

PUBLIC WATER SUPPLIER AMENDMENTS

2017 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Jani Iwamoto

House Sponsor: _____

LONG TITLE

General Description:

This bill authorizes a public water supplier to file a change application in certain circumstances.

Highlighted Provisions:

This bill:

- ▶ adds a public water supplier to the list of entities eligible to file a change application for the purpose of providing water for an instream flow;
- ▶ describes the circumstances in which a public water supplier may file a change application for the purpose of providing water for an instream flow; 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 2013, Chapter 379

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

Section 1. Section **73-3-30** is amended to read:



28 **73-3-30. Change application for an instream flow.**

29 (1) As used in this section:

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

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

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

34 (ii) promotes fishing opportunities in the state.

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

38 (d) "Public water supplier" means the same as that term is defined in Subsection
39 [73-1-4\(1\)\(b\)](#), except that no agency of the federal government may be considered a public
40 water supplier for the purposes of this section.

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

44 (i) the propagation of fish;

45 (ii) public recreation; or

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

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

48 (i) a perfected water right:

49 (A) presently owned by the division;

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

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

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

55 (c) A division may:

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

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

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

61 (3) (a) Subject to Subsections (3)(b) and (c), a public water supplier may file a fixed
62 time change as provided in Subsection (1)(c), or an annual temporary change application as
63 provided in Section 73-3-3:

64 (i) on a perfected water right that is currently held by the public water supplier for the
65 reasonable future needs of the public, as determined by Subsection 73-1-4(2)(f); and

66 (ii) for the purpose of providing water for an instream flow within a specified section
67 of a natural or altered stream channel within the public water supplier's jurisdictional
68 boundaries, including areas over which jurisdiction is recognized under Section 10-8-15 and
69 within the state:

70 (A) for the propagation of fish;

71 (B) for public recreation;

72 (C) for the reasonable preservation or enhancement of the natural stream environment;

73 or

74 (D) to improve or protect water quality.

75 (b) A public water supplier may not acquire water rights by eminent domain for the
76 purpose of filing a change application for an instream flow.

77 (c) A public water supplier may file an instream flow application based on a Bureau of
78 Reclamation water right appropriated under Section 73-3-1, provided that the instream flow
79 application is co-signed by:

80 (i) the designated representative of the public water supplier;

81 (ii) the designated representative of the local water user's organization that is
82 contractually responsible for:

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

84 (B) the repayment of project costs; and

85 (iii) the record owner of the water right.

86 ~~[(3)]~~ (4) (a) A fishing group may file a fixed time change application on a perfected,
87 consumptive water right for the purpose of providing water for an instream flow, within a
88 specified section of a natural or altered stream channel, to protect or restore habitat for three
89 native trout:

- 90 (i) the Bonneville cutthroat;
- 91 (ii) the Colorado River cutthroat; or
- 92 (iii) the Yellowstone cutthroat.

93 (b) Before filing an application authorized by Subsection [~~(3)~~] (4)(a) to change a
94 shareholder's proportionate share of water, the water company shall submit the decision to
95 approve or deny the change request required by Subsection 73-3-3.5(3) to a vote of the
96 shareholders:

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

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

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

106 (e) The director of the Division of Wildlife Resources may approve a proposed change
107 if:

108 (i) the specified section of the stream channel is historic or current habitat for a species
109 listed in Subsections [~~(3)~~] (4)(a)(i) through (iii);

110 (ii) the proposed purpose of use is consistent with an existing state management or
111 recovery plan for that species; and

112 (iii) the fishing group has:

113 (A) entered into a programmatic Candidate Conservation Agreement with Assurances
114 with the United States Fish and Wildlife Service, as authorized by 16 U.S.C. Secs. 1531(a)(5)
115 and 1536(a)(1), that gives the water right holder the option to receive an enhancement of
116 survival permit, as authorized by 16 U.S.C. Sec. 1539(a)(1)(A), or a certificate of inclusion, for
117 a fixed time change application that benefits a candidate species of trout; or

118 (B) until a programmatic Candidate Conservation Agreement with Assurances
119 described in Subsection [~~(3)~~] (4)(e)(iii)(A) becomes valid and enforceable, entered into a
120 contract with the water right holder agreeing to defend and indemnify the water right holder for

121 liability under Section 1538(a) of the Endangered Species Act, 16 U.S.C. Secs. 1531 through
122 1544, for an action taken by the water right holder under the terms of the water right holder's
123 agreement with the fishing group for a fixed time change application.

124 (f) The director may deny a proposed change if the proposed change would not be in
125 the public's interest.

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

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

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

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

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

139 [(4)] (5) In addition to the requirements of Section 73-3-3, an application authorized by
140 this section shall:

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

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

146 [(5)] (6) (a) For a [~~permanent change application or a~~] fixed time change application
147 filed according to this section, 60 days before the date on which proof of change for an
148 instream flow is due, the state engineer shall notify the applicant by mail or by any form of
149 communication through which receipt is verifiable of the date when proof of change is due.

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

151 (i) file a verified statement with the state engineer that the instream flow uses have

152 been perfected, setting forth:

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

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

156 (C) the period of use; and

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

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

159 (c) (i) Upon acceptance of the verified statement required under Subsection ~~[(5)]~~

160 ~~(6)(b)(i)~~, the state engineer shall issue a certificate of change for instream flow use in
161 accordance with Section 73-3-17.

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

163 ~~[(6)] (7)~~ No person may appropriate unappropriated water under Section 73-3-2 for the
164 purpose of providing an instream flow.

165 ~~[(7)] (8)~~ Water used in accordance with this section is considered to be beneficially
166 used, as required by Section 73-3-1.

167 ~~[(8)] (9)~~ A physical structure or physical diversion from the stream is not required to
168 implement a change for instream flow use.

169 ~~[(9)] (10)~~ This section does not allow enlargement of the water right that the applicant
170 seeks to change.

171 ~~[(10)] (11)~~ A change application authorized by this section may not impair a vested
172 water right, including a water right used to generate hydroelectric power.

173 ~~[(11)] (12)~~ The state engineer or the water commissioner shall distribute water under
174 an approved or a certificated instream flow change application according to the change
175 application's priority date and not upon the priority of the water right upon which the change
176 application is based, relative to the other water rights ~~[located within the stream section~~
177 ~~specified in the change application for instream flow]~~ in the stream.

178 ~~[(12)] (13)~~ An approved fixed time change application does not create a right of access
179 across private property or allow any infringement of a private property right.