

SENATE BILL NO. 37

INTRODUCED BY J. FIELDER

BY REQUEST OF THE WATER POLICY COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR FILING OF CERTAIN WATER RIGHTS CLAIMS; CREATING A DEADLINE FOR FILING THESE CLAIMS; PROVIDING FOR A SUPPLEMENTAL PRELIMINARY DECREE; AND AMENDING SECTIONS 3-7-212, 85-2-221, 85-2-222, 85-2-225, 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 3-7-212, MCA, is amended to read:

"3-7-212. Enforcement of decrees. The district court having jurisdiction may enforce the provisions of a final decree. In the absence of any final decree having been issued, the district court having jurisdiction may enforce the provisions of a temporary preliminary decree, ~~or preliminary decree,~~ or supplemental preliminary decree entered under 85-2-231, as modified by a water judge after objections and hearings."

Section 2. Section 85-2-221, MCA, is amended to read:

"85-2-221. Filing of claim of existing water right -- filing late claim. (1) A person claiming an existing right, unless ~~exempted~~ provided for under 85-2-222 or unless an earlier filing date is ordered as provided in 85-2-212, shall file with the department no later than June 30, 1983, a statement of claim for each water right asserted on a form provided by the department.

(2) The department shall file a copy of each statement of claim with the clerk of the district court for the judicial district in which the diversion is made or, if there is a claimed right with no diversion, the department shall file a copy of the statement of claim with the clerk of the district court of the judicial district in which the use occurs.

(3) Subject to certain terms and conditions, the legislature intends to provide for the remission of the forfeiture of existing rights to the use of water caused by the failure to comply with subsection (1). Accordingly, with respect only to a basin that has not been closed to further appropriation pursuant to a compact ratified by the legislature under part 7 of this chapter prior to July 1, 1993, a claim of an existing water right not filed with the

1 department on or before April 30, 1982, may be filed with the department on or before July 1, 1996, on forms
2 provided by the department. This section is not intended to prevent the filing of a late claim in addition to a claim
3 of an existing water right filed on or before April 30, 1982, if and to the extent that the additional right claimed is
4 not the same as the right that was the subject of a previous claim and is not an abandoned right. Claims must
5 be physically submitted to the department or sent by United States mail, postmarked on or before the deadline
6 set forth in this subsection, in order to be considered timely. The claims are then subject to adjudication by the
7 district courts as any other claim of existing right. The claimant is then subject to all rights and obligations of any
8 other party, except that:

9 (a) a late claim must be incorporated into the adjudication, subject to all proceedings that have taken
10 place prior to the date of filing;

11 (b) the person filing a late claim may request that a decree previously entered be reopened or may object
12 to matters previously determined on the merits by the water court only to the extent that the request or objection
13 is otherwise authorized by law and is based on a claim of water right filed on or before April 30, 1982;

14 (c) a person filing a late claim does not have the right or standing to object to any water rights compact
15 reached in accordance with part 7 of this chapter that is ratified by the legislature prior to July 1, 1993, except to
16 the extent that right or standing to object exists based on a claim of water right filed on or before April 30, 1982,
17 or to claim protection for the right represented in the late claim under any provision of such a compact that
18 subordinates the use of a water right recognized in the compact to a right recognized under state law;

19 (d) if the water judge, following objection under 85-2-233, finds that the right represented in the late claim
20 was the subject of a prior order or decree by the water judge or is otherwise without merit, the water judge shall
21 award costs and reasonable attorney fees to the person or persons filing the objection;

22 (e) a right represented in a late claim is subordinate to all federal and Indian reserved water rights
23 established by compact or decree under this chapter;

24 (f) unless a late claim either was placed in the United States mail and postmarked on or before April 30,
25 1982, or, if there is no evidence of the date of mailing, there is evidence of execution on or before April 30, 1982,
26 and actual receipt by the department on or before May 7, 1982, the right represented in the claim is, in addition,
27 subordinate to:

28 (i) rights represented in all valid, timely filed claims; and

29 (ii) rights represented in a permit or reservation of water issued under this chapter if and to the extent that
30 the person holding the permit or reservation files an objection under this part and proves that the person holding

1 the permit or reservation reasonably relied to the detriment of the person holding the permit or reservation upon
2 the failure of the claimant to file a claim on or before April 30, 1982.

3 (4) The department and the district courts may not accept any statements of claim physically submitted
4 or postmarked after July 1, 1996, and shall notify a person who files a claim after July 1, 1996, that the claim will
5 not be accepted."

6

7 **Section 3.** Section 85-2-222, MCA, is amended to read:

8 **"85-2-222. Exemptions -- petition for determination Definition -- filing process -- notice.** (1) ~~Claims~~
9 As used in this section, an "exempt right" means those claims for existing rights for livestock and individual uses
10 as opposed to municipal domestic uses based upon instream flow or ground water sources and claims for rights
11 in the Powder River basin included in a declaration filed pursuant to the order of the department or a district court
12 issued under sections 8 and 9 of Chapter 452, Laws of 1973, or under sections 3 and 4 of Chapter 485, Laws
13 of 1975; are An exempt right is exempt from the filing requirements of 85-2-221(1).

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

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

19 ~~(a)(2) file a petition in the water court~~ A person claiming an exempt right:

20 (a) may file with the department no later than February 28, 2018, a statement of claim for each water
21 right asserted and pay a filing fee, including the cost of examination by the department under 85-2-243;

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

23 (c) shall provide and pay for the notice required by 85-2-233(6) or subsection (6) of this section.

24 ~~(4)(3) A claim of an existing exempt right undergoing judicial determination pursuant to this section~~
25 ~~constitutes prima facie proof of its content.~~

26 ~~(5)(4) The provisions of 85-2-233, 85-2-243, and 85-2-248, as well as supreme court examination rules,~~
27 ~~apply to petitions for judicial determination~~ any statement of claim of an exempt right filed ~~under this section;~~
28 ~~except that the department may not resolve issue remarks.~~

29 ~~(6)(5) Failure to file a claim for an existing exempt right exempt under this section or failure to request~~
30 ~~a judicial determination for an existing right exempt under this section:~~

1 (a) does not result in the forfeiture of an existing water right; and
 2 (b) subordinates the existing right to all other water rights except those ~~that are exempt from this section~~
 3 ~~and exempt rights~~ for which ~~there has been neither a claim~~ has not been ~~filed nor a judicial determination sought.~~

4 (6) Notice of the filing deadline provided in subsection (2) must be published once a week for 3
 5 consecutive weeks in all daily newspapers in the state and in at least one newspaper in each county. The notice
 6 must be clearly posted in each county courthouse. The department shall send to the last-known address of each
 7 property taxpayer a written notice of the filing deadline and a claim form, postage prepaid, at least one time before
 8 January 1, 2017.

9 (7) The department may not accept any statements of claim submitted or postmarked after February 28,
 10 2018. The department shall notify a person who files a claim after February 28, 2018, that the person's claim will
 11 not be accepted."

12

13 **Section 4.** Section 85-2-225, MCA, is amended to read:

14 **"85-2-225. Filing fee -- processing fee for remitted claims.** (1) Each claim filed under 85-2-221 or
 15 85-2-222 must be accompanied by a filing fee in the amount of \$40, subject to the following exceptions:

16 (a) the total filing fees for all claims filed by one person in any one water court division may not exceed
 17 \$480; and

18 (b) a filing fee is not required to accompany a claim of an existing right that is included in a decree of a
 19 court in the state of Montana and that is accompanied by a copy of that decree or pertinent portion of the decree.

20 (2) A claim that is exempt from the filing requirements of 85-2-221(1) but that is ~~voluntarily~~ filed must be
 21 accompanied by a filing fee in the amount of \$40. Exempt claims for a single development with several uses if
 22 filed simultaneously may be accompanied by a filing fee in the amount of \$40.

23 ~~(3) (a) In addition to the filing fee set forth in subsection (1), each statement of claim filed under~~
 24 ~~85-2-221(3) must be accompanied by a processing fee in the amount of \$150, which must be deposited in the~~
 25 ~~general fund.~~

26 ~~(b) The water judge shall assess against the late claimant all reasonable administrative costs and~~
 27 ~~expenses that may be incurred by the court due to the filing of the late claim and the consideration of the~~
 28 ~~objection, and the assessment must be deposited in the general fund."~~

29

30 **Section 5.** Section 85-2-231, MCA, is amended to read:

- 1 **"85-2-231. Temporary preliminary decree, and preliminary decree, and supplemental preliminary**
2 **decree.** (1) A water judge may issue a temporary preliminary decree prior to the issuance of a preliminary decree
3 if the temporary preliminary decree is necessary for the orderly adjudication or administration of water rights.
- 4 (2) (a) The water judge shall issue a preliminary decree. The preliminary decree must be based on:
5 (i) the statements of claim before the water judge, including those claims filed pursuant to 85-2-222 for
6 a preliminary decree issued after February 28, 2018;
7 (ii) the data submitted by the department;
8 (iii) the contents of compacts approved by the Montana legislature and the tribe or federal agency or,
9 lacking an approved compact, the filings for federal and Indian reserved rights; and
10 (iv) any additional data obtained by the water judge.
- 11 (b) The preliminary decree must be issued within 90 days after the close of the special filing period set
12 out in 85-2-702(3) or as soon after the close of that period as is reasonably feasible.
- 13 (c) In basins where a water judge has issued a preliminary decree prior to March 1, 2018, the water
14 judge shall issue a supplemental preliminary decree, containing only those claims for exempt rights, as defined
15 in 85-2-222, filed between the date of issuance of the preliminary decree and the filing deadline provided for in
16 85-2-222 and for which notice has not been provided under 85-2-233(6).
- 17 ~~(e)~~(d) The water judge may issue an interlocutory decree if an interlocutory decree is otherwise
18 necessary for the orderly administration of water rights.
- 19 (3) A temporary preliminary decree may be issued for any hydrologically interrelated portion of a water
20 division, including but not limited to a basin, subbasin, drainage, subdrainage, stream, or single source of supply
21 of water, or any claim or group of claims at a time different from the issuance of other temporary preliminary
22 decrees.
- 23 (4) The temporary preliminary decree, or preliminary decree, or supplemental preliminary decree must
24 contain the information and make the determinations, findings, and conclusions required for the final decree under
25 85-2-234.
- 26 (5) If the water judge is satisfied that the report of the water master meets the requirements for the
27 preliminary decree and is satisfied with the conclusions contained in the report, the water judge shall adopt the
28 report as the preliminary decree. If the water judge is not satisfied, the water judge may recommit the report to
29 the master with instructions or modify the report and issue the preliminary decree.
- 30 (6) The department shall examine claims in basins that were verified rather than examined as ordered

1 by the water court. The objection and hearing provisions of Title 85, chapter 2, part 2, apply to these claims.
 2 (Subsection (6) terminates June 30, 2020--sec. 18, Ch. 288, L. 2005.)"

3

4 **Section 6.** Section 85-2-232, MCA, is amended to read:

5 **"85-2-232. Availability of temporary preliminary decree, or preliminary decree, or supplemental**
 6 **preliminary decree.** (1) (a) The water judge shall send to the department a copy of a temporary preliminary
 7 decree, or preliminary decree, or supplemental preliminary decree issued for a basin.

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

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

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

17 (e) The water judge shall enclose with a notice required under subsections (1)(b) through (1)(d) an
 18 abstract of the disposition of the claimed or declared existing right of a person identified in this section or that
 19 person's successor as documented in the department's records.

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

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

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

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

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

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

1 (3) Notice of the availability of a preliminary decree or a supplemental preliminary decree must also be
 2 published at least once each week for 3 consecutive weeks in at least three newspapers of general circulation
 3 that cover the water division or divisions in which the decreed basin is located. This notice must be provided
 4 before the final decree for the basin is issued.

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

8

9 **Section 7.** Section 85-2-233, MCA, is amended to read:

10 **"85-2-233. Hearing on decrees or petition -- procedure.** (1) (a) For good cause shown and subject
 11 to the provisions of subsection (9), a hearing must be held before the water judge on any objection to a temporary
 12 preliminary decree, a preliminary decree, or a ~~petition for judicial determination under 85-2-222 by~~ supplemental
 13 preliminary decree by:

14 (i) the department;

15 (ii) a person named in the temporary preliminary decree, ~~or~~ 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 that
 22 a person has an ownership interest in water or its use that has been affected by the decree.

23 (c) A person does not waive the right to object to a preliminary decree by failing to object to a temporary
 24 preliminary decree issued before March 28, 1997. However, a person may not raise an objection to a matter in
 25 a preliminary decree if that person was a party to the matter when the matter was previously litigated and resolved
 26 as the result of an objection raised in a temporary preliminary decree unless the objection is allowed for any of
 27 the following reasons:

28 (i) mistake, inadvertence, surprise, or excusable neglect;

29 (ii) newly discovered evidence that by due diligence could not have been discovered in time to move for
 30 a new trial under Rule 59(b), Montana Rules of Civil Procedure;

1 (iii) fraud, misrepresentation, or other misconduct of an adverse party;

2 (iv) the judgment is void; or

3 (v) any other reason justifying relief from the operation of the judgment.

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

8 (i) mistake, inadvertence, surprise, or excusable neglect;

9 (ii) newly discovered evidence that by due diligence could not have been discovered at the close of the
10 objection period set forth in subsection (2);

11 (iii) fraud, misrepresentation, or other misconduct of an adverse party;

12 (iv) the temporary preliminary decree is void; or

13 (v) any other reason justifying relief from the operation of the prior decree issued under this part. The
14 fact that a prior owner of a water right did not object or counterobject at a prior decree stage may not be a basis
15 for a subsequent owner of the water right to object or counterobject absent a finding that one of the provisions
16 in this subsection (1)(d) applies.

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

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

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

29 (5) (a) Upon expiration of the time for filing counterobjections under subsection (3), the water judge shall
30 notify each party named in the temporary preliminary decree, ~~or preliminary decree,~~ or supplemental preliminary

1 decree or that person's successor as documented in the department records and shall notify the attorney general
2 that objections and counterobjections have been filed. The water judge shall fix a day when all parties who wish
3 to participate in future proceedings are required to appear or file a statement. The water judge shall then set a
4 date for a hearing. The water judge may conduct individual or consolidated hearings. A hearing must be
5 conducted in the same manner as for other civil actions. At the order of the water judge, a hearing may be
6 conducted by the water master, who shall prepare a report of the hearing as provided in Rule 53(e), Montana
7 Rules of Civil Procedure.

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

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

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

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

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

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

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

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

22 (7) Failure to object under subsection (1) to a compact negotiated and ratified under 85-2-702 or
23 85-2-703 bars any subsequent cause of action in the water court.

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

30 (9) Upon petition by a claimant, the water court may grant a motion for dismissal to an objection to a

1 temporary preliminary or preliminary decree if the objection pertains to an element of a water right that was
 2 previously decreed and if dismissal is consistent with common-law principles of issue and claim preclusion.

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

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

7

8 **Section 8.** Section 85-2-234, MCA, is amended to read:

9 **"85-2-234. Final decree.** (1) The water judge shall, on the basis of the preliminary decree and any
 10 supplemental preliminary decree, on the basis of any hearing that may have been held, and on final resolution
 11 of all issue remarks, as defined in 85-2-250, enter a final decree affirming or modifying the preliminary decree.

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

16 (3) The final decree must establish the existing rights and priorities within the water judge's jurisdiction
 17 of persons who have filed a claim in accordance with 85-2-221 and 85-2-222, of persons required to file a
 18 declaration of existing rights in the Powder River basin pursuant to an order of the department or a district court
 19 issued under sections 8 and 9 of Chapter 452, Laws of 1973, ~~of any judicial determinations made pursuant to~~
 20 ~~85-2-222~~; and of any federal agency or Indian tribe possessing water rights arising under federal law, required
 21 by 85-2-702 to file claims.

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

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

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

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

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

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

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