

Water Resources and the Public Interest*

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XVIth World Water Congress, Cancun, Mexico

Abstract

Countries around the world are in near perfect agreement about the wisdom of treating their water resources as public property. Not surprisingly this has led most countries to articulate a goal of managing these resources in the public interest. But the meaning of the phrase “public interest,” especially in the context of water resources management, is far from clear. This paper seeks to bring some clarity to the issue by exploring three theoretical approaches that might be used for defining the public interest in water resources before settling on an approach that gives preference to the communal values associated with water. It then suggests how the civic republican ideal might be employed through a public process to further flesh out the meaning of public interest. The article concludes by acknowledging the need to assess how well various water management regimes comport with the suggested framework, and offering recommendations for reforming water management regimes in way that best reflects the public interest.

Introduction

As a standard for government decisionmaking, the obligation to act in the public interest is pervasive. To take just one well-known American example, the Federal Communications Act of 1934 requires the Federal Communications Commission to find that that “the public interest, convenience, and necessity would be served” before it can issue or renew a broadcast license. Not surprisingly, protecting the public interest is also a common requirement for allocating and managing water resources. The American Society of Engineers Model Water Code, for example, requires that private water use applications be approved only if “reasonable” – defined as, among other things, consistent with the public interest.

Despite its ubiquity as a public law standard, what it means to manage a resource in the public interest far from clear. And the problem is arguably of particular importance for a common pool resource such as water. Like the air we breathe, the public understands that water is a communal resource with important public values and modern societies expect their government to manage water resources responsibly and protect its

* The authors wish to thank research assistants Sam May, Greg Carter, and Sam Fresher for their outstanding assistance on this paper and for their ongoing efforts on the broader project that led to publication of this work.

public values.

This paper explores the important role played by the public interest in assuring the conservation and protection of the communal values associated with water. It begins by considering three possible theoretical approaches for analyzing the public interest. The first employs an economic or utilitarian lens that views the public interest as a tool for promoting decisions that either maximize wealth or perhaps, afford “the greatest good to the greatest number in the long run.” While a utilitarian approach offers an arguably objective standard, it tends to play out in terms of costs and benefits that can be readily measured in monetary terms, thereby excluding or marginalizing costs and benefits for intangible, communal assets such as aesthetic or existential values.

In contrast to a utilitarian, a pluralist seeks to aggregate the individual preferences of interested parties and filter those views through a political or democratic process. This category privileges majoritarian views as determined either by popular vote or the vote of elected representatives. While legislative choices might reflect majoritarian views, they can seem incoherent because they lack fealty to any precise theory or principle. Indeed, as legislatures change they can adopt radically different versions of the public interest that are more reflective of political views and the influence of lobbyists at the moment in time when they are adopted.

A third approach and the one advocated in this paper views the public interest as solely reflective of shared communal and societal values.¹ The key to this approach is in recognizing that public interests are distinct from private interests, and then in apprehending and describing the communal aspect of the public interest in normative terms. A communal perspective on the public interest acknowledges the value of private interests in common resources but only to the extent that the shared values of these public resources are protected first.

The paper draws on the work of Hannah Arendt, Richard Flathman and others to support a view of the public interest that focuses on communal values. In the context of water, a communal approach to the public interest might establish protected baselines for communal values in water, including, for example, minimum stream flows, water quality standards, and ecological health standards. Private rights and uses would be allowed under this system but only after the primary public interests are protected. While the public interest is an inherently dynamic concept and must be sufficiently flexible to change as values change and as new information becomes available, its unwavering focus must be on protecting its core communal values.

After establishing a communal values framework for the public interest, the paper turns to an appropriate process for actually defining the term. Here the paper relies on the work of John Rawls, Cass Sunstein, and others to advocate a civic republican approach, which asks that interested parties set aside their personal preferences and work toward a definition that reflects communal values.

Future work on this project will examine how different jurisdictions employ the public interest framework in managing water resources and how well their approaches conform to the proposed model. In addition, it will consider reforms that might help bring state policies more in line with the preferred model as outlined here.

¹ This also seems to be the approach advocated in the Model Water Code. The Code defines the public interest as “any interest in the waters of the State or in water usage within the State shared by the people of the State as a whole....” Regulated Riparian Model Water Code, § 2R-2-18. (ASCE/EWRI 40-03, 2004)

The Public Interest in Water Policy

Despite its widespread acceptance as a core principle for evaluating policy and its exhaustive treatment in scholarly literature, the public interest remains an elusive concept, and scholars and policymakers alike have struggled to ascertain a precise meaning.² The public interest surely encompasses “community values,” but what about private values that arguably enhance public welfare? And what role does subjective bias play in influencing the proper choice and scope of relevant values?³ While one can imagine a wide range of approaches for elucidating the public interest, they generally fit into three categories.

The first takes an economic or utilitarian approach, asking that the public interest be defined to promote decisions that maximize overall wealth,⁴ or, putting it in more egalitarian and progressive era terms, to afford “the greatest good of the greatest number in the long run.”⁵ A utilitarian approach has several advantages. It offers an objective standard that can be somewhat readily ascertained. Moreover, if initial projections of costs and benefits of a decision or choice turn out to be inaccurate or incomplete the decision can often be adapted to reflect the new information.⁶

On the other hand, a utilitarian approach tends to play out in terms of costs and

² Flathman begins his extensive analysis of the “public interest” by distinguishing between its commendatory and descriptive meanings. As a commendatory phrase it occupies an important role in political rhetoric. The other meaning is descriptive, and is used to whether a certain policy fits the defined public interest criteria. Rhetorical maneuvers abound in politics, leading politicians to sometimes invoke the phrase for its commendatory meaning without carefully thinking through what criteria should be invoked to apply the descriptive meaning. The arguments found in the remainder of this article focus on the descriptive meaning of the public interest. See RICHARD E. FLATHMAN, *THE PUBLIC INTEREST: AN ESSAY CONCERNING THE NORMATIVE DISCOURSE OF POLITICS*, 9–13 (1966).

³ Subjective views inevitably influence the interpretation of the public interest but subjective perspectives should not be confused with selfishness. The former describes a particular interpretation of communal values influenced by one’s “location” (geographically, socially, etc.) within a “common world.” See HANNAH ARENDT, *THE HUMAN CONDITION*, at 57 (1985). The latter constitutes a violation of duty by explicitly ignoring the consequences of an action (see FLATHMAN, *supra* n. 2, at 26-28. The presence of subjective values requires the public interest to incorporate these often-competing views in the policy process. The procedural component of the public interest will be further outlined below.

⁴ See JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION*, at 12 (J. H. Burns and H. L. A. Hart, eds., 1970).

⁵ Jeremy Bentham first articulated the idea that “it is the greatest happiness of the greatest number that is the measure of right and wrong.” *COLLECTED WORKS OF JEREMY BENTHAM*, at 393 (J.H. Burns & H.L.A Hart, editors, 1977). Gifford Pinchot, the renowned conservation and first Chief of the U.S. Forest Service, adapted this principle, adding a time element: “Where conflicting interests must be reconciled, the question shall always be answered from the standpoint of the greatest good of the greatest number in the long run.” See *Pinchot and Utilitarianism: What is the Greatest Good?*, available at, <http://www.fs.fed.us/greatestgood/press/mediakit/facts/pinchot.shtml>.

⁶ Professor Douglas Grant has written extensively on the public interest’s function in water policy. Grant argues that the public interest serves to assess and weigh the externalities of a given water project or policy. Grant later characterizes this cost-benefit-style approach to the public interest as the “maximum benefits model.” Such a model, Grant argues, has been able to incorporate new values, such as ecological values, into public interest review. See Douglas L. Grant, *Public Interest Review of Water Right Allocation and Transfer in the West: Recognition of Public Values*, 19 ARIZ. ST. L. J. 681 (1987); Douglas L. Grant, *Two Models of Public Interest Review of Water Allocation in the West*, 9 DENV. WATER L. REV. 485 (2006). As suggested in the text, cost-benefit analysis is fraught with problems, especially in the context of assessing the value of commonly-held, public resources like water.

benefits that can be readily measured in monetary terms. This often excludes or marginalizes costs and benefits for intangible assets such as aesthetic or existential values that also happen to generally reflect broad-based community values. Efforts to quantify the value of such assets is often tried but rarely succeeds,⁷ and the results are almost always presented in terms of the value of these assets to humans as opposed to any inherent value that they might possess.⁸ How should a society, for example, value a free flowing stream? Is it enough to identify the economic values associated with fishing, boating, or otherwise recreating in or on the stream? Or does a free-flowing stream have some inherent value that should also be taken into account? And how should society value the use and enjoyment of the stream by future generations? As world population grows and fewer water resources remain pristine, is it not likely that those water resources that continue to survive in a relatively unspoiled condition will hold a far greater value to future people than can be appreciated today? Because there are no easy answers to these questions, a cost-benefit approach invariably favors private, present economic uses over current and future public uses that are shared in common.⁹

Somewhat related to the utilitarian approach is a pluralist view that seeks to aggregate the individual preferences of interested parties and filter those views through a political or democratic process.¹⁰ This category privileges majoritarian views as determined either by popular vote or the vote of elected representatives. As a practical matter, legislative decisions can and sometimes do define the public interest, thereby establishing a legal standard that limits the discretion and influence of policymakers in the

⁷ One of the more thoughtful, though ultimately supportive critiques of cost-benefit analysis is MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* (2006). In a review of the Adler/Posner book, Sinden, Kysar, and Dreisen suggest that given CBA's limitations, other decisionmaking tools might be preferable. Amy Sinden, Douglas A. Kysar, & David M. Driesen, *Cost-Benefit Analysis: New Foundations on Shifting Sand*, 3 *REGULATION & GOVERNANCE* 48 (2009).

⁸ Even more troubling is the problem of placing a value on human life, although that is not likely to pose a significant issue for implementing a public interest standard in the context of water rights. See FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* (2004).

⁹ Flathman makes the moral argument that while individuals are motivated by self-interest they should sometimes support policies contrary to self-interest and presumably then in the greater public interest. Flathman criticizes scholars, most notably Jeremy Bentham, who define the public interest by aggregating individual interests. Nonetheless, Flathman acknowledges that individual interest "is to be highly valued, fostered, and protected as a means of strengthening the body politic" FLATHMAN, *supra* n. 2, at 33-37; JEREMY BENTHAM, *A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION*, 12-13 (1948).

¹⁰ Bentham arguably supports this approach, as well as pure utilitarianism. He argues, for example that "[t]he interest of the community then is, what? - the sum of the interests of the several members who compose it." JEREMY BENTHAM, *A FRAGMENT ON GOVERNMENT AND THE PRINCIPLES OF MORALS AND LEGISLATION*, p. 126.

Bentham further defines the "principle of utility" as the "principle which approves or disapproves of every action whatsoever." Individuals and political leaders alike determine the principle of utility by summing the pleasure and pain of an action to determine if the action produces a beneficial result. This process of summing pain and pleasure works on both the individual and communal level. Bentham stresses, "It is in vain to talk of the interest of the community without understanding what is in the interest of the individual." Understanding the interest of a communal "body" begins by understanding the individual interests that shape that body; after understanding individual interests the community's interest is then "the sum of the interests of the several members who compose it (Bentham, p. 12).

executive branch.¹¹

For good or ill, legislative choices made by elected officials in a representative democracy may or may not reflect majoritarian views, and might be more in step with utilitarian or communal principles as described above and below. Such choices often seem incoherent, however, because they lack fealty to any precise theory or principle. Indeed, legislatures can announce radically different versions of the public interest that are more reflective of political views and the influence of lobbyists and other participants in the decisionmaking process at the moment in time that they are adopted. A pluralist approach also suffers from being both unpredictable and unstable. Indeed, unlike the utilitarian or communal approaches, pluralism makes no pretense of seeking an objective understanding of the public interest, focusing instead on the values and preferences of those individuals allowed to engage in the decision process as aggregated by the decisionmaker. And because decisionmakers are typically elected or appointed they are constantly changing, and with these changes come different political and ideological views about how to define the public interest.¹²

Like utilitarianism, pluralism also tends to favor present interests over those of future generations because it is essentially responding to pressure from interested parties and organizations. While it is possible and perhaps even likely that some of these parties will promote the protection of water resources for the future, it is difficult to imagine that such arguments will overcome the demands made by present users, especially for those water resources facing significant stress.

This leads to a third theory that views the public interest as solely reflective of shared communal, and societal values. The key to this approach is in recognizing that public interests are distinctly different from private interests, and then in apprehending and describing the communal aspect of the public interest in normative, value-based terms.¹³ A communal perspective on the public interest acknowledges the value of private

¹¹ See for example, the State of Alaska's definition of the public interest, which asks the decisionmaker to balance a range of public and private interests in deciding whether to issue a water permit. Alaska Stat. § 46.15.080 provides that the state water commissioner should issue a water permit only if he finds, among other things, that the issuance of the permit is in the public interest. In determining the public interest, the commissioner must consider:

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

¹² The constant turnover in elected officials and agency leadership has prompted some scholars to favor judicial application of the Public Trust Doctrine for water resources rather than the public interest standard found in legislation. See Michelle Bryan Mudd, *Hitching Our Wagon to a Dim Star: Why Outmoded Water Codes and the Public Interest Review Cannot Protect the Public Trust in Western Water Law*, 32 STAN. ENVTL. L. L. 307 (2013).

¹³ Communal values include trans-subjective values that are devoid of self-interest and can be "justifiably imposed" on all members of a community, particularly in instances when there are two competing interests. These communal values are determined by filtering context-specific information; this requires that the public interest incorporate a procedural component further described in the next paragraph. When

interests in common resources but only to the extent that the shared, public values of those resources are protected first.¹⁴

In *Public Rights and Private Interests*,¹⁵ Hannah Arendt offers a compelling argument supporting this third approach. As she explains:

Throughout his life man moves constantly in two different orders of existence: he moves within what is his own, and he also moves in a sphere that is common to him and his fellowmen. The “public good,” the concerns of the citizen, is indeed the common good because it is localized in the world which we have in common without owning it. The reckless pursuit of private interests in the public-political sphere is as ruinous for the public good as the arrogant attempts of governments to regulate the private lives of their citizens are ruinous for private happiness.

Arendt acknowledges, however, the difficulty of adhering to a communal view of the public interest even as she speaks to the role of private interests in public interest analysis:

To recognize and embrace the common good requires not enlightened self-interest but impartiality; such impartiality, however, is resisted at every turn by the urgency of one’s self-interests, which are always more urgent than the common good.... A communal perspective on the public interest acknowledges the value of private interests in common resources but only to the extent that the shared, public values of those resources are protected first.

Although not written to explain the public interest in water resources management, Arendt’s understanding of the public interest as a common good, her recognition of the challenge posed by self-interest, and her articulation of the proper place for private interests in a public interest analysis fit surprisingly well into the water resources frame. The public or communal values associated with water resources include such things as ecological health, aesthetic values, and recreational opportunities for fishing, boating, and swimming. The prospective value of water resources to future communal users should also play a role. This does not mean, of course, that the public interest demands absolute protection of communal resources. But some appropriate level of protection is vital to defending the public interest.

One useful strategy for helping agencies to define the scope of the public interest in terms of protecting communal rights might employ John Rawls “veil of ignorance.”¹⁶ Rawls’ thought experiment asks parties to assume an original position where “no one

assessing if a policy can be justifiably imposed, public interest review depends on what Flathman calls the principle of “generalization.” Policy typically affects particular groups – or “classes” – of individuals. The principle of generalization dictates that a policy can be justifiably imposed on all members of a particular class. See Flathman, *supra*, n. 2 at 37–42, 70–72.

¹⁴ The word “first” should be particularly emphasized here because it has particular application to water law in the American West. In many western states the prior appropriation doctrine can cause certain state-held water rights to be subject to private uses, even if those uses violate the communal values held by the state’s citizens.

¹⁵ Hannah Arendt, *Public Rights: In Response to Charles Frankel*, in *SMALL COMFORTS FOR HARD TIMES: HUMANISTS ON PUBLIC POLICY*, (M. Mooney and F. Stuber, eds., 1977)

¹⁶ JOHN RAWLS, *A THEORY OF JUSTICE* at 136-142 (1971). This “veil of ignorance” strategy was suggested by Stefano Moroni in the context of planning theory. See Stefano Moroni, *Towards a Reconstruction of the Public Interest Criterion*, 3 *PLANNING THEORY* 151-171 (2004).

knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength and the like.”¹⁷ If all parties were to define the public interest from behind the veil of ignorance they would more likely support communal interests that benefit society broadly, as opposed to private interests that would benefit only the privileged few.

In the context of water, a Rawlsian approach to the public interest might identify appropriate baselines for protecting communal values in water, and these might include, for example, minimum stream flows or lake levels, minimum water quality standards, and minimum ecological health standards. Again, private rights and uses would be allowed and fully expected under this system but, as Arendt suggests, only after the primary public interests are protected and preserved. Of course, the public interest is an inherently dynamic concept and should be sufficiently flexible to change as values change and as new information becomes available that better informs public needs and how to protect them. While some academics and policymakers might prefer the more certain posture of a static public interest, all can take comfort from the fact that changes to our understanding of communal needs evolve slowly and predictably as new information becomes available and as our values evolve.¹⁸

Even if interested parties could agree that the public interest should be defined in terms of communal values, the term must still be defined. And in order to accommodate the dynamic nature of communal values the public interest must incorporate procedural norms into any standard that might be adopted. A procedural norm can help policymakers collect and process context-specific information used to identify and assess communal values and ultimately to define the public interest.¹⁹ In an excellent essay aimed at reconciling the public interest with environmental philosophy, Ben Minter argues for defining the public interest through a deliberative process, following an approach advocated by the American philosopher, John Dewey.²⁰ Although Dewey does not mention the term, and Minter mentions it only in passing, both seem to favor a process that reflects the civic republican ideal. Cass Sunstein has described civic republicanism as embracing a deliberative process that promotes political equality for the purpose of achieving a definable common good where engaged parties sublimate their private interests and instead act as citizens committed to achieving the public interest.²¹ As described by Sunstein, civic republicanism offers a seemingly perfect framework for identifying the public interest in water resources.

While civic republicanism seems an obvious choice for developing a public interest standard, it must be approached with care due to very real risk that it can be co-opted by special interests. More specifically, civic republicanism is often quite rightly described as an “ideal” that cannot be fully realized in the real world. Try as they might, people do not

¹⁷ RAWLS, *supra* n. 16 at 137.

¹⁸ Ben A. Minter, *Environmental Philosophy and the Public Interest: A Pragmatic Reconciliation*, 14 ENVIRON. VALUES 37–60 (2005); Douglas L. Grant, *Two Models of Public Interest Review of Water Allocation in the West*, 492–507.

¹⁹ Flathman, *The Public Interest: An Essay Concerning the Normative Discourse of Politics*, *supra*, n. 2 at 53–63.

²⁰ See Ben A. Minter, *supra*, n. 18.

²¹ Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L. J. 1539, 1544 (1988); see also, Mark Squillace, *Embracing a Civic Republican Tradition in Natural Resources Decision-Making*, in THE EVOLUTION OF NATURAL RESOURCES LAW AND POLICY (2010).

generally sublimate their private interests or the interests of their clients when engaged in deliberative processes, even when they are asked to do so, and perhaps even when they honestly try to do so. On the contrary, public choice theory predicts, with some reliability, that powerful and concentrated private interests are likely to overwhelm the more diffuse public interest in civic engagement processes.²²

If the public choice problem is real, then the best solution for this problem is to ask the agency decisionmaker to rise above the fray and make a choice that in the mind of the decisionmaker best reflects societal values and public needs, as informed by the best information available, including perhaps information derived through a meaningful and deliberative public process.

Acknowledging the essential role of the decisionmaker in carrying out the challenging task of ascertaining an objective, normative “public interest,” not unduly influenced by private interests, lends further support for adhering to a view of the public interest that reflects communal values as posited by the third theoretical approach. In contrast to an approach that focuses on communal values, both the utilitarian and pluralist approaches play to the strengths of concentrated private interests, thereby posing a risk that the real public interest will be sacrificed in favor of powerful and concentrated private interests. While this risk is not entirely absent from a process that focuses on communal values, it is far less prominent.

All of this leads to the conclusion that, at least in the context of water resources management, the public interest must ultimately reflect communal values as ascertained by a relevant agency following a meaningful and deliberative public process that embodies the civic republican ideal.

Conclusion

Most people reflexively accept the notion that water resources are public resources and that the public naturally enjoys a communal right to use those resources for communal purposes. In fact, however, private rights, often sanctioned by government agencies, can interfere in significant ways with the exercise of public interest rights in water. At least part of the problem stems from the ambiguity and uncertainty that surround the phrase “the public interest.” This paper offers a framework for understanding and defining the phrase, and for protecting public interest values associated with our finite, precious, and publicly-held water resources.

²² See Eamonn Butler, *Public Choice—A Primer* (2012); JAMES BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962); Earl Latham, *The Group Basis of Politics: Notes for a Theory*, 46 AM. POL. SCI. REV. 376–397 (1952).