

CHANGE APPLICATION PROCEDURE

2012 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Ralph Okerlund

House Sponsor: _____

LONG TITLE

General Description:

This bill requires that a person who applies for a permanent or temporary change to a water right meet certain qualifications and allows the state engineer, upon receiving a change application, to determine the quantity of water that is currently being beneficially used and limit approval of the change application based on that determination.

Highlighted Provisions:

This bill:

- defines terms;
- requires that a person who applies for a permanent or temporary change to a water right meet certain qualifications;
- allows the state engineer, upon receiving a change application, to determine the quantity of water that is currently being beneficially used and limit approval of the change application based on that determination; and
- makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:



AMENDS:

73-2-27, as enacted by Laws of Utah 2005, Chapter 215

73-3-3, as last amended by Laws of Utah 2008, Chapter 311

73-3-8, as last amended by Laws of Utah 2007, Chapter 136

73-3-30, as last amended by Laws of Utah 2009, Chapter 344

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

Section 1. Section **73-2-27** is amended to read:

73-2-27. Criminal penalties.

(1) This section applies to offenses committed under:

(a) Section 73-1-14;

(b) Section 73-1-15;

(c) Section 73-2-20;

(d) Subsection [~~73-3-3(9)~~] 73-3-3(8);

(e) Section 73-3-26;

(f) Section 73-3-29;

(g) Section 73-5-9;

(h) Section 76-10-201;

(i) Section 76-10-202; and

(j) Section 76-10-203.

(2) Under circumstances not amounting to an offense with a greater penalty under Subsection 76-6-106(2)(b)(ii) or Section 76-6-404, violation of a provision listed in Subsection (1) is punishable:

(a) as a felony of the third degree if:

(i) the value of the water diverted or property damaged or taken is \$2,500 or greater;

and

(ii) the person violating the provision has previously been convicted of violating the same provision;

(b) as a class A misdemeanor if:

(i) the value of the water diverted or property damaged or taken is \$2,500 or greater; or

(ii) the person violating the provision has previously been convicted of violating the

59 same provision; or

60 (c) as a class B misdemeanor if Subsection (2)(a) or (b) does not apply.

61 Section 2. Section 73-3-3 is amended to read:

62 **73-3-3. Permanent or temporary changes in point of diversion, place of use, or**
63 **purpose of use.**

64 (1) For purposes of this section:

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

68 (i) point of diversion;

69 (ii) place of use;

70 (iii) period of use;

71 (iv) nature of use for which the water is currently appropriated; or

72 (v) addition or deletion of storage as an authorized use.

73 (b) "Temporary change" means a change for a fixed period of time, not exceeding one
74 year[-], to the:

75 (i) point of diversion;

76 (ii) place of use;

77 (iii) period of use;

78 (iv) nature of use for which the water is currently appropriated; or

79 (v) addition or deletion of storage as an authorized use.

80 (c) "Change applicant" means:

81 (i) the holder of an approved but unperfected application to appropriate water;

82 (ii) the record owner of a perfected water right;

83 (iii) a person who has written authorization from a person described in Subsection
84 (1)(c)(i) or (ii) to file a change application on that person's behalf; or

85 (iv) a shareholder in a water company who files a change application in accordance
86 with Section 73-3-3.5.

87 (d) "Quantity of water available for change" means the quantity of water, under a water
88 right, that has been put to beneficial use within the time provided in Section 73-1-4.

89 ~~[(2) (a) Any person entitled to the use of water may make permanent or temporary~~

changes in the:]

~~[(i) point of diversion;]~~

~~[(ii) place of use; or]~~

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

(2) (a) A person may not make a permanent or temporary change to a water right or an approved application to appropriate water, including a water right or an approved application to appropriate water involved in a general determination of rights or other suit, unless the person:

(i) is a change applicant; and

(ii) makes the change in accordance with this section.

(b) Except as provided by Section 73-3-30, a change may not be made if it impairs a vested water right without just compensation.

(c) (i) Subject to Subsection (2)(c)(ii), in a change application proceeding relating to a water right, to prevent impairing other water rights, the state engineer may review the beneficial use of the water under the water right and determine the quantity of water available for change.

(ii) In reviewing the beneficial use of the water under Subsection (2)(c)(i), the state engineer shall, if the water right is exempted or protected under Section 73-1-4 or other law, consider the water reasonably applied to beneficial use.

(d) (i) In reviewing the beneficial use of water and determining the quantity of water available for change under Subsection (2)(c)(i), the state engineer shall:

(A) presume that the quantity of water available for change is the full amount of water available under the water right, unless the presumption is rebutted by clear and convincing evidence that demonstrates that a smaller quantity of water is available for change;

(B) if the state engineer or a protestant to the application questions the quantity of water available for change, conduct an administrative hearing where the change applicant and a protestant may present evidence regarding the quantity of water available for change; and

(C) if the state engineer determines that the quantity of water available for change is less than the amount of water required by the change application, state the factual basis for the determination.

(ii) If the state engineer determines that the quantity of water available for change is less than the amount of water required by the change application, the state engineer may:

- 121 (A) reject the change application; or
122 (B) limit approval of the change application to the quantity of water available for
123 change.
124 (iii) The state engineer's determination of the quantity of water available for change
125 does not:
126 (A) constitute a forfeiture or abandonment;
127 (B) affect the use of the unapproved portion of the underlying water right; or
128 (C) constitute an adjudication of the underlying water right.
129 (e) (i) Before the state engineer makes a decision on a change application, the change
130 applicant may:
131 (A) withdraw the change application; or
132 (B) request that the state engineer stay the proceedings on the change application for up
133 to two years after the day on which the applicant requests the stay, or, if the state engineer finds
134 good cause, for more than two years.
135 (ii) (A) A change applicant who desires to resume proceedings stayed under Subsection
136 (2)(e)(i)(B) shall file with the state engineer a written request to resume the proceedings.
137 (B) If the state engineer stays the proceedings of a change application under Subsection
138 (2)(e)(i)(B) and the applicant does not resume the proceedings within the time limit of the stay,
139 the state engineer shall consider the application withdrawn.
140 ~~[(3) A person entitled to use water shall change a point of diversion, place of use, or~~
141 ~~purpose of water use, including water involved in a general adjudication or other suit, in the~~
142 ~~manner provided in this section.]~~
143 ~~[(4) (a) A person entitled to use water may not make a change unless the state engineer~~
144 ~~approves the change application.]~~
145 (3) (a) A change applicant who files a change application with the state engineer may
146 not make the permanent or temporary change requested in the application unless, and to the
147 extent that, the state engineer approves the change application.
148 (b) A [person entitled to use water] change applicant shall submit a change application
149 upon forms furnished by the state engineer and shall set forth:
150 (i) the applicant's name;
151 (ii) the water right description, including the water right number;

- 152 (iii) the water quantity;
- 153 (iv) the stream or water source;
- 154 (v) if applicable, the point on the stream or water source where the water is currently
- 155 diverted;
- 156 (vi) if applicable, the point to which it is proposed to change the diversion of the water;
- 157 (vii) the place, [~~purpose,~~] nature, period, and extent of the [~~present~~] current use;
- 158 (viii) the place, [~~purpose,~~] nature, period, and extent of the proposed use; and
- 159 (ix) any other information that the state engineer requires.
- 160 [~~(5) (a) The state engineer shall follow the same procedures, and the rights and duties~~
- 161 ~~of the applicants with respect to applications for permanent changes of point of diversion, place~~
- 162 ~~of use, or purpose of use shall be the same, as provided in this title for applications to~~
- 163 ~~appropriate water.]~~
- 164 (4) (a) With respect to a change application for a permanent change:
- 165 (i) the state engineer shall follow the same procedures provided in this title for
- 166 approving an application to appropriate water; and
- 167 (ii) the rights and duties of a change applicant are the same as the rights and duties of a
- 168 person who applies to appropriate water under this title.
- 169 (b) The state engineer may waive notice for a permanent change application involving
- 170 only a change in point of diversion of 660 feet or less.
- 171 [~~(6)~~] (5) (a) The state engineer shall investigate all temporary change applications.
- 172 (b) The state engineer shall issue an order authorizing a temporary change if the state
- 173 engineer finds that the temporary change:
- 174 (i) will not exceed the quantity of water available for the change; and
- 175 (ii) does not impair a vested water right.
- 176 (c) The state engineer may deny a temporary change application if the state engineer
- 177 finds that the temporary change:
- 178 (i) will exceed the quantity of water available for the change; or
- 179 (ii) would impair a vested water right.
- 180 [~~(b) If the state engineer finds that the temporary change will not impair a vested water~~
- 181 ~~right, the state engineer shall issue an order authorizing the change.]~~
- 182 [~~(c) If the state engineer finds that the change sought might impair a vested water right,~~

183 ~~before authorizing the change, the state engineer shall give notice of the application to any~~
184 ~~person whose right may be affected by the change.]~~

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

188 ~~[(7)] (6)~~ (a) Except as provided by Section 73-3-30, the state engineer may not reject a
189 permanent or temporary change application for the sole reason that the change would impair a
190 vested water right.

191 (b) If otherwise proper where interference with another water right has been
192 demonstrated, the state engineer may approve a permanent or temporary change application
193 ~~[for part of the water involved or]~~ upon the condition that the applicant acquire the conflicting
194 water right.

195 ~~[(8) (a) A person holding an approved application for the appropriation of water may~~
196 ~~change the point of diversion, place of use, or purpose of use.]~~

197 ~~[(b)] (7)~~ A change of an approved application to appropriate water does not:

198 ~~[(i)] (a)~~ affect the priority of the original application to appropriate water; or

199 ~~[(ii)] (b)~~ extend the time period within which the construction of work is to begin or be
200 completed.

201 ~~[(9)] (8)~~ Any person who ~~[changes or who attempts to change a point of diversion,~~
202 ~~place of use, or purpose of use, either permanently or temporarily, without first applying to the~~
203 ~~state engineer in the manner provided in this section:]~~ makes a permanent or temporary change
204 before obtaining an approved change application under this section:

205 (a) obtains no right;

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

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

209 ~~[(10)] (9)~~ (a) This section does not apply to the replacement of an existing well by a
210 new well drilled within a radius of 150 feet from the point of diversion of the existing well.

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

213 Section 3. 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.**

(1) (a) ~~[It shall be the duty of the]~~ The state engineer ~~[to]~~ shall approve an application to appropriate water, or a permanent change application, if:

(i) there is unappropriated water in the proposed source;

(ii) subject to Section 73-1-4, for a permanent change application described in Section 73-3-3, the proposed use [will not impair existing rights or interfere with the more beneficial use of the water] is based on the quantity of water that has been placed to beneficial use under a water right;

(iii) the proposed use will not impair an existing right or interfere with a more beneficial use of the water;

~~[(iii)]~~ (iv) the proposed plan is physically and economically feasible, unless the application is filed by the United States Bureau of Reclamation, and would not prove detrimental to the public welfare;

~~[(iv)]~~ (v) the applicant has the financial ability to complete the proposed works; and

~~[(v)]~~ (vi) the application was filed in good faith and not for purposes of speculation or monopoly.

(b) (i) 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 to appropriate water or a change application will interfere with ~~[its]~~ the water's more beneficial use for irrigation, 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, it is the state engineer's duty to withhold approval or rejection of the application until the state engineer has investigated the matter.

(ii) 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;

(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) No extension shall 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 in the event of the failure of the applicant to comply with terms of the royalty contract.

Section 4. 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, created in Section 23-14-1, or the Division of Parks and Recreation, created in Section 79-4-201.

(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.

(c) "Fixed time change" means a change in a water right's point of diversion, place of use, or purpose of use for a fixed period of time longer than one year but not longer than 10 years.

(2) (a) A division may file a permanent or temporary 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:

(i) the propagation of fish;

(ii) public recreation; or

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

(b) 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, through funding provided for that purpose by legislative appropriation; or

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

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

(c) A division may:

(i) purchase a water right for the purposes provided 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) A division may not acquire water rights by eminent domain for an instream flow 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:

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

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

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

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

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

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

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

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

(e) (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.

(f) 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.

(g) (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 Subsection [~~73-3-3(4)(b)~~] 73-3-3(3)(b), an application authorized by this section shall:

(a) set forth the legal description of the points on the stream channel between which the instream flow will be provided by the change application; 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 stream and the projected benefits to the public resulting from the change.

(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.

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

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

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

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

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

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

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

Legislative Review Note
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Office of Legislative Research and General Counsel