THE PUEBLO RIGHTS DOCTRINE IN NEW MEXICO

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I

The Decision and its Legal and Other Background

On May 6, 1955, a complaint was filed in the District Court for San Miguel County that eventually produced the consequences to be discussed here. It is my task to outline and evaluate the final decision of the New Mexico Supreme Court in that case. The case is known as Cartwright et al v. The Public Service Co. of New Mexico. Actually Cartwright was joined by over 100 surface water users from the Gallinas River, including the State Insane Asylum, in the action against the Public Service Company of New Mexico. These plaintiffs alleged interference by the defendant with their prior appropriative rights. During the early course of the proceedings the water users were permitted to amend their pleadings and the Town of Las Vegas, a municipal corporation, was also granted leave to intervene in the case.

(At this point it should be made clear that the Public Service Company of New Mexico is a private corporation and is not a governmental or public corporation such as a ditch company or a conservancy district. It is a private corporation that is publicly regulated. In other words, it is a public utility. I make this point because there has been some confusion in the general public's mind between the Public Service Commission, 1/ a state regulatory body, and the Public Service Company of New Mexico, the defendant in this case).

On April 23, 1956, the District Judge who heard the case made findings of fact and prepared conclusions of law upon which he rested his decision in favor of the Defendant Public Service Company.

The District Judge found as a fact 2/ that the Town of Las Vegas and the city of Las Vegas were successors in interest to the Mexican pueblo (known as Nuestra Senora de las Dolores de Las Vegas) established under Mexican law on April 6, 1835. This pueblo was founded under a colonization grant whereby the grantees were given lawful and paramount rights to so much of the waters of the Gallinas which flowed through and by the pueblo as was needed by the present inhabitants and for the continued uses of water by inhabitants in the future. It is, of course, this portion of the grant's application that gives us difficulty today. The grant was confirmed by Congress in 1860 and a patent to the grant was issued. 3/

Here we must also inject an explanation that the term pueblo in this context had and has nothing to do with rights of Indians. 4/ You must realize that the term pueblo means town. The Indians who were discovered by the early Spaniards to be living in towns were called pueblo Indians which distinguished them from the nomadic Apache, Commanche and Navajo. In the discussions I have had with many lawyers on this subject I find this confusion.

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It is also found in some of the briefs. 5/

The most important findings of the District Court for the purpose of this discussion can be summarized briefly: 6/

The District Court found that the Gallinas River was the sole source of supply for the pueblo and its successors, the town and city of Las Vegas; that in 1880 the Agua Pura Company, a private corporation, received a 50 year franchise properly granted by the County Commission of San Miguel County; that this franchise carried the right to distribute the municipal water supply to the town and city and that The Public Service Company is the successor to the Agua Pura Company.

The court also found that water rights of the city and town were not litigated in the Federal equity case entitled U. S. v. Hope Community Ditch, 7/ which began in 1920 and ended in 1933 with a decree that adjudicated a very large number of water rights on the Pecos and its tributaries.

The District Court reached these conclusions of law:

1. That the Town and City of Las Vegas had an continues to have paramount rights to Gallinas waters dating back to 1835 that are superior to Plaintiff's appropriative rights.

2. That the Public Service Company is diverting and distributing this water supply for the proper purposes of municipal needs and may contine to do so.

3. That the Hope decree is not res judicata as to the legal question raised by the case, i.e., the issue of pueblo rights was not cut off by the Hope Decree.

On the basis of the facts as found and these conclusions of law, the District Court entered judgment dismissing the plaintiff's complaint.

The Plaintiff appealed this decision to the New Mexico Supreme Court. Briefs were filed as usual by both sides and by others not parties to the litigation. These were not ordinary briefs. They were the work of a large number of excellent lawyers and they filled many pages. Both the State of New Mexico through the Attorney General and the City of Albuquerque filed amicus curiae briefs because of the great public questions involved. Two irrigation districts, the Interstate Stream Commission and the State Engineer joined in the State's amicus brief. The Court heard oral agruments and had the case under consideration until December 12, 1958, when a 3-2 decision was handed down which affirmed the trial court. Subsequently a rehearing was sought and more briefs were filed. On June 1, 1959, a court reaffirmed its original stand in a one paragraph opinion and denied the motion for a rehearing. The two dissenting judges filed another long dissenting opinion. Thereafter following the mandate there were three additional motions filed -- for another rehearing, to recall the mandate and a motion for a five judge court to hear the motions, Justice Sadler having retired. On September 3, or two months ago, the court denied all of the motions. Under authority of earlier cases they declined to call another judge to break the existing tie. This meant that the original opinion stood. The two dissenting justices filed another dissenting opinion.

It is this mass of material, covering 42 printed pages in the published report, 8/ that I am going to try to summarize and comment on.

The Supreme Court framed the appeal in the context of three questions:

1. Did the Hope decree bar the present assertion of pueblo rights?

2. Did some of the plaintiffs have water rights superior to any pueblo rights because they were prior in time and were based on allegedly older appropriation rights?

3. Is the New Mexico court entitled to apply the pueblo rights doctrine as known and recognized in California?

These questions will be taken up in the order stated:

1. Hope Decree. The nature and effect of the Hope decree, although extremely important to the case, is of more interest to lawyers than to most of this group. However, I will summarize the court's conclusion.

You will remember that the plaintiff water users in this case claimed that the defendant corporation and the town of Las Vegas could not assert pueblo rights in 1955 because the town's rights had been adjudicated by the Hope equity proceeding which ended in 1933. The defendant, on the other hand, contended that the Hope decree had no application because the town and city of Las Vegas had not participated in the proceedings and no water rights as to them had been adjudicated. The Supreme Court interpreted the record to show no appearance or any participation by the Town or the City. Thus, the court concluded the Town and City were not barred by the principle or *res judicata* from asserting pueblo rights in the present proceeding. (*Res judicata* applied in this context means that no water rights had been litigated and new claims could be made). As I said, this is a technical legal point which I must pass over too quickly in order to get to the pueblo rights doctrine.

2. Claims of older water rights established before the Town of Las Vegas pueblo established. Here again I must be very brief. The plaintiffs who claimed as heirs under the title of Luis Cabeza asserted rights that were alleged to go back to 1821, or before the pueblo was founded in 1835. The court referred to the Congressional confirmation of the pueblo grant in 1860 and the patent that was issued and pointed out that no conflicting claims were recognized at that time. The court also referred to an earlier decision 9/ that said that a grant by Mexico under conditions that were properly shown did not need legislative confirmation. In effect they recognized *judicial* confirmation of a grant.

3. The applicability of the pueblo rights doctrine. This is the subject of primary interest to you. It is the part of the decision with the greatest ramifications. The court concluded that the doctrine was applicable in New Mexico and the plaintiffs' claims were held to have been properly dismissed by the trial judge. A number of the court's statements should be read to you.* I have them before me, but I shall read only the most vital excerpts and comment on them. I will also mention the dissenting

*The portions underlined were the ones actually read.

opinion's main themes. At the end I shall comment on the doctrine as announced with respect to its future application in New Mexico.

> This leaves for final determination of the three basic questions listed near the beginning of this opinion, viz., the question of whether the doctrine of Pueblo Rights was properly recognized and applied by the trial court in disposing of this case. It should be enough at this point in our opinion, without setting out all the facts pertinent to the question, to say the learned judge did recognize the doctrine and apply it to the facts found, thereby upholding the doctrine in its relation to the rights of the Town of Las Vegas, the City of Las Vegas and the defendant, respectively, in and to the waters of the Gallinas River under said doctrine. 10/
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> It is not surprising that a doctrine such as the Pueblo Rights arose when we consider the fact that these colonization pueblos to which the right-attached were largely, if indeed, not always, established before there was any settlement of the surrounding area. Thus it resulted that there had never been any prior appropriations or use of water of the river or stream, nor any allotment of lands, by the Mexican government prior to the establishment of the Pueblo.
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> (3) It is the claim of plaintiffs (appellants) that constitutional and statutory provisions touching the use of water is contrary to the Pueblo Rights doctrine and that it can find no place in our jurisprudence. They fail, however, to point out in what respect this is true. This Court has long recognized that we have followed the Mexican law of water rights rather than the common law. In Martinez v. Cook, 56 N.M. 343, 244 P. 2d 134, 138, we said:
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> > "Particularly, we have never followed it 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."
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> We see nothing in the theory of Pueblo Rights inconsistent with the doctrine of prior appropriation and beneficial use. The Town of Las Vegas was granted a water right by the Mexican government in 1835.
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> It is an admitted fact that the doctrine of Pueblo Rights as we understand and all the parties argue it is well recognized in the State of California. The parties agree that the question has not been determined in the State of New Mexico, although both parties seek to gain some comfort from two New Mexico cases which mention the doctrine. They are the cases of State ex. rel. Community Ditches v. Tularosa Community Ditch, 19 N.M. 352, 143 P. 207, and the case of New Mexico Products v. New Mexico Power Co., 42 N.M. 311, 77 P. 2d 634. In neither case was any position

taken by the Court on the doctrine. In the Tularosa Ditch case the Court merely referred to it and said the right could not be sustained under the facts of that case because Tularosa was founded long after the territory was acquired by the United States and had never been a Mexican pueblo. In the New Mexico Products Co. case supra, we referred to the decision of the Supreme Court of the United States in United States v. City of Santa Fe, 165 U. S. 675, 17 S. Ct. 472, 41 L. Ed. 874, where it was held that Santa Fe was never established by the Spanish or Mexican government as a pueblo and therefore could not claim Pueblo Rights. We did not in either of the cases mentioned hold that the doctrine of Pueblo Rights was not applicable in New Mexico, but only that, under the facts before us neither Town had such rights . . . in State v. Tularosa Community Ditch, supra, we said (19 N.M. 352, 143 P. 215):

> "At first the plan for the establishment of these pueblos was for the King of Spain, in each case by special ordinance, to provide for the foundation of the pueblo and to set apart for the use of the pueblo and its inhabitants a certain area of land and to prescribe in the ordinance the rights of the pueblo and its inhabitants to the use of the waters flowing to those lands. * * * And, further, it was also at this time provided by the King, by general ordinance, that thereafterward, the provisions and rights granted and the general plan followed in the foundation of the pueblo of Pictic should be followed in the foundation of any new pueblos in the jurisdiction of the commanding general of the internal Provinces of the West, of which California, Arizona, New Mexico, and Texas constituted a part. * * * And this pueblo rights to the use of water, or the right of all the inhabitants in common within the jurisdiction of the pueblo, was superior to the individual rights of appropriators, and also superior to the right of the riparian proprietors, through whose fields the stream ran."

As already stated, however, neither this case nor that of the New Mexico Products Co. v. New Mexico Power Co. may be cited with any justification by any party to this suit as sustained a position taken by this Court on the Pueblo Rights doctrine. 11/

(4) (And) in California the priority of right in a colonization pueblo to take all the waters of a non-navigable stream for the use of its inhabitants on an expanding scale necessary for the benefit of its inhabitants was early recognized and enforced. Hart v. Burnett, 15 Cal. 530; Lux v. Haggin, 69 Cal. 255, 4 P. 919, 10 P. 674; Vernon Irrigation Co. v. City of Los Angeles 106 Cal. 237, 39 P. 762; City of Los Angeles v. Los Angeles Farming & Drilling Co., 152 Cal. 645, 93 P. 869, 1135; City of San Diego v. Cuyamaca Water Co., 209 Cal. 102, 287 P. 475; City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 P. 585; Hooker v. City of Los Angeles, 188 U. S. 314, 23 S. Ct. 395, 47 L. Ed. 487; Treaty of Guadalupe Hidalgo. 12/

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It was as early as 1789 that the King of Spain established the Town of Pictic in New Spain and gave the settlement preferred rights to all available water from which evolved the doctrine of Pueblo Rights. 1 Kinney on Irrigation and Water Rights 996. And as shown by the quotation from Kinney in State v. Tularosa Community Ditch, supra, the King decreed that thereafter the general plan followed in the foundation of the Pueblo of Pictic should be followed in the foundation of any new pueblos in California, Arizona, New Mexico and Texas. 13/

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(6) 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.

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 entitled him enjoys a priority for the whole, so by analogy and 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 answers to claims of confiscation always present when private and public rights of claims collide. Compare, Middle Rio Grande Water Users Ass'n. v. Middle Rio Grande Conservancy District, 57 N.M. 287, 310, 258 P 2d 391. So, here, we see in the Pueblo Rights doctrine the elevation of the public good over the claim of a private right. 14/

* * * *

Public Service Company does not own the pueblo rights of said City and Town, as the trial judge viewed the matter. His findings, conclusions and judgment so reflect and affirm. It merely acted as the agent and instrumentality of said City and Town in enabling their inhabitants to enjoy to the fullest extent the pueblo rights inaugurated by the King of Spain. Yet, even he, the King but bespoke a fact of life as ancient as the hills when he became the author of the Plan of Pictic. Water is as essential to the life of a community as are air and water to the life of an individual. It is frequently mentioned as the "life blood of a community." It is precious. It is priceless. A community, whether corporate or not, possessing such an indispensable right can neither sell, barter, exchange, or give it away. Either this is

so, or the supposed benefaction of the King of Spain in anaugurating the Plan of Pictic became in reality an obituary instead. Water is essential to life. Without it we perish.

Furthermore, we can no more ignore the Pueblo Rights doctrine as a major issue in this case then could we with propriety decline to entertain this appeal. It is raised both by defendant's answer and the "further, separate" and affirmative defense of intervenor filed in the cause, and so recognized by Judge Brand in his letter to all counsel under date of January 30, 1956, and the judgment itself. Either the court and all counsel at the pretrial conference misapprehended what the major issue was, or it projected itself as such surely and unmistakably.

We think the trial court was correct in sustaining the claim of defendant and intervenor under the Pueblo Rights doctrine. Other collateral questions are argued but they either are resolved by what we have said, found to be without merit or unnecessary to determine. The findings and conclusions are supported by substantial evidence and the judgment should be affirmed.

It will be so ordered. 15/

The dissenting opinions are too long 16/ to take up in detail at this time. Their main thrusts are both technical and policy oriented. All I will give you is an outline of their main points. It seems appropriate, if not necessary, to explain why a five man Supreme Court has split 3-2 over a water law problem.

The dissenters question the applicability of the pueblo rights doctrine on constitutional, historical, procedural, jurisdictional and public policy grounds.

Their first main point is that the pueblo rights question was not properly before the court since the Town of Las Vegas did not assert such rights. The community was merely an intervenor. Thus the Public Service Company was asserting a right which was not its property. The dissent stresses that the Public Service Company is merely a carrier and distributor of water under a franchise with the community and even though the pleadings in the case state that the utility is "the instrumentality of the intervenor" it is not the owner of the community's water rights. The utility could not assert any title or ownership to the "pueblo water rights" because its rights are those obtained from its predecessor The Agua Pura Company, which had its 1881 priority adjudicated by the Hope decree. This contention of the dissenters is supported by the records of the State Engineer's office and other documents in the case. The dissenters believe that the sole issue before the court was whether the Public Service Company was using more than the 2,600 acre feet allocated to the Agua Pura Company and in which, the dissent says the community may have also had an interest. This amount was reconfirmed by the State Engineer in 1950. 17/ On this basis the dissent concludes that the Hope decree is res judicata between the plaintiffs and the Public Service Company, i.e., the assertion of pueblo rights by the Public Service Company at this time is barred by established legal principles.

The dissent also expresses the view that the only possible way the Public Service Company may assert pueblo rights is as Trustee for the Town of Las Vegas and its inhabitants. 18/ But here the dissent directs attention to the fact that the town was a party in the earlier Hope adjudication. It did not file an Answer in the proceeding or make a claim at that time but there was an appearance by the Town's lawyer in these words quoted in the opinion: 19/

> "I also appear for the Town of Las Vegas, and consumers of water of the Town of Las Vegas, in the event it becomes necessary to appear for said parties by reason of any adjudication of the title to the water between them and the Agua Pura Company as to the water rights of the consumers of the Town of Las Vegas."

The dissent's construction of these words differs from the view of the majority and is of course a crucial element in the decision. The second dissenting opinion, filed after the second motion for a rehearing was denied, re-emphasizes that the Agua Pura Company's rights were adjudicated in the Hope decree and since the Public Service Company could not have greater rights than it received from its predecessor, its present rights cannot be greater than those received under the decree.

Moving on to a consequence of the majority decision, the dissent declares that it "will cast a cloud on all stream rights in the Pecos stream system, to say nothing of what will happen to the Rio Grande water rights as shown by briefs herein of amicus curiae." 20/ The dissent states that "the doctrine of Pueblo Water Rights as enunciated by the California courts should not be followed and declared to also be the law of New Mexico." 21/ The dissent expresses the view that the new doctrine is California doctrine made necessary by demands for an adequate city supply for Los Angeles and is not the old pueblo rights doctrine. 22/

There is a sharp criticism of the majority's statement of history to the effect that: 23/

> "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."

The dissent quotes from a case decided by the New Mexico Supreme Court in 1892 which recites facts clearly showing that in 1819 a grant was made to one Antonio Ortiz in the area of the Gallinas river. 24/ This record indicates that the Gallinas area was not unoccupied territory.

The old question is raised of whether the Las Vegas area was part of Texas and not subject to the treaty of Guadalupe-Hidalgo. 25/ This treaty with Mexico was required to recognize only vested rights. If there were any water rights existing at that time they were what in law are called contingent rights based on Mexican Law. It was this theory that the California courts and the California legislature molded into the California pueblo rights doctrine. No such evolution of legal doctrine took place in New Mexico. In fact, the court has twice refused to apply this doctrine: "On two prior occasions this court has carefully desisted from expressing an

opinion that the pueblo rights doctrine applied in New Mexico." 26/ Moreover, the dissent says, the doctrine contradicts appropriation theory and practice as developed in New Mexico and which is the doctrine or rights based on actual beneficial uses. In addition, it jeopardizes our interstate relations under the Pecos and other compacts and under established principles of interstate allocation.

The dissenters would have granted all three of the subsequent and final motions filed in the case. Emphasis is placed on a newly raised jurisdictional question, viz., that the Las Vegas Grant created by territorial legislation in 1903 was an indispensable party because the Town of Las Vegas, which did not exist as a municipal corporation in 1860 when the Las Vegas Grant was confirmed by the Congress, was and is within the exterior boundaries of this grant. 27/ The dissenters believe this was a serious question which should have been reviewed by a five man court rather than by the four remaining justices who were divided 2-2 after the retirement of Justice Sadler.

Although I have already taken too much time, I have given you only a glimpse of the contending doctrines, historical uncertainty and legal assumptions.

Let me repeat that the law of the case, the majority opinion, holds that the Public Service Company through its franchise from the Town and City of Las Vegas was entitled to assert the pueblo rights doctrine as imported from California and that the municipalities' rights to the waters of the Gallinas were not litigated or determined in the Hope decree.

II

Significance of the Decision

Now you will want to know what future significance this decision may have for the rest of the state.

The case raises a large number of questions including future attacks on the Hope decree which I will not discuss. However, there are five questions that I will take up.

1. Can the pueblo rights doctrine as derived from the Plan of Pictic (or Pitic) and the California cases be applied elsewhere in the State?

The theoretical answer is yes. However, the likelihood of its application is not great. You will remember that the Plan of Pictic was devised in 1789. 28/ At this time New Mexico, as a part of New Spain, had a pretty well settled tradition. The important Rio Grande towns had long been established, e.g., Albuquerque was already officially over 60 years old. 29/ You will recall that in the history of New Mexico the Rio Abajo towns were established later than the Rio Arriba towns. Most of these lower river towns were settled after the Pueblo Rebellion of 1680 when the Spaniards retreated to El Paso del Norte. 30/ The towns in the north, Santa Fe, Espanola and those in that area were founded earlier. Most of the large land grants in the river areas had also been made before 1789. If the Rio Grande and Pecos river towns are to

establish pueblo rights they will have to find some law older than the Plan of Pictic of 1789 on which to base their claims, assuming of course that water rights were included in them in the manner of the Plan of Pictic. That this can be done is highly doubtful for a number of reasons that cannot be examined in the time allowed us here. It should be pointed out, however, that California precedent will be of little or no help if some pre-1789 pueblo grants are discovered in New Mexico. California was not occupied until long after New Mexico was settled. Although the early explorers had sailed along the coast in 1542-43 California was not of sufficient importance to SPAIN to encourage occupation until 1769-1770 when San Diego and Monterrey were occupied as part of a counterbalance to the Russian activities in Alaska between 1745 and 1765. 31/ The so called "mission period" extended from 1769 to 1823. Civil municipalities, as distinguished from the missions and presidios, were called pueblos. 32/ Los Angeles, El Pueblo de Neustra Senora La Reina de Los Angeles, was established as a pueblo in 1781. 33/

2. Will communities claiming the benefits of the pueblo rights doctrine be required to produce formal documents establishing the date and circumstances of their founding?

Apparently they will under the principle discussed in New Mexico Products Co. v. New Mexico Power Co. 34/ This case relied upon a decision of the United States Supreme Court in U. S. v. City of Santa Fe 35/ which held that it was never established that Santa Fe was founded by the Spanish or Mexican government as a pueblo and therefore it could not claim pueblo rights. However, at the time the New Mexico Products case was tried the Orders regarding the founding of the City of Santa Fe received by de Peralta, the third governor of the region, had been published and translated in the pages of the New Mexico Historical Review in 1930. 36/ The new governor followed Juan Onate and his son Cristobal who had made some plans for the town. The founding apparently took place between 1609 and 1614 and very probably in 1610.

California of course has followed a de facto or in fact founding principle rather than a de jure or legal theory, i.e., the formal legal documents are not the important test but the actual existence of a community.

3. What effect will this doctrine have on interstate stream apportionment and interstate compacts?

It may have considerable effect in terms of interstate suspicion and complaint even if no actual pueblo rights beyond those claimed in the Cartwright case are recognized. If additional actual claims are made and substantiated some demands may occur for compact renegotiations or new apportionments. The compacts are subject to the overriding appropriation doctrine with its hierarchy of priorities and preferences. The effect on intrastate rights is obvious from this case.

4. What problems does this decision present in the area of public control and supervision of water resources charged by law to the State Engineer?

The case raises questions about methods for determining supply in any given area. It makes the job of the State Engineer extremely difficult in anticipating demands in terms of known rights and projected uses. There is

an increased element of uncertainty in the picture of determining available supply at a given place or for a particular purpose. It will undoubtedly add to the administrative burden of the State Engineer's office in that he will have to spend more time gathering data to show some claim to be baseless in fact.

5. Does the doctrine apply to ground water?

It does not unless the State Engineer wishes to have his interrelationship theory of surface and ground water pressed to the ultimate limits. The California cases if they are followed in this matter may prove helpful to compel the State Engineer to go to that length, although it must be remembered that under the common law and the civil law of Spain percolating ground water belonged to the land owner. 37/

This question is of course very important since most of the claims of towns like Albuquerque will be to ground waters. (Here reference was made to a newspaper story in the Albuquerque Journal for November 3, 1959, entitled, "Town of Atrisco Launches Claim to Grant Waters" and containing the following statement: "The grant has laid claim to all of the Rio Grande water it needs for its growth, including underground water . . . ."). In areas outside of the declared ground water basins where the State Engineer has no jurisdiction the problem will also be important if a pueblo right is asserted and proved.

III

Conclusions

Any new public policy that recognizes the claims of a city is good law in terms of utility and necessity. However, the method of reasoning in this case from uncertain historical premises and dubious Spanish, Mexican and California precedents is not very presuasive. The oblique reliance on the police power of the state to limit property rights, i.e., prior appropriation rights seems contrived. Hortatory expressions like the following from the majority opinion 38/ state the obvious, but they are not good substitutes for analysis and explanation:

> "Public Service Company does not own the pueblo rights of said City and Town, as the trial judge viewed the matter. His findings, conclusions and judgment so reflect and affirm. It merely acted as the agent and instrumentality of said City and Town in enabling their inhabitants to enjoy to the fullest extent the pueblo rights inaugurated by the King of Spain. Yet, even he, the King, but bespoke a fact of life as ancient as the hills when he became author of the Plan of Pictic. Water is as essential to the life of a community as are air and water to the life of an individual. It is frequently mentioned as the "life blood of a community." It is precious. It is priceless. A community, whether corporate or not, possessing such an indispensable right can neither sell, barter, exchange, or give away. Either this is so, or the supposed benefaction of the King of Spain in inaugurating the Plan of Pictic became in reality an obituary instead. Water is essential to life. Without it we perish." (My emphasis)

The modern reading of the police power into the pueblo rights doctrine[39] of the colonial period is not easily accepted as the basis for an act that amounts to confiscation. Here we should recall that the police power is an important attribute of the state's power to provide for the health, safety and general welfare of the people. We must remember that there is no constitutional limitation on its exercise except that it be reasonable. No compensation need be paid. Eminent domain, on the other hand, has been the traditional method for taking private property for a public use and constitutional guarantees require just compensation. It is my opinion that the revival of a community power long dormant and unknown through the conjuring up of doubtful legal history and non-applicable California decisions is not the way to get to the heart of the main problem presented by the case. I refer of course to preferences among water uses. The dissent makes clear "that municipalities do have a preferential right but such right is a preference developed by the law of appropriation" [40] and would require condemnation and compensation. No doubt in some communities this method would be inadequate and the police power would have to be invoked to preserve the health, safety and welfare of a community. For citizens must and will have water to drink. However, I do not believe that their supply should be preserved in the guise of historical rights. In summary, I believe the Cartwright case reaches a desirable result in assuring community supply but it does so over a course of intellectual hurdles I find hard to leap.

The case will continue to be important no matter how narrowly the principle it announces is construed. It calls attention to the matter of preferences among water uses which must be re-examined by the public and the legislature. The West's water law institutions have long been dominated by agricultural and mining requirements. While these are extremely important and will certainly continue to be so, it must be recognized that the pressing demands of the future, while not necessarily large in volume, are the key to the West's development. I refer to residential, industrial and recreational uses. It is expected that by 1980 the population of the Nation will have increased by 75 million. [41] In the 11 far western states population increases are expected to continue to be over 3 times as great as the rate for the Nation. Between 1940 and 1955 the increase in the 11 western states was 83% as compared with an increase of 24% for the Nation. This means that our Western population of about 26 or 27 million will double to over 50 million by 1980. You know what that means to New Mexico and every one of its communities. And it seems to be a valid assumption that most of our future growth and activity will not be dependent upon the expansion of irrigation.

Available knowledge and an examination of trends leads me to believe that the Rio Grande towns and the cities of the Pecos sub-basin will have to think up some better theories than pueblo rights to augment municipal supplies. I make this statement for several reasons. First, the Cartwright decision probably won't prove applicable to the facts, the law or the history of these many communities in the state. Secondly, the rule of the case does not apply to ground waters. Yet cities will have to rely increasingly on that source of supply. Thirdly, the cloak of the police power in the manner of the Cartwright decision is productive of uncertainty, expensive litigation and unconvincing results. It may be cheaper for towns to condemn water rights and pay for them. Finally, the Las Vegas Grant itself, as distinguished from the Town of Las Vegas, has not yet been finally heard from. It seems to me that it should be. Although the Cartwright decision says nothing directly about this matter it may be that the Grant will find

its way into court and will remain there long enough to limit the Cartwright decision to its own facts and thus put an end to this confusion of history and desirable community goals.

Footnotes

1. The New Mexico Public Service Commission (N.M. STAT. ANN. 1953, 68-4-1 et seq through 68-10-1 et seq) is a statutory public utilities commission. The New Mexico Corporation Commission was established by the Constitution Art. XI, sec. 1 et seq.
2. The Supreme Court reproduced in full the District Judge's findings and conclusions, 343 P. 2d 654 at 655-659.
3. 12 Stat. 70, Section 3 of the Act of Congress, June 21, 1860. See 343 P. 2d 654 at 663: "The Section of the Act of 1860 confirming the Las Vegas Grant is in the same language, except for the claim made, as that confirming the other Mexican grants by the same Act."
4. Indian rights and titles are a field apart. The point under discussion concerns colonization pueblos and not the confirmation of Indian rights. Indians have available additional constitutional, treaty and compact safeguards. However, the question of priority between Indian claims and pueblo rights is not part of this disucssion even though, as will appear obvious from the later discussion, the claims of towns under the pueblo rights doctrine to large supplies of water may threaten to impair existing Indian uses, e.g., if Albuquerque were to establish a pueblo right, the effect on the Rio Grande at Isleta would no doubt result in action by the Indians to find out who has a prior legal right.
5. See Amicus Brief of City of Albuquerque (in opposition to motion for rehearing) at page 11-12 where the idea of Indian rights is refuted.
6. There are a total of 25 separate findings of fact and 6 separate conclusions of law. However, formal requirements of statements of jurisdiction and other matters partly explain their number.
7. No. 712, Equity, U. S. District Court of New Mexico (1933).
8. 343 P. 2d 654-696.
9. State ex rel State Game Commission v. Red River Valley Co. 51 N.M. 207, 182 P 2d 421 (1947).
10. Cartwright v. Public Service Co. 343 P 2d 654, at 664-665.
11. Ibid 665-666.
12. Ibid 667-668.
13. Ibid 668.
14. Ibid 668-669.
15. Ibid 669.
16. They cover about 26 printed pages.
17. See dissent page 671.
18. Dissent page 672.
19. Dissent page 673.
20. Dissent page 674.
21. Ibid.
22. Ibid 677-678.
23. Dissent quotes majority at page 686.
24. Ibid 687 quoting from Waddingham v. Robledo 6 N.M. 347, 28 Pac. 663, 667 (1892).
25. Ibid 687.
26. Ibid 674.

27. Ibid 692-693.
28. Ibid 668. "It was as early as 1789 that the King of Spain established the Town of Pictic in New Spain and gave the settlement preferred rights to all available water from which evolved the doctrine of Pueblo Rights . . . ."
29. Historians tell us that the City was founded in 1706.
30. Blackmar, Spanish Institutions of the Southwest p.225 (1891).
31. Encyclopedia Britannica, 1955 ed., vol. 4, p. 591.
32. Blackmar, supra p. 153: "The purely civil colonies of California were called pueblos to distinguish them from missions and presidios . . . ."
33. See Hutchins paper.
34. 42 N.M. 311, 77 P. 2d 634 (1937).
35. 165 U.S. 675 (1897).
36. Vol. 4, New Mexico Historical Review, pps. 179-194 (1929).
37. See Bristor v. Cheatham, 75 Arizona 227, 255 P. 2d 173 at 176 (1953) Citing Kinney on Irrigation and Water Rights, Vol. 1, sec. 563, 2d ed.
38. Cartwright v. Public Service Co. 343 P. 2d 654, 669 (1959).
39. Ibid 668-669: "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 . . . ."
40. Ibid dissent p. 679.
41. These figures and those following are from Fox, "Water: Supply, Demand and the Law" a paper read before the Mineral and Resources Law Section of the American Bar Association at the annual meeting August 25, 1959.