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Contract for Nonbeneficial Use: New Mexico Water Law is Drowned out by Contract. (Margarito Trujillo and Swope Farm and Livestock Co. v. CS Cattle Company and Eagle Nest Reservoir Corporation v. Angel Fire Corporation, 109 N.M. 705, 790 P.2d 502 (1990))

William Singdahlsen

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NOTE

Contract For Nonbeneficial Use: New Mexico Water Law Is Drowned Out by Contract

***Margarito Trujillo and Swope Farm and Livestock Co. v. CS Cattle Company* and *Eagle Nest Reservoir Corporation v. Angel Fire Corporation*, 109 N.M. 705, 790 P.2d 502 (1990)**

In *Trujillo v. CS Cattle Company*,[1] the New Mexico Supreme Court held that a deed conveying land, and appurtenant contract rights to the use of water, prohibits the reservoir owner, Charles Springer Cattle Company (CS), from selling or delivering any reservoir water to any party without vested water rights when there is less than 20,000 acre feet of water in the reservoir.[2] The court based its decision on tenets of contract law, and ignored the ramifications and implications to New Mexico water law in holding that a reservoir owner must store water that no one has the right to use.

The court concluded that deeds granting appellants Margarito Trujillo and Swope Farm & Livestock Company, through their predecessors in title, acreage and contract water rights, do not *require* the CS Cattle Company to store 20,000 acre feet of water, but simply prohibit the reservoir owner from selling or delivering water when the level of the reservoir falls below 20,000 acre feet.[3] In reality, the court, by focusing its ruling on contract law, created a right in appellants to require storage of water that appellants are not entitled to ever use. By forcing CS to maintain a minimum water level of 20,000 acre-feet in the reservoir, the court effectively requires a nonbeneficial use heretofore never contemplated in New Mexico.

Any nonbeneficial use of water is in direct contradiction to the New Mexico Constitution[4], statutory law[5], and public policy.[6] Furthermore, because the court decided the case on contract law, the court created a precedent of honoring and enforcing an illegal contract. This note ana-

1. 109 N.M. 705, 790 P.2d 502 (1990) *reh'g denied* (1990).
2. *Id.* at 711, 790 P.2d at 508.
3. *Id.* at 709 n.4, 790 P.2d at 506 n.4.
4. N.M. Const. art. XVI. § 3.
5. N.M. Stat. Ann. § 72–1–2 (1985 Repl. Pamp.)
6. C. DuMars, *New Mexico Water Law: An Overview and Discussion of Current Issues*, 22 Nat. Res. J. 1045 (1982); *See*, Young & Norton v. Hinderlider, 15 N.M. 666, 110 P. 1045 (1910); Jicarilla Apache Tribe v. United States, 657 F.2d 1126, 1133–34 (10th Cir. 1981).

lyzes *Trujillo v. CS Cattle Co.*, focusing on the court's improper interpretation of contract law and water law, and the effect the holding could have on water use and water rights adjudication in New Mexico.

STATEMENT OF THE CASE

Plaintiffs-appellants Margarito Trujillo and Swope Farm & Livestock Company (Trujillo) filed a complaint in the Colfax County District Court seeking, *inter alia*, a declaratory judgment to enforce a covenant in the 1951 deed between Trujillo's predecessors in title (Trujillo) and CS, as well as an injunction to prevent the implementation of reservoir management regulations recently promulgated by CS.[7] The trial court found the covenant ambiguous and relied on parol evidence to ascertain that the intent of the grantor and grantee was that the covenant be consistent with New Mexico water law, and furthermore, that the covenant was meant to insure that the first tier users[8] were entitled to their share of reservoir water before other users when the reservoir began to fall below 20,000 acre-feet.[9] The New Mexico Supreme Court reversed, finding that the 1951 deed was not ambiguous; that CS was stopped from attacking the validity of the deed; and that the deed covenant prohibited CS from selling or delivering water to any nonvested users when the reservoir water level falls below 20,000 acre-feet.[10]

FACTUAL BACKGROUND

Several small creeks flow south into the Moreno Valley in North Central New Mexico and then converge at Cimarron Canyon where they become the Cimarron River, which then flows southeast into the Canadian River. In 1907 Charles Springer, president and founder of CS Cattle Company, had the foresight to realize that a dam situated at the mouth of Cimarron Canyon would capture surplus flood waters so as to enable downstream land owners access to greater and more reliable amounts of

7. *CS Cattle Co.*, 109 N.M. at 706, 790 P.2d at 503.

8. First tier users are those whose rights to the use of water are to be delivered (to the extent of availability) on a per annum basis contracted and issued out of License 71 (Permit 71) prior to January 1, 1983, and having a priority date of June 12, 1907. The first tier users do not include the approximately 10,000 acre feet of water rights which predate the building of the reservoir.

9. Margarito Trujillo and Swope Farm & Livestock Co. v. CS Cattle Company, et al. v. Angel Fire Corporation, No. 85-178-CV, (District Court of Colfax County, August 17, 1988.) (hereinafter *Trial Record*)(Decision and Findings of Fact & Conclusions of Law).

10. *CS Cattle Co.*, 109 N.M. 705, 790 P.2d 502.

water.[11] CS envisioned a reservoir that would harness the Cimarron River and make previously unavailable water accessible to a variety of uses.[12]

In 1907, CS applied for a permit to construct a dam and reservoir capable of 78,000 to 113,700 acre-feet of water and the right to the use of any subsequently harnessed water.[13] The permit (Permit 71) allows CS to store, and thereafter use or sell, all of the surplus and flood waters of the Cimarron River and its tributaries originating above the Eagle Nest Dam.[14] CS began construction of the concrete dam in 1918 and it was completed 1919, creating Eagle Nest Reservoir.[15] The dam and reservoir opened up previously nonirrigable downstream land to farming, as well as harnessing water for municipal, industrial and recreational use, pursuant to the terms of Permit 71.[16]

Existing laws at the time (and substantially similar to current law) granted CS the right to contract for the sale or lease of any unappropriated waters harnessed by the dam to those who could put the waters to beneficial use.[17] The water right, granted to CS by the 1908 permit, gave CS the exclusive control over the waters in Eagle Nest Reservoir.[18] Prior to the issuance of the permit there were approximately 10,000 acre feet of pre-reservoir water rights on the Cimarron River.[19] The allocation of the pre-reservoir water rights and the additional newly controlled waters were

11. Appellee's Answer Brief, at 2, *Trujillo v. CS Cattle Co.*, 109 N.M. 705, 790 P.2d 502 (1990)(No. 18129) (hereinafter *Brief*).

12. *Id.*

13. The application for a permit to divert and store all of the surplus and flood waters of the Cimarron River was formally approved by the Territorial Engineer on July 3, 1908 with a priority date of 1907.Brief, *supra* note 11 at 2–3.

14. The water right commonly referred to as "Permit 71" was issued on July 3, 1908 with a priority date of June 12, 1907, and was confirmed by result of the adjudication Decree in *Springer Ditch Co. v. French Land and Irrigation Co.*, Cause No. 5054, (District Court of Colfax County, December 21, 1929.) On April 22, 1932, the State Engineer issued License No. 71 formalizing the terms of Permit 71 as set out in the Decree. *See*, 1897 N.M. Laws §§ 468, 484; 1907 N.M. Laws ch 49.

15. *See Trial Record, supra* note 9, (Pre-Trial Statement at 2, paragraph 5).

16. *See* Brief, *supra* note 11.

17. 1907 N.M. Laws, ch 49, § 39; N.M. Stat. Ann. § 72-5-17 (1985 Repl. Pamp.)

18. The water right granted pursuant to Permit 71, and by the terms of the Decree states that "... The Charles Springer Cattle Company has a valid, lawful and subsisting right, with a priority date of June 12th, 1907 ... to impound and store in its Eagle Nest Dam situate at the head of the Cimarron River and at the mouth of the Moreno Valley, all surplus and flood waters of side stream and tributaries thereto originating above said dam, which waters, on said 12th day of June, 1907, had not been theretofore lawfully appropriated, and to store, use or sell said waters at all seasons of each successive year for power plants and mining and for supplying cities, towns and water users generally, and for the purpose of irrigating all or any portion of the lands described in said application and permit ..."; *See*, 1907 N.M.Laws ch 49 §§ 20, 21; N.M. Stat. Ann. §§ 72-1-1, 72-12-1, 72-12-3.1, 72-12-4, 72-9-1, 72-9-2 (1985 Repl. Pamp.)

19. *Trujillo v. CS Cattle Co.*, 109 N.M. 705,707, 790 P.2d 502,504 (1990).

regulated by a water master.[20]

Subsequent to the completion of the reservoir, individuals and municipalities began seeking contract rights to use the water from Eagle Nest Reservoir through its owner, CS.[21] Farmers who were once without sufficient water to irrigate; the water-starved community of Raton; and the famous Philmont Scout Ranch sought water from the reservoir to meet their needs.[22]

CS had a duty under its permit to provide and allocate water to parties seeking water for beneficial use.[23] CS allocated the water by contract rather than through the sale of Permit 71 or the reservoir, and by contract CS was able to transfer water to various users without going through the somewhat difficult process for the transfer of ownership of water rights.[24]

Appellants' predecessors in title obtained such contract water rights in 1933 (202.5 acre-feet), and in 1951 (1,458 acre-feet) through two warranty deeds conveying land to appellants.[25] CS, allocating water by contract, determined to give anyone who had contracted for water as of 1951 a priority date equal to that of "Permit 71", which was June 12, 1907.[26] The contractual water right holders with said equal priority dates are known as the "first tier users",[27] and have vested water rights. A covenant in the 1951 deed stated that CS would not sell or deliver water to any party not having a vested right as of 1951 when the water in the reservoir is less than 20,000 acre-feet.[28]

CS contended that the covenant was meant to protect the interests of the pre-1907 water rights holders (10,000 acre-feet) and the first tier users (10,040 acre-feet), including appellants who held equal priority dates. The covenant was meant only to insure that the first tier users

20. The water master had the duty to regulate and control the allocation of water so as to prevent waste. 1907 N.M. Laws ch 49, § 14.

21. *Brief, supra* note 11, at 3.

22. *Id.*

23. *See supra* note 18; N.M. Stat. Ann. § 72-5-17 (1985 Repl. Pamp.).

24. N.M. Stat.Ann. § 72-5-22 (1985 Repl. Pamp.); *See also,* Rogers, *Water Rights Transfers: A Practical Guide to Water Reallocation in New Mexico,* 5 N.M. Nat. Resources L. Rep. 29 (1990).

25. *Trial record, supra,* note 9 (Findings of Fact Nos. 5,6,8).

26. Warranty Deed between CS Cattle Co. and Neal Hansen, (Dec. 8, 1951)(Trujillo's predecessor in title); *Trial record, supra* note 9 (Findings of Fact No 56).

27. *See supra* note 8.

28. The portion of the 1951 deed containing the clause concerning storage of water reads as follows. "To guard against a shortage of irrigation water for these irrigated lands, the party of the first part [CS] agrees that of the water stored in the Eagle's Nest Dam and Reservoir, it will not sell or deliver water for any use whatsoever to any person or party not having a vested water right for the same at the date of this deed, at any time when the water stored in the said Eagle's Nest Reservoir is less than 20,000 acre feet, except with the written consent of all parties having a vested water rights under said Permit No. 71, or their heirs or assigns." Warranty Deed between CS Cattle Co. and Neal Hansen (Dec.8, 1951).

would be guaranteed their share of water even when water in the reservoir fell below 20,000 acre-feet, and not to guarantee the mere existence of 20,000 acre-feet of water.[29] The trial court found this covenant ambiguous and relied on parol evidence to ascertain the intent of the grantor and grantee.[30] The trial court recognized that the only logical intent of the parties was not to simply store water, but to insure that the first tier users were entitled to their share of reservoir water when the reservoir began to fall below 20,000 acre-feet.[31] The contract merely provided that no other users would be entitled to a share of reservoir waters before the first tier users and the pre-1907 users annual right was met.[32]

The supreme court reversed, finding the covenant unambiguous and prohibiting CS from delivering water to nonvested, nonfirst tier users when the reservoir level falls below 20,000 acre-feet.[33] The court based its ruling on contract law, enforcing a contract that is directly contrary to New Mexico law and public policy.[34] The court held that CS is estopped from challenging the deed and that unless or until the deed is challenged by parties with standing who are not estopped, CS must not sell or deliver water when the reservoir level is below 20,000 acre feet.[35] However, the court specifically held that CS is not required to store 20,000 acre feet of water, but is only required not to sell or deliver the water.[36] The requirement that CS not sell or deliver the water continues regardless of whether the first tier users have been delivered their annual water right.[37] The court's assertion in such a distinction is absurd. By requiring CS to not sell or deliver water that *no one* is entitled to use, the court is requiring CS to store the water that *no one* can use, and thus CS is required to waste the water. Ironically, the court goes on to say that CS is not required to store any water.[38]

BACKGROUND LAW

It is a basic tenet of New Mexico water law that water must be put to beneficial use.[39] Beneficial use shall be the base, measure and limit of

29. *Trial record, supra* note 9 (Pre-Trial Order at 7).
30. *Trial record, supra* note 9 (Findings of Fact No. 18).
31. *Id.*
32. *Id.*
33. Trujillo v. CS Cattle Co., 109 N.M. 705, 709, 709 P.2d 502, 506 (1990).
34. *See supra* notes 4–6.
35. *CS Cattle Co.*, 109 N.M. at 711, 790 P.2d at 508.
36. *Id.* at 709, n. 4, 790 P.2d at 506, n.4.
37. *Id.*
38. *Id.* ("The deed does not require any water to be stored, and it does not grant appellants ownership or an exclusive right to the water—it simply precludes CS from selling water to nonvested, nonfirst tier users when the water level falls below 20,000 acre feet.")
39. N.M. Const. art. XVI, Sec. 3; N.M. Stat. Ann., § 72-1-2 (1985 Repl. Pamp.).

the right to the use of water.[40] The term beneficial use is not defined in either the New Mexico Constitution or the statutes. Over the years however, the courts have defined most of the contours of beneficial use. The purposes contemplated under this term include "irrigation. . . mining, milling, manufacturing, [public health, and domestic use] or any other purpose for which water is needed to supply the natural and artificial wants of man provided it be for a beneficial use."[41] The beneficial use of water is defined not by what can be a beneficial use, but rather by what is not. "It *is beneficial use that is of primary importance*, not the particular purpose (ultimate use) to which the water is put."[42]

Beneficial use cannot impair the rights of the public to the maximum benefits of water. "Water conservation and preservation is of utmost importance. Its utilization for maximum benefits is a requirement second to none, not only for progress, but for survival".[43] No one is "entitled to receive more water than is necessary for his actual use. An excessive diversion of water, through waste, cannot be regarded as beneficial use."[44] "Whatever water right one has. . . is subject to. . .[the]. . . principle that his use shall not be injurious to the rights of others or of the general public."[45] An appropriator cannot take more water than he can beneficially use and a great degree of care must be taken to prevent a loss of a volume greatly disproportionate to that amount actually consumed.[46] This concept has become known as the doctrine of beneficial use which is determined to be the use of such water as may be necessary for some useful and beneficial purpose in connection with the land from which it is taken.[47]

The basic principle that water must be put to beneficial use was unchallenged until the *CS* case. The *CS* opinion put forth the unique proposition that water must be stored and never used.[48] There is no law on which to support the court's holding in *CS*. In fact, the law of beneficial use prohibits the storage or taking of water in excess of the amount that can be beneficially used.[49] Even irrigation water cannot be held in gross and cannot be stored except under a storage permit.[50] The fact that a con-

40. N.M. Const., art XVI, § 3; N.M. Stat. Ann. § 72-1-2 (1985 Repl. Pamp.); State ex rel Erickson v. McLean, 62 N.M.264, 308 P.2d 983 (1957); Worley v. U.S. Borax and Chemical Corp., 78 N.M. 112, 428 P.2d 651 (1967); State ex rel Reynolds v. Mears, 86 N.M. 510, 525 P.2d 870 (1974).

41. Cascade Town Co. v. Empire Water & Power Co., 181 F. 1011, 1017 (C.C.D.Co. 1910). *rev'd in part*, 205 F.123 (8th Cir. 1913), *modified in part*, Bigger v. Empire Water & Power Co., 205 F. 130 (8th Cir. 1913).

42. Kaiser Steel Corp. v. W.S. Ranch Co., 81 N.M. 414, 419, 467 P.2d 986, 991 (1970).

43. *Id.*, at 417, 467 P.2d at 989.

44. State ex rel Erickson v. McLean, 62 N.M. 264, 270, 308 P.2d 983, 987 (1957).

45. *Id.* at 273, 308 P.2d at 989.

46. *See Id.*

47. *See Id.*

48. Trujillo v. CS Cattle Co., 109 N.M. 705, 709 n.4, 790 P.2d 502, 506 n.4 (1990).

49. *See McLean*, 62 N.M. at 273, 308 P.2d at 489.

50. *See* N.M. Stat.Ann. §72-5-23 (1985 Repl. Pamp.); *See* Snow v. Abalos, 18 N.M. 683, 140 P. 1044 (1914).

tract exists does not alter the priority of beneficial use. In New Mexico, the doctrine of beneficial use overrides any contrary contract provisions.[51]

Storage by CS, in order to efficiently carry out the distribution of the water to water rights holders has been held to be a beneficial use.[52] However, under the court's analysis, CS' storage of 20,000 acre feet would not be for the efficient distribution of water, but simply to create a standby pool that must always exist. Such a standby pool would only evaporate over a short period of time, and the water would never realize its maximum potential required under the doctrine of beneficial use.[53] The court recognized that appellants have no ownership in the standby pool, that they are not given storage, and that they cannot take more than their annualized duty.[54] Even if the appellants had a right to the water they could not require storage for some hypothetical future use. There is no law to support the position that water stored for some hypothetical future use is a beneficial use.[55] Although storage of water for recreational use may be a beneficial use under New Mexico law[56], the appellants are not claiming a beneficial use for recreation, and in fact, since they do not have any right to the water to be stored[57] they cannot be said to have standing to assert to what use the water should be put. The court addressed this apparent contradiction in footnote 4, stating that although appellants have no right to more than their annualized duty and are not given storage, they are entitled to hold CS to the terms of the covenant precluding the delivery of water when the reservoir level is less than 20,000 acre feet.[58] By hiding behind contract law, instead of squarely facing this issue, the court has set New Mexico water law on its head, and created a precedent which allows the nonbeneficial use of New Mexico water to hold priority over other beneficial uses.

ADDRESSING THE PROBLEM

Under the court's analysis of this case, the question of storing water that no one has a right to use is simply a contract law problem, and issues concerning New Mexico water law and the problems of beneficial use need not be addressed. The court predicated its opinion on contract

51. Jicarilla Apache Tribe v. United States, 657 F.2d 1126 (10th Cir. 1981).
52. *See supra* note 14.
53. *See supra Trial record* (Findings of Fact No. 51).
54. Trujillo v. CS Cattle Co.,109 N.M. 705, 709 n. 4, 790 P.2d 502, 506n.4 (1990).
55. *See Jicarilla*, 657 F.2d 1126.
56. *Id.*, at 1138.
57. "... [CS] argues that the clause does not answer whether appellants are allowed to take more than their annualized duty. The answer is 'no'; by the terms of their deed, appellants can take only their duty. Because the deed does not require storage, appellants are not 'given' storage, but this does not limit their right to hold CS to the terms of the agreement." *CS Cattle Co.*, 109 N.M. at 709 n.4, 790 P.2d at 506 n.4.
58. *Id.*

law, ignoring the tenets of New Mexico water law.[59] The court held that evidence (on why the provision in the contract preventing CS from selling any water to nonfirst tier users when the level of the reservoir fell below 20,000 acre-feet exists, or what the parties actually intended when they entered into the agreement), was improperly admitted at trial, and that the deed unambiguously expressed the intent of the parties.[60] The court then recognized that there *might* be a problem with the legality of the contract, but declared that CS was estopped from challenging the validity or legality of the contract, under the doctrine of estoppel by deed.[61]

The court's reliance on principles of contract law is misplaced. First, the contract between CS and Trujillo is illegal, and contract law principles should not be invoked to protect an illegal contract. "[P]ublic policy encourages freedom between competent parties of the right to contract, and requires the enforcement of contracts, *unless they clearly contravene some positive law or rule of public morals.*"[62] By requiring CS to not sell or deliver any water to nonvested users when the reservoir level falls below 20,000 acre-feet, the court is enforcing a contract that contravenes the New Mexico constitution, statutory law and established public policy.[63]

Contracts that contravene statutory law or public policy are not honored as valid contracts in New Mexico.[64] In *Stinbrink v. Farmers Ins. Co. of Ariz.*,[65] the New Mexico Supreme Court overruled a contract between an insurer and insured which excluded coverage for punitive damages against uninsured motorists.[66] The court based its obviation on the statutory language that an insured is entitled to recover *damages*.[67] The court construed damages as all types of damages and that a contract excluding punitive damages was void as contrary to the statute.[68] Such a stretch of statutory language contravened by contract is significantly more tenuous than the constitutional and statutory language explicitly contravened by the contract at issue in *CS*. The contract between CS and Trujillo granting appurtenant water rights is void *ab initio* under the court's interpretation because it requires a nonbeneficial use of state-owned water contrary to public policy.[69] Furthermore, because the New Mexico Constitution mandates that water be put to beneficial use, any contractual provisions pro-

59. *Id.* at 109 N.M. 705–06, 790 P.2d at 508–09.
60. *Id.* at 710, 790 P.2d at 507.
61. *Id.* at 710–11, 790 P.2d at 507–08.
62. General Elec. Credit Corp. v. Tidenberg, 78 N.M. 59, 62, 428 P.2d 33, 36 (1967) (emphasis added).
63. *See* Kaiser Steel Corp. v. W.S. Ranch Co., 81 N.M. 414, 467 P.2d 986 (1970).
64. Stinbrink v. Farmers Ins. Co. of Ariz., 111 N.M. 179, 803 P.2d 664 (1991); Padilla v. Dairyland Ins. Co., 109 N.M. 555, 787 P.2d 835 (1990); Armijo v. Cebolleta Land Grant, 105 N.M. 324, 732 P.2d 426 (1987); DiGesu v. Weingardt, 91 N.M. 441, 575 P.2d 950 (1978).
65. *Stinbrink*, 111 N.M. 179, 803 P.2d 664 (1991).
66. *Id.* at 179–80, 803 P.2d 664–65.
67. *Id.* at 180, 803 P.2d at 665.
68. *Id.*
69. *See* Digesu v. Weingardt, 91 N.M. 441, 575 P.2d 950 (1978).

viding for a nonbeneficial use of water would be unconstitutional and void. The limit of water rights is beneficial use, not specific contractual limitations.[70] If contractual limitations on water rights thwart legislative intent, then they are without any legal effect.[71]

Second, CS cannot be estopped from denying the validity of the deed covenant. The court stated that CS did not contest the validity of the deed and cannot now be heard to challenge the deed.[72] This is patently false. CS contested the validity of the deed covenant if the court interpreted it to require CS to store 20,000 acre-feet of water.[73] Prior to the filing of Plaintiffs' complaint, the covenant had never been read or interpreted to require CS to not sell water when the first tier users had already received their yearly share.[74] "[T]o adopt Plaintiffs' interpretations of the covenant would violate principles of New Mexico Constitutional water law doctrine and be a horrendous waste of water. . ."[75] By prohibiting CS from selling or delivering any water when the reservoir falls below 20,000 acre-feet,[76] CS is forced to store water that no one is entitled to use.[77] Such a requirement is contrary to New Mexico water law.[78] If no one is entitled to use the water, and it is required to be stored, then how can it be put to beneficial use? The answer is simple, not only can it not be put to beneficial use, it cannot be put to any use, as it must stay in the reservoir and evaporate.[79]

Most importantly, by ignoring the basic tenets of New Mexico water law, the court establishes a new nonbeneficial use of water, the ramifications of which are far-reaching and disastrous. One may put forth the proposal that requiring a certain level of water in the Eagle Nest reservoir for recreation is a beneficial use of water. Although CS' right to store water in the reservoir has been adjudicated to be a beneficial use of water, it is CS' right and duty to ascertain to what beneficial uses the water is put.[80] Neither appellants, nor the court, have the right to dictate to CS that it

70. United States v. Alpine Land & Reservoir Co., 503 F. Supp. 877, 887 (D. Nev. 1980).

71. *Id.*

72. Trujillo v. CS Cattle Co., 109 N.M. 705, 710, 790 P.2d 502, 507 (1990).

73. *Trial record, supra* note 9, (Pre-Trial Order at 5–9).

74. *Id.* (Findings of Fact Nos. 18, 19).

75. *Brief, supra* note 11, at 6.

76. This requirement prevails, according to the court, even when appellants have already used their yearly allocation of water. *CS Cattle Co.*, 109 N.M. 705, 709 n.4, 790 P.2d 502, 506 n.4 (1990).

77. Appellant's right to irrigation water is a right to 1.5 acre-feet per year, and they have no legal right to the use of any additional water. *See CS Cattle Co.*, 109 N.M. 705; N.M. Stat. Ann. § 72-5-39 (1985 Repl. Pamp.).

78. *See* N.M. Stat. Ann. §72-5-39 (1985 Repl. Pamp.).

79. The court said that evaporation is not an issue, because the contract only calls for the nondelivery of at least 20,000 acre-feet of water, and does not address evaporation. *CS Cattle Co.*, 109 N.M. at 709 n. 4, 790 P.2d at 506 n. 4. However, the trial court found that 20,000 acre feet of water in the reservoir would lose 78% to evaporation in less than 10 years. *Trial record supra*, note 9 (Findings of Fact No. 51).

80. *See supra* note 14 and accompanying text.

must store the water, under the pretext that such storage is a beneficial use.

CS contends that the water should be used for irrigation and municipal consumption. There is no provision in New Mexico for the court to force a water right holder to allocate water for recreation or any other purpose, against his will on behalf of parties who have no right to use the water. In fact, the First Judicial District Court in *In the Matter of Howard Sleeper*,[81] ascertained the public interest in beneficial use of water to encompass the externality of the special needs, circumstances and interests of local communities.[82] The district court declared that economic benefits are subservient to the preservation of the cultural identity of northern New Mexicans which revolve around irrigation.[83] Clearly, the use of Eagle Nest reservoir for a standby pool does not serve the special needs, circumstances and interests of Northern New Mexicans. By forbidding CS from selling or delivering any water when the level is below 20,000 acre feet, the court is prohibiting others from using the water, and restricts the local communities from obtaining any additional water for irrigation or municipal use.

Furthermore, this decision flies in the face of recent developments in the protection of instream flows. The court, by restricting water use from the Cimarron River, condones the storage of water for no specific immediate beneficial use, and gives this storage priority over the protection of instream flows. This is not only contrary to New Mexico law, but goes against current trends in protecting the existing natural watercourses throughout the country.[84]

Contrary to the court's assertion, it is not possible to decide this case without addressing the ramifications to New Mexico water law. By requiring the storage of water on behalf of persons who have no right to its use, the deed violates New Mexico law.[85] The deed covenant restricting water use by CS when the reservoir level is below 20,000 acre-feet is contrary to public policy, illegal and therefore void *ab initio*.[86] It is established law that a deed founded on a consideration which is against public policy or is illegal, is generally held to be invalid.[87] Where a deed was invalid from its inception, or void *ab initio*, it may not be validated by application of the doctrine of estoppel.[88] A void deed will not work and may not be

81. Rio Arriba County Cause No. RA 84–53 (C) (Apr.16, 1985), *rev'd on other grounds*, In re Sleeper, 107 N.M. 494, 760 P.2d 787 (1988), *writ quashed*, Ensenada Land & Water Ass'n v. Sleeper, 107 N.M. 413, 759 P.2d 200 (1988).

82. *Id.*

83. *Id.*

84. *See*, DeYoung, *New Approach, Same Result: New Mexico's Instream Flow Protection Act of 1989*, N. M. Nat. Resources Rep. 17 (1989).

85. *See supra* notes 54–58 and accompanying text.

86. *See supra* notes 4–6.

87. 26 C. J. S. *Deeds*, § 65 (1964).

88. 26 C. J. S. *Deeds*, § 66 (1978).

made the basis of an estoppel. Thus, a deed which is invalid in that it is contrary to public policy or contrary to some statutory prohibition, and therefore null and void in contemplation of the law, does not operate as an estoppel.[89] "An invalid instrument will not serve as the basis of an estoppel by deed, even though it may contain covenants of warranty."[90] "[I]t is well settled that the doctrine of estoppel by deed does not apply where a conveyance is made by one *non sui juris*, or *that is contrary to public policy or statutory prohibition.*"[91] Because the deed is contrary to statutory law and public policy, it is void and the principle of estoppel by deed does not apply. Under the interpretation given the deed by the court, it cannot be validated by the doctrine of estoppel by deed. A conveyance that is contrary to public policy cannot be rendered effective through the doctrine of estoppel by deed.[92]

In holding that CS is not the proper party to challenge appellant's right to store unusable water in the reservoir, the court stated that the State Engineer or other junior users would not be estopped from challenging such right.[93] This is also contrary to the law in New Mexico. "The State of New Mexico functions through persons who are for the time being its officers. The failure of any of these persons to enforce any law may *never estop the people to enforce that law either then or at any future time.*"[94] The waters encompassed in Eagle Nest reservoir behind the Eagle Nest dam are public waters.[95] This characterization holds true even for the water the court is forbidding CS to sell or deliver on behalf of appellants.[96] "Public policy forbids the application of the doctrine of estoppel to a sovereign state where public waters are involved".[97] The waters encompassed within Eagle Nest reservoir are public and the doctrine of estoppel cannot be invoked to prevent the beneficial use and conservation of public waters.

The *CS* court relied on *Surface Creek Ditch & Reservoir Co. v. Grand Mesa Resort Co.*,[98] to support its position that CS is estopped from denying the validity of the deed on the grounds that (under the court's interpretation) the deed grants a use of water contrary to basic water law.[99] This reliance is misplaced. The defendant in *Surface Creek* was estopped because the plaintiff owned the lake and the waters in question, and the defendant

89. 28 Am. Jur. 2d, *Estoppel and Waiver* § 7 (1956).
90. Dominex, Inc. v. Key, 456 So. 2d 1047, 1057 (Ala. 1984).
91. Starr v. Long Jim, 227 U.S. 613, 624–25 (1913).
92. 31 C.J.S. *Estoppel*, § 43. (1978).
93. Trujillo v. CS Cattle Co., 109 N.M. 705, 711, 790 P.2d 502, 508 (1990).
94. State ex rel. Erickson v. McLean, 62 N.M. 264, 273, 308 P.2d 983, 991 (1957) (emphasis added).
95. *CS Cattle Co.*, 109 N.M. at 709 n. 4, 790 P.2d at 506 n. 4.
96. *Id.*
97. *McLean*, 62 N.M. at 274, 308 P.2d at 993.
98. 114 Colo. 543, 168 P.2d 906 (1946).
99. *CS Cattle Co.*, 109 N.M. at 711, 790 P.2d at 508.

had agreed at the time of the original grant that plaintiff's use of the water was a beneficial use, and the use was clearly a beneficial use under Colorado water law.[100] The situation in *Surface Creek* is inapposite to the one in *CS*. Defendant CS owns the reservoir, CS has never agreed that the court's interpretation of the covenant results in a beneficial use, and the contemplated use is not beneficial under New Mexico law. The interpretation given the deed is clearly contrary to the policy of New Mexico requiring the beneficial use of water, and cannot be rendered effective by the doctrine of estoppel by deed.

CS never accepted the validity the deed under the court's interpretation, never accepted the nonuse as beneficial, and cannot be estopped from denying the validity of an illegal conveyance that is also contrary to public policy.

ANALYSIS

The court's holding in this case is wrong for at least two reasons. First, its interpretation and application of contract law is misplaced. Estoppel cannot apply to an illegal contract, especially when the legality of an interpretation has always been challenged.[101] Second, by forbidding CS from selling water, while at the same time telling CS they are not required to store water, the court is forcing CS to either waste water, store it against its will, or deliver it to users who have no desire, need, or legal right to the use of the water.

The court stated that although CS is not required to store any water, it must not sell or deliver water when the water level is below 20,000 acre feet. In analyzing this contradiction, CS is faced with an untenable dilemma. Because CS is not required to store any water, and appellants are not entitled to the use of any additional water, and CS cannot sell or deliver any water; then CS must be required to waste the water or sell the water to appellants as water additional to their water right amount.[102] Either position left open to CS requires that they violate New Mexico law and public policy.

100. *Surface Creek*, 114 Colo. at 556–57, 168 P.2d at 912–13.

101. *See supra* notes 72–75, 86–92 and accompanying text.

102. It should be noted that if CS were to sell water to the first tier users (including appellants) when the reservoir level fell below 20,000 acre-feet, this would not satisfy the court's interpretation of the covenants. CS would have to continually sell or deliver this water to the first tier users, theoretically delivering an infinite amount of water, as long as the reservoir level was below 20,000 acre feet. This is such a preposterous concept that it was not addressed by the court. However because CS must not waste the water, and must not let the water evaporate, they could be forced to deliver this water to first tier users whether they have the need or the desire to beneficially use this water. The next obvious question is, do the appellants have some hidden agenda to sell this water to others, after they force CS to deliver the water to them under the court's interpretation of the contract?

However, appellants have never requested a purchase of additional water rights, and have never even insinuated that they wished to acquire more than their annualized duty of water. In fact, appellants do not have the right to use the water, even if CS were to deliver it as it would be in excess of their water right amount. If CS were to simply store the water, unavailable for any beneficial uses, waste of the water would occur through evaporation. Also, by depriving the public of the opportunity to utilize the water, CS would be in violation of New Mexico law.[103] Therefore, in order not to be in violation of the law, CS *must* sell or give away the water to the first tier users, including appellants— whether they want it or not—or whether they can put it to beneficial use or not. Such a requirement on the part of CS is preposterous. The court is requiring CS to sell or deliver water to individuals who have no right to the water and have never requested additional water. The court said this is not the case, "it is irrelevant . . . whether water must be stored, [or] what happens to the water . . . CS simply cannot sell water [to non first tier users] when the amount is less than 20,000 acre feet."[104] This statement clearly implies that the court fully intended to require CS to sell or give away water to the first tier users, including appellants or let the water evaporate. This is a totally improper position for the court to take. The deed is clearly illegal. Appellants have no right to any additional water. The court, by forcing CS to sell water to appellants, or let the water evaporate, takes a position that cannot be supported by law.

CONCLUSION

The effect of the court's holding in *CS* is far reaching in several respects. First, by holding that CS is estopped from attacking the validity of the deed, the court has opened the door for parties to insist on the enforcement of illegal contracts. Second, the court has established that a nonbeneficial use of water is permitted in New Mexico. Such a holding is contrary to all previous water law in New Mexico. The result of this holding may not be fully appreciated until a reservoir owner asserts his new found right to store water and not sell it to anyone. More immediately, the ruling will force CS to charge appellants for the previously free water management it currently provides, thereby possibly raising the price of water out of appellants' reach. Also, in abiding by the court's ruling, CS could lose its water right acquired at the turn of the century.[105]

The holding also brings into question the beneficial use of instream flows. By forcing CS to restrict the flow of the Cimarron River,

103. N.M. Stat. Ann. §§ 72-5-17, 72-5-28 (1985 Repl. Pamp.).
104. Trujillo v. CS Cattle Co., 109 N.M. 705,709, 790 P.2d 502,506 (1990).
105. N.M. Stat. Ann. § 72-5-28 (1985 Repl. Pamp.).

the court in effect gives priority to storage over instream flows. This case law establishes precedent that will continue to undermine continued efforts to protect instream flows as a beneficial use of New Mexico water.

The court's holding takes New Mexico from the forefront of western water law to the rear echelons. Because of the scarcity of water in New Mexico, similar situations will likely occur in the future where water right holders seek to contract for storage above their annualized duty. This can only lead to waste and hoarding of New Mexico's most precious resource. Hopefully, the court will clarify this position in future holdings and prevent the public interest in beneficial water use and water conservation from becoming subservient to the freedom to contract.

WILLIAM SINGDAHLSEN