

HB0043S01 compared with HB0043

~~deleted text~~ shows text that was in HB0043 but was deleted in HB0043S01.

inserted text shows text that was not in HB0043 but was inserted into HB0043S01.

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Representative Kay L. McIff proposes the following substitute bill:

WATER RIGHTS - CHANGE APPLICATION AMENDMENTS

2015 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

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- ▶ 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

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

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

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

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

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

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

(1) As used in this section:

(a) "Public entity" means:

(i) the United States;

(ii) an agency of the United States;

(iii) the state;

(iv) a state agency;

(v) a political subdivision of the state; or

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

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

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

(ii) is:

(A) a public entity;

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

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(C) a community water system:

(I) that:

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

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

(II) whose voting members:

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

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

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

(D) a water users association:

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

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

(c) "Shareholder" ~~[is as]~~ means the same as that term is defined in Section 73-3-3.5.

(d) "Water company" ~~[is as]~~ means the same as that term is defined in Section 73-3-3.5.

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

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

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

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

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

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

(ii) If a person described in Subsection (2)(b)(i) files and receives approval on a nonuse application, nonuse of the water right subject to the application is not counted toward a

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seven-year period described in Subsection (2)(a) during the period of time beginning on the day on which the person files the application and ending on the day on which the application expires without being renewed.

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

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

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

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

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

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

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

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

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

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

(B) the water made available by the forfeiture:

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

and

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

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

(i) permitted to run to waste; or

(ii) used by others without right with the knowledge of the water right holder.

(e) This section does not apply to:

(i) the use of water according to a lease or other agreement with the appropriator or the appropriator's successor in interest;

(ii) a water right if its place of use is contracted under an approved state agreement or federal conservation fallowing program;

~~[(iii) those periods of time when a surface water or groundwater source fails to yield sufficient water to satisfy the water right;]~~

(iii) a water right during a period of time when a surface water source or groundwater source fails to yield sufficient water to satisfy the water right;

~~{ (iv) a water right when failure to use results from other physical causes beyond the reasonable control of the water right owner;~~

~~{ ~~(iv)~~ ~~(v)~~ a water right when water is unavailable because of the water right's priority date;~~

~~{ ~~(v)~~ ~~(vi)~~ a water right to store water in a surface reservoir or an aquifer, in accordance with Title 73, Chapter 3b, Groundwater Recharge and Recovery Act, if:~~

~~(A) the water is stored for present or future use; or~~

~~(B) storage is limited by a safety, regulatory, or engineering restraint that the appropriator or the appropriator's successor in interest cannot reasonably correct;~~

~~{ ~~(vi)~~ ~~(vii)~~ a water right if a water user has beneficially used substantially all of the water right within a seven-year period, provided that this exemption does not apply to the~~

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adjudication of a water right in a general determination of water rights under Chapter 4, Determination of Water Rights;

~~(vii)~~~~(viii)~~ except as provided by Subsection (2)(g), a water right:

(A) (I) owned by a public water supplier;

(II) represented by a public water supplier's ownership interest in a water company; or

(III) to which a public water supplier owns the right of use; and

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

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

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

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

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

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

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

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

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

(ii) the state engineer approves the change application.

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

(i) the name and address of the applicant;

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

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- (iii) the quantity of water;
- (iv) the period of use;
- (v) the extension of time applied for;
- (vi) a statement of the reason for the nonuse of the water; and
- (vii) any other information that the state engineer requires.

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

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

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

(ii) The notice shall:

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

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

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

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

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

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

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

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

(b) A reasonable cause for nonuse includes:

(i) a demonstrable financial hardship or economic depression;

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

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

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

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

~~[(v)]~~ (vi) situations where, in the opinion of the state engineer, the nonuse would assist in implementing an existing, approved water management plan; or

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

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

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

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

73-2-27. Criminal penalties.

(1) This section applies to offenses committed under:

(a) Section 73-1-14;

(b) Section 73-1-15;

(c) Section 73-2-20;

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

(e) Section 73-3-26;

(f) Section 73-3-29;

(g) Section 73-5-9;

(h) Section 76-10-201;

(i) Section 76-10-202; and

(j) Section 76-10-203.

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

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

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

and

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

(b) as a class A misdemeanor if:

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

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

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

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

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

(1) For purposes of this section:

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

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

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

(i) point of diversion;

(ii) place of use; ~~or~~

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

(iii) period of use;

(iv) nature of use ~~{ for which the water is currently appropriated};~~ or

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

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

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

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

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

(B) the repayment of project costs; and

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) if the change applicant is submitting a change application in accordance with Section 73-3-3.5, the information required by Section 73-3-3.5; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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made knowingly or intentionally~~;~~ and].

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

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

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

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

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

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

(1) As used in this section:

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

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

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

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

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

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

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

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application with the state engineer.

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) (a) The water company shall respond to the proposed change application described in Subsection (2) within ~~60~~90 days after the day on which the water company receives the proposed change application.

(b) The water company's response to the proposed change application shall be in

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writing and shall:

(i) consent to the proposed change;

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

(iii) decline to consent to the proposed change, describing the reasons for declining to consent ~~or~~; or

(iv) give notice that it elects to respond in a confidential communication for use in mediation, as described in Subsection (8).

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

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

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

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

~~[(iv) impairment of either]~~

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

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

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

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

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

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

(4) (a) Within 60 days after the day on which the shareholder receives the water

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

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

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

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

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

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

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

(b) provide written notice to the water company, if it failed to respond as required under Subsection (3)(b), that the water company shall respond to the proposed change application within 30 days after the day on which the water company receives the notice from the state engineer ~~, and that failure of the water company to respond constitutes consent to the proposed change~~ and that the response shall conform with one of the options described in Subsection (3)(b).

(7) If the water company has not previously responded under Subsection (3)(b) and

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fails to respond to the notice under Subsection (6)(b), ~~if the water company's consent to the change application is established as a matter of law and~~ the state engineer may proceed with the administrative evaluation under Subsection (13).

(8) (a) If the water company has, in writing, declined to consent to the change application under Subsection (3)(b)(iii) or Subsection (6)(b), ~~for~~ has consented on conditions unacceptable to the shareholder, or has elected to respond in a confidential communication as described in Subsection (3)(b)(iv), the parties shall jointly retain the service of a mediator and schedule a mediation on the change application filed by the shareholder and the response of the water company.

(b) If the shareholder and water company are unable to agree upon a mediator, the ~~private property rights ombudsman~~ Office of the Property Rights Ombudsman shall serve in the capacity of mediator.

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

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

(e) If the water company elected to respond in a confidential communication as described in Subsection (3)(b)(iv), the water company shall provide the shareholder and the mediator a confidential statement of the reasons supporting any conditions on which its consent is based, or on which its decision to decline to consent is based, no less than 21 days before the day on which mediation is scheduled to occur.

(f) The shareholder and the mediator shall keep confidential any information in the statement described in Subsection (8)(e) identified as confidential.

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

(h) If the water company gave written notice under Subsection (3)(b)(iv) of its election to respond to the shareholder's change application in a confidential communication before mediation, but then failed to respond as required in Subsection (8)(e) within the time specified or the time allowed under any agreed extension, the water company shall be considered to have

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consented to the change application.

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

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

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

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

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

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

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

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

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

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

(c) The state engineer may not withhold approval of a change application under this

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section based on potential damage, liability, or impairment to the water company or its shareholders if the potential damage, liability, or impairment can be reasonably mitigated without cost to the water company.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

+ ~~(b) a~~ (b) a unreasonably declined to consent to the proposed change; or

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

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

Legislative Review Note

~~as of 6-17-14 11:40 AM~~

~~Office of Legislative Research and General Counsel~~