

SENATE BILL NO. 377

INTRODUCED BY V. JACKSON

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A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE DEFINITION OF "GOOD CAUSE SHOWN" WITH REGARD TO THE ATTORNEY GENERAL FILING AN OBJECTION IN THE WATER ADJUDICATION PROCESS; AMENDING SECTION 85-2-233, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1.** Section 85-2-233, MCA, is amended to read:

**"85-2-233. Hearing on temporary preliminary decree or preliminary decree -- procedure.** (1) (a)

For good cause shown and subject to the provisions of subsection (9), a hearing must be held before the water judge on any objection to a temporary preliminary decree or preliminary decree by:

- (i) the department;
- (ii) a person named in the temporary preliminary decree or preliminary decree;
- (iii) any person within the basin entitled to receive notice under 85-2-232(1); or
- (iv) any other person who claims rights to the use of water from sources in other basins that are hydrologically connected to the sources within the decreed basin and who would be entitled to receive notice under 85-2-232 if the claim or claims were from sources within the decreed basin.

(b) For the purposes of this subsection (1), "good cause shown" means:

- (i) a written statement showing that a person has an ownership interest in water or its use that has been affected by the decree; or
- (ii) in the case of the attorney general, with regard to water rights for hydroelectric power generation that are not held by a governmental entity and for which the flow rate or calculated flow rate is greater than or equal to 250 cubic feet per second, that the claim appears to exceed the historic beneficial use.

(c) A person does not waive the right to object to a preliminary decree by failing to object to a temporary preliminary decree issued before March 28, 1997. However, a person may not raise an objection to a matter in a preliminary decree if that person was a party to the matter when the matter was previously litigated and resolved as the result of an objection raised in a temporary preliminary decree unless the objection is allowed for any of the following reasons:



- 1 (i) mistake, inadvertence, surprise, or excusable neglect;
- 2 (ii) newly discovered evidence that by due diligence could not have been discovered in time to move for  
3 a new trial under Rule 59(b), Montana Rules of Civil Procedure;
- 4 (iii) fraud, misrepresentation, or other misconduct of an adverse party;
- 5 (iv) the judgment is void; or
- 6 (v) any other reason justifying relief from the operation of the judgment.
- 7 (d) After March 28, 1997, a person may not raise an objection or counterobjection to a matter contained  
8 in a subsequent decree issued under this part if the matter was contained in a prior decree issued under this part  
9 for which there was an objection and counterobjection period unless the objection is allowed for any of the  
10 following reasons:
- 11 (i) mistake, inadvertence, surprise, or excusable neglect;
- 12 (ii) newly discovered evidence that by due diligence could not have been discovered at the close of the  
13 objection period set forth in subsection (2);
- 14 (iii) fraud, misrepresentation, or other misconduct of an adverse party;
- 15 (iv) the temporary preliminary decree is void; or
- 16 (v) any other reason justifying relief from the operation of the prior decree issued under this part. The  
17 fact that a prior owner of a water right did not object or counterobject at a prior decree stage may not be a basis  
18 for a subsequent owner of the water right to object or counterobject absent a finding that one of the provisions  
19 in this subsection (1)(d) applies.
- 20 (2) Objections must be filed with the water judge within 180 days after entry of the temporary preliminary  
21 decree or preliminary decree. The water judge may, for good cause shown, extend this time limit up to two  
22 additional 90-day periods if application for an extension is made prior to expiration of the original 180-day period  
23 or any extension of it.
- 24 (3) Upon expiration of the time for filing objections under subsection (2), the water judge shall notify each  
25 party whose claim received an objection that an objection was filed. The notice must set forth the name of each  
26 objector and must allow an additional 60 days for the party whose claim received an objection to file a  
27 counterobjection to the claim or claims of the objector. Counterobjections must be limited to those claims that are  
28 included within the particular decree issued by the court.
- 29 (4) Objections and counterobjections must specify the paragraphs and pages containing the findings and  
30 conclusions to which objection is made. The request must state the specific grounds and evidence on which the

1 objections are based.

2 (5) (a) Upon expiration of the time for filing counterobjections under subsection (3), the water judge shall  
3 notify each party named in the temporary preliminary decree or preliminary decree or that person's successor  
4 as documented in the department records and shall notify the attorney general that objections and  
5 counterobjections have been filed. The water judge shall fix a day when all parties who wish to participate in  
6 future proceedings are required to appear or file a statement. The water judge shall then set a date for a hearing.  
7 The water judge may conduct individual or consolidated hearings. A hearing must be conducted in the same  
8 manner as for other civil actions. At the order of the water judge, a hearing may be conducted by the water  
9 master, who shall prepare a report of the hearing as provided in Rule 53(e), Montana Rules of Civil Procedure.

10 (b) In conducting hearings pursuant to this chapter, a water judge may require the parties to participate  
11 in settlement conferences or may assign the matter to a mediator. Any settlement reached by the parties is  
12 subject to review and approval by a water judge.

13 (6) After the issuance of a temporary preliminary decree or preliminary decree, notice of any motion to  
14 amend a statement of claim or a timely filed objection that may adversely affect other water rights must be  
15 published for 3 consecutive weeks in two newspapers of general circulation in the basin where the statement of  
16 claim or objection was filed. The notice must specify that any response or objection to the proposed amendment  
17 must be filed within 45 days of the date of the last notice. The water judge may order any additional notice of the  
18 motion as the water judge considers necessary. The costs of the notice required pursuant to this subsection must  
19 be borne by the moving party.

20 (7) Failure to object under subsection (1) to a compact negotiated and ratified under 85-2-702 or  
21 85-2-703 bars any subsequent cause of action in the water court.

22 (8) If the court sustains an objection to a compact, it may declare the compact void. The agency of the  
23 United States, the tribe, or the United States on behalf of the tribe party to the compact is permitted 6 months after  
24 the court's determination to file a statement of claim, as provided in 85-2-224, and the court shall issue a new  
25 preliminary decree in accordance with 85-2-231. However, any party to a compact declared void may appeal from  
26 that determination in accordance with those procedures applicable to 85-2-235, and the filing of a notice of appeal  
27 stays the period for filing a statement of claim as required under this subsection.

28 (9) Upon petition by a claimant, the water court may grant a motion for dismissal to an objection to a  
29 temporary preliminary or preliminary decree if the objection pertains to an element of a water right that was  
30 previously decreed and if dismissal is consistent with common-law principles of issue and claim preclusion.

1           (10) The provisions of subsection (9) do not apply to issues arising after entry of the previous decree,  
2 including but not limited to the issues of abandonment, expansion of the water right, and reasonable diligence.

3           (11) All issue remarks, as defined in 85-2-250, must be finally resolved before the issuance of a final  
4 decree."

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6           NEW SECTION. **Section 2. Effective date.** [This act] is effective on passage and approval.

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