PUEBLO RIGHTS IN THE WEST*

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In western water law, the pueblo water right is the paramount right of an American city as successor of a Spanish or Mexican pueblo (municipality) to the use of water naturally occurring within the old pueblo limits to supply the needs of the inhabitants of the city.

The subject of this paper, Pueblo Rights in the West, is intended to cover only pueblo water rights in the West. Inasmuch as a pueblo water right, in American legal parlance, stems from the water rights of Spanish and Mexican pueblos, the scope of the subject pertains solely to the American Southwest, for it is only in this part of what is now the United States that the Spaniards and Mexicans established their settlements, including the purely civil settlements known as pueblos. The scope is still further restricted geographically by the circumstance that in the high courts of only two southwestern jurisdictions -- California and New Mexico -- have pueblo water rights been litigated and their existence adjudicated.

American law on the subject of pueblo water rights was developed in California over a long period of years beginning in the last century. The immediate interest in the subject in New Mexico stems from a very recent decision of the State supreme court in the Cartwright case. 1/ In two previous decisions, claims of pueblo water rights had been considered and rejected because of the factual situations then before the court. Now, under different circumstances, the supreme court has applied to the settlement of a controversy in New Mexico the doctrine as developed by the California courts.

The issues in the Cartwright case were strenuously argued before a court which, in reaching its decision, was sharply divided, each order being made by a vote of 3 to 2. The subject is still highly controversial; it may have an important relation to the water economy of New Mexico. Therefore, the speaker desires to stress the fact that this paper does not purport to reflect the official views of the United States Department of Agriculture, nor those of the Agricultural Research Service -- to which he is attached -- or the Office of the General Counsel within the Department. The comments herein portray the considered personal views of this speaker only.

Another matter to be stressed is that this paper presents the results of a study, not of Spanish or Mexican law, but of American law only -- decisions of American courts, with particular attention to their citations or quotations of Spanish-Mexican authority. Desirable as an exploration

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* The opinions expressed are those of the author and do not necessarily represent the views of the Farm Economics Research Division, Agricultural Research Service, or the U. S. Department of Agriculture.

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of the original sources would have been, limitations of time have precluded it. Perhaps such a background study may come later.

Origin of the American Doctrine of Pueblo Water Rights

Inquiry into the origin of this doctrine begins in California. As elsewhere in the Southwest, the colonization of that area by Spain included the establishment of civil pueblos or municipalities, as well as religious missions and presidial towns.[2] Under the old Spanish law as it existed in Spain, waters were held by pueblos as a common property for domestic use, irrigation, and other purposes under regulations administered by the town officials.[3] In the Spanish settlements of California, this practice was followed in the early agricultural pueblos of San Jose and Los Angeles. Irrigation was an all important consideration in the location of each of these settlements; in fact, instructions of Governor Neve for the founding of Los Angeles required the selection of "a spot for a dam and ditch with a view of irrigating the largest possible area of land." [4] The public acequias or ditches at both San Jose and Los Angeles were managed as such by the pueblo authorities throughout the Spanish and Mexican rule. Upon incorporation as American cities, both municipalities were confirmed in their rights and responsibilities as successors of the pueblos and the city councils were given specific authority to provide for irrigation. [5] The pueblo rights of Los Angeles as to the distribution and use of waters of the Los Angeles River have been adjudicated in a series of court decisions, as noted hereinafter. The main acequia of San Jose ran through what became the principal business section of the city and was finally abandoned. Whatever pueblo rights San Jose may have possessed have not been adjudicated in the high courts of California. The pueblo water rights of San Diego, which succeeded the pueblo established under Mexican rule, have been adjudicated.

The pueblo water rights doctrine as it is recognized in California was developed in decisions of the supreme court of that State, most of the cases involving the rights of the City of Los Angeles.

Development of the Doctrine in the California Decisions

Foundation of the doctrine

It is noteworthy that in laying the foundation of the California pueblo rights doctrine, a significant part was played by statements of the supreme court in Lux v. Haggin, decided in 1886 -- a landmark case involving riparian water rights, not pueblo water rights. [6] The statments in question were dicta -- not necessary to the decision. This the court admitted, in taking notice that no pueblo existed on Kern River, which was the subject of the instant controversy, and that no portion of the waters thereof was dedicated or diverted to the use of the inhabitants of any pueblo. However the subject matter of these observations later became judicial law in California as the result of adjudications in subsequent cases in which pueblo rights actually were adjudicated.

The pueblo rights thesis that the California Supreme Court included in its opinion in Lux v. Haggin was based upon a decision that it had rendered a quarter-century earlier in a land case, [7] in which water rights were not involved. It was there held that when, in 1834, a municipality

was erected at the presidio of San Francisco and officially recognized as a pueblo, such pueblo became vested with some right or title to four square leagues of land, to be held in trust for the benefit of the entire community but with such lawful powers of allenation as it might have or acquire. By analogy to this decision and in conformity with its principles, said the court in Lux v. Haggin, "we hold" that the pueblos had a species of property in the flowing waters within their limits, subject to a public trust of continuously distributing the use in just proportion to the common lands and the lands originally set apart to the settlers or subsequently granted by municipal authorities. This trust, said the court, is within the supervision and authority of the State. Further, each pueblo was quasi a public corporation. By the scheme of the Mexican law, it was treated as an entity or person, having a right as such, and by reason of its title to the four leagues of land granted to it, to the use of the waters of the river on which it was situated; while as a political body, it was vested with power to provide by ordinance for a distribution of the water to those for whose benefit the right and powers were conferred.

Actually, the first California decision respecting what came to be known as the pueblo water right was rendered in Feliz v. Los Angeles, in 1881. [8] Here the contest was between upstream riparian owners and the City of Los Angeles. From the founding of the Pueblo of Los Angeles in 1781, a century earlier, said the supreme court, the right to all the waters of Los Angeles River had been claimed by the pueblo and by the successor city; that right had been recognized by all owners of land on the stream; under a recognition and acknowledgment of that right, the ditches of plaintiffs' grantors had been dug; and by the permission and license of the municipal authorities, plaintiffs thereafter used waters from the river. This use was continued until a water shortage deprived the inhabitants of the city of water that they needed, whereupon -- two or three years preceding the action -- agents of the city closed plaintiffs' headgates. Can plaintiffs now assert a claim of right adverse to the city, asked the court? "We think not." Statutes of the California legislature were cited to the effect that the city had succeeded to all the rights of the former pueblo. But, said the court, "We have not examined the rights of the defendant (City of Los Angeles) as they existed under the Spanish and Mexican laws, applicable to pueblos, for the findings in this case render such examination unnecessary." The supreme court specifically held that to the extent of the needs of the inhabitants, the city had the paramount right to the use of the waters of the Los Angeles River, and the further long exercised and recognized right to manage and control the waters for such purposes.

It is significant that in this decision in Feliz v. Los Angeles, the California Supreme Court did not invoke the Plan of Pitic or any particular Spanish or Mexican water laws or texts. The decision rested upon the disability of plaintiffs to assert an adverse claim after their uniform and long continued conduct in recognizing the city's paramount claim and in diverting water with the city's permission, and upon legislative declarations supporting the city's succession to all of the old pueblo rights -- but without particularizing the basis of this adjudicated paramount pueblo water right.

Five years later, the final decision in the riparian rights case of Lux v. Haggin was rendered. Whatever may have been the purpose of the California Supreme Court in including a discussion of pueblo water rights in

its lengthy opinion in this case -- 200 pages in the California reports -- its effect was threefold: (1) to broaden the court's dissertation on Spanish-Mexican water law; (2) to show that in deciding the real issues, questions of pueblo rights could be ignored because of the absence of any pueblo on the river; and (3) even though dictum in the instant case, to establish a persuasive basis for actual adjudications in the future.

In Lux v. Haggin, the supreme court stated that the laws of Mexico relating to pueblos conferred on the municipal authorities the power of distributing to the common lands and inhabitants the waters of an innavigable river on which the pueblo was situated; and that it would seem that a species of right to the use of all its waters necessary to supply the settlers' needs was vested in the authorities for the common benefit. Reference was made to the Plan of Pitic, two sections of which (19 and 20) were quoted. Both quoted sections deal with the distribution of water within the pueblo itself; neither section confers on the pueblo the right to all waters of the stream as against nonpueblo water users. After stating principles analogous to those of Hart v. Burnett, the court inserted several paragraphs from Escriche regarding rights of inhabitants of pueblos and others, one of which states, with regard to rivers: "if not navigable, the owners of the lands through which they pass may use the waters thereof for the utility of their farms or industry, without prejudice to the common use or destiny which the pueblos on their course shall have given them." From the foregoing, said the court, it appears that a riparian proprietor could not so appropriate water as to interfere with the common use or destiny which a pueblo on the same stream should have given to the waters for its own community, and that the pueblos had a preference right to consume the waters even as against another riparian proprietor. But, said the court, it is not necessary here to decide that the pueblos had the preference above suggested.

Granted that in Lux v. Haggin the court was expressing its views on pueblo water rights by way of dictum, the use of these qualified expressions may possibly indicate that the court was not yet entirely sure of the soundness of its tentative conclusions as to the preferential right of a pueblo to the use of all the waters of the stream.

A question of local law

A decade after the decision in Lux v. Haggin was rendered, the California Supreme Court approved the conclusion therein expressed to the effect that Mexican pueblos had a right to the water that had been appropriated under general law to the use of the inhabitants. 9/ Satisfaction with that conclusion was reached after a perusal of translations of Spanish and Mexican laws, regulations, etc., pertaining to the subject. In the instant case, the court applied the principle to the City of Los Angeles, as successor of the Spanish pueblo of La Reina de Los Angeles, which had been founded in 1781.

Several years later the supreme court, although sharply divided on the issues, again decided important matters respecting the pueblo right of Los Angeles, including the vitally important principle that the paramount right of the city was not limited to the quantity of water required to supply the area within the limits of the original pueblo, but grew quantitatively with the expanded area of the city and with its expanding population. 10/ As noted hereinafter, the court did not pretend to base this

expansion principle on any specific Spanish or Mexican authority, but frankly grounded it on its own presumption that this would have been the rule had there been occasion to apply it.

As the trend of the California Supreme Court decisions on this matter appeared to be now well charted, objectors sought relief in the United States Supreme Court, but were denied it -- not because of concurrence on the part of the highest court with the State court's decisions -- whether there was agreement or disagreement had no bearing on the case -- but solely on the matter of jurisdiction. That is, the United States Supreme Court held that the assertion of rights or titles to the use of water derived under Spanish and Mexican land grants and United States patents based on the original grants which did not involve any title or right claimed under the Constitution or under any treaty, statute, commission held, or authority exercised under the Constitution, did not raise a Federal question. It was held that the controversy in the California State court did not involve the construction of the Treaty of Guadalupe Hidalgo between Mexico and the United States, but involved only the validity of Mexican and Spanish grants made prior to the treaty. Hence it followed that the question of private title or right in the land and whatever appertained thereto was one of State law and general public law, on which the decision of the State court was final. The first decision to this effect was rendered by the Supreme Court in 1903, although several years earlier a Federal court decree dismissing a suit for want of jurisdiction had been affirmed by the Supreme Court on authority of cited cases, but without comment. 11/

A few years later, not daunted by this ruling of the highest court in the land, the interests that opposed the monopoly of the waters of Los Angeles River that was being accorded by successive State court decisions to the great and rapidly growing City of Los Angeles again went to the United States Supreme Court, this time by way of the Federal courts. 12/ Again it was held that the controversy was not within Federal jurisdiction. A suit does not arise under the Constitution or laws or treaties of the United States, said the court, "unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution or of some law or treaty of the United States, upon the determination of which the result depends." Therefore, questions as to the nature and extent of water rights claimed by holders of United States patents based upon Spanish and Mexican grants are necessarily questions of State of general law.

On still another occasion the question was taken to the United States Supreme Court, this time on writ of error to the California Supreme Court, which in 1910 was dismissed for want of jurisdiction. 13/ Whatever may be the rule as to patents conveying title to lands of the United States, said the Supreme Court, " it has been distinctly held in this court that neither the treaty of Guadalupe Hidalgo nor patents under the act of March 3, 1851, are original sources of private titles, but are merely confirmatory of rights already accured under a former sovereignty." Therefore, so the Court again held, "the extent of the riparian rights belonging to pueblos or persons receiving such patents is a matter of local or general law."

Extent of the California pueblo water right

Needs of inhabitants of the city. - In its first decision respecting the pueblo water right, rendered in 1881, the California Supreme Court held that as against certain upstream riparian owners, the City of Los Angeles had the paramount right to the use of the waters of Los Angeles River to the extent of the needs of its inhabitants, "and the further right, long exercised and recognized, * * * to manage and control the said waters for those purposes." 14/ As stated above, in discussing the foundation of the pueblo water rights doctrine, the court admitted that it had not examined the rights of the city as they existed under Spanish and Mexican laws applicable to pueblos, but based its decision on the effects of the conduct of the adversary parties. In other words, the water rights of the city were adjudicated in this case as against the specific individuals on grounds that pertained to them individually. However, in 1895, the city's pueblo water right was adjudicated on the historical grounds stated by way of dictum in Lux v. Haggin -- approved after perusing translations of documents furnished by counsel -- but the court held that the pueblo right to a preferred use of the water extended only to the quantity of water needed to supply the wants of the city's inhabitants, and that the city had no right to take more than that quantity for sale outside the city limits. 15/

Grows with expanding needs of expanding city. - Granting that the pueblo right at no time exceeds the needs of the city, no limit has been placed on the magnitude of actual needs. Not only are the inhabitants of the area constituting the old pueblo entitled to enjoy the full pueblo right, but the right grows with the number of inhabitants to whatever extent this increases. And not only that -- the right grows with the extension of the city limits by the annexation of land not within the limits of the original pueblo, and with the increasing number of inhabitants therein. 16/ With the growth of both Los Angeles and San Diego, the Supreme Court of California has said that the pueblo right extends to so much of the waters of the stream "as the expanding needs of such city" require, 17/ and that it "thus insures a water supply for an expanding city." 18/ In other words, the only limit is the physical extent of the water supply. If the needs of the city justly demand the whole supply, the city may take it all.

Place of use of water. - The California pueblo right extends to the use of water only within the city limits. 19/ The city has no right to take for sale outside the city limits any quantity of water in excess of the requirements of its inhabitants therein.

Purpose of use of water. - The California pueblo water right relates to the use of water necessary for the inhabitants of the city and for ordinary municipal purposes. 20/ The original pueblo right included the use of water for domestic purposes, watering of stock, and irrigation. The supreme court agreed that the fact that some of the pueblo lands had been converted into ornamental parks would not impair the right to irrigate them and, somewhat reluctantly, approved the use of water for ornamental fountains and artificial lakes in which considerable water is lost through absorption and evaporation. 21/

No restrictions upon the purpose of use of the water under the pueblo right have been imposed by the California Supreme Court. 22/

Waters to which pueblo rights attach. - The pueblo right extends to the use of all surface and ground waters of the stream that flowed through the original pueblo, including all its tributaries, from its source to its mouth. This has been declared by the California Supreme Court with respect to the rights of both Los Angeles in the waters of Los Angeles River and of San Diego in the San Diego River. 23/ This applies to peak flood flows as well as other flows, and to waters impounded for the purpose of controlling floods and subsequently released to rejoin the body of water of which they are naturally a part. (Los Angeles v. Glendale, 23 Calif. (2d) 68 at 73-74.)

The pueblo right attaches only to the waters naturally in the watershed of the stream flowing through the pueblo -- not to waters brought into the area from other nontributary watersheds. 24/

Superiority of the California pueblo water right

Prior and paramount right. - According to the California Supreme Court, the American city as successor of the Spanish or Mexican pueblo has the prior and paramount right to the use of the waters of the stream that flowed through the original pueblo. 25/ The right to the use of the water vests in the pueblo upon its establishment. (San Diego v. Cuyamaca Water Co., 209 Calif. 105 at 126.)

Superior to the riparian rights of other landowners. - In Lux v. Haggin, the California Supreme Court expressed its belief that the pueblo had a preference or prior right to consume the water of the stream even as against another riparian proprietor on the same stream, but the court considered it unnecessary to decide the question in that case inasmuch as no pueblo actually was involved. 26/ In subsequent cases the court has held the pueblo right to be superior to riparian rights of other proprietors. 27/

Superior to appropriative rights. - The pueblo right is likewise superior to the rights of appropriators of water from the stream. 28/

The question whether rights of way acquired under the Act of Congress of 1866 and the supplementary act of January 12, 1891 took priority over the pueblo right of the City of San Diego was presented to the supreme court. Inasmuch as these congressional acts were passed after the rights of the pueblo had become vested, these rights of way were held to be subordinate to the vested rights of the city derived from its succession to the pueblo. 29/

Not inconsistent with the State constitutional amendment of 1928. - The amendment to the California constitution approved in 1928 declares that the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and forbids the waste or unreasonable use or unreasonable method of use or diversion of water. 30/ According to the supreme court, even though the pueblo right includes a potential right to waters not presently needed, it is not thereby inconsistent with the amendment. 31/ The mandate of the fundamental law, said the court, in no way diminishes the rights of a successor to the pueblo, for this right not only protects the reasonable beneficial needs of the city, but also insures a minimum of waste by leaving surplus water accessible to others until such time as the city needs it. "The amendment was designed primarily to destroy the right to object to the use of water

not presently needed, a right that the pueblo or its successor never had."

Preservation of the California pueblo right. - Under the California decisions, an American city that inherited from its Mexican municipal predecessor a pueblo water right owns that right in perpetuity for the satisfaction of its ultimate needs, no matter how great they may become nor how long the time of ultimate need may be delayed. No decision of the California Supreme Court has suggested that the city should be held to any standard of diligence in putting the water to use. On the contrary, the whole tenor of the decisions is to the effect that the pueblo water right is available for the use of the city whenever the city is ready to exercise it.

If there is any method by which the pueblo water right can be lost to the city, the supreme court has not yet declared it. On the contrary, the court has specifically ruled out several suggested ways in which the right might be lost or impaired. 32/ These were:

(1) A statutory provision then extant declaring that waters not put to use by riparian owners for any consecutive period of 10 years thereby became subject to appropriation, was held to be not applicable to pueblo water rights.

(2) The statute providing that failure for 3 years to use beneficially water for the purpose for which it was appropriated or adjudicated, causes such water to revert to the public, does not apply to the pueblo water right, which is not based upon appropriation or adjudication.

(3) The pueblo water right is not lost or impaired by prescription because of the taking, during the period prescribed by the statute of limitations, of part of the water by other during such time as the city does not need that portion. The supreme court said that as the pueblo right entitles the city to take only the water that it needs, it has no occasion to object to the taking of the surplus by others. "It is settled that an appropriation must invade the rights of another before it can destroy them by the establishment of a prescriptive title." In other words, the nature of a pueblo right is such that a taking of part of the water by others when the city does not need it is not an invasion of the right.

With respect to the pueblo water right of San Diego, the California Supreme Court stated that, as a general rule, no invasion of rights of property held by a public or municipal corporation in perpetual trust for public uses can be held sufficient to furnish the basis of a defense based solely upon prescription. 33/

Likewise, even conceding that a right based upon estoppel could arise by virtue of mere acquiescence in its assertion as between private persons, the supreme court expressed itself as satisfied that no such claim of right could come into being as against a municipal corporation, founded upon its mere acquiescence or that of its officials in the diversion by any number of upstream claimants of waters of a stream to the use of which the public corporation is entitled as part of its public rights and duties held in perpetual trust for public use. (209 Calif. 105 at 143.)

California cities having adjudicated pueblo water rights

Los Angeles. - As already stated, the opinion of the California Supreme Court in its first decision respecting pueblo water rights observed that from the founding of the pueblo of Los Angeles a century earlier, the right to all the waters of Los Angeles River had been claimed by the pueblo and by the city, which succeeded to all the rights held thereby; and the court sustained this claim as against an upstream riparian owner under the particular circumstances of the case, but without examining the Spanish and Mexican law on the subject. 34/

In subsequent cases, the supreme court has repeatedly recognized and adjudicated the pueblo water right of the City of Los Angeles. 35/

In four decisions, the United States Supreme Court refused to review questions as to the validity of the pueblo right of Los Angeles and of claims derived from Spanish or Mexican grants in opposition thereto, on the ground that these were questions of State or general law, not Federal questions. 36/

San Diego. - The pueblo water right of the City of San Diego was adjudicated by the California Supreme Court in two cases under the same title decided on the same day. 37/

The predecessor of the American city had been established as a Mexican pueblo in 1834. The pueblo water right was adjudicated in 1930 -- nearly 100 years later. Certain parties to the case contended that they were entitled to have reconsidered and relitigated the question as to whether a Spanish or Mexican pueblo organized in California under the laws, institutions, and regulations of Spain or Mexico during their successive governments, thereby became entitled to a prior and paramount water right, and as to whether an American municipality as successor of the pueblo succeeded to such rights. This question, said the supreme court, is no longer an open one for further consideration and review before it. The "proposition that the prior and paramount right of such pueblos and their successors to the use of the waters of such rivers and streams necessary for their inhabitants and for ordinary municipal purposes, has long since become a rule of property in this state, which at this late date in the history and development of those municipalities which became the successors of such pueblos we are not permitted, under the doctrine of stare decisis, to disturb." (209 Calif. 105 at 122.)

The supreme court therefore held, in these two cases, that the city of San Diego as successor of the Pueblo of San Diego "has had at all times and still has" a prior and paramount right to the use of all surface and ground waters of San Diego River, including its tributaries, from its source to its mouth, for the use of the city and its inhabitants for all purposes, whenever and to the extent that their needs require it. (209 Calif. 105 at 151; 209 Calif. 152 at 165.)

The Pueblo Rights Doctrine in the New Mexico Decisions

The Cartwright case, as it is commonly known, was decided by the New Mexico Supreme Court in 1959. It was preceded by two decisions in which claims of pueblo rights were involved but in which the pueblo rights doctrine

was neither approved nor disapproved. The earlier cases will be noticed first.

The earlier cases

The Tularosa Community Ditch case. - This case 38/ was decided in 1914, only a few years after the United States Supreme Court had refused for the last time to review the California decisions on the pueblo rights doctrine. The New Mexico Supreme Court held here that no exclusive right on the part of the residents of the town of Tularosa to the use of water could be sustained under what was known under Spanish and Mexican laws and customs as a "pueblo right," for the reason that this townsite grant was made by officers of the United States Government, under authority of an Act of Congress, long after New Mexico became a part of the United States. The grant of course was subject to and controlled by the laws of the granting sovereign. As such it would carry with it only such rights and privileges as were accorded by the laws of the United States. So there was in this case no Spanish or Mexican pueblo, and therefore no pueblo water right.

The New Mexico Products Co. case. - Nearly a quarter-century later, in 1937-1938, the Supreme Court of New Mexico again was called upon to decide a claim of pueblo right. 39/ Here the trial court had ruled that pursuant to such a right, the City of Santa Fe was entitled to take from Santa Fe Creek from time to time all the water needed for the use of the inhabitants of the city and for all municipal and public purposes therein, regardless of prior appropriation and beneficial use by others.

The supreme court considered the origin and nature of the pueblo water right as declared in the California cases, and emphasized that in several of them reference had been made to Spanish and Mexican grants as the source of pueblo water rights. 40/ The United States Supreme Court was cited as definitely settling the fact that no grant had been made by the Spanish King to the Villa de Santa Fe, and that the occupancy of the pueblo by the Spanish authorities conferred no title in the inhabitants. 41/ Without a grant, said the court, the Villa de Santa Fe had no pueblo right. "We have found," said the New Mexico court, "neither decision nor text suggesting that a mere colony of 'squatters' could acquire under the Spanish law this extraordinary power over the waters of an entire nonnavigable stream known as 'pueblo right,' even though they were organized as a pueblo -- which is the equivalent of the English word 'town' -- with a full quota of officers." (42 N. Mex. at 318.)

In this case, therefore, it was held that notwithstanding the existence of a "pueblo" or town during the Spanish sovereignty, as a question of fact no grant had been made to the pueblo by the King, and hence as a matter of law no pueblo water right had been acquired.

The Cartwright case

This case yields a contemporaneous, definitive decision of the New Mexico Supreme Court on the subject of pueblo water rights. 42/

The decision of the court was rendered December 12, 1958. Motion for rehearing was denied May 14, 1959. A second motion for rehearing and motions on a jurisdictional issue were denied September 3, 1959. Thereupon

the case was officially reported in 343 Pacific (2d), No. 3, advance sheets for October 2, 1959. Each order was made by a divided court on a vote of 3 to 2; to each order the minority filed a long dissenting opinion.

Owing to the fact that the next speaker, Professor Robert Emmet Clark, will present an analysis of this Cartwright case and of its implications with respect to the water law of New Mexico, the present speaker at this point will state only briefly the factual situation and conclusions of the majority -- which necessarily are the conclusions of the court -- on the pueblo rights question. Some general comments will follow.

The action in the Cartwright case was brought by certain users of water from Gallinas River -- on which the Mexican pueblo of Las Vegas was situated -- against the Public Service Company of New Mexico, which was engaged in furnishing water from this stream to the Town and City of Las Vegas under a county franchise. The Town of Las Vegas intervened. On April 6, 1835, the Mexican Government established the pueblo and made thereto a community colonization grant. The Town and City of Las Vegas are American successors to the Mexican pueblo. The trial court decided that the Town and City of Las Vegas had succeeded to ownership of the pueblo water right that had vested in the pueblo with a priority date of 1835, prior and paramount to any rights of the plaintiffs, and that the right of the defendant company under its franchise was a complete defense to the action.

It is an admitted fact, said the court, that the doctrine of pueblo rights as understood by the court and as argued by all parties is well recognized in California; and the parties agreed that the question had not yet been determined in New Mexico. Further, in neither of the two earlier New Mexico cases above cited had the supreme court held that the doctrine of pueblo rights was not applicable in New Mexico; it held that under the facts before it, neither community had such rights. After quoting extensively from several texts and citing the chief California decisions, the New Mexico court declared itself unable to avoid the conclusion that the reasons which brought the California court to uphold and enforce the pueblo rights doctrine apply with as much force in New Mexico as they do in California. The defendant Public Service Company did not own the pueblo rights of the town and city, but acted as their agent in enabling the inhabitants to enjoy to the fullest extent the pueblo rights inaugurated by the King of Spain in the Plan of Pitic. On this major issue, the court believed that the trial court was correct in sustaining the claim of defendant and intervener under the pueblo rights doctrine.

Some General Observations

Certain differences between pueblo and appropriative rights

In the Cartwright case, the majority of the court says (at 343 Pac. (2d) 665) that it sees nothing in the theory of pueblo rights inconsistent with the doctrine of prior appropriation and beneficial use. It is true that under each of the doctrines there is a date of priority based on the time of vesting of the right and, when the water is actually put to use, the necessity for using it beneficially and without unnecessary waste. In the application and exercise of the doctrines, however, there are important differences of which certain ones will be noted with respect to American municipalities.

Preferences in the appropriation of water are granted to municipalities in various western jurisdictions. Statutes of several States provide for the reservation of water to meet the growing needs of municipalities, and the principle has been sanctioned in several court decisions. 43/ Although the details differ, in most cases the process comprises appropriation of water to meet future reasonable needs of the municipality and its inhabitants, the effect of which is to prevent the accrual of intervening rights pending the time at which the city will require a larger supply of the water than needed at the time of initiating the appropriation. The appropriation for both present and future uses relates to specific quantities of water; if the city outgrows its estimates, additional appropriations must be made or other water supplies must be purchased or condemned. Use of surplus water may be made by others in the interim; but overestimates by these surplus water users of the longevity of their water tenure are made at their peril, for from the beginning they are on notice that the law is granting them rights that are temporary only.

The pueblo water right under the California doctrine dates from the establishment of the pueblo. The effect of the Treaty of Guadalupe Hidalgo, which was proclaimed July 4, 1848, was to foreclose the establishment of any more Mexican pueblos in the area ceded to the United States. Therefore, the priorities of all pueblos to which American cities succeeded relate back at least to 1848 -- more than a century ago. From the pueblo rights doctrine as declared by the California courts, it would follow that in a jurisdiction in which such doctrine is the law, a city that can trace its succession to a Spanish or Mexican pueblo to which a pueblo land grant was made by the sovereign may -- if not precluded by other circumstances -- find itself in position to assert, without the payment of compensation to existing users, paramount rights to all waters of a stream that flows through or by the city -- waters of which the city and its inhabitants may never have used a drop for more than one hundred years, but a large part of which may have been used for upwards of a century as the lifeblood of farming communities. Under the appropriation doctrine, the priority of a municipality's water right for for future use dates from the first assertion of a claim of right therefore; it does not relate back to a date of vesting declared by the courts for the first time a half-century or century later, during which period the municipality may never have used the water or even asserted the right to a preferential use.

Authorities on which the California doctrine rests

The California doctrine of pueblo water rights was created by the California Supreme Court and is contained in the opinions of the court in the cases cited in this paper. In reviewing these decisions, an effort was made to find therein any quotations from Spanish or Mexican authorities that would unequivocally portray the policy of the sovereign respecting the status of the pueblo's rights in the water of the stream on which situated. Most of the discussion of this matter is in the dicta in Lux v. Haggin. 44/ Quoted authorities therein relate chiefly to the internal water affairs of the pueblos, not to their rights as against other water users on the stream. On this last vital point, the only quotation found in the opinion is from Escriche to the effect that an upper riparian might use the stream waters "without prejudice to the common use or destiny which the pueblos on their course shall have given them." In Vernon Irr. Co. v. Los Angeles. 45/ It was stated that counsel had furnished the court with translations of

numerous ordinances, laws, rules, and regulations of Spain and Mexico relating to the subject, and that after perusing them, the court was satisfied with the conclusion reached in Lux v. Haggin that pueblos had a right to the water similar to the rights in pueblo lands, and that the inherited water right of the City of Los Angeles was superior to that of a riparian owner.

Undoubtedly in these early pueblo rights cases the courts were provided with many documents such as those generally alluded to in the Vernon Irr. Co. case. As to precisely what they were and how well translated, there is no specific mention. By contrast to the 100-page opinion of the California Supreme Court in Hart v. Burnett, 46/ decided in 1860 -- a large part of which was devoted to analysis of Spanish and Mexican laws in support of the court's decision respecting the existence of a pueblo at San Francisco and its rights to lands within its limits -- the treatment of Spanish and Mexican law in the pueblo water rights cases is most sketchy. Whether or not well grounded in Spanish-Mexican law, the principle that a pueblo on its creation was automatically endowed with an unlimited preference right to stream water for uses within the original pueblo limits rests -- so far as the authorities quoted in the American decisions show -- on a very narrow foundation.

Assuming for the present purpose the soundness of the foregoing principle from a standpoint of Spanish-Mexican law, its extension to encompass the future needs of a city after outgrowing the original pueblo limits is another matter. This extension was first made in Los Angeles v. Pomeroy, 47/ by a divided court. The prevailing opinion sets forth the purpose of establishing pueblos pursuant to the royal regulations of Spain, the original plan of which was for a primitive village, to aid and encourage the settlement of the country. Then, said the court: "Unquestionably it was contemplated and hoped that at least some of them would so prosper as to outgrow the simple form of the rural village. It is in the nature of things that this might happen, and when it did, and the communal lands were required for house lots, we must presume that under Mexican or Spanish rule they could be so converted, and that when the population increased so as to overflow the limits of the pueblo that such extension could be legally accomplished. Had this happened under Mexican rule, can it be doubted that the right vested in the pueblo would have been construed to be for the benefit of the population, however great the increase would be?" (Emphasis supplied.) Here, certainly, is an implied admission that the court's attention had been called to no Spanish or Mexican law or regulation to that effect -- of which it could have taken judicial notice -- but "must presume" that one would have been promulgated had the occasion called for it. Thus this vitally important principle that has enabled great cities to monopolize the entire flows of streams, regardless of water developments thereon by others -- solely because the cities originated from primitive villages organized as pueblos -- was added to the jurisprudence of California as the result of a presumption.

Later decisions of the supreme court reaffirmed and buttressed the principles thus decided, but without adding anything to the authorities on which they rested. After all, there was no need to add to the foundation already established. With the successive decisions, the matter became stare decisis, a rule of property.

The matter of stare decisis

The California Supreme Court had occasion to explore the applications and limits of the rule of stare decisis in reaching its decision in Hart v. Burnett, the case involving lands of the pueblo at San Francisco. 48/ The views expressed -- which need not be stated here -- were said to be particularly applicable to cases involving questions of Spanish and Mexican law. "The bench and bar of California, generally," said the court, "have not been familiar with these laws; it has been exceedingly difficult to procure copies of the Mexican statutes, and sometimes impossible to procure the works of the most distinguished commentators on the Spanish civil code. And even when procured, it was equally difficult to obtain correct translations of such laws and of the works of such law writers. Add to this the fact that nearly all the Mexican orders, laws, decrees, etc., respecting California, are still in manuscript, scattered through immense masses of unarranged archives, almost inaccessible, and known, even imperfectly, to scarcely half a dozen persons, and will it appear surprising that errors have been committed by the judiciary?"

Since this was written a century ago, much has been learned about Spanish and Mexican laws relating to water and their availability is much improved over that stated by the 1860 court. For example, valuable sources of information have been furnished to the court in current Texas litigation over waters of the lower Rio Grande.49/ Less favorable than it is now must have been the situation in California when the earlier pueblo rights cases were decided. The commission of errors by the judiciary in applying Spanish and Mexican laws prior to 1860, as suggested by the court in Hart v. Burnett, may have continued in some measure while the earlier pueblo water rights cases were being decided. However, the decisions of the California courts on the subject of pueblo water rights have been definitely held to be stare decisis. 50/ The soundness of the foundation on which they rest is no longer material in that State. It has been so for decades. The preferred water rights of the California cities that succeeded pueblos are matters of law. Prospective developers of waters of the same stream are on notice. Those who fail to take account of the situation have no ground for complaint when the city asserts its latent rights.

Authorities on which the Cartwright decision rests

The authorities on which the New Mexico Supreme Court based its decision in the Cartwright case may be briefly and accurately summarized as the California Supreme Court decisions.

It is true that the opinion of the court in this case includes a long quotation from Kinney on irrigation and Water Rights and shorter ones from Wiel on Water Rights, Corpus Juris, and American Jurisprudence. However, the only authorities cited by the writers of the quoted paragraphs are the California decisions. None of the statements so quoted, and none of the statements made by the New Mexico court in the Cartwright case, are supported by any specifically cited Spanish or Mexican law, regulation, or text to the effect that a pueblo was endowed on its creation with "this extraordinary power over the waters of an entire nonnavigable stream known as 'pueblo rights." 51/

The reason given for the New Mexico court's adoption of the pueblo water rights doctrine of the California court is not that the New Mexico court has examined the basic Spanish-Mexican authorities and believes that the doctrine has a solid foundation in Spanish or Mexican law -- it is the New Mexico court's conclusion that the reasons for adoption in California apply with equal force in New Mexico. The minority's dissenting opinion severely criticizes the basis of the California doctrine. The majority opinion accepts the doctrine with full approval and applies it to the settlement of the instant controversy.

The New Mexico Supreme Court thus applies to the decision in the Cartwright case American law -- the law of an American sister State -- rather than Spanish-Mexican law. The decisions of the California Supreme Court on pueblo water rights, although stare decisis in California, were obviously not conclusive on the New Mexico court. The latter was free to accept them as precedents or to reject them; as the United States Supreme Court said in refusing to review the California decisions, these were matters of State law, not Federal law. With the now larger and more readily available sources of information, there was an opportunity in the Cartwright case to explore the basic Spanish and Mexican laws, and to reach an independent conclusion as to their applicability to the local situation, before engrafting upon the jurisprudence of New Mexico a concept the authenticity of which has been the subject of so much disinterested criticism. There is no hint in the court's opinion that this was done.

The matter of public welfare

The opinion of the court in the Cartwright case specifically raises a question of public policy. It is said (at 343 Pac. (2d) 668-669) that when a colonization pueblo was established there were no questions of priority of use of water, because it was located in unoccupied territory; that water formed the lifeblood of the community not only at its origin but as it expanded from a handful to thousands of families; and that in the process of growth and expansion the founders of the pueblo carried with them the torch of priority so long as there was water to supply the lifeblood of the expanded community. It is said further that in the pueblo rights doctrine there is present the police power, the answer to claims of confiscation, and thus the elevation of the public good over the claim of a private right.

Granted that the concentration of settlers at carefully chosen points was necessary when the pueblos were established, subsequent removal of the menace of hostile Indians has made possible more widely scattered developments by groups or even individuals among whom priorities of appropriation and actual use of water have been established under Territorial and State law, which purported to continue appropriation methods followed under Mexican sovereignty, not to initiate a new system. Can it be asserted now that these smaller groups on a stream were on notice that some larger group among them could, solely by reason of its establishment as a pueblo, successfully claim in the distant future all the waters of the stream to supply its expanded population, without compensation to them? The first case in which the New Mexico Supreme Court considered a claim of pueblo water right was in 1914, the second in 1937-1938, and the third case -- the first actually to apply the doctrine -- in 1959. Throughout the period of 111 years following the cession from Mexico, no issue of stare decisis could arise.

The time-honored and legally established method of acquiring privately owned water rights by American cities is purchase or condemnation, not confiscation. Regardless of the legal soundness in New Mexico jurisprudence of the pueblo rights doctrine, which dispenses with the requirement of compensation, its introduction at this late date involves considerations of public welfare -- most certainly if the supreme court goes on in future decisions to actually apply the principle of unlimited expansion. Water is no less the lifeblood of a small farming community or single establishment than of a growing city. Widespread acquisition by municipalities of valuable water rights of agriculturists -- rights that may have been exercised for decades or even for generations under the long-established principle of priority of appropriation -- without paying for them, scarcely bears out the court's observation that in the pueblo rights doctrine there is seen the elevation of the public good over the claim of a private right -- particularly after all these years, and in this era of rapidly expanding cities and exploding populations.

FOOTNOTES

1/ Cartwright v. Public Service Co. of New Mexico, ___ N. Mex.___, 343 Pac. (2d) 654 (1959).

2/ Hutchins, Wells A., "The Community Acequia: Its Origin and Development," XXXI Southwestern Historical Quarterly 261 at 272-273 (1928).

3/ Hall, Wm. Ham., "Irrigation Development. France, Italy, and Spain." p. 370. (1886).

4/ Bancroft, "History of California," vol. 1, p. 345 (1884).

5/ San Jose: Calif. Stat. 1850, ch. 47, act to incorporate the City of San Jose, March 27, 1850. Stat. 1857, ch. 107, act to reincorporate the city, March 27, 1857, authority "to construct wells and cisterns: organize and maintain fire departments, and supply the city with water," omitting reference to irrigation.

Los Angeles: Calif. Stat. 1850, ch. 60, act to incorporate the City of Los Angeles, April 4, 1850; supplementary act, April 5, 1851, p. 329. Stat. 1854, ch. 65, April 13, 1854, construing 1850 statute as vesting in the mayor and common council control over the distribution of water for irrigation within the limits of the ancient pueblo. Stat. 1874, ch. 447, amending charter to provide among other things that the city is granted "in absolute ownership, the full, free, and exclusive right to all the water" of the Los Angeles River from source to southern boundary of the city, together with the right to develop and use all waters in the bed of the river beneath the surface; Stat. 1876, ch. 476, amending the 1874 statute. This exclusive legislative grant of all water was not taken seriously by the California Supreme Court, which could not see that the city had acquired any new rights by reason of the legislative acts, and stated that: "It will hardly be claimed that the legislature could grant to the city the water of the river so as to deprive riparian owners of it." -- Vernon Irr. Co. v. Los Angeles, 106 Calif. 237, 252, 253, 39 Pac. 762 (1895).

6/ Lux v. Haggin, 69 Calif. 255, 326-332, 4 Pac. 919 (1884). 10 Pac. 674 (1886).

7/ Hart v. Burnett, 15 Calif. 530, 542, 573 (1860).

8/ Feliz v. Los Angeles, 58 Calif. 73, 78-80 (1881). Elms v. Los Angeles, 58 Calif. 80 (1881), was presented on the same facts and submitted on the same arguments as Feliz v. Los Angeles, and on authority of that case the same decision was rendered by the supreme court.

9/ Vernon Irr. Co. v. Los Angeles, 106 Calif. 237, 250, 39 Pac. 762 (1895).

10/ Los Angeles v. Pomeroy, 124 Calif. 597, 649-650, 57 Pac. 585 (1899).

11/ Hooker v. Los Angeles, 188 U. S. 314, 317-318 (1903); dismissing writ of error, Los Angeles v. Pomeroy, 124 Calif. 597, 57 Pac. 585 (1899). Crystal Springs Land & Water Co. v. Los Angeles, 177 U. S. 169 (1900); affirming decree in 82 Fed. 114 (C.C.S.D. Calif., 1897), dismissing suit for want of jurisdiction.

12/ Devine v. Los Angeles, 202 U. S. 313, 332-333, 337 (1906).

13/ Los Angeles Farming & Mill. Co. v. Los Angeles, 217 U. S. 217, 233, 234 (1910); dismissing writ of error to the California Supreme Court for want of jurisdiction:Los Angeles v. Los Angeles Farming & Mill. Co., 152 Calif 645, 93 Pac. 869, 1135 (1908). The act of Congress of March 3, 1851 (9 Stat. 631, ch. 41) provided for the ascertainment and settlement of the land claims derived from Spain or Mexico in the State of California. It created a board of land commissioners for that purpose; provided that all lands, claim to which was rejected or not presented to the board should be held a part of the public domain of the United States; provided that claims of towns or cities should be presented under that act; and provided that decrees and patents issued under that act should be conclusive between the United States and the claimant.

14/ Feliz v. Los Angeles, 58 Calif. 73, 80 (1881). See Elms v. Los Angeles, 58 Calif. 80 (1881). See also the much later case of San Diego v. Cuyamaca Water Co., 209 Calif. 152, 164-165, 287 Pac. 496 (1930).

15/ Vernon Irr. Co. v. Los Angeles, 106 Calif. 237, 250-251, 39 Pac. 762 (1895).

16/ Los Angeles v. Pomeroy, 124 Calif. 597, 649-650, 57 Pac. 585 (1899); Los Angeles v. Hunter, 156 Calif. 603, 608-609, 105 Pac. 755 (1909).

17/ San Diego v. Cuyamaca Water Co., 209 Calif. 152, 164, 287 Pac. 496 (1930).

18/ Los Angeles v. Glendale, 23 Calif. (2d) 68, 75, 142 Pac. (2d) 289 (1943).

19/ Feliz v. Los Angeles, 58 Calif. 73, 79-80 (1881); Vernon Irr. Co. v. Los Angeles, 106 Calif. 237, 250-251, 39 Pac. 762 (1895).

20/ Los Angeles v. Los Angeles Farming & Mill Co., 152 Calif. 645, 652, 93 Pac. 869, 1135 (1908); San Diego v. Cuyamaca Water Co., 209 Calif. 105, 122, 287 Pac. 475 (1930).

21/ Los Angeles v. Pomeroy, 124 Calif. 597, 639-640, 650, 57 Pac. 585 (1899).

22/ See San Diego v. Cuyamaca Water Co., 209 Calif. 105, 151, 287 Pac. 475 (1930).

23/ Los Angeles v. Glendale, 23 Calif. (2d) 68, 74, 142 Pac. (2d) 289 (1943); San Diego v. Cuyamaca Water Co., 209 Calif. 105, 151, 287 Pac. 475 (1930).

24/ Los Angeles v. Glendale, 23 Calif. (2d) 68, 73, 142 Pac. (2d) 289 (1943).

25/ Feliz v. Los Angeles, 58 Calif. 73, 79-80 (1881); Los Angeles v. Los Angeles Farming & Mill. Co., 152 Calif. 645, 652-653, 93 Pac. 869, 1135 (1908); San Diego v. Cuyamaca Water Co., 209 Calif. 105, 116, 122, 151, 287 Pac. 475 (1930); San Diego v. Cuyamaca Water Co., 209 Calif. 152, 164-165, 287 Pac. 496 (1930); Los Angeles v. Glendale, 23 Calif. (2d) 68, 73, 142 Pac. (2d) 289 (1943).

26/ Lux v. Haggin, 69 Calif. 255, 331-332, 4 Pac. 919 (1884), 10 Pac. 674 (1886).

27/ Vernon Irr. Co. v. Los Angeles, 106 Calif. 237, 250, 39 Pac. 762 (1895); Los Angeles v. Los Angeles Farming & Mill. Co., 152 Calif. 645, 651-652, 93 Pac. 869, 1135 (1908); San Diego v. Cuyamaca Water Co., 209 Calif. 152, 164-165, 287 Pac. 496 (1930); Los Angeles v. Glendale, 23 Calif. (2d) 68, 73, 142 Pac. (2d) 289 (1943).

28/ Los Angeles v. Glendale, 23 Calif. (2d) 68, 73, 142 Pac. (2d) 289 (1943).

29/ San Diego v. Cuyamaca Water Co., 209 Calif. 105, 131-132, 287 Pac. 475 (1930).

30/ Calif. Const., art. XIV, section 3.

31/ Los Angeles v. Glendale, 23 Calif. (2d) 68, 74-75, 142 Pac. (2d) 289 (1943).

32/ Los Angeles v. Glendale, 23 Calif. (2d) 68, 74-79, 142 Pac. (2d) 289 (1943).

33/ San Diego v. Cuyamaca Water Co., 209 Calif. 105, 135, 287 Pac. 475 (1930).

34/ Feliz v. Los Angeles, 58 Calif. 73, 78-80 (1881); Elms v. Los Angeles, 58 Calif. 80 (1881).

35/ Vernon Irr. Co. v. Los Angeles, 106 Calif. 237, 250-251, 39 Pac. 762 (1895); Los Angeles v. Pomeroy, 124 Calif. 597, 639-640, 649-650, 57 Pac. 585 (1899); Los Angeles v. Los Angeles Farming & Mill. Co., 152 Calif. 645, 651-653, 93 Pac. 869, 1135 (1908); Los Angeles v. Hunter, 156 Calif. 603, 608-609, 105 Pac. 755 (1909); Los Angeles v. Glendale, 23 Calif. (2d) 68, 73-80, 142 Pac. (2d) 289 (1943). In opinions in several cases in which questions of pueblo water rights were not involved, the Los Angeles pueblo right has been mentioned: Anaheim Union Water Co. v. Fuller, 150 Calif. 327, 334, 88 Pac. 978 (1907);Fellows v. Los Angeles, 151 Calif. 52, 61, 90 Pac. 137 (1907); Miller v. Bay Cities Water Co., 157 Calif. 256, 287-288, 107 Pac. 115 (1910).

36/ Crystal Springs Land & Water Co. v. Los Angeles, 177 U. S. 169 (1900); affirming decree in 82 Fed. 114 (C.C.S.D. Calif., 1897); Hooker v. Los Angeles, 188 U. S. 314 (1903), dismissing writ of error, Los Angeles v. Pomeroy, 124 Calif. 597, 57 Pac. 585 (1899); Devine v. Los Angeles, 202 U. S. 313 (1906), appealed from the Circuit Court of United States for Southern District of California; Los Angeles Farming & Mill. Co. v. Los Angeles, 217 U. S. 217 (1910), dismissing writ of error, Los Angeles v. Los Angeles Farming & Mill. Co., 152 Calif. 645, 93 Pac. 869, 1135 (1908).

37/ San Diego v. Cuyamaca Water Co., 209 Calif. 105, 116, 122-132, 151, 287 Pac. 475 (1930); San Diego v. Cuyamaca Water Co., 209 Calif. 152, 164-165, 287 Pac. 496 (1930).

38/ State ex rel. Community Ditches v. Tularosa Community Ditch, 19 N. Mex. 352, 376, 143 Pac. 207 (1914).

39/ New Mexico Products Co. v. New Mexico Power Co., 42 N. Mex. 311, 315, 77 Pac. (2d) 634 (1937, 1938).

40/ Reference was made particularly to San Diego v. Cuyamaca Water Co., 209 Calif. 105, 287 Pac. 475 (1930), and Los Angeles Farming & Mill. Co. v. Los Angeles, 217 U. S. 217 (1910).

41/ United States v. Santa Fe, 165 U. S. 675, 676-678, 691-692, 707 (1897).

42/ Cartwright v. Public Service Co. of New Mexico, ___ N. Mex. ___, 343 Pac. (2d) 654 (1959).

43/ Hutchins, Wells A., "Selected Problems in the Law of Water Rights in the West," pp. 351-352 (1942).

44/ Lux v. Haggin, 69 Calif. 255, 326-332, 4 Pac. 919 (1884), 10 Pac. 674 (1886).

45/ Vernon Irr. Co. v. Los Angeles, 106 Calif. 237, 250, 39 Pac. 762 (1895).

46/ Hart v. Burnett, 15 Calif. 530 (1860).

47/ Los Angeles v. Pomeroy, 124 Calif. 597, 649, 57 Pac. 585 (1899).

48/ Hart v. Burnett, 15 Calif. 530, 611 (1860).

49/ State of Texas v. Valmont Plantations, No. B-20791, District Court of Hidalgo County,Texas.

50/ San Diego v. Cuyamaca Water Co., 209 Calif. 105, 122, 287 Pac. 475 (1930).

51/ See New Mexico Products Co. v. New Mexico Power Co., 42 N. Mex. 311, 318, 77 Pac. (2d) 634 (1937, 1938).