Law, Values, and Water Management Decisions

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Public Decisions, Public Values

At some level, public decisions, including decisions about how to manage public resources, are supposed to reflect societal values.

Of course, that's not as simple as it sounds.

The Challenges

We care about many things, and we care about them in different ways.

Many decisions implicate more than one of those things.

Moreover, values are often contested, difficult to prioritize, and difficult to quantify. In some cases, expressing values in dollar terms may strike some people as inappropriate or even insulting.

The Challenges

Even individuals can find it hard to define what they value, how much, and what trade-offs they are willing to make.

Deciding whose voice prevails or how to aggregate individual views to determine a legitimate set of "societal values" adds another layer of complexity.

The Challenges

In sum:

We are often uncertain: which preferences, and whose preferences, count; how those preferences should or can be measured; how trade-offs should be made or evaluated; and even who gets to decide those things.

HOW DO WE RISE TO THOSE CHALLENGES?

Or, how do public decisions ever get made? In multiple ways, with different methodologies and deciders.

Method #1: Legislative Fiat

Ex: The Endangered Species Act.

Action agencies must insure that their actions do not cause jeopardy.

"Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities . . . ."

Need not be that stark – consider Clean Air Act NAAQS, which are to be set at levels "requisite to protect the public health with an adequate margin of safety.

Pros/cons?

Methodologically easy (at least conceptually).

May be too rigid, become outdated, or be subject to strong "subterranean" political pressures.

May not seem legitimate, especially if imposed at a distant level of government, to those who perceive themselves as bearing the focused costs without getting benefits.

Method #2: Benefit-cost analysis

This can come with hard or soft edges. It can be done by the action agency, or by an oversight agency such as OIRA. It can be done at the level of general policy-setting or specific decisions.

Exs:

Water projects have long been required to be justified by benefit-cost comparisons.

In the Clean Air Act context, the Supreme Court recently declared that no agency decision could be considered rational if (quantified?) costs far outweigh (quantified?) benefits. Michigan v. EPA, 2015.

Pros/cons?

Provides a clear, objective mechanism for making trade-offs (at least conceptually).

Methodologically difficult in practice (at least in many contexts), perhaps in ways that introduce systematic bias. May effectively undervalue elements that are difficult to quantify or to forecast.

May be difficult to make transparent.

May not account for allocation of costs and benefits; may privilege efficiency at the expense of equity.

Method #3: General comparisons, agency discretion

Exs:

Federal Power Act: federally licensed hydropower facilities must serve the public interest.

FIFRA: pesticides may be registered for sale only if they pose no unreasonable risk to human health or the environment.

Overlaying mandates

In the natural resource context, it's exceptionally rare to have a single governing legal regime. It's far more common for multiple competing "macho" legal regimes to apply.

Typically that happens by accretion, with little direct attention to the interaction between those legal regimes. That includes questions about which prevails when they conflict, as well as questions about how costs or benefits should be allocated when new limits are imposed on resource use.

Water management decisions

Frequently implicate many different sources of law, with multiple decisionmakers, as well as multiple, potentially conflicting goals (water storage/provision, recreation, wildlife/fisheries protection, cultural resource provision, hydropower).

Often no clear priorities or guidance for trade-offs. Often deeply invested stakeholders, with both monetary and non-monetary interests, and sometimes with deeply embedded long-term animosity or at least distrust between them.

Water management decisions

The "Law of the [Colorado] River," in which Glen Canyon operation is embedded, is a prime example of all of the above.

Key legal mandates

Colorado River Compact
Upper Colorado River Basin Compact
Water Treaty with Mexico
Colorado River Storage Project Act
Colorado River Basin Project Act
Endangered Species Act
Grand Canyon Protection Act
National Parks Organic Act and enabling legislation for Grand Canyon NP and Glen Canyon NRA

Key legal mandates

A rough summary:

Dam operators are to protect park values (including resource protection and visitor use) while complying with all those other mandates, which means protecting essentially all the stakeholder interests. As usual, we want to have our cake and eat it too.

OR MORE ELEGANTLY . . .

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"[T]he GCPA does not set priorities among cultural, environmental, and recreational interests; nor does it mandate how they should be reconciled with water management objectives when the interests conflict. In fact, the GCPA seems to suggest that all demands can be met, and that the GCPA should in no way affect water allocations or conflict with any federal environmental laws."

Susskind, Camacho and Schenk (2010)
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Which takes us back to the beginning

The legal landscape provides more questions than answers about the goals of river/dam management, which leaves considerable doubt about what data are relevant to management.

Key open questions

Which preferences count and how much?

Whose preferences count and how much?

How should they be measured, expressed, and compared?

How should trade-offs be evaluated, particularly if there does not appear to be a comfortable metric across competing preferences?