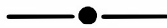


WEST VIRGINIA LEGISLATURE

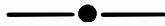
REGULAR SESSION, 1970



ENROLLED

HOUSE BILL No. 622

(By Mr. Speaker Mr. Boiarok, and
Mr. Edgar)



PASSED February 12, 1970

In Effect ninety days from Passage



FILED IN THE OFFICE
JOHN D. ROCKEFELLER, IV
SECRETARY OF STATE
THIS DATE 2-18-70

622 - Vetoed

ENROLLED

House Bill No. 622

(By MR. SPEAKER, MR. BOIARSKY, and MR. EDGAR)

[Passed February 12, 1970; in effect ninety days from passage.]

AN ACT to repeal section one-a, article five, chapter twenty of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to amend said chapter twenty of said code by adding thereto a new article, designated article five-c, relating to the dedication of the water resources of the state to the use of the people of the state but recognizing vested rights to such water resources; the control and regulation of rights to use such water resources; the establishing of criteria to determine rights to use such water resources; the powers and duties of the chief of the division of water resources and the water resources board with respect to such control and regula-

tion; the issuance of permits authorizing the construction, installation or use of works or facilities for appropriating such water resources and of certificates authorizing the use or appropriation of such water resources and certificates authorizing the enlargement or modification of an appropriation; the forfeiture, abandonment, transfer, changes, recording and reversion of rights to use such water resources; and the procedure for recognition and protection of both vested and new rights to use such water resources, including administrative regulation and action, with judicial review thereof; and civil and criminal actions to enforce the provisions of said article and the orders, rules and regulations promulgated under the provisions of said article.

Be it enacted by the Legislature of West Virginia:

That section one-a, article five, chapter twenty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed; and that said chapter twenty of said code be amended by adding thereto a new article, designated article five-c, to read as follows:

ARTICLE 5C. WATER USE ACT.**§20-5C-1. Declaration of policy.**

1 In view of the increased utilization of the water re-
2 sources of the state of West Virginia by agriculture,
3 industry and other economic activities, those resources
4 must be protected, conserved and controlled to assure
5 their highest beneficial use in the interest of the people
6 of the state. Therefore, it is declared to be the public
7 policy of the state of West Virginia that the public wel-
8 fare requires that the development, utilization and con-
9 trol of water resources of the state be directed in order
10 to make the maximum contribution to the public benefit;
11 that the state should control the development and use
12 of water for all beneficial purposes; and that public in-
13 terest and public welfare require the state, in the exer-
14 cise of its police powers, to take such measures as shall
15 effectuate the best utilization of the water resources
16 of the state with recognition that the public welfare
17 requires special protection of the water resources of
18 the state for preservation of an adequate supply of water
19 for human and animal consumption.

§20-5C-2. Determination of water rights.

1 The state water resources board, with guidance and
2 advice from the director and in accordance with the
3 provisions of this article, shall promulgate rules and
4 regulations which shall govern and control the chief
5 of the division of water resources of the department
6 of natural resources in determining rights in the water
7 of the state and in its appropriation and distribution, all
8 in accordance with the provisions of this article.

§20-5C-3. Definitions.

1 As used in this article, unless the context clearly re-
2 quires a different meaning:

3 (a) "A lawful common law use" shall mean a use
4 recognized as legal under common law doctrines and
5 legal principles, which does not include adverse use or
6 possession until such use or possession establishes pre-
7 scriptive rights;

8 (b) "Appropriate" shall mean to divert, impound or
9 withdraw a quantity of water from a source of water;

10 (c) "Appropriation" shall mean a right to appro-
11 prium;

12 (d) "Appropriator" shall mean a person having an
13 appropriation;

14 (e) "Beneficial use" shall mean a use of water for the
15 benefit of the appropriator, other persons or the public,
16 that is consistent with the public interest, including,
17 but not limited to, domestic, agricultural, irrigation, in-
18 dustrial, manufacturing, mining, water power, public,
19 sanitary, fish and wildlife, municipal, navigation, recre-
20 ational, aesthetic and scenic use;

21 (f) "Board" shall mean the state water resources
22 board;

23 (g) "Chief" shall mean the chief of the division of
24 water resources of the department of natural re-
25 sources;

26 (h) "Code" shall mean the code of West Virginia,
27 one thousand nine hundred thirty-one, as amended;

28 (i) "Director" shall mean the director of the depart-
29 ment of natural resources;

30 (j) "Modification" or "modification of an appropria-
31 tion" shall mean either a change in any works or fa-

32 cilities to appropriate or a change in the purpose or
33 beneficial use for which there is an appropriation;

34 (k) "Person," "persons" or "applicant" shall mean
35 any public or private corporation, institution, associa-
36 tion, firm or company organized or existing under the
37 laws of this or any other state or country; the United
38 States or the state of West Virginia; any federal or
39 state governmental agency; political subdivision; county
40 court; municipal corporation; industry; sanitary dis-
41 trict; public service district; drainage district; soil con-
42 servation district; watershed improvement district;
43 partnership; trust; estate; person or individual; group
44 of persons or individuals acting individually or as a
45 group; or any other legal entity whatever;

46 (l) "Public water supply" shall mean water which
47 may be taken by the applicant under the exercise of
48 the right of eminent domain and with a permit issued
49 under this article;

50 (m) "Source of water" shall mean an appreciable
51 quantity of water capable of being put to beneficial use;
52 and

53 (n) "Water resources," "water" or "waters" shall

54 mean any and all water on or beneath the surface of
55 the ground, whether percolating, standing, diffused or
56 flowing, wholly or partially within this state, or bor-
57 dering this state and within its jurisdiction, and shall
58 include, without limiting the generality of the foregoing,
59 natural or artificial lakes, rivers, streams, creeks,
60 branches, brooks, ponds (except industrial settling basins
61 and ponds and waste treatment facilities), impounding
62 reservoirs, springs, wells and watercourses except that
63 "water resources," "water" or "waters" shall not include
64 water from wells used for human or animal consumption
65 as long as the water is not used for irrigation or com-
66 mercial purposes nor shall "water resources," "water" or
67 "waters" include ponds not impounding streams to the
68 extent that the water therein is consumed for domestic
69 use or irrigation on the land on which the pond is located
70 nor shall "water resources," "water" or "waters" include
71 waters beneath the surface of the ground which are
72 harmlessly diverted incident to a lawful business pursuit.

**§20-5C-4. Powers and duties of chief and of board with respect
to water use.**

- 1 (a) In addition to all other powers and duties of
- 2 the chief of the division of water resources, as pre-

3 scribed in this article or elsewhere by law, the chief,
4 under the supervision of the director and in accordance
5 with the rules and regulations promulgated by the board,
6 shall have and may exercise all those powers and the
7 authority necessary to administer and enforce the pro-
8 visions and objectives of this article and all orders issued
9 pursuant to the provisions thereof or pursuant to the
10 rules and regulations of the board and shall perform
11 the following duties:

12 (1) Keep a public record of all applications for per-
13 mits and certificates and other documents filed in his
14 office and of the date and hour each was filed in his
15 office;

16 (2) Keep a public record of all permits, certificates
17 and orders affecting permits and certificates and of
18 any amendment of any permit, certificate or order affect-
19 ing permits or certificates, and keep all of these indexed
20 in accordance with the source of water and the name
21 of the applicant or appropriator;

22 (3) Cooperate with, assist, advise and coordinate
23 plans with the federal, state and local officers and agen-
24 cies, officers and agencies of other states, interstate

25 agencies and other interested persons, in any matter
26 relating to the appropriation, use, conservation, quality,
27 disposal and control of waters and activities related
28 thereto; and

29 (4) Apply for, accept, administer and expend grants,
30 gifts and loans from the federal government and any
31 other public or private sources on behalf of the state
32 for the purposes of this article, and adopt procedures
33 and do acts not otherwise restricted by law which are
34 necessary to qualify the state to receive such grants,
35 gifts and loans. The chief shall pay all moneys so re-
36 ceived into a special fund hereby created in the state
37 treasury, which fund shall be expended under the di-
38 rection of the chief solely for the purpose or purposes
39 for which the grant, gift or loan shall have been
40 made.

41 (b) In addition to all other powers and duties of the
42 water resources board, as prescribed in this article or
43 elsewhere by law, the board shall have and may exer-
44 cise the power and authority to promulgate rules and
45 regulations, in accordance with the provisions of chapter

46 twenty-nine-a of this code, to implement and make
47 effective the powers, duties and responsibilities vested
48 in the board and in the chief by the provisions of this
49 article, including the hiring of one or more individuals
50 to serve as hearing examiners on a full or part-time
51 basis. Such hearing examiners may be attorneys at law
52 admitted to practice before any circuit court of this
53 state. All such hearing examiners shall be individuals
54 authorized to take depositions under the laws of this
55 state. The board shall also:

56 (1) Prescribe reasonable fees or service charges for
57 any services rendered except that no fee or service
58 charge shall be imposed in relation to the filing of a
59 declaration of appropriation with the chief pursuant
60 to the provisions of section nine of this article; and

61 (2) Enter into contractual agreements necessary to
62 carry out the provisions of this article, including agree-
63 ments with federal, state and local officers and agencies,
64 officers and agencies of other states, interstate agencies
65 and other interested persons.

§20-5C-5. Water reserved to the people.

1 The waters of the state belong to the public and are
2 hereby reserved and dedicated to the use of the people
3 of the state and are subject to appropriation and bene-
4 ficial use only as provided in this article.

§20-5C-6. Right to appropriate; permit; limitation on eminent domain.

1 (a) An appropriation can be acquired only as pro-
2 vided in this article. No right to the use of water, either
3 appropriated or unappropriated, shall be acquired here-
4 after by adverse use or possession.

5 (b) Except for existing rights, as provided in sections
6 seven and nine of this article, a right to appropriate
7 water or to construct, install or use works or facilities
8 for appropriating water, or any substantial enlargement
9 or modification of an appropriation, shall be obtained by
10 first making application to the chief for a permit to appro-
11 priate, and not otherwise. The board shall prescribe
12 the form and contents of the application and the pro-
13 cedure for filing the application. If a permit is granted
14 and the works or facilities for such appropriation, en-

15 largement or modification are constructed or installed,
16 a certificate of appropriation therefor may be obtained
17 as provided in section seventeen of this article.

18 (c) No person having the right of eminent domain
19 may exercise such right hereafter as to water rights
20 except to the extent that he has an appropriation or a
21 permit under the provisions of this article which au-
22 thorizes or will authorize the right to appropriate which
23 may be sought under the eminent domain proceedings.

§20-5C-7. Existing rights; initial protection of existing rights.

1 (a) A lawful common-law use of water actually be-
2 ing made on the first day of July, one thousand nine
3 hundred seventy-one, or actually made within five years
4 before such date, or made in conjunction with works being
5 constructed in good faith on such date, if such works
6 shall be completed and water actually applied for such
7 use within a reasonable time thereafter, is a vested
8 right and a lawful appropriation under this article.
9 Nothing in this article shall take away or impair such
10 vested right and lawful appropriation of any person to
11 use the waters of the state: *Provided, That* such vested

12 right and lawful appropriation is subject to the appli-
13 cable provisions of this article and the rules and reg-
14 ulations adopted under this article. The extent of a
15 vested right or lawful appropriation under this section
16 shall not exceed the quantity of water which was ac-
17 tually used or applied for the common-law use, or be
18 a right which may be exercised in a manner or for a
19 purpose different from that on which the right is
20 based.

21 (b) Prior to the time the chief has followed the pro-
22 cedure in section nine of this article and has determined
23 the vested rights within a particular area of the state,
24 a common-law claimant with a vested right to appro-
25 priate in that area of the state shall have the right, with-
26 out having a certificate of appropriation or permit under
27 the provisions of this article, to injunctive relief and
28 damages to protect his vested right to appropriate.

**§20-5C-8. Priority of appropriation; injunctive relief and
damages.**

1 (a) Priority of appropriation gives prior right, but
2 priority of appropriation does not include the right to

3 prevent changes in the condition of water occurrence, such
4 as, the increase or decrease of stream flow, or the lowering
5 of a water table, artesian pressure or water level by
6 later appropriators, if the prior appropriator can reason-
7 ably acquire his water under the changed conditions.

8 (b) Priority of appropriation perfected under this
9 article other than under sections seven and nine shall
10 be determined from the time of the filing of an applica-
11 tion for a permit in the office of the chief.

12 (c) Priority of appropriation perfected under section
13 seven of this article shall be determined as provided in
14 section nine of this article.

15 (d) Any person with a certificate of appropriation
16 under the provisions of either section nine or section
17 seventeen of this article or with a permit under any
18 section of this article shall have the right to injunctive
19 relief and damages to protect his rights thereunder.

20 (e) An appropriator shall have the rights to injunctive
21 relief and damages to protect his prior appropriation
22 against an appropriator with a later priority.

§20-5C-9. Determination of existing rights; filing declaration of appropriation.

1 (a) A claimant of an existing right under section
2 seven of this article shall file a declaration of appropria-
3 tion with the chief as set out in this section and on the
4 form prescribed by the board for this purpose. The
5 declaration shall be considered correct and authorizes
6 that use until a certificate of appropriation is issued or
7 denied. Priority of such right dates from the day work
8 was begun in order to appropriate water if due diligence
9 was used in completing the work; otherwise, it dates
10 from the day water was used or applied for the lawful
11 common-law use.

12 (b) The chief shall, as soon as practicable, determine
13 the rights of persons who may have vested rights in each
14 river basin of the state, or in any portion thereof. To
15 accomplish this, the board shall (1) by order set a definite
16 time period for filing declarations of appropriation within
17 a particular area; and (2) complete publication of the
18 order, as a Class II legal advertisement in compliance
19 with the provisions of article three, chapter fifty-nine
20 of this code, at least fifteen days prior to the beginning

21 of the period in a newspaper of general circulation in
22 that area of the state and give notice of the order by
23 registered or certified mail to any person who may have
24 existing appropriations within the area who has filed a
25 request for notice from the chief of the period, when
26 fixed, for filing such declarations. Notices served shall
27 be served at least fifteen days prior to the beginning of
28 the period.

29 (c) The chief, or his duly authorized representative,
30 shall make such investigations, inspections and inquiries
31 as he considers necessary and proper of rights asserted
32 by declarations filed under this section and, within a
33 reasonable time, shall determine such existing appro-
34 priations and prepare a summary thereof. The chief
35 shall serve a copy of the summary of such determinations
36 by registered or certified mail on each person who filed
37 a declaration with respect to the area. Any person claim-
38 ing to be adversely affected or aggrieved by a determi-
39 nation, or a denial thereof, as to his own or another's
40 right may file with the chief a request for an informal
41 hearing within thirty days after the date on which he

42 received a copy of the summary. The chief shall cause
43 notice of such right to a hearing to be served with the
44 copy of the summary of determinations. If a hearing is
45 requested, the chief shall give reasonable notice of the
46 time and place of the hearing to each person who filed
47 a declaration with respect to the area. The testimony
48 at this hearing need not be recorded.

49 (d) If a hearing request is not timely made with re-
50 spect to a determination, or if, after the hearing, the chief
51 finds the determination to have been correctly made, he
52 shall immediately issue a certificate of appropriation. If
53 the chief finds the determination to be incorrect, he shall
54 correct it and either issue a certificate of appropriation
55 or deny the certificate according to his findings, and send
56 a notice of his action to each person who filed a declara-
57 tion with respect to the area. The chief shall also cause
58 to be served, with the notice of his action, a notice which
59 shall advise that any person claiming to be aggrieved or
60 adversely affected by the final action of the chief as to
61 his own or another's right may appeal to the board by
62 filing a notice of appeal, on the form prescribed by the

63 board for such purpose, with the board, in accordance
64 with the provisions of section twenty-two of this article,
65 within thirty days after the date upon which such person
66 received notice of the final action of the chief. Certificates
67 of appropriation issued under the provisions of this sec-
68 tion shall have the same form and contents as those
69 issued under the provisions of section seventeen of this
70 article.

§20-5C-10. Forfeiture and abandonment of existing rights.

1 After the chief has followed the procedure in section
2 nine of this article and determined the existing water
3 rights within any particular area of the state, the water
4 rights in such area shall be deemed established by the
5 certificates of appropriation recognizing such rights as
6 issued by the chief under the provisions of that section;
7 any rights to any additional water within such area will
8 be subject to appropriation in accordance with the other
9 provisions of this article; and any rights to such additional
10 water which may have existed under the provisions of
11 section seven of this article will have been forfeited and

12 abandoned by not having been asserted in proceedings
13 instituted in accordance with section nine of this article.

§20-5C-11. Application for permit; notices; objections.

1 (a) Any person, not having an appropriation under
2 the provisions of this article, who desires to appropriate
3 water or to use, construct or install works or facilities
4 to appropriate water, or who having an appropriation
5 under the provisions of this article desires an enlarge-
6 ment or a modification thereof, shall apply to the chief
7 for a permit therefor. Upon receipt of any such applica-
8 tion, the chief shall prepare a notice containing the loca-
9 tion and extent of the proposed appropriation or the pro-
10 posed enlargement or modification, the name and ad-
11 dress of the applicant and any other information he
12 considers pertinent. The notice shall state that, within
13 fifteen days after publication of notice is completed,
14 persons may file with the chief written objections, stat-
15 ing the name and address of the objector and any facts
16 tending to show that rights of the objector or the public
17 interest would be adversely affected by the proposal.

18 (b) The chief shall publish the notice, at the appli-

19 cant's expense, as a Class II legal advertisement in com-
20 pliance with the provisions of article three, chapter
21 fifty-nine of this code, in a newspaper of general circula-
22 tion in the river basin area of the state in which the water
23 is to be appropriated. The chief shall also have notice
24 served by registered or certified mail upon appropriators
25 of water and applicants for and holders of permits who,
26 according to the records in his office, may be affected
27 by the proposed appropriation or proposed enlargement
28 or modification and may serve notice upon any govern-
29 mental agency, political subdivision or person. Such
30 notice shall also be delivered to the director of sanitary
31 engineering of the state department of health. Notices
32 served shall provide at least fifteen days for the filing
33 of objections.

34 (c) Within fifteen days after publication of the notice
35 is completed, any interested person may file an objec-
36 tion. Any person upon whom notice is served may file
37 an objection within the time period provided in the no-
38 tice. If no objection is filed, the chief, or his duly au-
39 thorized representative, shall make such investigations,

40 inspections and inquiries as he considers necessary and
41 proper and proceed to make his determination upon the
42 application within a reasonable time. In addition, if an
43 objection is filed within the time prescribed, the chief
44 shall hold an informal hearing after giving reasonable
45 notice to the applicant and to all timely objectors and shall
46 enter an order granting, denying or conditioning the ap-
47 plication, in whole or in part, within thirty days after the
48 conclusion of the hearing. Notice of the order shall be
49 served by registered or certified mail upon the applicant
50 and upon all timely objectors. The testimony at such
51 hearing need not be recorded.

§20-5C-12. Simplified procedure for permits.

1 The board may, by rules and regulations, designate
2 types of appropriations which are exempt from the pro-
3 visions of section eleven and provide simplified proce-
4 dures for ruling on the applications therefor. Any pro-
5 cedure for ruling on such applications shall comply with
6 the provisions of chapter twenty-nine-a of this code.

§20-5C-13. Criteria for issuance of permits.

1 (a) The chief shall issue a permit if he finds that:

2 (1) Rights of prior appropriators will not be unduly
3 affected;

4 (2) The proposed means of diversion or construction
5 are efficient and adequate;

6 (3) The proposed use is a beneficial use; and

7 (4) The proposed appropriation or proposed enlarge-
8 ment or modification is in the public interest.

9 (b) In determining the public interest, the chief shall
10 consider:

11 (1) The benefit to the applicant resulting from the
12 proposal;

13 (2) The economic effect of the activity resulting from
14 the proposal;

15 (3) The effect on fish and game resources and on
16 public recreational opportunities;

17 (4) The effect on public health;

18 (5) The effect of loss of alternate uses of water that
19 might be made within a reasonable time if not precluded
20 or hindered by the proposal;

21 (6) Harm to other persons resulting from the pro-
22 posal;

23 (7) The intent and ability of the applicant to perfect
24 the appropriation; and

25 (8) The effect upon access to navigable or public
26 waters.

§20-5C-14. Competing applications; preference.

1 When there are competing applications for water from
2 the same area or source, and the water available is in-
3 sufficient to supply all applications, the chief shall give
4 preference first to public water supply and then to the
5 use which alone or in combination with other present and
6 foreseeable uses will constitute the most beneficial use
7 in the interest of the public welfare.

§20-5C-15. Terms of permit.

1 The chief may issue a permit for less than the amount
2 of water requested, but in no case may he issue a permit
3 for more water than can be beneficially used for the
4 purposes stated in the application. He may require alter-
5 ation of plans and specifications for the proposed appro-
6 priation of proposed enlargement or modification. He may
7 issue a permit subject to terms, conditions, restrictions
8 and limitations he considers necessary and proper to pro-

9 tect the rights of others and the public interest, but no
10 such terms, conditions, restrictions or limitations shall
11 make the appropriation to be acquired thereunder subject
12 to termination or transfer in any manner other than as
13 provided by this article.

§20-5C-16. Time for construction and completion.

1 A permit may place a time limit for beginning construc-
2 tion or installation and perfecting an appropriation.
3 Reasonable extensions of time shall be permitted for
4 good cause shown. The chief may require progress re-
5 ports, at such time intervals as he deems necessary, set-
6 ting forth the steps taken to perfect the appropriation and
7 the progress made toward perfection of the appropriation.

§20-5C-17. Certificates.

1 When construction or installation of the works or
2 facilities is completed and before commencement of the
3 use of water, the permit holder shall notify the chief
4 that he has perfected his appropriation and apply for
5 certificate of appropriation. If the chief determines that
6 the appropriation has been perfected in substantial com-
7 pliance with the permit, he shall issue the permit holder

8 a certificate of appropriation. The certificate shall set
9 out such pertinent information as the board may pre-
10 scribe by rule or regulation, but shall set forth clearly
11 the source of water to which it is applicable, the quan-
12 tity of water use permitted thereby and for what uses,
13 and any terms, conditions, restrictions and limitations
14 applicable to the appropriation, but no such terms, con-
15 ditions, restrictions or limitations shall make the appro-
16 priation subject to termination or transfer in any manner
17 other than as provided in this article: *Provided*, That no
18 permit or certificate of appropriation shall be necessary
19 when the business activity engaged in by a person entails
20 the use of portable equipment which is moved from site
21 to site and the consumption of water used in said business
22 activity is for a temporary period only.

§20-5C-18. Transfer and change of appropriations; recording.

1 (a) The right to use water under an appropriation
2 shall be appurtenant to the land or place where it has
3 been beneficially used. An appurtenant water right shall
4 pass with a conveyance or transfer of the land, including

5 a transfer by operation of law, unless specifically ex-
6 cepted therefrom.

7 (b) With the permission of the chief, all or any part
8 of an appropriation may be severed from the land or
9 place to which it is appurtenant, may be sold, leased or
10 transferred for other purposes or to other land or place
11 and be made appurtenant to other land or place.

12 (c) A deed, lease, contract or other instrument trans-
13 ferring all or any part of an appropriation may be filed
14 for record in the office of the chief and a copy thereof
15 may be filed for record in the office of the clerk of the
16 county court of each county in which the appropriation
17 or any part thereof is or may be used.

§20-5C-19. Effect of recording.

1 (a) A deed, lease, contract or other instrument trans-
2 ferring all or any part of an appropriation shall be void
3 as against a subsequent purchaser who in good faith
4 paid a valuable consideration without notice for the
5 appropriation or any portion of it.

6 (b) A deed, lease, contract or other instrument trans-
7 ferring all or any part of an appropriation which is re-

8 corded in all the offices as permitted by section eighteen
9 of this article is constructive notice of its contents to
10 subsequent purchasers of the appropriation or any por-
11 tion of it. An unrecorded instrument is valid between
12 the parties to it and as against one who has notice of it.

**§20-5C-20. Abandonment, forfeiture and reversion of appro-
priations.**

1 (a) The chief may declare an appropriation to be
2 wholly or partially abandoned and to that extent revoke
3 the certificate of appropriation if an appropriator, with
4 intention to abandon, does not make beneficial use of
5 all or a part of his appropriated water.

6 (b) The chief may declare an appropriation to be
7 wholly or partially forfeited and shall to that extent
8 revoke the certificate of appropriation if an appropriator
9 voluntarily fails or neglects, without good cause, to make
10 use of all or a part of his appropriated water for a
11 period of five successive years.

12 (c) The chief may declare an appropriation to be
13 wholly or partially forfeited and shall to that extent re-
14 voke the certificate of appropriation if an appropriator
15 ceases to use all or a part of his appropriated water in

16 substantial compliance with the provisions of the cer-
17 tificate.

18 (d) An appropriation or a part thereof so forfeited
19 or abandoned reverts to the state and the water becomes
20 unappropriated water.

§20-5C-21. Public water supply; preferred use permit.

1 (a) An applicant who asserts and proves a preferred
2 use shall be granted a permit and shall be granted prefer-
3 ence over other appropriators. A preferred use of water
4 must be for a public water supply.

5 (b) To be entitled to a preference an applicant must
6 show that:

7 (1) His use will be prevented or substantially inter-
8 fered with by a prior appropriation or prior permit for
9 a proposed appropriation;

10 (2) The use is a preferred use;

11 (3) The applicant will compensate the prior appro-
12 priator or permit holder for a prior appropriation for
13 any damages which will be sustained by the granting
14 of the preference; and

15 (4) Such other facts as the board requires by rule
16 or regulation.

§20-5C-22. Appeal to water resources board.

1 (a) Any person who claims to be aggrieved or ad-
2 versely affected by any action or nonaction of the chief
3 under the provisions of this article or under applicable
4 rules and regulations of the board may appeal to the
5 water resources board. The person so appealing shall
6 be known as the appellant and the chief shall be known
7 as the appellee.

8 (b) Such appeal shall be perfected by filing a notice
9 of appeal, on the form prescribed by the board for such
10 purpose, with the board within thirty days after the
11 date upon which the appellant received notice of such
12 action by the chief or after such refusal of the chief
13 to act, as the case may be. The filing of the notice of
14 appeal shall not stay or suspend the execution of the
15 action appealed from; but, if it appears to the director
16 or the board that an unjust hardship to the appellant
17 will result from the execution of the action pending
18 determination of the appeal, the director or the board
19 may grant a suspension of such action and fix its terms.
20 The notice of appeal shall set forth details of the action

21 or nonaction complained of and the ground upon which
22 the appeal is based. A copy of the notice of appeal
23 shall be filed by the board with the chief within three
24 days after the notice of appeal is filed with the board.

25 (c) With the consent of the board and upon such
26 terms and conditions as the board may prescribe, any
27 person affected by such action or nonaction by the chief
28 may by petition intervene as a party appellant or ap-
29 pellee. The board shall hear the appeal de novo, and
30 evidence may be offered on behalf of the appellant and
31 appellee, and, with the consent of the board, by any in-
32 tervenors.

33 (d) All of the pertinent provisions of article five,
34 chapter twenty-nine-a of this code shall apply to and
35 govern the hearing on an appeal authorized by this sec-
36 tion and the administrative procedures in connection
37 with and following such hearing, with like effect as if the
38 provisions of said article five were set forth in extenso
39 in this section, with the following changes or excep-
40 tions:

41 (1) The appeal hearing shall be held in the city of

42 Charleston, Kanawha county, West Virginia: *Provided,*
43 *however,* That if there are numerous appeals pending
44 at the same time which relate to water rights in the
45 same source in another area of the state, the board may
46 select a centrally located place in such area for the
47 appeal hearings and timely notify the persons involved
48 in the appeals of such change in the place for the hear-
49 ings; and

50 (2) In accordance with the provisions of section one,
51 article five of said chapter twenty-nine-a, all of the testi-
52 mony at any such hearing shall be recorded by steno-
53 graphic notes and characters or by mechanical, mag-
54 netic or electrical means. Such reported testimony shall
55 in every appeal hearing under this article be transcribed.

56 (e) Any such appeal hearing shall be conducted by a
57 quorum of the board, but the parties may by stipula-
58 tion agree to take evidence before a hearing examiner
59 employed by the board. Upon request of any party to
60 the appeal, the evidence taken before a hearing exam-
61 iner shall be taken in a county in which the appropria-
62 tion in issue, or any part thereof, is, may be or would

63 be used. For the purpose of conducting such appeal
64 hearing, any member of the board and the secretary
65 thereof shall have the power and authority to issue sub-
66 poenas and subpoenas duces tecum in the name of the
67 board, in accordance with the provisions of section one,
68 article five, chapter twenty-nine-a of this code. All sub-
69 poenas and subpoenas duces tecum shall be issued and
70 served within the time and for the fees and shall be
71 enforced as specified in section one, article five of said
72 chapter twenty-nine-a, and all of the said section one
73 provisions dealing with subpoenas and subpoenas duces
74 tecum shall apply to subpoenas and subpoenas duces
75 tecum issued for the purpose of an appeal hearing here-
76 under.

77 (f) Any such hearing shall be held within twenty
78 days after the date upon which the board received the
79 timely notice of appeal, unless there is a postponement or
80 continuance. The board may postpone or continue any
81 hearing upon its own motion, or upon application of
82 the appellant, the appellee or any intervenor for good
83 cause shown. The chief shall be represented at any such
84 hearing by the attorney general or his assistants. At

85 any such hearing the appellant and any intervenor may
86 represent himself or be represented by an attorney at
87 law admitted to practice before any circuit court of this
88 state.

89 (g) After such hearing and consideration of all of the
90 testimony, evidence and record in the case, the board
91 shall make and enter such order as the chief should have
92 entered, or take such action as the chief should have taken.
93 In determining its course of action, the board shall take
94 into consideration all of the factors which the chief was
95 required to consider.

96 (h) Any such order made and entered by the board
97 shall be accompanied by findings of fact and conclu-
98 sions of law as specified in section three, article five,
99 chapter twenty-nine-a of this code, and a copy of such
100 order and accompanying findings and conclusions shall
101 be served in person or by registered or certified mail, upon
102 the appellant and any intervenor, and their attorneys
103 of record, if any, and upon the appellee.

104 (i) The board shall also cause a notice to be served
105 with a copy of such order, which notice shall advise the

106 appellant, the appellee and any intervenor of their right
107 to judicial review in accordance with the provisions of
108 section twenty-three of this article. The order of the
109 board shall be final unless vacated or modified upon
110 judicial review thereof in accordance with the provi-
111 sions of section twenty-three of this article.

§20-5C-23. Judicial review.

1 (a) Any person or the chief claiming to be aggrieved
2 or adversely affected by the action or the nonaction of
3 the board or by a final order made and entered by the
4 board after such appeal hearing, held in accordance with
5 the provisions of section twenty-two of this article, is
6 entitled to judicial review thereof. All of the pertinent
7 provisions of section four, article five, chapter twenty-
8 nine-a of this code shall apply to and govern such review
9 with like effect as if the provisions of said section four
10 were set forth in extenso in this section, except that,
11 as to cases involving an order granting or denying an
12 application for a permit or certificate of appropriation,
13 or approving or modifying the terms and conditions of

14 a permit or a certificate of appropriation, or revoking a
15 certificate of appropriation or any part thereof, the peti-
16 tion shall be filed, within the time specified in said sec-
17 tion four, in the circuit court of a county in which the
18 appropriation in issue, or any part thereof, was, may
19 be or would be used.

20 (b) The judgment of the circuit court shall be final
21 unless reversed, vacated or modified on appeal to the
22 supreme court of appeals, in accordance with the pro-
23 visions of section one, article six, chapter twenty-nine-a
24 of this code, except that notwithstanding the provisions
25 of said section one the petition seeking such review
26 must be filed with the supreme court of appeals within
27 ninety days from the date of entry of the judgment of
28 the circuit court.

29 (c) Legal counsel and services for the chief in all
30 appeal proceedings in the circuit courts and in the su-
31 preme court of appeals shall be provided by the attorney
32 general or his assistants and in appeal proceedings in
33 the circuit courts by the prosecuting attorneys of the

34 several counties as well, all without additional compen-
35 sation, or the board or chief, with the written approval
36 of the attorney general, may employ special counsel to
37 represent the chief in a particular proceeding.

§20-5C-24. Actions to abate nuisances; injunctive relief.

1 (a) Whether any violation of the provisions of this
2 article, or the applicable rules and regulations of the
3 board, or any order of the chief or the board shall result
4 in prosecution or conviction or not, any such violation
5 is declared to be against the public interest and shall
6 be deemed a nuisance which may be abated upon appli-
7 cation by the chief to the circuit court of the county
8 in which such nuisance, or any part thereof, shall exist,
9 or to the judge thereof in vacation. Upon application
10 by the chief, the circuit courts of this state may by
11 mandatory or prohibitive injunction compel compliance
12 with the provisions of this article, the applicable rules
13 and regulations of the board and all orders of the chief
14 or of the board. The circuit courts may issue temporary
15 injunctions in any case pending a decision on the merits
16 of the case.

17 (b) The judgment of the circuit court upon any
18 application permitted by the provisions of this section
19 shall be final unless reversed, vacated or modified on
20 appeal to the supreme court of appeals. Any such appeal
21 shall be sought in the manner provided by law for appeals
22 from circuit courts in other civil cases, except that the
23 petition seeking such review must be filed with the
24 supreme court of appeals within ninety days from the
25 date of entry of the judgment of the circuit court.

26 The chief shall be represented in all such proceedings
27 by the attorney general or his assistants and in such
28 proceedings in the circuit courts by the prosecuting at-
29 torneys of the several counties as well, all without addi-
30 tional compensation, or the board or chief, with the
31 written approval of the attorney general, may employ
32 special counsel to represent the chief in a particular
33 proceeding.

§20-5C-25. Violations; criminal penalties.

1 Any person who fails or refuses to discharge any duty
2 imposed upon him by this article, or by any applicable
3 rules and regulations of the board, or by any order of

4 the chief or of the board, or who appropriates any water
5 or uses or constructs works therefor without the right
6 or authority to do so at that time under the provisions
7 of this article and applicable rules and regulations of the
8 board, or who knowingly makes a false or misleading
9 statement in a declaration of an existing right, shall be
10 guilty of a misdemeanor, and, upon conviction thereof,
11 shall be punished for a first offense by a fine of not less
12 than twenty-five dollars nor more than one hundred
13 dollars, and for a second offense by a fine of not less than
14 two hundred dollars nor more than five hundred dollars,
15 and for a third and each subsequent offense by a fine
16 of not less than five hundred dollars nor more than one
17 thousand dollars or by imprisonment for a period not to
18 exceed six months, or in the discretion of the court by
19 both such fine and imprisonment. Each day upon which
20 such violation continues shall constitute a separate
21 offense.

§20-5C-26. Short title.

1 This article may be known and cited as the "Water
2 Use Act."

§20-5C-27. Conflicting provisions.

1 In the event of any inconsistency or conflict between
2 any provision of this article and any provision in any
3 other article of this code, the provisions of this article
4 shall control.

§20-5C-28. Severability of provisions.

1 If any of the provisions of this article or the application
2 thereof to any person or circumstance is held invalid,
3 such invalidity shall not affect other provisions or appli-
4 cations of the article, and to this end the provisions of
5 this article are declared to be severable.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

William Tompkins
Chairman Senate Committee

Clayton C. Davidson
Chairman House Committee

Originated in the House.

Takes effect ninety days from passage.

Howard Meyer
Clerk of the Senate

C. A. Blankenship
Clerk of the House of Delegates

Frank B. Jackson
President of the Senate

Sam F. Bowers
Speaker House of Delegates

The within disapproved this the 18th
day of February, 1970.

Arch A. Shaver Jr.
Governor



PRESENTED TO THE
GOVERNOR

Date 2/16/70
Time 2:40 p.m.