CONCEPT OF BENEFICIAL USE IN WATER LAW OF NEW MEXICO

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At the outset of this paper, I wish to insert one word of caution. All opinions expressed are my own. When I discuss decisions of our Court, or interpret language used by Judges, I do not intend to be understood as speaking for anybody except myself - and even then I reserve the right to change my mind.

Any discussion of this subject necessarily must start with our State Constitution where in Art. XVI, Sec. 2, it is provided:

> "The unappropriated water of every natural stream, perennial or torrential, within the State of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right."

We should note that this section states that these unappropriated waters "belong to the public." However, the right of the public to use and exploit the water is to be in accord with laws of the state under which "appropriation to beneficial use," is accomplished, with full recognition being granted to the doctrine of prior appropriation.

It is thus seen that by this provision the right to appropriate water in natural streams after adoption of the constitution was provided for - the method to be in accordance with the "laws of the state," the purpose to be "for beneficial use," and the test of right to be the doctrine of prior appropriation. The provision applied only to unappropriated waters.

By Sec. 3 of Art. XVI the position of beneficial use in the picture is set forth in the provision that it "shall be the basis, the measure and the limit of the right to the use of water."

By Sec. 1 of Art. XVI "all existing rights to the use of any water in this state for any useful or beneficial purpose" were "recognized and confirmed."

By this last provision it is clear that all uses or the right to make use for any purpose was not preserved and protected, but only those uses which were "useful or beneficial."

Accordingly, with the adoption of our constitution we start out with a recognition and confirmation of water already appropriated "for useful or beneficial purposes," which is likewise the basis, measure and limit of the right and with a declaration that unappropriated waters could be appropriated "for beneficial use" with time or priority of appropriation - not type of use - being the yardstick for determining questions of right between conflicting claims.

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Before proceeding further it probably would not be amiss to point out that the doctrine of prior appropriation to beneficial use, although generally accepted as being well suited to accomplishing development of the limited waters in an arid region, has been criticized as not being based upon sound principles and not suited to the situation when the pioneering era is passed. Also, it has been pointed out that the doctrine leads to wasting of water, and does not guarantee the best use.

Moses Lasky in his paper appearing in 1 Rocky Mountain Law Review 161, written in 1929, stated that prior appropriation did not long remain as the law, and further that it "was not fit for the West." He quotes Elwood Mead, as follows:

> "The whole principle is wrong. It is wrong in principle as well as faulty in procedure. It assumes that the establishment of titles to the snows on the mountains and the rains falling on the public land and the water collected in the lakes and rivers, on the use of which the development of the state in a great measure depends, is a private matter. It ignores public interests in a resource upon which the enduring prosperity of the community must rest. It is like A suing B for control of property which belongs to C. Many able attorneys hold that these decreed rights will in time be held invalid because when they were established the public, the real owner of the property, did not have its day in court."

That eminent writer on water law, Mr. Samuel C. Wiel, as early as 1913, in an article entitled "Theories of Water Law" appearing in 27 Harvard Law Review 530 - was critical of the doctrine.

More recently Professor Robert Emmet Clark of the University of New Mexico law school faculty, in an article appearing in XXVIII, New Mexico Quarterly 97, suggests the possibility that our existing concepts and laws are in need of overhauling.

For the short time allotted me, it will be my purpose to explore our statutes and decisions with a view to determining as best we can what uses may be made of our waters within their framework, and whether or not our laws and constitutional provisions are badly in need of amendment to obtain better and greater use - and incidentally consider possible changes which might be made in our laws to bring them up to date to accomplish such an end.

At the outset, since we are going to talk about "beneficial use" it should be helpful if we orient ourselves by attempting to define it.

Recently, in connection with the work on a Model Water Use Act by the National Conference of Commissioners on Uniform State Laws, a definition has been suggested. It is as follows:

> "'Beneficial use' means a use of water, including the method of diversion, storage, transportation, and application, that is reasonable and consistent with the public interest in the proper utilization of water resources, including, but not limited to, domestic, agricultural, industrial, power, municipal, navigational,

fish and wildlife, and recreational uses."

This may seem to be a reasonably adequate definition. It will be noted that the emphasis is on "the public interest in the proper utilization of water resources." As will be hereinafter pointed out, the "public interest" is to be considered in granting rights to appropriate surface water to beneficial use in New Mexico, but here the emphasis is upon the element of time - priority of time giving the better right. The proposed Model Code will be referred to again in this discussion.

As long ago as 1900 in the case of Millheiser v. Long, 10 N.M. 99, 61 P. 11, the Territorial Supreme Court held that the doctrine of prior appropriation applied in New Mexico, and that a necessary element in an appropriation was the placing of the water to beneficial use. The court there said, "It is not the capacity of the ditch merely that determines the appropriation of water, it is the amount actually applied to a beneficial use that is appropriated within the meaning of the law." It was apparent in that case that the appropriators had undertaken to sell water diverted by them into their ditch. The court said, "These sales of water were * * * contrary to the law governing water rights in this Territory except to the extent" that there had been a "valid appropriation." It was held that water rights once acquired by being put to beneficial use could be sold, "but they could not sell and retain the water at the same time," and that the capacity of the ditch did not constitute a valid appropriation, unaccompanied by application of the water to some beneficial use.

In the case of First State Bank of Alamogordo v. McNew, 33 N.M. 414, 269 P. 56, it was held that use of water for domestic purposes, including stock watering, is a "beneficial use" of water.

Later, in the case of State v. Red River Valley Co., 51 N.M. 207, 182 P. 2d 421, the court said, "we are unable to find authority, or justification in reason, to support the claim that the "beneficial use" to which public waters, as defined in this and other jurisdictions, may be put, does not include uses for recreation and fishing." This may be an awkward method of saying that uses for recreation and fishing are beneficial uses, but that they are so recognized here, can not be doubted.

Finally, in 1957, in the case of State v. McLean, 62 N.M. 264, 308 P. 2d 983, the court discussed the meaning of "beneficial use" at some length. It reviewed the earlier cases and stated that they held it "to be the use of such water as may be necessary for some useful or beneficial purpose in connection with land from which it is taken." This was a case involving artesian water permitted by the claimant to run uncontrolled onto grass lands - thus the reference to "connection with land from which it is taken." However, I do not perceive any difference as to surface water and "the useful and beneficial purpose" to which the water must be put. The court then held that under an appropriation a person may not receive more water than is necessary for actual use. They also held that water wasted was not beneficially used. The court said, "The use must not only be beneficial to the lands of the appropriator, but it must also be reasonable in relation."

From the foregoing may be determined the extent to which our court has gone in attempting to define "beneficial use". That it is not too explicit should not be too difficult to understand. It would seem that what is or is

not beneficial use could only be determined definitely in a given case, upon consideration of the particular facts of that case. (See City and County of Denver v. Sheriff, 105 Colo. 193, 96 P. 2d 836).

In New Mexico, rights to water "flowing in streams and water courses" which were "recognized and confirmed" by Art. XVI, Sec. 1 of the Constitution were those acquired under Chapter 49, Laws of 1907, (L. 1907, Ch. 49, Sec. 75-1-1, N.M.S.A. 1953), as well as those vested prior to adoption of Chapter 49, Laws of 1907, and recognized by Section 59 of that act, as well as those rights to waters where appropriation "for beneficial use" had been initiated prior to March 19, 1907, by the filing of "affidavits, applications or notices." (Sec. 75-8-1, N.M.S.A. 1953).

It is interesting to note in passing that all "vested rights" were left unimpaired by the 1907 act - whether for beneficial use or not - but as to those in process it was required that they be for beneficial use. It is doubted that this is material because no cause has come to my attention where any use vested prior to the 1907 act was ever questioned on a basis of its benefits or lack thereof, and as has already been seen the law in Territorial days required that uses be beneficial. Because of the language of the section such a question was possible. At this late date, and for the reasons stated it is most doubtful that it will ever arise.

In addition to recognizing vested rights and initiated rights of appropriation for beneficial use, the 1907 law provided for preservation of rules and regulations adopted or to be adopted for distribution of water from ditches or ditch systems where "economical use" was accomplished. (Laws 1907, Ch. 49, Sec. 57; Sec. 75-8-2, N.M.S.A. 1953). By amendment in 1909 (Ch. 54, Sec. 1) "water tanks or wells for watering stock" were exempted from the other provisions of the act of 1907. By Chapter 126, Sec. 24, Laws 1941, this was amended so that the exemptions no longer apply to "wells for watering stock" but are now applicable to "water tanks or ponds for the purpose of watering stock which have a capacity of ten acre feet of water or less." (Sec. 75-8-3, N.M.S.A. 1953).

A brief review of the situation with reference to underground water under the Constitution is here indicated. The rights recognized and confirmed are identical with the surface water rights, the difference being that until 1931 we had no underground water law. (See Yeo v. Tweedy, 34 N.M. 611, 286 P. 970; Bliss v. Dority, 55 N.M. 12, 225 P. 2d 1007). In the legislature of that year a law was passed declaring as public waters, and subject to appropriation <u>for beneficial use</u> "the water of underground streams, channels, artesian basins, reservoirs or lakes having reasonably ascertainable boundaries." (Laws 1931, Ch. 131, Sec. 1; Sec. 75-11-1, N.M.S.A. 1953).

The act provided that "existing water rights based upon application to beneficial use were 'recognized' and provided that the act was not 'intended to impair the same or to distrub the priorities thereof.'" (Laws 1931, Ch. 131, Sec. 4; Sec. 75-11-4, N.M.S.A. 1953). Although no particular significance is attached to the differences present in this statute and those present in Sec. 75-8-1 mentioned above, it is interesting to note that here the rights "recognized" and the priorities not "impaired" are those "based upon application to beneficial use" whereas in Sec. 75-8-1 the rights not impaired are "existing vested rights" without reference to whether they were based upon application to beneficial use. As already stated this is probably not

material, or if it ever was, at this late date it no longer is.

In addition to the provision mentioned above, the 1931 act contained a provision not present with reference to surface water that permitted claimants of vested water rights which had been applied to beneficial use prior to the passage of the 1931 act to file a declaration with the State Engineer "setting forth the beneficial use to which said water" had "been applied" together with other information, and gave the same effect as "prima facie evidence of the truth of their contents." (Laws 1931, Chap. 131, Sec. 5; Sec. 75-11-5, N.M.S.A. 1953). Prior to 1959 we had no comparable statute covering vested surface water rights. This omission became material in the efforts of New Mexico to establish certain old rights to waters in the Colorado River watershed in the law suit brought by Arizona against California in the United States Supreme Court, and to which New Mexico was made a party. The 1959 session of the legislature passed Chapter 222 (Sec. 75-1-2.1 and 75-1-2.2, N.M.S.A. 1959 Supp.) which makes similar provisions for filing declarations of "beneficial use" of surface waters as had been authorized for underground water since 1931. Although providing for the filing of the declarations, the act does not purport to state the legal effect of doing so.

I come now to what I hope will be the substance of my discussion of "beneficial use" under New Mexico law. What I propose to do is to explore the proposition of whether or not beneficial use is necessarily the best or most economical use, and further, if it isn't, are certain changes indicated that would result in a better or more economical use of our waters.

Section 75-5-6, N.M.S.A. 1953, provides as follows:

> "If, in the opinion of the state engineer, there is no unappropriated water available, he shall reject such application. He shall decline to order the publication of notice of any application which does not comply with the requirements of the law and the rules and regulations thereunder. He may also refuse to consider or approve any application or notice of intention to make application, or to order the publication of notice of any application if, in his opinion, approval thereof would be contrary to public interest."

This language clearly states that the application shall be rejected if there is no unappropriated water available. This has nothing to do with economics and would seem to be regardless of intended use. The last sentence seems to give the State Engineer considerable discretion to refuse to consider or approve " * * * if, in his opinion, approval thereof would be contrary to public interest." Can this be made to coincide with our constitutional requirement that "priority of time shall give the better right"?

What is meant by "public interest"? Is it in the public interest to permit a use which is not the best use economically?

These questions are only pertinent, if pertinent at all, insofar as surface water is concerned, because the right to deny an application to appropriate underground water would appear to be limited by the statute (Sec.

75-11-3, N.M.S.A. 1953) to a determination "that there are no unappropriated waters in the designated source, or that the proposed appropriation would impair existing water rights from such source." There is no provision for rejecting or denying an application because not in the public interest. Also, it would seem clear, that at least as far as underground waters are concerned priority of appropriation to beneficial use, without subsequent abandonment or forfeiture by failure to use for four years (Sec. 75-11-8, N.M.S.A. 1953) is the sole determining factor - without regard to relative merits of the proposed use or other possible uses.

Let us examine the problem then, insofar as surface water rights are concerned.

As has already been pointed out, water in "tanks or wells for watering stock" was exempted from the 1907 act. In 1941 this exemption was made to apply to "tanks or ponds for the purpose of watering stock which have a capacity of 10-acre feet of water or less." (Sec. 75-8-3, N.M.S.A. 1953).

In addition, in the case of First State Bank of Alamogordo v. McNew, supra, it was decided that "use of water for domestic purposes, including stock watering, is a 'beneficial use' or water." In that case large amounts of water were being appropriated and distributed through a pipeline for stock watering purposes on public domain. The water right found to be present was incident to the right of the owner to enjoy the use of the range.

It has been generally considered that our system of acquiring and preserving water rights was devised with agriculture and irrigation in mind and that it works to the advantage of these uses. It has been stated by the Utah Supreme Court "that domestic use is the most beneficial use for water and that irrigation is the next most beneficial use in the arid western states is a self-evident and well recognized fact regardless of any statute." (Tanner v. Bacon, Utah, 1943, 136 P. 2d 957). There are those who, no doubt, would take issue with this statement today. Many new uses of water and uses which possibly would bring a larger monetary return than can be realized from farming or stock raising are now seeking recognition. Among these are uses for power, industry, oil recovery, and last but not least, use for recreation. A few years ago, anybody who suggested that water should be stored for recreational use in preference to agricultural uses would have been laughed out of court. Today, with more people, easier accessibility, and increased leisure time available, there is a growing recognition of the value of such uses - not only for its sociologic benefits, but principally for its economic benefits. That such use is recognized as beneficial in New Mexico has already been pointed out.

With aspirations for the best and most economical uses I am disposed to agree, but can these considerations enter into the deliberation of the State Engineer when passing on an application to appropriate water? If two applications are filed at the same time and there is only sufficient water to satisfy one, the Engineer could probably grant the right to whichever use could be demonstrated to be economically most beneficial - this under the provision that he could refuse to approve any application "which would be contrary to public interest." I assume that to approve a less economical use than is otherwise available would be considered "contrary to the public interest."

However, it can be argued that if any intended use would contribute something of public value or benefit, it could not be found to be "contrary to public interest," and accordingly if it was first in time, the Engineer would have to approve it. Also, would he have the right to deny an application for use to irrigate with available water in order to hold that water for some possible future application for a more economical use, or on the other hand, could he grant a right conditioned on such better or more beneficial use applying for it?

The Supreme Court of New Mexico has spoken only once on this subject and that was almost 50 years ago in the case of Young & Norton v. Hinderlider, 15 N.M. 666, 110 P. 1045, decided in 1910. In that case the Territorial Engineer had for consideration three applications. The first was from the appellee, Hinderlider, to appropriate 200 second feet of the flow of the La Plata River, to be stored in a reservoir of 12,406 acre feet capacity to be built and to be used to irrigate about 14,000 acres.

This application was followed a couple of months later by the application of appellants to appropriate the waters of the stream, to be stored in a reservoir of 10,149 acre feet capacity and to be used to irrigate about 5,000 acres of land. The third application need not be considered.

After a hearing the Engineer rejected appellee's application and approved appellants' basing his decision on the fact that although junior in time, appellants were settlers and would be using the water themselves, and not for speculative purposes, the amount of water sought by them was more within the available supply, that the cost was more reasonable, being only about half the cost of the appellee's project.

This decision by the Engineer was appealed to the Board of Water Commissioners of the Territory (since abolished) which heard the evidence and reversed the decision of the Engineer. This decision was appealed to the district court which affirmed the decision of the Water Commissioners and the case was then appealed to the Supreme Court which disposed of the case by remanding it to the district court with instructions that it make some additional findings which were deemed to be necessary for a final decision.

However, concerning the question of the rights, duties and powers when applications to appropriate waters for beneficial use are present, the Supreme Court pointed out that it "should be borne in mind" that "the entire statute is designed to secure the greatest possible benefit from them (the public waters) for the public **." The court further stated that it was "obviously for the public interest that investors should be protected against making worthless investments in New Mexico" and further that if there was water available only sufficient to irrigate 5,000 acres, "it would be contrary to the public interest" to give "official approval" which would make possible the sale of stock which was "reasonably sure to become worthless, and land which could not be irrigated at the price." The court expressed a concern about irrigation projects failing, not only because of the effect on the farmers dependent on it, but because such failures reflect upon all irrigation enterprises.

They said that the relative cost of the proposed works, although not conclusive on the question of "public interest" should be considered. Quoting from the decision we find the following:

"It may be said that the territorial engineer could have approved the Hinderlider project for the number of acres which could be irrigated from it. He makes it clear, however, from his report, that the cost of the works for that project would be much greater than for works fit to irrigate the land which could really be irrigated from the available water there."

Further along in the decision, the court points out that there was no reason under the inadequate findings and conclusions made that the earlier application should not have been approved for the acreage for which water was available. Quoting again, they say, "The price which the owners of land can afford to pay for irrigation must depend in part on the use to which it can be put" and then state that $40.00 per acre foot as a cost of water for one type of crop might be prohibitory whereas for another type it would not be excessive or unreasonable.

This decision caused Mr. Lasky in another law review article in 2 Rocky Mountain Law Review 35, at page 41, to state, "In the face of such decision, it seems difficult to say that prior appropriation still exists." This comment evidently stems from the fact that the court recognized considerations other than time as being proper for the State Engineer to weigh in granting or denying permits to appropriate water. That it did alter what might otherwise be simon-pure "prior appropriation" cannot be denied. This case arose before adoption of our constitution. Although the statute has remained unchanged and still contains the reference to "public interest," if the question of its constitutionality were raised in the light of the provision of Art. XVI, Sec. 2, that "priority of appropriation shall give the better right," there could be a real question of its continued application, at least in the manner just discussed. Possibly that is the reason there are no later cases where the question has arisen.

This is an appropriate place to note the recent case of Cartwright v. Public Service Co. of New Mexico, finally decided September 3, 1959, and appearing in 343 P. 2d 654, in which our Supreme Court by a three-to-two decision determined that the so-called pueblo doctrine of water rights applied in New Mexico. By this doctrine it is held that with the original grant of a pueblo for colonization purposes went the right to all waters necessary for the use of the pueblo, not only if put to beneficial use promptly, but for all future time.

The violence that such holding does to the prior appropriation doctrine and the requirement of beneficial use in order to acquire and maintain a right to water should be evident.

The majority of the court, in its opinion stated, "We see nothing in the theory of pueblo rights inconsistent with the doctrine of prior appropriation and beneficial use." However, Judge Federici, in his dissenting opinion on motion for rehearing, points out how this theory of pueblo rights cannot be supported under our laws as they have been heretofore announced. Although Judge Federici covers the matter at some length, the following quotation covers the matter directly and pertinently:

"What does prior appropriation mean? What is meant by beneficial use? Can the term 'first in time, first in right' be defined? What has this Court said about defining prior appropriation?

> In Carlsbad Irr. Dist. v. Ford, 46 N.M. 335, 340 128 P. 2d 1047, this Court, speaking through Justice Bickley, adopted the definition of the term 'appropriation of water' from Kinney, Irrigation and Water Rights, 2d Ed., Sec. 707, as follows:
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> 'Therefore, we believe that the following definition of the term "appropriation of water" under the Arid Regions Doctrine of Appropriation comes nearer being correct than any which we have found; the appropriation of water consists of the taking or diversion of it from some natural stream or other source of water supply, in accordance with law, with the intent to apply it to some beneficial use or purpose and consummated, within a reasonable time, by the actual application of all of the water to the use designed, or to some other useful purpose.' (Emphasis of Writer).
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> How can the theory of pueblo rights be considered consistent with the doctrine of prior appropriation with the language of this Court describing the doctrine of appropriation requiring an intent to apply it to some beneficial use or purpose and consummated within a reasonable time by the actual application of all of the water to the use defined or to some other useful purpose? Kinney and this Court were talking about the Arid Region Doctrine of Appropriation, the same thing that the majority is talking about when they say:
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> 'We see nothing in the theory of pueblo rights inconsistent with the doctrine of prior appropriation and beneficial use.'
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> How about the words and phrases: intent, consummated, reasonable time, the use defined?"

and then Judge Federici concludes, as follows:

> "The theory of pueblo rights, as construed by the majority here and by the California courts, is as antithetical to the doctrine of prior appropriation as day is to night."

It is still too early to be able to fully appreciate the effects of this decision in New Mexico. It seems clear that all municipalities in the state, which even remotely might trace their origins to pueblo grants, when finding themselves in need of more water to maintain their growth will seek to establish a pueblo right. What success in this effort will ultimately do to our agricultural economy built upon what have heretofore been supposedly valid appropriations to beneficial use will become clear only with the passage of time. Also, it has great potentialities for making our problems in interstate compact compliance difficult if not insurmountable.

However, before predicting disaster to what had been thought to be well settled principles, we should consider that it is possible that the right determined to be present in Las Vegas may not be generally present in all or many of our towns. There are those who have given the matter considerable study and thought who so assert - and as a matter of fact say that Las Vegas is the only town in the state where these rights exist.

Whatever the ultimate extent to which the doctrine may be applied, it is clear that we are entering upon an era of competition between municipalities and farmers for water heretofore used benefically in agriculture, and now needed to assure continued urban growth. Also, it is clear that these municipalities prefer to establish their right to this water under the pueblo doctrine rather than to acquire existing rights and transfer them from present uses to the new uses. Why this should be true is obvious.

Our statutes do not require preferential treatment of any beneficial use over any other beneficial use except on a basis of priority, with such possible consideration of "public interest" as is hereinbefore indicated. As already mentioned, this may have played into the hands of those interested in using water for irrigation.

Certain states have seen fit to provide by statute for the relative preference to which various types of uses should be accorded. (See the article by Professor Trelease of the University of Wyoming School of Law, appearing in 27 Rocky Mountain Law Review 133). This may have something to recommend it, but to say the least is subject to criticism on the ground that it merely adds another inflexible element into the law, and this is admittedly not desirable. New Mexico never saw fit to adopt such a legal strait jacket to govern its uses.

It can be said that municipal and other public uses for which condemnation powers are granted have a preference, as hereafter noted. Also, we may have "public interest" considerations already discussed which, theoretically and if constitutional, permit certain preferences. We have the pueblo doctrine which, at least in Las Vegas, and any other municipality which can prove a pueblo grant, gives a preference for future growth of the municipality. In addition, we have the exemption of reservoirs of less than 10-acre feet capacity built by stockmen for stock purposes, as already pointed out (Sec. 75-8-3, N.M.S.A. 1953) and a right in travelers who do not have a large number of cattle to the free use of water from all sources except wells, ponds or reservoirs. (Sec. 75-1-4, N.M.S.A. 1953). The underground water law provides that although application must be filed with the State Engineer by those desiring to make use of waters from wells for watering livestock, for "irrigation of not to exceed one acre of non-commercial trees, lawns or garden, or for household or other domestic use," when an application is filed a permit allowing such use shall issue. (Sec. 75-11-1, N.M. S.A. 1953).

Also, in passing, it is interesting to note that in the Colorado River Compact, which is a formal agreement of all of the states in the Colorado River drainage basin and the United States, adopted in 1922 and ratified by New Mexico in 1923 (Chap. 6, N.M.S.L. 1923), and therefore a part of the law of New Mexico, it is provided in Art. II (e) that "The states of the upper Division (of which New Mexico is one) shall not withhold water, and the states of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses," and in Art. II (h) "domestic use" is defined to "include the use of water for household, stock, municipal, mining, milling, industrial and other like purposes, but shall exclude the generation of electrical power."

Thus it is seen, that at least in this area of the law of New Mexico, agricultural and domestic uses which include all forms of industrial uses

are put in a higher category of importance than the use of water for production of power.

Out of these provisions arise the dispute which is presently raging between the states of the upper and lower division concerning filling procedures for Glen Canyon Reservoir. May the upper states withhold water to fill this reservoir if Lake Mead and the other storage lakes below contain sufficient water for domestic and agricultural purposes? The lower basin states say "no" because they claim that the only reason for filling Glen Canyon as rapidly as possible is to build up a sufficient head of water to develop power which is the least preferred use under the compact. The upper basin states say "yes" for the reason that their right to build the dam to store water is recognized in the compact - aside from any rights to manufacture power, and the lower basin states have no right to demand water so that they have a greater head for power at Hoover Dam. This argument is still unresolved, and merely mentioned here to demonstrate the type of dispute that can arise when uses are assigned relative positions in the scheme of things.

Incidentally, I would call your attention to the fact that fishing and recreation are uses not even mentioned in the compact, although as already stated there are those who ascribe to such uses the highest economic return of any.

Let us next inquire, whether our reliance on the prior appropriation doctrine slightly modified by what was said in Young & Norton v. Hinderlider, supra, if still applicable, and in the Cartwright case, supra, and without giving preference to one beneficial use over another was poorly conceived or has not worked.

I am constrained to feel it has worked reasonably well for two principal reasons. First, demands for other uses are only now arising. If use for irrigation had not been made, water which flowed unused downstream during the many years since this country was settled would have been lost entirely, either by passing unused to the sea, or to what would have been a worse fate so far as we are concerned, by being put to beneficial use in states lying between us and the sea, so that prior claims would have arisen in these users to have the flow continue undisturbed.

What has happened to Arizona on the Colorado River, and to New Mexico to a lesser extent, and what has given rise to the case of Arizona v. California, et. al., is an example of what can happen, and should be sufficient proof of one of the errors present in failing to make the earliest and greatest use of all water available for use in any state.

Secondly, it has been the foundation and basis of a large part of the growth of our state to its present position. It would have been neither desirable nor economical in my mind to have permitted the water to flow by unused and unclaimed, producing nothing, and being lost forever, with great likelihood that the future flow by the same failure to use was likewise being lost for all time.

It is suggested by Professor Clark in his study of "Water Law Institutions and the Community," already refered to, that our doctrine of appropriation has "become hardened into verbal formulations called constitutions and statutes and case decisions," and that whereas our problem heretofore has

been one of rights of appropriation and acquisition, we are entering into a new era where the problems are more related to "transfer or rights to different locations or other uses or involve more complex forms of ownership and administration."

True it is that with some exceptions on the San Juan River and on the Canadian River, all our surface water has been appropriated to beneficial use - largely for irrigation. Now arise the demands for other uses, assertedly more beneficial - for industry, power, etc. Can we, or should we by changing our laws attempt to give preference to these so-called higher uses?

As to the waters already appropriated and put to beneficial use for irrigation, the short answer is that we probably can't even though we would. Property rights have been acquired in this water, and these rights are protected against confiscation or unreasonable or unjustified infringement by both our state and federal constitutions. Professor Clark suggests that some means should be found to make these vested rights available to new uses so that the social and economic aspirations of the state may be nurtured. He does not suggest what he has in mind, and it may be that some formula for accomplishing this within the framework of our constitutional protection of human and property rights has escaped me, but I am frank to admit that I perceive of no method, except the laws of nature - of supply and demand - of economic necessity which can in any manner supply the answer.

True, we can condemn water rights for public use, paying the owner the reasonable value thereof. Our laws already provide for condemnation by cities and towns to provide the municipality with water (Sec. 14-21-52, Sec. 14-40-23 and Sec. 14-48-1, N.M.S.A. 1953) and also for condemnation by the Interstate Stream Commission when "deemed necessary or proper for the construction, operation and maintenance of * * * works" as provided in Chapter 266, N.M.S.L. 1955 (Sec. 75-34-10, N.M.S.A. 1953, 1959 Supp.) and these rights could be broadened to include other public bodies and anything which might be described as public purposes.

In this connection mention might be made of Chapter 286, N.M.S.L. 1959 (Sec. 75-4-1.1 N.M.S.A. 1953, 1959 Supp.) where county commissioners were given the power to condemn water rights within a county for developing a county water supply system. Possibly this is a step in the direction of broadening the power of eminent domain to accomplish some preferable beneficial use. However, unrestrained granting of the right for any and all purposes would be of questionable constitutionality. Accordingly, it is doubtful that any such method would resolve the problem.

I have already made mention of the proposed Model Water Use Act. A draft of this act was presented to the conference of Commissioners of Uniform State Laws last year. What progress it has made since then I do not know. It is interesting to note, however, that this model code sets up a system of licensing the use of water for limited times and so as not to impair "the most beneficial use and development of the water resources of the state," giving "no preference or priority to applications first in time."

Thus it is seen that whereas priority in time generally controls here, it plays no part under the suggested model code; and whereas, public interest is only incidentally considered here, it becomes the major and controlling

consideration in the model code.

The interest in this model code and the impetus behind it has come primarily from the eastern and southern states where the riparian doctrine has been in vogue and consequently rights in water have not become vested as they have here. The principle of licensing rather than granting rights to water would seem to have considerable merit, and although I do not want to be understood as giving unqualified endorsement to the proposed code, I am free to admit that if we had adopted it in 1912 instead of the prior appropriation doctrine, the problems now facing us of finding water for further development after practically the entire supply has been appropriated would not be so critical.

However, we must face reality. As already stated, except for the Canadian and San Juan Rivers, all our surface water has been appropriated to beneficial use - if not over-appropriated. I doubt if any great service will be performed by trying to evolve ways to overturn these rights. Neither do I think we should address our energies toward devising methods of tearing the rights away from those who have acquired them and are using them,as for example, proving rights to water under the pueblo doctrine recognized in the Cartwright case, supra. Rather, as already suggested in this paper, we should put our faith in the laws of nature - rather than in man-made laws. For one thing, they are more easily enforced, and if not more equitable, at least they are certain in their application.

Accordingly, as I see it, when the need becomes great enough, or the profits become inviting enough, there will come a time when the new uses will require that old water rights be legally acquired from those holding them. The fact that very few applications to change uses have arisen to date does not surprise me. (See XVII New Mexico Quarterly 103). In my opinion, we are only now arriving at the time when the demand for changes of use could be expected to be increasing. In addition, until the courts have spoken out clearly that only by acquiring valid existing rights and getting approval of a change of use is the only legal method open, there will continue to be resistance and objection.

Although the day when no water was available for new or better uses has been rapidly approaching, the action of the State Engineer in closing the underground basin of the Rio Grande Valley from the Colorado line to Elephant Butte in 1956 advanced the day of reckoning materially. It would have come sooner or later, but with this basin closed to new development unless old uses were retired, the day of decision had arrived. The Rio Grande Valley is the area where the new demands are the greatest. Resistance has been present and to date there has been no decision by our Supreme Court delineating what may be done and what may not be done, except only the case of State v. Myers, 64 N.M. 186, 326 P. 2d 1075, holding that in the exercise of its police powers the State could require a license before a well could be drilled, even though the water right was already in existence, and the Cartwright case which held out to municipalities in the valley the hope of getting this water as a matter of right. Of course, the actions of the State Engineer in declaring underground basins had long since been upheld generally in Pecos Valley Artesian Conservancy District v. Peters, 50 N.M. 165, 173 P. 2d 490.

However, since the area of greatest growth and biggest demand is around Albuquerque, and within the district declared in 1956, the problem has brought to a quick head, and a solution is required.

Examples of what I am talking about have been in the press during the last few days. I refer to applications by the Kaiser Cypsum plant, south of Santa Fe, at Rosario, and by the Hoffman City, west of Albuquerque.

You will recall that Kaiser made application to change use and point of diversion of a right acquired by it, and the State Engineer denied the application because the right sought to be moved was an abandoned or forfeited right that had not been used for many years.

When this occurred, Kaiser went out and acquired another right. If it isn't a valid and existing right there are still literally thousands of rights of varying value that can be acquired and moved. The application of the Hoffman development at Albuquerque is in the same position. These are two cases of natural needs and economic ends dictating changes in use from agriculture to what is a better or more economic use in these days and times. I anticipate that instances such as these will multiply as time passes, and that our progress will not be delayed by continued adherence to our established legal principles.

Before closing, I should probably mention that although, insofar as beneficial uses in New Mexico are concerned, there are no apparent differences between the law applicable to underground water that applicable to surface water, except as hereinbefore mentioned; nevertheless, the fact that we have proceeded under a theory that the two types of water are separate and distinct has caused some problem in the past.

There are those who persist in their position that there is no relation between underground and surface waters - and as to certain waters this is probably true to all practical purposes. However, as to other waters there undoubtedly is a relation, and in the administration of the whole of the water - some surface and some underground - under two different laws, difficulties of decision and administration are not surprising.

The recent case of Templeton v. Pecos Valley Artesian Conservancy District, 65 N.M. 59, 332 P. 2d 465, decided in November, 1958, probably went a long way toward resolving this problem. In that case the court sustained the lower court in its finding that surface water appropriations, were "in effect," appropriations from the underground. To an argument that this amounted to a change from a surface to an underground right, the court replied:

> "If the river and underground waters had two separate sources of supply and if there were no connection between them, this argument might be sound, but under the facts set forth above, the Valley Fill was the source of the flow of the river."

The same problem is present in the declaration of the Rio Grande Underground Water Basin in 1956, where the State Engineer found and declared that "the waters of said basin are interrelated with the flow of the Rio Grande Stream System, so that such underground waters are a substantial source of the flow of said stream system."

My reference to this phase of our present water problems is only indirectly connected with the discussion of beneficial use, but since all aspects of water appropriation are not too far removed from the basic problem

of use and the economic growth resulting from such use, I felt I could not close without at least pointing out the problem.

In conclusion I would like to say that although I may be guilty of inexcusable optimism, as I see it:

(1) We have benefitted most be fostering the greatest use possible at the earliest date possible which resulted from adoption of the prior appropriation doctrine.

(2) To have held any of this water for future better uses would have resulted in waste if not loss.

(3) A licensing system such as is suggested in the Model Code would possibly have been preferable, although it is doubtful that development to full use would have been as rapid thereunder.

(4) Adoption of a licensing system in New Mexico such as is proposed in the Model Code would not seem desirable at this late date after most of our water has been appropriated to beneficial use.

(5) The law of supply and demand will take care of changes from one beneficial use to another or better one.

(6) This change may not be as rapid as would result if our law could be changed, but is more in keeping with our concepts of property rights and moral responsibilities, than to attempt disappropriation through whatever method might be devised, and will come as rapidly as the changes are economically justified.

(7) The situation resulting from a recognition of the interrelation of certain surface and underground waters needs to be generally accepted so that the orderly appropriation of water to the greatest beneficial use may proceed.