

SENATE BILL NO. 45

INTRODUCED BY J. COHENOUR

BY REQUEST OF THE WATER POLICY INTERIM COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING CERTAIN WATER RIGHT ADJUDICATION PROCESSES; LIMITING A MOTION TO AMEND A CLAIM OR OBJECTION; REVISING NECESSARY ELEMENTS FOR A RESERVED WATER RIGHT AS PART OF A FINAL DECREE; CREATING AN APPEALS PROCESS FOR A WATER COURT DECISION AFFECTING A WATER RIGHT; AND AMENDING SECTIONS 85-2-233, 85-2-234, AND 85-2-235, MCA."

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 decrees or petition -- procedure.** (1) (a) For good cause shown and subject to the provisions of subsection (9), a hearing must be held before the water judge on any objection to a temporary preliminary decree, a preliminary decree, or a supplemental preliminary decree by:

(i) the department;

(ii) a person named in the temporary preliminary decree, preliminary decree, or supplemental 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, leasehold, economic, or clearly demonstrated particularized interest in an existing water right, permit, certificate, state water reservation under 85-2-316, or right to receive water through an irrigation project and that the person's interest 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

1 as the result of an objection raised in a temporary preliminary decree unless the objection is allowed for any of  
2 the following reasons:

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

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

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

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

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

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

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

- 19 (i) a motion to amend a statement of claim that may adversely affect other water rights; or  
20 (ii) a motion to amend a timely objection that may adversely affect other water rights.

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

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

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

26 (e) In a basin for which a preliminary decree has been issued, a motion to amend a statement of claim  
27 or timely objection may not be filed after that claim or objection has been subject to an order that is appealable  
28 under 85-2-235.

29 (7) Failure to object under subsection (1) to a compact negotiated and ratified under 85-2-702 or  
30 85-2-703 bars any subsequent cause of action in the water court.

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

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

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

12 (11) All issue remarks, as defined in 85-2-250, must be finally resolved before the issuance of a final  
13 decree."  
14

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

16 **"85-2-234. Final decree.** (1) The water judge shall, on the basis of the preliminary decree and any  
17 supplemental preliminary decree, on the basis of any hearing that may have been held, and on final resolution  
18 of all issue remarks, as defined in 85-2-250, enter a final decree affirming or modifying the preliminary decree.

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

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

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

30 (5) The final decree must state the findings of fact, along with any conclusions of law, upon which the

1 existing rights and priorities of each person, federal agency, and Indian tribe named in the decree are based.

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

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

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

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

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

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

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

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

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

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

15 (g) the place and means of diversion;

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

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

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

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

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

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

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

24 (e) the purpose for which the water included in the right ~~is currently~~ may be used, ~~if at all~~;

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

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

27 (h) any other information necessary to fully define the nature and extent of the right, including the terms  
28 of any compacts negotiated and ratified under 85-2-702.

29 (8) Clerical mistakes in a final decree may be corrected at any time on the initiative of the water judge  
30 or on the petition of any person who possesses a water right. The water judge shall order the notice of a

1 correction proceeding that the judge determines to be appropriate to advise all persons who may be affected by  
 2 the correction. An order of the water judge making or denying a clerical correction is subject to appellate review."

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4 **Section 3.** Section 85-2-235, MCA, is amended to read:

5 **"85-2-235. Appeals.** (1) A person whose existing rights and priorities are determined in a final decree  
 6 may appeal the determination only if:

7 (a) the person requested a hearing and appeared and entered objections to the temporary preliminary  
 8 decree or the preliminary decree;

9 (b) the person's rights or priorities as determined in the temporary preliminary decree or the preliminary  
 10 decree were affected as the result of an objection filed by another person;

11 (c) the person requested a hearing and appeared before the water court to finally resolve an issue  
 12 remark, as defined in 85-2-250; or

13 (d) the person is a claimant appealing an adverse decision when the water court issued the decision as  
 14 the result of an evidentiary hearing, or as the result of calling the claim in on the court's own motion, or under  
 15 85-2-248.

16 ~~(2) The attorney general may appeal a determination made in a final decree if the attorney general~~  
 17 ~~participated as an intervenor as provided in 85-2-248~~ (a) An order issued by a water judge after October 1, 2019,  
 18 that confirms, terminates, amends, or otherwise modifies a water right may be appealed by a party who  
 19 participated in the particular proceedings in which the order was issued.

20 (b) The order must be appealed immediately in accordance with the Montana Rules of Appellate  
 21 Procedure, or the right to appeal is waived.

22 ~~(3) An interlocutory ruling by the water judge upon a question of law may be appealed by any party who~~  
 23 ~~is affected by the decision and who participated in the matter in which the ruling was issued~~ (a) An order that  
 24 would otherwise be appealable under subsection (2) that was issued prior to October 1, 2019, must be appealed  
 25 by October 1, 2020. An eligible appeal that is not filed by October 1, 2020, is waived.

26 (b) Within 30 days after October 1, 2019, the water court shall publish notice of the appeal deadline  
 27 provided in this subsection (3) once a week for 3 consecutive weeks in at least two newspapers of general  
 28 circulation within each water division.

29 (c) Within 6 months after October 1, 2019, the water court shall send written notice of the appeal deadline  
 30 provided in this subsection (3) to all parties entitled to receive notice of the availability of a decree under

1 85-2-232."

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