

SENATE BILL NO. 355

AN ACT ~~CREATING A PETITION PROCESS TO JUDICIALLY DETERMINE~~ AMENDING THE CLAIM FILING PROCESS FOR EXISTING WATER RIGHTS THAT WERE EXEMPT FROM FILING FOR THE ADJUDICATION OF WATER RIGHTS; PROVIDING THAT ~~WITHOUT A DETERMINATION~~ FAILURE TO FILE A CLAIM OF AN WATER RIGHTS EXEMPT RIGHT FROM FILING ARE WILL RESULT IN THE RIGHT NOT ADMINISTERED BY FIRST IN TIME, FIRST IN RIGHT BEING SUBORDINATED TO ALL OTHER CLAIMS EXCEPT THOSE NOT FILED PURSUANT TO [SECTION 1], AND AMENDING SECTIONS 85-2-222, 85-2-231, 85-2-232, 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 process and deadline for filing.~~ (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). These claims are described as exempt rights in this section.

(2) The owners of ~~existing right~~ exempt rights for which claims have not been filed under 85-2-221(1) ~~from filing~~ may request a judicial determination from the water court of the existing water right at least 90 days prior to the 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. shall file statements of claim with the department no later than February 28, 2018 for each exempt water right asserted or be subject to the subordination provision in subsection (6)(b).

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

(a) ~~file a petition in the water court~~ claim for each water right asserted and pay a filing fee, including the cost of examination by the department under 85-2-243 and the cost of public notice under (7);

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

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

(4) A claim of an ~~existing~~ exempt right filed pursuant to this section ~~undergoing judicial determination~~ 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, apply to ~~petitions for judicial determination~~ any statement of claim of an exempt right filed under this section, ~~except that the department may not resolve issue remarks.~~

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

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

(b) ~~subordinates the existing right to all other water rights except those exempt rights section that are exempt from this section and for which a claim has not been filed. there has been neither a claim filed nor a judicial determination sought.~~

(7) Notice. Notice of this filing deadline shall be published once a week for 3 consecutive weeks in all Montana daily newspapers and in at least one newspaper in each Montana county. Notice shall be clearly posted in each county courthouse and shall be included with all statements of real property tax, mailed by county treasurer's office over the course of the filing period between the effective date of this legislation and February 28, 2018.

(8) The department shall not accept any statements of claim physically submitted or postmarked after February 28, 2018, and shall notify a person who files a claim after February 28, 2018, that the claim will not be accepted.

Section 2. Section 85-2-231, MCA, is amended to read:

85-2-231. Temporary preliminary ~~decree~~ and preliminary decree, and supplemental preliminary decree. (1) A water judge may issue a temporary preliminary decree prior to the issuance of a preliminary decree if the temporary preliminary decree is necessary for the orderly adjudication or administration of water rights.

(2) (a) The water judge shall issue a preliminary decree. The preliminary decree must be based on:

(i) the statements of claim before the water judge, including those claims filed pursuant to section 85-2-222 if the preliminary decree is issued after February 28, 2018;

(ii) the data submitted by the department;

(iii) the contents of compacts approved by the Montana legislature and the tribe or federal agency or, lacking an approved compact, the filings for federal and Indian reserved rights; and

(iv) any additional data obtained by the water judge.

(b) The preliminary decree must be issued within 90 days after the close of the special filing period set out in 85-2-702(3) or as soon after the close of that period as is reasonably feasible.

(c) In basins where a preliminary decree has issued prior to March 1, 2018, the water judge shall issue a supplemental preliminary decree, containing only those claims for exempt rights filed between the date of issuance of the preliminary decree and the filing deadline set forth in subsection

[\(2\) of 85-2-222 for which notice has not been provided under 85-2-233\(6\).](#)

(ed) The water judge may issue an interlocutory decree if an interlocutory decree is otherwise necessary for the orderly administration of water rights.

(3) A temporary preliminary decree may be issued for any hydrologically interrelated portion of a water division, including but not limited to a basin, subbasin, drainage, subdrainage, stream, or single source of supply of water, or any claim or group of claims at a time different from the issuance of other temporary preliminary decrees.

(4) The temporary preliminary decree~~s~~ or preliminary decree or supplemental preliminary decree must contain the information and make the determinations, findings, and conclusions required for the final decree under [85-2-234](#).

(5) If the water judge is satisfied that the report of the water master meets the requirements for the preliminary decree and is satisfied with the conclusions contained in the report, the water judge shall adopt the report as the preliminary decree. If the water judge is not satisfied, the water judge may recommit the report to the master with instructions or modify the report and issue the preliminary decree.

(6) The department shall examine claims in basins that were verified rather than examined as ordered by the water court. The objection and hearing provisions of Title 85, chapter 2, part 2, apply to these claims.

Section 3. Section 85-2-232, MCA, is amended to read:

85-2-232. Availability of temporary preliminary ~~decree~~ or preliminary decree or supplemental preliminary decree. (1) (a) The water judge shall send to the department a copy of a temporary preliminary decree~~s~~ or preliminary decree or supplemental preliminary decree issued for a basin.

(b) The water judge shall serve by mail a notice of availability of the temporary preliminary decree~~s~~ or preliminary decree or supplemental preliminary decree to each person who has filed a claim of existing right within the decreed basin or to that person's successor as documented in the department's records.

(c) The water judge shall also serve by mail a notice of availability of the temporary preliminary decree~~s~~ or preliminary decree or supplemental preliminary decree to the purchaser under contract for deed, as defined in [70-20-115](#), of property in connection with which a claim of existing right has been filed within the decreed basin.

(d) In the Powder River basin, the water judge shall serve by mail a notice of availability of the temporary preliminary decree~~s~~ or preliminary decree or supplemental preliminary decree to each person or to that person's successor as documented in the department's records, who has filed a declaration of an existing right.

(e) The water judge shall enclose with a notice required under subsections (1)(b) through (1)(d)

an abstract of the disposition of the claimed or declared existing right of a person identified in this section or that person's successor as documented in the department's records.

(f) The notice of availability required under this section must also be served upon:

(i) those issued or having applied for and not having been denied a permit to beneficially use water within the decreed basin pursuant to Title 85, chapter 2, part 3;

(ii) those granted a reservation within the decreed basin pursuant to [85-2-316](#); or

(iii) other interested persons who request service of the notice from the water judge.

(g) When the water court provides notice to claimants of the opportunity to object, it shall include information explaining the right to appeal a water court decision as provided in [85-2-235](#).

(2) The clerk or person designated by the water judge to mail the notice shall make a general certificate of mailing certifying that a copy of the notice has been placed in the United States mail, postage prepaid, addressed to each party required to be served notice of the temporary preliminary decree or preliminary decree. The certificate is conclusive evidence of legal notice of entry of decree.

(3) Notice of the availability of a preliminary decree or supplemental preliminary 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. This notice must be provided before the final decree for the basin is issued.

(4) A person may obtain a copy of the temporary preliminary decree, ~~or~~ preliminary decree or supplemental preliminary decree upon payment of a fee of \$20 or the cost of printing, whichever is greater, to the water judge. The fee must be deposited in the state general fund.

Section 4. Section 85-2-233, MCA, is amended to read:

"85-2-233. Hearing on temporary preliminary decree, ~~or~~ preliminary decree or supplemental preliminary decree— 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 supplemental preliminary decree, ~~or a petition for judicial determination under 85-2-222~~ by:

(i) the department;

(ii) a person named in the temporary preliminary decree, ~~or~~ 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 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.

(2) Objections must be filed with the water judge within 180 days after entry of the temporary preliminary decree, ~~or preliminary decree~~ or supplemental 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 supplemental preliminary decree or that person's successor as documented in the department records and shall notify the attorney general 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)(a) After the issuance of a temporary preliminary decree or preliminary decree, notice must be published once a week for 3 consecutive weeks in two newspapers of general circulation in the basin where the decree was issued for:

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

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

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

(b) 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.

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

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

(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) 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) 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) The provisions of subsection (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.

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

Section 5. Section 85-2-234, MCA, is amended to read:

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

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

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

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

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

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

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

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

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

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

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

(c) the date of priority of the right;

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

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

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

(g) the place and means of diversion;

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

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

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

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

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

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

(d) the date of priority of the right;

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

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

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

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

(8) Clerical mistakes in a final decree may be corrected at any time on the initiative of the water judge or on the petition of any person who possesses a water right. The water judge shall order the notice of a correction proceeding that the judge determines to be appropriate to advise all persons who may be affected by the correction. An order of the water judge making or denying a clerical correction is subject to appellate review.