

The Public Interest Test for Water Appropriations

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Nebraska, like most states, imposes a “public interest” review on applications for water appropriations, changes and transfers. However, Nebraska statutes do not provide any specific public interest criteria for use in evaluating applications for new water appropriations or intra-basin transfers.

Under Neb. Rev. Stat. § 46-234, an application for a water appropriation may be refused when denial is demanded by the public interest. The director of the Department of Natural Resources (DNR) has the duty of determining whether the public interest demands the denial of a water appropriation, but is given no express statutory criteria to provide assistance in making that decision.

Statutory factors for a public interest determination are specified with respect to inter-basin transfers, but the provisions are not strictly applicable to new appropriation applications. Neb. Rev. Stat. § 46-289 states that the DNR may consider the following factors when determining whether an interbasin transfer is in the public interest:

- (1) The economic, environmental, and other benefits of the proposed interbasin transfer and use;
- (2) Any adverse impacts of the proposed interbasin transfer and use;
- (3) Any current beneficial uses being made of the unappropriated water in the basin of origin;
- (4) Any reasonably foreseeable future beneficial uses of the water in the basin of origin;
- (5) The economic, environmental, and other benefits of leaving the water in the basin of origin for current or future beneficial uses;
- (6) Alternative sources of water supply available to the applicant; and
- (7) Alternative sources of water available to the basin of origin for future beneficial uses.

Although there is no explicit statutory authorization, nothing prevents the DNR from considering the criteria provided in Neb. Rev. Stat. § 46-289 for new water appropriations or intra-basin transfers. Some of the factors may provide useful guidance on such applications, while other factors are inapplicable outside of the inter-basin transfer context. A set of specified statutory criteria could assist the DNR in determining what is in the public interest with respect to new appropriations and intra-basin transfers.

Other western states, such as Oregon and Alaska, have enacted statutes that define the public interest in the context of new appropriation applications. In Oregon, under O.R.S § 537.170, the director or commission should determine whether the proposed use would impair or be detrimental to the public interest by considering:

- (a) 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 with special value to the public;

- (b) The maximum economic development of the waters involved;
- (c) The control of the waters of the state for drainage, sanitation and flood control;
- (d) The amount of water available for appropriation for beneficial use;
- (e) The prevention of wasteful, uneconomic, impracticable or unreasonable uses of water;
- (f) All vested and inchoate rights to the water; and
- (g) The state's water resource management policy.

In Alaska, when an application is filed for a water permit, the following public interest criteria are applied under Alaska Stat. § 46.15.080:

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

In comparison to other western states such as Alaska and Oregon, the assessment of the public interest for new water appropriation rights and intra-basin transfers in Nebraska is highly discretionary and subjective due to the lack of statutory criteria. A simple, non-exclusive set of factors to determine whether the public interest will be satisfied by a water appropriation would give the DNR guidelines to follow while also allowing applicants to assess their potential eligibility for a water right before filing an application.

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