Defining Public Interest in Washington State: Analysis of Western State Approaches and Washington Stakeholder and Tribe Perspectives

Prepared by UW Evans School Student Consulting Lab

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Cover photo of the Wenatchee River by Mark Lee from iStock by Getty Images.

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Executive Summary

This report is the product of a capstone project in collaboration with the Evans School and the Department of Ecology with the purpose of exploring how public interest is used in water management in Washington and how it should be used moving forward.

Background

All western States manage water as a public resource and most manage water in the "public interest." Specifically, laws in these states direct water management agencies to ensure that public interest is not impaired when making water appropriation decisions. However, each state manages public interest differently and only some states have decided to define what "public interest" means. Washington is no different. Water law in Washington mandates the Department of Ecology (Ecology) to consider public interest in water management decisions for new water allocations, but Ecology does not have a definition to rely on. The lack of a clear definition and objective guidelines and recent controversial decisions by Ecology has created uncertainty in the water right community. Ecology is now thinking about defining public interest with all Washingtonians in mind.

Methodology

Our research methods consisted of reviewing the literature and conducting semi-structured interviews. We used these methods to investigate how and if other western States define public interest and what Tribes and stakeholders think of Ecology's use of public interest in Washington State.

- **Other Western States:** To better understand how Washington could move forward with a definition on public interest, we examined how other states dealt with the same issue. Our sample included Alaska, Arizona, Colorado, Idaho, Montana, Nevada, Oregon, Utah, and Wyoming due to their close proximity to Washington and their similar water laws to Washington. We conducted a literature review of water management in these selected states and documented whether each state considers the public interest, how they use the public interest, and if they define the public interest. Additionally, we completed semi-structured interviews with water administrators in most of the states where they shared a more nuanced perspective on how they are implementing the public interest in regard to water rights.
- **Tribes and Stakeholders in Washington State:** Our second research stream focused on compiling Tribal and stakeholder perspectives on Ecology's current use of public interest and what they think should be included in a public interest definition. Our methods consisted of reviewing the literature and conducting semi-structured interviews with stakeholders and Tribes. We noted themes that we saw throughout the interviews and relied on the information gathered from the interviewees to craft our recommendation to Ecology. This part of the research was very sensitive because the individuals that we talked with represent communities who have a lot to lose or gain depending on how Ecology moves forward in their definition.

Limitations

Throughout our research, we encountered several limitations that prevented us from capturing a comprehensive range of perspectives. Our research relied heavily on interviews, and we did not hear back from individuals who represent communities both in and out of state. Specifically, we were not able to interview water administrators from Alaska, Arizona, Nevada, and Montana, and this limited the amount of nuance and detail that we could provide in our out-of-state section. well. Additionally, we did not have the opportunity to interview anyone from the agricultural community or obtain significant Tribal input. Despite reaching out several times to contacts representing these communities, we did not receive a response. As a result, our report lacks a comprehensive representation of the voices of Washington State residents. Lastly, time constraints imposed a further limitation as we had about five months to complete our research and finalize the report.

Findings

Our out-of-state findings offered technical considerations for moving forward in defining the public interest and our in-state research provided important considerations for how Tribes and stakeholders may be impacted through the implementation of this definition.

Other Western States

The use of public interest in water rights decisions varies among Western states (Table A). Out of the sampled states, only Colorado and Montana do not consider public interest in water management decisions. Arizona, Utah, and Wyoming have public interest considerations written into statute but rarely consider it. Alaska and Oregon are the only states with a definition of public interest. Both of these states call on decision-makers to balance a range of public and private interests when managing water rights. States without a definition manage the statutory silence quite differently. Idaho, for example, includes a broad range of public interest values, while Nevada has a narrow set of criteria.

Tribes and Stakeholders in Washington State

We broke this part of our research into three different categories: perception of public interest use in Washington State; impacts of how Ecology currently uses public interest; and how should Ecology move forward in their definition. Generally, the interviewees were aware of how Ecology uses public interest in allocating new water rights, and several mentioned that considerations of the public interest are important. We heard a mix of responses on if Ecology is currently using public interest the "right" way with most interviewees agreeing that it is a challenging concept to use without a definition or criteria. In terms of impacts, several interviewees mentioned a lack of clarity, consistency, and transparency with Ecology's use of public interest and said that it is used too subjectively, creating an environment of distrust. Lastly, the interviewees provided a wide range of characteristics that they think Ecology should consider when creating a definition for public interest (Table B). Some concerns were brought up with defining public interest including that Ecology may favor one group or community over

another, but others thought a definition would be mostly advantageous, in that the definition would make a more transparent process for allocating water rights.

Table A: Table of how the western states included in this report define and consider the public interest.

State	Public interest provisions in statute?	Use of public interest for water rights decisions?	Statutorily defines public interest?	Working to define public interest?
Alaska	Yes	Yes	Yes	-
Arizona	Yes	No	No	No
Colorado	No	-	-	-
Idaho	Yes	Yes	No	No
Montana	No	-	-	-
Nevada	Yes	Yes	No	No
Oregon	Yes	Yes	Yes	-
Utah	Yes	Rarely	No	No
Washington	Yes	Yes	No	Yes
Wyoming	Yes	Rarely	No	No

Table B: This is a list of characteristics that interviewees suggested should be considered when defining public interest.

Definition Characteristic	Why?
Objective	• The current system is too subjective
Binary	• Easier to implement
Flexible	• Water needs and issues will change over time • Climate variability
Holistic	• Include more than just environmental issues
Local	• Needs of different parts of Washington are different • Focus on local Tribal rights and interests
Defined by the Legislature	• Incorporate public interest into statute
Driven by a public process	• The process deserves a healthy debate and requires multiple perspectives
Protects sovereign Tribal rights	• Tribes have senior yet undetermined water rights • Public interest should be in part defined by Tribes

Recommendations

Based on our findings and analysis, we recommend that public interest should be defined through the following steps:

1. **Driven by a collaborative process**. The Legislature should allocate funding to create a legislative advisory group, with representatives from Tribes and stakeholders, to collaboratively define public interest.

2. **Prescribe objective criteria**. The advisory group with Ecology should establish objective and measurable criteria to address concerns about subjectivity in the current water management process.
3. **Define in statute**. After the advisory group creates a public interest definition and objective criteria, the legislature should define these in statute.
4. **Implement locally.** Create collaborations at the local level to consider the unique local characteristics when implementing the public interest definition and criteria.

Lastly, this report is not a comprehensive representation of all perspectives that should be included in considering a public interest definition. This report represents a starting point for Ecology in working towards a public interest definition. We recommend that Ecology continue to engage with stakeholders and Tribes on this important issue.

Glossary of Terms

Abandonment: refers to intentionally giving up a water right to the state by failing to use it for an extended period of time (Ecology, 1991). The difference between abandonment and relinquishment is the intent of the water rights holder to abandon the water right.

Adjudication: "to make an official decision about who is right in" an argument (Merriam-Webster). In the context of water management, adjudication refers to the legal process of determining and establishing water rights for a particular water source. This legal process involves identifying and quantifying existing water rights and resolving conflicts among users of the water source.

Allocation: a limit on the amount of groundwater that a well owner can pump over a certain period of time. Allocation can also refer to the process of assigning specific amounts of water to various users or uses.

Basin: the area of land over which surface run-off flows via streams, rivers, and lakes.

Beneficial Use: any use of a water right that benefits the user and society overall as long as it is available for the water right holder. This can include uses such as supporting agriculture, supporting municipalities, supporting environmental protections, supporting alternative energy sources, supporting recreation uses of water, etc. The concept of beneficial use is a fundamental principle of water law in the western U.S. where an individual or entity must demonstrate that they have a beneficial use for water to obtain a water right.

Groundwater: water found under the Earth's surface, often accessed through wells.

Instream Flows: flow of water that is contained within a river or other body of water.

Lease: to convey by contract a water right to a water bank, which is temporary in nature.

"New" Water Right: one that has recently been allocated and will adhere to the seniority ranking previously established. For example, if an individual who is interested in transferring their water right to another individual or changing its use – say from agriculture to mining – then that water right will have to go through a permitting process where Ecology will approve the use of that water right. Someone may apply for a brand-new water right, but because water is already over allocated then more senior water rights would have to be prioritized over the more recent water right holders.

Perennial Yield: the amount of water taken out of a groundwater basin.

Prior appropriation doctrine: the first person to take a quantity of water from a water source for "beneficial use" has the right to continue to use that quantity of water for that purpose. First users have rights senior to those issued later— "first in time, first in right."

Priority date: the date when a water right was established. Establishes seniority for water right holders.

Reasonable Diligence: a legal standard used to determine whether a water right holder has made a good faith effort to put water to beneficial use within a reasonable period of time. In other words, it is a measure of whether the holder of a water right has acted with due diligence to develop and use the water resources they are entitled to.

Relinquishment: this occurs when a water right has reverted to the state because of nonuse for five or more successive years without sufficient cause that excuses the nonuse. Relinquishment can be full or partial (Ecology, 1991).

Stakeholders: these are any individuals, groups, or organizations that have a particular interest in the way that Ecology navigates water rights in Washington. Examples of stakeholders include environmental groups, agricultural groups, municipalities, and consultants.

Surface water: water found above the Earth's surface, a primary source of water rights.

Tribes: this word is used throughout the report as a way to group all tribal sovereign nations that live within the boundaries of Washington State. Tribes are distinguished from stakeholders due to their sovereignty, and treaty rights, but are included with stakeholders in the conversation because their interests may overlap with one another.

Trust Water Rights Program (TWRP): enables water rights holders to protect their water right from relinquishment by allowing the Department of Ecology to hold onto their water right either temporarily or permanently.

Vested Right: "a right belonging completely and unconditionally to a person as a property interest which cannot be impaired or taken away (as through retroactive legislation) without the consent of the owner". (Merriam-Webster)

Water right changes or transfer: a person or group may be granted a right to use a volume of water, for a defined purpose, in a specific place. A change or transfer of an existing water right can involve changing the period of use, the place of use, the point of diversion or withdrawal, or the purpose or manner of use (Ecology, 2023).

Water Resource Inventory Areas: a division of watersheds into distinct management areas.

Watershed: the land area that drains into a stream, river, lake, or wetland.

Water Right: the right to use a certain amount of water for a specific person at a specific location. They do not own water because it is a public resource, rather the distinction is that they own the right to use it (Water rights, Ecology).

Chapter 1: Project Statement

1.1. Project Description

Washington State law requires the Department of Ecology (Ecology) to manage water resources in the public interest. Specifically, Ecology must ensure that public interest is not impaired when making water appropriation decisions for all new water rights, or when groundwater rights are changed or transferred. However, the meaning of the term public interest is unclear. Many government documents used to outline legislation and legal rights for water include the importance of considering the public interest, but Washington has yet to define what this term means in relation to water rights throughout the State. In the absence of this guidance, Ecology implicitly defines public interest through water appropriation decisions, such as approving a new water right. However, these decisions have been subject to judicial review, but the courts have provided little clarity on the issue. The lack of a definition has created uncertainty among water users regarding how Ecology makes water management decisions because the agency does not have standard objective guidelines that are predictable when making water right decisions.

As water demand increases across the state and water conservation efforts become more necessary due to climate change, Ecology will likely need to expand the use of public interest to effectively manage and allocate this scarce resource. Ecology is exploring how to define public interest in order to provide better guidance to water resource interests in the state as well as create a more meaningful legal standard. This project focuses on understanding what Ecology should consider in a definition of public interest. Specifically, this report explores how and if other western states define public interest, how Tribes and stakeholders perceive the current use of public interest in the State, and what they think should be considered in a public interest definition.

1.2. Research Questions

1. **How do other Western states use and define public interest?**
    - 1.1. Do other states use and/or define public interest in water allocation decisions, and if so, how?
    - 1.2. How has public interest been determined (factors, process, etc.) by other Western states?
    - 1.3. Do other Western state water agencies have input or feedback on how to improve their use of public interest?
2. **What do Tribes and stakeholders in Washington think about public interest?**
    - 2.1. How do Tribes and stakeholders perceive Ecology's use of public interest in water rights decisions? What are the impacts of the current use of public interest?
    - 2.2. Do Tribes and stakeholders think that public interest should be defined in Washington State? If so, how?
    - 2.3. What are the concerns and perceived advantages of Tribes and stakeholders have around defining public interest?

Chapter 2: Literature Review

This literature review serves as an introduction to water resource management in Washington State and provides context on how public interest plays a role. First, this review describes how water rights in Washington are allocated, maintained, and managed. The second section focuses on which water law provisions direct Ecology to make decisions based on the public interest. Although water law does not explicitly define public interest, the third section describes the few cases in which the Legislature has provided direction on the interpretation of public interest. This literature review concludes with more general information on the importance of public interest and the difficulty in defining it.

2.1. Introduction to water rights in Washington State

Water in Washington is managed as a public resource. The water itself cannot be owned but individuals or groups can be granted a water right to use a certain amount of water, for a beneficial purpose, during a certain period of time, in a specific place (Ecology, 2022). Water right holders are a diverse group, and they include farmers who use their water rights for agriculture, municipalities who use their water rights for drinking water and fire protection, and industrial and manufacturing sectors. Water right holders also include (but are not limited to) Tribes, hydroelectric power producers, and mining companies.

Like most Western states, Washington's water law is based on principles of the prior appropriation doctrine (Weeks, 2010). Known colloquially as “first in time, first in right” (Gopalakrishnan, 1973), the prior appropriations doctrine gives priority to older (or senior) rights over newer (or junior) rights, regardless of location and use. First established for surface water rights in Washington’s 1917 Water Code (RCW 90.03), prior appropriation was expanded to groundwater rights with the 1945 Groundwater Code (RCW 90.44). Entities seeking to develop a water right must submit an application to Ecology. Ecology then verifies water rights based on a four-part test:

1. Water must be physically and legally available for appropriation
2. Other existing water uses will not be impaired by the new use
3. The new use qualifies as a beneficial use
4. The new use will not impair the public interest

The Groundwater Code also established “permit-exempt uses,” a class of water rights that are exempt from the permitting process (RCW 90.44.050). Permit-exempt uses are still subject to the prior appropriation doctrine’s priority system and cannot impair existing water rights (Sessions & Christensen, 2018). These permit-exempt uses consist of:

- A single home or groups of homes (up to 5,000 gallons of water per day);
- Livestock (no quantity limit)
- A non-commercial lawn or garden one-half acre in size or less (no quantity limit); and,
- Industrial purposes (up to 5,000 gallons per day).

Water rights are only valid to the extent that they are beneficially used. Often described as the "use it or lose it" principle, water rights can be wholly or partially lost due to extended periods of non-use (Ecology, 2013). A water right holder can lose their right through two processes: abandonment or relinquishment. Abandonment refers to intentionally giving up a water right to the state by failing to use it for an extended period of time (Ecology, 1991). Relinquishment is a more common way of losing a water right. It applies when a water right holder voluntarily fails to use all or some of their water for five or more successive years and there is no sufficient cause to explain the non-use, such as water unavailability or military duty (Ecology, 2013). The purpose of abandonment and relinquishment is to ensure that water, as a scarce resource, is put to maximum beneficial use for Washington's citizens (Ecology, 2013). However, this system has created unintended consequences by discouraging water conservation. Water rights holders end up wasting water and using more water than needed to fend off relinquishment (Trout Unlimited, 2019). Ecology addressed this issue in 1991 by establishing the Trust Water Rights Program (TWRP), which enables water rights holders to protect their water right from relinquishment by allowing Ecology to hold onto their water right either temporarily or permanently. Water rights held in trust benefit from stream flows and recharge groundwater and retain their original priority date (Ecology, 2022).

Most of the water in Washington has been allocated, meaning that more water has been assigned to water rights than exists in streams most years (Trout Unlimited, 2019), which has made new water rights increasingly difficult to obtain (ORIA, 2023). As a result, entities seeking water rights have been relying on making changes to existing water rights instead of applying for new ones (ORIA, 2023). To change a water right, individuals or companies must submit a change application to Ecology who then completes an "extent and validity" evaluation largely based on the four-part test and relinquishment requirements (Ecology, 2008). Alternatively, water rights can be transferred. Transferring ownership of water rights usually occurs when someone sells their property including the water right or sells the water right separately (Ecology, 2008). This process also requires Ecology's approval, largely on the basis that the transfer does not impair other water rights.

To address the issue of overallocation, Ecology established rules to protect what was left of instream flows "for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values" (RCW 90.22.010). These rules consist of the 1969 Minimum Stream Flows Act (RCW 90.22) and the 1971 Water Resources Act (RCW 90.54). Both laws established instream flow protections. Instream flow protections serve as legally designated water rights for a river that identifies a specific instream flow level or the amount of water that must be kept instream. Quite literally, this means that an instream flow is protected from being entirely depleted to protect the wildlife that depend on this water source. The priority date of the instream flow is set at the time of the rule's adoption and does not impact more senior water rights. Ecology has adopted instream flow rules for 29 water resource inventory areas (WRIAs) (Sessions & Christensen, 2018). However, if a water body was over-allocated before the adoption of an instream flow rule, Ecology cannot prioritize environmental flow over senior water rights holders. Likewise, most watersheds with instream flow rules cannot meet these flow

requirements during water-stressed months due to the over-appropriation of those basins (Osborn & Mayer, 2020). To be said simply, some instream flow requirements may not be met during lower flow months from August to October because senior water rights take precedence over instream flow protections.

To compensate for depleting instream flow rules and the over-appropriated condition of many watersheds, Washington policymakers embraced the idea of mitigation for those developing new water rights (Osborn & Mayer, 2020). Those seeking to develop a water right in an over appropriated basin must provide a mitigation plan to Ecology that describes how they will offset any negative impacts of the proposed water use on existing water users and the environment. Mitigation has two forms:

- In-kind or "water-for-water" mitigation matches the quantity, place, and time of depletion. This means offsetting the equivalent amount of water used with the same amount of water at the same time and place. This is the standard mechanism for obtaining water rights when the basin is over-allocated. The TWRP is the most common mechanism for facilitating this kind of mitigation (Osborn & Mayer, 2020). Other options include water banks (Ebeling et al., 2019), cisterns to capture rainwater, re-filling using water trucks, piping water, and using reclaimed water (Osborn & Mayer, 2020).
- Out-of-kind mitigation uses habitat restoration projects to mitigate instream flow depletions. This kind of mitigation is much more controversial because it does not replace water and it is hard to identify how effective it is (Osborn & Mayer, 2020). This kind of mitigation has been challenged in the courts and no longer can be used to establish new water rights in over-allocated basins (see *Foster v. Ecology, et al.).*

There are only a few situations in which water rights can be developed that conflict with instream flow protections (Osborn, 2018). These water rights can only be authorized "where it is clear that overriding considerations of the public interest will be served" (RCW 90.54.020). Overriding considerations of the public interest (OCPI) allowed Ecology to establish "reservations" of water for specified uses even when the use conflicts with instream flows in over-allocated basins. In this case, specified uses include domestic, municipal, commercial and industrial, agricultural, and stock watering uses (Mack, 2013). Significant litigation has narrowed the use of this exception (see *Swinomish Indian Tribal Community v. Ecology* and *Foster v. Ecology, et al.)*.

Several Washington Supreme Court decisions have bolstered instream flow protections, narrowed the use of the OCPI, and changed how mitigation can be used. These include:

- *Postema, et al. v. Pollution Control Hearings Board* (Supreme Court of the State of Washington 2000) provides guidance to Ecology that a new groundwater withdrawal must be denied if it will deplete instream flows when a river is not meeting its regulatory minimum flows (Osborn, 2018). In practice, the court decided that instream flow rights are subject to the same protection as any other water right, even when impairment is not physically measurable or significant, known as de minimis.

- *Swinomish Indian Tribal Community v. Ecology* (Supreme Court of the State of Washington 2013) rejected Ecology's use of OCPI to justify water use that impairs instream flows. Specifically, the court rejected Ecology's amendment to the Skagit Instream Flow Rule to create a "reservation" of water for domestic use. This ruling narrowed the OCPI exception and clarified that it requires extraordinary circumstances before the minimum flow water right can be impaired.
- *Foster v. Ecology, et al.* (Supreme Court of the State of Washington 2015) reaffirmed Postema, finding that no impairment of instream flows is permissible, regardless of magnitude or ecological impact. The court rejected Ecology's use of OCPI to grant the City of Yelm a water right, conditioned on mitigation, including "water for water" and "out-of-kind" measures. The court ruled that out-of-kind mitigation, such as habitat improvements, cannot be used to address impairment of instream flows. They also found that Ecology cannot use OCPI to justify permanent allocations of water.
- *Hirst, Futurewise, et al. v. Whatcom County* (Supreme Court of the State of Washington 2016) found that counties have an independent responsibility to ensure that new permit-exempt uses do not impair senior uses, which includes instream flows. Specifically, the court found that Whatcom County's Comprehensive Plan failed to sufficiently protect water resources. They determined that counties must determine the physical and legal water availability when issuing building permits (Osborn, 2018).

2.2. Tribal Water Rights

Ecology has worked hard to increase collaboration with tribes, to uphold their water rights. Indigenous people have inhabited Washington State for time immemorial and have a strong connection to water and native fishes whose health and abundance depend on the existence of water. Native American Tribes entered treaties with the U.S. in the mid-nineteenth century to reserve rights to take fish on and off the reservation (NWIFC, 2014). Federally recognized tribes in Washington State have claimed and been awarded water rights through two different mechanisms associated with their fishing treaties:

1. *On-reservation "Winters" rights*. The 1908 U.S. Supreme Court case Winters v. United States held that on-reservation water rights are implied in the treaties that established reservations. Tribes own these water rights for on-reservation water use either for instream or out-of-stream use. The Winters "recognizes Tribal rights to a quantity of water sufficient to fulfill the purposes of Native American Reservations" (Osborn, 2018). The priority date for these rights are the treaty dates or the dates of the executive order that established the reservation. Unlike other water rights in Washington, Winters rights are not governed by the principles of prior appropriation in that they are based on future needs instead of actual use and cannot be lost if they are not used (Osborn, 2010).
2. *Habitat-based "Stevens Treaty" water rights*. Tribal – U.S. treaties, known as the "Stevens Treaties" because they were negotiated by Washington Territorial Governor Isaac Stevens, reserved Indigenous rights to take fish at historic fishing sites at locations inside and outside reservations. These rights include the right for habitat that supports fish. The priority date of the rights is time immemorial, predating all other water rights in

the state. However, most Tribes in Washington do not have their "Stevens Treaty" water rights quantified. The Yakima Nation is the notable exception who quantified their water rights through the "Acquavella" adjudication in 1977, which was then affirmed by the Washington State Supreme Court in 1993. The ruling found that the Yakima Nation holds off-reservation instream flow water rights for "the absolute minimum amount of water necessary to maintain anadromous fish life in the Yakima River" (Osborn, 2010). In practice, the quantity of the water right is determined annually in consultation with an advisory panel of biologists. During drought years, junior water rights are curtailed to protect endangered fish species (Osborn, 2010).

2.3. Public Interest and Water Management in Washington State

Public interest has been a part of Washington's water law since the inception of Washington's Water Code (Osborn, 2018). The water code contains several provisions aimed at protecting the public interest. The most widely used provision is the four-part test for water rights allocation, which requires that the appropriation must not "be detrimental to the public welfare" (RCW 90.03.290). Instream flow protections are another strong mechanism for protecting public interest, in which "the department of ecology [sic] may establish minimum water flows or levels for streams, lakes or other public waters for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said public waters whenever it appears to be in the public interest to establish the same" (RCW 90.22.010). Other references to the public interest in Washington water code statutes can be found in Table 1.

As shown, public interest is an important concept for managing water in Washington State. Ecology is required to ensure that the public interest is not harmed when making appropriation and adjudication decisions. However, there is no statutory definition for Ecology to rely on, making it a difficult standard to use. Despite this, Ecology has a history of using public interest provisions to make water rights decisions. Two water right permit examples below show the variation of how public interest has been a determining factor when approving or denying on public interest considerations (Osborn, 2018):

- Ecology approved a new point of diversion for a municipal water right because they determined it was in the public interest. They decided to include a well, that was serving a rural subdivision, into the local public utility district's water rights as it was in the public interest (Kitsap Public Utility District, 2014).
- Ecology denied a new water right in Wilson Creek-Coulee City because the area was "experiencing significant groundwater level declines. New water rights would worsen aquifer mining. It would impair existing water rights and would not be beneficial to the long-term economic stability of the area, which relies heavily on agriculture and ranching. Therefore, issuance of this application is not in the public's interest" (Wilson Creek-Coulee City area Reports of Examination, 2014).

Table 1. Highlights of the Revised Code of Washington (RCW) where Ecology is directed to apply or consider public interest.

Where Public Interest is Applied	RCW and Text Referring to Public Interest
New appropriations process	RCW 90.03.290: (3) The department shall make and file as part of the record in the matter, written findings of fact concerning all things investigated, and if it shall find that there is water available for appropriation for a beneficial use, and the appropriation thereof as proposed in the application will ***not impair existing rights or be detrimental to the public welfare***, it shall issue a permit... RCW 90.03.290: (1) If it is proposed to appropriate water for the purpose of power development, the department shall investigate, determine and find ***whether the proposed development is likely to prove detrimental to the public interest***, having in mind the highest feasible use of the waters belonging to the public.
Water Right Permit Extensions	RCW 90.03.320: For good cause shown, the department shall extend the time or times fixed as aforesaid and shall grant such further period or periods as may be reasonably necessary, having ***due regard to the good faith of the applicant and the public interests affected.***
Filing and Adjudication	RCW 90.03.110: (1) Upon the filing of a petition with the department by a planning unit or by one or more persons claiming the right to any waters within the state or when, after investigation, in the judgment of the department, ***the public interest will be served*** by a determination of the rights thereto RCW 90.44.220: Upon the filing of a petition with the department by a planning unit or by one or more persons claiming a right to any waters within the state or when, after investigation, in the judgment of the department, ***the public interest will be served*** by a determination of the rights thereto, the department shall file a petition to conduct an adjudication…
General declaration of fundamentals for utilization and management of waters of the state	RCW 90.54.020 (10) Expressions of the ***public interest will be sought*** at all stages of water planning and allocation discussions. RCW 90.54.020 (11) Water management programs, including but not limited to, water quality, flood control, drainage, erosion control and storm runoff are deemed to be in the ***public interest***
Trust water rights (instream flow protection)	90.42.040 (4)(a): Exercise of a trust water right may be authorized only if the department first determines that neither water rights existing at the time the trust water right is established, ***nor the public interest will be impaired.***
Instream flow protection	RCW 90.22.010: The department of ecology may establish minimum water flows or levels for streams, lakes or other public waters for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said public waters ***whenever it appears to be in the public interest to establish the same.***

A recent and more controversial example of when public interest was utilized to deny a water right comes from Darrington, Washington. The corporation U.S. Golden Eagle (USGE), which had a water right for consumptive use on the Skagit River for blueberry irrigation, submitted an application for a new permit to withdraw more water to irrigate hundreds more acres of blueberries (CELP, 2021). USGE proposed to use in-kind mitigation to mitigate the impairment to the instream flows through the TWRP (Ecology, 2021). USGE entered into a water supply agreement with Darrington to transfer a portion of the town's water rights into the TWRP which USGE would then use to mitigate their impairment (CELP, 2021). Ecology determined that it was not in the public interest for USGE to use Darrington's water right through the TWRP because the water right had been unused for about 50 years (Christensen, 2023). Ecology found

that "the proposed new use of water by US Golden Eagle, to be mitigated by Darrington's long-unused water right, will reduce actual flows in the Skagit River Basin that will have negative impacts on fish, including endangered species" (Ecology, 2021). Because of this finding, Ecology concluded that using the "trust water right would impair the public interest, and this application, if approved, would be detrimental to the public welfare" (Ecology, 2021).

Simply put, if Darrington had used this water for municipality purposes, the water right then would have been deemed as being put to a beneficial use because the water was being held in trust for municipal purposes. This is the first time that Ecology used public interest to deny a water right decision in this way. This case caused a lot of frustration and uncertainty among water rights holders because water users are now concerned that water rights placed in the TWRP may no longer be used in the future.

Although Ecology must consider the public interest for new water right permit applications (RCW 90.03.290), exercising a trust water right (RCW 90.42.050), and for groundwater change applications (Ecology, 2022), Ecology does not need to evaluate public interest in surface water right changes (RCW 90.03.380). A recent Ecology report directed by the Legislature recommends that the elected officials should consider extending public interest evaluations to surface water rights changes (Ecology, 2022a). Ecology proposes that this change would ensure consistency in evaluating both surface and groundwater rights changes while reducing the flexibility of surface water rights transfers (Ecology, 2022a).

2.4. How Public Interest Has Been Defined in Washington State

Despite being found throughout statute, public interest is not defined in Washington water law and Ecology has limited guidance on the use of public interest. However, there are a few cases where Ecology has definitions or direction in determining what public interest is, including:

- *Water right permitting* – When evaluating an application for a water right, transfer, or change, that includes provision for any water impoundment, "the legislature finds that... it is in the public interest to encourage the impoundment of excess water and other measures that can be used to offset the impact and withdrawals and diversions on existing rights and instream resources" (RCW 90.03.255).
- *Watershed planning* - The Department of Ecology uses watershed planning through the "Streamflow Restoration Act, to support local solutions to improve stream flows and secure water for new rural homes" (Ecology, 2023b). Ecology has also submitted drafts for the approval of the plans for the watershed to the Salmon Recovery Funding Board (SRFB), for which the board will give recommendations and provide a technical review by October 1, 2023 (Ecology, 2023b). This is important to Ecology to "enhance streams for fish and offset impacts from new domestic permit-exempt wells." (Ecology, 2023b) Successful allocations of public water resources would enable Washingtonians to be careful about protecting the instream flows into the watersheds and the correct stewardship of the same. RCW 90.82.130 finds that Ecology "shall rely upon the plan as

a primary consideration in determining the public interest related to" future water resource decisions for the planned watersheds.

- *Water management process* - With RCW 90.54.020 the legislature declared "several fundamentals for utilization and management of waters" in Washington, including defining water management programs, like "water quality, flood control, drainage, erosion control and storm runoff to be in the public interest."
- *Interties* - Interties in Washington State are defined as "interconnections between public water systems permitting exchange or delivery of water between those systems for other than emergency supply purposes" (RCW 90.03.383). These interconnections between public water systems bring clear relationships among stakeholders so that the resources that all Washingtonians shares can be easily managed. Requirements for the systems that handle these interties must be established to be reliable for the rightful distribution of the water among those who have the water right. The legislature "finds that it is in the public interest to recognize interties existing and in use" and "finds it in the public interest to develop a coordinated process to review proposals for interties" (RCW 90.03.383).
- *Stormwater control facilities* - Ecology defines stormwater as "rain and snow melt that runs off rooftops, paved streets, highways, and parking lots, which picks up oil, fertilizers, pesticides, soil, trash, and animal manure. This untreated water flows directly into streams, lakes, and marine waters, leading threats to Washington's urban waters, streambeds, banks, and habitats" (Ecology, 2023c). There are measures that Ecology currently takes to curtail stormwater runoffs into water habitats, for example, the provision of guidance and technical assistance to the compliance with permit requirements, in places that have construction sites stormwater permits to control surface and groundwater pollution from runoff. (Ecology, 2023c). The legislature finds "that it is in the public interest to permit the construction and operation of [these] public improvements to lessen the damage" (RCW 90.03.500).

Cumulatively, these definitions suggest that the public interest includes limiting adverse impacts on existing water rights and instream flows; responsibly stewarding watersheds; maximizing water quality, flood control, drainage, erosion control, and minimizing stormwater runoff; and facilitating regular exchange of water between public water systems.

2.5. Attempts to Evaluate Public Interest in Recent Years

In 2022, Ecology released the Water Resources Program Policy and Interpretive Statement POL-1010 that provides a definition of the public interest for the administration of the State's TWRP:

- Public interest – The consideration of impacts to the public at large that would result from the creation and operation of a water bank. General guidelines for consideration of the public interest are set forth in the water resources fundamentals in RCW 90.54.020. As applicable, considerations should include environmental impacts, with emphasis on the protection, restoration, and recovery of threatened and endangered species; environmental justice; implications for public health and safety; aesthetic, recreational,

and economic effects; and impacts on publicly owned resources and facilities" (Ecology, 2022a).

This definition received mixed support from water interest groups. Some Tribes, water irrigation districts, and law firms emphasized the importance of a public interest definition (Ecology, 2022). However, some stakeholders and Tribes expressed concerns about how this definition would reflect their interests (Ecology, 2022). One piece of criticism that came from several sources, including the Muckleshoot Tribe, Seattle Public Utilities, and the Center for Environmental Law & Policy, is that because this definition is quite broad, it is challenging to determine what exactly the public interest is. Additionally, many stakeholders were in opposition to this definition because they do not see their interests included and would like to see more consideration to the communities that they represent (Ecology, 2022).

Two options exist for developing a clearer definition of public interest (Ecology, 2022b):

1. Ecology could define public interest and provide criteria for public interest evaluation by issuing new administrative rules. This would allow Ecology to incorporate expertise from water right professionals with experience using public interest in water right decisions. The rulemaking process includes significant public involvement; however, water interests would likely be concerned with having non-elected agency staff define the public interest.
2. The Legislature could define public interest in statute and prescribe criteria for how to evaluate the public interest in water rights decisions. This option would likely increase public confidence that the definition reflects residents' interests since it is coming from elected officials. A statutory definition would also provide clear direction on what is included as public interest.

In a 2022 report, Ecology asked the Legislature to consider Option 2 - defining the public interest in statute and prescribing criteria for how to evaluate the public interest in water rights decisions (Ecology, 2022). The report emphasizes the "importance that a public interest definition has for future water right decisions" and suggests that "there was general support for further refining the public interest definition from the one currently in POL-1010" (Ecology, 2022). However, the report also notes that a "broad group of Tribes and stakeholders expressed significant concerns about the complexity of defining the public interest and questioned whether the outcome would sufficiently reflect their interests" (Ecology, 2022). Lastly, the report offers two outstanding questions that need to be answered before implementing this concept (Ecology, 2022):

- "How would a definition of the public interest or criteria for evaluating the public interest weigh the competing and strongly held interests?"
- "How can adequate input and participation by Tribes and stakeholders for defining public interest be ensured?"

These questions illustrate the complexity of trying to define public interest. The following chapters of this report try to provide insight into these questions by reviewing the literature and interviewing key stakeholders and Tribes.

2.6. Defining the Public Interest in Policy & the Public Sector

This section of the literature review is meant to shift away from the background information on water rights in Washington State and provide some details on how public interest may be considered in the public sector. The literature on this topic is vast, and we are only sharing a small portion of information on this topic. The purpose of this section is to provoke a conversation around ethics and morals around public interest in how it should be applied to water rights. Each paragraph is an overview from a source used to help lay out the landscape of what public interest is, and necessary consideration in applying that definition.

Public interest is most prominently used in a legal framework and is often applied to address issues impacting underserved and marginalized communities in society (PILA, 2022). The term public interest is quite a broad and all-encompassing phrase, and because of its blanket use it can be difficult to refine who may be the intended focus of such laws and policies. Questions that may arise, include:

1. Are companies and businesses included in the public interest, and if so, then which ones?
2. Are flora and fauna included in the public interest?
3. How might one balance the different needs of marginalized populations to be included in the definition?

Therefore, it is important to note that the way public interest is defined has tangible impacts on different communities for which the focus is intended. Defining the public interest by both public officials and scholars is a challenging task because the term is so subjective and personal. Public interest should not include private or personal interests, personal preferences, or political interests. It should consider a specific population of communities, and not favor one's interests over another. However, two questions that quickly arise are, who is the "public", and what is the geographical scope to consider? Overall, public interest should be considered at the right scope of government that is trying to identify the term, whether that's at the national, state, or local level. Additionally, with so many stakeholders and competing interests where historically overrepresented voices may overcrowd out historically underrepresented voices, a graceful balance is difficult to manage. Even when public interest has been defined, political pressure may prevent public officials from applying the definition to its intended use. The four dimensions of the public interest that are key in the implementation and design of its definition are: outcomes, inputs, process, and conduct. These dimensions not only encapsulate what technical development goes into defining public interest, but how the definition should apply for an agency or government entity. Finally, an important distinction must be made between the idea of what public interest is and how to apply it around decision making for public policy and agency matters (Wheeler, 2006).

Working to define public interest is a process in exploration and experimentation that is often subject to debate among differing parties. There are several different avenues in which to ground a definition of public interest, including those based on normative planning substance, planning procedure, and political discourse governing planning. An ethical definition integrates a community's morals and values, particularly around what type of ethical framework to work with, and where the burden and benefits lie in terms of duties and outcomes. A definition rooted in normative planning substance balances the restriction of some private rights for the greater good while striving for legal legitimacy and using blanket terms to fully cover the values and expectations of competing parties of various interests. A planning procedure definition emphasizes processing through communication and balancing multiple interests through "universally accepted standards". Lastly, a political discourse definition balances what the government's role should be in implementing the public interest. This is not an exhaustive collection of frameworks to build a definition for public interest, and more research may be done to explore other dominant strategies for this challenging task (Dadashpoor & Sheydayi, 2021).

Chapter 3: Research Methods: Ecology Water Rights – Public Interest

This report strives to provide Ecology with key considerations for defining public interest in water management in Washington State. To do this, we focus on three research streams:

1. Examine how Ecology currently utilizes and acts on public interest in water management.
2. Survey how public interest is used and defined in water management practices across other Western states and evaluate the strengths and weaknesses of these management systems.
3. Gather perspectives from Tribes and Stakeholders on the current scheme and how public interest should be defined in the future.

To investigate these three research streams, we used literature reviews and semi-structured interviews. We then performed thematic analyses by reviewing interview transcripts and the literature to identify themes across the data. This section details how we used these two research tools and how we analyzed the data to understand public interest in Washington state and across other Western states.

3.1. Other Western States and Public Interest

3.1.1. Western State Selection

The research for our capstone relied on understanding if and how other Western states define the public interest in relation to water resource management. We considered all Western states with a prior appropriation system of water rights governance: Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, and Wyoming. From this list, we chose a subset of states that have both similar and different laws and water resource management practices to Washington. We also excluded certain states, including Texas and California, that were not of interest to Ecology mostly because their water rights laws are much different than those of Washington. The states identified that best fit these criteria include Alaska, Arizona, Colorado, Idaho, Montana, Nevada, Oregon, Utah, and Wyoming.

3.1.2. Literature Review

For each state, we conducted a literature review to obtain information on how each state manages water resources and where public interest plays a role. This included providing a brief background of water rights and water management for each state and describing how the public interest is included and defined, if applicable. We also described the laws and court cases that include and/or define how to use public interest in relation to water management in the state.

3.1.3. Semi-Structured Interviews

We conducted semi-structured interviews with water managers and administrators in each of the selected states. If we were not able to schedule an interview, we sent them a copy of the questions we had, and they responded back with their answers. We developed a series of questions with input from Ecology to assure that language and context were accurate before

starting the interview process. Contact information for water administrators was provided by Ecology or a brief internet search, and we contacted them via email (see Appendix A for a full list of interviewees). If the person contacted was not the point of contact for the topic of water rights, the initial email was forwarded to the correct individual. Each interview was scheduled for one hour, but times fluctuated based on the flow of conversation and the time the interviewee had available (See Appendix B for interview questions). The semi-structured format also allowed for us to ask follow up questions if we were curious about something the interviewee said. We analyzed the interviews using thematic analysis techniques, in which we compared interview transcripts to the literature review and identified common themes.

3.2. Washington State and Public Interest

3.2.1. Literature Review

We employed two literature reviews to understand public interest in Washington State water management. The first examined how Ecology currently uses public interest to manage water in Washington State. This context was necessary to center the issue of why defining the public interest is important. The literature review included relevant court case decisions, current laws, and reference materials on how Ecology should use the public interest for decision-making. For the second literature review, we focused on the perceptions of Tribes and stakeholders on Ecology's current use of public interest for water management decisions and what how they think public interest should be defined.

3.2.2. Semi-Structured Interviews

Another key part of understanding different perspectives of public interest for water rights was using semi-structured interviews with individuals representing various Tribes and stakeholders throughout Washington State. Ecology provided us with a list of stakeholders and Tribes along with their contact information, and by utilizing a snowball sampling technique, we asked each interviewee who else they recommended that we talk with, which increased our sample of stakeholders and Tribe contacts. Ecology had previously worked with all of the stakeholder and Tribal interviewees in some capacity, and they all are considered experts in their field with decades of experience. The interviewee's connection with Ecology provided us with the legitimacy and the context to coordinate the interviews. In each interview, we asked Tribes and stakeholders their perceptions of the current water management scheme and what they think about the future direction of water management in the State (see Appendix D for the list of interview questions). These included interviews with Tribal water leadership, those representing rural interests, environmental organizations, local government representatives, and other individuals who may have something to lose or gain depending on how Ecology moves forward with defining public interest (see Appendix C for a full list those interviewed). We analyzed the interviews using thematic analysis techniques, in which we compared interview transcripts to the literature review and then generated, reviewed, and defined common themes. These interviews provided Ecology with essential information on the opinions – both positive and negative - of water users who will be affected by defining public interest.

3.3. Limitations

Our methods have several limitations that have led to gaps in our data. Our reliance on interviews as a primary data source, coupled with the short timeline of the project posed constraints on the comprehensiveness of our report.

Interviews with western State water administrators provided us with valuable insights into how these states use public interest for water rights management. However, we were unable to interview representatives from Alaska, Arizona, Nevada, Montana, and Oregon. Instead, we relied on existing literature to gather information about how public interest is used in these states, but the literature did not always provide the specific information we sought, which impacted the depth of our analysis.

Additionally, the study is missing key perspectives from certain stakeholders and Tribes. Several of the Tribes and stakeholders we contacted did not respond to our interview requests. Specifically, some Tribal representatives mentioned that they did not feel comfortable speaking on behalf of Tribes for our research project. We were also unable to speak with someone representing an agricultural perspective, which was a significant gap in the report. The absence of these perspectives limits the breadth of our research and may have impacted the recommendations we provided at the end of the report.

Lastly, our project's major limitation was the time constraint. Given more time, we could have included a more diverse range of interviewees, which would have led to a more comprehensive analysis. Despite these limitations, we made every effort to ensure the validity and reliability of the data collected and the presented findings.

We encourage the Department of Ecology to continue engaging with the perspectives we missed so that all voices that want to be included in this conversation around public interest can be included. We recognize that our report is the first step in defining the public interest, and we recognize that further work is necessary to address this complex problem.

Chapter 4: Out of State Research

Western states in the U.S. treat water as a public resource and manage water using the prior appropriation doctrine (National Agricultural Law Center, 2022). Almost all western states manage water resources in the public interest, meaning that public interest considerations are used to limit the private right to use water only towards a beneficial use (Squillace, 2020). However, few states define public interest and of the states that do not, they all interpret public interest in water management differently.

This chapter aims to explore how different Western states use and define public interest in water management. Specifically, the chapter discusses three elements, including 1) a brief background of water rights and management for each state, 2) how public interest is used and defined (if at all) to manage water in each state, including an exploration of the laws and court cases that have influenced the use of public interest, and 3) a look into the future of public interest in each state. Through this exploration, this chapter aims to shed light on the complexities and nuances of public interest's use in water management in the Western United Sates.

4.1. Alaska

Table 2. Summary of if Alaska uses and defines public interest.

State	Public interest provisions in statute?	Use of public interest for water rights decisions?	Statutorily defines public interest?	Working to define public interest?	What authority is responsible for administering water rights?
Alaska	Yes	Yes	Yes	-	Department of Natural Resources

4.1.1 Water Administration, Management, and History

A relatively new state, the Alaska Statehood Act was passed in 1958 after the US purchased the territory from Russia. Included in the constitution from statehood, Alaska "...declared water as a public resource belonging to the people of the state, subject to appropriation determined by the state for maximum benefit to the public" (Curran and Dwight, 1979) based on the doctrine of prior appropriation. This is shown in the excerpt from the Alaska constitution below:

- "Section 13. Water Rights. All surface and subsurface waters reserved to the people for common use, except mineral and medicinal waters, are subject to appropriation. Priority of appropriation shall give prior right. Except for public water supply, an appropriation of water shall be limited to stated purposes and are subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law, and to the general reservation of fish and wildlife."

To prevent potential future problems, Alaska passed the Water Use Act (AS 46.15.010) in 1966. The act covers all waters of the state and established a procedure for maintaining existing rights and obtaining new rights. The Alaska Department of Natural Resources (DNR) were delegated the responsibilities of determining, adjudicating, and administering the rights of water as listed in

the act. Initially, the act was seen to provide all the tools necessary in appropriating water rights, but an understaffed DNR created a large backlog of applications. In 1978, the Alaska Legislature had to allocate $1.2 million to the Division of Forest, Land and Water Management for one year with 25% required to be utilized in hiring staff to clear the 12-year backlog (Curran and Dwight, 1979). The last major amendment on the Water Use Act took effect in 1986, establishing procedures for basin-wide adjudications of federal reserve water rights (Chambers, 2017). This amendment came in accordance with the McCarran Amendment (43 U.S.C. § 666) of 1952, a federal law waiving the United States' sovereign immunity in lawsuits regarding the ownership or management of water rights. This amendment is important to Alaska because "...Alaska contains more federal land than any other state... Federal reserved water rights may take priority over the water rights of individuals whose application dates were established subsequent to the date of the federal land withdrawal, even if the individual is using the water at the time of the withdrawal." (Chambers, 2017). As of 2017, Alaska has yet to conduct any basin-wide adjudications, yet the potential implications the provisions have are certainly important to look out for.

4.1.2 Public Interest

Although Alaska does not list "public interest" under definitions in statute, the DNR criteria for appropriating water cites public interest as a determining factor in adjudication and descriptively defines what it encompasses. The criteria in AS 46.15.133 are as follows:

(a) The commissioner shall issue a permit if the commissioner finds that
    1. Rights of a prior appropriator will not be unduly affected;
    2. The proposed means of diversion or construction are adequate;
    3. The proposed use of water is beneficial; and
    4. The proposed appropriation is in the public interest
(b) In determining the public interest, the commissioner shall consider
    1. The benefit to the applicant resulting from the proposed appropriation;
    2. The effect on 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

It is also listed that "Under AS 46.15.080 (b), Also, DNR may include conditions, terms, restrictions, and limitations to protect the public interest" (Curran and Dwight, 1979). Due to the extensive and broad list of what can encompass "public interest", whether applications pass the final criteria in the permitting process is deemed mainly by the discretion of the DNR Commissioner.

This definition came of use in the 1995 *Tulkisarmute Native Community v. Heinz* Alaska Supreme Court case. In this case, "...the court held that the Alaska Department of Natural Resources acted outside its authority when it granted water rights permits to a mining group in derogation of concerns raised by the Tulkisarmute Native Community Council (TNCC) regarding the protection of fish and wildlife resources deemed vital to the livelihood of the native community" (Squillace, 2020). This decision proves as an example of how much power simply defining "public interest" within statute can have, as the court held the DNR responsible for not following explicit directives in considering "...the effect on fish and game resources...". Although Alaska's definition is extremely broad and greatly influenced by the DNR's discretion, circumstances where stakeholders feel permits were wrongly approved or rejected can be taken to court and tangibly dealt with.

4.1.3 Future Use of Public Interest

Alaska is in the minority of Western States in that Public Interest is already explicitly defined. As of now, the state plans to continue utilizing its current definition of public interest and allowing extensive discretion in decisions by the DNR Commissioner. From what can be found, there are no plans to modify or remove the current definition as it stands, so we can make the assumption that Alaska plans to incorporate it into their water permitting decisions for years to come. As the *Tulkisarmute* case proved, defining public interest can have great power and provide a valuable check on the DNR commissioners power when it comes to approving or declining water rights applications.

4.2. Arizona

Table 3. Summary of if Arizona uses and defines public interest.

State	Public interest provisions in statute?	Use of public interest for water rights decisions?	Statutorily defines public interest?	Working to define public interest?	What authority is responsible for administering water rights?
Arizona	Yes	No	No	No	Department of Water Resources

4.2.1. Water Administration, Management, and History

Prior to 1919, a person in Arizona could acquire a surface water right by utilizing it for a beneficial purpose then posting a notice of it at the point of diversion. On June 12, 1919, Arizona enacted its first legal documentation surrounding water rights known as the Arizona Surface Water Code that adopted the prior appropriation doctrine. Although the name of the document was later changed to the Public Water Code, the content of the law remained the same and provided that "a person must apply for and obtain a permit and certification to appropriate (use) surface water and that beneficial use shall be the basis, measure, and limit to the use of water within the state." In 2016, *Arizona Revised Statute § 45-151(A)* defined beneficial uses as "domestic, municipal, irrigation, stock watering, waterpower, recreation, wildlife, including fish, nonrecoverable water storage pursuant to section 45-833.1 or mining uses..." (Arizona Department of Water Resources, 2023). The goal of the new legislation and clarification of

beneficial uses was, according to the Arizona Department of Water Resources (ADWR), "...to ensure a long-term, sufficient and secure water supply for the State by promoting, allocating and comprehensively managing in an environmentally and economically sound manner the rights and interests of the State's surface water resources for the citizens of Arizona." (ADWR, 2023).

4.2.2. Public Interest

There is little to no discussion defining public interest within Arizona State regarding water rights as of 2023. Although there is no explicit reason for this lack of definition, an inference one could make is that the naturally dry, arid climate of Arizona coupled with the fact that most of Arizona's water supply has already been appropriated causes public interest in water right appropriation to be at the bottom of priorities in Arizona Water Law. The closest differentiation between public interest and regular water rights found was the specification of community water systems versus noncommunity water systems. Community water systems are defined as a public water system which serves at least 15 service connections used by year-round residents or regularly serves at least 25 year-round residents (Law Insider, 2023). Noncommunity water systems just means that a given water system does not meet the above qualifications.

Although Arizona does not clearly define public interest, the Arizona Department of Water Resources is statutorily required to review all new water allocations with the public interest in mind. There are, however, no cases reported indicating that Arizona rejected a water right application citing public interest. Squillace (2020) states, "Given the significant stream dewatering that has occurred in Arizona, it does not appear that Arizona has implemented this standard as might be necessary to protect public values in the state's water resources." According to Arizona attorney Janet Howe, "Broad examples of public interest in water might include societal considerations like aesthetics, recreation, environmental protection, public health, economic benefits, and water security. … For the purposes of this note, the public interest is composed of all public values independent of a vested water right. In particular, the public interest contemplates the effect of water uses on the community at large." (Howe, 2017). Due to the broad, vague description of what public interest is considered, the ADWR has little say in rejecting those seeking water rights as illustrated in the following case.

The Arizona Department of Water Resources previously had a test similar to that of Washington State's 4-part test regarding water rights allocation. The 3 criteria for Arizona consider whether a new appropriation would 1. conflict with vested rights, 2. is a menace to public safety, or 3. is against the interests and welfare of the public. Howe (2017) argues that public interest should just be removed entirely, since the *Arizona Department of Water Resources vs. Mclennen* case mitigated the authority the ADWR has in utilizing public interest. In this case, "The County put forth three arguments as to why the ADWR should have the authorization to consider the public interest when reviewing applications for the transfer of water rights... [but] The court declined to follow any of these arguments, and instead held that the ADWR could not consider the public interest when approving or denying an application for water transfer." (Howe, 2017). The arguments against Mclennen were that the use of the word "may" in A.R.S. § 45-172 suggests the ADWR has authority in determining what the public interest consists of, that the language

from other Arizona statutes on public interest should inform the court's interpretation of A.R.S. § 45-172, and that the transfer from Mclennen consisted of a new appropriation because it involved a "new location, with different geography, geology, rainfall, and neighbors." These arguments were made to no avail, as the court approved the water transfer regardless. Since this decision, the precedent in Arizona has been that public interest cannot be considered when making determinations on water right allocations.

4.2.3. Future Use of Public Interest

Following the decision from the *Mclennen* case, it is unlikely that there will be significant change in the positive direction regarding public interest in water rights. Though there was a mention of considering public interest previously, the court essentially removed any credibility the ADWR has in rejecting water right claims for public interest purposes. Arizona attorney Howe recommends that the public interest language be removed entirely from Arizona Water Code, therefore a logical step in the right direction would be to contrarily specify in Arizona law what constitutes public interest so that the ADWR can make decisions backed by law. Arizona does not seem heavily concerned with defining or utilizing public interest, so the future use of it in water law is unlikely.

4.3. Colorado

Table 4. Summary of if Colorado uses and defines public interest.

State	Public interest provisions in statute?	Use of public interest for water rights decisions?	Statutorily defines public interest?	Working to define public interest?	What authority is responsible for administering water rights?
Colorado	No	-	-	-	Water Courts

4.3.1. Water Administration, Management, and History

Water was first appropriated in Colorado in the early 1850s during the territorial period, which predated legal and administrative water structures. Colorado first adopted water use laws in the 1860s, known as the Colorado Doctrine (CWC, 2023). These laws established Colorado's water as a public resource that can be used through a system of water rights. Water provisions in Colorado's 1876 Constitution went on to declare all water in the state "to be the property of the public" and "dedicated to the use of the people in the state" (Article 16, Section 5). The constitution continued, the "right to divert the unappropriated waters of any natural stream to beneficial use shall never be denied" and that the "priority of appropriation shall give the better right as between those using the water for the same purpose" (Article 16, Section 3). This part of the constitution stipulated that the prior appropriation doctrine will be used to govern water rights in the State (Hobbs, 2015). The prior appropriation system was refined by the Water Right Determination and Administration Act of 1969 ("1969 Act"), which changed the water management procedures of the state and defined the state's role in water administration.

Most notably, the 1969 Act established the water court system. The Colorado General Assembly assigned district courts to set water rights priority dates in 1897 but the 1969 Act defined adjudication procedures and created state water courts for each of the 7 major watersheds (CFWE, 2009). Unlike every other western state that uses a statutory permit procedure for appropriating water rights, Colorado uses this judicial system of water courts (Squillace, 2020). The Colorado Supreme Court appoints water judges for each of the seven divisions throughout the state (CRS 37-92). Water courts confirm water rights while the actual application of water to a beneficial use creates the water right (CFWE, 2009). The courts have jurisdiction over water right applications for surface water and groundwater and review cases of reasonable diligence for conditional water rights, changes of water rights, exchanges, and augmentation plans. Water courts, however, cannot choose between different types of beneficial uses nor deny water right applications based on public interest or environmental grounds (CFWE, 2009).

The 1969 Act also stated that the state's administrative priority shall be given to "maximize the beneficial use of all waters of the state" (CRS 37-92). What is considered a "beneficial" use of water has changed over time. Initially, beneficial uses were limited to domestic use and resource production including irrigation, stock, and mining operations. Over time, this definition has expanded to include uses previously thought to be incompatible with the Colorado Constitution, such as environmental and recreational benefits (CFWE, 2009). In 1973, the State Legislature created the Instream Flow and Natural Lake Level Program within the Colorado Water Conservation Board (CWCB) to recognize the "need to correlate the activities of mankind with some reasonable preservation of the natural environment" (CFWE, 2009). This program established instream flow and natural lake level water rights for thousands of miles of streams and hundreds of lakes and allows the CWCB to supplement their junior instream flow rights by acquiring the use of senior water rights (CFWE, 2009).

Those looking to obtain a water right, apply for conditional water right decrees to unappropriated water, if available (CFWE, 2009). The conditional decree holds the date in the priority system and is made absolute when the water is put to a beneficial use (CFWE, 2009). Several basins in Colorado are over-appropriated, which means that a water right seeker must obtain an out-of-priority diversion using an augmentation plan (like mitigation, it requires relacing all water that is consumed) or change a decree for an existing water right either through a change, sale, or transfer (CFWE, 2009). If an applicant is interested in obtaining a new water right, they must show there is unappropriated water available for appropriation (CFWE, 2009). Obtaining a decree for a water right consists of submitting an application to a water court for approval. Each application is also published for public comment through monthly water resumes (CFWE, 2009). Owners of existing water rights may file statements of opposition if they think the application might cause injury to their own water rights (CFWE, 2009). The State and Division Engineers can also file a statement of opposition to any application. Colorado's State Engineer's duties relate to the administration and distribution of existing water rights while the Water Courts confirm or deny water rights (CRS 37-92-101).

4.3.2. Public Interest

Colorado is notably one of the only Western states that does not consider public interest in the allocation of water resources. The Colorado Supreme Court found that "conceptually, a public interest theory is in conflict with the doctrine of prior appropriation because a water court cannot, in the absence of statutory authority, deny a legitimate appropriation based on public policy" (*Board of County Commissioners of the County of Arapahoe v. United States*). The court's finding essentially punted the decision to the Colorado Legislature, which has withheld from incorporating public interest into water resource decision-making. Water administrators with the Department of Natural Resources confirmed that public interest is not included in water management in Colorado (CODNR, 2023). The idea of the public trust doctrine has come up a few times but has not gone too far in the legislature (CODNR, 2023).

The closest Colorado water management comes to the idea of public interest shows up in the Colorado Constitution. Colorado has a preference system, in which, in times of water shortage, the prior appropriation doctrine can be ignored (CWC, 2023). In this case, domestic water use has a preference over any other purpose and agricultural use has a preference over manufacturing use (CWC, 2023). This provision gives municipalities the power to condemn water rights as long as the owners of the condemned water rights are paid just compensation (CFWE, 2009). This has been upheld by the Colorado Supreme Court in which Grand Junction condemned water rights in 1911 (CFWE, 2009). However, an interview with Department of Natural Resources employees revealed that this part of the constitution is purely speculative and is unlikely to be implemented in the future (CODNR, 2023).

4.3.3. Future Use of Public Interest

With natural variation from year to year, junior water right holders face uncertainty on whether or not they will be able to fill their water rights (CODRN, 2023). Myers (2016) argues that Colorado should incorporate a public interest standard into the current water courts system because the current state laws do not reflect modern reality. This change would provide water courts with a measure of discretion and further flexibility in approving water rights applications and help Colorado prepare for climate change and a growing population (Myers, 2016). However, this kind of change would require amending Colorado's Constitution, which requires Legislative support, which would be a difficult undertaking (Myers, 2016). Myer (2016) also suggests that the legislature should adopt an independent, multifactor public interest standard to go with the constitutional amendment.

On the heels of extreme drought throughout Colorado, the Colorado legislature enacted the Colorado Water for the 21st Century Act in 2005 to address growing pressures from climate change and water demand. Although it does not incorporate the concept of public interest, the Act strives to incorporate the public's interests. The Act directs the Colorado Water Conservation Board (CWCB) to update the Colorado Water Plan periodically, which serves as a framework for managing water conservation and development of Colorado's water resources (CWCB, 2023). Each plan update consists of a multi-year grassroots effort and collaborative action around water development and water conservation (CWCB, 2023). These efforts consist

of basin roundtables, in which a collaborative of state and non-state actors work to identify future risks to water resources throughout the state and identify projects that could help manage risks. This process centers equity and engagement to create solutions that are resilient to changing conditions (CWB, 2023).

4.4 Idaho

Table 5. Summary of if Idaho uses and defines public interest.

State	Public interest provisions in statute?	Use of public interest for water rights decisions?	Statutorily defines public interest?	Working to define public interest?	What authority is responsible for administering water rights?
Idaho	Yes	Yes	No	No	Department of Water Resources

4.4.1. Water Administration, Management, and History

Idaho's current water rights are based on Article XV of Idaho's constitution. Despite many amendments in the constitution, there is a central theme, which is the realization that irrigated agriculture in Idaho comes first in line in Idaho's constitution, giving the agricultural community seniority in water rights. (Colson, 2010). The state's constitution was drafted in 1889, during a convention in which there were three key chapters that shaped the state's water rights decisions (Colson, 2010):

1. Challenges to irrigation farmers from ditch companies appropriating water for resale and distribution to settlers. The convention tuned in to reduce the challenge that farmers faced because of the ditch companies. There were six sections in article XV to defeat the challenges that the farmers faced. The sections were added to address the discrepancies that faced these irrigation communities and gave the state regulatory authority to have preference of irrigation purposes over prior appropriations.
2. The second chapter addressed the challenge of irrigation farmers from the development of hydroelectric power. The Snake River had its first hydroelectric plant built in 1901 to serve the Silver City mines. Idaho Power Company merged with five small regional companies to develop hydroelectric power. The development of hydroelectric powerplant threatened the upstream irrigation farmers and their viability. The constitution was amended to give the state the responsibility to regulate power generation in 1934, to not affect the farmers.
3. The third chapter and most recent was to reduce the impact of irrigation farmers from Los Angeles. This proposed outcome was to come in 1963, from Los Angeles proposing that the Snake River to be diverted into the Colorado River to supply California and Arizona with more water. To avoid this, the state of Idaho put "all of its water to a beneficial use so that none of it would be available for a trans-basin diversion" (Colson, 2010).

Idaho's water is managed by the State's agency, Idaho Water Resources (IDWR). The agency, through its director, is responsible for the oversight of water rights administration and water use

appropriation (Water Banking, 2019). The state defines beneficial use as the use of water in "domestic use, irrigation, stock-watering, manufacturing, mining, as well as fish and wildlife." Water rights might be lost if the water rights owner has not used the water for a continuous period of five years. (Idaho.gov, 2022). The public has the responsibility to beneficially use the water for beneficial use, to serve their own purposes. The use may be for farming, and many other purposes, but the citizens are asked to steward the water well. The State has a distinct water use code that determines the priority of when the water was established and who gets the water when there is a shortage. If there is not enough water to be used, then the one who holds the senior water rights is satisfied first and then goes in order until there is no water left (Idaho.gov, 2022).

4.4.2. Public Interest

Idaho started requiring a public interest review for new appropriations in 1978 and then extended this review to transfer applications three years later (Weeks, 2010). Specifically, the Idaho Code authorizes the IDWR Director to reject, condition, or limit a water rights application if they find "that it will conflict with the local public interest as defined in section 42-202B, Idaho Code (Idaho Code § 42-203A (5)). Section 42-202B defines "local public interest" as the "interest that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource (Idaho Code § 42-202B (3)). Although the Idaho Legislature defined the public interest geographically, they did not create a list of statutory criteria to define what the public interest actually means. In absence of this definition, the courts have interpreted public interest in the State.

Idaho has other rules and regulations in place when it comes to water rights allocation and adjudication. The following two clauses for water right adjudication also apply to the public interest:

1. "Five or more or a majority of the users of water from any water system may petition the director to request the attorney general to file an action to commence a general adjudication. If the director deems that the public interest and necessity will be served by a determination of the water rights of that water system, the director shall request the attorney general to file an action to commence the general adjudication" (Idaho Code § 42-1405).
2. "If the director deems that the public interest and necessity will be served by a determination of the water rights of any water system, the director, upon his own initiative, may request the attorney general to file an action to commence a general adjudication" (Idaho Code § 42-1405).

There was a Supreme Court case in 1978, *Shokal v. Dunn,* in which the defendant Trout Co. applied for a water right permit to use water from Billingsley Creek for a fish farm and power generation, while the plaintiff, Edward Shokal filed various and numerous petitions against the decision. The case was taken to district courts, and further to the Supreme Court, and after IDWR granted the petition to Trout Co., the court reversed the decision based on two inadequate issues:

1. The financial ability of the Trout Co.
2. The local public interest with respect to the proposed water project.

The Superior Court found out that there were errors in the water code. The judge found that the petitioner did not have the "local public interest" defined in the water use that he proposed with his petition, under I.C. § 42-203A (Idaho Supreme Court, 1985). This case was prominent in Idaho's public interest definition as the Supreme Court of Idaho "incorporated public interest elements identified in the minimum stream flow statute into the definition of local public interest" (Weeks, 2010). In the case, the Idaho Supreme court considered the idea of "local public interest" broadly to include "more traditional public interest values such as fish and wildlife habitat, aquatic life, recreation, and water quality" (Squillace, 2020). The court also recognized public interest elements from Alaska's statutory definition of public interest, including "the project's benefit to the applicant, economic effect, harm to others, effect on access to navigable or public waters, the applicant's intent and ability to actually use the water, and the loss of alternative water uses" (Weeks, 2010). Lastly, the court recognized that public interest "should be read broadly in order to secure the greatest possible benefit from public waters for the public." In 2003, the Idaho Legislature narrowed this broad definition of the public interest to exclude secondary effects of water use (Weeks, 2010).

4.4.3. Future Use of Public Interest

The Idaho Water Supply Bank (IWSB) uses a clearinghouse to bring together willing buyers and sellers of excess water. (Bell, 2008). Future generations will benefit from the beneficial use of these systems to make sure that there is enough water for the state. The beneficial use of water in the state of Idaho will depend on the stewardship of the current resource. Having systems and organizations that manage the water well will increase the availability of water in future years, and have more people benefit. The future of Idaho's public water system, through the beneficial use of water from systems in place, like the IWSB, can ensure that there would be enough water for water rights appropriation.

4.5. Montana

Table 6. Summary of if Montana uses and defines public interest.

State	Public interest provisions in statute?	Use of public interest for water rights decisions?	Statutorily defines public interest?	Working to define public interest?	What authority is responsible for administering water rights?
Montana	No	-	-	-	Department of Natural Resources and Conservation

4.5.1. Water Administration, Management, and History

In 1972, Montana implemented in the state constitution clarification about water rights. Prior to 1972, Montana allowed a "use right" where anyone who diverted available water could apply it

to a beneficial use, and a less common "filed right" in county courts that only appropriated water within the county. The 1972 Montana Constitution clarification indicated that water in Montana is owned by the state and can only be owned by the state. In 1973, the constitution clarification was signed into law by the Montana Legislature as the Water Use Act. Articulated in this act, individuals and entities must apply for the ability to use any public water, and the public interest is directly tied to whatever the state deems important. Even later than that in 1979, Montana created the Water Court, a special district court with exclusive jurisdiction to determine the characteristics of existing water rights (University of Montana School of Law, 2014). The job of this court was to expedite and facilitate over 218,000 water rights cases in the state of Montana.

The current criteria in obtaining permitting to use water as stated in Section 85-2-311(1), MCA for less than 4,000 acre-feet per year and 5.5 cubic feet per-second is as follows:

1. Water is physically and legally available
2. Use will not adversely affect prior existing water rights
3. Diversion, construction, and operation are adequate.
4. The proposed use is beneficial
5. Possessory interest in place of use

For more than 4,000 acre-feet per year, the Department of Natural Resources and Conservation (DNRC) must determine if the use is "reasonable" (Section 85-2-311(3)). To establish a use as "reasonable," the DNRC considers the effects on the quantity and quality of water as well as investigates the potential adverse environmental impacts of the appropriation on minimum streamflow and aquatic life (Squillace, 2020).

4.5.2. Public Interest

For water rights over 4,000 acre-feet per year, the Department of Natural Resources and Conservation in Montana is responsible for the water right allocation, but Montana is unique in that there is no specific public interest review of water rights applications (Squillace, 2020). Overall, water rights in Montana are dominated by senior rights. The public interest must be directly tied to a water-right, and senior water rights hold precedence regardless of what they want to do with the water.

Montana, however, attempts to include public values in other ways when reviewing water rights applications. As noted above, water rights over 4,000 acre-feet per year are only approved if the use is considered "reasonable." During a review of a water permit application, the DNRC must take public comment and prepare environmental assessments to ensure that the water use does not adversely impact the environment to be considered reasonable (Squillace, 2020).

4.5.3. Future Use of Public Interest

Water is typically over appropriated in Montana, therefore defining public interest is not high on the state's list of priorities. Creating the water court illustrated Montana's intention to focus more on satiating as many water rights claims as possible as efficiently as possible. Defining public interest could potentially be detrimental to this goal if it slows the rate at which water claims are

made, but overall, its inclusion could help the state ease any concerns over water rights appropriations that may follow the current permitting criteria but might be detrimental to potential public interests.

4.6. Nevada

Table 7. Summary of if Nevada uses and defines public interest.

State	Public interest provisions in statute?	Use of public interest for water rights decisions?	Statutorily defines public interest?	Working to define public interest?	What authority is responsible for administering water rights?
Nevada	Yes	Yes	No	No	State Engineer, Division of Water Resources

4.6.1. Water Administration, Management, and History

Nevada's water law has been around since 1866, and it is based off of the prior appropriation doctrine while considering beneficial use. Nevada water law was intended to be flexible enough to allow growth throughout the state while protecting the rights of those who have water rights. (Nevada Water Law Overview, 2023). The Act of 1866 allowed anyone to pull water from a water source and gave those individuals right of way access though other landowner's property. Because of the mining booms and irrigation development in Nevada – a relatively dry state – some order had was needed to create some type of structure for allocating water rights. The first avenue for the state to gain control was to go through the court system, but this ended up taking a long time and was an expensive process. Hence, the State Engineer office was created through the Irrigation Act of 1903 to determine water rights throughout Nevada. The act also stated that all natural water sources that are not currently held by a private owner "belong to the public and are subject to appropriation for a beneficial use" (Welden, 2003). In addition to administering water rights for Nevada, the State Engineer also oversees dam safety and inspection, authorizes availability of water for new subdivisions, provides licensing for well drillers and water right surveyors, completes paperwork and files records on water right ownership, and represents the State on several commissions on the topic of interstate waters (Welden, 2003).

Currently, adjudication and application are two ways that a water right is established and authorized in the State of Nevada, and there are three procedural steps to go through when seeking a water right: adjudication, distribution, and appropriation. Appropriation will be the focus, though, because it is the step in the process that considers public interest. The current laws outlined in the NRS include how to appropriate both ground and surface water within Nevada. There are nine steps to be taken for the appropriation of water. To be put simply, the process starts with an individual filing an application to receive a water right, then the State Engineer either accepts or denies the application, and then the proper documentation must be completed and filed by all appropriate parties.

The State Engineer must consider three statutory criteria while reviewing applications, and they must deny an application if:

1. No unappropriated water is available in the proposed source of supply;
2. Conflicts with existing rights or with protectible interests in existing domestic wells are present; or
3. Approval of the application threatens to prove detrimental to the public interest (NRS 533.370)

OUTLINE OF STATUTORY PROCEDURES FOR APPROPRIATION OF WATER	
1	The person who desires to use water files an application, accompanied by a map prepared by a licensed water rights surveyor, with the Division of Water Resources.
2	A summary of the application is noticed in the newspaper.
3	A 30-day period beginning after the last date of publication exists for interested parties to file protests.
4	The State Engineer may hold field investigations and hearings relative to the application, if he deems these necessary.
5	The State Engineer grants or denies the application based primarily upon availability of supply, relationship to existing rights, and the public interest. Any aggrieved party may appeal the decision to the district court.
6	The State Engineer issues a permit to appropriate a specific amount of water at a specified point of diversion for use at a specified location. The permit also contains additional conditions and information, including the date of priority.
7	The permittee must file within specified time limits: a. Proof of completion of the works of diversion; and b. Proof of placement of the water to beneficial use.
8	Upon request, the State Engineer may grant extensions of time.
9	After all proofs have been filed and compliance with the other terms of the permit has been shown, the State Engineer records a certificate of the water right in his office and sends a copy to the permit holder.

Figure 1: Outline of Statutory Procedures for Appropriation of Water (Welden, 2003).

Additionally, the State Engineer must also make certain considerations when deciding to accept or approve applications for inter-basin transfers, including:

- Whether the applicant has justified the need to import the water from another basin;
- If the State Engineer determines that a plan for conservation of water is advisable for the basin into which the water is to be imported, whether the applicant has demonstrated that such a plan has been adopted and is being effectively carried out;
- Whether the proposed action is environmentally sound as it relates to the basin form which the water is exported;
- Whether the proposed action is an appropriate long-term use which will not unduly limit the future growth and development in the basin from which the water is exported; and
- Any other factor the State Engineer determines to be relevant (NRS 533.370).

The State Engineer policy around groundwater extraction is that they are only to permit additional withdrawals from a groundwater basin as long as the basin can recharge to natural maximum amount. Perennial yield is the term used to describe the water that is being taken out of the ground water basin, and if too much water is taken away from the basin, then groundwater levels will eventually be depleted over time. Furthermore, if groundwater levels are being depleted in a basin at a faster rate than water is being recharged, then the State Engineer may have to make decisions around which uses are most beneficial while making further decisions around groundwater basins in the area, including:

- Issue temporary permits to appropriate groundwater which can be limited as to time and which may, except as limited by subsection 4, be revoked if and when water can be furnished by an entity such as a water district or a municipality presently engaged in furnishing water to the inhabitants thereof;
- Deny applications to appropriate groundwater for any use in areas served by such an entity;
- Limit the depth of domestic wells;
- Prohibit the drilling of wells for domestic use, as defined in NRS 534.013, in areas where water can be furnished by an entity such as a water district or a municipality presently engaged in furnishing water to the inhabitants thereof; and
- In connection with the approval of a parcel map in which any parcel is proposed to be served by a domestic well, require the dedication to a city or county or a designee of a city or county, or require a relinquishment to the State Engineer, of any right to appropriate water required by the State Engineer to ensure a sufficient supply of water for each of those parcels, unless the dedication of the right to appropriate water is required by a local ordinance (NRS 534.120).

Nevada is an incredibly dry state with a growing population, and so some concerns around water rights and water access include over allocation of water rights and environmental concerns around instream flow and protecting wildlife habitat (Welden, 2003). Additionally, the federal government manages a significant portion of state land, (Harris, 2021) and there is worry that local control over water resource management may become more limited. Lastly, federally recognized tribes are beginning to take claim of water rights through adjudication proceedings throughout Nevada (Welden, 2003).

4.6.2. Public Interest

As stated above, the State engineer is responsible for processing water right applications, and included in the process is outlined in NRS 533.370 states that an application should be rejected if "approval … threatens to prove detrimental to the public interest". Although Nevada has been one of the first states to require consideration of the public interest for processing water permit applications, the state has not statutorily or legislatively defined what exactly it means. Because it has not been explicitly defined, determinations of what is or is not in the public interest have been appointed by the State Engineer with court oversight (Weeks, 2010). Because there is no lawful definition of the public interest, the State Engineer is limited in his interpretation by including "only those public values already codified in other water law statutes" (Weeks, 2010).

In 1992, the Nevada Second Judicial District Court essentially required the State Engineer to define the public interest. However, the State Engineer claimed that the public interest has already been defined throughout the state's water law and identified thirteen public interest principles within Nevada's water law statutes. This then took the burden off of the State Engineer to more explicitly define public interest because they stated that the current water law already defines it. *Pyramid Lake Paiute Tribe v. Washoe County* upheld the State Engineers' definition (Weeks, 2010). The thirteen principles are:

1. "An appropriation must be for a beneficial use" (NRS 533.030(1));
2. "[t]he applicant must demonstrate the amount, source and purpose of the appropriation" (NRS 533.335);
3. "[i]f the appropriation is for municipal supply, the applicant must demonstrate the approximate number of persons to be served and the approximate future requirements" (NRS 533.340(3));
4. "[tlhe right to divert ceases when the necessity for the use of water does not exist" (NRS 533.045);
5. "[t]he applicant must demonstrate the magnitude of the use of water, such as the number of acres irrigated, the use to which generated hydroelectric power will be applied, or the number of animals to be watered" (NRS 533.340);
6. "[in considering extensions of time to apply water to beneficial use, the State Engineer must determine the number of parcels and commercial or residential units which are contained or planned in the area to be developed, economic conditions which affect the availability of the developer to complete application of the water to beneficial use, and the period contemplated for completion in a development project approved by local governments or in a planned unit development" (NRS 533.380(4));
7. "[for large appropriations, the State Engineer must consider whether the applicant has the financial capability to develop the water and place it to beneficial use" (NRS 533.375);
8. "[the State Engineer may also cooperate with federal authorities in monitoring the development and use of the water resources of the State" (NRS 532.170(1));
9. "[the State Engineer] may cooperate with California authorities in monitoring the future needs and uses of water in the Lake Tahoe area and to study ways of developing water supplies so that the development of the area will not be impeded" (NRS 532.180);
10. "[rotation in use is authorized to bring about a more economical use of supplies" (NRS 533.075);
11. "[t]he State Engineer may determine whether there is over pumping of groundwater and refuse to issue permits if there is no unappropriated water available" (NRS 534.110(3));
12. "[the State Engineer] may determine what is a reasonable lowering of the static water level in an area after taking into account the economics of pumping water for the general type of crops growing and the effect of water use on the economy of the area in general" (NRS 534.110(4));
13. "[w]ithin an area that has been designated, the State Engineer may monitor and regulate the water supply" (NRS 534.110(6)).

This definition allows for four general considerations to be made in denying a water right application, such as:

1. Failure to demonstrate intent to place water to beneficial use;
2. Lack of unappropriated water or conflict with existing rights;
3. Lack of interest in pursuing the application; and
4. Failure to demonstrate ownership of a water right or existing water to transfer (Weeks, 2010).

Criticisms of using these thirteen principles is that the definition of public interest is too narrow to have any real substance, and it's just a summary of water law that is not connected to public interest on a larger scale (Brown, 2012). When the State Engineer denies an application, they often claim that it is in violation of one of these principles rather than denying it because it is not in the public interest. Since 2007 the State Engineer has expressed that the public interest has the ability to change over time, and so they have taken a more strategically conservative approach to deny an application on a principle that is already embedded in the law rather than on public interest alone (Weeks, 2010).

4.6.3. Future Use of Public Interest

Nevada has several programs available to include individuals outside of the State Engineer's office for making decisions on water rights concerns. The Nevada Division of Water Resources (NDWR) has a Well Drillers' Advisory Board where the five members on the board examine and interview potential licensees on their experience and expertise to provide a recommendation to the State Engineer on whether applicants should have a license for well drilling. Additionally, the board is involved in advising the NDWR on enforcement and complaints on well drillers and may make recommendations to the State Engineer on license suspension or revocation (Programs: Well Drillers-Advisory Board, 2023). Another program within the state called the Source Water Protection Task Force partners with several government agencies including NDWR, and "the goal of the Task Force is to expand connections between multiple partners surrounding Source water and watershed resources" (Source Water Protection Task Force, 2021). The purpose of the task force is to protect the quality of water from pollution so that it can be used as future drinking water. It seems to be a fairly new task force in Nevada, and there is not much information available about what types of projects it has been working on recently.

Based on the written responses received from one Nevada administrator, there is no interest in redefining or further defining the public interest for water rights. However, based on what is available online, there are efforts to involve individuals and communities in the decision-making process for concerns on water rights throughout the state. Though this is not explicitly defining public interest, because the public is involved, the public interest is inherently considered in future water right activities.

4.7. Oregon

Table 8. Summary of if Oregon uses and defines public interest.

State	Public interest provisions in statute?	Use of public interest for water rights decisions?	Statutorily defines public interest?	Working to define public interest?	What authority is responsible for administering water rights?
Oregon	Yes	Yes	Yes	-	Water Resources Department

4.7.1. Water Administration, Management, and History

Oregon has recognized that water is a publicly owned resource since the beginning of the State (Blumm, 2011). This was named by the authority of the court system in Oregon. Since 1860's, Oregon Supreme courts have ruled in favor of public rights in waterways, maintaining that water should be public highways and not "hogged" by private parties (Blumm, 2011).

Oregon has an established water code that was enacted in 1909 and "currently codified in chapter 536 to 558 of the Oregon Revised Statutes." Policies and laws are administered by the Oregon Water Resources Department (OWRD), and the director under the direction of the Oregon Water resources Commission (OWRC), appointed by the Governor. Their law treated groundwater and surface water separately, which were governed by the same riparian rules applied to the surface watercourses (Shively v. Hume 1881; Neuman, et. al 2014).

Oregon's law defines that the use of surface or groundwater requires a permit from the OWRD. The WRD performs water availability analysis before granting the permits. Water rights may be sought for any beneficial use, unless the source of the water has been withdrawn from further appropriation or has been classified for other limited uses or quantity of uses. (Neuman, et. al 2014).

Oregon's Transfer statutes and rules don't require a public interest review. Rather, the criteria for approval of a Transfer Application are (Oregon Legislature Bills, 2021):

- The water right proposed for transfer must be a "water use subject to transfer" as defined in ORS 540.505
- The portion of the water right proposed for transfer has been beneficially used over the past five years according to the terms and conditions of the right and is not otherwise subject to forfeiture under ORS 540.610 (…nor cancelled pursuant to ORS 540.610)
- The water user is ready, willing and able to use the full amount of water allowed under the right
- The proposed transfer would not result in enlargement of the right that is to be transferred
- The proposed transfer would not result in injury to other existing water rights
- Any other requirements are met, such as the application and map are complete, ownership information has been submitted and verified, it's been verified that a proposed

change in point of diversion/appropriation will take water from the same source/aquifer as the original point of diversion/appropriation, etc.

4.7.2. Public Interest

Oregon made some major steps in incorporating public interest in the western states, as it "was the first state to define the public interest in its water permit statute" (Grant, 2006). Proposed water rights can only be approved if they do "not impair or [are] detrimental to the public interest" (OR. REV. STAT. § 537.153(2)). Oregon law goes on to say that "If the presumption of public interest under ORS 537.153 (2) is overcome, then before issuing a final order, the directo or the commission, if applicable, shall make the final determination of whether the proposed use or the proposed use as modified in the proposed final order would impair or be detrimental to the public interest by considering:

- Conserving the highest use of the water for all purposes, including irrigation, domestic use, municipal water supply, power development, public recreation, protection of commercial and game fishing and wildlife, fire protection, mining, industrial purposes, navigation, scenic attraction or any other beneficial use to which the water may be applied for which it may have a special value to the public.
- The maximum economic development of the waters involved.
- The control of the waters of this state for all beneficial purposes, including drainage, sanitation and flood control.
- The amount of waters available for appropriation for beneficial use.
- The prevention of wasteful, uneconomic, impracticable or unreasonable use of the waters involved.
- All vested and inchoate rights to the waters of this state or to the use of the waters of this state, and the means necessary to protect such rights.
- The state water resources policy formulated under ORS 536.295 to 536.350 and 537.505 to 537.534." (OR. REV. STAT. § 537.170(8)).

This statutory definition is unique among Western states. All applications must go through a public interest review by OWRC, which includes consideration of any comments or protests. Anyone can file a protest for evidence if they believe the application is detrimental to the public interest (Squillace, 2020). Also, all water rights applications require information regarding potential impacts to sensitive, threatened, or endangered species as well as potential impacts to water quality (Squillace, 2020).

4.7.3. Future Use of Public Interest

"Oregon is unique for the multitude of interests served by the state's water resources: fish and wildlife, Tribal, municipal and industrial, agricultural, recreational, flood control, and hydropower are among the uses that rely on water" (Jamin, 2022). The State's perspective on water management is incumbent upon the right stewardship of the current water resources that are in the State. When Oregon takes care of the resources that are there, then, since "demand

keeps increasing, but supply is diminishing" (Jamin, 2022), the department of water resources will be tasked with managing the water for future generations.

4.8. Utah

Table 9. Summary of if Utah uses and defines public interest.

State	Public interest provisions in statute?	Use of public interest for water rights decisions?	Statutorily defines public interest?	Working to define public interest?	What authority is responsible for administering water rights?
Utah	Yes	Rarely	No	No	State Engineer, Division of Water Rights

4.8.1. Water Administration, Management, and History

The basis for Utah's current water law was established by Mormon colonizers in 1847. They followed the same principles as many other western states by establishing prior appropriation for water rights. Because water is such a valuable resource in an arid state like Utah, the colonizers began work almost immediately to irrigate and develop the land. Before proper secular law was established, the Church of the Latter-Day Saints (LDS) was responsible for "the development and administration of water" by church leaders (Olds, 2004). Most decisions on the irrigation of water and water rights in general were based on community interdependency, and the two principles that developed – with direction from the LDS Church – were:

1. "Mutual cooperation in the development of the water diversion" (Olds, 2004); and
2. Establishing prior appropriation from a water source.

These two principals were considered as the doctrine of appropriation and recognized that water in its original source is public property, and those who have acquired a water right must put it towards a beneficial use.

In 1852, the Territorial Legislature in Utah readjusted control over water right allocation from the LDS Church to county courts. The courts were then to administer water rights based on "public interest, common sense and on-site inspection of projects as well as by legal case law" (Olds 2004). This legislation recognized those who already had established water rights while also providing an application process for those who wanted newer water rights. The legislation was ended in 1880 and was not applied in every county. The next important law that was passed in 1880 for Utah water law was called "An Act for Recording Vested Rights to the Use of Water and Regulating their Exercise", which established water commissioners at the county level to evaluate all concerns related to water rights. However, during the time that this law was established from 1880 until 1897 there was no proper avenue to record new water appropriations in the state (Olds, 2004).

Utah officially became a state in 1896, and legislation was passed in 1897 to establish the State Engineer's Office to "appropriate water and other related provisions" (Olds, 2004). In 1903 the first comprehensive water law was established that gave the State Engineer almost compete authority over all water administration in the state. The new set of laws were mostly consistent with the previous statutes around water law and allocation, and it included recognizing that water in its natural stream was public property, a water right must be put towards a beneficial use, and if a water right is not used to its full extent then the right may be taken away and given back to the State. Additionally, the laws established an application process for water rights, as well as providing an avenue to go through the courts if the application is denied. With these laws, the State Engineer was also required to create hydrographic surveys of all natural water sources in the state, submit them to the district court, and allowed for individuals who had a water right to stake their claim to what had previously been established essentially starting the process for adjudication procedures (Olds, 2004).

Over the years, the water law has been repealed, amended, and altered but the basic structure of the 1903 law has remained. Lastly, the courts and the State Engineer have been and will continue to be weaved together throughout this complex process of making decisions around water rights and water law. "All decisions of the state engineer are subject to judicial review by the courts" and the law may be altered to best address any issues that are addressed by this process (Olds, 2004).

4.8.2. Public Interest

Similar to several other western states, a state engineer allocates water rights, and rather than using the term public interest Utah Code uses the term public welfare. The State Engineer will provide a water right as long as it does not impede more senior water rights and "would not prove detrimental to the public welfare" (Utah Code 73-3-8). However, "detrimental to the public welfare" has never been defined by the state, and water right application forms have no mention of "public interest, public welfare, or public values, and the State has no clear practice of conditioning permits to protect the public values associated with Utah's water resources" (Squillace, 2020). The full Utah Code73-3-8 used to determine the approval or rejection of water rights affirms that:

> It shall be the duty of the state engineer to approve an application if there is reason to believe that:

1. for an application to appropriate, there is unappropriated water in the proposed source;
2. the proposed use will not impair existing rights or interfere with the more beneficial use of the water;
3. the proposed plan:
4. is physically and economically feasible, unless the application is filed by the United States Bureau of Reclamation; and
5. would not prove detrimental to the public welfare;
6. the applicant has the financial ability to complete the proposed works;

7. the application was filed in good faith and not for purposes of speculation or monopoly; and
8. If applicable, the application complies with a groundwater management plan adopted under Section 73-5-15.

The topic of public interest has recently been a controversial issue in Utah, especially because the Great Salt Lake Basin was recorded as having the lowest water levels ever recorded in 2022. The Utah State Engineer office rarely bases its water right appropriation decision based on public welfare alone, mostly because it is not concretely defined. Administrators are worried that any decision that uses public welfare may go to the courts for a decision, and they believe that this is not the court's place to decide these matters rather it is the place of the State's elected officials (Bingham, 2023). Utah's courts tend to be more conservative, and because of the uncertainty that court decision may have, there is administrative support in going through the legislature. This is because the path allows for more conversations to happen around the complexities of water rights and public welfare. However, even though the State Engineer has been careful in making a decision on public welfare, several key court decisions have created somewhat of a structure in providing legal guidance. *Tanner v. Bacon* authorized the State Engineer to accept or reject an application "in the interest of the public welfare", and *Bonham v. Morgan* allowed for the process to be the same for both a water right application and a water right transfer, as long as the water right is not "detrimental to the public welfare" (Squillace, 2020). A more contentious court case was *HEAL Utah v. Kane Co. Water Conservancy District* in which the State Engineer appropriated a water right to a nuclear power plant because it was being put to beneficial use. HEAL Utah argued that in allowing a nuclear power plant to use a water right in this way was against the public welfare, but the courts disagreed and the appropriated water right "would not prove detrimental to the public welfare" (HEAL Utah v. Kane Co. Water Conservancy District). It is challenging decisions like this one that worry administrators in what other future court cases might decide in the State of Utah.

4.8.3. Future Use of Public Interest

Currently public interest – or public welfare – is not concretely defined in Utah's water rights laws. There is an argument to be made about the need to define what public welfare is, and whether it is worth the battle that lays ahead among state administrators, legislators, and diverse stakeholders. Creating a strict definition might create winners and losers among the many stakeholders which might further polarize the purpose of water right allocation. Additionally, with urbanization in Utah increasing and farming generally decreasing throughout the state, predictions suggest that in the long term a stable water supply exists in the Greater Salt Lake Basin (Manning, 2023). Short term fears may overshadow long term trends, and so debating the need for defining public welfare may not be a beneficial use of time for all those who would be involved.

Another way that Utah has been considering this issue has been implementing an executive water task force for individuals to work with the legislature to participate in the water legislation process (Bingham, 2023). This task force has been around for about twenty years at this point,

and there are between nine and eleven members who represent different interest grounds, including agriculture interests, municipal interests, environmental interests, etc. The purpose of this task force is to understand the legislation that is being brought forward, and to craft a recommendation for the governor to decide about the proposed bill. Some conflict has arisen from this task force in several ways. Sometimes Utah House members and Senators may feel frustrated at this executive task force without having their own legislative water task force. However, this was set up because there is a little more regularity with the governor while there may be more turnover in the legislature to keep the conversations consistent over time. The task force has started grappling with this issue because of the low water levels in the Great Salt Lake, but the subcommittee has not really gotten any ground in moving forward with their recommendation. The largest issue that they face is needing to protect constitutional property rights, and it is almost impossible to protect constitutional rights while getting more water in the Great Salt Lake" (Manning, 2023). Although the task force is not explicitly involved in defining the public interest in water rights, it represents a way that the public is involved in water right decisions. In turn, one might interpret that this stakeholder involvement with the task force is an application of the public interest in Utah water rights at large.

4.9. Wyoming

Table 10. Summary of if Wyoming uses and defines public interest.

State	Public interest provisions in statute?	Use of public interest for water rights decisions?	Statutorily defines public interest?	Working to define public interest?	What authority is responsible for administering water rights?
Wyoming	Yes	Rarely	No	No	State Engineer's Office

4.9.1. Water Administration, Management, and History

Wyoming's first water laws were enacted in 1875 with more comprehensive laws adopted alongside the State's constitution in 1890 (Tyrrell, 2001). The State constitution declares all water in Wyoming as the property of the state. As with other Western States, water in Wyoming is managed under the prior appropriation doctrine and administered by the State Engineer. Water rights must be acquired by securing a permit from the State Engineer. To secure a permit, applicants must submit evidence to the State Engineer that the water right is a beneficial use, unappropriated water is available, adequate diversion facilities exist, and that the proposed use will not impair the value of existing rights (WYO. STAT. ANN. §§ 41-4-501–503). Once an applicant is issued a permit, the applicant must beneficially use the water within the time specified on their permit and then submit final proof to the State Engineer's Office, which then inspects the project (Tyrrell, 2001). If no protests are filed, the water right is considered adjudicated, and a certification of appropriation is issued (Tyrrell, 2001).

In 1986, Wyoming adopted the Wyoming Instream Flow Law, which allows the Wyoming Game and Fish Commission to protect fish and wildlife habitats in streams and rivers throughout the state (WYO. STAT. ANN. §§ 41-3-1001–10014). As with other water rights, the instream flow

rights have a priority date of the application, making them junior to all older water rights. However, this system has been critiqued for making instream rights difficult to secure and defend for several reasons, including (1) certain stretches of streams and rivers are not protectable, (2) the state encourages the construction of dams to release water for instream flows, (3) instream flow rights are limited by interstate compacts, (4) instream rights can be condemned by a city or town for municipal purposes, (5) only the Wyoming Game and Fish Commission can file applications for instream flows with no mechanism for private involve, and (6) temporary transfers to instream use are not allowable (Boyd, 2003).

4.9.2. Public Interest

Several of Wyoming's water laws require the State Engineer to consider the public interest when granting or denying water right applications (Brown, 2012). Specifically, the Wyoming constitution requires the state to deny water rights that are contrary to the public interest. The constitution states that "no appropriation shall be denied except when such denial is demanded by the public interest." This idea is reinforced by the State's statutes governing water rights applications. The Wyoming state engineer must deny surface water (WYO. STAT. ANN. § 41-4-503) and ground water (WYO. STAT. ANN. § 41-3-932) rights applications that are "detrimental to the public welfare" or "threaten to prove detrimental to the public interest." Other statute specifically describing the inclusion of public interest in water management, include:

- Water Planning: Wyoming Statute ANN. § 41-3-901 requires the Wyoming Water Development Commission to develop and periodically update a comprehensive state water plan that addresses the current and future water needs of the state. The plan is required to consider the public interest, including the needs of all water users, the environment, and economic development.
- Adjudication of Water Rights: Wyoming Statute ANN. § 41-3-802 requires the Wyoming State Engineer to consider the public interest when adjudicating water rights. The statute directs the State Engineer to ensure that water rights are allocated in a manner that is in the public interest.
- Conservation Programs: Wyoming Statute ANN. § 41-3-921 provides for the establishment of water conservation programs that promote efficient and sustainable water use. The statute directs the Wyoming Water Development Commission to develop and implement these programs, which are designed to benefit the public by protecting water resources and ensuring that water is used efficiently.

Administrative regulations regarding water appropriations in Wyoming also consider the public interest. Wyoming Water Administrative Rules (ch. 1, § 4(a), (c)) describe that "use [of water] is always limited to a concept of public interest" and that the "State Engineer may deny or modify an application for permit if he or she determines that granting of an application would be injurious in some respect." The same idea exists for Wyoming's Groundwater Rules (ch. II, § 2(c)), insisting that applications "shall be granted as a matter of course, if the proposed use is beneficial and would be in the public interest."

However, the state legislature, the courts, nor the State Engineer's office has defined public interest in this context (Squillace, 2020). Brown (2012) writes that the same laws requiring the State Engineer to consider the public interest "provide little guidance about what the public interest means in Wyoming." The State Engineer's Office uses a checklist to review water rights applications, however, public interest is not included as a criterion (Squillace, 2020). State Engineer from 2001 to 2019, Pat Tyrell, described public interest in an interview as "poorly defined in our statute" and too amorphous to be considered at the permitting state (Squillace, 2020). He went on to say that the permits are never rejected for public interest reasons. When prompted, Tyrell acknowledged that the State has never considered adopting rules to define the public interest and insisted that the current process grants water rights based on the best use of water at the time of the decision while ignoring possible future needs (Squillace, 2020). Squillace (2020) notes that because of the lack of guidance, the State Engineer's office has largely ignored the public interest standard laid out in Wyoming water law.

Two Wyoming case law examples illustrate how public interest has been considered in the state over time:

- *Big Horn Power Co. V. State, 148 P. 1110* (Supreme Court of Wyoming 1915) agreed with the State Engineer's decision to reject the applicant's request to build a dam based on public interest. The dam would have powered the surrounding mining community but would have increased railway transportation costs and the costs of delivering water through canals and reservoirs. The State Engineer rejected the power plant because the dam's location was flexible while the railway and canal locations were fixed. The State Engineer saw the dam as a threat to the cost of transportation and therefore would be detrimental to the public interest from an economic perspective (Brown, 2012).
- *William F. West Ranch v. Tyrell, 206 P.3d 722, 729-30 (Supreme Court of Wyoming 2009)* consisted of plaintiffs suing the State Engineer for failing to consider the public interest when they approved the appropriation of groundwater for the extraction of coalbed methane. The plaintiffs, consisting of ranchers in the Powder River Basin, complained about water pollution and flooding due to water releases associated with coalbed methane wells (Squillace, 2020). The Court dismissed the claim, finding that it was "too amorphous to be justiciable" and that they could not find how a finding would "have a practical effect on the plaintiffs." The court went on to say that it "is not the function of the judicial branch to pass judgement on the general performance of other branches of government" (Weeks, 2010).

4.9.3. Future Use of Public Interest

According to the Wyoming State Engineer's Office, there are no plans to define public interest at this time (WYSEO, 2023). In absence of a definition, Brown (2012) provided the State Engineer's offices with the following criteria to consider, based on Wyoming water law, when evaluating the public interest for appropriation decisions:

1. The advice of the elected Control Area Advisory Board (Wyo. Stat. Ann. § 41-3-932(c)).

2. The impact of the proposed use on the source of supply taking into account the State‘s policy to conserve its underground water resources (Wyo. Stat. Ann. §§ 41-3-909, 41-3-115(n)(i) & (ii)).
3. The amount and priority of other existing claims to the resource, and whether the proposed appropriation will impact those claims (Wyo. Stat. Ann. §§ 41-3-914, -936, 41-4-503).
4. Whether the appropriation will preclude alternate, preferred uses of water that might be made within a reasonable time (Wyo. Stat. Ann. §§ 41-3-906, -907, -911; 41-3-115(r)(viii))
5. The economic benefits or losses to the applicant, the state and any other interests involved from the proposed appropriation (Wyo. Stat. Ann. § 41-3-104(a)(i) & (ii); Wyo. Const. art. 1, § 31).
6. Whether other sources of water are available for the proposed use (Wyo. Stat. Ann. § 41-3-104(a)(iii)).
7. Whether the proposed use will contribute to the pollution of groundwater (Wyo. Stat. Ann. § 41-3-909(a)(viii)).
8. Whether any permit conditions are necessary and adequate to properly guard the public interest (Wyo. Stat. Ann. § 41-3-933).

Chapter 5: Western State Water Right Discussion

All of the states included in this report, except for Colorado and Montana, require a public interest review when considering new water right permits and transfers (Table 11). However, most of these states do not statutorily define what the public interest is, with the notable exceptions being Oregon and Alaska. This has created very different approaches in how water management agencies deal with statutory silence regarding public interest, for example,

- Colorado and Montana do not use public interest but have water courts, which differ from the other states. Colorado uses water courts to appropriate water rights while Montana uses their water courts to establish the characteristics of existing water rights.
- Based on the Idaho Supreme Court's broad interpretation of "local public interest," Idaho includes a wide range of public interest values when determining whether a decision is in the public interest.
- Nevada uses a narrow set of criteria found in water law statutes that has been held up in the state Supreme Court as a public interest definition.
- Arizona and Utah must consider public welfare by law, but there is no established definition for what public welfare is. Utah, Arizona, and Wyoming rarely consider public interest in water management decisions.
- Wyoming has not defined public interest and considers it to be too "amorphous to be justiciable."

Table 11. Summary of if Western states have, use, define, and/or are working to define public interest in water management.

State	Public interest provisions in statute?	Use of public interest for water rights decisions?	Statutorily defines public interest?	Working to define public interest?	What authority is responsible for administering water rights?
Alaska	Yes	Yes	Yes	-	DNR
Arizona	Yes	No	No	No	DWR
Colorado	No	-	-	-	Water Courts
Idaho	Yes	Yes	No	No	DWR
Montana	No	-	-	-	DNRC
Nevada	Yes	Yes	No	No	State Engineer, DWR
Oregon	Yes	Yes	Yes	-	WRD
Utah	Yes	Rarely	No	No	State Engineer, DWR
Washington	Yes	Yes	No	Yes	ECY
Wyoming	Yes	Rarely	No	No	State Engineer's Office

Alaska and Oregon define public interest in statute with similar approaches. Both states' definitions are expansive and call on agency decision-makers to balance a wide range of public and private interests when making a water right decision (Table 12).

Table 12. List of characteristics found in Alaska and Oregon's public interest definition (AS 46.15.133; OR. REV. STAT. § 537.153(2)).

Characteristic	**Alaska** (AS 46.15.133)	**Oregon (**REV. STAT. § 537.153(2))
Economy	• "the effect of economic activity"	• "maximum economic development" • "protection of commercial and game fishing" • "irrigation...power development...mining, industrial purposes"
Beneficial Use	• "the benefit to the applicant" • "the effect of loss of alternate uses of water"	• "other beneficial use to which the water may be applied" • "prevention of wasteful, uneconomic, impracticable, or unreasonable use"
Environment	• "The effect on fish and game resources"	• "protection of commercial and game fishing and wildlife, fire protection" • "drainage, sanitation, and flood control"
Recreation	• "the effect on … public recreational opportunities"	• "Conserving the highest use...including...public recreation...game fishing...scenic attraction"
Navigation	• "the effect upon access to navigable or public water"	• "Conserving the highest use...including...navigation"
The public	• "harm to other persons"	• "All vested and inchoate rights"
Other	• "effect on public health" • "intent and ability of the applicant to complete the appropriation"	• "domestic use, municipal water supply" • "amount of water available"

Most of the states without a public interest definition are not considering defining it. However, in response to this statutory silence, several states are considering a clearer set of guidance in how to use public interest in water rights decisions. This is less of a definition, and more of an established framework for moving forward in future decisions.

- Even though Colorado does not use the public interest in appropriating water rights, it is working to incorporate similar ideas to public interest in grass roots initiatives involving decision makers such as the state legislature. There is also a small push to include public interest standards with the water courts system to accommodate climate change and population growth.
- Nevada has two initiatives to help with the future of water right allocation in the state. They have established a Well Drillers' Advisory Board to make decisions on licenses for well drilling and have a Water Protection Task Force to protect water quality for prospective consumption.
- Utah is currently having its own conversation on whether the state will benefit from defining the public interest. An executive task force has been established where multiple interests are represented to better understand proposed legislation before proposing recommendations to the governor. Right now, there is some worry that because there's no definition, when an application is denied on the grounds of public interest, the case will

go to the courts who do not have the technical background on water rights to make a well-informed decision.

- Arizona, Idaho, Montana, and Wyoming are not working on defining public interest, and do not have similar collaborations or grass roots initiatives that other states are trying to establish.

Chapter 6: In State (Washington) Research

This chapter presents our results from the literature review and interviews with Washington State Tribes and stakeholders. This consists of examining Tribes and stakeholders' perceptions of how public interest is used in Washington state and how public interest should be used going forward. We included a diverse set of interests throughout the state, including environmental, legal, and Tribal interests. We also include perspectives from local governments at the municipal and county levels from across the state. Each person that we spoke with shared their unique perspective on water rights and defining the public interest, and disclosed their concerns about what water management will look like in the future.

6.1. Perception of Public Interest Use in Washington State

This sub-section presents how different Tribes and stakeholders understand what public interest is and perceive how it is used in water management in Washington State. Generally, the interviewees believe that considerations of public interest are important and influential factors when allocating water rights. The four-part test was referenced in most interviews as the basis for where public interest plays a role in Washington's water law. A smaller subsection of interviewees noted that public interest has more recently started playing more of a role in water rights decisions. Specifically, a water rights consultant commented that historically, the public interest test in Washington was quite weak, but now Ecology is using it to create a higher level of scrutiny, noting that we are undergoing a time where the understanding of public interest is ever changing. A lawyer interviewed referenced RCW 90.54.020, which lays out the fundamentals of water management in the state, as the closest definition Washington has for public interest.

Interviewees had mixed perceptions on whether Ecology was making correct judgment calls in their decisions to either approve or deny applications in the public interest (although the term "correct" has different interpretations). Most interviewees agreed that public interest is a challenging concept to use without a definition or criteria and that it has become flexible in its implementation. We heard from some interviewees that they think public interest is being utilized well by the state considering the vagueness of the laws and the discretion with which Ecology must implement it. Some interviewees were more neutral and said that Ecology has made both correct and incorrect public interest decisions throughout the years. These interviewees mentioned that they think Ecology truly has all Washingtonians in mind and they have done a good job determining what is not in the public interest. The third theme we heard from interviewees was that they think that Ecology has started to use the public interest in unprecedented ways that could be detrimental to water management in the state.

6.2. Impacts of How Ecology Currently Uses Public Interest

Across the board, questions around the impacts of Ecology's current use of public interest were the most controversial. While many participants that were interviewed did not have an opinion

on the matter, a number of interviewees believed that there are significant shortcomings with how Ecology applies the public interest. Common themes include:

- Lack of predictability in decisions made by Ecology,
- concern around the consistency of decisions,
- a lack of clarity in what is considered as the public interest in these decisions,
- an incomplete approach that neglects to consider all relevant considerations and varied interests,
- longer permitting process due to uncertainty around public interest, and
- subjective criteria gives way to subjective authority.

Several interviewees called the current use of public interest too subjective and subject to change. These interviewees mentioned that water right applicants must take on a lot of risk and upfront costs, which makes the process seem unfair since they do not know what criteria will be used. One interviewee, a representative for the Washington Association of Counties, mentioned that the current system makes it so that "people do not know the rules of the game" (Jewell, 2023). Other interviewees expressed similar concerns and suggested that this creates an environment of distrust in how Ecology reviews applications and implements their public interest test.

There were some other more nuanced perspectives on how Tribes and stakeholders perceive the impacts of Ecology's use of public interest. Several interviewees suggested that there are not enough cases where Ecology has made a public interest-based decision. These interviewees mentioned that because most basins are over-appropriated, applications are often denied for other criteria outlined in the four-part test and most rejections do not make it to part four - the public interest test. Lastly, a smaller number of interviewees suggested that these emerging conversations on public interest are beneficial because it provides stakeholders and Tribes an opportunity to engage with Ecology and balance the needs of the public.

Finally, several interviewees mentioned the Golden Eagle decision as a recent example of how Ecology's use of public interest can have far reaching impacts. Most of the respondents that mentioned Golden Eagle in their interviews were concerned about the impact the decision will have on the future of water management in Washington. A water right consultant called it an "unprecedented decision" because never before has someone not been able to use the TWRP and a valid right for mitigation as proposed (Haller, 2023). A common concern was whether there will now be time limits on how long someone can keep a water right in Trust before taking it out, or until public interest changes what future uses it is eligible to be used for. Based on their interpretation of the decision, these interviewees were concerned that a water right holder who has part or all their water right in the TWRP, will not be able to take it out for a separate purpose in the future. However, one interviewee found this anxiety to be unfounded, and thinks that those who are concerned are misinterpreting Ecology's decision to deny the Golden Eagle application.

6.3. How Should Ecology Move Forward in Their Definition?

This sub-section describes how stakeholders and Tribes think Ecology should define public interest if at all. First, we look at how stakeholders and Tribes have officially commented on public interests. Second, we list common characteristics that stakeholders and Tribes would like to see in a public interest definition. Lastly, we describe the perceived advantages and concerns stakeholders and Tribes have by defining public interest.

6.3.1. Official Comments on Public Interest Recommendations

In a 2022 report, titled "Water Right Transfers, Water Banking, and Trust Legislative Report," Ecology asked the Legislature to consider defining the public interest in statute and prescribing criteria for how to evaluate the public interest in water rights decisions (Ecology, 2022). Ecology sought public comments on the report in 2022 some of which were directed at the question of defining public interest. The comments on that policy that are specific to the public interest are discussed in this section.

Of the stakeholders and Tribes that provided commented on Ecology's 2022 report, some supported defining public interest in statute while others opposed it (Figure 2). Those in support of a definition supported it for several reasons. The Swinomish Indian Tribal Community, Stillaguamish Tribe, and the Port Gamble S'Klallam Tribe supported a definition but only if it supports the protection, restoration and recover of fish species. The Stillaguamish Tribe also notes that a definition, which will provide "further guidance from the legislature on how to properly invoke PI or OCPI when making water decisions would be helpful" (Stillaguamish Tribe, 2022).

Two commenters supported defining public interest but for other reasons. The Chelan County Public Utility District supported a definition to provide Ecology staff with "appropriate guidance to make consistent decisions" (CCPU, 2022). They commented that "in light of Ecology's draft decision on U.S. Golden Eagle/Darrington, it appears that legislation or rulemaking is necessary to address the full range of public interest criteria that Ecology will rely on in making a 'public interest' determination for a trust water right" (CCUP, 2022). The Methow Valley Citizens Council wrote in their comment that they "supports defining the criteria for public interest evaluations" but did not mention their reasoning (MVCC, 2022).

Some Tribes and stakeholders have stated that they opposed defining the public interest. The Muckleshoot Tribe wrote in their comment that they oppose a definition because they "are concerned that the Legislature will choose to make the definition and criteria a balancing issue such that a private interest is equal to or greater than the public good or Tribal treaty rights" (Muckleshoot, 2022). The Squaxin Island Tribe agreed, writing in their public comment that they are concerned that the legislature would "prioritize consumptive water uses over instream flows" in their definition and that it could "alter court decisions that currently further the streamflow protective goals" (Squaxin Island Tribe, 2022). Some environmental groups also wrote comments opposing defining the public interest. The Center for Environmental Law and Policy commented that they believe defining the public interest "would remove the intentional

flexibility that the current system gives Ecology" and that Ecology "has the information and authority it needs to determine the public interest in each scenario" (CELP, 2022).

Written comments in 2022 report to the Legislature	Supported Defining Public Interest	Opposed Defining Public Interest
For environmental and Tribal reasons	• Swinomish Indian Tribal Community • Stillaguamish Tribe • Port Gamble S'Klallam Tribe	• Muckleshoot Tribe • Squaxin Island Tribe • Center for Environmental Law and Policy
For other reasons	• Methow Valley Citizens Council • Public Utility District of Chelan County	• Benton and Franklin County Water Conservancy Board • Yakima Basin Joint Board • Washington State Water Resources Association

Figure 2. This Matrix presents information from public comments from Ecology's (2022) report. The matrix shows which Stakeholders and Tribes supported or opposed defining public interest and if it is for an environmental and/or Tribal reason or for another reason. Note that several Tribes and stakeholders that provided public comment did not support or oppose defining public interest and instead provided recommendations on what they would like to see in a public interest definition if defined. These Tribes and stakeholders included Confluence Law, Seattle Public Utilities, and the Confederated Tribes of the Colville Reservation (Ecology, 2022).

The Benton and Franklin County Water Conservancy Board opposed a definition of public interest for a different reason, stating that "the desire to now redefine a "public interest" test for water right changes/transfers are totally disingenuous and seeks to strip away basic citizen rights to property and the protection thereof. Here again, the bureaucratic machine seeks to manipulate long-agreed-to principles for what constitutes the public interest, by trampling private property rights and legitimate water markets" (BFCWCB, 2022). The Washington State Water Resources Association agreed, commenting that "Any attempt at redefining the public interest definition only causes uncertainty and will not serve the interests of the public. There will be no consensus on the definition, and any definition will still be analyzed and subjective based on the opinion of the person or entity applying the test. A new definition only increases the time and costs of any entity proposing a transfer" (WSWRA, 2022). The Yakima Basin Joint Board and its members also believed that defining public interest would cause uncertainty and that the criteria would still be subjective (YBJB, 2022).

6.3.2. Public Interest Definition Characteristics

Most of the stakeholder and Tribal interviewees agree that Ecology should define public interest while a smaller group thinks that the current system works best. Among those that would like to see a public interest definition, they all think different characteristics should be included (Table

13). This sub-section pulls together information gathered from interviews as well as from public comments on Ecology's 2022 report and describes common themes among stakeholders and Tribes regarding a public interest definition.

Table 13. List of characteristics stakeholders and Tribes would like to see in a public interest definition and their reasoning.

Definition Characteristic	**Why?**
Objective	• The current system is too subjective • Water users spend a lot of time and resources and should be able to know what to expect
Binary	• Easier to implement
Flexible	• Water needs and issues will change over time and water management should be able to change as well • With climate change, we need to be prepared to make tradeoffs in the future • Ability to evolve over time because public interest is always changing as population changes
Holistic	• Includes more than just environmental interests such as climate risk and affordability
Driven by a Local and Tribal Process	• The needs of different parts of Washington are so different from a water perspective and public interest should reflect that • Must consider stakeholders in each watershed because water as a resource is not uniform across the state • Particular focus must be given to Tribes in each watershed to include their input • Concerns that a statewide legislative action may not include local interests
Defined by Legislature	• Incorporate public interest into statute
Driven by a public process	• Either through rulemaking or the legislative process • The process deserves a healthy debate and requires multiple perspectives • A well facilitated task force could work
Protects sovereign Tribal rights	• Some/many Tribes have senior yet undetermined water rights and the public interest should be in part defined by Tribes
Protects fisheries	• Fisheries should be prioritized over consumptive uses

Several interviewees observed that the current use of public interest is too subjective, and a definition must be **objective** through explicit statutory criteria. These interviewees mentioned that before people spend a lot of time and money trying to develop a water right, they should know what to expect. Most of these respondents agreed that the current subjective test is a recipe for a lot of litigation and think that a **binary** definition would be more implementable. A consultant noted that the definition should be "small and binary because grey just creates a lot of room for litigation" (Haller, 2023). However, none of the interviewees specified what would

make the criteria objective. Objective is ironically a subjective and vague term. Some of the interviewees believe that having the Legislature define public interest would be best procedural step for defining objective criteria.

Some of the stakeholders and Tribes discussed how water needs will likely change over time especially given the reality of climate change. Because of this, several interviewees suggested a public interest definition should be **flexible and able to evolve over time**. For example, if no impacts are allowed under a public interest definition, then it will be difficult to mitigate climate change since certain forms of clean energy tend to harm fish populations. In a written comment to Ecology, the Port Gamble S'Klallam Tribe expressed agreement with climate change concerns, stating that Ecology should "take into consideration projected impacts of climate change" int the definition (Port Gamble S'Klallam, 2022).

Water needs and concerns differ across Washington State and some stakeholders and Tribal representatives called for a definition that is **geographically flexible**. Interviewees noted that a definition should have a flexible framework so that water solutions can be built on local circumstances and local needs. These interviewees insisted that instead of defining public interest state-wide, it should be more individualized to the watershed and dependent on agreements with the Tribes of that watershed.

Tribes have called for a public interest definition that **recognizes tribal water rights**. Interviews with Tribal representatives remarked that this should be a primary parameter and that an analysis of treaty rights impacts should be part of a definition or criteria. They also noted that Tribes should be involved in defining public interest. In a written comment to Ecology's (2022) report, the Port Gamble S'Klallam (2022) agreed, stating "Indian tribes are senior water rights holders with extensive experience in stewarding water resources, and it is therefore in the public interest to preserve and protect tribal water rights." Several interviewees underlined that the State has an opportunity to define public interest collaboratively while ensuring that Tribe's water rights are recognized. These interviewees emphasized that honoring treaty rights is in the public interest.

We heard from several interviewees that the process to define public interest should be **public** and include a healthy debate. In a written comment to Ecology's (2022) report, Seattle Public Utilities wrote that defining public interest requires an "organized collaboration with major stakeholders, including Tribes and municipalities" (SPU, 2022). They went on to say that the Legislature should "allocate funding to create an advisory group that informs the need to specifically define the public interest in statute and prescribe criteria for how to evaluate the public interest in water right decisions" (SPU, 2022).

Lastly, several interviewees mentioned key issues that should be outlined in a public interest definition. One common theme is the importance of **protecting fisheries** should show up in the public interest definition. Some of the Tribal representatives note that protecting fisheries is in the public interest because fishing rights are protected by previously signed treaties. The Swinomish (2022) comment in response to Ecology's 2022 report that public interest

considerations must "include protection, restoration, and recovery of all species of fish harvested in treaty fisheries, not just those that are threatened and endangered" (Swinomish, 2022). A similar point was brought up by the Port Gamble S'Klallam Tribe in their response to Ecology's 2022 report, stating that instream flows should be prioritized in a public interest definition and "consumptive uses - such as temporary or permanent mitigation of water use for new private development, for new water-intensive agriculture, and for water uses likely to diminish water quality—should be given lower priority under a public interest analysis" (Port Gamble S'Klallam, 2022). They also commented that the public interest definition "should not reference beneficial use, but should include the protection of water rights, prioritization of increasing water supply, and considerations of climate change" instead (Port Gamble S'Klallam, 2022).

6.3.3. Advantages and Concerns to Defining the Public Interest

We heard a wide range of perspectives on different advantages and concerns stakeholders and Tribes have with defining public interest (Table 14). Several interviewees were concerned that a public interest definition will not include their interests. This concern was especially expressed by certain Tribes. A representative for the Swinomish Tribe noted that "public sentiment doesn't equate to public interest, and as Ecology has meetings and workshops, it's important to consider what's in the long-term interests of all Washingtonians and recognize the legal obligations of the State for tribal and non-tribal populations" (LW, 2023).

Table 14. List of common perceived advantages and concerns mentioned by stakeholders and Tribes to defining public interest.

Advantages	**Concerns**
• Stakeholders and Tribes will have greater clarity and direction and feel better engaging in these processes • Less uncertainty, risk, and potential costs up front for applicants • Less broad authority for Ecology to make subjective decisions • Less of a chance that the definition changes over time with new administrators and administrations • More defensible legally • Less ad hoc decision making since it will need to be used for every water decision • Greater chance to include stakeholders and balance the needs of the public	• The definition will create winners and losers • Ecology will be less flexible in their management • The definition will be more lenient to Tribal and environmental interests • The definition will not consider Tribal interests nor honor treaty rights • The definition will not prioritize fish and wildlife • Public input processes have generally not done well for the Tribes • Private interest will be equal to or greater than the public good or Tribal treaty rights • A definition by the legislature will further the critical goal of streamflow restoration and protection

Chapter 7: Recommendations and Conclusion

"Define the public interest" is a common refrain in the public interest literature (Squillace, 2020; Myers, 2016; Weeks, 2010; Grant, 2006). Squillace (2020) argues that a definition is needed to "apprise the relevant agencies, applicants, and members of the public of how the public interest will likely constrain present and future water rights." Weeks (2010) agrees, noting that the absence of a definition puts a strain on the water management agencies, which puts them in a "position of either deciding issues beyond their expertise or ignoring them entirely." Weeks (2010) goes on to say that the current approach produces "uncertainty in how different state water resource agencies interpret and apply public interest provisions" which leads to different results in the judicial and administrative response to public interest decisions across states. Without a definition, there is worry that public interest determinations do not actually reflect public values (Squillace, 2020; Weeks, 2010).

Connecting these ideas with our research, it is important for Washington to have a statutory definition for the public interest so as to limit the concerns mentioned above. Oregon and Alaska are the only two states included in this study that have a statutory definition of public interest. Both definitions call on the water management agencies to balance a wide range of public and private interests, which is what certain Tribes and stakeholders said that they do not want. In practice, these definitions provide the state agencies with discretion when utilizing public interest in water management decisions, but with such a broad scope it may be challenging to pin down how they might determine what the public interest is in certain cases. The states without a definition manage water in different ways but generally include a broad range of values in their application of public interest. Idaho, for example, includes a wide range of values when determining public interest. Even Nevada, which has a narrower set of public interest criteria, includes a wide range of considerations that include both private and public uses.

The literature also agrees that on top of defining public interest, the definition must be concrete and objective (Squillace, 2020; Myers, 2016;). Squillace (2020) writes that a "definition must be concrete enough to establish a clear standard for administrators to apply in particular cases involving the allocation, use, and management of water resources." Taking these points into consideration along with the analysis completed in Chapters 5 and 6, we suggest Ecology take the following steps to ensure integrity in the complex process of defining the public interest in Washington State:

1. **Driven by a collaborative process.** First, we recommend that the public interest definition should be formulated through a collaborative process. We recommend that the Legislature should allocate funding to create a legislative advisory group consisting of Tribes and stakeholders across the state with the purpose of collaboratively creating a public interest definition for water rights. Those involved in the advisory group should include representation and organized collaboration from Tribes, cities, counties, agricultural groups, environmental groups, and any other major stakeholders that wish to be involved in the process. Ecology and the Legislature should look to other states – such

as Utah – who have established task forces and advisory boards to better understand the structure needed to establish an active work group in Washington.

2. **Prescribe objective criteria.** As part of the step above, Ecology must work with those involved in the work groups to determine objective and measurable criteria that are predictable for all water right applicants. Throughout the interview process, we heard criticism that the current way applications are processed with the current public interest criteria seems too subjective. Many find it challenging to anticipate what Ecology's decision may be on water right applications, which creates distrust. An objective and measurable set of criteria established with the advisory groups' recommendations will address these concerns.
3. **Define in statute.** Finally, once the criteria have been agreed upon by all Tribes and stakeholders who were included in the advisory group, Ecology should work with the legislature to define public interest in statute. Only then will the definition and criteria have authority needed to assure that all future water right application decisions are within the public interest.
4. **Implement locally.** Once the public interest has been statutorily defined in Washington, we recommend establishing a local process for implementation of the public interest definition. One option consists of creating work groups that will focus on the implementation of utilizing the public interest criteria in each watershed. Because there are 62 water resource inventory areas in Washington (Find your WRIA, 2023), this may mean 62 work groups or collaborations of work groups throughout the state. There are different concerns, ecosystems, and climates for all watersheds throughout Washington, and a more localized grassroots process will allow Tribes and stakeholders to collaborate to explore a more individualized implementation of public interest.

This process may take time to complete, but important steps need to be taken to preserve water resources for all current and future Washingtonians. We want to emphasize that this report is not a comprehensive incorporation of all perspectives that need to be included in the conversation, rather a starting point for Ecology in furthering the work for defining the public interest.

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Appendices

Appendix A. Western States Interviewees.

Table A.1. List of other Western State water agencies that we interviewed representatives from.

State	Agency
Arizona	AZ Dept. of Water Resources
Colorado	Colorado Dept. of Natural Resources
Idaho	Idaho Dept. of Water Resources
Kansas	Kansas Dept. of Agriculture
Montana	Montana Department of Natural Resources
Nevada	Deputy Administrator
Oregon	Oregon Water Resources
Utah	Deputy State Engineer
Wyoming	Wyoming Water Development Office

Appendix B. Other Western States Interview Questions

1. What is your job/position title, and how does your role relate to water rights and water management?
2. How long have you been in your current role?
3. Please describe how your role relates to water rights.
4. Have you been involved with issues around public interest and water rights?
    a. Please describe.
    b. (Or if that you haven't been involved directly) What role does your organization have in interpreting and establishing the public interest in relation to water rights?
5. Is "public interest" a determining factor for evaluating water rights in [State]? If not, why not?
    a. Is [State] evaluating "public interest" in water resource management correctly? Please explain why/why not?
    b. How has "public interest" been evaluated for water rights?
    c. What are specific cases (policy or case law) that we can reference for the use of public interest in water resource management?
6. Have there been economic, environmental, and/or social impacts from the way that [State] has/has not defined public interest?
    a. Please explain.
7. What are the benefits/shortcomings in the way that [State] has/has not defined public interest? How do you think this definition could be strengthened?
    a. If there is no definition, what are the benefits/shortcomings in the way that public interest is used in [State]?
8. What else should we know about the relation between [State's] definition of public interest and water rights?
9. Who else should we talk to within your organization? Or with other agencies/organizations?
10. What should we have asked but we didn't?

<u>Bonus Questions (if there was time)</u>

11. Why was the public interest in relation to water rights defined the way it is in [State]?
12. How do you interpret what "public interest" means in relation to water rights?
13. (Ask this question if information is not included in question #6) What challenges has [Sate] faced in implementing the definition of public interest?
    a. How has [State] responded to these challenges; *OR* how do you expect to respond to these challenges?

Appendix C. Stakeholder and Tribe Interviewees.

Table C.1. List of Washington State Tribe and Stakeholder Interviewees affiliations.

Name	Affiliation
Bill Clarke	Water Law (Clarke Law)
Bruce Wakefield	Confederate Tribes of the Colville Reservation
Dan Haller	Aspect Consulting
Paul Jewell	Washington State Association of Counties
Lisa Pelly	Trout Unlimited
Hansi Hall	Jamestown S'Klallam Tribe
Jessica Kuchan	Water Law (Confluence Law)
Sarah Mack	Water Law (TMW Law)
Megan Kernan	Department of Fish and Wildlife
Tom McDonald	Water Law (Cascadia Law)
Larry Wasserman	Swinomish Indian Tribal Community

Appendix D. Washington State Stakeholder and Tribe Interview Questions

1. What is your job/position title, and how does your role relate to water rights and water management?
2. How long have you been in your current role?
3. Please describe how your role relates to water rights.
4. Have you been involved with issues around public interest and water rights?
    a. Please describe.
    b. (Or if that you haven't been involved directly) What role does your organization have in interpreting and establishing the public interest in relation to water rights?
5. Is "public interest" a determining factor for evaluating water rights in Washington? f not, why not?
    a. Is Washington evaluating "public interest" in water resource management correctly? Please explain why/why not?
    b. How has "public interest" been evaluated for water rights?
    c. What are specific cases (policy or case law) that we can reference for the use of public interest in water resource management?
6. Have there been economic, environmental, and/or social impacts from the way that Washington has/has not defined public interest?
    a. Please explain.
7. What are the benefits/shortcomings in the way that Washington has/has not defined public interest? How do you think this definition could be strengthened?
    a. If there is no definition, what are the benefits/shortcomings in the way that public interest is used in Washington?
8. What else should we know about the relation between Washington's definition of public interest and water rights?
9. Who else should we talk to within your organization? Or with other agencies/organizations?
10. What should we have asked but we didn't?

<u>Bonus Questions (if there was time)</u>

11. Why was the public interest in relation to water rights defined the way it is in Washington?
12. How do you interpret what "public interest" means in relation to water rights?
13. (Ask this question if information is not included in question #6) What challenges has Washington faced in implementing the definition of public interest?
    a. How has Washington responded to these challenges; *OR* how do you expect to respond to these challenges?