

SB0109S03 compared with SB0109

~~{deleted text}~~ shows text that was in SB0109 but was deleted in SB0109S03.

inserted text shows text that was not in SB0109 but was inserted into SB0109S03.

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Representative V. Lowry Snow proposes the following substitute bill:

CHANGE APPLICATION PROCEDURE

2013 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Ralph Okerlund

House Sponsor: ~~{_____}~~ V. Lowry Snow

LONG TITLE

General Description:

This bill ~~{requires that a person who applies for a permanent or temporary change to a water right meet certain qualifications and allows the state engineer, upon receiving a change application, to determine the quantity of water that is being beneficially used and limit approval}~~ modifies provisions of Title 13, Chapter 43, Property Rights Ombudsman Act, and requirements of the change application ~~{based on that determination}~~ process under Title 73, Water and Irrigation.

Highlighted Provisions:

This bill:

- ▶ defines terms;
- ▶ allows a change applicant or an aggrieved person who protests a change application to request an advisory opinion through the Office of the Property Rights

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Ombudsman:

- ▶ requires that a person who applies for a permanent or temporary change to a water right meet certain qualifications;

and requirements:

- ▶ modifies the procedure for, and requirements relating to, submitting a change application;
- ▶ prohibits a water company, under certain circumstances, from filing a change application if the proposed change deprives an existing shareholder of the shareholder's water use right;
- ▶ allows the state engineer, ~~{upon receiving a change application}~~ under certain circumstances, to determine the quantity of water that is being beneficially used under a change application and limit approval of the change application based on that determination;
- ▶ eliminates criminal penalties;
- ▶ modifies the procedure for, and requirements relating to, submitting a change application for a shareholder in a water company; and
- ▶ makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

13-43-203, as last amended by Laws of Utah 2008, Chapters 3, 84, and 382

13-43-205, as last amended by Laws of Utah 2012, Chapter 172

13-43-206, as last amended by Laws of Utah 2011, Chapter 47

73-2-27, as enacted by Laws of Utah 2005, Chapter 215

73-3-3, as last amended by Laws of Utah 2012, Chapter 229

73-3-3.5, as last amended by Laws of Utah 2008, Chapter 3

73-3-7, as last amended by Laws of Utah 1995, Chapter 19

73-3-8, as last amended by Laws of Utah 2007, Chapter 136

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73-3-30, as last amended by Laws of Utah 2009, Chapter 344

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

Section 1. Section 13-43-203 is amended to read:

13-43-203. Office of the Property Rights Ombudsman -- Duties.

(1) The Office of the Property Rights Ombudsman shall:

- (a) develop and maintain expertise in and understanding of takings, eminent domain, [and] land use law, and water law;
- (b) assist state agencies and local governments in developing the guidelines required by Title 63L, Chapter 4, Constitutional Taking Issues;
- (c) at the request of a state agency or local government, assist the state agency or local government, in analyzing actions with potential takings implications or other land use issues;
- (d) advise real property owners who:
 - (i) have a legitimate potential or actual takings claim against a state or local government entity or have questions about takings, eminent domain, and land use law; or
 - (ii) own a parcel of property that is landlocked, as to the owner's rights and options with respect to obtaining access to a public street;
- (e) identify state or local government actions that have potential takings implications and, if appropriate, advise those state or local government entities about those implications; and
- (f) provide information to private citizens, civic groups, government entities, and other interested parties about takings, eminent domain, and land use law and their rights and responsibilities under the takings, eminent domain, or land use laws through seminars and publications, and by other appropriate means.

(2) The Office of the Property Rights Ombudsman may not represent private property owners, state agencies, or local governments in court or in adjudicative proceedings under Title 63G, Chapter 4, Administrative Procedures Act.

(3) No member of the Office of the Property Rights Ombudsman nor a neutral third party rendering an advisory opinion under Section 13-43-205 or 13-43-206, may be compelled to testify in a civil action filed concerning the subject matter of any review, mediation, or arbitration by, or arranged through, the office.

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(4) (a) Except as provided in Subsection (4)(b), evidence of a review by the Office of the Property Rights Ombudsman and the opinions, writings, findings, and determinations of the Office of the Property Rights Ombudsman are not admissible as evidence in a judicial action.

(b) Subsection (4)(a) does not apply to:

(i) actions brought under authority of Title 78A, Chapter 8, Small Claims Courts;

(ii) a judicial confirmation or review of the arbitration itself as authorized in Title 78B, Chapter 11, Utah Uniform Arbitration Act;

(iii) actions for de novo review of an arbitration award or issue brought under the authority of Subsection 13-43-204(3)(a)(i); or

(iv) advisory opinions provided for in Sections 13-43-205 and 13-43-206.

Section 2. Section 13-43-205 is amended to read:

13-43-205. Advisory opinion.

(1) A local government or a potentially aggrieved person may, in accordance with Section 13-43-206, request a written advisory opinion:

[+] (a) from a neutral third party to determine compliance with:

[+] (i) Section 10-9a-505.5 and Sections 10-9a-507 through 10-9a-511;

[+] (ii) Section 17-27a-505.5 and Sections 17-27a-506 through 17-27a-510; and

[+] (iii) Title 11, Chapter 36a, Impact Fees Act; and

[2] (a) (b) (i) at any time before a final decision on a land use application by a local appeal authority under Section 10-9a-708 or 17-27a-708; or

[b] (ii) at any time before the deadline for filing an appeal with the district court under Section 10-9a-801 or 17-27a-801, if no local appeal authority is designated to hear the issue that is the subject of the request for an advisory opinion.

(2) In accordance with Sections 13-43-206 and 73-3-3, a change applicant or an aggrieved person who protests a change application may request a written advisory opinion to determine whether a court would conclude in a judicial proceeding that a water right subject to the change application has been forfeited or abandoned as a matter of law.

Section 3. Section 13-43-206 is amended to read:

13-43-206. Advisory opinion -- Process.

(1) A request for an advisory opinion under Section 13-43-205 shall be:

(a) filed with the Office of the Property Rights Ombudsman; and

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(b) accompanied by a filing fee of \$150.

(2) The Office of the Property Rights Ombudsman may establish policies providing for partial fee waivers for a person who is financially unable to pay the entire fee.

(3) A person requesting an advisory opinion need not exhaust administrative remedies, including remedies described under Section 10-9a-801 or 17-27a-801, before requesting an advisory opinion.

(4) The Office of the Property Rights Ombudsman shall:

(a) deliver notice of the request to opposing parties indicated in the request;

(b) if the request is made under Subsection 13-43-205(2), deliver notice of the request to the state engineer:

(b) (c) inquire of all parties if there are other necessary parties to the dispute; and

(c) (d) deliver notice to all necessary parties.

(5) If a governmental entity is an opposing party, the Office of the Property Rights Ombudsman shall deliver the request in the manner provided for in Section 63G-7-401.

(6) (a) The Office of the Property Rights Ombudsman shall promptly determine if the parties can agree to a neutral third party to issue an advisory opinion.

(b) If no agreement can be reached within four business days after notice is delivered pursuant to Subsections (4) and (5), the Office of the Property Rights Ombudsman shall appoint a neutral third party to issue an advisory opinion.

(7) All parties that are the subject of the request for advisory opinion shall:

(a) share equally in the cost of the advisory opinion; and

(b) provide financial assurance for payment that the neutral third party requires.

(8) The neutral third party shall comply with the provisions of Section 78B-11-109, and shall promptly:

(a) seek a response from all necessary parties to the issues raised in the request for advisory opinion;

(b) investigate and consider all responses; and

(c) issue a written advisory opinion within 15 business days after the appointment of the neutral third party under Subsection (6)(b), unless:

(i) the parties agree to extend the deadline; or

(ii) the neutral third party determines that the matter is complex and requires additional

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time to render an opinion, which may not exceed 30 calendar days.

(9) An advisory opinion shall include a statement of the facts and law supporting the opinion's conclusions.

(10) (a) Copies of any advisory opinion issued by the Office of the Property Rights Ombudsman shall be delivered as soon as practicable to all necessary parties.

(b) A copy of the advisory opinion shall be delivered to the government entity in the manner provided for in Section 63G-7-401.

(11) An advisory opinion issued by the Office of the Property Rights Ombudsman is not binding on any party ~~[to, nor] or~~ admissible as evidence ~~[in, a dispute involving land use law]~~ except as provided in Subsection (12).

(12) (a) Subject to Subsection (12)(d), if the same issue that is the subject of an advisory opinion is listed as a cause of action in litigation, and that cause of action is litigated on the same facts and circumstances and is resolved consistent with the advisory opinion:

(i) the substantially prevailing party on that cause of action:

(A) may collect reasonable attorney fees and court costs pertaining to the development of that cause of action from the date of the delivery of the advisory opinion to the date of the court's resolution; and

(B) shall be refunded an impact fee held to be in violation of Title 11, Chapter 36a, Impact Fees Act, based on the difference between the impact fee paid and what the impact fee should have been if the government entity had correctly calculated the impact fee; and

(ii) in accordance with Subsection (12)(b), a government entity shall refund an impact fee held to be in violation of Title 11, Chapter 36a, Impact Fees Act, to the person who was in record title of the property on the day on which the impact fee for the property was paid if:

(A) the impact fee was paid on or after the day on which the advisory opinion on the impact fee was issued but before the day on which the final court ruling on the impact fee is issued; and

(B) the person described in Subsection (12)(a)(ii) requests the impact fee refund from the government entity within 30 days after the day on which the court issued the final ruling on the impact fee.

(b) A government entity subject to Subsection (12)(a)(ii) shall refund the impact fee based on the difference between the impact fee paid and what the impact fee should have been

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if the government entity had correctly calculated the impact fee.

(c) Nothing in this Subsection (12) is intended to create ~~any~~a new cause of action ~~under land use law~~.

(d) Subsection (12)(a) does not apply unless the resolution described in Subsection (12)(a) is final.

(13) ~~Unless~~ Except as provided in Section 73-3-3, or unless filed by the local government, a request for an advisory opinion under Section 13-43-205 does not stay the progress of a land use application ~~, or the effect of a land use decision~~ or otherwise limit the progress of the underlying controversy.

Section ~~(f)~~4. Section **73-2-27** is amended to read:

73-2-27. Criminal penalties.

(1) This section applies to offenses committed under:

(a) Section 73-1-14;

(b) Section 73-1-15;

(c) Section 73-2-20;

~~(d) Subsection (f) 73-3-3(9);~~

~~(e) 73-3-3(18)(d);~~

~~(e)~~ Section 73-3-26;

~~(f)~~ ~~(e)~~ Section 73-3-29;

~~(g)~~ ~~(f)~~ Section 73-5-9;

~~(h)~~ ~~(g)~~ Section 76-10-201;

~~(i)~~ ~~(h)~~ Section 76-10-202; and

~~(j)~~ ~~(i)~~ Section 76-10-203.

(2) Under circumstances not amounting to an offense with a greater penalty under Subsection 76-6-106(2)(b)(ii) or Section 76-6-404, violation of a provision listed in Subsection (1) is punishable:

(a) as a felony of the third degree if:

(i) the value of the water diverted or property damaged or taken is \$2,500 or greater;

and

(ii) the person violating the provision has previously been convicted of violating the same provision;

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(b) as a class A misdemeanor if:

(i) the value of the water diverted or property damaged or taken is \$2,500 or greater; or

(ii) the person violating the provision has previously been convicted of violating the

same provision; or

(c) as a class B misdemeanor if Subsection (2)(a) or (b) does not apply.

Section ~~{2}~~5. Section 73-3-3 is amended to read:

73-3-3. Permanent or temporary changes to ~~{a}~~the use of water~~{right}~~.

(1) For purposes of this section:

(a) (i) "Change applicant" means any of the following who seek to make a permanent or temporary change under Subsection (2)(a):

(A) the record title owner of a perfected water right;

(B) the holder of an approved but unperfected application to appropriate water;

(C) a shareholder in a water company;

(D) a person who has written authorization from a person described in Subsection

(1)(a)(i)(A), (B), or (C) to file a change application on that person's behalf; or

(E) a person who submits a change application described in Subsection (2)(c).

(ii) "Change applicant" does not include a person who holds only a contract or leasehold interest in a water right.

~~[(a)]~~ (b) "Permanent change" means a change ~~{}~~ for an indefinite period of time ~~[with an intent to relinquish the original point of diversion, place of use, or purpose of use.]~~ {, for an indefinite period of time, } to the:

(i) point of diversion;

(ii) place of use;

(iii) period of use;

(iv) nature of use for which the water is currently appropriated; or

(v) addition or deletion of storage as an authorized use.

(c) "Quantity of water available for change" means the amount of water described in Subsection (5).

~~[(b)]~~ (d) "Temporary change" means a change for a fixed period of time, not exceeding one year~~[-]~~, to the:

~~[(2)(a) Subject to Subsection (2)(c), a person entitled to the use of water may make~~

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~~permanent or temporary changes in the:]~~

~~[(i) point of diversion;]~~

~~[(ii) place of use; or]~~

~~[(iii) purpose of use for which the water was originally appropriated:]~~

(i) point of diversion;

(ii) place of use;

(iii) period of use;

(iv) nature of use for which the water is currently appropriated; or

(v) addition or deletion of storage as an authorized use.

~~{ (c) "Change applicant" means:~~

~~— (i) the holder of an approved but unperfected application to appropriate water;~~

~~— (ii) the record owner of a perfected water right;~~

~~— (iii) a person who has written authorization from a person described in Subsection (1)(c)(i) or (ii) to file a change application on that person's behalf; or~~

~~— (iv) a shareholder in a water company who files a change application in accordance with Section 73-3-3.5.~~

~~— (d) "Quantity of water available for change" means the quantity of water, under a water right, that has been put to beneficial use within the time provided in Section 73-1-4.~~

~~‡ (2) (a) A person may not make a permanent or temporary change to a water right or an approved application to appropriate water, including a water right or an approved application to appropriate water involved in a general determination of rights or other suit, unless the person:~~

~~(i) is a change applicant; and~~

~~(ii) makes the change in accordance with this section.~~

~~(b) Except as provided by Section 73-3-30, a change may not be made if it impairs a vested water right without just compensation.~~

~~(c) A change application on a federal reclamation project water right or a Division of Water Resources project water right shall be signed by:~~

~~[(i) the local water users organization that is contractually responsible for:]~~

~~(i) the person who is contractually responsible for:~~

~~(A) the operation and maintenance of the project; or~~

~~(B) the repayment of project costs; and~~

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(ii) the record owner of the water right.

~~[(3) A person entitled to use water shall change a point of diversion, place of use, or purpose of water use, including water involved in a general adjudication or other suit, in the manner provided in this section.]~~

~~[(4)(a) A person entitled to use water may not make a change unless the state engineer approves the change application.]~~

~~(d) {(i) Subject to Subsection (2)(d)(ii), in} A shareholder in a water company who seeks to make a permanent or temporary change to a water right held in title by the water company shall file a change application {proceeding relating to a water right, to prevent impairing other water rights, the state engineer may review the beneficial use of the water under the water right and determine the quantity of water available for change.~~

~~—— (ii) In reviewing the beneficial use of the water under} in accordance with Section 73-3-3.5.~~

~~(e) Except as provided in Subsection (2)~~(d)(i), the state engineer shall, if the water right is exempted or protected under Section 73-1-4 or other law, consider the water reasonably applied to beneficial use.~~~~

~~—— (c) (i) In reviewing the beneficial use of water and determining the quantity of water available for change under Subsection (2)(d)(i), the state engineer shall:~~

~~—— (A) presume that the quantity of water available for change is the full amount of water available under the water right, unless the presumption is rebutted by clear and convincing evidence that demonstrates that a smaller quantity of water is available for change;~~

~~—— (B) if the state engineer or a protestant to the application questions the quantity of water available for change, conduct an administrative hearing where the change applicant and a protestant may present evidence regarding the quantity of water available for change; and~~

~~—— (C) if the state engineer determines that the quantity of water available for change is less than the amount of water required by the change application, state the factual basis for the determination.~~

~~—— (ii) If the state engineer determines that the quantity of water available for change is less than the amount of water required by the change application, the state engineer may:~~

~~—— (A) reject the change application; or~~

~~—— (B) limit approval of the change application to the quantity of water available for~~

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change:

~~_____ (iii) The state engineer's determination of the quantity of water available for change does not:~~

~~_____ (A) constitute a forfeiture or abandonment;~~

~~_____ (B) affect the use of the unapproved portion of the underlying water right; or~~

~~_____ (C) constitute an adjudication of the underlying water right.~~

~~_____ (f) (i) Before the state engineer makes a decision on a change application, the change applicant may:~~

~~_____ (A) withdraw the change application; or~~

~~_____ (B) request that the state engineer stay the proceedings on the} f), a water company may not file a change application for {up to two years after the day on which the applicant requests the stay, or, if the state engineer finds good cause, for more than two years.~~

~~_____ (ii) (A) A change applicant who desires to resume proceedings stayed under Subsection (2)(f)(i)(B) shall file with the state engineer a written request to resume the proceedings.~~

~~_____ (B) If the state engineer stays the proceedings of} a change of use, including a change that facilitates the sale of a water right or a lease of water, if the change would deprive an existing shareholder of the shareholder's use of water or water right.~~

(f) A water company may file a change application {under Subsection (2)(f)(i)(B) and the applicant does not resume the proceedings within the time limit of the stay, the state engineer shall consider the application withdrawn} that deprives an existing shareholder of the shareholder's use of water or water right if the water company:

(i) allows the shareholders in the water company to choose whether to participate in the proposed change and its corresponding benefits and burdens; and

(ii) adopts a reallocation formula that distributes the benefits proportionally among participating shareholders as follows:

(A) for a temporary change, the formula makes a corresponding adjustment to water delivery to participants during the season; or

(B) for a permanent change, the formula makes a corresponding adjustment in the ownership interests of the remaining water rights of the water company among the participating and nonparticipating shareholders.

(3) (a) A change applicant who files a change application with the state engineer may

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not make the permanent or temporary change requested in the application unless, and only to the extent that, the state engineer approves the change application.

(b) A ~~[person entitled to use water]~~ change applicant shall submit a change application, upon forms furnished by the state engineer ~~[and shall set forth]~~, that includes:

- (i) the change applicant's name;
- (ii) the water right description, including the water right number;
- (iii) the water quantity;
- (iv) the stream or water source;
- (v) if applicable, the point on the stream or water source where the water is diverted;
- (vi) if applicable, the point to which it is proposed to change the diversion of the water;
- (vii) the place, ~~[purpose {,}]~~ nature, period, and extent of the ~~[present]~~ current use;
- (viii) the place, ~~[purpose {,}]~~ nature, period, and extent of the proposed use; ~~{and~~
~~(ix)} [and]~~

(ix) if the change applicant is submitting a change application in accordance with Section 73-3-3.5, the information required by Section 73-3-3.5; and

~~[(ix)]~~ (x) any other information that the state engineer requires.

~~[(5)(a) The state engineer shall follow the same procedures, and the rights and duties of the applicants with respect to applications for permanent changes of point of diversion, place of use, or purpose of use shall be the same, as provided in this title for applications to appropriate water.]~~

(4)(a) With respect to a change application for a permanent change:

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

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

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

(5)(a) Except as provided in Subsection (5)(b) or (c), the quantity of water available for change is the full amount of the water right requested in the change application.

(b) If under Subsection (6) a settlement agreement or court order determines that all or part of a water right has been abandoned or forfeited, the quantity of water available for change

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is the full amount of the water right requested in the change application less the amount abandoned or forfeited in the settlement agreement or court order.

(c) If the change applicant and all protestants to the change application who have asserted issues of forfeiture or abandonment and are aggrieved persons agree in writing to submit to a determination made by the state engineer in accordance with Subsections (14) and (15), the quantity of water available for change is the amount determined by the state engineer in accordance with Subsections (14) and (15).

(6) An aggrieved person who protests the amount of water requested in a change application may:

(a) stay the change application process while the person:

(i) (A) requests an advisory opinion in accordance with Subsection (7), if the person requests the advisory opinion within 120 days after the last day on which the state engineer publishes notice of the change application; and

(B) diligently pursues the advisory opinion; or

(ii) pursues an action in a court of competent jurisdiction alleging that the underlying right has been wholly or partially forfeited or abandoned, if the person:

(A) files the action within 120 days after the last day on which the state engineer published notice of the change application;

(B) mails notice of the stay to the state engineer; and

(C) settles the action or diligently pursues the action to its conclusion; or

(b) agree in writing with the change applicant to allow the state engineer to determine the quantity of water available for change under Subsections (14) and (15).

(7) If an aggrieved person protests a change application, the change applicant or the protestant may stay the change application process and toll the filing time described in Subsection (6)(a)(ii)(A) by requesting an advisory opinion under Subsection 13-43-205(2) before filing an action under Subsection (6)(a)(ii)(A).

(8) A request for an advisory opinion in accordance with Subsection (7) tolls a filing time described in Subsection (6)(a)(ii)(A) until 30 days after the day on which:

(a) the advisory opinion is issued; or

(b) the participants have submitted a written request to withdraw the request for the advisory opinion.

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(9) (a) Within 10 days after the day on which the state engineer receives the notice of the stay described in Subsection 13-43-206(4)(b), the state engineer shall submit to the Office of the Property Rights Ombudsman, for distribution to the parties, copies of all records of beneficial use, nonuse, and permission for nonuse related to the underlying water right of the change application.

(b) The records described in Subsection (9)(a) may not include the state engineer's conclusory remarks.

(10) A person may not bring a forfeiture or abandonment action against a water right that is the subject of a pending change application unless the person protested the change application and files the action in accordance with Subsection (6).

(11) Within 70 days after the last day on which a person may file a protest to a change application under Subsection 73-3-7(1)(a), 60 days after the last day on which a person may file a protest to a change application under Subsection 73-3-7(1)(b), or 10 days after the last day on which a person may file a protest to a change application under Subsection 73-3-7(1)(c), the state engineer shall deliver or make available to the change applicant and each protestant all existing evidence from the state engineer's records regarding:

(a) beneficial use of the underlying water right;

(b) lack of beneficial use of the underlying water right; and

(c) all approved nonuse applications.

(12) In an action filed under Subsection (6)(a)(ii)(A) or for an advisory opinion requested under Subsection (7):

(a) the person who protests the quantity of water available for change shall bear the burden of proof to show that the underlying water right has been fully or partially abandoned or forfeited; and

(b) the state engineer may not be included as a party.

(13) If the change application procedure is stayed under Subsection (6) for a change application, when the parties make a settlement agreement or the court issues a final order, the state engineer shall complete the change application procedure under 73-3-3 and 73-3-8 using the quantity of water available for change.

(14) (a) If the change applicant and all protestants to the change application who are aggrieved persons agree in writing to allow the state engineer to determine the quantity of

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water available for change under a change application, the state engineer shall review the beneficial use of the water under the water right and determine the quantity of water available for change.

(b) In reviewing the beneficial use of the water under Subsection (14)(a), the state engineer shall, if the water right is exempted or protected under Section 73-1-4 or other law, consider the water reasonably applied to beneficial use.

(15) (a) In reviewing the beneficial use of water and determining the quantity of water available for change under Subsection (14)(a), the state engineer shall:

(i) presume that the full amount of water indicated in the water right is available for the change, unless the presumption is rebutted by clear and convincing evidence that demonstrates that a smaller quantity of water is available for the change;

(ii) if the state engineer or a protestant to the change application questions the quantity of water available for change, conduct an administrative hearing where the change applicant and any protestant may present evidence regarding the quantity of water available for change; and

(iii) if the state engineer determines that the quantity of water available for change is less than the amount of water requested in the change application, state the factual basis for the determination.

(b) If the state engineer determines that the quantity of water available for change is less than the amount of water requested in the change application, the state engineer may:

(i) reject the change application; or

(ii) limit approval of the change application to the quantity of water available for change.

(c) The state engineer's determination of the quantity of water available for change does not:

(i) constitute a forfeiture or abandonment of the unapproved portion of the underlying water right;

(ii) prohibit the use of the unapproved portion of the underlying water right; or

(iii) constitute an adjudication of the underlying water right.

(16) (a) After September 1, 2013, a change applicant who files a change application may obtain finality for nonuse issues in accordance with this Subsection (16) if:

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(i) the change applicant requests finality for nonuse issues in the change application;

(ii) the change applicant allows for the 90-day protest period described in Subsection 73-3-7(1)(c);

(iii) the water right requested to be changed in the application is not:

(A) a diligence claim that has not previously been recognized by the issuance of a certificate of beneficial use or a judicial decree; or

(B) a water user's claim that has not previously been recognized in a proposed determination, a judicial decree, or by the issuance of a certificate of beneficial use; and

(iv) the finality of the change application supports a perpetual and inalienable dedication of the water right to the public water supply.

(b) A change application becomes final as to the application's nonuse issues when:

(i) the time period for a protest described in Subsection 73-3-7(1)(c) passes; and

(ii) the state engineer approves the change application.

(c) An approved change application that is final for nonuse issues as described in Subsection (16)(b), is not subject to a claim of abandonment or forfeiture for a period of nonuse that occurred before the day on which the state engineer approves the change application.

(d) (i) A person may register with the state engineer to receive notice of all change applications that request finality.

(ii) The state engineer shall, at the time of publication of notice under Section 73-3-6, provide electronic notice of a change application that requests finality to a person who registers to receive notice under Subsection (16)(d)(i).

~~[(6)]~~ ~~(15)~~ (17) (a) The state engineer shall investigate all temporary change applications.

~~[(b) If the state engineer finds that the temporary change will not impair a vested water right, the state engineer shall issue an order authorizing the change.]~~

~~[(c) If the state engineer finds that the change sought might impair a vested water right, before authorizing the change, the state engineer shall give notice of the application to any person whose right may be affected by the change.]~~

~~[(d) Before making an investigation or giving notice, the state engineer may require the applicant to deposit a sum of money sufficient to pay the expenses of the investigation and publication of notice.]~~

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(b) The state engineer shall issue an order authorizing a temporary change if the state engineer finds that the temporary change

~~— (i) will not exceed the quantity of water available for the change; and~~

~~— (ii) } does not impair a vested water right.~~

(c) The state engineer may deny a temporary change application if the state engineer finds that the temporary change

~~— (i) } will } exceed the quantity of water available for the change; or~~

~~— (ii) would } impair a vested water right.~~

~~[(7) (6) 18]~~ (a) Except as provided by Section 73-3-30, the state engineer may not reject a permanent or temporary change application for the sole reason that the change would impair a vested water right.

(b) If otherwise proper, where interference with another water right has been demonstrated, ~~the~~ state engineer may approve a permanent or temporary change application ~~[for part of the water involved or]~~ upon the condition that the change applicant:

(i) acquire the conflicting water right; or

(ii) otherwise mitigate the interference.

~~[(8) (a) A person holding an approved application for the appropriation of water may change the point of diversion, place of use, or purpose of use.]~~

~~[(b) (7)]~~ A change of an approved application does not:

~~{to appropriate water}~~ (19) An approved change application does not:

~~[(i)]~~ (a) affect the priority of the original [application] ~~{to appropriate }~~ water right; or

~~[(ii)]~~ (b) extend the time period within which the construction of work is to begin or be completed.

~~[(9) (8)]~~ Any person who ~~{}~~ changes or who attempts to change a point of diversion, place of use, or purpose of use, either permanently or temporarily, without first applying to the state engineer in the manner provided in this section ~~{}~~ makes a permanent or temporary change before obtaining an approved change application under this section:

~~— };~~

[(a) obtains no right];

[(b) is guilty of a crime punishable under Section 73-2-27 if the change or attempted change is made knowingly or intentionally; and]

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~~[(c) is guilty of a separately punishable offense for each day of the unlawful change.]~~

(20) A person who makes a permanent or temporary change before obtaining an approved change application under this section obtains no additional right by the change.

~~[(10)]~~ ~~(19)~~ (21) (a) This section does not apply to the replacement of an existing well by a new well drilled within a radius of 150 feet from the point of diversion of the existing well.

(b) Any replacement well must be drilled in accordance with the requirements of Section 73-3-28.

Section 6. Section 73-3-3.5 is amended to read:

73-3-3.5. Application by a shareholder for a permanent or temporary change ~~{of point of diversion, place of use, or purpose of}~~ to the use of water in a water company ~~{made by a shareholder}~~.

(1) As used in this section:

(a) "Shareholder" means the owner of a share of stock, or other evidence of stock ownership, that entitles the person to a proportionate share of water in a water company.

(b) "Water company" means any company, operating for profit or not for profit, ~~[in which]~~ where a shareholder has the right to receive a proportionate share, based on that shareholder's ownership interest, of water delivered by the company.

~~[(2) A shareholder who seeks to change the point of diversion, place of use, or purpose of use of the shareholder's proportionate share of water in the water company shall submit a request for the change, in writing, to the water company. This request shall include the following information:]~~

~~[(a) the details of the requested change, which may include the point of diversion, period of use, place, or nature of use;]~~

~~[(b) the quantity of water sought to be changed;]~~

~~[(c)]~~

(2) (a) A shareholder who files a change application under Section 73-3-3 to make a change to the shareholder's share of water in a water company shall:

(i) submit the proposed change application to the water company before the shareholder files the change application with the state engineer; and

(ii) include as part of the change application filed with the state engineer:

(A) the water company's response to the shareholder's proposed change application; or

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(B) an affidavit of the shareholder documenting the water company's failure to respond to the shareholder's notice of a proposed change application within the time period described in Subsection (3)(a), including the extension if applicable.

(b) In addition to the information required under Section 73-3-3, the proposed change application shall include:

~~(c)~~ (i) the certificate number of the shareholder's stock affected by the change;

~~(d)~~ (ii) a description of the land proposed to be retired from irrigation [pursuant to] in accordance with Section 73-3-3, if the proposed change in place or nature of use of the water involves a situation where the water was previously used for irrigation;

~~(e)~~ (iii) an agreement by the shareholder to:

(A) continue to pay all applicable corporate assessments on the share affected by the change; ~~and~~

~~—~~ (f) any; and or

(B) prepay an amount, specified in the agreement, that includes outstanding indebtedness assessable to the shares being changed and a fully capitalized amount of operation and maintenance assessment, with credit given to the shareholder for cost savings to the company; and

~~(f) any~~ (iv) other information that the water company may reasonably need to evaluate the requested review the proposed change application.

~~(3)(a)~~ A water company shall make a decision and provide written notice of that decision on a shareholder's request for a change application within 120 days from receipt of the request.

~~(b)~~ Based on the facts and circumstances of each proposed change, a water company may take the following action:

~~(i)~~ approve the change request;

~~(ii)~~ approve the change request with conditions; or

~~(iii)~~ deny the change request.

~~(c)~~ If the water company fails to respond to a shareholder's request for a change application, pursuant to Subsection (3)(a), the failure to respond shall be considered to be a denial of the request.

~~(d)~~ The water company may not withhold approval if any potential damage, liability,

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or impairment to the water company, or its shareholders, can be reasonably mitigated without cost to the water company.]

~~[(e) A water company may consider the following factors in evaluating change applications:~~

~~— (i) any];~~

(3) (a) Except as provided in Subsection (3)(a)(i), a water company shall respond to a shareholder's proposed change application within 60 days after the day on which the water company receives the shareholder's proposed change application.

(i) If a water company requires additional time to respond to the shareholder's proposed change application, the water company may, upon giving written notice to the shareholder within the time period described in Subsection (3)(a), add 30 days to the time period described in Subsection (3)(a).

(ii) A water company's failure to respond to a shareholder's proposed change application within the time period described in Subsection (3)(a), including the extension if applicable, constitutes consent by the water company to the proposed change.

(b) The water company's response to the shareholder's proposed change application shall be in writing and shall:

(i) consent to a proposed change;

(ii) consent to a proposed change subject to certain conditions described by the water company; or

(iii) oppose a proposed change, describing the reasons the water company opposes the change.

(c) In reviewing a shareholder's proposed change application, a water company may consider:

(i) ~~[any]~~ whether an increased cost to the water company or its shareholders results from the proposed change;

(ii) ~~[interference]~~ whether the change will interfere with the water company's ability to manage and distribute water for the benefit of all shareholders;

(iii) whether the proposed change represents more water than the shareholder's ~~[pro rata]~~ proportionate share of the water company's right;

(iv) ~~[impairment of either]~~ whether the change will impair the quantity or quality of

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water delivered to other shareholders under the existing water rights of the water company, including rights to carrier water;

(v) whether the proposed change ~~[would cause a violation of any]~~ violates a statute, ordinance, regulation, or order of a court or ~~[governmental]~~ government agency; or

~~[(vi) whether the shareholder has or can arrange for the beneficial use of water to be retired from irrigation within the water company's service under the proposed change; or]~~

~~[(vii)]~~ (vi) the cumulative effects that the approval of the change application may have on other shareholders or water company operations.

~~{(4) The}~~ (4) (a) The state engineer shall evaluate a shareholder's change application in the same manner used to evaluate a change application submitted under Section 73-3-3, using:

(i) the criteria described in Section 73-3-8;

(ii) the considerations described in Subsection (3)(c); and

(iii) the water company's response to the shareholder's proposed change application.

(b) Nothing in this section limits the authority of the state engineer in evaluating and processing a change application, including the authority to allow a shareholder or water company to submit additional relevant information, if the state engineer allows adequate time and opportunity for the other party to respond.

(c) The state engineer may not withhold approval of a change application under this section based on potential damage, liability, or impairment to the water company ~~{may require that all}~~ or its shareholders if the potential damage, liability, or impairment can be reasonably mitigated without cost to the water company.

~~[(4)]~~ (5) The [water company] state engineer may require [that all] a shareholder to pay the water company's reasonable costs associated with the shareholder's change application[- including costs of submitting proof, be paid by the shareholder {

~~— (5) (a) The}~~].

~~[(5) (a) The]~~ (6) For the shares listed in the change application, the state engineer shall require that the shareholder requesting the change [must]:

(a) be current on all water company assessments; and [agree to]

(b) (i) continue to pay all reasonably applicable future assessments[- except that the shareholder may choose to prepay any portion of the water company assessments attributable to an existing debt of the water company.] or fees, with credit given to the shareholder for cost

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savings to the company; or

~~[(b) Other than prepaid assessments, the water company may require that the shareholder continue to pay all applicable assessments.]~~

~~[(6) If the water company approves the requested change, with or without conditions, the change application may be filed with the state engineer, and must:]~~

~~[(a) be signed on behalf of the water company; or]~~

~~[(b) be accompanied by written authorization from the water company assenting to the change.]~~

~~[(7)(a) The state engineer may evaluate a change application authorized by a water company under this section in the same manner and using the same criteria that he or she uses to evaluate any other change application.]~~

~~[(b) Nothing in this section shall limit the authority of the state engineer in evaluating and processing any change application.]~~

~~[(8) If an application authorized by a water company under this section is approved by the state engineer, the shareholder may file requests for extensions of time to submit proof of beneficial use under the change application without further permission of the water company.]~~

~~—(9)]~~

(ii) if the shareholder chooses, negotiate and prepay an amount that includes:

(A) outstanding indebtedness assessable to the shares being changed; and

(B) a fully capitalized amount of operation and maintenance assessments, with credit given to the shareholder for cost savings to the company.

(7) (a) In accordance with Section 73-3-7, a water company may protest a change application filed by a shareholder only if:

(i) the change application filed by the shareholder is inconsistent with the consent given by the water company under Subsection (3)(b)(i) or (ii); or

(ii) the water company opposed the change application under Subsection (3)(b)(iii).

(b) If a water company files a protest under Subsection (7)(a), the state engineer may:

(i) upon request of the water company or the shareholder, refer the water company and shareholder to mediation;

(ii) require that, before the state engineer makes an order in the adjudicative proceeding, the water company and shareholder mediate the dispute; or

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(iii) if the state engineer finds that a legal issue exists in the adjudicative proceeding that is appropriate for the courts to determine, require that the water company and the shareholder obtain a ruling from a district court on the issue before the state engineer continues with the adjudicative proceeding.

~~[(9)] (8)~~ (a) Change applications approved under this section are subject to all ~~{conditions imposed by}~~ written conditions relating to the change application, including conditions:

(i) imposed by [the water company and] the state engineer[-]; and

(ii) agreed upon between the water company and the {state engineer.} shareholder if the conditions are consistent with the conditions described in Subsection (8)(a)(i).

(b) If a shareholder fails to comply with all of the conditions imposed by the water company, the water company may, after written notice to the shareholder and after allowing reasonable time to remedy the failure, withdraw its ~~[approval]~~ consent of the application, and petition the state engineer for an order canceling the change application.

(c) The water company may not revoke its ~~[approval]~~ consent of the change application or seek an order canceling the application if the conditions are substantially satisfied.

~~[(10)] (9)~~ (a) The shareholder requesting the change shall have a cause of action, including an award of actual damages incurred, against the water company if the water company:

(i) unreasonably withholds ~~[approval]~~ consent of a ~~[requested]~~ proposed change;

(ii) imposes unreasonable conditions in its ~~[approval]~~ response; or

(iii) unreasonably withdraws ~~[approval of]~~ consent to a change application ~~[in a manner other than as provided in Subsection (9)].~~

(b) The action referred to in Subsection ~~[(10)] (9)~~(a) shall be referred to mediation by the court under Title 78B, Chapter 6, Part 2, Alternative Dispute Resolution Act, unless both parties decline mediation.

(c) If mediation is declined, the prevailing party to the action shall be entitled to costs and reasonable attorney fees.

Section 7. Section 73-3-7 is amended to read:

73-3-7. Protests.

(1) Any person interested may file a protest with the state engineer:

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(a) within 20 days after the day on which notice is published, if the adjudicative proceeding is informal; ~~[and]~~

(b) within 30 days after the day on which notice is published, if the adjudicative proceeding is formal~~[-]; or~~

~~[(2) The state engineer shall consider the protest and shall approve or reject the application.]~~

(c) for a change application where the change applicant has requested finality under Subsection 73-3-3(16), within 90 days after the day on which the notice is published.

(2) Subject to the requirements of Title 73, Water and Irrigation, the state engineer shall:

(a) consider the protest; and

(b) approve or reject the application.

Section ~~{3}~~8. Section 73-3-8 is amended to read:

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

(1) (a) ~~[It shall be the duty of the]~~ The state engineer [to] shall approve an application to appropriate water, or a permanent change application, if:

(i) there is unappropriated water in the proposed source;

(ii) subject to Section 73-1-4, for a permanent change application described in Section 73-3-3, the proposed use [will not impair existing rights or interfere with the more beneficial use of the water] is based on the quantity of water ~~{that has been placed to beneficial use under a water right}~~ available for change, as defined in Section 73-3-3;

(iii) the proposed use will not impair an existing water right or interfere with a more beneficial use of the water;

~~[(iii)]~~ (iv) the proposed plan is physically and economically feasible, unless the application is filed by the United States Bureau of Reclamation, and would not prove detrimental to the public welfare;

~~[(iv)]~~ (v) the applicant has the financial ability to complete the proposed works; and

~~[(v)]~~ (vi) the application was filed in good faith and not for purposes of speculation or monopoly.

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(b) (i) If the state engineer, because of information in the state engineer's possession obtained either by the state engineer's own investigation or otherwise, has reason to believe that an application to appropriate water or a change application will interfere with [its] the water's more beneficial use for municipal, industrial, irrigation, domestic or culinary, stock watering, power or mining development, or manufacturing, or will unreasonably affect public recreation or the natural stream environment, or will prove detrimental to the public welfare, it is the state engineer's duty to withhold approval or rejection of the application until the state engineer has investigated the matter.

(ii) If an application does not meet the requirements of this section, ~~it shall be rejected.~~ the state engineer shall:

(A) reject the application; and

(B) in writing, state each reason for the rejection.

(2) (a) An application to appropriate water for industrial, power, mining development, manufacturing purposes, agriculture, or municipal purposes may be approved for a specific and certain period from the time the water is placed to beneficial use under the application, but in no event may an application be granted for a period of time less than that ordinarily needed to satisfy the essential and primary purpose of the application or until the water is no longer available as determined by the state engineer.

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

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

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

(i) the essential purpose of the original application has not been satisfied;

(ii) the need for an extension is not the result of any default or neglect by the applicant;

and

(iii) the water is still available.

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

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

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

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

Section ~~41~~9. Section **73-3-30** is amended to read:

73-3-30. Change application for an instream flow.

(1) As used in this section:

(a) "Division" means the Division of Wildlife Resources, created in Section 23-14-1, or the Division of Parks and Recreation, created in Section 79-4-201.

(b) "Fishing group" means an organization that:

(i) is exempt from taxation under Section 501(c)(3), Internal Revenue Code; and

(ii) promotes fishing opportunities in the state.

(c) "Fixed time change" means a change in a water right's point of diversion, place of use, or purpose of use for a fixed period of time longer than one year but not longer than 10 years.

(2) (a) A division may file a permanent or temporary change application, as provided by Section 73-3-3, for the purpose of providing water for an instream flow, within a specified section of a natural or altered stream channel, necessary within the state for:

(i) the propagation of fish;

(ii) public recreation; or

(iii) the reasonable preservation or enhancement of the natural stream environment.

(b) A division may file a change application on:

(i) a perfected water right:

(A) presently owned by the division;

(B) purchased by the division for the purpose of providing water for an instream flow, through funding provided for that purpose by legislative appropriation; or

(C) acquired by lease, agreement, gift, exchange, or contribution; or

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(ii) an appurtenant water right acquired with the acquisition of real property by the division.

(c) A division may:

(i) purchase a water right for the purposes provided in Subsection (2)(a) only with funds specifically appropriated by the Legislature for water rights purchases; or

(ii) accept a donated water right without legislative approval.

(d) A division may not acquire water rights by eminent domain for an instream flow or for any other purpose.

(3) (a) A fishing group may file a fixed time change application on a perfected, consumptive water right for the purpose of providing water for an instream flow, within a specified section of a natural or altered stream channel, to protect or restore habitat for three native trout:

(i) the Bonneville cutthroat;

(ii) the Colorado River cutthroat; or

(iii) the Yellowstone cutthroat.

(b) Before filing an application authorized by Subsection (3)(a) to change a shareholder's proportionate share of water, the water company shall submit the ~~decision to approve or deny the change request~~ proposed application and response required by Subsection 73-3-3.5(3) to a vote of the shareholders:

(i) in a manner outlined in the water company's articles of incorporation or bylaws;

(ii) at an annual or regular meeting described in Section 16-6a-701; or

(iii) at a special meeting convened under Section 16-6a-702.

(c) The specified section of the natural or altered stream channel for the instream flow may not be further upstream than the water right's original point of diversion nor extend further downstream than the next physical point of diversion made by another person.

(d) (i) The fishing group shall receive the Division of Wildlife Resources' director's approval of the proposed change before filing the fixed time change application with the state engineer.

(ii) The director may approve the proposed change if:

(A) the specified section of the stream channel is historic or current habitat for a specie listed in Subsections (3)(a)(i) through (iii);

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(B) the proposed purpose of use is consistent with an existing state management or recovery plan for that specie; and

(C) the water right owner has received a certificate of inclusion from a person who has:

(I) entered into a programmatic Candidate Conservation Agreement with Assurances with the United States Fish and Wildlife Service, as authorized by 16 U.S.C. Sec. 1531(a)(5) and 1536(a)(1); and

(II) obtained an enhancement of survival permit, as authorized by 16 U.S.C. Sec. 1539(a)(1)(A).

(iii) The director may disapprove the proposed change if the proposed change would not be in the public's interest.

(e) (i) In considering a fixed time change application, the state engineer shall follow the same procedures as provided in this title for an application to appropriate water.

(ii) The rights and the duties of a fixed time change applicant are the same as provided in this title for an applicant to appropriate water.

(f) A fishing group may refile a fixed time change application by filing a written request with the state engineer no later than 60 days before the application expires.

(g) (i) The water right for which the state engineer has approved a fixed time change application will automatically revert to the point of diversion and place and purpose of use that existed before the approved fixed time change application when the fixed time change application expires or is terminated.

(ii) The applicant shall give written notice to the state engineer and the lessor, if applicable, if the applicant wishes to terminate a fixed time change application before the fixed time change application expires.

(4) In addition to the requirements of ~~Subsection (f)~~ Section 73-3-3 ~~(4)(b)~~ 73-3-3(3)(b), an application authorized by this section shall:

(a) set forth the legal description of the points on the stream channel between which the instream flow will be provided by the change application; and

(b) include appropriate studies, reports, or other information required by the state engineer demonstrating the necessity for the instream flow in the specified section of the stream and the projected benefits to the public resulting from the change.

(5) (a) For a permanent change application or a fixed time change application filed

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according to this section, 60 days before the date on which proof of change for an instream flow is due, the state engineer shall notify the applicant by mail or by any form of communication through which receipt is verifiable of the date when proof of change is due.

(b) Before the date when proof of change is due, the applicant must either:

(i) file a verified statement with the state engineer that the instream flow uses have been perfected, setting forth:

(A) the legal description of the points on the stream channel between which the instream flow is provided;

(B) detailed measurements of the flow of water in second-feet changed;

(C) the period of use; and

(D) any additional information required by the state engineer; or

(ii) apply for a further extension of time as provided for in Section 73-3-12.

(c) (i) Upon acceptance of the verified statement required under Subsection (5)(b)(i), the state engineer shall issue a certificate of change for instream flow use in accordance with Section 73-3-17.

(ii) The certificate expires at the same time the fixed time change application expires.

(6) No person may appropriate unappropriated water under Section 73-3-2 for the purpose of providing an instream flow.

(7) Water used in accordance with this section is considered to be beneficially used, as required by Section 73-3-1.

(8) A physical structure or physical diversion from the stream is not required to implement a change for instream flow use.

(9) This section does not allow enlargement of the water right that the applicant seeks to change.

(10) A change application authorized by this section may not impair a vested water right, including a water right used to generate hydroelectric power.

(11) The state engineer or the water commissioner shall distribute water under an approved or a certificated instream flow change application according to the change application's priority date relative to the other water rights located within the stream section specified in the change application for instream flow.

(12) An approved fixed time change application does not create a right of access across

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private property or allow any infringement of a private property right.

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Legislative Review Note

~~as of 12-6-12 2:21 PM~~

~~Office of Legislative Research and General Counsel}~~