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# Water Law—The Effect of Acts of the Sovereign on the Pueblo Rights Doctrine in New Mexico Cartwright v. Public Service Co., 66 N.M. 64, 343 P.2d 654 (1959)

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# Water Law—The Effect of Acts of the Sovereign on the Pueblo Rights Doctrine in New Mexico*

The pueblo rights doctrine provides generally that a city, town, or village has a prior right to take all the water of a non-navigable stream for the use of its inhabitants. This right is prior and superior to all other claims. The rationale is that the pueblos were established in uninhabited regions before the arrival of any riparian settlers or other appropriators.[1] California was first to recognize pueblo rights.[2] It was the first state created out of the territory acquired from Mexico by the Treaty of Guadalupe Hidalgo, and it was there that the law of waters first became important enough to be the subject of adjucation.

In *Cartwright v. Public Serv. Co.*,[3] suit was filed alleging that the defendant company was interfering with the plaintiffs' water rights which had accrued to them as prior users. The defendant offered an 1835 grant of pueblo rights made to its predecessors by the Republic of Mexico as an affirmative defense. The trial court upheld the defense and dismissed the action. On appeal to the Supreme Court of New Mexico, *held*, affirmed.[4]

In this opinion, adopting the pueblo rights doctrine, the Court said:

> We are unable to avoid the conclusion that the reasons which brought the Supreme Court of California to uphold and enforce the Pueblo Rights doctrine apply with as much force in New Mexico as they do in California. A new, undeveloped and unoccupied territory was being settled. There were no questions of priority of use when a colonization pueblo was established because there were no such users. Water formed the life blood of the community or settlement, not only in its origin but as it grew and expanded. A group of fifty families at the founding of a colony found it no more so than when their number was multiplied to hundreds or even thousands in an orderly, progressive growth.
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> And just as in the case of a private user, so long as he proceeds with due dispatch to reduce to beneficial use the larger area to which his permit entitles him, enjoys a priority for the whole, so by analogy and

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* Cartwright v. Public Service Co. of New Mexico, 66 N.M. 64, 343 P.2d 654 (1959).

1. 1 S. Wiel, Water Rights in the Western States 68, 69 (3rd Ed. 1911).
2. Lux v. Haggin, 69 Cal. 255, 4 P. 919 (1884).
3. 66 N.M. 64, 343 P.2d 654 (1959).
4. A second suit was brought as a continuation of the first under N.M. Stat. Ann. § 23-1-14 (1953) alleging that the grant was made to the "Town of Las Vegas Grant" rather than to the "Town of Las Vegas" as had been determined in the first suit. The Supreme Court of New Mexico upheld the dismissal of the action in the first case and held that the continuation statute did not apply because judgment on the merits had been rendered. Cartwright v. Public Serv. Co., 68 N.M. 418, 362 P.2d 796 (1961).

> under the rationale of the Pueblo Rights doctrine, the settlers who founded a colonization pueblo, in the process of growth and expansion, carried with them the torch of priority, so long as there was available water to supply the life blood of the expanded community. 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 rights or claims collide. . . . So, here, we see in the Pueblo Rights doctrine the elevation of the public good over the claim of a private right.[5]

New Mexico is commonly regarded as a prior appropriation state. In *Martinez v. Cook*[6] the Supreme Court of New Mexico said, "Particularly, we have never followed it [the common law] in connection with our waters, but, on the contrary, have followed the Mexican or civil law, and what is called the Colorado doctrine of prior appropriation and beneficial use;" and in *State v. Red River Valley Co.,*[7] "All of our unappropriated waters from 'every natural stream, perennial or torrential, within the state of New Mexico' Art. 16, Sec. 2, Const., are public waters. These waters belong to the public until beneficially appropriated."

The pioneers emphasized the acquisition of individual rights in water. Because of the arid conditions they settled near streams or springs where water was available when needed. They applied the law of capture to water, which evolved into the doctrine of prior appropriation.[8] Today the claims of appropriators exceed the normal flow on nearly all of the streams in New Mexico.

There are cities and towns in New Mexico which were originally established as Spanish colonial pueblos.[9] They resembled the municipalities in Spain. The land was considered part of the royal domain, and the laws were declared by the central government.[10] The grants were not in fee simple. Rather, they were guarantees of perpetual use and "the king could maintain a right to allow the occupation of these towns by his own decree, although the town could not."[11]

Initially, in the colonization of New Spain, the king, by special ordinance, provided the customary four leagues of land and the water flowing to it for the use of each new pueblo and its inhabitants. However, in 1789 the town of Pitic (or Pictic) was established in Sonora under general regulations which the king ordered to be fol-

5. Cartwright v. Public Serv. Co., 66 N.M. 64 at 85, 343 P.2d 654, 668-69 (1959).
6. 56 N.M. 343 at 349, 244 P.2d 134, 138 (1952).
7. 51 N.M. 207 at 222, 182 P.2d 421, 430 (1945).
8. R. Clark, New Mexico Water Resources Law 2 (1964).
9. 1 C. Kinney, Irrigation and Water Rights 994 (2d ed. 1912).
10. F. Blackmar, Spanish Institutions of the Southwest 160 (1891).
11. *Id.* at 168-69.

lowed in the foundation of all new pueblos in the internal Provinces of the West. That territory included the present states of California, Arizona, New Mexico, and Texas. The regulations were known as the Plan of Pitic which stated:

> The neighbors and natives shall likewise enjoy the use of the woods, water, and other benefits from the royal and vacant lands lying outside of the tract assigned to the new town, jointly with the residents and natives of the immediate and adjoining towns; which favor and right shall continue until by His Majesty the same shall be granted or alienated; in which case regulations will be made according to the provisions for concessions in favor of new possessors or proprietors.[12]

Will the pueblo rights doctrine be applied throughout New Mexico? Professor Clark[13] has suggested it is not very likely because many of the river towns were established as pueblos before 1789 and, therefore, cannot rely upon the provisions of the Plan of Pitic to assert pueblo rights.[14] However, in *Albuquerque v. Reynolds*[15] the trial court held that Albuquerque was originally established as a pueblo on the Rio Grande River and "has a right to take whatever water it may need, and as the city expands, the added needs for present and future times." The Supreme Court of New Mexico reversed the judgment, but on other grounds.

The decision in the *Cartwright* case has enabled the City of Las Vegas to take water from persons who have been appropriating from the Gallinas River for many years. If other cities and towns with pueblo origins assert pueblo rights on the various streams throughout the state, the injury to farmers and other appropriators would be severe.

The issue is not whether the towns may take the water they need, but whether they must compensate the current users. The towns may take the water by eminent domain but only upon payment of just compensation. If, however, they take the water under the doctrine of pueblo rights, the "presence of *lex suprema*" enables them to do so without paying for it.[16]

12. 1 C. Kinney, *supra* note 9, at 995; State v. Tularosa Community Ditch, 19 N.M. 352 at 377, 143 P, 207, 216 (1914).

13. Professor of Law, University of Arizona.

14. Clark, *The Pueblo Rights Doctrine in New Mexico,* 35 New Mexico Historical Rev. 265, 276-77 (1960).

15. 71 N.M. 428, 379 P.2d 73 (1962).

16. Ellis, *Water Provisions of the New Mexico Constitution,* Proposed Constitution and Comment 2 (1967), in Report of the Constitutional Revision Commission 182 (1967).

The majority opinion in the *Cartwright* decision stated that the police power "furnishes answer to claims of confiscation always present when private and public rights or claims collide. . . . So, here, we see in the Pueblo Rights doctrine the elevation of the public good over the claim of a private right."[17] This is in line with the approach taken by courts throughout the nation in denying compensation to private citizens who have suffered losses resulting from appropriations by government.[18] It appears on its face, however, to ignore "justice," if one defines "justice" as "fairness."

Professor Michelman[19] argues that "the only 'test' for compensability which is 'correct' in the sense of being directly responsive to society's purpose in engaging in a compensation practice is the test of fairness: . . . [A]nd that its most important immediate implication for public policy pertains to the assignment of responsibility for ensuring that compensation is paid whenever it ought to be."[20]

On the other hand, Professor Sax[21] applies the rule: "[W]hen an individual or limited group in society sustains a detriment to legally acquired existing economic values as a consequence of government activity which enhances the economic value of some governmental enterprise, then the act is a taking, and compensation is constitutionally required; but when the challenged act is an improvement of the public condition through resolution of conflict within the private sector of the society, compensation is not constitutionally required."[22]

Should Michelman's "fairness" and "public policy" be considered, the court might find that compensation should be paid. But, in essence, the *Cartwright* opinion applies the Sax test, which brings us to the paramount issue: Since pueblo rights are prior and superior to those of other users, what are the nature and extent of the rights which have vested in the pueblo under the doctrine? Are they limitable? Are they extinguishable? Have they been limited? Have they been extinguished?

The Spanish have never regarded running water in natural streams as property. No one, not even the government, could own the corpus of the water. Spanish water law, as under the civil law, considered

17. *See* text accompanying note 5 *supra.*

18. There is no exact definition of the term police power. It is traditionally applied by the courts to protect the health, safety, and morals of the community. *See* Sax, *Taking and the Police Power,* 74 Yale L.J. 36 (1964).

19. Professor of Law, Harvard Law School.

20. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 Harv. L. Rev. 1165, 1171-72 (1967).

21. Professor of Law, University of Michigan.

22. Sax, *supra* note 18, at 67.

natural running water to be *res communes*.[23] Therefore, if any water right vested in the pueblos, it was only to the use of the water.

Spain considered the colonial territories in America to be part of the mother country. Her motivation for colonizing New Spain was to expand the royal domain. The possession of all new land was vested in the Crown. The king controlled all colonial power and policy; all rights flowed directly from him. The settlers had no rights nor political power.[24] The sovereign always maintained close control over the rights to use the land and its resources. The pueblos were under constant supervision by officers of the government. No grants of land were ever made to them, and the government officers could suspend, restrict, or enlarge the powers of the pueblos.[25]

The grants made to the pueblos were for the perpetual use of the land and its resources, not grants in fee, and "the king could maintain a right to allow the occupation of these towns by his own decree, although the town could not."[26] The Plan of Pitic provided for the use of the land and its resources, including the water, "which favor and right shall continue until by His Majesty the same shall be granted or alienated; in which case regulations will be made according to the provisions for concessions in favor of new possessors or proprietors."[27] Los Angeles was founded as a pueblo under Neve's *Reglamento* which similarly provided:

> The residents and natives shall enjoy equally the woods, pastures, water privileges, and other advantages of the royal and vacant lands that may be outside of the lands assigned to the new settlement, in common with the residents and natives of the adjoining and neighboring pueblos, which bounty and privilege shall continue as long as they are not changed or altered by His Majesty, in which case they shall conform to that which has been provided in the Royal orders that may be issued in favor of the new possessors or owners.[28]

Thus, the right to use land and its resources in New Spain was granted on conditions that rendered the right limitable and extinguishable.

The colonies of New Spain revolted in 1821, banished the officers of the Spanish Crown, and created the United States of Mexico. The rights to the use of land and water established by the king were recognized by the Mexican Government, which retained the power

23. 1 C. Kinney, *supra* note 9, at 468, 989.
24. F. Blackmar, *supra* note 10, at 51.
25. 1 C. Kinney, *supra* note 9, at 994-95.
26. *See* note 11 *supra* and accompanying text.
27. *See* note 12 *supra* and accompanying text.
28. J. Dwinelle, The Colonial History of the City of San Francisco, Addenda No. IV at 5 (1924); quoted in V. Ostrom, Water and Politics 32 (1953).

to establish by law the terms, conditions, and limitations of the use.[29]

Later, Texas revolted against the Mexican Government, declared its independence, and eventually was annexed by the United States of America. This precipitated war between the United States and Mexico which ended in the Treaty of Guadalupe Hidalgo in 1848. The territory, now comprising the states of California, Nevada, Utah, and most of Arizona and New Mexico, was ceded to the United States. The remainder of the present states of Arizona and New Mexico was acquired in 1853 by the Gadsden Purchase.

The United States annexed this land with the pueblo rights in full force.[30] The transfer involved simply a change of sovereign, not a change of right.[31] The United States Government, as the new sovereign, has made it clear on several occasions that the power to determine the rules controlling the use of water is vested in the states.[32]

In Section 9 of the Act of 1866, Congress protected vested water rights which were recognized by the local customs, laws, and decisions of the courts.[33]

The amending Act of 1870 provided that patents granted for federal land were subject to all existing or subsequently acquired rights as protected in the Act of 1866.[34]

Congress passed the Desert Land Act in 1877. It applied to California, Oregon, Nevada and the then territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and Dakota. Its principal purpose was to reclaim desert land on the public domain, but its provisions were also subject to existing rights.[35] In 1935 the U.S. Supreme Court, in construing this act, said: "What we hold is that following the Act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris,* subject to the plenary control of the designated states, including those since created out of the territories named. . . ."[36]

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29. 1 C. Kinney, *supra* note 9, at 990.

30. *Id.*

31. 1 C. Kinney, *supra* note 9, at 1003. "The law governing waters in Mexico was always subject to Government control, and by the transfer of the title of these lands to this country, through which these waters flow, there was simply a change of sovereign and not a change of right. . . . [I]t is left entirely to the States and Territories formed out of the lands acquired from Mexico to adopt whatever rule as to waters they may see fit. . . ."

32. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 162-64 (1935).

33. 14 Stat. 253 § 9 (1866).

34. 16 Stat. 218 § 17 (1870).

35. 19 Stat. 377 § 1 (1877).

36. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163-64 (1935).

There are other statutes in which Congress has recognized the rights of the states to control the laws of water within their own borders, including section 8 of the Reclamation Act,[37] section 18 of the Boulder Canyon Project Act,[38] and section 1 of the Flood Control Act of 1944.[39]

By way of the Mexican Government and the United States Government, New Mexico has succeeded to the sovereignty of the Spanish Crown with respect to the water within its borders. "All water within the state, whether above or beneath the surface of the ground belongs to the state, which authorizes its use, and there is no ownership in the corpus of the water but the use thereof may be acquired and the basis of such acquisition is beneficial use. . . ."[40] The right reserved by the royal government of Spain to grant or alienate and to make new regulations concerning the use of the water in favor of new possessors[41] may be exercised by the sovereign government of New Mexico. Has the legislature exercised this right with respect to pueblo rights?

The Kearny Code of 1846 protected the existing uses of water without specifically mentioning the appropriation doctrine or pueblo rights.[42] It was established by the commander of the U.S. troops occupying the land prior to the legal cession of the territory to the United States in the Treaty of Guadalupe Hidalgo in 1848.

The New Mexico Water Code[43] was enacted in 1907. It declared the existing law as it had been judicially established.[44] The New Mexico Constitution, adopted in 1911, embraced the provisions of the Water Code in Article XVI.

Section 1 confirmed the existing rights: "All existing rights to the use of any waters in this state for any useful or beneficial purpose are hereby recognized and confirmed." This recognized the rights of pueblos to divert water, at least to the extent that they actually had put the water to beneficial use. The expanding right, the right to future use of a greater quantity of the water as the pueblos grew, was neither confirmed nor denied explicitly. However, in the opinion of the Attorney General, ". . . only those rights to the use of waters are recognized and confirmed in which the waters are applied

37. 43 U.S.C. §§ 372, 383 (1952).
38. 43 U.S.C. § 617(q) (1952).
39. 33 U.S.C. § 701-1 (1952).
40. State *ex rel.* Erickson v. McLean, 62 N.M. 264 at 271, 308 P.2d 983, 987 (1957).
41. *See* note 12 *supra* and accompanying text.
42. *See* Kearny Code, *Watercourses, Stock Marks, Etc.,* N.M. Stat. Ann. § 1 at 360 (1953).
43. N.M. Laws 1907, ch. 49.
44. Hagerman Irr. Co. v. McMurray, 16 N.M. 172, 113 P. 823 (1911); Yeo v. Tweedy, 34 N.M. 611, 286 P. 970 (1929).

to a useful or beneficial purpose. Rights to waters not used for such purposes, if there are any such rights, are not recognized or confirmed."[45] Under this interpretation, any rights of pueblos to future appropriations were revoked by the sovereign.

Section 2 stated:

> 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.

This declared all unappropriated water to be subject to appropriation for beneficial use. Clearly, that quantity of water which had already been applied to beneficial use by the pueblos was confirmed as an existing right. The pueblos, having settled uninhabited regions, had appropriated the water prior in time to any private claimants.[46] The pueblos, therefore, are senior appropriators today.

But what effect has this section on any claim to future applications to beneficial use under the expanding theory of the pueblo rights doctrine? The answer requires construing the term "appropriation." When has appropriation been accomplished?

In *Snow v. Abalos*,[47] the Supreme Court of New Mexico said:

> The intention to apply to beneficial use, the diversion works, and the actual diversion of the water necessarily all precede the application of the water to the use intended, but it is the application of the water, or the intent to apply, followed with due diligence toward application and ultimate application, which gives to the appropriator the continued and continuous right to take the water. All the steps precedent to actual application are but preliminary to the same, and designed to consummate the actual application. Without such precedent steps no application could be made, but it is the application to a beneficial use which gives the continuing right to divert and utilize the water.

Under this construction of the doctrine of appropriation, it is apparent that in incorporating this section in the Constitution, the legislature has limited the rights of the pueblos to take only that amount of water that they were diverting in 1911. Any subsequent appropriations are junior to all others prior in time, including those granted under the pueblo rights doctrine, and take effect as of the date of the diversion.

45. [1915-1916] N.M. Att'y Gen. Rep. no. 1508.
46. 1 S. Wiel, *supra* note 1.
47. 18 N.M. 681 at 694; 140 P. 1044, 1048 (1914).

The opinion in *Snow v. Abalos* does permit the relation back doctrine to come in to establish a previous date of appropriation where intent to apply the water to beneficial use can be established. But although the intent to apply may have been present in 1911, due diligence is not satisfied simply by waiting for expanded population to increase the needs of the pueblos.[48]

Section 3 stated: "Beneficial use shall be the basis, the measure and the limit of the right to the use of water." This section also limits the rights of the pueblos to that amount of water which they were applying to beneficial use in 1911. The Attorney General stated this very clearly in interpreting the section:

> By limiting the right to the use of water to a "beneficial use", our Constitution grants to the appropriator only that quantity of water which is so applied, the remainder being subject to further appropriation for like purpose.
>
> An appropriator acquires a vested right only to that quantity of water which he appropriates to a beneficial use, and he cannot be heard to complain if application is made for the use of the surplus water.[49]

The Constitution makes no exceptions in favor of the rights of pueblos. It is difficult to see how the court could infer from the Constitution an intention of the framers to except the pueblos. Such intention is not implied at all. Even if the court could infer that a pueblo rights exception was intended, the sovereign has subsequently acted to limit the rights of appropriators, again without excepting the pueblos.

New Mexico participates in seven river compacts. The legislature has ratified agreements with other riparian states for the apportionment of the waters of the Canadian River, the Colorado, the Upper Colorado, Costilla Creek, the La Plata, the Pecos, and the Rio Grande.[50]

New Mexico District Judge Federici pointed out, in his lengthy dissent in the *Cartwright* case,[51] that Article IX of the Pecos River Compact provides: "In maintaining the flows at the New Mexico-Texas state line required by this compact, New Mexico shall in all instances apply the principle of prior appropriation within New Mexico."[52] But more important to establishing the ratifications of the river compacts as acts of the sovereign which limit the water

48. Rio Puerco Irr. Co. v. Jastro, 19 N.M. 149 at 153, 141 P. 874, 876 (1914).
49. N.M. Att'y Gen. Rep., *supra* note 45.
50. R. Clark, *supra* note 8, at 70; N.M. Stat. Ann. § 75-34-3 (Supp. 1963).
51. Cartwright v. Public Serv. Co., 66 N.M. 64 at 100, 343 P.2d 654, 679 (1959).
52. N.M. Stat. Ann. § 75-34-3 (1953).

rights of the pueblos is the effect of the requirement placed upon the state in each compact to deliver a certain quantity of water to the lower riparian state. The compacts bind not only the states but also the citizens of the states and, thereby, may alter or limit the rights of private users. Pueblo rights, along with other private water rights, are thus subject to limitation.[53]

Clark takes the position that the compacts are inferior to the rights of appropriators.[54] But the Supreme Court of the United States in *Hinderlider v. La Plata River and Cherry Creek Ditch Co.* ruled that "the apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted water rights before it entered into the compact."[55] The Supreme Court also approved the provision in the La Plata River Compact that the water could be "rotated between the two States in such manner, for such periods, and to continue for such time as the state engineers may jointly determine."[56] Thus, the compacts may limit the rights of the pueblos and, at times, may administratively suspend those rights.

The Supreme Court of New Mexico has followed the lead of the California courts in affirming the rights of a pueblo "to the use of so much of the water . . . as should be necessary for the pueblo and its inhabitants, including the future growth and expansion of said pueblo."[57] It applied the doctrine of pueblo rights and ruled properly that a municipality with Spanish-Mexican pueblo origin succeeded to all the rights in land and water acquired by the old pueblo.

However, in pointing to the Plan of Pitic as the foundation of pueblo rights, it failed to recognize the reservation by the sovereign of the right to change or alienate the privilege. The government of New Mexico has not only succeeded to that sovereign reservation but has exercised it. The effect of the provisions in the New Mexico Constitution was the cancellation of any rights to increase the amount of water to be appropriated in the future to satisfy the expanding needs of the growing pueblos. The ratification of the river compacts generally affect the pueblos situated on those rivers, not only by confirming the cancellation of any expanding water rights, but also by technically limiting or suspending the rights in favor of

53. King, *Interstate Water Compacts,* Water Resources and the Law 355, 372 (1958).

54. Clark, *supra* note 14, at 278.

55. 304 U.S. 92, 106 (1937).

56. N.M. Stat. Ann. § 75-34-3 (1953).

57. Cartwright v. Public Serv. Co. of New Mexico, 66 N.M. 64 at 68, 343 P.2d 654, 657 (1959).

the rights of the lower riparian states which are parties to the compacts.

The pueblos are senior appropriators. Their rights to continue to appropriate that amount of water which was applied to beneficial use before the appropriations by private users is clearly affirmed. But all subsequent increases in the amount of water appropriated take effect as of the date of application to beneficial use and are junior to the rights of all prior appropriations, whether by pueblos or by private users. Since nearly all of the streams in New Mexico are "over-appropriated", the pueblo towns are going to have to condemn existing appropriation rights of private users under the power of eminent domain in order to meet the needs of their expanding populations. Just compensation must be paid for the taking of that water.

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