

Standard Operating Procedure of the Office of the State Engineer

Consent Agreement Method for Resolving Unauthorized Taking and Sale of Waters of the State

Due to the increased scrutiny of industrial water sales and the findings of a legislatively mandated performance audit of the Water Appropriations Division, auditors and the state legislature have indicated that minimal State fines for violations of State water appropriation laws by industrial water sellers serving the oil industry are an inadequate deterrent to violation. Concern is that if minimal fines are imposed, when such large profit potential exists for unauthorized taking, the appearance that a water source can be pumped with impunity will determine the business decisions of potential water sellers. It has been determined that a “profit” based penalty is needed to ensure that violations of State law will not result from a simple business decision to ignore parameters of a permit, or not obtain a permit, and just pay the fine. It is also considered desirable that criminal prosecution and loss of water appropriation rights be avoided whenever possible.

Based on these concerns, as an alternative to criminal, civil and regulatory action available under statute, the State Engineer offers the alternative of a consent agreement based upon the following principles: 1) The violator should not “profit” from the unauthorized taking and sale of the waters of the state; and 2) there should be a net-zero impact on the resource and no impact to prior appropriators or pending water permit applications. If possible, the violations should be dealt with in a consensual manner using the above principles to guide the formation of the consent agreement.

STATE LAWS PERTAINING TO WATER USE AUTHORITY AND CRIMINAL AND CIVIL PENALTIES

- **61-04-29. Enforcement.**
- The *state engineer has full power and authority* to institute, maintain, and prosecute to determination in an administrative proceeding or any of the courts of this state, or in any of the federal courts, any and all actions, suits, and special proceedings that may be necessary to *enjoin unauthorized use of water*, to enforce an order of the state engineer or the state water commission, or to otherwise administer the provisions of this chapter. Notwithstanding any other provision of law, the state engineer may issue administrative orders requiring the immediate cessation of water use when the state engineer has a reasonable belief that such use is unauthorized or continued use will damage the rights of prior appropriators.
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- **61-03-23. Penalties - Civil.**
- In addition to criminal sanctions that may be imposed pursuant to law, a person who violates any provision of this title or any rules adopted under this title *may be assessed a civil penalty not to exceed twenty-five thousand dollars for each day the violation occurred and continues to occur and* may be required by the state engineer to *forfeit any right to the use of water*. The civil penalty for violation of an irrigation appropriation permit may not exceed five thousand dollars for each day the violation occurred and continues to occur. The civil penalty or forfeiture of a right to use water may be adjudicated by the courts or by the state engineer through an administrative hearing under chapter 28-32.
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- **61-04-30. Penalty - Criminal.**
- A person who constructs works for an appropriation, or diverts, impounds, withdraws, or uses a significant amount of water from any source without a permit specifically authorizing such action, except as otherwise provided in section 61-04-02; who violates an order of the state engineer; who fails or refuses to install meters, gauges, or other measuring devices or to control works; who violates an order establishing corrective controls for an area or for a source of water; who violates the terms of the permit; or who knowingly makes a false or misleading statement in a declaration of existing rights is guilty of a class A misdemeanor. As used in this section, "significant amount of water" means any amount of water in excess of that allowed in a valid water permit, or any amount of water in excess of the needs for domestic and livestock purposes where no permit has been issued. The state engineer shall inform the tax commissioner of violations of industrial use permits.