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State v. City of Las Vegas, 89 P.3d 47 (N.M. 2004)

Amy Mockenhaupt

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stormwater flows. In February 2002 Markowitz submitted a revised application for GP6, and POND again submitted additional materials in opposition of Markowitz's application. DEP responded to POND's submitted materials by indicating that DEP's on-site inspections did not find any evidence to support an opinion that the wetlands were not isolated. Consequently, DEP issued the GP6 in May 2003 and concluded a portion of the land contained isolated wetlands and that these wetlands could be disturbed for the construction project.

The Superior Court of New Jersey, Appellate Division, concluded DEP's permitting process was quasi-judicial and, thus, DEP needed to engage in fact-finding to the extent required by statute or regulation. The court also determined all FWPA permitting actions required certain fact-finding consistent with statutory criteria and reflected in the record. The court pointed to evidence POND provided, including POND's engineering expert, and decided an abundance of factual material contrary to DEP's determinations existed. The court also noted its discomfort with the fact that DEP's 1986 Freshwater Wetlands map reflected the wetlands in question as part of the inland tributary system and that DEP's on-site visits took place during a dry period. The court further stated that statutes and regulations did not define "sheet flow" and "concentrated flow," and DEP failed to provide significantly distinct definitions of these two different types of flows. Because ample evidence of water flowing from Markowitz's property existed, and due to DEP's failure to distinguish the evidence as "sheet flow" or "concentrated flow," the court remanded the case to DEP for further fact-finding and analysis to address the court's concerns.

Laura L. Chartrand

NEW MEXICO

State v. City of Las Vegas, 89 P.3d 47 (N.M. 2004) (overturning the pueblo rights doctrine for inconsistency with the doctrines of prior appropriation and beneficial use).

This case arose through the course of adjudicating water rights on the Gallinas River when the New Mexico state engineer sought a declaration of the City of Las Vegas' ("City") water rights based on the pueblo rights doctrine. The state engineer argued the inapplicability of this doctrine in New Mexico, thus prohibiting the City's water right entitlement under the doctrine's invocation. The Court of Appeals of New Mexico did not follow the precedent of *Cartwright v. Public Service Company of New Mexico*, but instead offered an opinion to aid the New Mexico Supreme Court's further independent consideration. Specifically, the appellate court expressed reservations over reconciliation between the pueblo rights doctrine and the prior appropriation doctrine.

Accordingly, the court held the pueblo rights doctrine offended the doctrine of prior appropriation and beneficial use, the latter being the basis of New Mexico water law. The court stated that for all appropriations of public water, including municipalities, the proper measurement for a water right was beneficial use within a reasonable time after appropriation and the pueblo rights doctrine contradicted this timeliness requirement by allowing indefinite expansion of a water right to accommodate changing municipal needs. Therefore, the court determined the pueblo rights doctrine encouraged underutilization of public water and prevented efficient and economic water use both of which were antithetical to the doctrine of prior appropriation and, therefore, contradicted New Mexico's established water law principles.

In overruling *Cartwright's* precedent, the court addressed issues of stare decisis and prior reliance concerns. Regarding stare decisis, the court stated because *Cartwright* was inconsistent with prior appropriation and did not establish a rule of property, following *Cartwright* would be more injurious than not. The court reasoned following an incorrect principle established by case law was more injurious than overruling the case law and establishing a new, correct principle. Furthermore, regarding issues of reliance on the *Cartwright* rule, the court stated, overruling *Cartwright* did not take away the City's colonization grant water right, as the City retained vested rights in all water put to beneficial use within a reasonable time after appropriation.

Finally, the court considered the City's argument that the court should only apply the overruling of *Cartwright* prospectively. To make this determination, the court considered three factors: (1) whether the ruling announced a new principal of law, (2) whether retroactive application would advance or hinder the purposes of the new rule, and (3) whether prospective application of the new rule was necessary to avoid injustice. Accordingly, the court determined because its ruling clearly announced a new rule of law, a prospective application of the new rule frustrated prior appropriation and was, therefore, not necessary to avoid injustice. However, the court noted the City's reliance interest was substantial. Thus, the court ordered retroactive application of its decision with limited prospective application to the City: the City could no longer claim a pueblo water right, but the City was entitled to an equitable remedy that balanced its reasonable reliance interests with the other interests of Gallinas River appropriators. Accordingly, the court remanded the case to the district court to complete the balancing test above and determine the specifics of the City's equitable remedy.

Amy Mockenhaupt