

Senator John L. Valentine proposes the following substitute bill:

WATER COMPANIES AND WATER RIGHT

CHANGE REQUESTS

2010 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: John L. Valentine

House Sponsor: _____

LONG TITLE

General Description:

This bill addresses the process for changing water rights.

Highlighted Provisions:

This bill:

- ▶ addresses the filing of a change application, including:
 - treatment of a change application by a shareholder in a water company; and
 - the state engineer's evaluation of a change application;
- ▶ provides restrictions on a water company's denial of a shareholder's change request;
- ▶ allows a water company to require a shareholder to pay certain water company costs

in connection with the shareholder's change request;

- ▶ prohibits a water company from requiring a shareholder, as part of the share assessment process, to pay a proportionate share of the costs of an action concerning the shareholder's change request; and

- ▶ makes technical changes.

Monies Appropriated in this Bill:

None

Other Special Clauses:



26 None

27 **Utah Code Sections Affected:**

28 AMENDS:

29 **73-3-3**, as last amended by Laws of Utah 2008, Chapter 311

30 **73-3-3.5**, as last amended by Laws of Utah 2008, Chapter 3

31

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

33 Section 1. Section **73-3-3** is amended to read:

34 **73-3-3. Permanent or temporary changes in point of diversion, place of use, or**
35 **purpose of use.**

36 (1) For purposes of this section:

37 (a) "Permanent change" means a change for an indefinite period of time with an intent
38 to relinquish the original point of diversion, place of use, or purpose of use.

39 (b) "Temporary change" means a change for a fixed period of time not exceeding one
40 year.

41 (2) (a) Any person entitled to the use of water, or a shareholder of a water company
42 with the written consent of the corporation given in accordance with Section 73-3-3.5, may
43 make permanent or temporary changes in the:

44 (i) point of diversion;

45 (ii) place of use; or

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

47 (b) Except as provided by Section 73-3-30, a change may not be made if it impairs a
48 vested water right without just compensation.

49 (3) A person entitled to use water, or a shareholder of a water company with the written
50 consent of the corporation given in accordance with Section 73-3-3.5, shall change a point of
51 diversion, place of use, or purpose of water use, including water involved in a general
52 adjudication or other suit, in the manner provided in this section.

53 (4) (a) [~~A person entitled to use water may not make a change~~] A change in the use of
54 water may not be made unless the state engineer approves the change application.

55 (b) A person entitled to use water, or a shareholder of a water company with the written
56 consent of the corporation given in accordance with Section 73-3-3.5, shall submit a change

57 application upon forms furnished by the state engineer and shall set forth:

- 58 (i) the applicant's name;
- 59 (ii) the water right description;
- 60 (iii) the water quantity;
- 61 (iv) the stream or water source;
- 62 (v) if applicable, the point on the stream or water source where the water is diverted;
- 63 (vi) if applicable, the point to which it is proposed to change the diversion of the water;
- 64 (vii) the place, purpose, and extent of the present use;
- 65 (viii) the place, purpose, and extent of the proposed use; and
- 66 (ix) any other information that the state engineer requires.

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

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

73 (6) (a) The state engineer shall investigate all temporary change applications.

74 (b) If the state engineer finds that the temporary change will not impair a vested water
75 right, the state engineer shall issue an order authorizing the change.

76 (c) If the state engineer finds that the change sought might impair a vested water right,
77 before authorizing the change, the state engineer shall give notice of the application to any
78 person whose right may be affected by the change.

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

82 (7) (a) Except as provided by Section 73-3-30, the state engineer may not reject a
83 permanent or temporary change application for the sole reason that the change would impair a
84 vested water right.

85 (b) If otherwise proper, the state engineer may approve a permanent or temporary
86 change application for part of the water involved or upon the condition that the applicant
87 acquire the conflicting water right.

88 (8) (a) A person holding an approved application for the appropriation of water may
89 change the point of diversion, place of use, or purpose of use.

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

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

92 (ii) extend the time period within which the construction of work is to begin or be
93 completed.

94 (9) Any person who changes or who attempts to change a point of diversion, place of
95 use, or purpose of use, either permanently or temporarily, without first applying to the state
96 engineer in the manner provided in this section:

97 (a) obtains no right;

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

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

101 (10) (a) This section does not apply to the replacement of an existing well by a new
102 well drilled within a radius of 150 feet from the point of diversion of the existing well.

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

105 Section 2. Section **73-3-3.5** is amended to read:

106 **73-3-3.5. Application for a change of point of diversion, place of use, or purpose**
107 **of use of water in a water company made by a shareholder.**

108 (1) As used in this section and Section 73-3-3:

109 (a) "Shareholder" means the owner of a share of stock, or other evidence of stock
110 ownership, that entitles the ~~[person]~~ owner to a proportionate share of water in a water
111 company.

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

115 (2) A shareholder who seeks to change the point of diversion, place of use, or purpose
116 of use of the shareholder's proportionate share of water in the water company shall submit a
117 request for the change, in writing, to the water company. This request shall include the
118 following information:

- 119 (a) the details of the requested change, which may include the point of diversion,
120 period of use, place, or nature of use;
- 121 (b) the quantity of water sought to be changed;
- 122 (c) the certificate number of the stock affected by the change;
- 123 (d) a description of the land proposed to be retired from irrigation pursuant to Section
124 73-3-3, if the proposed change in place or nature of use of the water involves a situation where
125 the water was previously used for irrigation;
- 126 (e) an agreement by the shareholder to continue to pay all applicable corporate
127 assessments on the share affected by the change; and
- 128 (f) any other information that the water company may reasonably need to evaluate the
129 requested change application.

130 (3) (a) A water company shall make a decision and provide written notice of that
131 decision on a shareholder's request for a change application within 120 days from receipt of the
132 request.

133 (b) Based on the facts and circumstances of each proposed change, a water company
134 may take the following action:

- 135 (i) approve the change request;
- 136 (ii) approve the change request with conditions; or
- 137 (iii) deny the change request.

138 (c) If the water company fails to respond to a shareholder's request for a change
139 application, pursuant to Subsection (3)(a), the failure to respond shall be considered to be a
140 denial of the request.

141 ~~[(d) The water company may not withhold approval if any potential damage, liability,
142 or impairment to the water company, or its shareholders, can be reasonably mitigated without
143 cost to the water company.]~~

144 (d) The water company shall approve the change request, including a change that if
145 made would result in changing the place of use to a location outside of the historic service area
146 of the water company, unless the water company reasonably believes that:

147 (i) the proposed use:

148 (A) would be contrary to a restriction in an exchange or other contractual agreement
149 between the water company and:

150 (I) another water company; or
151 (II) a political subdivision of the state; or
152 (B) could adversely affect the status of a water company as a public water supplier, as
153 defined in Section 73-1-4; and
154 (ii) any potential damage, liability, or impairment to the water company or its
155 shareholders cannot be mitigated:
156 (A) by the imposition of reasonable conditions on the approval of the change request;
157 and
158 (B) without cost to the water company.
159 (e) A water company may consider the following factors in evaluating change
160 applications:
161 (i) any increased cost to the water company or its shareholders;
162 (ii) interference with the water company's ability to manage and distribute water for the
163 benefit of all shareholders;
164 (iii) whether the proposed change represents more water than the shareholder's pro rata
165 share of the water company's right;
166 (iv) impairment of either the quantity or quality of water delivered to other
167 shareholders under the existing water rights of the water company, including rights to carrier
168 water;
169 (v) whether the proposed change would cause a violation of any statute, ordinance,
170 regulation, or order of a court or governmental agency;
171 (vi) whether the shareholder has or can arrange for the beneficial use of water to be
172 retired from irrigation within the water company's service area under the proposed change; or
173 (vii) the cumulative effects that the approval of the change application may have on
174 other shareholders or water company operations.
175 ~~[(4) The water company may require that all costs associated with the change~~
176 ~~application, including costs of submitting proof, be paid by the shareholder.]~~
177 (4) (a) The water company may require the shareholder to pay the following costs
178 incurred in the water company's review of the requested change, the state engineer's review of
179 the change application, and judicial review of the state engineer's order:
180 (i) filing fees;

181 (ii) necessary professional fees incurred by the water company; and
182 (iii) other costs associated with the state engineer's consideration of the change
183 application.

184 (b) The water company may require the shareholder to pay the costs of submitting
185 proof of the change.

186 (c) The water company shall provide the shareholder with:

187 (i) an accounting of fees or costs under this Subsection (4); and

188 (ii) copies of any invoices for fees or costs under this Subsection (4).

189 (5) (a) The shareholder requesting the change must be current on all water company
190 assessments and agree to continue to pay all applicable future assessments, except that the
191 shareholder may choose to prepay any portion of the water company assessments attributable to
192 an existing debt of the water company.

193 (b) Other than prepaid assessments, the water company may require that the
194 shareholder continue to pay all applicable assessments.

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

197 (a) be signed on behalf of the water company; or

198 (b) be signed by the requesting shareholder, accompanied by written authorization from
199 the water company assenting to the change and the filing of the application by the shareholder
200 for the shareholder and on the water company's behalf.

201 (7) (a) [~~The~~] Subject to the other provisions of this Subsection (7), the state engineer
202 may evaluate a change application authorized by a water company under this section in the
203 same manner and using the same criteria that [~~he or she uses~~] is used to evaluate any other
204 change application.

205 (b) As part of an evaluation under Subsection 73-3-8(1)(a)(ii) and (iii), the state
206 engineer may consider whether a proposed change of use will adversely affect:

207 (i) the local public welfare, including the affairs of the persons residing in the area
208 where the water has historically been used;

209 (ii) the local public welfare in the area where the water would be transferred, including
210 the affairs of the persons residing in the area directly affected by the proposed use; or

211 (iii) whether the proposed change may preclude a more beneficial use of the water that

212 is of greater benefit to the public welfare of the citizens of this state.

213 (c) If the state engineer concludes the proposed change in a change application is
214 detrimental to the public welfare in accordance with Subsection (7)(b), the state engineer may:

215 (i) reject the change application;

216 (ii) approve the change application for a lesser quantity of water; or

217 (iii) approve the change application with conditions designed to protect the public
218 welfare.

219 ~~[(b)]~~ (d) Nothing in this section ~~[shall limit]~~ limits the authority of the state engineer in
220 evaluating and processing any change application.

221 (8) If an application authorized by a water company under this section is approved by
222 the state engineer, the shareholder may file requests for extensions of time to submit proof of
223 beneficial use under the change application without further permission of the water company.

224 (9) (a) Change applications approved under this section are subject to all conditions
225 imposed by the water company and the state engineer.

226 (b) If a shareholder fails to comply with all of the conditions imposed by the water
227 company, the water company may, after written notice to the shareholder and after allowing
228 reasonable time to remedy the failure, withdraw its approval of the application, and petition the
229 state engineer for an order canceling the change application.

230 (c) The water company may not revoke its approval of the change application or seek
231 an order canceling the application if the conditions are substantially satisfied.

232 (10) (a) The shareholder requesting the change shall have a cause of action, including
233 an award of actual damages incurred, against the water company if the water company
234 unreasonably:

235 (i) ~~[unreasonably withholds]~~ denies approval of a requested change;

236 (ii) imposes ~~[unreasonable]~~ conditions in its approval; or

237 (iii) withdraws approval of a change application in a manner other than as provided in
238 Subsection (9).

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

242 (c) If mediation is declined, the prevailing party to the action shall be entitled to costs

243 and reasonable attorney fees.

244 (d) Notwithstanding Title 16, Chapter 4, Share Assessment Act, a shareholder who
245 prevails in an action under this Subsection (10) may not be assessed by the water company for
246 payment of a proportionate share of:

247 (i) the water company's attorney fees and other costs incurred in the action; or

248 (ii) an award of actual damages the water company is required to pay the prevailing
249 shareholder.