

**CHANGE APPLICATION PROCEDURE**

2013 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Ralph Okerlund**

House Sponsor: \_\_\_\_\_

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**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 of the change application based on that determination.

**Highlighted Provisions:**

This bill:

- ▶ defines terms;
- ▶ 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; and
- ▶ makes technical changes.

**Money Appropriated in this Bill:**

None

**Other Special Clauses:**

None

**Utah Code Sections Affected:**

AMENDS:



- 28           73-2-27, as enacted by Laws of Utah 2005, Chapter 215
- 29           73-3-3, as last amended by Laws of Utah 2012, Chapter 229
- 30           73-3-8, as last amended by Laws of Utah 2007, Chapter 136
- 31           73-3-30, as last amended by Laws of Utah 2009, Chapter 344



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

34           Section 1. Section 73-2-27 is amended to read:

35           **73-2-27. Criminal penalties.**

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

- 37           (a) Section 73-1-14;
- 38           (b) Section 73-1-15;
- 39           (c) Section 73-2-20;
- 40           (d) Subsection [~~73-3-3(9)~~] 73-3-3(8);
- 41           (e) Section 73-3-26;
- 42           (f) Section 73-3-29;
- 43           (g) Section 73-5-9;
- 44           (h) Section 76-10-201;
- 45           (i) Section 76-10-202; and
- 46           (j) Section 76-10-203.

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

- 50           (a) as a felony of the third degree if:
- 51           (i) the value of the water diverted or property damaged or taken is \$2,500 or greater;

52 and

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

55           (b) as a class A misdemeanor if:

- 56           (i) the value of the water diverted or property damaged or taken is \$2,500 or greater; or
- 57           (ii) the person violating the provision has previously been convicted of violating the  
58 same provision; or

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

60 Section 2. Section **73-3-3** is amended to read:

61 **73-3-3. Permanent or temporary changes to a water right.**

62 (1) For purposes of this section:

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

66 (i) point of diversion;

67 (ii) place of use;

68 (iii) period of use;

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

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

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

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

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

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

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

78 (i) point of diversion;

79 (ii) place of use;

80 (iii) period of use;

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

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

83 (c) "Change applicant" means:

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

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

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

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

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

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

95 (i) is a change applicant; and

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

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

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

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

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

103 (B) the repayment of project costs; and

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

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

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

110 (d) (i) Subject to Subsection (2)(d)(ii), in a change application proceeding relating to a  
111 water right, to prevent impairing other water rights, the state engineer may review the  
112 beneficial use of the water under the water right and determine the quantity of water available  
113 for change.

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

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

119 (A) presume that the quantity of water available for change is the full amount of water  
120 available under the water right, unless the presumption is rebutted by clear and convincing

121 evidence that demonstrates that a smaller quantity of water is available for change;

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

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

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

130 (A) reject the change application; or

131 (B) limit approval of the change application to the quantity of water available for  
132 change.

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

135 (A) constitute a forfeiture or abandonment;

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

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

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

140 (A) withdraw the change application; or

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

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

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

149 (3) (a) A change applicant who files a change application with the state engineer may  
150 not make the permanent or temporary change requested in the application unless, and to the  
151 extent that, the state engineer approves the change application.

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

- 154 (i) the change applicant's name;
- 155 (ii) the water right description, including the water right number;
- 156 (iii) the water quantity;
- 157 (iv) the stream or water source;
- 158 (v) if applicable, the point on the stream or water source where the water is diverted;
- 159 (vi) if applicable, the point to which it is proposed to change the diversion of the water;
- 160 (vii) the place, ~~[purpose,]~~ nature, period, and extent of the ~~[present]~~ current use;
- 161 (viii) the place, ~~[purpose,]~~ nature, period, and extent of the proposed use; and
- 162 (ix) any other information that the state engineer requires.

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

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

- 168 (i) the state engineer shall follow the same procedures provided in this title for  
169 approving an application to appropriate water; and
- 170 (ii) the rights and duties of a change applicant are the same as the rights and duties of a  
171 person who applies to appropriate water under this title.

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

174 ~~[(6)]~~ (5) (a) The state engineer shall investigate all temporary change applications.

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

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

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

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

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

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

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

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

190 (ii) would impair a vested water right.

191 ~~[(7)]~~ (6) (a) Except as provided by Section 73-3-30, the state engineer may not reject a  
192 permanent or temporary change application for the sole reason that the change would impair a  
193 vested water right.

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

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

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

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

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

204 ~~[(9)]~~ (8) Any person who ~~[changes or who attempts to change a point of diversion,~~  
205 ~~place of use, or purpose of use, either permanently or temporarily, without first applying to the~~  
206 ~~state engineer in the manner provided in this section]~~ makes a permanent or temporary change  
207 before obtaining an approved change application under this section:

208 (a) obtains no right;

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

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

212 ~~[(10)]~~ (9) (a) This section does not apply to the replacement of an existing well by a  
213 new well drilled within a radius of 150 feet from the point of diversion of the existing well.

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

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

217 **73-3-8. Approval or rejection of application -- Requirements for approval --**  
218 **Application for specified period of time -- Filing of royalty contract for removal of salt or**  
219 **minerals.**

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

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

223 (ii) subject to Section 73-1-4, for a permanent change application described in Section  
224 73-3-3, the proposed use [~~will not impair existing rights or interfere with the more beneficial~~  
225 use of the water] is based on the quantity of water that has been placed to beneficial use under a  
226 water right;

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

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

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

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

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

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

244 (2) (a) An application to appropriate water for industrial, power, mining development,



245 manufacturing purposes, agriculture, or municipal purposes may be approved for a specific and  
246 certain period from the time the water is placed to beneficial use under the application, but in  
247 no event may an application be granted for a period of time less than that ordinarily needed to  
248 satisfy the essential and primary purpose of the application or until the water is no longer  
249 available as determined by the state engineer.

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

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

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

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

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

259 and

260 (iii) the water is still available.

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

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

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

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

271 Section 4. Section **73-3-30** is amended to read:

272 **73-3-30. Change application for an instream flow.**

273 (1) As used in this section:

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

276 (b) "Fishing group" means an organization that:  
277 (i) is exempt from taxation under Section 501(c)(3), Internal Revenue Code; and  
278 (ii) promotes fishing opportunities in the state.  
279 (c) "Fixed time change" means a change in a water right's point of diversion, place of  
280 use, or purpose of use for a fixed period of time longer than one year but not longer than 10  
281 years.

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

- 285 (i) the propagation of fish;
- 286 (ii) public recreation; or
- 287 (iii) the reasonable preservation or enhancement of the natural stream environment.

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

- 289 (i) a perfected water right:
  - 290 (A) presently owned by the division;
  - 291 (B) purchased by the division for the purpose of providing water for an instream flow,
  - 292 through funding provided for that purpose by legislative appropriation; or
  - 293 (C) acquired by lease, agreement, gift, exchange, or contribution; or
- 294 (ii) an appurtenant water right acquired with the acquisition of real property by the  
295 division.

296 (c) A division may:

- 297 (i) purchase a water right for the purposes provided in Subsection (2)(a) only with  
298 funds specifically appropriated by the Legislature for water rights purchases; or
- 299 (ii) accept a donated water right without legislative approval.

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

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

- 306 (i) the Bonneville cutthroat;

307 (ii) the Colorado River cutthroat; or

308 (iii) the Yellowstone cutthroat.

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

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

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

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

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

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

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

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

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

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

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

331 (II) obtained an enhancement of survival permit, as authorized by 16 U.S.C. Sec.  
332 1539(a)(1)(A).

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

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

337 (ii) The rights and the duties of a fixed time change applicant are the same as provided

338 in this title for an applicant to appropriate water.

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

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

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

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

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

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

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

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

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

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

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

365 (C) the period of use; and

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

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

368 (c) (i) Upon acceptance of the verified statement required under Subsection (5)(b)(i),

369 the state engineer shall issue a certificate of change for instream flow use in accordance with  
370 Section 73-3-17.

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

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

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

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

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

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

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

386 (12) An approved fixed time change application does not create a right of access across  
387 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**