

Senator Ralph Okerlund 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 modifies provisions of Title 13, Chapter 43, Property Rights Ombudsman Act, and requirements of the change application process under Title 73, Water and Irrigation.

Highlighted Provisions:

This bill:

- ▶ defines terms;
- ▶ allows an aggrieved person who protests a change application filed by a municipality to request an advisory opinion through the Office of the Property Rights Ombudsman;
- ▶ requires that a person who applies for a permanent or temporary change to a water right meet certain qualifications;
- ▶ allows the state engineer, upon receiving a change application, to determine the quantity of water that is being beneficially used and limit approval of the change application based on that determination;
- ▶ modifies the procedure for, and requirements relating to, submitting a change application for a municipality; and
- ▶ makes technical changes.

Money Appropriated in this Bill:



26 None

27 **Other Special Clauses:**

28 None

29 **Utah Code Sections Affected:**

30 AMENDS:

31 **13-43-203**, as last amended by Laws of Utah 2008, Chapters 3, 84, and 382

32 **13-43-205**, as last amended by Laws of Utah 2012, Chapter 172

33 **13-43-206**, as last amended by Laws of Utah 2011, Chapter 47

34 **73-2-27**, as enacted by Laws of Utah 2005, Chapter 215

35 **73-3-3**, as last amended by Laws of Utah 2012, Chapter 229

36 **73-3-7**, as last amended by Laws of Utah 1995, Chapter 19

37 **73-3-8**, as last amended by Laws of Utah 2007, Chapter 136

38 **73-3-30**, as last amended by Laws of Utah 2009, Chapter 344

39 ENACTS:

40 **73-3-3.6**, Utah Code Annotated 1953



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

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

44 **13-43-203. Office of the Property Rights Ombudsman -- Duties.**

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

46 (a) develop and maintain expertise in and understanding of takings, eminent domain,

47 [~~and~~] land use law, and water law;

48 (b) assist state agencies and local governments in developing the guidelines required by

49 Title 63L, Chapter 4, Constitutional Taking Issues;

50 (c) at the request of a state agency or local government, assist the state agency or local

51 government, in analyzing actions with potential takings implications or other land use issues;

52 (d) advise real property owners who:

53 (i) have a legitimate potential or actual takings claim against a state or local

54 government entity or have questions about takings, eminent domain, and land use law; or

55 (ii) own a parcel of property that is landlocked, as to the owner's rights and options

56 with respect to obtaining access to a public street;

57 (e) identify state or local government actions that have potential takings implications
58 and, if appropriate, advise those state or local government entities about those implications;
59 and

60 (f) provide information to private citizens, civic groups, government entities, and other
61 interested parties about takings, eminent domain, and land use law and their rights and
62 responsibilities under the takings, eminent domain, or land use laws through seminars and
63 publications, and by other appropriate means.

64 (2) The Office of the Property Rights Ombudsman may not represent private property
65 owners, state agencies, or local governments in court or in adjudicative proceedings under Title
66 63G, Chapter 4, Administrative Procedures Act.

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

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

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

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

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

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

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

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

82 **13-43-205. Advisory opinion.**

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

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

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

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

88 ~~[(c)]~~ (iii) Title 11, Chapter 36a, Impact Fees Act; and
89 ~~[(2)-(a)]~~ (b) (i) at any time before a final decision on a land use application by a local
90 appeal authority under Section 10-9a-708 or 17-27a-708; or

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

94 (2) In accordance with Sections 13-43-206 and 73-3-3.6, the applicant for a municipal
95 change application or an aggrieved person who protests the municipal change application may
96 request a written advisory opinion to determine whether a court would conclude in a judicial
97 proceeding that a water right subject to the municipal change application has been forfeited or
98 abandoned as a matter of law.

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

100 **13-43-206. Advisory opinion -- Process.**

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

- 102 (a) filed with the Office of the Property Rights Ombudsman; and
- 103 (b) accompanied by a filing fee of \$150.

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

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

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

- 110 (a) deliver notice of the request to opposing parties indicated in the request;
- 111 **(b) if the request is made under Subsection 13-43-205(2), deliver notice of the request**
112 **to the state engineer;**

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

114 ~~[(c)]~~ (d) deliver notice to all necessary parties.

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

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

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

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

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

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

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

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

129 (b) investigate and consider all responses; and

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

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

133 (ii) the neutral third party determines that the matter is complex and requires additional
134 time to render an opinion, which may not exceed 30 calendar days.

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

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

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

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

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

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

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

150 court's resolution; and

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

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

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

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

163 (b) A government entity subject to Subsection (12)(a)(ii) shall refund the impact fee
164 based on the difference between the impact fee paid and what the impact fee should have been
165 if the government entity had correctly calculated the impact fee.

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

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

170 (13) ~~[Unless]~~ Except as provided in Section 73-3-3.6, or unless filed by the local
171 government, a request for an advisory opinion under Section 13-43-205 does not stay the
172 progress of a land use application~~[, or the effect of a land use decision]~~ or otherwise limit the
173 progress of the underlying controversy.

174 Section 4. Section **73-2-27** is amended to read:

175 **73-2-27. Criminal penalties.**

176 (1) This section applies to offenses committed under:

177 (a) Section 73-1-14;

178 (b) Section 73-1-15;

179 (c) Section 73-2-20;

180 (d) ~~[Subsection]~~ Section 73-3-3~~(9)~~;

181 (e) Section 73-3-26;

182 (f) Section 73-3-29;

183 (g) Section 73-5-9;

184 (h) Section 76-10-201;

185 (i) Section 76-10-202; and

186 (j) Section 76-10-203.

187 (2) Under circumstances not amounting to an offense with a greater penalty under

188 Subsection 76-6-106(2)(b)(ii) or Section 76-6-404, violation of a provision listed in Subsection

189 (1) is punishable:

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

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

192 and

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

194 same provision;

195 (b) as a class A misdemeanor if:

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

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

198 same provision; or

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

200 Section 5. Section **73-3-3** is amended to read:

201 **73-3-3. Permanent or temporary changes to a water right.**

202 [~~(1) For purposes of this section:~~]

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

205 [~~(b) "Temporary change" means a change for a fixed period of time not exceeding one~~
206 ~~year.]~~

207 [~~(2) (a) Subject to Subsection (2)(c), a person entitled to the use of water may make~~
208 ~~permanent or temporary changes in the:~~]

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

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

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

212 (1) As used in this section:

213 (a) "Change applicant" means any of the following who seek to make a permanent or
214 temporary change:

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

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

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

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

221 (b) "Permanent change" means a change for an indefinite period of time to the:

222 (i) point of diversion;

223 (ii) place of use;

224 (iii) period of use;

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

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

227 (c) "Quantity of water available for change" means:

228 (i) for a municipal change application as defined in Section 73-3-3.6, the amount
229 described in Subsection (2)(g); or

230 (ii) for a change application that is not a municipal change application, subject to
231 Section 73-1-4 and as determined by the state engineer in accordance with Subsections (2)(d),
232 (e), and (f), the amount of water under a water right that has been put to beneficial use within
233 the time provided in Section 73-1-4.

234 (d) "Temporary change" means a change for a fixed period of time, not exceeding one
235 year, to the:

236 (i) point of diversion;

237 (ii) place of use;

238 (iii) period of use;

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

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

241 (2) (a) A person may not make a permanent or temporary change to a water right or an
242 approved application to appropriate water, including a water right or an approved application to

243 appropriate water involved in a general determination of rights or other suit, unless the person:

244 (i) is a change applicant; and

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

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

248 (c) A change application on a federal reclamation project water right shall be signed
249 by:

250 (i) the local water users organization that is contractually responsible for:

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

252 (B) the repayment of project costs; and

253 (ii) the record owner of the water right.

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

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

259 (d) (i) Except as provided in Subsection (2)(d)(ii) or (2)(g), in a change application
260 proceeding relating to a water right, to prevent impairing other water rights, the state engineer
261 may review the beneficial use of the water under the water right and determine the quantity of
262 water available for change.

263 (ii) In reviewing the beneficial use of the water under Subsection (2)(d)(i), the state
264 engineer shall, if the water right is exempted or protected under Section 73-1-4 or other law,
265 consider the water reasonably applied to beneficial use.

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

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

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

274 and

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

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

280 (A) reject the change application; or

281 (B) limit approval of the change application to the quantity of water available for
282 change.

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

285 (A) constitute a forfeiture or abandonment;

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

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

288 (f) (i) Before the state engineer issues a written decision on a change application, the
289 change applicant may:

290 (A) withdraw the change application; or

291 (B) request that the state engineer stay the proceedings on the change application for up
292 to two years after the day on which the applicant requests the stay, or, if the state engineer finds
293 good cause, for more than two years.

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

296 (B) If the state engineer stays the proceedings of a change application under Subsection
297 (2)(f)(i)(B) and the applicant does not resume the proceedings within the time limit of the stay,
298 the state engineer shall consider the application withdrawn.

299 (g) (i) Except as provided in Subsection (2)(g)(ii) or (iii), for a change application filed
300 by a municipality, the quantity of water available for change is the full amount of water
301 requested in the change application.

302 (ii) If under Section 73-3-3.6 a settlement agreement or court order determines that all
303 or part of the water right has been abandoned or forfeited, the quantity of water available for
304 change is the full amount of water requested in the change application less the amount

305 abandoned or forfeited in the settlement agreement or court order.

306 (iii) If the municipality agrees in writing to submit to a determination made by the state
307 engineer in accordance with Subsections (2)(d), (e), and (f), the quantity of water available for
308 change is the amount determined by the state engineer in accordance with Subsections (2)(d),
309 (e), and (f).

310 (3) (a) A change applicant may not make a permanent or temporary change requested
311 in the change application unless, and to the extent that, the state engineer approves the change
312 application.

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

- 315 (i) the change applicant's name;
- 316 (ii) the water right description, including the water right number;
- 317 (iii) the water quantity;
- 318 (iv) the stream or water source;
- 319 (v) if applicable, the point on the stream or water source where the water is diverted;
- 320 (vi) if applicable, the point to which it is proposed to change the diversion of the water;
- 321 (vii) the place, ~~[purpose,]~~ nature, period, and extent of the ~~[present]~~ current use;
- 322 (viii) the place, ~~[purpose,]~~ nature, period, and extent of the proposed use; and
- 323 (ix) any other information that the state engineer requires.

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

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

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

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

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

335 ~~[(6)]~~ (5) (a) The state engineer shall investigate all temporary change applications.

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

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

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

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

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

347 (ii) does not impair a vested water right.

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

350 (i) will exceed the quantity of water available for the change; or

351 (ii) will impair a vested water right.

352 ~~[(7)]~~ (6) (a) Except as provided by Section 73-3-30, the state engineer may not reject a
353 permanent or temporary change application for the sole reason that the change would impair a
354 vested water right.

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

358 (i) acquire the conflicting water right[-]; or

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

361 (ii) otherwise mitigate the interference.

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

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

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

366 ~~[(9)]~~ (8) Any person who ~~[changes or who attempts to change a point of diversion,~~

367 ~~place of use, or purpose of use, either permanently or temporarily, without first applying to the~~
368 ~~state engineer in the manner provided in this section]~~ makes a permanent or temporary change
369 before obtaining an approved change application under this section:

- 370 (a) obtains no right;
- 371 (b) is guilty of a crime punishable under Section 73-2-27 if the change or attempted
372 change is made knowingly or intentionally; and
- 373 (c) is guilty of a separately punishable offense for each day of the unlawful change.

374 ~~[(10)]~~ (9) (a) This section does not apply to the replacement of an existing well by a
375 new well drilled within a radius of 150 feet from the point of diversion of the existing well.

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

378 Section 6. Section **73-3-3.6** is enacted to read:

379 **73-3-3.6. Application by a municipality for a permanent or temporary change to**
380 **the use of water.**

381 (1) As used in this section:

382 (a) "Municipal change application" means a change application filed under Section
383 73-3-3 by a municipality incorporated under Title 10, Utah Municipal Code.

384 (b) "Quantity of water available for change" is as defined in Subsection 73-3-3(1)(c)(i).

385 (2) An aggrieved person who protests the amount of water requested in a municipal
386 change application may:

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

388 (i) (A) requests an advisory opinion in accordance with Subsection (4), if the person
389 requests the advisory opinion within 120 days after the last day on which the state engineer
390 publishes notice of the municipal change application; and

391 (B) diligently pursues the advisory opinion; or

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

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

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

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

398 (b) agree in writing with the change applicant to allow the state engineer to determine
399 the quantity of water available for change under Subsection 73-3-3(1)(c)(ii).

400 (3) If a municipality protests the amount of water requested in a municipal change
401 application, the change applicant shall:

402 (a) stay the change application process while the change applicant:

403 (i) (A) requests an advisory opinion in accordance with Subsection (4), if the person
404 requests the advisory opinion within 120 days after the last day on which the state engineer
405 published notice of the municipal change application; and

406 (B) diligently pursues the advisory opinion; or

407 (ii) pursues a declaratory judgment action against each municipality that protests the
408 amount of water requested in the change application to determine whether the underlying water
409 right has been fully or partially abandoned or forfeited, if the change applicant:

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

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

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

414 (b) withdraw the change application; or

415 (c) allow the state engineer to determine the quantity of water available for change in
416 accordance with Section 73-3-3.

417 (4) If an aggrieved person protests a municipal change application, the change
418 applicant or the protestant may stay the change application process and toll a filing time
419 described in Subsection (2)(a)(ii)(A) or (3)(a)(ii)(A) by requesting an advisory opinion under
420 Subsection 13-43-205(2) before filing an action under Subsection (2)(a)(ii)(A) or (3)(a)(ii)(A).

421 (5) A request for an advisory opinion in accordance with Subsection (4) tolls a filing
422 time described in Subsection (2)(a) or (3)(a) until 30 days after the day on which:

423 (a) the advisory opinion is issued; or

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

426 (6) (a) Within 10 days after the day on which the state engineer receives the notice of
427 the stay described in Subsection (4)(b), the state engineer shall submit to the Office of the
428 Property Rights Ombudsman, for distribution to the parties, copies of all records of beneficial

429 use, non-use, and permission for non-use related to the underlying water right of the municipal
430 change application.

431 (b) The records described in Subsection (6)(a) may not include the state engineer's
432 conclusory remarks.

433 (7) In an action filed under Subsection (2)(a)(ii)(A) or (3)(a)(ii)(A), or for an advisory
434 opinion requested under Subsection (4):

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

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

439 (8) If the change application procedure is stayed under Subsection (2) or (3) for a
440 municipal change application, when the parties make a settlement agreement or the court issues
441 a final order the state engineer shall complete the change application procedure using the
442 quantity of water available for change.

443 (9) A person may not bring a forfeiture or abandonment action against a water right
444 that is the subject of a pending municipal change application unless the person protested the
445 municipal change application and files the action in accordance with Subsection (2).

446 (10) (a) After September 1, 2013, a change applicant who files a municipal change
447 application may obtain finality in accordance with this Subsection (10) if:

448 (i) the change applicant requests finality in the change application;

449 (ii) the change applicant allows for the 90-day protest period described in Subsection
450 73-3-7(1)(c);

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

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

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

456 (iv) the water right was:

457 (A) exacted by the municipality under Section 10-9a-508 to mitigate the impact of a
458 development activity allowed under Title 9a, Chapter 10, Municipal Land Use, Development,
459 and Management Act, including an approved land use permit or annexation;

460 (B) purchased unconditionally for value by the municipality; or
461 (C) obtained by the municipality as an unconditional gift.
462 (b) An approved municipal change application is final when:
463 (a) the time period for protest described in Subsection 73-3-7(1)(c) passes; and
464 (b) the state engineer approves the municipal change application.
465 (c) An approved municipal change application that is final, as described in Subsection
466 (10)(b) is not subject to a claim of abandonment or forfeiture for a period of time that occurred
467 before the day on which the state engineer approved the municipal change application.
468 (d) (i) A person may register with the state engineer to receive notice of all municipal
469 change applications that request finality.
470 (ii) The state engineer shall, at the time of publication of notice under Section 73-3-6,
471 provide electronic notice of a municipal change application that requests finality to a person
472 who registers to receive notice under Subsection (10)(d)(i).
473 (11) Within 90 days after the last day on which the state engineer publishes notice of a
474 municipal change application, the state engineer shall deliver to the change applicant and each
475 protestant all existing evidence from the state engineer's records regarding:
476 (a) beneficial use of the underlying water right;
477 (b) lack of beneficial use of the underlying water right; and
478 (c) all approved nonuse applications.
479 Section 7. Section **73-3-7** is amended to read:
480 **73-3-7. Protests.**
481 (1) Any person interested may file a protest with the state engineer:
482 (a) within 20 days after the day on which notice is published, if the adjudicative
483 proceeding is informal; [~~and~~]
484 (b) within 30 days after the day on which notice is published, if the adjudicative
485 proceeding is formal[-]; or
486 [~~(2) The state engineer shall consider the protest and shall approve or reject the~~
487 ~~application.-]~~
488 (c) for a municipal change application where the change applicant has requested
489 finality under Section 73-3-3.6(10), within 90 days after the day on which the notice is
490 published.

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

493 (a) consider the protest; and

494 (b) approve or reject the application.

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

496 **73-3-8. Approval or rejection of application -- Requirements for approval --**
497 **Application for specified period of time -- Filing of royalty contract for removal of salt or**
498 **minerals.**

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

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

502 (ii) subject to Section 73-1-4, for a permanent change application described in Section
503 73-3-3, the proposed use [~~will not impair existing rights or interfere with the more beneficial~~
504 ~~use of the water~~] is based on the quantity of water available for change, as defined in Section
505 73-3-3;

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

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

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

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

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

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

524 (A) reject the application; and

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

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

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

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

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

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

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

542 (iii) the water is still available.

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

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

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

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

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

554 **73-3-30. Change application for an instream flow.**

555 (1) As used in this section:

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

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

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

560 (ii) promotes fishing opportunities in the state.

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

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

567 (i) the propagation of fish;

568 (ii) public recreation; or

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

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

571 (i) a perfected water right:

572 (A) presently owned by the division;

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

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

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

578 (c) A division may:

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

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

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

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

- 588 (i) the Bonneville cutthroat;
- 589 (ii) the Colorado River cutthroat; or
- 590 (iii) the Yellowstone cutthroat.

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

- 595 (i) in a manner outlined in the water company's articles of incorporation or bylaws;
- 596 (ii) at an annual or regular meeting described in Section 16-6a-701; or
- 597 (iii) at a special meeting convened under Section 16-6a-702.

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

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

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

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

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

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

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

613 (II) obtained an enhancement of survival permit, as authorized by 16 U.S.C. Sec.
614 1539(a)(1)(A).

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

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

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

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

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

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

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

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

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

637 (5) (a) For a permanent change application or a fixed time change application filed
638 according to this section, 60 days before the date on which proof of change for an instream
639 flow is due, the state engineer shall notify the applicant by mail or by any form of
640 communication through which receipt is verifiable of the date when proof of change is due.

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

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

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

- 646 (B) detailed measurements of the flow of water in second-feet changed;
647 (C) the period of use; and
648 (D) any additional information required by the state engineer; or
649 (ii) apply for a further extension of time as provided for in Section 73-3-12.
650 (c) (i) Upon acceptance of the verified statement required under Subsection (5)(b)(i),
651 the state engineer shall issue a certificate of change for instream flow use in accordance with
652 Section 73-3-17.
653 (ii) The certificate expires at the same time the fixed time change application expires.
654 (6) No person may appropriate unappropriated water under Section 73-3-2 for the
655 purpose of providing an instream flow.
656 (7) Water used in accordance with this section is considered to be beneficially used, as
657 required by Section 73-3-1.
658 (8) A physical structure or physical diversion from the stream is not required to
659 implement a change for instream flow use.
660 (9) This section does not allow enlargement of the water right that the applicant seeks
661 to change.
662 (10) A change application authorized by this section may not impair a vested water
663 right, including a water right used to generate hydroelectric power.
664 (11) The state engineer or the water commissioner shall distribute water under an
665 approved or a certificated instream flow change application according to the change
666 application's priority date relative to the other water rights located within the stream section
667 specified in the change application for instream flow.
668 (12) An approved fixed time change application does not create a right of access across
669 private property or allow any infringement of a private property right.