

1 SENATE BILL NO. 352

2 INTRODUCED BY J. ESP

3

4 A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING GOOD CAUSE SHOWN FOR AN OBJECTION TO A
5 WATER RIGHT CLAIM, A WATER RIGHT APPLICATION, OR A WATER RIGHT CHANGE; AND AMENDING
6 SECTIONS 85-2-233 AND 85-2-308, MCA."

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

9

10 **Section 1.** Section 85-2-233, MCA, is amended to read:

11 **"85-2-233. Hearing on decrees or petition -- procedure.** (1) (a) For good cause shown and subject
12 to the provisions of subsection (9), a hearing must be held before the water judge on any objection to a
13 temporary preliminary decree, a preliminary decree, or a supplemental preliminary decree by:

14 (i) the department;

15 (ii) a person named in the temporary preliminary decree, preliminary decree, or supplemental
16 preliminary decree;

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

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

21 (b) For the purposes of this subsection (1), "good cause shown" means a written statement showing
22 that a person ~~has an ownership, leasehold, economic, or clearly demonstrated particularized interest in an~~
23 ~~existing water right, permit, certificate, state water reservation under 85-2-316, or right to receive water through~~
24 ~~an irrigation project~~ is an owner of a water right and that the person's ~~interest~~ hydrologically connected water
25 right 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
27 temporary preliminary decree issued before March 28, 1997. However, a person may not raise an objection to a
28 matter in a preliminary decree if that person was a party to the matter when the matter was previously litigated

1 and resolved as the result of an objection raised in a temporary preliminary decree unless the objection is
2 allowed for any of 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
5 for 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
10 contained in a subsequent decree issued under this part if the matter was contained in a prior decree issued
11 under this part for which there was an objection and counterobjection period unless the objection is allowed for
12 any of the 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
23 preliminary decree, preliminary decree, or supplemental preliminary decree. The water judge may, for good
24 cause shown, extend this time limit up to two additional 90-day periods if application for an extension is made
25 prior to expiration 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
27 each party whose claim received an objection that an objection was filed. The notice must set forth the name of
28 each objector and must allow an additional 60 days for the party whose claim received an objection to file a

1 counterobjection to the claim or claims of the objector. Counterobjections must be limited to those claims that
2 are included within the particular decree issued by the court.

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

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

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

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

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

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

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

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

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

1 2-703 bars any subsequent cause of action in the water court.

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

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

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

13 (11) All issue remarks, as defined in 85-2-250, must be finally resolved before the issuance of a final
14 decree."
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16 **Section 2.** Section 85-2-308, MCA, is amended to read:

17 "**85-2-308. Objections.** (1) (a) An objection to an application under this chapter must be filed by the
18 date specified by the department under 85-2-307(3).

19 (b) The objection to an application for a permit must state the name and address of the objector and
20 facts indicating that one or more of the criteria in 85-2-311 are not met.

21 (2) For an application for a change in appropriation rights, the objection must state the name and
22 address of the objector and facts indicating that one or more of the criteria in 85-2-320, if applicable, 85-2-402,
23 85-2-407, 85-2-408, and 85-2-436, if applicable, are not met.

24 (3) A person who owns a hydrologically connected water right or is a discharge permit holder has
25 standing to file an objection under this section if ~~the property, water rights, or interests of the objector~~ the
26 person's water rights or ability to satisfy effluent limitations of a discharge permit issued in accordance with Title
27 75, chapter 5, part 4, would be adversely affected by the proposed appropriation permit or change. The
28 department of environmental quality or a local water quality district under Title 7, chapter 13, part 45, has

1 standing to file an objection to a permit based on the criteria set forth in 85-2-311(1)(g).

2 (4) For an application for a reservation of water, the objection must state the name and address of the
3 objector and facts indicating that one or more of the criteria in 85-2-316 are not met.

4 (5) An objector to an application under this chapter shall file a correct and complete objection on a
5 form prescribed by the department within the time period stated on the public notice associated with the
6 application. In order to assist both applicants and objectors, the department shall adopt rules in accordance
7 with this chapter delineating the components of a correct and complete objection. For instream flow water rights
8 for fish, wildlife, and recreation, the rules must require the objector to describe the reach or portion of the reach
9 of the stream or river subject to the instream flow water right and the beneficial use that is adversely affected
10 and to identify the point or points where the instream flow water right is measured and monitored. The
11 department shall notify the objector of any defects in an objection. An objection not corrected or completed
12 within 15 days from the date of notification of the defects is terminated.

13 (6) An objection is valid if the objector has standing pursuant to subsection (3), has filed a correct and
14 complete objection within the prescribed time period, and has stated the applicable information required under
15 this section and rules of the department."

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