



## Change Application Procedure (SB109)

### *Resolving Conflict / Securing a Future*

#### What is Behind this Bill?

This bill was originally proposed by the Executive Water Issues Task Force to clarify legislative policy on water right change applications. Two Utah Supreme Court decisions have disrupted long standing change application policy employed by the state engineer. Lacking legislative clarification, the state engineer and public will remain in confusion, additional litigation is a certainty, and efficiency in governance will suffer as distraction from the issues raised consume resources of the agency. The Utah League of Cities and Towns (ULCT) opposed the solution developed by the task force. At the request of Senator Okerlund the State Engineer and Executive Director of the Department of Natural Resources have negotiated with the ULCT and developed a compromise proposal with special provisions for municipalities which is an experimental solution aimed at finding new ways to deal with nonuse/forfeiture issues.

#### What are the Issues?

The two issues in doubt are: who may file a change application and what is the state engineer's duty in approving change applications.

#### State Engineer Action on Change Applications with Nonuse Issues

The Utah Supreme Court, reviewing a district court de novo proceeding which originated with a state engineer decision to reject a change application on the grounds that the applicant had not used the water for a period well in excess of the statutory nonuse period of seven years, found no authority in the change application statute for the state engineer to reject an application on that basis as has long been the practice of the office and necessary to protect other rights. The Supreme Court, noting a declaration of forfeiture is a judicial function suggested the engineer stay change application proceedings in such cases and initiate a law suit for forfeiture against the applicant. The state engineer is concerned the court's solution may not be what the legislature intends or public will embrace. It is difficult to imagine a positive outcome from being sued by state government just for filing a change application. The state engineer is therefore seeking a less ominous administrative remedy.

The Executive Water Issues Task force studied the issue. The solution proposed is that the state engineer in his role approving change applications, if he finds clear and convincing evidence of nonuse, is to inform the applicant and provide time for the applicant to make a decision. The



# Utah Department of Natural Resources

## Division of Water Rights



applicant may withdraw the application, request up to a two year stay of change application proceedings to address the issue, or ask the state engineer to proceed with the change application approval process knowing the state engineer will limit approved uses under the change to that which has been observed historically. The bill clarifies that the limitations due to nonuse imposed by a state engineer change application decision do not limit or forfeit rights held by the applicant to the water right being offered for change. They affect only what the applicant may do under the change application proposal.

Municipalities have additional options under the bill. The options represent new, untested solutions to resolve water right nonuse issues but may hold promise for better future solutions for all water users. Municipalities may proceed under the change process described above (state engineer decision making on nonuse) if they indicate that desire in writing to the state engineer. Alternately they may proceed independent of the state engineer to address nonuse/forfeiture issues. The mechanisms provided are:

- 1) An advisory opinion on forfeiture from the property rights ombudsman initiated by the applicant or a change application protestant.
- 2) A limited time frame judicial action for forfeiture initiated by a change application protestant.
- 3) An action between municipalities to settle water right forfeiture claims.

Once any protestant's assertions regarding forfeiture have been resolved either through actions above or failure to act in a 120 day time period, a municipal change application returns to the state engineer for processing and approval on all issues except nonuse.

Municipalities as part of the change application process will also be granted an opportunity under the bill after September 1, 2013 to extinguish all claims for forfeiture due to prior nonuse if a change application on decreed or certificated rights is approved in the change application process. In order to secure the added protection an extended change application noticing process (90 days) must be requested by the municipality.

### Who Can File a Change Application?

The change application statute, Utah Code Section 73-3-3 currently provides “a person entitled to the use of water” may file a water right change application. Since a water right is the “entitlement” or right to divert and beneficially use water, the state engineer has relied upon ownership of that right as an indicator of entitlement. A change application is the means whereby water rights are permanently changed. It is difficult to imagine a scenario where a person who owns a water right which is treated like real property for purposes of conveyance should not be entitled to remain in control of that property in a change application process. However, the Utah Supreme Court has ruled that since water right ownership is complex it believes there are other tests that should be employed to determine if a person is entitled to file a change application. The course of the courts can only lead to the state engineer getting entangled in contractual disputes and/or making decisions that ultimately deprive owners of water rights, control of their property rights. Wisely, the task force has proposed a legislative solution to this dilemma which clearly articulates only the owner of the water right or one authorized in writing by the owner may file water right change applications.

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