

1 **WATER INSTREAM FLOW AMENDMENTS**

2 2023 GENERAL SESSION

3 STATE OF UTAH

4 **Chief Sponsor: David P. Hinkins**

5 House Sponsor: Scott H. Chew

7 **LONG TITLE**

8 **General Description:**

9 This bill modifies provisions related to instream flow.

10 **Highlighted Provisions:**

11 This bill:

- 12 ▶ allows for certain change applications related to delivery of water to reservoirs; and
- 13 ▶ makes technical changes.

14 **Money Appropriated in this Bill:**

15 None

16 **Other Special Clauses:**

17 None

18 **Utah Code Sections Affected:**

19 AMENDS:

20 **73-3-8**, as last amended by Laws of Utah 2022, Chapter 43

21 **73-3-30**, as last amended by Laws of Utah 2022, Chapter 43

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

24 Section 1. Section **73-3-8** is amended to read:

25 **73-3-8. Approval or rejection of application -- Requirements for approval --**
26 **Application for specified period of time -- Filing of royalty contract for removal of salt or**
27 **minerals -- Request for agency action.**

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

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

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

34 (iii) the proposed plan:

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

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

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

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

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

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

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

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

57 (b) At the expiration of the period fixed by the state engineer the water shall revert to

58 the public and is subject to appropriation as provided by this title.

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

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

- 64 (i) the essential purpose of the original application has not been satisfied;
- 65 (ii) the need for an extension is not the result of any default or neglect by the applicant;
- 66 and
- 67 (iii) the water is still available.

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

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

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

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

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

79 (b) The state engineer shall:

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

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

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

85 (i) the state engineer shall follow the same procedures provided in this title for

86 approving an application to appropriate water; and

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

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

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

94 (d) A condition described in Subsection (5)(c) may not include a reduction in the
95 currently approved diversion rate of water under the water right identified in the change
96 application solely to account for the difference in depletion under the nature of the proposed
97 use when compared with the nature of the currently approved use.

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

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

103 (i) for part of the water involved;

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

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

107 (c) (i) There is a rebuttable presumption of quantity impairment, as defined in Section
108 73-3-3, to the extent that, for a period of at least seven consecutive years, a portion of the right
109 identified in a change application has not been:

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

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

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

- 114 (A) Subsection 73-1-4(2)(e);
- 115 (B) an approved nonuse application under Subsection 73-1-4(2)(b);
- 116 (C) Subsection [~~73-3-30(6)~~] 73-3-30(7); or
- 117 (D) the passage of time under Subsection 73-1-4(2)(c)(i).
- 118 (d) The state engineer may not consider quantity impairment based on the conditions
- 119 described in Subsection (6)(c) unless the issue is raised in a:
- 120 (i) timely protest that identifies which of the protestant's existing rights the protestant
- 121 reasonably believes will experience quantity impairment; or
- 122 (ii) written notice provided by the state engineer to the applicant within 90 days after
- 123 the change application is filed.
- 124 (e) The written notice described in Subsection (6)(d)(ii) shall:
- 125 (i) specifically identify an existing right the state engineer reasonably believes may
- 126 experience quantity impairment; and
- 127 (ii) be mailed to the owner of an identified right, as shown by the state engineer's
- 128 records, if the owner has not protested the change application.
- 129 (f) The state engineer is not required to include all rights the state engineer believes
- 130 may be impaired by the proposed change in the written notice described in Subsection
- 131 (6)(d)(ii).
- 132 (g) The owner of a right who receives the written notice described in Subsection
- 133 (6)(d)(ii) may not become a party to the administrative proceeding if the owner has not filed a
- 134 timely protest.
- 135 (h) If a change applicant, the protestants, and the persons identified by the state
- 136 engineer under Subsection (6)(d)(ii) come to a written agreement regarding how the issue of
- 137 quantity impairment shall be mitigated, the state engineer may incorporate the terms of the
- 138 agreement into a change application approval.

139 Section 2. Section 73-3-30 is amended to read:

140 **73-3-30. Change application for an instream flow -- Change application for**

141 **delivery to a reservoir.**

142 (1) As used in this section:

143 (a) "Colorado River System" means the same as that term is defined in Sections
144 73-12a-2 and 73-13-10.

145 (b) "Division" means the Division of Wildlife Resources created in Section 23-14-1,
146 the Division of State Parks created in Section 79-4-201, or the Division of Forestry, Fire, and
147 State Lands created in Section 65A-1-4.

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

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

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

154 (2) (a) Pursuant to Section 73-3-3, a division may file a permanent change application,
155 a fixed time change application, or a temporary change application, or a person entitled to the
156 use of water may file a fixed time change application or a temporary change application, to
157 provide water within the state for:

- 158 (i) an instream flow within a specified section of a natural or altered stream; or
- 159 (ii) use on sovereign lands.

160 (b) The state engineer may not approve a change application filed under this ~~[section]~~
161 Subsection (2) unless the proposed instream flow or use on sovereign lands will contribute to:

- 162 (i) the propagation or maintenance of wildlife;
- 163 (ii) the management of state parks; or
- 164 (iii) the reasonable preservation or enhancement of the natural aquatic environment.

165 (c) A division may file a change application on:

- 166 (i) a perfected water right:
 - 167 (A) presently owned by the division;
 - 168 (B) purchased by the division for the purpose of providing water for an instream flow
- 169 or use on sovereign lands, through funding provided for that purpose by legislative

170 appropriation; or

171 (C) secured by lease, agreement, gift, exchange, or contribution; or

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

174 (d) A division may:

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

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

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

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

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

186 (4) (a) Pursuant to Section 73-3-3, a person entitled to the use of water may file a fixed
187 time change application or a temporary change application for a project to deliver water to a
188 reservoir located partially or entirely within the Colorado River System in the state in
189 accordance with:

190 (i) Colorado River Drought Contingency Plan Authorization Act, Public Law 116-14;

191 (ii) a water conservation program funded by the Bureau of Reclamation; or

192 (iii) a water conservation program authorized by the state.

193 (b) Before filing a change application under this Subsection (4), a person entitled to the
194 use of water shall obtain the approval from the executive director of the Colorado River
195 Authority of Utah, appointed under Section 63M-14-401.

196 (c) By approving a proposed fixed time change application or temporary change
197 application, the executive director of the Colorado River Authority of Utah attests that the

198 water that is the subject of the application can be used consistent with this section.

199 ~~[(4)]~~ (5) In addition to the requirements of Section 73-3-3, an application authorized by
200 this section shall include:

201 (a) a legal description of:

202 (i) the segment of the natural or altered stream that will be the place of use for an
203 instream flow; ~~[or]~~

204 (ii) the location where the water will be used on sovereign lands; ~~[and]~~ or

205 (iii) the reservoir located partially or entirely within the Colorado River System in the
206 state that the water will be delivered to; and

207 (b) appropriate studies, reports, or other information required by the state engineer
208 demonstrating:

209 (i) the projected benefits to the public resulting from the change; and

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

211 ~~[(5)]~~ (6) A person may not appropriate unappropriated water under Section 73-3-2 for
212 the purpose of providing an instream flow or use on sovereign lands.

213 ~~[(6)]~~ (7) Water used in accordance with this section is considered to be beneficially
214 used, as required by Section 73-3-1.

215 ~~[(7)]~~ (8) A physical structure or physical diversion from the stream is not required to
216 implement a change under this section.

217 ~~[(8)]~~ (9) An approved change application described in this section does not create a
218 right of access across private property or allow any infringement of a private property right.