

The Response to Nestlé's Water Appropriation in California

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Abhilash Mangu

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On my honor as a University Student, I have neither given nor received unauthorized aid on this assignment as defined by the Honor Guidelines for Thesis-Related Assignments

Advisor

Kent Wayland, Assistant Professor, Department of Engineering and Society

Introduction

Water scarcity is one of the most significant environmental dilemmas that our society faces. Population growth and socioeconomic development are expected to increase water demand, both industrial and domestic, by 50-80% over the next three decades (He et al., 2021). Water is supplied in many ways, with corporations extracting fresh water from reservoirs and aquifers. These corporations must pay for this right, and in extracting fresh water must abide by laws to not disrupt related systems. Large corporations, including Nestlé Waters North America (now BlueTriton), have recently come under scrutiny for “drying up” creeks and harming local groundwater, all while not paying for the water they are extracting. Drying up creeks directly affects the wildlife around the extraction site and depletes groundwater, supply normally used for irrigation or drinking water. BlueTriton is not alone in this practice, with many other bottling companies around the world illegally extracting too much water and breaking their permits, leaving less water for distribution to local communities (Brown, 2020). The California State Water Board launched an investigation into BlueTriton, yet has failed to enact any concrete changes to legislation to hold corporations such as BlueTriton accountable.

When looking at these cases, an obvious exploitation of the water supply that is currently in growing demand can be seen. One must look at how to treat these corporations to stop illegal bottling practices. This would most effectively come in the form of passing legislation and regulations that would prohibit unethical extractions in the future. A concept called collaborative governance, used throughout this paper, can be used to gain insight into enacting this legislation. This concept is useful for the analysis of environmental groups and how they work with outside actors to pass strong legislation. The California Water Board is still in hearings against Blue Triton with the Administrative Hearing Office, with Blue Triton not yet facing any consequences

for their actions. By studying the case of The California State Water Board against Blue Triton using the concept of collaborative governance, we can see whether the decisions that the water board made were proper and what that means for the future of environmental legislation against unethical extraction.

Theory: Collaborative Governance

Collaborative governance, or collaborative policy making, has become increasingly significant in environmental management (Connick & Innes, 2003). In collaborative governance, public and private stakeholders work with public agencies in decision making, emphasizing consensus-based decisions (Ansell & Gash, 2007). Collaborative governance was seen as an asset for environmental regulation over twenty years ago, and continues to grow today (Randolph & Bauer, 1999). Those working in the field of environmental political science have found the concept of collaborative governance to be a useful way to frame environmental policy making. Chris Ansell and Alison Gash, herein referred to as Ansell & Gash, have emphasized the fact that collaborative governance has replaced other modes of policy making of more managerial modes of thinking (Ansell & Gash, 2007). In their paper “Collaborative Governance in Theory and Practice” they list out multiple criteria that define collaborative governance. The criteria can be seen below:

1. The forum is initiated by public agencies of institutions
2. Participants in the forum include nonstate actors
3. Participants engage directly in decision making and are not merely “consulted” by public agencies
4. The forum is formally organized and meets collectively
5. The forum aims to make decisions by consensus

6. The focus of collaboration is on public policy or public management

By looking at the case through this framework, each point of criteria can be compared methodically to conclude whether the collaborative governance framework even applies to the California State Water Board. By learning this, we can learn what decisions the board made (or did not make) and how that relates to the current state of holding Blue Triton accountable.

Background

Due to the nature of collaborative governance, many participants play a part in policy making. Many participants are to be analyzed, but the two main participants for this case are The California State Water Board and Blue Triton. The California State Water Board is a state agency that regulates water extraction in the public interest (Rizzardo & Board, 2021; Stork et al., 2021). The board manages many programs to provide for, “A sustainable California made possible by clean water and water availability for both human uses and environmental resource protection.” (Board, 2020). They conduct investigations based on submitted formal complaints, investigating any acts in California working against water rights. The water board issued a draft cease and desist document to BlueTriton in April of 2021 after receiving multiple complaints regarding diversion of water without a valid basis of right and unreasonable use of water (Rizzardo & Board, 2021). Since then, many public hearings have been held along with witnesses and members of the participants in the case entirely. A concrete outcome has not been produced from these hearings yet, though it is stated to be completed halfway through 2022. Nestle Water North America Inc, renamed to BlueTriton in 2021, is a for-profit corporation that presents itself as an advocacy committed to a sustainable water supply (BlueTriton, 2021; Nestlé USA, 2016). The company claims to be “learning from what we have done in the past to better understand what is expected of us in the future” (BlueTriton, n.d.). The brand is currently

undergoing a series of hearings after challenging the draft cease and desist order given to them by the state water board (James, 2022). They are currently understood to be avoiding real accountability through legal battles, being able to continue extracting unethically (James, 2022). The corporation is the party being investigated by the California State Water board, due to their unethical extraction practices in Strawberry Creek.

BlueTriton, when it was Nestlé, had taken as much as 356 acre-feet of unauthorized water (Wilson, 2019). The company claimed that it was legally intitled to every drop and “sustainably collecting water at volumes believed to be in compliance with all laws and permits at this time,” when questioned by *The Desert Sun*. This extraction took place from Strawberry Creek, a river flowing through the San Bernardino National Forest protected by the U.S. Forest Service. The San Bernardino National Forest provides water to residents of California. Most of the precipitation in the region falls on the San Bernardino Forest and mountain, with the streams supplying most of the groundwater recharge (Stork et al., 2021). Nestlé specifically extracted water from Strawberry Creek, a river within a canyon known as Strawberry Canyon (Stork et al., 2021).

The U.S. Forest Service is a federal agency of the Department of Agriculture. It administers National Forests, including the San Bernardino National Forest (James, 2015). The service provides permits to watersheds, including the Strawberry Creek watershed in San Bernardino (Behrens, 2018). The Forest Service issued the permits to Nestlé starting in 1929, issuing another oen in 1978 to the subsidiary Arrowhead Puritas, Inc. They then denied many permit applications as the development would not be “in national forest interest” and would not be “surplus to present and future public needs.” (Stork et al., 2021, pg. 8). The Forest Service has the power to no longer authorize the occupancy of the national forest yet chose not to as long as

BlueTriton ensured compliance with the land management plan laid out for the San Bernardino National Forest. It is worth noting that they are allowing BlueTriton to extract without a legal permit, but if they ensure compliance with loose standards set in a management plan. *The Desert Sun*, a daily newspaper based in Southern California broke the news on the expired permit and Nestle's unethical extraction (James, 2015). They investigated the diversions gaining lots of social media visibility, causing a large social movement towards holding the company accountable. Due to this article, many petitions were drafted and signed, then sent to the water board acting as formal complaints (Stork et al., 2021). The Story of Stuff Project (2020), an advocacy seeking to restore public trust in water in the State of California, filed complaints against the U.S. Forest Service to prohibit operation unless a valid permit was presented (Rizzardo & Board, 2021). They then also submitted a formal complaint to the water board on unauthorized diversion.

Literature & Methods

The literature that will provide the most insight into comparing the case to collaborative governance will be documentation from the water board. This includes investigative documents, cease and desist letters, and interviews with water board officials. The Desert Sun also provides information of progress of the case as time went on, as the publication had published multiple articles while the water board was progressing in their exchanges with Nestlé.

The main way that all the groups coalesced to stop Nestlé from their extraction practices were through drafted complaints, which were then proposed to the California State Water Board who then ran their investigation to verify those complaints. All these complaints are documented by the water board and will be analyzed thoroughly to see if the collaboration qualifies under that of collaborative governance.

Evidence & Analysis

This section will be split up into six sections, each section representing one point of Ansell & Gash's criteria for variables that result in effective collaborative governance. Each point will have evidence supporting whether the criteria is met, and an analysis of what that means in the larger scheme of unethical extraction.

Initiated by Public Agency or Institution

The first set of criteria that Ansell & Gash lay out states "The forum is initiated by public agencies or institutions". In the case of the Nestlé investigation, the forum was not directly initiated by the California Water Board but through an indirect system that allows for complaints. These complaints can consist of allegations like diversion of water without valid basis of right and unreasonable use of water. Rather than the water board specifically picking out the groups to participate in the forum, the water board allowed for complaints to be submitted through a complaint archival system. Groups that submitted similar complaints were then aggregated into the investigation (Stork et al., 2021). These groups include The Story of Stuff Project, the Center for Biological Diversity, and many individuals submitting petitions (Stork et al., 2021).

Ansell & Gash stress that public agencies usually initiate these forums to "fulfill their own purposes or to comply with a mandate..." (Ansell & Gash, 2007, p. 545). The California State Water Board complied with their own standards and regulations of following up on submitted complaints. The Water Board states that it will investigate every single complaint if it regards a violation of the conditions of a permit, waste or unreasonable use of water, or illegal diversion of water. Due to this standard set within the board itself, the board initiates discourse with the party that submitted the formal complaint. It should be noted that the leader of the forum

does not have the be the public agency that initiates the discourse. The water board fell into the leadership role due to the necessity of background knowledge regarding policy making and water state legislation procedures.

Presence of Nonstate Actors

The second set of criteria states “Participants in the forum include nonstate actors”. The forum includes two nonstate actors: The Story of Stuff Project and the Desert Sun (Stork et al., 2021). Both groups contributed information to the water board’s investigation. Ansell & Gash stress the importance of nonstate actors’ participation so that all key interest groups can be represented. Nonstate stakeholders bring perspectives that public agencies could not bring to the consensus-based decision-making process that collaborative governance revolves around. As previously mentioned, the water board allows for nonstate actors to mention their concerns through an open feedback channel on their website.

Though nonstate actors are present, all perspectives are not covered by the nonstate actors. The interests of indigenous peoples who once occupied lands in the San Bernardino Forest and Strawberry Creek are not represented directly in this investigation. The Huchiun Ohlone tribe once settled along Strawberry Creek and were displaced due to Spanish colonization in the mid-1700s (Margolin, 1978). This tribe still resides in the Bay Area and should be included in a conversation regarding the land that was once theirs. The importance of having every perspective covered when addressing a problem is vital, as seen in the following section.

Participants Are Not Just “Consulted”

The third form of criteria states, “participants engage directly in decision making and are not merely ‘consulted’ by public agencies”. The forum participants have met each other, though

it appears that they only met each other post-investigation during the time where hearings were taking place against the corporation. In terms of drafting compliance actions (such as cease and desist letters) the documents were drafted with no counsel with other members of the forum except for the Forest Service. This is apparent in all policy related documentation produced by the board, always using the term “Division enforcement staff” as the group that makes final policy decisions and moves the investigation forward (Stork et al., 2021). Only the Forest Service was consulted due to the nuances of the Special Use Permit process, the process that BlueTriton would have to go through if they were forced to apply for a new permit. Other than that, no other groups were appeared to have been counseled (Stork et al., 2021).

Having none of the groups consulted, in addition to neglecting to include indigenous peoples in the conversation shows a lack of thoughtfulness when developing the full forum. Ansell & Gash state that “collaboration also implies that nonstate stakeholders will have real responsibility for policy outcomes.” (Ansell & Gash, 2007, p. 546). The idea of collaborative governance moves away from the decisions made behind closed doors, but rather let’s all stakeholder perspectives influence the decision making (Ansell & Gash, 2007, p. 547). This was not seen throughout the investigative documentation for this case. Nonstate stakeholders were not involved within policy outcomes but provided background information for the water board to conduct their own investigation using their own procedures. The purposeful decision to just “consult” with the nonstate actors in drafting any conclusive allegations and recommendations could provide for an ignorant perspective while trying to hold corporations like BlueTriton accountable.

Alternatively, the fact that the nonstate actors were not consulted could be seen as beneficial to the final recommendations made towards BlueTriton. From another perspective, the

water board has experience with conducting investigations against parties to protect water rights within California. If the nonstate actors were to be included in the investigation, there is a possibility that due to the lack of knowledge regarding policy and previous regulation, the recommendation drafting process gets inhibited.

Formally Organized and Meets Collectively

Ansell & Gash's fourth point states, "the forum is formally organized and meets collectively". The forum does not appear to be formally organized or meet collectively, with no reports of any meetings in any documentation found on the state water board website. The Desert Sun appeared to consult with all parts of the forum to develop stories for their paper, and the water board met with Forest Service staff and Blue Triton employees (Stork et al., 2021). The discussions with the Forest Service, a member of the theoretical forum, was related to specific technical information like points of diversion and basis of right (Stork et al., 2021). This conversation was not with other members of the forum (Story of Stuff Project, The Desert Sun, petition writers).

Formal organization is important to distinguish this form of governance from more casual interactions between public and private groups. An example given by Ansell & Gash is that of the relationship between agencies and interest groups, a relationship that does not develop a formal and organized strategy on forming policy (Ansell & Gash, 2007, p. 546). The water board did not seem to have any formal organization between all the parties involved. The board had conversations with many groups to gain more information for their own investigation. That investigation would then help them form their own recommendations, without further involvement of the other parties representing the voices of those directly involved. The forum

formed by the water board does not, as Walter and Petr state, “involve joint activities, joint structures and shared resources.” (Walter & Petr, 2000, p. 495).

Consensus-Based Decisions

The fifth form of criteria states, “the forum aims to make decisions by consensus (even if consensus is not achieved in practice)”. No documentation pointed to the forum aiming to make decisions by consensus, but rather the water board leading the investigation according to their regulations and not the direct input of the other groups in the proposed forum.

Consensus oriented decision making seeks to discover areas of agreement to develop policy in an all-encompassing way, even if consensus is not reached (Ansell & Gash, 2007, p. 546-547). The water board did not seem to even want to create a forum where resources are shared and collective meetings occur, so consensus-oriented decision making was not a priority either. If they did want that type of decision making then maybe more inclusive recommendations could have been developed, where areas of agreement could have been found.

Focus is on Public Policy

The last criteria from Ansell & Gash states, “the focus of collaboration is on public policy or public management”. The focus of the collaboration was on public policy and holding the corporation accountable through hearings and any documentation that could force them to meet certain standards. The investigation (Stork et al., 2008) showed a different priority than that of making policy to prevent this in the future, but rather recommendations to stop the extraction happening at the moment. This can be seen in the conclusion section of the investigative document *INV 8217*, used previously in this section. In this conclusion section, the main conclusions were to set up the recommendations. For example, the conclusion section elaborated on the basis of right claims made by Blue Triton for their continuous extraction, and the

recommendation uses their findings for that basis of right claim to force them to stop immediately, an ultimately failed attempt (Stork et al., 2008).

Discussion

After gathering evidence and analyzing based on all six criteria, the model for collaborative governance provide by Ansell & Gash does not match the case studied. Many of the parameters were not found in the literature search, showing that a successful model for collaborative governance was not seen in the case of the California State Water Board. This shows some mismanagement from the water board itself, as they did not collaborate enough with those who are directly affected by the unethical extraction of Blue Triton. When making decisions that affect a large population, that large population should be included in the conversation to have a voice in what they feel. The water board, though overall fighting for the right cause of unethical extraction, are not letting those who are directly affected have a say in what the solution looks like. They do accept complaints from the general public, and most likely take this into account when doing the investigation and testifying against the corporation, yet that does not directly substitute for having that voice present.

For the future of environmental regulation against unethical extraction, or issues similar, collaborative governance using this model should be a priority. By collaborating with multiple viewpoints, perhaps a situation where the corporation takes the findings to court and is able to work around small loopholes could be prevented. Though it could be easy for a environmental regulatory board to fall into making their own decisions, having other voices would make the outcomes more effective.

There are multiple ways that regulatory boards like the California State Water Board could integrate collaborative governance into their policymaking. By creating more opportunities

for collaboration, like having open forums available for the public could be key. These forums could be more than just a space to submit complaints, but rather work through what the regulatory board would pursue in the steps after receiving the complaint. Making sure that the public is educated on those next steps and have their voices heard there is vital to the idea behind collaborative governance. The board could also educate themselves on collaborative governance and use the six main criteria laid out by Ansell and Gash to develop the change that they are looking to create.

Conclusion

The evidence shows that the California State Water Board did not fit the criteria for collaborative governance laid out by Ansell & Gash. The lack of collaboration can be seen as a reason for the failed attempt to force Blue Triton out of extracting water unethically out of Strawberry Creek, allowing them to continue while avoiding legal battles. Education regarding collaborative governance, both for public environmental regulatory agencies as well as for the public who are trying to challenge unethical practices, could be a major step in the right direction for consensus-based decision making.

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