

INSTREAM FLOW TO PROTECT TROUT

HABITAT

2008 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Stephen E. Sandstrom

Senate Sponsor: Peter C. Knudson

LONG TITLE

General Description:

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

Highlighted Provisions:

This bill:

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

Monies Appropriated in this Bill:

None

Other Special Clauses:

None



28 **Utah Code Sections Affected:**

29 AMENDS:

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

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

32 **73-3-12**, as last amended by Laws of Utah 2007, Chapter 136

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

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

35 **73-5-4**, as last amended by Laws of Utah 2007, Chapter 136

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42 (1) Title 73, Chapter 27, State Water Development Commission, is repealed December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 instream flow water right for trout habitat established in Subsection 73-3-30(3)
45 is repealed December 31, 2018.

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

47 **73-3-3. Permanent or temporary changes 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, a change may not be made if it impairs
61 [any] a vested water right without just 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 applicant's name [of the applicant];

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

72 (iii) ~~[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 duties of a permanent change applicant are the same as provided in
86 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 wave 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]~~ A person holding an approved application for the appropriation of water
107 may ~~[either permanently or temporarily]~~ change the point of diversion, place of use, or purpose
108 of 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 and the application of~~] An applicant shall

183 construct works, if necessary, and apply the water to beneficial use [~~shall be diligently~~
184 ~~prosecuted to completion~~] within the time fixed by the state engineer.

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

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

193 (d) [~~All requests~~] An applicant shall file a request for an extension of time [~~shall be~~
194 ~~filed in~~] with the office of the state engineer on or before the date fixed for filing proof of
195 appropriation.

196 (e) The state engineer may grant an extension of time:

197 [~~(e) Extensions~~] (i) not exceeding 14 years after the approval date [~~of approval may be~~
198 ~~granted by the state engineer~~] upon a sufficient showing[~~, but extensions~~]; and

199 (ii) beyond 14 years [~~shall be granted only~~] 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 source 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 or holds an application from the source of
208 supply referred to in Subsection (2)(f) [~~or holds an application from that source of supply~~] may
209 file a protest with the 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 of time 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 of time is effective so long as the applicant continues to
223 exercise reasonable diligence in completing the appropriation.

224 (j) (i) The state engineer shall consider the holding of an approved application by [~~any~~]
225 a 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~~] an extension of time beyond 50 years
228 for a public agency, if the public agency provides information [~~sufficient to demonstrate~~] that
229 shows the water will be needed to meet the 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:

232 (i) deny the extension of time; or [~~may~~]

233 (ii) grant the request in part or upon conditions, including a reduction of the priority of
234 all or part of the application.

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

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

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

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

245 **73-3-16. Proof of appropriation or permanent change -- Notice -- Manner of**
246 **proof -- Statements -- Maps, profiles, and drawings -- Verification -- Waiver of filing --**
247 **Statement in lieu of proof of appropriation or change.**

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

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

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

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

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

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

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

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

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

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

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

287 (i) the location of the completed works;

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

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

291 (iv) the place of use.

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

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

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

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

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

306 (9) This section does not apply to an instream flow water right authorized by Section

307 73-3-30.

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

309 **73-3-17. Certificate of appropriation -- Evidence.**

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

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

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

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

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

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

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

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

323 (f) the date of the appropriation or change[;]; and [~~such other matter as will fully and~~
 324 ~~completely define~~]

325 (g) other information that defines the extent and conditions of actual application of the
 326 water to a beneficial use[; ~~provided that certificates~~].

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

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

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

336 (5) One copy of [~~such~~] a certificate issued under this section shall be filed in the office
 337 of the state engineer and the other shall be delivered to the appropriator or to the person making

338 the change who shall, within [~~thirty~~] 30 days, cause the same to be recorded in the office of the
339 county recorder of the county in which the water is diverted from the natural stream or source.

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

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

344 **73-3-30. Change application for an instream flow.**

345 (1) As used in this section:

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

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

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

350 (ii) promotes fishing opportunities in the state.

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

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

357 (i) the propagation of fish;

358 (ii) public recreation; or

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

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

361 (i) a perfected water right:

362 (A) presently owned by the division;

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

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

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

368 (c) A division may:

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

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

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

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

378 (i) the Bonneville cutthroat;

379 (ii) the Colorado River cutthroat; or

380 (iii) the Yellowstone cutthroat.

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

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

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

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

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

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

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

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

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

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

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

403 (II) obtained an enhancement of survival permit, as authorized by 16 U.S.C. Sec.
404 1539(a)(1)(A).

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

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

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

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

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

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

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

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

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

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

- 431 (b) Before the date when proof of change is due, the applicant must either:
432 (i) file a verified statement with the state engineer that the instream flow uses have
433 been perfected, setting forth:
434 (A) the legal description of the points on the stream channel between which the
435 instream flow is provided;
436 (B) detailed measurements of the flow of water in second-feet changed;
437 (C) the period of use; and
438 (D) any additional information required by the state engineer; or
439 (ii) apply for a further extension of time as provided for in Section 73-3-12.
440 (c) (i) Upon acceptance of the verified statement required under Subsection (5)(b)(i),
441 the state engineer shall issue a certificate of change for instream flow use in accordance with
442 Section 73-3-17.
443 (ii) The certificate expires at the same time the fixed time change application expires.
444 (6) No person may appropriate unappropriated water under Section 73-3-2 for the
445 purpose of providing an instream flow.
446 (7) Water used in accordance with this section is considered to be beneficially used, as
447 required by Section 73-3-1.
448 (8) A physical structure or physical diversion from the stream is not required to
449 implement a change for instream flow use.
450 (9) This section does not allow enlargement of the water right that the applicant seeks
451 to change.
452 (10) A change application authorized by this section may not impair a vested water
453 right, including a water right used to generate hydroelectric power.
454 (11) The state engineer or the water commissioner shall distribute water under an
455 approved or a certificated instream flow change application according to the change
456 application's priority date relative to the other water rights located within the stream section
457 specified in the change application for instream flow.
458 (12) An approved fixed time change application does not create a right of access across
459 private property or allow any infringement of a private property right.
460 Section 7. Section **73-5-4** is amended to read:
461 **73-5-4. Controlling works and measuring devices.**

462 (1) To assist the state engineer or water commissioner in the regulation, distribution,
463 and measurement of water, ~~[each]~~ a person using water in this state, except as provided by
464 Subsection (4), shall construct or install and maintain controlling works and a measuring
465 device at:

- 466 (a) each location where water is diverted from a source; and
- 467 (b) any other location required by the state engineer.

468 (2) ~~[Each]~~ A person using water in this state shall make the controlling works and
469 measuring device accessible to the state engineer or water commissioner.

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

- 471 (a) the measuring device; and
- 472 (b) controlling works so that the state engineer or a water commissioner may regulate
473 and lock the works.

474 (4) A person using water as an instream flow:

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

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

480 ~~[(4)]~~ (5) (a) ~~[Each]~~ An owner or manager of a reservoir shall construct and maintain a
481 measuring device as directed by the state engineer to measure the inflow, storage content, and
482 outflow from the reservoir.

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

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

486 ~~[(5)]~~ (6) If a water user refuses or neglects to construct or install the controlling works
487 or measuring device after 30 days' notice to do so by the state engineer, the state engineer may:

488 (a) forbid the use of water until the user complies with the state engineer's requirement;
489 and

490 (b) commence enforcement proceedings authorized by Section 73-2-25.

Legislative Review Note
as of 12-31-07 7:53 AM

Office of Legislative Research and General Counsel

H.B. 117 - Instream Flow to Protect Trout Habitat

Fiscal Note

2008 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.
