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THE PUBLIC INTEREST - A MATTER OF DISCRETION?

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THE PUBLIC INTEREST - A MATTER OF DISCRETION?

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Introduction

The laws of most western states now provide for consideration of the public interest in decisions on water allocation and transfers of existing uses. The administrative body of the particular state, whether an individual, a board or a water court is given responsibility to not only protect the rights and interests of an applicant and other directly-affected water users but the public interest and trust as well. The difficulty faced by these administrative bodies is assuring that the public interest and trust is adequately identified and considered in administrative proceedings.

Historical Perspective

As the West was settled and developed, laws and institutions were put in place to assure development of water resources and the protection of property rights in water. Initially, it was considered that the only parties having rights worth protecting as a new uses was being considered were the applicant and other directly-affected present water users. Little, if any, consideration was given to the effects of a proposed new or changed use upon the environment or other matters of interest to the general populace.

This is no longer the situation as most states now have laws which are intended to consider and protect the environment and the

public interest in the public trust resources. Such laws include instream flow appropriations, stream channel protection, and state environmental protection acts. Most prior appropriation statutes also now require the administrator to consider the impact of the project on the public interest.

The Appropriation Process

In general, when anyone wishes to establish a new right to divert water from a western stream or to transfer an existing use of water an application is filed with the state administrative agency. This is often the state water engineer or equivalent. Notice of the pending application is published and there is opportunity for the filing of formal protests and consideration of the matter in a hearing proceeding. The administrator is charged (§42-203A, Idaho Code, as a typical example) with determining as a result of such hearing process whether:

- 1) the water supply is sufficient for the purpose for which it is sought to be appropriated,
- 2) the intended diversion and use will or will not interfere with other existing water rights,
- 3) the application is filed in good faith and not for delay or speculation or as an attempt to monopolize the available resource, and the applicant has sufficient financial resources to make the development, and
- 4) approval would conflict with the public interest.

As part of the record before the administrator, the applicant has to show that the quantity of water being sought is reasonable for the intended use. Experience with statutory and case law provides a methodology for determining the amount of water to which a water user is reasonably entitled for various uses. For irrigation, a "duty of water" which specifies the reasonable and

efficient irrigation requirements for the crops normally grown in an area has been the standard. Courts have awarded 3, 4 or 5 acre feet of water per acre of land benefitted as the general entitlement for agricultural use. We have also used the "miner's inch" measure which varies somewhat from state to state as the rate of authorized diversion. In most states the limitation is one miner's inch per acre of land to be served. (In Idaho one miner's inch = 1/50 cfs.)

Other standards or measures have been employed for other uses. Municipal water supply has been based on gallons per day per domestic connection; livestock watering requirements are determined by the type of livestock served. Range cattle need less than dairy stock, for example.

Even in the area of instream flows for fish and wildlife purposes there have been some standards and procedures developed which allow for some quantification of the amount of water necessary. The Tennant (Montana) Method or the IFIM (Instream Flow Incremental Method) procedures have been used to justify and quantify instream flow appropriations under state law for the protection of fish and wildlife values.

The record is fairly easy to make on water supply, interference with other uses and the applicant's financial ability and serious intent. But there is considerable difficulty in making an adequate record on the last criteria for consideration, whether the proposed use would conflict with the public interest.

Determining the Public Interest

What is the public interest? Who speaks for or can represent it in a formal hearing proceeding? Whose judgement will prevail in a conflict between different interest groups or publics expressing opposing views as to what would bring the greater public value?

There are countless numbers of interest groups in the nation and in each state. The larger, more visible ones seem to have great financial resources which enable them to appear formally or informally in any proceeding when they choose to do so. One of these groups usually is considered as the "lead" entity in the matter. I sometimes picture in my mind a war room where representatives of these national organizations meet periodically to map strategy and decide which will take the lead on a particular issue. Some people are public organizers and for every cause, there suddenly appear the local "Friends of Mud Lake" organizations. But none of these entities represents the public interest or, as in Idaho Law, the local public interest. They are special interest groups which speak for only some aspect of the overall public interest. What is the public interest?

In a proceeding in my state about six years ago the Idaho Supreme Court defined public interest by reference to Idaho and Alaska statutory law. Alaska had set forth these criteria for judging the public interest:

- (1) The benefit to the applicant resulting from the proposed appropriation;
- (2) the effect of the economic activity resulting from the proposed appropriation;
- (3) the effect on fish and game resources and on public recreational opportunities;
- (4) the effect on public health;
- (5) the effect of loss of alternative uses of

water that might be made within a reasonable time if not precluded or hindered by the proposed application; (6) harm to other persons resulting from the proposed appropriation; (7) the intent and ability of the applicant to complete the appropriation; and (8) the effect on access to navigable or public waters. ALASKA STAT. §46.15.080(6)(1)-(A)(1987).

Using the Alaska law and Idaho statutes for administrative programs designed to protect the environment, such as the stream channel protection act and the minimum streamflow law, the Idaho Supreme Court in Shokal v. Dunn, 109 Idaho 330, 338-339 (1985) defined "the public interest" in this fashion:

Clearly, the legislature in §42-203A must have intended the public interest on the local scale to include the public interest elements listed in §42-1501: "fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality."

...

Other elements which common sense argues ought to be considered part of the local public interest ... include the proposed appropriation's benefit to the applicant, its economic effect, its effect "of loss of alternative uses of water that might be made within a reasonable time if not precluded or hindered by the proposed appropriation," its harm to others, its "effect upon access to navigable or public waters," and "the intent and ability of the applicant to complete the appropriation."

Several other public interest elements, though obvious, deserve specific mention. These are: assuring minimum stream flows, as specifically provided in I.C. §42-1501, discouraging waste, and encouraging conservation.

The above-mentioned elements of the public interest are not intended to be a comprehensive list ... By using the general term "the local public interest," the legislature intended to include any locally important factor impacted by proposed appropriations.

Of course, not every appropriation will impact every one of the above elements. Nor will the elements have equal weight in every situation. The relevant elements and

their relative weights will vary with local needs, circumstances, and interests. For example, in an area heavily dependent on recreation and tourism or specifically devoted to preservation in its natural state, Water Resources may give great consideration to the aesthetic and environmental ramifications of granting a permit which calls for substantial modification of the landscape or stream.

The determination of what elements of the public interest are impacted, and what the public interest requires, is committed to Water Resources' sound discretion. (Emphasis added)

From this decision I could list elements to be considered in a determination of the public interest in Idaho as, at least, these matters:

- fish and wildlife habitat
- aquatic life
- recreation
- aesthetic beauty
- transportation and navigation
- water quality
- benefit to the applicant
- economic effect
- loss of alternative uses
- harm to others
- effect upon navigation and public waters
- intent and ability of the applicant to complete the appropriation
- assuring minimum stream flows
- discouraging waste
- encouraging conservation
- any locally important factor

This is, obviously, not an all-inclusive list of factors which might be considered. It is the role of the hearing officer to attempt to obtain a record from which the decision maker can balance consideration of all of these and any other important factors.

Obviously, if you were an applicant, you could arrange to present information on some but probably not all of these elements

at a hearing on the matter. If the applicant carries the burden of proof that the proposed project will not conflict with the public interest that burden may become overwhelming. In a 1988 case the Idaho Supreme Court, relying on its previous decision in Shokal found:

In this case the department was required to resolve conflicting facts and local interests and apply its statutory authority in deciding this fact-specific case. The department did this and found that the applicants had not met their burden of proof and that it was "not in the public interest" to use the water from this geothermal aquifer to irrigate crops.

...

the department's determination that it was not in the public interest to use the water from this geothermal aquifer to irrigate crops is not "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." I.C. § 67-5215(g)(5).

But should the applicant carry the burden of presenting a prima facie case on all the public interest considerations as part of his case in support of his application? Who is responsible, for example, for assuring that the record contains sufficient information on aesthetic beauty to sustain a decision approving or rejecting an application which could affect something that the public enjoys looking at?

Our administrative rules provide the following:

The applicant shall bear the initial burden of coming forward with evidence for the evaluation of ... any factor affecting local public interest of which he is knowledgeable or reasonably can be expected to be knowledgeable. The protestant shall bear the initial burden of coming forward with evidence for those factors ... which the protestant can reasonably be expected to be more cognizant than the applicant. IDWR Admin. Rules, Appropriation 4,4,2,2.

As previously indicated there are numerous organization which claim to speak for the public interest. But neither the Sierra Club, nor the Audubon Society, nor the National Wildlife Federation, nor American Rivers nor the National Water Resources Association nor any other single national or local entity can claim that it's views represent all elements of the public interest.

Accommodating Third Parties in the Hearing Process

An applicant and a formal protesting party (another water user, for example) are automatically given party status in a hearing on a new appropriation or proposed water transfer. But what about third parties, those who find that the proposed project will disrupt their lifestyle, not their vested property rights.

Several of the participants in this seminar are members of a national committee which is finishing a report on Western Water Management Change - water transfers, water marketing and third party impacts. Committee member Bonnie Colby made the following comments (Colby, Department of Agricultural Economics, University of Arizona, unpublished manuscript, 1991) concerning the abilities and needs for some third parties, particularly minority groups and economically-disadvantaged persons, to participate in the public process:

State and tribal governments who make the rules regarding who may participate in the water transfer process can go to varying degrees of effort to facilitate third party participation. An essential follow-up to decisions regarding which interests should be allowed to influence the process, involves determining the appropriate degree of influence and considering how their participation can be made more effective. The following four items illustrate different degrees of government effort in facilitating third party participation.

1. **Permission to be present and articulate concerns.** This simply gives representatives of a particular interest the opportunity to be present at hearings and to voice their concerns.

2. **Legal ability to influence transfer conditions and to delay transfer approval.** A third party interest may be allowed to voice their concerns but without some bargaining power they cannot effectively influence the outcome.

3. **Designated representation.** This assigns a particular government agency the task of representing an interest. For instance, some state Game and Fish Departments have been assigned some responsibilities for assessing impacts on instream flows. However, if the interest may only be represented by a specific government unit this can effectively limit participation on behalf of that interest.

4. **Financial and legal assistance to conduct investigations and collect evidence regarding transfer impacts and to hire attorneys and other experts.**

Of equal but opposite concern is how to accommodate large numbers of persons or entities each of whom file formal protests and are, therefor, entitled to party status. We can all sympathize with Michael Turnipseed, State Engineer of Nevada, who has received more than 3,600 formal protests to the Las Vegas Valley Water District's 146 applications to divert 860,000 acre feet of ground water from three adjoining counties in southern and eastern Nevada. Many of those protestants have expressed similar public interest concerns but each could, conceivably, be entitled to separate party status at the hearings which the state is beginning to hold. Unless these can be organized into a combined presentation the process will become bogged down by the sheer weight of the presentation and cross examination of witnesses.

Last year an Idaho District Court issued a decision in a case in which we were challenged for having allowed "public interest witnesses" who had not otherwise been admitted to the proceeding as formal parties to testify at a hearing on proposed amendments to permits, Hardy v. Higginson, No 92599 (4th Jud. Dist., Ada Co., Idaho, July 23, 1990) appeal docketed, No. 19262 (Idaho Sup. Ct. Apr. 19, 1991). The district judge at page 26 of the opinion ruled that:

While protests, or parties otherwise requesting to be heard, should demonstrate some nexus to the issues in controversy, it is not required that they demonstrate that they are adjacent property owners or actual water users in order to be heard. The agency has discretion to allow the legitimate voice of environmental concerns to participate. The conduct of hearings at the agency level should be left to the discretion of the agency; so long as no fundamental infringement of due process occurs, there is no reason to artificially impose technical judicial standards on such proceedings... Since the IDWR was entitled to consider the elements of local public interest, it would not appear to make any difference whether the protestants were heard as parties to the proceedings, or merely as witnesses. (emphasis added)

The case involved the proposed construction of a commercial fish hatchery on Box Canyon Creek, one of the several spring-fed areas comprising the Thousand Springs scenic area. Several permits had been issued about 20 years previous and the permittee was proposing to add new points for diversion of the water on some BLM public lands. With the environmental awakening which has occurred here as elsewhere in the country, his proposed amendment was protested on the basis that it would have a negative impact on the public interest. Many members of the general public wished to express their views on the matter so we allowed them to testify as

"public interest witnesses" without requiring status as intervenors. At least one court has found this practice to be an acceptable means of obtaining public input to the decision process, particularly from large numbers of the public who wish to be heard.

Multiple Levels of Determination of the Public Interest

There are some state water programs, such as comprehensive river basin planning, which require various levels of review and approval. These are mentioned here because they can include the adoption of plans, regulations and laws which affect the exercise of property and other rights. There may be required approval by an administrator, and a board or commission plus the legislature and the governor. How then is the public interest determined and by which body?

One such program is the Idaho protected rivers program (§§ 42-1734A-I, Idaho Code). This program was established in response to the provisions of the Electric Consumers Protection Act, Pub. L. 99-495, 100 Stat. 1234 (1986) and actions of the Northwest Power Planning Council under its fish protection program. The state law contemplates planning studies within each river basin and the adoption of a comprehensive plan for the present and future use of water resources. As part of that plan the Water Resource Board may designate river reaches as either "natural" or "recreational" and thereby prohibit activities on those rivers such as construction of dams and diversions, hydropower generation, dredge and placer mining, sand and gravel extraction and stream channel alterations. Once the plan is adopted by the Board it must be submitted to the

legislature where any protected river designations must be approved "by law" (§ 42-1734B(8), Idaho Code) which, of course, requires both legislative and gubernatorial concurrence.

Of interest in the context of this discussion is the question of how and by whom the public interest is determined. The statement of purpose for the act provided:

...Selected rivers possessing outstanding fish and wildlife, recreational, aesthetic, historic, cultural, natural or geologic values should be protected for the public benefit and enjoyment;... (§42-1730(7), Idaho Code).

In a recent matter, The Payette River Corridors Plan, the staff and members of the Board spent two and one-half years in preparation of a draft plan during which ten meetings were held with a local advisory committee. There were 5 public information meetings on plan drafts and 6 formal hearings throughout the area. At the hearings 918 persons were present of whom 182 made formal presentations of views and opinions. In addition, some 1015 written statements and petitions signed by hundreds of individuals and agency representatives were received and considered.

A plan which included protected recreational river designations was adopted. You would think that the public interest had been adequately served by this process. However, once it was submitted to the legislature questions concerning the prohibitions of such designations, particularly hydropower, resurfaced. Committees of the legislature held one joint hearing which lasted about four hours and a committee hearing for another four hours and finally passed a bill which approved the adopted plan which was

then signed by the governor. I would guess that through this process, the public interest in these reaches of the Payette River has been preserved and protected.

Summary

Determination of the public interest in administrative decisions is not an exact science. As people ask me how I would define the public interest I facetiously respond, "It is whatever I find it to be that I can get a court to agree with if someone appeals my decision." That may not be far from the truth.

THE PUBLIC INTEREST - A MATTER OF DISCRETION expresses what I believe the present state of the administrative practice to be. Some administrator, board or commission must make an initial finding. It is then up to the court to determine if they have abused that permitted discretion.

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