

**Representative Ben C. Ferry** proposes the following substitute bill:

**WATER RIGHT USE**

2008 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Patrick Painter**

Senate Sponsor: \_\_\_\_\_

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**LONG TITLE**

**General Description:**

This bill amends provisions relating to the use of water.

**Highlighted Provisions:**

This bill:

- ▶ defines terms;
- ▶ changes the nonuse period of a water right from five to seven years;
- ▶ allows a shareholder in a water company to file a nonuse application on a water right owned by the water company;
- ▶ changes the nonuse application;
- ▶ exempts a water right from forfeiture that is subject to an approved change application, which application is being diligently pursued;
- ▶ removes the requirement:
  - to file a statement of the resumption of use; and
  - for the state engineer to issue a certificate for the resumption of use;
- ▶ authorizes the state engineer to:
  - evaluate beneficial use when reviewing a change application; and
  - deny a change application based on nonuse;
- ▶ clarifies that a denial of a change application does not forfeit the water right; and



26           ▶ makes technical changes.

27 **Monies Appropriated in this Bill:**

28           None

29 **Other Special Clauses:**

30           None

31 **Utah Code Sections Affected:**

32 AMENDS:

33           **73-1-4**, as last amended by Laws of Utah 2007, Chapters 136 and 329

34           **73-2-27**, as enacted by Laws of Utah 2005, Chapter 215

35           **73-3-3**, as last amended by Laws of Utah 2005, Chapter 215



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

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

39           **73-1-4. Reversion to the public by abandonment or forfeiture for nonuse within**  
40 **seven years -- Extension of time.**

41           ~~[(1) (a) In order to further the state policy of securing the maximum use and benefit of~~  
42 ~~its scarce water resources, a person entitled to the use of water has a continuing obligation to~~  
43 ~~place all of a water right to beneficial use.]~~

44           ~~[(b) The forfeiture of all or part of any right to use water for failure to place all or part~~  
45 ~~of the water to beneficial use makes possible the allocation and use of water consistent with~~  
46 ~~long established beneficial use concepts.]~~

47           ~~[(c) The provisions of Subsections (2) through (6) shall be construed to carry out the~~  
48 ~~purposes and policies set forth in this Subsection (1).]~~

49           ~~[(2)]~~ (1) As used in this section ~~[-"public"]:~~

50           (a) "Public water supply entity" means an entity that supplies water as a utility service  
51 or for irrigation purposes and is also:

52           ~~[(a)]~~ (i) a municipality, water conservancy district, metropolitan water district,  
53 irrigation district, or other public agency;

54           ~~[(b)]~~ (ii) a water company regulated by the Public Service Commission; or

55           ~~[(c)]~~ (iii) any other owner of a community water system.

56           (b) "Shareholder" is as defined in Section 73-3-3.5.

57 (c) "Water company" is as defined in Section 73-3-3.5.

58 ~~[(3)]~~ (2) (a) When an appropriator or the appropriator's successor in interest abandons  
59 or ceases to use all or a portion of a water right for a period of ~~[five]~~ seven years, the water  
60 right or the unused portion of that water right ceases and the water reverts to the public,  
61 unless~~[-before the expiration of the five-year period,]~~ the appropriator or the appropriator's  
62 successor in interest files a ~~[verified]~~ nonuse application with the state engineer.

63 (b) (i) A nonuse application may be filed on all or a portion of the water right,  
64 including water rights held by ~~[mutual irrigation companies]~~ a water company.

65 (ii) ~~[Public water supply entities that own stock in a mutual water company,]~~ A  
66 shareholder after giving written notice to the water company, may file a nonuse [applications]  
67 application with the state engineer on the water represented by the stock.

68 (c) (i) A water right or a portion of the water right may not be forfeited unless a judicial  
69 action to declare the right forfeited is commenced within 15 years from the end of the latest  
70 period of nonuse of at least ~~[five]~~ seven years.

71 (ii) If forfeiture is asserted in an action for general determination of rights in  
72 conformance with the provisions of Chapter 4, Determination of Water Rights, the 15-year  
73 limitation period shall commence to run back in time from the date the state engineer's  
74 proposed determination of rights is served upon each claimant.

75 (iii) A decree entered in an action for general determination of rights under Chapter 4,  
76 Determination of Water Rights, shall bar any claim of forfeiture for prior nonuse against any  
77 right determined to be valid in the decree, but ~~[shall]~~ does not bar a claim for periods of nonuse  
78 that occur after the entry of the decree.

79 (iv) A proposed determination by the state engineer in an action for general  
80 determination of rights under Chapter 4, Determination of Water Rights, shall bar any claim of  
81 forfeiture for prior nonuse against any right proposed to be valid, unless a timely objection has  
82 been filed within the time allowed in Chapter 4, Determination of Water Rights.

83 ~~[(d) The extension of time to resume the use of that water may not exceed five years~~  
84 ~~unless the time is further extended by the state engineer.]~~

85 ~~[(e) The provisions of this section are applicable]~~

86 (d) This section applies whether the unused or abandoned water or a portion of the  
87 water is;

88 (i) permitted to run to waste; or ~~its~~

89 (ii) used by others without right with the knowledge of the water right holder;  
90 ~~provided that the~~; or

91 (iii) leased or made available to others by agreement.

92 (e) The use of water pursuant to a lease or other agreement with the appropriator or the  
93 appropriator's successor ~~[shall be considered to constitute]~~ is beneficial use.

94 (f) ~~[The provisions of this]~~ This section [shall] does not apply to:

95 (i) ~~[to]~~ those periods of time when:

96 (A) a surface water source fails to yield sufficient water to satisfy the water right~~;~~ or  
97 when]; or

98 (B) groundwater is not available because of:

99 (I) a sustained drought; or

100 (II) regulation of the water right based on its priority;

101 (ii) ~~[to]~~ water stored ~~[in reservoirs pursuant to an existing water right], according to a~~  
102 water right, in a surface reservoir or an aquifer in accordance with Title 73, Chapter 3b,  
103 Groundwater Recharge and Recovery Act, where the stored water is being held in storage for  
104 present or future use; ~~[or]~~

105 (iii) ~~[when]~~ a water right if a water user has beneficially used substantially all of [a] the  
106 water right within a ~~[five-year]~~ seven-year period, provided that this exemption [shall] does not  
107 apply to the adjudication of a water right in a general determination of water rights under  
108 Chapter 4, Determination of Water Rights[-];

109 ~~[(g) Groundwater rights]~~ (iv) a groundwater right used to supplement the quantity or  
110 quality of other water supplies ~~[may not be subject to loss or reduction under this section]~~ if not  
111 used during periods when the other water source delivers sufficient water ~~[so as]~~ to not require  
112 use of the supplemental groundwater[-]; or

113 (v) a water right subject to an approved change application where the applicant is  
114 diligently pursuing certification.

115 ~~[(4)]~~ (3) (a) The state engineer shall furnish ~~[an]~~ a nonuse application form requiring  
116 the following information:

117 (i) the name and address of the applicant;

118 (ii) a description of the water right or a portion of the water right, including the point of

119 diversion, place of use, and priority;

120 ~~[(iii) the date the water was last diverted and placed to beneficial use;]~~

121 ~~[(iv)]~~ (iii) the quantity of water;

122 ~~[(v)]~~ (iv) the period of use;

123 ~~[(vi)]~~ (v) the ~~[extension of time]~~ period of nonuse applied for;

124 ~~[(vii)]~~ (vi) a statement of the reason for the nonuse of the water; and

125 ~~[(viii)]~~ (vii) any other information that the state engineer requires.

126 (b) (i) Filing the application extends the time during which nonuse may continue until

127 the state engineer issues his order on the nonuse application.

128 (ii) Approval of a nonuse application protects a water right from forfeiture for nonuse  
 129 from the date the application was filed until the date of expiration of the nonuse application set  
 130 by the state engineer.

131 (c) (i) Upon receipt of the application, the state engineer shall publish a notice of the  
 132 application once a week for two successive weeks in a newspaper of general circulation in the  
 133 county in which the source of the water supply is located and where the water is to be used.

134 (ii) The notice shall:

135 (A) state that an application has been made; and

136 (B) specify where the interested party may obtain additional information relating to the  
 137 application.

138 (d) Any interested person may file a written protest with the state engineer against the  
 139 granting of the application:

140 (i) within 20 days after the notice is published, if the adjudicative proceeding is  
 141 informal; and

142 (ii) within 30 days after the notice is published, if the adjudicative proceeding is  
 143 formal.

144 (e) In any proceedings to determine whether the nonuse application ~~[for extension]~~  
 145 should be approved or rejected, the state engineer shall follow the procedures and requirements  
 146 of Title 63, Chapter 46b, Administrative Procedures Act.

147 (f) After further investigation, the state engineer may approve or reject the application.

148 ~~[(5)]~~ (4) (a) ~~[Nonuse applications]~~ The state engineer shall grant a nonuse application  
 149 on all or a portion of a water right ~~[shall be granted by the state engineer for periods]~~ for a

150 period of time not exceeding [~~five years each, upon a showing of~~] seven years if the applicant  
151 shows a reasonable cause for nonuse.

152 (b) [~~Reasonable causes~~] A reasonable cause for nonuse [~~include~~] includes:

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

154 (ii) the initiation of [~~recognized~~] water conservation or efficiency practices, or the  
155 operation of a groundwater recharge recovery program approved by the state engineer;

156 (iii) operation of legal proceedings;

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

159 (v) situations where, in the opinion of the state engineer, the nonuse would assist in  
160 implementing an existing, approved water management plan;

161 (vi) situations where [~~all or part of~~] the land on which water is used is contracted under  
162 an approved state agreement or federal conservation fallowing program; or

163 (vii) the loss of capacity caused by deterioration of the water supply or delivery  
164 equipment if the applicant submits, with the application, a specific plan to resume full use of  
165 the water right by replacing, restoring, or improving the equipment[~~; or~~].

166 [~~(viii) any other reasonable cause.~~]

167 [~~(6)(a)~~] (5) Sixty days before the expiration of [~~any extension of time~~] a nonuse  
168 application, the state engineer shall notify the applicant by mail or by any form of electronic  
169 communication through which receipt is verifiable, of the date when the [~~extension period~~]  
170 nonuse application will expire.

171 [~~(b) Before the date of expiration, the applicant shall either:~~]

172 [~~(i) file a verified statement with the state engineer setting forth the date on which use~~  
173 ~~of the water was resumed, and whatever additional information is required by the state~~  
174 ~~engineer; or]~~

175 [~~(ii) apply for a further extension of time in which to resume use of the water according~~  
176 ~~to the procedures and requirements of this section.~~]

177 [~~(c) Upon receipt of the applicant's properly completed, verified statement, the state~~  
178 ~~engineer shall conduct investigations necessary to verify that beneficial use has resumed and, if~~  
179 ~~so, shall issue a certificate of resumption of use of the water as evidenced by the resumed~~  
180 ~~beneficial use.~~]

181           ~~[(7) The appropriator's water right or a portion of the water right ceases and the water~~  
182 ~~reverts to the public if the:]~~

183           ~~[(a) appropriator or the appropriator's successor in interest fails to apply for an~~  
184 ~~extension of time;]~~

185           ~~[(b) state engineer denies the nonuse application; or]~~

186           ~~[(c) appropriator or the appropriator's successor in interest fails to apply for a further~~  
187 ~~extension of time.]~~

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

189           **73-2-27. Criminal penalties.**

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

191           (a) Section 73-1-14;

192           (b) Section 73-1-15;

193           (c) Section 73-2-20;

194           (d) Subsection 73-3-3~~(9)~~(10);

195           (e) Section 73-3-26;

196           (f) Section 73-3-29;

197           (g) Section 73-5-9;

198           (h) Section 76-10-201;

199           (i) Section 76-10-202; and

200           (j) Section 76-10-203.

201           (2) Under circumstances not amounting to an offense with a greater penalty under  
202 Subsection 76-6-106(2)(b)(ii) or Section 76-6-404, violation of a provision listed in Subsection  
203 (1) is punishable:

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

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

206 and

207           (ii) the person violating the provision has previously been convicted of violating the  
208 same provision;

209           (b) as a class A misdemeanor if:

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

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

212 same provision; or

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

214 Section 3. Section **73-3-3** is amended to read:

215 **73-3-3. Permanent or temporary changes in point of diversion, place of use, or**  
216 **purpose of use.**

217 (1) For purposes of this section:

218 (a) "Permanent changes" means changes for an indefinite length of time with an intent  
219 to relinquish the original point of diversion, place of use, or purpose of use.

220 (b) "Temporary changes" means changes for fixed periods not exceeding one year.

221 (2) (a) Any person entitled to the use of water may make permanent or temporary  
222 changes in the:

223 (i) point of diversion;

224 (ii) place of use; or

225 (iii) purpose of use for which the water was originally appropriated.

226 (b) A change may not be made if it impairs any vested right without just compensation.

227 (3) Both permanent and temporary changes of point of diversion, place of use, or  
228 purpose of use of water, including water involved in general adjudication or other suits, shall  
229 be made in the manner provided in this section.

230 (4) (a) A change may not be made unless the change application is approved by the  
231 state engineer.

232 (b) Applications shall be made upon forms furnished by the state engineer and shall set  
233 forth:

234 (i) the name of the applicant;

235 (ii) a description of the water right;

236 (iii) the quantity of water;

237 (iv) the stream or source;

238 (v) the point on the stream or source where the water is diverted;

239 (vi) the point to which it is proposed to change the diversion of the water;

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

241 (viii) the place, purpose, and extent of the proposed use; and

242 (ix) any other information that the state engineer requires.

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

247 (b) (i) The state engineer may:

248 (A) evaluate evidence of the beneficial use of the water right provided by:

249 (I) an applicant; or

250 (II) a person who protests the change application; and

251 (B) deny or limit a change application if it appears that all or a portion of the water  
252 right:

253 (I) has not been used for a period of seven years; and

254 (II) is not protected by a nonuse application granted under Section 73-1-4.

255 (ii) Denial of a change application by the state engineer does not forfeit a water right.

256 ~~[(b)]~~ (6) The state engineer may, in connection with applications for permanent change  
257 involving only a change in point of diversion of 660 feet or less, waive the necessity for  
258 publishing a notice of application.

259 ~~[(6)]~~ (7) (a) The state engineer shall investigate all temporary change applications.

260 (b) If the state engineer finds that the temporary change will not impair any vested  
261 rights of others, he shall issue an order authorizing the change.

262 (c) If the state engineer finds that the change sought might impair vested rights, before  
263 authorizing the change, he shall give notice of the application to any person whose rights may  
264 be affected by the change.

265 (d) Before making an investigation or giving notice, the state engineer may require the  
266 applicant to deposit a sum of money sufficient to pay the expenses of the investigation and  
267 publication of notice.

268 ~~[(7)]~~ (8) (a) The state engineer may not reject applications for either permanent or  
269 temporary changes for the sole reason that the change would impair the vested rights of others.

270 (b) If otherwise proper, permanent or temporary changes may be approved for part of  
271 the water involved or upon the condition that conflicting rights are acquired.

272 ~~[(8)]~~ (9) (a) Any person holding an approved application for the appropriation of water  
273 may either permanently or temporarily change the point of diversion, place of use, or purpose

274 of use.

275 (b) A change of an approved application does not:

276 (i) affect the priority of the original application; or

277 (ii) extend the time period within which the construction of work is to begin or be

278 completed.

279 ~~[(9)]~~ (10) Any person who changes or who attempts to change a point of diversion,  
280 place of use, or purpose of use, either permanently or temporarily, without first applying to the  
281 state engineer in the manner provided in this section:

282 (a) obtains no right;

283 (b) is guilty of a crime punishable under Section 73-2-27 if the change or attempted  
284 change is made knowingly or intentionally; and

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

286 ~~[(10)]~~ (11) (a) This section does not apply to the replacement of an existing well by a  
287 new well drilled within a radius of 150 feet from the point of diversion of the existing well.

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

290 ~~[(11)]~~ (12) (a) In accordance with the requirements of this section, the Division of  
291 Wildlife Resources or Division of Parks and Recreation may file applications for permanent or  
292 temporary changes for the purpose of providing water for instream flows, within a designated  
293 section of a natural stream channel or altered natural stream channel, necessary within the state  
294 for:

295 (i) the propagation of fish;

296 (ii) public recreation; or

297 (iii) the reasonable preservation or enhancement of the natural stream environment.

298 (b) Applications may be filed for changes on:

299 (i) perfected water rights presently owned by the respective division;

300 (ii) perfected water rights purchased by the respective division for the purpose of  
301 providing water for instream flows, through funding provided for that purpose by legislative  
302 appropriation or acquired by lease, agreement, gift, exchange, or contribution; or

303 (iii) appurtenant water rights acquired with the acquisition of real property by either  
304 division.

305 (c) A physical structure or physical diversion from the stream is not required to  
306 implement a change for instream flow use.

307 (d) This Subsection [~~(11)~~] (12) does not allow enlargement of the water right sought to  
308 be changed nor may the change impair any vested water right.

309 (e) In addition to the other requirements of this section, an application filed by either  
310 division shall:

311 (i) set forth the legal description of the points on the stream between which the  
312 necessary instream flows will be provided by the change; and

313 (ii) include appropriate studies, reports, or other information required by the state  
314 engineer that demonstrate the necessity for the instream flows in the specified section of the  
315 stream and the projected benefits to the public that will result from the change.

316 (f) The Division of Wildlife Resources and Division of Parks and Recreation may:

317 (i) purchase water rights for the purposes provided in Subsection [~~(11)~~] (12)(a) only  
318 with funds specifically appropriated by the Legislature for water rights purchases; or

319 (ii) accept a donated water right without legislative approval.

320 (g) This Subsection [~~(11)~~] (12) does not authorize either division to:

321 (i) appropriate unappropriated water under Section 73-3-2 for the purpose of providing  
322 instream flows; or

323 (ii) acquire water rights by eminent domain for instream flows or for any other  
324 purpose.

325 (h) This Subsection [~~(11)~~] (12) applies only to change applications filed on or after  
326 April 28, 1986.

327 [~~(12)~~] (13) (a) Sixty days before the date on which proof of change for instream flows  
328 under Subsection [~~(11)~~] (12) is due, the state engineer shall notify the applicant by registered  
329 mail or by any form of electronic communication through which receipt is verifiable of the date  
330 when proof of change is due.

331 (b) Before the date when proof of change is due, the applicant must either:

332 (i) file a verified statement with the state engineer that the instream flow uses have  
333 been perfected, which shall set forth:

334 (A) the legal description of the points on the natural stream channel or altered natural  
335 stream channel between which the necessary instream flows have been provided;

- 336 (B) detailed measurements of the flow of water in second feet changed;
- 337 (C) the period of use; and
- 338 (D) any additional information required by the state engineer; or
- 339 (ii) apply for a further extension of time as provided for in Section 73-3-12.
- 340 (c) Upon approval of the verified statement required under Subsection [~~(12)~~] (13)(b)(i),
- 341 the state engineer shall issue a certificate of change for instream flow use.