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## RESTORING THE PUBLIC INTEREST IN WESTERN WATER LAW

Mark Squillace\*

### *Abstract*

*American Western states and virtually every country and state with positive water resources law are in perfect agreement about the wisdom of treating their water resources as public property. Not surprisingly, this has led most Western states to articulate a goal of managing these resources in the public interest. But the meaning of the term “public interest,” especially in the context of water resources management, is far from clear. This Article strives to bring clarity to that issue. It begins by exploring three theoretical approaches that might be used for defining the public interest in water resources law before urging an approach that prioritizes communal values. It then calls on each state to articulate its own, objective definition of the public interest—one that can serve as a meaningful legal standard. Included in this call to action is an outline of a public, deliberative process that states might use to formulate such a definition. This is followed by an investigation of the current attitudes of Western states toward the public interest standard, which includes a survey of whether and how a public interest review is incorporated into each state’s administration of water rights. The survey reveals that most Western states routinely fail to meet their obligation to consider the public interest in water rights administration, despite unambiguous public interest mandates. I conclude by recommending changes to existing water resource management regimes that will help ensure accounting for public values.*

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\* © 2020 Mark Squillace. Raphael J. Moses Professor of Natural Resources Law, University of Colorado Law School. This Article has been a long time coming. I began thinking about the role of the public interest in water resources law many years ago while teaching at the University of Wyoming, and I have been slowly building toward this Article for nearly a decade. Over these many years, I have received much good advice and I regret that I am unable to recall everyone who contributed to my thinking. Nonetheless, I want to particularly thank Professors Bob Wilkinson, Jim Salzman, Buzz Thompson, Gary Libecap and the outstanding students in the Sustainable Water Management program at the University of California, Santa Barbara for their patience and support, and for their thoughtful comments and suggestions on earlier drafts of this paper. I also want to thank the many research assistants who helped me over these years, including Justin Bonebrake, Jeremy Baker, Sam May, Greg Carter, Sam Fresher, and Noah Stanton. They all made important contributions to the final product and I hope it is worth the wait.

## I. INTRODUCTION

*[F]ew public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a State, and grows more pressing as population grows. It is fundamental, and we are of [the] opinion that the private property of riparian proprietors cannot be supposed to have deeper roots.<sup>1</sup>*

*No appropriation shall be denied except when such denial is demanded by the public interests.<sup>2</sup>*

Ask any resident of the Western United States to describe local water law, and you will likely hear that the “prior appropriation” doctrine protects private water users according to the order that they first diverted water for beneficial uses. “First in time, first in right” is the jingle often used to describe Western water law; that is, the water rights of an earlier appropriator have legal priority over the rights of a junior appropriator.<sup>3</sup> However, it is probably unlikely that the same Westerner is aware that water has been deemed the property of the State from the earliest incarnations of the prior appropriation doctrine. That is, public interest considerations limit the private right to use water in virtually every Western state (the notable exception being Colorado).<sup>4</sup>

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<sup>1</sup> Hudson Cty. Water Co. v. McCarter, 209 U.S. 349, 356 (1908) (Holmes, J.).

<sup>2</sup> WYO. CONST. art. VIII, §3.

<sup>3</sup> Under the prior appropriation system, the first appropriator to put water to beneficial use receives their entire allocation of water before the next person in priority receives any water. 1 WATERS AND WATER RIGHTS § 12.01 (Amy K. Kelley ed., 3d ed. LexisNexis/Matthew Bender 2019) [hereinafter WATERS AND WATER RIGHTS].

A property right in the use of water is created by diversion of the water from a stream (or lake) and its application to a beneficial use. Water can be used at any location, without regard to the position of place of use in relation to the stream. In the event of a shortage of supply, water will be supplied up to a limit of the right in order of temporal priority: the last man to divert and make use of the stream is the first to have his supply cut off. *Id.* (citing CHARLES J. MEYERS, A HISTORICAL AND FUNCTIONAL ANALYSIS OF THE APPROPRIATION SYSTEM 4 (1971)). The allocation of water proceeds in this way until water is no longer available, either because the stream has run dry, or as contended in this Article, because the public interest would not be served by allowing any further allocation.

<sup>4</sup> Colorado is the notable exception to this general rule, as discussed *infra* Part VII.

The failure of many Western states to embrace their responsibility to protect public values in water has profound consequences for water management. So long as priorities are maintained, private water rights are commonly allocated and may be used without regard for public needs.<sup>5</sup> If the public or its elected officials believe that water should be preserved in the stream for recreational, aesthetic, or other purposes, then those interests are typically asked to stand in line with every other water user and trust their fate to the prior appropriation system.<sup>6</sup> Too often, this leads to dewatered streams while inefficient irrigation practices abound.<sup>7</sup>

In this Article, I argue for restoring the public interest to its rightful role as a universal limitation on water rights, with a particular focus on the Western United States. I begin in Part II by exploring how the public interest concept informs public policy generally. This explanation is offered to identify and illuminate a framework that can help guide the allocation and administration of water resources. In Part III, I proceed to outline different perspectives on what the term “public interest” means, offering a definition centered on common public values. Then, in Part IV, I describe a model deliberative process whereby water management agencies could fairly and meaningfully define the public interest. This is followed by a brief explanation of the distinction in Part V between the public interest and the public trust doctrine. These two related but distinct ideas are easily conflated, and I explain why my focus is on the public interest. Instream flow laws are briefly addressed in Part VI to explain how they can unintentionally undermine efforts to protect public interest values in water.

In Part VII, I turn to an historical look at the evolution of Western water law and an overview of the water appropriation process typical of modern administrative systems. This leads to a survey of the water allocation laws of twelve Western states in Part VIII, with a focus on how the laws in these states protect (or were designed to protect) the public interest. While the record is mixed, many states appear to give short shrift to positive law<sup>8</sup> standards requiring consideration of the public interest in making water allocation decisions.

All of this sets up a discussion in Part IX of a possible path forward that is more sensitive to public interest concerns. The entrenched policies embedded in the traditional water management schemes employed by Western states will be difficult to overcome, but regulatory and judicial reforms hold some promise for better protecting public values, and this part analyzes the opportunities and obstacles to

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<sup>5</sup> See, e.g., Interview with Pat Tyrell, Wyo. State Engineer in Cheyenne, Wyo. (July 12, 2007), discussed *infra* note 190 and accompanying text.

<sup>6</sup> See, e.g., WYO. STAT. ANN. § 41-3-1001(b) (2019).

<sup>7</sup> See, e.g., Todd Reeve, *Harnessing a Voluntary Market to Restore Flow to Dewatered Rivers and Streams*, GLOBAL WATER FORUM (Aug. 14, 2012), <http://www.globalwaterforum.org/2012/08/14/harnessing-a-voluntary-market-to-restore-flow-to-dewatered-rivers-and-streams/> [https://perma.cc/5JNJ-WQET].

<sup>8</sup> The reference to “positive law” used in this Article refers to legislative or constitutional pronouncements, in contrast to judicial precedent. See *Positive Law*, BLACK’S LAW DICTIONARY (11th ed. 2019).

implementing appropriate reforms. I conclude in Part X with recommendations for states and other parties that might want to bring about much-needed reforms that will better protect the public values associated with our water resources.

## II. THE PUBLIC INTEREST AND PUBLIC POLICY

The public interest as a guiding principle of public policy is not unique to the water resources field. One of the more prominent and longstanding American examples of a policy guided by a public interest standard is the Federal Communications Act of 1934 (FCA).<sup>9</sup> The FCA established the Federal Communications Commission (FCC), which is tasked with “regulat[ing] interstate and foreign commerce in communication . . . without discrimination . . . .”<sup>10</sup> To carry out this mission, the Act authorizes the FCC to “prescribe such rules and regulations as may be necessary *in the public interest* to carry out the provisions of this Act.”<sup>11</sup> But what does it mean that regulations are “in the public interest”? Two recent FCC regulatory actions on net neutrality shed light on this question, even as they raise the prospect that protecting the public interest is a futile endeavor, so long as the term lacks an objective definition.

In 2015, the FCC issued a final rule barring broadband internet providers from blocking, throttling, or engaging in the paid prioritization of their online services.<sup>12</sup> This action sought to ensure that internet providers treat all content on the web equally and non-preferentially—an elusive objective known as net neutrality.<sup>13</sup> By classifying consumer broadband service as a “telecommunications service,” the FCC claimed it had the authority to regulate internet service providers as utilities under the common-carrier provisions of the FCA, and it repeatedly invoked the public interest to support its decision.<sup>14</sup> Less than three years later, however, following a change in leadership at the FCC, the Commission issued a new rule repealing the 2015 rule.<sup>15</sup> In particular, the FCC stripped broadband services of their designation as a “telecommunications service” and opined that the FCC lacked the authority to regulate such services.<sup>16</sup> “Given the unknown needs of the networks of the future,” the order reads, “it is our determination that the utility-style regulations . . . run *contrary to the public interest*.”<sup>17</sup> In short, two diametrically opposed regulations were both purportedly cloaked in the public interest.

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<sup>9</sup> Communications Act of 1934, Pub. L. No. 73–416, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. § 151–624 (2018)).

<sup>10</sup> 47 U.S.C. § 151.

<sup>11</sup> *Id.* § 201(b) (emphasis added).

<sup>12</sup> 80 Fed. Reg. 19,738 (Apr. 13, 2015) (repealed).

<sup>13</sup> *Id.*

<sup>14</sup> *Id. at passim* (referencing the “public interest” a total of 122 times).

<sup>15</sup> 83 Fed. Reg. 7852 (Feb. 22, 2018) (codified at 47 C.F.R. pts. 1, 8, and 20).

<sup>16</sup> *Id.* at 7853.

<sup>17</sup> *Id.* at 7871.

The dueling invocation of the “public interest” in the net neutrality example above lays bare a key tension that I address in this Article: If, under a statute, the public interest can be constructed to mean one thing but also the opposite of that very thing, then that statute fails to establish a meaningful regulatory standard. Put another way, the “public interest” must have an ascertainable, objective meaning to avoid being hollow, surplus language.<sup>18</sup> Moreover, if the term lacks an objective meaning, then it cannot logically serve as an “intelligible principle” sufficient to support a constitutional delegation of legislative power.<sup>19</sup> Many state courts also apply similar nondelegation doctrines, rooted in their own constitutional separation of powers jurisprudence.<sup>20</sup>

In this Article, I argue that, while subject to interpretation and nuance, the public interest must be reducible to an objective definition. Only then can it serve as a proper limitation on delegated power sufficient to satisfy constitutional standards.<sup>21</sup> This is not to say that the public interest can mean only one thing. Because the public interest reflects a societal value judgment, and because societal values evolve, so too can the meaning of the term. But as I attempt to demonstrate below in Part III, the public interest must have a discrete meaning that derives from

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<sup>18</sup> The rule against surplusage is a time-honored canon of construction that urges judges to construe text such that each word and phrase has meaning. *See* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 174 (2012); *see also* *United States v. Butler*, 297 U.S. 1, 65 (1936) (“These words cannot be meaningless, else they would not have been used.”).

<sup>19</sup> *See* *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (holding that “[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”). Yet the Supreme Court has already held that the public interest standard in the FCA does, in fact, afford the FCC a sufficient basis upon which it may exercise its regulatory power. *Nat’l Broadcasting Co. v. United States*, 319 U.S. 190, 225–26 (1943).

<sup>20</sup> *See, e.g., State v. Fairbanks North Star Borough*, 736 P.2d 1140, 1143 (Alaska 1987) (discussing application of federal delegation doctrine cases by state courts); *El Dorado Oil Works v. McColgan*, 215 P.2d 4, 8–9 (Cal. 1950) (“The essential requirement [of the nondelegation doctrine] is the Legislature’s specification of a standard—an intelligible principle to which the person or body authorized to administer the act is directed to conform” (internal citations omitted)); *People v. Holmes*, 959 P.2d 406, 409–10 (Colo. 1998) (discussing the judicial standards and development of Colorado’s nondelegation doctrine); *Newport Int’l Univ., Inc. v. State*, 186 P.3d 382, 388 (Wyo. 2008) (“The nondelegation doctrine is a judicial construction which limits the exercise of power by actors not elected to or otherwise employed within a designated branch of government . . . State constitutional vesting clauses, which entrust certain branches of government with specified functions and powers, are the primary source of limitations on delegations.”).

<sup>21</sup> To be sure, courts might have greater flexibility to construe the public interest to accommodate two different—potentially even inconsistent—interpretations outside of the nondelegation doctrine context. One example is in the context of a deferential agency review standard such as that articulated by the U.S. Supreme Court in *Chevron USA, Inc. v. Nat. Res. Def. Council, Inc.* 467 U.S. 837, 844, 865 (1984).

an objective framework. To put it another way, the public interest cannot simply be applied to mean whatever an individual regulator decides it should mean.<sup>22</sup>

This leads me to ask how best to define “public interest,” recognizing that defining the term is a matter that has particular resonance for a common-pool resource such as water. Like the air we breathe, the public understands that water is a communal resource with important public values, and modern societies expect their governments to manage water resources responsibly and protect those public values.<sup>23</sup>

### III. DEFINING THE PUBLIC INTEREST

Despite its widespread acceptance as a core principle for evaluating policy and its exhaustive treatment in scholarly literature, the public interest remains an elusive concept, and scholars and policymakers alike have struggled to ascertain a precise, normative meaning.<sup>24</sup> The public interest surely encompasses “community values,” but what about private values that also arguably enhance public welfare? And what role does subjective bias play in influencing the proper choice and scope of relevant values?<sup>25</sup> While one can potentially conjure a wide range of approaches for

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<sup>22</sup> For example, it seems beyond peradventure that if a government agency gave all of the water resources in a particular basin to a single for-profit entity, without limitation, that decision would be contrary to the public interest.

<sup>23</sup> See Mitch Tobin, *7 Things I Learned Studying Public Opinion on Water*, NEWS DEEPLY: WATER DEEPLY (May 1, 2017), <https://www.newsdeeply.com/water/articles/2017/05/01/7-things-i-learned-studying-public-opinion-on-water> [https://perma.cc/8267-UKKH].

<sup>24</sup> See RICHARD E. FLATHMAN, *THE PUBLIC INTEREST: AN ESSAY CONCERNING THE NORMATIVE DISCOURSE OF POLITICS* 9–13 (1966) (providing an extensive analysis of the “public interest” that distinguishes between its commendatory and descriptive meanings). As a commendatory phrase, the public interest occupies an important role in political rhetoric. *Id.* The other meaning is descriptive and is used to whether a certain policy fits the defined public interest criteria. *Id.* Rhetorical maneuvers abound in politics, leading politicians to sometimes invoke the phrase for its commendatory meaning without carefully thinking through what criteria should be invoked to apply the descriptive meaning. *Id.* The arguments found in the remainder of this Article focus on the descriptive meaning of the public interest. See also C.W. Cassinelli, *Some Reflections on the Concept of the Public Interest*, 69 ETHICS 48–49 (1958) (identifying three categories of problems with trying to define the public interest, but also suggesting that “an opposition between the public interest and individual interests is not consistent with a democratic ethic . . .”). For reasons stated in this Part of the Article, I largely reject this claim put forth by Professor Cassinelli.

<sup>25</sup> Subjective views inevitably influence the interpretation of the public interest, but subjective perspectives should not be confused with selfishness. The former describes a particular interpretation of communal values influenced by one’s “location” (geographically, socially, etc.) within a “common world.” See HANNAH ARENDT, *THE HUMAN CONDITION* 57 (1958). The latter constitutes a violation of duty by explicitly ignoring the consequences of an action. See FLATHMAN, *supra* note 24, at 26–28. The presence of subjective values requires the public interest to incorporate these often-competing views in the policy process.

elucidating the public interest, they generally fit into three categories: (A) an economic or utilitarian approach; (B) a pluralist approach; and (C) a view of the public interest as solely reflective of shared communal and societal values.

#### *A. The Utilitarian Approach to the Public Interest*

The first of the common frameworks defining the public interest takes an economic or utilitarian approach, asserting that the public interest be defined to promote decisions that maximize overall wealth;<sup>26</sup> or restated in more egalitarian and progressive-era terms, actions that afford “the greatest good of the greatest number in the long run.”<sup>27</sup> A utilitarian approach has several advantages. It offers an objective standard that can, in theory, be readily ascertained. This is because maximizing net present values relies on defining costs and benefits that, even if difficult to quantify, will offer objective variables upon which to base the public interest. Moreover, if initial projections of costs and benefits of a decision or choice turn out to be inaccurate or incomplete, or if values or conditions change the utilitarian calculus, the decision can often be adapted to reflect the new information.<sup>28</sup> In this way, utilitarianism is also inherently flexible.

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The procedural component of the public interest will be further outlined below.

<sup>26</sup> See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 12–13 (J.H. Burns & H.L.A. Hart eds., 1970) [hereinafter BENTHAM, AN INTRODUCTION] (“The community is a fictitious body, composed of the individual persons who are considered as constituting as it were its members. The interest of the community then is, what?—the sum of the interest of the several members who compose it . . . . An action then may be said to be conformable to the principle of utility, or, for shortness sake, to utility, (meaning with respect to the community at large) when the tendency it has to augment the happiness of the community is greater than any it has to diminish it.”).

<sup>27</sup> Jeremy Bentham first articulated the idea that “it is the greatest happiness of the greatest number that is the measure of right and wrong.” JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES AND THE FRAGMENT OF GOVERNMENT 393 (J.H. Burns & H.L.A. Hart eds., 2010). Gifford Pinchot, the renowned conservation and first Chief of the U.S. Forest Service, adapted this principle, adding a time element: “Where conflicting interests must be reconciled, the question shall always be answered from the standpoint of the greatest good of the greatest number in the long run.” See *Pinchot and Utilitarianism*, THE GREATEST GOOD, <https://www.fs.fed.us/greatestgood/press/mediakit/facts/pinchot.shtml> [https://perma.cc/DTT6-6UEJ] (last visited June 27, 2018).

<sup>28</sup> Professor Douglas Grant has written extensively on the public interest’s function in water policy. See, e.g., Douglas L. Grant, *Public Interest Review of Water Right Allocation and Transfer in the West: Recognition of Public Values*, 19 ARIZ. ST. L.J. 681 (1987) [hereinafter Grant, *Public Interest Review*] (examining the evolution of public interest review to reflect public values). Grant argues that the public interest serves to assess and weigh the externalities of a given water project or policy. *Id.* at 702–707. Grant later characterizes this cost-benefit-style approach to the public interest as the “maximum benefits model.” See Douglas L. Grant, *Two Models of Public Interest of Water Allocation in the West*, 9 U. DENV. WTR. L. REV. 485, 490, 498 (2006) [hereinafter Grant, *Two Models*]. Such a model, Grant argues, has been able to incorporate new values, such as ecological values, into public



On the other hand, a utilitarian approach tends to play out in terms of costs and benefits that can be readily measured in monetary terms.<sup>29</sup> This often excludes or undervalues costs and benefits for intangible assets such as aesthetic, existential, or communal values,<sup>30</sup> and it is these shared values that are perhaps most reflective of the public's interests. Moreover, efforts to quantify the value of such intangible assets are often tried but rarely succeed.<sup>31</sup> Indeed, the results are almost always presented in terms of the economic value of environmental assets to humans, as opposed to any inherent value that they might possess.<sup>32</sup> How should a society, for example, value a free-flowing stream? Is it enough to identify the economic values associated with riparian property, or with fishing, boating, or otherwise recreating in or on the stream? Or does a free-flowing stream have some intrinsic value that should also be taken into account? And how should society value the use and enjoyment of the stream by future generations? As the world's population grows and fewer water resources remain pristine, is it not likely that those water resources that continue to survive in a relatively unspoiled condition will hold far greater value to future people than can be appreciated today? Because there are no easy answers to

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interest review. *Id.* at 495. As suggested in the text, cost-benefit analysis is fraught with problems, especially in the context of assessing the value of commonly held public resources like water. *See id.* at 495–98.

<sup>29</sup> *See, e.g.*, Jonathan H. Adler, *The Challenge of Regulating Objectively*, 31 NEW ATLANTIS 136 (2011) (reviewing DOUGLAS A. KYSAR, *REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY* (2010)), <https://www.thenewatlantis.com/publications/the-challenge-of-regulating-objectively> [<https://perma.cc/M58J-FHK2>] (“The core argument [against cost-benefit analysis] is that cost-benefit calculations are incapable of capturing the full range of ethical, aesthetic, and other concerns that should motivate regulatory decision-making . . .”).

<sup>30</sup> *Id.* at 143.

<sup>31</sup> *See generally* MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* (2006) (presenting one of the more thoughtful, though ultimately supportive, critiques of cost-benefit analysis); *see also* Amy Sinden, Douglas A. Kysar & David M. Driesen, *Cost-Benefit Analysis: New Foundations on Shifting Sand*, 3 REG. & GOVERNANCE 48 (2009) (reviewing ADLER & POSNER, *NEW FOUNDATION*) (suggesting that given the limitations of cost-benefit analyses (CBAs), other decision-making tools might be preferable).

<sup>32</sup> *See generally* FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* (2004) (discussing the troubling problem of placing a value on human life, although that is not likely to pose a significant issue for implementing a public interest standard in the context of water rights).

these questions, a utilitarian or cost-benefit approach tends to minimize and sometimes even disregard current and future public values that are commonly shared, in favor of private and present economic values.<sup>33</sup> Many see this as a distorted view of the public interest.<sup>34</sup>

Finally, a utilitarian approach fails to subjectively consider *who* benefits. A public interest definition that maximizes net benefits but fails to address distributive justice<sup>35</sup> concerns will be difficult to defend. For example, a decision that grants a handful of industrial users control over finite water resources might maximize overall wealth, but if these users dry up a river and thereby deprive the general public of access to water to meet basic human needs, as well as their traditional rights to fish and recreate in the river, then such a decision hardly seems to be in the public interest—at least if the “public” is understood to encompass society as a whole.

### B. *The Pluralist View of the Public Interest*

Somewhat related to the utilitarian approach to defining public interest is the pluralist view, which seeks to aggregate the individual preferences of interested parties and filter those views through a political or democratic process.<sup>36</sup> This

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<sup>33</sup> See FLATHMAN, *supra* note 24, at 33–37 (making the moral argument that, while individuals are usually motivated by self-interest, they should sometimes support policies that are contrary to their own self-interest yet support the greater public interest). Flathman criticizes scholars, most notably Jeremy Bentham, who define the public interest by aggregating individual interests. *Id.*; see also BENTHAM, AN INTRODUCTION *supra* note 26, at 12 (“It is in vain to talk of the interest of the community, without understanding what is the interest of the individual. A thing is said to promote the interest, or to be for the interest, of an individual, when it tends to add to the sum total of his pleasures: or, what comes to the same thing, to diminish the sum total of his pains.”). Nonetheless, Flathman acknowledges that individual interest “is to be highly valued, fostered, and protected as a means of strengthening the body politic.” FLATHMAN, *supra* note 24, at 37.

<sup>34</sup> See Sinden et al., *supra* note 31, at 62; see also Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 PENN L. REV. 1553, 1567 (2002); Steven Kelman, *Cost-Benefit Analysis: An Ethical Critique*, 5 REGULATION 33, 36–37 (1981).

<sup>35</sup> See generally JOHN RAWLS, A THEORY OF JUSTICE (1971) (addressing the problem of distributive justice and defining the concept as the socially just distribution of goods in a society).

<sup>36</sup> Bentham arguably supports this approach, as well as pure utilitarianism. He argues, for example, that “[t]he interest of the community then is, what?—the sum of the interests of the several members who compose it.” BENTHAM, AN INTRODUCTION, *supra* note 26, at 12. Bentham further defines the “principle of utility” as the “principle which approves or disapproves of every action whatsoever.” *Id.* at 11–12. Individuals and political leaders alike determine the principle of utility by summing the pleasure and pain of an action to determine if the action produces a beneficial result. *Id.* at 12. This process of summing pain and pleasure works on both the individual and communal level. *Id.* Bentham stresses, “It is in vain to talk of the interest of the community without understanding what is the interest of the individual.” *Id.* Understanding the interest of a communal “body” begins by understanding the individual

framework privileges majoritarian views, as determined either by popular vote or the vote of elected representatives.<sup>37</sup>

As a practical matter, legislatures can and sometimes do define the public interest, thereby establishing a legal standard that limits the discretion and influence of policymakers in the executive branch.<sup>38</sup> But legislative choices made by elected officials in a representative democracy may or may not reflect majoritarian views, and might be more in step with utilitarian or communal principles (as described in Sections A and C of this Part, respectively). Moreover, such choices often seem incoherent because they lack fealty to any precise theory or principle. Indeed, legislatures can announce radically different versions of the public interest that are more reflective of political views and the influence of well-financed lobbyists and politically connected participants in the decision-making process. This is essentially what happened with the FCC's net neutrality rules.<sup>39</sup>

A pluralist approach also suffers from being both unpredictable and unstable. Indeed, unlike the utilitarian or communal approaches, pluralism makes no pretense of seeking an objective understanding of the public interest, focusing instead on the values and preferences of those individuals allowed to engage in the decision process as aggregated by the decision-maker.<sup>40</sup> And because decision-makers are typically

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interests that shape that body; after understanding individual interests the community's interest is then "the sum of the interests of the several members who compose it." *Id.*

<sup>37</sup> For a general review of pluralist approaches in the political sphere, see Richard Bellamy, *Dealing with Difference: Four Models of Pluralist Politics*, 53 PARLIAMENTARY AFFAIRS 198 (2000).

<sup>38</sup> See, for example, the definition of the public interest in the Alaska Water Use Act, which asks the agency decision-maker to balance a range of public and private interests in deciding whether to issue a water permit. ALASKA STAT. § 46.15.080 (2019). The statute provides that the state water commissioner should issue a water permit only if he finds, among other things, that the issuance of the permit is in the public interest. In determining the public interest, the commissioner must consider:

- (1) the benefit to the applicant resulting from the proposed appropriation;
- (2) the effect of the economic activity resulting from the proposed appropriation;
- (3) the effect on fish and game resources and on public recreational opportunities;
- (4) the effect on public health;
- (5) the effect of loss of alternate uses of water that might be made within a reasonable time if not precluded or hindered by the proposed appropriation;
- (6) harm to other persons resulting from the proposed appropriation;
- (7) the intent and ability of the applicant to complete the appropriation;
- and (8) the effect upon access to navigable or public water.

*Id.*

<sup>39</sup> See *supra* Part II; see also Timothy Karr, *Exposing D.C.'s Anti-Democratic Opposition to Net Neutrality*, FREEPRESS (June 19, 2019), <https://www.freepress.net/our-response/expert-analysis/explainers/exposing-dcs-anti-democratic-opposition-net-neutrality> [<https://perma.cc/NGW9-GJ29>].

<sup>40</sup> See Bellamy, *supra* note 37.

elected or appointed, they are constantly changing. With shifts in power come different political and ideological views about how to define the public interest.<sup>41</sup> In this sense, the public interest may not reflect the *public's* interests at all, but instead the interests of rent-seekers<sup>42</sup> who are able to commandeer the political and agency decision-making processes.

Like utilitarianism, pluralism also tends to favor present interests over those of future generations because it essentially responds to time-sensitive pressure from interested parties and organizations.<sup>43</sup> It is entirely possible—if not likely—that some of these parties will promote the protection of both public values and the needs of future generations. Still, it is difficult to imagine that such arguments will prevail over the demands made by present users, especially for those water resources facing significant stress. Concerted lobbying efforts of water-intensive industries, such as agriculture, for example, tend to overpower concerns raised by individual members of the public.<sup>44</sup> The experience in many places where streams have been entirely dewatered by private, consumptive uses would appear to bear out the observation that communal values often receive short shrift when water resources are claimed chiefly for private uses.<sup>45</sup>

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<sup>41</sup> The constant turnover in elected officials and agency leadership has prompted some scholars to favor judicial application of the Public Trust Doctrine for water resources rather than the public interest standard found in legislation. See Michelle Bryan Mudd, *Hitching Our Wagon to a Dim Star: Why Outmoded Water Codes and the Public Interest Review Cannot Protect the Public Trust in Western Water Law*, 32 STAN. ENVTL. L.J. 283, 307 (2013).

<sup>42</sup> “Rent seeking is the attempt by particular groups to persuade governments to grant them . . . valuable monopolies or legal privileges. If their rent seeking is successful, such benefits could add up to a substantial transfer of wealth to these privileged groups from the general public.” EAMONN BUTLER, PUBLIC CHOICE – A PRIMER 76 (2012).

<sup>43</sup> See Bellamy, *supra* note 37.

<sup>44</sup> See, e.g., Noah Gallagher Shannon, *The Water Wars of Arizona*, N.Y. TIMES (July 19, 2018), <https://www.nytimes.com/2018/07/19/magazine/the-water-wars-of-arizona.html> [<https://perma.cc/M2LJ-MUU9>] (chronicling the experiences of rural landowners in Arizona who are unable to access groundwater to meet even their most basic needs due to the depletion of local aquifers). Industrial irrigation is responsible for 70% of the water withdrawn from aquifers in the region, but residents “felt there were too many forces already marshaled against them, including the state’s strong agriculture and ranching lobbies,” to change local policies. *Id.*

<sup>45</sup> See, e.g., *River*, NATIONAL GEOGRAPHIC, <https://www.nationalgeographic.org/encyclopedia/river/> [<https://perma.cc/P29V-UCWF>] (last visited Nov. 10, 2019) (“An unsettling number of large rivers—including the Colorado, Rio Grande, Yellow, Indus, Ganges, Amu Darya, Murray, and Nile—are now so overtapped that they discharge little or no water to the sea for months at a time.”); Laura Paskus, *Time’s Out for the Rio*, SANTA FE REP. (Apr. 15, 2014), <https://www.sfreporter.com/news/coverstories/2014/04/15/times-out-for-the-rio/> [<https://perma.cc/LQ5K-SRYJ>] (“It doesn’t take driving 1,000 miles south of Pilar to Texas, where about 400 miles of the Rio Grande are almost always dry, to see sandy riverbed. Just look south of Albuquerque between June and the end of October. Last year, about 30 miles dried.”).

*C. Public Interest as Shared Communal and Societal Values*

A third theory views the public interest as solely reflective of shared communal and societal values. The essence of this approach is recognizing that public interests are distinctly different from private interests and describing the communal aspect of the public interest in normative, values-based terms.<sup>46</sup> A communal perspective of the public interest acknowledges the value of private interests in common resources, but only to the extent that the shared, public values of those resources are protected first.<sup>47</sup>

This theory might seem particularly anomalous in the context of traditional Lockean notions of private property,<sup>48</sup> but it finds strong support in the water resources context for two reasons. First, the property at issue is water, which—unlike land—is traditionally viewed as public property.<sup>49</sup> Water users acquire a usufructuary<sup>50</sup> right in water, but nothing more.<sup>51</sup> Second, notions of property that informed the early architects of the American experiment—and that trace their

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<sup>46</sup> Communal values include trans-subjective values that are devoid of self-interest and can be “justifiably imposed” on all members of a community, particularly in instances when there are two competing interests. FLATHMAN, *supra* note 24, at 37–42. These communal values are determined by filtering context-specific information, making the public interest incorporate a procedural component further described in the next paragraph. *Id.* When assessing if a policy can be justifiably imposed, public interest review depends on what Flathman calls the principle of “generalization.” *Id.* Policy typically affects particular groups—or “classes”—of individuals. *Id.* at 70–72. The principle of generalization dictates that a policy can be justifiably imposed on all members of a particular class. *Id.*

<sup>47</sup> The word “first” should be emphasized here because it has particular application to water law in the American West. In many Western states, the prior appropriation doctrine can cause certain State-held water rights to be subject to private uses, even if those uses violate the communal values held by the State’s citizens.

<sup>48</sup> See JOHN LOCKE, TWO TREATISES ON CIVIL GOVERNMENT 213 (2d ed. 1887), (“[L]abour . . . gave a right of property, wherever anyone was pleased to employ it upon what was common . . .”).

<sup>49</sup> Water as public property is a common refrain in the constitutions of western states. See, e.g., COLO. CONST. art. XVI, § 5 (“The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state . . .”).

<sup>50</sup> Black’s Law Dictionary defines a “usufruct” as “[a] right for a certain period to use and enjoy the fruits of another’s property without damaging or diminishing it, but allowing for any natural deterioration in the property over time.” BLACK’S LAW DICTIONARY (11th ed. 2019). In the case of water, one can acquire a property right to use it, but title to the water itself remains vested in the State. See, e.g., *In re Hood River*, 227 P. 1065, 1096 (Or. 1924). (In Oregon, “[t]he owner [of a water right] has no property in the water itself, but a simple usufruct. The [Oregon] Water Code declares the waters of the state to be public property.” (internal citations omitted)).

<sup>51</sup> See *Spear T. Ranch v. Knaub*, 691 N.W.2d 116, 127 (Neb. 2005) (“A right to appropriate surface water . . . is not an ownership of property.”).

origins back to Aristotle<sup>52</sup>—suggest stronger support for egalitarian notions of property rights than John Locke might have preferred, with a concomitant focus on the common good. Thomas Jefferson, for example, expressed a view of property that was far more circumspect about rights of inheritance and alienability. In Jefferson’s view, it is society that creates and thus ultimately controls property rights.<sup>53</sup> Jefferson thought it “self-evident” that “the earth belongs to the living in usufruct; that the dead have neither power nor rights over it.”<sup>54</sup> Whatever one thinks of Jefferson’s “self-evident” claim, it seems remarkably salient in the context of water rights, where public ownership is the norm, and where private rights are commonly understood as usufructuary.

Gregory Alexander offers further support for the idea that public and private interests are distinct. In *Commodity & Propriety*, Alexander argues that “the core of American republican thought during the eighteenth century was the idea that private ‘interests’ could and should be subordinated to the common welfare of the polity.”<sup>55</sup> In making his case, he reflects on how early Americans embraced a view of the public good distinct from private interests:

The holistic conception of society made the notion of the public good as the central objective of political life intelligible. . . . The common good then, was not merely what the consensus of society’s individual members wished, but a substantive conception of the moral good that transcended individual interests . . . .<sup>56</sup>

In *Public Rights and Private Interests*,<sup>57</sup> Hannah Arendt takes an approach to the public interest not unlike Alexander’s. Arendt argues that public rights and the public interest must be understood as distinct from private rights and private interests. As Arendt explains, the public interest is more than a sum of private interests.<sup>58</sup> On the contrary, the public sphere is inherently distinct from, and often at odds with, private values and rights:

These two, the private and the public, must be considered separately, for the aims and chief concerns in each case are different. Throughout his life man moves constantly in two different orders of existence: he moves within what is his *own*, and he also moves in a sphere that is *common* to him and his fellowmen. The “public good,” the concerns of the citizen, is

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<sup>52</sup> GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY* 29 (1997).

<sup>53</sup> *Id.* at 27.

<sup>54</sup> *Id.* at 26.

<sup>55</sup> *Id.* at 29.

<sup>56</sup> *Id.*

<sup>57</sup> Hannah Arendt, *Public Rights and Private Interests: In Response to Charles Frankel*, in *SMALL COMFORTS FOR HARD TIMES: HUMANISTS ON PUBLIC POLICY* 103, 103–04 (Michael J. Mooney & Florian Stuber eds., 1977).

<sup>58</sup> *Id.* at 103.

indeed the common good because it is localized in the world which we have in common *without owning it*. The reckless pursuit of private interests in the public-political sphere is as ruinous for the public good as the arrogant attempts of governments to regulate the private lives of their citizens are ruinous for private happiness.<sup>59</sup>

Arendt thus sees the public sphere as a world beyond the self. All citizens—including those who came before us and those who will come after us—share in this public space, and all must suppress their private interests to enjoy it.<sup>60</sup>

Arendt acknowledges the difficulty of premising the public interest upon the suppression of one's own private interests. This task requires that individuals act impartially, and Arendt notes that "such impartiality . . . is resisted at every turn by the urgency of one's self-interests, which are always more urgent than the common good."<sup>61</sup> But she sees such resistance as necessary to preserve public values. In a civil society, people must sacrifice certain individual interests to promote shared, communal values.<sup>62</sup> When private interests are allowed to influence the public realm, common values are sacrificed for personal values.

In seeking to shield the public interest from private intrusions, Arendt acknowledges the important role of private interests in a modern society.<sup>63</sup> But she insists that private interests in common resources must yield to the shared, public values of those resources and that these public values must be protected first: "What is necessary for the public realm is that it be shielded from the private interest which have intruded upon it in the most brutal and aggressive form."<sup>64</sup>

Although not written to explain the public interest in water resources management, Arendt's understanding of the public interest as a common good, her recognition of the challenge posed by self-interest, and her articulation of the proper place for private interests in a public interest analysis fit surprisingly well into the water resources paradigm.<sup>65</sup> The most basic public or communal value associated

<sup>59</sup> *Id.* at 103–04 (emphasis in original).

<sup>60</sup> See Maurizio Passerin d'Entreves, *Hannah Arendt*, STAN. ENCYCLOPEDIA OF PHIL. (Jan. 11, 2019), <https://plato.stanford.edu/entries/arendt/> [<https://perma.cc/RQ3R-C6MR>].

<sup>61</sup> Arendt, *supra* note 57, at 105.

<sup>62</sup> Arendt points to the example of the juror to illustrate her point. When called upon for jury duty, each of us is asked to set aside our private feelings and administer justice as neutrally as possible. *Id.* at 104–05.

<sup>63</sup> See, e.g., Suzanne Duvall Jacobitti, *The Public, the Private, the Moral: Hannah Arendt and Political Morality*, 12 INT'L POL. SCI. REV. 281, 287 (1991) (noting that Arendt "was not hostile to the private sphere").

<sup>64</sup> Arendt, *supra* note 57, at 108.

<sup>65</sup> Arendt's understanding of the public interest is firmly grounded within the liberal tradition. See *id.* For example, Jean-Jacques Rousseau spoke of a "general will" that encompassed only common interests. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 58 (Christopher Betts trans., Oxford Univ. Press 1994) (1762). As opposed to "the will of all," the general will was not merely a sum of individual interests but rather a set of shared values that transcended a person's particular station. *Id.* at 62. To Rousseau, the general will was

with water resources is for meeting essential human needs. But it also includes such things as ecological health, aesthetic values, and recreational opportunities for fishing, boating, and swimming. The prospective value of water resources to *future* communal users should play a role as well.

Protecting the communal values associated with water resources does not mean that public interest demands are absolute. Accommodating other uses of water will often be necessary and can usually be done without unduly compromising public values. But a water resources law that is supposed to protect the public interest should ensure an appropriate level of protection for public values before private rights are even considered.

A useful strategy for persuading decision-makers about the merits of protecting communal values in water before protecting private rights might employ John Rawls' "veil of ignorance."<sup>66</sup> Rawls' thought experiment asks parties to assume an original position where "no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength and the like."<sup>67</sup> If all parties were to define the public interest from behind the veil of ignorance, they would be more likely to support communal interests that benefit society broadly, as opposed to private interests that would benefit only the privileged few.<sup>68</sup>

A Rawlsian approach to the public interest in the water resources context might identify appropriate baselines for protecting communal values in water. As

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preeminent and could not be contradicted. *Id.* In fact, the social contract hinged on each citizen putting "his person and all his power in common under the supreme direction of the general will." *Id.* at 55. Rousseau's forebearer, John Locke, described a similar concept that he termed the "publick good." JOHN LOCKE, TWO TREATISES OF GOVERNMENT 278 (1st ed., Cambridge Univ. Press 1960) (1690). While leaving the term undefined, Locke insisted that legislators must act in the public good rather than acting to promote private interests, and his writing suggested at least one shared value that might be encompassed within the public good—the basic sustenance of all men. *Id.* at 303–06; see Jeffrey M. Gaba, *John Locke and the Meaning of the Takings Clause*, 72 MO. L. REV. 525, 538–39 (2007).

<sup>66</sup> JOHN RAWLS, A THEORY OF JUSTICE 136–42 (1971). This "veil of ignorance" strategy was suggested by Stefano Moroni in the context of planning theory. See Stefano Moroni, *Towards a Reconstruction of the Public Interest Criterion*, 3 PLAN. THEORY 151, 163 (2004).

<sup>67</sup> RAWLS, *supra* note 66, at 137.

<sup>68</sup> In this way, Rawls uses the veil of ignorance to show his clear preference for a political approach that emphasizes communal values over simply maximizing private benefits. He believes that the utilitarian approach leads to an unacceptable distributional inequity that allows some men to prosper but denies other men fundamental baseline interests: "Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override." *Id.* at 3. The veil of ignorance, therefore, is helpful in identifying the certain interests that all men ought to be afforded in society. Rawls' work echoes the ethos of Immanuel Kant, who also believed that men only ought to act in a manner that would be consistent, regardless of his station in society: "I ought never to act except in such a way that I could also will that my maxim should become a universal law." IMMANUEL KANT, THE MORAL LAW 74 (H.J. Paton trans., Routledge Classics 1948).



suggested above, these baselines might include, for example, water to meet basic human needs, minimum instream flows or lake levels, minimum water quality standards, and minimum ecological health standards. Again, private water rights and uses would be allowed and fully expected under this system. But, as Arendt suggests, private rights should only be recognized after the primary public interests are protected and preserved.<sup>69</sup>

The public interest, of course, is an inherently dynamic concept. Accordingly, an adaptive mechanism should be built into any definition to allow for efficient changes as values change and as new information becomes available that better informs public needs and how to protect them. A dynamic conception of the public interest is particularly important for managing water resources where water supplies can fluctuate wildly due to droughts, floods, and climate change. While some academics and policymakers might prefer the more certain posture of a static public interest, all can take comfort from the fact that changes to the public's understanding of communal needs evolves slowly—and, for the most part, predictably—as new information becomes available and as societal values evolve.<sup>70</sup>

#### IV. A PROCESS FOR DEFINING THE PUBLIC INTEREST

Even if interested parties could agree that the public interest should be defined in terms of communal values, the nature and scope of those communal values—and the manner in which they should be protected under a public interest standard—must still be fleshed out. The key question to be answered here is what procedural norms should be adopted to achieve both a good outcome and one that will be embraced, or at least accepted, by the public as a legitimate reflection of public interest values. The procedural norms to which I refer include: (1) appropriate advance notice of a proposal, or a pre-proposal; (2) one or more opportunities for meaningful civic engagement through written comments and public meetings or hearings; (3) a decision process that transparently reflects how the decision-maker responded to significant comments from the public; and (4) a process for review of the final decision by an impartial arbiter. Such procedures can help policymakers collect and process context-specific information used to identify and assess communal values, and ultimately to define the public interest.<sup>71</sup>

A process, of course, is only as good as its implementation. In an excellent essay aimed at reconciling the public interest with environmental philosophy, Ben Minter argues for defining the public interest through a deliberative process, following an approach advocated by the American philosopher John Dewey.<sup>72</sup>

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<sup>69</sup> See *supra* notes 58–64 and accompanying discussion.

<sup>70</sup> See generally Ben A. Minter, *Environmental Philosophy and the Public Interest: A Pragmatic Reconciliation*, 14 ENVTL. VALUES 37 (2005); Grant, *Two Models*, *supra* note 28.

<sup>71</sup> FLATHMAN, *supra* note 24, at 53–63.

<sup>72</sup> See generally Minter, *supra* note 70, at 44–49; see also François-Pierre Gauvin, Nat'l Collaborating Ctr. for Healthy Pub. Pol'y, *What Is a Deliberative Process?*, Pub. No. 1193 (Oct. 2009), [http://www.ncchpp.ca/docs/DeliberativeDoc1\\_EN\\_pdf.pdf](http://www.ncchpp.ca/docs/DeliberativeDoc1_EN_pdf.pdf)

Although Dewey does not mention the term, and Minter mentions it only in passing, both seem to favor a process with robust give-and-take that reflects the civic republican ideal.<sup>73</sup> Cass Sunstein has described civic republicanism as embracing a deliberative process that promotes political equality for the purpose of achieving a definable common good; where engaged parties sublimate their private interests and instead act as citizens committed to achieving the public interest.<sup>74</sup> As described by Sunstein, civic republicanism offers a seemingly perfect framework for identifying the public interest in water resources.

While civic republicanism seems an obvious choice for developing a public interest standard, it must be approached with care due to the very real risk that it might be co-opted by special interests. More specifically, civic republicanism is quite rightly described as an “ideal,” meaning that it cannot be fully realized in the real world.<sup>75</sup> Try as they might, people do not generally sublimate their private interests or the interests of their clients when engaged in deliberative processes, even when they are asked to do so (and perhaps even when they honestly try to do so). On the contrary, public choice theory predicts, with some reliability, that powerful and concentrated private interests are likely to overwhelm the more diffuse public interest in civic engagement processes.<sup>76</sup>

If the public choice problem is real, then the best solution for this problem is to ask the agency decision-maker to rise above the fray and make a choice that, in the

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[<https://perma.cc/9RRQ-PPQN>]; JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 207 (1927) (“A class of experts . . . is so removed from common interests as to become a class with private interests and private knowledge, which in social matters is not knowledge at all.”).

<sup>73</sup> See Minter, *supra* note 70, at 47–49; see also Win McCormack, *Are You Progressive?*, *THE NEW REPUBLIC* (Apr. 20, 2018), <https://newrepublic.com/article/147825/progressive-vital-term-us-political-life-lost-significance> [<https://perma.cc/7CLS-QHW5>]. McCormack describes Dewey’s philosophy as “an ongoing deliberative process through which bearers of individual rights address issues facing their political community as a whole and chart its future together.” *Id.* According to McCormack, Dewey “redefined, in other words, the ‘negative rights’ of liberalism and the ‘positive rights’ of civic republicanism as mutual necessities.” *Id.*

<sup>74</sup> Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539, 1544–45 (1988); see also Mark Squillace, *Embracing a Civic Republican Tradition in Natural Resources Decision-Making*, in *THE EVOLUTION OF NATURAL RESOURCES LAW AND POLICY* 195 (Lawrence J. MacDonnell & Sarah F. Bates eds., 2010).

<sup>75</sup> See, e.g., Mark Seidenfeld, *Civic Republican Justification for the Bureaucratic State*, 105 *HARV. L. REV.* 1511 (1992) (discussing how government can be structured to achieve the civic republican ideal); David A. Martin, *The Civic Republican Ideal for Citizenship, and for Our Common Life*, 35 *VA. J. INT’L L.* 301, 306–07 (1994).

<sup>76</sup> See EAMONN BUTLER, *PUBLIC CHOICE—A PRIMER* 58–59 (2012); JAMES BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 285–88 (1962); Earl Latham, *The Group Basis of Politics: Notes for a Theory*, 46 *AM. POL. SCI. REV.* 376 (1952) (addressing the dynamic of public versus private interest in policy decisions).

mind of the decision-maker, best reflects societal values and public needs, as informed by the best information available, including information derived through a meaningful and deliberative public process.

Acknowledging the essential role of the decision-maker in carrying out the challenging task of ascertaining an objective, normative “public interest,” not unduly influenced by private interests, lends further support for adhering to a view of the public interest that reflects communal values as promoted above. This is because both the utilitarian and pluralist approaches described above play to the strengths of the rent-seeking<sup>77</sup> proclivities of concentrated private interests. The loudest and most influential voices in a process that follows one of these approaches can easily overwhelm those voices representing the public interest in the common, shared values of water resources. While this risk is not entirely absent from a process that focuses on communal values, it is far less likely to intrude into the agency decision because private interests are theoretically off the table.

The foregoing analysis leads to the conclusion that, at least in the context of water resources management, the public interest should ultimately reflect communal values—as ascertained by the relevant water management agency or officials following a meaningful and deliberative public process that embodies the civic republican ideal.

#### V. DISTINGUISHING THE PUBLIC INTEREST FROM THE PUBLIC TRUST DOCTRINE

The roots of the public trust doctrine (PTD) run deep, tracing back at least to the time of the Emperor Justinian and the “Institutes” or code that bears his name. In the Book of Things, the Justinian Code provides as follows:

1. By the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore . . . .
2. All rivers and ports are public; hence the right of fishing in a port, or in rivers, is common to all men.
3. The seashore extends as far as the greatest winter flood runs up.
4. The public use of the banks of a river is part of the law of nations, just as is that of the river itself . . . .<sup>78</sup>

Public rights of use are thus the hallmark of the PTD, and accordingly, the PTD has much in common with the public interest. At its core, it protects public rights in communal water-related resources, including public use of the shore and the bed of waterways, the rights of fishing and public access, and perhaps even the right to the

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<sup>77</sup> See BUTLER, *supra* note 76, at 76. Butler describes “rent seeking” as “the attempt by particular groups to persuade governments to grant them these sorts of valuable monopolies or legal privileges.” *Id.*

<sup>78</sup> J. INST. 2.1.1–4 (J.B. Moyle trans. Oxford, 1911).

water itself for certain communal uses.<sup>79</sup> These might fairly be seen as public interest values.

But the public interest in water paints a wider swath that is not tied entirely to the water or waterway. It might include, for example, opportunity costs, equitable or distributive justice<sup>80</sup> concerns, economic factors, and cultural considerations. Moreover, unlike the PTD—which, as part of the common law protects public trust values independently of any other government action, the public interest in water resources functions (or at least should function) as a specific factor to be assessed in any decision that allocates, reallocates, or manages water resources.<sup>81</sup>

The two concepts also differ in how they are invoked. While the PTD has historically been grounded in the common law, the public interest in water arises specifically and almost universally from positive law. Thus, as a common law doctrine, the recognition of the PTD is advanced through litigation. The public interest, by contrast, typically arises in the context of public deliberation and participation during the administrative decision-making process.<sup>82</sup>

Notwithstanding these differences, I fully concede that states can protect public values in water resources through either or both the public trust doctrine and a public interest review of water rights. Scholars have written extensively about the public trust doctrine and its potential for embracing newfound public values, such as ecosystem services and recreational opportunities.<sup>83</sup> In 1983, the California Supreme Court gave voice to this idea in its famous decision in *National Audubon Society v. Superior Court*<sup>84</sup>—commonly called the *Mono Lake* case. In the *Mono Lake* decision, the court invoked the public trust doctrine to hold that longstanding water

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<sup>79</sup> State laws and constitutions commonly provide for state ownership of water resources on behalf of the people of the state. States then, arguably hold their water resources as trustee for the people. *See Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709 (Cal. 1983).

<sup>80</sup> As used here, distributive justice refers to the fair distribution of goods—in this case, water and access to water—among all members of a society.

<sup>81</sup> As a normative standard mandated by positive law, the public interest ought to permeate all aspects of agency decisions involving the management of water resources.

<sup>82</sup> *See, e.g.*, Brian Maffly, *Environmentalists, Feds, and Utahns Agree: Don't Send Green River Water to Colorado*, THE SALT LAKE TRIBUNE (Nov. 8, 2018), <https://www.sltrib.com/news/environment/2018/11/08/finally-something/> [<https://perma.cc/K996-EQEN>] (discussing participation of multiple stakeholders in hearing arguing against proposed interstate water project, citing the effect on public recreation and instream flows).

<sup>83</sup> *See, e.g.*, Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecologic Public Trust*, 37 *ECOL. L.Q.* 71 (2010); Mudd, *supra* note 41, at 291–92; Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 *MICH. L. REV.* 471, 475 (1970).

<sup>84</sup> *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709 (Cal. 1983).

rights possessed by the City of Los Angeles did not bar the State from affording some protection for public values in the Lake, including the adverse ecological impacts of water withdrawals by the City from tributaries feeding Mono Lake.<sup>85</sup>

Still, the *Mono Lake* decision arguably conflates common law public trust doctrine with the positive law, public interest standard. Indeed, as applied in *Mono Lake*, the PTD has much more in common with the public interest than with its common law antecedents,<sup>86</sup> and it thus offers a useful framework for applying public interest criteria in the review of water rights applications.

To the extent that the PTD has, in fact, evolved to encompass values that are or should have been historically protected by the public interest, including those inherent in the water resources themselves, I recognize and acknowledge their likely overlap. For purposes of this Article, however, the public interest is distinguished from the traditional common law public trust doctrine, and the following analysis focuses only on the former.

## VI. DISTINGUISHING THE PUBLIC INTEREST FROM INSTREAM FLOW PROTECTION

An additional distinction that must be acknowledged is that between public interest review and instream flow protection. Protecting minimum instream flows<sup>87</sup>

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<sup>85</sup> *Id.* at 728. The court found that the State of California had an “affirmative duty” to protect public trust values in water resources including scenic and ecological values. *Id.* Somewhat controversially, the court held that “[i]n exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.” *Id.*

<sup>86</sup> Indeed, to support its PTD holding, the Court invokes a California statute that requires the State Water Board to account for “[t]he use of water for recreation and preservation and enhancement of fish and wildlife resources . . . when it is in the public interest” when making water allocation decisions. *Id.* at 726 (emphasis added) (quoting CAL. WATER CODE § 1243 (West 1959)). The Court also cites a second provision that authorizes the Board to establish terms and conditions for appropriations “as in its judgment will best develop, conserve, and utilize *in the public interest*, the water sought to be appropriated.” *Id.* (emphasis added) (quoting CAL. WATER CODE § 1257 (West 1969)).

<sup>87</sup>

In the simplest terms, instream flow is the water flowing in a stream channel . . . This simple concept belies the difficulty of determining what that flow should be among competing uses for water, such as irrigation, public supply, recreation, hydropower, and aquatic habitat. The simple definition may not account for variations in flow levels across different seasons and wet, dry, and normal years. A challenge facing natural resource managers is to find a workable balance among these demands and use appropriate methods to quantify instream flow needs for each of these uses.

for recreational, ecological, and aesthetic purposes is plainly the kind of public value that might normally be considered under the public interest, as I use that term in this Article. Yet many Western states purporting to protect the public interest in water nonetheless require that, in order to protect uses that depend on a minimum instream flow, the State or private parties must first acquire water rights for instream flow purposes by standing in line with other appropriators. This arguably turns the public interest assessment on its head.

Consider, for example, the Wyoming Constitution, which demands that the State deny water rights that are contrary to the public interest.<sup>88</sup> This requirement is reinforced by a provision in the Wyoming statutes governing water rights applications, which declare that, where a proposed water use “threatens to prove detrimental to the public interest, it shall be the duty of the state engineer to reject such application . . . .”<sup>89</sup> If this requirement were enforced based upon a reasonable interpretation of the public interest as described above, then presumably water rights would be conditioned on preserving minimum stream flows, and Wyoming would not need a separate program to acquire and protect instream flows. Yet, as will be described in Part VIII, Wyoming routinely ignores the public interest standard enshrined in its water law, and thus fails even to consider—let alone protect—public values in the state’s waters.

In 1986, Wyoming did adopt its own instream flow law, which allows the State Game and Fish Commission to recommend the issuance of instream flow permits in the name of the State for the limited purpose of protecting fisheries.<sup>90</sup> But, as with other water rights, instream flow rights hold a priority date as of the date of the application, which means that private water rights with earlier priority dates may lawfully deny water needed to protect minimum stream flows.<sup>91</sup>

While instream flow laws such as the one adopted by the State of Wyoming have done much to protect stream flows, they have also faced many challenges.<sup>92</sup> And these challenges would simply not arise if states were committed to a fulsome

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<sup>88</sup> WYO. CONST. art. XIII, § 3.

<sup>89</sup> WYO. STAT. ANN. § 41-4-503. (2019). *See also* the comparable provisions on groundwater at WYO. STAT. ANN. § 41-3-932(c) (2019).

<sup>90</sup> 1986 Wyo. Sess. Laws 140 (codified at WYO. STAT. ANN. §§ 41-3-1001–10014 (2019)). The State Game and Fish Department, which manages instream flow segments in the State acknowledges that the State has thus far protected “just over 2 percent of all stream miles in the state.” *See Instream Flow Information*, WYO. GAME & FISH DEP’T, <https://wgfd.wyo.gov/Fishing-and-Boating/Instream-Flow-XStream-Angler> [<https://perma.cc/KG52-KV8K>] (last visited July 24, 2018). If water rights were conditioned on protecting stream flows up front many more miles would likely be protected without the need for priority dates and instream flow designations.

<sup>91</sup> WYO. STAT. ANN. § 41-3-1007 (2019).

<sup>92</sup> *See generally* Adell L. Amos & Christopher R. Swenson, *Evaluating Instream Flow Programs: Innovative Approaches and Persistent Challenges in the Western United States*, 61 ROCKY MOUNTAIN MINERAL L. FOUND. 22-1 (2015) (analyzing the different challenges facing several western states’ instream flow laws).

application of public interest standards. Instead, the protection of minimum stream flows and other public values would be imposed as a condition of approving any water rights, as is done in a few states like California.<sup>93</sup> This approach honors the primary role of the public interest in water resources management, allowing private rights in water only after these public rights are protected. Not only would statutes like the Wyoming instream flow law become unnecessary, but they might actually be seen as counterproductive since they threaten to compromise public interest rights on the altar of priorities.

Perhaps it is too late in the day to be claiming public interest rights in the face of a long history of state decisions that granted vested water rights without actually protecting public interest values. But, as the California Supreme Court demonstrated in the *Mono Lake* case, public rights in water that appear to have been lost as a result of prior appropriations can be reclaimed, at least in part, when courts acknowledge a legal duty to protect public values in water.<sup>94</sup> And decision-makers and courts can protect these values even as they limitedly consider the ramifications of upsetting senior appropriators' settled expectations.<sup>95</sup>

In contrast to the Wyoming approach to instream flow protection, a few states have chosen to protect stream flows outside of the priority system.<sup>96</sup> The State of Washington offers perhaps the best examples of this more robust model that uses the public interest standard to protect instream flows and arguably other public values. Like most Western states, Washington has positive law requiring it to deny any application that "threatens to prove detrimental to the public interest."<sup>97</sup> Washington's Water Resources Act of 1971 reinforces this requirement in the context of instream flows by mandating that minimum base flows be protected when approving applications. And where conflicts arise, applications should only be approved if "it is clear that overriding considerations of the public interest will be served."<sup>98</sup> To implement this policy, water permits in Washington are reviewed by

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<sup>93</sup> See CAL. WATER CODE § 1257 (West 2019).

<sup>94</sup> See generally *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709 (Cal. 1983).

<sup>95</sup> See, e.g., *id.* at 363.

<sup>96</sup> California and Washington are the primary examples. See CAL. WATER CODE § 1257; WASH. REV. CODE § 90.03.290(3) (2019).

<sup>97</sup> WASH. REV. CODE § 90.03.290(3).

<sup>98</sup> The quality of the natural environment shall be protected and, where possible, enhanced as follows:

(a) Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. Lakes and ponds shall be retained substantially in their natural condition. Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.

(b) Waters of the state shall be of high quality.

*Id.* § 90.54.020(3).

the Department of Ecology, the same agency that manages the State's environmental program.<sup>99</sup> This institutional structure seems to facilitate the State's willingness to place conditions on water permits to protect instream flows, which makes other forms of streamflow protection unnecessary.

## VII. THE PUBLIC INTEREST AND THE PRIOR APPROPRIATION DOCTRINE

Modern Western water law evolved from the legal systems established in the nineteenth century mining camps of the Western United States.<sup>100</sup> Until at least 1866,<sup>101</sup> the miners were technically trespassers on federal public lands. Partly because the federal government lacked a significant presence in the Western United States during the middle part of the nineteenth century, the miners established mining camps with a local government structure that set out rules for allocating mineral rights.<sup>102</sup> The basic principle that evolved was to protect the first person who discovered a valuable mineral deposit and diligently worked toward its development.<sup>103</sup> As miners came to realize that they would need substantial amounts of water to process their claimed mineral resources, they also learned that water resources in the West were relatively scarce.<sup>104</sup>

The common law riparian system that existed throughout the country at the time tied water rights to riparian land ownership.<sup>105</sup> This system was of little use to miners because it lacked certainty in terms of the availability of the water supply.<sup>106</sup> Consequently, miners quickly adapted their system for allocating mineral rights to apply to water allocation decisions as well; hence, "first in time, first in right."<sup>107</sup> When agrarian settlers followed the miners out West, they saw the advantage that the prior appropriation doctrine offered them as well.<sup>108</sup> As the earliest settlers, they

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<sup>99</sup> *Id.* § 90.54.020(1); *see also* WASH. ADMIN. CODE § 173-173-050 (2019).

<sup>100</sup> *See* A. DAN TARLOCK, JAMES N. CORBRIDGE, JR., DAVID H. GETCHES & REED D. BENSON, *WATER RESOURCE MANAGEMENT: A CASEBOOK IN LAW AND PUBLIC POLICY* 76 (6th ed. 2009).

<sup>101</sup> Congress first provided for the private acquisition of public mineral lands in the Lode Law of 1866. *See* R. S. § 2339, ch. 262 § 1-2, 14 Stat. 251, 251 (1866).

<sup>102</sup> *See* JOHN LESHY, *THE MINING LAW: A STUDY IN PERPETUAL MOTION* 13 (1987) ("In the mining camps themselves, the miners had worked out, in the best democratic tradition, their own system for determining rights and obligations in the exploitation of a resource to which they had no legal claim.").

<sup>103</sup> *See* CHERYL OUTERBRIDGE ET AL., *AMERICAN LAW OF MINING* § 4.09 (2d ed. 2011) [hereinafter *AMERICAN LAW OF MINING*].

<sup>104</sup> *See* Charles F. Wilkinson, *Western Water Law in Transition*, 56 U. COLO. L. REV. 317, 318-19 (1985).

<sup>105</sup> 1 WATERS AND WATER RIGHTS, *supra* note 3, § 6.01(a.01).

<sup>106</sup> *See* TARLOCK ET AL., *supra* note 100, at 83.

<sup>107</sup> *See* WELLS A. HUTCHINS, 1 WATER RIGHTS LAWS IN NINETEEN WESTERN STATES 164 (1971).

<sup>108</sup> *See* TARLOCK ET AL., *supra* note 100, at 83.



could secure for themselves the most valuable lands and water rights, and thus protect themselves from claims brought by future settlers.<sup>109</sup>

As the nineteenth century wore on, the federal government adopted laws that effectively acquiesced in the legal structure established for the mining camps, including their rules for the appropriation of water.<sup>110</sup> And as the Western territories achieved statehood, the new states built into their constitutions the basic tenets of the prior appropriation doctrine.<sup>111</sup>

Even as prior appropriation came to dominate the water law of the Western United States, the states uniformly recognized that water resources were public assets. The 1876 Colorado Constitution, for example, provides that “[t]he water of every natural stream, not heretofore appropriated . . . is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state . . . .”<sup>112</sup> Thus, while the states guaranteed the right of private parties to claim water rights based upon priority, they retained the authority to manage the water resources, at least in part to protect the public rights inherent in the water. As part of that management, every Western state has established a comprehensive permitting scheme to govern the acquisition and administration of water rights.<sup>113</sup> With the notable exception of Colorado, which adopted a system of water courts,<sup>114</sup> executive branch agencies administer these water allocation programs.<sup>115</sup>

The prominent state role in the administration of water rights led the noted trial lawyer, Moses Lasky, to declare approvingly in 1929 that “prior-appropriation is the law nowhere in the West.”<sup>116</sup> To be sure, “allowing settlers to appropriate water . . .

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<sup>109</sup> *Id.*

<sup>110</sup> For example, “An Act Granting the Right of Way to Ditch and Canal Owners Over the Public Lands” provides that:

Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed . . . .

Act of July 26, 1866, R. S. § 2339, ch. 262, §9, 14 Stat. 251, 253 (1866) (codified at 43 U.S.C. § 661 (2018)).

<sup>111</sup> See, e.g., COLO. CONST. art. XVI, §5; WYO. CONST. art. XIII, §5.

<sup>112</sup> COLO. CONST. art. XVI, § 5.

<sup>113</sup> See TARLOCK ET AL., *supra* note 100, at 295.

<sup>114</sup> *Id.*

<sup>115</sup> See JAMES RASBAND, JAMES SALZMAN, MARK SQUILLACE, & SAMUEL KALEN, *NATURAL RESOURCES LAW AND POLICY* 879 (3d ed. 2016) (“Colorado is the only appropriation state that never adopted a statutory permit procedure.”).

<sup>116</sup> Moses Lasky, *From Prior Appropriation to Economic Distribution of Water by the State—Via Irrigation Administration*, 1 ROCKY MTN. L. REV. 161, 170 (1929).

with no record of title or rights, could not stand.”<sup>117</sup> But, as Lasky saw it, the water law of the Western states was designed not only to protect priorities but also the public values associated with the water. Indeed, the administrative permit systems that are nearly universal among the Western states require the relevant state agencies to account for and protect these public values before granting private parties water rights.<sup>118</sup> Lasky lavished particular praise on the administrative system established in Wyoming under the leadership of Elwood Mead. Lasky describes Mead as “one far-sighted man”<sup>119</sup> and quotes extensively from Mead’s seminal work: *Irrigation Institutions*. One particular passage quoting Mead’s work merits repeating:

[N]ecessity has led to . . . a gradual decrease in the freedom of the appropriator and an increase in control exercised by the public authorities. This change has been so gradual that the legislatures have . . . in effect abandoned the doctrine of prior appropriation, although retaining the word in their statutes. The person using the water must secure a permit from a board of the State officials, and . . . the right acquired is not governed by the appropriator’s claim but by the license for diversion issued by the authorities. The tendency toward . . . public supervision is manifest in the other arid States and it seems only a question of time when the doctrine of appropriation will give way to complete public supervision.<sup>120</sup>

The forward-thinking Lasky, and Elwood Mead before him, understood the limitations of a pure form of prior appropriation. But their assumption that state administrators or the courts would use the permit system to protect the public interests in water has thus far proved illusory, at least in most Western states. Nonetheless, opportunities to revive the long-dormant role of the public interest in water administration remain. In particular, a decline in overall demand for water resources<sup>121</sup> could provide an opening for making more water available for public

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<sup>117</sup> *Id.* at 173.

<sup>118</sup> While Colorado water rights are adjudicated in the State’s water courts, they have adapted their system such that it works very much like a permit system, albeit with a bit more formality. See TARLOCK ET AL., *supra* note 100, at 303–05.

<sup>119</sup> Lasky, *supra* note 116, at 172.

<sup>120</sup> *Id.* (quoting ELWOOD MEAD, *IRRIGATION INSTITUTIONS* 82 (1903)). Somewhat ominously, Mead laments the tendency of government institutions to grant large speculative water rights, noting that “[o]rganized selfishness is more potent than unorganized consideration for the public interests.” ELWOOD MEAD, *IRRIGATION INSTITUTIONS* 87 (1903). Ironically, while most states have proven adept at fighting off speculative claims, they have proved far less capable of exercising their responsibility to consider and protect the public interests. See, e.g., *High Plains A & M v. Se. Colo. Water Conservancy Dist.*, 120 P.3d 710, 724 (Colo. 2005).

<sup>121</sup> See *Trends in Water Use in the United States, 1950–2015*, U.S. GEOLOGICAL SURVEY, [https://www.usgs.gov/special-topic/water-science-school/science/trends-water-use-united-states-1950-2015?qt-science\\_center\\_objects=0#qt-science\\_center\\_objects](https://www.usgs.gov/special-topic/water-science-school/science/trends-water-use-united-states-1950-2015?qt-science_center_objects=0#qt-science_center_objects) [<https://perma.cc/Q74B-4CMP>] (last visited Nov. 13, 2019).

uses. On the other hand, cyclical drought,<sup>122</sup> and climate change<sup>123</sup> threaten to make this a far more difficult challenge.

#### A. *Appropriative Water Rights as Property*

Like fish and wildlife,<sup>124</sup> water is generally considered a public resource that, in its natural state, cannot be privately owned.<sup>125</sup> As previously noted, every Western state, including the twelve states specifically described in this Article, expressly declares in its statutes or constitution that the waters of the state are publicly owned.<sup>126</sup> Furthermore, each of these states preserves the public's rights and may have some duty to regulate the use of the state's water for the benefit of the public.<sup>127</sup>

Before the states established modern regulatory programs to handle the administration of water rights, priorities were established based upon the first affirmative step to divert water and apply it to a beneficial use. Beginning with Wyoming in 1890, however, all Western states now establish priority dates based upon the date of the application to the state seeking to apply water to a beneficial use,<sup>128</sup> or, in the case of Colorado, to the date of the application to a water court for a conditional right.<sup>129</sup>

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<sup>122</sup> See generally B. LYNN INGRAM & FRANCES MALAMUD-ROAM, *THE WEST WITHOUT WATER: WHAT PAST FLOODS, DROUGHTS, AND OTHER CLIMATIC CLUES TELL US ABOUT TOMORROW* (2013) (discussing the changing water situation in the Western United States).

<sup>123</sup> *National Climate Assessment: Water Supply*, U.S. GLOBAL CLIMATE CHANGE RESEARCH PROGRAM (2014), <https://nca2014.globalchange.gov/highlights/report-findings/water-supply> [<https://perma.cc/6FTQ-NZL3>].

<sup>124</sup> See RASBAND ET AL., *supra* note 115, at 384–85.

<sup>125</sup> See *id.* at 702.

<sup>126</sup> ALASKA STAT. § 46.15.030 (2019); ARIZ. REV. STAT. ANN. § 45-141(A) (2019); CAL. CONST. art. XX, § 5; COLO. CONST. art. XVI, § 5; IDAHO CONST. art. XV, § 1; MONT. CONST. art. IX, § 3(3); NEB. CONST. art. XIV, § 5; NEV. REV. STAT. ANN. § 533.025 (2019); N.M. CONST. art. XVI, § 2; OR. REV. STAT. § 537.110 (2019); UTAH CODE ANN. § 73-1-1 (West 2019); WASH. REV. CODE § 90.03.010 (2019); WYO. CONST. art. VIII, § 1.

<sup>127</sup> See Charles T. DuMars, *Public Policy Considerations in State Water Allocations and Management*, 42 ROCKY MT. MIN. L. INST. § 24.01, §§ 24.06–24.10 (1996); see also ALASKA STAT. § 46.15.080(a)(4) (2019); ARIZ. REV. STAT. ANN. § 45-153(A) (2019); CAL. WATER CODE §§ 1253, 1255–1256 (West 2019); IDAHO CODE § 42-203A(5) (West 2019); MONT. CODE ANN. § 85-2-311(3)(b) (West 2019) (defining “reasonable use” by reference to public interest criteria); NEB. REV. STAT. §§ 46-234, 235(1), -235(2)(a)(iii), 235(4)(a) (2019); NEV. REV. STAT. § 533.370(5) (2019); N.M. STAT. ANN. §§ 72-5-7, 72-12-3(E) (2019); West 2019); OR. REV. STAT. ANN. §§ 537.153(2), 537.170(8) (West 2019); UTAH CODE ANN. §§ 73-3-8(1)(a)(iii), 8(1)(b)(i) (West 2019); WASH. REV. CODE ANN. § 90.03.290(3) (West 2019); WYO. STAT. ANN. §§ 41-3-931–932, 41-3-503 (West 2019).

<sup>128</sup> 1 WATERS AND WATER RIGHTS, *supra* note 3, §§ 11.04(b), 12.02(b).

<sup>129</sup> *Id.* at § 15.05. Conditional water rights are defined in Colorado statutes. COLO. REV. STAT. § 37-92-103(6) (2019).

As previously noted, water rights must be used on the land for which they were appropriated.<sup>130</sup> The owner of a water right can, however, generally change the use, place of use, or point of diversion without loss of priority, so long as the change will not cause injury to other appropriators.<sup>131</sup>

The long history of Western states' support for private use of the public's water resources has led many to believe that water rights are a kind of "super-property" right that is not subject to regulation in the same manner as other property rights.<sup>132</sup> Professor Joseph Sax has argued, however, that:

[This] view is wrong. . . . Water rights have no greater protection against state regulation than any other property rights. . . . In fact, water rights have less protection than most other property rights . . . because their exercise may intrude on a public common.<sup>133</sup>

To illustrate the tradition of subordinating private water rights to the public interest, Sax quotes Justice Holmes's description of the fundamental principles underlying state regulation of water rights:

[F]ew public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a state, and grows more pressing as population grows. . . . The private right to appropriate is subject . . . to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.<sup>134</sup>

As Holmes recognized, the notion that private parties could gain absolute control over water was untenable, given the vital role of this resource to the wellbeing of the community.<sup>135</sup>

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<sup>130</sup> 1 WATERS AND WATER RIGHTS, *supra*, note 3, § 12.02(f).

<sup>131</sup> However, to change the purpose of use, place of use, or point of diversion, the appropriator is usually required to apply to the state for permission. *Id.* at § 14.01(a).

<sup>132</sup> Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U. COLO. L. REV. 257, 260 (1990).

<sup>133</sup> *Id.* In describing how water rights are subject to state regulation, Sax also notes that they are limited by definition to beneficial, non-wasteful uses and that water rights can also be limited by conditions articulated in the permit granting the right. *Id.*

<sup>134</sup> *Id.* at 274–75 (quoting *Hudson Cty. Water Co. v. McCarter*, 209 U.S. 349, 356 (1908)). Although *Hudson Cty. Water Co.* involved New Jersey's riparian-based water laws, Holmes makes clear that private water rights are subordinate to the public interest that exists "wherever there is a state." *Id.*

<sup>135</sup> See Sax, *supra* note 132, at 276–77.

Notwithstanding the clear public aspects of water resources, no one seriously contests the ability of private water users to secure a vested right<sup>136</sup> to use that water.<sup>137</sup> And while the precise nature of this “usufructuary” property right varies from state to state,<sup>138</sup> these rights cannot be viewed as sacrosanct. In particular, as Professor Sax suggests, private water rights do not include the right to use waters in derogation of public values. A compelling case can even be made that states are required to limit the allocation of water as necessary to protect these public values, and where states have failed to do so, such limits might fairly be implied on the basis of clear statutory and constitutional language.

### *B. Acquiring a Water Right in the Western States*

While an early miner needed only to post notice at the point of diversion and apply the diverted water to a beneficial use to perfect a water right,<sup>139</sup> all Western states now have complex statutory schemes to regulate the allocation and administration of water rights.<sup>140</sup> In every state except Colorado, the authority over water rights is vested in an administrative agency, often called a State Engineer,<sup>141</sup> but sometimes a state board or other state agency.<sup>142</sup> Appropriators in these states

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<sup>136</sup> Thus, the state or federal government cannot take water rights from an appropriator without providing just compensation. For a discussion of the complex legal framework applicable to takings cases, see 2 WATERS AND WATER RIGHTS, *supra* note 3, § 35.09.

<sup>137</sup> The nature of the property right in water under prior appropriation is usufructuary, in that a water rights holder does not own the water itself, but rather owns the right to put the water to beneficial use. See 1 WATERS AND WATER RIGHTS, *supra* note 3, § 4.01.

<sup>138</sup> Generally, water in canals, conduits, reservoirs, and pipes is not considered personal property, while water held in containers after delivery to consumers is treated as personal property. DAVID H. GETCHES, WATER LAW IN A NUTSHELL 86 (4th ed. 2009). Conversely, some states treat all water in the possession of a beneficial user as personal property. *Id.*

<sup>139</sup> See HUTCHINS, *supra* note 107, at 440. “Perfecting” a water right generally refers to completing all the necessary steps for the state water agency to fully recognize the water right, usually by issuing a license or permit. 1 WATERS AND WATER RIGHTS, *supra* note 3, § 12.02(e).

<sup>140</sup> 1 WATERS AND WATER RIGHTS, *supra* note 3, § 15.01.

<sup>141</sup> In Nevada, New Mexico, Utah, and Wyoming, the state engineer is charged with administering the water permit system. NEV. REV. STAT. ANN. §§ 532.110, 533.325 (West 2019); N. M. STAT. ANN. § 72-2-1; UTAH CODE ANN. § 73-2-1 (West 2019); WYO. CONST. art. 8, § 2. Colorado also has a state engineer, but as that state employs a judicial system for issuing water rights, the state engineer’s duties primarily relate to the administration and distribution of existing water rights. See COLO. REV. STAT. §§ 37-92-101 (2019) *et seq.*

<sup>142</sup> States that do not have a state engineer typically administer water through a department of natural resources, headed by a “director” or “commissioner.” Alaska: Department of Natural Resources. ALASKA STAT. § 46.15.010 (2019). Arizona: Department of Water Resources. ARIZ. REV. STAT. ANN. § 45-103 (2019). California: State Water Resources Control Board. CAL. WATER CODE § 174 (West 2019). Idaho: Department of Water Resources. IDAHO CODE § 42-1775 (2019). Montana: Department of Natural Resources and Conservation. MONT. CODE ANN. §§ 2-15-3301, 85-2-112 (2019). Nebraska:

must obtain a permit from the relevant state entity before they can withdraw water.<sup>143</sup> Colorado is unique in its use of a judicial system, but that system has evolved to employ some of the efficiencies of an administrative agency.<sup>144</sup> In particular, water courts in Colorado have developed an application that is hard to distinguish from a permit.<sup>145</sup>

The permitting process allows states to determine whether the statutory standards for issuing a water right have been met. Wyoming's law is typical. It requires applicants to submit evidence showing a beneficial use, the availability of unappropriated water, adequate diversion facilities, and that the proposed use will not impair the value of existing rights.<sup>146</sup> In every state discussed in this Article except Colorado, the agency is also authorized or required to reject or condition applications that are not consistent with the public interest or public welfare.<sup>147</sup> Thus, as the principal architect of the original water law provisions in the Wyoming constitution and Wyoming statutes, Elwood Mead recognized that the permitting process would be essential to protecting public values.<sup>148</sup> In practice, however, an application for a permit to appropriate water is generally approved if the applicant follows the prescribed procedures and the agency finds that there is unappropriated water available.<sup>149</sup> Only rarely does the permitting agency actually take account of

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Department of Natural Resources. NEB. REV. STAT. § 61-206 (2019). Oregon: Water Resources Department. OR. REV. STAT. § 536.039 (2019). Washington: Department of Ecology. WASH. REV. CODE § 43.21A.064 (2019).

<sup>143</sup> 1 WATERS AND WATER RIGHTS, *supra* note 3, § 15.01.

<sup>144</sup> Although in Colorado water rights are judicially determined, the process begins with an application form that is similar to other states' permit applications. *See* COLO. JUD. BRANCH, APPLICATION FOR WATER RIGHTS (SURFACE) (2017), [https://www.courts.state.co.us/Forms/PDF/JDF%20296W%20App%20for%20water%20ri%20gths%20\(surface\).pdf](https://www.courts.state.co.us/Forms/PDF/JDF%20296W%20App%20for%20water%20ri%20gths%20(surface).pdf) [<https://perma.cc/BA6W-VSTB>]. The Colorado system of water courts is described *infra* Part X. *See also* TARLOCK ET AL., *supra* note 100, at 303–05.

<sup>145</sup> Colorado uses an application for a conditional water right, which is equivalent to a water permit application. COLO. JUD. BRANCH, APPLICATION FOR WATER RIGHTS (SURFACE) AND CERTIFICATE OF NOTICE (2013), <https://www.courts.state.co.us/Forms/PDF/JDF%20290W%20Certificate%20of%20Notice%20R7-13.pdf> [<https://perma.cc/3CDH-B5V3>].

<sup>146</sup> WYO. STAT. ANN. §§ 41-4-501–503 (2019).

<sup>147</sup> Grant, *Public Interest Review supra* note 28, at 683.

<sup>148</sup> The permit application and adjudication process designed by Mead makes it the duty of the State Engineer to reject an application that “threatens to prove detrimental to the public interest.” WYO. STAT. ANN. § 41-4-503 (2019). As Moses Lasky explained:

It was the fate of prior-appropriation . . . to lose ground to such administrative systems almost from the beginning . . . [But] the Wyoming system, so often lauded over the Colorado, deserves the praise, not as a better administration, but as evidence of a better substantive law of waters.

Lasky *supra*, note 116, at 171.

<sup>149</sup> *See* Ronald B. Robie, *The Public Interest in Water Rights Administration*, 23 ROCKY MTN. MIN. L. INST. 917, 935 (1977); Grant, *Public Interest Review supra* note 28, at 688.

the impacts on public interest values.<sup>150</sup> The typical process for obtaining a permit is described below.

First, a prospective appropriator must formally apply to the state engineer or appropriate agency for a permit to withdraw unappropriated water.<sup>151</sup> Other affected parties may protest or object to the application during a prescribed time period on the grounds that it fails to meet the state's statutory criteria for issuance of a permit<sup>152</sup>—including, ostensibly, whether it is consistent with the public interest.<sup>153</sup>

If there are properly filed objections or protests, the agency may hold a public hearing regarding the application.<sup>154</sup> Based on a record compiled by an agency official, the permit application will be approved, disapproved, or provisionally approved with modifications or conditions.<sup>155</sup> Judicial review of the agency's findings may then be available.

When an application is approved, a permit will be issued. A permit is not a perfected water right, but it may become one once certain conditions are met.<sup>156</sup> In particular, the permittee must construct the diversion works, divert the water, and apply the water to a beneficial use within a defined time period.<sup>157</sup> In most states, the responsible agency may impose additional conditions that might limit the exercise of the water right.<sup>158</sup> After the water has been applied to a beneficial use, states generally require the permittee to seek an adjudication of the water right.<sup>159</sup> This affords the state the opportunity to limit the water right to the actual uses and needs of the appropriator, potentially allowing the state a second chance to consider the impacts of the use on the public interest.<sup>160</sup> Once the permit has been adjudicated, the water right vests and the priority relates back to the time that the original permit application was filed.<sup>161</sup> The final step in the process is the issuance of a document,

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<sup>150</sup> See *infra* Part VIII.

<sup>151</sup> See 1 WATERS AND WATER RIGHTS, *supra* note 3, § 15.03(a).

<sup>152</sup> Standing requirements vary by state. California, for example, has a liberal policy, allowing “any interested party” to protest an application. CAL. WATER CODE § 1330 (2019). New Mexico has stricter requirements, limiting standing to holders of water rights that may be detrimentally affected by the granting of the application, or to objectors who claim that granting the application will be contrary to the conservation of water or detrimental to the public welfare and who will be “*substantially and specifically affected*” if the application is granted. N.M. STAT. ANN. § 72-5-5(B) (2019) (emphasis added). See the individual state summaries, *infra*, for the standing requirements of each state reviewed in this Article.

<sup>153</sup> 1 WATERS AND WATER RIGHTS, *supra* note 3, § 15.03(b).

<sup>154</sup> *Id.*

<sup>155</sup> See A. DAN TARLOCK & JASON ANTHONY ROBISON, LAW OF WATER RIGHTS AND RESOURCES § 5:51 (2019).

<sup>156</sup> See, *id.*; see also AMERICAN LAW OF MINING, *supra* note 103 and accompanying text defining a perfected water right.

<sup>157</sup> See 1 WATERS AND WATER RIGHTS, *supra* note 3, § 15.03(d)(1).

<sup>158</sup> See TARLOCK & ROBISON, *supra* note 155, § 5:51.

<sup>159</sup> See RASBAND ET AL., *supra* note 115, at 879.

<sup>160</sup> See, e.g., WYO. STAT. ANN. § 41-4-511 (2019).

<sup>161</sup> See 1 WATERS AND WATER RIGHTS, *supra* note 3, § 15.03(d)(1).

alternatively called a “license,” “certificate,” “certificate of appropriation,” or “water right certificate,” defining the water right holder’s property interest in water.<sup>162</sup>

Water rights may also be transferred to another beneficial use or place of use, or changes may be made at the point of diversion, subject to state law limitations.<sup>163</sup> Appropriators seeking to make such changes must first file an application with the same state authority that acted on their original permit application.<sup>164</sup> Other appropriators may object to the change application on the basis that it will injure their rights, and in most states, the person seeking the new use has the burden of proving that no harm will result.<sup>165</sup> Most Western states also authorize or require denial of a change application based on public interest grounds, just as they do in initial applications to appropriate.<sup>166</sup>

While the preceding section focuses on the allocation of surface water, prior appropriation concepts also govern groundwater use in most Western states.<sup>167</sup> However, due in part to the hydrological complexities of groundwater and in part to its nature as an important common-pool public resource, state groundwater laws in Western states lack the consistency that is found with respect to surface water allocation laws.<sup>168</sup> A comprehensive discussion of the West’s varied and complex

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<sup>162</sup> *See id.* at § 15.03(d)(2).

<sup>163</sup> *Id.* at § 14.01(a).

<sup>164</sup> *See, e.g.*, WYO. STAT. ANN. § 41-3-104 (2019).

<sup>165</sup> GETCHES, *supra* note 138, at 175. Once the applicant has made a prima facie case, however, the burden shifts to the objector to prove harm. *Id.* at 176.

<sup>166</sup> *See, e.g.*, Bonham v. Morgan, 788 P.2d 497, 499–500 (Utah 1989).

<sup>167</sup> Alaska, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming are among the states incorporating appropriation concepts in their groundwater laws. GETCHES, *supra* note 138, at 273. While some of the same reasons for affording rights to earlier appropriators of surface water also apply to groundwater, such as encouraging investment and development, strict application of the doctrine is not practical. For example, because virtually any new pumping will have some effect on existing wells, in theory a senior groundwater appropriator could demand that no new pumping be allowed. Strict application of the doctrine also frustrates individual equities and the public interest; for example, it could deny rights to junior appropriators that own overlying land and have no other available water source, and it ignores the nonrenewable nature of some groundwater resources. *Id.* at 272–73.

<sup>168</sup> For example, California’s groundwater law is generally based on the correlative rights doctrine, providing overlying landowners with the right to a reasonable share of the total supply of groundwater, but the rights to exported (surplus) groundwater are determined by prior appropriation. 1 WATERS AND WATER RIGHTS, *supra* note 3, § 21.03. In contrast, Wyoming adheres pretty closely to a prior appropriation theory with some minor modifications. Mark Squillace & Reed D. Benson, *Wyoming*, in 4 WATERS AND WATER RIGHTS, *supra* note 3, at I.C.2. Other states give broad rights to use as much water as they can reasonably use on their overlying land. *See, e.g.*, ARIZ. REV. STAT. ANN. § 45-453; (2019); NEB. REV. STAT. ANN. § 46-702 (2019).



groundwater management regimes is beyond the scope of this Article.<sup>169</sup> Still, the same public interest principles that constrain surface water allocations often constrain groundwater allocations as well,<sup>170</sup>—though some groundwater rights have historically been tied to ownership of the overlying land in ways that might allow the groundwater user to avoid a public interest review altogether.<sup>171</sup>

### VIII. THE PUBLIC INTEREST IN WESTERN WATER LAW

The impetus for this Article came from the recognition of a tension in Western water law: while most Western states require that decisions to allocate water resources be carried out in a manner that protects the public interest, water allocation practices often fail to protect even the most basic public values, as introduced above. In fact, states frequently award water rights without ever considering the public interest, even where the law appears to require it.<sup>172</sup> This Part surveys the water resources laws in twelve Western states in an effort to understand how they approach the public interest. I do not intend this as a comprehensive review of the water laws of these states. Moreover, the analysis laid out here is not limited to these states. Rather, these states were chosen as illustrative of the problem and because they have well-developed legal systems for, and substantial experience with, allocating water. This Part, therefore, offers a window into how—and how well—states protect public values in managing their water resources.

A near-universal consensus exists in modern societies, and in particular among Western American states, that the public interest must be protected when allocating and managing water resources.<sup>173</sup> As presented below, to varying degrees, the constitutions, statutes, and regulations adopted by Western American states specifically invoke the public interest or some similar concept as a threshold principle of their water law. With a few exceptions, however, actually defining the public interest, and applying the concept to water rights and water management decisions, has proved far more elusive. In particular, and as described below, only two states—Washington and California—appear to address the public interest routinely in the consideration of water rights applications, although a number of other states have occasionally considered and even denied applications on public interest grounds.

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<sup>169</sup> For a detailed overview of groundwater management in the western United States, see JEFFERY S. ASHLEY & ZACHARY C. SMITH, *GROUNDWATER MANAGEMENT IN THE WEST* (1999).

<sup>170</sup> See, e.g., WYO. STAT. ANN. § 41-3-932(c) (West 2019).

<sup>171</sup> See, e.g., Gregg Eckhardt, *Laws and Regulations Applicable to the Edwards Aquifer*, THE EDWARDS AQUIFER WEBSITE, <https://www.edwardsaquifer.net/rules.html> [<https://perma.cc/8N6C-CWX2>] (last visited Nov. 6, 2019).

<sup>172</sup> See Grant, *Public Interest Review*, *supra* note 28, at 694, 702–08.

<sup>173</sup> See generally Mitch Tobin, *Conservation in the West Poll: Findings on Water-related Public Opinion*, WATERPOLLS.ORG (July 12, 2018), <https://waterpolls.org/conservation-in-the-west-poll-2018/> [<https://perma.cc/8TUR-YNB9>].

In Wyoming and Nebraska, the public interest in water use is rooted in those states' constitutions. For example, Article VIII, Section 3 of the Wyoming Constitution provides that “[n]o appropriation [of water] shall be denied except when such denial is demanded by the public interests.”<sup>174</sup> Wyoming’s water law reaffirms this requirement, providing that:

[I]t shall be the duty of the State Engineer to approve all applications . . . which contemplate the application of water to a beneficial use and where the proposed use does not tend to impair the value of existing rights, or be otherwise detrimental to the public welfare. But where . . . the proposed use . . . threatens to prove detrimental to the public interest, it shall be the duty of the state engineer to reject such application . . . .<sup>175</sup>

Despite these clear legal requirements, neither the state legislature nor the courts nor the State Engineer’s Office have ever defined the public interest, and the State Engineer appears to ignore the requirement when it reviews and approves water rights applications.<sup>176</sup> Applications for permits to appropriate water are reviewed for acceptability using a standardized checklist by the State Engineer’s Office,<sup>177</sup> but this checklist includes no filter for a public interest review. Perhaps it should not be surprising then that the public interest has never served as a basis for denying water permits in Wyoming.

During a boom in coal bed methane (CBM) development in northeastern Wyoming during the early part of the twenty-first century, the State Engineer issued thousands of water permits for CBM wells because the gas could not be removed without first removing the groundwater that holds the gas in place.<sup>178</sup> The cumulative effect of these wells, and particularly the disposal of wastewater on the surface, was allegedly harming ranchers in the Powder River Basin, where much of the CBM development was occurring.<sup>179</sup> This led to the only case where the public interest was expressly raised in the context of Wyoming state water law.<sup>180</sup> In *William F. West Ranch, LLC v. Tyrrell*,<sup>181</sup> a group of Powder River Basin ranchers sued the State Engineer for approving groundwater permits for CBM wells without

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<sup>174</sup> WYO. CONST. art. VIII, § 3 (amended 2008).

<sup>175</sup> WYO. STAT. ANN. § 41-4-503 (2016). The State Engineer is designated under the Wyoming Constitution as having “general supervision over the waters of the state.” WYO. CONST. art. VIII, § 5 (amended 2008).

<sup>176</sup> Interview with Pat Tyrell, State Engineer, State of Wyo., in Cheyenne, Wyo. (July 12, 2007).

<sup>177</sup> *Id.* at 1.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 1 n.11.

<sup>180</sup> See *Big Horn Power Co. v. State*, 148 P. 1110, 1115 (Wyo. 1915) (upholding a decision to deny an application for a high dam on the Big Horn River because it would inundate the only viable railroad right-of-way through the basin).

<sup>181</sup> 206 P.3d 722 (Wyo. 2009).

considering the public interest.<sup>182</sup> The plaintiffs complained specifically about water pollution and flooding that was caused by water releases from CBM wells.<sup>183</sup> The Wyoming Supreme Court never reached the merits, however, dismissing the case on the grounds that the case was not justiciable because the plaintiffs had failed to demonstrate that they had suffered or would suffer any direct harm as a result of the State Engineer's alleged failure to comply with the Wyoming Constitution and enabling water statutes.<sup>184</sup>

An even better example of Wyoming's unwillingness to credit its constitutional public interest standard comes from the state's water statutes. Wyoming law limits water diversions for agricultural lands to one cubic foot per second for each seventy acres of irrigated land.<sup>185</sup> This is a generous but fairly common allocation of water for agricultural purposes.<sup>186</sup> In 1945 and 1985, however, Wyoming effectively granted agricultural users a second cubic foot per second for each seventy acres of irrigated land,<sup>187</sup> which is far more than is generally needed to grow crops efficiently.<sup>188</sup> While in theory, Wyoming farmers are still limited by the beneficial use requirement, the excessive appropriations authorized under the 1945 and 1985 laws obviously pose serious concerns about the protection of public interest values in streams. To make matters even worse, however, Wyoming law provides that, "where there may be in any stream water in excess of the total amount of all appropriations from said stream, such excess *shall be divided among the appropriators therefrom in proportion to the acreage covered by their respective permits . . .*"<sup>189</sup> Thus, Wyoming water law appears to authorize appropriators to divide up the waters of a stream until nothing is left. The dewatering of Wyoming's streams as expressly authorized under this law flies in the face of the State's

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<sup>182</sup> *Id.* at 729.

<sup>183</sup> *Id.* at 725.

<sup>184</sup> *Id.* at 729. The Court was particularly concerned that the plaintiffs were requesting "some type of general ruling" regarding the improper administration of CBM water "without challenging a specific action or requesting individualized relief." *Id.* at 734-35.

<sup>185</sup> WYO. STAT. ANN. § 41-4-317 (West 2019).

<sup>186</sup> See, e.g., Caleb Carter et al., *Wyoming Small Acreage Irrigation*, U. OF WYO. 3 (Dec. 2017), [http://www.uwyo.edu/barnbackyard/\\_files/documents/resources/irrigation/wysmall-acreageirrigationguide.pdf](http://www.uwyo.edu/barnbackyard/_files/documents/resources/irrigation/wysmall-acreageirrigationguide.pdf) [<https://perma.cc/PN2H-6LCH>] ("In Wyoming, a basic water right for irrigation from a surface water source is 1 cubic foot per second (cfs) for 70 acres of land.")

<sup>187</sup> The 1945 statute, known as the Surplus Water Law, gave pre-1945 agricultural appropriators a second cfs. 1945 Wyo. Sess. Laws ch. 153, § 6 (codified as amended at WYO. STAT. ANN. § 41-4-322). The 1985 statute known as the Excess Water Law gave post-1945 and pre-1985 agricultural appropriators a second cfs. 1985 Wyo. Sess. Laws ch. 176, § 1 (codified as amended WYO. STAT. ANN. § 41-4-330 (1985)).

<sup>188</sup> Samantha Larson, *How Much Water Does it Take to Grow America's Favorite Foods?*, SMITHSONIAN (Apr. 10, 2015), <https://www.smithsonianmag.com/smart-news/how-much-water-does-it-take-grow-americas-favorite-foods-180954941/> [<https://perma.cc/4FE9-8F3D>].

<sup>189</sup> WYO. STAT. ANN. § 41-4-317 (emphasis added).

constitutional obligation to administer its water resources to protect the public interests.

In an interview with the Pat Tyrell, the Wyoming State Engineer from 2001 through 2019, he acknowledged that the public interest is “poorly defined in our statute,” and that permits are never rejected for public interest reasons.<sup>190</sup> But he added that the “public interest” is too amorphous to be considered at the permitting stage.<sup>191</sup> When asked about adopting rules to define the public interest, he indicated that his office had not considered that option.<sup>192</sup> He further acknowledged that the current process grants water permits based only on the highest and best use of water at the time the decision is made and does not take into account possible future needs.<sup>193</sup> In explaining this approach, the State Engineer claimed that he lacked the ability to be “prescient to what better use may come along ten years down the road.”<sup>194</sup>

Nebraska’s initial foray into water law came in the form of the 1895 Appropriation and Irrigation Law, which dedicated the use of waters within the State to its citizens.<sup>195</sup> Nebraska subsequently amended its constitution in 1920 by adding a provision that tracks Wyoming’s language pretty closely, declaring that, “[t]he right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest.”<sup>196</sup>

While the State does not appear to consider the public interest routinely in reviewing water rights application, it has nonetheless rejected several applications on public interest grounds—and the Nebraska Supreme Court has approved of these actions. For example, in *Central Platte Natural Resources Dist. v. City of Fremont*, the Nebraska Supreme Court upheld the State’s decision to deny a water diversion application on the grounds that the proposed project would jeopardize the endangered whooping crane and would thus be contrary to the public interest.<sup>197</sup> Likewise, in an earlier case, the Director of Water Resources rejected the applications of a water district seeking to make inter-basin water-diversion

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<sup>190</sup> Interview with Pat Tyrell, State Engineer, State of Wyo., in Cheyenne, Wyo. (July 12, 2007).

<sup>191</sup> Of course, the statute specifically requires the State Engineer to reject an application that “threatens to prove detrimental to the public interest.” WYO. STAT. ANN. § 41-4-503. Thus, whether amorphous or not, the State Engineer appears to be acting in violation of Wyoming law.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> See Ralph J. Fischer, Richard S. Harnsberger & Jarret C. Oeltjen, *Rights to Nebraska Streamflows: A Historical Overview with Recommendations*, 52 NEB. L. REV. 313, 348 (1973) (citing NEB. LAWS c. 69 1895).

<sup>196</sup> NEB. CONST. art. XIV, § 6; see also KATE GAUL & LOGAN SEACREST, NEB. LEGISLATIVE RESEARCH OFFICE, THE NEBRASKA CONSTITUTION: 1866–2016, at 159 (2017), <http://nebraskalegislature.gov/pdf/reports/research/constitution2017.pdf> [<https://perma.cc/6V9E-9K25>].

<sup>197</sup> *Cent. Platte Nat. Res. Dist. v. Fremont*, 549 N.W.2d 112, 121 (Neb. 1996).

applications because these diversions could harm various endangered species.<sup>198</sup> Once again, the Nebraska Supreme Court upheld the decision on public interest grounds.<sup>199</sup> In yet another case, the Nebraska Supreme Court upheld an instream flow appropriation made pursuant to statute and specifically rejected a constitutional challenge to the law, finding that “the public interest demands the recognition of instream uses for fish, recreation, and wildlife.”<sup>200</sup>

Most other Western states recognize the public interest by statute rather than under their constitutions, and their approaches to protecting the public interest vary widely. Washington and California are particularly noteworthy, as they are the only states that appear to embed a public interest review into the water permit application process.<sup>201</sup>

Washington law authorizes:

[t]he department of ecology [to] establish minimum water flows or levels for streams, lakes or other public waters for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said public waters whenever it appears to be in the public interest to establish the same.<sup>202</sup>

But this somewhat equivocal language is followed with a specific mandate: “[p]erennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values.”<sup>203</sup> A limited exception allows for

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<sup>198</sup> *In re Applications A-16027*, 495 N.W.2d 23, 35 (Neb. 1993).

<sup>199</sup> *Id.* at 34. The Nebraska statute lays out specific factors that must be considered in determining whether an interbasin transfer is in the public interest. These include:

- (1) The economic, environmental, and other benefits of the proposed interbasin transfer and use;
- (2) Any adverse impacts of the proposed interbasin transfer and use;
- (3) Any current beneficial uses being made of the unappropriated water in the basin of origin;
- (4) Any reasonably foreseeable future beneficial uses of the water in the basin of origin;
- (5) The economic, environmental, and other benefits of leaving the water in the basin of origin for current or future beneficial uses;
- (6) Alternative sources of water supply available to the applicant; and
- (7) Alternative sources of water available to the basin of origin for future beneficial uses.

NEB. REV. STAT. § 46-289 (2000). The statute then goes on to note that “[t]he application shall be deemed in the public interest if the overall benefits to the state and the applicant’s basin are greater than or equal to the adverse impacts to the state and the basin of origin.” *Id.*

<sup>200</sup> *In re Application A-16642*, 463 N.W.2d 591, 605 (Neb. 1990); *see* NEB. REV. STAT. § 46-2,107 (1984).

<sup>201</sup> *See* WASH. REV. CODE § 90.22.010 (2019); CAL. WATER CODE § 1253 (West 2019).

<sup>202</sup> WASH. REV. CODE § 90.22.010.

<sup>203</sup> *Id.* § 90.54.020(3)(a). The statute also requires that waters of the state “be of high quality.” *Id.* § 90.54.020(3)(b).

the withdrawal of water that would reduce these base flows “only in those situations where it is clear that overriding considerations of the public interest will be served.”<sup>204</sup> The Washington Supreme Court has made clear that this exception “is very narrow . . . and requires extraordinary circumstances before the minimum flow water right can be impaired.”<sup>205</sup>

In the context of issuing permits to appropriate water, a Washington statute describes four criteria that must be met before a permit to appropriate may be granted.<sup>206</sup> The third criterion is that the proposed water use cannot “threaten to prove detrimental to the public welfare.”<sup>207</sup> To implement this requirement, the Washington Administrative Code requires “the department of ecology [to] conduct a reconnaissance survey for the purpose of determining whether or not the interests of the public can best be served by the adjudication of the individual rights [to use waters of a stream or other source].”<sup>208</sup> The Washington Supreme Court has also made clear that the State has a responsibility to consider water quality in making a decision on a water rights application due to the State’s Environmental Policy Act.<sup>209</sup>

Despite the strong support for public interest review in Washington, the Washington Supreme Court refused to allow the Department of Ecology to consider the public interest in the context of a change in the point of diversion of an existing water right on the grounds that the relevant statute authorized such changes if they could be carried out without detriment or injury to existing rights, and where the water had been put to beneficial use.<sup>210</sup> Although a change in the point of diversion may seem like a relatively minor action, the court’s decision appears to apply to any change application, since the statute construed by the court addressed transfers broadly.<sup>211</sup> On the other hand, the court made clear that the Department retained the

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<sup>204</sup> *Id.* While the “public interest” is not defined here, the statute suggests that the public values in the state’s water resources are given paramount importance.

<sup>205</sup> *Swinomish Indian Tribal Cmty. v. Dep’t of Ecology*, 311 P.3d 6, 8 (Wash. 2013); *Postema v. Pollution Control Hearings Bd.*, 11 P.3d 726, 735 (Wash. 2000).

<sup>206</sup> WASH. REV. CODE § 90.03.290. The four criteria are (1) determining “what water, if any, is available for appropriation”; (2) “find[ing] and determin[ing] to what beneficial use or uses it can be applied”; (3) “find[ing] whether the proposed development is likely to prove detrimental to the public interest”; and (4) finding that “the application will not impair existing rights.” *Id.* §§ 90.03.290(1), (3).

<sup>207</sup> WASH. REV. CODE § 90.03.290(3).

<sup>208</sup> WASH. ADMIN. CODE § 508-12-080 (2019).

<sup>209</sup> *Stempel v. Dep’t of Water Res.*, 508 P.2d 166, 171 (Wash. 1973); *see* WASH. REV. CODE § 43.21C.010–.914.

<sup>210</sup> *Pub. Util. Dist. No. 1 of Pend Oreille Cty. v. Dept. of Ecology*, 51 P.3d 744, 746 (Wash. 2002). The Utah Supreme Court reached a different conclusion on similar facts, but the relevant statute there provided that the “rights and duties of the applicants with respect to applications for permanent changes of point of diversion, place or purpose of use shall be the same as provided in this title for applications . . . .” *Bonham v. Morgan*, 788 P.2d 497, 499 (Utah 1989) (citing UTAH CODE ANN. § 73-3-3 (1980)).

<sup>211</sup> *See generally* WASH. REV. CODE § 90.03.380.

authority to condition the existing water right on the maintenance of minimum stream flows.<sup>212</sup>

Treatment of the public's interest in California operates somewhat like Washington. Section 1253 of the California State Water Code provides that the State Water Resources Control Board (Board) "shall allow the appropriation for beneficial purposes of unappropriated water under such terms and conditions as in its judgment will best develop, conserve, and utilize *in the public interest* the water sought to be appropriated."<sup>213</sup> In *People v. Shirokow*, the California Supreme Court upheld the Board's decision to issue an appropriation permit subject to the condition that the applicant institute a brush removal program to salvage the amount of water needed, finding that the Board properly acted to protect the public interest.<sup>214</sup> More specifically, the court held that "[i]f the board determines a particular use is not in furtherance of the greatest public benefit, on balance the public interest must prevail."<sup>215</sup>

Like Washington, California also provides for instream flow protection up front, when decisions are made to allocate water. The Director of the California Department of Fish and Game (Fish and Game) must identify and list streams and watercourses throughout the state where minimum flow levels need to be established in order to assure the "continued viability of stream-related fish and wildlife resources." The Director must provide that list to the Board, and the Board may deny an appropriation permit that infringes on streamflow requirements identified by Fish and Game.<sup>216</sup>

The California process seems somewhat less robust than the Washington approach since, unlike Washington,<sup>217</sup> California does not require protection of scenic, aesthetic, environmental, and navigational values. Moreover, the Board retains discretion to refuse to protect streamflows identified by Fish and Game—although technically the failure to protect those flows could be deemed arbitrary and capricious by a court.<sup>218</sup> Nonetheless, protecting minimum instream flows for fish and wildlife will likely provide substantial protection for those other public values

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<sup>212</sup> *Pub. Util. District No. 1*, 51 P.3d at 765–66. (holding that appellee had "authority to impose instream flow conditions in a state water quality certification under § 401 of the Clean Water Act regardless of whether the applicant for the federal license [had] existing water rights.").

<sup>213</sup> CAL. WATER CODE § 1253 (West 2019) (emphasis added).

<sup>214</sup> 605 P.2d 859, 866 (Cal. 1980).

<sup>215</sup> *Id.*; see also CAL. WATER CODE § 1253; *id.* § 1255 ("The board shall reject an application when in its judgment the proposed appropriation would not best conserve the public interest.").

<sup>216</sup> CAL. PUB. RES. CODE §§ 10001–10002 (West 2019); see also CAL. FISH AND GAME CODE § 1600 (West 2019) ("[T]he protection and conservation of fish and wildlife resources are of utmost public interest.").

<sup>217</sup> See *supra* notes 197–198 and accompanying text.

<sup>218</sup> See CAL. GOV'T CODE § 11350 (West 2019).

that are specifically noted in Washington's law, such as recreational, scenic, and aesthetic values.

One additional aspect of California law warrants discussion. As previously noted, the public interest is best understood as distinct from the common law public trust doctrine. But the impact of the California Supreme Court's decision in *National Audubon Society v. Superior Court*<sup>219</sup> (the *Mono Lake* case) for protecting the public interest cannot be ignored. Even though the decision arguably conflates the public trust doctrine with the public interest by expanding the former doctrine beyond its historical roots, recognizing a trust responsibility for protecting the state's water resources is not so different from protecting the public interests in those resources. Moreover, the near-universal claim of state ownership of water resources for the benefit of California residents, like other Western states, strongly implies a trust responsibility. Still, as previously described in Part V, the common law roots of the public trust doctrine are distinct from a statutory public interest requirement,<sup>220</sup> and the public trust doctrine might be more difficult for courts to construe flexibly.

The state closest to Washington and California in carrying out systematic public interest reviews of water rights applications may be Oregon, which manages its water resources through its Water Resources Department (OWRD), subject to policies and rules established by the state Water Resources Commission (OWRC).<sup>221</sup> At first blush, Oregon law appears somewhat narrow, as it establishes a rebuttable presumption that a proposed water use "will not impair or be detrimental to the public interest," so long as an application meets basic criteria regarding the proposed water use that are generally unrelated to public values.<sup>222</sup> Moreover, the presumption can only be rebutted if a protest is filed and sufficient evidence is presented at a hearing to rebut the presumption.<sup>223</sup> Applications, however, are subject to OWRC rules,<sup>224</sup> and those rules appear to require an affirmative public interest review by the state agency, including consideration of any comments or protests received.<sup>225</sup>

This conclusion is supported by the water rights application form used in Oregon.<sup>226</sup> That form requires specific information about potential impacts on sensitive, threatened, or endangered species, and a determination by the OWRD that

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<sup>219</sup> 658 P.2d 709 (Cal. 1983).

<sup>220</sup> That is not to say that the public trust doctrine is unrelated to the public interest or that it could not be used to protect the public interest in water. It does mean, however, that the public trust doctrine suffers from a narrow historical pedigree that could limit its application in the context of water allocation and water management decisions.

<sup>221</sup> OR. REV. STAT. § 537.153(2) (2017).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at § 537.170.

<sup>224</sup> *Id.* at § 537.153(2).

<sup>225</sup> OR. ADMIN. R. §690-310-0110 (2019).

<sup>226</sup> See OREGON WATER RESOURCES DEP'T, SURFACE WATER RIGHTS APPLICATION FORM (2018), [https://www.oregon.gov/owrd/WRDFormsPDF/surface\\_water\\_app.pdf](https://www.oregon.gov/owrd/WRDFormsPDF/surface_water_app.pdf) [<https://perma.cc/EP6E-XD3C>].



the proposed use will not prove detrimental to the public interest in such species.<sup>227</sup> The application form also takes account of various water quality concerns as well as potential impacts from diversions that occur in the Columbia River basin.<sup>228</sup>

The Oregon Supreme Court has further reinforced this more expansive view of the public interest inquiry. In *Diack v. City of Portland*, the court addressed a diversion by the City of Portland that would draw water from a scenic waterway.<sup>229</sup> The *Diack* court held that public interest criteria in the Oregon statute were “inexact terms” that the state must interpret “in a way that effectuates the underlying statutory policy.”<sup>230</sup> To that end, the court held that a mere “regurgitation of the statutory language, without analysis” is insufficient to meet requirements for a public interest assessment.<sup>231</sup> The clear implication of *Diack* is that the state has an affirmative obligation to make specific findings demonstrating how it will protect the public interest when it approves a water rights application.<sup>232</sup> The current application form used by the state seems designed to facilitate this obligation.

In a few states, the public interest has actually been defined by statute. For example, Alaska’s water statute describing the criteria for issuing a permit expressly provides:

- (b) In determining the public interest, the commissioner shall consider
  - (1) the benefit to the applicant resulting from the proposed appropriation;
  - (2) the effect of the economic activity resulting from the proposed appropriation;
  - (3) the effect on fish and game resources and on public recreational opportunities;
  - (4) the effect on public health;
  - (5) the effect of loss of alternate uses of water that might be made within a reasonable time if not precluded or hindered by the proposed appropriation;
  - (6) harm to other persons resulting from the proposed appropriation;
  - (7) the intent and ability of the applicant to complete the appropriation;
  - and
  - (8) the effect upon access to navigable or public water.<sup>233</sup>

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<sup>227</sup> *Id.* at 3–4.

<sup>228</sup> *Id.* at 3.

<sup>229</sup> 759 P.2d 1070, 1072 (Or. 1988).

<sup>230</sup> *Id.* at 1078.

<sup>231</sup> *Id.*

<sup>232</sup> More specifically, the court held that “the Commission should explain more fully its application of the public interest criteria, pointing to the facts that it believes (if it still does) permit it to make the “ultimate” findings and the conclusions it draws from them.” *Id.*

<sup>233</sup> ALASKA STAT. § 46.15.080 (2019).

The Alaska Supreme Court employed this definition and related standards implementing it in *Tulkisarmute Native Community v. Heinze*.<sup>234</sup> In *Tulkisarmute*, the court held that the Alaska Department of Natural Resources acted outside its authority when it granted water rights permits to a mining group in derogation of concerns raised by the Tulkisarmute Native Community Council (TNCC) regarding the protection of fish and wildlife resources deemed vital to the livelihood of the native community.<sup>235</sup> The court held that the Commissioner should have conditioned the permit to protect the public interest and the rights of the TNCC as required by state law.<sup>236</sup> The court emphasized that the Department of Natural Resources (DNR) “may not issue a permit unless doing so is in the public interest,” and added that “[i]n making this determination, DNR shall consider the impacts of water appropriation on fish and game resources, public health, and access to navigable water.”<sup>237</sup> More than anything, this case illustrates the power of simply defining the public interest by statute. While the Alaska definition accords the Alaska DNR wide discretion, it necessarily encompasses public values such as the protection of fish and game and public recreation, and the Alaska Supreme Court effectively required that these public values be protected first and not merely balanced against private economic interests.

Like Alaska, Idaho also defines the public interest but in its own unique way. The Idaho Code authorizes the Director of the Department of Water Resources to reject, condition, or limit a water rights application if it finds:

- (a) that it will reduce the quantity of water under existing water rights;
- (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated;
- (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes;
- (d) that the applicant has not sufficient financial resources with which to complete the work involved therein;
- (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code;
- (f) that it is contrary to conservation of water resources within the state of Idaho;

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<sup>234</sup> *Tulkisarmute Native Community Council v. Heinze*, 898 P.2d 935 (Alaska 1995).

<sup>235</sup> *Id.* at 938, 942.

<sup>236</sup> *Id.* at 950; *see also* ALASKA ADMIN. CODE tit. 11 § 93.120(e) (2019) (“(e) [t]he department may issue a permit subject to conditions considered necessary to protect the rights of prior appropriators of record and the public interest, including: . . . (3) conditions to maintain, or restrictions from withdrawing, a specific quantity, rate of flow or volume of water at a given point on a stream or body of water, or in a specified reach of stream, throughout the year or for specified times of the year, to achieve any of the following purposes: (A) protection of fish or wildlife habitat; (B) recreational purposes; (C) navigation . . .”).

<sup>237</sup> *Heinze*, 898 P.2d at 950 (citing ALASKA STAT. § 46.15.080).

(g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates.<sup>238</sup>

Section 42-202B defines the phrase “local public interest” 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.”<sup>239</sup>

Section 42-203A also contains a proviso that prohibits establishing minimum stream flows under the local public interest standard, making clear that instream flow protections are authorized only under Idaho’s separate instream flow law.<sup>240</sup> This would appear to undercut the State’s ability to protect ecological and amenity values in water bodies in the course of approving water rights applications, as is done in Washington and California. In *Shokal v. Dunn*, however, the Idaho Supreme Court construed the phrase “local public interest” broadly, to encompass a wide range of more traditional public interest values such as fish and wildlife habitat, aquatic life, recreation, and water quality.<sup>241</sup> The court based its decision on the explanation of the public interest contained in the instream flow law that had been enacted on the same day.<sup>242</sup> At the time of the *Shokal* decision, however, the Idaho statute that requires consideration of the local public interest did not preclude the use of the provision to protect instream flows. That language was added to the statute in 2003.<sup>243</sup> It thus remains an open question whether the Court will adhere to the *Shokal* standard if the issue arises again in another case.

Like most Western states, Nevada law specifically requires the State Engineer to reject a water rights application that “threatens to prove detrimental to the public interest. . . .”<sup>244</sup> In contrast to the Idaho Supreme Court, the Nevada Supreme Court has accepted a much narrower definition of the public interest as that term was used in the Nevada water rights application statute. In *Pyramid Lake Paiute Tribe v. Washoe County*, the Nevada State Engineer argued that thirteen requirements from the state’s existing water statutes provided sufficient direction for approving applications in the public interest.<sup>245</sup> These requirements, however, had little to do with the public values associated with water, but instead focused on such matters as

<sup>238</sup> IDAHO CODE § 42-203A(5) (2019).

<sup>239</sup> *Id.* § 42-202B(3).

<sup>240</sup> *See* IDAHO CODE § 42-203A(5) (2020) (“Provided however, that minimum stream flow water rights may not be established under the local public interest criterion, and may only be established pursuant to chapter 15, title 42, Idaho Code.”); *see also* IDAHO CODE §§ 42-1501–1505 (2019) (for the Water Resource Board); *see also* *Minimum Stream Flows*, IDAHO WATER RESOURCES BOARD, <https://idwr.idaho.gov/IWRB/water-planning/minimum-stream-flows/> [<https://perma.cc/CNT9-UXFK>] (last visited Aug. 15, 2018) (providing public information on the Idaho’s Minimum Stream Flow program).

<sup>241</sup> 707 P.2d 441, 448–50 (Idaho 1985).

<sup>242</sup> *Id.* at 448–49 (citing IDAHO CODE § 42-1501).

<sup>243</sup> H.B. 284, 57 Leg., 1st Reg. Sess. (Idaho 2003)

<sup>244</sup> NEV. REV. STAT. ANN. § 533.370(2) (West 2019).

<sup>245</sup> 918 P.2d 697, 698–700 (Nev. 1996).

whether the applicant had the financial capacity to complete the proposed project and whether the water would be put to a beneficial use.<sup>246</sup> The court specifically rejected a broader interpretation of the public interest, such as the standard adopted by the Idaho Supreme Court in *Shokal*.<sup>247</sup>

Given that the Nevada State Engineer identified the thirteen “public interest” requirements only after he was sued, it seems fair to assume that the State does not routinely and affirmatively address the public interest in approving water rights applications, even under the narrow definition it put forth in *Pyramid Lake*. But change may be coming to Nevada. In *Mineral County v. State Department of Conservation*, the Nevada Supreme Court denied a writ of mandamus seeking to force the State of Nevada to better regulate water rights in the Walker River Basin.<sup>248</sup> The court’s decision was based primarily on the fact that the Walker River Basin was an interstate resource shared with California that had long been subject to the jurisdiction of the federal courts.<sup>249</sup> In a concurring opinion, however, Justice Rose signaled a new willingness on the part of some members of the court to review the nature and scope of public interest claims:

If the current law governing the water engineer does not clearly direct the engineer to continuously consider in the course of his work the public’s interest in Nevada’s natural water resources, then the law is deficient. It is then appropriate, if not our constitutional duty, to expressly reaffirm the engineer’s continuing responsibility as a public trustee to allocate and supervise water rights so that the appropriations do not “substantially impair the public interest in the lands and waters remaining.” “[T]he public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands, and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.” Our dwindling natural resources deserve no less.<sup>250</sup>

Echoing the *Mono Lake* decision, Justice Rose made clear that the owners of vested water rights hold these rights “forever subject to the public trust, which at all times ‘forms the outer boundaries of permissible government action with respect to public trust resources.’ In this manner, then, the public trust doctrine operates simultaneously with the system of prior appropriation.”<sup>251</sup>

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<sup>246</sup> According to the court, the Nevada State Engineer “identified [thirteen] policy considerations contained in Nevada water statutes . . .” *Id.* at 698–99. These appear to have been derived largely from NEV. REV. STAT. § 533.370 (West 2019).

<sup>247</sup> *Pyramid Lake*, 918 P.2d at 700; *c.f. Shokal*, 707 P.2d at 450.

<sup>248</sup> 20 P.3d 800, 801 (Nev. 2001).

<sup>249</sup> *Id.* at 807.

<sup>250</sup> *Id.* at 808–09 (Rose, J., concurring) (internal citations omitted).

<sup>251</sup> *Id.* at 808 (internal citations omitted).

While Justice Rose freely mixes references to the public interest and the public trust doctrine, his approach would take Nevada well beyond the *Pyramid Lake* decision. Not only does it signal a new focus on the public values associated with water, but it would also impose an affirmative duty on the Nevada State Engineer to protect these values.

Justice Rose’s opinion remains particularly relevant today because, ten years thereafter, in *Lawrence v. Clark County*,<sup>252</sup> the Nevada Supreme Court quoted extensively and approvingly from the *Mineral County* concurring opinion of Justice Rose in the course of expressly adopting the public trust doctrine for Nevada.<sup>253</sup> Although *Lawrence* arose in the context of the state’s ownership of the bed of a navigable waterway—a traditional public trust resource—the Court appeared to signal its readiness to move beyond *Pyramid Lake* and to adopt the more robust approach to the public interest in water resource allocation advocated by Justice Rose.<sup>254</sup> The issue will likely be resolved soon, as the U.S. Court of Appeals for the Ninth Circuit has certified to the Nevada Supreme Court the question of whether the public trust doctrine applies to already-adjudicated water rights in the state.<sup>255</sup>

Much like Nevada, Utah law requires the Utah State Engineer to approve an application to appropriate water only if the “proposed plan . . . would not prove detrimental to the public welfare.”<sup>256</sup> The statute does not define the phrase “detrimental to the public welfare,” and while the Utah courts have occasionally been asked to consider the issue, the State does not appear to have any practice or procedure for routinely reviewing water rights applications to address public welfare concerns. For example, unlike Oregon, Utah’s water rights application forms do not mention the public interest, public welfare, or public values,<sup>257</sup> and the State has no clear practice of conditioning permits to protect the public values associated with Utah’s water resources. Nonetheless, the Utah Supreme Court has used the public welfare standard in at least one case—not directly to protect public values, but rather to give a preference to a later water rights application over an earlier application.<sup>258</sup>

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<sup>252</sup> 254 P.3d 606 (Nev. 2011).

<sup>253</sup> *Id.* at 610–13.

<sup>254</sup> *Id.* at 611, n.1.

<sup>255</sup> *Mineral Cty. v. Walker River Irrigation District*, 900 F.3d 1027, 1034 (9th Cir. 2018) (certifying to the Nevada Supreme Court questions of whether Nevada public trust doctrine applies to adjudicated water rights and, if so, to what extent), *docketed sub nom.*, *Mineral Cty. v. Lyon Cty.*, No. 75917 (Nev. argued Mar. 3, 2020).

<sup>256</sup> UTAH CODE ANN. § 73-3-8(1)(a)(iii)(B) (West 2019).

<sup>257</sup> See *Applications & Forms*, UTAH DIVISION OF WATER RIGHTS, <https://www.waterrights.utah.gov/wrinfo/forms/> [<https://perma.cc/4Z3B-FNJ9>] (last visited Aug. 15, 2018).

<sup>258</sup> “Where the approval of the application would . . . interfere with the more beneficial use for any of the purposes mentioned, or would prove detrimental to the public welfare, the State Engineer is directed to reject the same.” *Tanner v. Bacon*, 136 P.2d 957, 962 (Utah 1943). To be sure, the broad purposes of the Deer Creek Project proposed by the second applicant, which included “domestic, culinary and irrigation purposes,” *id.* at 961, might arguably encompass some public values.

In *Tanner v. Bacon*, the court found that the express language of the Utah statute requiring that the State Engineer reject an application where an appropriation is detrimental to the public welfare, coupled with case law from surrounding states with similar statutes, demonstrated that the State Engineer was authorized to reject the earlier application “in the interest of the public welfare.”<sup>259</sup>

The scope of “public welfare” review also arose in *Bonham v. Morgan*, where the Utah Supreme Court held that the standards that apply to the review of an original water rights application also apply to a permanent water transfer application, including the requirement that applications be rejected if detrimental to the public welfare.<sup>260</sup> This set the stage for a 2016 case where the Utah Court of Appeals upheld a change application following a public welfare review.<sup>261</sup> In *HEAL Utah v. Kane County Water Conservancy District*, the plaintiffs claimed that the applicants, who were seeking to change their point of diversion and nature of use, had the burden of showing that the statutory criteria for approving water rights, including the public welfare standard, were met.<sup>262</sup> While the court ultimately concluded that the applicants had met their burden by showing that the proposed change would not prove detrimental to the public welfare, it recognized the importance of addressing the potential harm to public values, including public recreation and the natural stream environment.<sup>263</sup>

New Mexico’s approach to the public interest seems to have followed a pattern similar to that of Utah. Much like Utah, New Mexico law requires the New Mexico State Engineer to approve an application “if the proposed appropriation is not contrary to the conservation of water within the state and is not detrimental to the public welfare of the state.”<sup>264</sup> In *Young & Norton v. Hinderlider*, the New Mexico

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<sup>259</sup> *Id.* at 964.

<sup>260</sup> 788 P.2d 497, 498 (Utah 1989).

<sup>261</sup> *HEAL Utah v. Kane Cty. Water Conservancy Dist.*, 2016 UT App 153, 378 P.3d 1246 (2016).

<sup>262</sup> *Id.* at ¶¶ 20, 21.

<sup>263</sup> The Court of Appeals noted that the lower court had found that “99% of the time the width of the river will be reduced less than 1.5 feet, out of an average width of approximately 350 feet,” and “99% of the time the depth of the river would be reduced less than 1.5 inches.” *Id.* at ¶ 32. Further, although the “stretch of the Green and Colorado Rivers from Flaming Gorge Reservoir to Lake Powell includes critical habitat for four species of endangered fish unique to the Colorado River system, HEAL Utah’s evidence and experts were unable to demonstrate the extent of impact the diversions would have on the fish or stream.” *Id.* at ¶¶ 28–36 (internal quotation marks omitted). The court relied, in part, on an earlier decision of the Utah Supreme Court in *Searle v. Milburn Irrigation Co.*, which had held that “the applicant bears the burden of persuasion throughout the application process,” although the court described this as “a fairly low burden.” 2006 UT 16, ¶¶ 35–42, 133 P.3d 382.

<sup>264</sup> N.M. STAT. ANN. § 72-5-6 (LexisNexis 2019). Similar language applies to applications for changes of place of use, *id.* at § 72-5-23, and groundwater. *Id.* § 72-12-3(E). Separately, New Mexico requires the State Engineer to reject applications that are contrary to the public welfare. *Id.* § 72-5-7. New Mexico law even affords “standing for those asserting legitimate concerns involving public welfare and conservation of water” so long as

Supreme Court reviewed a decision of the State's Board of Water Commissioners overturning a decision of the Territorial Engineer (the predecessor to the State Engineer before New Mexico became a state) involving two conflicting applications.<sup>265</sup> The Territorial Engineer chose to approve the application later in time on public interest grounds because it was "more within the available water supply" and because of the lower cost of irrigation per acre.<sup>266</sup> The Commissioners had determined that the public interest should be narrowly construed to allow denial of an application only if it would be a "menace to the public health and safety."<sup>267</sup> The New Mexico Supreme Court disagreed, suggesting that the Territorial Engineer had properly considered the economic viability of the competing projects.<sup>268</sup>

The application of the public welfare standard to water transfers also arose in New Mexico, much as it had in Utah, although in a more interesting context. *In re Application of Sleeper* involved a proposal to transfer water from traditional irrigation purposes to a recreational lake associated with a ski area.<sup>269</sup> The district court judge denied the transfer on public interest grounds, having been persuaded that "to transfer water rights, devoted for more than a century to agricultural purposes, in order to construct a playground for those who can pay is a poor trade, indeed."<sup>270</sup> On appeal, however, the New Mexico Court of Appeals held that the provision requiring public interest review of water rights applications did not apply to transfer applications.<sup>271</sup> That ruling was later changed by statute such that transfers are now subject to public interest reviews, just as in Utah.<sup>272</sup>

New Mexico's limited foray into implementing the public welfare mandate in its water resources law has not led to any clear policy regarding its scope, and the State does not seem to apply the standard routinely in reviewing all water resources applications.<sup>273</sup> What does seem clear, however, is that New Mexico has faced

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they do not impose undue burdens on the administrative and judicial processes. *Id.* § 72-5-5.1.

<sup>265</sup> 110 P. 1045 (N.M. 1910).

<sup>266</sup> *Id.* at 1048, 1050.

<sup>267</sup> *Id.* at 1048.

<sup>268</sup> *Id.* at 1050. The court ultimately remanded the case to the lower court for further fact-finding. *Id.* at 1051.

<sup>269</sup> JOSE A. RIVERA, *ACEQUIA CULTURE: WATERS, LANDS, AND COMMUNITY IN THE SOUTHWEST* 174 (1998) (citing *In re Howard Sleeper et al.*, Rio Arriba County Cause No. RA 84-53(C) (N.M. Div. 5, First Judicial Dist. April 16, 1985)).

<sup>270</sup> *Id.* at 173.

<sup>271</sup> *In re Application of Sleeper*, 760 P.2d 787, 790-92 (N.M. App. 1988).

<sup>272</sup> See N.M. STAT. ANN. § 72-5-23 (LexisNexis 2019).

<sup>273</sup> See Consuelo Bokum, *Implementing the Public Welfare Requirement in New Mexico's Water Code*, 36 NAT. RES. J. 681, 690 (1996). Bokum suggests four options available to the State for addressing the "public welfare" mandate: (1) interpreting public welfare sufficiently narrowly that the issue is essentially avoided; (2) doing nothing affirmatively to define public welfare and rule on the issue in an ad hoc manner; (3) relying solely on the definitions that evolve from the regional and state water planning process to produce definitions of public welfare; or (4) promulgating regulations defining public

serious problems with stream dewatering, including the drying up of sections of the mighty Rio Grande River itself.<sup>274</sup>

As with the laws of most other Western states, Arizona statutes require a water rights application to be rejected if it is “against the interests and welfare of the public.”<sup>275</sup> There are, however, no reported cases from Arizona concerning the application of this standard to water rights applications. Given the significant stream dewatering that has occurred in Arizona,<sup>276</sup> it does not appear that Arizona has implemented this standard as might be necessary to protect public values in the state’s water resources.

Montana is somewhat unique among Western states in not specifically providing for a public interest review of water rights applications. Nonetheless, Montana law requires the State Department of Natural Resources and Conservation (DNRC) to consider certain public values, particularly in the context of large diversions. In cases involving more than 5.5 cubic feet per second or greater than 4,000 acre-feet of water, the DNRC must determine whether a use is “reasonable.”<sup>277</sup> An application will only be approved as a reasonable use if it considers the effects on the quantity and quality of water, if it weighs the probable significant adverse environmental impacts of the appropriation, and if it protects (among other things) minimum streamflows for aquatic life.<sup>278</sup> The adverse impact requirement highlights the important role played by the Montana Environmental Protection Act (MEPA) in the DNRC’s review of water permit applications. MEPA requires that state agencies take public comment and prepare environmental assessments or environmental impact statements on proposed agency actions before reaching a final decision.<sup>279</sup>

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welfare broadly and establishing standards for applying the public welfare criterion. *Id.* at 691.

<sup>274</sup> See Henry Fountain, *In a Warming West, the Rio Grande Is Drying Up*, N.Y. TIMES (May 24, 2018), <https://www.nytimes.com/interactive/2018/05/24/climate/dry-rio-grande.html> [<https://perma.cc/ATB3-4Q5Y>].

<sup>275</sup> ARIZ. REV. STAT. ANN. § 45-153.A (2019).

<sup>276</sup> The conservation group, American Rivers reports that “[o]nce navigable by large riverboats from its mouth nearly to Phoenix, the Gila below Phoenix today crosses the Gila River Indian Reservation as an intermittent trickle due to large irrigation diversions.” *Gila River*, AMERICAN RIVERS, <https://www.americanrivers.org/river/gila-river/> [<https://perma.cc/6FZ6-ARTN>] (last visited Aug. 16, 2018). The Salt River, which is a significant tributary of the Gila that also flows through Phoenix, has generally run dry below the Granite Reef Diversion Dam, since the dam was completed in 1908. The reservoir behind the dam stores water for irrigation and municipal purposes. See *Celebrating Arizona’s Rivers*, ENVTL. DEF. FUND (Apr. 2012), [http://www.edf.org/sites/default/files/EDF-Salt\\_River.pdf](http://www.edf.org/sites/default/files/EDF-Salt_River.pdf) [<https://perma.cc/9264-GQS9>].

<sup>277</sup> MONT. CODE ANN. § 85-2-311(3) (2019).

<sup>278</sup> *Id.*

<sup>279</sup> MONT. CODE ANN. § 75-1-102(1) (2019). See generally HOPE STOCKWELL, MONT. ENVTL. QUALITY COUNCIL, A GUIDE TO THE MONTANA ENVIRONMENTAL POLICY ACT (2013), <https://www.leg.mt.gov/content/Publications/Environmental/2013-mepa-handbook.pdf> [<https://perma.cc/8CAB-982B>] (providing guidance on when MEPA applies and the



The final Western state considered in this Article is Colorado. Colorado appears last in this survey largely because it is the only state that has expressly disavowed an obligation to consider the public interest in the allocation of water resources. This is surprising not least because Colorado's constitution contains strong language that appears to recognize the importance of public values in the state's water resources:

The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.<sup>280</sup>

The last phrase, of course, seems to limit the preceding language, and the very next section of the State constitution provides that "[t]he right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied."<sup>281</sup> To be sure, this language could be construed to allow the State to decide that waters are not "unappropriated" if they are necessary to protect the people's use of the water, as guaranteed by the State constitution. But that is not the conclusion reached by the Colorado Supreme Court. In *Board of County Commissioners of the County of Arapahoe v. United States*, the Colorado Supreme Court held that "[c]onceptually, a public interest theory is in conflict with the doctrine of prior appropriation because a water court cannot, in the absence of statutory authority, deny a legitimate appropriation based on public policy."<sup>282</sup> The Colorado Supreme Court thus left open the possibility that the State legislature might someday require public interest review of water resource decisions,<sup>283</sup> but no effort has been made to establish such a requirement in the more than twenty years since the court rendered its decision.<sup>284</sup>

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appropriate steps for agencies to take).

<sup>280</sup> COLO. CONST. art. XVI, § 5.

<sup>281</sup> COLO. CONST. art. XVI, § 6. This presents an interesting contrast with the Wyoming constitution, which contains the same language but adds the qualifying phrase "except as demanded by the public interests." WYO. CONST. art. VIII, §3; *see supra* note 119, at 172 and accompanying text.

<sup>282</sup> Bd. of Cty. Comm'rs v. United States (*In re Application for Water Rights of the Bd. of Cty. Comm'rs*), 891 P.2d 952, 972 (Colo. 1995).

<sup>283</sup> As the court noted, "[t]he degree of protection afforded the environment and the mechanism to address state appropriation of water for the good of the public is the province of the General Assembly and the electorate." *Id.* at 974. The court also rejected the claim that "beneficial use" limitation on water rights should be construed to encompass a "broad public policy of protecting the . . . environment," and suggested that the state's instream flow law was how the legislature intended to protect the environment. *Id.* at 971-72.

<sup>284</sup> The Colorado Court of Appeals has, however, recognized the authority of counties to regulate domestic water system development to ensure that such systems do not significantly deteriorate aquatic habitats and wetlands. *City of Colo. Springs v. Bd. of Cty. Comm'rs of County of Eagle*, 895 P.2d 1105, 1111-12 (Colo. App. 1994).

## IX. RESTORING THE PUBLIC INTEREST IN WATER RESOURCES MANAGEMENT

A universal principle of water law—not just Western-style, prior appropriation law, but virtually all water law—is public ownership of the resource.<sup>285</sup> If we accept this as true, then how is it even possible that state agencies charged with managing this public resource are allowed to make decisions that operate in plain derogation of the core public values associated with our water resources? If we accept a shared-values conception of the public interest, then how is it that states can defend decisions to grant water rights that allow the dewatering of streams or the destruction of ecological or recreational values for the narrow benefit of private parties?<sup>286</sup> Such claims are simply indefensible under any fair understanding of what it means that the state owns the water and manages it for the benefit of the people that it serves.<sup>287</sup> But I would go further. To my mind, the destruction of public values associated with our water resources for the benefit of private parties is immoral because it turns the very notion of protecting the public interest—a defining principle for any civil society—on its head.

I am not suggesting that private parties are incapable of acquiring vested, private water rights. They surely are. But I am suggesting, as Justice Rose so eloquently stated in the *Mineral County* case, that states have an affirmative duty “to protect the people’s common heritage of streams, lakes, marshlands and tidelands . . .”<sup>288</sup> I applaud those states, such as Washington, California, and perhaps Oregon, that seem to have largely embedded a public interest review into every important decision over whether to authorize private use of water resources.<sup>289</sup>

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<sup>285</sup> See Bryant Walker Smith, *Water as a Public Good: The Status of Water Under the General Agreement on Tariffs and Trade*, 17 CARDOZO J. INT’L & COMP. L. 291, 301 (2009) (“Today, water is unambiguously a public good. A survey of current domestic water laws identified forty-four countries in which significant water resources belong to the state, the nation, or the people; it identified no countries that disavowed such public ownership.”). See generally DANTE A. CAPONERA, PRINCIPLES OF WATER LAW AND ADMINISTRATION (Marcella Nanni, ed., 3d ed. rev. 2019). Caponera details water law around the globe, noting that even where private ownership of water has existed, “there is an increasing tendency to consider water as community, public, crown, or state property.” *Id.* at 200. He concludes that “[p]ublic ownership of water resources or state control over water is inevitable and beneficial.” *Id.*

<sup>286</sup> I include within the scope of the phrase “private parties” those special purpose districts that claim the benefit of a quasi-public status that operate largely for the benefit of their private party clients.

<sup>287</sup> As Justice Holmes so eloquently noted, “[F]ew public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished . . .” *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 356 (1908); see also *supra* note 84 and accompanying text.

<sup>288</sup> *Mineral County v. State*, 20 P.3d 800, 809 (Nev. 2001).

<sup>289</sup> I say “largely” because every state can surely do better. Even Washington, for example, seems unwilling to acknowledge that the public interest might limit water transfer

And while I respect that many other states have occasionally seen fit to impose public interest limits on private water rights, that is not nearly enough to protect the public interest in the public's water resources. This Part proposes a catalog of policies that, if thoughtfully employed, could restore the public interest to its rightful place as a limitation of private water rights—without upending traditional schemes for water resource allocation in any significant way.

### *A. Define the Public Interest*

At the beginning of this Article, I laid out my case for defining the public interest in terms of those public, communal values that are typically associated with our water resources. I believe that those values must be protected first—before private parties are permitted to profit off of the public's property. Nonetheless, I recognize that other considerations that arguably reflect good government policy—and thus a different type of public value—might come into play.<sup>290</sup> Moreover, at least some uses of water resources may simultaneously protect both public and private interests.<sup>291</sup>

The bottom line, however, is that states must develop a concrete definition of the public interest such that its application in individual cases will lead to an obvious result. So, for example, when a private party applies for a water right that might damage ecological resources, the public interest restriction should routinely lead the water resources agency to impose conditions on the withdrawal and use of water that will adequately protect the stream's ecology. Parties might argue about whether particular restrictions are necessary to protect the stream ecology, but not whether the public interest requires its protection. In this way, a concrete definition should apprise the relevant agencies, applicants, and members of the public of how the public interest will likely constrain present and future water rights.

States will likely be tempted to follow the definitional approach taken by Alaska's water permit criteria law,<sup>292</sup> which identifies eight factors to be considered in reviewing water resource applications. But where these factors take account of private economic benefits alongside public values, as the Alaska statute does, they risk undermining those values, especially in light of probable rent-seeking behavior on the part of private applicants.<sup>293</sup> Under the Alaska approach, for example, the

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or change applications.

<sup>290</sup> See *Tanner v. Bacon*, 136 P.2d 957, 962 (Utah 1943); *Young & Norton v. Hinderlider*, 110 P. 1045, 1050 (N.M. 1910). In both of these cases, State Engineers favored later applicants who were deemed to have stronger plans for making use of a limited water supply.

<sup>291</sup> For example, water resources to meet basic human needs for water, sanitation, and food production might be in the public interest even if made possible by private parties.

<sup>292</sup> See ALASKA STAT. § 46.15.080 (2019); see also *supra* Section VII.B, notes 166–169 and accompanying text.

<sup>293</sup> To be fair to Alaska, in the only reported case where the issue arose, the court was careful to require that public values be protected before private interests were considered,

ecological health of a stream might be lawfully traded for an economic benefit to an individual applicant or a segment of the community. Moreover, where the agency decision-maker must choose from a range of unweighted but competing (and perhaps conflicting) factors, the final decision seems likely to reflect political pressure, and this could easily come at the cost of protecting actual public values. Notwithstanding its limitations, Alaska is well-ahead of most other states in adopting a reasonably clear and objective definition for the public interest that can help to ensure a systematic administrative decision-making process, and that will provide an administrative record upon which interested parties can obtain meaningful judicial review.

A robust public rulemaking-style process, modeled on the civic republican ideal,<sup>294</sup> with the stated goal of protecting shared public values in water resources, and with a nod to Rawls' "veil of ignorance,"<sup>295</sup> remains a better mechanism for realizing a concrete, meaningful, and objective definition of the public interest that is capable of protecting our shared values in water resources. While some degree of rent-seeking may be inevitable, even with a civic republican approach, strong ground rules and good leadership should go a long way to minimizing this problem.<sup>296</sup>

*B. Incorporate Public Interest Review and Adaptive Management into Every Significant Decision Involving a State's Water Resources*

Despite the fact that the public interest is imposed as a statutory or even constitutional limit on the authority of most states to grant water rights, many states routinely ignore their obligation to at least consider—let alone protect—the public interest.<sup>297</sup> The most generous explanation for this failure may be that our notions about the shared public values associated with water resources, such as ecological and recreational values, have evolved considerably since water rights administration regimes were first put in place in the late nineteenth and early twentieth centuries. In those early years, the focus was on "reclaiming" the land, which was understood to mean bringing the land into agricultural production through irrigation. Water was reasonably plentiful in those early years, and we had a far more limited appreciation for ecological health and the recreational opportunities associated with water

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notwithstanding the balancing test. *See Tulkisarmute Native Cmty. Council v. Heinze*, 898 P.2d 935 (Alaska 1995); *see also supra* Section VII.B, notes 166–169 and accompanying text.

<sup>294</sup> *See DEWEY, supra* note 72, at 207.

<sup>295</sup> *See RAWLS, supra* note 66, at 163.

<sup>296</sup> Because of the enormous pressure that will likely be brought to bear on agency officials by private interests, applying the civic republican approach to this process will be challenging. A successful process will require clear ground rules that articulate the agency's overarching goal of protecting the public interest and strong leadership from the ultimate decision-maker.

<sup>297</sup> *See supra* note 176 and accompanying text.

resources. Consequently, as water allocation procedures were established, consideration of the public interest fell into the background, to the point that granting water rights for private use was itself deemed to be in the public interest.<sup>298</sup> The lack of a concrete definition for the public interest also made it easier to effectively ignore the requirement in the course of approving water rights applications.

This, of course, is the reason that a definition is so important. Once the state develops a clear and meaningful definition of the public interest, it becomes much harder to avoid applying it to every request involving the use of the state's water resources. This includes the initial permit application, the water right adjudication decision, the transfer or modification of a water right, and even more general decisions such as the adjudication of water rights for an entire surface or groundwater basin. Moreover, this "public interest review" need not be terribly burdensome, because state fish and game agencies can usually provide the water resources agency with detailed information about stream flows needed to protect fish and other ecological values in a given waterbody.<sup>299</sup> And state environmental agencies can deliver comparable information regarding water quality. Thus, minor applications can be processed rather quickly. And while large diversions or changes in use will require more complex assessments, these can often be streamlined if the approval provides for an adaptive management<sup>300</sup> program for the affected water resource based upon actual data that is gathered once the use commences. For example, a party might be granted a permit for their water right that is subject to a minimum stream flow to protect a fishery, with different flow regimes for different times of the year. But as a condition for granting the right, the appropriator might agree to work with the state to monitor the fishery to determine whether adjustments

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<sup>298</sup> When I first asked the former State Engineer of Wyoming, George Christopulos, how he took into account the state's public interest requirement he responded essentially with this argument that private development of water resources was itself in the public interest. Interview with George Christopulos, Former State Engineer, State of Wyo., at the University of Wyoming College of Law, Laramie, Wyo. (c. 1987). This seems to be the essential point behind the Nevada State Engineer's public interest argument to the Nevada Supreme Court in the *Pyramid Lake* case. See *Pyramid Lake Paiute Tribe of Indians v. Washoe Cty.*, 918 P.2d 697, 698–99 (Nev. 1996); see also *supra* note 177 and accompanying text.

<sup>299</sup> For states like Washington, Montana, and California that have statutes requiring some form of environmental impact assessment, it should be relatively easy to incorporate a public interest review into those analyses. See *States with NEPA-like Environmental Planning Requirements*, U.S. DEP'T OF ENERGY, <https://www.energy.gov/nepa/downloads/states-nepa-environmental-planning-requirements> [<https://perma.cc/S2XV-YY5H>] (last visited Aug. 16, 2018).

<sup>300</sup> Adaptive management is a robust, iterative process of decision-making whereby practitioners test hypotheses and adjust behavior, decisions, and actions based on experience and changed conditions. See GEORGE H. STANKEY ET AL., U.S. FOREST SERV., ADAPTIVE MANAGEMENT OF NATURAL RESOURCES: THEORY, CONCEPTS, AND MANAGEMENT INSTITUTIONS 8–9 (2005), [https://www.fs.fed.us/pnw/pubs/pnw\\_gtr654.pdf](https://www.fs.fed.us/pnw/pubs/pnw_gtr654.pdf) [<https://perma.cc/P2KB-FVH8>].

are needed to either increase or decrease minimum flows, or to change the timing of those flows to better protect the public resources. These obligations could ultimately help or hurt the holder of the water right, but it has the advantage of allowing adjustments to be made on the basis of actual data rather than speculation. Moreover, this arrangement ensures protection of the public interest at the level that maximizes opportunities for private use.

*C. Announce that a Public Interest “Servitude” Limits Every Vested Water Right*

Much water has been allocated throughout the Western United States—and indeed throughout the world—often without a clear statement of any ongoing restrictions on the right to use the respective water resources. It does not follow that such restrictions are therefore unavailable. Rather, states ought to make clear to the public, through their rules, statutes, or judicial decisions, that they retain the authority to regulate water rights in the public interest.

Some in the water rights community seem to think that the state’s failure to include restrictions in the water right itself makes their rights inviolate, at least insofar as their historic use of the resource.<sup>301</sup> They claim support for this position under the Takings Clause of the Fifth Amendment of the U.S. Constitution (or counterpart provisions of state constitutions),<sup>302</sup> which prohibits the taking of private property for a public use without just compensation.<sup>303</sup> But a state’s imposition of reasonable restrictions on pre-existing water rights is unlikely to support an unconstitutional takings claim, for the reasons described below.

The basic framework for analyzing a regulatory takings claim under the U.S. Constitution involves two parts. First is the question of whether the regulation

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<sup>301</sup> See, e.g., James L. Huffman et al., *Constitutional Protections of Property Interests in Western Water*, 41 PUB. LAND & RESOURCES L. REV. 27, 47 (2019) (“[A]ny government action that precludes use of the water right deprives the owner of some—or arguably all . . . —of the economic value of the water right, meaning just compensation must be paid to the owner.”); David R. E. Aladjem, *There Is No Free Lunch: The Endangered Species Act, The Public-Trust Doctrine and the Takings Clause*, Presentation at 36th Annual Am. Bar Ass’n Water Conference 2 (April 16–18, 2018), [https://www.americanbar.org/content/dam/aba/events/environment\\_energy\\_resources/2018/water/conference\\_materials/4\\_aladjem\\_david\\_authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/events/environment_energy_resources/2018/water/conference_materials/4_aladjem_david_authcheckdam.pdf) [<https://perma.cc/25QR-GJFV>] (“Th[e] expropriation] doctrine allows for the government to reallocate water when it deems such a reallocation to serve the public interest but requires the government to compensate the owners of the rights in question. In that way, the expropriation doctrine provides an intrinsic limit on such takings and so implements one of the chief functions of the Takings Clause: preventing the government from forcing a few people from bearing the burdens that should properly be borne by the public at large.”).

<sup>302</sup> See, e.g., Huffman et al., *supra* note 301, at 39–63; Aladjem, *supra* note 301, at 2 (citing U.S. CONST. amend. V).

<sup>303</sup> U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

amounts to a “total taking” of the property right.<sup>304</sup> If so, then the U.S. Supreme Court has suggested that compensation is owed unless the regulation was necessary to prevent something akin to a common law nuisance.<sup>305</sup> While questions about the so-called “denominator” in a takings case remain somewhat unresolved,<sup>306</sup> it seems unlikely that seasonal restrictions on water withdrawals needed to protect ecological flows, and that are likely to vary from year to year, could be characterized as a “total taking.”

If a “total taking” is not shown, then the complaining party must look at the character of the government regulation and its economic impact, particularly in terms of how it might interfere with “distinct, investment-backed expectations” of the owner.<sup>307</sup> In the case of regulating water rights to protect the public interest, the government is seeking to regulate property that it owns under a positive requirement of law as against a private right to use that public property. Determining economic impacts will depend on an “*ad hoc* factual inquiry,”<sup>308</sup> but it seems unlikely that regulators will impose public interest restrictions on existing water rights holders that would completely deprive them of the ability to use their water right for the purposes for which it was intended.<sup>309</sup>

Beyond the technical legal argument, Professor Joseph Sax has explained with typical clarity why takings claims brought by holders of water rights will have difficulty making their case:

Because rights granted in water have always been subject to what Justice Holmes called an initial limitation of private rights, the subsequent exercise of public authority [to limit] such rights, as in requiring releases for in-stream flow maintenance, is neither a redefinition nor a repudiation of property rights. Instead, it is a realization of a limit that was always there . . . .

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<sup>304</sup> *Lucas v. S.C. Coastal Comm’n*, 505 U.S. 1003, 1015 (1992) (A “total taking” is one where the government regulation deprives the owner of “all economically beneficial or productive use of land.”).

<sup>305</sup> *Id.* at 1022–23.

<sup>306</sup> *Compare Lucas*, 505 U.S. at 1016–17 n.7. (“The answer to this difficult question may lay in how the owner’s reasonable expectations have been shaped by the State’s law of property – i.e., whether and to what degree the State’s law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.”), *with Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497–501 (1987) (stating that the answer may be “where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking because the aggregate must be viewed in its entirety.”).

<sup>307</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

<sup>308</sup> *Hodel v. Va. Surface Mining and Reclamation Ass’n*, 452 U.S. 264, 295 (1981).

<sup>309</sup> *See generally Nat’l Audubon Soc’y v. Superior Court*, 658 P.2d 709 (Cal. 1983), (seeking an accommodation between private water rights and public rights was the primary focus of the court). Similar efforts at accommodation seem likely where states impose public interest restrictions on existing water rights.

The roots of private property in water have simply never been deep enough to vest in water users a compensable right to diminish lakes and rivers or to destroy the marine life within them. Water is not like a pocket watch or a piece of furniture, which an owner may destroy with impunity. The rights of use in water, however long standing, should never be confused with more personal, more fully owned, property. . . . [R]ecognition of the right of the state to protect its water resources is only a restatement of a familiar and oft-stated public prerogative.<sup>310</sup>

In other words, the public interest acts as an inherent limitation on the scope of private property rights in water, which in turn limits the scope of potential takings claims.

#### *D. Engage the Public in the Enterprise of Managing Their Water*

No public resource affords as much public value as water. We use it, of course, to meet basic human needs, but we value water for so many other reasons—for swimming, boating, fishing, and for pure aesthetic enjoyment. And we lament it when water is polluted or depleted in ways that undermine these public uses. This is not to deny the value of water for private purposes, but it does mean that the public deserves to be engaged on all matters that may impact their shared use of a state’s water resources. Many communities have formed “waterkeeper” or watershed management organizations that are designed to stimulate and ensure public involvement in the management of particular public waterways.<sup>311</sup> States could do much more to promote and support these types of organizations as a way to ensure that public values are always part of any discussion about the use of public water resources. Short of this, states could try to identify and engage individual fishermen, boaters, and others who care about protecting communal rights in water.

State water resource agencies might also appoint a public ombudsman whose mission would be to represent the shared public values associated with water resources in every significant proceeding before the state agency. While not a perfect substitute for actual community engagement, an ombudsman might at least help ensure that someone representing communal values in water has a seat at the table.

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<sup>310</sup> See Joseph L. Sax, *The Limits of Private Rights in Public Waters*, 19 ENVTL. L. 473, 481–482 (1989).

<sup>311</sup> The Waterkeeper Alliance claims “more than 300 Waterkeeper Organizations and Affiliates that are on the frontlines of the global water crisis, patrolling and protecting more than 2.5 million square miles of rivers, lakes and coastal waterways on six continents.” See *About Us*, WATERKEEPER ALLIANCE, <https://waterkeeper.org/about/> [<https://perma.cc/UNF3-VTGK>] (last visited Aug. 15, 2018); see also *Search Results for Watershed Management*, RED LODGE CLEARINGHOUSE, <http://www.rlch.org/search/node/watershed%20management> [<https://perma.cc/HB6S-D5WS>] (last visited Aug. 15, 2018).



The four policies proposed above, if fully and fairly implemented, could go a long way toward restoring the public interest to its rightful place as a reasonable and necessary limit on private water rights. But no one should expect that policies like these will be adopted without significant public pressure. Fortunately, public-minded citizens interested in protecting our shared public values in water are not without options for applying that pressure. Citizens and interest groups might, for example, petition state water agencies to commence a rulemaking to define the public interest and to establish a process for carrying out a public interest review for decisions impacting water resources.<sup>312</sup> While these agencies will likely be reluctant to grant such petitions, the utter failure of many states to routinely consider public values when they approve water rights, even in the face of statutory and constitutional commands that they do so, could provide a compelling basis for a court to force a state to take some action.<sup>313</sup>

Of course, even if a legislature or water agency agrees to take the first step by defining the public interest, they will likely try their best to retain maximum administrative discretion by adopting something along the lines of the Alaska balancing test.<sup>314</sup> But shared public values will necessarily have to be a part of the equation,<sup>315</sup> and interested parties can work to move public officials to give preference to shared public values over private interests, as in fact happened in Alaska's *Tulkisarmute Native Community* case.<sup>316</sup>

Interested citizens might also challenge individual water resource decisions that award private water rights at the expense of public rights—or decisions that fail to even take account of their impact on public rights. In Wyoming, an effort to adjudicate just such a claim was thrown out on justiciability grounds.<sup>317</sup> But even in Wyoming, a plaintiff might find success if they can demonstrate a clear connection between a concrete injury that they suffered and the State's failure to address public interests. For example, if the state were to grant a water right that allowed the dewatering of a stream, a party using the stream for fishing or recreational purposes might have a legitimate claim that their injury resulted from the State's failure to protect the public interest, and would be redressable by a judicial order commanding

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<sup>312</sup> See, e.g., N.M. STAT. ANN. § 12-8-7 (1978); WASH. REV. CODE § 34.05.330 (2009); WYO. STAT. ANN. § 16-3-106 (1982).

<sup>313</sup> See, e.g., N.M. STAT. ANN. § 12-8-16 (West 2019) (showing how state administrative procedure laws often stipulate that parties "exhaust all administrative remedies" before becoming able to petition for judicial review of the agency).

<sup>314</sup> See *supra* note 293 and accompanying text.

<sup>315</sup> The Alaska Water Use Act, for example, requires consideration of the effects of an appropriation on fish and game, public recreation opportunities, public health, and access to public waters. ALASKA STAT. § 46.15.080 (2018).

<sup>316</sup> See *Tulkisarmute Native Cmty. Council v. Heinze*, 898 P.2d 935 (Alaska 1995).

<sup>317</sup> *William F. West Ranch v. Tyrell*, 206 P.3d 722, 736 (Wyo. 2009). Interestingly, the Wyoming Supreme Court intimated that the plaintiffs should have filed a petition for rulemaking rather than seeking a declaratory judgment in court.

the state to recognize the public interest.<sup>318</sup> Further, if the state failed to even consider the public interest on the record of its decision in approving a water right, a plaintiff can argue that such failure renders the decision arbitrary and capricious.<sup>319</sup>

Interested citizens might also work with states to amend their water rights forms to include questions and review criteria that can help ensure that both the applicant and the water resources agency to consider public values before they reach a decision on the application. Agencies should welcome such a change since it will provide them with some evidence in the decision record that these values were taken into account.

## X. CONCLUSION AND THE PATH FORWARD

My quest to understand the public interest in water resources law led me to consider the broader implications of a public interest standard in public policy more generally. Here, I had to confront the inherent ambiguity of a term that demands clarity because of its importance to public policy. With the help of other scholars,<sup>320</sup> I was persuaded that public interests are those that reflect communal values, and these must be distinguished from private interests. This was the frame that I used to assess how well Western states—and by extension, most any jurisdiction with positive water law—protects the important public interests in our water resources. Following a survey of “the public interest” in Western water law, I concluded that Western states—with a few notable exceptions—have largely abdicated their responsibility to protect these public values. In trying to understand the reasons for this failure, I came to realize that the term’s ambiguity provides political and legal cover to water resource agencies that might prefer to avoid the politically difficult choice that arises when proposals to grant private water rights adversely impact communal values.

The most significant obstacle to solving this problem is therefore political, but the problem can be solved, and the solution is relatively straightforward. A state must begin by defining the public interest in objective, normative terms. I have

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<sup>318</sup> As previously noted, a Wyoming statute essentially invites agricultural appropriators to dewater public streams. See WYO. STAT. ANN. § 41-4-317 (1957); see also DuMars, *supra* note 127.

<sup>319</sup> In *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983), where the U.S. Supreme Court famously described agency action as arbitrary and capricious “if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Id.* 43–44. The failure to consider a clear requirement from a statute or the constitution would appear to satisfy the second of the *State Farm* tests. State courts often look to the federal APA arbitrary and capricious standard under *State Farm* and its progeny when assessing whether a state agency action was arbitrary or capricious. See, e.g., *Neah Bay Chamber of Commerce v. Dep’t of Fisheries*, 832 P.2d 1310, 1313–14 (Wash. 1992).

<sup>320</sup> See FLATHMAN, *supra* note 24; ALEXANDER, *supra* note 52; Arendt, *supra* note 57.

offered my own analysis of why the definition should reflect communal values and not private interests, although I recognize that states may find other legitimate ways to define the term. But however a state chooses to define the public interest, the definition must be concrete enough to establish a clear standard for administrators to apply in particular cases involving the allocation, use, and management of water resources.

Further, public interest review of water resource decisions must become routine. Employing the definition, state agencies must ensure that every decision meets a public interest threshold. An adequate public interest review process must also allow those who might disagree with the decision an opportunity to challenge that decision in court on the basis of a thorough record that explains how the agency addressed public interest concerns.

Finally, the longstanding failure of many state agencies to consider the public interest in approving water resource uses cannot excuse significant conflicts with public values. While it may be impractical and even impossible to fully restore public values in our shared water resources, we can and should restore some balance to the system without unduly impacting the settled expectations of existing water users.

Our public waterways are the quintessential example of community property, and billions of people around the globe rely on public water resources both for their essential needs as well as their incalculable recreational, ecological, and aesthetic values. Once lost, these resources may prove difficult or impossible to recover. With heightened awareness and some political pressure, the public interest may yet prove to be the bulwark that protects our public waters for present and future generations.