

Don MacIntyre WPIC work group 5-12-08

85-2-114. Judicial enforcement. (1) If the department ascertains, by a means reasonably considered sufficient by it, that a person is wasting water, using water unlawfully, preventing water from moving to another person having a prior right to use the water, or violating a provision of this chapter, it may, after reasonable attempts have failed to obtain voluntary compliance as provided in subsection (4), petition the district court supervising the distribution of water among appropriators from the source to:

(a) regulate the controlling works of an appropriation as may be necessary to prevent the wasting or unlawful use of water or to secure water to a person having a prior right to its use;

(b) order the person wasting, unlawfully using, or interfering with another's rightful use of the water to cease and desist from doing so and to take steps that may be necessary to remedy the waste, unlawful use, or interference; or

(c) issue a temporary, preliminary, or permanent injunction to prevent a violation of this chapter. Notwithstanding the provisions of Title 27, chapter 19, part 3, a temporary restraining order must be granted if it clearly appears from the specific facts shown by affidavit or by the verified complaint that a provision of this chapter is being violated.

(2) Upon the issuance of an order or injunction, the department may attach to the controlling works a written notice, properly dated and signed, setting forth the fact that the controlling works have been properly regulated by it. The notice constitutes legal notice to all persons interested in the appropriation or distribution of the water.

(3) The department may also direct its own attorney or request the attorney general or county attorney to bring suit to enjoin the waste, unlawful use, interference, or violation. The county attorney may prosecute under 85-2-122(1) or bring an action under 85-2-122(2) without being requested to do so by the department. The attorney general and a county attorney are subject to the voluntary compliance provisions of subsection (4).

(4) The department shall attempt to obtain voluntary compliance through warning, conference, or any other appropriate means before petitioning the district court under subsection (1). The attempts to obtain voluntary compliance under this subsection must extend over a period of at least 7 days and may not exceed 30 working days.

(5) If a person requests that the department take action under subsection (1), the department may not take action unless the person requesting the action agrees:

(a) to participate as a party in any legal action initiated by the department, or

(b) to pay the cost and attorney fees, at the prevailing rate charged by agency legal services bureau, of the department's attorney, the attorney assigned by the attorney general, or the attorney assigned by the county attorney to seek any relief under subsection (1). If relief is granted under subsection (1), the person must be awarded reasonable costs and attorney fees.