

Senator Margaret Dayton proposes the following substitute bill:

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;
- ▶ allows the state engineer, upon receiving a change application, to determine the quantity of water that is being beneficially used and limit approval of the change application based on that determination;
- ▶ 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



26 **Other Special Clauses:**

27 None

28 **Utah Code Sections Affected:**

29 AMENDS:

30 **73-1-4**, as last amended by Laws of Utah 2013, Chapters 221 and 380

31 **73-2-27**, as enacted by Laws of Utah 2005, Chapter 215

32 **73-3-3**, as last amended by Laws of Utah 2012, Chapter 229

33 **73-3-3.5**, as last amended by Laws of Utah 2008, Chapter 3

34 **73-3-8**, as last amended by Laws of Utah 2007, Chapter 136



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

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

38 **73-1-4. Reversion to the public by abandonment or forfeiture for nonuse within**
39 **seven years -- Nonuse application.**

40 (1) As used in this section:

41 (a) "Public entity" means:

42 (i) the United States;

43 (ii) an agency of the United States;

44 (iii) the state;

45 (iv) a state agency;

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

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

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

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

51 (ii) is:

52 (A) a public entity;

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

55 (C) a community water system:

56 (I) that:

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

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

59 (II) whose voting members:

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

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

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

65 (D) a water users association:

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

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

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

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

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

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

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

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

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

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

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

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

93 (iv) Approval of a nonuse application does not protect a water right that is already
94 subject to forfeiture under Subsection (2)(a) for full or partial nonuse of the water right.

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

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

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

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

106 (B) After the day on which a proposed determination of rights is filed with the court a
107 person may not assert that a water right subject to that determination was forfeited during the
108 15-year period described in Subsection (2)(c)(ii)(A), unless the state engineer asserts forfeiture
109 in the proposed determination, or a person makes, in accordance with Section 73-4-11, an
110 objection to the proposed determination that asserts forfeiture.

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

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

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

- 119 (B) the water made available by the forfeiture:
- 120 (I) first, satisfies other water rights in the hydrologic system in order of priority date;
- 121 and
- 122 (II) second, may be appropriated as provided in this title.
- 123 (d) ~~[This]~~ Except as provided in Subsection (2)(e), this section applies whether the
- 124 unused or abandoned water or a portion of the water is:
- 125 (i) permitted to run to waste; or
- 126 (ii) used by others without right with the knowledge of the water right holder.
- 127 (e) This section does not apply to:
- 128 (i) the use of water according to a lease or other agreement with the appropriator or the
- 129 appropriator's successor in interest;
- 130 (ii) a water right if its place of use is contracted under an approved state agreement or
- 131 federal conservation fallowing program;
- 132 ~~[(iii) those periods of time when a surface water or groundwater source fails to yield~~
- 133 ~~sufficient water to satisfy the water right;]~~
- 134 (iii) a water right during a period of time when a surface water source or groundwater
- 135 source fails to yield sufficient water to satisfy the water right;
- 136 (iv) a water right when water is unavailable because of the water right's priority date;
- 137 (v) a water right to store water in a surface reservoir or an aquifer, in accordance with
- 138 Title 73, Chapter 3b, Groundwater Recharge and Recovery Act, if:
- 139 (A) the water is stored for present or future use; or
- 140 (B) storage is limited by a safety, regulatory, or engineering restraint that the
- 141 appropriator or the appropriator's successor in interest cannot reasonably correct;
- 142 (vi) a water right if a water user has beneficially used substantially all of the water right
- 143 within a seven-year period, provided that this exemption does not apply to the adjudication of a
- 144 water right in a general determination of water rights under Chapter 4, Determination of Water
- 145 Rights;
- 146 (vii) except as provided by Subsection (2)(g), a water right:
- 147 (A) (I) owned by a public water supplier;
- 148 (II) represented by a public water supplier's ownership interest in a water company; or
- 149 (III) to which a public water supplier owns the right of use; and

150 (B) conserved or held for the reasonable future water requirement of the public, which
151 is determined according to Subsection (2)(f);

152 (viii) a supplemental water right during a period of time when another water right
153 available to the appropriator or the appropriator's successor in interest provides sufficient water
154 so as to not require use of the supplemental water right; or

155 (ix) a water right subject to an approved change application where the applicant is
156 diligently pursuing certification.

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

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

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

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

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

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

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

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

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

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

175 (iii) the quantity of water;

176 (iv) the period of use;

177 (v) the extension of time applied for;

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

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

180 (b) (i) Upon receipt of the application, the state engineer shall publish a notice of the

181 application once a week for two successive weeks:

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

184 (B) as required in Section 45-1-101.

185 (ii) The notice shall:

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

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

189 (c) Any interested person may file a written protest with the state engineer against the
190 granting of the application:

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

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

195 (d) In any proceedings to determine whether the nonuse application should be
196 approved or rejected, the state engineer shall follow the procedures and requirements of Title
197 63G, Chapter 4, Administrative Procedures Act.

198 (e) After further investigation, the state engineer may approve or reject the application.

199 (4) (a) The state engineer shall grant a nonuse application on all or a portion of a water
200 right for a period of time not exceeding seven years if the applicant shows a reasonable cause
201 for nonuse.

202 (b) A reasonable cause for nonuse includes:

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

204 (ii) physical causes or changes that render use beyond the reasonable control of the
205 water right owner;

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

208 [~~(iii)~~] (iv) operation of legal proceedings;

209 [~~(iv)~~] (v) the holding of a water right or stock in a mutual water company without use
210 by any water supply entity to meet the reasonable future requirements of the public;

211 [~~(v)~~] (vi) situations where, in the opinion of the state engineer, the nonuse would assist

212 in implementing an existing, approved water management plan; or
213 ~~[(vi)]~~ (vii) the loss of capacity caused by deterioration of the water supply or delivery
214 equipment if the applicant submits, with the application, a specific plan to resume full use of
215 the water right by replacing, restoring, or improving the equipment.

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

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

221 Section 2. Section 73-2-27 is amended to read:

222 **73-2-27. Criminal penalties.**

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

224 (a) Section 73-1-14;

225 (b) Section 73-1-15;

226 (c) Section 73-2-20;

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

228 (e) Section 73-3-26;

229 (f) Section 73-3-29;

230 (g) Section 73-5-9;

231 (h) Section 76-10-201;

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

233 (j) Section 76-10-203.

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

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

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

239 and

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

242 (b) as a class A misdemeanor if:

- 243 (i) the value of the water diverted or property damaged or taken is \$2,500 or greater; or
- 244 (ii) the person violating the provision has previously been convicted of violating the
- 245 same provision; or
- 246 (c) as a class B misdemeanor if Subsection (2)(a) or (b) does not apply.

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

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

250 (1) For purposes of this section:

251 (a) "Change applicant" means:

252 (i) the holder of an approved but unperfected application to appropriate water;

253 (ii) the record owner of a perfected water right;

254 (iii) a person who has written authorization from a person described in Subsection

255 (1)(a)(i) or (ii) to file a change application on that person's behalf; or

256 (iv) a shareholder in a water company who files a change application in accordance

257 with Section [73-3-3.5](#).

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

260 (i) point of diversion;

261 (ii) place of use;

262 (iii) period of use;

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

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

265 (c) "Quantity of water available for change" means the quantity of water, under a water
266 right, that has been put to beneficial use within the time provided in Section [73-1-4](#).

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

269 (i) point of diversion;

270 (ii) place of use;

271 (iii) period of use;

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

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

274 (2) (a) Subject to Subsection (2)(~~(c)~~)(h), a ~~[person entitled to the use of]~~ change
275 applicant water may make permanent or temporary changes in the:

- 276 (i) point of diversion;
- 277 (ii) place of use; ~~[or]~~
- 278 ~~[(iii) purpose of use for which the water was originally appropriated.]~~
- 279 (iii) period of use;
- 280 (iv) nature of use; or
- 281 (v) addition or deletion of storage as an authorized use.

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

284 (c) A person may not make a permanent or temporary change to a water right or an
285 approved application to appropriate water, including a water right or an approved application to
286 appropriate water involved in a general determination of rights or other suit, unless the person:

- 287 (i) is a change applicant; and
- 288 (ii) makes the change in accordance with this section.

289 (d) (i) Subject to Subsection (2)(d)(ii), in a change application proceeding to prevent
290 impairing other water rights, the state engineer may review the beneficial use of the water
291 under the water right and determine the quantity of water available for change.

292 (ii) In reviewing the beneficial use of the water under Subsection (2)(d)(i), the state
293 engineer shall, if the water right is exempted or protected under Section 73-1-4 or other law,
294 consider the water reasonably applied to beneficial use.

295 (e) (i) In reviewing the beneficial use of the water and determining the quantity of
296 water available for change under Subsection (2)(d)(i), the state engineer shall:

297 (A) presume that the quantity of water available for change is the full amount of water
298 available under the water right, unless the presumption is rebutted by clear and convincing
299 evidence demonstrating that a smaller quantity of water is available for change;

300 (B) if the state engineer or a protestant to the application questions the quantity of
301 water available for change, conduct an administrative hearing where the change applicant and a
302 protestant may present evidence regarding the quantity of water available for change; and

303 (C) if the state engineer determines that the quantity of water available for change is
304 less than the amount of water required by the change application, state the factual basis for the

305 determination.

306 (ii) If the state engineer determines that the quantity of water available for change is
307 less than the amount of water required by the change application, the state engineer may:

308 (A) reject the change application; or

309 (B) limit approval of the change application to the quantity of water available for
310 change.

311 (iii) The state engineer's determination of the quantity of water available for change
312 does not:

313 (A) constitute a forfeiture or abandonment;

314 (B) affect the use of the unapproved portion of the underlying water right; or

315 (C) constitute an adjudication of the underlying water right.

316 (f) (i) Before the state engineer makes a decision on a change application, the change
317 applicant may:

318 (A) withdraw the change application; or

319 (B) request that the state engineer stay the procedure on the change application for up
320 two years after the day on which the applicant requests the stay, or, if the state engineer finds
321 good cause, for more than two years.

322 (ii) (A) A change applicant who desires to resume proceedings stayed under Subsection
323 (2)(f)(i)(B) shall file with the state engineer a written request to resume the proceedings.

324 (B) If the state engineer stays the proceedings of a change application under Subsection
325 2)(f)(i)(B) and the applicant does not resume the proceedings within the time limit of the stay,
326 the state engineer shall consider the application withdrawn.

327 (g) A shareholder in a water company who seeks to make a permanent or temporary
328 change to a water right held in title by the water company shall file a change application in
329 accordance with Section [73-3-3.5](#).

330 [~~(e)~~] (h) A change application on a federal reclamation project water right shall be
331 signed by:

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

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

334 (B) the repayment of project costs; and

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

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

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

341 (3) (a) A change applicant who files a change application with the state engineer may
342 not make the permanent or temporary change requested in the application unless, and to the
343 extent that, the state engineer approves the change application.

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

346 (i) the change applicant's name;

347 (ii) the water right description, including the water right number;

348 (iii) the water quantity;

349 (iv) the stream or water source;

350 (v) if applicable, the point on the stream or water source where the water is diverted;

351 (vi) if applicable, the point to which it is proposed to change the diversion of the water;

352 (vii) the place, ~~[purpose]~~ nature, period, and extent of the ~~[present]~~ current use;

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

354 (ix) if the change applicant is submitting a change application in accordance with

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

356 ~~[(ix)]~~ (x) any other information that the state engineer requires.

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

361 (4) (a) With respect to a change application for a permanent change:

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

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

366 (b) The state engineer may waive notice for a permanent change application involving

367 only a change in point of diversion of 660 feet or less.

368 ~~[(6)]~~ (5) (a) The state engineer shall investigate all temporary change applications.

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

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

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

377 (b) The state engineer shall issue an order authorizing a temporary change if the state
378 engineer finds that the temporary change:

379 (i) will not exceed the quantity of water available for the change; and

380 (ii) does not impair a vested water right.

381 (c) The state engineer may deny a temporary change application if the state engineer
382 finds that the temporary change:

383 (i) will exceed the quantity of water available for the change; or

384 (ii) would impair a vested water right.

385 ~~[(7)]~~ (6) (a) Except as provided by Section 73-3-30, the state engineer may not reject a
386 permanent or temporary change application for the sole reason that the change would impair a
387 vested water right.

388 (b) If otherwise proper where interference with another water right has been
389 demonstrated, the state engineer may:

390 (i) approve a permanent or temporary change application;

391 (A) for part of the water involved; or

392 (B) upon the condition that the applicant acquire the conflicting water right[-]; or

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

395 (ii) otherwise mitigate the impairment.

396 ~~[(b)]~~ (7) A change of an approved application does not:

397 ~~[(i)]~~ (a) affect the priority of the original application; or

398 ~~[(it)]~~ (b) extend the time period within which the construction of work is to begin or be
399 completed.

400 ~~[(9)]~~ (8) Any person who changes ~~[or who attempts to change]~~ a point of diversion,
401 place of use, or purpose of use, either permanently or temporarily, without first applying to the
402 state engineer in the manner provided in this section~~[:]~~ is guilty of an offense punishable under
403 Section 73-2-27 if the change is made knowingly and intentionally.

404 ~~[(a) obtains no right;]~~

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

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

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

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

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

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

416 **73-3-3.5. Application for a change of point of diversion, place of use, or purpose**
417 **of use of water in a water company made by a shareholder.**

418 (1) As used in this section:

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

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

425 (c) "Water company" does not include a public water supplier, as defined in Section
426 73-1-4, that primarily provides domestic water, as defined in Section 59-2-1111.

427 ~~[(2) A shareholder who seeks to change the point of diversion, place of use, or purpose~~
428 ~~of use of the shareholder's proportionate share of water in the water company shall submit a~~

429 request for the change, in writing, to the water company. This request shall include the
430 following information:]

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

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

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

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

440 ~~[(e)]~~ (i) the certificate number of the stock affected by the change;

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

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

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

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

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

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

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

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

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

459 ~~[(d) The water company may not withhold approval if any potential damage, liability,~~

460 or impairment to the water company, or its shareholders, can be reasonably mitigated without
461 cost to the water company.]

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

464 (3) (a) The water company shall respond to the proposed change application described
465 in Subsection (2) within 90 days after the day on which the water company receives the
466 proposed change application.

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

469 (i) consent to the proposed change;

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

472 (iii) decline to consent to the proposed change, describing the reasons for declining to
473 consent.

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

476 (i) [~~any~~] whether an increased cost to the water company or its shareholders results
477 from the proposed change;

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

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

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

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

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

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

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

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

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

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

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

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

505 (5) If a shareholder files a change application and the water company has consented to
506 the proposed change under Subsection (3)(b)(i), or the water company has consented to the
507 proposed change subject to certain conditions under Subsection (3)(b)(ii) and the shareholder
508 agrees to the conditions, the state engineer shall proceed to evaluate the change application in
509 accordance with Subsection (13).

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

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

519 (b) provide written notice to the water company, if it failed to respond as required
520 under Subsection (3)(b), that the water company shall respond to the proposed change
521 application within 30 days after the day on which the water company receives the notice from

522 the state engineer, and that failure of the water company to respond constitutes consent to the
523 proposed change.

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

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

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

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

537 (d) The mediation described in Subsection (8)(a) shall be held within 60 days of the
538 day on which the state engineer gives the notice set forth in Subsection (6)(a) if the water
539 company issued a written response pursuant to Subsection (3)(a), or within 60 days of the day
540 on which the water company issues a written response pursuant to Subsection (6)(b).

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

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

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

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

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

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

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

563 (i) the criteria described in Section 73-3-8;

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

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

568 (b) Nothing in this section limits the authority of the state engineer in evaluating and
569 processing a change application, including the authority to require or allow a shareholder or
570 water company to submit additional relevant information, if the state engineer finds an absence
571 of prejudice and allows adequate time and opportunity for the other party to respond.

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

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

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

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

583 (i) continue to pay all reasonably applicable future assessments[~~, except that the~~

584 shareholder may choose to prepay any portion of the water company assessments attributable to
585 an existing debt of the water company.], with credit given to the shareholder for cost savings to
586 the company; or

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

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

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

592 [~~(b) be accompanied by written authorization from the water company assenting to the~~
593 ~~change.]~~

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

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

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

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

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

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

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

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

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

614 [~~(iii) withdraws approval of a change application in a manner other than as provided in~~

615 Subsection (9).]

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

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

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

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

629 (16) If, after a proposed change has been approved and gone into effect, a shareholder
630 fails to substantially comply with a condition described in Subsection (14)(a) or (b) and
631 neglects to remedy the failure after written notice from the water company that allows the
632 shareholder a reasonable opportunity to remedy the failure, that is not less than 90 days after
633 the day on which the water company gives notice, the water company may:

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

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

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

639 (a) the shareholder refused to accept conditions advanced by the water company for the
640 water company to consent to the proposed change; and

641 (b) the conditions advanced by the water company for consenting to the shareholder's
642 change were reasonable and necessary to protect the other shareholders.

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

646 (a) unreasonably declined to consent to the proposed change; or

647 (b) conditioned its consent to the proposed change on unreasonable requirements.

648 Section 5. Section 73-3-8 is amended to read:

649 **73-3-8. Approval or rejection of application -- Requirements for approval --**

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

652 (1) (a) ~~[It shall be the duty of the]~~ The state engineer [to] shall approve an application
653 to appropriate water, or a permanent change application, if:

654 (i) there is unappropriated water in the proposed source;

655 ~~[(ii) the proposed use will not impair existing rights or interfere with the more~~
656 ~~beneficial use of the water;]~~

657 (ii) subject to Section 73-1-4, for a permanent change application described in Section
658 73-3-3, the proposed use is based on the quantity of water that has been placed to beneficial use
659 under a water right;

660 (iii) the proposed use will not impair an existing water right or interfere with a more
661 beneficial use of the water;

662 ~~[(iii)]~~ (iv) the proposed plan is physically and economically feasible, unless the
663 application is filed by the United States Bureau of Reclamation, and would not prove
664 detrimental to the public welfare;

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

666 ~~[(v)]~~ (vi) the application was filed in good faith and not for purposes of speculation or
667 monopoly.

668 (b) (i) If the state engineer, because of information in the state engineer's possession
669 obtained either by the state engineer's own investigation or otherwise, has reason to believe that
670 a change application or an application to appropriate water will interfere with [its] the water's
671 more beneficial use for irrigation, domestic or culinary, stock watering, power or mining
672 development, or manufacturing, or will unreasonably affect public recreation or the natural
673 stream environment, or will prove detrimental to the public welfare, it is the state engineer's
674 duty to withhold approval or rejection of the application until the state engineer has
675 investigated the matter.

676 (ii) If an application does not meet the requirements of this section, it shall be rejected.

677 (2) (a) An application to appropriate water for industrial, power, mining development,
678 manufacturing purposes, agriculture, or municipal purposes may be approved for a specific and
679 certain period from the time the water is placed to beneficial use under the application, but in
680 no event may an application be granted for a period of time less than that ordinarily needed to
681 satisfy the essential and primary purpose of the application or until the water is no longer
682 available as determined by the state engineer.

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

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

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

- 690 (i) the essential purpose of the original application has not been satisfied;
- 691 (ii) the need for an extension is not the result of any default or neglect by the applicant;
- 692 and
- 693 (iii) the water is still available.

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

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

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

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