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Defining the Public Interest: Administrative Narrowing and Broadening of the Public Interest in Response to the Statutory Silence of Water Codes

Amber L. Weeks

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ABSTRACT

The majority of western states require state water agencies to deny applications for new appropriations and transfers that are not in the public interest. However, the majority of these states leave the public interest undefined. This article examines contrasting administrative responses to statutory silence in Nevada and Idaho. Ultimately, this article finds that statutory silence has historically led the Nevada State Engineer to narrowly interpret the public interest as water law. In contrast, the Idaho Department of Water Resources has broadly interpreted statutory silence beyond water issues, causing the Nevada Legislature to narrow the public interest definition in 2003. Statutory silence has resulted in both uncertain interpretation of the public interest and a disconnect between the public interest and public values. Consequently, this article calls for legislatures to define the public interest through a combination of statewide public interest criteria and ongoing input from regional planning groups.

INTRODUCTION

Sixteen of the 18 western states create an affirmative duty for state water agencies to deny new appropriations that are not in the public interest.[1] Ten western states require state agencies to deny water trans-

* J.D. Candidate, University of New Mexico School of Law, 2010. Ms. Weeks would like to thank her father, Dan Abercrombie, for advocating for water planning to ensure water availability for his grandkid's grandkids. Ms. Weeks would also like to thank Professor Reed D. Benson for his valuable feedback in developing this article.

1. ALASKA STAT. ANN. § 46.15.080(a)(4) (West, Westlaw through Apr. 2009 legislation); ARIZ. REV. STAT. ANN. § 45-153(A) (West, Westlaw through Apr. 2009 legislation); CAL. WATER CODE ANN. §§ 1253, 1255–1256 (West, Westlaw through 2009 Reg. Sess.); IDAHO CODE ANN. § 42-203A(5) (West, Westlaw through Apr. 15, 2009); KAN. STAT. ANN. §§ 82a-711(a)–(b) (West, Westlaw through 2008 Sess.); MONT. CODE ANN. § 85-2-311(3)(b) (West, Westlaw through 2007 Sess.) (using the phrase "reasonable use" but defining the term by listing typical public interest criteria); NEB. REV. STAT. § 46-234, -235(1), -235(2)(a)(iii), -235(4)(a) (West, Westlaw through 2008 legislation); NEV. REV. STAT. § 533.370(5) (West, Westlaw through May 2009 amendment); N.D. CENT. CODE ANN. § 61-04-06(4) (West, Westlaw through 2008); N.M. STAT. ANN. §§ 72-5-7, 72-12-3(E) (West,

fers that are not in the public interest.[2] However, only six states list criteria to define the public interest.[3]

Policy issues concerning the use of scarce water resources are at the heart of public interest considerations. Although traditional western water law principles consider who was first in putting the water to beneficial use,[4] statutory public interest factors can be used to recognize that a "beneficial" use may nonetheless conflict with public values. Statutory public interest factors weigh which "beneficial" use is the most consistent with public values when there is not enough water to fulfill all beneficial uses. States that have statutorily defined the public interest require state water agencies not only to consider traditional water law principles, but to also consider broader policy considerations of water use. Some examples of public interest considerations include recreation, preservation of

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Westlaw through Apr. 10, 2009) (using the phrase "public welfare"); OR. REV. STAT. ANN. §§ 537.153(2), 537.170(8) (West, Westlaw through 2009 Reg. Sess.); S.D. CODIFIED LAWS § 46-2A-9 (West, Westlaw through 2008 Reg. Sess.); TEX. WATER CODE ANN. § 11.134(b)(3)(C) (West, Westlaw through 2007 Reg. Sess.) (using the phrase "public welfare"); UTAH CODE ANN. § 73-3-8(1)(a)(iii), -8(1)(b)(i) (West, Westlaw through 2008 Sess.); WASH. REV. CODE ANN. § 90.03.290(3) (West, Westlaw through May 4, 2009); WYO. STAT. ANN. 41-3-931 to -932, 41-4-503 (West, Westlaw through 2008 Budget Sess.). Of the western states, only Oklahoma and Colorado do not statutorily require public interest review. However, the Colorado Supreme Court held that the Colorado Division of Water Resources has a "clear obligation to represent the public interest" in water rights decisions. *Bar 70 Enterprises, Inc. v. Tosco Corp.*, 703 P.2d 1297, 1304 (Colo. 1983).

2. IDAHO CODE ANN. § 42-222(1) (West, Westlaw through Apr. 15, 2009); KAN. STAT. ANN. § 82a-708b(a) (West, Westlaw through Apr. 2009 amendments) (requiring the same procedures for transfers as for new permits); MONT. CODE ANN. § 85-2-402(4) (West, Westlaw through 2009 Sess.) (using the phrase "reasonable use" but defining the term by listing typical public interest criteria); NEB. REV. STAT. § 46-294(1)(l) (West, Westlaw through 2008 legislation); NEV. REV. STAT. §§ 533.370(5), 533.345 (West, Westlaw through 2008 Sess.); N.M. STAT. ANN. §§ 72-12-7(A), 72-12B-1 (West, Westlaw through Apr. 10, 2009); S.D. CODIFIED LAWS § 46-2A-12 (West, Westlaw through 2008 Reg. Sess.); TEX. WATER CODE ANN. § 11.122(b) (West, Westlaw through 2007 Reg. Sess.) (requiring the same procedures for transfers as for new permits); UTAH CODE ANN. § 73-3-3(5)(a) (West, Westlaw through 2008 Sess.) (requiring the same procedures for transfers as for new permits). Alaska requires public interest review of transfers by regulation but not explicitly by statute. ALASKA ADMIN. CODE, tit. 11, § 93.930(b) –(f) (2008).

3. ALASKA STAT. ANN. § 46.15.080(b); KAN. STAT. ANN. 82a-711(b); MONT. CODE ANN. § 85-2-311(3)(b) (using the phrase "reasonable use" but defining the term by listing public interest criteria such as water quality and environmental impacts); NEB. REV. STAT. § 46-235(4)(b) (West, Westlaw through 1st Special Session 2009) (listing public interest factors to consider in deciding applications for certain new appropriations); N.D. CENT. CODE ANN. § 61-04-06(4); OR. REV. STAT. ANN. § 537.170(8). Although California does not list specific public interest criteria, the public interest statute requires the Department of Water Resources to consider water resources plans in determining the public interest. CAL. WATER CODE ANN. § 1256.

4. *See infra* notes 11–16 and accompanying text.

fish and wildlife resources, water conservation, water quality, protecting minimum stream flows, and public health.[5]

In the absence of legislative guidance, definition of the public interest is implicitly delegated to state water agencies with judicial review by courts. Three major issues arise when states do not statutorily define the public interest. First, agencies can avoid considering the public interest. Public interest statutes require state water agencies to consider the public interest as an independent basis of approval or denial;[6] however, in the absence of legislative definition, state agencies may reduce the public interest to a summation of other statutorily-defined water law principles,[7] or fail to consider the public interest at all.[8] Secondly, state agencies may make public interest decisions that are entirely disconnected from public values. Statutory silence implicitly delegates the weighing of public policy considerations underlying the public interest to state agencies. However, public interest considerations often involve non-technical, public policy issues that are not squarely within the technical expertise of state water agencies,[9] but are instead more appropriately decided by elected legislative bodies and local communities. Finally, statutory silence creates uncertainty for water users in how state agencies and courts will define the public interest. As this article illustrates, statutory silence can result in either broad or narrow definitions of the public interest, both of which may conflict with public values.

This article illustrates how statutory silence can produce vastly different interpretations of the public interest by contrasting the judicial and administrative responses to statutory silence in Nevada and Idaho. Part I describes the law governing water permits and transfers in the West and the significance of public interest statutes within that framework. Part II analyzes the Nevada State Engineer's narrow interpretation of the public interest in response to statutory silence. Part III analyzes the

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5. Susanne Hoffman-Dooley, *Determining What Is in the Public Welfare in Water Appropriations and Transfers: The Intel Example*, 36 NAT. RESOURCES J. 103, 113 (1996).

6. *See infra* note 26 and accompanying text.

7. Hoffman-Dooley, *supra* note 5, at 119–20.

8. In Wyoming, plaintiffs recently sued the State Engineer for failing to consider the public interest in appropriating groundwater for extraction of coalbed methane. *William F. West Ranch v. Tyrrell*, 206 P.3d 722, 729–30 (Wyo. 2009). The Wyoming Supreme Court upheld the district court's dismissal of the plaintiffs' claims, finding that they were "too amorphous to be justiciable." *Id.* at 730. Although the court acknowledged that statutory and constitutional provisions seemed to require the State Engineer to consider the public interest, the court reasoned that it could not be assured that such a finding would "have a practical effect on the plaintiffs." *Id.* at 732–33. The court further reasoned that it "[i]s not the function of the judicial branch to pass judgment on the general performance of other branches of government." *Id.* at 733.

9. Hoffman-Dooley, *supra* note 5, at 124.

Idaho Department of Water Resources' (IDWR) broad interpretation of the public interest in response to statutory silence and the subsequent narrowing of the public interest in response to legislative guidance in 2003. Part IV concludes with a comparison of Nevada and Idaho's different approaches and a recommendation for state legislatures to define the public interest through a combination of statewide public interest criteria and ongoing input from regional planning groups.

I. THE PUBLIC INTEREST IN WATER PERMITTING AND TRANSFERS IN THE WEST

To understand why statutory public interest requirements are needed, one must first understand traditional principles of the law governing water permits and transfers in the West. Western water law is based upon the doctrine of prior appropriation.[10]

The "bedrock principle" of prior appropriation in the West is that "beneficial use is the basis, the measure, and the limit of a water right."[11] Beneficial use as a basis of the right means that in order to create a water right, a person must first either apply or demonstrate intent to apply the water to a purpose that is recognized as beneficial, such as traditionally recognized irrigation, domestic, or industrial uses.[12] In recent years, some states have expanded beneficial use to also recognize less traditional uses such as recreation, aesthetics, and wildlife habitat.[13] Beneficial use as the limit and measure of a right means that the quantity of a water right is limited to the amount of water that can be reasonably used for that purpose.[14] Although in theory "reasonable use" means that a use cannot be wasteful, courts rarely limit the measure of water rights based

10. In general, western states follow the prior appropriation doctrine for surface water, while eastern states follow the riparian doctrine. A. DAN TARLOCK ET AL., WATER RESOURCE MANAGEMENT: A CASEBOOK IN LAW AND PUBLIC POLICY 76, 112 (6th ed. 2009). California follows a hybrid approach for surface water in which riparian rights exist alongside prior appropriation rights. *Id.* at 303. Most western states also follow the doctrine of prior appropriation for groundwater, although some high water-use states, including California, Nebraska, and Texas, do not. A. Dan Tarlock, *Putting Rivers Back in the Landscape: The Revival of Watershed Management in the United States*, 14 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 1059, 1073 (2008).

11. Reed D. Benson, *Rivers to Live By: Can Western Water Law Help Communities Embrace Their Streams?*, 27 J. LAND RESOURCES, & ENVTL. L. 1, 4–6 (2007) (internal quotation marks omitted).

12. *See id.* at 4.

13. Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. 919, 928 (1998).

14. *See* Benson, *supra* note 11, at 6.

on wastefulness in practice.[15] Consequently, "water rights in the West generally last forever."[16]

A corollary to beneficial use is the principle of "first in time, first in right."[17] This principle provides protection to earlier beneficial uses over later ones, meaning that if there is not enough water for all water users, the "oldest rights are fully satisfied before the more recent ones get any water at all."[18]

The process for acquiring water rights has evolved from a traditional action-oriented approach to a modern statutory approach. Under traditional prior appropriation principles, a water right was created if a water user demonstrated the following: (1) intent to appropriate water; (2) diversion of water from its natural course; and (3) the application of water to a beneficial use.[19] Now, western statutes codify traditional prior appropriation principles and specify conditions for obtaining new water rights or changing water uses.[20] Every prior appropriation state except for Colorado has delegated quasi-judicial authority to state administrative agencies or state engineers to administer both new allocations, or permits, and changes in water rights, or transfers.[21] State water agencies have the discretion to either grant or deny new permits based upon whether water is available and whether a new water allocation would impair pre-existing water rights.[22] Water permits are granted for a specific place and purpose. If a user wants to change the point where the water is diverted, the place where the water is used, or the purpose for which the water is used, the water user must file a transfer application.[23] State water officials have the discretion to either grant or deny the transfer application based upon whether the change would impair existing rights.[24]

Even if an applicant meets the threshold requirements of water availability and lack of impairment to existing rights for new permits or transfers, most western states give state water officials the discretion to deny new permits and transfers that are not in the public interest.[25] Pub-

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15. Neuman, *supra* note 13, at 928.
16. Benson, *supra* note 11, at 6.
17. *Id.*
18. *Id.*
19. A. Dan Tarlock et al., *supra* note 10, at 158.
20. *Id.* at 294.
21. *Id.* at 295. In Colorado, state water courts administer water acquisitions and transfers. *Id.* at 304.
22. *See id.* at 308.
23. *Id.* at 367.
24. *Id.*
25. *Id.* at 319; *see also supra*, note 1 and accompanying text.

lic interest statutes require state water agencies not only to consider traditional water law principles, but to also consider the broader policy considerations of water use. Under public interest statutes, state agencies have an affirmative duty to grant new permits and transfers only if the proposed use will be in the public interest.[26] However, only six public interest statutes define what the public interest actually is.[27] Some examples of statutorily-defined public interest considerations include recreation, preservation of fish and wildlife resources, water conservation, water quality, protection of minimum stream flows, and public health.[28] The majority of legislatures, however, give broad discretion to state water agencies to determine the public interest, rather than developing a list of public interest criteria.[29]

Public interest review allows water agencies to allocate limited water resources to the uses that society values most. In the West, water resources are scarce and often over-allocated.[30] To compound water scarcity issues, the distribution of water between different uses does not always align with the uses that society presently values most.[31] Public interest review allows state water resource agencies to recognize that not all "beneficial" uses are equally beneficial, and to prioritize limited water resources to those uses that are most reflective of public values. Although public interest review does not disrupt past water allocations unless someone is seeking to transfer those rights, meaningful public interest review of new allocations and transfers creates a mechanism for directing future water uses toward new public values.

II. THE NEVADA APPROACH: NARROWLY INTERPRETING THE PUBLIC INTEREST IN RESPONSE TO STATUTORY SILENCE

Nevada was one of the first states to require public interest review of water permit applications, adopting a public interest requirement in 1905.[32] However, the Nevada Legislature has never defined the meaning

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26. Douglas L. Grant, *Two Models of Public Interest Review of Water Allocation in the West*, 9 U. DENV. WATER L. REV. 485, 486 (2006).

27. *See supra* note 3 and accompanying text.

28. Hoffman-Dooley, *supra* note 5, at 113.

29. TARLOCK, *supra* note 19, at 337; *see also* notes 1–3 and accompanying text.

30. Sarah B. Van De Wetering & Robert W. Adler, *New Directions in Western Water Law: Conflict or Collaboration?* 20 J. LAND RESOURCES, & ENVTL. L. 15, 19 (2000).

31. *Id.*

32. An Act Amendatory of and Supplemental to an Act Providing for the Cooperation of the State of Nevada with the Secretary of the Interior of the United States in the Construction and Administration of Irrigation Works, ch. XLVI, § 25, 1905 Nev. Stat. 68 (origi-

of the public interest.[33] The Nevada public interest provision simply provides that the State Engineer must reject a new permit or transfer application if the proposed use or change "threatens to prove detrimental to the public interest."[34] For temporary transfers, the Nevada provision simply states that the State Engineer shall approve the transfer if, in addition to other requirements, the "temporary change is in the public interest."[35] By failing to statutorily define the public interest, the Nevada Legislature implicitly delegated definition of the public interest to the State Engineer, with judicial review by the courts. This Part discusses administrative and judicial responses to the statutory silence of the Nevada public interest requirement. This Part then analyzes how the State Engineer has applied the public interest provision in practice, and concludes with a discussion of the future of public interest review in Nevada.

A. The State Engineer's Narrow Interpretation of the Public Interest Statute

The Nevada State Engineer has narrowly interpreted the public interest to include only those public values already codified in other water law statutes. From 1905 until 1992, the Nevada State Engineer applied the public interest without developing regulations to define the public interest. As early as 1906, the State Engineer interpreted the public interest provision as "giving him but little power" and considered it his duty to grant applications in the order of their receipt if unappropriated water existed and the use was lawful.[36] Finally, in 1992, the Nevada Second Judicial District Court forced the State Engineer to define the public interest by remanding a ruling that granted intrabasin and interbasin transfers of 28,588 acre feet of water annually from the Honey Lake Basin to a metropolitan area.[37] The court instructed the State Engineer to make additional public interest findings in light of the Nevada Legislature's

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nally using the phrase "public welfare") (current version at NEV. REV. STAT. ANN. § 533.370(5) (West, Westlaw through May 2009 amendment)); Grant, *supra* note 26, at 488.

33. Nevada is not alone in failing to define statutory public interest provisions. Other states that have adopted public interest provisions but failed to statutorily define them include Arizona, California, Idaho, New Mexico, South Dakota, Texas, Utah, Washington, and Wyoming. *See supra* notes 1–3 and accompanying text.

34. NEV. REV. STAT. ANN. § 533.370(5) (West, Westlaw through May 2009 amendment) (codifying the public interest provision for both new permit and transfer applications).

35. NEV. REV. STAT. § 533.345(2) (West, Westlaw through 2008 Sess.).

36. R.P. TEELE, U.S. DEPT. OF AGRIC., THE STATE ENGINEER AND HIS RELATION TO IRRIGATION 76 (1906).

37. *See Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 745, 918 P.2d 697, 698 (1996).

failure to define the public interest.[38] In the State Engineer's Supplemental Ruling on Remand, the State Engineer commented that "although Nevada law does not define public interest, public interest considerations are found throughout [Nevada water law statutes]."[39] The State Engineer reasoned that the legislature established principles of beneficial use, encouraged efficient use of Nevada's limited water resources, and recognized the use of water for wildlife, wetlands, fisheries, livestock watering, and recreational purposes.[40] Consequently, the State Engineer found that the legislature had "provided substantial guidance as to what it determines to be in the public interest."[41]

The State Engineer then identified thirteen public interest principles that are each cited to another section of Nevada water law,[42] in effect negating the public interest requirement. The thirteen principles are

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38. Applications 53407 et al. to Change the Place of Use and Manner of Use in Honey Lake Valley, Supplemental Ruling on Remand, No. 3787A, at 9 (Nev. State Eng'r Oct. 9, 1992) (affirmed in *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 918 P.2d 697 (1996)).

39. *Id.*

40. *Id.* at 9–11.

41. *Id.* at 11.

42. The 13 public interest principles are as follows: (1) "An appropriation must be for a beneficial use" (NRS 533.030(1)); (2) "[t]he applicant must demonstrate the amount, source and purpose of the appropriation" (NRS 533.335); (3) "[i]f the appropriation is for municipal supply, the applicant must demonstrate the approximate number of persons to be served and the approximate future requirements" (NRS 533.340(3)); (4) "[t]he right to divert ceases when the necessity for the use of water does not exist" (NRS 533.045); (5) "[t]he applicant must demonstrate the magnitude of the use of water, such as the number of acres irrigated, the use to which generated hydroelectric power will be applied, or the number of animals to be watered" (NRS 533.340); (6) "[i]n considering extensions of time to apply water to beneficial use, the State Engineer must determine the number of parcels and commercial or residential units which are contained or planned in the area to be developed, economic conditions which affect the availability of the developer to complete application of the water to beneficial use, and the period contemplated for completion in a development project approved by local governments or in a planned unit development" (NRS 533.380(4)); (7) "[f]or large appropriations, the State Engineer must consider whether the applicant has the financial capability to develop the water and place it to beneficial use" (NRS 533.375); (8) "[t]he State Engineer may also cooperate with federal authorities in monitoring the development and use of the water resources of the State" (NRS 532.170(1)); (9) "[the State Engineer] may cooperate with California authorities in monitoring the future needs and uses of water in the Lake Tahoe area and to study ways of developing water supplies so that the development of the area will not be impeded" (NRS 532.180); (10) "[r]otation in use is authorized to bring about a more economical use of supplies" (NRS 533.075); (11) "[t]he State Engineer may determine whether there is over pumping of groundwater and refuse to issue permits if there is no unappropriated water available" (NRS 534.110(3)); (12) "[the State Engineer] may determine what is a reasonable lowering of the static water level in an area after taking into account the economics of pumping water for the general type of crops growing and the effect of water use on the economy of the

based upon beneficial use; availability of unappropriated water; the applicant's demonstration of the source, amount, and purpose of the appropriation; the applicant's need for the water; specific requirements for municipal and large appropriations; the State Engineer's authority over the water supply; and other previously codified standards.[43] By referencing each of these factors to other statutes, the State Engineer in effect defined the public interest as a compilation of Nevada water law. Rather than developing distinct public interest criteria, the State Engineer duplicated criteria from other statutory requirements for approving and denying new permits and transfers. In doing so, the State Engineer construed the public interest as a water law catch-all rather than an independent requirement. This narrow interpretation effectively negated the public interest requirement.[44]

B. Judicial Deference to the State Engineer's Narrow Interpretation of Public Interest

In *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, the Nevada Supreme Court upheld the State Engineer's narrow definition of the public interest.[45] Appellants argued that the Nevada Supreme Court should follow the Idaho Supreme Court's example in *Shokal v. Dunn* of defining the public interest by incorporating language from both Idaho statutes and Alaska's statutory criteria.[46] Specifically, appellants argued that the State Engineer had a duty to consider economic considerations and analyze alternatives during public interest review.[47] However, the Nevada Supreme Court found that although the Nevada Legislature was "presumably aware of the broad definition of the public interest enacted by other states," the legislature "demonstrated through its silence that Nevada's water law statutes should remain as they have been for over 45 years."[48] The court further reasoned that local government rather than the State Engineer should evaluate economic and social considerations of

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area in general" (NRS 534.110(4)); (13) "[w]ithin an area that has been designated, the State Engineer may monitor and regulate the water supply" (NRS 534.110(6)). *Id.* at 11–13.

43. *Id.*

44. *See infra* Part II.C.

45. *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 748, 918 P.2d 697, 700 (NV 1996) [hereinafter *Pyramid Lake*].

46. *Id.* (citing *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985)). *See infra* Part III.B for a discussion of the Idaho Supreme Court's definition of the public interest in *Shokal v. Dunn*.

47. *Id.*

48. *Id.* at 749, 918 P.2d at 700–01.

competing projects.[49] Consequently, the court held that the State Engineer's thirteen principles "adequately defined the public interest."[50]

The dissent in *Pyramid Lake* vigorously argued for a broader reading of the public interest. Justice Charles E. Springer dissented, arguing that none of the State Engineer's thirteen principles "had the slightest thing to do with . . . the public interest."[51] Instead, the principles "merely comprise[d] a useless summary of readily accessible statutory water law."[52] The dissent further argued that the State Engineer failed to address the legitimate public interest issues in the case. Specifically, the State Engineer failed to consider the project's adverse effect on threatened and endangered species of fish, wildlife, wetlands, and plant life.[53]

In *United States v. Alpine Land & Reservoir Co.*, the 9th Circuit applied the Nevada Supreme Court's narrow interpretation of the public interest criterion.[54] The 9th Circuit interpreted *Pyramid Lake* to mean that the Nevada Legislature has the sole "authority to expand the definition of public interest beyond the plain text of the Nevada Revised Statutes."[55] The 9th Circuit also concluded that the "State Engineer's authority [is] limited to considerations identified in Nevada's water policy statutes."[56]

C. The State Engineer's Application of the Public Interest in Practice

In practice, the Nevada State Engineer has effectively negated the public interest provision by using it as a convenient compilation of other water law statutes. The State Engineer has denied applications on public interest grounds based on the following considerations: (1) failure to demonstrate intent to place the water to beneficial use; (2) lack of unappropriated water and conflicts with existing rights; and (3) lack of interest in pursuing the application. In the context of transfer applications, the State Engineer has also denied applications on public interest grounds due to the nonexistence of water, or ownership of a water right to transfer. This subsection demonstrates that the State Engineer's denials of applications and transfers based on "public interest" considerations fall squarely under prior appropriation principles. In effect, the State Engi-

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49. *Id.* at 750–51, 918 P.2d at 701–02.
50. *Id.* at 748, 918 P.2d at 700.
51. *Id.* at 755, 918 P.2d at 704 (Springer, J., dissenting).
52. *Id.*
53. *Id.* at 760, 918 P.2d at 707.
54. *United States v. Alpine Land & Reservoir Co.*, 341 F.3d 1172, 1181–83 (9th Cir. 2003).
55. *Id.* at 1184.
56. *Id.* at 1183.

neer has reduced the public interest provision to an administratively convenient water law catch-all, rather than recognizing it as an independent means to ensure that water allocation decisions reflect public values.

1. Failure to Demonstrate Intent to Place Water to Beneficial Use

The Nevada State Engineer has both explicitly and implicitly used public interest grounds to deny applications based upon beneficial use principles. In 2003, the State Engineer denied an application to appropriate groundwater for mining purposes due to the applicant's failure to proceed with the mining project for over seventeen years after the applications were filed.[57] The State Engineer reasoned that since the "applicant did not place the water to *beneficial use* with reasonable diligence, it would threaten to prove detrimental to the *public interest* to consider granting the applications."[58] In doing so, the State Engineer explicitly denied the application on public interest grounds instead of beneficial use principles, indicating that the public interest encompasses the statutory requirement of beneficial use.

The Nevada State Engineer has also implicitly used the public interest criterion to deny applications based on beneficial use principles. For example, the State Engineer has used public interest grounds to deny applications based upon lack of access to the diversion point or place of use. In 2008, the State Engineer denied an application to appropriate groundwater for municipal purposes because the proposed diversion points were located on land that was no longer available for public use.[59] The State Engineer reasoned that approving applications for which the applicant could not access the proposed diversion point would be detrimental to the public interest.[60] Since accessing the diversion point is essential to using the water, failure to demonstrate the ability to put the water to beneficial use would have been a more appropriate ground for denial. However, the State Engineer implicitly incorporated beneficial use principles into the public interest and denied the application on public interest grounds rather than beneficial use principles.

The Nevada State Engineer has also denied applications on public interest grounds rather than beneficial use principles when the applicant has been unable to demonstrate control of the place of use. The State

57. Applications 49038 et al. to Appropriate the Public Waters within the Lower Reese River Valley Hydrographic Basin, Ruling No. 5288, at 7 (Nev. State Eng'r Oct. 6, 2003).

58. *Id.* (emphasis added).

59. Applications 66073–076 to Appropriate the Public Waters Within the Frenchman Flat Hydrographic Basin, Ruling No. 5859, at 3 (Nev. State Eng'r June 10, 2008).

60. *Id.*

Engineer has used public interest grounds to deny applications for water appropriations related to land applications under the Desert Lands Act[61] that were at the time pending or closed.[62] The State Engineer reasoned that when a project requires use of federal lands and the applicants have failed to gain entry to that land, the proposed project does not exist and approval of the applications would be detrimental to the public interest.[63] Since having control of the place of use is essential to demonstrate that the user can actually use the water, the State Engineer is again using public interest grounds to deny applications for beneficial use reasons.

Applications failing to demonstrate need for water have also been denied based on public interest grounds rather than beneficial use principles. For example, in situations where the applicant already had a source of water, the State Engineer has denied applications for new appropriations based on public interest grounds.[64] In 2008, the Nevada State Engineer denied the U.S. Forest Service's application for a new surface water right for recreational use since the Forest Service had already received a groundwater permit for that same use.[65] Reasoning that the Forest Service no longer needed to appropriate water, the State Engineer denied the application on public interest grounds.[66] Already possessing one source of water, and consequently no longer needing a second

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61. In 1877, the Desert Lands Act made arid and semi-arid public lands available for private ownership by individuals who were able to put the land to use by irrigating it within three years. *See* Desert Lands Act, ch. 107, 19 Stat. 377, 377 (1877) (codified as amended at 43 U.S.C. § 321 (2006)). The federal government gave individuals title to the public land, but required them to go through state permitting processes for appropriation of water. *See id.* Although most of the public lands have already been allocated to private parties, it is still possible for even non-residents to obtain a desert land entry in Nevada. U.S. Dep't of the Interior, Bureau of Land Mgmt., Desert Land Entries, http://www.blm.gov/wo/st/en/prog/more/lands/desert_land_entries.html (last visited Oct. 31, 2009). However, limited land and water availability and the high cost of development make obtaining a desert land entry extremely difficult. *Id.*

62. *See, e.g.*, Applications 31575, 31576, and 31589 to Appropriate the Public Waters within the Railroad Valley, Ruling No. 5803, at 4–5 (Nev. State Eng'r Dec. 14, 2007); Applications 31567 et al. to Appropriate the Public Waters within the Railroad Valley, Ruling No. 5784, at 5 (Nev. State Eng'r Oct. 2, 2007); Application 59837 and Change Application 70845 to Appropriate the Public Waters within the Spring Valley Hydrographic Basin, Ruling No. 5781, at 4 (Nev. State Eng'r Sept. 7, 2007).

63. *Id.*

64. *See, e.g.*, Application 52860 to Appropriate Public Waters of Bird Spring, Ruling No. 5864, at 2–3 (Nev. State Eng'r June 27, 2008); Application 43224 to Appropriate the Public Waters within Dixie Valley Hydrographic Basin, Ruling No. 5244, at 3 (May 13, 2003).

65. Application 52860 to Appropriate Public Waters of Bird Spring, Ruling No. 5864, at 2–3.

66. *Id.*

source, epitomizes a failure to demonstrate an ability to put the water to beneficial use rather than a public interest concern.

The Nevada State Engineer has repeatedly used public interest grounds to deny new water permits based on beneficial use principles. Failure to use appropriated water, inability to access the source of water for diversion, inability to access the place of use for diversion, and no longer needing water are all more appropriately considered failures to place the water to beneficial use. By using public interest grounds rather than beneficial use as a source of denial, the State Engineer is construing public interest as encompassing other water law principles rather than as an independent ground of denial with distinct criteria.

2. Lack of Unappropriated Water or Conflict with Existing Rights

Public interest concerns have also been used to support the denial of applications due to a lack of available water or conflicts with existing rights. In a 2008 application to appropriate groundwater for irrigation purposes, the Nevada State Engineer found that new groundwater appropriations for irrigation were prohibited by a State Engineer order because the groundwater basin was being depleted.[67] Consequently, the State Engineer concluded that approval of the application would both violate the order and "threaten to prove detrimental to the public interest." However, in the actual ruling, the State Engineer listed only public interest grounds for denial.[68] Rather than denying the application based on the State Engineer's own order not to approve any new appropriations in a depleted basin, the State Engineer used the public interest ground to justify the ruling.

In cases where approval of the application would result in withdrawals of groundwater beyond the perennial yield of the basin, the State Engineer has used dual grounds to deny the applications based on both a conflict with existing rights and public interest grounds.[69] The State Engineer reasoned that since approval of the applications would result in groundwater withdrawal exceeding the basin's perennial yield, approval of the applications would both conflict with existing rights and be contrary to the public interest.[70] Instead of denying the application based solely on lack of available water to appropriate, the State Engineer

67. Application 73347 to Appropriate the Underground Waters of the Lovelock Valley, Ruling No. 5908, at 1–2 (Nev. State Eng'r Nov. 26, 2008).

68. *Id.* at 2–3.

69. *See, e.g.,* Application 73242 to Appropriate Public Waters within the Imlay Area Hydrographic Basin, Ruling No. 5871, at 8 (Nev. State Eng'r June 30, 2008); Applications 71162 and 71163 to Appropriate the Public Waters within the Dayton Valley Hydrographic Basin, Ruling No. 5407, at 5 (Nev. State Eng'r Aug. 20, 2004).

70. *Id.*

used the public interest as a supplementary factor that encompassed the fundamental water law principle of "first in time, first in right."[71] If approving a new permit would conflict with senior rights to the water, prior appropriation principles require denial of the junior permit to protect senior rights. By basing the denial on public interest grounds, the State Engineer is again recognizing the public interest as a catch-all ground of denial rather than an independent ground.

3. Lack of Interest in Pursuing the Application

The Nevada State Engineer has also denied applications on public interest grounds when the applicant has failed to demonstrate interest in pursuing the application. Nevada statute provides that "[b]efore either approving or rejecting the application, the State Engineer may require such additional information as will enable him to guard the public interest properly."[72] However, the State Engineer has denied applications on public interest grounds rather than under the statute when an applicant has failed to respond to the State Engineer's request for additional information.[73]

The Nevada State Engineer has also denied applications on public interest grounds when the applicant has expressly stated a lack of interest in pursuing the application.[74] For example, when an applicant conveyed the land upon which the application for appropriation was based to the Forest Service, and neither the applicant nor the Forest Service intended to pursue the application, the State Engineer denied the application on public interest grounds.[75] In doing so, the State Engineer is recognizing the public interest as encompassing mere technical requirements inherent in demonstrating an ability to put water to beneficial use rather than a means for considering public values implicated by the proposed water use.

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71. *See supra* note 17 and accompanying text.

72. NEV. REV. STAT. ANN. § 533.375 (West, Westlaw through the 25th Special Sess., 2008).

73. *See, e.g.*, Application 29588 to Appropriate the Public Waters within the Big Smoky Valley, Ruling No. 5656, at 2 (Nev. State Eng'r Sept. 1, 2006); Application 52720 to Change the Manner of Use of the Public Waters within the Elko Segment Hydrographic Basin, Ruling No. 5631, at 3 (Nev. State Eng'r July 31, 2006); Application 67848 to Appropriate the Public Waters within the Dixie Creek/Tenmile Creek Area Hydrographic Basin, Ruling No. 5467, at 3 (Nev. State Eng'r Jan. 11, 2005).

74. Applications 12536 et al. to Appropriate the Public Waters within the Upper Reese River Valley Hydrographic Basin, Ruling No. 5790, at 11–12 (Nev. State Eng'r Oct. 16, 2007); Application 54526 to Appropriate the Public Waters within the Lake Tahoe Basin Hydrographic Basin, Ruling No. 5504, at 3 (Nev. State Eng'r Sept. 6, 2005).

75. Applications 12536 et al. to Appropriate the Public Waters within the Upper Reese River Valley Hydrographic Basin, Ruling No. 5790, at 11–12.

4. Failure to Demonstrate Ownership of a Water Right or Existing Water to Transfer

In the context of transfer applications, the Nevada State Engineer has used public interest grounds to deny transfers where the applicant failed to demonstrate ownership of the water right underlying the transfer application and where no water was available to transfer. The State Engineer has additionally denied applications for changes in the point of diversion and/or time, place, or manner of use when the applicant fails to demonstrate ownership of the right underlying the transfer application.[76] The State Engineer reasoned that if an applicant fails to "demonstrate a clear chain of title to the water rights being requested for change," approval of the application would be contrary to the public interest.[77]

The Nevada State Engineer has also denied transfer applications on public interest grounds if no water was available for transfer.[78] For example, in an application to change the place of use for a surface water right for irrigation and domestic purposes from a right that had already been transferred under a different permit, the State Engineer found that there was no water available to transfer.[79] Therefore, the State Engineer concluded that it was detrimental to the public interest to approve a transfer application if the "source of water [did] not exist."[80]

In the context of both new applications and transfers, the Nevada State Engineer has applied the public interest provision as a convenient catch-all ground for denial. Rather than developing the public interest into an independent means for denial based upon public values considerations, the State Engineer has simply used the public interest provision as a compilation of other water law statutes, orders, and technical re-

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76. *See, e.g.*, Applications 40847–849 to Change the Point of Diversion, Time, and Place of Use, Ruling No. 5939, at 3 (Nev. State Eng'r Feb. 10, 2009); Applications 60696–698 to Change the Place of Use of the Public Waters of the Truckee River, Ruling No. 5839, at 8–9 (Nev. State Eng'r Apr. 11, 2008); Application 45185 to Change the Point of Diversion and Place of Use of the Public Waters within the Truckee Meadows Hydrographic Basin, Ruling No. 5653, at 3 (Nev. State Eng'r Aug. 30, 2006).

77. Applications 40847–849 to Change the Point of Diversion, Time, and Place of Use, Ruling No. 5939, at 3 (Nev. State Eng'r Feb. 10, 2009).

78. *See, e.g.*, Application 52726 to Change the Place of Use of the Public Waters of the Truckee River, Ruling No. 5849, at 2 (Nev. State Eng'r May 15, 2008); Application 53440 to Change the Place of Use of the Public Waters of the Truckee River, Ruling No. 5835, at 2 (Nev. State Eng'r Apr. 11, 2008); Application 61068 to Change the Point of Diversion and Place of Use of the Public Waters of the Truckee River, Ruling No. 5725, at 3 (Nev. State Eng'r Mar. 13, 2007).

79. Application 52726 to Change the Place of Use of a Portion of the Public Waters of the Truckee River, Ruling No. 5849, at 2.

80. *Id.*

quirements. In doing so, the State Engineer has failed to consider public values underlying water use that have not been codified under Nevada water law.

D. Hints by the State Engineer of Broadening the Public Interest

The Nevada State Engineer recently wrote a rosy analysis of the history of the public interest provision, potentially creating a window of opportunity for broader application of the provision in the future. In a 2007 ruling on the Las Vegas Valley Water District's applications for a large interbasin transfer for municipal and domestic uses, protestants raised public interest concerns regarding population, economics, air quality, critical habitat for wildlife, water conservation, negative impacts on threatened and endangered species, adverse effects on agriculture, and environmental, scenic and recreational values.[81] To determine whether these were appropriate public interest considerations, the State Engineer analyzed the historical development of the public interest provision in Nevada.[82] Not surprisingly, the State Engineer found a "consistent thread" throughout State Engineer opinions—"violating specific statutory provisions of Nevada's water law threatens to prove detrimental to the public interest."[83] However, the State Engineer ultimately concluded that the public interest is a "dynamic concept" that changes over time in response to legislative guidance on issues of importance.[84]

The Nevada State Engineer's early analysis of the public interest provision is not startling. The State Engineer found that from the 1940s through the 1960s, the public interest was almost always tied to other water law provisions.[85] In the 1970s, the State Engineer began recognizing orders that prohibited new permits in basins where water was being depleted as public interest grounds for denial. In the 1980s, the State Engineer found that the public interest analysis began to change significantly as the State Engineer began prioritizing preferred over non-preferred uses in basins where the groundwater was being depleted.[86]

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81. Applications 54003–021 to Appropriate Underground Water of the Spring Valley Hydrographic Basin, Ruling No. 5726, at 7–11 (Nev. State Eng'r Apr. 16, 2007).

82. *Id*. at 37–43.

83. *Id*. at 42.

84. *Id.* at 43.

85. *Id.* at 39.

86. *Id.* at 40. "In the interest of public welfare," the Nevada State Engineer has the authority to designate preferred uses of water in basins where the State Engineer has recognized that groundwater is being depleted. NEV. REV. STAT. § 534.120(2) (West, Westlaw through 2008 Sess.). When competing applications request use of the same water, the State Engineer has the authority to prioritize granting applications requesting water for preferred uses over those requesting water for non-preferred uses. *See id.* In Nevada, preferred

The State Engineer also opened the door for future development of the public interest provision. He recognized that the list of public interest criteria developed in the 1990s was not exclusive and that effects on endangered species and water quality could properly be considered public interest concerns.[87] In contrast, the State Engineer reasoned that socioeconomic issues did not fall under the public interest criterion and were more properly addressed in the comprehensive planning process.[88] The State Engineer concluded that at present, decisions were closely tied to statutory criteria, but that the State Engineer needed to balance economic and population growth concerns against environmental concerns.[89] In so doing, the State Engineer demonstrated a willingness to consider effects on endangered species, water quality concerns, environmental issues, and economic and growth concerns as public interest grounds for denial in the future.

Despite the Nevada State Engineer's apparent willingness to consider non-statutory criteria as public interest considerations, he has not yet denied an application on public interest grounds not closely linked to statutory or administrative criteria. After the optimistic analysis of the history of the public interest in the Las Vegas Valley Water District decision at issue, the State Engineer recognized a concern for wildlife, wetlands, and fisheries, and consequently required monitoring and additional study to protect the public interest.[90] However, the State Engineer stopped short of denying the applications to protect the public interest.

Since the Las Vegas Valley Water District decision, the State Engineer has continued to avoid denying applications based upon public interest considerations potentially implicated by endangered species, fish and wildlife habitat, recreational values, and water quality concerns. Instead, the State Engineer has found insufficient evidence to support the public interest concerns or denied the applications on other grounds. Several months after the Las Vegas Valley Water District decision, protestants raised public interest concerns regarding an application to appropriate underground water for industrial and other purposes.[91] Public

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uses are limited to domestic, municipal, quasi-municipal, industrial, irrigation, mining, stock-water, and "any uses for which a county, city, town, public water district or public water company furnishes the water." *Id.*

87. Applications 54003–021 to Appropriate Underground Water of the Spring Valley Hydrographic Basin, Ruling No. 5726, at 41.

88. *Id.*

89. *Id.* at 42.

90. *Id.* at 43, 55.

91. Applications 63805 et al. to Appropriate the Public Waters Within the Tracy Segment Hydrographic Basin, Ruling No. 5747, at 8–9 (Nev. State Eng'r June 27, 2007).

interest concerns were based on water quality, wildlife habitat, effects on endangered species, and the recreational value of Pyramid Lake.[92] In response, the State Engineer found that "no substantial evidence was submitted regarding impact to cui-ui or Lahontan cutthroat trout, impact to agriculture or fisheries, impact to the recreational value of Pyramid Lake, impact to water quality . . . or violations of the Endangered Species Act."[93] Notably, the State Engineer rejected the claim based on failure to submit substantial evidence, rather than the inapplicability of the public interest criterion. In doing so, the State Engineer left the door open for well-supported public interest claims based on effects on endangered species, impact on fisheries and recreational values, and water quality concerns.

In a 2008 decision, the State Engineer relied on non-public interest grounds to deny another application that protestants argued would threaten endangered species. In response to an application to appropriate underground water for municipal purposes, protestants argued that the appropriation would be detrimental to the public interest in "protecting the threatened and endangered species and critical habitats."[94] However, the State Engineer denied the application on other grounds, failing to address the effect of the appropriation on threatened and endangered species.[95]

Historically, the Nevada State Engineer has construed the public interest as a compilation of other water law statutes, rather than an independent ground for denial with distinct criteria. However, since 2007, the State Engineer has described public interest as a dynamic concept that changes over time. The State Engineer has also indicated a willingness to consider grounds for public interest denials beyond those derived from other water law statutes, including effects on fisheries, endangered species, recreational values, and water quality concerns. In practice, however, the State Engineer has avoided denying applications or transfers on public interest grounds not encompassed by other water law statutes or orders. Consequently, the public interest provision has been limited to consideration of public values closely linked to statutory or administrative criteria.

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92. *Id.*

93. *Id.* at 27–28.

94. Applications 66073–076 to Appropriate the Public Waters Within the Frenchman Flat Hydrographic Basin, Ruling No. 5859, at 3 (Nev. State Eng'r June 10, 2008).

95. *See id.* at 3–4.

III. THE IDAHO APPROACH: READING THE LOCAL PUBLIC INTEREST BROADLY IN RESPONSE TO STATUTORY SILENCE AND THEN BACK-TRACKING IN RESPONSE TO LEGISLATIVE GUIDANCE

While Nevada courts and the State Engineer have narrowly defined the public interest in response to statutory silence, Idaho courts and the Idaho Department of Water Resources (IDWR) have interpreted statutory silence broadly.[96] This Part discusses the original statutory definition, judicial interpretation, and administrative interpretation of the local public interest requirement in Idaho. This Part then analyzes the implications of a 2003 amendment that narrowed the statutory definition of the local public interest to effects on the public water resource. This Part concludes that while IDWR regulations have perpetuated public interest review of certain secondary effects of water usage, the statutory amendment has seemingly eliminated secondary effects not referenced in the regulations from public interest review.

A. Original Statutory Ambiguity in Defining the "Local Public Interest"

In contrast to Nevada's long history of public interest review, Idaho did not statutorily require public interest review for new appropriations until 1978.[97] Three years later, Idaho extended statutory public interest review requirements to transfer applications.[98] IDWR is required to review the "local public interest" of all applications for new appropriations or transfers regardless of whether they are protested.[99] From 1978 to 2003, the Idaho Legislature defined local public interest as "the affairs of the people in the area directly affected by the proposed use."[100] Although the Idaho Legislature limited the public interest geographically, the Idaho Legislature, similarly to the Nevada Legislature, did not create a list of statutory criteria to further define the public interest.

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96. Idaho is not alone in implicitly defining public interest provisions in response to statutory silence. For example, the Washington Supreme Court interpreted the Washington public interest provision to include water pollution in response to two environmental acts that did not explicitly amend the public interest provision. Stempel v. Dep't of Water Res., 508 P.2d 166, 170–71 (Wash. 1973).

97. 1978 Idaho Sess. Laws 768 (codified as amended at IDAHO CODE ANN. § 42-203A(5) (West, Westlaw current through Mar. 3, 2009)).

98. 1981 Idaho Sess. Laws 256 (codified as amended at IDAHO CODE ANN. § 42-222(1) (West, Westlaw current through Mar. 3, 2009)).

99. IDAHO CODE ANN. § 42-203A(5) (West, Westlaw current through Mar. 3, 2009).

100. IDAHO CODE ANN. § 42-203A(5)(e) (West, Westlaw current through 2002).

B. Broad Judicial Interpretation of the Local Public Interest in *Shokal v. Dunn*

In 1985, the Idaho Supreme Court interpreted the "local public interest" as an issue of first impression in *Shokal v. Dunn*.[101] While recognizing that the legislature provided little statutory guidance, the Idaho Supreme Court interpreted the public interest based upon a related Idaho minimum stream flow statute,[102] and statutory definition of the public interest in other western states.[103]

The Idaho Supreme Court first incorporated public interest elements identified in the minimum stream flow statute into the definition of local public interest. The court reasoned that since the legislature adopted the local public interest statute on the same day as the minimum stream flow statute, the legislature must have intended the local public interest to include the public interest elements identified for minimum stream flow.[104] Consequently, the court held that the local public interest included fish and wildlife habitat, recreation, aquatic life, aesthetic beauty, water quality, and transportation and navigation values.[105]

The court then recognized public interest elements derived from Alaska's statutory definition of public interest. The court reasoned that "common sense" dictated that the following elements from the Alaska statute should also be included in the definition of the local public interest: the project's benefit to the applicant, economic effect, harm to others, effect on access to navigable or public waters, the applicant's intent and ability to actually use the water, and the loss of alternative water uses.[106]

The court also identified "obvious" other elements as within the public interest, including encouraging conservation, discouraging waste, and preserving minimum stream flows.[107] Finally, the court recognized that the identified elements were not comprehensive and that the public interest "should be read broadly in order to secure the greatest possible benefit from public waters for the public."[108]

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101. *Shokal v. Dunn*, 109 Idaho 330, 336, 707 P.2d 441, 447 (1985).

102. IDAHO CODE ANN. § 42-1501 (West, Westlaw current through Mar. 3, 2009) (recognizing preserving "minimum stream flows required for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality" as beneficial uses that are "in the public interest").

103. *Shokal*, 109 Idaho at 337, 707 P.2d at 448.

104. *Id.* at 338, 707 P.2d at 449.

105. *Id.*

106. *Shokal*, 109 Idaho at 338, 707 P.2d at 449 (citing Alaska Stat. § 46.15.080(b)) (internal quotation marks omitted).

107. *Id.*

108. *Id.* (quoting *Young v. Hinderlider*, 15 N.M. 666, 110 P. 1045, 1050 (N.M. 1910)) (internal quotation marks omitted).

C. Broad Administrative Interpretation of the Local Public Interest

In 1993, IDWR promulgated broad regulations for interpreting the local public interest.[109] IDWR included the following as public interest factors: economic effects, impacts on recreation, impacts on fish and wildlife resources, compliance with planning and zoning ordinances, and compliance with water, air, and hazardous substance standards.[110] In addition, the regulations permitted consideration of "any other factors [found] to be appropriate."[111]

IDWR decisions considered public interest factors identified in *Shokal v. Dunn* and Idaho water regulations.[112] Prior to the 2003 legislative amendment, IDWR decisions also considered the following factors: efficient use of geothermal water, appropriations in moratorium areas,[113] management and cumulative effects of obnoxious odors, impacts on property values, dust, flies, traffic, and other case-specific concerns.[114] IDWR also recognized that the local public interest included not only economic considerations, but also social costs and the "impact upon the people and properties in the area."[115]

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109. IDWR identified the following factors, "along with any other factors [found] to be appropriate," as included in the local public interest:

> i. The effect the project will have on the economy of the local area affected by the proposed use as determined by the employment opportunities, both short and long term, revenue changes to various sectors of the economy, short and long term, and the stability of revenue and employment gains; (7-1-93)
>
> ii. The effect the project will have on recreation, fish and wildlife resources in the local area affected by the proposed use; and (7-1-93)
>
> iii. Compliance with applicable air, water and hazardous substance standards, and compliance with planning and zoning ordinances of local or state government jurisdictions. (7-1-93)

Idaho Admin. Code 37.03.08.045, subsection 01(e) (West, Westlaw current through Jan. 7, 2009).

110. *Id.*

111. *Id.*

112. *See* Robert L. Harris, *Narrowing the Local Public Interest Criterion in Idaho Water Right Transfers*, 39 Idaho L. Rev. 713, 719 (2003) (listing and explaining local public interest considerations from Idaho cases and IDWR decisions).

113. Moratorium orders prohibit the issuance of any new water permits in areas that IDWR designates as having no available water to appropriate. In moratorium areas, IDWR must deny all applications for new permits, and new users can obtain water rights only through the transfer process. *Id.* at 715.

114. *Id.* at 719.

115. Application for Transfer No. 5580 in the Name of Steve and/or Darla Wybenga, No. 5580, 2001 Ida. ENV LEXIS 8, at *20–21 (IDWR June 28, 2001).

D. Legislative Narrowing of the Local Public Interest in 2003 to Effects of a Proposed Water Use "on the Public Water Resource"

IDWR's broad interpretation of the local public interest led to concern by some water users, and proposals to narrow the definition of local public interest.[116] Concerns focused on IDWR going beyond its expertise to address issues more properly addressed by land use and zoning commissions or regulatory agencies such as the Environmental Protection Agency.[117] One applicant described IDWR as a "'roving economic cop'" that was "engaging in 'social engineering'" by considering economic effects of losing a municipal water use as part of the local public interest.[118] Additional concerns included costs and delays resulting from public interest review.[119]

In 2003, the Idaho Legislature narrowed the definition of public interest by excluding secondary effects of water use from public interest considerations. The local public interest is now defined as "the interests that the people in the area directly affected by a proposed water use have in the effects of such use *on the public water resource*."[120]

In the 2003 amendment, the Idaho Legislature failed to provide specific local public interest criteria, leaving defining effects of the use "on the public water resource" to IDWR discretion. However, legislative history clarifies that the local public interest should not include an activity's secondary effects "just because that activity happens to use water."[121] For example, air quality issues that could result if a manufacturing plant received a water appropriation are secondary effects of the water use that should not be considered in public interest review.[122] In contrast, appropriate local public interest considerations include "all locally important factors affecting the public water resources, *including but not limited to* fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation, navigation, water quality[,] and the . . . availability of water for alternative uses."[123] Notably, this list includes all of the factors identified in *Shokal v. Dunn* as part of the "local public interest" by analogy to the minimum stream flow statute defini-

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116. Harris, *supra* note 112, at 731.

117. *Id.* at 731–36.

118. Application for Transfer No. 5691 in the Name of Jerome Cheese Co., No. 5691, 2000 Ida. ENV LEXIS 8, at *15–16 (IDWR Nov. 24, 2000).

119. Harris, *supra* note 112, at 736.

120. IDAHO CODE ANN. § 42-202B(3) (West, Westlaw current through Mar. 3, 2009) (emphasis added).

121. Statement of Purpose, H.B. 284, 57th Leg., First Reg. Sess. (Idaho 2003), *available at* http://www3.state.id.us/oasis/2003/H0284.html.

122. *Id.*

123. *Id.* (emphasis added).

tion of public interest.[124] In addition, this list includes water availability for alternative uses, as incorporated in *Shokal v. Dunn* from the Alaska public interest statute.[125]

Legislative history fails to clarify whether other arguably secondary effects of water usage that were identified in *Shokal v. Dunn* and previous IDWR decisions were still intended to be included in local public interest review. Additional factors from *Shokal v. Dunn* include the economic effect of the appropriation, its benefit to the applicant and harm to others, encouraging conservation, and discouraging waste.[126] Legislative history also fails to directly address whether odor, dust, flies, traffic, and other case-specific issues previously recognized by IDWR as local public interest concerns were intended to be excluded from local public interest review as secondary effects of water usage. Instead, while limiting local public interest considerations to effects on the "public water resource," the legislature left interpretation of what affected the public water resource to IDWR discretion.

E. Administrative Response to Legislative Narrowing of the Local Public Interest

Despite legislative narrowing of the definition of the local public interest in 2003, IDWR continues to apply the same regulations for evaluating public interest considerations.[127] Although legislative history indicated that secondary effects of water usage should not be considered, regulations still require public interest evaluation of certain arguably secondary effects of water usage. These secondary effects include the project's impact on the local economy, effects on recreation, effects on fish and wildlife resources, compliance with planning and zoning ordi-

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124. *Shokal v. Dunn*, 109 Idaho at 338, 707 P.2d at 449 (identifying "fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality" as local public interest criteria). *See also* Idaho Code Ann. § 42-1501 (West, Westlaw current through Mar. 3, 2009) (recognizing preserving "minimum stream flows required for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality" as a beneficial use that is "in the public interest").

125. *Shokal*, 109 Idaho at 338, 707 P.2d at 449 (citing Alaska Stat. § 46.15.080(b)).

126. *Id.*

127. The criteria for determining the public interest are exactly the same in the 2002 and 2009 Idaho Administrative Code. *Compare* IDAHO ADMIN. CODE 37.03.08.045, subsection 01(e) (West, Westlaw current through Jan. 7, 2009), *with* IDAHO ADMIN. CODE 37.03.08045, subsection 01(e) (West, Westlaw current through Dec. 4, 2002).

nances, and compliance with water, air, and hazardous substance standards.[128]

One IDWR hearing officer has repeatedly recognized that local public interest regulations may conflict with the amended statutory definition of the local public interest.[129] After noting this concern in a 2004 recommendation, the hearing officer applied regulatory criteria, including the project's economic effects, impacts on fish and wildlife, and compliance with water quality standards, to find that the project was in the local public interest.[130] In 2005, the officer again noted the potential conflict but then applied the economic effects criterion to find that the project did not conflict with the local public interest.[131] In both of these cases, the IDWR director incorporated the hearing officer's conclusions of law into the final orders without discussing the potential conflict between the statutory and regulatory definitions of local public interest.[132]

IDWR has also continued to consider aesthetic values and other secondary effects of water usage by tying them to the economic effects criterion. For example, in an application for a surface water right permit for wildlife, recreation, and aesthetic use, the hearing officer recognized "subdivision aesthetics" along with recreation and wildlife as an "integral part of the local economy."[133] The officer also reasoned that water was used extensively for non-consumptive, aesthetic uses.[134] Therefore, the officer concluded that the project would not conflict with the local public interest.[135] However, the director of IDWR ultimately rejected the

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128. IDAHO ADMIN. CODE 37.03.08.045, subsection 01(iii) (West, Westlaw current through Jan. 7, 2009).

129. Application for Permit No. 73-11961 in the Name of Idaho Power Co., No. 73-11961, 2004 Ida. ENV LEXIS 1, at *36 (IDWR Jan. 9, 2004); Application for Amendment of Permit No. 63-12448 in the Name of the City of Eagle, No. 63-12448, 2004 Ida. ENV LEXIS 9, at *41 (IDWR Mar. 5, 2004); Application for Permit No. 65-22650 in the Name of Frederick and/or Gloria Ringel, No. 65-22650, 2005 Ida. ENV LEXIS 11, at *21 (IDWR Feb. 17, 2005).

130. Application for Permit No. 73-11961 in the Name of Idaho Power Co., No. 73-11961, 2004 Ida. ENV LEXIS 1, at *36–39.

131. Application for Permit No. 65-22650 in the Name of Frederick and/or Gloria Ringel, No. 65-22650, 2005 Ida. ENV LEXIS 11, at *21.

132. *See* Application for Permit No. 73-11961 in the Name of Idaho Power Co., No. 73-11961, 2004 Ida. ENV LEXIS 17, at *33–36 (IDWR May 11, 2004); Application to Appropriate Water No. 65-22650 in the Name of Frederick and/or Gloria Ringel, No. 65-22650, 2005 Ida. ENV LEXIS 51, at *2 (IDWR Sept. 23, 2005).

133. Application for Permit No. 37-21119 in the Name of Lane Ranch Homeowners Ass'n Inc., No. 37-21119, 2006 Ida. ENV LEXIS 2, at *23 (IDWR Jan. 10, 2006).

134. *Id.*

135. *Id.*

hearing officer's recommendation and denied the application on other grounds.[136]

IDWR has also considered the public good and efficiency standards under the amended local public interest criterion. In evaluating the local public interest of an application to appropriate geothermal water for a spa, IDWR recognized a "public demand" and "public good" resulting from the use of geothermal water for soaking and bathing.[137] At the same time, IDWR found that both the local public interest and conservation demanded efficient use of geothermal water.[138] Consequently, IDWR required that the applicant submit detailed designs for efficient use of geothermal water to heat the spa buildings and pools.[139]

Although IDWR continues to evaluate certain secondary effects of water use in public interest review, the amended statutory definition of local public interest has seemingly eliminated other secondary effects from review. In evaluating applications under the pre-2003 statutory standards for local public interest, IDWR regularly considered odor, dust, and fly nuisance concerns, particularly in the context of applications from the dairy industry.[140] However, under the amended definition of local public interest, IDWR has not evaluated odor or air quality considerations.[141] This failure cannot be attributed to a lack of applications that would potentially raise odor or other air quality issues. On the contrary, IDWR has evaluated waste and water quality public interest concerns for multiple dairy applications under the new statutory

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136. The director reasoned that only IDWR, not individuals, could appropriate water for minimum stream flows. Application to Appropriate Water No. 37-21119 in the Name of Lane Ranch Homeowners Ass'n Inc., No. 37-21119, 2007 Ida. ENV LEXIS 1, at *18 (IDWR Jan. 5, 2007).

137. Applications to Appropriate Water Nos. 65-13912, 65-13913, and 65-13986 in the name of Carol Lynn MacGregor, 2006 Ida. ENV LEXIS 41, at *51 (IDWR Oct. 4, 2006).

138. *Id.* at *57.

139. *Id.* at *57–58.

140. Application for Transfer No. 5384 in the Name of Box Canyon Dairy, No. 5384, 2005 Ida. ENV LEXIS 52, at *30–31 (IDWR Oct. 7, 2005) (applying the pre-2003 statutory standard to address odor, dust, and fly nuisance concerns as local public interest criteria); Application for Transfer No. 5464 in the Name of Salmon Falls Land & Livestock Co., No. 5654, 2004 Ida. ENV LEXIS 31, at *27–29 (IDWR Sept. 3, 2004) (applying the pre-2003 statutory standard to deny a dairy's application based in part on odor concerns); Application for Transfer No. 5580 in the Name of Steve and/or Darla Wybenga, No. 5580, 2001 Ida. ENV LEXIS 8, at *21–24 (IDWR June 28, 2001) (denying a dairy's transfer application based on fly and odor concerns).

141. The most recent IDWR decision to consider odor as a local public interest criterion was decided under the pre-2003 statutory standard for public interest. *See* Application for Transfer No. 5384 in the Name of Box Canyon Dairy, No. 5384, 2005 Ida. ENV LEXIS 52, at *30–31.

standard.[142] However, IDWR failed to even address the possibility of local public interest concerns involving odor, dust, or flies in any of these applications.[143] IDWR instead noted that it only evaluates whether a proposed water use will comply with water quality programs of other agencies and whether the water use will have an effect on the public water resource.[144]

A lingering opportunity for consideration of secondary effects of water resources remains in the unchanged local public interest regulations. The unchanged regulations have perpetuated consideration of some secondary effects of water use, including a project's economic effects, impacts on fish and wildlife, and compliance with water quality standards. Arguably, public interest regulations would permit consideration of odor and other secondary concerns by linking them to criteria identified in the regulations, such as economic concerns or planning and zoning compliance. IDWR has linked secondary effects of water usage to the economic effects criterion in evaluating factors such as aesthetic beauty that were identified as public interest considerations in *Shokal v. Dunn*. However, since the 2003 amendment, IDWR has declined to extend regulatory public interest criteria to include secondary effects such as odor and flies that were not recognized in *Shokal v. Dunn*.

F. The Uncertain Future of the Local Public Interest

Interpretation of the local public interest criterion remains ambiguous. Since the 2003 amendment, IDWR decisions reflect a narrowing of the local public interest to direct effects on the public water resource and secondary effects recognized in IDWR regulations or *Shokal v. Dunn*. Prior to 2003, IDWR interpreted the public interest broadly to include consideration of secondary effects of water usage, such as odor, dust, and flies. Since 2003, IDWR has responded to legislative guidance by narrowing public interest concerns to those directly related to the public water resource, with several exceptions. IDWR has continued to consider secondary effects like aesthetic beauty and economic considerations. However, evaluation of the secondary effects of water use appears to be limited to secondary effects recognized in *Shokal v. Dunn* or public inter-

142. Application for Transfer No. 71607 in the Name of 4 Bros. Dairy, Inc., No. 71607, 2007 Ida. ENV LEXIS 7, at *33–34 (IDWR Apr. 30, 2007); Application for Transfer No. 71692 in the Name of David L. & Shirlene Funk, No. 71692, 2007 Ida. ENV LEXIS 3, at *25 (IDWR Feb. 23, 2007); Application for Transfer No. 71968 & 71971, Darrell and/or Patricia Funk, Nos. 71968 & 71971, 2006 ENV LEXIS 34, at *23 (IDWR July 17, 2006).

143. *See id.*

144. Application for Transfer No. 71607 in the Name of 4 Bros. Dairy, Inc., No. 71607, 2007 Ida. ENV LEXIS 7, at *33.

est regulations. The future of the local public interest in Idaho is uncertain as IDWR continues to re-develop the local public interest case-by-case, leaving potential conflicts between the regulatory and statutory definition of local public interest unresolved.

IV. CONCLUSION AND RECOMMENDATION: DEFINING THE PUBLIC INTEREST THROUGH STATEWIDE STATUTORY CRITERIA AND LOCAL PUBLIC INPUT

First, this Part compares the Nevada and Idaho approaches and discusses the problems arising from statutory silence. This Part then discusses alternate approaches to defining the public interest. Finally, this Part concludes with a call for legislatures to adopt a hybrid approach that combines legislative definition of statewide public interest criteria with a statutory requirement for state water agencies to consider the recommendations of regional planning groups.

A. Comparison of the Nevada and Idaho Approaches to Statutory Silence

Both Nevada and Idaho require public interest review for new permits and transfers, yet neither state statutorily defines what the public interest actually is. While state water agencies in Nevada and Idaho have taken very different approaches to construing the public interest, both approaches present significant limitations. Nevada restricts the public interest to a compilation of criteria found in other water law statutes. While technically denying applications on public interest grounds, the State Engineer's reasoning is based upon beneficial use and other traditional water law principles. The State Engineer has indicated a potential willingness to consider a broader range of public interest criteria in the future. Historically, however, the State Engineer has filled in the statutory silence of the public interest statute with other water law statutes, failing to develop independent public interest criteria. Consequently, public interest considerations only exist on paper and not in practice in Nevada.

In contrast, the Idaho Supreme Court and IDWR initially filled the statutory silence of the public interest statute with criteria from related statutes, statutory public interest criteria from other states, and any other "appropriate" factors.[145] Consequently, the public interest quickly expanded to include not only the direct effects of water use, such as impacts on recreation, fish, and wildlife, but also indirect effects of water

145. *See Shokal v. Dunn*, 109 Idaho 330, 336–38, 707 P.2d 441, 447–49 (1985); IDAHO ADMIN. CODE 37.03.08.045.01.e (West, Westlaw current through Jan. 7, 2009).

use, such as concerns about flies, dust, and odor. In response to concerns about IDWR going beyond its expertise in water issues, the legislature narrowed the public interest definition in 2003 to include only effects "*on the public water resource*."[146] While certain secondary effects of water usage such as dairy odor have been eliminated from public interest review in practice, IDWR interpretation of the public interest continues to develop case-by-case. Consequently, the Idaho approach has created uncertainty for water users in how closely the public interest is tied to water.

The contrasting Nevada and Idaho approaches illustrate four issues with leaving the public interest undefined. First, the Nevada approach illustrates that agencies can avoid considering the public interest by reducing it to a compilation of other statutory criteria rather than an independent ground of denial with independent criteria. Second, the Idaho approach illustrates the strains on agency expertise that result when statutory silence implicitly delegates public policy considerations underlying the public interest to state agencies. Although economic and social issues created by the use of water are not squarely within the technical expertise of water resources agencies, statutory silence places agencies in a position of either deciding issues beyond their expertise or ignoring them entirely. Third, the contrasting approaches together illustrate how statutory silence produces uncertainty in how different state water resource agencies interpret and apply public interest provisions. Neither state statutorily defines public interest criteria; however, the judicial and administrative responses have led to starkly different results. Finally, since neither legislature defines the public interest and neither state water agency is required to solicit public input in deciding the public interest, no framework exists to ensure that public interest determinations actually reflect public values.

B. Alternative Approaches for Defining the Public Interest

Alternative approaches for defining the public interest include creating statutory lists of public interest criteria, forming decision-making bodies to provide public interest recommendations to state water agencies, or a hybrid approach that combines statutory criteria with public input.

The first approach is to create a list of statutory criteria to define the public interest. The limitations of this approach are two-fold. First, simply developing a statutory list of public criteria does not necessarily resolve ambiguity. Even with a statutory list of criteria, state water agen-

146. IDAHO CODE ANN. § 42-202B(3) (West, Westlaw current through Mar. 3, 2009) (emphasis added).

cies must determine which criteria are the most important. Lists of criteria also often create ambiguity by including open-ended factors such as "harm to other persons" or "all other matters pertaining to" the public interest.[147] Consequently, even statutes that purport to define the public interest leave interpretation of the purpose and scope of public interest review to water agencies and courts.[148] Secondly, even if the lists of criteria were specific, a countering concern is that state water agencies could interpret the lists as exclusive.[149] Thus, creating lists that include general criteria could perpetuate ambiguity, while lists of specific criteria could result in inflexibility of the public interest to evolve to reflect changing public policy.

A variation of the list approach would be for legislatures to create a list of public interest criteria that are ranked in order of importance. The advantage of this approach is that the rankings would provide guidance to agencies in how to weigh which criteria are most important, thus creating more certainty for water users.[150] However, the limitation of this approach is that a statewide ranking would not allow variance between different areas of the state in terms of which criteria are the most important for that area.[151] Consequently, statewide lists of public interest criteria result in conflicting concerns of lack of certainty and lack of flexibility to tailor public interest review to issues in a particular area.

An alternate approach would be for legislatures to create local decision-making bodies to provide public interest recommendations to state water agencies. The advantages of a local approach are that that it would create flexibility in tailoring public interest review to concerns in a particular area and allow the public to give input on public policy issues that are beyond agency expertise.[152] However, one major obstacle to this approach is creating the legal and institutional framework to both solicit and implement public recommendations.

The regional planning process in New Mexico illustrates both the possibilities and challenges involved in using local planning groups to define the public interest, which is synonymous with public welfare in New Mexico. New Mexico statute provides that the State Engineer may deny appropriations or transfers that are not in the public welfare even if

147. Grant, *supra* note 26, at 486–87 (internal quotation marks omitted).

148. *Id.* at 487.

149. Diane K. Brownlee, *The Public Vote in the Game of Water Wars: An Unquenchable Thirst to Define and Implement "Public Values" in Western Water Laws*, 70 UMKC L. Rev. 647, 670 (2002).

150. Hoffman-Dooley, *supra* note 5, at 113.

151. *Id.* at 114.

152. *See* Hoffman-Dooley, *supra* note 5, at 122.

water is available.[153] However, like the Nevada and Idaho statutes, New Mexico public welfare statutes fail to define the public welfare.[154] Recently, however, the regional water planning process has led local planning groups to develop their own local public welfare statements to include in the State Water Plan. In the State Water Plan Act of 2003, the New Mexico Legislature authorized funding to develop a state water plan that would, in part, "identify and reflect the common priorities, goals and objectives that [would] have a positive impact on the public welfare of the state."[155] The legislature also provided funding to regional planning groups to develop regional plans that are incorporated into a comprehensive state plan.[156]

In 2006, the Taos regional water planning group formed a subcommittee to develop a public welfare statement to incorporate into its regional water plan.[157] The goals were two-fold: first, the subcommittee would develop a list of public welfare criteria specific to the region; and second, an ongoing oversight committee would evaluate all proposed permits and transfers to make recommendations to the State Engineer about whether specific proposed appropriations or transfers were in the public welfare.[158] For over two years, volunteer water users, members of environmental organizations, and representatives of *acequias*[159] met and drafted 17 versions of a public welfare statement and plan for implementing it.[160] However, the Interstate Stream Commission ultimately re-

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153. If no unappropriated water is available, the State Engineer "*shall* reject" an application for a new permit. N.M. STAT. ANN. §§ 72-5-7, 72-12-3(E) (West, Westlaw through Apr. 10, 2009) (emphasis added). The State Engineer "*may* reject" an application if it would be "detrimental to the public welfare of the state" or contrary to water conservation in the state. *Id.* (emphasis added). New Mexico statute allows transfers of existing water rights only if the applicant can demonstrate that the change will not "impair existing rights," "be contrary to water conservation within the state," or "be detrimental to the public welfare of the state." N.M. STAT. ANN. §§ 72-12-7(A), 72-12B-1 (West, Westlaw through Apr. 10, 2009).

154. *Id.*

155. N.M. STAT. ANN. § 72-14-3.1(C)(1) (2003).

156. *Id.* § 72-14-3.1(C)(11).

157. Kay Matthews, *It's Time to Define Just Exactly What Public Welfare Means*, LA JICARITA NEWS, July/August 2006, *available at* http://www.lajicarita.org/06julaug.htm#publicwelfare.

158. Kay Matthews, *Editorial: Taos Regional Water Plan Hijacked by the Powers that Be*, LA JICARITA NEWS, March 2008, *available at* http://www.lajicarita.org/08mar.htm#editorial.

159. Acequias are historic communal irrigation systems for water sharing in New Mexico. N.M. Acequia Ass'n, http://www.lasacequias.org (last visited May 18, 2009).

160. Matthews, *Editorial: Taos Regional Water Plan Hijacked by the Powers that Be*, *supra* note 127. The public welfare statement includes an introduction that explains specific values implicated in water management in the Taos region. Taos Regional Water Plan, Public Welfare Statement, 2-5 to 2-9 (Mar. 7, 2008), *available at* http://www.ose.state.nm.us/water-info/NMWaterPlanning/regions/taos/2-TaosPublicParticipation.pdf. The state-

jected the plan for an ongoing oversight committee because the Commission found that it "did not adequately represent the opinion of all of the local governments."[161] Instead, the final plan adopted the Taos public welfare statement and provided for creation of an informational repository of technical reports and documents related to public interest considerations.[162] Consequently, no ongoing public oversight exists to ensure that the State Engineer's public interest findings prioritize the most important local criteria for a particular project or reflect evolving public policy concerns.

The Taos example illustrates several major issues with defining the public interest regionally through local planning groups. First, legislatures need to provide statutory authority and funding to form public interest planning groups and implement their recommendations. If state water authorities are not required to consider public interest recommendations by statute, the recommendations could be ignored entirely. Second, composing a planning group that represents the views of all water users is difficult. Particularly, if no funding is available for participant travel, planning groups could be dominated by major water users with greater personal stake in the outcome and not be representative of the interests of environmental groups, ditch associations, or smaller water users.[163] Finally, a purely local definition of the public interest could be used as a means for merely preserving the status quo while ignoring consideration of broader public policy objectives.[164] Broader statewide public interest concerns, such as conservation of water and instream flow protection, would not necessarily be reflected through purely local public interest decision-making.[165]

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ment goes on to identify and explain how the following public interest criteria relate to the Taos region: (1) cultural protection; (2) agrarian character; (3) ecological health; (4) long-term community and economic development potential; (5) recreational tourism; (6) public information and educational outreach; (7) conservation; (8) water supply management; (9) minimizing water contamination. *Id.* at 2-6 to 2-9.

161. THE UTTON TRANSBOUNDARY RESOURCE CENTER, WATER MATTERS! 33 (2009), *available at* http://uttoncenter.unm.edu/pdfs/Water_Matters_2009.pdf.

162. Taos Regional Water Plan, Public Welfare Statement Implementation Outline, 2-9 (Mar. 7, 2008), *available at* http://www.ose.state.nm.us/water-info/NMWaterPlanning/regions/taos/2-TaosPublicParticipation.pdf.

163. *See* Hoffman-Dooley, *supra* note 5, at 123.

164. "[W]ater users have very little to lose by maintaining the status quo," and the status quo of preserving older water rights discourages projects beneficial to whole watershed health, such as instream water transfers and conservation projects. *See* Reed D. Benson, *A Watershed Issue: The Role of Streamflow Protection in Northwest River Basin Management*, 26 ENVTL. L. 175, 208 (1996).

165. *See* Hoffman-Dooley, *supra* note 5, at 125.

C. Call for a Hybrid Approach of Combining Legislative Statewide Public Interest Criteria with Local Public Input

The best solution may be a hybrid approach that combines legislative definition of statewide public interest criteria with a statutory requirement for state water agencies to consider the recommendations of regional planning groups *on those criteria*.[166] Identifying statewide criteria such as water conservation and instream flow protection would allow legislatures to set important policy objectives in order to promote optimal use of a scarce resource.[167] At the same time, organizing regional planning groups to give input on those public interest criteria would allow flexibility to consider regional interests.[168]

Definition of statewide criteria would increase certainty in public interest decisions while ensuring that public interest decisions further statewide policy objectives for use of a scarce resource. The process for developing statewide criteria would vary from state to state. One approach would be to develop statewide criteria based upon both public interest criteria in other states' public interest statutes and input from a legislatively funded working group of water users, persons representing environmental interests, and persons representing other water-related interests.[169]

Public input from regional planning groups would complement statutory definition of the public interest by providing water agencies with guidance on which of the statewide public interest criteria are the most important in a given region. Although the structure and composition of regional planning groups would vary from state to state, three critical components of regional planning groups include: (1) legislative authorization and funding; (2) membership composition that represents a diverse range of water-related interests; and (3) a water agency liaison that would provide technical assistance and facilitate communication between the planning group and the agency.

Colorado Basin Roundtables provide an excellent model for organizing regional planning groups. The Colorado Legislature provided statutory authority and funding to form and implement recommendations of regional planning groups. The Colorado Legislature authorized the formation of Basin Roundtables with the Colorado Water for the 21st

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166. The author would like to thank Susan Kelly for suggesting the approach of developing statewide statutory public interest criteria and soliciting public input on those criteria. Interview with Susan Kelly, Interim Director, The Utton Transboundary Resources Center (Sept. 23, 2009).

167. *See* Hoffman-Dooley, *supra* note 5, at 124–25.

168. *See id.*

169. *See id.* at 124.

Century Act.[170] In addition, two representatives from each Basin Roundtable are part of a statewide Interbasin Compact Committee.[171] The legislature also provided funding for the Interbasin Compact Committee to distribute to Basin Roundtables through the Water Supply Reserve Account.[172] Decisions within Basin Roundtables are governed using bylaws adopted by each roundtable.[173] Each Basin Roundtable's recommendations are then forwarded to other Basin Roundtables and the Interbasin Compact Committee for analysis and consideration.[174] The Interbasin Compact Committee is responsible for developing procedures to ratify agreements between Basin Roundtables, with the caveat that recommendations are not legally binding unless every Basin Roundtable whose waters are affected by a proposed compact or agreement supports the proposal.[175]

The Colorado Legislature also provided a statutory framework for ensuring that the composition of Basin Roundtables reflects diverse interests. By statute, Basin Roundtables must include *designated members* appointed by counties, municipalities, conservancy districts, and state legislature agricultural committee chairs; *at-large members* representing agricultural, recreational, local domestic water provider, industrial, and environmental interests; *non-voting members* appointed by the roundtable membership who have water interests, water contracts, or knowledge about water issues; and *agency liaisons* to provide technical assistance and facilitate communication between the roundtable and agencies.[176]

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170. COLO. REV. STAT. ANN. § 37-75-104 (Westlaw, West current through end of the First Regular Session of the 67th General Assembly (2009)).

171. COLO. REV. STAT. ANN. § 37-75-105(1)(a) (Westlaw, West current through the end of the First Regular Session of the 67th General Assembly (2009). The Interbasin Compact Committee also includes six members appointed by the governor who live in different regions of the state and have expertise in agricultural, industrial, environmental, recreational, and local government matters; one member appointed by the chair of the House Agriculture, Livestock, and Natural Resources Committee; one member appointed by the chair of the Senate Agriculture, Natural Resources, and Energy Committee; and the director of Compact Negotiations. *Id.*

172. COLO. REV. STAT. ANN. § 39-29-109(2)(c) (Westlaw, West current through the end of the First Regular Session of the 67th General Assembly (2009)); *see also* Interbasin Compact Committee, Overview of the Interbasin Compact Process, http://ibcc.state.co.us/Process/Overview/ (last visited Nov. 20, 2009).

173. COLO. REV. STAT. ANN. § 37-75-104(2)(a)(I).

174. COLO. REV. STAT. ANN. §37-75-104(2)(c).

175. COLO. REV. STAT. ANN. § 37-75-105(3)(b).

176. COLO. REV. STAT. ANN. § 37-75-104(4)(a); Interbasin Compact Committee, Basin Roundtable Membership, http://ibcc.state.co.us/Process/Overview/BasinRoundtableMembership/BasinRoundtableMembership.htm (last visited Nov. 20, 2009).

An early challenge to Colorado Basin Roundtables has been achieving equivalent investment levels of all members.[177] A study conducted 18 months after the inception of Basin Roundtables reported that members who are most concerned about protecting consumptive needs are the least satisfied with Roundtables in meeting either individual goals or goals for Roundtables generally.[178] In contrast, members who prioritize protecting non-consumptive needs are the most invested and satisfied with Basin Roundtables.[179] The key factor in investment level appears to be the extent that water needs have been historically met (or unmet). Members whose needs have been historically met by the prior appropriation system are less satisfied and consequently less invested in the new process of Basin Roundtables than members whose needs have historically been unmet.[180] The danger of low investment levels of some members is that these members could in effect exercise "veto" power over any decision by refusing to compromise, as they lack desire to change the status quo.[181]

To encourage investment of all members, regional planning groups should engage in the following practices: provide funding to ensure that all members are able to attend meetings in order to facilitate trust-building between members; define "success" for regional planning groups in terms of how to best meet the needs of differing interests; provide training to develop leadership that fosters cooperation within regional planning groups; and encourage collaboration between regional planning groups in sharing best practices.[182]

In the context of public interest recommendations, regional planning groups would make public interest recommendations to state water agencies. Water agencies would not be bound by local recommendations. Instead, water agencies would be required to either accept local recommendations on a particular application or explain the reasons for rejecting the recommendation. This approach would encourage meaningful public interest review while still allowing state water agencies to use their expertise in allocating water resources for the good of the state as a whole. The obvious danger of this approach is that state agencies could fail to meaningfully consider public interest recommen-

177. JEWLYA LYNN & LYN KATHLEEN, COLORADO INSTITUTE OF PUBLIC POLICY IN PARTNERSHIP WITH THE CENTER FOR SYSTEMS INTEGRATION, MAPPING THE COLORADO BASIN ROUNDTABLE'S WATER POLICY NETWORKS 4 (March 2008), *available at* http://www.csi-policy.org/projects/csi-projects/documents/MappingColoradoBasinRoundtableReport.pdf.

178. *Id.*

179. *Id.* at 5.

180. *See id.* at 4.

181. *See id.* at 5.

182. *See id.* at 42.

dations. However, judicial review would provide a check on agency decisions. States could promote more efficacious judicial review of agency decisions by codifying statutory public interest criteria and thus providing courts with a framework for reviewing public interest decisions. The recommendations of regional planning groups would also provide additional facts to facilitate meaningful judicial review. In contrast, the alternative approach of elevating local public input to a mandate, rather than recommendation, would strip state water agencies of authority to allocate water for the good of the state as a whole. Therefore, requiring agencies to consider public input and explain public interest decisions would provide an appropriate balance between soliciting public input regarding local public interest issues and relying on agency expertise regarding statewide water allocation.

Public participation in public interest decisions would result in the following benefits: (1) allowing state water agencies to use public input to fill gaps in their technical expertise on public policy issues; (2) providing state water agencies with a mechanism for weighing the importance of different statutorily-defined criteria in a particular region; (3) increasing the transparency of public interest decisions to grow public confidence in water allocation decisions; and (4) creating a framework to ensure that public interest determinations by state water agencies actually reflect public values. At the same time, concerns about both the uncertainty of ongoing public input and the propensity of local groups to simply preserve the status quo would be balanced by limiting the scope of public interest recommendations to input regarding the relative importance of statutorily-defined criteria in the region.

Although this approach still ultimately leaves public interest decisions to the discretion of state water agencies, it recognizes the role of the public in filling the gaps of agency expertise regarding the public interest. Ultimately, the public has the greatest expertise in deciding the public interest. Therefore, legislatures should provide the statutory authority necessary for the public to participate in defining its own interest.