

Initial Briefing Points on:
Beneficial Use, Public Interest, and Public Benefit
As they relate to permits and adjudicated water rights in Wyoming

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The following descriptions are not necessarily formal, legal definitions of the concepts presented. They are, however, intended to provide a practical, general background on the terms, how they are used, and how they can be and are distinguishable. Hopefully these descriptions lead to further understanding of the concepts, and further discussion.

Beneficial Use

Beneficial Use, in general terms, describes the purposes for which Wyoming's water is used and recognized under our permitting and adjudicatory system. It is a utilitarian concept in place since territorial days that has described very physical acts that divert water in ways deemed "beneficial." Beneficial uses are defined by their type (e.g. irrigation, domestic, stock), and their amount (cubic feet per second, gallons per minute, or acre-feet). Wyoming water rights (permits or certificates of adjudicated rights) list those specific beneficial uses to which water under a particular water right can be applied.

In general, water embraced in a Wyoming water right cannot be put to *any other beneficial use not listed thereon* absent approval from the State Engineer or the Board of Control to make a permanent, or temporary, change of use. Beneficial uses are provided in statute (irrigation, domestic, stock, hydropower, instream flow, etc.) or have been determined by the State Engineer and Board of Control (the production of coalbed gas, dust abatement, wildlife, fire protection, storage of groundwater for irrigation, etc.). In 1986, Wyoming's Instream Flow law for the first time recognized a beneficial use that required neither the diversion nor consumption of water. A full listing of beneficial uses that have been recognized in Wyoming is attached.

But the primary purpose of the beneficial use concept is not to enumerate allowable water uses. The primary purpose of the concept is to prevent waste. To that end, it is fundamental to western water law that beneficial use is "the basis, the measure, and the limit" of a water right. For example, to maintain a water right, the user must continue to use the water for the permitted purpose or face possible abandonment. Further, only the amount of water necessary to achieve the purpose is permitted and thus wasteful practices are not allowed. Similarly, except in the limited circumstance of municipalities, speculation is prohibited. That way applicants with no present use

cannot tie up the water to the detriment of future applicants with real needs. Ultimately, as recognized by the Wyoming Supreme Court, beneficial use is an evolving concept which can be expanded to reflect changes in societal values, just like it was expanded by the Wyoming Legislature in 1986.

Public Benefit

Public Benefit appears to be more of a policy term or consideration than is the more utilitarian or technical term *Beneficial Use*. Rather than describing how the water is used under a particular right, and how much, public benefit contemplates a broader consideration of the public at large. The term appears nowhere in the general water administration statutes applicable to the State Engineer and the Board of Control, but is instead confined to statutes such as those applicable to the Wyoming Water Development Commission which contemplate use of public money for water development projects.

The Wyoming Legislature has defined public benefit in at least one instance in 1977 when providing state assistance for reconstruction and repair of Park Reservoir Dam (in Sheridan County). Wyoming Statute § 99-99-501(a)(v) states:

“Public benefit” means those things including but not limited to fisheries, aesthetics, water quality, recreation and flood control which are enjoyed by the public in general and no specific identifiable group in particular;

In this case, a distinction can be drawn between public benefit and beneficial use. A domestic well, for example, is a definable and recognized beneficial use. However, a domestic well would not satisfy the above definition of public benefit because the water itself only benefits the individual appropriator and is not enjoyed by the public in general. Therefore, while all water rights must be used for their permitted beneficial use and not wasted, that use does not necessarily qualify as a public benefit unless it is enjoyed by the public in general.

Public Interest

Wyoming’s constitution states that no appropriation shall be denied except when such denial is demanded by the public interests. Wyo. Const. art. 8, § 3. Wyoming’s water administration statutes contain the same requirement. This is a recognition that factors related to the general public will come to bear on applications to appropriate water. Such factors might require the State, through the State Engineer, to deny all or part of an application. Perhaps the proposed water use would violate an existing interstate compact or decree, or dramatically interfere with another established use and economic activity. As demanded by the Constitution and multiple statutes, the appropriation must be denied if it is detrimental to the public interests. It is important to note that an appropriation need not advance the public interests in some way to be granted, it simply must not be detrimental to the public interests. Each case must be assessed under its own facts.

Nowhere does the Constitution, statutes or the Wyoming Supreme Court define the term “public interests” as it relates to water. However, the denial of appropriations in Wyoming as being detrimental to the public interests are exceedingly rare. The following are three known examples:

Original Boysen Reservoir

In 1906, Asmus Boysen applied for a permit to construct a 60 foot dam proposing to divert water from the Big Horn River. The proposed dam was primarily for the purpose of power generation for the applicant’s own use and the surrounding mining community. The problem faced by the State Engineer was that a sixty foot dam would perpetually increase railway transportation costs or the costs of delivering water through canals and reservoirs. The State Engineer rejected the sixty foot dam application as being detrimental to the public interest because the power plant was flexible in its location, the necessary location of railways and canals were fixed, and the applicant could satisfy his own power needs with a thirty five foot dam.

Pilot Butte and Bull Lake Reservoirs

In 1991, the Bureau of Reclamation filed for the ability to refill both Pilot Butte and Bull Lake Reservoirs under what would then be current day priorities. In essence, they wanted a junior right to fill, after having filled once already under their original rights, when water was available. In 1998, State Engineer Fassett rejected both applications. His endorsement read: “This permit is hereby rejected since it is not in the best interest of the public to appropriate this amount of water for the same uses without a physical enlargement of the reservoir.” The rejections were not appealed.

4 Quarters Land and Livestock

This was an instance where a groundwater well permit application in a control area was originally not approved in full (oil and gas drilling water was not approved as a use), an action appealed by the applicant. The appeal led to a “public interest” hearing in front of the State Engineer as provided under W.S. 41-3-932(b). The resulting Order issued in 2012 contained a public interest analysis, by which the State Engineer did determine that some water for oil and gas purposes should be permitted, subject to certain conditions which the State Engineer found to be in the public interest.

It is important to note that public interest is only a factor at the initial permitting stage. Once a permit or certificate is issued, it cannot be revisited by the State Engineer at a later date with some finding that “we’ve decided this use is no longer in the public interest, and propose to change it.” In fact, once a permit is issued and adjudicated, the State Engineer is forbidden from changing a use (that ability being reserved for the Board of Control only, and typically only on the petition of an appropriator desiring the change).