

WATER LAW - NONUSE APPLICATIONS

2017 GENERAL SESSION

STATE OF UTAH

LONG TITLE**General Description:**

This bill modifies provisions regarding a nonuse application.

Highlighted Provisions:

This bill:

- ▶ states that an approved nonuse application excuses the requirement of beneficial use of water from the date of filing;
- ▶ states that the time during which an approved nonuse application is in effect does not count toward the seven-year time limit for purposes of forfeiture;
- ▶ states that the filing or approval of a nonuse application or a series of nonuse applications does not:
 - constitute a beneficial use of a water right;
 - protect a water right that is already subject to forfeiture; and
 - bar a water right owner from using the water under the water right, as permitted under the water right, or claiming a forfeiture defense;
- ▶ modifies the procedure for instituting a forfeiture action; and
- ▶ makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

73-1-4, as last amended by Laws of Utah 2016, Chapter 54

73-1-4.5, as enacted by Laws of Utah 2002, Chapter 19

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **73-1-4** is amended to read:

33 **73-1-4. Reversion to the public by abandonment or forfeiture for nonuse within**
34 **seven years -- Nonuse application.**

35 (1) As used in this section:

36 (a) "Public entity" means:

37 (i) the United States;

38 (ii) an agency of the United States;

39 (iii) the state;

40 (iv) a state agency;

41 (v) a political subdivision of the state; or

42 (vi) an agency of a political subdivision of the state.

43 (b) "Public water supplier" means an entity that:

44 (i) supplies water, directly or indirectly, to the public for municipal, domestic, or
45 industrial use; and

46 (ii) is:

47 (A) a public entity;

48 (B) a water corporation, as defined in Section 54-2-1, that is regulated by the Public
49 Service Commission;

50 (C) a community water system:

51 (I) that:

52 (Aa) supplies water to at least 100 service connections used by year-round residents; or

53 (Bb) regularly serves at least 200 year-round residents; and

54 (II) whose voting members:

55 (Aa) own a share in the community water system;

56 (Bb) receive water from the community water system in proportion to the member's
57 share in the community water system; and

58 (Cc) pay the rate set by the community water system based on the water the member
59 receives; or

60 (D) a water users association:

61 (I) in which one or more public entities own at least 70% of the outstanding shares; and

62 (II) that is a local sponsor of a water project constructed by the United States Bureau of
63 Reclamation.

64 (c) "Shareholder" means the same as that term is defined in Section 73-3-3.5.

65 (d) "Water company" means the same as that term is defined in Section 73-3-3.5.

66 (e) "Water supply entity" means an entity that supplies water as a utility service or for
67 irrigation purposes and is also:

68 (i) a municipality, water conservancy district, metropolitan water district, irrigation
69 district, or other public agency;

70 (ii) a water company regulated by the Public Service Commission; or

71 (iii) any other owner of a community water system.

72 (2) (a) Except as provided in Subsection (2)(b) or (e), when an appropriator or the
73 appropriator's successor in interest abandons or ceases to beneficially use all or a portion of a
74 water right for a period of at least seven years, the water right or the unused portion of that
75 water right is subject to forfeiture in accordance with Subsection (2)(c).

76 (b) (i) An appropriator or the appropriator's successor in interest may file an
77 application for nonuse with the state engineer.

78 ~~[(ii) If a person described in Subsection (2)(b)(i) files and receives approval on a
79 nonuse application, nonuse of the water right subject to the application is not counted toward a
80 seven-year period described in Subsection (2)(a) during the period of time beginning on the day
81 on which the person files the application and ending on the day on which the application
82 expires without being renewed.]~~

83 ~~[(iii) If a person described in Subsection (2)(b)(i) files and receives approval on
84 successive, overlapping nonuse applications, nonuse of the water right subject to the
85 applications is not counted toward a seven-year period described in Subsection (2)(a) during
86 the period of time beginning on the day on which the person files the first application and
87 ending on the day on which the last application expires without being renewed.]~~

88 ~~[(iv) Approval of one or more nonuse applications, or successive overlapping nonuse
89 applications, does not protect a water right that is already subject to forfeiture under Subsection
90 (2)(a) for full or partial nonuse of the water right, nor does the approval of one or more nonuse
91 applications constitute beneficial use of the water for purposes of calculating the 15-year period
92 in Subsection (2)(c)(i).]~~

93 ~~[(v)]~~ (ii) A nonuse application may be filed on all or a portion of the water right,
94 including water rights held by a water company.

95 ~~(vi)~~ (iii) After giving written notice to the water company, a shareholder may file a
96 nonuse application with the state engineer on the water represented by the stock.

97 (iv) (A) The approval of a nonuse application excuses the requirement of beneficial use
98 of water from the date of filing.

99 (B) The time during which an approved nonuse application is in effect does not count
100 toward the seven-year period described in Subsection (2)(a).

101 (v) The filing or approval of a nonuse application or a series of nonuse applications
102 under Subsection (3) does not:

103 (A) constitute beneficial use of a water right;

104 (B) protect a water right that is already subject to forfeiture under this section; or

105 (C) bar a water right owner from:

106 (D) using the water under the water right as permitted under the water right; or

107 (II) claiming the benefit of Subsection (2)(e) or any other forfeiture defense provided
108 by law.

109 (c) (i) Except as provided in Subsection (2)(c)(ii), a water right or a portion of the
110 water right may not be forfeited unless a judicial action to declare the right forfeited is
111 commenced;

112 (A) within 15 years from the end of the latest period of nonuse of at least seven
113 years[-]; or

114 (B) within the combined time of 15 years from the end of the most recent period of
115 nonuse of at least seven years and the time the water right was subject to one or more nonuse
116 applications.

117 (ii) (A) The state engineer, in a proposed determination of rights filed with the court
118 and prepared in accordance with Section 73-4-11, may not assert that a water right was
119 forfeited unless [a] the most recent period of nonuse of seven years ends or occurs;

120 (D) during the 15 years immediately preceding the day on which the state engineer files
121 the proposed determination of rights with the court[-]; or

122 (II) during the combined time immediately preceding the day on which the state
123 engineer files the proposed determination of rights consisting of 15 years and the time the
124 water right was subject to one or more approved nonuse applications.

125 (B) After the day on which a proposed determination of rights is filed with the court a

126 person may not assert that a water right subject to that determination was forfeited [~~during the~~
127 ~~15-year period described in Subsection (2)(c)(ii)(A);~~] before the issuance of the proposed
128 determination, unless the state engineer asserts forfeiture in the proposed determination, or a
129 person [~~makes~~], in accordance with Section 73-4-11, makes an objection to the proposed
130 determination that asserts forfeiture.

131 (iii) A water right, found to be valid in a decree entered in an action for general
132 determination of rights under Chapter 4, Determination of Water Rights, is subject to a claim
133 of forfeiture based on a seven-year period of nonuse that begins after the day on which the state
134 engineer filed the related proposed determination of rights with the court, unless the decree
135 provides otherwise.

136 (iv) If in a judicial action a court declares a water right forfeited, on the date on which
137 the water right is forfeited:

138 (A) the right to beneficially use the water reverts to the public; and

139 (B) the water made available by the forfeiture:

140 (I) first, satisfies other water rights in the hydrologic system in order of priority date;

141 and

142 (II) second, may be appropriated as provided in this title.

143 (d) Except as provided in Subsection (2)(e), this section applies whether the unused or
144 abandoned water or a portion of the water is:

145 (i) permitted to run to waste; or

146 (ii) beneficially used by others without right with the knowledge of the water right
147 holder.

148 (e) This section does not apply to:

149 (i) the beneficial use of water according to a lease or other agreement with the
150 appropriator or the appropriator's successor in interest;

151 (ii) a water right if its place of use is contracted under an approved state agreement or
152 federal conservation following program;

153 (iii) those periods of time when a surface water or groundwater source fails to yield
154 sufficient water to satisfy the water right;

155 (iv) a water right when water is unavailable because of the water right's priority date;

156 (v) a water right to store water in a surface reservoir or an aquifer, in accordance with

157 Title 73, Chapter 3b, Groundwater Recharge and Recovery Act, if:

158 (A) the water is stored for present or future beneficial use; or

159 (B) storage is limited by a safety, regulatory, or engineering restraint that the
160 appropriator or the appropriator's successor in interest cannot reasonably correct;

161 (vi) a water right if a water user has beneficially used substantially all of the water right
162 within a seven-year period, provided that this exemption does not apply to the adjudication of a
163 water right in a general determination of water rights under Chapter 4, Determination of Water
164 Rights;

165 (vii) except as provided by Subsection (2)(g), a water right:

166 (A) (I) owned by a public water supplier;

167 (II) represented by a public water supplier's ownership interest in a water company; or

168 (III) to which a public water supplier owns the right of beneficial use; and

169 (B) conserved or held for the reasonable future water requirement of the public, which
170 is determined according to Subsection (2)(f);

171 (viii) a supplemental water right during a period of time when another water right
172 available to the appropriator or the appropriator's successor in interest provides sufficient water
173 so as to not require beneficial use of the supplemental water right; or

174 (ix) a period of nonuse of a water right during the time the water right is subject to an
175 approved change application where the applicant is diligently pursuing certification.

176 (f) (i) The reasonable future water requirement of the public is the amount of water
177 needed in the next 40 years by:

178 (A) the persons within the public water supplier's reasonably anticipated service area
179 based on reasonably anticipated population growth; or

180 (B) other water use demand.

181 (ii) For purposes of Subsection (2)(f)(i), a community water system's reasonably
182 anticipated service area:

183 (A) is the area served by the community water system's distribution facilities; and

184 (B) expands as the community water system expands the distribution facilities in
185 accordance with Title 19, Chapter 4, Safe Drinking Water Act.

186 (g) For a water right acquired by a public water supplier on or after May 5, 2008,
187 Subsection (2)(e)(vii) applies if:

- 188 (i) the public water supplier submits a change application under Section 73-3-3; and
189 (ii) the state engineer approves the change application.
- 190 (3) (a) The state engineer shall furnish a nonuse application form requiring the
191 following information:
- 192 (i) the name and address of the applicant;
193 (ii) a description of the water right or a portion of the water right, including the point of
194 diversion, place of use, and priority;
195 (iii) the quantity of water;
196 (iv) the period of use;
197 (v) the extension of time applied for;
198 (vi) a statement of the reason for the nonuse of the water; and
199 (vii) any other information that the state engineer requires.
- 200 (b) (i) Upon receipt of the application, the state engineer shall publish a notice of the
201 application once a week for two successive weeks:
- 202 (A) in a newspaper of general circulation in the county in which the source of the water
203 supply is located and where the water is to be beneficially used; and
204 (B) as required in Section 45-1-101.
- 205 (ii) The notice shall:
- 206 (A) state that an application has been made; and
207 (B) specify where the interested party may obtain additional information relating to the
208 application.
- 209 (c) Any interested person may file a written protest with the state engineer against the
210 granting of the application:
- 211 (i) within 20 days after the notice is published, if the adjudicative proceeding is
212 informal; and
213 (ii) within 30 days after the notice is published, if the adjudicative proceeding is
214 formal.
- 215 (d) In any proceedings to determine whether the nonuse application should be
216 approved or rejected, the state engineer shall follow the procedures and requirements of Title
217 63G, Chapter 4, Administrative Procedures Act.
- 218 (e) After further investigation, the state engineer may approve or reject the application.

219 (4) (a) The state engineer shall grant a nonuse application on all or a portion of a water
220 right for a period of time not exceeding seven years if the applicant shows a reasonable cause
221 for nonuse.

222 (b) A reasonable cause for nonuse includes:

223 (i) a demonstrable financial hardship or economic depression;

224 (ii) physical causes or changes that render use beyond the reasonable control of the
225 water right owner so long as the water right owner acts with reasonable diligence to resume or
226 restore the use;

227 (iii) the initiation of water conservation or efficiency practices, or the operation of a
228 groundwater recharge recovery program approved by the state engineer;

229 (iv) operation of legal proceedings;

230 (v) the holding of a water right or stock in a mutual water company without use by any
231 water supply entity to meet the reasonable future requirements of the public;

232 (vi) situations where, in the opinion of the state engineer, the nonuse would assist in
233 implementing an existing, approved water management plan; or

234 (vii) the loss of capacity caused by deterioration of the water supply or delivery
235 equipment if the applicant submits, with the application, a specific plan to resume full use of
236 the water right by replacing, restoring, or improving the equipment.

237 (5) (a) Sixty days before the expiration of a nonuse application, the state engineer shall
238 notify the applicant by mail or by any form of electronic communication through which receipt
239 is verifiable, of the date when the nonuse application will expire.

240 (b) An applicant may file a subsequent nonuse application in accordance with this
241 section.

242 Section 2. Section **73-1-4.5** is amended to read:

243 **73-1-4.5. Authorization for water companies to allocate water rights lost by**
244 **forfeiture or nonuse -- Redemption and retirement of water shares.**

245 (1) (a) If a water right, to which a [~~mutual~~] water company holds title, ceases or is lost
246 due to forfeiture or abandonment for lack of beneficial use, in whole or in part, the water
247 company shall, through procedures consistent with this section, and as defined in the
248 company's articles of incorporation or bylaws, apportion the loss to each stockholder whose
249 failure to make beneficial use caused the loss of the water right.

250 (b) The water company shall make an apportionment if [~~the Utah Division of Water~~
251 ~~Rights~~ or] a court of proper jurisdiction makes a final decision that a loss has occurred.

252 (c) The water company shall also reduce the amount of water provided to the
253 shareholder in proportion to the amount of the lost water right during an appeal of a decision
254 that reduced the company water rights, unless otherwise ordered by a court of proper
255 jurisdiction.

256 (d) The water company may take any action under this Subsection (1), whether the loss
257 occurred:

258 (i) under Utah Code Annotated Section 73-1-4, including losses that occur as part of a
259 general determination under Title 73, Chapter 4, Determination of Water Rights; or

260 (ii) through any other decision by a court of proper jurisdiction.

261 (2) (a) If the water company apportions a water right under Subsection (1), a sufficient
262 number of shares to account for the water right lost, including necessary transport or "carrier
263 water" losses, shall be treated by the water company as shares redeemed by the company from
264 the stockholder responsible for the loss.

265 (b) The number of shares owned by that shareholder shall be reduced accordingly on
266 the records of the company.

267 (c) Upon the redemption, the authorized shares of the company shall be reduced by the
268 amount of shares that were redeemed under this Subsection (2).

269 (3) The redemption and retirement under this section of shares belonging to a
270 stockholder does not relieve the stockholder of liability for unpaid assessments on the stock or
271 debts the shareholder may owe to the water company.

Legislative Review Note
Office of Legislative Research and General Counsel