

Draft Discussion Paper: Public Interest

NOTE: This paper was created only for the purposes of generating discussion to inform potential legislative recommendations. None of the topics described are proposed or endorsed by Ecology.

Summary

Public interest is an important concept in water law, yet is challenging to define. New water rights that are approved by Ecology cannot harm public interest, but no standards exist in statute that describe what, exactly that means. Similarly, the exercise of a trust water right cannot “impair” the public interest. However, transfers of surface water rights (whether in-basin or out-of-basin) do not include evaluation of the public interest.

Concerns about speculation and private investment in water rights could be addressed through a more specific definition/prescribed criteria for public interest evaluation when Ecology exercises a right in the trust water rights program (TWRP) or issues a new water right decision. Specifically defining the public interest and prescribing how to evaluate the public interest to address speculation in these water management decisions could be accomplished by the Legislature in statute or by Ecology in administrative rule or policy.

Another option would be to create a new requirement to evaluate surface water right transfers to ensure they do not harm the public interest. This new requirement could only be accomplished by the Legislature through statutory amendment.

Background

We have heard concerns that rural communities are being harmed by private investment speculation with water rights, specifically through the use of the TWRP to boost private profits at the expense of individual landowners.

RCW 90.54.020 discusses general consideration of the public interest in water resources management. These considerations could include environmental impacts, environmental justice, implications for public health and safety, aesthetics, recreation, economic effects, and impacts on publicly owned resources and facilities¹. Ecology currently considers the public interest and public welfare in a number of water right decisions including exercising a trust water right², application for a new water right permit³, and establishing minimum water flow levels⁴.

Although these definitions and uses of the public interest can serve as a general direction, they are not tailored to specific water right decisions or contexts. For example, they do not provide details on what topics are most relevant to consider for different types of water right decisions. Additionally, it does not

¹ Draft For 2nd Public Comment Period: Policy and Interpretive Statement for Administration of the Statewide Trust Water Rights Program. February 1, 2022. <https://apps.ecology.wa.gov/publications/SummaryPages/2111017.html>.

² RCW 90.42.050.

³ RCW 90.03.290.

⁴ RCW 90.22.010.

provide direction on if the public interest should be considered at a local or statewide level. Ambiguity in what constitutes the public interest in these evaluations and how it is applied can reduce consistency and public confidence in water right decisions made by Ecology.

Discussion

Further defining/prescribe public interest evaluations for use of the TWRP

Existing direction on the public interest does not specifically address speculation and other concerns we have heard about use of the TWRP. One possible approach to addressing these concerns is to establish more detailed criteria for evaluating the public interest when a water right in the TWRP is being exercised. This could involve specifying that investment speculation should be considered when evaluating the public interest for the exercise of trust water rights or requiring an applicant to demonstrate/quantify the public benefits of their proposal. Each of these approaches could help address speculation and ensure public benefits are derived from the use of the TWRP.

Another example for how defining public interest that could reduce the impacts of investment speculation involves defining limits on the use of the TWRP in statute or rule for privately held water rights. One such change could be limiting the use of the TWRP to only smaller water right holders because investment speculation with large water rights could result in greater negative effects from speculation than with smaller water rights, including impacts on the local economic and water availability.

Defining the public interest so that large water rights would be limited from using the TWRP would only impact a portion of the water rights that use the TWRP. For example, the median size of water rights that have used temporary donations is 72 AFY and 75% of these rights are smaller than 241 AFY. Private entities, who could be using the TWRP for speculation, also make up the majority (53%) of water banks in the state. The water rights used to seed these water banks have a median size of 22 AFY and 75% of them are 87 AFY or smaller.

Limiting the use of the TWRP to smaller water rights would reduce use of the TWRP. Without the protection from relinquishment, larger water users without access to the TWRP might continue with out-of-stream uses. Overall, the outcome could be reducing the streamflow benefits of the TWRP. It could also reduce water availability for new/expanded uses in some situations by creating barriers for private water banks.

A key consideration when further defining criteria and directions for evaluating the public interest is determining the appropriate entity to establish this definition. One option is to have the Legislature define it statute. Legislators are directly elected by the public, which could increase public confidence that the definition of the public interest would reflect state residents' interests. A statutory definition would also provide the clearest direction on what constitutes the public interest and would ensure that the intent of the Legislature is reflected. A legislative definition would also improve statewide consistency in how Ecology considers the public interest in water right decisions.

Another option would be if Ecology defined the public interest through policy or rulemaking. Note that the current draft of the Trust Water Rights Policy⁵ contains a definition of public interest for the

⁵ <https://apps.ecology.wa.gov/publications/SummaryPages/2111017.html>.

implementation of the TWRP. If Ecology were to define the public interest in rule it could incorporate the expertise of water right professionals with experience in the different types of water right decisions that occur throughout the state. Additionally, even though a rulemaking process includes significant public involvement, concerns would likely be raised about agency staff that were not directly elected by the public defining the public interest. This could lead to lower levels of public confidence in the definition that would result from an Ecology-led rulemaking.

Creating a new public interest requirement for surface water right transfers

Surface water right transfers can be used for investment speculation that result in negative impacts to water availability and local economies when water is transferred out-of-basin, with larger water rights resulting in greater impacts. Risks of investment speculation could be reduced if the legislature established a requirement for a public interest evaluation for surface water right transfers. The statute could also include specific standards, such as limiting the evaluation to large water rights. Including a public interest evaluation for the largest surface water right transfers could focus resources on those transfers that would have the greatest negative effects on local communities and limit the administrative burden. For context, since 2002 the average size of surface water rights transferred out-of-basin transfer was 399 acre-feet per year (AFY).

Any increase in requirements for surface water right transfers would reduce water availability for new/expanded uses and limit the ability of water rights to move to locations and uses that produce greater overall economic value. This change would likely have negative impacts on a statewide or regional scale, for the benefit of specific local economies and a reduction in the potential impacts resulting from investment speculation using surface water right transfers.