

Senator David P. Hinkins proposes the following substitute bill:

**CANAL AMENDMENTS**

2018 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: David P. Hinkins**

House Sponsor: \_\_\_\_\_

**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 to a property owner and facility owner when requested; 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



26 **73-1-15**, as last amended by Laws of Utah 2005, Chapter 215

27 ENACTS:

28 **73-1-15.5**, Utah Code Annotated 1953



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

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

32 **13-43-204. Office of the Property Rights Ombudsman -- Arbitration or mediation**  
33 **of disputes.**

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

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

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

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

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

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

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

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

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

55 (3) (a) (i) In conducting or arranging for arbitration under Subsection (1), the Office of  
56 the Property Rights Ombudsman shall follow the procedures and requirements of Title 78B,

57 Chapter 11, Utah Uniform Arbitration Act.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

88 the appointed arbitrator.

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

91 (A) both parties; or

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

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

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

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

102 (e) (i) The property owner and government entity, or other condemning entity, may  
103 agree in advance of arbitration that the arbitration is binding and that no de novo review may  
104 occur.

105 (ii) The private property owner and facility owner of a water conveyance facility, as  
106 described in Section [73-1-15.5](#), may agree in advance of arbitration that the arbitration is  
107 binding and that no de novo review may occur.

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

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

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

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

118 (4) The filing with the Office of the Property Rights Ombudsman of a request for

119 mediation or arbitration of a constitutional taking issue does not stay:

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

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

122 (c) the occupancy of the property.

123 (5) A member of the Office of the Property Rights Ombudsman, or an arbitrator  
124 appointed by the office, may not be compelled to testify in a civil action filed concerning the  
125 subject matter of any review, mediation, or arbitration by the Office of the Property Rights  
126 Ombudsman.

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

128 **73-1-15. Obstructing canals or other watercourses -- Penalties.**

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

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

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

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

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

141 (2) Any person violating this section is guilty of a crime punishable under Section  
142 73-2-27.

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

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

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

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

150           73-1-15.5. Relocation of easements for a water conveyance facility -- Alteration of  
151 **a water conveyance facility.**

152           (1) As used in this section:

153           (a) "Facility owner" means an individual, entity, mutual water company, or  
154 unincorporated organization:

155           (i) operating a water conveyance facility;

156           (ii) owning any interest in a water conveyance facility; or

157           (iii) having a property interest in real property based on the presence of the water  
158 conveyance facility located and operating on the real property.

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

162           (ii) "Water conveyance facility" does not mean a ditch, canal, flume, pipeline, or other  
163 watercourse used to convey water used for culinary or industrial water, stormwater drainage, or  
164 any federal water project facility.

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

169           (a) having a licensed engineer:

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

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

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

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

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

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

187 (3) A facility owner:

188 (a) may require a change to the plans designed by the licensed engineer under  
189 Subsection (2)(a)(i) only if the change is:

190 (i) directly related to a reasonably anticipated negative impact, resulting from the  
191 relocation of the water conveyance facility or a change in the method of water delivery; and

192 (ii) the least costly means of addressing the anticipated negative impact described in  
193 Subsection (3)(a)(i) after taking into account the provisions of Subsection (4); and

194 (b) shall approve the plans designed by the licensed engineer under Subsection (2)(a)(i)  
195 if:

196 (i) the plans reasonably address any anticipated negative impacts resulting from the  
197 relocation of the water conveyance facility or a change in the method of water delivery;

198 (ii) the property owner has proposed reasonable terms or conditions to satisfy the  
199 provisions of Subsection (4); and

200 (iii) the property owner satisfies the provisions of Subsection (2).

201 (4) A property owner may not relocate a water conveyance facility or change the  
202 method of delivery of a water conveyance facility in accordance with Subsection (2) if the  
203 modification:

204 (a) significantly decreases the utility of the water conveyance facility;

205 (b) increases the burden on the facility owner's use of the water conveyance facility in a  
206 way not compensated for by the property owner; or

207 (c) frustrates the purpose of the water conveyance facility.

208 (5) (a) A property owner or a facility owner may request the Office of the Property  
209 Rights Ombudsman to mediate any dispute over the application of this section.

210 (b) A property owner and a facility owner may jointly request the Office of the  
211 Property Rights Ombudsman to arbitrate any dispute over the application of this section.

212 (6) A property owner relocating a water conveyance facility under this section is  
213 responsible for:

214 (a) the reasonable, actual costs incurred in modifying the water conveyance facility,  
215 including:

216 (i) planning and construction costs;

217 (ii) the actual engineering and inspection costs during construction;

218 (iii) costs reasonably and necessarily incurred by the facility owner related to the  
219 modification of the water conveyance facility; and

220 (iv) legal costs incurred by the facility owner in reviewing and approving plans and  
221 proposing modifications, limited to the lesser amount of actual attorney fees incurred or  
222 \$5,000; and

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

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

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

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

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

237 (b) The instruments extinguishing the previous easement and granting the new  
238 easement shall be:

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

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

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