

1 _____ BILL NO. _____

2 INTRODUCED BY _____
3 (Primary Sponsor)

4 A BILL FOR AN ACT ENTITLED: "AN ACT TERMINATING THE RESERVED WATER RIGHTS COMPACT
5 COMMISSION; REVISING THE ADJUDICATION OF WATER RIGHTS FOR INDIAN TRIBES AND FEDERAL
6 AGENCIES; AMENDING SECTIONS 85-2-217, 85-2-228, 85-2-231, 85-2-233, 85-2-234, 85-2-701, AND
7 85-2-702, MCA; REPEALING SECTIONS 2-15-212, 85-2-703, 85-2-704, 85-2-705, AND 85-2-708, MCA; AND
8 PROVIDING AN EFFECTIVE DATE."

9

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

11

12 **Section 1.** Section 85-2-217, MCA, is amended to read:

13 **"85-2-217. Suspension of adjudication.** ~~While negotiations for the conclusion of a compact under part~~
14 ~~7 are being pursued, all proceedings to generally adjudicate reserved Indian water rights and federal reserved~~
15 ~~water rights of those tribes and federal agencies that are negotiating are suspended. The obligation to file water~~
16 ~~rights claims for those federal non-Indian and Indian reserved rights is also suspended. This suspension is~~
17 ~~effective until July 1, 2013, as long as negotiations are continuing or ratification of a completed compact is being~~
18 ~~sought.~~

19 (1) If approval by the state legislature and tribes or federal agencies has not been accomplished by July
20 1, 2013, the suspension of proceedings to adjudicate the federal reserved water rights claims of any Indian tribe
21 or federal entity without an approved compact must terminate on that date. Upon termination of the suspension
22 of this part, the tribes and the federal agencies are subject to the special filing requirements of 85-2-702(3) and
23 all other requirements of the state water adjudication system provided for in Title 85, chapter 2. Those tribes and
24 federal agencies that choose not to negotiate their federal non-Indian and Indian reserved water rights are subject
25 to the full operation of the state adjudication system and may not benefit from the suspension provisions of this
26 section.

27 (2) Upon termination of the suspension, any Indian tribe or federal entity without an approved compact
28 shall file water rights claims for reserved water rights with the department within 2 years.

29 (3) Filings submitted pursuant to subsection (2) must be:

30 (a) used in the formulation of a preliminary decree as provided by 85-2-231;

1 (b) given treatment similar to all other filings; and

2 (c) subject to all requirements of the state water adjudication system provided for in Title 85, chapter 2."

3
4 **Section 2.** Section 85-2-228, MCA, is amended to read:

5 **"85-2-228. Federal reserved water rights with priority date of July 1, 1973, or later -- process and**
6 **adjudication -- purpose.** (1) The purpose of this section is to ensure that a federal reserved water right with a
7 priority date of July 1, 1973, or later is subject to the same process and adjudication as a federal reserved water
8 right with a priority date before July 1, 1973.

9 (2) Under authority granted to the states by 43 U.S.C. 666, a federal reserved water right that has a
10 priority date of July 1, 1973, or later and that is asserted by a federal agency is subject to the claim filing
11 requirements and all other applicable requirements of the state water adjudication system provided for in Title
12 85, chapter 2, parts 2 and 7.

13 (3) At the request of a federal agency, the ~~reserved water rights compact commission~~ state of Montana
14 may negotiate to conclude a compact under Title 85, chapter 2, part 7, for a federal reserved water right with a
15 priority date of July 1, 1973, or later.

16 (4) Whenever necessary, a water judge may reopen any decree issued pursuant to Title 85, chapter 2,
17 to process the asserted ~~or negotiated~~ federal reserved water right."

18
19 **Section 3.** Section 85-2-231, MCA, is amended to read:

20 **"85-2-231. Temporary preliminary and preliminary decree.** (1) A water judge may issue a temporary
21 preliminary decree prior to the issuance of a preliminary decree if the temporary preliminary decree is necessary
22 for the orderly adjudication or administration of water rights.

23 (2) (a) The water judge shall issue a preliminary decree. The preliminary decree must be based on:

24 (i) the statements of claim before the water judge;

25 (ii) the data submitted by the department;

26 (iii) the contents of compacts approved by the Montana legislature and the tribe or federal agency or,
27 lacking an approved compact, the filings for federal and Indian reserved rights; and

28 (iv) any additional data obtained by the water judge.

29 (b) The preliminary decree must be issued within 90 days after the close of the special filing period set
30 out in ~~85-2-702(3)~~ 85-2-217(2) or as soon after the close of that period as is reasonably feasible.

1 (c) The water judge may issue an interlocutory decree if an interlocutory decree is otherwise necessary
2 for the orderly administration of water rights.

3 (3) A temporary preliminary decree may be issued for any hydrologically interrelated portion of a water
4 division, including but not limited to a basin, subbasin, drainage, subdrainage, stream, or single source of supply
5 of water, or any claim or group of claims at a time different from the issuance of other temporary preliminary
6 decrees.

7 (4) The temporary preliminary decree or preliminary decree must contain the information and make the
8 determinations, findings, and conclusions required for the final decree under 85-2-234.

9 (5) If the water judge is satisfied that the report of the water master meets the requirements for the
10 preliminary decree and is satisfied with the conclusions contained in the report, the water judge shall adopt the
11 report as the preliminary decree. If the water judge is not satisfied, the water judge may recommit the report to
12 the master with instructions or modify the report and issue the preliminary decree.

13 (6) The department shall examine claims in basins that were verified rather than examined as ordered
14 by the water court. The objection and hearing provisions of Title 85, chapter 2, part 2, apply to these claims.
15 (Subsection (6) terminates June 30, 2020--sec. 18, Ch. 288, L. 2005.)"

16

17 **Section 4.** Section 85-2-233, MCA, is amended to read:

18 **"85-2-233. Hearing on temporary preliminary decree or preliminary decree -- procedure.** (1) (a)

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

21 (i) the department;

22 (ii) a person named in the temporary preliminary decree or preliminary decree;

23 (iii) any person within the basin entitled to receive notice under 85-2-232(1); or

24 (iv) any other person who claims rights to the use of water from sources in other basins that are
25 hydrologically connected to the sources within the decreed basin and who would be entitled to receive notice
26 under 85-2-232 if the claim or claims were from sources within the decreed basin.

27 (b) For the purposes of this subsection (1), "good cause shown" means a written statement showing that
28 a person has an ownership interest in water or its use that has been affected by the decree.

29 (c) A person does not waive the right to object to a preliminary decree by failing to object to a temporary
30 preliminary decree issued before March 28, 1997. However, a person may not raise an objection to a matter in

1 a preliminary decree if that person was a party to the matter when the matter was previously litigated and resolved
2 as the result of an objection raised in a temporary preliminary decree unless the objection is allowed for any of
3 the following reasons:

- 4 (i) mistake, inadvertence, surprise, or excusable neglect;
- 5 (ii) newly discovered evidence that by due diligence could not have been discovered in time to move for
6 a new trial under Rule 59(b), Montana Rules of Civil Procedure;
- 7 (iii) fraud, misrepresentation, or other misconduct of an adverse party;
- 8 (iv) the judgment is void; or
- 9 (v) any other reason justifying relief from the operation of the judgment.

10 (d) After March 28, 1997, a person may not raise an objection or counterobjection to a matter contained
11 in a subsequent decree issued under this part if the matter was contained in a prior decree issued under this part
12 for which there was an objection and counterobjection period unless the objection is allowed for any of the
13 following reasons:

- 14 (i) mistake, inadvertence, surprise, or excusable neglect;
- 15 (ii) newly discovered evidence that by due diligence could not have been discovered at the close of the
16 objection period set forth in subsection (2);
- 17 (iii) fraud, misrepresentation, or other misconduct of an adverse party;
- 18 (iv) the temporary preliminary decree is void; or
- 19 (v) any other reason justifying relief from the operation of the prior decree issued under this part. The
20 fact that a prior owner of a water right did not object or counterobject at a prior decree stage may not be a basis
21 for a subsequent owner of the water right to object or counterobject absent a finding that one of the provisions
22 in this subsection (1)(d) applies.

23 (2) Objections must be filed with the water judge within 180 days after entry of the temporary preliminary
24 decree or preliminary decree. The water judge may, for good cause shown, extend this time limit up to two
25 additional 90-day periods if application for an extension is made prior to expiration of the original 180-day period
26 or any extension of it.

27 (3) Upon expiration of the time for filing objections under subsection (2), the water judge shall notify each
28 party whose claim received an objection that an objection was filed. The notice must set forth the name of each
29 objector and must allow an additional 60 days for the party whose claim received an objection to file a
30 counterobjection to the claim or claims of the objector. Counterobjections must be limited to those claims that are

1 included within the particular decree issued by the court.

2 (4) Objections and counterobjections must specify the paragraphs and pages containing the findings and
3 conclusions to which objection is made. The request must state the specific grounds and evidence on which the
4 objections are based.

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

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

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

23 (7) Failure to object under subsection (1) to a compact ~~negotiated and ratified under 85-2-702 or~~
24 ~~85-2-703~~ ratified by the legislature and a tribe or federal agency bars any subsequent cause of action in the water
25 court.

26 (8) If the court sustains an objection to a compact, it may declare the compact void. The federal agency
27 ~~of the United States~~, the tribe, or the United States on behalf of the tribe that is party to the compact is permitted
28 ~~6 months~~ 2 years after the court's determination to file a statement of claim, as provided in 85-2-224, and the
29 court shall issue a new preliminary decree in accordance with 85-2-231. However, any party to a compact
30 declared void may appeal from that determination in accordance with those procedures applicable to 85-2-235,

1 and the filing of a notice of appeal stays the period for filing a statement of claim as required under this
2 subsection.

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

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

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

10

11 **Section 5.** Section 85-2-234, MCA, is amended to read:

12 **"85-2-234. Final decree.** (1) The water judge shall, on the basis of the preliminary decree, on the basis
13 of any hearing that may have been held, and on final resolution of all issue remarks, as defined in 85-2-250, enter
14 a final decree affirming or modifying the preliminary decree.

15 (2) The terms of a compact ~~negotiated and ratified under 85-2-702~~ ratified by the legislature and a tribe
16 or federal agency must be included in the final decree without alteration unless an objection is sustained pursuant
17 to 85-2-233. However, the court may not alter or amend any of the terms of a compact except with the prior
18 written consent of the parties in accordance with applicable law.

19 (3) The final decree must establish the existing rights and priorities within the water judge's jurisdiction
20 of persons who have filed a claim in accordance with 85-2-221, of persons required to file a declaration of existing
21 rights in the Powder River basin pursuant to an order of the department or a district court issued under sections
22 8 and 9 of Chapter 452, Laws of 1973, and of any federal agency or Indian tribe possessing water rights arising
23 under federal law, required by ~~85-2-702~~ 85-2-217(2) to file claims.

24 (4) The final decree must establish, in a form determined to be appropriate by the water judge, one or
25 more tabulations or lists of all water rights and their relative priorities.

26 (5) The final decree must state the findings of fact, along with any conclusions of law, upon which the
27 existing rights and priorities of each person, federal agency, and Indian tribe named in the decree are based.

28 (6) For each person who is found to have an existing right arising under the laws of the state of Montana,
29 the final decree must state:

30 (a) the name and post-office address of the owner of the right;

- 1 (b) the amount of water included in the right, as follows:
- 2 (i) by flow rate for direct flow rights, such as irrigation rights;
- 3 (ii) by volume for rights, such as stockpond and reservoir storage rights, and for rights that are not
- 4 susceptible to measurement by flow rate; or
- 5 (iii) by flow rate and volume for rights that a water judge determines require both volume and flow rate
- 6 to adequately administer the right;
- 7 (c) the date of priority of the right;
- 8 (d) the purpose for which the water included in the right is used;
- 9 (e) the place of use and a description of the land, if any, to which the right is appurtenant;
- 10 (f) the source of the water included in the right;
- 11 (g) the place and means of diversion;
- 12 (h) the inclusive dates during which the water is used each year;
- 13 (i) any other information necessary to fully define the nature and extent of the right.
- 14 (7) For each person, tribe, or federal agency possessing water rights arising under the laws of the United
- 15 States, the final decree must state:
- 16 (a) the name and mailing address of the holder of the right;
- 17 (b) the source or sources of water included in the right;
- 18 (c) the quantity of water included in the right;
- 19 (d) the date of priority of the right;
- 20 (e) the purpose for which the water included in the right is currently used, if at all;
- 21 (f) the place of use and a description of the land, if any, to which the right is appurtenant;
- 22 (g) the place and means of diversion, if any; and
- 23 (h) any other information necessary to fully define the nature and extent of the right, including the terms
- 24 of any compacts ~~negotiated and ratified under 85-2-702~~ ratified by the legislature and a tribe or federal agency.
- 25 (8) Clerical mistakes in a final decree may be corrected at any time on the initiative of the water judge
- 26 or on the petition of any person who possesses a water right. The water judge shall order the notice of a
- 27 correction proceeding that the judge determines to be appropriate to advise all persons who may be affected by
- 28 the correction. An order of the water judge making or denying a clerical correction is subject to appellate review."
- 29
- 30 **Section 6.** Section 85-2-701, MCA, is amended to read:

1 **"85-2-701. Legislative intent.** (1) Because the water and water rights within each water division are
 2 interrelated, it is the intent of the legislature to conduct unified proceedings for the general adjudication of existing
 3 water rights under the Montana Water Use Act. It is the intent of the legislature that the unified proceedings
 4 include all claimants of federal reserved ~~Indian~~ water rights as necessary and indispensable parties under
 5 authority granted the state by 43 U.S.C. 666. However, it is further intended that the state of Montana proceed
 6 ~~under the provisions of this part in an effort to conclude compacts for the equitable division and apportionment~~
 7 ~~of waters between the state and its people and the several Indian tribes claiming reserved water rights within the~~
 8 ~~state.~~

9 ~~————(2) To the maximum extent possible, the reserved water rights compact commission established under~~
 10 ~~2-15-212 should make the negotiation of water rights claimed by the federal government or Indian tribes in or~~
 11 ~~affecting the basins identified by 85-2-218 its highest priority. In negotiations, the commission is acting on behalf~~
 12 ~~of the governor."~~

13

14 **Section 7.** Section 85-2-702, MCA, is amended to read:

15 **"85-2-702. Negotiation Compacts with Indian tribes -- federal agencies.** (1) ~~The reserved water rights~~
 16 ~~compact commission, created by 2-15-212, may negotiate with the Indian tribes or their authorized~~
 17 ~~representatives jointly or severally to conclude compacts authorized under 85-2-701. Compact proceedings must~~
 18 ~~be commenced by the commission. The commission shall serve by certified mail directed to the governing body~~
 19 ~~of each tribe a written request for the initiation of negotiations under this part and a request for the designation~~
 20 ~~of an authorized representative of the tribe to conduct compact negotiations. Compact negotiations commence~~
 21 ~~upon receipt of the written designation from the governing body of a tribe.~~

22 (2) (1) When the compact commission legislature and the Indian tribes or their authorized representatives
 23 a federal agency have ~~agreed to~~ ratified a compact, they shall sign a copy and file an original copy with the United
 24 States department of state ~~of the United States of America~~ and copies with the secretary of state of Montana and
 25 with the governing body for the tribe or federal agency involved.

26 (2) A compact with an Indian tribe ~~The compact~~ is effective and binding upon all parties upon ratification
 27 by the legislature ~~of Montana~~ and any affected tribal governing body; and upon approval by the appropriate
 28 federal authority.

29 (3) A compact with a federal agency is effective and binding upon all parties upon ratification by the
 30 legislature and the federal agency. ~~Upon its ratification by the Montana legislature and the tribe, the terms of a~~

1 compact must be included in the preliminary decree as provided by 85-2-231, and unless an objection to the
2 compact is sustained under 85-2-233, the terms of the compact must be included in the final decree without
3 alteration. However, if approval of the state legislature and the tribe has not been accomplished by July 1, 2013,
4 all Indian claims for reserved water rights that have not been resolved by a compact must be filed with the
5 department within 24 months. These new filings must be used in the formulation of the preliminary decree and
6 must be given treatment similar to that given to all other filings."

7
8 **NEW SECTION. Section 8. Repealer.** The following sections of the Montana Code Annotated are
9 repealed:

- 10 2-15-212. Reserved water rights compact commission.
11 85-2-703. Negotiation with federal government.
12 85-2-704. Termination of negotiations.
13 85-2-705. Status reports to chief water judge.
14 85-2-708. Water administration interim agreements within Indian reservations.

15
16 **NEW SECTION. Section 9. Notification to tribal governments.** The secretary of state shall send a
17 copy of [this act] to each tribal government located on the seven Montana reservations and to the Little Shell
18 Chippewa tribe.

19
20 **NEW SECTION. Section 10. Effective date.** [This act] is effective July 1, 2013.

21 - END -