

**Effective 5/12/2015**

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

(1) As used in this section:

- (a) "Shareholder" means the owner of a share of stock, or other evidence of stock ownership, that entitles the person to a proportionate share of water in a water company.
- (b) "Water company" means, except as described in Subsection (1)(c), any company, operating for profit or not for profit, where a shareholder has the right to receive a proportionate share, based on that shareholder's ownership interest, of water delivered by the company.
- (c) "Water company" does not include a public water supplier, as defined in Section 73-1-4.

(2)

(a) A shareholder who seeks to file a change application under Section 73-3-3 to make a change to some or all of the water rights represented by the shareholder's shares in a water company shall:

- (i) prepare a proposed change application on forms furnished by the state engineer; and
  - (ii) provide the proposed change application to the water company by personal delivery with a signed receipt, certified mail, or electronic mail with confirmation of receipt.
- (b) The water company and the shareholder shall cooperate in supplying information relevant to preparation or correction of the shareholder's change application.
- (c) In addition to the information required under Section 73-3-3, the proposed change application shall include:
- (i) the certificate number of the stock affected by the change;
  - (ii) a description of the land proposed to be retired from irrigation in accordance with Section 73-3-3, if the proposed change in place or nature of use of the water involves a situation where the water was previously used for irrigation;
  - (iii) an agreement by the shareholder to continue to pay all applicable corporate assessments on the share affected by the change; and
  - (iv) any other information that the water company may reasonably need to evaluate the proposed change application.

(3)

(a) The water company shall respond to the proposed change application described in Subsection (2) within 120 days after the day on which the water company receives the proposed change application.

(b) The water company's response to the proposed change application shall be in writing and shall:

- (i) consent to the proposed change;
- (ii) consent to the proposed change, subject to certain conditions described by the water company; or
- (iii) decline to consent to the proposed change, describing the reasons for declining to consent.

(c) If the water company fails to timely respond, as described in Subsection (3)(a), the failure to respond shall be considered the water company's consent to the proposed change application and the shareholder may file the change application with the state engineer.

(4)

(a) In reviewing a shareholder's proposed change application, a water company may consider:

- (i) whether an increased cost to the water company or its shareholders results from the proposed change;
- (ii) whether the proposed change will interfere with the water company's ability to manage and distribute water for the benefit of all shareholders;

- (iii) whether the proposed change represents more water than the shareholder's proportionate share of the water company's right;
  - (iv) whether the proposed change would create preferential access to use of particular company water rights to the detriment of other shareholders;
  - (v) whether the proposed change will impair the quantity or quality of water delivered to other shareholders under the existing water rights of the water company, including rights to carrier water;
  - (vi) whether the proposed change violates a statute, ordinance, regulation, or order of a court or government agency;
  - (vii) if applicable, whether the shareholder has or can arrange for the beneficial use of water to be retired from irrigation within the water company's service area under the proposed change; and
  - (viii) the cumulative effects that the approval of the change application may have on other shareholders or water company operations.
- (b) The water company may not withhold consent if any potential damage, liability, or impairment to the water company, or its shareholders, can be reasonably mitigated without cost to the water company.
  - (c) The water company may require the shareholder to pay all reasonable and necessary costs associated with the change application, but may not impose unreasonable exactions.
- (5)
- (a) If the water company declines to consent to the proposed change application, stating its reasons, the shareholder may file an action in district court, seeking court review of the reasonableness of the conditions imposed for giving consent or the reasons stated for declining consent and a final order allowing the shareholder to file the proposed change application with the state engineer.
  - (b) If the water company consents to the proposed change application subject to conditions to which the shareholder does not agree, the shareholder may file the change application with the state engineer as provided in Subsection (6), without waiving the shareholder's right to contest conditions set by the water company under Subsection (3)(b)(ii).
  - (c) During or after the completion of the proceeding before the state engineer commenced under Subsection (6), the shareholder may file an action in district court seeking court review of the reasonableness of the conditions imposed by the water company for giving consent.
  - (d) In an action brought under Subsection (5)(a), (b), or (c), the court:
    - (i) shall refer the parties to mediation under Title 78B, Chapter 6, Part 2, Alternative Dispute Resolution Act, unless one or both parties decline mediation; and
    - (ii) may award costs and reasonable attorney fees to the prevailing party if mediation does not occur because the other party declined to participate in mediation.
- (6) If the water company consents to the proposed change, the water company fails to respond as required by Subsection (3)(a), the court has entered an order described in Subsection (5)(a), or the water company consents to the proposed change subject to conditions to which the shareholder does not agree, as described in Subsection (5)(b), the shareholder may commence an administrative proceeding by filing the change application with the state engineer in accordance with Section 73-3-3 and this section.
- (7) The shareholder shall include as part of the change application filed with the state engineer under Subsection (5)(b) or (6):
- (a) the water company's response to the shareholder's proposed change application;
  - (b) if applicable, an affidavit signed by the shareholder documenting the water company's failure to respond in the time period described in Subsection (3)(a); or

- (c) if applicable, the court order described in Subsection (5)(a).
- (8)
- (a) The state engineer shall evaluate a shareholder's change application in the same manner used to evaluate a change application submitted under Section 73-3-3, using the criteria described in Section 73-3-8.
  - (b) Nothing in this section limits the authority of the state engineer in evaluating and processing a change application, including the authority to require or allow a shareholder or water company to submit additional relevant information, if the state engineer finds an absence of prejudice and allows adequate time and opportunity for the other party to respond.
- (9) If the state engineer approves a shareholder's change application, the state engineer may, for shares included in the approval, require that the shareholder requesting the change be current on all water company assessments and continue to pay all reasonably applicable future assessments, with credit given to the shareholder for any cost savings to the company resulting from the change.
- (10) By mutual agreement only, and when the shares will rely upon a different diversion and delivery system, the water company and the shareholder may negotiate a buyout from the water company that may include a pro rata share of the water company's existing indebtedness assignable to the shares.
- (11) After an application has been approved by the state engineer, the shareholder may file requests for extensions of time to submit proof of beneficial use under the change application without further involvement of the water company.
- (12) If, after a proposed change has been approved and gone into effect, a shareholder fails to substantially comply with a condition described in Subsection (9), or any condition reasonably imposed by the company and agreed to by the shareholder, and neglects to remedy the failure after written notice from the water company that allows the shareholder a reasonable opportunity to remedy the failure, no less than 90 days after the day on which the water company gives notice, the water company may petition the state engineer to order a reversal of the change application approval.
- (13)
- (a) The shareholder requesting the change shall have a cause of action, including an award of actual damages incurred, against the water company if the water company:
    - (i) unreasonably withholds approval of a requested change;
    - (ii) imposes unreasonable conditions in its approval; or
    - (iii) withdraws approval of a change application in a manner other than as provided in Subsection (12).
  - (b) The court may award costs and reasonable attorney fees:
    - (i) to the shareholder if the court finds that the water company acted in bad faith when it declined to consent to the proposed change or conditioned its consent on excessive exactions or unreasonable conditions; or
    - (ii) to the water company if it finds that the shareholder acted in bad faith in refusing to accept conditions reasonably necessary to protect other shareholders if the shareholder's change application is approved.

Amended by Chapter 249, 2015 General Session