

Incorporating comments from drafting committee and Leg. Counsel.

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.

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

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

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- 47 Subsection 73-1-4(2)(f), for the purpose of providing water for an instream
48 flow, within a specified section of a natural or altered stream channel
49 within the state for:
- 50 (i) the propagation of fish;
 - 51 (ii) public recreation;
 - 52 (iii) the reasonable preservation or enhancement of the natural stream
53 environment; or
 - 54 (iv) to improve or protect water quality.
- 55 (b) A public water supplier may not acquire water rights by eminent
56 domain for an instream flow.
- 57 (c) An instream flow change application filed by a public water supplier on
58 a federal reclamation project water right shall be signed by:
- 59 (i) the public water supplier;
 - 60 (ii) the local water user's organization that is contractually responsible for:
 - 61 (A) the operation and maintenance of the project; or
 - 62 (B) the repayment of project costs; and
 - 63 (iii) the record owner of the water right.
- 64 (4)
- 65 (a) Except as provided in Subsection (3)(c), an instream flow application
66 filed by the United States or an agency of the United States on a federally
67 owned water right shall be signed by:
 - 68 (i) the United States or federal agency; and
 - 69 (ii) a division.
 - 70 (iii) An instream flow application filed by the United States or an agency of
71 the United States and a division shall be for the purpose of providing water
72 for an instream flow within a specified section of a natural or altered
73 stream channel within the state for:
 - 74 (A) the propagation of fish;
 - 75 (B) public recreation;
 - 76 (C) the reasonable preservation or enhancement of the natural
77 stream environment; or
 - 78 (D) to improve or protect water quality.
- 79
- 80 (5)
- 81 (a) A fishing group may file a fixed time change application on a perfected,
82 consumptive water right for the purpose of providing water for an instream
83 flow, within a specified section of a natural or altered stream channel, to
84 protect or restore habitat for three native trout:
 - 85 (i) the Bonneville cutthroat;
 - 86 (ii) the Colorado River cutthroat; or
 - 87 (iii) the Yellowstone cutthroat.
 - 88 (b) Before filing an application authorized by Subsection (3)(a) to change a
89 shareholder's proportionate share of water, the water company shall
90 submit the decision to approve or deny the change request required by
91 Subsection 73-3-3.5(3) to a vote of the shareholders:
 - 92 (i) in a manner outlined in the water company's articles of incorporation or

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- 93 bylaws;
- 94 (ii) at an annual or regular meeting described in Section 16-6a-701; or
- 95 (iii) at a special meeting convened under Section 16-6a-702.
- 96 (c) The specified section of the natural or altered stream channel for the
- 97 instream flow may not be further upstream than the water right's original
- 98 point of diversion nor extend further downstream than the next physical
- 99 point of diversion made by another person.
- 100 (d) The fishing group shall receive the Division of Wildlife Resources'
- 101 director's approval of the proposed change before filing the fixed time
- 102 change application with the state engineer.
- 103 (e) The director of the Division of Wildlife Resources may approve a
- 104 proposed change if:
- 105 (i) the specified section of the stream channel is historic or current habitat
- 106 for a species listed in Subsections (3)(a)(i) through (iii);
- 107 (ii) the proposed purpose of use is consistent with an existing state
- 108 management or recovery plan for that species; and
- 109 (iii) the fishing group has:
- 110 (A) entered into a programmatic Candidate Conservation Agreement with
- 111 Assurances with the United States Fish and Wildlife Service, as
- 112 authorized by 16 U.S.C. Secs. 1531(a)(5) and 1536(a)(1), that gives the
- 113 water right holder the option to receive an enhancement of survival permit,
- 114 as authorized by 16 U.S.C. Sec. 1539(a)(1)(A), or a certificate of inclusion,
- 115 for a fixed time change application that benefits a candidate species of
- 116 trout; or
- 117 (B) until a programmatic Candidate Conservation Agreement with
- 118 Assurances described in Subsection (3)(e)(iii)(A) becomes valid and
- 119 enforceable, entered into a contract with the water right holder agreeing to
- 120 defend and indemnify the water right holder for liability under Section
- 121 1538(a) of the Endangered Species Act, 16 U.S.C. Secs. 1531 through
- 122 1544, for an action taken by the water right holder under the terms of the
- 123 water right holder's agreement with the fishing group for a fixed time
- 124 change application.
- 125 (f) The director may deny a proposed change if the proposed change
- 126 would not be in the public's interest.
- 127 (g)
- 128 (i) In considering a fixed time change application, the state engineer shall
- 129 follow the same procedures as provided in this title for an application to
- 130 appropriate water.
- 131 (ii) The rights and the duties of a fixed time change applicant are the same
- 132 as provided in this title for an applicant to appropriate water.
- 133 (h) A fishing group may refile a fixed time change application by filing a
- 134 written request with the state engineer no later than 60 days before the
- 135 application expires.
- 136 (i)
- 137 (i) The water right for which the state engineer has approved a fixed time
- 138 change application will automatically revert to the point of diversion and

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139 place and purpose of use that existed before the approved fixed time
140 change application when the fixed time change application expires or is
141 terminated.

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

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

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

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

154 (5)

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

160 (b) Before the date when proof of change is due, the applicant must either:

161 (i) file a verified statement with the state engineer that the instream flow
162 uses have been perfected, setting forth:

163 (A) the legal description of the points on the stream channel between
164 which the instream flow is provided;

165 (B) detailed measurements of the flow of water in second-feet changed;

166 (C) the period of use; and

167 (D) any additional information required by the state engineer; or

168 (ii) apply for a further extension of time as provided for in Section 73-3-12.

169 (c)

170 (i) Upon acceptance of the verified statement required under Subsection
171 (5)(b)(i), the state engineer shall issue a certificate of change for instream
172 flow use in accordance with Section 73-3-17.

173 (ii) The certificate expires at the same time the fixed time change
174 application expires.

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

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

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

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

183 (10) A change application authorized by this section may not impair a
184 vested water right, including a water right used to generate hydroelectric

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

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195 Amended by Chapter 379, 2013 General Session
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