

SENATE FILE NO. SF0106

Temporary instream flow rights.

Sponsored by: Senator(s) Case and Decaria and
Representative(s) Gay, Thompson and
Zwonitzer

A BILL

for

1 AN ACT relating to water; authorizing the temporary
2 acquisition or transfer of water rights for instream flow
3 as specified; authorizing other beneficial uses; defining
4 certain terms; making conforming amendments; and providing
5 for an effective date.

6

7 *Be It Enacted by the Legislature of the State of Wyoming:*

8

9 **Section 1.** 41-3-104(a)(intro), 41-3-110(c) and by
10 creating new subsections (e) and (f), 41-3-1001 by creating
11 a new subsection (e), 41-3-1002, 41-3-1003, 41-3-1004(a),
12 41-3-1005, 41-3-1006, 41-3-1007, 41-3-1008(a)(intro),
13 41-3-1010, 41-3-1011 and 41-3-1012 are amended to read:

14

15 **41-3-104. Procedure to change use or place of use.**

16

1 (a) Unless otherwise provided by law, when an owner
2 of a water right wishes to change a water right from its
3 present use to another use, or from the place of use under
4 the existing right to a new place of use, he shall file a
5 petition requesting permission to make such a change. The
6 petition shall set forth all pertinent facts about the
7 existing use and the proposed change in use, or, where a
8 change in place of use is requested, all pertinent
9 information about the existing place of use and the
10 proposed place of use. The board may require that an
11 advertised public hearing or hearings be held at the
12 petitioner's expense. The petitioner shall provide a
13 transcript of the public hearing to the board. The change
14 in use, or change in place of use, may be allowed, provided
15 that the quantity of water transferred by the granting of
16 the petition shall not exceed the amount of water
17 historically diverted under the existing use, nor exceed
18 the historic rate of diversion under the existing use, nor
19 increase the historic amount consumptively used under the
20 existing use, nor decrease the historic amount of return
21 flow, nor in any manner injure other existing lawful
22 appropriators. The board of control shall consider all
23 facts it believes pertinent to the transfer which may
24 include the following:

1

2 **41-3-110. Right to acquire temporary water rights for**
3 **highway or railroad roadbed construction or repair;**
4 **application; restrictions; fee; other temporary uses.**

5

6 (c) Only that portion of a water right so acquired
7 which has been consumptively used under the historical use
8 made of the water right, may be diverted by a temporary
9 user. In determining the consumptive use of water rights
10 for the direct use of the natural unstored flow of any
11 stream for irrigation purposes, the return flow from those
12 rights shall be presumed to be fifty percent (50%). In
13 those situations where an assumption of fifty percent (50%)
14 return flow would be significantly in error, the state
15 engineer shall have the prerogative of making a
16 determination of the actual amount of return flow, and the
17 amount of water which can be diverted for the temporary use
18 provided herein shall be adjusted accordingly. The actual
19 historic return flow, or the assumed return flow of fifty
20 percent (50%) will be left in the stream for the use of
21 downstream appropriators. In evaluating return flow and
22 consumptive use, the state engineer shall consider timing
23 of return flows. The foregoing formula and procedure for
24 the determination of consumptive use and return flow shall

1 be limited to this section and shall have no application to
2 any other statute of the state of Wyoming. Nothing herein
3 contained shall be treated or construed as changing the
4 prior use of water held by said owner or owners and as
5 provided by the laws of the state of Wyoming.

6
7 (e) It is the policy of the state to encourage
8 temporary transfers in order to maximize the beneficial use
9 of water and to provide for more effective water
10 management, particularly in times of drought. A person or
11 entity may acquire or transfer by purchase, gift, lease or
12 other form of conveyance the right to temporarily use water
13 which may be embraced in any adjudicated or valid
14 unadjudicated water right, or any portion thereof, for a
15 period of not to exceed two (2) years, for irrigation,
16 municipal, instream uses or other purposes, provided that:

17
18 (i) The state engineer shall not issue a
19 temporary transfer order if it appears that the proposed
20 transfer would significantly and adversely affect other
21 appropriators, or the stream channel, or would, in the
22 opinion of the state engineer, be too difficult to
23 administer or adverse to the public interest. All
24 temporary transfers shall be presumed to be adverse to the

1 interests of other appropriators, to the stream channel and
2 to the public interest, and the burden shall be upon the
3 applicant to prove the contrary by substantial evidence;
4

5 (ii) Unless otherwise provided by law and to the
6 extent subsection (b) of this section is applicable, any
7 person desiring to acquire or transfer any temporary water
8 right or portion thereof under this subsection shall comply
9 with subsection (b) of this section;
10

11 (iii) Should an application allowing any
12 temporary transfer be granted, the applicant shall
13 immediately post notice of the decision, including the date
14 of the decision, once each week for four (4) consecutive
15 weeks in a newspaper or newspapers of general circulation
16 in the county or counties in which the stream segment
17 between the new and old places of use lies, or, if place of
18 use does not change, in which the water is used;
19

20 (iv) Any decision by the state engineer granting
21 or denying a temporary transfer under this subsection may
22 be appealed to the board of control by filing notice with
23 the board of control within thirty (30) days of the
24 decision of the state engineer. The board of control shall

1 conduct a hearing in accordance with its rules and the
2 Wyoming Administrative Procedure Act;

3
4 (v) The party prevailing, in whole or in part,
5 in a hearing before the state board of control, or in a
6 final decision on appeal, may be awarded the costs and fees
7 of bringing or defending such an action;

8
9 (vi) A person who obtains a temporary transfer
10 granted pursuant to this subsection may apply for
11 additional periods of temporary transfer not to exceed two
12 (2) years each by following the procedures of this
13 subsection. Nothing in this subsection shall be construed
14 to limit or restrict the number of times a person may
15 obtain a temporary transfer.

16
17 (f) The provisions of subsection (b) of this section
18 relating to loss, abandonment, impairment and reinvestment
19 of rights shall apply to subsection (e) of this section.

20
21 **41-3-1001. Waters stored for permanent instream flows**
22 **a beneficial use of water; natural stream flows allowed for**
23 **permanent instream flows; definitions.**

24

1 (e) Unless otherwise indicated, as used in W.S.
2 41-3-1001 through 41-3-1014, "permanent" means for any time
3 period greater than two (2) years;
4

5 **41-3-1002. Permanent instream flows to be by stream**
6 **segment; waters for permanent instream flows may be sold,**
7 **transferred or otherwise conveyed under certain**
8 **restrictions; ownership restricted; temporary uses.**
9

10 (a) All waters used for the purpose of providing
11 permanent instream flows shall be applied only to that
12 segment of the stream for which they are granted. The
13 stream segment and the determination of a minimum amount of
14 water required for permanent instream flow purposes shall
15 be defined specifically.
16

17 (b) After waters allowed for permanent instream flows
18 have passed through the specific stream segment, all rights
19 to those instream flow waters are relinquished, and the
20 water shall be available for reappropriation, diversion and
21 other beneficial use. Any person making use of instream
22 flow waters after the waters have left the specific stream
23 segment shall not claim any harm or loss if and when the

1 water right is returned to its original use or changed to a
2 different use.

3

4 (c) Storage water appropriated for the purpose of
5 providing permanent instream flows in specified stream
6 segments or existing water rights which are converted to
7 instream flow under provisions of W.S. 41-3-1007 of this
8 act may later be sold, transferred or otherwise conveyed to
9 any other purpose pursuant to the requirements of W.S.
10 41-3-104, except that the board of control shall require
11 that an advertised public hearing be held prior to changing
12 the use from instream flow. The purpose of the public
13 hearing shall be to determine the potential harm or benefit
14 associated with the proposed change.

15

16 (d) Any person may divert and appropriate, as
17 provided by law, permanent instream flow waters for any
18 beneficial use other than for instream flows at the
19 following places:

20

21 (e) No person other than the state of Wyoming shall
22 own any permanent instream flow water right.

23

1 (f) Instream flows for temporary beneficial uses may
2 be obtained, held or otherwise controlled by persons or
3 entities pursuant to W.S. 41-3-110(e).

4
5 **41-3-1003. Game and fish commission; construction of**
6 **measuring devices; recommendations; permits; fees and**
7 **costs.**

8
9 (a) The game and fish commission shall construct any
10 measuring device the state engineer considers necessary for
11 the administration of ~~an~~ permanent instream flow right.

12
13 (b) The state game and fish commission may report to
14 the water development commission annually those specific
15 segments of stream which the game and fish commission
16 considers to have the most critical need for permanent
17 instream flows. The game and fish commission shall
18 identify the points on the stream at which the need for
19 permanent instream flows begins and ends, the time of year
20 when the flows are most critical and a detailed description
21 of the minimum amount of water necessary to provide
22 adequate instream flows.

23

1 (c) The water development commission shall file
2 applications in the name of the state of Wyoming for
3 permits to appropriate water for permanent instream flows
4 in those segments of stream recommended by the game and
5 fish commission. The state engineer shall not grant any
6 permits to appropriate or store water for permanent
7 instream flows prior to the completion of the study
8 provided by W.S. 41-3-1004 or prior to the hearing required
9 by W.S. 41-3-1006. Fees and costs of the commission
10 associated with permit applications and adjudication of
11 water rights shall be borne by the game and fish
12 commission.

13

14 **41-3-1004. Water development commission to determine**
15 **storage feasibility; report to the game and fish commission**
16 **and the legislature.**

17

18 (a) Immediately after permits have been applied for
19 under W.S. 41-3-1003(c), the water development commission
20 shall determine the feasibility of providing permanent
21 instream flows for the recommended segments of streams from
22 unappropriated direct flows or from existing storage
23 facilities or from new facilities. The feasibility study
24 shall include a determination of water necessary to

1 maintain or improve existing fisheries for water rights
2 under W.S. 41-3-1001(b) or of water necessary to provide
3 fisheries for water rights under W.S. 41-3-1001(a). The
4 feasibility study shall also include the availability of
5 storage sites, the estimated cost of providing any required
6 storage and such other findings and conclusions as the
7 water development commission deems appropriate.

8

9 **41-3-1005. Approval of storage project.**

10

11 If the water development commission determines that storage
12 of water to provide permanent instream flows is feasible
13 and in the interest of the state of Wyoming, it shall
14 request authority from the legislature to proceed with the
15 design and construction of storage facilities and the
16 storage of sufficient water for such purposes. The costs
17 of the project may be shared with other water users
18 benefiting therefrom, or paid solely from funds
19 appropriated from the water development account, or
20 otherwise as the legislature directs.

21

22 **41-3-1006. Appropriation of unappropriated waters for**
23 **direct instream flows.**

24

1 (a) Any application for a permit to appropriate
2 direct flow waters for the purpose of providing permanent
3 instream flows shall be by stream segment, as defined in
4 W.S. 41-3-1002.

5
6 (b) If the water development commission, under W.S.
7 41-3-1004, determines that storage of water for the purpose
8 of providing permanent instream flows is not feasible but
9 that appropriation of direct flow water appears feasible,
10 the state engineer shall act on applications for permits to
11 appropriate water filed under W.S. 41-3-1003(c) in the name
12 of the state of Wyoming.

13
14 (c) Subsequent to submission of an application for ~~an~~
15 a permanent instream flow appropriation, the game and fish
16 commission shall conduct relevant studies on the proposal.

17
18 (d) The applicant for ~~an~~a permanent instream flow
19 water right shall publish a notice of the application and
20 hearing in a newspaper of general circulation in the area
21 near the proposed reservoir site or stream segment, once
22 each week for at least two (2) consecutive weeks prior to
23 the hearing provided by subsection (e) of this section
24 which notice shall briefly describe the application.

1

2 (e) Prior to granting or denying the application for
3 a permanent instream flow right, the state engineer shall
4 conduct any studies as are deemed necessary to evaluate the
5 proposed instream flow and the necessary amount of water to
6 maintain existing fisheries and shall hold a public
7 hearing. At the public hearing, the game and fish
8 commission shall present its studies and any other
9 interested parties shall present views on the proposed
10 permanent instream flow appropriation. The state engineer
11 may place a condition on the permit, if one is granted,
12 requiring a review of the continuation of the permit as an
13 a permanent instream flow appropriation.

14

15 (f) If an application for ~~an~~a permanent instream
16 flow appropriation is approved by the state engineer, it
17 shall be deemed that work has been commenced and completed
18 and beneficial use made thirty (30) days after the date of
19 approval for purposes of W.S. 41-4-506 and proof of
20 appropriation shall not be submitted until three (3) years
21 thereafter.

22

23 (g) The state engineer shall not issue ~~an~~a permanent
24 instream flow permit where the instream flow right would be

1 included as a portion of the consumptive share of water
2 allocated to the state of Wyoming under any interstate
3 compact or United States supreme court decree.

4

5 (h) The amount of water appropriated for a permanent
6 instream flow in each river basin in Wyoming shall not
7 result in more water leaving the state than the amount of
8 water that is allocated by interstate compact or United
9 States supreme court decree for downstream uses outside of
10 Wyoming.

11

12 **41-3-1007. Acquisition of existing rights for**
13 **instream flow purposes.**

14

15 (a) The state of Wyoming may acquire any existing
16 water rights in streams of Wyoming by transfer, ~~or gift,~~
17 lease or purchase from willing sellers for the purpose of
18 providing instream flows, provided that a change in use of
19 the right acquired shall be in accordance with W.S.
20 41-3-104. Any right acquired and changed pursuant to this
21 section shall be in the name of the state of Wyoming and
22 shall be administered by the state engineer and the board
23 of control, who shall insure that the use of water for
24 instream flows shall not interfere with existing water

1 rights or impair the value of such rights or related
2 property. The game and fish commission shall act as a
3 petitioner in a petition for change in use under this
4 section.

5

6 (b) Any ~~such~~ water rights acquired ~~and~~or changed
7 pursuant to W.S. 41-3-1002(f) or 41-3-1007(a) shall be
8 limited to a specified stream segment by the board of
9 control with priority date intact.

10

11 **41-3-1008. Regulation of streams.**

12

13 (a) The game and fish commission shall report to the
14 water development commission the need to regulate a stream
15 to protect the priority of ~~an~~a permanent instream flow
16 right. The report shall include information establishing
17 present or future damage to the fishery if the stream is
18 not regulated. The commission, on the next working day,
19 shall submit the report to the state engineer and call for
20 stream regulation. The state engineer shall not regulate
21 the stream to protect the instream flow right:

22

23 **41-3-1010. Litigation costs.**

24

1 If any other appropriator in a drainage where waters are
2 allowed for permanent instream flows proves in district
3 court that his right to use appropriated waters has been
4 impaired or diminished by the allowance for permanent
5 instream flows, the costs of litigation, including
6 reasonable attorney fees, shall be borne by the holder of
7 the instream flow right.

8

9 **41-3-1011. Abandonment.**

10

11 No right to water for the purposes of providing a permanent
12 instream flow may be acquired through the process of
13 abandonment nor shall any beneficiary of instream flow
14 rights granted under this act be qualified under W.S.
15 41-3-401 and 41-3-402 to file for abandonment.

16

17 **41-3-1012. Ingress and egress.**

18

19 Nothing in this act shall grant, nor shall it be construed
20 to grant the right of ingress or egress through or upon
21 private property to reach streams where permanent instream
22 flows are maintained, nor shall it operate or be so
23 construed as to grant any right of eminent domain to

1 acquire the right of ingress or egress through private
2 property to any waters so maintained.

3

4 **Section 2.** This act is effective July 1, 2005.

5

6

(END)