

Unofficial Draft Copy

As of: August 6, 2018 (3:19pm)

LCw002

**** Bill No. ****

Introduced By *****

By Request of the *****

A Bill for an Act entitled: "An Act revising the motion to amend a water right statement of claim to restrict publication requirements; revising final decree requirements for reserved water rights; providing deadlines to appeal decisions of the water court; 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

Unofficial Draft Copy

As of: August 6, 2018 (3:19pm)

LCw002

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 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

Unofficial Draft Copy

As of: August 6, 2018 (3:19pm)

LCw002

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, 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, 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.

(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.

(e) A motion to amend a statement of claim or timely objection may not be filed under this subsection after that claim or objection has been subject to an order that is appealable under 85-2-235.

(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

Unofficial Draft Copy

As of: August 6, 2018 (3:19pm)

LCw002

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."

{*Internal References to 85-2-233:*

85-2-221[x] 85-2-222[x] 85-2-231[x] 85-2-234[x]
85-2-237[x] 85-2-237[x] 85-2-248[x] 85-2-248[x]
85-2-702[x] 85-20-1401[x] 85-20-1401[x]}

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

Unofficial Draft Copy

As of: August 6, 2018 (3:19pm)

LCw002

"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, 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~~ include:

(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

Unofficial Draft Copy

As of: August 6, 2018 (3:19pm)

LCw002

water rights arising under the laws of the United States, the final decree must ~~state~~ include:

(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~~ may be 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."

{*Internal References to 85-2-234:*

85-2-141[x]	85-2-141[x]	85-2-231[x]	85-20-401[x]
85-20-601[x]	85-20-701[x]	85-20-801[x]	85-20-901[x]
85-20-901[x]	85-20-901[x]	85-20-901[x]	85-20-901[x]
85-20-901[x]	85-20-901[x]	85-20-901[x]	85-20-901[x]
85-20-1001[x]	85-20-1101[x]	85-20-1201[x]	85-20-1301[x]
85-20-1401[x]	85-20-1401[x]	85-20-1401[x]	85-20-1501[x]
85-20-1501[x]	85-20-1901[x]	85-20-1901[x]	}

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

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

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

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

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

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

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

(b) The order must be appealed immediately in accordance with the Montana Rules of Appellate Procedure or the right to

Unofficial Draft Copy

As of: August 6, 2018 (3:19pm)

LCw002

appeal is waived.

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

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

(c) Within 6 months after October 1, 2019, the water court shall send written notice of the appeal deadline provided in this subsection (3) to all parties entitled to receive notice of the availability of a decree under 85-2-232."

{*Internal References to 85-2-235:*

85-2-232[x] 85-2-233[x] 85-2-237[x] 85-2-237[x]}

- END -

{Name : Erin A. Bills
Title : Legal Staff
Agency: Legislative Services Division
Phone : (406) 444-3804
E-Mail: erin.bills@mt.gov}