

SENATE FILE NO. SF0072

Water rights-temporary uses &amp; instream flows.

Sponsored by: Senator(s) Case, Decaria and Goodenough and  
Representative(s) Meyer, Robinson, Thompson  
and Tipton

A BILL

for

1 AN ACT relating to water; specifying considerations for  
2 evaluating return flows; authorizing the temporary  
3 acquisition or transfer of water rights for instream flow  
4 as specified; authorizing instream flows for establishment,  
5 maintenance and improvement of fisheries and habitat;  
6 authorizing other beneficial uses; defining certain terms;  
7 making conforming amendments; authorizing specified state  
8 agencies to apply for instream flow water rights; providing  
9 procedures for public notice and hearing; providing  
10 procedures for reviewing instream flow water rights;  
11 repealing an inconsistent provision; and providing for an  
12 effective date.

13

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

15

1           **Section 1.**       W.S. 35-11-109(a) by creating a new  
2 paragraph (xvi), 35-11-110(a) by creating a new paragraph  
3 (x), by renumbering (x) as (xi) and (c) through (e),  
4 35-11-112(a) by creating a new paragraph (vii), 35-11-114  
5 by creating a new subsection (f), 41-3-104(a)(intro), 41-3-  
6 110(c) and by creating new subsections (e) and (f),  
7 41-3-1001, 41-3-1002(a) through (c), (e) and by creating a  
8 new subsection (f), 41-3-1003, 41-3-1004(a) and (b),  
9 41-3-1006(c) through (e) and by creating a new subsection  
10 (j), 41-3-1007, 41-3-1008(a)(intro) and (i), 41-3-1009 and  
11 41-3-1011 are amended to read:

12

13           **35-11-109. Powers and duties of director.**

14

15           (a) In addition to any other powers and duties imposed  
16 by law, the director of the department shall:

17

18                       (xvi) Advise the council on matters relating to  
19 the filing of applications for instream flow water rights.

20

21           **35-11-110. Powers of administrators of the divisions.**

22

23           (a) The administrators of the air quality, land  
24 quality and water quality divisions, under the control and

1 supervision of the director, shall enforce and administer  
2 this act and the rules, regulations and standards  
3 promulgated hereunder. Each administrator shall have the  
4 following powers:

5

6 (x) To recommend to the director, after  
7 consultation with the appropriate advisory board, the  
8 filing of applications for instream flow water rights;

9

10 ~~(x)~~ (xi) To possess such further powers as shall  
11 be reasonably necessary and incidental to the proper  
12 performance of the duties imposed upon the divisions under  
13 this act.

14

15 (c) The administrator of the solid and hazardous waste  
16 management division shall have the powers set forth in  
17 paragraphs (a) (ii) through ~~(x)~~ (xi) of this section.

18

19 (d) The administrator of the abandoned mine land  
20 division shall enforce and administer the provisions of  
21 W.S. 35-11-1201 through ~~35-11-1208~~ 35-11-1209 and 35-11-  
22 1301 through 35-11-1304. He shall have the powers set forth  
23 in paragraph ~~(a) (x)~~ (a) (xi) of this section.

24

1 (e) The administrator of the industrial siting  
2 division shall enforce and administer the provisions of  
3 W.S. 35-12-101 through 35-12-119. He shall have the powers  
4 set forth in paragraph ~~(a)(x)~~ (a)(xi) of this section.

5  
6 **35-11-112. Powers and duties of the environmental**  
7 **quality council.**

8  
9 (a) The council shall act as the hearing examiner for  
10 the department and shall hear and determine all cases or  
11 issues arising under the laws, rules, regulations,  
12 standards or orders issued or administered by the  
13 department or its air quality, land quality, solid and  
14 hazardous waste management or water quality divisions.  
15 Notwithstanding any other provision of this act, including  
16 this section, the council shall have no authority to  
17 promulgate rules or to hear or determine any case or issue  
18 arising under the laws, rules, regulations, standards or  
19 orders issued or administered by the industrial siting or  
20 abandoned mine land divisions of the department. The  
21 council shall:

22  
23 (vii) File applications for permits to  
24 appropriate water for instream flows, after recommendation

1 from the director of the department, the administrators of  
2 the various divisions and their respective advisory boards.

3  
4 **35-11-114. Powers and duties of the advisory boards.**

5  
6 (f) The advisory board shall recommend to the council  
7 through the administrator and director the filing of  
8 applications for instream flow water rights.

9  
10 **41-3-104. Procedure to change use or place of use.**

11  
12 (a) Unless otherwise provided by law, when an owner  
13 of a water right wishes to change a water right from its  
14 present use to another use, or from the place of use under  
15 the existing right to a new place of use, he shall file a  
16 petition requesting permission to make such a change. The  
17 petition shall set forth all pertinent facts about the  
18 existing use and the proposed change in use, or, where a  
19 change in place of use is requested, all pertinent  
20 information about the existing place of use and the  
21 proposed place of use. The board may require that an  
22 advertised public hearing or hearings be held at the  
23 petitioner's expense. The petitioner shall provide a  
24 transcript of the public hearing to the board. The change

1 in use, or change in place of use, may be allowed, provided  
2 that the quantity of water transferred by the granting of  
3 the petition shall not exceed the amount of water  
4 historically diverted under the existing use, nor exceed  
5 the historic rate of diversion under the existing use, nor  
6 increase the historic amount consumptively used under the  
7 existing use, nor decrease the historic amount of return  
8 flow, nor in any manner injure other existing lawful  
9 appropriators. The board of control shall consider all  
10 facts it believes pertinent to the transfer which may  
11 include the following:

12

13 **41-3-110. Right to acquire temporary water rights for**  
14 **highway or railroad roadbed construction or repair;**  
15 **application; restrictions; fee; other temporary uses.**

16

17 (c) Only that portion of a water right so acquired  
18 which has been consumptively used under the historical use  
19 made of the water right, may be diverted by a temporary  
20 user. In determining the consumptive use of water rights  
21 for the direct use of the natural unstored flow of any  
22 stream for irrigation purposes, the return flow from those  
23 rights shall be presumed to be fifty percent (50%). In  
24 those situations where an assumption of fifty percent (50%)

1 return flow would be significantly in error, the state  
2 engineer shall have the prerogative of making a  
3 determination of the actual amount of return flow, and the  
4 amount of water which can be diverted for the temporary use  
5 provided herein shall be adjusted accordingly. The actual  
6 historic return flow, or the assumed return flow of fifty  
7 percent (50%) will be left in the stream for the use of  
8 downstream appropriators. In evaluating return flow and  
9 consumptive use, the state engineer shall consider timing  
10 of return flows. The foregoing formula and procedure for  
11 the determination of consumptive use and return flow shall  
12 be limited to this section and shall have no application to  
13 any other statute of the state of Wyoming. Nothing herein  
14 contained shall be treated or construed as changing the  
15 prior use of water held by said owner or owners and as  
16 provided by the laws of the state of Wyoming.

17

18 (e) It is the policy of the state to encourage  
19 temporary transfers in order to maximize the beneficial use  
20 of water and to provide for more effective water  
21 management, particularly in times of drought. A person or  
22 entity may acquire or transfer by purchase, gift, lease or  
23 other form of conveyance the right to temporarily use water  
24 which may be embraced in any adjudicated or valid

1 unadjudicated water right, or any portion thereof, for a  
2 period of not to exceed two (2) years, for irrigation,  
3 municipal, instream uses or other purposes, provided that:

4  
5 (i) The state engineer shall not issue a  
6 temporary transfer order if it appears that the proposed  
7 transfer would significantly and adversely affect other  
8 appropriators, or the stream channel, or would, in the  
9 opinion of the state engineer, be too difficult to  
10 administer or adverse to the public interest. All  
11 temporary transfers shall be presumed to be adverse to the  
12 interests of other appropriators, to the stream channel and  
13 to the public interest, and the burden shall be upon the  
14 applicant to prove the contrary by substantial evidence;

15  
16 (ii) Unless otherwise provided by law and to the  
17 extent subsection (b) of this section is applicable, any  
18 person desiring to acquire or transfer any temporary water  
19 right or portion thereof under this subsection shall comply  
20 with subsection (b) of this section;

21  
22 (iii) Should an application allowing any  
23 temporary transfer be granted, the applicant shall  
24 immediately post notice of the decision, including the date



1 of the decision, once each week for four (4) consecutive  
2 weeks in a newspaper or newspapers of general circulation  
3 in the county or counties in which the stream segment  
4 between the new and old places of use lies, or, if place of  
5 use does not change, in which the water is used;

6  
7 (iv) Any decision by the state engineer granting  
8 or denying a temporary transfer under this subsection may  
9 be appealed to the board of control by filing notice with  
10 the board of control within thirty (30) days of the  
11 decision of the state engineer. The board of control shall  
12 conduct a hearing in accordance with its rules and the  
13 Wyoming Administrative Procedure Act;

14  
15 (v) The party prevailing, in whole or in part,  
16 in a hearing before the state board of control, or in a  
17 final decision on appeal, may be awarded the costs and fees  
18 of bringing or defending such an action;

19  
20 (vi) A person who obtains a temporary transfer  
21 granted pursuant to this subsection may apply for  
22 additional periods of temporary transfer not to exceed two  
23 (2) years each by following the procedures of this  
24 subsection. Nothing in this subsection shall be construed

1 to limit or restrict the number of times a person may  
2 obtain a temporary transfer.

3

4 (f) The provisions of subsection (b) of this section  
5 relating to loss, abandonment, impairment and reinvestment  
6 of rights shall apply to subsection (e) of this section.

7

8 **41-3-1001. Waters stored for instream flows a**  
9 **beneficial use of water; natural stream flows allowed for**  
10 **instream flows; other beneficial uses; definitions.**

11

12 (a) The storage of water in any drainage in Wyoming  
13 for the purpose of providing a recreational pool or the  
14 release of water for instream flows to establish, ~~or~~  
15 maintain ~~new or existing~~ or improve fisheries and habitat  
16 is a beneficial use of water subject to normal stream loss.

17

18 (b) Unappropriated water flowing in any stream or  
19 drainage in Wyoming may be appropriated for instream flows  
20 to establish, maintain or improve ~~existing~~ fisheries and  
21 habitat and declared a beneficial use of water on a case by  
22 case basis by the state engineer if such use does not  
23 impair or diminish the rights of any other appropriator in  
24 Wyoming.

1

2 (c) Waters used for the purpose of providing instream  
3 flows under subsection (a) of this section shall be the  
4 ~~minimum flow~~ amount necessary to establish or maintain  
5 fisheries and habitat.

6

7 (d) Waters used for the purpose of providing instream  
8 flows under subsection (b) of this section shall be the  
9 ~~minimum flow~~ amount necessary to establish, maintain or  
10 improve ~~existing~~ fisheries and habitat.

11

12 (e) In addition to the beneficial uses listed in  
13 subsection (a) of this section, water quality, aesthetics  
14 and groundwater recharge are declared to be beneficial  
15 uses. The game and fish commission or the environmental  
16 quality council may identify streams and may file  
17 applications for permits to appropriate water for permanent  
18 instream flows for these beneficial uses. Waters used for  
19 the purpose of providing instream flows pursuant to this  
20 subsection shall be the amount necessary to achieve water  
21 quality, aesthetics or groundwater discharge as  
22 determinable by scientific study or other related evidence.

23

1       (f) Unless otherwise indicated, as used in W.S.  
2 41-3-1001 through 41-3-1014:

3  
4       (i) "Amount necessary" means the amount based  
5 upon current and historic flows, or in the case of the  
6 establishment of a fishery or habitat or other beneficial  
7 use as defined by subsection (e) of this section, the  
8 amount required to create a fishery or habitat or achieve  
9 other beneficial purposes, based upon scientific study or  
10 other related evidence;

11  
12       (ii) "Applicant" or "applicant for the instream  
13 flow right" means the game and fish commission or the  
14 environmental quality council filing an application for a  
15 permanent instream flow right;

16  
17       (iii) "Maintain" means to keep or preserve at  
18 current or historic levels;

19  
20       (iv) "Permanent" means for any time period  
21 greater than two (2) years;

22  
23       (v) "Temporary" means for a time period of two  
24 (2) years or less.

1

2           **41-3-1002. Instream flows to be by stream segment;**  
3 **waters for instream flows may be sold, transferred or**  
4 **otherwise conveyed under certain restrictions; ownership**  
5 **restricted; temporary uses.**

6

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

13

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

23

1 (c) Storage water appropriated for the purpose of  
2 providing instream flows in specified stream segments or  
3 existing water rights which are converted to instream flow  
4 under provisions of W.S. 41-3-1007 of this act may later be  
5 sold, transferred or otherwise conveyed to any other  
6 purpose, including the original use of that water right  
7 without diminution, pursuant to the requirements of W.S.  
8 41-3-104, except that the board of control shall require  
9 that an advertised public hearing be held prior to changing  
10 the use from instream flow. The purpose of the public  
11 hearing shall be to determine the potential harm or benefit  
12 associated with the proposed change.

13  
14 (e) No person other than the state of Wyoming shall  
15 own any permanent instream flow water right.

16  
17 (f) Instream flows for temporary beneficial uses  
18 including water quality, aesthetics, fish and wildlife  
19 propagation and groundwater recharge may be obtained, held  
20 or otherwise controlled by persons or entities pursuant to  
21 W.S. 41-3-110(e).

22  
23 **41-3-1003. State agencies; construction of measuring**  
24 **devices; recommendations; permits; fees and costs.**

1

2 (a) The game and fish commission or the environmental  
3 quality council with the assistance of the state engineer  
4 should the agency request assistance, shall construct any  
5 measuring device the state engineer considers necessary for  
6 the administration of an instream flow right.

7

8 ~~The state game and fish commission may report to~~  
9 ~~the water development commission annually those specific~~  
10 ~~segments of stream which the game and fish commission~~  
11 ~~considers to have the most critical need for instream~~  
12 ~~flows.~~ The game and fish commission ~~shall~~ or environmental  
13 quality council may identify streams with the most critical  
14 need for instream flows, the points on the stream at which  
15 the need for instream flows begins and ends, the time or  
16 times of year when the flows are ~~most critical~~ needed and a  
17 detailed description of the ~~minimum~~ amount of water  
18 necessary ~~to provide adequate instream flows to establish,~~  
19 maintain or improve fisheries and habitat or serve other  
20 beneficial purposes as specified by W.S. 41-3-1001 through  
21 41-3-1014.

22

23 (c) ~~The water development commission~~ When the game  
24 and fish commission or environmental quality council has

1 determined the need for permanent instream flows, the  
2 commission or council shall file applications in the name  
3 of the state of Wyoming for permits to appropriate water  
4 for instream flows. ~~in those segments of stream recommended~~  
5 ~~by the game and fish commission~~ The application shall  
6 detail the information required to be identified pursuant  
7 to subsection (b) of this section. Any right approved  
8 shall be in the name of the state of Wyoming and shall be  
9 administered by the state engineer and the board of  
10 control, who shall ensure that the use of water for  
11 instream flows shall not interfere with existing water  
12 rights or impair the value of any existing water rights or  
13 related property. The state engineer shall not grant any  
14 permits to appropriate or store water for instream flows  
15 prior to ~~the completion of the study provided by W.S.~~  
16 ~~41-3-1004 or prior to the hearing required~~ allowed by W.S.  
17 41-3-1006, if the hearing is held. Fees and costs ~~of the~~  
18 ~~commission~~ associated with permit applications and  
19 adjudication of water rights shall be borne by the ~~game and~~  
20 ~~fish commission~~ applicant for the permanent instream flow  
21 right.  
22



1           **41-3-1004. Water development commission to determine**  
2 **storage feasibility; report to the game and fish commission**  
3 **and the legislature.**

4  
5           (a) Immediately after permits have been applied for  
6 under W.S. 41-3-1003(c), the state engineer may request  
7 that the water development commission ~~shall~~ determine the  
8 ~~feasibility of providing instream flows for the recommended~~  
9 ~~segments of streams from~~ reasonable availability of  
10 unappropriated direct flows or water from existing storage  
11 facilities ~~or from new facilities. The feasibility study~~  
12 ~~shall include a determination of water necessary to~~  
13 ~~maintain or improve existing fisheries for water rights~~  
14 ~~under W.S. 41-3-1001(b) or of water necessary to provide~~  
15 ~~fisheries for water rights under W.S. 41-3-1001(a). The~~  
16 ~~feasibility~~ according to present water use patterns and  
17 active water rights. Upon request of the state engineer or  
18 the applicant, the water availability study ~~shall~~ may also  
19 include the availability of storage sites, the estimated  
20 cost of providing any required storage and such other  
21 findings and conclusions as the water development  
22 commission deems appropriate.

23

1 (b) The water development commission shall make a  
2 report to the ~~game and fish commission~~ applicant for the  
3 instream flow right and the ~~legislature~~ state engineer  
4 outlining their findings made pursuant to a request under  
5 subsection (a) of this section.

6  
7 **41-3-1006. Appropriation of unappropriated waters for**  
8 **direct instream flows.**

9  
10 (c) ~~Subsequent~~ Prior to submission of an application  
11 for an instream flow appropriation, the ~~game and fish~~  
12 ~~commission~~ applicant shall conduct relevant studies on the  
13 proposal.

14  
15 (d) The ~~applicant for an instream flow water right~~  
16 board of control shall publish a notice of the application  
17 and the opportunity for the public to request a hearing in  
18 a newspaper of general circulation in the area near the  
19 proposed reservoir site or stream segment, once each week  
20 for at least two (2) consecutive weeks prior to the hearing  
21 provided by subsection (e) of this section which notice  
22 shall briefly describe the application. The cost of the  
23 notice and hearing, if one is held, shall be paid by the  
24 applicant.

1

2 (e) Prior to granting or denying the application, the  
3 state engineer ~~shall~~may conduct any studies as are deemed  
4 necessary to evaluate the proposed instream flow and the  
5 necessary amount of water ~~to maintain existing fisheries~~  
6 ~~and shall~~and at his discretion may, or upon request from  
7 the public if at least twenty-five (25) persons request so  
8 shall hold a public hearing. At the public hearing, if  
9 held, the ~~game and fish commission~~applicant shall present  
10 its studies and any other interested parties shall present  
11 ~~views on~~statements of fact or data detailing any harms or  
12 benefits to those parties should the proposed instream flow  
13 appropriation be approved. The state engineer may place a  
14 condition on the permit, if one is granted, requiring a  
15 review of the continuation of the permit as an instream  
16 flow appropriation.

17

18 (j) No person or entity shall apply for or acquire an  
19 instream flow for the purpose of transferring the use of  
20 that water to another location outside the boundaries of  
21 the state.

22

23 **41-3-1007. Acquisition of existing rights for**  
24 **instream flow purposes.**

1

2 (a) The state of Wyoming may acquire any existing  
3 water rights in streams of Wyoming by transfer, ~~or gift,~~  
4 lease or purchase from willing sellers for the purpose of  
5 providing instream flows, provided that a change in use of  
6 the right acquired shall be in accordance with W.S.  
7 41-3-104. Any right acquired and changed shall be in the  
8 name of the state of Wyoming and shall be administered by  
9 the state engineer and the board of control, who shall  
10 insure that the use of water for instream flows shall not  
11 interfere with existing water rights or impair the value of  
12 such rights or related property. The ~~game and fish~~  
13 ~~commission~~ applicant for the instream flow right shall act  
14 as a petitioner in a petition for change in use under this  
15 section.

16

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

21

22 **41-3-1008. Regulation of streams.**

23

1           (a) The game and fish commission ~~shall or the~~  
2 environmental quality council may report to the ~~water~~  
3 ~~development commission~~ board of control and call for  
4 regulation of streams when they determine the need to  
5 regulate a stream to protect or affirm the priority of an  
6 instream flow right. The report shall include information  
7 establishing present or future damage ~~to the fishery~~ if the  
8 stream is not regulated. ~~The commission, on the next~~  
9 ~~working day, shall submit the report to the state engineer~~  
10 ~~and call for stream regulation.~~ The ~~state engineer~~ board  
11 of control shall not regulate the stream to protect the  
12 instream flow right:

13  
14           (i) Unless present or future injury ~~to the~~  
15 ~~fishery~~ has been shown;

16  
17           **41-3-1009. Statement regarding condemnation and**  
18 **impairment of existing water rights.**

19  
20 This act does not grant, nor shall it operate or be so  
21 construed to grant the power of condemnation to the game  
22 and fish ~~department~~ commission or the environmental quality  
23 council for acquisition of existing water rights for the  
24 purpose of providing instream flows, nor shall it operate

1 or be so construed as to impair or diminish the value of or  
2 divest existing water rights.

3

4 **41-3-1011. Abandonment.**

5

6 (a) No right to water for the purposes of providing  
7 instream flow may be acquired through the process of  
8 abandonment nor shall any beneficiary of instream flow  
9 rights granted under this act be qualified under W.S.  
10 41-3-401 and 41-3-402 to file for abandonment. Once  
11 approved, instream flow water rights held by the state  
12 shall not be subject to abandonment.

13

14 (b) The state engineer shall conduct a public hearing  
15 to consider the standing, continuance and possible need to  
16 modify any permanent instream flow held by the state on or  
17 within thirty (30) days after each five (5) year  
18 anniversary of the adjudication date of the instream flow  
19 right. The state engineer shall advertise the hearing in a  
20 newspaper of general circulation in the area near the  
21 location of the instream flow right, once each week for at  
22 least two (2) consecutive weeks prior to the hearing.  
23 Prior to the hearing, the state engineer may conduct any

1 studies deemed necessary to evaluate the instream flow  
2 right.

3  
4 (c) The ruling of the state engineer shall be based  
5 on a finding that the water is being used for the greatest  
6 good and beneficial use of the state and its citizens. The  
7 state engineer shall consider both economic and noneconomic  
8 factors including:

9  
10 (i) Statements of fact and appropriate  
11 supporting information provided by the applicant as to the  
12 continued need of that water right for the original purpose  
13 of the filing, based on past and existing conditions as  
14 well as scientific study; and

15  
16 (ii) Statements of fact and appropriate  
17 supporting information from the public as to the direct or  
18 indirect benefits or harm they have received, are receiving  
19 or will receive from continuation or termination of the  
20 instream flow right. Any statements made pursuant to this  
21 paragraph shall be based on past and existing conditions  
22 and needs and shall not be speculative in nature.

23

1       (d) The hearing required by subsection (b) of this  
2 section shall be in accordance with the rules of the board  
3 of control and the Wyoming Administrative Procedure Act.  
4 Any decision of the state engineer shall be appealed first  
5 to the full board of control. In addition, if any  
6 proceeding results in termination of an instream flow  
7 right, and the water formerly used to provide instream flow  
8 is not put to new beneficial use within one (1) year of the  
9 state engineer's ruling or is not maintained for that use  
10 for at least five (5) years thereafter when water is  
11 available and in priority, the water right shall revert to  
12 instream flow use with original priority date and other  
13 conditions intact.

14  
15       (e) The failure of the state engineer to hold the  
16 hearing required by subsection (b) of this section within  
17 the specified thirty (30) day period shall be treated as  
18 though the state engineer approves of the continuation of  
19 the instream flow right. No person shall have the right to  
20 review the instream flow water right should the state  
21 engineer fail to hold the required hearing until the next  
22 five (5) year anniversary date of the initial adjudication.

23  
24       **Section 2.** W.S. 41-3-1006(b) is repealed.



