

HOUSE BILL NO. 886

INTRODUCED BY K. WALSH, B. GILLESPIE, J. COHENOUR, R. MINER, J. SECKINGER

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR THE ~~A~~-WATER DIVISION COURT AND WATER DIVISION JUDGES; REVISING THE JURISDICTION OF THE WATER DIVISION COURT; PROVIDING THE GOVERNOR APPOINT MEMBERS TO THE WATER DIVISION COURT; PROVIDING FOR NOMINATIONS, VACANCY REPLACEMENTS, TERMS, AND SUBSTITUTIONS OF WATER DIVISION JUDGES; PROVIDING A DEFINITION; PROVIDING FOR ENFORCEMENT OF WATER RIGHTS AT THE WATER ~~DISTRICT~~ DIVISION COURT; PROVIDING FOR WATER DIVISION COURT SUPERVISION OF WATER DISTRIBUTION; CLARIFYING COMPLAINTS BY DISSATISFIED WATER USERS; CLARIFYING PROCEDURES; REVISING LAWS RELATED TO WATER COMMISSIONERS AND WATER MEDIATORS; AMENDING SECTIONS 2-4-702, 3-1-102, 3-1-901, 3-1-904, 3-1-905, 3-1-907, 3-7-101, 3-7-103, 3-7-202, 3-7-203, 3-7-204, 3-7-221, 3-7-301, 3-7-311, 3-7-401, 3-7-402, 3-7-403, 3-7-404, 3-7-501, 3-7-502, 19-5-101, 19-5-301, 85-2-102, 85-2-112, 85-2-114, 85-2-122, 85-2-123, 85-2-125, 85-2-309, 85-2-405, 85-2-406, 85-5-101, 85-5-102, 85-5-103, 85-5-106, 85-5-107, 85-5-109, 85-5-110, 85-5-111, 85-5-201, 85-5-203, 85-5-204, 85-5-301, 85-5-401, 85-5-402, 85-5-403, 85-5-407, AND 85-5-408, MCA; REPEALING SECTIONS 3-7-201, 3-7-211, 3-7-212, 3-7-222, 3-7-223, 3-7-224, AND 3-7-225, MCA; AND PROVIDING A DELAYED EFFECTIVE DATE."

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

Section 1. Section 2-4-702, MCA, is amended to read:

" 2-4-702. ~~(Temporary) Initiating judicial review of contested cases.~~ (1) (a) Except as provided in ~~75-2-213 and 75-20-223, a person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final written decision in a contested case is entitled to judicial review under this chapter. This section does not limit use of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by statute.~~

(b) ~~A party who proceeds before an agency under the terms of a particular statute may not be precluded from questioning the validity of that statute on judicial review, but the party may not raise any other~~

Section 17. Section 3-7-221, MCA, is amended to read:

"3-7-221. Appointment of chief water judge and ~~associate water judge~~ -- terms of office. (1) The chief justice of the Montana supreme court shall appoint a ~~chief water judge as provided in Title 3, chapter 1, part 9. The chief justice of the Montana supreme court may appoint an associate water judge~~ water division court judge to serve as the chief water judge of the water division court.

(2) ~~To be eligible for the office of chief water judge or associate water judge, a person shall have the qualifications for district court or supreme court judges found in Article VII, section 9, of the Montana constitution.~~ The chief judge of the water division court shall direct all matters regarding the efficient management of the water division court's business in cooperation with other water division judges and the water division court administrator including:

(a) assigning duties to water division court personnel as needed;

(b) preparing water division court budget requests for the supreme court; and

(c) overseeing the office of the water division court, including supervising the water division court administrator.

(3) ~~The term of office of the chief water judge and the associate water judge is 4 years, subject to continuation of the water divisions by the legislature of the water division court is concurrent with the appointee's remaining term pursuant to 3-7-202. A water division judge may serve consecutive terms as chief judge."~~

~~**NEW SECTION. Section 18. Substitution of water division judge.** Except for a water division judge presiding in an adjudication proceeding pursuant to Title 85, chapter 2, part 2, a water division judge may be substituted in the manner provided by supreme court rule.~~

Section 18. Section 3-7-301, MCA, is amended to read:

"3-7-301. Appointment of water masters -- removal. (1) ~~The chief water judge or the water judge in each water division of the water division court~~ may appoint one or more water masters to expedite the adjudication of existing water rights pursuant to Title 85, chapter 2, part 2.

~~(2) A water master may be appointed after July 1, 1980, and must be appointed on or before July~~

master specified in this ~~section-part~~ is exclusive unless otherwise specifically altered by the Montana supreme court."

NEW SECTION. Section 24. Substitution of water division judge. (1) A water division judge may not be substituted in an adjudication proceeding under Title 85, chapter 2, part 2.

(2) In a proceeding other than an adjudication proceeding under Title 85, chapter 2, part 2, each adverse party is entitled to one substitution of a water division judge. The judge may be substituted in the same manner as a district court judge pursuant to ~~section 48~~ 3-1-804. The judge who has been substituted shall designate a subsequent water division judge to assume the proceedings. Except as provided in subsection (3)(a), the judge who has been substituted shall designate a water division judge as the substitute judge before designating a district court judge.

(3) (a) In a proceeding other than an adjudication proceeding under Title 85, chapter 2, part 2, a party may file a motion for good cause to substitute a water division judge with a district court judge. The motion to substitute under this subsection (3)(a) must be filed within 30 days after the first summons is served or an adverse party has appeared or within 10 days of the service of a petition filed to appoint a water commissioner pursuant to 85-5-101.

(b) A party served with a motion for substitution may file a ~~motion for substitution response~~. The ~~motion-response~~ must be filed:

(i) for all matters except a matter described in subsection (3)(b)(ii), within 30 days after service has been completed in compliance with Rule 4, M.R.Civ.P.; or

(ii) for a matter involving the appointment of a water commissioner pursuant to 85-5-101, within 10 days after service of the motion for substitution is completed.

(c) A water division judge may grant a motion to substitute a water division judge for a district court judge if:

(i) good cause exists for the substitution of a district court judge;

(ii) there is no undue delay or prejudice to the other parties in the controversy;

(iii) the district court judge presides in a judicial district where the water right is located or where the controversy arises; and

(iv) the water proceeding does not present an issue of statewide or basinwide concern.

(4) If a vacancy occurs pursuant to 3-7-203, the chief justice of the supreme court may appoint a substitute water division judge to preside over pending matters until the vacancy is filled pursuant to [section 12].

(5) A district court judge substituted for a water division judge presides as a water division judge.

Section 25. Section 3-7-501, MCA, is amended to read:

"3-7-501. Jurisdiction. (1) The jurisdiction of each judicial district water division court has jurisdiction over:

(a) matters concerning the determination and interpretation of cases certified to the court under 85-2-309 or of existing water rights is exercised exclusively by it through the water division or water divisions that contain the judicial district wholly or partly ;

(b) adjudication of existing water rights pursuant to Title 85, chapter 2, part 2, including the adjudication of total or partial abandonment of existing water rights at any time before the issuance of a final decree;

(c) the interpretation, enforcement, and administration of water rights subject to:

(i) a final decree entered pursuant to 85-2-234; or

(ii) the provisions of a temporary preliminary decree, preliminary decree, or supplemental preliminary decree entered under 85-2-234, as modified after objections and hearings;

(d) the distribution, administration, and enforcement of water rights pursuant to 85-2-406, including granting necessary declaratory and injunctive relief;

(e) the appointment of water commissioners and the administration of water rights pursuant to Title 85, chapter 5;

(f) proceedings related to a water compact in Title 85, chapter 20;

(g) proceedings related to ~~abandoned~~ the abandonment of water rights pursuant to 85-2-404 and 85-2-405;

(h) judicial enforcement pursuant to 85-2-114 and 85-2-122; and

(i) judicial review of a department of natural resources and conservation final decision in a

1 contested case involving an application for a provisional permit or an application for a change in appropriation
2 right as provided in 2-4-702.

3 ~~(2) A water judge may not preside over matters concerning the determination and interpretation of~~
4 ~~cases certified to the court under 85-2-309 or of existing water rights beyond the boundaries specified in 3-7-~~
5 ~~102 for the judge's division except as provided in 3-7-201.~~

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

10 ~~(4) The determination and interpretation of existing water rights includes, without limitation, the~~
11 ~~adjudication of total or partial abandonment of existing water rights occurring at any time before the entry of the~~
12 ~~final decree~~

13 (2) The water division court has jurisdiction over matters certified to the court by the department
14 involving disputes over the ownership of a water right under 85-2-424.

15 (3) Except as provided in 85-2-406(2)(a), the water division court's jurisdiction over the
16 proceedings in subsection (1) is exclusive."

17
18 **Section 26.** Section 3-7-502, MCA, is amended to read:

19 **"3-7-502. Jurisdictional disputes.** Whenever a question arises concerning which water division
20 judge shall preside over adjudication of a matter concerning ~~a case certified to the court under 85-2-309 or the~~
21 ~~determination and interpretation of existing water rights~~ within the jurisdiction of the water division court
22 pursuant to 3-7-501, the question shall must be settled by the water division judges involved."

23
24 **Section 27.** Section 19-5-101, MCA, is amended to read:

25 **"19-5-101. Definitions.** Unless a different meaning is plainly implied by the context, the following
26 definitions apply in this chapter:

27 (1) (a) "Compensation" means remuneration, as defined in 2-16-403, and 3-5-211, and 3-7-222,
28 paid to a member.

and appeal must be taken in accordance with the Montana Rules of Appellate Procedure.

(2) At the hearing, the burden of proof is on the department, which shall establish by a preponderance of the evidence that the appropriation has been abandoned under 85-2-404.

(3) The determination of the water division court must be appended to the final decree. The department shall keep a copy of the determination in its office in Helena."

Section 37. Section 85-2-406, MCA, is amended to read:

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

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

(b) When a water distribution controversy arises upon a source of water in which not all existing rights have been conclusively determined according to part 2 of this chapter, any party to the controversy may petition the ~~district water division court to certify the matter to the chief water judge. If a certification request is made, the district court shall certify to the chief water judge the determination of~~ determine the existing rights that are involved in the controversy according to part 2 of this chapter. The ~~district water division court from which relief is sought~~ shall retain exclusive jurisdiction to grant injunctive or other relief that is necessary and appropriate pending adjudication of the existing water rights ~~certified to the water judge. Certified controversies~~ A petition must be given priority over all other adjudication matters. After determination of the matters ~~certified in the petition~~, the water division judge shall ~~return the decision to the district court with a tabulation or list~~ issue one or more tabulations or lists of the existing rights and their relative priorities.

(3) A controversy between appropriators from a source that has been the subject of a final decree under part 2 of this chapter must be settled by the ~~district water division court~~. The order of the ~~district water division court~~ settling the controversy may not alter the existing rights and priorities established in the final decree except to the extent the court alters rights based upon abandonment, waste, or illegal enlargement or

1 change of right. In cases involving permits issued by the department, the water division court may not amend
2 the respective rights established in the permits or alter any terms of the permits unless the permits are
3 inconsistent or interfere with rights and priorities established in the final decree. The order settling the
4 controversy must be appended to the final decree, and a copy must be filed with the department. The
5 department must be served with process in any proceeding under this subsection, and the department may, in
6 its discretion, intervene in the proceeding.

7 (4) A temporary preliminary decree or preliminary decree or a portion of a temporary preliminary
8 decree or preliminary decree as modified after objections and hearings is enforceable and administrable
9 according to its terms. If an action to enforce a temporary preliminary decree or preliminary decree is
10 commenced, ~~the water judge shall upon referral from the district court establish, in a form determined to be~~
11 ~~appropriate by the water judge, the water division court shall establish~~ one or more tabulations or lists of all
12 existing rights and their relative priorities within the area defined in the petition. In a case involving water rights
13 permits issued pursuant to 85-2-302, the water division court may not amend the respective right established in
14 a permit or the terms of the permit.

15 (5) When an action or petition is brought to the water division court pursuant to subsections
16 subsection (2)(b), (3), or (4), a water division judge may order, on motion of a party to the action or sua sponte,
17 the department to provide technical assistance to define the enforcement area set forth in the action or petition.

18 (6) On a determination that an action or petition filed under ~~subsections-subsection (2)(b), (3), or~~
19 ~~(4) is sufficient and includes a defined enforcement area, the water division court shall issue an order requiring~~
20 ~~the action or petition to be served-noticed on all water right owners within the enforcement area and the~~
21 ~~department. The order must set a time and place for an interested party to show cause why the action or~~
22 ~~petition should not be granted.~~ The provisions of Title 25, chapter 3, parts 2 and 3, and Rules 4 and 12(a),
23 M.R.Civ.P., apply to actions or petitions brought under subsections-subsection (2), (3), or (4) if they do not
24 conflict with this section.

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

28 (8) When a water distribution controversy involves issues of statewide or basinwide importance,

1 the water division judge may, on motion of a party to the action or the state of Montana or sua sponte, order the
2 joinder of the state of Montana."

3
4 **Section 38.** Section 85-5-101, MCA, is amended to read:

5 **"85-5-101. Appointment of water commissioners.** (1) Whenever the rights of persons to use the
6 waters of any stream, ditch or extension of ditch, watercourse, spring, lake, reservoir, or other source of supply
7 have been determined by a decree of a court of competent jurisdiction, including temporary preliminary,
8 preliminary, and final decrees issued by a water division judge, it is the duty of the ~~judge of the district~~ court
9 having jurisdiction of the subject matter, upon the application of the owners of at least 15% of the water rights
10 affected by the decree or at least 15% of the flow rate of the water rights affected by the decree, in the exercise
11 of the ~~judge's court's~~ discretion, to appoint one or more commissioners. A petition for appointment of a
12 commissioner may not recommend more than three eligible commissioners to be considered for appointment.

13 The commissioners have authority to admeasure and distribute to the parties owning water rights in the source
14 affected by the decree the waters to which they are entitled, according to their rights as fixed by the decree and
15 by any certificates, permits, and changes in appropriation right issued under chapter 2 of this title. When
16 petitioners make proper showing that they are not able to obtain the application of the owners of at least 15% of
17 the water rights affected or at least 15% of the flow rate of the water rights affected and they are unable to
18 obtain the water to which they are entitled, the judge of the ~~district~~ court having jurisdiction may appoint a water
19 commissioner.

20 (2) When the existing rights of all appropriators from a source or in an area have been determined
21 in a temporary preliminary decree, preliminary decree, or final decree issued under chapter 2 of this title, the
22 judge of the ~~district~~ court having jurisdiction may, upon application by both the department of natural resources
23 and conservation and one or more holders of valid water rights in the source, appoint a water commissioner.
24 The water commissioner shall distribute to the appropriators, from the source or in the area, the water to which
25 they are entitled.

26 (3) The department of natural resources and conservation or any person or corporation operating
27 under contract with the department or any other owner of stored waters may petition the court having
28 jurisdiction to have stored waters distributed by the water commissioners appointed by the ~~district~~ court. The

1 court may order the commissioner or commissioners appointed by the court to distribute stored water when and
2 as released to water users entitled to the use of the water.

3 (4) The petitioners shall certify that they have ~~served-noticed~~ a copy of the petition to all water
4 rights owners subject to the petition.

5 ~~(4)(5)~~ At the time of the appointment of a water commissioner or commissioners, the ~~district~~ court
6 having jurisdiction shall fix their compensation, require a commissioner or commissioners to purchase a
7 workers' compensation insurance policy and elect coverage on themselves, and require the owners and users
8 of the distributed waters, including permittees, certificate holders, and holders of a change in appropriation
9 right, to pay their proportionate share of fees and compensation, including the cost of workers' compensation
10 insurance purchased by a water commissioner or commissioners. The judge may include the department in the
11 apportionment of costs if it applied for the appointment of a water commissioner under subsection (2).

12 ~~(5)(6)~~ Upon the application of the board or boards of one or more irrigation districts entitled to the use
13 of water stored in a reservoir that is turned into the natural channel of any stream and withdrawn or diverted at
14 a point downstream for beneficial use, the ~~district court of the judicial district where the most irrigable acres of~~
15 ~~the irrigation district or districts are situated~~ water division court may appoint a water commissioner to equitably
16 admeasure and distribute stored water to the irrigation district or districts from the channel of the stream into
17 which it has been turned. A commissioner appointed under this subsection (6) has the powers of any
18 commissioner appointed under this chapter, limited only by the purposes of this subsection (6). A
19 commissioner's compensation is set by the ~~appointing judge~~ court and paid by each district and other users of
20 stored water affected by the admeasurement and distribution of the stored water. In all other matters, the
21 provisions of this chapter apply so long as they are consistent with this subsection (6).

22 ~~(6)(7)~~ A water commissioner appointed by a ~~district~~ court is not an employee of the judicial branch, a
23 local government, or a water user.

24 ~~(7)(8)~~ A water commissioner who fails to obtain workers' compensation insurance coverage required
25 by subsection ~~(4)~~ (5) is precluded from receiving benefits under Title 39, chapter 71, as a result of the
26 performance of duties as a water commissioner."

27
28 **Section 39.** Section 85-5-102, MCA, is amended to read:

1 compensation among the several owner or owners, tenants in common, or stockholders of the ditch according
2 to their respective rights and interest. The order has the effect of a judgment against the person to whom the
3 water was admeasured and for whose benefit it was used. When, in the discretion of the court, an order of
4 apportionment of expense is made against the land for which the water was used, it has the effect of a lien
5 against the land to which the apportionment was made. ~~Execution may issue upon the order as upon a~~
6 ~~judgment by direction of the court.~~ If the court issues an order, the order may be enforced as a final judgment,
7 ~~upon the on~~ application of any person interested in the order.

8 (2) When a commissioner is appointed under the provisions of this chapter to distribute the waters
9 of the stream from which the waters flowing in a ditch are taken and to apportion and distribute the waters of
10 the ditch according to the rights of the respective owners of the waters, the judge, ~~in the judge's discretion,~~ may,
11 in addition to the apportionment taxed against the respective owners of the waters of the stream, apportion and
12 tax the amount, ~~if any,~~ that the owners of the ditch shall pay in addition to the amount taxed under the
13 provisions of this chapter."

14
15 NEW SECTION. Section 55. Repealer. The following sections of the Montana Code Annotated are
16 repealed:

- 17 3-7-201. Designation of water judge.
18 3-7-211. Appointment of water commissioners.
19 3-7-212. Enforcement of decrees.
20 3-7-222. Salary -- office space.
21 3-7-223. (Temporary) Duties of chief water judge.
22 3-7-224. (Temporary) Jurisdiction of chief water judge and associate water judge.
23 3-7-225. (Temporary) Duties of associate water judge.

24
25 NEW SECTION. Section 56. Codification instruction. (1) [Sections 9 through 11] are intended to
26 be codified as an integral part of Title 3, chapter 7, part 1, and the provisions of Title 3, chapter 7, part 1, apply
27 to [sections 9 through 11].

28 (2) [Sections 12, and 16, ~~and 18~~] are intended to be codified as an integral part of Title 3, chapter

1 7, part 2, and the provisions of Title 3, chapter 7, part 2, apply to [sections 12, and 16, ~~and 18~~].

2 (3) [Section ~~25~~ 24] is intended to be codified as an integral part of Title 3, chapter 7, part 4, and the
3 provisions of Title 3, chapter 7, part 4, apply to [section ~~25~~ 24].
4

5 NEW SECTION. **Section 57. Notification to tribal governments.** The secretary of state shall send
6 a copy of [this act] to each federally recognized tribal government in Montana.
7

8 NEW SECTION. **Section 58. Severability.** If a part of [this act] is invalid, all valid parts that are
9 severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications,
10 the part remains in effect in all valid applications that are severable from the invalid applications.
11

12 NEW SECTION. **Section 59. Effective date.** [This act] is effective January 1, 2026.
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