

SENATE FILE NO. SF0107

Instream flow reform.

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

A BILL

for

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

11

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

13

14 **Section 1.** W.S. 35-11-109(a) by creating a new
 15 paragraph (xvi), 35-11-110(a) by creating a new paragraph
 16 (x), by renumbering (x) as (xi) and (c) through (e),

1 35-11-112(a) by creating a new paragraph (vii), 35-11-114
2 by creating a new subsection (f), 41-3-1001, 41-3-1002(a)
3 through (c), 41-3-1003, 41-3-1004(a) and (b), 41-3-1006(c)
4 through (e) and by creating a new subsection (j),
5 41-3-1007, 41-3-1008(a)(intro) and (i), 41-3-1009 and
6 41-3-1011 are amended to read:

7

8 **35-11-109. Powers and duties of director.**

9

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

12

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

15

16 **35-11-110. Powers of administrators of the divisions.**

17

18 (a) The administrators of the air quality, land
19 quality and water quality divisions, under the control and
20 supervision of the director, shall enforce and administer
21 this act and the rules, regulations and standards
22 promulgated hereunder. Each administrator shall have the
23 following powers:

24

1 (x) To recommend to the director, after
2 consultation with the appropriate advisory board, the
3 filing of applications for instream flow water rights;
4

5 ~~(x)~~(xi) To possess such further powers as shall
6 be reasonably necessary and incidental to the proper
7 performance of the duties imposed upon the divisions under
8 this act.
9

10 (c) The administrator of the solid and hazardous
11 waste management division shall have the powers set forth
12 in paragraphs (a)(ii) through ~~(x)~~(xi) of this section.
13

14 (d) The administrator of the abandoned mine land
15 division shall enforce and administer the provisions of
16 W.S. 35-11-1201 through ~~35-11-1208~~35-11-1209 and
17 35-11-1301 through 35-11-1304. He shall have the powers set
18 forth in paragraph ~~(a)(x)~~(a)(xi) of this section.
19

20 (e) The administrator of the industrial siting
21 division shall enforce and administer the provisions of
22 W.S. 35-12-101 through 35-12-119. He shall have the powers
23 set forth in paragraph ~~(a)(x)~~(a)(xi) of this section.
24

1 **35-11-112. Powers and duties of the environmental**
2 **quality council.**

3
4 (a) The council shall act as the hearing examiner for
5 the department and shall hear and determine all cases or
6 issues arising under the laws, rules, regulations,
7 standards or orders issued or administered by the
8 department or its air quality, land quality, solid and
9 hazardous waste management or water quality divisions.
10 Notwithstanding any other provision of this act, including
11 this section, the council shall have no authority to
12 promulgate rules or to hear or determine any case or issue
13 arising under the laws, rules, regulations, standards or
14 orders issued or administered by the industrial siting or
15 abandoned mine land divisions of the department. The
16 council shall:

17
18 (vii) File applications for permits to
19 appropriate water for instream flows, after recommendation
20 from the director of the department, the administrators of
21 the various divisions and their respective advisory boards.

22
23 **35-11-114. Powers and duties of the advisory boards.**
24

1 (f) The advisory board shall recommend to the council
2 through the administrator and director the filing of
3 applications for instream flow water rights.

4
5 **41-3-1001. Waters stored for instream flows a**
6 **beneficial use of water; natural stream flows allowed for**
7 **instream flows; other beneficial uses; definitions.**

8
9 (a) The storage of water in any drainage in Wyoming
10 for the purpose of providing a recreational pool or the
11 release of water for instream flows to establish, ~~or~~
12 maintain ~~new or existing~~ or improve fisheries and habitat
13 is a beneficial use of water subject to normal stream loss.

14
15 (b) Unappropriated water flowing in any stream or
16 drainage in Wyoming may be appropriated for instream flows
17 to establish, maintain or improve ~~existing~~ fisheries and
18 habitat and declared a beneficial use of water on a case by
19 case basis by the state engineer if such use does not
20 impair or diminish the rights of any other appropriator in
21 Wyoming.

22
23 (c) Waters used for the purpose of providing instream
24 flows under subsection (a) of this section shall be the

1 ~~minimum flow amount~~ necessary to establish or maintain
2 fisheries and habitat.

3

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

8

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

21

22 (f) Unless otherwise indicated, as used in W.S.
23 41-3-1001 through 41-3-1014:

24

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

8
9 (ii) "Applicant" or "applicant for the instream
10 flow right" means the game and fish commission or the
11 environmental quality council filing an application for an
12 instream flow right;

13
14 (iii) "Maintain" means to keep or preserve at
15 current or historic levels.

16
17 **41-3-1002. Instream flows to be by stream segment;**
18 **waters for instream flows may be sold, transferred or**
19 **otherwise conveyed under certain restrictions; ownership**
20 **restricted.**

21
22 (a) All waters used for the purpose of providing
23 instream flows shall be applied only to that segment of the
24 stream for which they are granted. The stream segment and

1 the determination of ~~a minimum~~the amount of water ~~required~~
2 necessary for instream flow purposes shall be defined
3 specifically.

4
5 (b) After waters allowed for instream flows have
6 passed through the specific stream segment, all rights to
7 those instream flow waters are relinquished, and the water
8 shall be available for reappropriation, diversion and other
9 beneficial use. Any person making use of instream flow
10 waters after the waters have left the specific stream
11 segment shall not claim any harm or loss if and when the
12 water right is returned to its original use or changed to a
13 different use.

14
15 (c) Storage water appropriated for the purpose of
16 providing instream flows in specified stream segments or
17 existing water rights which are converted to instream flow
18 under provisions of W.S. 41-3-1007 of this act may later be
19 sold, transferred or otherwise conveyed to any other
20 purpose, including the original use of that water right
21 without diminution, pursuant to the requirements of W.S.
22 41-3-104, except that the board of control shall require
23 that an advertised public hearing be held prior to changing
24 the use from instream flow. The purpose of the public

1 hearing shall be to determine the potential harm or benefit
2 associated with the proposed change.

3
4 **41-3-1003. State agencies; construction of measuring**
5 **devices; recommendations; permits; fees and costs.**

6
7 (a) The game and fish commission or the environmental
8 quality council with the assistance of the state engineer
9 should the agency request assistance, shall construct any
10 measuring device the state engineer considers necessary for
11 the administration of an 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 instream~~
17 ~~flows.~~ The game and fish commission ~~shall~~ or environmental
18 quality council may identify streams with the most critical
19 need for instream flows, the points on the stream at which
20 the need for instream flows begins and ends, the time or
21 times of year when the flows are ~~most critical~~ needed and a
22 detailed description of the ~~minimum~~ amount of water
23 necessary ~~to provide adequate instream flows to establish,~~
24 maintain or improve fisheries and habitat or serve other

1 beneficial purposes as specified by W.S. 41-3-1001 through
2 41-3-1014.

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

1 adjudication of water rights shall be borne by the ~~game and~~
2 ~~fish commission~~ applicant for the instream flow right.

3

4 **41-3-1004. Water development commission to determine**
5 **storage feasibility; report to the game and fish commission**
6 **and the legislature.**

7

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

1 findings and conclusions as the water development
2 commission deems appropriate.

3

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

9

10 **41-3-1006. Appropriation of unappropriated waters for**
11 **direct instream flows.**

12

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

17

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

1 shall briefly describe the application. The cost of the
2 notice and hearing, if one is held, shall be paid by the
3 applicant.

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

20
21 (j) No applicant shall apply for or acquire an
22 instream flow for the purpose of transferring the use of
23 that water to another location outside the boundaries of
24 the state.

1

2 **41-3-1007. Acquisition of existing rights for**
3 **instream flow purposes.**

4

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

19

20 (b) Any such water rights acquired and changed
21 pursuant to subsection (a) of this section shall be limited
22 to a specified stream segment by the board of control with
23 priority date intact.

24

1 **41-3-1008. Regulation of streams.**

2

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

15

16 (i) Unless present or future injury ~~to the~~
17 ~~fishery~~ has been shown;

18

19 **41-3-1009. Statement regarding condemnation and**
20 **impairment of existing water rights.**

21

22 This act does not grant, nor shall it operate or be so
23 construed to grant the power of condemnation to the game
24 and fish ~~department~~commission or the environmental quality

1 council for acquisition of existing water rights for the
2 purpose of providing instream flows, nor shall it operate
3 or be so construed as to impair or diminish the value of or
4 divest existing water rights.

5

6 **41-3-1011. Abandonment.**

7

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

15

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

1 may conduct any studies deemed necessary to evaluate the
2 instream flow 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.

1

2

Section 3. This act is effective July 1, 2005.

3

4

(END)