

1 **QUANTITY IMPAIRMENT MODIFICATIONS**

2 2019 GENERAL SESSION

3 STATE OF UTAH

4 **Chief Sponsor: Carl R. Albrecht**

5 Senate Sponsor: Daniel Hemmert

7 **LONG TITLE**

8 **General Description:**

9 This bill deals with change applications.

10 **Highlighted Provisions:**

11 This bill:

12 ▶ states that there is a rebuttable presumption of quantity impairment to the extent
13 that, for a period of at least seven consecutive years, a portion of the right identified
14 in a change application has not been:

- 15 • diverted from the approved point of diversion; or
- 16 • beneficially used at the approved place of use.

17 **Money Appropriated in this Bill:**

18 None

19 **Other Special Clauses:**

20 None

21 **Utah Code Sections Affected:**

22 AMENDS:

23 **73-3-8**, as last amended by Laws of Utah 2015, Chapter 245 and last amended by
24 Coordination Clause, Laws of Utah 2015, Chapter 249

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

27 Section 1. Section **73-3-8** is amended to read:

28 **73-3-8. Approval or rejection of application -- Requirements for approval --**
29 **Application for specified period of time -- Filing of royalty contract for removal of salt or**

30 **minerals.**

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

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

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

37 (iii) the proposed plan:

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

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

41 (iv) the applicant has the financial ability to complete the proposed works;

42 (v) the application was filed in good faith and not for purposes of speculation or
43 monopoly; and

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

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

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

54 (2) (a) An application to appropriate water for industrial, power, mining development,
55 manufacturing purposes, agriculture, or municipal purposes may be approved for a specific and
56 certain period from the time the water is placed to beneficial use under the application, but in
57 no event may an application be granted for a period of time less than that ordinarily needed to

58 satisfy the essential and primary purpose of the application or until the water is no longer
59 available as determined by the state engineer.

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

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

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

- 67 (i) the essential purpose of the original application has not been satisfied;
- 68 (ii) the need for an extension is not the result of any default or neglect by the applicant;
- 69 and
- 70 (iii) the water is still available.

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

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

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

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

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

82 (b) The state engineer shall:

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

85 (ii) deny the temporary change if the state engineer finds there is reason to believe it

86 would impair an existing right.

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

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

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

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

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

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

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

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

106 (i) for part of the water involved;

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

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

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

113 (A) diverted from the approved point of diversion; [~~and~~] or

- 114 (B) beneficially used at the approved place of use.
- 115 (ii) The rebuttable presumption described in Subsection (6)(c)(i) does not apply if the
- 116 beneficial use requirement is excused by:
 - 117 (A) Subsection 73-1-4(2)(e);
 - 118 (B) an approved nonuse application under Subsection 73-1-4(2)(b);
 - 119 (C) Subsection 73-3-30(7); or
 - 120 (D) the passage of time under Subsection 73-1-4(2)(c)(i).
- 121 (d) The state engineer may not consider quantity impairment based on the conditions
- 122 described in Subsection (6)(c) unless the issue is raised in a:
 - 123 (i) timely protest that identifies which of the protestant's existing rights the protestant
 - 124 reasonably believes will experience quantity impairment; or
 - 125 (ii) written notice provided by the state engineer to the applicant within 90 days after
 - 126 the change application is filed.
- 127 (e) The written notice described in Subsection (6)(d)(ii) shall:
 - 128 (i) specifically identify an existing right the state engineer reasonably believes may
 - 129 experience quantity impairment; and
 - 130 (ii) be mailed to the owner of an identified right, as shown by the state engineer's
 - 131 records, if the owner has not protested the change application.
- 132 (f) The state engineer is not required to include all rights the state engineer believes
- 133 may be impaired by the proposed change in the written notice described in Subsection
- 134 (6)(d)(ii).
- 135 (g) The owner of a right who receives the written notice described in Subsection
- 136 (6)(d)(ii) may not become a party to the administrative proceeding if the owner has not filed a
- 137 timely protest.
- 138 (h) If a change applicant, all protestants, and all persons identified by the state engineer
- 139 under Subsection (6)(d)(ii) come to a written agreement regarding how the issue of quantity
- 140 impairment shall be mitigated, the state engineer may incorporate the terms of the agreement
- 141 into a change application approval.

