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WATER LAW - APPLICATION REVISIONS

2015 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: V. Lowry Snow

Senate Sponsor: Margaret Dayton

LONG TITLE

Committee Note:

The Natural Resources, Agriculture, and Environment Interim Committee recommended this bill.

General Description:

This bill modifies the procedure for a change application.

Highlighted Provisions:

This bill:

- ▶ defines terms;
- ▶ authorizes a person who is proposing a change application to request a meeting with the state engineer, or the state engineer's designee, to discuss potential issues with the change;
- ▶ authorizes the state engineer, upon receiving a change application, to determine whether a proposed change would result in quantity impairment of another water right;
- ▶ describes the burden of proof on a person who applies for a change application; and
- ▶ makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None



28 **Utah Code Sections Affected:**

29 AMENDS:

30 **73-2-27**, as enacted by Laws of Utah 2005, Chapter 215

31 **73-3-3**, as last amended by Laws of Utah 2012, Chapter 229

32 **73-3-8**, as last amended by Laws of Utah 2007, Chapter 136



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

35 Section 1. Section **73-2-27** is amended to read:

36 **73-2-27. Criminal penalties.**

37 (1) This section applies to offenses committed under:

38 (a) Section **73-1-14**;

39 (b) Section **73-1-15**;

40 (c) Section **73-2-20**;

41 (d) [~~Subsection **73-3-3**(9)~~] Section **73-3-3**;

42 (e) Section **73-3-26**;

43 (f) Section **73-3-29**;

44 (g) Section **73-5-9**;

45 (h) Section **76-10-201**;

46 (i) Section **76-10-202**; and

47 (j) Section **76-10-203**.

48 (2) Under circumstances not amounting to an offense with a greater penalty under

49 Subsection **76-6-106**(2)(b)(ii) or Section **76-6-404**, violation of a provision listed in Subsection

50 (1) is punishable:

51 (a) as a felony of the third degree if:

52 (i) the value of the water diverted or property damaged or taken is \$2,500 or greater;

53 and

54 (ii) the person violating the provision has previously been convicted of violating the

55 same provision;

56 (b) as a class A misdemeanor if:

57 (i) the value of the water diverted or property damaged or taken is \$2,500 or greater; or

58 (ii) the person violating the provision has previously been convicted of violating the

59 same provision; or

60 (c) as a class B misdemeanor if Subsection (2)(a) or (b) does not apply.

61 Section 2. Section **73-3-3** is amended to read:

62 **73-3-3. Permanent or temporary changes to a water right.**

63 (1) For purposes of this section:

64 (a) "Permanent change" means a change, for an indefinite period of time [~~with an intent~~
65 ~~to relinquish the original point of diversion, place of use, or purpose of use.~~], to the:

66 (i) point of diversion;

67 (ii) place of use;

68 (iii) period of use;

69 (iv) nature of use; or

70 (v) storage of water.

71 (b) (i) "Quantity impairment" means any reduction in the amount of water a person is
72 able to receive in order to satisfy an existing right to the use of water that would result from an
73 action proposed in a change application, including:

74 (A) diminishing the quantity of water in the source of supply for the existing right;

75 (B) a change in the timing of availability of water from the source of supply for the
76 existing right; or

77 (C) enlarging the quantity of water depleted by the nature of the proposed use when
78 compared with the nature of the currently approved use.

79 (ii) "Quantity impairment" does not mean a decrease in the static level of water in an
80 underground basin or aquifer that would result from an action proposed to be taken in a change
81 application, if the volume of water necessary to satisfy an existing right otherwise remains
82 reasonably available.

83 [~~(b)~~] (c) "Temporary change" means a change for a fixed period of time, not exceeding
84 one year[-], to the:

85 (i) point of diversion;

86 (ii) place of use;

87 (iii) period of use;

88 (iv) nature of use; or

89 (v) storage of water.

90 (2) (a) A person who proposes to file a permanent or temporary change application
91 may request consultation with the state engineer, or the state engineer's designee, before filing
92 the application in order to review the requirements of the change application process, discuss
93 potential issues related to the change, and provide the applicant with information.

94 (b) Statements made and information presented in the consultation are not binding on
95 the applicant or the state engineer.

96 (c) The consultation described in Subsection (2)(a) may occur in the state engineer's
97 regional office for the region where the proposed change would occur.

98 ~~[(2)]~~ (3) (a) [Subject to Subsection (2)(c), a] A person entitled to the use of water may
99 make a permanent or temporary [changes in the:] change to an existing right to use water,
100 including a right involved in a general determination of rights or other suit, if:

101 ~~[(i) point of diversion;]~~

102 ~~[(ii) place of use; or]~~

103 ~~[(iii) purpose of use for which the water was originally appropriated.]~~

104 (i) the person makes the change in accordance with this section;

105 ~~[(b) Except]~~ (ii) except as provided by Section 73-3-30, [a] the change [may not be
106 made if it impairs a vested water] does not impair an existing right without just
107 compensation[.] or adequate mitigation; and

108 (iii) the state engineer approves the change application, consistent with the
109 requirements of Section 73-3-8.

110 ~~[(c)]~~ (b) A change application on a federal reclamation project water right shall be
111 signed by:

112 (i) the local water users organization that is contractually responsible for:

113 (A) the operation and maintenance of the project; or

114 (B) the repayment of project costs; and

115 (ii) the record owner of the water right.

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

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

121 ~~[(b) A] (4) (a) Before making a permanent or temporary change, a person entitled to~~
122 ~~the use of water shall submit a change application upon forms furnished by the state engineer~~
123 ~~[and shall set forth:].~~

124 (b) The application described in Subsection (4)(a) shall set forth:

- 125 (i) the applicant's name;
- 126 (ii) the water right description, including the water right number;
- 127 (iii) the water quantity;
- 128 (iv) the stream or water source;
- 129 (v) if applicable, the point on the stream or water source where the water is diverted;
- 130 (vi) if applicable, the point to which it is proposed to change the diversion of the water;
- 131 (vii) the place, ~~[purpose;]~~ nature, period, and extent of the ~~[present]~~ currently approved
132 use;
- 133 (viii) the place, ~~[purpose;]~~ nature, period, and extent of the proposed use; and
- 134 (ix) any other information that the state engineer requires.

135 ~~[(5) (a) The state engineer shall follow the same procedures, and the rights and duties~~
136 ~~of the applicants with respect to applications for permanent changes of point of diversion, place~~
137 ~~of use, or purpose of use shall be the same, as provided in this title for applications to~~
138 ~~appropriate water.]~~

139 ~~[(b) The state engineer may waive notice for a permanent change application involving~~
140 ~~only a change in point of diversion of 660 feet or less.]~~

141 ~~[(6) (a) The state engineer shall investigate all temporary change applications.]~~

142 ~~[(b) If the state engineer finds that the temporary change will not impair a vested water~~
143 ~~right, the state engineer shall issue an order authorizing the change.]~~

144 ~~[(c) If the state engineer finds that the change sought might impair a vested water right,~~
145 ~~before authorizing the change, the state engineer shall give notice of the application to any~~
146 ~~person whose right may be affected by the change.]~~

147 ~~[(d) Before making an investigation or giving notice, the state engineer may require the~~
148 ~~applicant to deposit a sum of money sufficient to pay the expenses of the investigation and~~
149 ~~publication of notice.]~~

150 ~~[(7) (a) Except as provided by Section 73-3-30, the state engineer may not reject a~~
151 ~~permanent or temporary change application for the sole reason that the change would impair a~~

152 ~~vested water right.]~~

153 ~~[(b) If otherwise proper, the state engineer may approve a permanent or temporary~~
154 ~~change application for part of the water involved or upon the condition that the applicant~~
155 ~~acquire the conflicting water right.]~~

156 ~~[(8) (a) A person holding an approved application for the appropriation of water may~~
157 ~~change the point of diversion, place of use, or purpose of use.]~~

158 (5) In a proceeding before the state engineer, the applicant has the burden of producing
159 evidence sufficient to support a reasonable belief that the change can be made in compliance
160 with this section and Section 73-3-8, including evidence:

161 (a) that the change will not cause a specific existing right to experience quantity
162 impairment; or

163 (b) if applicable, rebutting the presumption of quantity impairment described in
164 Subsection 73-3-8(6)(c).

165 ~~[(b)] (6) A change of an approved application to appropriate water does not:~~

166 ~~[(i)] (a) affect the priority of the original application to appropriate water; or~~

167 ~~[(ii)] (b) extend the time period within which the construction of work is to begin or be~~
168 ~~completed.~~

169 ~~[(9)] (7) Any person who [~~changes or who attempts to change a point of diversion,~~~~
170 ~~place of use, or purpose of use, either permanently or temporarily, without first applying to the~~
171 ~~state engineer in the manner provided in this section] makes a permanent or temporary change~~
172 ~~without first filing and obtaining approval of a change application providing for such change:~~

173 ~~(a) obtains no right;~~

174 ~~(b) is guilty of [~~a crime~~] an offense punishable under Section 73-2-27 if the change [~~or~~~~
175 ~~~~attempted change~~] is made knowingly or intentionally; and~~

176 ~~(c) is guilty of a separately punishable offense for each day of the unlawful change.~~

177 ~~[(10)] (8) (a) This section does not apply to the replacement of an existing well by a~~
178 ~~new well drilled within a radius of 150 feet from the point of diversion of the existing well.~~

179 ~~(b) Any replacement well must be drilled in accordance with the requirements of~~
180 ~~Section 73-3-28.~~

181 Section 3. Section 73-3-8 is amended to read:

182 **73-3-8. Approval or rejection of application -- Requirements for approval --**

183 **Application for specified period of time -- Filing of royalty contract for removal of salt or**
184 **minerals.**

185 (1) (a) It shall be the duty of the state engineer to approve an application if there is
186 reason to believe that:

187 (i) for an application to appropriate, there is unappropriated water in the proposed
188 source;

189 (ii) the proposed use will not impair existing rights or interfere with the more
190 beneficial use of the water;

191 (iii) the proposed plan:

192 (A) is physically and economically feasible, unless the application is filed by the
193 United States Bureau of Reclamation[;]; and

194 (B) would not prove detrimental to the public welfare;

195 (iv) the applicant has the financial ability to complete the proposed works; ~~[and]~~

196 (v) the application was filed in good faith and not for purposes of speculation or
197 monopoly[;]; and

198 (vi) if applicable, the application complies with a groundwater management plan
199 adopted under Section 73-5-15.

200 (b) ~~[(i)]~~ If the state engineer, because of information in the state engineer's possession
201 obtained either by the state engineer's own investigation or otherwise, has reason to believe that
202 an application ~~[to appropriate water]~~ will interfere with ~~[its]~~ the water's more beneficial use for
203 irrigation, municipal and industrial, domestic or culinary, stock watering, power or mining
204 development, or manufacturing, or will unreasonably affect public recreation or the natural
205 stream environment, or will prove detrimental to the public welfare, ~~[it is the state engineer's~~
206 ~~duty to]~~ the state engineer shall withhold approval or rejection of the application until the state
207 engineer has investigated the matter.

208 ~~[(i)]~~ (c) If an application does not meet the requirements of this section, it shall be
209 rejected.

210 (2) (a) An application to appropriate water for industrial, power, mining development,
211 manufacturing purposes, agriculture, or municipal purposes may be approved for a specific and
212 certain period from the time the water is placed to beneficial use under the application, but in
213 no event may an application be granted for a period of time less than that ordinarily needed to

214 satisfy the essential and primary purpose of the application or until the water is no longer
215 available as determined by the state engineer.

216 (b) At the expiration of the period fixed by the state engineer the water shall revert to
217 the public and is subject to appropriation as provided by this title.

218 (c) No later than 60 calendar days before the expiration date of the fixed time period,
219 the state engineer shall send notice by mail or by any form of electronic communication
220 through which receipt is verifiable, to the applicant of record.

221 (d) Except as provided by Subsection (2)(e), the state engineer may extend any limited
222 water right upon a showing that:

223 (i) the essential purpose of the original application has not been satisfied;

224 (ii) the need for an extension is not the result of any default or neglect by the applicant;
225 and

226 (iii) the water is still available.

227 (e) No extension shall exceed the time necessary to satisfy the primary purpose of the
228 original application.

229 (f) A request for extension of the fixed time period must be filed in writing in the
230 office of the state engineer on or before the expiration date of the application.

231 (3) (a) Before the approval of any application for the appropriation of water from
232 navigable lakes or streams of the state that contemplates the recovery of salts and other
233 minerals therefrom by precipitation or otherwise, the applicant shall file with the state engineer
234 a copy of a contract for the payment of royalties to the state.

235 (b) The approval of an application shall be revoked in the event of the failure of the
236 applicant to comply with terms of the royalty contract.

237 (4) (a) The state engineer shall investigate all temporary change applications.

238 (b) The state engineer shall:

239 (i) approve the temporary change if the state engineer finds there is reason to believe
240 that it will not impair an existing right; and

241 (ii) deny the temporary change if the state engineer finds there is reason to believe it
242 would impair an existing right.

243 (5) (a) The state engineer shall follow the same procedures, and the rights and duties of
244 applicants with respect to permanent change applications shall be the same as provided in this

245 title for applications to appropriate water.

246 (b) The state engineer may waive notice for a permanent change application if it only
247 involves a change in point of diversion of 660 feet or less.

248 (c) The state engineer may condition approval of a change application to prevent an
249 enlargement of the quantity of water depleted by the nature of the proposed use when compared
250 with the nature of the currently approved use of water proposed to be changed.

251 (d) A condition described in Subsection (5)(c) may not include a reduction in the
252 currently approved diversion rate of water under the water right identified in the change
253 application solely to account for the difference in depletion under the nature of the proposed
254 use when compared with the nature of the currently approved use.

255 (6) (a) Except as provided in Subsection (6)(b), the state engineer shall reject a
256 permanent change application if the person proposing to make the change is unable to meet the
257 burden described in Subsection 73-3-3(5).

258 (b) If otherwise proper, the state engineer may approve a permanent or temporary
259 change application upon one or more of the following conditions:

260 (i) for part of the water involved;

261 (ii) that the applicant acquire a conflicting right; or

262 (iii) that the applicant provide and implement a plan approved by the state engineer to
263 mitigate impairment of an existing right.

264 (c) (i) There is a rebuttable presumption of quantity impairment, as defined in
265 Subsection 73-3-3(1), to the extent that, for a period of at least seven consecutive years, a
266 portion of the right identified in a change application has not been:

267 (A) diverted from the approved point of diversion; and

268 (B) beneficially used at the approved place of use.

269 (ii) The rebuttable presumption described in Subsection (6)(c)(i) does not apply if the
270 beneficial use requirement is excused by:

271 (A) Subsection 73-1-4(2)(e);

272 (B) an approved nonuse application under Subsection 73-1-4(2)(b);

273 (C) Subsection 73-3-30(7); or

274 (D) the passage of time under Subsection 73-1-4(2)(c)(i).

275 (d) The state engineer may not consider quantity impairment based on the conditions

276 described in Subsection (6)(c) unless the issue is raised in a:
277 (i) timely protest that identifies which of the protestant's existing rights the protestant
278 reasonably believes will experience quantity impairment; or
279 (ii) written notice provided by the state engineer to the applicant within 90 days after
280 the change application is filed.
281 (e) The written notice described in Subsection (6)(d)(ii) shall:
282 (i) specifically identify an existing right the state engineer reasonably believes may
283 experience quantity impairment; and
284 (ii) be mailed to the owner of an identified right, as shown by the state engineer's
285 records, if the owner has not protested the change application.
286 (f) The state engineer is not required to include all rights the state engineer believes
287 may be impaired by the proposed change in the written notice described in Subsection
288 (6)(d)(ii).
289 (g) The owner of a right who receives the written notice described in Subsection
290 (6)(e)(ii) may not become a party to the administrative proceeding if the owner has not filed a
291 timely protest.
292 (h) If a change applicant, all protestants, and all persons identified by the state engineer
293 under Subsection (6)(d)(ii) come to a written agreement regarding how the issue of quantity
294 impairment shall be mitigated, the state engineer may incorporate the terms of the agreement
295 into a change application approval.

Legislative Review Note
as of 11-21-14 11:59 AM

Office of Legislative Research and General Counsel