

SENATE BILL NO. 435
INTRODUCED BY V. JACKSON

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT POWER GENERATION WATER RIGHTS ARE JUNIOR IN PRIORITY TO ALL WATER RIGHTS UPSTREAM FROM A HYDROELECTRIC FACILITY; PROVIDING THAT THERE IS NO LIMIT ON THE AMOUNT OF WATER THAT A HYDROELECTRIC FACILITY MAY HOLD IN STORAGE BEHIND A DAM THROUGH WHICH WATER FLOWS TO CREATE ELECTRICITY; REQUIRING THE WATER COURT TO MAKE NECESSARY AMENDMENTS TO DECREED WATER RIGHTS; AMENDING SECTION 85-2-237, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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

NEW SECTION. Section 1. Power generation rights junior to other water rights -- unlimited storage. (1) Subject to subsection (2), power generation water rights are junior in priority to all water rights, except other power generation water rights, upstream from a hydroelectric facility.

(2) Power generation water rights that are held by entities licensed through the federal energy regulatory commission or that are appurtenant to structures that are licensed through the federal energy regulatory commission may not be reduced in flow or volume to an extent that the owner would not be able to meet the regulatory requirements in the license issued to the owner by the federal energy regulatory commission.

(3) A hydroelectric water right places no limit on the volume or use of water that a hydroelectric facility may hold in storage behind a dam through which water flows to create electricity. However, the hydroelectric facility shall comply with water right calls placed by downstream senior water rights and other laws, including but not limited to maximum storage and dam safety requirements.

NEW SECTION. Section 2. Definition. As used in 85-2-237 and [sections 1 and 2], "water right" means the right to use water as documented by a claim to an existing right, a permit, or a certificate of water right.

Section 3. Section 85-2-237, MCA, is amended to read:

"85-2-237. (Temporary) 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;
 (b) for basins for which claims have been filed under 85-2-221(3); ~~or~~
 (c) for basins that were verified and not examined for which the water court has received a petition and has determined that examination is necessary, as provided in 85-2-282, or the water court has issued an order for reexamination on its own initiative; or

(d) for basins that contain power generation water rights.

(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:

(i) an objection to the claim has been filed for the purpose of protecting rights to the use of water from sources:

~~(i)(A)~~ within the basin for which the decree was entered; or

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

(ii) a claim was filed in that basin for the purpose of power generation.

(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.

(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) 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:

(a) dismissal of the objection or modification of the portion of the decree describing the contested claim;

or

(b) (i) changing the priority date of any power generation water rights to be junior to all water rights that exist upstream from a hydroelectric facility; and

(ii) modifying the decree to reflect this change in priority date.

(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.

(10) An order requiring the department to examine a basin that was initially verified is limited to the types of claims in the basin that were identified in the petition, as provided in 85-2-282, or the types of claims identified in an order that the water court issued on its own initiative. (Terminates June 30, 2020--sec. 18, Ch. 288, L. 2005.)

85-2-237. (Effective July 1, 2020) 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); or

(c) for basins that contain power generation water rights.

(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:

(i) an objection to the claim has been filed for the purpose of protecting rights to the use of water from sources:

~~(i)(A)~~ within the basin for which the decree was entered; or

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

(ii) a claim was filed in that basin for the purpose of power generation.

(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.

(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 objection may 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:

(a) dismissal of the objection or modification of the portion of the decree describing the contested claim;

or

(b) (i) changing the priority date of any power generation water rights to be junior to all water rights that exist upstream from a hydroelectric facility; and

(ii) modifying the decree to reflect this change in priority date.

(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."

NEW SECTION. Section 4. Codification instruction. [Sections 1 and 2] are intended to be codified as an integral part of Title 85, chapter 2, part 2, and the provisions of Title 85, chapter 2, part 2, apply to [sections 1 and 2].

NEW SECTION. Section 5. Effective date. [This act] is effective on passage and approval.

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