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## Which Right is Right: The Pueblo Water Rights Doctrine Meets Prior Appropriation

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# CASENOTE

## Which Right is Right: The Pueblo Water Rights Doctrine Meets Prior Appropriation

The New Mexico Court of Appeals decided *State ex rel. Martinez v. City of Las Vegas*<sup>1</sup> on July 15, 1994. The case was the latest incarnation of litigation started in 1978 to determine the extent of the pueblo water rights adjudicated to the City of Las Vegas, New Mexico, in *Cartwright v. Public Service Company of New Mexico*.<sup>2</sup> Speaking through Judge Apodaca,<sup>3</sup> the court evaluated the historical record of the doctrine, concluded that the New Mexico Supreme Court would overrule *Cartwright I* if the issue were before it, and held that the city was not entitled to pueblo water rights.<sup>4</sup> While the court of appeals was on solid substantive ground in its decision, the procedural issues raised by its holding lead to uncertainty in the law. The New Mexico Supreme Court should use this case to settle those procedural issues and overrule *Cartwright I*, purging the doctrine of pueblo water rights from New Mexico law.<sup>5</sup>

Water in New Mexico, as elsewhere in the Southwest, is crucial to economic development. Municipalities wishing to grow or expand

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1. 880 P.2d 868 (N.M. Ct. App. 1994).

2. 343 P.2d 654 (N.M. 1958) [hereinafter *Cartwright I*].

3. Now Chief Judge of the New Mexico Court of Appeals.

4. *State ex rel. Martinez*, 880 P.2d at 868-69.

5. As of this writing, the New Mexico Supreme Court had granted certiorari and scheduled oral arguments in *State ex rel. Martinez*. At the request of the parties, however, the court vacated the arguments pending a negotiated settlement of the dispute between the State and the City. Nevertheless, the supreme court can still rule on the merits if the parties settle. In *First National Bank in Albuquerque v. Sanchez*, 815 P.2d 613 (N.M. 1991), the court issued an opinion "for precedential value alone," *Id.* at 622, because while it was preparing its opinion in final form, the parties settled the matter. *Id.*

Even if the litigants reach a settlement, the court should issue an opinion to settle New Mexico law, since the procedural and substantive issues raised in this case would benefit from guidance from the supreme court. Should the court decline to publish an opinion, the procedural issues raised here with regard to the holding in *State v. Wilson*, 867 P.2d 1175 (N.M. 1994), will remain unresolved until another case raises them. See discussion below. Furthermore, the status of the pueblo water rights doctrine would remain uncertain. Litigants cannot agree on issues of law. Neither the state nor the city has the power to determine the fate of the pueblo water rights doctrine in New Mexico. Potential litigants need to know whether *Cartwright I* or *State ex rel. Martinez* would control similar issues raised in the future. By deciding *State ex rel. Martinez*, regardless of the settlement position of the parties, the court would act in the name of certainty and efficiency in the law.

need to assure that they have a reliable supply of water to sustain that growth. The City of Las Vegas in eastern New Mexico is no exception. For several decades, Las Vegas has litigated to secure its water rights, either directly or through agents.<sup>6</sup> In a controversial 1958 New Mexico Supreme Court ruling, the court adjudicated to the city a pueblo water right, thus giving it unlimited access to the waters of the Gallinas River, which flows through the city.<sup>7</sup> The doctrine of pueblo water rights holds that a municipality or pueblo that is a successor to a Spanish or Mexican colonization grant has a paramount right to waters of nonnavigable streams flowing through the grant.<sup>8</sup> "The quantity of water guaranteed by this right increases in time with the expanding size, population, and needs of the successor community."<sup>9</sup> The *Cartwright I* court found the City of Las Vegas to be the successor to the pueblo Nuestra Senora de Las Dolores de Las Vegas, an 1835 community land grant from the Mexican government which the United States Congress confirmed in 1860.<sup>10</sup> In 1978, the state began proceedings to clarify the extent of the city's rights.<sup>11</sup> The most recent appeal in this litigation is the subject of this casenote.

The 1978 litigation has gone through two appeals. The first was in 1990, affirming the denial of motions for summary judgment and allowing the trial court to hear evidence as to the historical validity of the pueblo water rights doctrine.<sup>12</sup> The second, resulting in the present decision, was from a district court's partial final judgment defining the

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6. See *The Acequia Madre de Las Vegas v. Gallinas Canal, Water Storage and Irrigation Co.*, San Miguel County District Court No. 8142 (1922) (the Gallinas Decree); *United States v. Hope Community Ditch Co.*, United States District Court No. 712 Equity (1933); *State ex rel. Erickson v. Public Service Co. of New Mexico*, San Miguel County District Court No. 15,219 (1954); *Cartwright v. Public Service Co. of New Mexico*, 343 P.2d 654 (N.M. 1958) [hereinafter *Cartwright I*]; *Cartwright v. Public Service Co. of New Mexico*, 362 P.2d 796 (N.M. 1961) [hereinafter *Cartwright II*]; *City of Las Vegas v. Oman*, 796 P.2d 1121 (N.M. Ct. App.), cert. denied, 795 P.2d 87 (N.M. 1990).

7. *Cartwright I*, 343 P.2d 654.

8. Iris H.W. Engstrand, *Introduction to DANIEL TYLER, THE MYTHICAL PUEBLO RIGHTS DOCTRINE: WATER ADMINISTRATION IN HISPANIC NEW MEXICO* 1 (1990).

9. Anastasia S. Stevens, *Pueblo Water Rights in New Mexico*, 28 NAT. RESOURCES J. 535 (1988).

10. See *Cartwright I*, 343 P.2d at 658, 667; *Oman*, 796 P.2d at 1124; *Maese v. Herman*, 183 U.S. 572 (1902). Note, however, that there is the possibility for dispute of that claim. See *Cartwright I*, 343 P.2d at 686, 689-90 (dissenting opinion); *State ex rel. Reynolds v. Lewis*, Nos. 20294 and 22600 Consolidated, slip op. at 2 (5th Jud. D. Chaves County, N.M. Dec. 29, 1992) (the latest district court pronouncement in this case, entering no judgment on whether the city is the successor to a colonization grant.) Note also the silence of the court of appeals on this issue in *State ex rel. Martinez*, 880 P.2d 868 (N.M. Ct. App. 1994).

11. *City of Las Vegas v. Oman*, 796 P.2d 1121, 1127 (N.M. Ct. App.), cert. denied, 795 P.2d 87 (N.M. 1990).

12. *Oman*, 796 P.2d at 1121.

limits of the city's right.<sup>13</sup> In its appeal from that ruling, the state urged the court of appeals to declare the pueblo water rights doctrine invalid.<sup>14</sup> The city argued that the validity issue was not before the court and urged the court to overturn the restrictions on the city's rights which the district court had imposed.<sup>15</sup> The court of appeals did not address those restrictions, instead ruling directly on the pueblo water rights doctrine.<sup>16</sup>

Procedural and substantive reasoning guided the court of appeals in *State ex rel. Martinez*. Procedurally, an intermediate court of appeals cannot overturn a decision of the state's highest court. New Mexico law abides by this principle as much as other courts in the nation.<sup>17</sup> Yet the court of appeals viewed the recent New Mexico Supreme Court decision in *State v. Wilson*<sup>18</sup> as granting it the freedom "to decline to uphold the pueblo water rights doctrine as established in *Cartwright I*."<sup>19</sup> The language of *Wilson*, however, does not seem to support such an expansive view of its holding. Therefore, the New Mexico Supreme Court should review this case to clarify the *Wilson* holding.

Substantively, the overwhelming weight of modern historical authority on Spanish and Mexican water rights persuaded the court of appeals that the doctrine should not continue to exist in New Mexico.<sup>20</sup> The *Cartwright I* court imported the doctrine from California law. But an analysis more correctly based on principles of Spanish and Mexican law reveals that the pueblo water rights doctrine is historically invalid and lacks modern scholarly support. Moreover, the doctrine directly conflicts with fundamental constitutional property rights and with the law of prior appropriation and beneficial use. In addition to resolving procedural uncertainty, then, the New Mexico Supreme Court should use this case to overrule the *Cartwright I* holding that brought pueblo water rights to New Mexico.

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13. *State ex rel. Reynolds*, Nos. 20294 and 22600 Consolidated, slip op. at 2.

14. *State ex rel. Martinez*, 880 P.2d at 869.

15. *Id.* See also Appellant's Brief-in-Chief.

16. *State ex rel. Martinez*, 880 P.2d at 868-69.

17. Taylor Mattis, *Precedential Value of Decisions of the Court of Appeals of the State of New Mexico*, 22 N.M. L. REV. 535, 547-48 (1992).

18. 867 P.2d 1175 (1994).

19. *State ex rel. Martinez*, 880 P.2d at 870.

20. *Id.*

### *The Procedural Hurdle: Oman, Alexander, and their legacy*

The first appeal of the 1978 litigation was in *City of Las Vegas v. Oman*.<sup>21</sup> In the district court, both the city and the state filed cross motions for partial summary judgment based upon res judicata arguments.<sup>22</sup> The city relied on *Cartwright I* while the state looked to the Gallinas Decree<sup>23</sup> for legal support.<sup>24</sup> The court denied both motions, and the court of appeals then denied motions for interlocutory appeal.<sup>25</sup> The New Mexico Supreme Court, at the city's request, granted a writ of superintending control and remanded the case for consideration by the court of appeals.<sup>26</sup> *Oman* was thus a procedural appeal, not an appeal from an adverse judgment decided on the merits. The present case came up on appeal from litigation in the district court that followed the *Oman* remand.

Two developments in New Mexico case law allowed the court of appeals to decline to follow the *Cartwright I* precedent in *State ex rel. Martinez*. First, the *Oman* court allowed the district court on remand to hear testimony as to the validity of the pueblo water rights doctrine.<sup>27</sup> Second, the court of appeals read the supreme court in *State v. Wilson*<sup>28</sup> as granting it some latitude in contributing to the development of case law in New Mexico.

The *Oman* court held that stare decisis prevented it from addressing the validity of the pueblo water rights doctrine in New Mexico.<sup>29</sup> The court found itself constrained not only by the *Cartwright I* decision, but also by an unrelated case which restricted the court of appeals in its interpretation of the law. In *Alexander v. Delgado*,<sup>30</sup> the New Mexico Supreme Court admonished the court of appeals for straying too far from the principles of appellate review. *Alexander* dealt primarily with the tort defense of unavoidable accident, which, although questioned, had been reaffirmed on several occasions by the supreme

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21. 796 P.2d 1121 (N.M. Ct. App. 1990).

22. *Id.* at 1123.

23. Named after the 1922 litigation of water rights in the Gallinas river. See *The Acequia Madre de Las Vegas v. Gallinas Canal, Water Storage and Irrigation Co.*, San Miguel County District Court No. 8142 (1922).

24. 796 P.2d at 1123.

25. *Id.*

26. *Id.*

27. *Id.* at 1131.

28. 867 P.2d 1175 (N.M. 1994).

29. *Oman*, 796 P.2d at 1123.

30. 507 P.2d 778 (N.M. 1973).

court.<sup>31</sup> When the court of appeals heard *Alexander*, it abolished the defense, thus overruling sixteen supreme court cases and a uniform jury instruction.<sup>32</sup>

The supreme court was not happy with this action. It first noted New Mexico constitutional and statutory provisions which clearly placed the court of appeals under superintending control of the supreme court.<sup>33</sup> The court then stated that "[q]uite apart from [those provisions], it is not considered good form for a lower court to reverse a superior one. Such actions are unsettling in the law which we ought to strive to make certain, and result in a disorderly judicial process."<sup>34</sup> The supreme court upheld the holding of the court of appeals, finding the reasoning of the lower court "above reproach."<sup>35</sup> But it did so only after establishing clear lines of appellate authority, and holding that the court of appeals, in its rulings, was tightly constrained by supreme court precedent. Against this background, the *Oman* court paid particular attention to stare decisis.

The *Oman* court nevertheless recognized that "[t]here is a good deal of dispute among contemporary scholars regarding the historical validity of pueblo water rights as described in *Cartwright I.*"<sup>36</sup> It accordingly allowed the district court on remand to hear testimony addressing that validity,<sup>37</sup> finding this procedural step important to the development of case law in New Mexico:

We do not interpret *Alexander* to preclude development of an adequate record at trial to allow reconsideration of a precedent on appeal. If *Alexander* were interpreted otherwise, development of case law would be inhibited. We believe the supreme court's ability to develop case law will be best served if, when a district court makes a preliminary determination that the supreme court might reconsider one of its prior decisions, the district court is permitted to allow an offer of proof or otherwise permit the development of an adequate record.<sup>38</sup>

The supreme court denied certiorari in *Oman*.<sup>39</sup>

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31. *Id.* at 778-79.

32. *Id.* at 779.

33. *Id.*

34. *Id.*

35. *Id.* at 780.

36. *Oman*, 796 P.2d at 1130.

37. *Id.* at 1131.

38. *Id.*

39. 795 P.2d 87 (N.M. 1990). A denial of certiorari is neutral as to the court's opinion of the law expressed in the case below. *See, e.g.*, *State v. Cutnose*, 532 P. 2d 889, 893 (N.M. Ct. App. 1975) (Sutin, J., concurring in part and dissenting in part), *overruled on other grounds*

On remand from *Oman*, the district court "declined to address the validity of the pueblo rights doctrine."<sup>40</sup> But, following its *Oman* mandate, the court allowed the parties to present evidence as to the validity of the doctrine.<sup>41</sup> At the end of the trial, the district court ruled that the city could use the waters of the Gallinas in an amount "reasonably necessary to meet [its] present and future needs."<sup>42</sup> The court, however, severely limited that claim by holding that the city could only use the water for ordinary non-industrial municipal uses within the city limits, that it could not sell the Gallinas water to consumers outside the city limits, and that it further did not have the right to store the water diverted from the Gallinas river under the pueblo rights doctrine.<sup>43</sup> In addition, the court refused to rule on either the validity of the doctrine or the issue of succession to the original Las Vegas grant.<sup>44</sup> Both the state and the city appealed.

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by *State v. McCormack*, 674 P.2d 1117 (N.M. 1984). Thus no approval of *Oman* can be inferred by this denial.

40. *State ex rel. Martinez v. City of Las Vegas*, 880 P.2d 868, 869 (N.M. Ct. App. 1994).

41. *Id.*

42. *State ex rel. Reynolds v. Lewis*, Nos. 20294 and 22600 Consolidated, slip op. at 2 (5th Jud. D. Chaves County, N.M. Dec. 29, 1992).

43. *Id.* The court also ruled that possible reuse of effluent from the city's use of Gallinas water did not fall within the pueblo water rights doctrine, and thus was controlled by *Reynolds v. City of Roswell*, 654 P.2d 537 (N.M. 1982), which held that a city could use its effluent as it saw fit, providing that a change of use did not impair the existing rights of others. *Id.* at 539. In addition, the court held that the city could not extend a pueblo water right to the underground waters of the Taylor Well Field, since use of such waters is governed by the *Templeton* doctrine, which holds that an appropriator of surface water may successfully apply to drill wells to fulfill that appropriation so long as those wells do not impact on existing water rights of others. *Templeton v. Pecos Valley Artesian Conservancy Dist.*, 332 P.2d 465, 471 (N.M. 1958). The trial court, while constrained by *Cartwright I* to uphold the city's pueblo water right, nonetheless limited that right to the court's understanding of what such a right might have been in 1835.

44. While the trial court heard evidence on the issues, it found itself bound by *Cartwright I*:

Based on the binding effect of the pueblo water right doctrine articulated by the Supreme Court in *Cartwright v. Public Service Co.*, the Court refuses the tender of the state and the counter-tender of the city, and enters no judgment on the validity of the doctrine. The Court likewise refuses the tender of the state and the counter-tender of the city, and enters no judgment, on whether the city is the successor to a colonization grant and became the beneficiary of the pueblo water right.

This Partial Final Judgment determines all the city's claims of right to use the surface and ground waters of the Pecos River stream system under the pueblo water rights doctrine.

*State ex rel. Reynolds*, Nos. 20294 and 22600 Consolidated, slip op. at 2-3.

It is clear from this holding, therefore, that no court, subsequent to *Cartwright I*, has adjudicated the validity of the pueblo water right based upon new historical evidence presented at trial. See *infra* note 106.

A second procedurally important decision came in early 1994 when the supreme court decided *State v. Wilson*.<sup>45</sup> In *Wilson* the court of appeals certified a question on uniform jury instructions to the supreme court.<sup>46</sup> Uniform jury instructions in New Mexico are mandatory when adopted by the supreme court through a general order and, before *Wilson*, could not be questioned by the court of appeals.<sup>47</sup> But the *Wilson* court held that the court of appeals had "authority to question uniform jury instructions in cases in which the instruction ha[d] not been challenged previously and to amend, modify, or abolish the instruction if it [was] erroneous."<sup>48</sup> The *Wilson* opinion thus created two branches of appellate review of jury instructions in New Mexico. In the first branch are the traditional concepts of review, where the court of appeals must follow supreme court decisions when the supreme court has reaffirmed jury instructions subsequent to their initial promulgation. In the second are the cases similar to *Wilson*, where the supreme court does not confirm an instruction subsequent to that instruction's adoption. There the court of appeals may amend, modify, or abolish that instruction.<sup>49</sup>

The court of appeals in this case interpreted *Wilson* to mean that when a common law precedent has not been subsequently affirmed by the supreme court, the court of appeals has the latitude to decline to follow that precedent. *Wilson* allows court of appeals review of jury instructions not affirmed since their adoption.<sup>50</sup> Since jury instructions are presumptively "correct statements of law",<sup>51</sup> it could logically follow that the same review principle applies to other supreme court-determined law. The court of appeals' language case indicates that this logic could have guided Judge Apodaca. As his opinion points out, "in the thirty-six years that have elapsed since *Cartwright I* was decided, our Supreme Court has not reaffirmed or even reviewed the validity of the pueblo rights doctrine."<sup>52</sup> It is true that the uniformly critical commentaries on the doctrine also eased the court's task in declaring it invalid,<sup>53</sup> and that the court's holding seems to hinge on its conclusion that the supreme court would overrule *Cartwright I* if it had the chance.<sup>54</sup> Yet the court's interpretation of *Wilson* does not depend on the substantive merits of the pueblo water rights doctrine. Rather, the court contains its analysis of

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45. 867 P.2d 1175 (N.M. 1994).

46. *Id.* at 1177.

47. *Id.*

48. *Id.* at 1178.

49. *Id.*

50. *Id.* at 1177-78.

51. *Id.* at 1178.

52. *State ex rel. Martinez v. City of Las Vegas*, 880 P.2d 868, 870 (N.M. Ct. App. 1994).

53. *Id.*

54. *Id.*

*Wilson* to its procedural implications when read in conjunction with *Alexander*. In that analysis, the court of appeals finds that *Wilson* applies to all case law in New Mexico, not just unaffirmed jury instructions.

It appears that the court read the *Wilson* language expansively. In its discussion of *Wilson*, the court of appeals focused on that opinion's modification of *Alexander*, concluding that *Wilson* freed the court of appeals from *Alexander's* constraints. The court was careful to say that despite its holding, it still considered itself bound by supreme court precedent.<sup>55</sup> Yet, in construing *Wilson* as permitting it to break from the *Cartwright I* precedent, the court of appeals made a distinction without a difference. When a lower court does not apply the law of a superior court's precedent, the lower court has acted as if not bound by that precedent.

The conclusions the court of appeals drew from its reading of *Wilson* seem at odds with the language of *Wilson*. While the court broadly construed *Wilson* to apply to all case law, a close reading of *Wilson* shows that its holding is restricted to jury instructions and does not extend to case law precedent.<sup>56</sup> The *Wilson* court did not group uniform jury instructions in the same category as other case law precedent. Rather, the court considered the promulgation of the instructions as "establish[ing] a presumption that the instructions are correct statements of law."<sup>57</sup> Such a presumption, the court made clear, is rebuttable by the court of appeals when it is the first court to review the instructions after their promulgation.<sup>58</sup> The holding of *Wilson* is unambiguous: "[W]e hold that the Court of Appeals has authority to question uniform jury instructions in cases in which the instruction has not been challenged previously and to amend, modify, or abolish the instruction if it is erroneous."<sup>59</sup>

Several factors could have influenced the court of appeals' understanding of *Wilson*. One is a key sentence from *Wilson* itself. Although *Wilson* was explicit in its reference to jury instructions, both as the subject of the opinion and as a separate category of law, Justice Ransom, author of the *Wilson* opinion, seemed to open the door to a broader construction when he said: "[f]urther, this Court encourages the Court of Appeals to express its rationale for any reservations it might harbor over Supreme Court precedent."<sup>60</sup> The use of the general word "precedent" instead of the more restrictive "jury instructions" might have led the court of appeals to its expansive conclusions. In addition, the

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55. *Id.*

56. See *State v. Wilson*, 867 P.2d at 1177-78.

57. *Id.* at 1178.

58. The presumption "alone is not sufficient to tie the hands of the court of appeals." *Id.*

59. *Id.*

60. *Id.*

rationale in *Wilson* specifically referred to *Alexander*,<sup>61</sup> and *Alexander* ruled that a court of appeals is governed by supreme court precedent.<sup>62</sup> The court of appeals here construed *Wilson* as explicitly modifying *Alexander*.<sup>63</sup> *Alexander* has long stood for broad principles of appellate review; the court of appeals could therefore have interpreted the *Wilson* modification of *Alexander* as extending to appellate review in general. Furthermore, since jury instructions are statements of substantive law, a holding affecting jury instructions could also logically affect the underlying law. Finally, persuasive federal case law indicates that both in the state and federal system, courts of appeals may sometimes rule contrary to supreme court precedent.<sup>64</sup>

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61. *Id.* at 1175.

62. See *Alexander v. Delgado*, 507 P.2d 778 (N.M. 1973); accord *State v. Wilson*, 867 P.2d at 1175. It is beyond the scope of this note to discuss the ramifications of the *Alexander* doctrine. At the time of this writing, at least 146 opinions and 9 law review articles mention or discuss *Alexander*.

63. *State ex rel. Martinez v. City of Las Vegas*, 880 P.2d 868, 870 (N.M. Ct. App. 1994).

64. The court of appeals relies on *Indianapolis Airport Authority v. American Airlines, Inc.*, 733 F.2d 1262 (7th Cir. 1984). *State ex rel. Martinez*, 880 P.2d at 870. In *Indianapolis Airport*, the Seventh Circuit Court of Appeals, speaking through Judge Posner, used the following language:

[J]ust as an intermediate federal appellate court may properly decline to follow a U.S. Supreme Court decision when convinced that the Court would overrule the decision if it had the opportunity to do so, see, e.g., *Norris v. United States*, 687 F.2d 899, 902-04 (7th Cir. 1982); *Browder v. Gayle*, 142 F.Supp. 707, 717 (M.D. Ala.) (three judge court), *aff'd per curiam*, 352 U.S. 903 (1956); *United States v. Girouard*, 149 F.2d 760, 765 (1st Cir. 1945) (dissenting opinion), *rev'd*, 328 U.S. 61 (1946), so may intermediate state appellate courts decline to follow earlier state supreme court decisions for the same reason—especially when almost a century has passed since the earlier decisions. And if we think the intermediate state appellate court has made a correct or even, perhaps, just a defensible prediction of what the state supreme court would do if the question were put to it, then we are bound to follow its ruling in a diversity case or any other case where the issue is one of State law.

733 F.2d at 1272.

*Norris v. United States*, 687 F.2d 899 (7th Cir. 1982), addressed somewhat the same issue in the framework of interpretation of Supreme Court decisions. While the *Norris* court was circumscribed in its language, the court indicated that looking at past decisions is not necessarily the most reliable method for deciding current law:

Ordinarily the best predictor of how a Court will decide an issue in a future case is how it decided the same issue in a past case, and when that is so the law is what is stated in the earlier decision. But sometimes later decisions, though not explicitly overruling or even mentioning an earlier decision, indicate that the Court very probably will not decide the issue in the same way the next time. In such a case, to continue to follow the earlier case blindly until it is formally overruled is to apply the dead, not the living, law.

The interpretation of the *Wilson* holding in this case leads to uncertainty in the law. The court of appeals read *Wilson* as applying to all supreme court precedent, not just jury instructions promulgated by the supreme court. Yet the *Wilson* court was careful to distinguish uniform jury instructions from usual case law precedent. The two views are directly at odds. If the court of appeals applied too broad a reading of *Wilson*, the supreme court needs to explain the *Wilson* holding and correct the impact *Wilson* will have when read with this court of appeals opinion. If the court of appeals correctly interpreted *Wilson*, then the supreme court needs to issue a mandate clarifying its holding in *Wilson*, ensuring that the court of appeals will uniformly apply supreme court-made law. The need to accurately apply precedent cuts across all areas of substantive law. Clear leadership from the supreme court will not only determine the fate of the pueblo water rights doctrine, it will foster stability and predictability in New Mexico case law. The supreme court should thus review *State ex. rel Martinez v. City of Las Vegas* to reconcile the procedural problems it raised.

### *The Substantive Hurdle*

#### *The Cartwright I dissent: Pueblo Water Rights are off to a shaky start*

Cartwright I was a controversial decision from birth. The opinion included a heated dissent by Justices Federici and McGhee.<sup>65</sup> Justice Federici, then a district court judge sitting by designation, authored the dissent and outlined the problems of incorporating the pueblo water rights doctrine into New Mexico law.<sup>66</sup>

Justice Federici first found fault with the majority's use of scholarly authority. The Clesson S. Kinney treatise relied on by Justice Sadler and the majority<sup>67</sup> discussed the pueblo water rights doctrine only by reporting California court decisions, not by explaining why the doctrine ought to be valid in other western states.<sup>68</sup> Justice Federici then took pains to point out that "even Kinney . . . speaks of [p]ueblo [water]

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*Id.* at 904.

While the *Norris* language is less on point than *Indianapolis Airport*, since there essentially were no later decisions interpreting *Cartwright I* until this case, the opinion nevertheless lends weight to the idea that appellate courts should not merely rule according to precedent when that precedent is an old opinion that is extensively doubted as good law.

65. *Cartwright I*, 343 P.2d at 670.

66. For a clear discussion of *Cartwright I* written at the time it was decided, see Robert Emmet Clark, *The Pueblo Rights Doctrine in New Mexico*, 35 N.M. HIST. REV. 265 (1960).

67. Clesson S. Kinney, *A TREATISE ON THE LAW OF IRRIGATION AND WATER RIGHTS* (2d ed. 1912).

68. *Cartwright I*, 343 P.2d at 674-75.

[r]ights as compared to riparian rights and not as compared to rights acquired under the [d]octrine of prior appropriation."<sup>69</sup>

The dissent referred to another flaw in the majority's rationale, the statement that the "colonization pueblos to which the right attached were largely, if indeed, not always, established before there was any settlement of the area."<sup>70</sup> Justice Federici substantiated that when the pueblo antecedent to the City of Las Vegas was founded, there were already settlers in the area, directly contrary to the majority's assertion.<sup>71</sup>

Third, the dissent demonstrated that the Plan of Pitic,<sup>72</sup> a 1783 grant relied on by California courts in establishing pueblo water rights for Los Angeles, did not include in its scope the type of expanding water right that the majority had awarded to the City of Las Vegas.<sup>73</sup> Furthermore, Justice Federici argued that the Plan of Pitic awarded rights to water that included irrigation,<sup>74</sup> and could not be interpreted to "give preference to domestic users of water rather than to other users,"<sup>75</sup> thereby precluding irrigators in the area from sharing in the city's water right.<sup>76</sup>

In addition, Justice Federici examined the California rationale in ruling in favor of the existence of a pueblo water right, and concluded that those decisions were driven by reasons other than analysis of Mexican laws in effect at the time of grants of water rights.<sup>77</sup> The *Cartwright I* dissent argued that the seminal case on California's adoption of pueblo water rights, *Lux v. Haggin*,<sup>78</sup> "did not and could not apply the Mexican Pueblo Water Rights Doctrine,"<sup>79</sup> but instead created a pueblo water rights doctrine particular to California's circumstances.<sup>80</sup>

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69. *Id.*

70. *Id.* at 665-70.

71. *Id.* at 675-76.

72. 1782 Document establishing the Sonoran town of Pitic, setting boundaries and discussing land and water uses. The plan was to have force not only in Pitic, but in all subsequent Spanish communities in the Southwest. Iris H.W. Engstrand, *A Note on the Plan of Pitic*, 3 COLONIAL LATIN AM. HIST. REV. 73, 74 (1994); see also MICHAEL C. MEYER, *WATER IN THE HISPANIC SOUTHWEST, A SOCIAL AND LEGAL HISTORY, 1550-1850*, 112, 158 (1984); DANIEL TYLER, *THE MYTHICAL PUEBLO WATER RIGHTS DOCTRINE: WATER ADMINISTRATION IN HISPANIC NEW MEXICO* 15 (1990).

73. *Cartwright I*, 343 P.2d at 676-77.

74. The plaintiffs in *Cartwright I* included about 100 users of surface water from the Gallinas River. Clark, *supra* note 66, at 265.

75. *Cartwright I*, 343 P.2d at 687.

76. *Id.*

77. *Id.* at 688.

78. 4 P. 919 (Cal. 1886) (en banc).

79. *Cartwright I*, 343 P.2d at 688.

80. *Id.* The dissent explains:

Los Angeles, being thwarted by the courts in her attempts to expropriate all the waters of the Los Angeles river, then went to the legislature and after legislation was adopted favorable to the municipality the statutes

Fifth, Justice Federici maintained that the pueblo water rights doctrine as embraced by the majority was in violation of the Pecos River Compact, which mandates that New Mexico apply the doctrine of prior appropriation in its water law.<sup>81</sup> Since the compact "has the full force and effect of law comparable to a treaty,"<sup>82</sup> it is binding on New Mexico and cannot be affected by court adjudication of rights to a tributary of the Pecos River.

Finally, the dissent addressed the conflict between the doctrine adopted by the majority and New Mexico's water law, first recognizing the constitutional and statutory provisions for applying prior appropriation and beneficial use in New Mexico.<sup>83</sup> Noting that the city successfully asserted a right which, if valid, had lain dormant for over one hundred years, Justice Federici argued that "there is no provision [in the constitution or statutes] for a municipality to reserve water rights for a period of over one hundred years before the rights are applied to beneficial use."<sup>84</sup>

### *The court of appeals' review of Cartwright I*

The New Mexico Court of Appeals, in holding that the city was not entitled to pueblo water rights, essentially revisited *Cartwright I*. The court first analyzed the authority relied by the *Cartwright I* majority, including treatises and California case law, then discussed the results of modern scholarship on the doctrine of pueblo water rights. Third, the court examined the incompatibility of pueblo water rights with prior appropria-

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were upheld although the courts prior to such legislation had refused to uphold the claims of Los Angeles to the water.

*Id.*

81. *Id.* at 690.

82. *Id.*

83. *Id.* at 694.

84. *Id.* Justice Federici authored another dissenting opinion, when the court denied a Motion for Rehearing. *Cartwright I*, 343 P.2d at 696. In that dissent, Justice Federici excruciatingly elaborated on the conflicts between pueblo water rights and the doctrine of prior appropriation and beneficial use. Justice Federici then argued that even if the antecedent pueblo to the City of Las Vegas had an expanding right, claiming water not yet put into use, that right could not have survived the transition from Mexican to United States sovereignty, since it was an inchoate right by virtue of its not being vested, or "fixed, accrued, settled, absolute." *Cartwright I*, 343 P.2d at 704 (Federici, J., dissenting) (quoting Black's Law Dictionary, 3rd ed.). He further illustrated, citing United States Supreme Court precedent, that inchoate non-vested rights, when confirmed by Congress, "became American titles, and took their legal validity wholly from the act of confirmation, and not from any French or Spanish element which entered into their previous existence." *Id.* at 705. Thus even if Spanish or Mexican law implied a pueblo water right, such a right could not have survived the change in sovereign when New Mexico became a United States territory and later a state.

tion. Finally, the court considered the city's claim of reliance on the doctrine as a means of converting the doctrine into a rule of property.<sup>85</sup>

The court of appeals' opinion concluded that the treatises discussed in *Cartwright I* do not provide a proper basis for an inquiry into the pueblo water rights doctrine. The court found the same flaw with those treatises that the *Cartwright I* dissent found, namely, that none of the treatises "cited to any original Spanish and Mexican sources of law on the subject of pueblo water rights."<sup>86</sup> The court therefore turned to the California cases that decreed a pueblo water right<sup>87</sup> to find the proper "historical basis [for the right] on which *Cartwright I* relied."<sup>88</sup>

The first California case to speak of pueblo water rights was *Lux v. Haggin*,<sup>89</sup> a supreme court decision which mentioned the doctrine in dicta.<sup>90</sup> *Lux* implied the existence of a pueblo's best right to the use of water from nonnavigable rivers partly from analogy to an 1860 California land case awarding title to San Francisco as the successor to a pueblo.<sup>91</sup> In addition, *Lux* relied on a quotation by the Spanish scholar Joaquin Escriche, who said that a pueblo inhabitant might use water from a river so long as it was done "without prejudice to the common use or destiny which the pueblo shall have given the waters."<sup>92</sup> The *Lux* court also examined the Plan of Pitic in speaking on water rights of a pueblo.<sup>93</sup>

The court of appeals in this case discussed the flaws of *Lux* and the line of cases that adopted its holding. The court noted that "the *Lux* dicta was then formally adopted by the California Supreme Court in *Vernon Irrigation Co. v. City of Los Angeles*,"<sup>94</sup> adding that after *Vernon Irrigation*, pueblo water rights took hold in California jurisprudence through reaffirmation of the doctrine without additional historical authority to support it.<sup>95</sup> The court also echoed the same concerns with an analysis of the Plan of Pitic that Justice Federici indirectly raised in

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85. *State ex rel. Martinez v. City of Las Vegas*, 880 P.2d 868, 870-76 (N.M. Ct. App. 1994).

86. *Id.* at 871. Compare *Cartwright I*, 343 P.2d at 671-73.

87. An articulate exposition of the California origins of the pueblo water rights doctrine appears in a recent article by Peter L. Reich, *Mission Revival Jurisprudence: State Courts and Hispanic Water Law Since 1850*, 69 WASH. L. REV. 869 (1994). Professor Reich forcefully argues that the doctrine is completely spurious: "[i]n developing a jurisprudence of Hispanic water rights, southwestern state courts deliberately distorted historic communal water sharing in favor of municipal exclusivity and riparian irrigation." *Id.* at 923.

88. *State ex rel. Martinez*, 880 P.2d at 871.

89. 10 P. 674 (Cal. 1886) (en banc).

90. *Id.* at 713-17.

91. *Id.* at 714-15.

92. *Id.* at 716.

93. *Id.* at 714.

94. *State ex rel. Martinez*, 880 P.2d at 871.

95. *Id.*

*Cartwright I*,<sup>96</sup> namely that the "Plan of Pitic only dealt with water distribution within a pueblo and not with a pueblo's water rights as against non-pueblo users."<sup>97</sup> Furthermore, as in *Cartwright I*'s dissent,<sup>98</sup> the court found that section 7 of the Plan called for a sharing of water with others who resided outside the pueblo, including natives.<sup>99</sup> The court therefore concluded that the Plan of Pitic cannot serve as the basis for the pueblo rights doctrine.<sup>100</sup> The court did not discount Escriche's writings, finding that Escriche enjoys a widely held credible reputation.<sup>101</sup> The court recognized, however, that the single quote from Escriche used in *Lux*, uncorroborated by any other pre-1848 writings and ably countered by modern scholarship, is too slender a reed on which to base the pueblo water rights doctrine.<sup>102</sup>

*The conclusions of modern scholarship on the doctrine of pueblo water rights*

The court of appeals next addressed post *Cartwright I* historical research and analysis and found that modern authority is unified in asserting the invalidity of the pueblo water rights doctrine.<sup>103</sup> The parties at trial took divergent approaches to litigating the issues. The state introduced expert testimony arguing against the validity of the pueblo water rights doctrine.<sup>104</sup> The city, on the other hand, did not refute the state's evidence on the doctrine with its own experts but relied on the doctrine's validity as established in *Cartwright I* and "reaffirmed in California in *City of Los Angeles v. City of San Fernando*."<sup>105</sup> Consequently, the only evidence before the trial court as to the validity of the doctrine came from the state's experts.<sup>106</sup>

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96. *Cartwright I*, 343 P.2d at 687-88.

97. *State ex rel. Martinez*, 880 P.2d at 872.

98. *Cartwright I*, 343 P.2d at 687.

99. *State ex rel. Martinez*, 880 P.2d at 872.

100. *Id.*

101. *Id.* at 873.

102. *Id.*

103. *Id.* at 874.

104. *Id.* at 868.

105. *Id.* at 871 (citing *City of Los Angeles v. City of San Fernando*, 537 P.2d 1250 (Cal. 1975)).

106. Obviously, there are two possibilities as to why the city did not offer expert testimony of its own on the validity of the pueblo water rights doctrine. The first is that the city chose to rely on *Cartwright I* exclusively, confident that *stare decisis* would suffice to quiet the state's claim as to the invalidity of the doctrine. The more likely possibility, however, is that there is no expert opinion that would support the city's position. An exhaustive survey of the historical basis for the existence or non-existence of an expanding water right is beyond the scope of this note. But the parties in this litigation surely did not

The court of appeals recognized that the grant of land to a pueblo implicated the grant of water necessary to support that land.<sup>107</sup> Scholars even acknowledge that under Mexican law, an increase in a pueblo's size "could lead to an increase in the pueblo's water allocation."<sup>108</sup> But allocation or adjudication was the mechanism for that increase, and there was an obligation in the allocation to protect the rights of junior water users.<sup>109</sup> Municipalities could not exclude other users from rights to flowing water; both law and custom required sharing.<sup>110</sup> Nowhere in the literature is there historical authority for an expanding right that does not come into effect through allocation or does not protect to some extent the rights of other users.

All authorities cited by the court of appeals explain that the pueblo water right as adjudicated in *Cartwright I* had no historical precedent in Spanish or Mexican law.<sup>111</sup> One authority mentioned by the court of appeals, Daniel Tyler, presents perhaps the best synopsis of the issue:

After reviewing extant Hispanic documents of New Mexico, the only supportable conclusion is that no municipal entity, Indian or non-Indian, had a right to enlarge its claim to water without consideration of the legitimate needs of other users, individuals, or communities. Equitable, or proportional, distribution was the objective, and although this might seem idealistic when viewed from today's perspective, both Spaniards and Mexicans developed a system of sharing which they hoped would function in avoidance of costly litigation. Absolute water rights were inconsistent with Spanish thinking and inappropriate to the New Mexican environment. Thus, the pueblo [water] rights doctrine can only be seen as unhistorical and fictitious—an invention of modern minds that failed to

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spare any resources in trying to substantiate the historical support for their respective positions.

The court of appeals opinion in this case does not once cite expert trial testimony, relying instead on published scholarly authority on the doctrine. Perhaps the trial court's refusal of the city's tender of evidence as to the validity of the doctrine dictated the court of appeals' approach. See *supra* note 44. The result is that the actual practices of water use of Hispanic settlers, as revealed by modern authority, have not been adjudicated in this case.

107. *State ex rel. Martinez*, 880 P.2d at 873.

108. *Id.* See also CHARLES T. DUMARS ET AL., PUEBLO INDIAN WATER RIGHTS 30-31 (1984); MEYER, *supra* note 72, at 136-37 (1984).

109. See DUMARS ET AL., *supra* note 108, at 30; MEYER, *supra* note 72, at 135.

110. TYLER, *supra* note 72, at 14-15.

111. See, e.g., TYLER, *supra* note 72, at 45; Stevens, *supra* note 9, at 535; Engstrand, *supra* note 8, at 1; Jefferson E. LeCates, *Water Law—The Effect of Acts of the Sovereign on the Pueblo Rights Doctrine in New Mexico*, 8 NAT. RESOURCES J. 727, 731, 736 (1968); MALCOM EBRIGHT, LAND GRANTS AND LAWSUITS IN NORTHERN NEW MEXICO 196 (1994).

read the record left by the Spanish and Mexican people of New Mexico.<sup>112</sup>

Lack of historical support for the doctrine correctly guided the court of appeals' holding. The history of New Mexico's birth as a United States territory plays a pivotal role in the pueblo water rights controversy. The Treaty of Guadalupe Hidalgo governed New Mexico's transition from the Mexican to the United States sovereign. The treaty recognized all existing rights vested at the time of its ratification,<sup>113</sup> and any property rights vested before the treaty remained unchanged after its ratification.<sup>114</sup> If the pueblo Nuestra Señora de Las Dolores de Las Vegas did not have an expanding water right before the treaty, then the sole source for existence of such a right would be the laws of the Territory, and later the State of New Mexico. Neither the Territory nor the State, however, had ever, until *Cartwright I*, acknowledged the existence of an expanding pueblo water right. Thus, the source of the City of Las Vegas' right could only be the laws and practices predating the Treaty of Guadalupe Hidalgo, which uniformly substantiate that such a right was unknown under then-existing law. The circular nature of the inquiry is further evidence of the illegitimacy of the existence of a pueblo water right in New Mexico.

*The conflict between pueblo water rights and prior appropriation*

The court of appeals also correctly placed importance on the conflict between the doctrine and New Mexico water law. New Mexico, like other Western states, follows the doctrine of prior appropriation and beneficial use. Under that doctrine, a right to water awarded to a user can only vest if the user diverts the water from its source and puts the water to beneficial use.<sup>115</sup> Moreover, the time lapse between a municipality's appropriation of water and vesting of the right through beneficial use cannot exceed forty years.<sup>116</sup> If the owner of a water right "ceases using water beneficially for long enough, the water becomes available to other appropriators."<sup>117</sup> Any unappropriated water belongs to the

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112. TYLER, *supra* note 72, at 45.

113. Treaty of Guadalupe Hidalgo, Treaty of Peace, Friendship, Limits, and Settlement, Feb. 2, 1848, U.S.-Mexico, 9 Stat. 922 (1848).

114. N.M. CONST. art. II, § 5.

115. For a short and useful discussion of New Mexico water law, see Charles T. DuMars, *New Mexico Water Law: An Overview and Discussion of Current Issues*, 22 NAT. RESOURCES J. 1045 (1982).

116. See, e.g., N.M. STAT. ANN. § 72-1-9 (Michie 1994).

117. DuMars, *supra* note 115, at 1045.

public;<sup>118</sup> in this way no water in New Mexico is free for the taking. The pueblo water right prevents other vested appropriators from using water to the limit of their appropriation.<sup>119</sup> It follows, therefore, that a pueblo water right clashes with prior appropriation law.

### *The constitutional issue*

While the court of appeals made no mention of the constitutional issue raised by *Cartwright I*, implicit in the pueblo water rights controversy is the issue of the taking of a property right without just compensation. The city's increased use, without compensation to existing owners, of the water it uses now but did not use in the past, is a clear example of an unconstitutional taking prohibited by the United States and New Mexico constitutions.<sup>120</sup>

On the surface, *Cartwright I* involved nothing more than adjudication of water rights between users of the same stream. Las Vegas, acting through its agent, asserted one claim, the plaintiffs another. The litigants called on the supreme court to decide the question. The parties had competing rights, and the determination of the better right was a routine matter at law that did not involve constitutional issues.

Below the surface, however, *Cartwright I* fundamentally misapplied the law and violated core constitutional guarantees when it granted the city an expanding right. The *Cartwright I* holding awarded a right where none had existed before. The historical evidence overwhelmingly rebuts any contention that the city had an expanding water right awarded along with its 1835 land grant. *Cartwright I* was thus no mere adjudication of disputed rights, but an improper substitution of a valid right by a spurious claim. In awarding Las Vegas a pueblo water right, the *Cartwright I* court explicitly invoked the police power of the state.<sup>121</sup>

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118. *Id.* at 1046-47. See also N.M. STAT. ANN. §§ 72-1-1, 72-12-1-, 72-12-18 (Michie 1994).

119. Compare such exclusion of the rights of vested appropriators with instances where junior appropriators cannot divert water in times of drought. There the senior appropriator has a better right, but is still limited to the terms of the appropriation. Under the pueblo rights doctrine, a municipality, whether in times of drought or not, could divert to the detriment of junior appropriators any and all waters from a stream necessary for its uses, without compensation.

120. U.S. CONST. amend. V; N.M. CONST. art. II, § 20.

121. See *Cartwright I*, 343 P.2d at 668, where the court states:

There is present in the doctrine discussed the recognizable presence of *lex suprema*, the police power, which furnishes answer to claims of confiscation always present when private and public claims collide . . . So, here, we see in the Pueblo Rights doctrine the elevation of the public good over the claim of a private right.

*Id.* (emphasis in original).

By granting an expanding right to a state entity, invoking the police power of the state, and extinguishing the vested property rights of other water users, the court essentially performed an eminent domain action. Yet even in eminent domain, the state must compensate a property owner for the loss of property.<sup>122</sup>

The New Mexico Supreme Court was itself called on to decide a similar question of state action in *Marjon v. Quintana*.<sup>123</sup> Anna Marjon owned property where the defendants, the ditch commissioners and the mayordomo of the Sombrillo Community Ditch, had a fifteen foot ditch easement.<sup>124</sup> The defendants, acting pursuant to New Mexico statutory authority, undertook to enlarge and reline the ditch.<sup>125</sup> In doing so, they widened the ditch beyond its historic boundaries, encroaching on the plaintiff's land.<sup>126</sup> The supreme court ruled that even under the statutory right to modify the ditch, the defendants could not take private property without just compensation.<sup>127</sup>

The analogies between *Cartwright I* and *Marjon* are obvious. In *Marjon*, the plaintiff had a vested property right under New Mexico law. The *Cartwright I* plaintiffs had a vested property right under New Mexico law. In *Marjon*, the defendant wanted to expand its easement right, diminishing the plaintiff's property interest pursuant to statutory authority, yet without compensation. In *Cartwright I*, the defendant sought to expand its water right, diminishing the plaintiffs' property interest pursuant to a judicial doctrine that had never been the law in New Mexico, yet without compensation.

Where one branch of government cannot constitutionally take property without compensation, another branch is equally powerless to act. *Marjon* raised the issue of uncompensated taking of property pursuant to legislative authority. *Cartwright I* raised the issue of uncompensated taking of property pursuant to judicial authority. One action is unconstitutional in a legislative context; it cannot be constitutional in the judicial context.

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122. N.M. CONST. art. II, § 20.

123. 123.484 P.2d 338 (N.M. 1971).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* The court was unequivocal in its holding:

The fact that ditch commissioners are given the right to alter, change the location of, enlarge, extend, or reconstruct a ditch under the conditions set forth in § 75-14-53, *supra*, cannot be construed as giving them authority to take private property for these uses without just compensation, contrary to Art. II, § 20, Constitution of New Mexico . . .

*Id.* at 498.

Understandably, a court of appeals might be reluctant to apply such an analysis to a holding of a supreme court. Yet the need for compensation for taking of water under the doctrine has been raised before.<sup>128</sup> The New Mexico Supreme Court, by overruling *Cartwright I*, can quiet the constitutional difficulty introduced by the *Cartwright I* holding.

*The City's claim of a right created by its reliance on Cartwright I*

The City of Las Vegas also argued that its reliance on *Cartwright I* precluded the court of appeals from disturbing the city's right.<sup>129</sup> The city maintained that continuously diverting from the Gallinas river, investing in a pipeline to nearby Storrie Lake, and foregoing from purchasing other water rights amounted to interests which had become a "rule of property."<sup>130</sup>

The city derived its argument in part from three New Mexico cases. In *Duncan v. Brown*,<sup>131</sup> the court held that it would not disturb unsound judicial decisions when they concern real property, finding that reliance on an earlier property decision precluded overturning even an erroneous ruling.<sup>132</sup> The supreme court again refused in *Baca v. Chavez*<sup>133</sup> to upset a possibly questionable ruling when many real property transfers had occurred in reliance upon it.<sup>134</sup> Finally, *State v. Dority*,<sup>135</sup>

128. See LeCates, *supra* note 111, at 737.

129. *State ex rel. Martinez v. City of Las Vegas*, 880 P.2d 868, 875-76 (N.M. Ct. App. 1994).

130. *Id.*

131. 139 P. 140 (N.M. 1914).

132. *Id.* The court only discussed application of such a rule to property adjudications which have been relied on in subsequent transactions:

Judicial decisions, affecting title to real estate presumptively acquired in reliance upon such decisions, should not be disturbed or departed from except for the most cogent reasons, certainly not because of doubts as to their soundness. If there should be a change, the legislature can make it . . . with infinitely less derangement of titles than would follow a new ruling of the Court, for the statutory regulations operate only in the future.

*Id.* at 141.

133. 252 P. 987 (N.M. 1927).

134. *Id.*

[The prior case's] mere unsoundness, even if so considered, is not sufficient reason to overrule it. It has been a rule of property in this state for ten years. We must consider that attorneys have passed, and their clients have accepted, title in reliance upon it. Litigation involving property rights has, no doubt, been determined by it. A change in the rule, not merely prospective, might cast doubt upon many titles. In such a case we are not at liberty to overturn a former decision of this court, even if convinced it is unsound.

*Id.* at 989.

a case litigating water rights, held that a nineteen year old decision presumably relied on by purchasers of irrigated land should stand regardless of the correctness of the decision.<sup>136</sup>

A parallel exists in California law to support the city's position. The 1975 case reaffirming the pueblo water rights doctrine in California is *City of Los Angeles v. City of San Fernando*.<sup>137</sup> There, the supreme court, sitting en banc, refused to reconsider the pueblo water rights doctrine, basing its holding in substantial part on the extensive reliance Los Angeles had placed on the doctrine while developing the necessary infrastructure to bring water to the city.<sup>138</sup>

The court of appeals rejected the City of Las Vegas' argument. First, Judge Apodaca held that since *Cartwright I* did not define which uses of water were permissible under pueblo water rights, the city could not have "reasonably relied on the doctrine for any use to which it has put the water since *Cartwright I*."<sup>139</sup> Second, the court of appeals found that the city could not "prove that it made expenditures based solely on its reliance that its claimed water rights existed."<sup>140</sup> Third, the court distinguished *Duncan*, *Baca*, and *Dority* by pointing out that in those cases, the supreme court had "noted that numerous parties, other than just those involved in the litigation, had depended on the previous decisions."<sup>141</sup> In the present case, the city did not show that anyone else had relied on the *Cartwright I* decision.<sup>142</sup> Therefore, this case did not fall within the rationale of *Duncan*, *Baca*, and *Dority*.<sup>143</sup> Finally, the court

135. 225 P.2d 1007 (N.M. 1950).

136. The *Dority* court clearly stated its concept of a rule of property:

There is another consideration which requires the affirmance of the trial court's decree. The decision of *Yeo v. Tweedy*, [286 P. 970 (N.M. 1930)] has become a rule of property. In the nineteen years since that decision it may be assumed that many thousands of acres of the one hundred thousand irrigated with water from the Roswell Artesian basin and the valley fill have been sold to purchasers who relied on that decision as determining title to the right to use the water here involved, and the water rights to which would be injured if *Yeo v. Tweedy* is overruled. Whether it stated the correct rule of law (and we are of the opinion that it did), it is now a rule of property that we will not disturb.

*State v. Dority*, 225 P.2d at 1019.

137. 537 P.2d 1250 (Cal. 1975).

138. See *id.* at 1274, 1281-85. The City of Los Angeles had, among other acts, constructed a 200 mile aqueduct to import water to Los Angeles. "In importing the water, plaintiff [City of Los Angeles] relied on the pueblo right to retain priority in its original native supply once this surplus was exhausted." *Id.* at 1283.

139. *State ex rel. Martinez*, 880 P.2d at 875.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

of appeals reasoned that even assuming a reliance on the part of the city, two grounds existed for not following *Cartwright I*: the lack of a historical basis for the doctrine and its clash with the rest of New Mexico water law.<sup>144</sup>

On balance, the court of appeals correctly ruled on the reliance argument. The court appropriately distinguished *Duncan*, *Baca*, and *Dority*, since nowhere in this litigation is the argument raised that subsequent purchasers of the city's water right relied on its validity under *Cartwright I*. The common thread in all three of these earlier cases is not the mere reliance on a property right, but the actual or presumed transfer of title to real property to purchasers who had relied on that adjudicated right. It is unclear, however, why the court found no applicable reliance as a result of the vagueness of the right adjudicated in *Cartwright I*. Presumably, the city could have relied on the right regardless of the uses to which it put the *Cartwright I* water. On this point, perhaps a remand to consider more closely the facts of the reliance issue might have been appropriate.<sup>145</sup> Given the failure of the city to prove sole reliance on the doctrine, however, even on remand the city might not have overcome this weakness in its position. Furthermore, the historical problems associated with the doctrine, its conflict with existing New Mexico law, and the constitutional taking issue are all significant bars to the survival of the doctrine, even if a court were to assume viable reliance on the part of the city. Thus, the court of appeals appropriately ruled that the city's possible reliance claim was not enough to justify enshrining the bad law *Cartwright I* introduced in New Mexico.

## CONCLUSION

The New Mexico Supreme Court should decide *State ex rel. Martinez v. City of Las Vegas* to settle uncertainty in the law. The court of appeals was on solid substantive ground in its holding. The pueblo water rights doctrine, created by California law to meet that state's circumstances, has no validity in New Mexico outside *Cartwright I*. There is no

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144. *Id.* at 876. The *Duncan* court had reserved an exception to the rule of not disturbing property rights, saying that it would do so given sufficient cogent reasons. See *supra* note 132. The court of appeals here found those two reasons to be cogent. *State ex rel. Martinez*, 880 P.2d at 876.

145. See the opinion of Judge Hartz in this case, arguing for a remand "on the issue of whether the City still possesses any rights arising from the Supreme Court decision in *Cartwright I*." *State ex rel. Martinez v. City of Las Vegas*, 880 P.2d at 876 (Hartz, J., concurring in part, dissenting in part). Compare the reasoning of the court's holding on the reliance argument with the reliance reasoning in *City of Los Angeles v. City of San Fernando*, 537 P.2d 1250 (Cal. 1975). There the court did not address specific uses of water as pertaining to Los Angeles' reliance.

historical basis for the doctrine, which is in direct conflict with settled prior appropriation law. Furthermore, the doctrine unconstitutionally allows the taking of private property without just compensation. Despite these deficiencies in the *Cartwright I* holding, however, the court of appeals took an unorthodox approach to shaping case law in New Mexico. By expansively construing the holding of *State v. Wilson*, the court of appeals might have intruded on the decision-making prerogatives of the supreme court. The New Mexico Supreme Court should therefore use this case to both overrule *Cartwright I* and clarify the procedural doubt introduced into New Mexico law.

Pierre Lévy