

Senator David P. Hinkins proposes the following substitute bill:

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 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 or storm water drainage and any related
161 easement for the ditch, 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, or any federal water
164 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 for its current
205 use;

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

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

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

211 (b) A property owner and a facility owner may jointly request the Office of the

212 Property Rights Ombudsman to arbitrate any dispute over the application of this section.

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

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

217 (i) planning and construction costs;

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

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

221 (iv) legal costs incurred by the facility owner in reviewing and approving plans and
222 proposing modifications, limited to the lesser amount of actual attorney fees incurred or
223 \$5,000; and

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

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

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

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

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

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

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

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

242 (c) The property owner shall pay all recording fees for the instruments described in

243 Subsections (8)(a) and (b).