

WATER RIGHTS - CHANGE APPLICATION AMENDMENTS

2014 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Kay L. McIff

Senate Sponsor: _____

LONG TITLE

General Description:

This bill modifies Title 73, Water and Irrigation, by amending the requirements for a change application.

Highlighted Provisions:

This bill:

- ▶ amends definitions;
- ▶ modifies the procedure for filing a change application;
- ▶ requires parties to mediate issues arising from a change application before administrative review or litigation;
- ▶ provides an option for court resolution of legal issues not within the purview of the state engineer;
- ▶ allows recovery of attorney fees under certain circumstances; and
- ▶ makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

73-1-4, as last amended by Laws of Utah 2013, Chapters 221 and 380



28 73-2-27, as enacted by Laws of Utah 2005, Chapter 215

29 73-3-3, as last amended by Laws of Utah 2012, Chapter 229

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 73-1-4 is amended to read:

34 **73-1-4. Reversion to the public by abandonment or forfeiture for nonuse within**
35 **seven years -- Nonuse application.**

36 (1) As used in this section:

37 (a) "Public entity" means:

38 (i) the United States;

39 (ii) an agency of the United States;

40 (iii) the state;

41 (iv) a state agency;

42 (v) a political subdivision of the state; or

43 (vi) an agency of a political subdivision of the state.

44 (b) "Public water supplier" means an entity that:

45 (i) supplies water, directly or indirectly, to the public for municipal, domestic, or
46 industrial use; and

47 (ii) is:

48 (A) a public entity;

49 (B) a water corporation, as defined in Section 54-2-1, that is regulated by the Public
50 Service Commission;

51 (C) a community water system:

52 (I) that:

53 (Aa) supplies water to at least 100 service connections used by year-round residents; or

54 (Bb) regularly serves at least 200 year-round residents; and

55 (II) whose voting members:

56 (Aa) own a share in the community water system;

57 (Bb) receive water from the community water system in proportion to the member's
58 share in the community water system; and

59 (Cc) pay the rate set by the community water system based on the water the member
60 receives; or

61 (D) a water users association:

62 (I) in which one or more public entities own at least 70% of the outstanding shares; and

63 (II) that is a local sponsor of a water project constructed by the United States Bureau of
64 Reclamation.

65 (c) "Shareholder" is as defined in Section 73-3-3.5.

66 (d) "Water company" is as defined in Section 73-3-3.5.

67 (e) "Water supply entity" means an entity that supplies water as a utility service or for
68 irrigation purposes and is also:

69 (i) a municipality, water conservancy district, metropolitan water district, irrigation
70 district, or other public agency;

71 (ii) a water company regulated by the Public Service Commission; or

72 (iii) any other owner of a community water system.

73 (2) (a) Except as provided in Subsection (2)(b) or (e), when an appropriator or the
74 appropriator's successor in interest abandons or ceases to use all or a portion of a water right
75 for a period of seven years, the water right or the unused portion of that water right is subject to
76 forfeiture in accordance with Subsection (2)(c).

77 (b) (i) An appropriator or the appropriator's successor in interest may file an
78 application for nonuse with the state engineer.

79 (ii) If a person described in Subsection (2)(b)(i) files and receives approval on a nonuse
80 application, nonuse of the water right subject to the application is not counted toward a
81 seven-year period described in Subsection (2)(a) during the period of time beginning on the day
82 on which the person files the application and ending on the day on which the application
83 expires without being renewed.

84 (iii) If a person described in Subsection (2)(b)(i) files and receives approval on
85 successive, overlapping nonuse applications, nonuse of the water right subject to the
86 applications is not counted toward a seven-year period described in Subsection (2)(a) during
87 the period of time beginning on the day on which the person files the first application and
88 ending on the day on which the last application expires without being renewed.

89 (iv) Approval of a nonuse application does not protect a water right that is already

90 subject to forfeiture under Subsection (2)(a) for full or partial nonuse of the water right.

91 (v) A nonuse application may be filed on all or a portion of the water right, including
92 water rights held by a water company.

93 (vi) After giving written notice to the water company, a shareholder may file a nonuse
94 application with the state engineer on the water represented by the stock.

95 (c) (i) Except as provided in Subsection (2)(c)(ii), a water right or a portion of the water
96 right may not be forfeited unless a judicial action to declare the right forfeited is commenced
97 within 15 years from the end of the latest period of nonuse of at least seven years.

98 (ii) (A) The state engineer, in a proposed determination of rights prepared in
99 accordance with Section 73-4-11, may not assert that a water right was forfeited unless a period
100 of nonuse of seven years ends or occurs during the 15 years immediately preceding the day on
101 which the state engineer files the proposed determination of rights with the court.

102 (B) After the day on which a proposed determination of rights is filed with the court a
103 person may not assert that a water right subject to that determination was forfeited during the
104 15-year period described in Subsection (2)(c)(ii)(A), unless the state engineer asserts forfeiture
105 in the proposed determination, or a person makes, in accordance with Section 73-4-11, an
106 objection to the proposed determination that asserts forfeiture.

107 (iii) A water right, found to be valid in a decree entered in an action for general
108 determination of rights under Chapter 4, Determination of Water Rights, is subject to a claim
109 of forfeiture based on a seven-year period of nonuse that begins after the day on which the state
110 engineer filed the related proposed determination of rights with the court, unless the decree
111 provides otherwise.

112 (iv) If in a judicial action a court declares a water right forfeited, on the date on which
113 the water right is forfeited:

114 (A) the right to use the water reverts to the public; and

115 (B) the water made available by the forfeiture:

116 (I) first, satisfies other water rights in the hydrologic system in order of priority date;

117 and

118 (II) second, may be appropriated as provided in this title.

119 (d) [~~This~~] Except as provided in Subsection (2)(e), this section applies whether the
120 unused or abandoned water or a portion of the water is:

- 121 (i) permitted to run to waste; or
- 122 (ii) used by others without right with the knowledge of the water right holder.
- 123 (e) This section does not apply to:
- 124 (i) the use of water according to a lease or other agreement with the appropriator or the
- 125 appropriator's successor in interest;
- 126 (ii) a water right if its place of use is contracted under an approved state agreement or
- 127 federal conservation following program;
- 128 ~~[(iii) those periods of time when a surface water or groundwater source fails to yield~~
- 129 ~~sufficient water to satisfy the water right;]~~
- 130 (iii) a water right during a period of time when a surface water source or groundwater
- 131 source fails to yield sufficient water to satisfy the water right;
- 132 (iv) a water right when failure to use results from other physical causes beyond the
- 133 reasonable control of the water right owner;
- 134 ~~[(iv)]~~ (v) a water right when water is unavailable because of the water right's priority
- 135 date;
- 136 ~~[(v)]~~ (vi) a water right to store water in a surface reservoir or an aquifer, in accordance
- 137 with Title 73, Chapter 3b, Groundwater Recharge and Recovery Act, if:
- 138 (A) the water is stored for present or future use; or
- 139 (B) storage is limited by a safety, regulatory, or engineering restraint that the
- 140 appropriator or the appropriator's successor in interest cannot reasonably correct;
- 141 ~~[(vi)]~~ (vii) a water right if a water user has beneficially used substantially all of the
- 142 water right within a seven-year period, provided that this exemption does not apply to the
- 143 adjudication of a water right in a general determination of water rights under Chapter 4,
- 144 Determination of Water Rights;
- 145 ~~[(vii)]~~ (viii) except as provided by Subsection (2)(g), a water right:
- 146 (A) (I) owned by a public water supplier;
- 147 (II) represented by a public water supplier's ownership interest in a water company; or
- 148 (III) to which a public water supplier owns the right of use; and
- 149 (B) conserved or held for the reasonable future water requirement of the public, which
- 150 is determined according to Subsection (2)(f);
- 151 ~~[(viii)]~~ (ix) a supplemental water right during a period of time when another water right

152 available to the appropriator or the appropriator's successor in interest provides sufficient water
153 so as to not require use of the supplemental water right; or

154 [~~(ix)~~] (x) a water right subject to an approved change application where the applicant is
155 diligently pursuing certification.

156 (f) (i) The reasonable future water requirement of the public is the amount of water
157 needed in the next 40 years by the persons within the public water supplier's projected or
158 reasonably anticipated service area based on projected or reasonably anticipated population
159 growth or other water use demand.

160 (ii) For purposes of Subsection (2)(f)(i), a community water system's projected or
161 reasonably anticipated service area:

162 (A) is the area served by the community water system's distribution facilities; and

163 (B) expands as the community water system expands the distribution facilities in
164 accordance with Title 19, Chapter 4, Safe Drinking Water Act.

165 (g) For a water right acquired by a public water supplier on or after May 5, 2008,
166 Subsection (2)(e)[~~(vii)~~](viii) applies if:

167 (i) the public water supplier submits a change application under Section 73-3-3; and

168 (ii) the state engineer approves the change application.

169 (3) (a) The state engineer shall furnish a nonuse application form requiring the
170 following information:

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

172 (ii) a description of the water right or a portion of the water right, including the point of
173 diversion, place of use, and priority;

174 (iii) the quantity of water;

175 (iv) the period of use;

176 (v) the extension of time applied for;

177 (vi) a statement of the reason for the nonuse of the water; and

178 (vii) any other information that the state engineer requires.

179 (b) (i) Upon receipt of the application, the state engineer shall publish a notice of the
180 application once a week for two successive weeks:

181 (A) in a newspaper of general circulation in the county in which the source of the water
182 supply is located and where the water is to be used; and

- 183 (B) as required in Section 45-1-101.
- 184 (ii) The notice shall:
- 185 (A) state that an application has been made; and
- 186 (B) specify where the interested party may obtain additional information relating to the
187 application.
- 188 (c) Any interested person may file a written protest with the state engineer against the
189 granting of the application:
- 190 (i) within 20 days after the notice is published, if the adjudicative proceeding is
191 informal; and
- 192 (ii) within 30 days after the notice is published, if the adjudicative proceeding is
193 formal.
- 194 (d) In any proceedings to determine whether the nonuse application should be
195 approved or rejected, the state engineer shall follow the procedures and requirements of Title
196 63G, Chapter 4, Administrative Procedures Act.
- 197 (e) After further investigation, the state engineer may approve or reject the application.
- 198 (4) (a) The state engineer shall grant a nonuse application on all or a portion of a water
199 right for a period of time not exceeding seven years if the applicant shows a reasonable cause
200 for nonuse.
- 201 (b) A reasonable cause for nonuse includes:
- 202 (i) a demonstrable financial hardship or economic depression;
- 203 (ii) physical causes or changes that render use beyond the reasonable control of the
204 water right owner;
- 205 [~~(ii)~~] (iii) the initiation of water conservation or efficiency practices, or the operation of
206 a groundwater recharge recovery program approved by the state engineer;
- 207 [~~(iii)~~] (iv) operation of legal proceedings;
- 208 [~~(iv)~~] (v) the holding of a water right or stock in a mutual water company without use
209 by any water supply entity to meet the reasonable future requirements of the public;
- 210 [~~(v)~~] (vi) situations where, in the opinion of the state engineer, the nonuse would assist
211 in implementing an existing, approved water management plan; or
- 212 [~~(vi)~~] (vii) the loss of capacity caused by deterioration of the water supply or delivery
213 equipment if the applicant submits, with the application, a specific plan to resume full use of

214 the water right by replacing, restoring, or improving the equipment.

215 (5) (a) Sixty days before the expiration of a nonuse application, the state engineer shall
216 notify the applicant by mail or by any form of electronic communication through which receipt
217 is verifiable, of the date when the nonuse application will expire.

218 (b) An applicant may file a subsequent nonuse application in accordance with this
219 section.

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

221 **73-2-27. Criminal penalties.**

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

223 (a) Section 73-1-14;

224 (b) Section 73-1-15;

225 (c) Section 73-2-20;

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

227 (e) Section 73-3-26;

228 (f) Section 73-3-29;

229 (g) Section 73-5-9;

230 (h) Section 76-10-201;

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

232 (j) Section 76-10-203.

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

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

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

238 and

239 (ii) the person violating the provision has previously been convicted of violating the
240 same provision;

241 (b) as a class A misdemeanor if:

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

243 (ii) the person violating the provision has previously been convicted of violating the
244 same provision; or

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

246 Section 3. Section 73-3-3 is amended to read:

247 **73-3-3. Permanent or temporary changes in point of diversion, place of use, or**
248 **purpose of use.**

249 (1) For purposes of this section:

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

252 (b) "Temporary change" means a change for a fixed period of time not₂ exceeding one
253 year.

254 (2) (a) Subject to Subsection (2)(c), a person entitled to the use of water may make
255 permanent or temporary changes in the:

256 (i) point of diversion;

257 (ii) place of use; [or]

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

259 (iii) period of use;

260 (iv) nature of use for which the water is currently appropriated; or

261 (v) addition or deletion of storage as an authorized use.

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

264 (c) A change application on a federal reclamation project water right shall be signed
265 by:

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

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

268 (B) the repayment of project costs; and

269 (ii) the record title owner of the water right.

270 (3) A person entitled to use water shall change a point of diversion, place of use, or
271 purpose of water use, including water involved in a general adjudication or other suit, in the
272 manner provided in this section.

273 (4) (a) A person entitled to use water may not make a change unless the state engineer
274 approves the change application.

275 (b) A shareholder in a water company who seeks to make a permanent or temporary

276 change to a water right held in title by the water company shall file a change application in
277 accordance with Section 73-3-3.5.

278 ~~[(b)]~~ (5) A person entitled to use water shall submit a change application, upon forms
279 furnished by the state engineer ~~[and shall set forth], that includes:~~

280 ~~[(i)]~~ (a) the change applicant's name;

281 ~~[(ii)]~~ (b) the water right description, including the water right number;

282 ~~[(iii)]~~ (c) the water quantity;

283 ~~[(iv)]~~ (d) the stream or water source;

284 ~~[(v)]~~ (e) if applicable, the point on the stream or water source where the water is
285 diverted;

286 ~~[(vi)]~~ (f) if applicable, the point to which it is proposed to change the diversion of the
287 water;

288 ~~[(vii)]~~ (g) the place, ~~[purpose]~~ nature, period, and extent of the ~~[present]~~ approved use;

289 ~~[(viii)]~~ (h) the place, ~~[purpose]~~ nature, period, and extent of the proposed use; ~~[and]~~

290 (i) if the change applicant is submitting a change application in accordance with

291 Section 73-3-3.5, the information required by Section 73-3-3.5; and

292 ~~[(ix)]~~ (j) any other information that the state engineer requires.

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

297 (6) (a) With respect to a change application for a permanent change:

298 (i) the state engineer shall follow the same procedures provided in this title for
299 approving an application to appropriate water; and

300 (ii) the rights and duties of a change applicant are the same as the rights and duties of a
301 person who applies to appropriate water under this title.

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

304 ~~[(6)]~~ (7) (a) The state engineer shall investigate all temporary change applications.

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

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

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

313 ~~[(7)]~~ (8) (a) Except as provided by Section 73-3-30, the state engineer may not reject a
314 permanent or temporary change application for the sole reason that the change would impair a
315 vested water right.

316 (b) If otherwise proper, the state engineer may approve a permanent or temporary
317 change application for part of the water involved or upon the condition that the applicant
318 acquire the conflicting water right or otherwise mitigate the impairment.

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

321 ~~[(b)]~~ (9) A change of an approved application to appropriate water does not:

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

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

325 ~~[(9)]~~ (10) Any person who changes ~~[or who attempts to change]~~ a point of diversion,
326 place of use, or purpose of use, either permanently or temporarily, without first applying to the
327 state engineer in the manner provided in this section~~[: (a) obtains no right; (b)]~~, is guilty of ~~[a
328 crime]~~ an offense punishable under Section 73-2-27 if the change ~~[or attempted change]~~ is
329 made knowingly or intentionally~~[: and]~~.

330 ~~[(c) is guilty of a separately punishable offense for each day of the unlawful change:]~~

331 (11) A person who makes a permanent or temporary change before obtaining an
332 approved change application under this section obtains no additional water right by the change
333 and shall comply with the change application process.

334 ~~[(10)]~~ (12) (a) This section does not apply to the replacement of an existing well by a
335 new well drilled within a radius of 150 feet from the point of diversion of the existing well.

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

338 Section 4. Section **73-3-3.5** is amended to read:

339 **73-3-3.5. Application for a change of point of diversion, place of use, or purpose**
340 **of use of water in a water company made by a shareholder.**

341 (1) As used in this section:

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

344 (b) "Water company" means, except as described in Subsection (1)(c), any company,
345 operating for profit or not for profit, ~~[in which]~~ where a shareholder has the right to receive a
346 proportionate share, based on that shareholder's ownership interest, of water delivered by the
347 company.

348 (c) "Water company" does not include a public water supplier, as defined in Section
349 73-1-4, that primarily provides domestic water, as defined in Section 59-2-1111.

350 ~~[(2) A shareholder who seeks to change the point of diversion, place of use, or purpose~~
351 ~~of use of the shareholder's proportionate share of water in the water company shall submit a~~
352 ~~request for the change, in writing, to the water company. This request shall include the~~
353 ~~following information:]~~

354 ~~[(a) the details of the requested change, which may include the point of diversion,~~
355 ~~period of use, place, or nature of use;]~~

356 ~~[(b) the quantity of water sought to be changed;]~~

357 (2) (a) A shareholder who seeks to file a change application under Section 73-3-3 to
358 make a change to some or all of the water represented by the shareholder's shares in a water
359 company shall submit a proposed change application to the water company before filing the
360 application with the state engineer.

361 (b) In addition to the information required under Section 73-3-3, the proposed change
362 application shall include:

363 ~~[(c)]~~ (i) the certificate number of the stock affected by the change;

364 ~~[(d)]~~ (ii) a description of the land proposed to be retired from irrigation ~~[pursuant to]~~ in
365 accordance with Section 73-3-3, if the proposed change in place or nature of use of the water
366 involves a situation where the water was previously used for irrigation;

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

369 ~~[(f)]~~ (iv) any other information that the water company may reasonably need to
370 evaluate the ~~[requested]~~ proposed change application.

371 ~~[(3)(a)]~~ A water company shall make a decision and provide written notice of that
372 decision on a shareholder's request for a change application within 120 days from receipt of the
373 request.]

374 ~~[(b)]~~ Based on the facts and circumstances of each proposed change, a water company
375 may take the following action:]

376 ~~[(i)]~~ approve the change request;]

377 ~~[(ii)]~~ approve the change request with conditions; or]

378 ~~[(iii)]~~ deny the change request.]

379 ~~[(c)]~~ If the water company fails to respond to a shareholder's request for a change
380 application, pursuant to Subsection (3)(a), the failure to respond shall be considered to be a
381 denial of the request.]

382 ~~[(d)]~~ The water company may not withhold approval if any potential damage, liability,
383 or impairment to the water company, or its shareholders, can be reasonably mitigated without
384 cost to the water company:]

385 ~~[(e)]~~ A water company may consider the following factors in evaluating change
386 applications:]

387 (3) (a) The water company shall respond to the proposed change application described
388 in Subsection (2) within 60 days after the day on which the water company receives the
389 proposed change application.

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

392 (i) consent to the proposed change;

393 (ii) consent to the proposed change, subject to certain conditions described by the water
394 company; or

395 (iii) decline to consent to the proposed change, describing the reasons for declining to
396 consent.

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

399 (i) [any] whether an increased cost to the water company or its shareholders results

400 from the proposed change;

401 (ii) [~~interference~~] whether the proposed change will interfere with the water company's
402 ability to manage and distribute water for the benefit of all shareholders;

403 (iii) whether the proposed change represents more water than the shareholder's [pro
404 rata] proportionate share of the water company's right;

405 (iv) whether the proposed change would create preferential access to use of particular
406 company water rights to the detriment of other shareholders;

407 [~~(iv) impairment of either~~] (v) whether the proposed change will impair the quantity or
408 quality of water delivered to other shareholders under the existing water rights of the water
409 company, including rights to carrier water;

410 [~~(v)~~] (vi) whether the proposed change [would cause a violation of any] violates a
411 statute, ordinance, regulation, or order of a court or [governmental] government agency; and

412 [~~(vi) whether the shareholder has or can arrange for the beneficial use of water to be~~
413 ~~retired from irrigation within the water company's service under the proposed change; or]~~

414 [(vii)] (vii) the cumulative effects that the approval of the change application may have
415 on other shareholders or water company operations.

416 [~~(4) The water company may require that all costs associated with the change~~
417 ~~application, including costs of submitting proof, be paid by the shareholder. (5) (a) The]~~

418 (4) (a) Within 60 days after the day on which the shareholder receives the water
419 company's response, or, if the water company fails to respond within 60 days after the last day
420 on which the water company may respond under Subsection (3)(a), the shareholder may
421 commence an administrative proceeding by filing the change application with the state
422 engineer in accordance with Section 73-3-3 and this section.

423 (b) The shareholder shall include as part of the change application filed with the state
424 engineer under Subsection (4)(a):

425 (i) the water company's response to the shareholder's proposed change application; or

426 (ii) an affidavit signed by the shareholder documenting the water company's failure to
427 respond in the time period described in Subsection (3)(a).

428 (5) If a shareholder files a change application and the water company has consented to
429 the proposed change under Subsection (3)(b)(i), or the water company has consented to the
430 proposed change subject to certain conditions under Subsection (3)(b)(ii) and the shareholder

431 agrees to the conditions, the state engineer shall proceed to evaluate the change application in
432 accordance with Subsection (13).

433 (6) If a shareholder files a change application and the water company has consented to
434 the proposed change subject to certain conditions under Subsection (3)(b)(ii), but the
435 shareholder disagrees with one or more conditions described in the response, or if the water
436 company declines to consent under Subsection (3)(b)(iii), or if the water company fails to
437 respond and the shareholder submits an affidavit of nonresponse under Subsection (4)(b)(ii),
438 the state engineer shall:

439 (a) within 10 days after the day on which the state engineer receives the change
440 application, give notice to the shareholder and the water company that both parties are required
441 to engage in mediation before the state engineer will evaluate the change application; and

442 (b) provide written notice to the water company, if it failed to respond as required
443 under Subsection (3)(b), that the water company shall respond to the proposed change
444 application within 30 days after the day on which the water company receives the notice from
445 the state engineer, and that failure of the water company to respond constitutes consent to the
446 proposed change.

447 (7) If the water company has not previously responded and fails to respond to the
448 notice under Subsection (6)(b), the water company's consent to the change application is
449 established as a matter of law and the state engineer may proceed with the administrative
450 evaluation under Subsection (13).

451 (8) (a) If the water company has, in writing, declined to consent to the change
452 application under Subsection (3)(b)(iii), or Subsection (6)(b), or has consented on conditions
453 unacceptable to the shareholder, the parties shall jointly retain the service of a mediator and
454 schedule a mediation on the change application filed by the shareholder and the response of the
455 water company.

456 (b) If the shareholder and water company are unable to agree upon a mediator, the
457 private property rights ombudsman shall serve in the capacity of mediator.

458 (c) The shareholder and water company shall equally share the costs related to the use
459 of the mediator for a mediation conducted under Subsection (8)(a).

460 (d) The mediation described in Subsection (8)(a) shall be held within 60 days of the
461 day on which the state engineer gives the notice set forth in Subsection (6)(a) if the water

462 company issued a written response pursuant to Subsection (3)(a), or within 60 days of the day
463 on which the water company issues a written response pursuant to Subsection (6)(b).

464 (e) The time for completion of the mediation may be extended for up to 90 days if the
465 parties agree and send written notice to the state engineer.

466 (f) Within five days after the day on which the final day of mediation occurs, the
467 mediator shall send a written statement to the state engineer, with a copy provided to each
468 party, advising whether the mediation resulted in an agreement between the parties.

469 (9) If a shareholder and a water company come to an agreement in a mediation
470 conducted under Subsection (8), the state engineer shall proceed to evaluate the change
471 application in accordance with Subsection (13).

472 (10) If the parties do not reach an agreement through mediation and a mediator's
473 statement, as described in Subsection (8)(f), is not received within 10 days following the time
474 allowed for mediation, either party may send written notice to the other and to the state
475 engineer that the parties are not in agreement regarding the proposed change application.

476 (11) Within 60 days of the day on which the state engineer receives the written
477 statement from the mediator under Subsection (8)(f), or the written notice from a party under
478 Subsection (10), that the parties are not in agreement regarding the proposed change
479 application, the shareholder or the water company may file an action in district court to resolve
480 legal issues not within the purview of the state engineer's evaluation under Subsection (13).

481 (12) If a court action is not timely filed under Subsection (11), or if an action is timely
482 filed and subsequently resolved and the matter remanded to the state engineer, the state
483 engineer shall move forward with the administrative proceeding under Subsection (13).

484 (13) (a) The state engineer shall evaluate a shareholder's change application in the same
485 manner used to evaluate a change application submitted under Section [73-3-3](#), using:

486 (i) the criteria described in Section [73-3-8](#);

487 (ii) the considerations described in Subsection (3)(c), related specifically to shareholder
488 applications; and

489 (iii) the water company's conditions in consenting to the shareholder's proposed change
490 application.

491 (b) Nothing in this section limits the authority of the state engineer in evaluating and
492 processing a change application, including the authority to require or allow a shareholder or

493 water company to submit additional relevant information, if the state engineer finds an absence
494 of prejudice and allows adequate time and opportunity for the other party to respond.

495 (c) The state engineer may not withhold approval of a change application under this
496 section based on potential damage, liability, or impairment to the water company or its
497 shareholders if the potential damage, liability, or impairment can be reasonably mitigated
498 without cost to the water company.

499 (14) If the state engineer approves a shareholder's change application, the state
500 engineer:

501 (a) may condition approval on payment of the water company's reasonable costs
502 incurred in the transfer process and in making adjustments to the water company's diversion or
503 delivery system that are necessitated by the approved change application; and

504 (b) for shares included in the approval, require that the shareholder requesting the
505 change [must] be current on all water company assessments and [agree to]:

506 (i) continue to pay all reasonably applicable future assessments[~~, except that the~~
507 shareholder may choose to prepay any portion of the water company assessments attributable to
508 an existing debt of the water company.], with credit given to the shareholder for cost savings to
509 the company; or

510 ~~[(b) Other than prepaid assessments, the water company may require that the~~
511 ~~shareholder continue to pay all applicable assessments.]~~

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

514 ~~[(a) be signed on behalf of the water company; or]~~

515 ~~[(b) be accompanied by written authorization from the water company assenting to the~~
516 ~~change:]~~

517 ~~[(7) (a) The state engineer may evaluate a change application authorized by a water~~
518 ~~company under this section in the same manner and using the same criteria that he or she uses~~
519 ~~to evaluate any other change application.]~~

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

522 ~~[(8) If an application authorized by a water company under this section is approved by~~
523 ~~the state engineer, the shareholder may file requests for extensions of time to submit proof of~~

524 ~~beneficial use under the change application without further permission of the water company.]~~

525 ~~[(9) (a) Change applications approved under this section are subject to all conditions~~
526 ~~imposed by the water company and the state engineer.]~~

527 ~~[(b) If a shareholder fails to comply with all of the conditions imposed by the water~~
528 ~~company, the water company may, after written notice to the shareholder and after allowing~~
529 ~~reasonable time to remedy the failure, withdraw its approval of the application, and petition the~~
530 ~~state engineer for an order canceling the change application.]~~

531 ~~[(c) The water company may not revoke its approval of the change application or seek~~
532 ~~an order canceling the application if the conditions are substantially satisfied.]~~

533 ~~[(10) (a) The shareholder requesting the change shall have a cause of action, including~~
534 ~~an award of actual damages incurred, against the water company if the water company:]~~

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

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

537 ~~[(iii) withdraws approval of a change application in a manner other than as provided in~~
538 ~~Subsection (9).]~~

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

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

544 (ii) by mutual agreement only, and when the shares will rely upon a different diversion
545 and delivery system, negotiate a buyout that includes a prorata share of the bonded
546 indebtedness assignable to the shares, together with the capitalized value of anticipated future
547 assessments for maintenance and operation that otherwise would have applied.

548 (15) A shareholder or a water company may obtain de novo judicial review of the state
549 engineer's determination under Subsections (13) and (14) by filing an action in district court
550 within 30 days after the day on which the state engineer makes a final determination in the
551 adjudicative proceeding on the change application.

552 (16) If, after a proposed change has been approved and gone into effect, a shareholder
553 fails to substantially comply with a condition described in Subsection (14)(a) or (b) and
554 neglects to remedy the failure after written notice from the water company that allows the

555 shareholder a reasonable opportunity to remedy the failure, that is not less than 90 days after
556 the day on which the water company gives notice, the water company may:

557 (a) petition the state engineer to order a reversal of the change application approval; or

558 (b) proceed under the remedies provided in Title 16, Chapter 4, Share Assessment Act.

559 (17) If a shareholder's change application is denied by the state engineer and the denial
560 is upheld by the district court in a de novo action, the district court may award costs and
561 reasonable attorney fees to the water company if the court finds that:

562 (a) the shareholder declined to participate, or failed to cooperate in, the mediation
563 required under Subsection (8); or

564 (b) (i) the shareholder refused to accept conditions advanced by the water company for
565 the water company to consent to the proposed change; and

566 (ii) the conditions advanced by the water company for consenting to the shareholder's
567 change were reasonable and necessary to protect the other shareholders.

568 (18) If a shareholder's change application is approved by the state engineer and upheld
569 by a district court in a de novo action, the district court may award costs and reasonable
570 attorney fees to the shareholder if the district court finds that the water company:

571 (a) declined to participate or failed to cooperate in the mediation required under
572 Subsection (8);

573 (b) unreasonably declined to consent to the proposed change; or

574 (c) conditioned its consent to the proposed change on unreasonable requirements.

575 (19) The district court may award actual damages to a shareholder beyond costs and
576 reasonable attorney fees if the district court finds that the water company's acts or decisions
577 were so unreasonable or indefensible as to constitute bad faith.

Legislative Review Note
as of 1-9-14 5:34 PM

Office of Legislative Research and General Counsel