

## COMPONENTS OF “PUBLIC WELFARE”

The NM Water Code enacted in 1907 specifically states that the “public interest” must be taken into account in the allocation of water. Amendments in 1985 substituted the phrase “public welfare” for “public interest”. Since there is no longer any unallocated fresh water in New Mexico, the legal significance of “public welfare” today arises during the transfer of water rights. The legislature has given the State Engineer authority to deny an application for a new water right or a water right transfer if it will impair existing water rights, is contrary to the conservation of water within the State, or is detrimental to the public welfare of the State. In practice, the State Engineer has made decisions based on only the first two of these criteria, so that the definition of public welfare remains unclear. However, New Mexico courts have held that the term should be construed broadly to include “health and safety, recreational, aesthetic, environmental and economic interests.”

In an effort to give guidance to the State Engineer, most of the 16 Regional Water Plans include a public welfare statement or some equivalent. A review of those statements reveals a number of shared values. Protecting the quality of the water is a universal goal as are assuring an adequate water supply, promoting conservation and efficient water use, and supporting agricultural sustainability.

A major source of disagreement both within and between the regions is illustrated by Sierra-Socorro’s plan, which calls for managers to consider the impact of water projects on traditional users and the economy while also protecting the rights of individual water rights holders. The Lower Pecos Region concludes that the uses will be determined by economics while the Mora-San Miguel-Guadalupe Regional Plan states that changes in water use “should reflect decisions made from a cultural and spiritual connection to place.”

Of course the increasing demand for water rights is due to growth. The public welfare statement of the Middle Grande Region (MRG), where

there is already a deficit, says: “We recognize the current deficit situation and have a duty to balance water use with renewable supply, starting now and in the future.” More controversially, among the goals for the planning process included in its General Summary, the MRG lists “balancing growth with a renewable water supply”, a goal that was accepted by the Water Assembly (composed of volunteers), but not by the Water Resources Board (composed of local government representatives).

All of the plans include a reference to the environment or the benefit of healthy watersheds, but the Federal requirement for in-stream flow is frequently regarded as an imposition. There are some exceptions. For example, the Southwest New Mexico Regional Plan refers to the “unique values of the diverse ecology of the Gila Basin and other surface water resources in the region.” Environmentalists in the state complain that most of the regions have failed to give adequate value to healthy rivers.

Another important category of public welfare statements deals with the decision-making process. In a lengthy statement the MRG calls for a transparent public and participatory process when water rights are transferred. The Taos Regional Plan originally sought to create a review process for water transfer applications in order to assure consideration of the public welfare, but the participants failed to reach consensus. Instead, the plan emphasizes the gathering and dissemination of information about the capacity and condition of local water resources.

Clearly, consideration of public welfare raises difficult economic, environmental and social issues. But although there may be problems associated with the implementation of a public welfare criterion, it does provide a mechanism to broaden the protection of water resources beyond the constitutionally mandated criteria of “beneficial use” and “prior appropriation”.