

1 SENATE BILL NO. 108

2 INTRODUCED BY BECK

3 BY REQUEST OF THE MONTANA WATER ADJUDICATION ADVISORY COMMITTEE

4
 5 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING WATER ADJUDICATION LAWS;
 6 ALLOWING THE WATER COURT TO ADJUDICATE ABANDONMENT OF WATER RIGHTS; ALLOWING A
 7 WATER JUDGE TO CONSIDER RELEVANT EVIDENCE ARISING BEFORE OR AFTER JULY 1, 1973;
 8 PROVIDING FOR THE WATER COURT TO ENTER A TEMPORARY PRELIMINARY DECREE FOR ANY
 9 CATEGORY OF CLAIM THAT REQUIRES ADJUDICATION; REQUIRING OBJECTIONS TO BE FILED AT THE
 10 INITIAL DECREE STAGE; ALLOWING CLAIMANTS AND OBJECTORS TO AMEND THEIR CLAIMS OR
 11 OBJECTIONS; GIVING CLAIMANTS AN OPPORTUNITY TO FILE COUNTEROBJECTIONS; ENCOURAGING
 12 INCREASED USE OF ALTERNATIVE DISPUTE RESOLUTION; CLARIFYING THE PROCESS FOR
 13 ADMINISTERING WATER RIGHTS PENDING ADJUDICATION; AMENDING SECTIONS 3-7-501, 85-2-227,
 14 85-2-231, 85-2-233, AND 85-2-406, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."
 15

16 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
 17

18 **Section 1.** Section 3-7-501, MCA, is amended to read:

19 **"3-7-501. Jurisdiction.** (1) The jurisdiction of each judicial district concerning the determination
 20 and interpretation of cases certified to the court under 85-2-309 or of existing water rights is exercised
 21 exclusively by it through the water division or water divisions that contain the judicial district wholly or
 22 partly.

23 (2) ~~No~~ A water judge may not preside over matters concerning the determination and interpretation
 24 of cases certified to the court under 85-2-309 or of existing water rights beyond the boundaries specified
 25 in 3-7-102 for ~~his~~ the judge's division except as provided in 3-7-201.

26 (3) The water judge for each division shall exercise jurisdiction over all matters concerning cases
 27 certified to the court under 85-2-309 or concerning the determination and interpretation of existing water
 28 rights within ~~his~~ the judge's division as specified in 3-7-102 that are considered filed in or transferred to
 29 a judicial district wholly or partly within the division.

30 (4) The determination and interpretation of existing water rights includes, without limitation, the

1 adjudication of total or partial abandonment of existing water rights occurring at any time before the entry
 2 of the final decree."

3

4 **Section 2.** Section 85-2-227, MCA, is amended to read:

5 **"85-2-227. Claim to constitute prima facie evidence -- relevant evidence -- abandonment.** (1) For
 6 purposes of adjudicating rights pursuant to this part, a claim of an existing right filed in accordance with
 7 85-2-221 or an amended claim of existing right constitutes prima facie proof of its content until the
 8 issuance of a final decree. For purposes of administering water rights, the provisions of a temporary
 9 preliminary decree or a preliminary decree, as modified after objections and hearings, supersede a claim of
 10 existing right until a final decree is issued.

11 (2) A water judge may consider all relevant evidence in the determination and interpretation of
 12 existing water rights. Relevant evidence under this part may include admissible evidence arising before or
 13 after July 1, 1973.

14 (3) A water judge may determine all or part of an existing water right to be abandoned based on
 15 a consideration of all relevant evidence, including, without limitation, evidence relating to acts or intent
 16 occurring in whole or in part after July 1, 1973."

17

18 **Section 3.** Section 85-2-231, MCA, is amended to read:

19 **"85-2-231. Temporary preliminary and preliminary decree.** (1) A water judge may issue a
 20 temporary preliminary decree prior to the issuance of a preliminary decree if the temporary preliminary
 21 decree is necessary for the orderly adjudication or administration of water rights.

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

24 (i) the statements of claim before the water judge;

25 (ii) the data submitted by the department;

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

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

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

1 (c) ~~This section does not prevent the~~ The water judge from issuing may issue an interlocutory
 2 decree ~~or other temporary decree, pursuant to 85-2-321 or as provided in subsection (1) of this section,~~
 3 ~~or if such a~~ an interlocutory decree is otherwise necessary for the orderly administration of water rights
 4 ~~prior to the issuance of a preliminary decree.~~

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

9 (4) The temporary preliminary decree or preliminary decree ~~shall~~ must contain the information and
 10 make the determinations, findings, and conclusions required for the final decree under 85-2-234. ~~The water~~
 11 ~~judge shall include in the preliminary decree the contents of a compact negotiated under the provisions of~~
 12 ~~part 7 that has been approved by the legislature and the tribe or federal agency.~~

13 (5) If the water judge is satisfied that the report of the water master meets the requirements for
 14 the preliminary decree ~~set forth in subsections (1) and (3)~~ and is satisfied with the conclusions contained
 15 in the report, the water judge shall adopt the report as the preliminary decree. If the water judge is not ~~se~~
 16 satisfied, ~~he~~ the water judge may, ~~at his option,~~ recommit the report to the master with instructions, or
 17 modify the report and issue the preliminary decree.

18 ~~(6) In issuing a subsequent preliminary decree, the water judge shall incorporate the temporary~~
 19 ~~preliminary decree for the basin as modified by objections and hearings. The temporary preliminary decree~~
 20 ~~or preliminary decree, as modified after objections and hearings, is enforceable and administrable according~~
 21 ~~to its terms among parties ordered under 85-2-406. The preliminary decree, as modified after objections~~
 22 ~~and hearings, shall upon issuance supersede and replace the temporary preliminary decree."~~

23
 24 **Section 4.** Section 85-2-233, MCA, is amended to read:

25 **"85-2-233. Hearing on temporary preliminary decree or preliminary decree -- procedure.** (1) (a) For
 26 good cause shown and subject to the provisions of subsection ~~(7)~~ (9), a hearing must be held before the
 27 water judge on any objection to a temporary preliminary decree or preliminary decree by:

- 28 (i) the department;
 29 (ii) a person named in the temporary preliminary decree or preliminary decree;
 30 (iii) any person within the basin entitled to receive notice under 85-2-232(1); or

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

4 (b) For the purposes of this subsection (1), "good cause shown" means a written statement
 5 showing that a person has an ownership interest in water or its use that has been affected by the decree.

6 (c) A person does not waive the right to object to a preliminary decree by failing to object to a
 7 temporary preliminary decree issued before [the effective date of this act]. However, a person may not
 8 raise an objection to a matter in a preliminary decree if that person was a party to the matter when the
 9 matter was previously litigated and resolved as the result of an objection raised in a temporary preliminary
 10 decree, unless the objection is allowed for any of the following reasons:

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

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

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

15 (iv) the judgment is void; or

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

17 (d) After [the effective date of this act], a person may not raise an objection or counterobjection
 18 to a matter contained in a subsequent decree issued under this part if the matter was contained in a prior
 19 decree issued under this part for which there was an objection and counterobjection period unless the
 20 objection is allowed for any of the following reasons:

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

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

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

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

26 (v) any other reason justifying relief from the operation of the prior decree issued under this part.

27 The fact that a prior owner of a water right did not object or counterobject at a prior decree stage may not
 28 be a basis for a subsequent owner of the water right to object or counterobject absent a finding that one
 29 of the provisions in this subsection (1)(d) applies.

30 (2) ~~If a hearing is requested, the request~~ Objections must be filed with the water judge within 180

1 days after entry of the temporary preliminary decree or preliminary decree. The water judge may, for good
 2 cause shown, extend this time limit up to two additional 90-day periods if application for an extension is
 3 made prior to expiration of the original 180-day period or any extension of it.

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

9 ~~(3)(4)~~ The request for a hearing Objections and counterobjections must specify the paragraphs and
 10 pages containing the findings and conclusions to which objection is made. The request must state the
 11 specific grounds and evidence on which the objections are based.

12 ~~(4)(5) (a)~~ Upon expiration of the time for filing ~~objections and upon timely receipt of a request for~~
 13 ~~a hearing~~ counterobjections under subsection (3), the water judge shall notify each party named in the
 14 temporary preliminary decree or preliminary decree or that person's successor as documented in the
 15 department records that a hearing has been requested objections and counterobjections have been filed.
 16 The water judge shall fix a day when all parties who wish to participate in future proceedings ~~must~~ are
 17 required to appear or file a statement. The water judge shall then set a date for a hearing. The water judge
 18 may conduct individual or consolidated hearings. A hearing must be conducted in the same manner as for
 19 other civil actions. At the order of the water judge, a hearing may be conducted by the water master, who
 20 shall prepare a report of the hearing as provided in Rule 53(u), Montana Rules of Civil Procedure.

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

24 (6) After the issuance of a temporary preliminary decree or preliminary decree, notice of any motion
 25 to amend a statement of claim or a timely filed objection that may adversely affect other water rights must
 26 be published for 3 consecutive weeks in two newspapers of general circulation in the basin where the
 27 statement of claim or objection was filed. The notice must specify that any response must be filed within
 28 45 days of the date of the last notice. The water judge may order any additional notice of the motion as
 29 the water judge considers necessary. The costs of the notice required pursuant to this subsection must
 30 be borne by the moving party.

1 ~~(5)(7)~~ Failure to object under subsection (1) to a compact negotiated and ratified under 85-2-702
2 or 85-2-703 bars any subsequent cause of action in the water court.

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

10 ~~(7)(9)~~ Upon petition by a claimant, the water court may grant a motion for dismissal to an objection
11 to a temporary preliminary or preliminary decree if the objection pertains to an element of a water right that
12 was previously decreed and if dismissal is consistent with common-law principles of issue and claim
13 preclusion.

14 ~~(8)(10)~~ The provisions of subsection ~~(7)~~ (9) do not apply to issues arising after entry of the
15 previous decree, including but not limited to the issues of abandonment, expansion of the water right, and
16 reasonable diligence."

17

18 **Section 5.** Section 85-2-406, MCA, is amended to read:

19 **"85-2-406. District court supervision of water distribution.** (1) The district courts shall supervise
20 the distribution of water among all appropriators. This supervisory authority includes the supervision of all
21 water commissioners appointed prior or subsequent to July 1, 1973. The supervision ~~shall~~ must be
22 governed by the principle that first in time is first in right.

23 (2) (a) A district court may order the distribution of water pursuant to a district court decree
24 entered prior to July 1, 1973, until an enforceable decree is entered under part 2 of this chapter or the
25 matter has been adjudicated under the procedure set forth in subsection (2)(b).

26 (b) When a water distribution controversy arises upon a source of water in which not all existing
27 rights have ~~not~~ been conclusively determined according to part 2 of this chapter ~~or when a basin is the~~
28 subject of a temporary preliminary decree or preliminary decree, as modified after objections and hearings,
29 any party to the controversy ~~or any person whose rights are or may be affected by enforcement of the~~
30 decree may petition the district court for relief to certify the matter to the chief water judge. If a

1 certification request is made, the district court shall certify to the chief water judge the determination of
 2 the existing rights that are involved in the controversy according to part 2 of this chapter. The district court
 3 from which relief is sought ~~may~~ shall retain exclusive jurisdiction to grant injunctive or other relief which
 4 that is necessary and appropriate to preserve property rights or the status quo pending the issuance of the
 5 final decree pending adjudication of the existing water rights certified to the water judge. Certified
 6 controversies must be given priority over all other adjudication matters. After determination of the matters
 7 certified, the water judge shall return the decision to the district court with a tabulation or list of the
 8 existing rights and their relative priorities.

9 (3) A controversy between appropriators from a source that has been the subject of a final decree
 10 under part 2 of this chapter must be settled by the district ~~court that issued the final decree~~ court. The
 11 order of the district court settling the controversy may not alter the existing rights and priorities established
 12 in the final decree except to the extent the court alters rights based upon abandonment, waste, or illegal
 13 enlargement or change of right. In cases involving permits issued by the department, the court may not
 14 amend the respective rights established in the permits or alter any terms of the permits unless the permits
 15 are inconsistent or interfere with rights and priorities established in the final decree. The order settling the
 16 controversy must be appended to the final decree, and a copy must be filed with the department. The
 17 department must be served with process in any proceeding under this subsection, and the department may,
 18 in its discretion, intervene in the proceeding.

19 (4) A temporary preliminary decree or preliminary decree or a portion of a temporary preliminary
 20 decree or preliminary decree as modified after objections and hearings is enforceable and administrable
 21 according to its terms. If an action to enforce a temporary preliminary decree or preliminary decree is
 22 commenced, the water judge shall upon referral from the district court establish, in a form determined to
 23 be appropriate by the water judge, one or more tabulations or lists of all existing rights and their relative
 24 priorities.

25 (5) ~~(a)~~ A person whose existing rights and priorities are determined in a temporary preliminary
 26 decree or preliminary decree or a person exercising a suspension under 85-2-217 and part 7 of this chapter
 27 may appeal a determination made pursuant to subsection (2).

28 ~~(b) The water judge is not bound by a supreme court determination on an appeal entered under this~~
 29 ~~subsection in issuing any subsequent decree under part 2 of this chapter."~~

30

1 NEW SECTION. **Section 6. Saving clause.** [This act] does not affect rights and duties that
2 matured, penalties that were incurred, or proceedings that were begun before [the effective date of this
3 act].

4

5 NEW SECTION. **Section 7. Effective date.** [This act] is effective on passage and approval.

6

-END-

STATE OF MONTANA - FISCAL NOTE

Fiscal Note for SB0108, as introduced

DESCRIPTION OF PROPOSED LEGISLATION:

An act generally revising water adjudication laws; allowing the Water Court to adjudicate abandonment of water rights; allowing a water judge to consider relevant evidence arising before or after July 1, 1973; providing for the Water Court to enter a temporary preliminary decree for any category of claim that requires adjudication; requiring objections to be filed at the initial decree stage; allowing claimants and objectors to amend their claims or objections; giving claimants an opportunity to file counter objections; encouraging increased use of alternative dispute resolution; clarifying the process for administering water rights pending adjudication.

ASSUMPTIONS:

Department of Natural Resources and Conservation:

1. The results of this legislation will not increase the workload or expenses incurred by the DNRC in its role of providing assistance to the Montana Water Court.
2. Because counter objections may now be filed, the objection list prepared by the Water Court may be slightly larger. DNRC, at the court's direction, mails the notice of the objection/counter objection list to water users. The number of individual water users noticed is not expected to increase.

Judiciary:

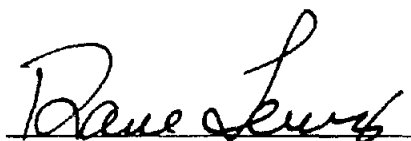
1. Because counter objections may now be filed, the objection list prepared by the Water Court may be slightly larger; however, it is anticipated that the adjudication process will be improved and expedited.
2. The workload of Water Court staff should not be significantly impacted.

FISCAL IMPACT:

No fiscal impact anticipated to DNRC or Judiciary.

LONG-RANGE EFFECTS OF PROPOSED LEGISLATION:

1. It is anticipated the adjudication process will be improved and expedited. The legislation will assist the administration of water rights among water right holders and clarify the allocation of water resources among competing interests.
2. The proposed legislation clarifies many issues which otherwise would require much time and expense to answer through litigation and development of case law.
3. Since claimants will now be required to file objections at the initial decree stage, duplication of effort by the Water Court will be reduced and claimants will have to defend the right only once.

 1-11-97
DAVE LEWIS, BUDGET DIRECTOR DATE
Office of Budget and Program Planning

 1/14/97
TOM BECK, PRIMARY SPONSOR DATE

Fiscal Note for SB0108, as introduced

SB 108

APPROVED BY COM ON
NATURAL RESOURCES

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2 INTRODUCED BY BECK

3 BY REQUEST OF THE MONTANA WATER ADJUDICATION ADVISORY COMMITTEE

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14 85-2-231, 85-2-233, 85-2-404, AND 85-2-406, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE
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SECOND READING

1 (4) The determination and interpretation of existing water rights includes, without limitation, the
 2 adjudication of total or partial abandonment of existing water rights occurring at any time before the entry
 3 of the final decree."

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 5 **Section 2.** Section 85-2-227, MCA, is amended to read:

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 9 issuance of a final decree. For purposes of administering water rights, the provisions of a temporary
 10 preliminary decree or a preliminary decree, as modified after objections and hearings, supersede a claim of
 11 existing right until a final decree is issued.

12 (2) A water judge may consider all relevant evidence in the determination and interpretation of
 13 existing water rights. Relevant evidence under this part may include admissible evidence arising before or
 14 after July 1, 1973.

15 (3) A water judge may determine all or part of an existing water right to be abandoned based on
 16 a consideration of all ~~relevant evidence~~ ADMISSIBLE EVIDENCE THAT IS RELEVANT, including, without
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 22 decree is necessary for the orderly adjudication or administration of water rights.

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 24 on:

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- 26 (ii) the data submitted by the department;
- 27 (iii) the contents of compacts approved by the Montana legislature and the tribe or federal agency
 28 or, lacking an approved compact, the filings for federal and Indian reserved rights; and
- 29 (iv) any additional data obtained by the water judge.

30 (b) The preliminary decree ~~shall~~ must be issued within 90 days after the close of the special filing

1 period set out in 85-2-702(3) or as soon ~~thereafter~~ after the close of that period as is reasonably feasible.

2 (c) ~~This section does not prevent the~~ The water judge from issuing may issue an interlocutory
3 decree ~~or other temporary decree, pursuant to 85-2-321 or as provided in subsection (1) of this section,~~
4 ~~or if such a~~ an interlocutory decree is otherwise necessary for the orderly administration of water rights
5 ~~prior to the issuance of a preliminary decree.~~

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

10 (4) The temporary preliminary decree or preliminary decree ~~shall~~ must contain the information and
11 make the determinations, findings, and conclusions required for the final decree under 85-2-234. ~~The water~~
12 ~~judge shall include in the preliminary decree the contents of a compact negotiated under the provisions of~~
13 ~~part 7 that has been approved by the legislature and the tribe or federal agency.~~

14 (5) If the water judge is satisfied that the report of the water master meets the requirements for
15 the preliminary decree ~~set forth in subsections (1) and (3)~~ and is satisfied with the conclusions contained
16 in the report, the water judge shall adopt the report as the preliminary decree. If the water judge is not se
17 satisfied, ~~he~~ the water judge may, ~~at his option,~~ recommit the report to the master with instructions, or
18 modify the report and issue the preliminary decree.

19 (6) ~~In issuing a subsequent preliminary decree, the water judge shall incorporate the temporary~~
20 ~~preliminary decree for the basin as modified by objections and hearings. The temporary preliminary decree~~
21 ~~or preliminary decree, as modified after objections and hearings, is enforceable and administrable according~~
22 ~~to its terms among parties ordered under 85-2-406. The preliminary decree, as modified after objections~~
23 ~~and hearings, shall upon issuance supersede and replace the temporary preliminary decree."~~

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

26 **"85-2-233. Hearing on temporary preliminary decree or preliminary decree -- procedure.** (1) (a) For
27 good cause shown and subject to the provisions of subsection ~~(7)~~ (9), a hearing must be held before the
28 water judge on any objection to a temporary preliminary decree or preliminary decree by:

29 (i) the department;

30 (ii) a person named in the temporary preliminary decree or preliminary decree;

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

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

5 (b) For the purposes of this subsection (1), "good cause shown" means a written statement
6 showing that a person has an ownership interest in water or its use that has been affected by the decree.

7 (c) A person does not waive the right to object to a preliminary decree by failing to object to a
8 temporary preliminary decree issued before [the effective date of this act]. However, a person may not
9 raise an objection to a matter in a preliminary decree if that person was a party to the matter when the
10 matter was previously litigated and resolved as the result of an objection raised in a temporary preliminary
11 decree, unless the objection is allowed for any of the following reasons:

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

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

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

16 (iv) the judgment is void; or

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

18 (d) After [the effective date of this act], a person may not raise an objection or counterobjection
19 to a matter contained in a subsequent decree issued under this part if the matter was contained in a prior
20 decree issued under this part for which there was an objection and counterobjection period unless the
21 objection is allowed for any of the following reasons:

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

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

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

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27 (v) any other reason justifying relief from the operation of the prior decree issued under this part.

28 The fact that a prior owner of a water right did not object or counterobject at a prior decree stage may not
29 be a basis for a subsequent owner of the water right to object or counterobject absent a finding that one
30 of the provisions in this subsection (1)(d) applies.

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

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

10 ~~(3)(4) The request for a hearing~~ Objections and counterobjections must specify the paragraphs and
11 pages containing the findings and conclusions to which objection is made. The request must state the
12 specific grounds and evidence on which the objections are based.

13 ~~(4)(5) (a) Upon expiration of the time for filing objections and upon timely receipt of a request for~~
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20 other civil actions. At the order of the water judge, a hearing may be conducted by the water master, who
21 shall prepare a report of the hearing as provided in Rule 53(e), Montana Rules of Civil Procedure.

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

25 **(6)** After the issuance of a temporary preliminary decree or preliminary decree, notice of any motion
26 to amend a statement of claim or a timely filed objection that may adversely affect other water rights must
27 be published for 3 consecutive weeks in two newspapers of general circulation in the basin where the
28 statement of claim or objection was filed. The notice must specify that any response OR OBJECTION TO
29 THE PROPOSED AMENDMENT must be filed within 45 days of the date of the last notice. The water judge
30 may order any additional notice of the motion as the water judge considers necessary. The costs of the

1 notice required pursuant to this subsection must be borne by the moving party.

2 ~~(6)(7)~~ Failure to object under subsection (1) to a compact negotiated and ratified under 85-2-702
3 or 85-2-703 bars any subsequent cause of action in the water court.

4 ~~(6)(8)~~ If the court sustains an objection to a compact, it may declare the compact void. The agency
5 of the United States, the tribe, or the United States on behalf of the tribe party to the compact is permitted
6 6 months after the court's determination to file a statement of claim, as provided in 85-2-224, and the
7 court shall issue a new preliminary decree in accordance with 85-2-231. However, any party to a compact
8 declared void may appeal from that determination in accordance with those procedures applicable to
9 85-2-235, and the filing of a notice of appeal stays the period for filing a statement of claim as required
10 under this subsection.

11 ~~(7)(9)~~ Upon petition by a claimant, the water court may grant a motion for dismissal to an objection
12 to a temporary preliminary or preliminary decree if the objection pertains to an element of a water right that
13 was previously decreed and if dismissal is consistent with common-law principles of issue and claim
14 preclusion.

15 ~~(8)(10)~~ The provisions of subsection ~~(7)~~ (9) do not apply to issues arising after entry of the
16 previous decree, including but not limited to the issues of abandonment, expansion of the water right, and
17 reasonable diligence."

18

19 **SECTION 5. SECTION 85-2-404, MCA, IS AMENDED TO READ:**

20 **"85-2-404. (Temporary) Abandonment of appropriation right.** (1) If an appropriator ceases to use
21 all or a part of an appropriation right with the intention of wholly or partially abandoning the right or if the
22 appropriator ceases using the appropriation right according to its terms and conditions with the intention
23 of not complying with those terms and conditions, the appropriation right is, to that extent, considered
24 abandoned and must immediately expire.

25 (2) If an appropriator ceases to use all or part of an appropriation right or ceases using the
26 appropriation right according to its terms and conditions for a period of 10 successive years and there was
27 water available for use, there is a prima facie presumption that the appropriator has abandoned the right
28 in whole or for the part not used.

29 (3) If an appropriator ceases to use all or part of an appropriation right because the land to which
30 the water is applied to a beneficial use is contracted under a state or federal conservation set-aside

1 program:

2 (a) the set-aside and resulting reduction in use of the appropriation right does not represent an
3 intent by the appropriator to wholly or partially abandon the appropriation right or to not comply with the
4 terms and conditions attached to the right; and

5 (b) the period of nonuse that occurs for part or all of the appropriation right as a result of the
6 contract may not create or may not be added to any previous period of nonuse to create a prima facie
7 presumption of abandonment.

8 (4) The lease of an existing right pursuant to 85-2-436, the use of water pursuant to 85-2-439,
9 or a temporary change pursuant to 85-2-407 does not constitute an abandonment or serve as evidence that
10 could be used to establish an abandonment of any part of the right.

11 (5) Subsections (1) and (2) do not apply to existing rights until they have been finally determined
12 in accordance with part 2 of this chapter. (Terminates June 30, 1999--sec. 4, Ch. 740, L. 1991.)

13 **85-2-404. (Effective July 1, 1999) Abandonment of appropriation right.** (1) If an appropriator
14 ceases to use all or a part of an appropriation right with the intention of wholly or partially abandoning the
15 right or if the appropriator ceases using the appropriation right according to its terms and conditions with
16 the intention of not complying with those terms and conditions, the appropriation right is, to that extent,
17 considered abandoned and must immediately expire.

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19 appropriation right according to its terms and conditions for a period of 10 successive years and there was
20 water available for use, there is a prima facie presumption that the appropriator has abandoned the right
21 in whole or for the part not used.

22 (3) If an appropriator ceases to use all or part of an appropriation right because the land to which
23 the water is applied to a beneficial use is contracted under a state or federal conservation set-aside
24 program:

25 (a) the set-aside and resulting reduction in use of the appropriation right does not represent an
26 intent by the appropriator to wholly or partially abandon the appropriation right or to not comply with the
27 terms and conditions attached to the right; and

28 (b) the period of nonuse that occurs for part or all of the appropriation right as a result of the
29 contract may not create or may not be added to any previous period of nonuse to create a prima facie
30 presumption of abandonment.

1 (4) The use of water pursuant to 85-2-439 or a temporary change pursuant to 85-2-407 does not
2 constitute an abandonment or serve as evidence that could be used to establish an abandonment of any
3 part of the right.

4 (5) Subsections (1) and (2) do not apply to existing rights until they have been finally determined
5 in accordance with part 2 of this chapter. (Terminates June 30, 2005--sec. 14, Ch. 487, L. 1995.)

6 **85-2-404. (Effective July 1, 2005) Abandonment of appropriation right.** (1) If an appropriator
7 ceases to use all or a part of his appropriation right with the intention of wholly or partially abandoning the
8 right or if he ceases using his appropriation right according to its terms and conditions with the intention
9 of not complying with those terms and conditions, the appropriation right shall, to that extent, be deemed
10 considered abandoned and shall immediately expire.

11 (2) If an appropriator ceases to use all or part of his appropriation right or ceases using his
12 appropriation right according to its terms and conditions for a period of 10 successive years and there was
13 water available for his use, there shall be a prima facie presumption that the appropriator has abandoned
14 his right in whole or for the part not used.

15 (3) If an appropriator ceases to use all or part of his appropriation right because the land to which
16 the water is applied to a beneficial use is contracted under a state or federal conservation set-aside
17 program:

18 (a) the set-aside and resulting reduction in use of the appropriation right does not represent an
19 intent by the appropriator to wholly or partially abandon the appropriation right or to not comply with the
20 terms and conditions attached to the right; and

21 (b) the period of nonuse that occurs for part or all of the appropriation right as a result of the
22 contract may not create or may not be added to any previous period of nonuse to create a prima facie
23 presumption of abandonment.

24 (4) A temporary change pursuant to 85-2-407 does not constitute an abandonment or serve as
25 evidence that could be used to establish an abandonment of any part of the right.

26 (5) Subsections (1) and (2) do not apply to existing rights until they have been finally determined
27 in accordance with part 2 of this chapter."

28
29 **Section 6.** Section 85-2-406, MCA, is amended to read:

30 **"85-2-406. District court supervision of water distribution.** (1) The district courts shall supervise

1 the distribution of water among all appropriators. This supervisory authority includes the supervision of all
2 water commissioners appointed prior or subsequent to July 1, 1973. The supervision ~~shall~~ must be
3 governed by the principle that first in time is first in right.

4 (2) (a) A district court may order the distribution of water pursuant to a district court decree
5 entered prior to July 1, 1973, until an enforceable decree is entered under part 2 of this chapter or the
6 matter has been adjudicated under the procedure set forth in subsection (2)(b).

7 (b) When a water distribution controversy arises upon a source of water in which not all existing
8 rights have ~~not~~ been conclusively determined according to part 2 of this chapter ~~or when a basin is the~~
9 subject of a temporary preliminary decree or preliminary decree, as modified after objections and hearings,
10 any party to the controversy ~~or any person whose rights are or may be affected by enforcement of the~~
11 ~~decree~~ may petition the district court ~~for relief~~ to certify the matter to the chief water judge. If a
12 certification request is made, the district court shall certify to the chief water judge the determination of
13 the existing rights that are involved in the controversy according to part 2 of this chapter. The district court
14 from which relief is sought ~~may~~ shall retain exclusive jurisdiction to grant injunctive or other relief ~~which~~
15 that is necessary and appropriate ~~to preserve property rights or the status quo pending the issuance of the~~
16 final decree pending adjudication of the existing water rights certified to the water judge. Certified
17 controversies must be given priority over all other adjudication matters. After determination of the matters
18 certified, the water judge shall return the decision to the district court with a tabulation or list of the
19 existing rights and their relative priorities.

20 (3) A controversy between appropriators from a source that has been the subject of a final decree
21 under part 2 of this chapter must be settled by the district ~~court that issued the final decree~~ court. The
22 order of the district court settling the controversy may not alter the existing rights and priorities established
23 in the final decree except to the extent the court alters rights based upon abandonment, waste, or illegal
24 enlargement or change of right. In cases involving permits issued by the department, the court may not
25 amend the respective rights established in the permits or alter any terms of the permits unless the permits
26 are inconsistent or interfere with rights and priorities established in the final decree. The order settling the
27 controversy must be appended to the final decree, and a copy must be filed with the department. The
28 department must be served with process in any proceeding under this subsection, and the department may,
29 in its discretion, intervene in the proceeding.

30 (4) A temporary preliminary decree or preliminary decree or a portion of a temporary preliminary

1 decree or preliminary decree as modified after objections and hearings is enforceable and administrable
2 according to its terms. If an action to enforce a temporary preliminary decree or preliminary decree is
3 commenced, the water judge shall upon referral from the district court establish, in a form determined to
4 be appropriate by the water judge, one or more tabulations or lists of all existing rights and their relative
5 priorities.

6 (5) ~~(a)~~ A person whose existing rights and priorities are determined in a temporary preliminary
7 decree or preliminary decree or a person exercising a suspension under 85-2-217 and part 7 of this chapter
8 may appeal a determination made pursuant to subsection (2).

9 ~~(b) The water judge is not bound by a supreme court determination on an appeal entered under this~~
10 ~~subsection in issuing any subsequent decree under part 2 of this chapter."~~

11

12 NEW SECTION. Section 7. Saving clause. [This act] does not affect rights and duties that
13 matured, penalties that were incurred, or proceedings that were begun before [the effective date of this
14 act].

15

16 NEW SECTION. Section 8. Effective date. [This act] is effective on passage and approval.

17

-END-

1 SENATE BILL NO. 108

2 INTRODUCED BY BECK

3 BY REQUEST OF THE MONTANA WATER ADJUDICATION ADVISORY COMMITTEE

4

5 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING WATER ADJUDICATION LAWS;
6 ALLOWING THE WATER COURT TO ADJUDICATE ABANDONMENT OF WATER RIGHTS; ALLOWING A
7 WATER JUDGE TO CONSIDER RELEVANT EVIDENCE ARISING BEFORE OR AFTER JULY 1, 1973;
8 PROVIDING FOR THE WATER COURT TO ENTER A TEMPORARY PRELIMINARY DECREE FOR ANY
9 CATEGORY OF CLAIM THAT REQUIRES ADJUDICATION; REQUIRING OBJECTIONS TO BE FILED AT THE
10 INITIAL DECREE STAGE; ALLOWING CLAIMANTS AND OBJECTORS TO AMEND THEIR CLAIMS OR
11 OBJECTIONS; GIVING CLAIMANTS AN OPPORTUNITY TO FILE COUNTEROBJECTIONS; ENCOURAGING
12 INCREASED USE OF ALTERNATIVE DISPUTE RESOLUTION; CLARIFYING THE PROCESS FOR
13 ADMINISTERING WATER RIGHTS PENDING ADJUDICATION; AMENDING SECTIONS 3-7-501, 85-2-227,
14 85-2-231, 85-2-233, 85-2-404, AND 85-2-406, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE
15 DATE."

16

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

**THERE ARE NO CHANGES IN THIS BILL AND IT WILL NOT BE
REPRINTED. PLEASE REFER TO SECOND READING COPY
(YELLOW) FOR COMPLETE TEXT.**

THIRD READING

1 SENATE BILL NO. 108

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10 INITIAL DECREE STAGE; ALLOWING CLAIMANTS AND OBJECTORS TO AMEND THEIR CLAIMS OR
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13 ADMINISTERING WATER RIGHTS PENDING ADJUDICATION; AMENDING SECTIONS 3-7-501, 85-2-227,
14 85-2-231, 85-2-233, 85-2-404, AND 85-2-406, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE
15 DATE."

16
17 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

18
19 **Section 1.** Section 3-7-501, MCA, is amended to read:

20 **"3-7-501. Jurisdiction.** (1) The jurisdiction of each judicial district concerning the determination
21 and interpretation of cases certified to the court under 85-2-309 or of existing water rights is exercised
22 exclusively by it through the water division or water divisions that contain the judicial district wholly or
23 partly.

24 (2) ~~No~~ A water judge may not preside over matters concerning the determination and interpretation
25 of cases certified to the court under 85-2-309 or of existing water rights beyond the boundaries specified
26 in 3-7-102 for ~~his~~ the judge's division except as provided in 3-7-201.

27 (3) The water judge for each division shall exercise jurisdiction over all matters concerning cases
28 certified to the court under 85-2-309 or concerning the determination and interpretation of existing water
29 rights within ~~his~~ the judge's division as specified in 3-7-102 that are considered filed in or transferred to
30 a judicial district wholly or partly within the division.

1 (4) The determination and interpretation of existing water rights includes, without limitation, the
 2 adjudication of total or partial abandonment of existing water rights occurring at any time before the entry
 3 of the final decree."

4
 5 **Section 2.** Section 85-2-227, MCA, is amended to read:

6 **"85-2-227. Claim to constitute prima facie evidence -- relevant evidence -- abandonment.** (1) For
 7 purposes of adjudicating rights pursuant to this part, a claim of an existing right filed in accordance with
 8 85-2-221 or an amended claim of existing right constitutes prima facie proof of its content until the
 9 issuance of a final decree. For purposes of administering water rights, the provisions of a temporary
 10 preliminary decree or a preliminary decree, as modified after objections and hearings, supersede a claim of
 11 existing right until a final decree is issued.

12 (2) A water judge may consider all relevant evidence in the determination and interpretation of
 13 existing water rights. Relevant evidence under this part may include admissible evidence arising before or
 14 after July 1, 1973.

15 (3) A water judge may determine all or part of an existing water right to be abandoned based on
 16 a consideration of all ~~relevant evidence~~ ADMISSIBLE EVIDENCE THAT IS RELEVANT, including, without
 17 limitation, evidence relating to acts or intent occurring in whole or in part after July 1, 1973."

18
 19 **Section 3.** Section 85-2-231, MCA, is amended to read:

20 **"85-2-231. Temporary preliminary and preliminary decree.** (1) A water judge may issue a
 21 temporary preliminary decree prior to the issuance of a preliminary decree if the temporary preliminary
 22 decree is necessary for the orderly adjudication or administration of water rights.

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

25 (i) the statements of claim before the water judge;

26 (ii) the data submitted by the department;

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

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

30 (b) The preliminary decree ~~shall~~ must be issued within 90 days after the close of the special filing

1 period set out in 85-2-702(3) or as soon ~~thereafter~~ after the close of that period as is reasonably feasible.

2 (c) ~~This section does not prevent the~~ The water judge from issuing ~~may issue~~ an interlocutory
3 decree ~~or other temporary decree, pursuant to 85-2-321 or as provided in subsection (1) of this section,~~
4 ~~or if such a~~ an interlocutory decree is otherwise necessary for the orderly administration of water rights
5 prior to the issuance of a preliminary decree.

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

10 (4) The temporary preliminary decree or preliminary decree ~~shall~~ must contain the information and
11 make the determinations, findings, and conclusions required for the final decree under 85-2-234. ~~The water~~
12 ~~judge shall include in the preliminary decree the contents of a compact negotiated under the provisions of~~
13 ~~part 7 that has been approved by the legislature and the tribe or federal agency.~~

14 (5) If the water judge is satisfied that the report of the water master meets the requirements for
15 the preliminary decree ~~set forth in subsections (1) and (3)~~ and is satisfied with the conclusions contained
16 in the report, the water judge shall adopt the report as the preliminary decree. If the water judge is not ~~se~~
17 satisfied, ~~he~~ the water judge may, ~~at his option,~~ recommit the report to the master with instructions, or
18 modify the report and issue the preliminary decree.

19 ~~(6) In issuing a subsequent preliminary decree, the water judge shall incorporate the temporary~~
20 ~~preliminary decree for the basin as modified by objections and hearings. The temporary preliminary decree~~
21 ~~or preliminary decree, as modified after objections and hearings, is enforceable and administrable according~~
22 ~~to its terms among parties ordered under 85-2-406. The preliminary decree, as modified after objections~~
23 ~~and hearings, shall upon issuance supersede and replace the temporary preliminary decree."~~

24

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

26 **"85-2-233. Hearing on temporary preliminary decree or preliminary decree -- procedure.** (1) (a) For
27 good cause shown and subject to the provisions of subsection ~~(7)~~ (9), a hearing must be held before the
28 water judge on any objection to a temporary preliminary decree or preliminary decree by:

29 (i) the department;

30 (ii) a person named in the temporary preliminary decree or preliminary decree;

- 1 (iii) any person within the basin entitled to receive notice under 85-2-232(1); or
- 2 (iv) any other person who claims rights to the use of water from sources in other basins that are
- 3 hydrologically connected to the sources within the decreed basin and who would be entitled to receive
- 4 notice under 85-2-232 if the claim or claims were from sources within the decreed basin.
- 5 (b) For the purposes of this subsection (1), "good cause shown" means a written statement
- 6 showing that a person has an ownership interest in water or its use that has been affected by the decree.
- 7 (c) A person does not waive the right to object to a preliminary decree by failing to object to a
- 8 temporary preliminary decree issued before [the effective date of this act]. However, a person may not
- 9 raise an objection to a matter in a preliminary decree if that person was a party to the matter when the
- 10 matter was previously litigated and resolved as the result of an objection raised in a temporary preliminary
- 11 decree, unless the objection is allowed for any of the following reasons:
- 12 (i) mistake, inadvertence, surprise, or excusable neglect;
- 13 (ii) newly discovered evidence that by due diligence could not have been discovered in time to move
- 14 for a new trial under Rule 59(b), Montana Rules of Civil Procedure;
- 15 (iii) fraud, misrepresentation, or other misconduct of an adverse party;
- 16 (iv) the judgment is void; or
- 17 (v) any other reason justifying relief from the operation of the judgment.
- 18 (d) After [the effective date of this act], a person may not raise an objection or counterobjection
- 19 to a matter contained in a subsequent decree issued under this part if the matter was contained in a prior
- 20 decree issued under this part for which there was an objection and counterobjection period unless the
- 21 objection is allowed for any of the following reasons:
- 22 (i) mistake, inadvertence, surprise, or excusable neglect;
- 23 (ii) newly discovered evidence that by due diligence could not have been discovered at the close
- 24 of the objection period set forth in subsection (2);
- 25 (iii) fraud, misrepresentation, or other misconduct of an adverse party;
- 26 (iv) the temporary preliminary decree is void; or
- 27 (v) any other reason justifying relief from the operation of the prior decree issued under this part.
- 28 The fact that a prior owner of a water right did not object or counterobject at a prior decree stage may not
- 29 be a basis for a subsequent owner of the water right to object or counterobject absent a finding that one
- 30 of the provisions in this subsection (1)(d) applies.

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

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

10 ~~(3)(4) The request for a hearing~~ Objections and counterobjections must specify the paragraphs and
11 pages containing the findings and conclusions to which objection is made. The request must state the
12 specific grounds and evidence on which the objections are based.

13 ~~(4)(5) (a) Upon expiration of the time for filing objections and upon timely receipt of a request for~~
14 ~~a hearing~~ counterobjections under subsection (3), the water judge shall notify each party named in the
15 temporary preliminary decree or preliminary decree or that person's successor as documented in the
16 department records that a hearing has been requested objections and counterobjections have been filed.
17 The water judge shall fix a day when all parties who wish to participate in future proceedings ~~must~~ are
18 required to appear or file a statement. The water judge shall then set a date for a hearing. The water judge
19 may conduct individual or consolidated hearings. A hearing must be conducted in the same manner as for
20 other civil actions. At the order of the water judge, a hearing may be conducted by the water master, who
21 shall prepare a report of the hearing as provided in Rule 53(e), Montana Rules of Civil Procedure.

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

25 (6) After the issuance of a temporary preliminary decree or preliminary decree, notice of any motion
26 to amend a statement of claim or a timely filed objection that may adversely affect other water rights must
27 be published for 3 consecutive weeks in two newspapers of general circulation in the basin where the
28 statement of claim or objection was filed. The notice must specify that any response OR OBJECTION TO
29 THE PROPOSED AMENDMENT must be filed within 45 days of the date of the last notice. The water judge
30 may order any additional notice of the motion as the water judge considers necessary. The costs of the

1 notice required pursuant to this subsection must be borne by the moving party.

2 ~~(6)~~(7) Failure to object under subsection (1) to a compact negotiated and ratified under 85-2-702
3 or 85-2-703 bars any subsequent cause of action in the water court.

4 ~~(6)~~(8) If the court sustains an objection to a compact, it may declare the compact void. The agency
5 of the United States, the tribe, or the United States on behalf of the tribe party to the compact is permitted
6 6 months after the court's determination to file a statement of claim, as provided in 85-2-224, and the
7 court shall issue a new preliminary decree in accordance with 85-2-231. However, any party to a compact
8 declared void may appeal from that determination in accordance with those procedures applicable to
9 85-2-235, and the filing of a notice of appeal stays the period for filing a statement of claim as required
10 under this subsection.

11 ~~(7)~~(9) Upon petition by a claimant, the water court may grant a motion for dismissal to an objection
12 to a temporary preliminary or preliminary decree if the objection pertains to an element of a water right that
13 was previously decreed and if dismissal is consistent with common-law principles of issue and claim
14 preclusion.

15 ~~(8)~~(10) The provisions of subsection ~~(7)~~ (9) do not apply to issues arising after entry of the
16 previous decree, including but not limited to the issues of abandonment, expansion of the water right, and
17 reasonable diligence."

18

19 **SECTION 5. SECTION 85-2-404, MCA, IS AMENDED TO READ:**

20 **"85-2-404. (Temporary) Abandonment of appropriation right.** (1) If an appropriator ceases to use
21 all or a part of an appropriation right with the intention of wholly or partially abandoning the right or if the
22 appropriator ceases using the appropriation right according to its terms and conditions with the intention
23 of not complying with those terms and conditions, the appropriation right is, to that extent, considered
24 abandoned and must immediately expire.

25 (2) If an appropriator ceases to use all or part of an appropriation right or ceases using the
26 appropriation right according to its terms and conditions for a period of 10 successive years and there was
27 water available for use, there is a prima facie presumption that the appropriator has abandoned the right
28 ~~in whole or~~ for the part not used.

29 (3) If an appropriator ceases to use all or part of an appropriation right because the land to which
30 the water is applied to a beneficial use is contracted under a state or federal conservation set-aside

1 program:

2 (a) the set-aside and resulting reduction in use of the appropriation right does not represent an
3 intent by the appropriator to wholly or partially abandon the appropriation right or to not comply with the
4 terms and conditions attached to the right; and

5 (b) the period of nonuse that occurs for part or all of the appropriation right as a result of the
6 contract may not create or may not be added to any previous period of nonuse to create a prima facie
7 presumption of abandonment.

8 (4) The lease of an existing right pursuant to 85-2-436, the use of water pursuant to 85-2-439,
9 or a temporary change pursuant to 85-2-407 does not constitute an abandonment or serve as evidence that
10 could be used to establish an abandonment of any part of the right.

11 (5) Subsections (1) and (2) do not apply to existing rights until they have been finally determined
12 in accordance with part 2 of this chapter. (Terminates June 30, 1999--sec. 4, Ch. 740, L. 1991.)

13 **85-2-404. (Effective July 1, 1999) Abandonment of appropriation right.** (1) If an appropriator
14 ceases to use all or a part of an appropriation right with the intention of wholly or partially abandoning the
15 right or if the appropriator ceases using the appropriation right according to its terms and conditions with
16 the intention of not complying with those terms and conditions, the appropriation right is, to that extent,
17 considered abandoned and must immediately expire.

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19 appropriation right according to its terms and conditions for a period of 10 successive years and there was
20 water available for use, there is a prima facie presumption that the appropriator has abandoned the right
21 ~~in whole or~~ for the part not used.

22 (3) If an appropriator ceases to use all or part of an appropriation right because the land to which
23 the water is applied to a beneficial use is contracted under a state or federal conservation set-aside
24 program:

25 (a) the set-aside and resulting reduction in use of the appropriation right does not represent an
26 intent by the appropriator to wholly or partially abandon the appropriation right or to not comply with the
27 terms and conditions attached to the right; and

28 (b) the period of nonuse that occurs for part or all of the appropriation right as a result of the
29 contract may not create or may not be added to any previous period of nonuse to create a prima facie
30 presumption of abandonment.

1 (4) The use of water pursuant to 85-2-439 or a temporary change pursuant to 85-2-407 does not
 2 constitute an abandonment or serve as evidence that could be used to establish an abandonment of any
 3 part of the right.

4 (5) Subsections (1) and (2) do not apply to existing rights until they have been finally determined
 5 in accordance with part 2 of this chapter. (Terminates June 30, 2005--sec. 14, Ch. 487, L. 1995.)

6 **85-2-404. (Effective July 1, 2005) Abandonment of appropriation right.** (1) If an appropriator
 7 ceases to use all or a part of his appropriation right with the intention of wholly or partially abandoning the
 8 right or if he ceases using his appropriation right according to its terms and conditions with the intention
 9 of not complying with those terms and conditions, the appropriation right shall, to that extent, be deemed
 10 considered abandoned and shall immediately expire.

11 (2) If an appropriator ceases to use all or part of his appropriation right or ceases using his
 12 appropriation right according to its terms and conditions for a period of 10 successive years and there was
 13 water available for his use, there shall be a prima facie presumption that the appropriator has abandoned
 14 his right ~~in whole~~ or for the part not used.

15 (3) If an appropriator ceases to use all or part of his appropriation right because the land to which
 16 the water is applied to a beneficial use is contracted under a state or federal conservation set-aside
 17 program:

18 (a) the set-aside and resulting reduction in use of the appropriation right does not represent an
 19 intent by the appropriator to wholly or partially abandon the appropriation right or to not comply with the
 20 terms and conditions attached to the right; and

21 (b) the period of nonuse that occurs for part or all of the appropriation right as a result of the
 22 contract may not create or may not be added to any previous period of nonuse to create a prima facie
 23 presumption of abandonment.

24 (4) A temporary change pursuant to 85-2-407 does not constitute an abandonment or serve as
 25 evidence that could be used to establish an abandonment of any part of the right.

26 (5) Subsections (1) and (2) do not apply to existing rights until they have been finally determined
 27 in accordance with part 2 of this chapter."

28

29 **Section 6.** Section 85-2-406, MCA, is amended to read:

30 "**85-2-406. District court supervision of water distribution.** (1) The district courts shall supervise

1 the distribution of water among all appropriators. This supervisory authority includes the supervision of all
 2 water commissioners appointed prior or subsequent to July 1, 1973. The supervision ~~shall~~ must be
 3 governed by the principle that first in time is first in right.

4 (2) (a) A district court may order the distribution of water pursuant to a district court decree
 5 entered prior to July 1, 1973, until an enforceable decree is entered under part 2 of this chapter or the
 6 matter has been adjudicated under the procedure set forth in subsection (2)(b).

7 (b) When a water distribution controversy arises upon a source of water in which not all existing
 8 rights have not been conclusively determined according to part 2 of this chapter or when a basin is the
 9 subject of a temporary preliminary decree or preliminary decree, as modified after objections and hearings,
 10 any party to the controversy or any person whose rights are or may be affected by enforcement of the
 11 decree may petition the district court for relief to certify the matter to the chief water judge. If a
 12 certification request is made, the district court shall certify to the chief water judge the determination of
 13 the existing rights that are involved in the controversy according to part 2 of this chapter. The district court
 14 from which relief is sought may shall retain exclusive jurisdiction to grant injunctive or other relief which
 15 that is necessary and appropriate to preserve property rights or the status quo pending the issuance of the
 16 final decree pending adjudication of the existing water rights certified to the water judge. Certified
 17 controversies must be given priority over all other adjudication matters. After determination of the matters
 18 certified, the water judge shall return the decision to the district court with a tabulation or list of the
 19 existing rights and their relative priorities.

20 (3) A controversy between appropriators from a source that has been the subject of a final decree
 21 under part 2 of this chapter must be settled by the district ~~court that issued the final decree~~ court. The
 22 order of the district court settling the controversy may not alter the existing rights and priorities established
 23 in the final decree except to the extent the court alters rights based upon abandonment, waste, or illegal
 24 enlargement or change of right. In cases involving permits issued by the department, the court may not
 25 amend the respective rights established in the permits or alter any terms of the permits unless the permits
 26 are inconsistent or interfere with rights and priorities established in the final decree. The order settling the
 27 controversy must be appended to the final decree, and a copy must be filed with the department. The
 28 department must be served with process in any proceeding under this subsection, and the department may,
 29 in its discretion, intervene in the proceeding.

30 (4) A temporary preliminary decree or preliminary decree or a portion of a temporary preliminary

1 decree or preliminary decree as modified after objections and hearings is enforceable and administrable
 2 according to its terms. If an action to enforce a temporary preliminary decree or preliminary decree is
 3 commenced, the water judge shall upon referral from the district court establish, in a form determined to
 4 be appropriate by the water judge, one or more tabulations or lists of all existing rights and their relative
 5 priorities.

6 (5) ~~(a)~~ A person whose existing rights and priorities are determined in a temporary preliminary
 7 decree or preliminary decree or a person exercising a suspension under 85-2-217 and part 7 of this chapter
 8 may appeal a determination made pursuant to subsection (2).

9 ~~(b) The water judge is not bound by a supreme court determination on an appeal entered under this~~
 10 ~~subsection in issuing any subsequent decree under part 2 of this chapter."~~

11

12 NEW SECTION. Section 7. Saving clause. [This act] does not affect rights and duties that
 13 matured, penalties that were incurred, or proceedings that were begun before [the effective date of this
 14 act].

15

16 NEW SECTION. Section 8. Effective date. [This act] is effective on passage and approval.

17

-END-

1 SENATE BILL NO. 108

2 INTRODUCED BY BECK

3 BY REQUEST OF THE MONTANA WATER ADJUDICATION ADVISORY COMMITTEE
4

5 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING WATER ADJUDICATION LAWS;
6 ALLOWING THE WATER COURT TO ADJUDICATE ABANDONMENT OF WATER RIGHTS; ALLOWING A
7 WATER JUDGE TO CONSIDER RELEVANT EVIDENCE ARISING BEFORE OR AFTER JULY 1, 1973;
8 PROVIDING FOR THE WATER COURT TO ENTER A TEMPORARY PRELIMINARY DECREE FOR ANY
9 CATEGORY OF CLAIM THAT REQUIRES ADJUDICATION; REQUIRING OBJECTIONS TO BE FILED AT THE
10 INITIAL DECREE STAGE; ALLOWING CLAIMANTS AND OBJECTORS TO AMEND THEIR CLAIMS OR
11 OBJECTIONS; GIVING CLAIMANTS AN OPPORTUNITY TO FILE COUNTEROBJECTIONS; ENCOURAGING
12 INCREASED USE OF ALTERNATIVE DISPUTE RESOLUTION; CLARIFYING THE PROCESS FOR
13 ADMINISTERING WATER RIGHTS PENDING ADJUDICATION; AMENDING SECTIONS 3-7-501, 85-2-227,
14 85-2-231, 85-2-233, 85-2-404, AND 85-2-406, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE
15 DATE."

16
17 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
1819 **Section 1.** Section 3-7-501, MCA, is amended to read:

20 **"3-7-501. Jurisdiction.** (1) The jurisdiction of each judicial district concerning the determination
21 and interpretation of cases certified to the court under 85-2-309 or of existing water rights is exercised
22 exclusively by it through the water division or water divisions that contain the judicial district wholly or
23 partly.

24 (2) ~~No~~ A water judge may not preside over matters concerning the determination and interpretation
25 of cases certified to the court under 85-2-309 or of existing water rights beyond the boundaries specified
26 in 3-7-102 for ~~his~~ the judge's division except as provided in 3-7-201.

27 (3) The water judge for each division shall exercise jurisdiction over all matters concerning cases
28 certified to the court under 85-2-309 or concerning the determination and interpretation of existing water
29 rights within ~~his~~ the judge's division as specified in 3-7-102 that are considered filed in or transferred to
30 a judicial district wholly or partly within the division.

1 (4) The determination and interpretation of existing water rights includes, without limitation, the
 2 adjudication of total or partial abandonment of existing water rights occurring at any time before the entry
 3 of the final decree."

4
 5 **Section 2.** Section 85-2-227, MCA, is amended to read:

6 **"85-2-227. Claim to constitute prima facie evidence -- relevant evidence -- abandonment.** (1) For
 7 purposes of adjudicating rights pursuant to this part, a claim of an existing right filed in accordance with
 8 85-2-221 or an amended claim of existing right constitutes prima facie proof of its content until the
 9 issuance of a final decree. For purposes of administering water rights, the provisions of a temporary
 10 preliminary decree or a preliminary decree, as modified after objections and hearings, supersede a claim of
 11 existing right until a final decree is issued.

12 (2) A water judge may consider all relevant evidence in the determination and interpretation of
 13 existing water rights. Relevant evidence under this part may include admissible evidence arising before or
 14 after July 1, 1973.

15 (3) A water judge may determine all or part of an existing water right to be abandoned based on
 16 a consideration of all ~~relevant evidence~~ ADMISSIBLE EVIDENCE THAT IS RELEVANT, including, without
 17 limitation, evidence relating to acts or intent occurring in whole or in part after July 1, 1973."

18
 19 **Section 3.** Section 85-2-231, MCA, is amended to read:

20 **"85-2-231. Temporary preliminary and preliminary decree.** (1) A water judge may issue a
 21 temporary preliminary decree prior to the issuance of a preliminary decree if the temporary preliminary
 22 decree is necessary for the orderly adjudication or administration of water rights.

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

25 (i) the statements of claim before the water judge;

26 (ii) the data submitted by the department;

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

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

30 (b) The preliminary decree ~~shall~~ must be issued within 90 days after the close of the special filing

1 period set out in 85-2-702(3) or as soon ~~thereafter~~ after the close of that period as is reasonably feasible.

2 (c) ~~This section does not prevent the~~ The water judge from issuing ~~may issue~~ an interlocutory
3 decree ~~or other temporary decree, pursuant to 85-2-321 or as provided in subsection (1) of this section,~~
4 ~~or if such a~~ an interlocutory decree is otherwise necessary for the orderly administration of water rights
5 ~~prior to the issuance of a preliminary decree.~~

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

10 (4) The temporary preliminary decree or preliminary decree ~~shall~~ must contain the information and
11 make the determinations, findings, and conclusions required for the final decree under 85-2-234. ~~The water~~
12 ~~judge shall include in the preliminary decree the contents of a compact negotiated under the provisions of~~
13 ~~part 7 that has been approved by the legislature and the tribe or federal agency.~~

14 (5) If the water judge is satisfied that the report of the water master meets the requirements for
15 the preliminary decree ~~set forth in subsections (1) and (3)~~ and is satisfied with the conclusions contained
16 in the report, the water judge shall adopt the report as the preliminary decree. If the water judge is not ~~so~~
17 satisfied, ~~he~~ the water judge may, ~~at his option,~~ recommit the report to the master with instructions, or
18 modify the report and issue the preliminary decree.

19 ~~(6) In issuing a subsequent preliminary decree, the water judge shall incorporate the temporary~~
20 ~~preliminary decree for the basin as modified by objections and hearings. The temporary preliminary decree~~
21 ~~or preliminary decree, as modified after objections and hearings, is enforceable and administrable according~~
22 ~~to its terms among parties ordered under 85-2-406. The preliminary decree, as modified after objections~~
23 ~~and hearings, shall upon issuance supersede and replace the temporary preliminary decree."~~

24

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

26 **"85-2-233. Hearing on temporary preliminary decree or preliminary decree -- procedure.** (1) (a) For
27 good cause shown and subject to the provisions of subsection ~~(7)~~ (9), a hearing must be held before the
28 water judge on any objection to a temporary preliminary decree or preliminary decree by:

29 (i) the department;

30 (ii) a person named in the temporary preliminary decree or preliminary decree;

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

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

5 (b) For the purposes of this subsection (1), "good cause shown" means a written statement
6 showing that a person has an ownership interest in water or its use that has been affected by the decree.

7 (c) A person does not waive the right to object to a preliminary decree by failing to object to a
8 temporary preliminary decree issued before [the effective date of this act]. However, a person may not
9 raise an objection to a matter in a preliminary decree if that person was a party to the matter when the
10 matter was previously litigated and resolved as the result of an objection raised in a temporary preliminary
11 decree, unless the objection is allowed for any of the following reasons:

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

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

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

16 (iv) the judgment is void; or

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

18 (d) After [the effective date of this act], a person may not raise an objection or counterobjection
19 to a matter contained in a subsequent decree issued under this part if the matter was contained in a prior
20 decree issued under this part for which there was an objection and counterobjection period unless the
21 objection is allowed for any of the following reasons:

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

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

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

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

27 (v) any other reason justifying relief from the operation of the prior decree issued under this part.

28 The fact that a prior owner of a water right did not object or counterobject at a prior decree stage may not
29 be a basis for a subsequent owner of the water right to object or counterobject absent a finding that one
30 of the provisions in this subsection (1)(d) applies.

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

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

10 ~~(3)(4) The request for a hearing~~ Objections and counterobjections must specify the paragraphs and
11 pages containing the findings and conclusions to which objection is made. The request must state the
12 specific grounds and evidence on which the objections are based.

13 ~~(4)(5) (a) Upon expiration of the time for filing objections and upon timely receipt of a request for~~
14 ~~a hearing~~ counterobjections under subsection (3), the water judge shall notify each party named in the
15 temporary preliminary decree or preliminary decree or that person's successor as documented in the
16 department records that a hearing has been requested objections and counterobjections have been filed.
17 The water judge shall fix a day when all parties who wish to participate in future proceedings ~~must~~ are
18 required to appear or file a statement. The water judge shall then set a date for a hearing. The water judge
19 may conduct individual or consolidated hearings. A hearing must be conducted in the same manner as for
20 other civil actions. At the order of the water judge, a hearing may be conducted by the water master, who
21 shall prepare a report of the hearing as provided in Rule 53(e), Montana Rules of Civil Procedure.

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

25 (6) After the issuance of a temporary preliminary decree or preliminary decree, notice of any motion
26 to amend a statement of claim or a timely filed objection that may adversely affect other water rights must
27 be published for 3 consecutive weeks in two newspapers of general circulation in the basin where the
28 statement of claim or objection was filed. The notice must specify that any response OR OBJECTION TO
29 THE PROPOSED AMENDMENT must be filed within 45 days of the date of the last notice. The water judge
30 may order any additional notice of the motion as the water judge considers necessary. The costs of the

1 notice required pursuant to this subsection must be borne by the moving party.

2 ~~(6)(7)~~ Failure to object under subsection (1) to a compact negotiated and ratified under 85-2-702
3 or 85-2-703 bars any subsequent cause of action in the water court.

4 ~~(6)(8)~~ If the court sustains an objection to a compact, it may declare the compact void. The agency
5 of the United States, the tribe, or the United States on behalf of the tribe party to the compact is permitted
6 6 months after the court's determination to file a statement of claim, as provided in 85-2-224, and the
7 court shall issue a new preliminary decree in accordance with 85-2-231. However, any party to a compact
8 declared void may appeal from that determination in accordance with those procedures applicable to
9 85-2-235, and the filing of a notice of appeal stays the period for filing a statement of claim as required
10 under this subsection.

11 ~~(7)(9)~~ Upon petition by a claimant, the water court may grant a motion for dismissal to an objection
12 to a temporary preliminary or preliminary decree if the objection pertains to an element of a water right that
13 was previously decreed and if dismissal is consistent with common-law principles of issue and claim
14 preclusion.

15 ~~(8)(10)~~ The provisions of subsection ~~(7)~~ (9) do not apply to issues arising after entry of the
16 previous decree, including but not limited to the issues of abandonment, expansion of the water right, and
17 reasonable diligence."
18

19 **SECTION 5. SECTION 85-2-404, MCA, IS AMENDED TO READ:**

20 **"85-2-404. (Temporary) Abandonment of appropriation right.** (1) If an appropriator ceases to use
21 all or a part of an appropriation right with the intention of wholly or partially abandoning the right or if the
22 appropriator ceases using the appropriation right according to its terms and conditions with the intention
23 of not complying with those terms and conditions, the appropriation right is, to that extent, considered
24 abandoned and must immediately expire.

25 (2) If an appropriator ceases to use all or part of an appropriation right or ceases using the
26 appropriation right according to its terms and conditions for a period of 10 successive years and there was
27 water available for use, there is a prima facie presumption that the appropriator has abandoned the right
28 ~~in whole or~~ for the part not used.

29 (3) If an appropriator ceases to use all or part of an appropriation right because the land to which
30 the water is applied to a beneficial use is contracted under a state or federal conservation set-aside

1 program:

2 (a) the set-aside and resulting reduction in use of the appropriation right does not represent an
3 intent by the appropriator to wholly or partially abandon the appropriation right or to not comply with the
4 terms and conditions attached to the right; and

5 (b) the period of nonuse that occurs for part or all of the appropriation right as a result of the
6 contract may not create or may not be added to any previous period of nonuse to create a prima facie
7 presumption of abandonment.

8 (4) The lease of an existing right pursuant to 85-2-436, the use of water pursuant to 85-2-439,
9 or a temporary change pursuant to 85-2-407 does not constitute an abandonment or serve as evidence that
10 could be used to establish an abandonment of any part of the right.

11 (5) Subsections (1) and (2) do not apply to existing rights until they have been finally determined
12 in accordance with part 2 of this chapter. (Terminates June 30, 1999--sec. 4, Ch. 740, L. 1991.)

13 **85-2-404. (Effective July 1, 1999) Abandonment of appropriation right.** (1) If an appropriator
14 ceases to use all or a part of an appropriation right with the intention of wholly or partially abandoning the
15 right or if the appropriator ceases using the appropriation right according to its terms and conditions with
16 the intention of not complying with those terms and conditions, the appropriation right is, to that extent,
17 considered abandoned and must immediately expire.

18 (2) If an appropriator ceases to use all or part of an appropriation right or ceases using the
19 appropriation right according to its terms and conditions for a period of 10 successive years and there was
20 water available for use, there is a prima facie presumption that the appropriator has abandoned the right
21 ~~in whole or~~ for the part not used.

22 (3) If an appropriator ceases to use all or part of an appropriation right because the land to which
23 the water is applied to a beneficial use is contracted under a state or federal conservation set-aside
24 program:

25 (a) the set-aside and resulting reduction in use of the appropriation right does not represent an
26 intent by the appropriator to wholly or partially abandon the appropriation right or to not comply with the
27 terms and conditions attached to the right; and

28 (b) the period of nonuse that occurs for part or all of the appropriation right as a result of the
29 contract may not create or may not be added to any previous period of nonuse to create a prima facie
30 presumption of abandonment.

1 (4) The use of water pursuant to 85-2-439 or a temporary change pursuant to 85-2-407 does not
2 constitute an abandonment or serve as evidence that could be used to establish an abandonment of any
3 part of the right.

4 (5) Subsections (1) and (2) do not apply to existing rights until they have been finally determined
5 in accordance with part 2 of this chapter. (Terminates June 30, 2005--sec. 14, Ch. 487, L. 1995.)

6 **85-2-404. (Effective July 1, 2005) Abandonment of appropriation right.** (1) If an appropriator
7 ceases to use all or a part of his appropriation right with the intention of wholly or partially abandoning the
8 right or if he ceases using his appropriation right according to its terms and conditions with the intention
9 of not complying with those terms and conditions, the appropriation right shall, to that extent, be deemed
10 considered abandoned and shall immediately expire.

11 (2) If an appropriator ceases to use all or part of his appropriation right or ceases using his
12 appropriation right according to its terms and conditions for a period of 10 successive years and there was
13 water available for his use, there shall be a prima facie presumption that the appropriator has abandoned
14 his right ~~in whole or~~ for the part not used.

15 (3) If an appropriator ceases to use all or part of his appropriation right because the land to which
16 the water is applied to a beneficial use is contracted under a state or federal conservation set-aside
17 program:

18 (a) the set-aside and resulting reduction in use of the appropriation right does not represent an
19 intent by the appropriator to wholly or partially abandon the appropriation right or to not comply with the
20 terms and conditions attached to the right; and

21 (b) the period of nonuse that occurs for part or all of the appropriation right as a result of the
22 contract may not create or may not be added to any previous period of nonuse to create a prima facie
23 presumption of abandonment.

24 (4) A temporary change pursuant to 85-2-407 does not constitute an abandonment or serve as
25 evidence that could be used to establish an abandonment of any part of the right.

26 (5) Subsections (1) and (2) do not apply to existing rights until they have been finally determined
27 in accordance with part 2 of this chapter."

28

29 **Section 6.** Section 85-2-406, MCA, is amended to read:

30 **"85-2-406. District court supervision of water distribution.** (1) The district courts shall supervise

1 the distribution of water among all appropriators. This supervisory authority includes the supervision of all
 2 water commissioners appointed prior or subsequent to July 1, 1973. The supervision ~~shall~~ must be
 3 governed by the principle that first in time is first in right.

4 (2) (a) A district court may order the distribution of water pursuant to a district court decree
 5 entered prior to July 1, 1973, until an enforceable decree is entered under part 2 of this chapter or the
 6 matter has been adjudicated under the procedure set forth in subsection (2)(b).

7 (b) When a water distribution controversy arises upon a source of water in which not all existing
 8 rights have not been conclusively determined according to part 2 of this chapter or when a basin is the
 9 subject of a temporary preliminary decree or preliminary decree, as modified after objections and hearings,
 10 any party to the controversy or any person whose rights are or may be affected by enforcement of the
 11 decree may petition the district court for relief to certify the matter to the chief water judge. If a
 12 certification request is made, the district court shall certify to the chief water judge the determination of
 13 the existing rights that are involved in the controversy according to part 2 of this chapter. The district court
 14 from which relief is sought may shall retain exclusive jurisdiction to grant injunctive or other relief which
 15 that is necessary and appropriate to preserve property rights or the status quo pending the issuance of the
 16 final decree pending adjudication of the existing water rights certified to the water judge. Certified
 17 controversies must be given priority over all other adjudication matters. After determination of the matters
 18 certified, the water judge shall return the decision to the district court with a tabulation or list of the
 19 existing rights and their relative priorities.

20 (3) A controversy between appropriators from a source that has been the subject of a final decree
 21 under part 2 of this chapter must be settled by the district ~~court that issued the final decree~~ court. The
 22 order of the district court settling the controversy may not alter the existing rights and priorities established
 23 in the final decree except to the extent the court alters rights based upon abandonment, waste, or illegal
 24 enlargement or change of right. In cases involving permits issued by the department, the court may not
 25 amend the respective rights established in the permits or alter any terms of the permits unless the permits
 26 are inconsistent or interfere with rights and priorities established in the final decree. The order settling the
 27 controversy must be appended to the final decree, and a copy must be filed with the department. The
 28 department must be served with process in any proceeding under this subsection, and the department may,
 29 in its discretion, intervene in the proceeding.

30 (4) A temporary preliminary decree or preliminary decree or a portion of a temporary preliminary

1 decree or preliminary decree as modified after objections and hearings is enforceable and administrable
2 according to its terms. If an action to enforce a temporary preliminary decree or preliminary decree is
3 commenced, the water judge shall upon referral from the district court establish, in a form determined to
4 be appropriate by the water judge, one or more tabulations or lists of all existing rights and their relative
5 priorities.

6 (5) ~~(a)~~ A person whose existing rights and priorities are determined in a temporary preliminary
7 decree or preliminary decree or a person exercising a suspension under 85-2-217 and part 7 of this chapter
8 may appeal a determination made pursuant to subsection (2).

9 ~~(b) The water judge is not bound by a supreme court determination on an appeal entered under this~~
10 ~~subsection in issuing any subsequent decree under part 2 of this chapter."~~

11

12 NEW SECTION. Section 7. Saving clause. [This act] does not affect rights and duties that
13 matured, penalties that were incurred, or proceedings that were begun before [the effective date of this
14 act].

15

16 NEW SECTION. Section 8. Effective date. [This act] is effective on passage and approval.

17

-END-