

## SENATE BILL NO. 355

INTRODUCED BY HAMLETT, BRENDEN, KEANE, LARSEN

A BILL FOR AN ACT ENTITLED: "AN ACT CREATING A PETITION PROCESS TO JUDICIALLY DETERMINE CLAIMS FOR EXISTING WATER RIGHTS THAT WERE EXEMPT FROM FILING FOR THE ADJUDICATION OF WATER RIGHTS; PROVIDING THAT WITHOUT A DETERMINATION WATER RIGHTS EXEMPT FROM FILING ARE NOT ADMINISTERED BY FIRST IN TIME, FIRST IN RIGHT; AMENDING SECTIONS 85-2-222, 85-2-233, AND 85-2-234, MCA."

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

**Section 1.** Section 85-2-222, MCA, is amended to read:

**"85-2-222. Exemptions -- petition for determination.** (1) Claims for existing rights for livestock and individual uses as opposed to municipal domestic uses based upon instream flow or ground water sources and claims for rights in the Powder River basin included in a declaration filed pursuant to the order of the department or a district court issued under sections 8 and 9 of Chapter 452, Laws of 1973, or under sections 3 and 4 of Chapter 485, Laws of 1975, are exempt from the filing requirements of 85-2-221(1). ~~Such claims may, however, be voluntarily filed.~~

(2) The owner of an existing right exempt from filing under this section who did not voluntarily file a claim may request a judicial determination from the water court of the existing water right at least 90 days prior to issuance of a final decree pursuant to 85-2-234 or upon the reopening of a final decree pursuant to 85-2-237, whichever occurs later.

(3) To request a judicial determination of an existing right exempt from filing, the owner shall:

(a) file a petition in the water court and pay a filing fee, including the cost of examination by the department under 85-2-243;

(b) submit information required by 85-2-224(1) and (2) on a form provided by the department; and

(c) provide and pay for the notice required by 85-2-233(6).

(4) A claim of an existing right undergoing judicial determination pursuant to this section ~~does not~~ constitute CONSTITUTES prima facie proof of its content.

(5) The provisions of 85-2-233, 85-2-243, and 85-2-248 as well as supreme court examination rules

1 apply to petitions for judicial determination under this section, except that the department may not resolve issue  
 2 remarks.

3 ~~——— (6) If the judicial determination finds that the claim is without merit, the water judge may award costs and~~  
 4 ~~reasonable attorney fees to any party who objected to the claim.~~

5 (7)(6) Failure to file a claim for an existing right exempt under this section or failure to request a judicial  
 6 determination for an existing right exempt under this section:

7 (a) does not result in the forfeiture of an existing water right; and

8 ~~——— (b) excludes the water right from the first in time, first in right principle under 85-2-401 and water~~  
 9 ~~distribution pursuant to 85-2-406.~~

10 (B) SUBORDINATES THE EXISTING RIGHT TO ALL OTHER WATER RIGHTS EXCEPT THOSE THAT ARE EXEMPT FROM  
 11 THIS SECTION AND FOR WHICH THERE HAS BEEN NEITHER A CLAIM FILED NOR A JUDICIAL DETERMINATION SOUGHT."

12

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

14 **"85-2-233. Hearing on temporary preliminary decree or preliminary decree -- procedure.** (1) (a)

15 For good cause shown and subject to the provisions of subsection (9), a hearing must be held before the water  
 16 judge on any objection to a temporary preliminary decree, or preliminary decree, or a petition for judicial  
 17 determination under 85-2-222 by:

18 (i) the department;

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

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

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

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

26 (c) A person does not waive the right to object to a preliminary decree by failing to object to a temporary  
 27 preliminary decree issued before March 28, 1997. However, a person may not raise an objection to a matter in  
 28 a preliminary decree if that person was a party to the matter when the matter was previously litigated and resolved  
 29 as the result of an objection raised in a temporary preliminary decree unless the objection is allowed for any of  
 30 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) ~~(a)~~ After the issuance of a temporary preliminary decree or preliminary decree, notice ~~of any motion~~  
14 ~~to amend a statement of claim or a timely filed objection that may adversely affect other water rights~~ must be  
15 published once a week for 3 consecutive weeks in two newspapers of general circulation in the basin where ~~the~~  
16 ~~statement of claim or objection was filed~~ the decree was issued for:

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

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

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

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

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

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

25 (7) Failure to object under subsection (1) to a compact negotiated and ratified under 85-2-702 or  
26 85-2-703 bars any subsequent cause of action in the water court.

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

1 that determination in accordance with those procedures applicable to 85-2-235, and the filing of a notice of appeal  
2 stays the period for filing a statement of claim as required under this 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."

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11 **Section 3.** 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 must be included in the final decree  
16 without alteration unless an objection is sustained pursuant to 85-2-233. However, the court may not alter or  
17 amend any of the terms of a compact except with the prior written consent of the parties in accordance with  
18 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, of any judicial determinations made pursuant to 85-2-222, and of any  
23 federal agency or Indian tribe possessing water rights arising under federal law, required by 85-2-702 to file  
24 claims.

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

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

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

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

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