

INSTREAM FLOW AMENDMENTS

2013 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Michael E. Noel

Senate Sponsor: Peter C. Knudson

LONG TITLE

General Description:

This bill amends provisions relating to a change application for instream flow.

Highlighted Provisions:

This bill:

- ▶ amends provisions relating to a change application for instream flow;
- ▶ modifies conditions under which the director of the Division of Wildlife Resources may approve a fishing group's proposed instream flow change application before the change application is filed with the state engineer; and
- ▶ makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

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 **73-3-30** is amended to read:

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



28 (1) As used in this section:

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

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

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

33 (ii) promotes fishing opportunities in the state.

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

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

40 (i) the propagation of fish;

41 (ii) public recreation; or

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

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

44 (i) a perfected water right:

45 (A) presently owned by the division;

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

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

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

51 (c) A division may:

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

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

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

57 (3) (a) A fishing group may file a fixed time change application on a perfected,
58 consumptive water right for the purpose of providing water for an instream flow, within a

59 specified section of a natural or altered stream channel, to protect or restore habitat for three
60 native trout:

- 61 (i) the Bonneville cutthroat;
- 62 (ii) the Colorado River cutthroat; or
- 63 (iii) the Yellowstone cutthroat.

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

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

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

74 (d) ~~[(†)]~~ The fishing group shall receive the Division of Wildlife Resources' director's
75 approval of the proposed change before filing the fixed time change application with the state
76 engineer.

77 ~~[(†)]~~ (e) The director of the Division of Wildlife Resources may approve ~~[the]~~ a
78 proposed change if:

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

81 ~~[(B)]~~ (ii) the proposed purpose of use is consistent with an existing state management
82 or recovery plan for that ~~[specie]~~ species; and

83 ~~[(C)]~~ ~~the water right owner has received a certificate of inclusion from a person who~~
84 ~~has:]~~

85 (iii) the fishing group has:

86 ~~[(F)]~~ (A) entered into a programmatic Candidate Conservation Agreement with
87 Assurances with the United States Fish and Wildlife Service, as authorized by 16 U.S.C. ~~[Sec]~~
88 Secs. 1531(a)(5) and 1536(a)(1)~~[-and]~~, that gives the water right holder the option to receive
89 an enhancement of survival permit, as authorized by 16 U.S.C. Sec. 1539(a)(1)(A), or a

90 certificate of inclusion, for a fixed time change application that benefits a candidate species of
91 trout; or

92 ~~[(H) obtained an enhancement of survival permit, as authorized by 16 U.S.C. Sec.~~
93 ~~1539(a)(1)(A).]~~

94 (B) until a programmatic Candidate Conservation Agreement with Assurances
95 described in Subsection (3)(e)(iii)(A) becomes valid and enforceable, entered into a contract
96 with the water right holder agreeing to defend and indemnify the water right holder for liability
97 under Section 1538(a) of the Endangered Species Act, 16 U.S.C. Secs. 1531 through 1544, for
98 an action taken by the water right holder under the terms of the water right holder's agreement
99 with the fishing group for a fixed time change application.

100 ~~[(iii)]~~ (f) The director may ~~[disapprove the]~~ deny a proposed change if the proposed
101 change would not be in the public's interest.

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

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

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

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

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

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

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

119 (b) include appropriate studies, reports, or other information required by the state
120 engineer demonstrating the necessity for the instream flow in the specified section of the

121 stream and the projected benefits to the public resulting from the change.

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

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

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

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

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

132 (C) the period of use; and

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

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

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

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

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

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

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

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

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

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

152 specified in the change application for instream flow.

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

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

Legislative Review Note
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Office of Legislative Research and General Counsel