

## SENATE BILL NO. 417

INTRODUCED BY BARKUS, ANDERSON, LAIBLE, PERRY, SHEA

A BILL FOR AN ACT ENTITLED: "AN ACT AUTHORIZING PARTICIPATION BY CERTAIN POLITICAL SUBDIVISIONS IN NEGOTIATIONS OF RESERVED WATER RIGHTS COMPACTS AND ESTABLISHING NOTIFICATION REQUIREMENTS; PROHIBITING A POLITICAL SUBDIVISION THAT HAS AN OPPORTUNITY TO PARTICIPATE IN NEGOTIATIONS FROM OBJECTING TO A TEMPORARY PRELIMINARY DECREE, PRELIMINARY DECREE, OR REOPENED DECREE; ~~PROVIDING A STANDARD OF REVIEW FOR AN OBJECTION TO A COMPACT~~; ESTABLISHING MINIMUM REQUIREMENTS FOR A WATER ADMINISTRATION INTERIM AGREEMENT WITH A TRIBAL GOVERNMENT UNDER CERTAIN CONDITIONS; AMENDING SECTIONS 85-2-233, 85-2-237, 85-2-702, AND 85-2-708, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY 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)~~ ~~(10)~~ (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 a written statement showing that a person has an ownership interest in water or its use that has been affected by the decree.

(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:

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

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

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

(iv) the judgment is void; or

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

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

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

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

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

(iv) the temporary preliminary decree is void; or

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

(e) A political subdivision that was given the opportunity to participate in the negotiation of a compact under part 7 of this chapter may not file an objection to the compact.

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

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

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

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

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

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

~~(7) The water court shall apply a de novo standard of review to any objection filed under subsection (1) that is an objection to a compact negotiated and ratified under part 7 of this chapter.~~

~~(7)(8)(7)~~ Failure to object under subsection (1) to a compact negotiated and ratified under 85-2-702 or 85-2-703 bars any subsequent cause of action in the water court.

~~(8)(9)(8)~~ If the court sustains an objection to a compact, it may declare the compact void. The agency of the United States, the tribe, or the United States on behalf of the tribe party to the compact is permitted 6 months after the court's determination to file a statement of claim, as provided in 85-2-224, and the court shall issue a new preliminary decree in accordance with 85-2-231. However, any party to a compact declared void may appeal from that determination in accordance with those procedures applicable to 85-2-235, and the filing of a notice of appeal stays the period for filing a statement of claim as required under this subsection.

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

~~(10)(11)(10)~~ The provisions of subsection ~~(9)~~ ~~(10)~~ (9) do not apply to issues arising after entry of the previous decree, including but not limited to the issues of abandonment, expansion of the water right, and reasonable diligence."

**Section 2.** Section 85-2-237, MCA, is amended to read:

**"85-2-237. Reopening and review of decrees.** (1) After July 1, 1996, the water judges shall by order reopen and review, within the limits set forth by the procedures described in this section, all preliminary or final decrees:

- (a) that have been issued but have not been noticed throughout the water divisions; or
- (b) for basins for which claims have been filed under 85-2-221(3).

(2) (a) Each order must state that the water judge will reopen the decree or decrees and, upon a hearing, review the water court's determination of any claim in the decree or decrees if an objection to the claim has been filed for the purpose of protecting rights to the use of water from sources:

- (i) within the basin for which the decree was entered; or
- (ii) in other basins that are hydrologically connected to sources within the basin for which the decree was entered.

(b) A person may not raise an objection to a matter in a reopened decree if the person was a party to the matter when the matter was previously litigated and resolved as the result of the previous objection process, unless the objection is allowed for any of the following reasons:

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

(c) The objection must be made in accordance with the procedure for filing objections under 85-2-233.

(d) A political subdivision that was given the opportunity to participate in the negotiation of a compact that was negotiated and ratified under part 7 of this chapter may not file an objection to the compact.

(3) The water judges shall serve notice by mail of the entry of the order providing for the reopening and review of a decree or decrees to the department and to the persons entitled to receive service of notice under 85-2-232(1).

(4) Notice of the reopening and review of a preliminary or final decree must also be published at least once each week for 3 consecutive weeks in at least three newspapers of general circulation that cover the water division or divisions in which the decreed basin is located.

(5) ~~No~~ An objection may not cause a reopening and review of a claim unless the objection is filed with the appropriate water court within 180 days after the issuance of the order under subsection (1). This period of time may, for good cause shown, be extended by the water judge for up to two 90-day periods if an application for extension is made within the original 180-day period or any extension of it.

(6) The water judge shall provide notice to the claimant of any timely objection to the claim and, after further reasonable notice to the claimant, the objector or objectors, and other interested persons, set the matter for hearing. The water judge may conduct individual or consolidated hearings, and any hearing must be conducted according to the Montana Rules of Civil Procedure. On an order of the water judge, a hearing may be conducted by a water master, who shall prepare a report of the hearing as provided in Rule 53(e), Montana Rules of Civil Procedure.

(7) The water judge shall, on the basis of any hearing held on the matter, take action as warranted from the evidence, including dismissal of the objection or modification of the portion of the decree describing the contested claim.

(8) An order or decree modifying a previously issued final decree as a result of procedures described in this section may be appealed in the same manner as provided for an appeal taken from a final order of a district court.

(9) An order or decree modifying a previously issued preliminary decree as a result of procedures described in this section may be appealed under 85-2-235 when the preliminary decree has been made a final decree."

**Section 3.** Section 85-2-702, MCA, is amended to read:

**"85-2-702. Negotiation with Indian tribes.** (1) (a) The reserved water rights compact commission, created by 2-15-212, may negotiate with the Indian tribes or their authorized representatives jointly or severally to conclude compacts authorized under 85-2-701. Compact proceedings must be commenced by the commission. The commission shall serve by certified mail directed to the governing body of each tribe a written

request for the initiation of negotiations under this part and a request for the designation of an authorized representative of the tribe to conduct compact negotiations. Compact negotiations commence upon receipt of the written designation from the governing body of a tribe.

(b) (i) A political subdivision that claims a right to the use of water that is the subject of ongoing compact negotiations may participate in compact negotiations.

(ii) Whenever compact negotiations are commenced or, for compact negotiations commenced before [the effective date of this act], 60 days after [the effective date of this act], the compact commission shall notify each political subdivision that is eligible to participate in compact negotiations pursuant to subsection (1)(b)(i) that the political subdivision may participate in the negotiations.

(iii) The governing body of any political subdivision that elects to participate in the negotiations shall designate a representative within 30 days of receipt of the notice.

(iv) A political subdivision may elect to withdraw from the negotiations. A withdrawal by a political subdivision is irrevocable.

(v) The political subdivision may not terminate the negotiations under 85-2-704.

(2) When the compact commission, participating political subdivisions, and the Indian tribes or their authorized representatives have agreed to a compact, they shall sign a copy and file an original copy with the department of state of the United States of America and copies with the secretary of state of Montana and with the governing body for the tribe involved. The compact is effective and binding upon all parties upon ratification by the legislature of Montana and any affected tribal governing body; and upon approval by the appropriate federal authority.

(3) Upon its ratification by the Montana legislature and the tribe, the terms of a compact must be included in the preliminary decree as provided by 85-2-231, and unless an objection to the compact is sustained under 85-2-233, the terms of the compact must be included in the final decree without alteration. However, if approval of the state legislature and the tribe has not been accomplished by July 1, 2005, all Indian claims for reserved water rights that have not been resolved by a compact must be filed with the department within 6 months. These new filings must be used in the formulation of the preliminary decree and must be given treatment similar to that given to all other filings."

**Section 4.** Section 85-2-708, MCA, is amended to read:

**"85-2-708. Water administration interim agreements within Indian reservations.** (1) Because it appears to be to the common advantage of the state and Indian tribes to cooperate in matters involving the

permitting and use of water within the exterior boundaries of an Indian reservation prior to the final adjudication of Indian reserved water rights and because the state does not intend by enactment of this section to limit, expand, alter, or waive state jurisdiction to administer water rights within the exterior boundaries of an Indian reservation, pursuant to the requirements of Title 18, chapter 11, the department may negotiate and conclude an interim agreement with the tribal government of any Indian tribe in Montana prior to final adjudication of Indian reserved water rights for the purpose of implementing a water administration plan and a permitting process for the issuance of water rights and changes in water right uses within the exterior boundaries of an Indian reservation.

(2) Except as provided in subsection (4), an agreement entered into pursuant to subsection (1) must:

(a) provide for the retention of exclusive authority by the state to issue permits to applicants who are not members of the tribe and to issue change of use authorizations;

(b) provide that any permits must be issued in accordance with the criteria established by state law; and

(c) provide that permits may be only for new uses with a date of priority in compliance with state law.

(3) Prior to concluding any agreement under this section, the department shall hold public meetings, after proper public notice of the meetings has been given and the proposed agreement has been made available for public review, to afford the public an opportunity to comment on the contents of the agreement.

(4) The provisions of subsection (2) do not apply if a court of competent jurisdiction has held that the department lacks exclusive authority to issue new water use permits within the exterior boundaries of an Indian reservation pending final adjudication of tribal reserved water rights. In that case, an interim agreement:

(a) must provide for new ground water uses for domestic and municipal purposes. Except for the criterion in 85-2-311(a)(ii), an interim agreement must establish criteria for new water uses that incorporate the criteria listed in 85-2-311.

(b) must provide for changes in existing appropriation rights within the exterior boundaries of the reservation. An interim agreement must establish criteria for changes in existing appropriation rights that incorporate the criteria listed in 85-2-402.

(c) must provide a secure right to use water to an appropriator of water under the interim agreement in the event of the termination of the interim agreement, quantification of reserved water rights, or termination of negotiations of reserved water rights under 85-2-704;

(d) must maintain the jurisdictional claims of each party to the interim agreement;

(e) must protect each party against a waiver of the right to challenge the claims of each party at any time;

(f) may not prejudice the regulatory or adjudicatory jurisdiction of either party;

(g) must provide that none of the activities of each party in the negotiation or implementation of an interim agreement may be used to affect the equitable or legal position of either party in any future litigation; and

(h) must provide that nothing in the negotiation or implementation of an interim agreement may be considered as enlarging or diminishing the jurisdiction or authority of either party within the reservation."

NEW SECTION. Section 5. Notification to tribal governments. The secretary of state shall send a copy of [this act] to each tribal government located on the seven Montana reservations and to the Little Shell band of Chippewa.

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

NEW SECTION. Section 7. Applicability. [This act] applies to compact negotiations that were commenced before, on, or after [the effective date of this act].

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