

HB0043S04 compared with HB0043S03

~~{deleted text}~~ shows text that was in HB0043S03 but was deleted in HB0043S04.

inserted text shows text that was not in HB0043S03 but was inserted into HB0043S04.

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~~{Representative Kay L. McIff}~~Senator Jerry W. Stevenson proposes the following substitute bill:

WATER RIGHTS ~~{}~~ CHANGE APPLICATION AMENDMENTS

2015 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Kay L. McIff

Senate Sponsor: ~~{~~Jerry W. Stevenson

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;
- ▶ 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.

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Money Appropriated in this Bill:

None

Other Special Clauses:

~~{ None }~~ This bill provides a coordination clause to reconcile conflicts between this bill and other legislation.

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

Utah Code Sections Affected by Coordination Clause:

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

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

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:

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

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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 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

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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.

(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;

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

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

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(vii) 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) 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) 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:

(A) the persons within the public water supplier's ~~[projected]~~ reasonably anticipated service area based on ~~[projected]~~ reasonably anticipated population growth; or

(B) other water use demand.

(ii) For purposes of Subsection (2)(f)(i), a community water system's ~~[projected]~~ 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) 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;

(iii) the quantity of water;

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- (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 so long as the water right owner acts with reasonable diligence to resume or restore the use;

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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; or

(v) storage.

(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 owner of the water right.

(3) A person entitled to use water shall change a point of diversion, place of use, or ~~[purpose]~~ nature 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 to which the water company is the record owner 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;

(j) any proposed change to the storage of water; and

~~[(ix)]~~ (k) 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.]~~

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

(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

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~~crime] an offense punishable under Section 73-2-27 if the change [or attempted change] is 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.

~~[(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 rights represented by the shareholder's shares in a

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water company shall:

(i) prepare a proposed change application on forms furnished by the state engineer; and

(ii) provide the proposed change application to the water company by personal delivery with a signed receipt, certified mail, or electronic mail with confirmation of receipt.

(b) The water company and the shareholder shall cooperate in supplying information relevant to preparation or correction of the shareholder's change application.

(c) 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~~

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applications:]

(3) (a) The water company shall respond to the proposed change application described in Subsection (2) within 120 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 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.

(c) If the water company fails to timely respond, as described in Subsection (3)(a), the failure to respond shall be considered the water company's consent to the proposed change application and the shareholder may file the change application with the state engineer.

(4) (a) 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;

(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;

~~[(vi)]~~ (vii) if applicable, whether the shareholder has or can arrange for the beneficial

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use of water to be retired from irrigation within the water company's service area under the proposed change; ~~[or]~~ and

~~[(vii)]~~ (viii) 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]~~

(b) The water company may not withhold consent if any potential damage, liability, or impairment to the water company, or its shareholders, can be reasonably mitigated without cost to the water company.

(c) The water company may require the shareholder to pay all reasonable and necessary costs associated with the change application, but may not impose unreasonable exactions.

(5) (a) If the water company declines to consent to the proposed change application, stating its reasons, the shareholder may file an action in district court, seeking court review of the reasonableness of the conditions imposed for giving consent or the reasons stated for declining consent and a final order allowing the shareholder to file the proposed change application with the state engineer.

(b) If the water company consents to the proposed change application subject to conditions to which the shareholder does not agree, the shareholder may file the change application with the state engineer as provided in Subsection (6), without waiving the shareholder's right to contest conditions set by the water company under Subsection (3)(b)(ii).

(c) During or after the completion of the proceeding before the state engineer commenced under Subsection (6), the shareholder may file an action in district court seeking court review of the reasonableness of the conditions imposed by the water company for giving consent.

(d) In an action brought under Subsection (5)(a), (b), or (c), the court:

(i) shall refer the parties to mediation under Title 78B, Chapter 6, Part 2, Alternative Dispute Resolution Act, unless one or both parties decline mediation; and

(ii) may award costs and reasonable attorney fees to the prevailing party if mediation does not occur because the other party declined to participate in mediation.

(6) If the water company consents to the proposed change, the water company fails to respond as required by Subsection (3)(a), the court has entered an order described in

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Subsection (5)(a), or the water company consents to the proposed change subject to conditions to which the shareholder does not agree, as described in Subsection (5)(b), 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.

(7) The shareholder shall include as part of the change application filed with the state engineer under Subsection (5)(b) or (6):

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

(b) if applicable, an affidavit signed by the shareholder documenting the water company's failure to respond in the time period described in Subsection (3)(a); or

(c) if applicable, the court order described in Subsection (5)(a).

(8) (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 the criteria described in Section 73-3-8.

(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.

(9) If the state engineer approves a shareholder's change application, the state engineer may, for shares included in the approval, require that the shareholder requesting the change [must] be current on all water company assessments and [agree to] 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 any cost savings to the company resulting from the change.

~~[(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.]~~

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~~[(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.]~~

~~[(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) By mutual agreement only, and when the shares will rely upon a different diversion and delivery system, the water company and the shareholder may negotiate a buyout from the water company that may include a pro rata share of the water company's existing indebtedness assignable to the shares.

(11) After an application has been 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 involvement of the water company.

(12) If, after a proposed change has been approved and gone into effect, a shareholder fails to substantially comply with a condition described in Subsection (9), or any condition reasonably imposed by the company and agreed to by the shareholder, and neglects to remedy the failure after written notice from the water company that allows the shareholder a reasonable opportunity to remedy the failure, no less than 90 days after the day on which the water company gives notice, the water company may petition the state engineer to order a reversal of the change application approval.

~~[(10)]~~ (13) (a) The shareholder requesting the change shall have a cause of action,

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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)]~~ (12).

~~[(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.]~~

(b) The court may award costs and reasonable attorney fees:

(i) to the shareholder if the court finds that the water company acted in bad faith when it declined to consent to the proposed change or conditioned its consent on excessive exactions or unreasonable conditions; or

(ii) to the water company if it finds that the shareholder acted in bad faith in refusing to accept conditions reasonably necessary to protect other shareholders if the shareholder's change application is approved.

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

Section 5. Coordinating H.B. 43 with H.B. 25 -- Technical amendments.

If this H.B. 43 and H.B. 25, Water Law - Application Revisions, both pass and become law, it is the intent of the Legislature that the Office of Legislative Research and General Counsel, in preparing the Utah Code database for publication:

(1) modify Section 73-3-3 to read:

"73-3-3. Permanent or temporary changes to a water right.

(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.],~~ to the:

(i) point of diversion;

(ii) place of use;

(iii) period of use;

(iv) nature of use; or

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(v) storage of water.

(b) (i) "Quantity impairment" means any reduction in the amount of water a person is able to receive in order to satisfy an existing right to the use of water that would result from an action proposed in a change application, including:

(A) diminishing the quantity of water in the source of supply for the existing right;

(B) a change in the timing of availability of water from the source of supply for the existing right; or

(C) enlarging the quantity of water depleted by the nature of the proposed use when compared with the nature of the currently approved use.

(ii) "Quantity impairment" does not mean a decrease in the static level of water in an underground basin or aquifer that would result from an action proposed to be taken in a change application, if the volume of water necessary to satisfy an existing right otherwise remains reasonably available.

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

(i) point of diversion;

(ii) place of use;

(iii) period of use;

(iv) nature of use; or

(v) storage of water.

(2) (a) A person who proposes to file a permanent or temporary change application may request consultation with the state engineer, or the state engineer's designee, before filing the application in order to review the requirements of the change application process, discuss potential issues related to the change, and provide the applicant with information.

(b) Statements made and information presented in the consultation are not binding on the applicant or the state engineer.

(c) The consultation described in Subsection (2)(a) may occur in the state engineer's regional office for the region where the proposed change would occur.

~~(2)~~ (3) (a) ~~[Subject to Subsection (2)(c), a]~~ A person entitled to the use of water may make a permanent or temporary ~~[changes in the:]~~ change to an existing right to use water, including a right involved in a general determination of rights or other suit, if:

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~~[(i) point of diversion;]~~

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

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

~~(i) the person makes the change in accordance with this section;~~

~~[(b) Except] (ii) except as provided by Section 73-3-30, [a] the change [may not be made if it impairs a vested water] does not impair an existing right without just compensation[-] or adequate mitigation; and~~

~~(iii) the state engineer approves the change application, consistent with the requirements of Section 73-3-8.~~

~~[(c)] (b) 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:~~

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

~~(B) the repayment of project costs; and~~

~~(ii) the record 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] (4) (a) Before making a permanent or temporary change, a person entitled to the use of water shall submit a change application upon forms furnished by the state engineer [and shall set forth:].~~

~~(b) The application described in Subsection (4)(a) shall include:~~

~~(i) the applicant's name;~~

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

~~(iii) the water quantity;~~

~~(iv) the stream or water source;~~

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

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

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

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use:

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

(x) any proposed change to the storage of water; and

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

(c) A shareholder in a water company who seeks to make a permanent or temporary change to a water right to which the water company is the record owner shall file a change application in accordance with Section 73-3-3.5.

[(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.]

[(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) (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) (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.]

[(8) (a) A person holding an approved application for the appropriation of water may

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change the point of diversion, place of use, or purpose of use.]

(5) In a proceeding before the state engineer, the applicant has the burden of producing evidence sufficient to support a reasonable belief that the change can be made in compliance with this section and Section 73-3-8, including evidence:

(a) that the change will not cause a specific existing right to experience quantity impairment; or

(b) if applicable, rebutting the presumption of quantity impairment described in Subsection 73-3-8(6)(c).

~~(b)~~ (6) 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)~~ (7) 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]~~ makes a permanent or temporary change without first filing and obtaining approval of a change application providing for such change:

(a) obtains no additional water right by the change;

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

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

(c) shall comply with the change application process.

~~(10)~~ (8) (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."; and

(2) modify Section 73-3-8 to read:

"73-3-8 Approval or rejection of application -- Requirements for approval -- Application for specified period of time -- Filing of royalty contract for removal of salt or minerals.

(1) (a) It shall be the duty of the state engineer to approve an application if there is reason to believe that:

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(i) for an application to appropriate, there is unappropriated water in the proposed source;

(ii) the proposed use will not impair existing rights or interfere with the more beneficial use of the water;

(iii) the proposed plan:

(A) is physically and economically feasible, unless the application is filed by the United States Bureau of Reclamation[-]; and

(B) would not prove detrimental to the public welfare;

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

(v) the application was filed in good faith and not for purposes of speculation or monopoly[-]; and

(vi) if applicable, the application complies with a groundwater management plan adopted under Section 73-5-15.

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

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

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

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

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

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

(i) the essential purpose of the original application has not been satisfied;

(ii) the need for an extension is not the result of any default or neglect by the applicant;

and

(iii) the water is still available.

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

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

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

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

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

(b) The state engineer shall:

(i) approve the temporary change if the state engineer finds there is reason to believe that it will not impair an existing right; and

(ii) deny the temporary change if the state engineer finds there is reason to believe it would impair an existing right.

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

(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 if the

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

(c) The state engineer may condition approval of a change application to prevent an enlargement of the quantity of water depleted by the nature of the proposed use when compared with the nature of the currently approved use of water proposed to be changed.

(d) A condition described in Subsection (5)(c) may not include a reduction in the currently approved diversion rate of water under the water right identified in the change application solely to account for the difference in depletion under the nature of the proposed use when compared with the nature of the currently approved use.

(6) (a) Except as provided in Subsection (6)(b), the state engineer shall reject a permanent change application if the person proposing to make the change is unable to meet the burden described in Subsection 73-3-3(5).

(b) If otherwise proper, the state engineer may approve a permanent or temporary change application upon one or more of the following conditions:

(i) for part of the water involved;

(ii) that the applicant acquire a conflicting right; or

(iii) that the applicant provide and implement a plan approved by the state engineer to mitigate impairment of an existing right.

(c) (i) There is a rebuttable presumption of quantity impairment, as defined in Subsection 73-3-3(1), to the extent that, for a period of at least seven consecutive years, a portion of the right identified in a change application has not been:

(A) diverted from the approved point of diversion; and

(B) beneficially used at the approved place of use.

(ii) The rebuttable presumption described in Subsection (6)(c)(i) does not apply if the beneficial use requirement is excused by:

(A) Subsection 73-1-4(2)(e);

(B) an approved nonuse application under Subsection 73-1-4(2)(b);

(C) Subsection 73-3-30(7); or

(D) the passage of time under Subsection 73-1-4(2)(c)(i).

(d) The state engineer may not consider quantity impairment based on the conditions described in Subsection (6)(c) unless the issue is raised in a:

(i) timely protest that identifies which of the protestant's existing rights the protestant

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reasonably believes will experience quantity impairment; or

(ii) written notice provided by the state engineer to the applicant within 90 days after the change application is filed.

(e) The written notice described in Subsection (6)(d)(ii) shall:

(i) specifically identify an existing right the state engineer reasonably believes may experience quantity impairment; and

(ii) be mailed to the owner of an identified right, as shown by the state engineer's records, if the owner has not protested the change application.

(f) The state engineer is not required to include all rights the state engineer believes may be impaired by the proposed change in the written notice described in Subsection (6)(d)(ii).

(g) The owner of a right who receives the written notice described in Subsection (6)(d)(ii) may not become a party to the administrative proceeding if the owner has not filed a timely protest.

(h) If a change applicant, all protestants, and all persons identified by the state engineer under Subsection (6)(e)(ii) come to a written agreement regarding how the issue of quantity impairment shall be mitigated, the state engineer may incorporate the terms of the agreement into a change application approval."