

Incorporating comments from drafting committee and Leg. Counsel.

1 **73-3-30 Change application for an instream flow.**

2 (1) As used in this section:

3 (a) "Division" means the Division of Wildlife Resources, created in Section
4 23-14-1, or the Division of Parks and Recreation, created in Section
5 79-4-201.

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

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

9 (ii) promotes fishing opportunities in the state.

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

13 (d) "Public water supplier" means the same as that term is defined in
14 Subsection 73-1-4(1)(b).

15 (2)

16 (a) A division or public water supplier may file a permanent or temporary
17 change application, as provided by Section 73-3-3, for the purpose of
18 providing water for an instream flow, within a specified section of a natural
19 or altered stream channel, necessary within the state for:

20 (i) the propagation of fish;

21 (ii) public recreation; or

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

24 (b) A division or public water supplier may file a change application on:

25 (i) a perfected water right:

26 (A) presently owned by the division or public water supplier;

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

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

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

33 (c) A division may:

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

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

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

40 (e) A public water supplier may not acquire water rights by eminent
41 domain for an instream flow.

42 (3)

43 (a) Subject to Subsections (3) (b) and (c) a public water supplier may file a
44 fixed time change as provided in Subsection (1)(c) or a permanent or
45 temporary change application as provided in Section 73-3-3, on water
46 rights that are currently being held by the public water supplier for the

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reasonable future needs of the public, as determined according to Subsection 73-1-4(2)(f), for the purpose of providing water for an instream flow, within a specified section of a natural or altered stream channel within the state for:

- (i) the propagation of fish;
- (ii) public recreation;
- (iii) the reasonable preservation or enhancement of the natural stream environment; or
- (iv) to improve or protect water quality.

(b) A public water supplier may not acquire water rights by eminent domain for an instream flow.

(c) An instream flow change application filed by a public water supplier on a federal reclamation project water right shall be signed by:

- (i) the public water supplier;
- (ii) the local water user's 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.

(f)',

(43)

(a) Except as provided in Subsection (3)(c), an instream flow application filed by the United States or an agency of the United States on a federally owned water right shall be signed by:

- (i) the United States or federal agency; and
- (ii) a division.

(iii) An instream flow application filed by the United States or an agency of the United States and a division shall be for the purpose of providing water for an instream flow within a specified section of a natural or altered stream channel within the state for:

- (A) the propagation of fish;
- (B) public recreation;
- (C) the reasonable preservation or enhancement of the natural stream environment; or
- (D) to improve or protect water quality.

(5)

(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

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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' director's approval of the proposed change before filing the fixed time change application with the state engineer.

(e) 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 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)(e)(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)

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- 139 (i) The water right for which the state engineer has approved a fixed time
140 change application will automatically revert to the point of diversion and
141 place and purpose of use that existed before the approved fixed time
142 change application when the fixed time change application expires or is
143 terminated.
144 (ii) The applicant shall give written notice to the state engineer and the
145 lessor, if applicable, if the applicant wishes to terminate a fixed time
146 change application before the fixed time change application expires.
147 (4) In addition to the requirements of Section 73-3-3, an application
148 authorized by this section shall:
149 (a) set forth the legal description of the points on the stream channel
150 between which the instream flow will be provided by the change
151 application; and
152 (b) include appropriate studies, reports, or other information required by
153 the state engineer demonstrating the necessity for the instream flow in the
154 specified section of the stream and the projected benefits to the public
155 resulting from the change.
156 (5)
157 (a) For a permanent change application or a fixed time change application
158 filed according to this section, 60 days before the date on which proof of
159 change for an instream flow is due, the state engineer shall notify the
160 applicant by mail or by any form of communication through which receipt
161 is verifiable of the date when proof of change is due.
162 (b) Before the date when proof of change is due, the applicant must either:
163 (i) file a verified statement with the state engineer that the instream flow
164 uses have been perfected, setting forth:
165 (A) the legal description of the points on the stream channel between
166 which the instream flow is provided;
167 (B) detailed measurements of the flow of water in second-feet changed;
168 (C) the period of use; and
169 (D) any additional information required by the state engineer; or
170 (ii) apply for a further extension of time as provided for in Section 73-3-12.
171 (c)
172 (i) Upon acceptance of the verified statement required under Subsection
173 (5)(b)(i), the state engineer shall issue a certificate of change for instream
174 flow use in accordance with Section 73-3-17.
175 (ii) The certificate expires at the same time the fixed time change
176 application expires.
177 (6) No person may appropriate unappropriated water under Section 73-3-2
178 for the purpose of providing an instream flow.
179 (7) Water used in accordance with this section is considered to be
180 beneficially used, as required by Section 73-3-1.
181 (8) A physical structure or physical diversion from the stream is not
182 required to implement a change for instream flow use.
183 (9) This section does not allow enlargement of the water right that the
184 applicant seeks to change.

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- 185 (10) A change application authorized by this section may not impair a
186 vested water right, including a water right used to generate hydroelectric
187 power.
188 (11) The state engineer or the water commissioner shall distribute water
189 under an approved or a certificated instream flow change application
190 according to the change application's priority date relative to the other
191 water rights located within the stream section specified in the change
192 application for instream flow.
193 (12) An approved fixed time change application does not create a right of
194 access across private property or allow any infringement of a private
195 property right.

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197 Amended by Chapter 379, 2013 General Session
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