

CANAL AMENDMENTS

2018 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: David P. Hinkins

House Sponsor: Michael K. McKell

LONG TITLE

General Description:

This bill changes the procedure to modify a water conveyance facility.

Highlighted Provisions:

This bill:

- ▶ defines terms;
- ▶ provides a process for a property owner and the owner of a water conveyance

facility to approve and move forward with a plan to modify a water conveyance facility;

- ▶ states that the Office of the Property Rights Ombudsman shall provide mediation and arbitration services when requested by either a property owner or a facility owner; and

- ▶ makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

13-43-204, as last amended by Laws of Utah 2014, Chapter 59

73-1-15, as last amended by Laws of Utah 2005, Chapter 215



28 ENACTS:

29 [73-1-15.5](#), Utah Code Annotated 1953



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

32 Section 1. Section **13-43-204** is amended to read:

33 **13-43-204. Office of the Property Rights Ombudsman -- Arbitration or mediation**
34 **of disputes.**

35 (1) If requested by the private property owner, or in the case of a water conveyance
36 facility either the private property owner or the facility owner of the water conveyance facility,
37 and if otherwise appropriate, the Office of the Property Rights Ombudsman shall mediate, or
38 conduct or arrange arbitration for~~[-]~~:

39 (a) a dispute between the owner and a government entity or other type of condemning
40 entity:

41 ~~[(a)]~~ (i) involving taking or eminent domain issues;

42 ~~[(b)]~~ (ii) involved in an action for eminent domain under Title 78B, Chapter 6, Part 5,
43 Eminent Domain; or

44 ~~[(c)]~~ (iii) involving relocation assistance under Title 57, Chapter 12, Utah Relocation
45 Assistance Act~~[-]~~; or

46 (b) the private property owner and the facility owner of a water conveyance facility as
47 described in Section [73-1-15.5](#) regarding:

48 (i) the relocation of the water conveyance facility; or

49 (ii) a modification to the method of water delivery of the water conveyance facility.

50 (2) If arbitration or mediation is requested by a private property owner under this
51 section, Section [57-12-14](#), or [78B-6-522](#), or either the private property owner or the facility
52 owner of a water conveyance facility under Section [73-1-15.5](#), and arranged by the Office of
53 the Property Rights Ombudsman, the ~~[government entity or condemning entity]~~ parties shall
54 participate in the mediation or arbitration as if the matter were ordered to mediation or
55 arbitration by a court.

56 (3) (a) (i) In conducting or arranging for arbitration under Subsection (1), the Office of
57 the Property Rights Ombudsman shall follow the procedures and requirements of Title 78B,
58 Chapter 11, Utah Uniform Arbitration Act.

59 (ii) In applying Title 78B, Chapter 11, Utah Uniform Arbitration Act, the arbitrator and
60 parties shall treat the matter as if:

61 (A) it were ordered to arbitration by a court; and

62 (B) the Office of the Property Rights Ombudsman or other arbitrator chosen as
63 provided for in this section was appointed as arbitrator by the court.

64 (iii) For the purpose of an arbitration conducted under this section, if the dispute to be
65 arbitrated is not already the subject of legal action, the district court having jurisdiction over
66 the county where the private property involved in the dispute is located is the court referred to
67 in Title 78B, Chapter 11, Utah Uniform Arbitration Act.

68 (iv) An arbitration award under this chapter may not be vacated under the provisions of
69 Subsection 78B-11-124(1)(e) because of the lack of an arbitration agreement between the
70 parties.

71 (b) The Office of the Property Rights Ombudsman shall issue a written statement
72 declining to mediate, arbitrate, or to appoint an arbitrator when, in the opinion of the Office of
73 the Property Rights Ombudsman:

74 (i) the issues are not ripe for review;

75 (ii) assuming the alleged facts are true, no cause of action exists under United States or
76 Utah law;

77 (iii) all issues raised are beyond the scope of the Office of the Property Rights
78 Ombudsman's statutory duty to review; or

79 (iv) the mediation or arbitration is otherwise not appropriate.

80 (c) (i) The Office of the Property Rights Ombudsman shall appoint another person to
81 arbitrate a dispute when:

82 (A) either party objects to the Office of the Property Rights Ombudsman serving as the
83 arbitrator and agrees to pay for the services of another arbitrator;

84 (B) the Office of the Property Rights Ombudsman declines to arbitrate the dispute for a
85 reason other than those stated in Subsection (3)(b) and one or both parties are willing to pay for
86 the services of another arbitrator; or

87 (C) the Office of the Property Rights Ombudsman determines that it is appropriate to
88 appoint another person to arbitrate the dispute with no charge to the parties for the services of
89 the appointed arbitrator.

90 (ii) In appointing another person to arbitrate a dispute, the Office of the Property Rights
91 Ombudsman shall appoint an arbitrator who is agreeable to:

92 (A) both parties; or

93 (B) the Office of the Property Rights Ombudsman and the party paying for the
94 arbitrator.

95 (iii) The Office of the Property Rights Ombudsman may, on its own initiative or upon
96 agreement of both parties, appoint a panel of arbitrators to conduct the arbitration.

97 (iv) The Department of Commerce may pay an arbitrator per diem and reimburse
98 expenses incurred in the performance of the arbitrator's duties at the rates established by the
99 Division of Finance under Sections [63A-3-106](#) and [63A-3-107](#).

100 (d) In arbitrating a dispute, the arbitrator shall apply the relevant statutes, case law,
101 regulations, and rules of Utah and the United States in conducting the arbitration and in
102 determining the award.

103 (e) ~~§~~ **(i)** ~~§~~ The property owner and government entity, or other condemning entity, may
103a agree

104 in advance of arbitration that the arbitration is binding and that no de novo review may occur.

104a ~~§~~ **(ii) The private property owner and facility owner of a water conveyance facility, as**
104b **described in Section 73-1-15.5, may agree in advance of arbitration that the arbitration is**
104c **binding and that no de novo review may occur.** ~~§~~

105 (f) Arbitration by or through the Office of the Property Rights Ombudsman is not
106 necessary before bringing legal action to adjudicate any claim.

107 (g) The lack of arbitration by or through the Office of the Property Rights Ombudsman
108 does not constitute, and may not be interpreted as constituting, a failure to exhaust available
109 administrative remedies or as a bar to bringing legal action.

110 (h) Arbitration under this section is not subject to Title 63G, Chapter 4, Administrative
111 Procedures Act, or Title 78B, Chapter 6, Part 2, Alternative Dispute Resolution Act.

112 (i) Within 30 days after an arbitrator issues a final award, and except as provided in
113 Subsection (3)(e), any party to the arbitration may submit the dispute, the award, or any issue
114 upon which the award is based, to the district court for review by trial de novo.

115 (4) The filing with the Office of the Property Rights Ombudsman of a request for
116 mediation or arbitration of a constitutional taking issue does not stay:

117 (a) a county or municipal land use decision;

118 (b) a land use appeal authority decision; or

119 (c) the occupancy of the property.

120 (5) A member of the Office of the Property Rights Ombudsman, or an arbitrator

121 appointed by the office, may not be compelled to testify in a civil action filed concerning the
122 subject matter of any review, mediation, or arbitration by the Office of the Property Rights
123 Ombudsman.

124 Section 2. Section 73-1-15 is amended to read:

125 **73-1-15. Obstructing canals or other watercourses -- Penalties.**

126 (1) (a) Whenever any person has a right-of-way of any established type or title for any
127 canal or other watercourse it shall be unlawful for any person to place or maintain in place any
128 obstruction, or change of the water flow by fence or otherwise, along or across or in such canal
129 or watercourse, except as where said watercourse inflicts damage to private property, without
130 first:

131 (i) receiving written permission for the change and providing gates sufficient for the
132 passage of the owner or owners of such canal or watercourse[-]; or

133 (ii) complying with the requirements of Section 73-1-15.5.

134 (b) That the vested rights in the established canals and watercourse shall be protected
135 against all encroachments.

136 (c) That indemnifying agreements may be entered as may be just and proper by
137 governmental agencies.

138 (2) Any person violating this section is guilty of a crime punishable under Section
139 73-2-27.

140 (3) Any person who commits an act defined as a crime under this section is also liable
141 for damages or other relief and costs in a civil action to any person injured by that act.

142 (4) (a) A civil action under this section may be brought independent of a criminal
143 action.

144 (b) Proof of the elements of a civil action under this section need only be made by a
145 preponderance of the evidence.

146 Section 3. Section 73-1-15.5 is enacted to read:

147 **73-1-15.5. Relocation of easements for a water conveyance facility -- Alteration of**
148 **a water conveyance facility.**

149 (1) As used in this section:

150 (a) "Facility owner" means an individual, entity, mutual water company, or
151 unincorporated organization ~~§~~ :

151a (i) ~~§~~ operating ~~§~~ a water conveyance facility; ~~§~~

152 ~~§~~ → ~~(i)~~ **(ii) owning** ← ~~§~~ any interest in a water conveyance facility; or
 153 ~~§~~ → ~~(ii)~~ **(iii) having** ← ~~§~~ a property interest in ~~§~~ → ~~[which]~~ **real property based on the**
 153a **presence of** ← ~~§~~ the water conveyance facility ~~§~~ → ~~[operates]~~ **located and operating on the real**
 153b **property** ← ~~§~~ .

154 (b) (i) "Water conveyance facility" means a ditch, canal, flume, pipeline, or other
 155 watercourse used to convey water used for irrigation and any related easement for the ditch,
 156 canal, flume, pipeline, or other watercourse.

157 (ii) "Water conveyance facility" does not mean a ditch, canal, flume, pipeline, or other
 158 watercourse used to convey water used for culinary or industrial water or any federal water
 159 project facility.

160 (2) Unless prohibited by the terms of a written grant of easement or an agreement for
 161 which consideration was given, a property owner may make reasonable changes in the location
 162 and method of delivery of a water conveyance facility located on the property owner's real
 163 property after:

164 (a) having a licensed engineer:

165 (i) redesign the water conveyance facility, which may include relocating the water
 166 conveyance facility to a new location on the property owner's real property or on the real
 167 property of another person who consents to the relocation; and

168 (ii) certify that the engineered redesign of the water conveyance facility and method of
 169 delivery meets the requirements of Subsection (4);

170 (b) providing the plans designed by the licensed engineer under Subsection (2)(a)(i) to
 171 the facility owner;

172 (c) allowing the facility owner a reasonable time to review the plans designed by the
 173 licensed engineer under Subsection (2)(a)(i), provide comments to the plans, and subject to
 174 Subsection (3), require changes and approve the planned redesign before commencing the
 175 modifications;

176 (d) allowing the facility owner to inspect the modified water conveyance facility during
 177 construction of the modification and require reasonable changes if construction of the
 178 modification is not occurring according to an approved redesign plan as required by Subsection
 179 (3)(b); and

180 (e) providing the facility owner with the ability to reasonably access, operate, maintain,
 181 and replace the modified water conveyance facility.

182 (3) A facility owner:

183 (a) may require a change to the plans designed by the licensed engineer under
184 Subsection (2)(a)(i) only if the change is:
185 (i) directly related to a reasonably anticipated negative impact, resulting from the
186 relocation of the water conveyance facility or a change in the method of water delivery; and
187 (ii) the least costly means of addressing the anticipated negative impact described in
188 Subsection (3)(a)(i) after taking into account the provisions of Subsection (4); and
189 (b) shall approve the plans designed by the licensed engineer under Subsection (2)(a)(i)
190 if:
191 (i) the plans reasonably address any anticipated negative impacts resulting from the
192 relocation of the water conveyance facility or a change in the method of water delivery;
193 (ii) the property owner has proposed reasonable terms or conditions to satisfy the
194 provisions of Subsection (4); and
195 (iii) the property owner satisfies the provisions of Subsection (2).
196 (4) A property owner may not relocate a water conveyance facility or change the
197 method of delivery of a water conveyance facility in accordance with Subsection (2) if the
198 modification:
199 (a) significantly decreases the utility of the water conveyance facility;
200 (b) increases the burden on the facility owner's use of the water conveyance facility in a
201 way not compensated for by the property owner; or
202 (c) frustrates the purpose of the water conveyance facility.
203 (5) A property owner or a facility owner may request the Office of the Property Rights
204 Ombudsman to mediate or arbitrate any dispute over the application of this section.
205 (6) A property owner relocating a water conveyance facility under this section is
206 responsible for:
207 (a) the reasonable, actual costs incurred in modifying the water conveyance facility,
208 including:
209 (i) planning and construction costs;
210 (ii) the actual engineering and inspection costs during construction;
211 (iii) costs reasonably and necessarily incurred by the facility owner related to the
212 modification of the water conveyance facility; and
213 (iv) legal costs incurred by the facility owner in reviewing and approving plans and

214 proposing modifications, limited to the lesser amount of actual attorney fees incurred or
215 \$5,000; and

216 (b) the costs of preparing instruments associated with any new easement for the
217 modified water conveyance facility, as described in Subsection (8).

218 (7) In an action where a claim is made that a provision of this section has been
219 violated, a court may, in addition to any other relief granted, award costs and reasonable
220 attorney fees:

221 (a) to the facility owner if the court finds that the property owner failed to comply with
222 the plan approved in accordance with Subsection (3); or

223 (b) to the property owner if the court finds that the facility owner made unreasonable
224 demands in reviewing the property owner's proposed plans or in requiring changes to the
225 proposed or approved plans.

226 (8) (a) If a water conveyance facility is relocated under this section, the facility owner
227 shall record an instrument extinguishing the existing easement in exchange for the grant of a
228 new easement for the relocated water conveyance facility by the property owner burdened by
229 the modified water conveyance facility.

230 (b) The instruments extinguishing the previous easement and granting the new
231 easement shall be:

232 (i) in a form mutually acceptable to the facility owner and the property owner; and

233 (ii) recorded in the county in which the modified water conveyance facility is located.

234 (c) The property owner shall pay all recording fees for the instruments described in
235 Subsections (8)(a) and (b).

Legislative Review Note
Office of Legislative Research and General Counsel