

April 30, 1936.

Hon. Edwin T. Stewart,
State Water Commissioner,
Arizona State Building,
Phoenix, Arizona.

Dear Mr. Stewart:

Referring to your letter of recent date, wherein you requested an opinion from the Attorney General as to whether or not public waters of the State of Arizona may be appropriated for any other uses than those uses enumerated in Section 3281, Revised Code of Arizona, 1928, and more particularly whether or not water may be appropriated for "Recreational Use" and "Game Watering Use:"

Referring to question as to whether or not public waters of the State of Arizona may be appropriated for any other use or purpose other than the uses enumerated in Sections 3281 and 3285, Revised Code of Arizona, 1928:

Section 3280, Revised Code of Arizona, 1928, provides as follows:

"The water of all sources, flowing in streams, canyons, ravines or other natural channels, or in definite underground channels, whether perennial or intermittent, flood, waste or surplus water, and of lakes, ponds and springs on the surface, belongs to the public, and is subject to appropriation and beneficial use, as herein provided. Beneficial use shall be the basis, measure and limit to the use of water. Whenever the owner of a right to the use of water shall cease or fail to use the water appropriated for five successive years, the right to the use shall cease, and the water shall revert to the public and be again subject to appropriation."

Section 3281, Revised Code of Arizona, 1928, provides as follows:

"Any person may appropriate any unappropriated water for domestic, municipal, irrigation, stock watering, water power, or mining uses, for his personal use or for delivery to consumers; the person first appropriating shall have the better right. Such person, to effect the beneficial use, may construct and maintain

reservoirs, dams, canals, ditches, flumes, and other necessary waterways."

Section 3285, Revised Code of Arizona, 1928, provides in part as follows:

"* * * The relative values to the public for this purpose are: 1. Domestic and municipal uses, domestic uses to be construed to include gardens not exceeding one-half acre to each family; 2. irrigation and stock watering; 3. water power and mining uses. "

It will be noted from Section 3280, supra, that public waters are subject to appropriation "and beneficial use, as herein provided" and that "beneficial use shall be the basis, measure and limit to the use of the water." Section 3281, supra, enumerates the uses and purposes for which water may be appropriated, and Section 3285, supra, enumerates the relative values of the uses to the public.

Construing these sections together, it is our opinion that the beneficial use, as provided for in Section 3280, supra, is defined as and limited to the uses enumerated in Section 3281, supra, and that no person can make a valid appropriation of water for a use or purpose which is not mentioned in Section 3281, supra, the general rule being that water must be appropriated for the uses and purposes authorized by statute. 67 C. J. Sec. 416, page 973. In the case of Daggs vs. Howard Sheep Company, 16 Ariz. 283, at page 288, the rule is stated as follows:

"The rights in unappropriated waters or the surplus or flood waters are acquired by any person or corporation for delivery to consumers, rental, milling, irrigation, mechanical, domestic, stock or any other beneficial purpose, by appropriation of such waters. '* * The person or persons, company or corporation first appropriating water for the purposes herein mentioned shall always have the better right to the same.' Paragraph 4169, Ariz. Rev. Stats. 1901. The right to appropriate the waters depends upon whether the water is unappropriated and UPON THE PURPOSE FOR WHICH THE WATER IS TO BE APPLIED AFTER APPROPRIATION. The person first in time who uses the unappropriated waters of the state FOR ANY OF THE PURPOSES MENTIONED IN THE STATUTE, supra, acquires the better right to the water

so used. If, in order to use or appropriate the water FOR ANY OF THE PURPOSES MENTIONED, it becomes necessary or convenient, the appropriator is given by the said statute the right to construct and maintain reservoirs, dams, canals, ditches, flumes and any and all other necessary waterways." (capitals ours)

Under this rule, it is clear that the waters of the State of Arizona can only be appropriated for the uses and purposes enumerated in Section 3281, supra.

In regard to your question as to whether or not water may be appropriated for "Recreational Use," we are of the opinion that, if the term "Recreational Use," applies to the appropriation and storing of water for boating, swimming, and other types of recreational activity, waters of this state can not be appropriated for such purposes, as an appropriation for such use is not authorized by Section 3281, supra, or any other statute. However, if the term, "Recreational Use," should apply to the appropriation of water for domestic use for camp grounds, we are of the opinion that a valid appropriation can be made of water for such use, under the classification of "domestic use."

In this connection, we would advise that you compel any applicant, who has made an application to appropriate water for recreational uses, to amend his application to appropriate so that said application will clearly set forth the necessary facts showing that the water is sought to be appropriated for domestic use, and not for such uses as boating, swimming, etc.

In regard to your question as to whether or not water may be appropriated for "Game Watering," we are of the opinion that water of this state can not be appropriated for game watering, as the same is not a recognized use under the provisions of Section 3281, supra, for which water may be appropriated, and in the absence of such authorized use water can not be appropriated therefor. In the absence of statutory authority, water can not be appropriated for game use, and even if water in this state could be appropriated under the broad classification of "beneficial use," as in other states, the appropriation of water for such purpose and use has been declared not to be within the term, "beneficial use." Lake Shore Duck Club vs. Lake View Duck Club, 166 Pac. 309.

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Very truly yours,

JOHN L. SULLIVAN,
Attorney General.

ELMER C. COKER,
Assistant Attorney General.

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