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# CASENOTE

## Determining what is in the Public Welfare in Water Appropriations and Transfers: The Intel Example

### I. INTRODUCTION

In the arid western United States, economic development depends on control over water. Historically, water was valued in the West predominantly for mining, manufacturing, irrigated agriculture, domestic uses and hydropower generation.<sup>1</sup> Around the turn of the century, western states, led by Wyoming, began to adopt permit statutes with public welfare clauses.<sup>2</sup> Early case law shaping the public interest criterion has typically treated public interest as synonymous with economic development.<sup>3</sup> In recent decades, concerns about public values such as recreation, scenic beauty, and fish and wildlife habitat have grown.<sup>4</sup> Western states have responded to these concerns in a variety of ways, including reservation of minimum stream flows, instream protection,<sup>5</sup> and public welfare legislation for water rights allocations and transfers.<sup>6</sup> Today, most western states feature statutes mandating public interest review of new appropriations<sup>7</sup> and several mandate public

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1. 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).

2. *Id.* at 685.

3. See, e.g., *Young & Norton v. Hinderlider*, 110 P. 1045 (N.M. 1910); *Cookingham v. Lewis*, 114 P. 88 (Or. 1911), *reh'g denied*, 115 P. 32 (Or. 1911); *In re Commonwealth Power Co.*, 143 N.W. 937 (Neb. 1913).

4. See Grant, *supra* note 1, at 688.

5. See Richard Ausness, *Water Rights, The Public Trust Doctrine, and the Protection of Instream Uses*, 1986 U. ILL. L. REV. 407 (1986).

6. The terms public interest and public welfare are interchangeable for purposes of this discussion. Where cases and statutes specifically use one term or the other, this Note reflects that terminology.

7. See ALASKA STAT. § 46.15.080(a) (Michie 1962 & Supp. 1995); ARIZ. REV. STAT. ANN. § 45-153(A) (West 1994 & Supp. 1995-96); CAL. WATER CODE § 1255 (West 1971 & Supp. 1995); IDAHO CODE § 42-203A(5)(e) (Michie 1948 & Supp. 1995); KAN. STAT. ANN. §§ 82a-711 (1989 & Supp. 1993); MONT. CODE ANN. § 85-2-311(4)(b)(iii) (1995); NEB. REV. STAT. §§ 46-234(2), 235(2)(a)(iii), (1993 & Supp. 1994); NEV. REV. STAT. § 533.370(3) (1986 & Supp. 1993); N.M. STAT. ANN. §§ 72-5-1, 6, 7, 72-12-3(E) (Michie 1978 & Supp. 1985); N.D. CENT. CODE ANN. § 61-04-06 (Michie 1995); OR. REV. STAT. § 537.170 (Butterworth 1987); S.D.

interest review for water transfers.<sup>8</sup>

Under traditional appropriative law, water rights holders were granted water in the order that applications were made, and up to the amount of water available in a water course ("first in time, first in right").<sup>9</sup> As long as water was appropriated for a beneficial use,<sup>10</sup> no consideration was given to which use was a better use in considering applications for water rights.<sup>11</sup> New Mexico's water code, adopted in 1907, was amended in 1985 to require consideration of the public welfare in water transfers and new appropriations.<sup>12</sup> The legislature did not define public welfare. Public welfare is currently determined in an ad hoc fashion by state water officials, or ruled on by the courts on a case by case basis.

When preparing for hearings before the State Engineer, parties applying for new appropriations or transfers of water have no guidance on which public welfare arguments the State Engineer will consider and how he will weigh them. A lack of standards may lead to increased numbers of appeals. The courts are ill equipped to make public welfare determinations which are essentially political in nature. Thus, definition of public welfare is needed.

This Note examines how the New Mexico State Engineer deals with the public welfare criterion in the State water code by focusing on the recent decision by the State Engineer to grant an application for appropriation of groundwater by Intel Corporation. The Note first briefly examines the history of public welfare criteria in western states and in New Mexico and traces the development of specific statutory criteria in western water law. It next discusses the development of public welfare in New Mexico's water law. The Note then analyzes the 1994 decision of the New Mexico State Engineer to grant Intel Corporation's permit application to pump 4,500 acre feet per year of groundwater. Specifically,

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CODIFIED LAWS § 46-2A-9 (Michie Rev. 1987 & Supp. 1995); TEX. WATER CODE ANN. § 11.134(3)(c) (Vernon's 1988); UTAH CODE ANN. § 73-3-8(1) (Michie 1953 & Supp. 1995); WASH. REV. CODE ANN. § 90.03.290 (West 1992 Supp. 1995); WYO. STAT. § 41-4-503 (Michie 1995). The two states without public interest review statutes are Oklahoma and Colorado. See COLO. REV. STAT. ANN. §§ 37-82-101 *et seq.* (West 1990 & Supp. 1995); OKLA. STAT. ANN. §§ 82-105 *et seq.* (West 1990 & Supp. 1995-6).

8. These states are: Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, and North Dakota.

9. Norman K. Johnson & Charles T. DuMars, *A Survey of the Evolution of Western Water Law in Response to Changing Economic and Public Interest Demands*, 29 NAT. RESOURCES J. 347, 349 (1989).

10. N.M. CONST. ART. XVI, § 3: "Beneficial use shall be the basis, the measure and the limit of the right to use of water".

11. Johnson & DuMars, *supra* note 9, at 356.

12. N.M. STAT. ANN. §§ 72-5-51, 72-5-6, 72-5-7, 72-5-23, 72-5-24, 72-12-7 (Repl. Pam. 1985).

the Note examines the public welfare arguments made by the applicant Intel Corporation, the Protestant Village of Corrales, and the treatment by the State Engineer of public welfare in his decision to grant the permit application. Finally, the Note argues that public welfare decisions should not be made in an ad hoc fashion. It examines the strengths and weaknesses of several solutions to defining public welfare, concludes that the legislature, in cooperation with citizen advisory boards, should define the public welfare criterion in the New Mexico water code, and in Appendix A proposes public welfare factors which should be included in public welfare legislation.

## II. HISTORY OF PUBLIC WELFARE

Early case law in western states equated public interest with economic development.<sup>13</sup> Projects which had the potential of scaring away investors or impeding economic development were considered detrimental to the public interest. In 1910, the New Mexico Territorial Supreme court, in *Young & Norton v. Hinderlider*, said that it would not be in the public interest to grant a permit to a large irrigation project if there existed a possibility that the water supply was inadequate, because project failure would discourage potential investors from considering investment in future irrigation projects.<sup>14</sup> The court also held that larger irrigation projects were to be favored over smaller ones.<sup>15</sup>

In *In re Commonwealth Power Co.*,<sup>16</sup> the Nebraska Supreme Court upheld the state water agency's rejection of the second of two competing permit applications for generation of hydroelectric power.<sup>17</sup> The court reasoned that if permits were granted for conflicting projects, the resulting interference and litigation would discourage potential future investors.<sup>18</sup> A few years later, in *Big Horn Power Co. v. State of Wyoming*,<sup>19</sup> the state engineer in Wyoming in an unappealed decision determined that a proposed dam exceeding thirty-five feet in height would harm the public interest. The area had great potential for mineral development and the proposed dam would have interfered with the only

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13. See *Hinderlider*, 110 P. 1045; *In re Commonwealth Power*, 143 N.W. 937; *Big Horn Power Co. v. State of Wyoming*, 148 P. 1110 (Wyo. 1915).

14. *Hinderlider*, 110 P. at 1057. There, the court said that "the failure of any irrigation project carries with it not only disastrous consequences to its owners and to the farmers who are depending on it, but besides tends to destroy faith in irrigation projects generally." *Id.*

15. *Id.* at 1056-57.

16. 143 N.W. 937 (1913).

17. *Id.* at 939.

18. *Id.* at 938-39.

19. 148 P. 1110 (Wyo. 1915).

economically viable railroad in the area.<sup>20</sup> Although the lower dam produced less power, the state engineer determined that power for mineral development could be generated elsewhere.

In the early part of the century, courts and agencies gave no consideration to public values like scenic beauty, recreational uses, fish and wildlife habitat.<sup>21</sup> A notable exception was a 1929 Oregon law that required the State Reclamation Commission, when considering the public interest in new appropriations, to include the impacts on public recreation and commercial and game fishing.<sup>22</sup> By the mid-1960s, a transition from purely economic interpretations of public welfare to increased consideration of other public values began to emerge.<sup>23</sup> In 1966, the Alaska legislature enacted a water use act which, unlike other public interest statutes, comprehensively enumerated public welfare factors, including economics, fish and game, public health, public recreation, harm to other persons and loss of alternate uses of water.<sup>24</sup>

Under modern appropriative law, most states require consideration of public welfare criteria as part of the permitting process and in determining whether to grant applications for water transfers. Thus, today, only two of the eighteen western states have failed to enact statutes mandating public welfare review of new appropriations.<sup>25</sup> Although public welfare review of water transfers has been less widely accepted, it is rapidly gaining acceptance.<sup>26</sup> Modern public interest statutes feature a wide variety of public welfare factors, ranging from groundwater recharge,<sup>27</sup> fish and wildlife habitat and scenic resource

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20. *Id.* at 1114-15.

21. Grant, *supra* note 1, at 688.

22. Act of Feb. 28, 1929, ch. 245, § 1, 1929 Or. Laws 252-53. The currently amended version is at OR. REV. STAT. § 537.170(5) (1987).

23. Grant, *supra* note 1, at 688.

24. ALASKA STAT. § 46.15.080(b) (1962 & Supp. 1995) reads as follows:  
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 losses of alternate uses of water that might be made within a reasonable time if not precluded or hindered by the proposed appropriations;
- (6) harm to other persons resulting from the proposed appropriations;
- (7) the intent and ability of the applicant to complete the appropriation; and
- (8) the effect upon access to navigable or public waters.

25. See *supra*, note 7.

26. Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, and North Dakota currently have statutes requiring public interest review of water rights transfers. See *supra*, note 7.

27. ARIZ. REV. STAT. ANN. §§ 45-801.01-898.01 (West 1994 & Supp. 1995).

preservation<sup>28</sup> to instream flow, aesthetic and recreational concerns.<sup>29</sup> The statutes vary broadly, however, in the amount of guidance they afford to state water officials regarding what factors must be considered.

### III. PUBLIC WELFARE IN NEW MEXICO WATER LAW

New Mexico's water code, adopted in 1907, gave the Territorial Engineer the authority to deny an application for an appropriation if it was contrary to the public interest.<sup>30</sup> The only case which interprets the "contrary to the public interest" language is *Hinderlider*.<sup>31</sup> Since the early part of the century, the state's population has increased approximately fivefold, surface waters have become overappropriated and water is increasingly mined from groundwater.<sup>32</sup> Interstate stream compacts and Indian water rights impose additional constraints.<sup>33</sup> In 1985, the New Mexico legislature amended several water statutes. Transfers of water rights became subject to the public welfare requirement.<sup>34</sup> The law now also requires the State Engineer, when ruling on applications to appropriate groundwater, to consider the public interest.<sup>35</sup> Thus, the State Engineer must determine that there is unappropriated water available, that the proposed use will not impair existing water rights and is not contrary to conservation of water within the state or detrimental to the public welfare of the state.<sup>36</sup> However, the New Mexico legislature has not defined "public welfare." It is currently left to state water officials and the courts to define public welfare criteria on a case by case basis. There is little New Mexico case law dealing with the public welfare criterion. *Hinderlider* held that "public interest" should be construed more broadly than public health or safety matters. The court said that "the fact that the entire statute is designed to secure the greatest possible benefit from [public waters] for the public, should be borne in mind."<sup>37</sup> But the *Hinderlider* holding focuses entirely on economic factors. *In re Application*

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28. CAL. WATER CODE §§ 1243, 1243.5 (West 1971 & Supp. 1995).

29. IDAHO CODE § 42-1501 (Michie 1990 & Supp. 1995).

30. 1907 N.M. Laws, ch. 49, § 28.

31. *Young & Norton v. Hinderlider*, 110 P. 1045 (N.M. 1910).

32. Consuelo Bokum, Options for Implementing the Public Welfare Requirement in New Mexico's Water Code 1-2 (Oct. 1994) (unpublished manuscript on file with the author).

33. *Id.* at 2.

34. N.M. STAT. ANN. §§ 72-5-23, 72-5-24 (Michie 1978 & Supp. 1985) (surface water); N.M. STAT. ANN. § 72-12-7 (Michie 1978 & Supp. 1985) (ground water).

35. N.M. STAT. ANN. § 72-12-3(E) (Michie 1978 & Supp. 1985).

36. *Id.*

37. *Young & Norton v. Hinderlider*, 110 P. 1045, 1056 (N.M. 1910).

of *Sleeper*,<sup>38</sup> a case dealing with transfer of surface water, illustrates the movement away from maximum economic development as the primary public interest value.

In the *Sleeper* case, the New Mexico district court and appellate court<sup>39</sup> disagreed on the public welfare criterion in a case of first impression in New Mexico. Economic values associated with a new ski resort development were pitted directly against the traditional cultural values of a small farming community in northern New Mexico.<sup>40</sup> Tierra Grande Corporation began developing a subdivision in conjunction with a large ski resort development near Ensenada in northern New Mexico.<sup>41</sup> The corporation dug a gravel pit while building roads for the subdivision and subsequently transformed the pit into a recreational lake by damming the Nutrias Creek, in violation of state water law.<sup>42</sup> The Nutrias is a tributary of the Rio Brazos and empties into the Ensenada Ditch before joining the Rio Brazos. Members of the Ensenada Land and Water Association use the creek's water, which consists mainly of snow melt and is rich in silt, to "fertilize" their land.<sup>43</sup>

The state engineer forced Tierra Grande Corporation to breach the dam.<sup>44</sup> Subsequently, the corporation purchased two tracts of land and appurtenant water rights from local property owners in the Ensenada area.<sup>45</sup> The purchases were conditional upon the state engineer's approval of the transfer application.<sup>46</sup> The initial one-time diversion to fill the lake and subsequent annual diversions to compensate for evaporation losses necessarily would have resulted in retirement of agricultural land.<sup>47</sup> The Association protested the transfer, alleging that it would impair existing rights and would be contrary to the public interest.<sup>48</sup>

In the district court, the Ensenada Association argued that approval of the application would be contrary to the public interest

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38. *Sleeper v. Reynolds*, No. RA 84-53(C), (N.M. Dist. Ct. Apr. 16, 1985) [hereinafter *Sleeper I*], *rev'd*, 760 P.2d 787 (N.M. Ct. App. 1988), *cert. quashed*, 759 P.2d 200 (N.M. 1988). For a detailed discussion of the *Sleeper* case, see Shannon A. Parden, Note, *The Milagro Beanfield War Revisited in Ensenada Land and Water Association v. Sleeper: Public Welfare Defies Transfer of Water Rights*, 29 NAT. RESOURCES J. 861 (1989).

39. *Sleeper v. Ensenada Land and Water Ass'n*, 760 P.2d 787 (N.M. Ct. App. 1988) [hereinafter *Sleeper II*].

40. *Sleeper I*, slip op. at 2.

41. *Id.* at 4.

42. *Id.*

43. *Id.*

44. *Id.* at 5.

45. *Id.*

46. *Id.*

47. *Sleeper II*, 760 P.2d at 789.

48. *Sleeper I*, slip op. at 6-8.



because it would retire agricultural land from cultivation.<sup>49</sup> When a member of a ditch association sells his land and transfers his water rights, ditch maintenance expenses must be borne by fewer people than before. Consequently, a heavier financial burden is placed on remaining individual Association members.<sup>50</sup> Tierra Grande Corporation argued that the proposed project would increase economic development and stimulate the local economy and would therefore be in the public interest.<sup>51</sup>

The district court squarely addressed the conflicting public welfare values. Judge Encinias stated that northern New Mexicans possessed a significant history, traditions and culture of recognized value. The people of northern New Mexico were deeply rooted to the land and water was central to their cultural identity.<sup>52</sup> He noted that the proposed development would only create menial jobs for the local population and dismissed the corporation's assertion that greater economic benefits were more desirable than the preservation of cultural identity.<sup>53</sup> The judge said 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,"<sup>54</sup> would be a poor trade.

On appeal, the New Mexico Court of Appeals held that the statute in effect at the time of the application precluded the state engineer from considering broad public interest factors in the transfer of surface water.<sup>55</sup> Therefore, the court reversed, but without reaching the critical question of how to interpret conflicting public welfare values. Section 72-5-23 of the New Mexico water code was subsequently amended and now requires the State Engineer to consider the public welfare in an application for change of use.<sup>56</sup> Meanwhile, Judge Encinias' holding does not constitute binding precedent and the meaning of "public welfare" in the New Mexico Water Code remains unsettled.

*Sleeper I* appears to have carried forward the view of the Supreme Court of Idaho that public interest review should take into consideration any local public interest affected by a proposed appropriation.<sup>57</sup> The *Sleeper* case illustrates the problems associated with weighing conflicting public values. On the one side of the equation are the powerful economic

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49. *Id.*

50. Parden, *supra* note 38, at 864.

51. *Id.* at 865.

52. *Sleeper I*, slip op. at 5-6.

53. *Id.* at 8.

54. Parden, *supra* note 38, at 865-66.

55. *Sleeper II*, 760 P.2d at 791.

56. N.M. STAT. ANN. § 72-5-23 (Michie 1978 & Supp. 1985).

57. See *Shokal v. Dunn*, 707 P.2d 441 (Idaho 1985).

interests of a corporation whose public welfare arguments are easily quantifiable in generated jobs and primary and secondary economic activity. On the other side are aesthetic, cultural and community values which are far less tangible or easily quantifiable. More generally, the clash exists between private individuals' vested property interests in the free alienability of water rights on one side<sup>58</sup> and public values such as environment, fish and wildlife, instream flows, and recreational values related to the enjoyment of nature, or local public values such as the cohesion of a local ditch association and a traditional way of life on the other. The district court in *Sleeper I*, in weighing competing values, forcefully rejected a pure economic analysis of public welfare.<sup>59</sup> The decision raises difficult questions. How did Judge Encinias arrive at his decision? Is it paternalistic? The poverty-stricken local population may have preferred to earn a living wage in a ski resort rather than eking out a meager existence farming the land. How should competing factors be weighed? Who is to decide between competing values? The courts? The state engineer? The legislature?

After the trial court's decision in *Sleeper I*, the local county commission adopted land use regulations intended to "protect the unique culture" in the county which stated that the "transfer of water rights from traditional uses to residential subdivision or commercial uses, will generally not promote the public welfare."<sup>60</sup> This raises a related question: At what level of government should policy decisions such as the public welfare decisions be made? At the local (county commission) or the state level (legislature, state engineer)? The county commission's decision, though embodying democratic accountability and local control, lacks geographic breadth and allows for admission of few outside interests.<sup>61</sup> Thus, a more fundamental question in defining public welfare is: whose interests will be served?<sup>62</sup> The following section discusses how other western states have grappled with the issue of public welfare.

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58. See Johnson & DuMars, *supra* note 9, at 351. An appropriative water right, once vested, is a constitutionally protected property interest. It can be sold, leased, or transferred. This protection came about out of the necessity to promote investment of capital and protect the stability of long-term financial arrangements of economic development which depended on water.

59. *Sleeper I*, slip op. at 7-9.

60. Rio Arriba County Land Subdivision Regulations, 1 WATER MARKET UPDATE 1, 9-10 (1987), cited in Grant, *supra* note 1, at 701.

61. See Grant, *supra* note 1, at 701.

62. *Id.* at 701-02, citing Schmidt, COMMENTARY IN WESTERN WATER RESOURCES: COMING PROBLEMS AND THE POLICY ALTERNATIVES, 221-222 (M. Duncan ed., 1980): "[W]e can't say that one decision-making system is better, more efficient, or more equitable . . . without first asking whose interests we want to serve . . ." *Id.*

#### IV. PUBLIC WELFARE IN THE WESTERN STATES

Modern public interest review statutes afford varying degrees of guidance to administrative officials. Some statutes comprehensively define the public interest and include public values. The Alaska water use act is an example of such a statute.<sup>63</sup> Some statutes do not define the public interest as comprehensively as the Alaska statute but still give significant guidance. For example, the Utah permit statute for new appropriations requires consideration of the proposed appropriation's impact on public recreation or the natural stream environment.<sup>64</sup> Another example is several California statutes for new appropriations which require consideration of the state water plan and the relative benefit from various beneficial uses of the water, including, among others, preservation and enhancement of fish, wildlife and recreation, and streamflows.<sup>65</sup> Other permit statutes provide little or no guidance for public interest review. The permit statutes of Nevada,<sup>66</sup> New Mexico,<sup>67</sup> and Utah<sup>68</sup> are examples of such statutes.

Permit statutes which fail to provide specific guidance for public welfare review are subject to statutory interpretation by state water officials and by the courts. Two cases have grappled with this problem by relying on recently enacted and related legislation in arriving at their statutory interpretation.<sup>69</sup> In 1973, in *Stempel v. Department of Water Resources*,<sup>70</sup> the Washington Supreme court rejected the Department's arguments that it need not consider the effects of a proposed appropriation on water quality because other state agencies already had authority to regulate pollution and because the statutory public welfare requirement, dating back to 1917, was unrelated to pollution concerns.<sup>71</sup> The court found legislative guidance in the Water Resources Act,<sup>72</sup> which declared a policy of preserving and enhancing natural resources,

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63. ALASKA STAT. § 46.15.080(b). Other examples of public interest statutes which comprehensively define public welfare include N.D. CENT. CODE § 61-4-06 (1985) and OR. REV. STAT. § 537.170(5) (1985).

64. UTAH CODE ANN. § 73-3-8 (Michie 1953 & Supp. 1995). Other examples include CAL. WATER CODE §§ 1256-58 (West 1972 & Supp. 1987) and UTAH CODE ANN. § 73-3-8 (Supp. 1986).

65. CAL. WATER CODE §§ 1256-1258 (West 1971 & Supp. 1995).

66. NEV. REV. STAT. § 533.370(3) (1986 & Supp. 1993).

67. N.M. STAT. ANN. §§ 72-5-5.1, -6, -7, -23, 72-12-3, 72-12-7 (Michie 1978 & Supp. 1985).

68. UTAH CODE ANN. § 73-3-8(1) (Michie 1953 & Supp. 1995).

69. *Stempel v. Department of Water Resources*, 508 P.2d 166 (Wash. 1973); *Shokal v. Dunn*, 707 P.2d 441 (Idaho 1985).

70. *Stempel*, 508 P.2d 166.

71. *Id.* at 172.

72. WASH. REV. CODE ANN. §§ 90.54.010-.920 (West 1992 & Supp. 1995).

aesthetic values and public health. In addition, the court found that the State Environmental Policy Act of 1971<sup>73</sup> required state agencies to prepare environmental impact statements for major actions significantly affecting the quality of the environment. The court concluded that the department had an obligation, in light of these Acts, to consider the water quality effects of proposed appropriations.<sup>74</sup>

The Idaho Supreme Court, in *Shokal v. Dunn*<sup>75</sup> looked to minimum streamflow legislation to interpret an appropriations provision in the water code. The court found it persuasive that the streamflow statute, designed to protect "fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality,"<sup>76</sup> was passed on the same day that the legislature added the term "public interest" to the appropriations provision. Under that provision, the state water official could reject an application for appropriation of water if the applicant's appropriation would conflict with the local public interest. Local public interest is defined as the affairs of the people in the area directly affected by the proposed use.<sup>77</sup> Thus, the court concluded that the legislature must have intended the public interest on the local scale to include the elements listed in the minimum stream provision and "any locally important factor impacted by proposed appropriations."<sup>78</sup> This far-reaching decision empowers local communities in Idaho to assert any locally relevant public welfare factor in applications for water appropriation.

Absent such guidance in the form of recently enacted and related legislation which prescribes consideration of public welfare factors such as preservation and enhancement of natural resources, aesthetic values, and recreation, courts have difficulty mandating consideration of broad public welfare values beyond economic development.<sup>79</sup> In response to these concerns, most western states have defined public welfare to some degree.

## V. THREE APPROACHES TO DEFINING PUBLIC WELFARE

There appear to be three different approaches to defining public welfare. One approach is to adopt lists of welfare uses, either

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73. WASH. REV. CODE ANN. §§ 43.21C.010-910 (West 1983 & Supp. 1995).

74. *Stempel*, 508 P.2d. at 171-72.

75. 707 P.2d 441 (Idaho 1985).

76. *Shokal*, 707 P.2d at 448, citing IDAHO CODE § 42-1501 (Supp. 1986).

77. *Shokal*, 707 P.2d at 448, citing IDAHO CODE § 42-1501.

78. *Shokal*, 707 P.2d at 449.

79. See Grant, *supra* note 1, at 690-91.

legislatively<sup>80</sup> or judicially.<sup>81</sup> Examples of factors that states have included in their public welfare lists include:<sup>82</sup>

- harm to other persons, losses of alternative uses of water (Alaska);<sup>83</sup>
- public health (Alaska);<sup>84</sup>
- groundwater recharge (Arizona);<sup>85</sup>
- recreation, and preservation and enhancement of fish and wildlife resources (California);<sup>86</sup>
- aquatic life, aesthetic beauty, water quality, assuring minimum stream flows, discouraging waste and encouraging conservation (Idaho);<sup>87</sup>
- instream flow (Nebraska);<sup>88</sup>
- flood control (Oregon);<sup>89</sup> and
- natural resources, public health (Washington).<sup>90</sup>

Statutes that list welfare criteria are helpful because they provide greater certainty for permit applicants and parties protesting the applications in preparing their cases before a state water official. They have, however, been criticized because they offer little help for state water officials in weighing the relative merits of criteria.<sup>91</sup>

A second approach is for the legislature to prescribe, through preference statutes, how various public welfare factors should be weighed.<sup>92</sup> Some states have statutes preferring irrigation to recreation or domestic over agricultural uses. For example, a Texas statute states that domestic and municipal uses, including water for sustaining human life and the life of domestic animals, are superior to other purposes.<sup>93</sup>

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80. See, e.g., ALASKA STAT. ANN. § 46.15.080 (1962 & Supp. 1995).

81. See *Shokal*, 707 P.2d at 448-49. There, the Idaho Supreme Court held that the elements listed in the Alaska statute (§ 46.5.080(b)) must be considered part of the local public interest. It further held that assuring minimum stream flows, discouraging waste, and encouraging conservation should also be considered.

82. See generally NEW MEXICO ENVIRONMENTAL LAW CENTER, *LIVING WITHIN OUR MEANS: A WATER MANAGEMENT POLICY FOR NEW MEXICO IN THE 21ST CENTURY* (1992).

83. ALASKA STAT. ANN. § 46.15.080(b) (1985).

84. *Id.*

85. ARIZ. REV. STAT. ANN. §§ 45.801.01 to 898.01 (Supp. 1995).

86. CALIF. WATER CODE §§ 1243, 1243.5 (West 1962 & Supp. 1995).

87. IDAHO CODE § 42-1501 (Michie 1948 & Supp. 1995).

88. NEB. REV. STAT. § 46-2,107 (1993), § 46-2,111 (Supp. 1995).

89. OR. REV. STAT. § 537.170(5) (Butterworth 1987).

90. WASH. REV. CODE ANN. § 90.54.010 (West 1992 & Supp. 1995).

91. Grant, *supra* note 1, at 708-09.

92. *Id.* at 710.

93. TEX. WATER CODE ANN. § 11.024 (Supp. 1987). Another example is a provision in the California Water Code: "It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next

Most western states currently do not prioritize public welfare factors.<sup>94</sup> A precise definition of a hierarchy of public welfare values is probably undesirable. What is appropriate for one geographic area of the state may not be appropriate for another. Preference statutes would have the effect of constraining water appropriations and transfer decisions instead of allowing the flexibility necessary to accommodate regional and temporal differences and changes and to allow optimal use of the available water resources. Thus, they would not be good public policy.

A third approach to making public welfare decisions is the approach taken by the New Mexico legislature: to simply state that the public welfare must be taken into consideration. Public welfare decisions are made in an ad hoc fashion. Thus, parties applying for an appropriation or transfer of water must argue their case without any certainty about what to expect, which criteria will be considered or how much weight will be accorded to each criterion.<sup>95</sup> In addition, courts have no guidance by which to judge the State Engineer's treatment of public welfare. Related to this concern is an issue of administrative law.<sup>96</sup> The nondelegation doctrine<sup>97</sup> limits legislatures' ability to delegate broad powers to administrative agencies. Thus, it may be unconstitutional to write public welfare statutes without some form of direction to the state water official on what factors he must consider. Under current New Mexico law, the State Engineer has no standards to guide his discretionary power and the courts have no guidance to decide whether the agency overstepped the bounds of its delegated authority.

The Intel decision<sup>98</sup> poignantly demonstrates this lack of

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highest use is for irrigation." CAL WATER CODE § 106 (West 1971 & Supp. 1995).

94. But the North Dakota water code, for example, contains the following preference statute:

"When there are competing applications for water from the same source, and the source is insufficient to supply all applicants, the state engineer shall adhere to the following order of priority: (1) Domestic use; (2) Municipal use; (3) Livestock use; (4) Irrigation use; (5) Industrial use; (6) Fish, wildlife, and other outdoor recreation."

N.D. CENT. CODE ANN. § 61-04-06.1 (Michie 1995).

95. See generally Charles T. DuMars & Michelle Minnis, *New Mexico Water Law: Determining Public Welfare Values in Water Rights Allocation*, 31 ARIZ. L. REV. 817 (1989).

96. See Grant, *supra* note 1, at 693.

97. The nondelegation doctrine limits the ability of the legislative branch to delegate powers to an executive agency because the delegation may offend the separation of powers doctrine. To ensure that the power is essentially retained in the legislature, delegated powers must not be broad but must be limited by standards to guide the agency and to allow courts to determine whether standards have been followed. See, e.g., *Touby v. United States*, 500 U.S. 160 (1991).

98. *In Re the Applications of Intel Corporation to Appropriate the Underground Waters of the State of New Mexico in the Rio Grande Underground Water Basin*, No. RG-57125,

standards for interpreting the public welfare criterion in New Mexico water law. The State Engineer, uncomfortable with making policy decisions, equated beneficial use with public welfare. The unfortunate result is that the legislature's mandate to consider public welfare separately from beneficial use was simply ignored.

## VI. THE INTEL DECISION

On April 1, 1993, the New Mexico media announced the one billion dollar expansion by Intel for the Rio Rancho, New Mexico facility. Intel's water use before the expansion was between two to three million gallons a day. After the expansion, water use is expected to increase to as much as 10 million gallons a day.<sup>99</sup> Its consumptive use is estimated to be between five and thirteen percent of its permitted amount.<sup>100</sup>

Intel applied to the New Mexico State Engineer for permits to drill three wells from which Intel would pump 4,500 acre feet per year ("AFY")<sup>101</sup> or 1.5 billion gallons a year.<sup>102</sup> The Village of Corrales ("Corrales"), which is entirely dependent on domestic wells for its water, feared that their domestic wells would experience drawdowns and protested the application.<sup>103</sup> A hearing before the State Engineer followed in April, 1994. The State Engineer subsequently granted Intel's application.<sup>104</sup>

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RG-57125-S and RG-57125-S-2 (June 10, 1994) (Findings and Order) [hereinafter *State Engineer Findings and Order*].

99. *Id.* at 3. However, Intel proposed to implement water conservation measures to reduce its total average water demand by between 1,430,000 gallons per day in January 1995 to 4,080,000 gallons per day in 1999, resulting in a per-day demand of 5,680,000 in January 1995 to 6,320,000 in January 1999. Thus, Intel estimated a reduction in its average total site water demand between 20.1% in 1995 and 39.2% in 1999. *Id.* at 4-5. The State Engineer retained jurisdiction over the permit until 1999 to monitor Intel's progress on the proposed water conservation measures. *Id.* at 15-16.

100. State Engineer Findings and Order, *supra* note 98, at 8.

101. An acre foot is the amount of water it takes to flood one acre a foot deep.

102. Intel Permit Applications Nos. RG-57125, RG-57125-S, and RG-57125-S-2.

103. Memorandum Brief in Support of Findings and Order for the Village of Corrales, *In Re* the Applications of Intel Corporation to Appropriate the Underground Waters of the State of New Mexico in the Rio Grande Underground Water Basin, No. RG-57125, RG-57125-S and RG-57125-S-2 (June 10, 1994) [hereinafter *Corrales Memorandum Brief*].

104. The State Engineer granted Intel an appropriation of 3,248.6 AFY, to be drawn from all three wells combined, instead of the 4,500 AFY Intel applied for. The State Engineer imposed the condition that the applicant install well monitoring systems in the Corrales area to monitor groundwater effects from Intel's wells for a period of three years from the first date of diversion of water resulting from the permit. The State Engineer further retained jurisdiction to evaluate the effects on the shallow wells in Corrales after three years of pumpage. Finally, the State Engineer retained jurisdiction over the permit to evaluate, through January 1999, the progress made by Intel on its water conservation programs. State

## Public Welfare Criteria Addressed

### 1. Arguments of the Village of Corrales

Corrales strongly opposed the Intel expansion. At the heart of its public welfare discussion was the argument that the public welfare impacts of Intel's application must be evaluated in light of the broad public welfare concerns of the local communities in the vicinity of Intel's proposed pumping.<sup>105</sup> The Village urged that public welfare criteria should not be strictly confined to economic benefits. Citing two New Mexico district court cases, *Sleeper I*<sup>106</sup> and *Anaya*,<sup>107</sup> Corrales argued that public welfare should not be treated as synonymous with the economic benefits to Intel and the economic gain to the State of New Mexico. In both decisions, the court held that the public interest comprehends more than economic values and includes cultural, historical, and aesthetic values. Corrales also urged the State Engineer to look to the statutes and case law of Idaho, which consider "local public interest," and reject the application if "the affairs of the people in the area [are] directly affected by the proposed use."<sup>108</sup>

Corrales voiced a number of local public concerns. An expert for Corrales testified that 7,500 of its residents depend entirely on individual domestic wells for their water supply.<sup>109</sup> Corrales has an estimated 2,728 domestic wells, a majority of which are located in close proximity to the proposed Intel well sites. The wells are typically shallow. Intel's wells could draw down the water level to below the suction limit of the pumps on the domestic wells. Corrales argued that one foot draw-down, caused by Intel's pumping, could cause up to 50 percent of the domestic wells located east of the Corrales main canal to require drilling to a depth of 150 feet and be equipped with submersible pumps. The total cost of replacing 50 percent of these wells at an average of \$3,500 per well would amount to \$3,500,000 in costs to the residents of Corrales Village. If the wells needed to be drilled deeper, to 250 feet, the total cost would be

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Engineer Findings and Order, *supra* note 98, at 13-16.

105. Corrales Memorandum Brief, *supra* note 103, at 12-18.

106. *Sleeper v. Reynolds*, No. RA 84-53(C), (N.M. Dist. Ct. Apr. 16, 1985) [hereinafter *Sleeper I*], rev'd, 760 P.2d 787 (N.M. Ct. App. 1988), cert. quashed, 759 P.2d 200 (N.M. 1988).

107. *Anaya v. Public Service Co. of New Mexico*, No. 43,347 (N.M. First Jud. Dist. June 22, 1990), cited in Corrales Memorandum Brief, *supra* note 103, at 13. The court held that ditch users with provisionally determined priority dates earlier than that of the utility had the better right. Discussing public welfare considerations, the court said: "The interest of the public does not only comprehend economic values but cultural, historical and aesthetic values."

108. Corrales Memorandum Brief, *supra* note 103, at 13.

109. *Id.* at 16.



\$5,700,000. If the proportion of wells drilled to 150 feet and 250 feet depth were roughly equal, the total cost would be \$4,689,000.<sup>110</sup> Thus, granting Intel's application would not be in the public welfare of Corrales.

In addition, Corrales argued that the Intel expansion would have adverse effects on air quality, put stress on the Village infrastructure from increased traffic and waste water disposal, and generally diminish the quality of life for the Corrales residents.<sup>111</sup> While not disputing that the Intel expansion would result in economic benefits, however difficult to quantify, Corrales questioned the magnitude of the promised benefits to the State. It argued that there would be impacts on local infrastructure and societal and environmental values which Intel chose not to quantify. It cited a report<sup>112</sup> which stated that "the total cost to the taxpayers of the State is \$250 million in direct tax abatement and subsidies in the first five years alone. This translates to \$250,000 per job based on 1,000 jobs to be created."<sup>113</sup> Thus, Corrales argued, the cost of the Intel expansion might far outweigh the benefits to the community.<sup>114</sup> Corrales argued that Intel had an obligation to present a balanced analysis of public costs as well as public benefits resulting from Intel's expansion and attendant use of the public's water. Thus, Corrales urged that Intel's application should not be approved until a complete benefit-cost analysis was performed by Intel, or alternatively, that the State Engineer retain continued jurisdiction over Intel's permit in case pumping resulted in detrimental consequences to the public welfare of the local community.<sup>115</sup> While Corrales' public welfare arguments centered on the local public interest of the citizens of Corrales Village, Intel's arguments were predominantly of an economic nature.

## 2. *Intel's Public Welfare Arguments*

Intel made three public welfare arguments.<sup>116</sup> First, it argued that it would hire 2,400 more employees in New Mexico because of its

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110. *Id.* at 18.

111. *Id.* at 16.

112. SOUTHWEST ORGANIZING PROJECT, INTEL INSIDE NEW MEXICO 31 (May 3, 1994). The report can be obtained from Southwest Organizing Project in Albuquerque, New Mexico.

113. *Id.* at 31.

114. *Id.*

115. *Id.* at 18.

116. Intel Corporations's [sic] Findings of Facts, and Conclusions of Law at 13, *In Re the Applications of Intel Corporation to Appropriate the Underground Waters of the State of New Mexico in the Rio Grande Underground Water Basin*, No. RG-57125, RG-57125-S and RG-57125-S-2 (June 10, 1994) [hereinafter *Intel Findings and Conclusions*].

expansion.<sup>117</sup> The expansion would generate net state and local benefits of over \$24 million in the first two years of production.<sup>118</sup> In addition, it would generate approximately \$3 billion in indirect economic activity in the first two years through increased third-party economic activity.<sup>119</sup>

Second, Intel contended that the economic benefits brought to the State would create substantial social benefits including increased educational opportunities, improved security, recreational benefits and other social benefits which come from increased economic opportunities. It further argued that it provides social gains through the benefits program it makes available to its employees, including higher than average salaries, a corporate culture which encourages substantial responsibility and growth opportunities in the workplace, health coverage, training, education, employee sabbaticals, and stock options.<sup>120</sup> Intel also argued that it makes monetary, technical, and other contributions to the community, including supporting the TVI (Albuquerque Technical Vocational Institute)<sup>121</sup> campus at its Rio Rancho Facility, assisting and supporting science curricula and programs at schools, and donating computers to schools.<sup>122</sup>

Finally, Intel argued that it has paid substantial sums to cover infrastructure costs, including contributions to cover the costs of an additional sewer line and sewage treatment plant capacity.<sup>123</sup> It argued that it has spent money to abate odors in response to complaints by Corrales residents.<sup>124</sup> Citing traffic studies, it disputed that its expansion would result in increased traffic on Corrales Road.<sup>125</sup> Since it would not obtain water rights to offset the impacts of its pumping on the Rio Grande from any acequias, there would be no adverse impacts on members of community acequias.<sup>126</sup> Furthermore, Intel's pumping would have no negative impact on the cottonwoods or willows in the Bosque.<sup>127</sup> Lastly, Intel's expert predicted that drawdowns in Corrales domestic wells would be minimal.<sup>128</sup> Intel argued that water levels in the wells are declining now because of pumping by the City of Albuquerque and Rio Rancho Utility Corporation (RRUC), and that in

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117. *Id.* at 13.

118. *Id.*

119. *Id.*

120. *Id.* at 13-14.

121. TVI is a Community College in Albuquerque, New Mexico.

122. Intel Findings and Conclusions, *supra* note 117, at 14.

123. *Id.* at 15.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 14.

128. *Id.* at 6.

any case domestic wells need to be redrilled periodically because of a deepening of the water level and normal deterioration of the wells. Intel predicted that within 40 years, only 25 wells would have an insufficient water column as a result of granting Intel's permit applications.<sup>129</sup> Excluding from the total number of wells those which would need to be replaced because of natural deterioration, between four and eight wells would need to be redrilled somewhat sooner than anticipated.<sup>130</sup> In essence, Intel argued forcefully that access to water valued in the billions of dollars both to Intel and to the community should not be denied.

In summary, Corrales' and Intel's public welfare arguments were diametrically opposed. The State Engineer faced no easy decision.

### 3. *The State Engineer's Decision*

The State Engineer allowed that some domestic wells in the area would need to be redrilled but said that all existing wells in the vicinity of the Village of Corrales could be deepened to recover a reduced well water column.<sup>131</sup> He retained jurisdiction over Intel's permit to evaluate, after three years of pumpage, the effects to existing shallow wells in Corrales.<sup>132</sup>

At the heart of the State Engineer's decision lies his refusal to explicitly make the kinds of policy decisions involving public welfare. He stated:

[d]ecisions as to the type of development, i.e. growth, that is to occur in a given geographical area and effects resulting from that growth on the economy and physical infrastructure are best determined by appropriate governmental entities through local zoning and land development authority.<sup>133</sup>

As a consequence, it appears that the State Engineer equated public welfare with beneficial use. He held that "[t]he right to a new appropriation or reallocation of water, if obtained pursuant to New Mexico water law, is not against the public welfare."<sup>134</sup> He further stated that

Neither New Mexico State Constitution nor New Mexico Water Code do not [sic] provide a preference with respect to the type of use to be made of New Mexico's limited water

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129. *Id.* at 7.

130. *Id.* at 8.

131. State Engineer Findings And Order, *supra* note 98, at 13.

132. *Id.* at 15.

133. *Id.* at 14.

134. *Id.*

resources, provided that use of water is a beneficial use. A statutorily recognized beneficial use of water is not against the public welfare of the state.<sup>135</sup>

Thus, lacking any specific guidance for his consideration and weighing of public welfare criteria, the State Engineer ignored the legislature's mandate to consider detriment to the public welfare separately from beneficial use. This result is unfortunate and it clearly demonstrates the need for a definition of public welfare. The potential economic benefit of a project is no longer unquestioned as the guiding criterion of the appropriation doctrine. The voices of environmental, recreational, aesthetic and non-economic local interests are asserting themselves. The U.S. District Court for the District of New Mexico held that "'public welfare' is a broad term including health and safety, recreational, aesthetic, environmental and economic interests."<sup>136</sup> *Sleeper I* powerfully asserted local interests in conflict with economic development. Western states, in permit statutes and case law, have widely acknowledged the relevance of public values to public welfare review. New Mexico is one of only a few western states that has not defined public welfare. Defining public welfare would ensure that important public welfare values are considered in new appropriations and water transfers. The question which remains to be addressed is: who should define public welfare?

## VII. WHAT IS THE BEST FORUM FOR DEFINING PUBLIC WELFARE?

There are a number of solutions to the issue of defining public welfare. Among them are: defining public welfare legislatively through comprehensive lists of public welfare factors in permit statutes, or through water use preference statutes;<sup>137</sup> defining public welfare at the level of the Regional Water Planning process;<sup>138</sup> requiring the equivalent of an environmental impact statement (EIS) from applicants for appropriations and transfers of water within the state which would become part of the record from which the administrative decision-maker makes his decision;<sup>139</sup> and defining public welfare through a rulemaking proceeding by the State Engineer to adopt regulations

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135. *Id.*

136. *City of El Paso v. Reynolds*, 597 F. Supp. 694, 700 (D.N.M. 1984).

137. See Frank J. Trelease, *Alaska's New Water Use Act*, 2 LAND & WATER L. REV. 1 (1967).

138. See DuMars & Minnis, *supra* note 95; see also Martha C. Franks, *The Meaning of "Public Welfare" in Water Law*, 8 NEW MEXICO NAT. RESOURCES L. REP. 1 (1993).

139. John Klein-Robbenhaar, *Balancing Efficiency With Equity: Determining the Public Welfare in Northern New Mexico Surface Water Transfers*, 36 NAT. RESOURCES J. (1996).

binding on the State Engineer.<sup>140</sup> Each of these approaches has advantages as well as disadvantages.

#### A. Definition by the Legislature

Statutory definition of public welfare criteria by the legislature enjoys one major advantage over other approaches. The legislature is a democratically elected body and therefore more representative of, and accountable to, the public will than either the State Engineer or regional water planning groups. Public welfare determinations are decisions about the allocation of a scarce resource in such a way as to optimally achieve society's goals. They are, therefore, social policy decisions.<sup>141</sup> Water codes which feature comprehensive lists of public welfare factors assure at least that the state water officials must consider those public values. Furthermore, they provide guidance to all permit applicants and protestants as to which public welfare issues must be addressed. Yet lists of potentially relevant factors provide no guidance on how to weigh all the relevant factors.

One solution to this problem would be to prioritize welfare criteria statutorily.<sup>142</sup> Yet a system of priorities may be too static to accommodate regional or temporal differences in water use. What is appropriate and important to the public welfare in one region may be irrelevant in another.<sup>143</sup> Thus, preference statutes could, at best, be a guide to be disregarded when a region-specific or fact-specific situation made other uses more in the public interest.<sup>144</sup> Ultimately, detailed, mechanical standards contradict the goals of optimal productivity from existing water supplies and flexibility to take into consideration regional and temporal differences.

The *Shokal* court suggested an interesting approach to the problem. The court stated that: "what elements of the public interest are impacted, and what the public interest requires, is committed to [the

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140. See generally Bokum, *supra* note 32, at 19-28.

141. See generally DuMars & Minnis, *supra* note 95.

142. See Grant, *supra* note 1, at 709-10.

143. The Idaho Supreme Court in *Shokal v. Dunn*, 707 P.2d 441 (Idaho 1985), characterized the problem as follows:

The relevant elements and their relative weights will vary with local needs, circumstances, and interests. For example, in an area heavily dependent on recreation and tourism or specifically devoted to preservation in its natural state, Water Resources may give great consideration to the aesthetic and environmental ramifications of granting a permit which calls for substantial modification of the landscape or the stream. *Id.* at 450.

144. See Grant, *supra* note 1, at 710.

Department of] Water Resources' sound discretion."<sup>145</sup> However, the court further held that the permit should not be granted if the project were "contrary to the authority of the Board of Health in policing water for pollution."<sup>146</sup> Thus, the *Shokal* court's approach to weighing public interest factors, while flexible, has the effect of exempting certain public welfare factors from the state water official's discretion by giving some factors absolute priority.

### **B. Definition through the Regional Water Planning Process**

The New Mexico's legislature has established a forum in which public welfare could be determined. The legislature authorized the Interstate Stream Commission to fund regional entities in developing state water plans.<sup>147</sup> The process allows for involvement of citizens affected by water usage, fair and adequate notice and full public hearings.<sup>148</sup> Attaching the determination of public welfare to the regional water planning process would allow local communities to make fundamental choices about public welfare values in water use affecting their region.<sup>149</sup> It would allow for local input into public welfare determinations and for reflection of local economic conditions, values and interests.<sup>150</sup> Regional water plans could become a binding set of regulations for purposes of determining public welfare impacts in a region.<sup>151</sup>

While the regional planning process has the advantage of reflecting important regional concerns, adopting regional water plans as binding regulations has serious legal as well as political flaws. First, rulemaking power would be delegated to regional groups and the Interstate Stream Commission. The legislature does not currently delegate authority to these groups to adopt regulations. Thus, adoption of parts of regional water plans as binding regulations would amount to an unlawful delegation of power.<sup>152</sup> Second, it is likely that the regional

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145. *Shokal*, 707 P.2d at 450.

146. *Id.* at 451.

147. N.M. STAT. ANN. §§ 72-14-1-72-14-42 (Michie 1978 & 1995 Supp.).

148. *Id.*

149. See DuMars & Minnis, *supra* note 95, at 837-38.

150. *Id.* at 838.

151. *Id.* The authors argue that ideally, water use priorities established through the regional water planning process would reflect hydrologic and economic conditions of the region as well as the distribution of public values regarding water characteristic of the region. Once a regional plan had been produced, it could serve as a set of binding regulations for purposes of determining public welfare for water decisions affecting the region.

152. See Bokum, *supra* note 32, at 17.

planning groups are composed in large part of major water users with substantial self-interest in the outcome, and to a much smaller extent of environmental interests and local entities such as ditch associations.<sup>153</sup> Thus, there is a substantial risk that the resulting regulations would not fairly reflect local public interests.<sup>154</sup>

### C. *Requiring a "Public Welfare Impact Statement"*<sup>155</sup>

Requiring the equivalent of an Environmental Impact Statement, patterned on the National Environmental Policy Act (NEPA),<sup>156</sup> from applicants for water transfers<sup>157</sup> would have the advantage of forcing the applicant to discuss a wide range of public welfare values, rather than allowing it to limit its discussion to economic benefits. Furthermore, it would place an affirmative duty on the applicant to discuss public welfare criteria.

On the other hand, requiring an impact statement from every applicant for water transfer would not only prove too costly for many applicants, but more importantly, it would have the same drawbacks as the NEPA process. NEPA does not require commitment to any substantive values, but is purely a procedural statute.<sup>158</sup> Thus, an applicant preparing an EIS must discuss all reasonable alternatives but is under no obligation to make its substantive choice from among the alternatives listed in the EIS. Similarly, an applicant for an appropriation or transfer of water would be forced only to list and discuss a reasonable range of public welfare factors. The balancing analysis from among competing public welfare values would still be left to the State Engineer. Thus, the requirement of a public welfare impact statement would not necessarily be an improvement over the current process of making welfare decisions on an ad hoc basis.

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153. *Id.* at 18.

154. *Kerr-McGee Nuclear Corp. v. New Mexico Env'tl. Improvement Bd.*, 637 P.2d 38, 46 (N.M. Ct. App. 1981) ("[i]n administrative law it is essential that an independent state agency sit as a fair and impartial body at a hearing in which massive and important regulations are to be adopted."), *cited with approval by* Bokum, *supra* note 32, at 18.

155. See generally Klein-Robbenhaar, *supra* note 139.

156. 42 U.S.C. §§ 4321-4370(b) (1988). The requirements for an environmental impact statement are found at 42 U.S.C. § 4332(2)(C).

157. See DuMars & Minnis, *supra* note 95, at 837; see also Klein-Robbenhaar, *supra* note 139.

158. See, e.g., *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978). NEPA itself does not mandate particular results, but simply prescribes the necessary process.

#### ***D. Adoption of Binding Regulations by the State Engineer***

The State Engineer has statutory authority to "adopt regulations and codes to implement and enforce any provision of any law administered by him."<sup>159</sup> Adoption of regulations by the State Engineer would promote predictability and provide procedural protections for applicants to ensure that a wide range of public welfare factors is considered.<sup>160</sup> The State Engineer is more qualified than the judges to make water-related decisions and courts have been reluctant to interfere with the lawfully delegated authority of administrative agencies.<sup>161</sup> Furthermore, a major advantage of this approach would be that the rulemaking process allows for public input from a wide range of interests.<sup>162</sup>

There is legitimate concern, however, that an administrative forum may not lend itself to the definition of public welfare. The State Engineer may be ill prepared by training to deal with sweeping, non-technical issues which are not clear-cut and capable of technical resolution.<sup>163</sup>

#### ***E. The Preferred Solution: Legislative Definition of Public Welfare***

The problem of how to weigh often conflicting public welfare criteria defies easy solutions. The goal of providing optimal guidance to state water officials and applicants conflicts with the twin goals of flexibility to consider regional interests and optimal use of a scarce resource. The best approach would be to define public welfare legislatively. However, since the legislature has no specific expertise in public welfare criteria, it should provide adequate opportunity for citizen input before passing public welfare legislation.<sup>164</sup> It should do so by assembling a working group composed of members of various citizen groups and water users and delegate to that group authority to draft proposed public welfare legislation which would then be considered by the legislature.

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159. N.M. STAT. ANN. § 72-2-8 (Michie 1978 & Supp. 1985).

160. See Bokum, *supra* note 32, at 21.

161. *Id.*

162. *Id.* at 28.

163. DuMars & Minnis, *supra* note 95, at 837-38.

164. The idea that citizen input should be involved in the legislature's process of defining public welfare came from Consuelo Bokum. (telephone interview with Consuelo Bokum, Mar. 28, 1995).



The New Mexico legislature should further look to comprehensive public welfare statutes like those of Alaska, North Dakota or Oregon. Public welfare legislation should encompass a broad range of public values.<sup>165</sup> It should specifically direct the State Engineer to consider local public interests in applications for appropriations and transfers of water. Legislation might also direct the State Engineer to seek guidance from regional water plans to determine the nature of local needs and interests. In addition, the legislature should establish specific minimum standards<sup>166</sup> by giving absolute priority to some public welfare factors, such as water quality and conservation of water in the state.<sup>167</sup>

While such legislation would still leave the balancing of public welfare values to the State Engineer, it would provide him with clear direction to consider a range of public welfare factors, including local public interests, while limiting absolute discretion and preventing arbitrary decision-making. Furthermore, it would give clarity and guidance to all parties involved in applications for appropriations and water transfers, thereby minimizing the number of appeals. Finally, it would provide courts with clear standards by which to judge administrative decisions.

### VIII. CONCLUSION

Public welfare has not been defined by the New Mexico legislature and public welfare decisions are currently made in an ad hoc fashion by the State Engineer or case by case by the courts. The State Engineer, in his decision to grant Intel Corporation's application for an appropriation of groundwater for the planned expansion of its Rio Rancho, New Mexico facility, equated beneficial use with public welfare

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165. The New Mexico Supreme Court, in analyzing the public welfare requirement, stated that public welfare should be construed broadly. *Young & Norton v. Hinderlider*, 110 P. 1045, 1050 (N.M. 1910).

166. Douglas Grant argues that minimum standards will provide the additional benefit of streamlining permit processes by weeding out certain applications at the very outset of the process. Grant, *supra* note 1, at 710.

167. Conservation of water is already an important goal in New Mexico. The State Engineer must consider conservation of water in applications for appropriations and transfer of water.

Water quality, like conservation of water, is an important social goal which should be made a part of public welfare considerations. Idaho, for example, requires that water quality be made part of public welfare considerations. The *Shokal* court reasoned that although the Department of Health was already primarily responsible for water quality, it would make little sense for the Department of Water Resources to grant permit requests without regard to water quality regulations. *Shokal v. Dunn*, 707 P.2d 441, 451 (Idaho 1985).

and declined to make the kinds of policy decisions required in weighing competing public welfare values. The preceding discussion has attempted to demonstrate that there should be a framework within which public welfare decisions are made. Water use preference statutes in which the legislature defines public welfare are too rigid to accommodate local and temporal differences in water use. Defining public welfare through the regional water planning may give too much power to groups composed in large part of major water users with a substantial self-interest in the outcome. The legislature, as the forum best equipped to make social policy decisions, should define public welfare. Legislation should provide for broad consideration of public values and should mandate that the administrative official consider local public interests in its public welfare analysis. Finally, public welfare legislation should give absolute priority to certain values such as water quality and conservation of water.

***APPENDIX A: Public Welfare Factors which should be included in Public Welfare Legislation***

The following public welfare factors should be included in public welfare legislation:

- (1) The benefit to the applicant resulting from the proposed appropriation.
- (2) The effect of the economic activity resulting from the proposed appropriation, including the effects on local communities and traditional economies.
- (3) The effect on fish and game resources.
- (4) The effect on recreation and scenic beauty.
- (5) The effect the proposed appropriation would have on other uses, whether the proposed appropriation would result in loss of alternative uses, and which of the uses would be the highest desirable use.
- (6) The intent and ability of the applicant to complete the appropriation.
- (7) The effect on public health.
- (8) The effects on water quality.
- (9) The effect on the goal of conservation of water.
- (10) Local public interest as defined by regional land use planning and zoning boards and public welfare as defined in regional water plans.

Susanne Hoffman-Dooley