

1 **INSTREAM FLOW TO PROTECT TROUT**

2 **HABITAT**

3 2007 GENERAL SESSION

4 STATE OF UTAH

5 **Chief Sponsor: Peter C. Knudson**

6 House Sponsor: D. Gregg Buxton

7

LONG TITLE

8 **General Description:**

9 This bill authorizes a fishing group to temporarily change a water right for instream
10 flow to protect trout habitat.

11 **Highlighted Provisions:**

12 This bill:

- 13 ▶ defines terms;
- 14 ▶ authorizes a fishing group to file a change application for a fixed time period not
15 exceeding ten years for an instream flow to protect or restore habitat for native
16 trout;
- 17 ▶ requires the Division of Wildlife Resources' director to review the proposed change;
- 18 ▶ allows a fixed time change applicant to refile the application;
- 19 ▶ provides that the water right will automatically revert to its original place and
20 purpose of use when the application expires;
- 21 ▶ repeals the private instream flow water right in ten years; and
- 22 ▶ makes technical changes.

23 **Monies Appropriated in this Bill:**

24 None

25 **Other Special Clauses:**

26 **⚡→ [None] This bill coordinates with H.B. 48, Department of Natural Resources**

27 **Amendments by merging substantive and technical amendments. ←⚡**

27a



28 **Utah Code Sections Affected:**

29 AMENDS:

30 **63-55-273**, as last amended by Chapter 254, Laws of Utah 2003

31 **73-3-3**, as last amended by Chapter 215, Laws of Utah 2005

32 **73-3-12**, as last amended by Chapter 58, Laws of Utah 2006

33 **73-3-16**, as last amended by Chapter 33, Laws of Utah 1998

34 **73-3-17**, as last amended by Chapter 160, Laws of Utah 1955

35 **73-5-4**, Utah Code Annotated 1953

36 ENACTS:

37 **73-3-30**, Utah Code Annotated 1953



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

40 Section 1. Section **63-55-273** is amended to read:

41 **63-55-273. Repeal dates, Title 73.**

42 (1) Title 73, Chapter 27, State Water Development Commission, is repealed December
43 31, 2008.

44 (2) The private instream flow water right for trout habitat in Subsection 73-3-30(3) is
45 repealed December 31, 2017.

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

47 **73-3-3. A permanent or temporary change in point of diversion, place of use, or**
48 **purpose of use.**

49 (1) For purposes of this section:

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

53 (b) "Temporary [~~changes~~] change" means [~~changes~~] a change for a fixed [~~periods~~]
54 period of time not exceeding one year.

55 (2) (a) Any person entitled to [~~the~~] use [~~of~~] water may make a permanent or temporary
56 [~~changes~~] change in the:

57 (i) point of diversion;

58 (ii) place of use; or

59 (iii) purpose of use for which the water was originally appropriated.

60 (b) ~~[A] Except as provided by Section 73-3-30, \hat{S} → [the state engineer may not authorize] ← \hat{S} a~~
 61 change \hat{S} → [F] may not be made [F] ← \hat{S} if it impairs [any] a vested water right without just
 61a compensation.

62 (3) ~~[Both permanent and temporary changes of] A person entitled to use water shall~~
 63 change a point of diversion, place of use, or purpose of [use of] water use, including water
 64 involved in a general adjudication or other ~~[suits, shall be made]~~ suit, in the manner provided
 65 in this section.

66 (4) (a) A person entitled to use water may not make a change ~~[may not be made]~~ unless
 67 the state engineer approves the change application ~~[is approved by the state engineer]~~.

68 (b) ~~[Applications shall be made]~~ A person entitled to use water shall submit a change
 69 application upon forms furnished by the state engineer and shall set forth:

70 (i) the ~~[name of the applicant]~~ applicant's name;

71 (ii) ~~[a description of]~~ the water right description;

72 (iii) the ~~[quantity of]~~ water quantity;

73 (iv) the stream or water source;

74 (v) if applicable, the point on the stream or water source where the water is diverted;

75 (vi) if applicable, the point to which it is proposed to change the diversion of the water;

76 (vii) the place, purpose, and extent of the present use;

77 (viii) the place, purpose, and extent of the proposed use; and

78 (ix) any other information that the state engineer requires.

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

83 (5) (a) (i) In considering a permanent change application, the state engineer shall
 84 follow the same procedures as provided in this title for an application to appropriate water.

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

87 (b) The state engineer may~~[- in connection with applications for]~~ waive notice for a
 88 permanent change application involving only a change in point of diversion of 660 feet or less~~[-~~
 89 ~~waive the necessity for publishing a notice of application].~~

- 90 (6) (a) The state engineer shall investigate all temporary change applications.
- 91 (b) If the state engineer finds that the temporary change will not impair ~~[any]~~ a vested
- 92 ~~[rights of others, he]~~ water right, the state engineer shall issue an order authorizing the change.
- 93 (c) If the state engineer finds that the change sought might impair a vested ~~[rights]~~
- 94 water right, before authorizing the change, ~~[he]~~ the state engineer shall give notice of the
- 95 application to any person whose ~~[rights]~~ right may be affected by the change.
- 96 (d) Before making an investigation or giving notice, the state engineer may require the
- 97 applicant to deposit a sum of money sufficient to pay the expenses of the investigation and
- 98 publication of notice.
- 99 (7) (a) ~~[The]~~ Except as provided by Section 73-3-30, the state engineer may not reject
- 100 ~~[applications for either permanent or temporary changes]~~ a permanent or temporary change
- 101 application for the sole reason that the change would impair ~~[the]~~ a vested ~~[rights of others]~~
- 102 water right.
- 103 (b) If otherwise proper, the state engineer may approve a permanent or temporary
- 104 ~~[changes may be approved]~~ change application for part of the water involved or upon the
- 105 condition that the applicant acquire the conflicting ~~[rights are acquired]~~ water right.
- 106 (8) (a) Any person holding an approved application for the appropriation of water may
- 107 ~~[either permanently or temporarily]~~ change the point of diversion, place of use, or purpose of
- 108 use.
- 109 (b) A change of an approved application does not:
- 110 (i) affect the priority of the original application; or
- 111 (ii) extend the time period within which the construction of work is to begin or be
- 112 completed.
- 113 (9) Any person who changes or who attempts to change a point of diversion, place of
- 114 use, or purpose of use, either permanently or temporarily, without first applying to the state
- 115 engineer in the manner provided in this section:
- 116 (a) obtains no right;
- 117 (b) is guilty of a crime punishable under Section 73-2-27 if the change or attempted
- 118 change is made knowingly or intentionally; and
- 119 (c) is guilty of a separately punishable offense for each day of the unlawful change.
- 120 (10) (a) This section does not apply to the replacement of an existing well by a new

121 well drilled within a radius of 150 feet from the point of diversion of the existing well.

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

124 ~~[(11) (a) In accordance with the requirements of this section, the Division of Wildlife
125 Resources or Division of Parks and Recreation may file applications for permanent or
126 temporary changes for the purpose of providing water for instream flows, within a designated
127 section of a natural stream channel or altered natural stream channel, necessary within the state
128 for:]~~

129 ~~[(i) the propagation of fish;]~~

130 ~~[(ii) public recreation; or]~~

131 ~~[(iii) the reasonable preservation or enhancement of the natural stream environment.]~~

132 ~~[(b) Applications may be filed for changes on:]~~

133 ~~[(i) perfected water rights presently owned by the respective division;]~~

134 ~~[(ii) perfected water rights purchased by the respective division for the purpose of
135 providing water for instream flows, through funding provided for that purpose by legislative
136 appropriation or acquired by lease, agreement, gift, exchange, or contribution; or]~~

137 ~~[(iii) appurtenant water rights acquired with the acquisition of real property by either
138 division.]~~

139 ~~[(c) A physical structure or physical diversion from the stream is not required to
140 implement a change for instream flow use.]~~

141 ~~[(d) This Subsection (11) does not allow enlargement of the water right sought to be
142 changed nor may the change impair any vested water right.]~~

143 ~~[(e) In addition to the other requirements of this section, an application filed by either
144 division shall:]~~

145 ~~[(i) set forth the legal description of the points on the stream between which the
146 necessary instream flows will be provided by the change; and]~~

147 ~~[(ii) include appropriate studies, reports, or other information required by the state
148 engineer that demonstrate the necessity for the instream flows in the specified section of the
149 stream and the projected benefits to the public that will result from the change.]~~

150 ~~[(f) The Division of Wildlife Resources and Division of Parks and Recreation may:]~~

151 ~~[(i) purchase water rights for the purposes provided in Subsection (11)(a) only with~~

152 funds specifically appropriated by the Legislature for water rights purchases; or]

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

154 [(g) This Subsection (11) does not authorize either division to:]

155 [(i) appropriate unappropriated water under Section 73-3-2 for the purpose of
156 providing instream flows; or]

157 [(ii) acquire water rights by eminent domain for instream flows or for any other
158 purpose.]

159 [(h) This Subsection (11) applies only to change applications filed on or after April 28,
160 1986.]

161 [(12) (a) Sixty days before the date on which proof of change for instream flows under
162 Subsection (11) is due, the state engineer shall notify the applicant by registered mail or by any
163 form of electronic communication through which receipt is verifiable of the date when proof of
164 change is due.]

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

166 [(i) file a verified statement with the state engineer that the instream flow uses have
167 been perfected, which shall set forth:]

168 [(A) the legal description of the points on the natural stream channel or altered natural
169 stream channel between which the necessary instream flows have been provided;]

170 [(B) detailed measurements of the flow of water in second feet changed;]

171 [(C) the period of use; and]

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

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

174 [(c) Upon approval of the verified statement required under Subsection (12)(b)(i), the
175 state engineer shall issue a certificate of change for instream flow use.]

176 Section 3. Section **73-3-12** is amended to read:

177 **73-3-12. Time limit on construction and application to beneficial use --**

178 **Extensions -- Procedures and criteria.**

179 (1) As used in this section, "public agency" means:

180 (a) a public water supply agency of the state or a political subdivision of the state; or

181 (b) the Bureau of Reclamation.

182 (2) (a) The construction of the works, if necessary, and the application of water to

183 beneficial use shall be diligently prosecuted to completion within the time fixed by the state
184 engineer.

185 (b) ~~[Extensions]~~ The state engineer may grant an extension of time, not exceeding 50
186 years from the date of approval of the application, except as provided in Subsection (2)(c),
187 ~~[may be granted by the state engineer]~~ on proper showing of diligence or reasonable cause for
188 delay.

189 (c) ~~[Additional extensions]~~ The state engineer may grant an additional extension of
190 time, beyond 50 years, ~~[may be granted by the state engineer]~~ on applications held by any
191 public agency, if the public agency can demonstrate the water will be needed to meet the
192 reasonable future requirements of the public.

193 (d) All requests for extension of time shall be made by signed statement and shall be
194 filed in the office of the state engineer on or before the date fixed for filing proof of
195 appropriation.

196 (e) ~~[Extensions]~~ The state engineer may grant an extension not exceeding 14 years after
197 the date of approval ~~[may be granted by the state engineer]~~ upon a sufficient showing by signed
198 statement, but the state engineer shall grant extensions beyond 14 years ~~[shall be granted]~~ only
199 after application and publication of notice.

200 (f) (i) The state engineer shall publish a notice of the application once a week for two
201 successive weeks, in a newspaper of general circulation, in the county in which the source of
202 the water supply is located and where the water is to be used.

203 (ii) The notice shall:

204 (A) state that an application has been made; and

205 (B) specify where the interested party may obtain additional information relating to the
206 application.

207 (g) Any person who owns a water right from the source of supply referred to in
208 Subsection (2)(f) or holds an application from that source of supply may file a protest with the
209 state engineer:

210 (i) within 20 days after the notice is published, if the adjudicative proceeding is
211 informal; and

212 (ii) within 30 days after the notice is published, if the adjudicative proceeding is
213 formal.

214 (h) In considering an application to extend the time in which to place water to
215 beneficial use under an approved application, the state engineer shall deny the extension and
216 declare the application lapsed, unless the applicant affirmatively shows that the applicant has
217 exercised or is exercising reasonable and due diligence in working toward completion of the
218 appropriation.

219 (i) (i) ~~[H]~~ The state engineer shall approve the extension if the applicant shows
220 reasonable and due diligence ~~[is shown by the applicant, the state engineer shall approve the~~
221 ~~extension]~~.

222 (ii) The approved extension is effective so long as the applicant continues to exercise
223 reasonable diligence in completing the appropriation.

224 (j) (i) The state engineer shall consider the holding of an approved application by any
225 public agency to meet the reasonable future requirements of the public to be reasonable and
226 due diligence within the meaning of this section for the first 50 years.

227 (ii) The state engineer may approve extensions beyond 50 years for a public agency, if
228 the agency provides information sufficient to demonstrate the water will be needed to meet the
229 reasonable future requirements of the public.

230 (k) If the state engineer finds unjustified delay or lack of diligence in prosecuting the
231 works to completion, the state engineer may deny the extension or may grant the request in part
232 or upon conditions, including a reduction of the priority of all or part of the application.

233 (3) (a) Except as provided in Subsections (3)(b) and (c), an application upon which
234 proof has not been submitted shall lapse and have no further force or effect after the expiration
235 of 50 years from the date of its approval.

236 (b) If the works are constructed with which to make beneficial use of the water applied
237 for, the state engineer may, upon showing of that fact, grant additional time beyond the 50-year
238 period in which to make proof.

239 (c) An application held by a public agency to meet the reasonable future requirements
240 of the public, for which proof of appropriation has not been submitted, shall lapse, unless
241 extended as provided in Subsection (2)(j).

242 Section 4. Section **73-3-16** is amended to read:

243 **73-3-16. Proof of appropriation or permanent change -- Notice -- Manner of**
244 **proof -- Statements -- Maps, profiles, and drawings -- Verification -- Waiver of filing --**

245 **Statement in lieu of proof of appropriation or change.**

246 (1) Sixty days before the date set for the proof of appropriation or proof of change to be
247 made, the state engineer shall notify the applicant by mail when proof of completion of the
248 works and application of the water to a beneficial use will be due.

249 (2) On or before the date set for completing the proof in accordance with the
250 application, the applicant shall file proof with the state engineer on forms furnished by the state
251 engineer.

252 (3) Except as provided in Subsection (4), the applicant shall submit the following
253 information:

- 254 (a) a description of the works constructed;
- 255 (b) the quantity of water in acre-feet or the flow in second-feet diverted, or both;
- 256 (c) the method of applying the water to beneficial use; and
- 257 (d) (i) detailed measurements of water put to beneficial use;
- 258 (ii) the date the measurements were made; and
- 259 (iii) the name of the person making the measurements.

260 (4) (a) On applications filed for appropriation or permanent change of use of water to
261 provide a water supply for state projects constructed pursuant to Title 73, Chapter 10, Board of
262 Water Resources - Division of Water Resources, or for federal projects constructed by the
263 United States Bureau of Reclamation for the use and benefit of the state, any of its agencies, its
264 political subdivisions, public and quasi-municipal corporations, or water users' associations of
265 which the state, its agencies, political subdivisions, or public and quasi-municipal corporations
266 are stockholders, the proof shall include:

- 267 (i) a statement indicating construction of the project works has been completed;
- 268 (ii) a description of the major features with appropriate maps, profiles, drawings, and
269 reservoir area-capacity curves;
- 270 (iii) a description of the point or points of diversion and redirection;
- 271 (iv) project operation data;
- 272 (v) a map showing the place of use of water and a statement of the purpose and method
273 of use;
- 274 (vi) the project plan for beneficial use of water under the applications and the quantity
275 of water required; and

276 (vii) a statement indicating what type of measuring devices have been installed.

277 (b) The director of the Division of Water Resources shall sign proofs for the state
278 projects and an authorized official of the Bureau of Reclamation shall sign proofs for the
279 federal projects specified in Subsection (4)(a).

280 (5) The proof on all applications shall be sworn to by the applicant or the applicant's
281 appointed representative and proof engineer.

282 (6) (a) Except as provided in Subsection (6)(b), when filing proof, the applicant shall
283 submit maps, profiles, and drawings made by a Utah licensed land surveyor or Utah licensed
284 professional engineer that show:

285 (i) the location of the completed works;

286 (ii) the nature and extent of the completed works;

287 (iii) the natural stream or source from which and the point where the water is diverted
288 and, in the case of a nonconsumptive use, the point where the water is returned; and

289 (iv) the place of use.

290 (b) The state engineer may waive the filing of maps, profiles, and drawings if in the
291 state engineer's opinion the written proof adequately describes the works and the nature and
292 extent of beneficial use.

293 (7) The completed proof shall conform to rules and standards established by the state
294 engineer.

295 (8) In those areas in which general determination proceedings are pending, or have
296 been concluded, under Title 73, Chapter 4, Determination of Water Rights, the state engineer
297 may petition the district court for permission to:

298 (a) waive the requirements of this section and Section 73-3-17; and

299 (b) permit each owner of an application to file a verified statement to the effect that the
300 applicant has completed the appropriation or change and elects to file a statement of water
301 users claim in the proposed determination of water rights or any supplement to it in accordance
302 with Title 73, Chapter 4, Determination of Water Rights, in lieu of proof of appropriation or
303 proof of change.

304 (9) This section does not apply to an instream flow water right obtained under Section
305 73-3-30.

306 Section 5. Section **73-3-17** is amended to read:

307 **73-3-17. Certificate of appropriation -- Evidence.**

308 (1) Upon it being made to appear to the satisfaction of the state engineer that an
 309 appropriation [~~or~~], a permanent change of point of diversion, place or [~~nature~~] purpose of use,
 310 or a fixed time change authorized by Section 73-3-30 has been perfected in accordance with the
 311 application [~~therefor~~], and that the water appropriated or affected by the change has been put to
 312 a beneficial use, as required by Section 73-3-16[~~, he~~] or 73-3-30, the state engineer shall issue a
 313 certificate, in duplicate, setting forth:

314 (a) the name and post-office address of the person by whom the water is used[;];

315 (b) the quantity of water in acre-feet or the flow in second-feet appropriated[;];

316 (c) the purpose for which the water is used[;];

317 (d) the time during which the water is to be used each year[;];

318 (e) the name of the stream or water source [~~of supply~~];

319 (i) from which the water is diverted[;]; or

320 (ii) within which an instream flow is maintained;

321 (f) the date of the appropriation or change[;]; and

322 (g) such other matter as will fully and completely define the extent and conditions of
 323 actual application of the water to a beneficial use[~~, provided that certificates~~].

324 (2) Certificates issued on applications for projects constructed pursuant to Title 73,
 325 Chapter 10, [~~Utah Code Annotated 1953~~] Board of Water Resources - Division of Water
 326 Resources, and for the federal projects constructed by the United States Bureau of
 327 Reclamation, referred to in Section 73-3-16 [~~of said Code~~], need show no more than the facts
 328 shown in the proof. [~~The~~]

329 (3) A certificate [~~shall~~] under this section does not extend the rights described in the
 330 application.

331 (4) Failure to file proof of appropriation or proof of change of the water on or before
 332 the date set therefor shall cause the application to lapse.

333 (5) One copy of [~~such~~] a certificate issued under this section shall be filed in the office
 334 of the state engineer and the other shall be delivered to the appropriator or to the person making
 335 the change who shall, within [~~thirty~~] 30 days, cause the same to be recorded in the office of the
 336 county recorder of the county in which the water is diverted from the natural stream or source.

337 (6) The certificate [~~so~~] issued and filed [~~shall be~~] under this section is prima facie

338 evidence of the owner's right to the use of the water in the quantity, for the purpose, at the
 339 place, and during the time specified therein, subject to prior rights.

340 Section 6. Section **73-3-30** is enacted to read:

341 **73-3-30. Change application for an instream flow.**

342 (1) As used in this section:

343 (a) "Division" means the Division of Wildlife Resources, created in Section 23-14-1,
 344 or the Division of Parks and Recreation, created in Section 63-11-17.1.

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

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

347 (ii) promotes fishing opportunities in the state.

348 (c) "Fixed time change" means a change in a water right's point of diversion, place of
 349 use, or purpose of use for a fixed period of time ~~§~~→ [greater] longer ←~~§~~ than one year but
 349a ~~§~~→ [less] not longer ←~~§~~ than ten years.

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

353 (i) the propagation of fish;

354 (ii) public recreation; or

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

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

357 (i) a perfected water right:

358 (A) presently owned by the division;

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

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

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

364 (c) A division may:

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

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

368 (d) A division may not acquire water rights by eminent domain for an instream flow or

369 for any other purpose.

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

374 (i) the Bonneville cutthroat;

375 (ii) the Colorado River cutthroat; or

376 (iii) the Yellowstone cutthroat.

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

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

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

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

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

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

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

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

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

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

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

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

400 in this title for an applicant to appropriate water.

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

403 (g) (i) The water right ~~§~~ [on] for ~~←§~~ which the ~~§~~ [applicant filed] state engineer has
 403a approved ~~←§~~ a fixed time change application will
 404 automatically revert ~~§~~ [back] ~~←§~~ to ~~§~~ [its original] the point of diversion and ~~←§~~ place and
 404a purpose of use ~~§~~ that existed before the approved fixed time change application ~~←§~~ when the
 404b fixed time change
 405 application expires ~~§~~ or is terminated ~~←§~~ .

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

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

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

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

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

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

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

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

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

426 (C) the period of use; and

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

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

429 (c) (i) Upon acceptance of the verified statement required under Subsection (5)(b)(i),
 430 the state engineer shall issue a certificate of change for instream flow use in accordance with

431 Section 73-3-17.

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

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

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

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

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

441 (10) A change application authorized by this section may not impair any vested water
442 right.

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

447 (12) An approved fixed time change application does not create a right of access across
448 private property or allow any infringement of a private property right.

449 Section 7. Section **73-5-4** is amended to read:

450 **73-5-4. Head gates and measuring devices.**

451 [~~Every~~] (1) (a) Except as provided by Subsection (1)(b), each person using water in this
452 state shall construct or install and maintain [a substantial head gate, cap, valve or other]
453 controlling works[~~-, weir flume~~] and a measuring device at each [point] location where water is
454 diverted [or turned out, for the purpose of regulating and measuring] from a source to regulate
455 and measure the quantity of water [that may be used. Such] diverted.

456 (b) Each person using water as an instream flow:

457 (i) shall install and maintain a measuring device or stream gauging station in the
458 section of the stream within which the instream flow is maintained; and

459 (ii) is not required to install controlling works ~~§~~ → unless the state engineer's order
459a approving the application requires the installation because controlling works are necessary to achieve
459b the purpose of the application ←§ .

460 (2) The state engineer shall approve the design of:

461 (a) the measuring device or stream gauging station; and

462 (b) the controlling works [or measuring device shall be of such design as the state
 463 engineer may approve and] so that the [same can be locked and kept set by him or his
 464 assistants, and such] state engineer or a water commissioner may regulate and lock the works.

465 (3) The owner shall construct and maintain, when required by the state engineer,
 466 [flumes] a flume or other measuring [devices] device at [such] points along [his] the ditch as
 467 may be necessary [for the purpose of assisting] to assist the state engineer or [his assistants]
 468 water commissioner in determining the amount of water that is to be diverted into [his] the
 469 ditch from the stream or water source, or taken from it by the various users.

470 (4) Every owner or manager of a reservoir located across or upon the bed of a natural
 471 stream shall construct and maintain, when required by the state engineer, a flume or other
 472 measuring device [of a plan to be] of a design and at a location approved by the state engineer,
 473 below [such] the reservoir [at a point approved by him,] and [a flume or measuring device]
 474 above [such] the reservoir on each stream or source of supply discharging into [such] the
 475 reservoir, [for the purpose of assisting] to assist the state engineer or water commissioner in
 476 determining the amount of water to which prior appropriators are entitled, and thereafter
 477 diverting it for [such] the prior appropriators' use. [If the owner of irrigation works, canals,
 478 reservoirs, wells, pumps or tunnels shall refuse or neglect]

479 (5) If a water user refuses or neglects to construct or install [such head gates, caps,
 480 valves, flumes] the controlling works or measuring [devices] device after [thirty] 30 days'
 481 notice to do so by the state engineer[;]:

482 (a) the state engineer may forbid the use of water until the user [thereof shall comply
 483 with his requirement,] complies with the state engineer's requirement; or

484 (b) the state engineer may:

485 (i) proceed to construct or install or cause to be constructed or installed [such]
 486 controlling works or a measuring [devices] device, and the cost of the [same shall be]
 487 controlling works or measuring device is a lien against the lands and water rights served
 488 thereby[;]; and [the state engineer is authorized to]

489 (ii) bring action in the name of the state to foreclose [such] a lien under this Subsection
 490 (5).

490a **Ĥ→ Section 8. Coordinating S.B. 29 with H.B. 48 -- Merging substantive and technical**
 490b **amendments.**

490c **If this S.B. 29 and H.B. 48, Department of Natural Resources Amendments, both pass,**
 490d **it is the intent of the Legislature that the Office of Legislative Research and General Counsel in**
 490e **preparing the Utah Code database for publication modify Section 73-5-4 to read:**

490f ~~H~~→"73-5-4. Controlling works and measuring devices.

490g [Every] (1) To assist the state engineer or water commissioner in the regulation,
 490h distribution, and measurement of water, each person using water in this state , except as
 490i provided by Subsection (4), shall construct or install and maintain [a substantial head gate,
 490j cap, valve or other] controlling works[, weir flume -]and a measuring device at :

490k (a) each [point] location where water is diverted [or turned out, for the purpose of
 490l regulating and measuring the quantity of water that may be used. Such controlling works or
 490m measuring device shall be of such design as the state engineer may approve and so that the
 490n same can be locked and kept set by him or his assistants; and such owner shall construct and
 490o maintain, when required by the state engineer, flumes or other measuring devices at such
 490p points along his ditch as may be necessary for the purpose of assisting the state engineer or his
 490q assistants in determining the amount of water that is to be diverted into his ditch from the
 490r stream or water source, or taken from it by the various users. Every] from a source; and

490s (b) any other location required by the state engineer.

490t (2) Each person using water in this state shall make the controlling works and
 490u measuring device accessible to the state engineer or water commissioner.

490v (3) The state engineer shall approve the design of:

490w (a) the measuring device; and

490x (b) controlling works so that the state engineer or a water commissioner may regulate
 490y and lock the works.

490z (4) Each person using water as an instream flow:

490aa (a) shall install and maintain a measuring device or stream gauging station in the
 490ab section of the stream within which the instream flow is maintained; and

490ac (b) is not required to install controlling works unless the state engineer's order
 490ad approving the application requires the installation because controlling works are necessary to
 490ae achieve the purpose of the application.

490af (5) (a) Each owner or manager of a reservoir [located across or upon the bed of a
 490ag natural stream] shall construct and maintain[, when required] a measuring device as directed
 490ah by the state engineer[, a flume or other measuring device of a plan to be approved by the state
 490ai engineer, below such reservoir at a point approved by him, and a flume or measuring device
 490aj above such reservoir on each stream or source of supply discharging into such reservoir, for
 490ak the purpose of assisting the state engineer in determining the amount of water to which prior
 490al appropriators are entitled, and thereafter diverting it for such prior appropriators' use. If the
 490am owner of irrigation works, canals, reservoirs, wells, pumps or tunnels shall refuse or ←H

490an ~~neglect] to measure the inflow, storage content, and outflow from the reservoir.~~

490ao (b) The state engineer shall approve the design and location of a measuring device.

490ap (c) The owner or manager of a reservoir shall make the measuring device accessible to
490aq the state engineer or water commissioner.

490ar (6) If a water user refuses or neglects to construct or install [such head gates, caps,
490as valves, flumes] the controlling works or measuring [devices] device after [thirty] 30 days'
490at notice to do so by the state engineer, the state engineer may :

490au (a) forbid the use of water until the user [thereof shall comply with his] complies with
490av the state engineer's requirement[, or the state engineer may proceed to construct or install or
490aw cause to be constructed or installed such controlling works or measuring devices, and the cost
490ax of the same shall be a lien against the lands and water rights served thereby, and the state
490ay engineer is authorized to bring action in the name of the state to foreclose such lien.] ; and

490az (b) commence enforcement proceedings authorized by Section 73-2-25." ←Ĥ

Legislative Review Note
as of 11-17-06 12:57 PM

Office of Legislative Research and General Counsel

Legislative Committee Note
as of 12-13-06 2:28 PM

The Water Issues Task Force recommended this bill.

S.B. 29 - Instream Flow to Protect Trout Habitat

Fiscal Note

2007 General Session
State of Utah

State Impact

Enactment of this bill will not require additional appropriations.

Individual, Business and/or Local Impact

Enactment of this bill likely will not result in direct, measurable costs and/or benefits for individuals, businesses, or local governments.

1/10/2007, 10:38:52 AM, Lead Analyst: Djambov, I.

Office of the Legislative Fiscal Analyst