

WORKING DRAFT -- FOR DISCUSSION PURPOSES ONLY

1 **WATER RIGHTS - CHANGE APPLICATION AMENDMENTS**

2
3 **LONG TITLE**

4 **General Description:**

5 This bill modifies the requirements of the change application process under Title 73,
6 Water and Irrigation.

7 **Highlighted Provisions:**

8 This bill:

- 9 ▶ requires that a person who applies for a change to a water right meet certain
10 qualifications;
11 ▶ modifies the procedure for a shareholder in a water company who submits a
12 change application; and
13 ▶ makes technical changes.

14 **Money Appropriated in this Bill:**

15 None

16 **Other Special Clauses:**

17 None

18 List of sections affected:

19 AMENDS:

20 73-3-3

21 73-3-3.5

22 ENACTS:

23
24 REPEALS:

25
26 Statutory text:

27
28 **73-3-3. Permanent or temporary changes in point of diversion, place of use, or**
29 **purpose of use.**

30 (1) For purposes of this section:

WORKING DRAFT -- FOR DISCUSSION PURPOSES ONLY

- 31 (a) "Permanent change" means a change for an indefinite period of time with an
32 intent to relinquish the original point of diversion, place of use, or purpose of
33 use.
- 34 (b) "Temporary change" means a change for a fixed period of time not exceeding
35 one year.
- 36 (2) (a) ~~[Subject to Subsection (2)(c), a person entitled to the use of water]~~ Except as
37 provided in Subsections (2)(d), (2)(e), and (2)(f), a person described in
38 Subsection (2)(c) may make permanent or temporary changes in the:
- 39 (i) point of diversion;
40 (ii) place of use; or
41 (iii) purpose of use for which the water was originally appropriated.
- 42 (b) Except as provided by Section 73-3-30, a change may not be made if it impairs
43 a vested water right without just compensation.
- 44 (c) Except as provided in Subsections (2)(d), (2)(e), and (2)(f), a person may file an
45 application to change the use of water under Subsection (2)(a), if the person:
- 46 (i) is the record owner of the water right;
47 (ii) holds an approved application for the appropriation of water; or
48 (iii) is the equitable owner of a water right and entitled to beneficial use of
49 the water, although bare record title of the water right is held by another
50 person.
- 51 ~~(c)~~ (d) A change application on a federal reclamation project water right shall be
52 signed by:
- 53 (i) the local water users organization that is contractually responsible for:
54 (A) the operation and maintenance of the project; or
55 (B) the repayment of project costs; and
56 (ii) the record owner of the water right.
- 57 (e) (i) A person described in Subsection (2)(c)(iii), other than a shareholder in a
58 water company who may file a change application in accordance with
59 Subsection (2)(f), may only file a change application under this section if
60 the person submits the proposed change application to the record owner
61 of the water right at least 60 days before the day on which the person
62 files the change application with the state engineer.

WORKING DRAFT -- FOR DISCUSSION PURPOSES ONLY

- 63 (ii) A record title holder who receives a proposed change application in
64 accordance with Subsection (2)(e)(i) shall respond to the person's
65 submitted proposed change application within 60 days after the day on
66 which the record title holder receives the proposed change application.
- 67 (iii) A record title holder's response to the person's application shall be in
68 writing and shall:
- 69 (A) consent to the proposed change;
70 (B) consent to the proposed change subject to certain conditions
71 described by the record title holder in the response; or
72 (C) oppose a proposed change, describing the reasons why the
73 record title holder opposes the change.
- 74 (iv) A record title holder's failure to respond to the person's proposed change
75 application within the time period described in Subsection (2)(e)(ii)
76 constitutes consent by the record title holder to the proposed change.
- 77 (v) In submitting a change application to the state engineer in accordance
78 with this section, the person described in Subsection (2)(e)(i) shall also
79 submit:
- 80 (A) the record title holder's response to the person's proposed
81 change application; or
82 (B) an affidavit of the person documenting the record title holder's
83 failure to respond to the person's proposed change application
84 within the time period described in Subsection (2)(e)(ii).
- 85 (vi) The state engineer shall consider the record title holder's response to a
86 proposed change application in evaluating a change application
87 submitted by a person described in Subsection (2)(e)(i).
- 88 (f) (i) A shareholder in a water company may only file a change application in
89 accordance with Section 73-3-3.5.
- 90 (ii) The record owner of a water right who is not also the beneficial user of
91 the water may not file a change application if:
- 92 (A) the proposed change diminishes a fundamental part of the water
93 right of an existing beneficial user; and
94 (B) the change application is not signed by the existing beneficial user

WORKING DRAFT -- FOR DISCUSSION PURPOSES ONLY

95 of the water whose right is diminished.

96 (iii) (A) A person who has a temporary right to the use of water may only
97 apply for a temporary change to the water right.

98 (B) The state engineer may not approve a temporary change
99 described in Subsection (2)(f)(iii)(A) that exceeds the rights to the
100 temporary use held by the applicant.

101 (3) A person entitled to ~~[use water]~~ file a change application shall change a point of
102 diversion, place of use, or purpose of water use, including water involved in a general
103 adjudication or other suit, in the manner provided in this section.

104 (4) (a) A person entitled to ~~[use water]~~ file a change application may not make a
105 change unless the state engineer approves the change application.

106 (b) A person entitled to ~~[use water]~~ file a change application shall submit a change
107 application upon forms furnished by the state engineer and shall set forth:

108 (i) the applicant's name;

109 (ii) the water right description;

110 (iii) the water quantity;

111 (iv) the stream or water source;

112 (v) if applicable, the point on the stream or water source where the water is
113 diverted;

114 (vi) if applicable, the point to which it is proposed to change the diversion of
115 the water;

116 (vii) the place, purpose, and extent of the present use;

117 (viii) the place, purpose, and extent of the proposed use; ~~[and]~~

118 (ix) if the person is submitting a change application under Section 73-3-3.5,
119 the information required by Subsection 73-3-3.5; and

120 ~~[(ix)] (x)~~ any other information that the state engineer requires.

121 (5) (a) The state engineer shall follow the same procedures, and the rights and duties
122 of the applicants with respect to applications for permanent changes of point of
123 diversion, place of use, or purpose of use shall be the same, as provided in this
124 title for applications to appropriate water.

125 (b) The state engineer may waive notice for a permanent change application
126 involving only a change in point of diversion of 660 feet or less.

WORKING DRAFT -- FOR DISCUSSION PURPOSES ONLY

- 127 (6) (a) The state engineer shall investigate all temporary change applications.
128 (b) If the state engineer finds that the temporary change will not impair a vested
129 water right, the state engineer shall issue an order authorizing the change.
130 (c) If the state engineer finds that the change sought might impair a vested water
131 right, before authorizing the change, the state engineer shall give notice of the
132 application to any person whose right may be affected by the change.
133 (d) Before making an investigation or giving notice, the state engineer may require
134 the applicant to deposit a sum of money sufficient to pay the expenses of the
135 investigation and publication of notice.
- 136 (7) (a) Except as provided by Section 73-3-30, the state engineer may not reject a
137 permanent or temporary change application for the sole reason that the change
138 would impair a vested water right.
139 (b) If otherwise proper, the state engineer may approve a permanent or temporary
140 change application for part of the water involved or upon the condition that the
141 applicant acquire the conflicting water right.
- 142 (8) (a) A person holding an approved application for the appropriation of water may
143 change the point of diversion, place of use, or purpose of use.
144 (b) A change of an approved application does not:
145 (i) affect the priority of the original application; or
146 (ii) extend the time period within which the construction of work is to begin
147 or be completed.
- 148 (9) Any person who changes or who attempts to change a point of diversion, place of use,
149 or purpose of use, either permanently or temporarily, without first applying to the state
150 engineer in the manner provided in this section:
151 (a) obtains no right;
152 (b) is guilty of a crime punishable under Section 73-2-27 if the change or attempted
153 change is made knowingly or intentionally; and
154 (c) is guilty of a separately punishable offense for each day of the unlawful change.
- 155 (10) (a) This section does not apply to the replacement of an existing well by a new well
156 drilled within a radius of 150 feet from the point of diversion of the existing well.
157 (b) Any replacement well must be drilled in accordance with the requirements of
158 Section 73-3-28.

WORKING DRAFT -- FOR DISCUSSION PURPOSES ONLY

159 **73-3-3.5. Application for a change of point of diversion, place of use, or purpose of**
160 **use of water in a water company made by a shareholder.**

161 (1) As used in this section:

162 (a) "Shareholder" means the owner of a share of stock, or other evidence of stock
163 ownership, that entitles the person to a proportionate share of water in a water
164 company.

165 (b) "Water company" means any company, operating for profit or not for profit, in
166 which a shareholder has the right to receive a proportionate share, based on
167 that shareholder's ownership interest, of water delivered by the company.

168 (2) (a) A shareholder who seeks to change the point of diversion, place of use, or
169 purpose of use of the shareholder's proportionate share of water in ~~[the]~~ a
170 water company shall submit ~~[a request for the change, in writing,]~~ the
171 shareholder's proposed change application to the water company.

172 (b) ~~[This request]~~ The proposed change application shall include~~[the following~~
173 ~~information:]~~ :

174 ~~[(a)]~~ (i) the details of the requested change, which may include:

175 (A) ~~[the]~~ the point of diversion~~[:]~~ ;

176 (B) the period of use~~[:]~~ ;

177 (C) the place~~[:]~~ of use; or

178 (D) the nature of use;

179 ~~[(b)]~~ (ii) the quantity of water ~~[sought to be changed;]~~ the shareholder seeks to
180 change;

181 ~~[(c)]~~ (iii) the certificate number of the shareholder's stock affected by the change;

182 ~~[(d)]~~ (iv) ~~[a description of the land proposed to be retired from irrigation pursuant~~
183 ~~to Section 73-3-3, if the proposed change in place or nature of use of the~~
184 ~~water involves a situation where the water was previously used for~~
185 ~~irrigation;]~~ if the proposed change moves water outside of a water
186 company's distribution area, an analysis of the potential impact of the
187 change on the water company and its remaining shareholders;

188 ~~[(e)]~~ (v) an agreement by the shareholder to continue to pay all applicable
189 corporate assessments on the share affected by the change; and

190 ~~[(f)]~~ (vi) ~~[any]~~ other information that the water company may reasonably need to

WORKING DRAFT -- FOR DISCUSSION PURPOSES ONLY

- 191 ~~[evaluate the requested]~~ review the proposed change application.
- 192 (3) (a) (i) A water company shall ~~[make a decision and provide written notice of~~
193 ~~that decision on a shareholder's request for a]~~ respond to a
194 shareholder's proposed change application within 120 days ~~[from receipt~~
195 ~~of the request:]~~ after the day on which the water company receives the
196 shareholder's application.
- 197 (ii) A water company's failure to respond to a shareholder's proposed
198 change application within the time period described in Subsection
199 (3)(a)(i) constitutes consent by the water company to the proposed
200 change.
- 201 (b) ~~[Based on the facts and circumstances of each proposed change, a water-~~
202 ~~company may take the following action:]~~ The water company's response to the
203 shareholder's application shall be in writing and shall:
- 204 (i) ~~[approve the change request;]~~ consent to a proposed change;
- 205 (ii) ~~[approve the change request with conditions; or]~~ consent to a proposed
206 change subject to certain conditions described by the water company; or
- 207 (iii) ~~[deny the change request;]~~ oppose a proposed change, describing the
208 reasons the water company opposes the change.
- 209 ~~[(c) If the water company fails to respond to a shareholder's request for a change~~
210 ~~application, pursuant to Subsection (3)(a), the failure to respond shall be~~
211 ~~considered to be a denial of the request.]~~
- 212 ~~[(d) The water company may not withhold approval if any potential damage, liability,~~
213 ~~or impairment to the water company, or its shareholders, can be reasonably~~
214 ~~mitigated without cost to the water company.]~~
- 215 ~~[(e)]~~ (c) In reviewing a shareholder's proposed change application, [A] a water
216 company may consider [the following factors in evaluating change
217 applications]:
- 218 (i) ~~[any]~~ whether there is an increased cost to the water company or its
219 shareholders;
- 220 (ii) ~~[interference]~~ whether the change will interfere with the water company's
221 ability to manage and distribute water for the benefit of all shareholders;
- 222 (iii) whether the proposed change represents more water than the

WORKING DRAFT -- FOR DISCUSSION PURPOSES ONLY

- 223 shareholder's pro rata share of the water company's right;
- 224 (iv) [impairment of either] whether the change will impair the quantity or
- 225 quality of water delivered to other shareholders under the existing water
- 226 rights of the water company, including rights to carrier water;
- 227 (v) whether the proposed change [would cause a violation of any] violates a
- 228 statute, ordinance, regulation, or order of a court or [governmental]
- 229 government agency; or
- 230 ~~[(vi) whether the shareholder has or can arrange for the beneficial use of~~
- 231 ~~water to be retired from irrigation within the water company's service~~
- 232 ~~under the proposed change; or]~~
- 233 (vii) the cumulative effects that the approval of the change application may
- 234 have on other shareholders or water company operations.
- 235 (4) In submitting a change application to the state engineer in accordance with Section
- 236 73-3-3, a shareholder shall also submit:
- 237 (a) the water company's response to the shareholder's notice of a proposed
- 238 change application; or
- 239 (b) an affidavit of the shareholder documenting the water company's failure to
- 240 respond to the shareholder's notice of a proposed change application within the
- 241 time period described in Subsection (3)(a)(i).
- 242 (5) (a) The state engineer shall evaluate a shareholder's change application in the
- 243 same manner used to evaluate a change application submitted under Section
- 244 73-3-3, and using:
- 245 (i) the criteria described in Subsection 73-3-8;
- 246 (ii) the considerations described in Subsection(3)(c); and
- 247 (iii) the water company's response to the shareholder's notice of proposed
- 248 change application.
- 249 (b) Nothing in this section shall limit the authority of the state engineer in evaluating
- 250 and processing a change application.
- 251 (c) The state engineer may not withhold approval of a change application under
- 252 this section based on potential damage, liability, or impairment to the water
- 253 company or its shareholders if the potential damage, liability, or impairment can
- 254 be reasonably mitigated without cost to the water company.

WORKING DRAFT -- FOR DISCUSSION PURPOSES ONLY

- 255 ~~[(4)](6)~~ The ~~[water company]~~ state engineer may require that ~~[all]~~ reasonable costs
256 associated with the change application~~[-including costs of submitting proof,]~~ be
257 paid by the shareholder.
- 258 ~~[(5)](7)~~ ~~[(a) — The]~~ For the shares listed in the change application, the state engineer
259 shall require that the shareholder requesting the change:
- 260 (a) ~~[must]~~ be current on all water company assessments; and
- 261 (b) (i) ~~[agree]~~ continue to pay all applicable future assessments[-]; or
262 [except that the shareholder may choose to prepay any portion of
263 the water company assessments attributable to an existing debt
264 of the water company.]
- 265 (ii) if the shareholder chooses, prepay:
- 266 (A) a pro rata share of all of the company's outstanding
267 indebtedness assessable to the shares; and
- 268 (B) the present value of reasonably anticipated future
269 assessments required to fund the basic operation and
270 maintenance of the company.
- 271 ~~[(b) — Other than prepaid assessments, the water company may require that~~
272 ~~the shareholder continue to pay all applicable assessments.]~~
- 273 (8) (a) In accordance with Section 73-3-7 and Title 63G, Chapter 4, Administrative
274 Procedures Act, a water company may protest a change application filed by a
275 shareholder, only if:
- 276 (i) the change application filed by the shareholder is inconsistent with the
277 consent given by the water company under Subsection (3)(b)(i) or (ii); or
- 278 (ii) the water company opposed the change application under Subsection
279 (3)(b)(iii).
- 280 (b) If a water company files a request for agency action under Subsection (8)(a),
281 the state engineer may:
- 282 (i) upon request of the water company or the shareholder, refer the water
283 company and shareholder to mediation;
- 284 (ii) require that, before the state engineer makes an order in the adjudicative
285 proceeding, the water company and shareholder mediate the dispute; or
- 286 (iii) if the state engineer finds that a legal issue exists in the adjudicative

WORKING DRAFT -- FOR DISCUSSION PURPOSES ONLY

287 proceeding that is appropriate for the courts to determine, require that
288 the water company and the shareholder obtain a ruling from a district
289 court on the issue before the state engineer continues with the
290 adjudicative proceeding.

291 ~~[(6) If the water company approves the requested change, with or without conditions, the~~
292 ~~change application may be filed with the state engineer, and must:~~

293 ~~— (a) be signed on behalf of the water company; or~~

294 ~~— (b) be accompanied by written authorization from the water company assenting to~~
295 ~~the change.]~~

296 ~~[(7) (a) The state engineer may evaluate a change application authorized by a water~~
297 ~~company under this section in the same manner and using the same criteria~~
298 ~~that he or she uses to evaluate any other change application:~~

299 ~~— (b) Nothing in this section shall limit the authority of the state engineer in evaluating~~
300 ~~and processing any change application:~~

301 ~~(8) If an application authorized by a water company under this section is approved by the~~
302 ~~state engineer, the shareholder may file requests for extensions of time to submit~~
303 ~~proof of beneficial use under the change application without further permission of the~~
304 ~~water company:]~~

305 (9) ~~[(a)]~~Change applications approved under this section are subject to all
306 conditions~~[-]~~, including:

307 (a) conditions imposed by [the water company and]the state engineer[-];
308 and

309 (b) conditions agreed upon between the water company and the
310 shareholder.

311 (10) If a shareholder's change application is approved by the state engineer and upheld by
312 a district court in a de novo action, the district court shall award costs and reasonable
313 attorney fees to the shareholder if the district court finds that the water company:

314 (a) unreasonably opposed the proposed change under Subsection (3)(b)(iii); or

315 (b) imposed unreasonable conditions on the change application under Subsection
316 (3)(b)(ii).

317 ~~[(b) If a shareholder fails to comply with [all of the conditions] [imposed by the water~~
318 ~~company,] a condition described in Subsection (9)(a), the water company may,~~

WORKING DRAFT -- FOR DISCUSSION PURPOSES ONLY

319 after written notice to the shareholder and after allowing reasonable time to
320 remedy the failure, [~~withdraw its approval of the application, and~~] petition the
321 state engineer for an order canceling the change application:

322 ~~(c) The water company may not [revoke its approval of the change application or]~~
323 ~~seek an order canceling the application if the conditions described in~~
324 ~~Subsection (9)(a) are substantially satisfied.]~~

325 [(10) (a) The shareholder requesting the change shall have a cause of action, including
326 an award of actual damages incurred, against the water company if the water
327 company:

328 ~~(i) unreasonably withholds approval of a requested change;~~

329 ~~(ii) imposes unreasonable conditions in its approval; or~~

330 ~~(iii) withdraws approval of a change application in a manner other than as~~
331 ~~provided in Subsection (9).~~

332 ~~(b) The action referred to in Subsection (10)(a) shall be referred to mediation by~~
333 ~~the court under Title 78B, Chapter 6, Part 2, Alternative Dispute Resolution Act,~~
334 ~~unless both parties decline mediation.~~

335 ~~(c) If mediation is declined, the prevailing party to the action shall be entitled to~~
336 ~~costs and reasonable attorney fees.]~~

337 (11) If a shareholder's change application is denied by the state engineer and the denial is
338 upheld by a district court in a de novo action, the district court shall award costs and
339 reasonable attorney fees to the water company if the district court finds that:

340 (a) the shareholder refused to accept conditions advanced by the water company
341 for the water company to consent to the proposed change; and

342 (b) the conditions advanced by the water company for accepting the shareholder's
343 change were reasonable and did not undermine the shareholder's purpose in
344 requesting the change application.

345

