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"State water management cannot effectively address and incorporate public interest values unless state statutory and regulatory provisions related to water management recognize the values and establish means for responding to them. It is critical that each state assess the adequacy of its existing legal framework and institutions in this regard."[1]

ABSTRACT

Despite the fact that the New Mexico legislature added a public welfare criterion to the water code over 10 years ago, the State Engineer Office has not addressed the application of the criterion by regulation and has only addressed public welfare briefly in a few decisions. There is almost no case law in New Mexico addressing this issue. More and more participants, however, are raising public welfare in water rights protests. This paper addresses how the public welfare criterion has developed in western water law and proposes an approach for use of the criterion in New Mexico.

I. INTRODUCTION

When New Mexico's water code was enacted in 1907, the state was sparsely populated,[2] and people relied mainly on surface water

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1. Symposium, Western Governors' Association, *Western Water Management in an Era of Change: Incorporating Public Interest*, Report of the Oct. 10-12, Park City Workshop 5 (1991) (draft on file with the Western Governors' Association and the Western States Water Council).

2. In 1910, the population of New Mexico was 327,301. Census Bureau, Thirteenth Census of the United States, taken in the year 1910, with supplement for the state of New Mexico, 1910.

supplies. The Territorial Engineer was required to make four findings in allocating the state's waters: that there was unappropriated water; that the water would be put to beneficial use; that other users' water rights would not be impaired by the new user; and that the use was not contrary to the public interest.[3] Even 85 years ago, the legislature considered the public interest to be fundamental to the management of the state's water. When the Supreme Court of the Territory of New Mexico interpreted public interest, it did not limit its interpretation to beneficial or economic uses, but held that public interest must be construed broadly.[4]

The requirements in the water code reflected the economic and social values of the times. Conditions have changed since then. The state's population has increased approximately five times to over one and a half million.[5] Surface waters have become overappropriated, and water users have become increasingly dependent on ground water and water from projects. Ground water is now being used in many areas of the state faster than it is being replenished, and new supplies from water projects such as dams have become either too costly or unfeasible. Interstate stream compacts and Indian water rights impose additional constraints on water use.

Because New Mexico's surface water supplies are generally appropriated, market forces are driving water transfers and, to an increasing extent, the management and allocation of water.[6] Water rights are moving to those who are willing and able to pay the highest price. Although the ability to pay is a measure of the economic benefit to be derived from the new use, it does not take into account either third party impacts or other, non-economic values that reflect the public welfare. The rural poor, minorities, and environmental and aesthetic concerns are not

3. 1907 N.M Laws, ch. 49, § 28.

4. Prior to 1985, New Mexico statutory law enabled the State Engineer to refuse to approve an application for an appropriation of water if, in his opinion, it would be "contrary to the public interest." N.M. STAT. ANN. § 72-5-7 (Michie 1978). The only New Mexico case that interpreted this section was Young & Norton v. Hinderlider, 110 P. 1045 (N.M. 1910).

5. In 1990, the population was 1,515,069. BUREAU OF BUSINESS AND ECONOMIC RESEARCH, UNIVERSITY OF NEW MEXICO, THE CENSUS IN NEW MEXICO: POPULATION AND HOUSING CHARACTERISTICS FOR THE STATE AND COUNTIES FROM 1980 AND 1990 CENSUSES (1992).

6. This is true even for many ground water appropriations. Pumping a well near a stream system will create a cone of depression that will draw water from the surface into the ground. Because New Mexico must keep its stream systems whole to avoid impairment to existing users and to meet interstate stream obligations, those drilling a new well must obtain surface water rights to offset the well's impact on a stream. City of Albuquerque v. Reynolds, 379 P.2d 73 (N.M. 1962).

equitably represented in the market place.[7] Nor does the market necessarily protect against shifting the external costs of water use to the public.[8]

Attitudes toward water use are changing as well. Many New Mexicans now give greater importance to social and environmental values related to water use, such as water quality, ecological protection, and preservation of cultures and traditional communities.[9]

In 1985, the New Mexico legislature amended several statutes in the water code to mandate that the State Engineer consider whether applications for water rights are detrimental to the public welfare.[10] These amendments were made largely in response to litigation with Texas[11], and for a number of years they remained dormant, infrequently invoked in consideration of applications for either appropriations or transfers of water. More recently, new concerns about the impacts of water use at the local level have prompted an increasing number of protests of applications on public welfare grounds.

Consideration of public welfare raises economic, environmental and social issues. Often these new values cannot be measured or compared to one another easily. Many of these concerns have never before existed in the domain of the State Engineer Office. The public welfare criterion significantly expands the State Engineer's role in

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7. *See* David H. Getches, *Water Planning: Untapped Opportunity for the Western States*, 9 J. ENERGY L. & POL'Y 1, 4-8 (1988).

8. For example, if a water user contaminates water, both downstream users and the general public may bear the consequences and costs of that contamination.

9. Ensuring that public welfare values are recognized and protected in New Mexico is important for reasons not found in other western states: "All water management activities, from permit applications to adjudications, are more suspect than they are in other states because they threaten the complex and fragile web of communal uses [acequias or communal ditch systems] or threaten to deprive Indians or Hispanics of control over their future." COMMITTEE OF WESTERN WATER MANAGEMENT, NATIONAL RESEARCH COUNCIL, WATER TRANSFERS IN THE WEST: EFFICIENCY, EQUITY, AND THE ENVIRONMENT 163 (1992).

10. N.M. STAT. ANN. §§ 72-5-5.1, 72-5-6, 72-5-7, 72-5-23, 72-12-3, 72-12-7 (Michie Repl. Pamp. 1985). The amendments also require that applications not be "contrary to conservation in the state." *See* discussion, *infra*, Section III. A. 2. for a discussion on the adoption of these amendments. The phrase "public interest" appeared in N.M. STAT. ANN. § 72-5-7 until 1985 when "welfare" was substituted for "interest." The terms "public welfare" and "public interest" are used throughout western states' water codes. The terms appear to be synonymous. "Public welfare" is used in this paper because that is the term that appears in the New Mexico water code and includes public interest when used in reference to other western states unless referring to the phrase used in a specific statute or document.

11. City of El Paso v. Reynolds, 563 F. Supp. 379 (D.N.M. 1983). The ruling in *City of El Paso* relied on Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941 (1982), a U.S. Supreme Court case that utilized the phrase "public welfare."

managing the state's water resources and presents a new and difficult challenge for — and burden on — the State Engineer.[12]

While there may be problems associated with the implementation of the public welfare criterion, the public welfare requirement establishes a mechanism to broaden water resources protection. It provides the basis for the state to choose among competing uses and for denying or conditioning those applications that will have significant negative impacts. The authority given to the State Engineer to protect the "public welfare" enables the state to grapple with the problems and concerns of the twenty-first century, including the limitations imposed by scarce water resources.

When the water code was amended in 1985, the New Mexico legislature did not define public welfare. There has been some debate about the scope of public welfare and the manner in which public welfare should be applied.[13] Given the increasing frequency in which public welfare is invoked in water rights applications, clarifying how this criterion will be applied becomes increasingly important. This article:

1) begins with a review of the public trust doctrine which both provides the basis for the management of water as an essential public resource and encompasses public welfare values;

2) summarizes the benefits and problems with several of the approaches suggested for the application of the public welfare criterion;

3) argues that the term should be defined broadly under the State Engineer's rulemaking authority;[14] and

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12. Indeed, public welfare presents a challenge to all western states. In 1991 and 1992, the Western Governors' Association and the Western States Water Council held two workshops to "enhance the West's capacity to deal with an increasingly complex world of water." The results of the workshops have become known as the Park City Principles. "The Principles recognize the daunting challenges for resource managers who must act on the basis of incomplete information, subject to public scrutiny, while faced with conflicting demands for limited water supplies." CRAIG BELL ET. AL., RETOOLING WESTERN WATER MANAGEMENT: THE PARK CITY PRINCIPLES 15 (unpublished draft manuscript on file with the Western Governors' Association and the Western States Water Council). The second of three meetings focused on public interest in water management decisions.

13. In November, 1993, a State Engineer Task Force was convened to review and make recommendations on several water rights policies, including the public welfare criterion in the water code. The Task Force's report summarized a range of alternatives for utilizing the public welfare criterion which included retaining the current policy or issuing an all-inclusive regulation. Memorandum from the State Engineer Task Force on the Task Force's Discussion on Policy of the State Engineer in the Albuquerque Region to Eliud Martinez, State Engineer (Mar. 8, 1994) (on file with the State Engineer's office) [hereinafter *State Engineer Task Force*].

14. State Engineer Eluid Martinez announced that he would hold a rulemaking on public welfare at a legislative meeting in December, 1994. He took no action, however, before he was asked to resign by Governor Gary Johnson in early 1995.

4) includes a draft of a public welfare definition as well as standards for its implementation.

II. THE PUBLIC TRUST DOCTRINE

The public trust doctrine is a concept deeply imbedded nationally in judicial decisions related to public resources, and the constraints and duties it places on water management and allocation should be recognized in seeking to follow New Mexico's legislative mandate to protect the public welfare.

The public trust doctrine originated in Roman and English common law. The doctrine is based on the principle that water, like other basic resources, is so essential that it must be held by the state in an inalienable trust for common use. The state has a duty to maintain and preserve these resources for the public[15] and enforces the public trust as the representative of the public.[16] Significantly, the public trust doctrine has most often been applied to water.[17]

The principles underlying the doctrine are evident in the West where water is considered to be a public resource,[18] states control the allocation of water, and water rights are usufructuary only, that is, water rights holders do not own the water, but only have the right to use it as long as they comply with all the statutory provisions.

A. General Public Trust Principles Established by the Courts

In what is considered the "primary authority even today"[19] for public trust doctrine cases, the U.S. Supreme Court in 1892 ruled in *Illinois Central Railroad Co. v. Illinois*[20] that governments may not alienate public resources, in this case the shoreline in Chicago.

> The State can no more abdicate its trust over property in which the whole people are interested, than it can abdicate its police powers in the administration of government and the

15. Historically, the public trust doctrine extended to tidelines and the beds beneath water. Don Negaard, *The Public Trust Doctrine in North Dakota*, 54 N. D. L. REV. 565, 569 (1977-78); *see also* Nat'l Audubon Soc'y v. Superior Ct., 658 P.2d 709, 718 (Cal. 1983).

16. Frank J. Trelease, *Government Ownership and Trusteeship of Water*, 45 CAL. L. REV. 638, 640 (1957).

17. Negaard, *supra* note 15, at 569.

18. In many of the western states, either state constitutions or statutes declare that the water of the state belongs to the people or that water must be used in the public welfare. *See* discussion, *infra*, Sec. IV.

19. City of Berkeley v. Sup. Ct., 606 P.2d 362, 365 (Cal. 1980).

20. 146 U.S. 387 (1892).

> preservation of peace. In the administration of government, the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, they cannot be placed entirely beyond the direction and control of the State.[21]

Property held in the public trust cannot be disposed of if doing so results in a substantial impairment of the public interest in that resource.[22]

Certain principles have emerged as state courts around the country have articulated and developed the public trust doctrine. Three states with a developed and expansive body of law on this issue are Wisconsin, Massachusetts and California.[23] The judicial rulings in these three states, as well as those states in the West that have applied the doctrine to water, include principles that may be adopted by other states' courts as they are challenged to articulate a public trust doctrine.

The Wisconsin Supreme Court has emphasized that the state holds public resources "in its capacity as trustee for the benefit of all the people,"[24] and that these resources must be regulated to accomplish and promote public interests.[25] The trust responsibility is not passive; a resource subject to trust responsibilities must not only be preserved, but also promoted.[26] Decisions regarding the use and disposition of public resources may not be delegated to groups or interests that are narrowly based[27] nor may public interest considerations be narrowly construed.[28] Limited or private interests may not prevail over broader or public interests,[29] and the state has no authority to grant public resources to private persons for private gain.[30] The state may exercise its powers over

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21. *Id.* at 453-54.

22. *Id.*

23. Wisconsin and Massachusetts cases are discussed in this section. California cases are discussed in Sec. II B. Not all states have developed the doctrine judicially or legislatively.

24. *In re* Trempealeau Drainage District, 131 N.W. 838, 840 (Wis. 1911).

25. *Id.* at 841.

26. City of Milwaukee v. State, 214 N.W. 820, 830-31 (Wis. 1927).

27. *See* City of Madison v. Tolzmann, 97 N.W.2d 513 (Wis. 1959); Muench v. Public Service Comm'n, 53 N.W.2d 514 (Wis. 1952), *aff'd on reh'g*, 55 N.W.2d 40 (Wis. 1952).

28. *Muench*, 53 N.W.2d at 522, *citing* Diana Shooting Club v. Husting, 145 N.W. 815, 820 (Wis. 1914).

29. *Muench*, 53 N.W.2d at 522.

30. Priewe v. Wisconsin State Land & Improvement Co., 67 N.W. 918 (Wis. 1896); *In re* Crawford County Levee & Drainage Dist. No. 1, 196 N.W. 874 (Wis. 1924), *cert. denied*, 264 U.S. 598 (1924); *City of Milwaukee*, 214 N.W. at 820; *Trempealeau*, 131 N.W. at 838.

a public resource only where there is no substantial impairment to the public interest.[31]

The Massachusetts Supreme Court has limited public agencies' control over public resources even where those agencies' statutory authority is broad and general. The court held that public resources cannot be converted from one public use to "another inconsistent public use without plain and explicit legislation" to that end.[32] The court was especially concerned about the diversion of public land for private, commercial use and required that statutes delegating control over land to a commission be strictly interpreted.[33] Furthermore, the court prohibited granting authority to another public entity when a commission divested itself of its statutory functions.[34] In all of these cases, the court limited public agency discretion in diverting public resources (park land, a pond and wetlands) from one use to another. Authority for such changes must come specifically from the legislature, a body directly responsible to the public and not from administrative agencies which are one step removed from public scrutiny.

A number of principles emerge from judicial decisions in these and other states. First, whenever the public trust is involved in decision-making, it is the duty of the state agency to protect the broad interests of the public. Second, private, limited and immediate interests must not dictate or prevail over public, broad, and long-term statewide interests. Broadly based public interests must be protected from the undue influence exercised by self-interested and powerful minorities.[35]

B. The Public Trust Doctrine as Applied to Water Resources in the West

The constitutions and statutes of many western states,[36] including New Mexico,[37] codify a basic tenet of the public trust doctrine: Water resources belong to the public. The public trust doctrine, however, does not appear explicitly in the New Mexico water code or in the water

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31. State v. Public Serv. Comm'n, 81 N.W.2d 71, 74 (Wis. 1957).

32. Gould v. Greylock Reservation Comm., 215 N.E.2d 114, 121 (Mass. 1966); *see also* Sacco v. Dep't of Pub. Works, 227 N.E.2d 478, 479 (Mass. 1967); Robbins v. Dep't of Pub. Works, 244 N.E. 2d 577, 579 (Mass. 1968).

33. *Gould*, 215 N.E.2d at 122.

34. *Id.* at 124.

35. Joseph L. Sax, *The Public Trust In Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 560 (1969-70). This law review article is one of the chief reviews of the public trust doctrine and is cited in judicial decisions, including Nat'l Audubon Soc'y v. Superior Ct., 658 P.2d 709, 719 (Cal. 1983).

36. *See* discussion, *infra*, Sec. IV.

37. N.M. CONST. art. XVI, §2.

codes of any other western state. As discussed in this section, several state courts in the West have recognized — or imposed — the public trust doctrine on management of water.

California's extensive case law relates the public trust doctrine to water management. Even before the U.S. Supreme Court decided *Illinois Central Railroad*,[38] the California Supreme Court ruled that the legislature may not give away the rights of the people to navigable waters.[39] Although parties may acquire rights in trust properties, those rights remain subject to the trust and no vested rights may be asserted that are harmful to the trust.[40] When acting under its trust responsibilities, the state's power to control and regulate a natural resource is absolute,[41] and the state is obligated to exercise continuing jurisdiction to prevent a "harmful" use of the resource.[42] California courts have also stressed that actions taken by local bodies must be scrutinized closely to protect the general statewide interest in public resources.[43] In 1971, the California Supreme Court expanded the public trust doctrine to include recreation, the environment and ecology as public trust values related to water resources.[44]

In 1983, in the most far-reaching case related to the public trust doctrine and water management, the California Supreme Court decided the "Mono Lake" case[45] and ruled that the "core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over" the waters of the state.[46] Consequently, the "public trust doctrine and the appropriative water rights system are parts of an integrated system of water law."[47] Even where a party claims a vested right to divert water, that right is barred when it becomes clear that the diversion harms interests protected by the public trust.[48] Thus, the public trust doctrine may be applied retroactively.

When the state agency managing water failed to include public trust in its deliberations, the court emphatically acted to ensure that the public trust doctrine was considered. Where water had been appropriated without consideration of the public trust doctrine, public trust interests

38. 146 U.S. 387 (1892).

39. People v. Gold Run D. & M. Co., 4 P. 1150, 1159 (Cal. 1884).

40. *See, e.g.*, Boone v. Kingsbury, 273 P. 797, 815 (Cal. 1928); City of Berkeley v. Sup. Ct., 606 P.2d 362, 369 (Cal. 1980).

41. Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971).

42. People v. Harbor Hut Restaurant, 196 Cal. Rptr. 7, 8 (Ct. App. 1983).

43. Sax, *supra* note 35, at 538-44.

44. *Marks*, 491 P.2d at 380.

45. Nat'l Audubon Soc'y v. Sup. Ct., 658 P.2d 709 (Cal. 1983).

46. *Id.* at 712.

47. *Id.* at 732.

48. *Id.* at 712, 721, 727.

may be harmed,[49] and agencies must avoid or minimize harm to public trust values when feasible.[50] The state has an affirmative duty to take into account and protect the public trust whenever feasible when planning or allocating water resources.[51] Agencies must also take into account that public trust values should encompass changing public needs.[52] The failure of an agency to weigh and consider public trust uses imposes a greater duty on a court to reconsider a state water agency decision.[53]

Idaho's Supreme Court ruled in a leading case that Idaho's public interest requirement is "related to the larger doctrine of the public trust."[54] Citing an earlier case,[55] the court noted that water is held in trust for the benefit of the public and subject to action by the state to fulfill its trust responsibilities. Courts must take a "close look" at the decisions of the legislature or of state agencies that manage water resources to determine if they comply with the public trust doctrine and will not merely rubber stamp agency or legislative actions.[56] The court also stated that the "trust is a dynamic, rather than static, concept and seems destined to expand with the development and recognition of new public uses."[57]

The North Dakota Supreme Court found that a statute providing that the waters of the state belong to the public[58] "expresses the Public Trust Doctrine," permitting "alienation and allocation of such precious state resources only after an analysis of present supply and future need."[59] More recently, that court upheld a decision of the State Engineer to allow a permit to drain wetlands because the State Engineer had studied the evidence in detail and acted to protect the public interest. The court noted that the public trust doctrine is not necessarily intended to require no development, but to control development.[60]

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49. *Id.* at 712, 728.
50. *Id.* at 712.
51. *Id.* at 728.
52. *Id.* at 719.
53. *Id.* at 728.
54. Shokal v. Dunn, 707 P.2d 441, 447 n.2 (Idaho 1985).
55. *Id., citing* Kootenai Envtl. Alliance v. Panhandle Yacht Club, 671 P.2d 1085 (Idaho 1983).
56. *Id.*
57. *Id., quoting* Roderick E. Walton, *The Public Trust Doctrine in the Water Rights Context: The Wrong Environmental Remedy*, 22 SANTA CLARA L. REV. 62 (1982).
58. N.D. CENT. CODE § 61-01-01 (1995).
59. United Plainsmen Assoc. v. N. D. State Water Cons. Comm'n, 247 N.W.2d 457, 462-63 (N.D. 1976).
60. *In re* Stone Creek Channel Improvements, 424 N.W.2d 894, 902-03 (N.D. 1988).

The Utah Supreme Court declared that the state manages water as trustee for the benefit of the people:

> Public ownership is founded on the principle that water, a scarce and essential resource in this area of the country, is indispensable to the welfare of all the people, and the State must therefore assume the responsibility of allocating the use of water for the benefit and welfare of the people of the State as a whole.[61]

Although New Mexico courts have not explicitly recognized the public trust doctrine, they have adopted elements of the doctrine. The New Mexico Supreme Court acknowledged that this state has police powers over water,[62] and that "public waters of this state are owned by the state as trustee for the people . . ."[63] The state does not part with ownership of water; it allows only a usufructuary right to water.[64] Moreover, the state prescribes how water may be used.[65] Water rights are subject to the principle that their use shall not be injurious to the rights of others or of the general public.[66]

New Mexico courts also have held that the terms "public interest" and "public welfare" are to be construed broadly.[67] These rulings provide an indication that New Mexico courts are likely to view the public trust doctrine expansively and may overturn decisions where the State Engineer fails to give sufficient weight or consideration to public welfare values.

As applied by a number of western states' courts, the public trust doctrine is inclusive of public welfare and public interest considerations. The public trust doctrine provides a basis for states' authority over and responsibility for water resources; public welfare and public interest are the broad terms for the values states seek to protect in exercising their

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61. J.J.N.P. Co. v. State of Utah, 655 P.2d. 1133, 1136 (Utah 1982). This holding is similar to a Nebraska Supreme Court case, *In re* Hitchcock and Red Willow Irr. Dist., 410 N.W.2d 101, 108 (Neb. 1987). In *Hitchcock*, where an application was denied based on a finding that there was insufficient water, the court upheld the denial and noted that as guardian of the public welfare, the Department necessarily was given wide discretion. *Id.* at 108.

62. Fellows v. Shultz, 469 P.2d 141, 143 (N.M. 1970); State *ex rel.* Reynolds v. W.S. Ranch Co., 364 P.2d 1036, 1038 (N.M. 1961).

63. State *ex rel.* Bliss v. Dority, 225 P.2d 1007, 1010 (N.M. 1950), *citing* Murphy v. Kerr, 296 F. 536, 540 (D.N.M. 1923).

64. Jicarilla Apache Tribe v. United States, 657 F.2d 1126, 1133 (10th Cir. 1981), *citing* Holguin v. Elephant Butte Irrigation Dist., 575 P.2d 88, 92 (N.M. 1977).

65. State v. McLean, 308 P.2d 983, 987 (N.M. 1957).

66. *Id.* at 989.

67. Young & Norton v. Hinderlider, 110 P.2d 1045, 1049-51 (N.M. 1910); City of El Paso v. Reynolds, 597 F. Supp. 694, 698-702 (D.N.M. 1984).

responsibility.[68] Thus, the public trust doctrine should inform any decision regarding implementation of the public welfare criterion in the New Mexico water code.

III. DEFINING "PUBLIC WELFARE": FOUR OPTIONS

Because public welfare was not defined in the water code, there are a number of options available to the State Engineer for implementing the public welfare criterion, including:

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 welfare broadly and establishing standards for applying the public welfare criterion.

A. Limiting the Definition of Public Welfare

A 1994 order issued in response to Intel's application for water indicates that public welfare may be equated with beneficial use.[69] Such an approach would negate the legislature's requirement to consider detriment to the public welfare as an element distinct from beneficial use.[70]

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68. The public trust doctrine is a remedial device available when the system fails to protect the public interest. "No after-the-fact remedy can deal precisely or effectively with resource use and allocation, so the most valuable function of the doctrine is to signal the need for processes to avoid its judicial application." COMMITTEE OF WESTERN WATER MANAGEMENT, NATIONAL RESEARCH COUNCIL, *supra* note 9, at 102.

69. New Mexico State Engineer Finding and Order, Intel Corporation Applications, RG-57125, RG-57125-S and RG-57125-S-2 (June 10, 1994) (on file with the author). There, the State Engineer stated: "a statutorily recognized beneficial use of water is not against the public welfare of the state." *Id.* at 14.

70. To equate public welfare with beneficial use is contrary to principles of statutory construction. The plain language should be the primary indication of legislative intent. V.P. Clarence v. Colgate, 853 P.2d 722 (N.M. 1993). Courts will not construe statutes "so as to impute the legislature with *useless* acts." Allen v. Amoco Production Co., 833 P.2d 1199, 1201 (N.M. Ct. App. 1992) (emphasis added); *see also* Dona Ana Sav. & Loan Ass'n, F.A. v. Dofflemeyer, 855 P.2d 1054 (N.M. 1993); Matthews v. State, 825 P.2d 224, 225 (N.M. Ct. App. 1991).

1. *The Courts Require A Broad Definition*

Water law in the West has never been static. Uses of water considered to be beneficial have expanded from mining and other economic values to include health, environment, conservation and recreation.[71]

Over 85 years ago, the New Mexico legislature gave the Territorial Engineer the authority to deny applications found to be contrary to the public interest.[72] When the New Mexico Supreme Court analyzed the public interest requirement three years later, it ruled that the public interest is not limited to public health and safety, but should be construed broadly in order to "secure the greatest possible benefit from [public waters] for the public."[73] More recently, the U.S. District Court for the district of New Mexico ruled that public welfare in New Mexico "is a broad term including health and safety, recreational, aesthetic, environmental and economic interests."[74] Two New Mexico district courts have also upheld broad definitions of public welfare.[75] Thus, the parameters of public welfare have been broadly, not narrowly, delineated. Given this precedent, it is unlikely that New Mexico courts will allow the State Engineer to limit public welfare in the manner indicated in the Intel decision.

Approval of beneficial uses without consideration of public welfare may result in harm to or destruction of public welfare values. The duty of the State Engineer should be to avoid or minimize harm to

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71. *See* discussion, *infra*, Sec. IV. For a comprehensive discussion of the need to focus on the public interest criterion and third party impacts, see COMMITTEE OF WESTERN WATER MANAGEMENT, NATIONAL RESEARCH COUNCIL, *supra* note 9. The committee's "basic conclusions are that allocation processes should afford third parties with water rights-and those without them-legally cognizable interests in transfers and that states should develop new ways to consider these interests." *Id.* at 4.

72. 1907 N.M. Laws, ch. 49, § 28.

73. Young & Norton v. Hinderlider, 110 P. 1045, 1050 (N.M. 1910).

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

75. *See* Application of Sleeper, No. RA 84-53(C) (N.M. Dist. Ct., April 16, 1985); Henry Anaya, et al. v. Public Service Company, No. SF 43,347 (N.M. Dist. Ct., June 22, 1990). In *Sleeper*, the district court gave a broad definition to the term public interest which appeared in N.M. Stat. Ann. § 72-5-7 (Michie 1978), a statute that applied to applications for unappropriated water. The applicant in *Sleeper* was seeking a permit to transfer an existing water right. The Court of Appeals overruled the district court, not because it had given a broad definition to public interest, but because § 72-5-7 did not apply to transfers of water rights when the case was decided. *In re* Sleeper, 760 P.2d 787 (N.M. Ct. App. 1988). The New Mexico legislature amended the Water Code in 1985, and the public welfare criterion now applies to both permits for use of unappropriated water and transfers of existing water rights.

public welfare values.[76] For example, diversion of water for industrial use is clearly a beneficial use, but if that use results in polluted water supplies, beneficial use may not be equivalent to the public welfare. Given the duties imposed by the public trust doctrine, it becomes even more probable that equating public welfare with beneficial use as was suggested in the Intel order would be rejected by the courts.[77]

2. *Implications of a Limited Definition for Interstate Transfers*

In 1983, New Mexico's statutory prohibition against out-of-state transportation of ground water was declared unconstitutional. The court applied the holding in *Sporhase v. Nebraska*[78] where the U.S. Supreme Court found that a Nebraska statute prohibiting withdrawal and transportation of Nebraska's water by another state unless that state had a reciprocity clause placed an impermissible burden on interstate commerce.

The *Sporhase* court upheld, however, a state's right to base decisions regarding exportation of water resources on conservation and public welfare considerations. A state does not discriminate against interstate commerce when it seeks to prevent "uncontrolled" transfers of water out-of-state. A state has the right to protect the health and well-being of its citizens as long as that right does not rely primarily on economic concerns.[79] The court emphasized, however, that state statutes must "regulate evenhandedly to effectuate a legitimate local public interest."[80]

In response to the *El Paso* ruling, the New Mexico legislature amended a number of water statutes to give the State Engineer authority to deny an application if it is contrary to conservation or detrimental to the public welfare of the state. Significantly, these criteria apply to all new appropriations and transfers, not just to interstate transactions.

If New Mexico equates beneficial use with public welfare, it loses its ability to protect its citizens from having critical water resources

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76. *See* Nat'l Audubon Soc'y v. Sup. Ct., 658 P.2d 709, 712, 728 (Cal. 1983). The California Supreme Court held that water appropriated without consideration of the public trust doctrine may cause harm to public trust interests. *Id.*

77. Moreover, the courts could require any agency to exercise discretion, in this case to distinguish between public welfare and beneficial use. *Cf.* Pueblo of Cochiti v. United States, 647 F. Supp. 538, 542 (D.N.M. 1986). The court stated that "[a]cts tantamount to a refusal to exercise discretion are subject to judicial review." *Id.* (citations omitted).

78. Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941 (1982). The Supreme Court's decision was based on the Commerce Clause, U.S. CONST., ART. 1, § 10, which bars states from placing burdens on interstate commerce.

79. *Sporhase*, 458 U.S. at 956.

80. *Id.* at 954, *citing* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

allocated to other states. If New Mexico is to "regulate evenhandedly," it must treat intrastate applications in the same manner as interstate applications. Consequently, if we hope to retain our water in state to protect our environment, traditional cultures and aquifer sustainability, we must apply those same concerns to intrastate applications. A regulation that clearly applies to all applications — interstate and intra-state — will accomplish the objective of keeping water in New Mexico more effectively. Actions that are informal or *ad hoc* are more easily viewed as discriminatory and thus not permissible under the *Sporhase* rationale.[81]

B. Ad Hoc Rulings

Administrative agencies have an obligation to provide substantive and procedural protections to safeguard parties whose rights are subject to their authority. With no guidance, decisions are more likely to reach inconsistent results, increasing the uncertainty for all parties subject to an agency's actions. The lack of certainty in turn will result in more appeals and increased costs to the parties and the state — to no one's benefit.

Because significant powers are delegated to administrative agencies, a body of administrative law has developed to protect the public from abuses of power by non-elected officials. One principle is that delegation of authority is invalid unless limited by standards that guide the agency's discretionary power and enable the courts to decide whether the agency followed such standards.[82] An Oregon appellate court held that when the legislature delegates power in broad statutory language such as "demanded by public interest or convenience," the administrative agency has a responsibility to establish standards by which the law is to be applied.[83]

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81. Another reason for the State Engineer to avoid too narrow a construction of public welfare is that the federal government may pass laws it determines are necessary when states have failed to protect values such as preserving water quality or endangered species.

82. 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, 693 (1987). Legislatures create the framework for administrators; administrators must deal with specifics:

> Typically a regulatory agency must decide many major questions that could not have been anticipated at the time of the statutory enactment; typically, legislators are unable to write meaningful standards that will be helpful in answering such major questions; and typically, the protection will be less in standards than in frameworks procedural safeguards plus executive, legislative or judicial checks.

DAVIS, ADMINISTRATIVE CASE LAW 36-37 (5th ed. 1973).

83. Sun Ray Drive-In Dairy v. Oregon Liquor Control Comm'n, 517 P.2d 289, 292 (Or. Ct. App. 1973). The court also stated:

> Without written, published standards, the entire system of administrative law loses its keystone. The ramifications affect every party and every

Because public welfare has not been defined in New Mexico by statute or regulation, State Engineer decisions may be overturned, not necessarily because they reach the wrong conclusion, but because the decisionmaking process was insufficiently delineated. New Mexico courts may go so far as to require adoption of standards or definition of public welfare in their decisions, as has happened in a number of western states.[84]

Important public policies should not be developed in response to individual cases on a piecemeal basis. If the definition of public welfare evolves *ad hoc*, decisions that appear valid in one case may set poor precedents for water use statewide and mislead applicants in subsequent water transactions.

> procedure involved in the fulfillment of the agency's responsibility under law, e.g., the public, the applicant, agency personnel, the participants in the hearing, the commission, the legislature and the judiciary.
> The policies of an agency in a democratic society must be subject to public scrutiny. Published standards are essential to inform the public. Further, they help assure public confidence that the agency acts by rules and not from whim or corrupt motivation . . .
>
> An applicant . . . should be able to know the standards by which his application will be judged before going to the expense in time, investment and legal fees necessary to make application. Thereafter, he is entitled to even treatment by rule of law and reasonable confidence that he has received such treatment. This cannot be achieved without published rules.

Id. at 293; *see also* Steamboaters v. Winchester Water Cons. Dist., 688 P.2d. 92, 97 (Or. Ct. App. 1984). In a later case, the court ruled that where there are "inexact terms" such as "maximum economic development" or "wasteful, uneconomic . . . it is the agency's task to interpret ambiguous statutory terms in a way that effectuates the underlying statutory policy." Diack v. City of Portland, 759 P.2d 1070, 1078 (Or. 1988) (citation omitted).

84. In Idaho, the Supreme Court mandated an expansive definition of Idaho's public interest statute. Shokal v. Dunn, 707 P.2d 441 (Idaho 1985). For a discussion of *Shokal*, see note 145, *infra* and accompanying text. In California, courts have listed values comprising public interest as well as mandating the Water Board to protect public trust values. Marks v. Whitney, 491 P.2d 374 (Cal. 1971); Nat'l Audubon Soc'y v. Sup. Ct., 658 P.2d 709 (Cal. 1983). In Utah, a court required the State Engineer to consider public welfare in transfer applications even though that requirement did not appear in the statutes. Bonham v. Morgan, 788 P.2d 497 (Utah 1989). In Washington, a court required the Department of Ecology to broaden its definition of public welfare to include environmental values. Stempel v. Dep't of Water Resources, 508 P.2d 166, 171 (Wash. 1973). Even though neither public interest nor public welfare appear in the Colorado statutes, the Colorado Supreme Court has mandated the protection of the public interest in water. Wadsworth v. Kuiper, 562 P.2d 114, 116-17 (Colo. 1977); Bar 70 Enterprises, Inc. v. Tosco Corp., 703 P.2d 1297, 1304 (Colo. 1985).

C. *Utilizing the Regional and State Planning Process*

Fortunately, New Mexico has begun the process of water planning.[85] Public policy considerations must be part of the regional water planning process if regional water plans are to be effective. Since the planning process is an important vehicle for determining the public welfare in individual areas, the regional water plans should not be ignored. They reflect important grassroots concerns. The regional planning process, however, should be viewed as a complement to implementation of the public welfare requirement, not as a substitute for it.[86] Reliance solely on regional planning definitions of public welfare by the State Engineer Office in cases before it has serious legal flaws.

1. *Administrative Law Concerns*

To rely on the Interstate Stream Commission's regional water planning process to define public welfare shifts the rulemaking power to regional planning groups and the Interstate Stream Commission, an action not authorized by statute and, consequently, an unlawful delegation of authority. The legislature gave only the State Engineer authority to adopt regulations to enforce laws administered by his office.[87] As a general principle, "[a]dministrative bodies and officers cannot delegate power, authority and functions which under the law may be exercised only by them, which are quasi-judicial in character, or which requires the exercise of judgment."[88]

In an analogous New Mexico case, the Environmental Improvement Board (EIB) requested the Environmental Improvement Division (EID) to prepare draft regulations for the EIB to adopt. The court ruled that the "EID had no duty or authority by law to prepare the regulations for EIB. We can only assume that EIB impermissibly delegated its authority to the

85. In 1985, the New Mexico legislature enacted N.M. STAT. ANN. § 72-1-9 (Michie Repl. Pamp. 1985), which provides that planning by municipalities, counties and public utilities promotes the public welfare. In 1987, the legislature enacted N.M. STAT. ANN. § 72-14-44 (Michie Repl. Pamp. 1993), which authorized the Interstate Stream Commission to make grants or loans of funds for regional water planning.

86. "Such an approach [regional planning] could, in the end, expedite transfers by building public confidence in the fairness of evaluation procedures and by reducing uncertainty about what standards apply." COMMITTEE OF WESTERN WATER MANAGEMENT, NATIONAL RESEARCH COUNCIL, *supra* note 9, at 181.

87. N.M. STAT. ANN. § 72-2-8 (Michie Repl. Pamp. 1985).

88. Kerr-McGee Nuclear Corp. v. N.M. Envtl. Improvement Bd., 637 P.2d 38, 47 (N.M. Ct. App. 1981) *citing* Anderson v. Grand River Dam Auth., 446 P.2d 814, 818 (Okla. 1968).

Director of EID to perform its work in preparation of the public hearing."[89] Thus, the courts would be unlikely to uphold definitions of public welfare drafted by the Interstate Stream Commission or delegated to regions developing regional plans.

Second, relying only on the regional and state plans to define public welfare violates the procedural requirements in the statute giving the State Engineer rulemaking authority.[90] To adopt a rule, there must be publication of a proposed rule along with findings of fact that demonstrate that in the State Engineer's opinion, the rule is justified. The proposed rule must be available for public inspection. The State Engineer must provide for publication of the rule or a summary of it. All parties must be afforded an opportunity to present evidence[91]; that opportunity cannot be limited to special interest groups working within the regional planning process. Administrative law also requires that rulemaking be based on a hearing and an analysis of evidence[92] and that substantial evidence support the agency's decision. "When governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process."[93] Allowing the definitions of public welfare to emerge from the planning process short-circuits administrative law principles generally and the rulemaking procedures required in the water code specifically.[94]

Third, leaving the definition of public welfare to regional planning groups violates another basic premise of administrative rulemaking: Quasi-judicial powers must not be left to those with any substantial self-interest in the outcome.[95] "In 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."[96] Regional water planning groups, composed in large part of major water users, do not meet this criterion.

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89. *Kerr-McKee*, 637 P.2d at 46.

90. N.M. STAT. ANN. § 72-2-8 (Michie Repl. Pamp. 1985).

91. *Id.*

92. *See Kerr-McGee*, 637 P.2d at 46; Reid v. N.M. Bd. of Examiners, 589 P.2d 198, 199-200 (N.M. 1979).

93. *Reid*, 589 P.2d at 200 *citing* Hannah v. Larche, 363 U.S. 420, 442 (1960).

94. N.M. STAT. ANN. § 72-2-8 (Michie Repl. Pamp. 1985).

95. *See* Sax, *supra* note 35; City of Madison v. Tolzmann, 97 N.W.2d 513 (Wis. 1959); Muench v. Public Service Comm'n, 53 N.W.2d 514 (Wis. 1952), *aff'd on reh'g*, 55 N.W.2d 40 (Wis. 1952).

96. *Kerr-McGee*, 637 P.2d at 46.

2. *Public Trust Doctrine Concerns*

Although regional water plans have the potential to maximize democratic input,[97] the planning process generally involves those who have the greatest economic stake in current water use and management in the state. Regional planning groups in fact often have lacked breadth and scope of participation.[98] Indeed, the Interstate Stream Commission states that regional planning committees reflect the major water use interests.[99] In some regions, planning has been limited to a few individuals, has specifically excluded some interests, or has evolved without public participation. Despite efforts to involve a cross-section of the public, non-major users and third parties impacted by water decisions may be inadequately represented. Moreover, regional water plans will be limited to regional priorities, potentially to the detriment of statewide needs.

Understandably, water users will be working to protect their own interests first. Although users are essential to any planning process, there is a clear conflict of interest in giving limited groups the responsibility for developing public welfare criteria. Protection from unreasonable interference by special interests is clearly mandated by the judicial principles that have evolved under the public trust doctrine. Those who are responsible for protecting the public trust must act to protect broadly based public interests from "self interested and powerful minorities [who] often have undue influence."[100]

Given these flaws in the regional water planning process, the State Engineer may not abdicate his trust responsibilities by simply adopting a checklist of public welfare values from the regional water plans. Moreover, public resources are matters of statewide concern, and decisions regarding the use and disposition may not be delegated to narrowly based groups or interests.[101] The State Engineer has statewide responsibilities, and consideration of the public welfare must include statewide needs and concerns.

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97. It should be noted that the Interstate Stream Commission requires that regional water planning entities work to promote broad public participation in developing regional water plans. *See* NEW MEXICO INTERSTATE STREAM COMM'N, REGIONAL WATER PLANNING HANDBOOK (1994) (on file with the commission).

98. WESTERN NETWORK, 1 REGIONAL WATER PLANNING DIALOGUE 1 (1993) (on file with Western Network, Santa Fe, New Mexico).

99. Interstate Stream Comm'n Memorandum (July 17, 1992) (on file with the commission).

100. Sax, *supra* note 35, at 560.

101. *See* City of Madison v. Tolzmann, 97 N.W.2d 513 (Wis. 1959); Muench v. Public Service Comm'n, 53 N.W.2d 514 (Wis. 1952), *aff'd on reh'g*, 55 N.W.2d 40 (Wis. 1952).

D. *Adoption of Regulations Defining Public Welfare*

The pitfalls of narrowly defining public welfare, ruling on an *ad hoc* basis and relying on the regional water planning process discussed above are avoided if the State Engineer adopts regulations defining public welfare. Adoption of regulations will: 1) provide greater fairness, certainty and procedural protections to all parties involved in applications; 2) avoid unlawful delegation of authority; 3) ensure that public welfare is not defined by special interests; 4) promote public trust doctrine principles; 5) comply with administrative law requirements; and 6) ensure that all factors necessary to protect water resources are considered.[102] Inaction inevitably will shift the responsibility for defining public welfare to the judiciary.

The legislature has given the State Engineer explicit statutory authority as follows:

> The state engineer may adopt regulations and codes to implement and enforce any provision of any law administered by him...in the accomplishment of his duties. In order to accomplish its purpose, this provision is to be liberally construed.[103]

Given that administrative bodies are created by statute,[104] the "authority granted to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent or policy."[105] The legislature provided the State Engineer with broad powers to implement and enforce the water laws.[106] Thus, there is legislative and judicial authority for the State Engineer to adopt regulations that define public welfare and provide criteria to be used in making public welfare determinations when necessary. Use of this authority most clearly promotes sound development of public policy.[107] The rulemaking

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102. This is consistent with the National Research Council's recommendation for states to "develop and publish clear criteria and guidelines for evaluating water transfer proposals and addressing potential third party effects." COMMITTEE OF WESTERN WATER MANAGEMENT, NATIONAL RESEARCH COUNCIL, *supra* note 9, at 255.

103. *N.M. Stat. Ann.* § 72-2-8 (Michie Repl. Pamp. 1985).

104. Public Serv. Co. v. N.M. Envtl. Improvement Bd., 549 P.2d 638, 641 (N.M. Ct.App. 1976).

105. *Id.* at 642.

106. State *ex rel.* Reynolds v. Aamodt, 800 P.2d 1061, 1062 (N.M. 1990). The New Mexico Supreme Court has specifically held that the police powers of the state extend to the State Engineer Office. State *ex rel.* Reynolds v. W.S. Ranch Co., 364 P.2d 1036, 1038 (N.M. 1961); *see also* Fellows v. Schultz, 469 P.2d 141, 143 (N.M. 1970).

107. In addition, the "more comprehensive and predictable the review process, the more incentive water sellers and buyers will have to accommodate those [third party] interests throughout the transfer process." COMMITTEE OF WESTERN WATER MANAGEMENT, NATIONAL RESEARCH COUNCIL, *supra* note 9, at 8.

procedure lays a foundation for consideration of public welfare and provides for an orderly, open process for defining public welfare.

1. *Scope of Regulations*

The State Engineer has been reluctant to interpret public welfare broadly.[108] There is, however, ample precedent for broad definitions of legislatively mandated principles. Environmental regulations, for example, have been recognized and upheld judicially despite their breadth:

> In this field [of environmental regulation] it has long been recognized that it is impossible to anticipate every factual situation that might arise under a given set of regulations. Further, it is important on the record before us to remember that we are dealing with regulations, legislative justification for which is found in broadly applied terms such as *public interest, social well-being, environmental degradation,* and the like. That it is within the power of the legislature to enact legislation for those purposes is well settled. (Citations omitted.) In order to give effect to these broad legislative concerns, however, it is necessary that the standards developed by the administrative agency be somewhat general. Indeed, administrative regulations of this kind are required to hold the difficult line between overbreadth or vagueness on the one hand and inflexibility and unworkable restriction on the other.[109] (Emphasis in original.)

The New Mexico Court of Appeals also held that to "be reasonably adequate, the standards need not be specific.[110] Broad standards are permissible so long as they are capable of reasonable application and are

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108. *See State Engineer Task Force, supra* note 13, at 13-16. There is also concern that if an examination of public welfare raises broad issues, costly experts become increasingly necessary, and financial resources may determine who wins or loses. The State Engineer, however, is statutorily required to consider public welfare, and the courts have held that public welfare is to be construed broadly. The reality is that costs are increased regardless of whether or not the term is defined. *See* COMMITTEE OF WESTERN WATER MANAGEMENT, NATIONAL RESEARCH COUNCIL, *supra* note 9, at 251-52 (discussing transaction costs). For effective implementation of the public welfare requirement, it is important that public welfare concerns be evaluated before action is taken and financial resources committed. Although it may be costly at the outset, it will be less costly to the parties and society if foreseeable future impacts are acknowledged and incorporated into current decisions regarding allocation of scarce water resources.

109. N.M. Mun. League, Inc. v. N.M. Envtl. Improvement Bd., 539 P.2d 221, 229 (N.M. Ct. App. 1975), *cert. denied*, 540 P.2d 248 (N.M. 1975).

110. The New Mexico Supreme Court held that it is sometimes "impracticable and unreasonable to require legislation setting out more precise standards [than those sought by the plaintiffs]." Rutter & Wilbanks Corp. v. Oil Conservation Comm'n, 532 P.2d 582, 585 (N.M. 1975); *see also* Duke City Lumber Co. v. N.M. Envtl. Improvement Bd., 681 P.2d 717, 720 (N.M. 1984).

sufficient to limit and define the agency's discretionary powers."[111] Other jurisdictions have held that where a statute contains an "inexact" term, the task is to interpret ambiguous terms to effectuate the underlying statutory policy.[112]

There are also precedents for the application of broad social and economic requirements beyond the scope of an administrative agency's stated expertise. The Environment Improvement Act, for example, mandates that the Environmental Improvement Board adopt regulations governing a wide variety of concerns including food, radiation, occupational health and safety, and water quality, among others.[113] The Environmental Improvement Board is required to "give the weight it deems appropriate" to the evidence presented at public hearing and must consider such factors as the "public interest," including "social, economic and cultural values."[114] Yet members of the Board are not experts in these

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111. State v. Pina, 561 P.2d 43, 48 (N.M. Ct. App. 1977) *citing* City of Santa Fe v. Gamble-Skogmo, Inc., 389 P.2d 13 (N.M. 1964).

112. Diack v. City of Portland, 759 P.2d 1070, 1078 (Or. 1988).

113. The Act states:

> The board shall promulgate regulations and standards in the following areas:
>
> (1) food protection;
> (2) water supply, including regulations establishing a reasonable system of fees for the provision of services by the agency to public water supply systems;
> (3) liquid waste;
> (4) air quality...;
> (5) radiation control ...;
> (6) noise control;
> (7) nuisance abatement;
> (8) vector control;
> (9) occupational health and safety...;
> (10) sanitation of public swimming pools and public baths;
> (11) plumbing, drainage, ventilation and sanitation of public buildings in the interest of public health;
> (12) medical radiation, health and safety certification and standards for radiologic technologists...;
> (13) hazardous wastes and underground storage tanks...;
> (14) solid waste...

N.M. STAT. ANN. § 74-1-8 (Michie Repl. Pamp. 1993) (references to statutes omitted).

114. N.M. STAT. ANN. § 74-1-9 (Michie Repl. Pamp. 1993). The Act states that "in making its regulations, the board shall give the weight it deems appropriate to all relevant facts and circumstances presented at the public hearing, including but not limited to:

> (1) character and degree of injury to or interference with health, welfare, animal and plant life, property and the environment;
> (2) the public interest, including the social, economic and cultural value of the regulated activity and the social, economic and cultural effects of environmental degradation; and
> (3) technical practicability, necessity for and economic reasonableness of

areas; members are appointed by the governor, and the only requirement is that a majority represent the "public interest."[115]

Utilizing a broad definition of public welfare is bolstered by the Park City Principles[116] which call for problems to be "approached in a

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reducing, eliminating or otherwise taking action with respect to environmental degradation.

J. Upon appeal, the court of appeals shall set aside the regulation only if found to be:

(1) arbitrary, capricious or an abuse of discretion;

(2) not supported by substantial evidence in the transcript; or

(3) otherwise not in accordance with law.

Id.

115. N.M. Stat. Ann. § 74-1-4 (Michie Repl. Pamp. 1993).

116. The struggle to manage water in an era of increased scarcity and changing demands is not limited to New Mexico. All arid, western states face these problems. In response to these challenges, the Western Governors' Association and the Western States Water Council sponsored three workshops in Park City, Utah in 1991 and 1992. Despite the diversity of interests in each workshop, the experts and policy-makers involved agreed upon a number of principles referred to as the Park City Principles. The Park City Principles were adopted by the Western Governors Association in 1992. Western Governors' Association, *Water Management and the Park City Paradigm*, Resolution 92-007 (June 23, 1992) (on file with the Western Governors' Association).

The first workshop developed six principles. The following three principles are those that apply to consideration of implementing the public welfare criterion in New Mexico's water code:

1. There should be meaningful legal and administrative recognition of diverse interests in water resource values.
2. Problems should be approached in a holistic or systematic way that recognizes cross-cutting issues, cross-border impacts and concerns, and the multiple needs within the broader 'problemshed'-the area that encompasses the problem and all the affected interests. The capacity to exercise governmental authority at problemshed, especially basin wide, levels must be provided to enable and facilitate direct interactions and accommodate interests among affected parties.
3. The policy framework should be responsive to economic, social and environmental considerations. Policies must be flexible and yet provide some level of predictability. In addition, they must be able to adapt to changing conditions, needs, and values; accommodate complexity; and allow managers to act in the face of uncertainty.

See BELL, *supra* note 12 (discussing each principle and the Park City Principles generally).

The second workshop focused on how public interest should be incorporated into water management in the West. The group's mission statement recognized that western water officials are

> increasingly challenged to integrate into their actions a diverse set of evolving and changing values and interests . . . . The quality of water-related decisions and acceptance and respect for water institutions and policies depends in part on how well officials respond to these challenges. . . . . [D]ecisions, policies, and actions are most likely to be 'in the public interest' when they are reached in a manner that provides an opportunity for full participation, and a full range of values and interests to be

holistic or systematic way that recognizes cross-cutting issues, cross-border impacts and concerns, and the multiple needs within the broader 'problemshed'-the area that encompasses the problem and all the affected interests." A report on the Park City Principles notes that the Idaho's public interest protection "is consistent with the Park City call for recognition of the full range of values associated with water."[117] The National Research Council also concludes that states should develop definitions and criteria for assessing what constitutes the public interest, perhaps benefiting from the legislative and judicial experiences of the states of Idaho and Alaska. Such definitions should embrace existing water rights holders, environmental water needs for ecosystem protection, and social and cultural values in basins of origin.[118]

2. *Weighing Public Welfare Concerns*

The legislature provided no guidance on whether some water uses are more likely to promote public welfare than other uses or on how the State Engineer was to apply the public welfare criterion.[119] It is improbable and probably undesirable that the legislature by statute or the State Engineer by regulation could devise a formula or rank uses in a way that would truly protect the public welfare or anticipate the outcome of cases before the State Engineer Office. What is important to the public welfare in one location or time may be detrimental in another place and time. For example, agriculture may provide the economic base in one area and

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> considered. Although it is rarely possible to fully satisfy every interest, decision-makers must strive to consider and weigh interests in a fully accessible balancing process that produces information about those interests.

Western Governor's Association, *supra* note 1, at 3.

The group recommended that states "must have policies which require consideration of all elements of the public interest. . . . To ensure credibility of the process, decision-makers must strive to consider and weigh interests in a fully accessible balancing process." *Id.* at 4.

117. BELL, *supra* note 12.

118. COMMITTEE OF WESTERN WATER MANAGEMENT, NATIONAL RESEARCH COUNCIL, *supra* note 9, at 11. The Council also noted that the "more comprehensive and predictable the review process, the more incentive water sellers and buyers will have to accommodate those [third party] interests throughout the transfer process." *Id.* at 8.

119. Indeed, no western state specifically prioritizes public welfare values. Generally, decisions are left to the discretion of the administrative agency.

The Committee on Western Water Management notes that the "underlying challenge of any process used to evaluate transfers is how to determine and balance equitably the relative benefits and costs." COMMITTEE OF WESTERN WATER MANAGEMENT, NATIONAL RESEARCH COUNCIL, *supra* note 9, at 5. The Committee, however, does not see this challenge as a bar to the process of weighing public welfare concerns. *Id.*

moving agricultural rights to another use would be detrimental to the public welfare of that area. In another region, the land may have been sufficiently depleted that agriculture is no longer a viable economic activity, and recreational opportunities may provide the most benefit to the community. Decisions based on public welfare considerations rest on fact-specific situations. Therefore, the only realistic option to protect public welfare values is to give the State Engineer broad discretion to weigh the evidence based on criteria established by regulation and make a decision that best promotes the public welfare in each case before him.[120]

Such an approach is not new. Nearly 30 years ago, the primary author of Alaska's public interest legislation wrote:

> The decisions will be difficult. No law can make them, no formula, no computer. They must be made by people. The balancing of benefits against cost must be performed by the exercise of judgment. All the law can do is direct the water administrators to consider all factors, to give each its proper weight, and to reach an informed judgment that will tend to put the state's resources to the maximum use consistent with the public interest, for the maximum benefit of all its people.[121]

More recently, the Idaho Supreme Court developed a list of public interest values to be considered, but noted that not all the values would appear in any one case. Nor are the values to be given equal weight in every case. Public interest values will vary with local needs, circumstances and interests.[122] The court also gave discretion to the administering agency to determine which public interest values are impacted and what is required to protect the public interest.[123]

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120. The Park City participants felt that "[d]ecision-makers must strive to consider and weigh interests in a fully accessible balancing process. The scope of participation should be consistent with the scope of the problem and should include interests broader than just those who have water rights. Government should be relied upon to represent any known non-present interests." WESTERN STATES WATER COUNCIL & WESTERN GOVERNORS' ASSOCIATION, SUMMARY OF "THE PARK CITY PRINCIPLES" FROM THE 1991 PARK CITY, UTAH, WORKSHOPS, CHALLENGES AND OPPORTUNITIES FOR WESTERN WATER MANAGEMENT IN AN ERA OF CHANGING VALUES 3 (1991) (draft on file with the Western States Water Council and the Western Governors' Association).

121. Frank J. Trelease, *Alaska's New Water Use Act*, 2 LAND & WATER L. REV. 1, 27-28 (1967) (discussing the Alaska public welfare statute which Mr. Trelease was hired to draft and which lists factors Alaska's commissioner must consider in determining the public interest).

122. Shokal v. Dunn, 707 P.2d 441, 450 (Idaho 1985); *see also* Benz v. Water Res. Comm'n., 764 P.2d 594, 597-98 (Ct. App. Or. 1988). In *Benz*, the Oregon Court of Appeals ruled that even if a proposed use is beneficial, the Commission or the Director may balance the "proposed use against other beneficial uses, conflicting interests and concerns" and can place conditions on a permit to reflect those concerns.

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

IV. SUMMARY OF PUBLIC WELFARE AND PUBLIC INTEREST REQUIREMENTS IN OTHER WESTERN STATES[124]

Public welfare and public interest are not new concepts in western water law. With few exceptions, arid, western states have looked to public welfare or public interest statutes to protect their water resources. Given the breadth of the public welfare concerns, it is only surprising that there is some similarity between the methods states have used.

Consistent with the public trust principles that evolved from early colonial law, public control of water is protected in the West. Many western states explicitly recognize public ownership of water. Arizona was the first state to enact legislation which recognized public ownership of water, and Colorado's constitution was the first to declare that water was the property of the people and was dedicated to the use of the people of the state.[125] Nine of eighteen western states have either constitutional or statutory provisions asserting public ownership of water resources.[126]

Public welfare or public interest requirements were adopted in many western states in the late 1800s and early 1900's,[127] beginning with Wyoming in 1890.[128] By 1990, all western states except Colorado and Oklahoma had enacted public welfare or public interest requirements; even in Colorado, however, the Colorado Supreme Court held that protection of public interest is required.[129]

In recent years, public concern about the health, environmental, conservation and cultural considerations of water allocation and manage-

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124. A summary of the constitutional, statutory and judicial public interest and public welfare requirements from other western states as well as comments by state agencies on how well those requirements are implemented is available from the New Mexico Environmental Law Center, Santa Fe, New Mexico.

125. Frank J. Trelease, *Government Ownership and Trusteeship of Water*, 45 CAL. L. REV. 638, 641 (1957).

126. Those states with public ownership provisions in their constitutions include: Alaska, Colorado, Idaho, Montana, Nebraska, New Mexico, North Dakota, Washington, Wyoming. Those without such provisions include: Arizona, California, Kansas, Nevada, Oklahoma, Oregon, South Dakota, Texas and Utah. California's Constitution does state, however, that "the general welfare requires that the water resources of the State be put to beneficial use . . . in the interest of the people and for the public welfare." CAL. CONST. art. 10 § 2.

127. Douglas L. Grant, *supra* note 83, at 683-84. This article has a good summary of the development of public welfare/interest statutes in water codes in the West.

128. Shannon A. Parden, **The Milagro Beanfield War** *Revisited in Ensenada Land and Water Assoc. v. Sleeper: Public Welfare Defies Transfer of Water Rights*, 29 NAT. RESOURCES J. 861, 871 (1989), *citing* Grant, *supra* note 83, at 685.

129. In 1977, the Colorado Supreme Court held that the Colorado Constitution infers "a vital interest in preserving the water resources of the state [and] mandates the protection of the public interest in water." *In re* Wadsworth, 562 P.2d 1114, 1116-17(Colo. 1977). That principle was reaffirmed in 1985 in Bar 70 Enterprises, Inc. v. Tosco Corp., 703 P.2d 1304 (Colo. 1985).

ment has resulted in broadening the scope of public welfare considerations, both legislatively and judicially. These changes in public values have caused public welfare definitions to move increasingly beyond economic and consumptive uses to non-consumptive uses.

A. Public Welfare/Public Interest Values

Fourteen of 18 western states have adopted public welfare/interest lists of uses. Six of the 14 states list uses explicitly in their public welfare/interest statutes[130] and in six other states, the lists appear in the beneficial use sections.[131] In two states, lists of public welfare and public interest values were developed by the courts.[132]

Examples of uses of water that are deemed to be in the public welfare/interest include:

- groundwater recharge (Arizona[133]);
- preservation of public trust lands and water to serve ecological units for scientific study, open space, fish and wildlife habitat and scenic resources (California[134]);
- instream flow (Colorado[135]);
- aquatic life, aesthetic beauty, water quality, assuring minimum stream flows, discouraging waste and encouraging conservation (Idaho[136]);
- health and safety, recreational, aesthetic, environmental and economic interests (New Mexico)[137]
- state water plan, flood control (Oregon[138]); and
- natural resources, public health (Washington[139]).

B. Public Welfare/Public Interest Impacts

Six states include lists of impacts. Alaska was the first state to define public welfare in this manner in 1966, followed by North Dakota and Oregon in 1985.

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130. The six states are California, Montana, Nebraska, Texas, Oregon and Wyoming.

131. These six states are Arizona, Colorado, Kansas, North Dakota, Utah and Washington.

132. The two states are New Mexico and Idaho.

133. ARIZ. REV. STAT. ANN. § 45-401 (1994).

134. Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971).

135. COLO. REV. STAT. ANN. § 37-92-102 (West 1990).

136. IDAHO STAT. § 42-1501.

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

138. OR. REV. STAT. § 537.170(5) (1988).

139. WASH. REV. CODE ANN. §§ 90.54.010-.910 (West 1992).

The Alaska statute[140] requires the Commissioner of the Department of Natural Resources to consider the following in determining the public interest:

(1) the benefit to the applicant resulting from the proposed appropriation;
(2) the effect of the economic activity resulting from the proposed appropriation;
(3) the effect on fish and game resources and on public recreational opportunities;
(4) the effect on public health;
(5) the effect of loss of alternative uses of water that might be made within a reasonable time if not precluded or hindered by the proposed 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.[141]

The North Dakota public interest statute is similar to Alaska's but does not specifically include the "effect on public health" and "access to navigable or public waters" provisions.[142] Oregon considers seven factors including "conserving the highest use of water," maximum economic development, prevention of wasteful, uneconomic, impracticable or unreasonable use of water, and state resource planning.[143] In 1985, the Idaho Supreme Court held that the public interest requirement be interpreted expansively and looked to a number of sources in crafting a definition of public welfare, including the Alaska definition of public welfare.[144] Nebraska and Wyoming have less developed lists of

140. ALASKA STAT. § 46.15.080 (Cum. Supp. 1995).

141. When an application is received that raises one of the issues enumerated in the statute, the Department contacts the affected agency, such as the Game and Fish Department, and requests the agency's comments on the application. The Department also attempts to provide adequate public notice on applications. Usually when public interest considerations are raised, the application is approved with conditions that relate to the public interest concern. So far, the only complaints have come from parties who feel that there has been inadequate public notice. Telephone conversation with Kellie Litzen, Water Resources Officer, Department of Natural Resources (May 25, 1994).

142. N.D. CENT. CODE § 61-04-06 (Repl. Pamp. 1995).

143. OR. REV. STAT. § 537.170(5) (1988).

144. *See* Shokal v. Dunn, 707 P.2d 441, 447-50 (Idaho 1985). The court found that there is an "affirmative duty [on the Director] to assess and protect the public interest." *Id.* at 448 (emphasis in original). The court recognized the Board's authority to limit or impose conditions in the public interest and stated: "If the board determines a particular use is not in furtherance of the greatest public benefit on balance the public interest must prevail." *Id.*, *citing* People v. Shirokow, 605 P.2d 859, 866 (Cal. 1980). In addition, the court relied on Utah

impacts.[145]

The "laundry list" approach of defining public welfare has been criticized for not limiting the scope of inquiry or giving weight to relative merit of competing public welfare values. An inclusive list of factors to be considered, however, will at least ensure that important public welfare values are considered and not ignored.[146]

New Mexico is not the first state to wrestle with defining a broad term in statute or regulation, and the experiences of other states indicate that there are workable solutions. Interviews with agency officials from other states have not revealed any significant problems resulting from having defined public welfare.[147] Even though the definitions are broad,

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and California authority to enable the Director to approve applications subject to future appropriation for "uses of greater importance-in effect prioritizing among uses according to the public interest." *Id., citing* Tanner v. Bacon, 136 P.2d 957, 962-64 (Utah 1943); East Bay Municipal Utility District v. Department of Public Works, 35 P.2d. 1027, 1027-30 (Cal. 1934).

Having determined there was a duty to protect the public interest, the court turned to the "more difficult task" of defining public welfare and cited a New Mexico case for the proposition that the public interest should be read broadly to "secure the greatest possible benefit for the public." It noted that the definition of public welfare may differ in different parts of the state where there are other needs. *Id.* at 448-450, *citing* Young & Norton v. Hinderlider, 110 P.2d 1045, 1050 (N.M. 1910). The court also discussed protection against "the loss of water supply to preserve the minimum stream flows required for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality." *Id.* at 448-49, *citing* Idaho's Minimum Stream Flow Statute, IDAHO CODE § 42-1501. The court also addressed the need to discourage waste and encourage conservation. *Id.* at 449, *citing* People v. Shirokow, 605 P.2d. 859, 866 (Cal. 1980). Finally, the court discussed property values, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality. *Id., citing* Kootenai Envtl. Alliance v. Panhandle Yacht Club, 671 P.2d 1085, 1095 (Idaho 1983).

145. NEB. REV. STAT. § 46-2,116 (1993); WYO. STAT. § 41-3-104 (1995).

146. In Alaska, where public interest considerations are broadly defined, the Chief of Water, Department of Natural Resources, said that he feels the Alaska statute works precisely because it is general rather than specific and gives the Department broad discretion. Telephone interview with Gary Prokosch, Chief of Water, Alaska Department of Natural Resources (June 17, 1994).

147. The following summarize discussions with public officials in states where broad definitions of public welfare or public interest have been implemented:

> Alaska: When an application is received that raises one of the issues enumerated in the statute, the Department contacts the affected agency, such as the Game and Fish Department, and requests the agency's comments on the application. Usually when public interest considerations are raised, the application is approved with conditions that relate to the public interest concern. So far, the only complaints have come from parties who feel that there has been inadequate public notice. Telephone interview with Kellie Litzen, Water Resources Officer, Alaska Department of Natural Resources (May 25, 1994).
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> The Chief of the Water Section says that he feels the Alaska statutes work fairly well because the public interest criteria are broad and general rather than specific, and broad discretion is given to the Department. In

addition, implementation of the public interest criteria has not been problematic in part because there are few areas in the state with water deficits and in part because there are few applications for transfers of water. Telephone conversation with Gary Prokosch, Chief of Water, Alaska Department of Natural Resources (June 17, 1994).

Idaho: A lawyer for the Department states that the Department has in fact appreciated the addition of public interest considerations to applications for appropriations and transfers. Prior to the adoption of the public interest language, the Department was concerned that in some cases there were issues that needed to be addressed, but there was insufficient legal authority to include them in the decision-making process. The attorney also reported that there have been no problems with using the public interest parameters set forth by the Idaho Supreme Court provided each decision is supported by sufficient evidence in the record and decision. Telephone interview with Phil Rassier, Senior Legal Counsel, Idaho Department of Water Resources (July 7, 1993).

An Attorney General said public interest is now automatically an issue in all cases. Public interest is decided on a case-by-case basis in the same manner common law cases are considered by the courts. With time, factual patterns develop that provide guidance and instill confidence. He also recommended that in order to gain public acceptance, the use of public interest criteria should be not used to undo past decisions, but should be limited to current and future impacts only. For example, if water has already been diverted and an applicant seeks to change the use, impacts on instream flow should not be considered. Telephone interview with Kleve Strong, Idaho Attorney General's Office (Aug. 30, 1994).

Nebraska: The advantage to using these criteria is that "everyone walks away from the hearings feeling they have exhausted every argument." The Assistant Director is personally comfortable with these criteria, although some people find them too broad. Telephone interview with Don Blankinau, Assistant Director and Legal Counsel, Nebraska Water Resources Department (Aug. 30, 1993).

North Dakota: The Director of the Water Appropriations Division said that he feels North Dakota's public interest statute is working, and there have not been many questions raised regarding public interest considerations. In cases where public interest was taken into account, there have been two requests for rehearing and no appeals to the courts. He feels that people are "not dissatisfied with the factors to be considered." Telephone interview with Milt Lingbig, Director of Water Appropriations, North Dakota State Water Commission (Aug. 18, 1993).

Oregon: The staff who perform technical reviews of pending applications use a "public interest checklist," i.e., the standards for public interest review, that lists the public interest factors involved, including cultural and historic interests and riparian and ecological factors. Telephone interview with Jake Szramek, Permit Reviewer, Oregon Water Resources Commission (Aug. 19, 1993).

Texas: In order to incorporate public interest criteria into its regulatory program, the Natural Resource Conservation Commission: 1) defines and applies the public interest criteria through submission of a social, economic and environmental impact statement; 2) places conditions on the application to protect the public interest; and 3) "seeks to minimize public

they should be an improvement over no definition or incremental definitions derived from individual agency and court decisions.

V. DRAFT OF A PUBLIC WELFARE REGULATION[148] RELATING TO PUBLIC WELFARE AND CONSERVATION

The State of New Mexico recognizes the importance of public welfare and conservation of surface and groundwater in administering its public waters. The legislature affords standing for those asserting legitimate concerns involving public welfare and conservation of water in a manner which avoids unduly burdening the administrative and judicial processes.[149]

A. Public welfare includes, but is not limited to, the following considerations:
   (1) health and safety;
   (2) economic consequences, including impacts on the existing economy and area of origin[150] of water rights, maintenance of traditional rural and agricultural economies, recreation, and external costs;
   (3) encouragement of conservation and discouragement of waste or impractical or unreasonable uses of water;
   (4) environmental and ecological consequences, including impacts on fish, wildlife and plants, ecologically critical areas, riparian ecosystems, wetlands, and watershed management;[151]

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interest conflicts by creating economic incentives to conserve water and transfer it to higher valued uses." OFFICE OF WATER MANAGEMENT, A REGULATORY GUIDANCE DOCUMENT FOR APPLICATIONS TO DIVERT, STORE OR USE STATE WATER 23 (Mar. 28, 1994) (draft on file with the Texas Natural Resource Conservation Commission, Office of Water Resource Management). The burden to assess potential public interest impacts is on the applicant.

Id. The impact statements are modeled on the federal National Environmental Policy Act (42 U.S.C. § 4331) requirements, but the information required in the statements has been modified to reflect the factors needed to process a permit application. Telephone interview with Bruce Moulton, Environmental Scientist and Policy Specialist, Water Policy Division, Texas Natural Resource Conservation Commission (Aug. 30, 1994).

148. The following draft public welfare regulation is generally a composite from statutes, court decisions and regulations from western states.

149. This language already appears in N.M. STAT. ANN. § 72-5-5.1 (Michie Repl. Pamp. 1985).

150. *See* COMMITTEE OF WESTERN WATER MANAGEMENT, NATIONAL RESEARCH COUNCIL, *supra* note 9, at 257-59 (discussing area of origin protection).

151. COMMITTEE OF WESTERN WATER MANAGEMENT, NATIONAL RESEARCH COUNCIL, *supra* note 9, at 251 (discussing instream flow).

(5) sustainability, sustained yield, groundwater recharge, and aquifer management;
(6) water quality;[152]
(7) loss of alternative uses of water that might be made within a reasonable time if not precluded or hindered by the proposed application;
(8) opportunities for reuse of return flows;
(9) protection and enhancement of historic, cultural and natural resources, and aesthetic values;
(10) preservation of public and trust lands, water and open space;
(11) scientific study;
(12) whether high-quality water is being used when locally available low-quality water would suffice; and
(13) public welfare as defined in the regional and state plans or by elected officials in land use planning.

B. The State Engineer shall request comments on a proposed application from applicable state, federal or tribal governmental agencies if the application appears to affect any public welfare consideration under the authority of that agency.

C. The State Engineer may request that the applicant submit a social, economic and environmental analysis if he is concerned that the application may be detrimental to the public welfare or contrary to conservation of water.

D. Upon presentation of evidence by the protestant that the application is detrimental to the public welfare or contrary to conservation of water, the applicant for an appropriation has the burden of proof to show that the proposed application will not negatively impact the public welfare and conservation.

E. The State Engineer shall consider and balance the relative benefits and detriments of the considerations listed in Subsection A of this regulation, along with any other considerations deemed appropriate, in determining whether the application is detrimental to the public welfare or contrary to conservation.

F. In determining whether an application is detrimental to the public welfare and contrary to conservation of water, the State Engineer shall consider and prepare findings which include the following factors:
(1) the benefit to the applicant resulting from the proposed appropriation;

152. *See* COMMITTEE OF WESTERN WATER MANAGEMENT, NATIONAL RESEARCH COUNCIL, *supra* note 9, at 265-66.

(2) the benefit or harm to other persons resulting from the proposed appropriation;
(3) the degree to which the proposed application affects public welfare as defined in subsection A of this section;
(4) whether the application includes a conservation plan;
(5) whether there are better, alternative sources of water;
(6) the degree to which the action may establish a precedent for future actions with significant effects, represents a decision in principle about a future consideration, or is an irreversible or irretrievable commitment of water resources;
(7) whether the application under consideration is related to other actions with individually insignificant but cumulatively significant impacts on the public welfare and conservation of water;
(8) the short and long-term consequences of the proposed application; and
(9) the intent and ability of the applicant to complete the appropriation.

G. If the State Engineer determines an application is not detrimental to the public welfare and contrary to conservation pursuant to this rule, the application may be approved subject to the provisions of New Mexico statutes. In the interests of public welfare and conservation, the State Engineer may impose reasonable conditions to mitigate or minimize threatened damage to the public, and to promote the public welfare and the efficient use and conservation of water. The State Engineer may also limit the term of the permit if the application requests water for a project that is limited in time and need or for other reasons.

H. Beneficiaries or proponents of an appropriation or transfer may be required to bear any mitigation costs as a matter of equity.[153]

VI. CONCLUSION

The public welfare requirement in New Mexico's water code represents an opportunity as well as a challenge. Because public welfare is a broad term encompassing diverse values, the challenge is to ensure that

153. This appears at the recommendation of the Committee on Western Water Management. COMMITTEE OF WESTERN WATER MANAGEMENT, NATIONAL RESEARCH COUNCIL, *supra* note 9, at 257.

the requirement is applied fairly. This challenge must be met if New Mexico is to protect its water resources. With increasing stresses on our water supplies, the importance of making wise decisions about our water management that look to the future as well as the present multiplies. The public welfare requirement provides an opportunity to ensure judicious, thoughtful use of our water.

Western water officials and managers — state, tribal, local, and federal — are increasingly challenged to integrate into their actions a diverse set of evolving and changing values and interests and to consider the views of those who speak for these interests. The quality of water-related decisions and acceptance and respect for water institutions and policies depends in part on how well officials respond to these challenges.[154]

154. Western Governors' Association, *supra* note 1, at 3.