

Water Right Enforcement
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Interim Water Policy Committee – Thompson Falls

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DNRC Enforcement Authority

DNRC has broad enforcement authority ((Mont. Code Ann. § 85-2-114, 122), but does not have the resources to be the statewide water right enforcer. Most DNRC legal resources go towards defending the DNRC in litigation brought against it, or where DNRC permit and change decisions have been appealed to district court and the Supreme Court.

Water law has always provided for private water users to take each other to court. The prior appropriation system is based on the assertion of senior water rights – a senior letting a junior water user know the senior is not getting their water, and the junior's curtailment of their water use until the senior's prior water right is satisfied.

For DNRC enforcement you need:

1. a CALL by a senior water user and a COMPLAINT filed with the DNRC if a call is not respected
2. a willing county attorney
3. a winnable case
4. available DNRC resources and Regional Office support

County attorneys can bring criminal misdemeanor cases or civil injunctive cases:

Gallatin County case

senior call and complaint
DNRC investigated
illegal pond
water user warned & kept using water
county attorney in DNRC's name sought an injunction & fine
injunction granted
headgate padlocked
water user cut lock 3 times
DNRC investigated
water user brought before judge – found in contempt of court
after injunction – issue between judge and violator

fine still pending

Regional Office also has to have the resources to investigate and document, and be in support of the enforcement action.

DNRC Regional Office, if it has the resources at the time, can investigate complaints, try to work things out between water users, & send out letters saying the illegal use must stop, but most of the time lacks the resources to proceed further.

That's why the DNRC has found the need to partner with County Attorneys – a DNRC attorney can work with the local regional offices to make sure there is good communication between the County Attorney and the Regional Office at the start of an enforcement action, and can make sure the right type of DNRC investigation is completed that will be useful in court.

The statutes provide for County Attorney and Attorney General assistance – Mont. Code Ann. § 85-2-116.

County Attorneys are shorthanded prosecuting felonies and often don't have time to enforce water rights.

By partnering with County Attorneys, using DNRC water right expertise and investigation expertise, we hope to combine slim resources.

DNRC Attorney Britt Long is asking to talk to the county attorneys at their annual convention to further explore their interest in partnering.

DNRC is seeking to have County Attorneys send out a second letter after the DNRC has first investigated and sent out a letter telling a water user to stop using water in violation of the Water Use Act.

Future DNRC enforcement - the DNRC will be working over the next year to have the Regional Offices identify and rank violations of the Water Use Act in their areas, and the DNRC will then have one of its attorneys work as the liaison with the local County Attorney Office to see what enforcement can take place.

PLEASE REMEMBER THAT ANY WATER USER CAN TAKE ANY OTHER WATER USER TO COURT AT ANY TIME IF THEY ARE NOT SATISFIED WITH HAVING THE DNRC INVESTIGATE THE MATTER. THAT HAS BEEN THE HALLMARK OF THE PRIOR APPROPRIATION DOCTRINE.

Pre – 1973 v. Post-1973 Water Right Fights

Pre-1973 – hard for DNRC to get involved.

Until the adjudication is over, no one will know who has the better water right – the Water Court has to decide and issue a decree.

Under Mont. Code Ann. § 85-2-406 where pre-73 water rights are involved, the parties can seek injunctive relief in the district court, and then have the district court certify the issue of the pre-1973 water rights to the Water Court.

By law (Mont. Code Ann. § 85-2-406(2)(b), the Water Court must make deciding those cases a priority.

After the Water Court decides the case, it sends it back to the district court, and the district court settles the enforcement dispute between the parties.

Under Mont. Code Ann. § 85-2-406, two water users can have their dispute certified to the Water Court, or the entire tributary 2+ to 50+ or more. Prior to that change in the law the Water Court stated it was not bound by district court litigation.

Adjudication

Now the end of the ADJUDICATION is in sight (Mont. Code Ann. § 85-2-270(2)).

All claims are to be examined by June 30,2015

All water right decrees to be issued by June 30,2020

Compact Commission sunsets on July 1,2009

Water Commissioners

Old decrees can be enforced, or new temporary or preliminary decrees can be enforced when all of the objections have been filed and hearing held by the Water Court.

Can be appointed by the district court upon petition or on the court's own volition, sometimes with the involvement of the DNRC. Mont. Code Ann. § 85-5-101.

Water commissioners have arrest powers – Mont. Code Ann. § 85-5-108.

Again, courts can hold water users in contempt of court for interfering with a water commissioner.

Water users who don't think the water commissioner is properly delivering water can file a dissatisfied water user petition. Mont. Code Ann. § 85-5-301. Judge hears the matter and tells the water commissioner what to do, and commissioners can be held in contempt of court for not following court's orders. Mont. Code Ann. § 85-5-109.

Water user private remedies

Water users can always take another water user to court.

Injunctive relief (Mont. Code Ann. § 27-19-201 – water user has to have a better water right, show that they made a call, that they are still not getting water, and that they are being irreparably harmed.

Water users can also sue for damages – lost crops, etc.

HB 20 (2007) – provides for the mandatory award of attorney fees if a water user who clearly has water rights obtains an injunction against someone clearly using water without a water rights.

If an injunction is granted, the judge **MUST** award attorney fees.

HB 20 **EMPOWERS** local water users to police illegal water uses on their streams and not go broke doing it. DNRC pushed for this legislation.

DNRC can investigate who has a valid water right and who does not, and can be subpoenaed to testify – a substantial benefit for water users.

Good remedy for use against **ILLEGAL PONDS**, and a good remedy against repeat offenses. If new people keep moving into the same house and keep violating, the downstream senior can keep going to court to stop it without going broke.

After an injunction is granted, further violations are matters between the judge and the violator – contempt of court applies.

Water Court involvement in enforcement

The Water Court helps water commissioners by assembling the indexes of water rights needed in enforcement.

The Water Court does **NOT** enforce water rights – the local district courts do. Sometimes water right holders amend their water right claims during enforcement of decrees – that's why it is difficult to get involved in pre-1973 water right disputes until the adjudication is completed.

Mediation

A water user can petition the district court pursuant to Mont. Code Ann. § 85-5-110 for the appointment of a water mediator.

It is important to know that the mediator does not have the power to order any water user to do anything, but rather would be able to discuss proposed solutions. The DNRC has a list of mediators who have attended educational programs specifically offered for water mediators. This option may represent the best way for water users to start talking about a solution as an alternative to expensive and time-consuming litigation. How fast a mediator is appointed depends on the local district court. Although this may not represent the fastest solution, it may represent the one that leaves water users able to still talk with their neighbors when a matter is finally resolved.

Waste of water

The DNRC has jurisdiction over water users wasting water. Mont. Code Ann § 85-2-114.

Future of Enforcement Statewide

HAVING A *COMPLETED ADJUDICATION* WITH ENFORCEABLE DECREES IS THE BIGGEST FACTOR IN IMPROVING ENFORCEMENT ACROSS MONTANA.

ONCE ALL STREAMS ARE DECREED, WATER COMMISSIONERS CAN BE APPOINTED, AND WATER CAN BE DISTRIBUTED IN PRIORITY.