

# HB0033S01 compared with HB0033

~~{deleted text}~~ shows text that was in HB0033 but was deleted in HB0033S01.

inserted text shows text that was not in HB0033 but was inserted into HB0033S01.

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Representative Joel Ferry proposes the following substitute bill:

## INSTREAM WATER FLOW AMENDMENTS

2022 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Joel Ferry**

Senate Sponsor: Scott D. Sandall

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### LONG TITLE

#### ~~{Committee Note:~~

~~— The Legislative Water Development Commission recommended this bill.~~

~~— Membership: — 13 legislators — 11 non-legislators~~

~~— Total Vote: — 8 voting for — 1 voting against — 4 absent~~

~~— Legislative Vote: — 8 voting for — 1 voting against — 4 absent~~

#### ~~{General Description:~~

This bill makes changes related to change applications for certain uses of water.

#### **Highlighted Provisions:**

This bill:

- ▶ defines terms;
- ▶ provides that certain entities or individuals may file a change application to provide water for an instream flow or for use on sovereign lands;

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- ▶ amends the process by which a change application for instream flow or use on sovereign lands is considered; and
- ▶ makes technical and conforming changes.

### Money Appropriated in this Bill:

None

### Other Special Clauses:

None

### Utah Code Sections Affected:

AMENDS:

**73-3-3**, as last amended by Laws of Utah 2020, Chapter 421

**73-3-8**, as last amended by Laws of Utah 2020, Chapter 421

**73-3-30**, as last amended by Laws of Utah 2021, Chapter 280

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

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

**73-3-3. Changes to a water right.**

(1) [~~For purposes of~~] As used in this section:

(a) "Change" means a change to the:

- (i) point of diversion;
- (ii) place of use;
- (iii) period of use;
- (iv) nature of use; or
- (v) storage of water.

(b) "Fixed time change" means a change for a fixed period of time exceeding one year and not exceeding 10 years, including a fixed time change described in Section 73-3-30.

(c) "Permanent change" means a change, for an indefinite period of time, including a permanent change described in Section 73-3-30.

(d) "Person entitled to the use of water" means:

- (i) the holder of an approved but unperfected application to appropriate water;
- (ii) the record owner of a perfected water right;
- (iii) a person who has written authorization from a person described in Subsection

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(1)(d)(i) or (ii) to file a change application on that person's behalf; or

(iv) a shareholder in a water company who is authorized to file a change application in accordance with Section 73-3-3.5.

(e) (i) "Quantity impairment" means any reduction in the amount of water a person is able to receive in order to satisfy an existing right to the use of water that would result from an action proposed in a change application, including:

(A) diminishing the quantity of water in the source of supply for the existing right;

(B) a change in the timing of availability of water from the source of supply for the existing right; or

(C) enlarging the quantity of water depleted by the nature of the proposed use when compared with the nature of the currently approved use.

(ii) "Quantity impairment" does not mean a decrease in the static level of water in an underground basin or aquifer that would result from an action proposed to be taken in a change application, if the volume of water necessary to satisfy an existing right otherwise remains reasonably available.

(f) "Split season change" means a change when the holder of a perfected right grants to a water user the right to make sequential use of a portion of the water right.

(g) "Temporary change" means a change for a period of time, not exceeding one year, including a temporary change described in Section 73-3-30.

(2) (a) A person who proposes to file a change application may request consultation with the state engineer, or the state engineer's designee, before filing the application to review the requirements of the change application process, discuss potential issues related to the change, and provide the applicant with information.

(b) Statements made and information presented in the consultation are not binding on the applicant or the state engineer.

(c) The consultation described in Subsection (2)(a) may occur in the state engineer's regional office for the region where the proposed change would occur.

(3) (a) A person entitled to the use of water may make a change to an existing right to use water, including a right involved in a general determination of rights or other suit, if:

(i) the person makes the change in accordance with this section;

(ii) except as provided by Section 73-3-30, the change does not impair an existing right

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without just compensation or adequate mitigation; and

(iii) the state engineer approves the change application, consistent with Section 73-3-8.

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

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

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

(B) the repayment of project costs; and

(ii) the record owner of the water right.

(c) A change application on a United States Indian Irrigation Service water right that is serving the needs of a township or municipality shall be signed by:

(i) the local public water supplier that is responsible for the operation and maintenance of the public water supply system; and

(ii) the record owner of the water right.

(4) (a) Before making a change, a person entitled to the use of water shall submit a change application upon forms furnished by the state engineer.

(b) The application described in Subsection (4)(a) shall include:

(i) the applicant's name;

(ii) the water right description, including the water right number;

(iii) the 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, nature, period, and extent of the currently approved use;

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

(ix) if the change applicant is submitting a change application in accordance with Section 73-3-3.5, the information required by Section 73-3-3.5;

(x) any proposed change to the storage of water; and

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

(c) A shareholder in a water company who seeks to make a change to a water right to which the water company is the record owner shall file a change application in accordance with Section 73-3-3.5.

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(5) In a proceeding before the state engineer, the applicant has the burden of producing evidence sufficient to support a reasonable belief that the change can be made in compliance with this section and Section 73-3-8, including evidence:

(a) that the change will not cause a specific existing right to experience quantity impairment; or

(b) if applicable, rebutting the presumption of quantity impairment described in Subsection 73-3-8(6)(c).

(6) A change of an approved application to appropriate water does not:

(a) affect the priority of the original application to appropriate water; or

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

(7) Any person who makes a change without first filing and obtaining approval of a change application providing for the change:

(a) obtains no right by the change;

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

(c) shall comply with the change application process.

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

Section 2. Section **73-3-8** is amended to read:

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

(1) (a) It shall be the duty of the state engineer to approve an application if there is reason to believe that:

(i) for an application to appropriate, there is unappropriated water in the proposed source;

(ii) the proposed use will not impair existing rights or interfere with the more beneficial use of the water;

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(iii) the proposed plan:

(A) is physically and economically feasible, unless the application is filed by the United States Bureau of Reclamation; and

(B) would not prove detrimental to the public welfare;

(iv) the applicant has the financial ability to complete the proposed works;

(v) the application was filed in good faith and not for purposes of speculation or monopoly; and

(vi) if applicable, the application complies with a groundwater management plan adopted under Section 73-5-15.

(b) If the state engineer, because of information in the state engineer's possession obtained either by the state engineer's own investigation or otherwise, has reason to believe that an application will interfere with the water's more beneficial use for irrigation, municipal and industrial, domestic or culinary, stock watering, power or mining development, or manufacturing, or will unreasonably affect public recreation or the natural stream environment, or will prove detrimental to the public welfare, the state engineer shall withhold approval or rejection of the application until the state engineer has investigated the matter.

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

(2) (a) An application to appropriate water for industrial, power, mining development, manufacturing purposes, agriculture, or municipal purposes may be approved for a specific and certain period from the time the water is placed to beneficial use under the application, but in no event may an application be granted for a period of time less than that ordinarily needed to satisfy the essential and primary purpose of the application or until the water is no longer available as determined by the state engineer.

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

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

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

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

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

(iii) the water is still available.

(e) An extension may not exceed the time necessary to satisfy the primary purpose of the original application.

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

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

(b) The approval of an application shall be revoked if the applicant fails to comply with terms of the royalty contract.

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

(b) The state engineer shall:

(i) approve the temporary change if the state engineer finds there is reason to believe that the temporary change will not impair an existing right; and

(ii) deny the temporary change if the state engineer finds there is reason to believe the temporary change would impair an existing right.

(5) (a) With respect to a change application for a permanent or fixed time change:

(i) the state engineer shall follow the same procedures provided in this title for approving an application to appropriate water; and

(ii) the rights and duties of a change applicant are the same as the rights and duties of a person who applies to appropriate water under this title.

(b) The state engineer may waive notice for a permanent or fixed time change application if the application only involves a change in point of diversion of 660 feet or less.

(c) The state engineer may condition approval of a change application to prevent an enlargement of the quantity of water depleted by the nature of the proposed use when compared with the nature of the currently approved use of water proposed to be changed.

(d) A condition described in Subsection (5)(c) may not include a reduction in the currently approved diversion rate of water under the water right identified in the change

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application solely to account for the difference in depletion under the nature of the proposed use when compared with the nature of the currently approved use.

(6) (a) Except as provided in Subsection (6)(b), the state engineer shall reject a permanent or fixed time change application if the person proposing to make the change is unable to meet the burden described in Subsection 73-3-3(5).

(b) If otherwise proper, the state engineer may approve a change application upon one or more of the following conditions:

(i) for part of the water involved;

(ii) that the applicant acquire a conflicting right; or

(iii) that the applicant provide and implement a plan approved by the state engineer to mitigate impairment of an existing right.

(c) (i) There is a rebuttable presumption of quantity impairment, as defined in Section 73-3-3, to the extent that, for a period of at least seven consecutive years, a portion of the right identified in a change application has not been:

(A) diverted from the approved point of diversion; or

(B) beneficially used at the approved place of use.

(ii) The rebuttable presumption described in Subsection (6)(c)(i) does not apply if the beneficial use requirement is excused by:

(A) Subsection 73-1-4(2)(e);

(B) an approved nonuse application under Subsection 73-1-4(2)(b);

(C) Subsection 73-3-30~~(7)~~(6); or

(D) the passage of time under Subsection 73-1-4(2)(c)(i).

(d) The state engineer may not consider quantity impairment based on the conditions described in Subsection (6)(c) unless the issue is raised in a:

(i) timely protest that identifies which of the protestant's existing rights the protestant reasonably believes will experience quantity impairment; or

(ii) written notice provided by the state engineer to the applicant within 90 days after the change application is filed.

(e) The written notice described in Subsection (6)(d)(ii) shall:

(i) specifically identify an existing right the state engineer reasonably believes may experience quantity impairment; and



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(ii) be mailed to the owner of an identified right, as shown by the state engineer's records, if the owner has not protested the change application.

(f) The state engineer is not required to include all rights the state engineer believes may be impaired by the proposed change in the written notice described in Subsection (6)(d)(ii).

(g) The owner of a right who receives the written notice described in Subsection (6)(d)(ii) may not become a party to the administrative proceeding if the owner has not filed a timely protest.

(h) If a change applicant, the protestants, and the persons identified by the state engineer under Subsection (6)(d)(ii) come to a written agreement regarding how the issue of quantity impairment shall be mitigated, the state engineer may incorporate the terms of the agreement into a change application approval.

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

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

(1) As used in this section:

(a) "Division" means the Division of Wildlife Resources<sup>[;]</sup> created in Section 23-14-1, ~~[or]~~ the Division of State Parks<sup>[;]</sup> created in Section 79-4-201, or the Division of Forestry, Fire, and State Lands created in Section 65A-1-4.

~~[(b) "Fishing group" means an organization that:]~~

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

~~[(ii) promotes fishing opportunities in the state:]~~

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

(b) "Person entitled to the use of water" means the same as that term is defined in Section 73-3-3.

(c) "Sovereign lands" means the same as that term is defined in Section 65A-1-1.

(d) "Wildlife" means species of animals, including mammals, birds, fish, reptiles, amphibians, mollusks, and crustaceans, that are protected or regulated by a statute, law, regulation, ordinance, or administrative rule.

(2)(a) Pursuant to Section 73-3-3, a division may file a permanent change application.

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a fixed time change application, or a temporary change application, or a person entitled to the use of water may file a fixed time change application or a temporary change application, to provide water within the state for:

(i) an instream flow within a specified section of a natural or altered stream ~~channel~~;

or

(ii) use on sovereign lands.

(b) The state engineer may not approve a change application filed under this section unless the proposed instream flow or use on sovereign lands will contribute to:

(i) the propagation or maintenance of ~~[fish]~~ wildlife;

(ii) ~~[public recreation]~~ the management of state parks; or

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

~~[(b)]~~ (c) A division may file a change application on:

(i) a perfected water right:

(A) presently owned by the division;

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

(C) ~~[acquired]~~ secured by lease, agreement, gift, exchange, or contribution; or

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

~~[(c)]~~ (d) A division may:

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

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

~~[(d)]~~ (e) A division may not acquire water rights by eminent domain for an instream flow, use on sovereign lands, or for any other purpose.

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

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~~[(i) the Bonneville cutthroat;]~~

~~[(ii) the Colorado River cutthroat; or]~~

~~[(iii) the Yellowstone cutthroat.]~~

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

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

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

~~[(iii) at a special meeting convened under Section 16-6a-702.]~~

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

~~[(d) The fishing group shall receive the Division of Wildlife Resources']~~

~~(3) (a) A person entitled to the use of water shall obtain a division director's approval of the proposed change before filing [the] a fixed time change application or a temporary change application with the state engineer.~~

~~(b) By approving a proposed fixed time change application or temporary change application, a division director attests that the water that is the subject of the application can be used consistent with the statutory mandates of the director's division.~~

~~[(c) The director of the Division of Wildlife Resources may approve a proposed change if:]~~

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

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

~~[(iii) the fishing group has:]~~

~~[(A) entered into a programmatic Candidate Conservation Agreement with Assurances with the United States Fish and Wildlife Service, as authorized by 16 U.S.C. Secs. 1531(a)(5) and 1536(a)(1), that gives the water right holder the option to receive an enhancement of survival permit, as authorized by 16 U.S.C. Sec. 1539(a)(1)(A), or a certificate of inclusion, for~~

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~~a fixed time change application that benefits a candidate species of trout; or]~~

~~[(B) until a programmatic Candidate Conservation Agreement with Assurances described in Subsection (3)(c)(iii)(A) becomes valid and enforceable, entered into a contract with the water right holder agreeing to defend and indemnify the water right holder for liability under Section 1538(a) of the Endangered Species Act, 16 U.S.C. Secs. 1531 through 1544, for an action taken by the water right holder under the terms of the water right holder's agreement with the fishing group for a fixed time change application.]~~

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

~~[(g) (i) In considering a fixed time 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 fixed time change applicant are the same as provided in this title for an applicant to appropriate water.]~~

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

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

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

(4) In addition to the requirements of Section 73-3-3, an application authorized by this section shall include:

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

(i) the segment of the natural or altered stream {channel} that will be the place of use for an instream flow; or

(ii) the location where the water will be used on sovereign lands; and

(b) ~~[include]~~ appropriate studies, reports, or other information required by the state engineer demonstrating ~~[the necessity for the instream flow in the specified section of the~~

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~~stream and~~];

~~(i) the projected benefits to the public resulting from the change[-]; and~~

~~(ii) the necessity for the proposed instream flow or use on sovereign lands.~~

~~[(5) (a) For a permanent change application or a fixed time change application filed according to this section, 60 days before the date on which proof of change for an instream flow is due, the state engineer shall notify the applicant by mail or by any form of 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, setting forth:]~~

~~[(A) the legal description of the points on the stream channel between which the instream flow is 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) (i) Upon acceptance of the verified statement required under Subsection (5)(b)(i), the state engineer shall issue a certificate of change for instream flow use in accordance with Section 73-3-17.]~~

~~[(ii) The certificate expires at the same time the fixed time change application expires.]~~

~~[(6)] (5) A person may not appropriate unappropriated water under Section 73-3-2 for the purpose of providing an instream flow or use on sovereign lands.~~

~~[(7)] (6) Water used in accordance with this section is considered to be beneficially used, as required by Section 73-3-1.~~

~~[(8)] (7) A physical structure or physical diversion from the stream is not required to implement a change [for instream flow use] under this section.~~

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

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

~~[(11) The state engineer or the water commissioner shall distribute water under an~~

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~~approved or a certificated instream flow change application according to the change application's priority date relative to the other water rights located within the stream section specified in the change application for instream flow.]~~

[(12)] (8) An approved [~~fixed time~~] change application described in this section does not create a right of access across private property or allow any infringement of a private property right.