

**PERMANENT INSTREAM FLOW TO PRESERVE
WATER QUALITY**

2007 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Mike Dmitrich

House Sponsor: _____

LONG TITLE

General Description:

This bill authorizes a municipality and certain special districts to change a water right for instream flow to protect water quality.

Highlighted Provisions:

This bill:

- ▶ defines terms;
- ▶ authorizes the Water Quality Board to make rules regarding certification of instream flow change applications;
- ▶ allows a municipality, a special service district, a special service improvement district, a county water and sewer improvement district, a county service area, a water conservancy district, or an interlocal entity to file a change application for an instream flow to:
 - protect water quality or quantity; or
 - comply with state water quality standards;
- ▶ requires the Water Quality Board's executive secretary to certify the proposed change to an instream flow; and
- ▶ makes technical changes.

Monies Appropriated in this Bill:

None



28 **Other Special Clauses:**

29 None

30 **Utah Code Sections Affected:**

31 AMENDS:

32 **19-5-104**, as last amended by Chapter 179, Laws of Utah 200633 **19-5-106**, as last amended by Chapter 114, Laws of Utah 199534 **73-3-3**, as last amended by Chapter 215, Laws of Utah 200535 **73-3-12**, as last amended by Chapter 58, Laws of Utah 200636 **73-3-16**, as last amended by Chapter 33, Laws of Utah 199837 **73-3-17**, as last amended by Chapter 160, Laws of Utah 195538 **73-5-4**, Utah Code Annotated 1953

39 ENACTS:

40 **73-3-30**, Utah Code Annotated 195341

42 *Be it enacted by the Legislature of the state of Utah:*43 Section 1. Section **19-5-104** is amended to read:44 **19-5-104. Powers and duties of board.**45 (1) The board has the following powers and duties, but the board shall give priority to
46 pollution that results in hazards to the public health:47 (a) develop programs for the prevention, control, and abatement of new or existing
48 pollution of the waters of the state;49 (b) advise, consult, and cooperate with other agencies of the state, the federal
50 government, other states, and interstate agencies, and with affected groups, political
51 subdivisions, and industries to further the purposes of this chapter;52 (c) encourage, participate in, or conduct studies, investigations, research, and
53 demonstrations relating to water pollution and causes of water pollution as the board finds
54 necessary to discharge its duties;55 (d) collect and disseminate information relating to water pollution and the prevention,
56 control, and abatement of water pollution;57 (e) adopt, modify, or repeal standards of quality of the waters of the state and classify
58 those waters according to their reasonable uses in the interest of the public under conditions the

board may prescribe for the prevention, control, and abatement of pollution;

(f) make rules in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, taking into account Subsection (2), to:

(i) implement the awarding of construction loans to political subdivisions and municipal authorities under Section 11-8-2, including:

(A) requirements pertaining to applications for loans;

(B) requirements for determination of eligible projects;

(C) requirements for determination of the costs upon which loans are based, which costs may include engineering, financial, legal, and administrative expenses necessary for the construction, reconstruction, and improvement of sewage treatment plants, including major interceptors, collection systems, and other facilities appurtenant to the plant;

(D) a priority schedule for awarding loans, in which the board may consider in addition to water pollution control needs any financial needs relevant, including per capita cost, in making a determination of priority; and

(E) requirements for determination of the amount of the loan;

(ii) implement the awarding of loans for nonpoint source projects pursuant to Section 73-10c-4.5;

(iii) set effluent limitations and standards subject to Section 19-5-116;

(iv) implement or effectuate the powers and duties of the board; ~~and~~

(v) protect the public health for the design, construction, operation, and maintenance of underground wastewater disposal systems, liquid scavenger operations, and vault and earthen pit privies; and

(vi) implement the requirements of Section 73-3-30, including defining under what circumstances an instream flow is critical to comply with a state water quality standard;

(g) issue, modify, or revoke orders:

(i) prohibiting or abating discharges;

(ii) requiring the construction of new treatment works or any parts of them, or requiring the modification, extension, or alteration of existing treatment works as specified by board rule or any parts of them, or the adoption of other remedial measures to prevent, control, or abate pollution;

(iii) setting standards of water quality, classifying waters or evidencing any other

determination by the board under this chapter; ~~and~~

(iv) requiring compliance with this chapter and with rules made under this chapter; and

(v) issued by the executive secretary certifying an instream flow change application;

(h) review plans, specifications, or other data relative to disposal systems or any part of disposal systems, and issue construction permits for the installation or modification of treatment works or any parts of them;

(i) after public notice and opportunity for a public hearing, issue, continue in effect, revoke, modify, or deny discharge permits under reasonable conditions the board may prescribe to control the management of sewage sludge or to prevent or control the discharge of pollutants, including effluent limitations for the discharge of wastes into the waters of the state;

(j) give reasonable consideration in the exercise of its powers and duties to the economic impact of water pollution control on industry and agriculture;

(k) exercise all incidental powers necessary to carry out the purposes of this chapter, including delegation to the department of its duties as appropriate to improve administrative efficiency;

(l) meet the requirements of federal law related to water pollution;

(m) establish and conduct a continuing planning process for control of water pollution including the specification and implementation of maximum daily loads of pollutants;

(n) make rules governing inspection, monitoring, recordkeeping, and reporting requirements for underground injections and require permits for them, to protect drinking water sources, except for wells, pits, and ponds covered by Section 40-6-5 regarding gas and oil, recognizing that underground injection endangers drinking water sources if:

(i) injection may result in the presence of any contaminant in underground water which supplies or can reasonably be expected to supply any public water system, as defined in Section 19-4-102; and

(ii) the presence of the contaminant may result in the public water system not complying with any national primary drinking water standards or may otherwise adversely affect the health of persons;

(o) make rules governing sewage sludge management, including permitting, inspecting, monitoring, recordkeeping, and reporting requirements;

(p) adopt and enforce rules and establish fees to cover the costs of testing for

certification of operators of treatment works and sewerage systems operated by political subdivisions;

(q) notwithstanding the provisions of Section 19-4-112, make rules governing design and construction of irrigation systems which convey sewage treatment facility effluent of human origin in pipelines under pressure, unless contained in surface pipes wholly on private property and for agricultural purposes, and which are constructed after May 4, 1998; and

(r) (i) approve, approve in part, approve with conditions, or deny, in writing, an application for water reuse under Title 73, Chapter 3c, Wastewater Reuse Act; and

(ii) issue an operating permit for water reuse under Title 73, Chapter 3c, Wastewater Reuse Act.

(2) In determining eligible project costs and in establishing priorities pursuant to Subsection (1)(f)(i), the board shall take into consideration the availability of federal grants.

(3) In establishing certification rules under Subsection (1)(p), the board shall:

(a) base the requirements for certification on the size, treatment process type, and complexity of the treatment works and sewerage systems operated by political subdivisions;

(b) allow operators until three years after the date of adoption of the rules to obtain initial certification;

(c) allow new operators one year from the date they are hired by a treatment plant or sewerage system or three years after the date of adoption of the rules, whichever occurs later, to obtain certification;

(d) issue certification upon application and without testing, at a grade level comparable to the grade of current certification to operators who are currently certified under the voluntary certification plan for wastewater works operators as recognized by the board; and

(e) issue a certification upon application and without testing that is valid only at the treatment works or sewerage system where that operator is currently employed if the operator:

(i) is in charge of and responsible for the treatment works or sewerage system on March 16, 1991;

(ii) has been employed at least ten years in the operation of that treatment works or sewerage system prior to March 16, 1991; and

(iii) demonstrates to the board his capability to operate the treatment works or sewerage system at which he is currently employed by providing employment history and

references as required by the board.

Section 2. Section **19-5-106** is amended to read:

19-5-106. Executive secretary -- Appointment -- Duties.

The executive secretary shall be appointed by the executive director with the approval of the board, shall serve under the administrative direction of the executive director, and has the following duties:

(1) to develop programs for the prevention, control, and abatement of new or existing pollution of the waters of the state;

(2) to advise, consult, and cooperate with other agencies of the state, the federal government, other states and interstate agencies, and with affected groups, political subdivisions, and industries in furtherance of the purposes of this chapter;

(3) to employ full-time employees as necessary to carry out the provisions of this chapter;

(4) as authorized by the board and subject to the provisions of this chapter, to authorize any employee or representative of the department to enter at reasonable times and upon reasonable notice in or upon public or private property for the purposes of inspecting and investigating conditions and plant records concerning possible water pollution;

(5) to encourage, participate in, or conduct studies, investigations, research, and demonstrations relating to water pollution and causes of water pollution as necessary for the discharge of duties assigned under this chapter, including the establishment of inventories of pollution sources;

(6) to collect and disseminate information relating to water pollution and the prevention, control, and abatement of water pollution;

(7) to develop programs for the management of sewage sludge;

(8) as authorized by the board and subject to the provisions of this chapter, to enforce rules made by the board through the issuance of orders which may be subsequently amended or revoked by the board, which orders may include:

(a) prohibiting or abating discharges of wastes into the waters of the state;

(b) requiring the construction of new control facilities or any parts of them or the modification, extension, or alteration of existing control facilities or any parts of them, or the adoption of other remedial measures to prevent, control, or abate water pollution; and

(c) prohibiting any other violation of this chapter or rules made under this chapter;

(9) to review plans, specifications, or other data relative to pollution control systems or any part of the systems provided for in this chapter;

(10) as authorized by the board and subject to the provisions of this chapter, to exercise all incidental powers necessary to carry out the purposes of this chapter, including certification to any state or federal authorities for tax purposes only if the fact of construction, installation, or acquisition of any facility, land, or building, machinery, or equipment, or any part of them conforms with this chapter;

(11) to cooperate, where the board finds appropriate, with any person in studies and research regarding water pollution and its control, abatement, and prevention; ~~and~~

(12) to represent the state with the specific concurrence of the executive director in all matters pertaining to water pollution, including interstate compacts and other similar agreements~~[-]; and~~

(13) to issue an order certifying an instream flow change application, as provided by board rules.

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

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

(1) For purposes of this section:

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

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

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

(i) point of diversion;

(ii) place of use; or

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

(b) ~~[A]~~ Except as provided by Section 73-3-30, the state engineer may not authorize a change ~~[may not be made]~~ if it impairs ~~[any]~~ a vested water right without just compensation.

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

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

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

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

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

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

(iv) the stream or water source;

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

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

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

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

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

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

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

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

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

(6) (a) The state engineer shall investigate all temporary change applications.

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

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

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

(7) (a) ~~[The]~~ Except as provided by Section 73-3-30, the state engineer may not reject ~~[applications for either permanent or temporary changes]~~ a permanent or temporary change application for the sole reason that the change would impair ~~[the]~~ a vested [rights of others] water right.

(b) If otherwise proper, the state engineer may approve a permanent or temporary ~~[changes may be approved]~~ change application for part of the water involved or upon the condition that the applicant acquire the conflicting ~~[rights are acquired]~~ water right.

(8) (a) Any person holding an approved application for the appropriation of water may ~~[either permanently or temporarily]~~ change the point of diversion, place of use, or purpose of use.

(b) A change of an approved application does not:

(i) affect the priority of the original application; or

(ii) extend the time period within which the construction of work is to begin or be completed.

(9) Any person who changes or who attempts to change a point of diversion, place of use, or purpose of use, either permanently or temporarily, without first applying to the state engineer in the manner provided in this section:

(a) obtains no right;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

~~[(i) purchase water rights for the purposes provided in Subsection (11)(a) only with funds specifically appropriated by the Legislature for water rights purchases; or]~~

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 4. Section **73-3-12** is amended to read:

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

Extensions -- Procedures and criteria.

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

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

(b) the Bureau of Reclamation.

(2) (a) The construction of the works, if necessary, and the application of water to beneficial use shall be diligently prosecuted to completion within the time fixed by the state engineer.

(b) ~~[Extensions]~~ The state engineer may grant an extension of time, not exceeding 50

years from the date of approval of the application, except as provided in Subsection (2)(c),
[~~may be granted by the state engineer~~] on proper showing of diligence or reasonable cause for
delay.

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

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

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

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

(ii) The notice shall:

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

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

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

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

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

(h) In considering an application to extend the time in which to place water to
beneficial use under an approved application, the state engineer shall deny the extension and
declare the application lapsed, unless the applicant affirmatively shows that the applicant has

exercised or is exercising reasonable and due diligence in working toward completion of the appropriation.

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

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

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

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

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

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

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

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

Section 5. Section **73-3-16** is amended to read:

73-3-16. Proof of appropriation or permanent change -- Notice -- Manner of proof -- Statements -- Maps, profiles, and drawings -- Verification -- Waiver of filing -- Statement in lieu of proof of appropriation or change.

(1) Sixty days before the date set for the proof of appropriation or proof of change to be made, the state engineer shall notify the applicant by mail when proof of completion of the

works and application of the water to a beneficial use will be due.

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

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

(a) a description of the works constructed;

(b) the quantity of water in acre-feet or the flow in second-feet diverted, or both;

(c) the method of applying the water to beneficial use; and

(d) (i) detailed measurements of water put to beneficial use;

(ii) the date the measurements were made; and

(iii) the name of the person making the measurements.

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

(i) a statement indicating construction of the project works has been completed;

(ii) a description of the major features with appropriate maps, profiles, drawings, and reservoir area-capacity curves;

(iii) a description of the point or points of diversion and redirection;

(iv) project operation data;

(v) a map showing the place of use of water and a statement of the purpose and method of use;

(vi) the project plan for beneficial use of water under the applications and the quantity of water required; and

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

(b) The director of the Division of Water Resources shall sign proofs for the state projects and an authorized official of the Bureau of Reclamation shall sign proofs for the

federal projects specified in Subsection (4)(a).

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

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

(i) the location of the completed works;

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

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

(iv) the place of use.

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

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

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

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

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

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

Section 6. Section **73-3-17** is amended to read:

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

(1) Upon it being made to appear to the satisfaction of the state engineer that an appropriation or a permanent change of point of diversion, place or ~~nature~~ purpose of use has

been perfected in accordance with the application ~~[therefor]~~, and that the water appropriated or affected by the change has been put to a beneficial use, as required by Section 73-3-16~~[-he]~~ or 73-3-30, the state engineer shall issue a certificate, in duplicate, setting forth:

- (a) the name and post-office address of the person by whom the water is used~~[-];~~
- (b) the quantity of water in acre-feet or the flow in second-feet appropriated~~[-];~~
- (c) the purpose for which the water is used~~[-];~~
- (d) the time during which the water is to be used each year~~[-];~~
- (e) the name of the stream or water source ~~[of supply];~~
- (i) from which the water is diverted~~[-]; or~~
- (ii) within which an instream flow is maintained;
- (f) the date of the appropriation or change~~[-]; and~~
- (g) such other matter as will fully and completely define the extent and conditions of actual application of the water to a beneficial use~~[-; provided that certificates].~~

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

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

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

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

(6) The certificate ~~[so]~~ issued and filed ~~[shall be]~~ under this section is prima facie evidence of the owner's right to the use of the water in the quantity, for the purpose, at the place, and during the time specified therein, subject to prior rights.

Section 7. Section **73-3-30** is enacted to read:

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

493 (1) As used in this section, "division" means the Division of Wildlife Resources,
494 created in Section 23-14-1, or the Division of Parks and Recreation, created in Section
495 63-11-17.1.

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

499 (i) the propagation of fish;

500 (ii) public recreation; or

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

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

503 (i) a perfected water right:

504 (A) presently owned by the division;

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

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

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

510 (c) A division may:

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

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

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

516 (3) (a) A municipality, as defined in Subsection 10-1-104(5), a special district, as
517 defined in Subsection 17A-1-404(19)(c), (d), (g), or (l), or an interlocal entity as defined by
518 Section 11-13-103 may file a permanent or temporary change application on a perfected water
519 right, as provided by Section 73-3-3, for the purpose of providing water for an instream flow,
520 within a specified section of a natural or altered stream channel, reasonably necessary to:

521 (i) preserve water quantity or quality; or

522 (ii) comply with a state water quality standard.

523 (b) (i) An applicant must receive certification by the Water Quality Board's executive

524 secretary before filing the change application with the state engineer.

525 (ii) The Water Quality Board's executive secretary shall issue an order certifying the
526 proposed change if the executive secretary finds that an instream flow is critical to comply with
527 a state water quality standard.

528 (iii) An applicant may appeal the executive secretary's certification order to the Water
529 Quality Board as provided by Title 63, Chapter 46b, Administrative Procedures Act.

530 (c) A change of a water right to an instream flow is limited to the consumptive portion
531 of the water right.

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

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

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

539 (5) (a) For a permanent change application, 60 days before the date on which proof of
540 change for an instream flow is due, the state engineer shall notify the applicant by mail or by
541 any form of communication through which receipt is verifiable of the date when proof of
542 change is due.

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

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

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

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

549 (C) the period of use; and

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

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

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

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

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

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

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

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

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

569 Section 8. Section **73-5-4** is amended to read:

570 **73-5-4. Head gates and measuring devices.**

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

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

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

579 (ii) is not required to install controlling works.

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

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

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

585 (3) The owner shall construct and maintain, when required by the state engineer,

586 ~~[flumes]~~ a flume or other measuring ~~[devices]~~ device at ~~[such]~~ points along ~~[his]~~ the ditch as
587 may be necessary ~~[for the purpose of assisting]~~ to assist the state engineer or ~~[his assistants]~~
588 water commissioner in determining the amount of water that is to be diverted into ~~[his]~~ the
589 ditch from the stream or water source, or taken from it by the various users.

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

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

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

604 (b) the state engineer may:

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

609 (ii) bring action in the name of the state to foreclose ~~[such]~~ a lien under this Subsection
610 (5).

Legislative Review Note
as of 11-20-06 7:00 AM

Office of Legislative Research and General Counsel

S.B. 95 - Permanent Instream Flow to Preserve Water Quality

Fiscal Note

2007 General Session

State of Utah

State Impact

Enactment of this bill will not require additional appropriations. However, depending on the decision of the Water Quality Board, there may be additional travel costs incurred by the Division of Water Rights.

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.

1/11/2007, 8:08:15 AM, Lead Analyst: Djambov, I.

Office of the Legislative Fiscal Analyst