

HOUSE BILL NO. 555

INTRODUCED BY N. BALLANCE

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A BILL FOR AN ACT ENTITLED: "AN ACT TERMINATING THE MONTANA RESERVED WATER RIGHTS COMPACT COMMISSION; AMENDING SECTIONS 85-2-228, 85-2-231, 85-2-233, 85-2-234, 85-2-406, 85-2-701, AND 85-2-702, MCA; AND REPEALING SECTIONS 2-15-212, 85-2-217, 85-2-703, 85-2-704, 85-2-705, AND 85-2-708, MCA."

WHEREAS, in 1979 the Montana Legislature decreed that the water rights of Montana citizens would be adjudicated through a general stream adjudication; and

WHEREAS, the Montana Legislature established the Montana Water Court to hear and adjudicate the water rights of Montanans; and

WHEREAS, the Montana Legislature created the Montana Reserved Water Rights Compact Commission to negotiate the federal reserved water rights of federal reservations, including Indian reservations in Montana; and

WHEREAS, by statute, the Montana Legislature determined that all federal reserved water rights were to be filed in the Montana Water Court by July 2013; and

WHEREAS, the Montana Reserved Water Rights Compact Commission has completed negotiations for all ~~47~~ 18 federal reservations in Montana, including the seven Indian reservations in Montana; and

WHEREAS, after federal reserved water rights negotiations have been completed by the Montana Reserved Water Rights Compact Commission, there is no further role for the commission because any further activity IMPLEMENTATION is absorbed into the Montana Department of Natural Resources and Conservation; and

WHEREAS, all federal reserved water rights claims for the ~~47~~ 18 federal reservations in Montana have been filed with the Montana Water Court; and

WHEREAS, the work of the Montana Reserved Water Rights Compact Commission has been officially completed; and

WHEREAS, the repeal of six sections of state laws related to the compact commission and compact negotiations is warranted.

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



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Section 1. Section 85-2-228, MCA, is amended to read:

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

(2) Under authority granted to the states by 43 U.S.C. 666, a federal reserved water right that has a priority date of July 1, 1973, or later and that is asserted by a federal agency is subject to the claim filing requirements and all other applicable requirements of the state water adjudication system provided for in Title 85, chapter 2, parts 2 and 7. CLAIMS FOR FEDERAL OR INDIAN TRIBES CLAIMING RESERVED WATER RIGHTS MUST BE FILED WITH THE MONTANA WATER COURT WITHIN 24 MONTHS OF CREATION OF A FEDERAL OR INDIAN RESERVATION IN MONTANA.

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

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

Section 2. Section 85-2-231, MCA, is amended to read:

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

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

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

(ii) the data submitted by the department;

(iii) the contents of compacts approved by the Montana legislature and ~~the tribe or federal agency~~ the other party to the compact, either a tribe or a federal agency, or, lacking an approved compact, the filings for federal and Indian reserved rights; and

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

~~(b) The preliminary decree must be issued within 90 days after the close of the special filing period set~~

1 ~~out in 85-2-702(3) or as soon after the close of that period as is reasonably feasible.~~

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

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

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

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

14 (6) The department shall examine claims in basins that were verified rather than examined as ordered
15 by the water court. The objection and hearing provisions of Title 85, chapter 2, part 2, apply to these claims.
16 (Subsection (6) terminates June 30, 2028--sec. 10, Ch. 269, L. 2015.)"

17

18 **Section 3.** Section 85-2-233, MCA, is amended to read:

19 **"85-2-233. Hearing on decrees or petition -- procedure.** (1) (a) For good cause shown and subject
20 to the provisions of subsection (9), a hearing must be held before the water judge on any objection to a temporary
21 preliminary decree, a preliminary decree, or a petition for judicial determination under 85-2-222 by:

22 (i) the department;

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

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

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

28 (b) For the purposes of this subsection (1), "good cause shown" means a written statement showing that
29 a person has an ownership, leasehold, economic, or clearly demonstrated particularized interest in an existing
30 water right, permit, certificate, state water reservation under 85-2-316, or right to receive water through an

1 irrigation project and that the person's interest has been affected by the decree.

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

7 (i) mistake, inadvertence, surprise, or excusable neglect;

8 (ii) newly discovered evidence that by due diligence could not have been discovered in time to move for
9 a new trial under Rule 59(b), Montana Rules of Civil Procedure;

10 (iii) fraud, misrepresentation, or other misconduct of an adverse party;

11 (iv) the judgment is void; or

12 (v) any other reason justifying relief from the operation of the judgment.

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

17 (i) mistake, inadvertence, surprise, or excusable neglect;

18 (ii) newly discovered evidence that by due diligence could not have been discovered at the close of the
19 objection period set forth in subsection (2);

20 (iii) fraud, misrepresentation, or other misconduct of an adverse party;

21 (iv) the temporary preliminary decree is void; or

22 (v) any other reason justifying relief from the operation of the prior decree issued under this part. The
23 fact that a prior owner of a water right did not object or counterobject at a prior decree stage may not be a basis
24 for a subsequent owner of the water right to object or counterobject absent a finding that one of the provisions
25 in this subsection (1)(d) applies.

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

30 (3) Upon expiration of the time for filing objections under subsection (2), the water judge shall notify each

1 party whose claim received an objection that an objection was filed. The notice must set forth the name of each
2 objector and must allow an additional 60 days for the party whose claim received an objection to file a
3 counterobjection to the claim or claims of the objector. Counterobjections must be limited to those claims that are
4 included within the particular decree issued by the court.

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

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

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

19 (6) (a) After the issuance of a temporary preliminary decree or preliminary decree, notice must be
20 published once a week for 3 consecutive weeks in two newspapers of general circulation in the basin where the
21 decree was issued for:

22 (i) a motion to amend a statement of claim that may adversely affect other water rights;

23 (ii) a motion to amend a timely objection that may adversely affect other water rights; or

24 (iii) a petition for judicial determination as provided for in 85-2-222.

25 (b) The notice must specify that any response or objection to the proposed amendment must be filed
26 within 45 days of the date of the last notice.

27 (c) The water judge may order any additional notice of the motion as the water judge considers
28 necessary.

29 (d) The costs of the notice required pursuant to this subsection must be borne by the moving party.

30 (7) Failure to object under subsection (1) to a compact ~~negotiated and ratified under 85-2-702 or~~

1 ~~85-2-703~~ ratified by the legislature and the other party to the compact, either a tribe or a federal agency, bars any
2 subsequent cause of action in the water court.

3 (8) If the court sustains an objection to a compact, it may declare the compact void. The federal agency
4 ~~of the United States~~, the tribe, or the United States on behalf of the tribe that is party to the compact is permitted
5 6 months after the court's determination to file a statement of claim, as provided in 85-2-224, and the court shall
6 issue a new preliminary decree in accordance with 85-2-231. However, any party to a compact declared void may
7 appeal from that determination in accordance with those procedures applicable to 85-2-235, and the filing of a
8 notice of appeal stays the period for filing a statement of claim as required under this subsection.

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

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

14 (11) All issue remarks, as defined in 85-2-250, must be finally resolved before the issuance of a final
15 decree."
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17 **Section 4.** Section 85-2-234, MCA, is amended to read:

18 **"85-2-234. Final decree.** (1) The water judge shall, on the basis of the preliminary decree, on the basis
19 of any hearing that may have been held, and on final resolution of all issue remarks, as defined in 85-2-250, enter
20 a final decree affirming or modifying the preliminary decree.

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

25 (3) The final decree must establish the existing rights and priorities within the water judge's jurisdiction
26 of persons who have filed a claim in accordance with 85-2-221, of persons required to file a declaration of existing
27 rights in the Powder River basin pursuant to an order of the department or a district court issued under sections
28 8 and 9 of Chapter 452, Laws of 1973, of any judicial determinations made pursuant to 85-2-222, and of any
29 federal agency or Indian tribe possessing water rights arising under federal law, ~~required by 85-2-702 to file~~
30 claims.

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

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

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

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

8 (b) the amount of water included in the right, as follows:

9 (i) by flow rate for direct flow rights, such as irrigation rights;

10 (ii) by volume for rights, such as stockpond and reservoir storage rights, and for rights that are not
11 susceptible to measurement by flow rate; or

12 (iii) by flow rate and volume for rights that a water judge determines require both volume and flow rate
13 to adequately administer the right;

14 (c) the date of priority of the right;

15 (d) the purpose for which the water included in the right is used;

16 (e) the place of use and a description of the land, if any, to which the right is appurtenant;

17 (f) the source of the water included in the right;

18 (g) the place and means of diversion;

19 (h) the inclusive dates during which the water is used each year;

20 (i) any other information necessary to fully define the nature and extent of the right.

21 (7) For each person, tribe, or federal agency possessing water rights arising under the laws of the United
22 States, the final decree must state:

23 (a) the name and mailing address of the holder of the right;

24 (b) the source or sources of water included in the right;

25 (c) the quantity of water included in the right;

26 (d) the date of priority of the right;

27 (e) the purpose for which the water included in the right is currently used, if at all;

28 (f) the place of use and a description of the land, if any, to which the right is appurtenant;

29 (g) the place and means of diversion, if any; and

30 (h) any other information necessary to fully define the nature and extent of the right, including the terms

1 of any compacts ~~negotiated and ratified under 85-2-702~~ ratified by the legislature and the other party to the
 2 compact, either a tribe or a federal agency.

3 (8) Clerical mistakes in a final decree may be corrected at any time on the initiative of the water judge
 4 or on the petition of any person who possesses a water right. The water judge shall order the notice of a
 5 correction proceeding that the judge determines to be appropriate to advise all persons who may be affected by
 6 the correction. An order of the water judge making or denying a clerical correction is subject to appellate review."

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8 **Section 5.** Section 85-2-406, MCA, is amended to read:

9 **"85-2-406. District court supervision of water distribution.** (1) The district courts shall supervise the
 10 distribution of water among all appropriators. This supervisory authority includes the supervision of all water
 11 commissioners appointed prior or subsequent to July 1, 1973. The supervision must be governed by the principle
 12 that first in time is first in right.

13 (2) (a) A district court may order the distribution of water pursuant to a district court decree entered prior
 14 to July 1, 1973, until an enforceable decree is entered under part 2 of this chapter or the matter has been
 15 adjudicated under the procedure set forth in subsection (2)(b).

16 (b) When a water distribution controversy arises upon a source of water in which not all existing rights
 17 have been conclusively determined according to part 2 of this chapter, any party to the controversy may petition
 18 the district court to certify the matter to the chief water judge. If a certification request is made, the district court
 19 shall certify to the chief water judge the determination of the existing rights that are involved in the controversy
 20 according to part 2 of this chapter. The district court from which relief is sought shall retain exclusive jurisdiction
 21 to grant injunctive or other relief that is necessary and appropriate pending adjudication of the existing water
 22 rights certified to the water judge. Certified controversies must be given priority over all other adjudication matters.
 23 After determination of the matters certified, the water judge shall return the decision to the district court with a
 24 tabulation or list of the existing rights and their relative priorities.

25 (3) A controversy between appropriators from a source that has been the subject of a final decree under
 26 part 2 of this chapter must be settled by the district court. The order of the district court settling the controversy
 27 may not alter the existing rights and priorities established in the final decree except to the extent the court alters
 28 rights based upon abandonment, waste, or illegal enlargement or change of right. In cases involving permits
 29 issued by the department, the court may not amend the respective rights established in the permits or alter any
 30 terms of the permits unless the permits are inconsistent or interfere with rights and priorities established in the

1 final decree. The order settling the controversy must be appended to the final decree, and a copy must be filed
 2 with the department. The department must be served with process in any proceeding under this subsection, and
 3 the department may, in its discretion, intervene in the proceeding.

4 (4) A temporary preliminary decree or preliminary decree or a portion of a temporary preliminary decree
 5 or preliminary decree as modified after objections and hearings is enforceable and administrable according to
 6 its terms. If an action to enforce a temporary preliminary decree or preliminary decree is commenced, the water
 7 judge shall upon referral from the district court establish, in a form determined to be appropriate by the water
 8 judge, one or more tabulations or lists of all existing rights and their relative priorities.

9 ~~(5) A person whose existing rights and priorities are determined in a temporary preliminary decree or~~
 10 ~~preliminary decree or a person exercising a suspension under 85-2-217 and part 7 of this chapter may appeal~~
 11 ~~a determination made pursuant to subsection (2).~~

12 (5) A PERSON WHOSE EXISTING RIGHTS AND PRIORITIES ARE DETERMINED IN A TEMPORARY PRELIMINARY DECREE
 13 OR PRELIMINARY DECREE MAY APPEAL A DETERMINATION MADE PURSUANT TO SUBSECTION (2)."

14

15 **Section 6.** Section 85-2-701, MCA, is amended to read:

16 **"85-2-701. Legislative intent.** ~~(1) Because the water and water rights within each water division are~~
 17 ~~interrelated, it is the intent of the legislature to conduct unified proceedings for the general adjudication of existing~~
 18 ~~water rights under the Montana Water Use Act. It is the intent of the legislature that the unified proceedings~~
 19 ~~include all claimants of federal reserved FEDERAL OR INDIAN Indian water rights as necessary and indispensable~~
 20 ~~parties under authority granted the state by 43 U.S.C. 666. However, it is further intended that the state of~~
 21 ~~Montana proceed under the provisions of this part in an effort to conclude compacts for the equitable division and~~
 22 ~~apportionment of waters between the state and its people and the several Indian tribes claiming reserved water~~
 23 ~~rights within the state.~~

24 ~~(2) To the maximum extent possible, the reserved water rights compact commission established under~~
 25 ~~2-15-212 should make the negotiation of water rights claimed by the federal government or Indian tribes in or~~
 26 ~~affecting the basins identified by 85-2-218 its highest priority. In negotiations, the commission is acting on behalf~~
 27 ~~of the governor."~~

28

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

30 **"85-2-702. Negotiation Compacts with Indian tribes or federal agencies.** ~~(1) The reserved water~~

1 ~~rights compact commission, created by 2-15-212, may negotiate with the Indian tribes or their authorized~~
 2 ~~representatives jointly or severally to conclude compacts authorized under 85-2-701. Compact proceedings must~~
 3 ~~be commenced by the commission. The commission shall serve by certified mail directed to the governing body~~
 4 ~~of each tribe a written request for the initiation of negotiations under this part and a request for the designation~~
 5 ~~of an authorized representative of the tribe to conduct compact negotiations. Compact negotiations commence~~
 6 ~~upon receipt of the written designation from the governing body of a tribe.~~

7 ~~(2)(1) When the compact commission legislature and the an Indian tribes tribe or their authorized~~
 8 ~~representatives a federal agency have agreed to ratified a compact, they the parties shall sign a copy and file an~~
 9 ~~original copy with the United States department of state of the United States of America and copies with the~~
 10 ~~secretary of state of Montana and with the governing body for the tribe or federal agency involved.~~

11 ~~(2) A compact with an Indian tribe The compact is effective and binding upon on all parties upon~~
 12 ~~ratification by the legislature of Montana and any affected tribal governing body; and upon approval by the~~
 13 ~~appropriate federal authority. UPON ITS RATIFICATION BY THE MONTANA LEGISLATURE AND THE TRIBE, THE TERMS OF~~
 14 ~~A COMPACT MUST BE INCLUDED IN THE PRELIMINARY DECREE AS PROVIDED BY 85-2-231, AND UNLESS AN OBJECTION TO~~
 15 ~~THE COMPACT IS SUSTAINED UNDER 85-2-233, THE TERMS OF THE COMPACT MUST BE INCLUDED IN THE FINAL DECREE~~
 16 ~~WITHOUT ALTERATION.~~

17 ~~(3) A compact with a federal agency is effective and binding on all parties upon ratification by the~~
 18 ~~legislature and the federal agency. Upon its ratification by the Montana legislature and the tribe, the terms of a~~
 19 ~~compact must be included in the preliminary decree as provided by 85-2-231, and unless an objection to the~~
 20 ~~compact is sustained under 85-2-233, the terms of the compact must be included in the final decree without~~
 21 ~~alteration. However, if approval of the state legislature and the tribe has not been accomplished by July 1, 2013,~~
 22 ~~all Indian claims for reserved water rights that have not been resolved by a compact must be filed with the~~
 23 ~~department within 24 months. These new filings must be used in the formulation of the preliminary decree and~~
 24 ~~must be given treatment similar to that given to all other filings."~~

25
 26 **NEW SECTION. Section 8. Repealer.** The following sections of the Montana Code Annotated are
 27 repealed:

28 2-15-212. Reserved water rights compact commission.
 29 85-2-217. Suspension of adjudication.
 30 85-2-703. Negotiation with federal government.

- 1 85-2-704. Termination of negotiations.
- 2 85-2-705. Status reports to chief water judge.
- 3 85-2-708. Water administration interim agreements within Indian reservations.
- 4 - END -