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COMMENTS

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A Commentary

ROBERT EMMET CLARK*

I was going to address you as "fellow students of water problems and fellow slaves of the mythical marketplace," but the two need not be equated. My place on this program is one that I enjoy, that of a gadfly and a critic.

Some of you know that I have been a member of the bar of Arizona and New Mexico for 30 years. Many of you know that I have been in Arizona for the last 12 years; I went there for one year to be a visiting professor, and we are still there! I found something I could really criticize—namely, the Arizona water law, which is terrible.

When I was in New Mexico, we always used to have something to say about Texas; now, in this gathering, I think I should say something about Arizona. And what I have to say is pretty bad. You may have read the last Arizona Supreme Court decision that emphasizes exactly what Mr. Ogilvie of the Denver Water Board has discussed—the plight of municipal water users. I am especially pleased that he discussed municipal suppliers, because I feel like a prophet on that subject. While the farmers are going to grow pecans—which take about seven acre-feet per year—the mines are theoretically going to be shut down for lack of sufficient water, and the city of Tucson is going to be left somewhere in the middle.1 Obviously, some reevaluation of our water priorities will soon be necessary.

I should also like to make a disclaimer here. Some of the people on this panel represent particular interest groups. I do not represent any interest other than the critical ideas of a teacher and an opportunity to disagree with my long-time friend, Frank Trelease, about the role of public management—a concept that has been found in all systems that evolved from the primitive prior appropriation doctrine.

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The comparative system outlined by Professor Trelease emphasizes what makes this subject both serious and interesting. Water law demonstrates that jurisprudential studies are not high-level, metaphysical, or theoretical. The law of necessity, or of utility, is evident in most water law systems around the world. Thus, ever since the time of Mesopotamia and Egypt, the visible sources of the rivers have been the sources used, and the parties using them acquired the right to continue their uses.

Three questions may be asked in this jurisprudential context:

(1) What are the sources of the law? Can a man with a shovel and some enterprise using the stream to grow some frijoles be one? Should he be one?

(2) How does the law change? How does it grow? How does it develop? The permit system and its many variations might be one instructive example in this regard.

(3) What is the purpose of the law? Is it the purpose of the law of Arizona to ensure that the farmers will have water when others do not? Clearly, that is not the purpose, and clearly the legislation in Arizona will have to be changed.

A review of these juridprudential concerns further demonstrates my point: we must have a better system of public management of all resources, not just water resources. Professor Trelease knows that the prior appropriation system is no longer in its pure form, that it has been modified by statute, and that the modifications are directed toward greater public management. In fact, the Wyoming Supreme Court, early in this century, made one of the strongest statements about public management in a case involving the permit system.

But, greater representation of the public’s interest in water allocation is still necessary. We can no longer allow the pressures of special-interest groups to determine, one against the other, which interest shall prevail. This must be changed and is being changed. When I speak of the public management system I realize that Professor Trelease thinks that is a system of the God-damn bureaucrat and the wise administrator, which in his mind are the same thing.

But the marketplace is a wonderful thing to talk about; it is a wonderful myth. The economists have an objective stan-
dard that we in the law do not, since we deal in "weasel words" like "justice," "fairness," "equality," and "equity." The economists use "money" and they use it to measure love, and debt, and water rights. The economists cannot adequately measure the law's concerns, and the marketplace cannot be allowed to dictate the law's functions. Public participation and management is sorely needed in the water decisionmaking system.