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A Primer on New Mexico Oil and Gas Law: State, Federal, and Fee Lands

*Thomas C. Turner, Jr.**

INTRODUCTION

“Elsewhere the sky is the roof of the world; but [in New Mexico] the earth was the floor of the sky.” - Willa Cather, Death Comes for the Archbishop

“All calculations based on our experiences elsewhere fail in New Mexico.”- Former Governor Lew Wallace

New Mexico’s natural beauty and rich cultural traditions hold an observer’s gaze such that the State’s motto becomes self-evident: The Land of Enchantment. She is world famous for the Wild West¹ and her

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1. Everyone is familiar with the story of Sheriff Pat Garrett and Billy the Kid; lesser known is Pat Garrett’s role in co-founding the Pecos Irrigation and Ditch Company with Charles B. Eddy, which spurred the settlement of

hatch chile peppers,² while her origin stretches back beyond recorded history into the myths and legends of her native people. “Conquered” by Spain and subsequently ruled by Mexico, her civil law heritage continues to shape the contour of the legal landscape today. As a result, the lands of New Mexico are divided between sovereign Indian nations, the United States, the State of New Mexico, and private owners. The past, then, is very much present in New Mexico.

The purpose of this article is to orient the uninitiated to the complexities of New Mexico oil and gas law and to provide a helpful guide to additional resources available to the oil and gas practitioner. To this end, familiarity with the footnotes is highly recommended as they contain a wealth of hyperlinks to critical information resources. Section I and Section II of the article trace New Mexico’s development from pre-history to statehood in 1915, with particular focus on the genesis of land titles. Section III discusses the attributes of the fee mineral estate, the oil and gas lease, and provides a brief introduction to the New Mexico Oil Conservation Division. Section IV and Section V detail New Mexico’s unique community property and descent and distribution regimes, including important historical variances. The final two sections of the article provide an overview of federal oil and gas leasing and lease maintenance with the Bureau of Land Management (Section VI) and state oil and gas leasing and lease maintenance with the State Land Office (Section VII).

I. PRE-STATEHOOD

Ancestors of the Pueblo Indians occupied portions of New Mexico as early as 10,000 B.C.E., while Taos Pueblo was settled as early as 1,000

Southeastern New Mexico, particularly Lea and Eddy Counties; 2 GEORGE B. ANDERSON, HISTORY OF NEW MEXICO: ITS RESOURCES AND PEOPLE 768 (1907); *Carlsbad Irrigation Project*, NEW MEXICO HISTORY, <https://perma.cc/8N2M-MCYJ> (last visited Jan. 24, 2018).

2. Hatch, New Mexico is the self-styled Chile Capital of the World and a premier source of *capsicum annuum*, the spicy pepper that is the basis for much of New Mexican cuisine. Once aged, the green pepper turns red, changing its overall flavor and spiciness. New Mexicans eat “chile” on everything, and the official state question is “red or green,” to which the author usually responds “Christmas.” This cryptic reply refers to smothering a burrito or enchiladas in both sauces such that one side is green and the other red. For your chile fix, the author suggests Mi Casita in Carlsbad, or Tomasita’s or the Shed in Santa Fe.

C.E.³ The Anasazi, or “ancient ones” as the Navajos named them, inhabited cliff dwellings akin to those found at Chaco Culture National Historical Park in northwest New Mexico until their “dispersal” south of the Rio Grande valley in approximately 1,500 C.E.⁴ Also present throughout this time were the Navajo and Ute Indians in the northwestern portion of the State, as well as the itinerant Apaches and Comanches⁵ in the southeastern portions.⁶ Spanish conquistadores encountered this rich dynamic in their discovery of “New Spain” in 1540 and during the beginning of their official colonization of the region in 1598.⁷

With the Spanish settlers came their civilian legal system, based on custom and legislation, which included a concept novel to the Americas—the ownership of private property.⁸ In order to encourage settlement of her new territory and particularly to secure her borders, Spain offered extensive private (individual) and community land grants in New Mexico.⁹ This distinction between individual and community land grants, as well as the civil law reliance on custom, would later be the basis of much confusion, conflict, and ultimately, litigation, which continues to this day.

3. Robert L. Lucero, Jr., *State v. Romero: The Legacy of Pueblo Land Grants and the Contours of Jurisdiction in Indian Country*, 37 N.M. L. REV. 671, 672-73 (2007).

4. *Id.*; David Laskin, *New Mexico's Mysterious Anasazi Ruins*, N.Y. TIMES, Sept. 22, 1991, <http://www.nytimes.com/1991/09/22/travel/new-mexico-s-mysterious-anasazi-ruins.html?pagewanted=all>.

5. To best understand the terror that was the Comanche and for a brush-up on your 7th grade Texas history, see S. C. GWYNNE, *THE EMPIRE OF THE SUMMER MOON* (2014).

6. JOSEPH P. SANCHEZ, ROBERT L. SPUDE & ARTHUR R. GOMEZ, *NEW MEXICO: A HISTORY* (2013). The author highly recommends this very accessible book as background for understanding the events that shaped the State.

7. Lucero, Jr., *supra* note 3, at 673.

8. Elaine Patricia Lujan, *The Pajarito Land Grant: A Contextual Analysis of its Confirmation by the U. S. Government*, 48 N.M. L. REV. 1009, 1010 (2008). For a civil law comparison, see LA. CIV. CODE arts. 1-3, noting that the sources of Louisiana's civil law are legislation and custom and that custom “results from a practice repeated for a long time and generally accepted as having acquired the force of law.” For an overview of the history of Spanish civilian law, see Judge William A. Keleher, *Law of New Mexico Land Grants*, 23 LAW. & BANKER & CENT. L.J. 21 (1930). For an in-depth understanding of Spanish community property law as it affects New Mexico, see RICHARD A. BALLINGER, *A TREATISE ON THE PROPERTY RIGHTS OF HUSBAND AND WIFE UNDER THE COMMUNITY OR GANANCIAL SYSTEM* (1895) [hereinafter GANANCIAL SYSTEM].

9. Lujan, *supra* note 8; Robert V. Urias, *The Tierra Amarilla Grant, Reies Tijerina, and the Courthouse Raid*, 16 CHICANO-LATINO L. REV. 141, 141-42 (1995).

A distinctly civilian creature, the community land grant concept transferred large areas of land to settlers to be used in common, with smaller grants within the common lands granted to individuals to be used for their homesteads and for farming purposes.¹⁰ Known as *ejidos*, the community lands could not be sold, unlike the individual land grants used to elevate the status of the conquistadores. Eventually, the American common law system rejected the concept of communal lands, and those that had not been previously approved were invalidated and transferred to the United States government.¹¹

Spain made land grants to the Pueblo Indians and instituted legal protections to prevent the Pueblos' land from being encroached upon or sold, including requiring buffer zones between Pueblo lands and lands granted to European settlers.¹² This treatment was the spiritual predecessor to the United States' "special relationship" with Native Americans¹³ and mirrors the three main principles that shape American Indian law today: "sovereignty, Federal-to-Tribe relationship, and the Trust Responsibility of the U. S. Government to Indian tribes."¹⁴

Mexico, who gained her independence from Spain in 1821, continued the Spanish civil law tradition of individual and communal land grants in New Mexico. Instability marked the Mexican period of governance such that it was often unclear who among government officials had authority to make land grants.¹⁵ Between the late 1600's and 1846, Spain and Mexico made 295 land grants within New Mexico. Roughly 141 were made to individuals, with the remainder made to communities, including twenty-three granted to Indian pueblos.¹⁶ The majority of such grants were located

10. U. S. GOV'T ACCOUNTABILITY OFF., GAO-04-59, TREATY OF GUADALUPE HIDALGO: FINDINGS AND POSSIBLE OPTIONS REGARDING LONGSTANDING COMMUNITY LAND GRANT CLAIMS IN NEW MEXICO 3-4 (2004) [hereinafter GAO 2004]; Lujan, *supra* note 8.

11. See generally Maizie Houghton, *The Northern New Mexico Lands of Life and Death*, 8 LAW & SOC'Y J. UCSB 55, 57 (2008); U.S. v. Sandoval, 167 U.S. 278 (1897) (which invalidated all communal land grants and awarded such lands to the United States).

12. Lucero Jr., *supra* note 3, at 675.

13. Oneida County, N.Y. v. Oneida Indian Nation of N.Y. State, 470 U.S. 226, 234 (1985).

14. U.S. FOREST SERV., FOREST SERVICE NATIONAL RESOURCE GUIDE TO AMERICAN INDIANS AND ALASKA NATIVE RELATIONS 34 (Apr. 1997), <https://www.fs.fed.us/people/tribal/trib-1.pdf> (citing Worcester v. Georgia, 31 U.S. 515 (1832)). U.S. CONST. art. I, § 8, cl. 3 grants exclusive jurisdiction to Congress "to regulate commerce . . . with the Indian tribes . . ."

15. GAO 2004, *supra* note 10, at 19.

16. *Id.* at 14.

in central and northern New Mexico with none directly affecting Lea or Eddy Counties in southeastern New Mexico.¹⁷

In response to territorial disputes and the deafening drumbeat of “manifest destiny,” U.S. President James K. Polk declared war on Mexico on May 13, 1846. Brigadier General Stephen Watts Kearney, led by able guide and mythical figure of the West, Kit Carson, embarked for the New Mexico territory soon thereafter. By August 1846, the Governor of New Mexico, Juan Batista Vigil y Alarid, surrendered the New Mexico territory to the United States,¹⁸ and the Treaty of Guadalupe Hidalgo of 1848 brought the war to an end. Mexico ceded approximately fifty-five percent of her territory to the United States, including the later Gadsden Purchase of 1853.¹⁹ The Treaty included a clause that “inviolably respected” and guaranteed the property rights of former Mexican citizens.²⁰

17. Maps of New Mexico Land Grants are maintained by the State Land Office. See NEW MEXICO STATE LAND OFFICE, <https://perma.cc/U7UM-PRM6> (last visited Feb. 20, 2018).

18. See generally HAMPTON SIDES, BLOOD AND THUNDER: AN EPIC TALE OF THE AMERICAN WEST (2006). Other than Brigadier General Kearney, few men have had as dramatic an effect on the history of the State of New Mexico as Kit Carson. Intrepid mountain man, expert guide of the West, and legend in his own time, Carson time and again proved indispensable to Kearney, subsequent Civil War generals, and rescued pioneers. His “total war” campaign against the Navajo Nation secured the State, decimated the “Dine” (the Navajo’s name for themselves; the “people”), and remains a dark stain on his otherwise sterling reputation.

19. Houghton, *supra* note 11, at 58.

20. See Treaty of Guadalupe Hidalgo, Mex.-U.S., art. VIII, Feb. 2, 1848, 9 Stat. 922:

In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States.

The Queretaro Protocol to the Treaty of Guadalupe Hidalgo additionally provided that “all legitimate titles under Mexican law up to May 13, 1846” should be upheld and respected. The Kearney Code, which governed New Mexico during its territorial period from 1847 to the early 1850’s, similarly included protections for property previously granted by Spain and Mexico. Applicants could petition the Office of Register of Lands within five years of 1847 to verify land grants made by the two former sovereigns. Subsequent federal legislation preempted the land provisions of the Kearney Code in the 1850’s. GAO 2004, *supra* note 10, at 26; see generally SIDES, *supra* note 18.

The implementation of the guarantees of the Treaty of Guadalupe Hidalgo was imperfect at best, and predatory at worst, with the United States passing a series of legislation governing land claims, first adjudicated by the Surveyor General and authorized by the Act of 1854.²¹ The office of the Surveyor General processed over 200 claims under the Act of 1854, with Congress considering 181 grants and approving less than one-half.²² Congress halted this process during the Civil War and later suspended it again due to concerns of fraud and corruption.²³ In order to address these concerns, Congress passed the Act of 1891, which established the Court of Private Land Claims (CPLC).²⁴ The CPLC included stricter provisions and oversight and allowed appeal of its decisions to the United States Supreme Court. The combined efforts of both courts confirmed eighty-four grants and rejected fifty-five grants.²⁵

Ultimately, this period in New Mexican history resulted in the transfer of all lands not previously granted by Spain or Mexico and approved by the Surveyor General, the CPLC, or Congress to the United States of America. All land titles then, other than prior land grants, originate with the federal government.

21. GAO 2004, *supra* note 10, at 54; the Act of 1854 evaluated claims based on the “laws, usages, and customs” of Spain and Mexico.

22. *Id.*

23. A contemporary complaint regarding clouded land titles groused that “New Mexico show[ed a] disease from which this rich territory is suffering . . . spotted all over with Spanish and Mexican land grants more or less fraudulent” and blamed, among others, the Santa Fe Land Ring. William S. Brackett, *Land Grants in New Mexico*, 1 CHI. L. TIMES 323, 324 (1887). For a lively and detailed depiction of the Santa Fe Land Ring, see DAVID L. CAFFREY, *CHASING THE SANTA FE LAND RING: POWER AND PRIVILEGE IN TERRITORIAL NEW MEXICO* (2014). For an in-depth examination of the mechanisms of fraud and corruption employed by land speculators during this time period, see David Correia, *Land Grant Speculation in New Mexico During the Territorial Period*, 48 NAT. RESOURCES J. 927 (2008).

24. GAO 2004, *supra* note 10, at 77.

25. *Id.* at 52, 77; the new standard judged claims on whether they were “lawfully and regularly” derived under Spanish or Mexican law, a much stricter standard than the “laws, usages, and customs” standard employed by the Act of 1854.

II. THE FERGUSON ACT OF 1898 AND THE ENABLING ACT OF 1910/STATEHOOD

New Mexico moved from a territory to statehood at the dawn of the 20th century, thanks in large part to the efforts of Harvey B. Fergusson.²⁶ A Virginia native and attorney, Fergusson's West Virginia law firm sent him to White Oaks, New Mexico in lawless Lincoln County during the time when fugitives such as William H. Bonney ("El Chivato" also known as Billy the Kid) frequented the local saloons. There, Fergusson started his own practice and successfully defended his clients' claim to the Homestake mine, making a name for himself as a skilled attorney.²⁷

Fergusson later moved to Albuquerque and became involved in Democratic politics, serving one term as New Mexico's territorial delegate to the U.S. Congress, among numerous other public service positions.²⁸ In Congress, Fergusson used powerful and persuasive rhetoric to advocate for the progressive causes of his day. The Ferguson Act of 1898 stands as a historic result of his advocacy.²⁹

The Ferguson Act of 1898 allotted huge swaths of territory to New Mexico to be put in trust to support a public school system, universities, and hospitals.³⁰ The resulting transfer of Sections 16 and 36 in each

26. For a rich and detailed history of the Fergusson clan, including H.B., Sr., and H.B., Jr. (who became a celebrated author), see ROBERT GISH, *FRONTIER'S END: THE LIFE AND LITERATURE OF HARVEY FERGUSSON* ch. 3 (1988).

27. Discovered by an outlaw, the North Homestake claim was later sold for a horse, \$40, and a bottle of whiskey to "Uncle Jack" Winters; the claim eventually produced over half a million dollars in gold. "Uncle Jack's" heirs were Fergusson's clients, whom he most famously defended in *Brunswick v. Winters' Heirs*, 3 N.M. 386 (N.M. 1885); the facts of the case will be interesting to anyone who's negotiated a Joint Operating Agreement. GISH, *supra* note 26. Fergusson later made a significant fortune when the previous owners of the Old Abe mine forfeited their rights as they failed to pay sufficient attention to the details of mining claim law. A savvy attorney, Fergusson perfected title to the claim in himself and two partners. Gold production from the Old Abe significantly dwarfed that of the North Homestake. *Id.*

28. OFF. OF THE N.M. SECRETARY OF STATE, *NEW MEXICO BLUE BOOK: 2012 CENTENNIAL EDITION 12* (Kathryn A. Flynn, ed., 2011-2012).

29. Ferguson Act, Ch. 489, 30 Stat. 484 (1898), <https://perma.cc/6M43-KVMN>.

30. See Gabe Long, *When Is a Rock a Rock - New Mexico's Abandonment of Property Rules in Mineral Conveyancing*, 45 N.M. L. REV. 343, 349 (2014). A list of State Trust beneficiaries can be found on the New Mexico State Land Office website. *Trust Beneficiaries*, NEW MEXICO STATE LAND OFFICE, <https://perma.cc/65ZH-6GQS> (last visited Feb. 22, 2018).

Township and Range, among numerous other lands, enriched the State's public institutions in perpetuity.

With the stroke of a pen and a rather pithy remark, President William Howard Taft signed legislation on January 6, 1912 that admitted New Mexico as the forty-seventh State of the Union.³¹ This final chapter in the march to statehood, however, began almost two years earlier when President Taft signed the Enabling Act of 1910.³²

The Enabling Act of 1910 required New Mexico to elect delegates and hold a constitutional convention. After adoption of the Constitution of the United States, the delegates were then free to adopt a New Mexico State Constitution "under the conditions contained in [the] Act,"³³ which were "uncharacteristically lengthy" management requirements by comparison to preceding enabling acts.³⁴ These management requirements³⁵ continue to be refined and litigated to the present day.³⁶

31. "Well, it's all over. I'm glad to give you life. I hope you will be healthy." – President Taft. Such remarks underscored New Mexico's near sixty-year struggle to be admitted to the Union. Her path to statehood marched through prejudice against her Spanish and Catholic heritage, the firestorm of pro- and anti-slavery controversies and compromises, the resulting Civil War, numerous Indian wars and conflicts, and generally, the curse of perceived geographical obscurity. In contrast, consider California's admission as the thirty-first State of the Union in 1850 immediately following her acquisition from Mexico in the Mexican-American War. *See generally* DAVID V. HOLTBY, 47TH STAR: NEW MEXICO'S STRUGGLE FOR STATEHOOD (2012).

32. New Mexico-Arizona Enabling Act of 1910, Ch. 310, 36 Stat. 557 (1910).

33. *Id.*; adopted by N.M. Const. art XXI, §9:

This state and its people consent to all and singular the provisions of the said act of congress, approved June twentieth, nineteen hundred and ten, concerning the lands of said act granted or confirmed to this state, the terms and conditions upon which said grants and confirmations were made and the means and manner of enforcing such terms and conditions, all in every respect and particular as in said act provided.

34. *See* Erin Pounds, *State Trust Lands: Static Management and Shifting Values Perspectives*, 41 ENVTL. L. 1333, 1335 (2011).

35. For example, Section 10 of the Enabling Act prevents state lands from being mortgaged or encumbered in any way, details the strict conditions under which state lands may be sold, and nullifies any sale of state lands not in accordance with the Act, as well as provides numerous other management requirements. New Mexico-Arizona Enabling Act, § 10.

36. *See* State ex rel. King v. Lyons, 248 P.3d 878 (N.M. 2011); the court relied on a strict interpretation of the Enabling Act and the State's Constitution to disallow the Commissioner's exchange of public trust lands for private lands.

The Enabling Act significantly enlarged the Ferguson Act by transferring Section 2 and Section 32 in every Township and Range in New Mexico as well as additional specific land grants to be held in trust for the benefit of various public institutions, such as public buildings, penal institutions, and insane asylums, among others.³⁷ Where such sections or specific grants were unavailable due to previous land grants, Indian lands, or the reservation of mineral or “saline” lands, the State chose “lieu” lands in place of the previously patented lands to supplement the grant. A significant portion of these “lieu” lands is located in the Permian Basin of Lea and Eddy Counties, while the “saline” reservation constitutes some of the richest potash deposits in the world in Lea County.³⁸

President Taft’s signature effectively transferred over thirteen million acres of land to the newly-formed State of New Mexico to be held in trust for the benefit of various public schools and other institutions, including Sections 2, 16, 32, and 36 in each Township and Range. The Commissioner of Public Lands currently manages all such lands “subject to the restrictions imposed by the Enabling Act, the [New Mexico State] Constitution, and the statutes, and the manner of its exercise is subject to review by the courts.”³⁹

III. FEE LANDS, THE MINERAL ESTATE, AND THE OIL AND GAS LEASE

After drilling a dry hole and an uneconomic gas well, Martin Yates, Jr.⁴⁰ allowed his wife, Mary, to select his next drill site. The resulting

37. New Mexico-Arizona Enabling Act, 36 Stat. 557.

38. For an overview of the Designated Potash Area, see Thomas C. Turner, Jr., *Potash in the Permian Basin of New Mexico*, TAKEOFF (Permian Basin Landmen’s Association, Tex.), Oct. 2016, at 5.

39. *King*, 248 P.3d at 882.

40. For the full story, see SAMUEL D. MYRES, *PERMIAN BASIN – PETROLEUM EMPIRE OF THE SOUTHWEST: ERA OF DISCOVERY* 294 (1973); *ERA OF DISCOVERY* as well as *ERA OF ADVANCEMENT* include meticulously researched, fascinating accounts of the discovery and development of the major fields of the Permian Basin. SAMUEL D. MYRES, *PERMIAN BASIN – PETROLEUM EMPIRE OF THE SOUTHWEST: ERA OF ADVANCEMENT, FROM THE DEPRESSION TO PRESENT* (1977). The two volumes provide the most complete history of Southeastern New Mexico the author has encountered and include the genesis stories of several Permian dynasties, the family names of which will be most familiar to those who grew up in the Permian Basin. Additionally of interest is SAMUEL D. MYRES, *EDUCATION OF A WEST TEXAN* (1985), which recounts the research and writing of *ERA OF*

Flynn-Welch-Yates No. 3 (alternatively, the Illinois State #3) proved to be economic, launching the illustrious career of the “Father” of the New Mexico Oil business.⁴¹

Before his death in 1949, Yates helped discover enormous Potash deposits in southeastern New Mexico, built pipelines and refineries, and discovered numerous prolific fields.⁴² His legacy continues through his family to this day, as evidenced by EOG Resources’ recent \$2.5 billion acquisition of Yates Petroleum.⁴³ It is an understatement to say that Yates merely “contributed” to the development of oil and gas jurisprudence in New Mexico, as discussed below.

As previously detailed, title to lands in New Mexico originate from the United States, the State of New Mexico, or from approved Spanish or Mexican land grants. Land patents issued by the United States or the State of New Mexico convey all of the oil, gas, and other minerals to private landowners unless they include specific reservations.

New Mexico follows the ownership-in-place theory of mineral ownership. Minerals may be severed from the surface by grant or reservation to constitute a separate estate.⁴⁴ The separate mineral estate includes the right to receive royalty, bonus, and delay rentals, the executive right, and the right of ingress and egress to explore for and produce the minerals.⁴⁵ A mineral interest may be “stripped” of one or more of its attributes by grant or reservation.⁴⁶ Severed mineral or royalty interests are considered real property⁴⁷ and are thus devisable, heritable, and subject to the laws of community property.

The ownership-in-place theory results in the application of all real property concepts to the severed oil and gas estate. This includes the

DISCOVERY and ERA OF ADVANCEMENT, a monumental project conceived by George Abell, a legendary Midland oilman, and funded by the Abell-Hanger Foundation of Midland, Texas.

41. ERA OF DISCOVERY, *supra* note 40.

42. *Martin Yates, Jr.*, PERMIAN BASIN PETROLEUM MUSEUM, <https://perma.cc/BZ3J-WNMJ> (last visited Feb. 22, 2018).

43. Ellen Marks, *Yates Petroleum of Artesia Sold to Houston Company for \$2.5 Billion*, ALBUQUERQUE JOURNAL (Sept. 7, 2016), <https://perma.cc/AB9J-GTCK>.

44. *Kaye v. Cooper Grocery Co.*, 312 P.2d 798, 802 (N.M. 1957).

45. *HNG Fossil Fuels Co. v. Roach*, 656 P.2d 879, 882 (N.M. 1982); *Duvall v. Stone*, 213 P.2d 212, 216 (N.M. 1949).

46. *HNG Fossil Fuels Co.*, 656 P.2d at 882.

47. *Duvall*, 213 P.2d at 215.

statute of frauds,⁴⁸ which requires written and signed instruments evidencing the conveyance of real property interests, as well as an implied easement of necessity to use the surface of another's property to develop the oil and gas estate. In New Mexico, such an implied easement is subject to the Surface Owner's Protection Act (SOPA),⁴⁹ discussed below. Additionally, civil actions such as quiet title actions,⁵⁰ partition,⁵¹ and adverse possession,⁵² among others, are applicable to the severed oil and gas estate. Finally, the severed interests are subject to taxation by the State including severance taxes on oil and gas and ad valorem taxes on production equipment, among others.⁵³

The owner of the executive right may grant an oil and gas lease,⁵⁴ with such lease also being an interest in real property.⁵⁵ A lease conveys a fee simple determinable,⁵⁶ the term of which is outlined in the habendum

48. Childers v. Talbott, 16 P. 275, 276 (N.M. 1888) (adopts English Statute of Frauds in New Mexico); for a discussion, see Beaver v. Brumlow, 231 P.3d 628 (N.M. 2010).

49. Surface Owners Protection Act, N.M. STAT. ANN. § 70-12-1, et seq. (2007).

50. N.M. STAT. ANN. § 42-6-1 (1953).

51. N.M. STAT. ANN. § 42-5-1 (1953).

52. See N.M. STAT. ANN. § 37-1-22 (1973), which allows for the acquisition of title by adverse possession as defined therein and bars an action to recover title not filed within ten years.

53. See Oil and Gas Severance Tax, N.M. STAT. ANN. § 7-29-1, et seq. (1985); Oil and Gas Ad Valorem Production Tax, N.M. STAT. ANN. § 7-32-1, et seq. (1985); Oil and Gas Emergency School Tax, N.M. STAT. ANN. § 7-31-1, et seq. (1985); Oil and Gas Production Equipment Ad Valorem Tax, N.M. STAT. ANN. § 7-34-1, et seq. (1985); Natural Gas Processor Tax, N.M. STAT. ANN. § 7-33-1, et seq. (1985); Oil and Gas Conservation Tax, N.M. STAT. ANN. § 7-30-1, et seq. (1985). For everything you ever wanted to know about oil and gas taxation in New Mexico, see THOMAS CLIFFORD, OVERVIEW OF NEW MEXICO TAXES ON OIL AND GAS PRODUCTION, <https://perma.cc/5KZ4-L5E6> (last visited Feb. 23, 2018).

54. If you've driven through Roswell, then you've seen the Hall-Poorbaugh Press Alien Mural that depicts aliens disseminating literature via paper form. More interesting to the oil and gas practitioner is the Hall-Poorbaugh Press lease form, which for years was the standard of the oil and gas lease in Southeastern New Mexico, akin to the Producer's 88 in Texas; *Alien Print Shop Mural*, ROADSIDE AMERICA, <https://perma.cc/GD58-ESRC> (last visited Feb. 23, 2018).

55. *Duvall*, 213 P.2d at 215; *Heath v. Gray*, 274 P.2d 620, 622 (N.M. 1954). Similarly, an overriding royalty carved from a leasehold is an interest in real property; *Christy v. Petrol Res. Corp.*, 691 P.2d 59 (N.M. Ct. App. 1984).

56. A fee simple determinable is an estate in land that automatically terminates upon the occurrence of a specified event. Until such occurrence, the

clause,⁵⁷ usually consisting of a set primary term (three years) and a secondary term (for so long thereafter), the maintenance of which is dependent on production in paying quantities.⁵⁸ The lack of production in paying quantities automatically terminates the lease at the end of the primary term or during the secondary term, unless various savings clauses are invoked, including continuous operations, payment of delay rentals, or shut-in gas royalties. Failure to timely pay delay rentals during the primary term or shut-in gas royalties during the secondary term will automatically terminate the lease.⁵⁹ The statute requires lessees to execute a release of a forfeited oil and gas lease within thirty days of its expiration⁶⁰ or be subject to a \$100 penalty and payment of the lessor's reasonable attorney's fees.⁶¹

A typical habendum clause will also allow extension of the lease so long as operations are being conducted. In New Mexico, a "party may prove that it has actually commenced drilling operations with evidence that it committed resources, whether on-site or off-site, that demonstrate its present good-faith intent to diligently carry on drilling activities until completion."⁶² This permissive standard considers back room operations

grantor retains the possibility of reverter. The grantor of a fee simple determinable in a typical oil and gas lease additionally retains the lessor's royalty. The habendum (granting) clause in an oil and gas lease determines the duration of the fee simple determinable, which can be indefinite. For example: "for a term of three years, and for so long thereafter as oil or gas is produced . . ."

57. *Maralex Res., Inc. v. Gilbreath*, 76 P.3d 626, 630 (N.M. 2003); *Bolack v. Hedges*, 240 P.2d 844 (N.M. 1952).

58. *Greer v. Salmon*, 479 P.2d 294, 295-96 (N.M. 1970); commercial quantities is analogous to "production in paying quantities" as per *Maralex Res., Inc.*, 76 P.3d at 630. *Town of Tome Land Grant v. Ringle Dev. Co.*, 240 P.2d 850 (N.M. 1952) (concluding the mere discovery of oil and gas cannot extend a lease).

59. As to shut-in payments, see *Greer*, 479 P.2d 294; as to delay rentals, see *HNG Fossil Fuels Co.*, 656 P.2d 879.

60. N.M. STAT. ANN. § 70-1-3 (1953).

61. *Id.* § 70-1-4.

62. *Enduro Operating, LLC v. Echo Prod., Inc.*, 2018 WL 897360, at *1 (N.M. 2018).

(1) actual drilling is conclusive proof, but is not necessary, (2) obtaining a permit is not essential, (3) activities such as leveling the well location, digging a slush pit, or other good-faith commitment of resources at the drilling site will suffice as evidence of the parties' present intent to diligently carry on drilling activities until completion, and (4) the off-site commitment of resources, such as entering into an enforceable drilling contract requiring the diligent completion of the well, will also suffice as evidence that the operator actually commenced drilling operations.

Id. at *4.

such as execution of a drilling contract, as well as on site activities, to constitute commencement as a matter of law, provided they are carried on with the good-faith intention to complete the well. This is confirmation and clarification of the prior standard, which considered almost any action to constitute commencement.⁶³

The execution of an oil and gas lease transfers all of the mineral estate to the lessee, while the lessor retains a portion of the royalty estate and the possibility of reverter (fee simple determinable).⁶⁴ As a result, the lessee obtains the implied easement of necessity attendant to the mineral estate and may use “so much of the surface area as is reasonably necessary for . . . drilling and production operations.”⁶⁵ The lessee’s use is limited by SOPA,⁶⁶ however, which grants certain rights to private fee landowners as well as surface tenants whose leasehold improvements could be damaged by oil and gas operations.

Under SOPA, notice must be given by either certified mail or in person five days prior to commencement of surface activities, including staking and surveying, and thirty days prior to drilling operations. Most importantly, SOPA provides for treble damages in the event clear and convincing evidence demonstrates that an operator willfully entered on the premises to drill without giving the required notice.

Once production is obtained, royalty payments are governed by the Oil and Gas Proceeds Payments Act,⁶⁷ which requires payments be made no later than six months after the first day of the month following the date of first sale, and thereafter not later than forty-five days after the end of the calendar month within which payment is received by the payor for production. The Proceeds Act allows for interest to be paid on unpaid or suspended royalties and provides for a penalty in certain circumstances. Despite language contained in a division order to the contrary, a lessor cannot contract away her right to receive interest payments on unpaid royalties as a matter of public policy.⁶⁸

63. See *Johnson v. Yates Petroleum Corp.*, 981 P.2d 288 (N.M. Ct. App. 1999).

64. See *Bolack*, 240 P.2d 844.

65. *Amoco Prod. Co. v. Carter Farms*, 703 P.2d 894, 896 (N.M. 1985) [hereinafter *Carter Farms*]; *Kysar v. Amoco Prod. Co.*, 93 P.3d 1272, 1278 (N.M. 2004) (noting New Mexico case law on production in paying quantities is consistent with the principles announced in *Carter Farms*, 703 P.2d 894).

66. N.M. STAT. ANN. § 70-12-1, et seq. (2007).

67. N.M. STAT. ANN. § 70-10-1, et seq. (1985).

68. *First Baptist Church of Roswell v. Yates Petroleum Corp.*, 345 P.3d 310 (N.M. 2015); for a thorough review of the case, see Thomas C. Turner, Jr., *NM: Strong Public Policy Favors Payment of Interest on Suspended Royalties*, BUCKLEY & TURNER (July 27, 2016), <https://perma.cc/7M6R-YZ8B>.

It is common for operators to pool two or more oil and gas leases covering fee lands into spacing⁶⁹ or production units.⁷⁰ “Communitization” is the term used for pooling fee, state,⁷¹ and/or federal⁷² leases into a spacing or production unit. The intricacies of federal and state leases are discussed in subsequent sections of this article. Pooling agreements should be recorded in the local county records.⁷³

Where an oil and gas lease does not include a pooling clause, an operator must obtain ratification of the pooled unit from the lessor or pursue a forced pooling order from the New Mexico Oil Conservation Commission.⁷⁴ Under the statute, forced pooled mineral owners receive a one-eighths royalty interest and a seven-eighths working interest with production and costs allocated on a surface acreage basis.⁷⁵ In the event a co-tenant refuses to pay his share of reasonable costs attributable to the drilling and completion of a well, an operator may reimburse itself out of the non-consenting co-tenant’s share of production for such costs, plus a risk penalty not to exceed 200%.⁷⁶

Non-participating royalty interest (NPRI) owners and overriding royalty interest (ORI) owners must also ratify pooled units. NPRI and ORI are likewise subject to forced pooling.⁷⁷

Unitization should not be confused with pooling and communitization. While the latter combine two or more leases to create spacing or production units, unitization is the combination of “an entire field [or pool] to be operated as a single entity.”⁷⁸ Developed to maximize efficiency and

69. See N.M. ADMIN. CODE § 19.15.15.1, et seq. (2008) for spacing requirements.

70. N.M. STAT. ANN. § 70-2-17 (1977). Spacing and production units were first developed in New Mexico as a mechanism to protect grazing rights of cattle ranchers who leased lands from the state in Lea and Eddy Counties. They were most successfully employed during the early days of the Hobbs field, and the longevity of the field can be credited to the original 40-acre spacing units; see ERA OF DISCOVERY, *supra* note 40, at 536.

71. N.M. STAT. ANN. § 19-10-53 (1955).

72. See 30 U.S.C. § 226(m) (2014).

73. *Owens v. Superior Oil Co.*, 730 P.2d 569 (N.M. 1986).

74. N.M. STAT. ANN. § 70-2-17(C) (1977); N.M. ADMIN. CODE § 19.15.13.8 (2008).

75. See *supra* note 74.

76. *Id.*

77. N.M. STAT. ANN. § 70-2-17(C) (1977).

78. PATRICK H. MARTIN & BRUCE M. KRAMER, WILLIAMS & MEYERS, OIL AND GAS LAW § 901 (3d ed., 2007); *Kysar*, 93 P.3d at 1277 (includes detailed discussion on differences between pooling, communitization, and unitization).

economic returns, prevent waste, and protect correlative rights,⁷⁹ the original unitization scheme was “patterned after similar [water] irrigation systems in the parched American West.”⁸⁰

The State of New Mexico enacted the Statutory Unitization Act (SUA),⁸¹ which applies to “any type of operation that will substantially increase the recovery of oil [but] . . . not to what the industry understands as exploration units.”⁸² Unitization for exploration, then, is not common on fee lands. Such practice however, is common on state⁸³ and federal lands.⁸⁴

New Mexico gauges a lessee’s conduct by the reasonably prudent operator standard⁸⁵ and recognizes several implied covenants. Such covenants include the implied covenant to develop,⁸⁶ the implied covenant to prevent drainage, which must be shown by proof of substantial damage,⁸⁷ and the implied covenant to market production.⁸⁸ Implied covenants are superseded by the express terms of a lease⁸⁹ and can only be invoked in the absence of such express terms.

As a general rule, New Mexico courts will interpret an oil and gas lease against the lessee.⁹⁰ New Mexico has rejected the plain-meaning, or four corners rule, of contract interpretation⁹¹ and instead employs a

79. See ROBERT McNALLY, *CRUDE VOLATILITY: THE HISTORY AND THE FUTURE OF BOOM-BUST OIL PRICES* (2017).

80. *Id.* at 54. For a better historical understanding of the development of unitization, see Norman Nordhauser, *Origins of Federal Oil Regulation in the 1920’s*, 47 *BUS. HIST. REV.* 53 (1973).

81. See N.M. STAT. ANN. § 70-7-1, et seq. (1975).

82. *Id.* § 70-7-1.

83. See NEW MEXICO STATE LAND OFFICE, *OIL AND GAS MANUAL* 203 (July 2014), <https://perma.cc/79T6-L6PK>.

84. See 43 C.F.R. § 3181.1, et seq. (1998).

85. *Libby v. De Baca*, 179 P.2d 263 (N.M. 1947).

86. *State ex rel. Shell Petroleum Corp. v. Worden*, 103 P.2d 124, 126 (N.M. 1940) (“after production of oil and gas in paying quantities is obtained, [a lessee] will thereafter continue the work of development for production of oil and gas with reasonable diligence as to the undeveloped portion of the leased land”).

87. *Cone v. Amoco Prod. Co.*, 532 P.2d 590 (N.M. 1975).

88. *Libby*, 179 P.2d 263 (applying the reasonably prudent operator standard to lessee’s conduct and imposing the implied covenant to market).

89. *Continental Potash, Inc. v. Freeport-McMoran, Inc.*, 858 P.2d 66 (N.M. 1993); *Shell Petroleum Corp.*, 103 P.2d 124.

90. See *Greer*, 479 P.2d 294.

91. *C. R. Anthony Co. v. Loretto Mall Partners*, 817 P.2d 238, 243 (N.M. 1991) (as per the four-corners doctrine, “New Mexico case law to the contrary is

contextual approach.⁹² Even when the terms of an oil and gas lease or deed are unambiguous, a New Mexico court may consider circumstantial evidence to deduce the intent of the parties.⁹³ The question of ambiguity is a matter of law to be decided by the trial court.⁹⁴ In regard to mineral conveyances, New Mexico adopted the *Duhig* rule.⁹⁵

This contextual approach equally applies to land descriptions.⁹⁶ To be legally sufficient, a land description must contain within itself the means by which the land can be located on the ground.⁹⁷ Specific references to other instruments such as deeds and plats that contain legally sufficient descriptions will satisfy the statute of frauds.⁹⁸

Finally, no discussion of oil and gas in New Mexico would be complete without mention of the New Mexico Oil Conservation Division (NMOCD). The NMOCD of the Energy, Minerals, and Natural Resources Department (EMNRD) is the primary regulator of oil and gas exploration and production in the State. The NMOCD enforces the New Mexico Oil and Gas Act,⁹⁹ enacted in 1935, as expanded by Chapter 19, Section 15 of the New Mexico Administrative Code. The NMOCD and the New Mexico

hereby overruled.”); *Mark V, Inc. v. Mellekas*, 845 P.2d 1232 (N.M. 1993); *Jaramillo v. Providence Wash. Ins. Co.*, 871 P.2d 1343 (N.M. 1993).

92. See *C. R. Anthony Co.*, 817 P.2d 238.

93. *Id.*; see *Mark V, Inc.*, 845 P.2d at 1235.

94. *C. R. Anthony Co.*, 817 P.2d 238; *Mark V, Inc.*, 845 P.2d 1232.

95. PATRICK H. MARTIN & BRUCE M. KRAMER, WILLIAMS & MEYERS, OIL AND GAS LAW 301 (6th ed., 2016):

[This] construction rule is based on the case of *Duhig v. Peavy-Moore Lumber Co.*, 135 Tex. 503, 144, S.W.2d 878 (1940), relating to reservations in deeds purporting to cover 100% interest in the premises. Under this rule the grantor is said to be estopped to deny the effectiveness of the instrument to convey the interest recited in the instrument’s granting clause.

See also *Atlantic Refining Co. v. Beach*, 436 P.2d 107 (N.M. 1968).

96. See *Hughes v. Meem*, 371 P.2d 235, 238 (N.M. 1962):

[I]t may be laid down as a broad general principle that a deed will not be declared void for uncertainty in description if it is possible by any reasonable rules of construction to ascertain from the description, aided by extrinsic evidence, what property is intended to be conveyed. It is sufficient if the description in the deed or conveyance furnishes a means of identification of the land or by which the property conveyed can be located.

97. *Id.*

98. *Id.*

99. N.M. STAT. ANN. § 70-2-1, et seq. (1989); N.M. ADMIN. CODE § 19.15.2, et seq. (2008).

Oil Conservation Commission (NMOCC) are empowered with concurrent jurisdiction to protect correlative rights and prevent waste and are granted broad authority to that end.¹⁰⁰ The New Mexico Statutes (NMSA) defines waste to include the production of oil and gas in excess of market demand, as well as operations for production of oil and gas that would reduce the total commercial quantities of recoverable potash.¹⁰¹ To this end, the NMOCD regulates spacing,¹⁰² special pool rules, proration and allowables,¹⁰³ drilling permits,¹⁰⁴ pooling,¹⁰⁵ forced pooling,¹⁰⁶ and all other facets of oil and gas development and production in the State.¹⁰⁷

IV. COMMUNITY PROPERTY

The community property regime in New Mexico is based on the civil law *ganancial* system of Spain and has existed in one form or another from first conquest to the present day.¹⁰⁸ All property acquired by either husband or wife during marriage, regardless of the location of their domicile, is presumed to be community property,¹⁰⁹ and the characterization of the property is determined at the time of acquisition.¹¹⁰ This presumption may be rebutted by a preponderance of the evidence.¹¹¹ Property includes the “rents, issues, and profits thereof”¹¹² and can be held by husband and wife as joint tenants (with or without right of survivorship), tenants in common,

100. N.M. STAT. ANN. §§ 70-2-11(a)-(b) (1977); § 70-2-6 (1979).

101. N.M. STAT. ANN. § 70-2-3 (1965).

102. N.M. ADMIN. CODE § 19.15.15 (2008).

103. *Id.* § 19.15.20; N.M. STAT. ANN. § 70-2-17 (1977).

104. N.M. ADMIN. CODE § 19.15.14 (2008); N.M. STAT. ANN. § 70-2-6 (1979).

105. N.M. ADMIN. CODE § 19.15.12 (2008); N.M. STAT. ANN. § 70-2-17 (1977).

106. N.M. ADMIN. CODE § 19.15.13 (2008); N.M. STAT. ANN. § 70-2-17 (1977).

107. *Index to Rules*, NEW MEXICO ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT, <https://perma.cc/9B2C-XN78> (last visited Feb. 23, 2018) (a helpful Index of the rules of the NMOCD).

108. Robert Emmet Clark, *New Mexico Community Property Law; The Senate Interim Committee Report*, 15 LA. L. REV. 573 (1955); GANANCIAL SYSTEM, *supra* note 8, § 5.

109. N.M. STAT. ANN. § 40-3-12(A) (1973).

110. This is known as the “relation back” doctrine or inception of title rule; *Hollingsworth v. Hicks*, 258 P.2d 724 (N.M. 1953). *Bustos v. Bustos*, 673 P.2d 1289 (N.M. 1983); *Nichols v. Nichols*, 648 P.2d 780 (N.M. 1982).

111. *C & L Lumber & Supply, Inc. v. Texas Am. Bank*, 795 P.2d 502 (N.M. 1990); *Arch, Ltd. v. Yu*, 766 P.2d 911 (N.M. 1988).

112. N.M. STAT. ANN. § 40-3-8(E) (1990).

or as community property.¹¹³ Community property is defined as all property acquired by either or both spouses during marriage, which is not separate property.¹¹⁴

Separate property consists of the property acquired by either spouse before marriage or after entry of a decree of dissolution of marriage, all property acquired by gift, bequest, devise, or descent during marriage, and property designated as separate property by a written agreement between the spouses.¹¹⁵ A “written agreement” includes a deed or other written agreement concerning property held by the spouses as joint tenants or tenants in common, in which the property is designated as separate property.¹¹⁶ However, “the recitation in a deed not signed by both spouses that the property is the ‘sole and separate property’ of a married man does not affect the presumption that the property is community.”¹¹⁷ Finally, property acquired after entry of a judicial order of division of property without a petition for dissolution of marriage is similarly separate property, and property may be designated as separate by judicial decree.¹¹⁸

New Mexico additionally recognizes “quasi” community property.¹¹⁹ This includes all real and personal property acquired by purchase or exchange by either spouse while domiciled outside of New Mexico which would have been community property if the spouse who acquired the property had been domiciled in New Mexico at the time of acquisition.¹²⁰

A significant caveat exists to the presumption that property acquired during marriage belongs to the community. Prior to July 1, 1973, property acquired by a married woman by a written instrument in her name alone, or in her name and the name of another person not her spouse, was presumed to be her separate property. The passage of the Equal Rights Amendment to Article II, Section 18 of the New Mexico Constitution in November 1972 made this presumption unconstitutional.¹²¹ In response, the Community Property Act of 1973, effective July 1, 1973, updated New Mexico statutes to comport with the newly passed Equal Rights Amendment, prospectively eradicating the presumption.

113. *Id.* § 40-3-2.

114. *Id.* § 40-3-8(B).

115. *Id.* §§ 40-3-8(A)(1)-(5).

116. *Id.*

117. *C & L Lumber & Supply, Inc.*, 795 P.2d at 505.

118. N.M. STAT. ANN. §§ 40-3-8(A)(1)-(5) (1990).

119. *Id.* § 40-3-8(C).

120. *Id.* §§ 40-3-8(C)(1)-(2).

121. Anne K. Bingaman, *The Community Property Act of 1973: A Commentary and Quasi-Legislative History*, 5 N.M. L. REV. 1, 25 (1974).

The Equal Rights Amendment additionally affected descent and distribution of community property. From enactment of the statutes in 1907 to July 1, 1973, New Mexico denied the power of testamentary disposition over community property to wives.¹²² Under the prior regime, the wife's share of community property automatically passed to her husband without the necessity of administration at her death regardless of the provisions contained in her will. There were no similar restrictions on the husband's testamentary power of disposition over his community property. The Community Property Act of 1973 remedied this inequity by granting the power of testamentary disposition over community property to wives.

In New Mexico, both spouses are required to join in a conveyance, mortgage, lease over five years, or contract to transfer *any* interest in community real property *and* separate real property owned by the spouses as cotenants in joint tenancy or tenancy in common, including interests in state and federal oil and gas leaseholds.¹²³ Prior to June 18, 1993, the failure of a spouse to join in a conveyance of community property made such conveyance void and of no effect. New Mexico courts have historically interpreted this requirement mechanically, refusing to allow subsequent ratifications to "breathe life into a dead instrument."¹²⁴

Recognizing the harsh result of such treatment, the New Mexico legislature amended the statute, effective June 18, 1993, to allow the non-signing spouse to later ratify in writing a void instrument of conveyance, mortgage, lease, or the like.¹²⁵ According to a well-respected New Mexico practitioner, the current best practice is to obtain a ratification from both spouses that includes present words of grant and conveyance and to give no effect to ratifications merely executed by one spouse prior to June 18, 1993.¹²⁶

Finally, it is important to note that New Mexico rejected common law marriage. A 1934 case held that common law marriages could not serve as

122. N.M. STAT. ANN. § 29-1-8 (1953).

123. N.M. STAT. ANN. § 40-3-13(A) (1993). Prior to 1915, joinder was required only for the sale of the homestead and not for all community real property. Bingaman, *supra* note 121.

124. English v. Sanchez, 796 P.2d 236 (N.M. 1990) (includes a very helpful history of the joinder requirement from enactment of the statutes of 1907 to 1990).

125. N.M. STAT. ANN. § 40-3-13(B) (1993); see 1993 N.M. Laws, ch. 165, § 1.

126. Gregory J. Nibert, *Overview of New Mexico Oil and Gas Law* 11, HOUSTON ASSOCIATION OF DIVISION ORDER ANALYSTS, <https://perma.cc/J35L-542J> (last visited Feb. 23, 2018).

a basis for establishing rights in property accrued during the time the spouses cohabited.¹²⁷

V. DESCENT AND DISTRIBUTION¹²⁸

Pat Garrett and Billy the Kid¹²⁹ never got along: the former is famous for killing the latter. Not known for planning ahead, it is most likely Billy the Kid died intestate. The New Mexico laws of intestacy, then, would have determined the disposition of his estate.

The Uniform Probate Code (the Statute) governs descent and distribution of a New Mexico resident's estate as well as the distribution of New Mexico real property owned by a non-resident (discussed *infra*).¹³⁰ Since July 1, 1973, the Statute allocates 100% of the decedent spouse's separate and community property to the surviving spouse where there are neither children of the marriage nor children of a previous union.¹³¹ In the event the decedent spouse died with surviving descendants, the statute apportions one-fourth of his separate property to the surviving spouse, and three-fourths of such property to his surviving descendants *by representation*,¹³² with his one-half share of the community designated to the surviving spouse.¹³³ There is a 120-hour survival requirement to inherit,¹³⁴ and a child in gestation prior to the decedent's death must survive 120 hours after its birth in order to inherit under the statute.¹³⁵ Finally, note that legally adopted children inherit equally as natural born children.¹³⁶

To public knowledge, Billy the Kid died unmarried with no descendants. In such case, and under the current regime, his surviving parent or parents, would inherit his entire estate.¹³⁷ In the event his parents predeceased him, his siblings, if any, would inherit his pistols, boots, and

127. See Bingaman, *supra* note 121, at 51; see *In re Gabaldon's Estate*, 34 P.2d 672 (N.M. 1934).

128. For everything you ever wanted to know (and more) about probate proceedings in New Mexico, see MERRI RUDD & LORI FRANK, *NEW MEXICO PROBATE JUDGES MANUAL* (2013), <https://perma.cc/TKK5-QKQP>.

129. For "a scrupulous and persuasive sifting of the evidence about Billy's life and activities," see MICHAEL WALLIS, *BILLY THE KID: THE ENDLESS RIDE* (2007).

130. N.M. STAT. ANN. § 45-1-101, et seq. (1993).

131. N.M. STAT. ANN. § 45-2-102 (1975).

132. *Id.* § 45-2-106.

133. *Id.*; N.M. STAT. ANN. § 45-2-103 (2017).

134. N.M. STAT. ANN. § 45-2-104 (2012).

135. *Id.*

136. *Id.* § 45-2-118.

137. *Id.* § 45-2-102(A)(2).

the “pocket watch he never did wind”¹³⁸ by representation.¹³⁹ If his parents and siblings predeceased him, his surviving grandparent or grandparents and their descendant(s) would inherit his estate by representation, with one-half going to the maternal side and one-half to the paternal side or all to the sole surviving side.¹⁴⁰ Note that this schema has been unchanged since statehood, with the exception that all inheritance from statehood to June 18, 1993, was *per stirpes* with *by representation* being the norm after such date.

As discussed in Section IV, from statehood to July 1, 1973, a wife lacked the power of testamentary disposition over her one-half community property share. Such share automatically passed to her husband upon her death without the necessity of probate.

From statehood to July 12, 1959, when a husband died intestate, his wife received her one-half community property share and one-fourth of her husband’s one-half interest in the community for a total of five-eighths.¹⁴¹ The children received the remaining three-eighths of the community *per stirpes*.¹⁴² Subsequent to July 12, 1959, absent a will, the wife inherited the husband’s one-half interest in the community without the necessity of probate.¹⁴³

The Uniform Probate Code specifically governs the distribution of New Mexico real property by non-resident estates under the rule of situs.¹⁴⁴ The presumption that all property acquired during marriage is community property equally applies to New Mexico natives as well as residents of common law property jurisdictions (i.e. non-community property states like Oklahoma).¹⁴⁵ Such presumption may be rebutted by a preponderance of the evidence.¹⁴⁶ It is common practice for a title

138. JOE ELY, *Me and Billy the Kid, on LORD OF THE HIGHWAY* (Hightone Records 1987).

139. N.M. STAT. ANN. § 45-2-103(A)(3) (2017).

140. *Id.* § 45-2-103(A)(4).

141. N.M. STAT. ANN. § 29-1-9 (repealed 1959).

142. *Id.*

143. *Id.*

144. N.M. STAT. ANN. § 45-1-101 (1993); *Allen v. Amoco Prod. Co.*, 833 P.2d 1199, 1201 (N.M. Ct. App. 1992) (“Each state retains the power to control the law governing its land titles.”). *Price v. Johnson*, 428 P.2d 978 (N.M. 1967).

145. *Laughlin v. Laughlin*, 155 P.2d 1010, 1020 (N.M. 1944): “Property acquired in community property states takes its status as community or separate property at the very time it is acquired, and is fixed by the manner of its acquisition.” The community property states are Louisiana, Arizona, California, Texas, Washington, Idaho, Nevada, New Mexico, and Wisconsin.

146. *Nicholas v. Nicholas*, 428 P.2d 978 (N.M. 1967).

examiner to rely on the community property presumption where the record lacks any evidence of rebuttal.

An additional wrinkle to the intestacy schema in New Mexico is the partial revocation of wills due to pretermitted heirs, omitted spouses, and divorced spouses. A child born or adopted *after* the execution of a will, and who is not provided for, will receive an intestate portion of the decedent's estate unless the will is clear about the testator's intention to omit the child.¹⁴⁷ Children born *before* the execution of a will can be omitted. Similarly, an omitted spouse who marries the testator after execution of a will is entitled to receive an intestate share of the decedent's estate unless such share is devised to a child of the testator born prior to the most recent marriage.¹⁴⁸ There are numerous additional caveats and conditions, and careful examination of the statutes is advisable before application.

New Mexico law is clear that "divorce is equivalent to death."¹⁴⁹ A divorced spouse is treated as predeceasing the testator and the decedent's share of the estate will be distributed under the residuary clause of the will. Divorce automatically severs the rights of spouses in joint tenancies with the right of survivorship unless the divorce decree provides otherwise, transforming the divorced spouses' interests into an equal tenancy in common.¹⁵⁰

New Mexico courts routinely partially revoke validly probated foreign wills. This is most common where a foreign resident devises New Mexico real property.¹⁵¹ Pretermitted heirs, omitted spouses, and divorced spouses are thus fertile grounds for litigation. Fortunately, the Uniform Probate Code provides several avenues to avoid such issues, discussed *infra*.

If Billy the Kid had been gifted with more self-awareness and foresight, he certainly would have died testate. To be valid, Billy's will would need to be typed or handwritten, signed by Billy, and additionally, signed by two witnesses in Billy's presence.¹⁵² The signature of one witness *and* a notary's signature are considered sufficient in New

147. N.M. STAT. ANN. § 45-2-302 (1995).

148. *Id.* § 45-2-301. See *Bell v. Estate of Bell*, 181 P.3d 708 (N.M. Ct. App. 2008) for a thorough discussion.

149. N.M. STAT. ANN. § 45-2-508 (1993); *Matter of Seymour's Estate*, 600 P.2d 274 (N.M. 1979).

150. N.M. STAT. ANN. § 45-2-804(B)(2) (2012).

151. See *e.g.*, *Allen*, 833 P.2d 1199 & *Price*, 428 P.2d 978, among numerous others.

152. N.M. STAT. ANN. § 45-2-502 (1995).

Mexico,¹⁵³ and interested witnesses, such as Billy's girlfriend (and likely devisee, Paulina Maxwell),¹⁵⁴ may sign.¹⁵⁵ A holographic will (a handwritten will signed *only* by El Chivato)¹⁵⁶ would be invalid as the Uniform Probate Code excludes holographic wills from the definition of "will."¹⁵⁷ New Mexico, however, will honor a holographic will signed only by the testator if it is executed in a jurisdiction that allows for one.¹⁵⁸

The Land of Enchantment's probate process is very accessible, as the Statute allows for informal¹⁵⁹ and formal¹⁶⁰ proceedings. Most counties provide informal probate forms, and *pro se* applicants are the norm.¹⁶¹ Upon application, a court will appoint a personal representative to oversee distribution of the estate. Generally, a will must be admitted to probate no later than three years after the decedent's death¹⁶² and is invalid until admitted to probate. Passage of title to real property relates back to the decedent's death.¹⁶³

153. *Id.* § 45-2-505.

154. Very little is known about Paulita Maxwell except her birth (1864), death (1929), and her hometown (Mora, New Mexico); it is rumored she was pregnant when Pat Garrett killed Billy the Kid. Speculation names Billy as the father, which could explain why he returned to Fort Sumner, the site of his death, instead of leaving the New Mexico territory when he learned Pat Garrett was hunting him. See Marshall Trimble, *Did Paulita Maxwell Bear Billy the Kid's Child?*, TRUE WEST MAGAZINE (Apr. 11, 2016), <https://perma.cc/KQU7-4FZX>.

155. Matter of Martinez' Estate, 664 P.2d 1007 (N.M. Ct. App. 1983); Billy's girlfriend, Paulita Maxwell, most likely would have been one of his devisees.

156. Billy's eponymous nickname, El Chivato, is Spanish for goat (hence, the "kid"), as fictitiously bestowed on him by Regulator gang member Jose Chavez y Chavez (played by Lou Diamond Phillips) in the classic western, YOUNG GUNS (Morgan Creek Entm't Grp. 1988).

157. N.M. STAT. ANN. § 45-1-201(A)(57) (2012); "'Will' does not include a holographic will."

158. N.M. STAT. ANN. § 45-2-506 (2016).

159. N.M. STAT. ANN. §§ 45-3-301-311.

160. N.M. STAT. ANN. §§ 45-3-401-414.

161. For example, the Santa Fe County Probate Court provides forms; *Probate Judge*, SANTA FE COUNTY, <https://perma.cc/6XGR-GKE7> (last visited Feb. 23, 2018). Additionally, the New Mexico Courts website contains a very thorough probate section with explanations and forms; *Forms*, NEW MEXICO COURTS, <https://perma.cc/8KXU-KCLA> (last visited Feb. 23, 2018).

162. N.M. STAT. ANN. § 45-3-108 (2012). In the event three years has passed and none of the exceptions to § 45-3-108 apply, a successful quiet title suit against the unknown heirs of a decedent can extinguish outstanding claims and render title marketable; see N.M. STAT. ANN. § 42-6-1, et seq. (2018).

163. N.M. STAT. ANN. § 45-3-101 (2012).

A surviving spouse may utilize a “Transfer of Title to Homestead Affidavit” to transfer title to her marital home without the need to initiate probate proceedings.¹⁶⁴ Such an affidavit is ineffective to transfer title to any real property other than the homestead.¹⁶⁵ Furthermore, New Mexico has recognized “transfer on death deeds.”¹⁶⁶

Even though Billy the Kid “rode the hard country down the New Mexico line,”¹⁶⁷ it is likely he was not a New Mexico resident. As such, foreign probate of his foreign will would not confer authority on his estate’s representative to convey real property located in New Mexico.¹⁶⁸ Furthermore, title to real property located in New Mexico is not marketable¹⁶⁹ until probate proceedings have been conducted. These two realities necessitate New Mexico proceedings to administer a foreign estate. Such proceedings include intestacy actions or the following three methods to transfer title to New Mexico real property via a foreign will: (1) original or concurrent probate proceedings in New Mexico; (2) ancillary probate proceedings; or (3) proof of authority.

Upon application, a New Mexico court will appoint a personal representative to oversee an intestate or testate estate. The personal representative is required to execute a distribution deed to the heirs,¹⁷⁰ but he is not required to conduct heirship proceedings since the distribution deed is conclusive evidence that the heir “has succeeded to the interest of the estate.”¹⁷¹

164. *Id.* § 45-3-1205.

165. *Id.*

166. N.M. STAT. ANN. § 45-6-401, et seq. (2014) (“Uniform Real Property Transfer on Death Act”).

167. ELY, *supra* note 138.

168. *Allen*, 833 P.2d 1199.

169. *Simpson v. Stallings*, 225 P.2d 139, 140 (N.M. 1950):

A marketable title is a title not subject to such reasonable doubt as would create a just apprehension of its validity in the mind of a reasonably prudent and intelligent person; one that a person of reasonable prudence and intelligence, guided by competent legal advice, would be willing to take and pay for at its fair value.

See also *Campbell v. Doherty*, 206 P.2d 1145 (N.M. 1949).

170. N.M. STAT. ANN. § 45-3-907 (1975).

171. *Id.* § 45-3-908; however, as Sam Cooke crooned, “Please hear my cry” and conduct heirship proceedings. It makes life much easier for humble title attorneys and prevents third parties from challenging the probate proceedings for lack of due process.

Billy's representative may seek original or concurrent probate proceedings in New Mexico to probate his will. The venue for probate of a foreign will is the county where the non-resident decedent's property is located.¹⁷² Proceedings may be conducted simultaneously in New Mexico and the foreign jurisdiction.¹⁷³ The court will delay appointing a personal representative until thirty days after the decedent's death, unless the personal representative is the applicant in the New Mexico proceeding and was appointed in the foreign jurisdiction.¹⁷⁴

Ancillary probate proceedings are similar to those for the probate of a New Mexico resident's will.¹⁷⁵ To initiate, Billy's foreign personal representative would file an authenticated¹⁷⁶ copy of Billy's will and an authenticated copy of the domiciliary letters with a New Mexico court *in any county* where Billy owned real property.¹⁷⁷ The court would then grant Billy's foreign personal representative ancillary letters of administration,¹⁷⁸ which confer authority on the representative to convey real property in New Mexico.¹⁷⁹

The simplest and least expensive manner for Billy's representative to gain authority to convey his New Mexico real property is by "proof of authority." To do so, Billy's domiciliary foreign personal representative would file authenticated copies of her appointment in another state and a statement of her address with the probate court *in each county* where Billy owned real property.¹⁸⁰ The court would then assign a case number to the matter, but no final order would be signed.¹⁸¹ As such, it is best practice to have authenticated copies of the admitted proof of authority instruments filed in the office of the county clerk in order to substantiate the representative's authority to convey New Mexico real property.

172. *Id.* § 45-3-201(A)(2).

173. *Id.* §§ 45-3-308(C), 45-3-303(D).

174. *Id.* § 45-3-307.

175. N.M. STAT. ANN. § 45-4-207(B)(2) (1975); *see* §§ 45-3-101-1204.

176. N.M. STAT. ANN. § 45-1-201(A)(3) (2012) ("'authenticated,' with reference to copies, means certified or exemplified").

177. N.M. STAT. ANN. § 45-4-207(A) (1975).

178. *Id.*

179. *Id.* § 45-4-205.

180. *Id.* § 45-4-204.

181. According to a very well-respected New Mexico practitioner, an application for proof of authority should include language that admits the underlying will to probate in New Mexico as a will is not effective to pass title until it is admitted to probate in New Mexico. Although it is clear this was not the Legislature's intent when they passed the proof of authority statute, there is scant legislative history to provide guidance.

Finally, title in New Mexico is not marketable until a probate proceeding has been conducted. Therefore, an Affidavit of Death and Heirship sworn to by a disinterested affiant as to the marital history and heirship of the decedent will not suffice for marketable title purposes. Such affidavits, however, are customarily used to demonstrate devolution of small interests. Land departments are typically not uniform in their acceptance of an affidavit in lieu of probate proceedings.

VI.¹⁸² FEDERAL LANDS AND THE BUREAU OF LAND MANAGEMENT¹⁸³

A creature of merger, today's Bureau of Land Management (BLM) is the product of Harry S. Truman's combination of the United States General Land Office and the Grazing Service.¹⁸⁴ Now responsible for stewardship of over 256 million surface acres and 700 million acres of subsurface mineral estate, the BLM is America's "largest landlord."

As of 2015, the New Mexico state office of the BLM manages over 14,093,947 acres with a large portion of these lands located in two of the hottest oil and gas basins in the world: the San Juan and the Permian.¹⁸⁵ As such, familiarity with the Federal Mineral Leasing Act of 1920,¹⁸⁶ the rules and regulations of the Department of the Interior, and the BLM's Onshore Orders and National Notices to Lessees are critical for a New Mexico oil and gas practitioner. The United States Code (U.S.C.) is enacted by Congress but implemented by the Code of Federal Regulations (C.F.R.) as published in the Federal Register.

182. This section provides a limited overview of the Bureau of Land Management procedures regarding the acquisition and administration of Federal oil and gas leases in New Mexico. It does not cover leasing of Indian Lands, National Forest System Lands, or leases of oil and gas deposits in or under railroads and other rights-of-way. For a more in-depth treatment of this topic, see Gregory J. Nibert, *Administration of Federal Oil and Gas Leases in New Mexico* (2012), <https://perma.cc/N2VB-XF8L> (the author owes a large debt of gratitude to Mr. Nibert for his excellent paper). For the whole shebang, see *LAW OF FEDERAL OIL AND GAS LEASES* (Rocky Mtn. Min. L. Found. ed., 2017).

183. For an excellent and very concise history of Federal Lands and the BLM, see CAROL HARDY VINCENT, LAURA A. HANSON & CARLA N. ARGUETA, *FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA* (Mar. 3, 2017), <https://perma.cc/GS8J-8LTU>.

184. See generally *id.*; JAMES R. SKILLEN, *THE NATION'S LARGEST LANDLORD: THE BUREAU OF LAND MANAGEMENT IN THE AMERICAN WEST* (2009).

185. *BLM New Mexico Oil and Gas*, U.S. DEP'T OF THE INTERIOR BUREAU OF LAND MGMT., <https://perma.cc/5YZV-SSMD> (last visited Feb. 26, 2018).

186. 30 U.S.C. §§ 181-263; 43 C.F.R. §§ 3000-3930.

The Mineral Leasing Act of 1920 (MLA), as amended, provides for the leasing of federal lands that contain minerals, defined therein to include “mineral fuels including oil, gas, coal, oil shale, and uranium,”¹⁸⁷ with oil embracing “all nongaseous hydrocarbon substances other than those substances leasable as coal, oil shale, or gilsonite.”¹⁸⁸ Helium is expressly reserved to the United States.¹⁸⁹

Only United States citizens of majority age, including individuals, members of unincorporated associations,¹⁹⁰ and municipalities and corporations, are eligible to own interests in federal oil and gas resources.¹⁹¹ Citizenship requirements apply equally to heirs-at-law and devisees as the MLA requires sale by an alien devisee or heir-at-law within two years of inheritance.¹⁹² Aliens, however, may indirectly own interests in federal oil and gas leases through stock ownership in a United States corporation, provided the alien’s country (or for our friends from Roswell, home planet) grants the same rights to U.S. citizens.¹⁹³ Additionally, individual lessees may only hold up to 246,080 acres of federal leasehold in one state (except Alaska).¹⁹⁴ All federal oil and gas lease forms as well as assignments include the necessary citizenship requirement and acreage affidavits.

For purposes of leasing, federal lands are divided into two categories: competitive¹⁹⁵ and non-competitive.¹⁹⁶ Competitive leases are granted for lands located within a known geologic structure of a producing oil or gas field (or within special tar sand areas) upon the highest responsible qualified bidder’s payment of a bonus equal to or greater than the national

187. 30 U.S.C. § 21a (1996); 43 C.F.R. § 3000.0-5 (2005).

188. 30 U.S.C. § 181 (1981); 43 C.F.R. § 3000.0-5 (2005).

189. 30 U.S.C. § 181 (1981); 43 C.F.R. § 3100.1 (2016). For all you’d ever want to know about this noble gas, see Thomas C. Turner, Jr., *The Federal Helium Reserve*, NORTH HOUSTON ASSOCIATION OF PROFESSIONAL LANDMEN NEWSLETTER (Tex.), Fall 2016.

190. Unincorporated associations include partnerships trusts, joint ventures, tenants-in-common, joint tenants, and married couples, with all members required to be United States citizens.

191. 30 U.S.C. § 24 (2018); 43 C.F.R. § 3102.1 (2016).

192. 30 U.S.C. § 184(g) (2005); 43 C.F.R. §§ 3102.1-3102.5-3 (2016).

193. 30 U.S.C. § 181 (1981); 43 C.F.R. §§ 3102.1-3102.5-3 (2016).

194. 30 U.S.C. § 184(d)(1) (2005); 43 C.F.R. § 3101.2-1 (2016).

195. 43 C.F.R. §§ 3120.1-1 - 3120.7-3 (2016).

196. 43 C.F.R. §§ 3110.1 - 3110.9-4.

minimum acceptable bid (\$2.00 per acre)¹⁹⁷ and the first year's rental.¹⁹⁸ Traditionally, State BLM offices held oral bidding sessions, but recent updates to the MLA and C.F.R. allow for Internet based sales.¹⁹⁹

A competitive lease is granted for a primary term of ten years (term of years), and so long as oil or gas is produced in paying quantities (extended term),²⁰⁰ with a minimum royalty of 12.5%, and annual rentals²⁰¹ equal to \$1.50 per acre for the first five years of the primary term, and \$2.00 thereafter, or until production in paying quantities is achieved.²⁰² Rentals are due on or before the lease anniversary date and are due for a full year even when less than a year remains in the primary term. Late rental payments result in automatic termination of the lease unless a well capable of production in paying quantities is located on the lease, but note a terminated lease may be reinstated in certain circumstances.²⁰³ A minimum yearly royalty, not less than the rental required for that lease year, will be due each year after production in paying quantities is obtained.²⁰⁴ Spud of a well prior to the end of the primary term on a lease subject to an approved cooperative or unit plan will extend the primary term for an additional two years provided operations are diligently prosecuted.²⁰⁵

Non-competitive leases are those leases that received no bids or bids for amounts less than the minimum acceptable bid.²⁰⁶ They are struck off the lease sale and are available for leasing within thirty days of rejection and for a period of two years thereafter.²⁰⁷ Such a lease will be granted without competitive bidding to the first qualified person to make application for the lease, plus a \$75.00 application fee.²⁰⁸ After the two-

197. 43 C.F.R. § 3120.1-2(c) (2016): "The national minimum acceptable bid . . . shall not be prorated for any lands in which the United States owns a fractional interest." The United States must be paid for 1 acre, even if it merely owns 1/2 of that acre.

198. 30 U.S.C. §§ 226(b)(1)(A)-(C) (2014); 43 C.F.R. § 3120.5-3, et seq. (2016).

199. 30 U.S.C. § 226(b)(1)(C) (2014).

200. *Id.* § 226(e); 43 C.F.R. §§ 3120.2-1, 3107.2-1 (2016).

201. 30 U.S.C. § 226(b)(1)(A) (2014); 43 C.F.R. §§ 3102.1-3103.3 (2016).

202. 30 U.S.C. § 226(d) (2014); 43 C.F.R. § 3103.3-1, et seq. (2016).

203. 43 C.F.R. § 3108.2-2 (2005): Reinstatement at existing rental and royalty rates is Class I Reinstatement. *Id.* § 3108.2-3: Reinstatement at higher rental and royalty rates is Class II Reinstatement.

204. 30 U.S.C. § 226(d) (2014).

205. *Id.* § 226(e).

206. *Id.* § 226(b); 43 C.F.R. § 3110.1 (2016).

207. 30 U.S.C. § 226(b) (2014); 43 C.F.R. § 3110.1 (2016).

208. 30 U.S.C. § 226(c)(1) (2014).

year period, non-competitive leases are again offered for competitive leasing.²⁰⁹ Finally, the terms and conditions for competitive leases apply to non-competitive leases as to royalty (12.5%), rentals, etc.

Once granted, a Federal oil and gas lease conveys record title to its lessee, which includes the leasehold, the obligation to pay rent, and the right to assign and relinquish the lease.²¹⁰ Operating rights, overriding royalties, and production payments may be severed from record title interests by assignment.²¹¹ An operating right, also known as a sublease, authorizes the holder of that right to enter upon the leased lands to conduct drilling and related operations, including production of oil or gas.²¹²

Assignments of record title and operating rights *must* be filed with the BLM in Santa Fe, New Mexico, in triplicate on the Bureau's approved form. They also *must* be approved by the BLM in order to be effective against the United States.²¹³ BLM approval of an assignment of record title terminates the original lessee's or assignor's obligations under the lease and transfers all such obligations to the assignee.²¹⁴ Assignment of 100% of record title to a portion of the leased premises results in the segregation of the base lease into two separate leases, discussed *infra*.²¹⁵ An assignment of record title in a separate zone or deposit, or of part of a legal subdivision, will not be approved.²¹⁶

In order to facilitate separate ownership and development of different depths/zones, the BLM provides for the creation of operating rights carved out of record title. The assignment of operating rights is akin to a sublease, and upon BLM approval, the record title owner remains responsible for all lease obligations.²¹⁷ Separate record title ownership with numerous parties owning operating rights in different depths is customary, especially on leases held by production for decades.

Overriding royalty interests as well as payments out of production may be created by reservation in an assignment of record title or operating

209. *Id.* § 226(c)(2)(B).

210. 43 C.F.R. § 3100.0-5(c) (2016).

211. *Id.*

212. *Id.* § 3100.0-5(d).

213. *Id.* § 3106.4-1.

214. *Id.* § 3106.7-6(a).

215. *Id.* § 3106.7-5.

216. *Id.* § 3106.1(a).

217. *Id.* § 3106.7-6(b).

rights or by separate assignment.²¹⁸ Separate assignments of such interests *should* be filed with the BLM, but approval is not required.²¹⁹

New Mexico is a notice recording jurisdiction.²²⁰ As a result, recordation of an instrument affecting real property in the local county records provides constructive notice to the world of the instrument's contents from the time of recording.²²¹ Unrecorded instruments are ineffective against a good faith purchaser without knowledge of the instrument.²²² Additionally, all instruments transferring an interest in oil and gas royalties in production must be recorded in the local county records to impart constructive notice to the world. If unrecorded, such instruments are ineffective against a good faith purchaser without knowledge.²²³

In this regard, it is important to note that filings with the BLM do not impart constructive notice and are for administrative purposes only.²²⁴ All assignments of interests in federal oil and gas leases must be recorded in the county records where the interests are located in order to impart constructive notice to third parties.²²⁵ This results in two chains of title, both of which must be examined and reconciled, as instruments filed in the county records often contain additional terms and conditions not included in the instruments filed with the BLM. While BLM approval is required, it does not signify that either party holds legal or equitable title to the lease.²²⁶ Additionally, approval is not necessary for an assignment to be effective as amongst the parties. However, an unapproved assignment will be ineffective as against the United States.

As discussed above, assignment of 100% of record title to a portion of the leased premises in a federal oil and gas lease results in the segregation of the lease (referred to as the "base lease") into two separate leases.²²⁷ Segregation also occurs when a portion of the leased premises is committed to a unit²²⁸ with the uncommitted lands segregated into a separate lease. This results in the creation of two separate, distinct leases

218. *Id.* § 3106.4-2.

219. *Id.*

220. N.M. STAT. ANN. § 14-9-1 (1991).

221. *Id.* § 14-9-2.

222. *Id.* § 14-9-3.

223. N.M. STAT. ANN. §§ 70-1-1, 70-1-2 (1953).

224. 43 C.F.R. § 3106.7-1 (2016).

225. N.M. STAT. ANN. § 14-9-2 (1953).

226. 43 C.F.R. § 3106.7-1 (2016).

227. *Id.* § 3106.7-5.

228. *Id.* § 3107.3-2.

that retain the original anniversary date, terms, and conditions of the base lease. The BLM customarily assigns a new lease number to the segregated lease.²²⁹

Generally, operations and production from a segregated lease in its primary term²³⁰ will not extend the base lease and vice versa.²³¹ A segregated lease will continue for the longest of either the remainder of the base lease's primary term or for an additional two years after the date of first discovery of oil or gas in paying quantities upon any portion of the lease.²³² A segregated lease carved out of a base lease in its extended term issued prior to September 2, 1960 will continue for two years after the effective date of assignment,²³³ while one carved out of a base lease in its extended term issued after September 2, 1960 will continue for two years after the effective date of assignment and for so long thereafter as oil or gas is produced in paying quantities.²³⁴ In both instances, the segregated lease will be on a rental status, even though extended for the above-listed periods.

The portions of a base lease in its primary term not dedicated to a unit will be segregated and will continue to the end of the base lease's primary term but not less than two years from the date of segregation.²³⁵ In the event portions of a lease in its extended term are later committed to a unit, however, the segregated lease (i.e. those lands outside the unit) will be maintained for so long as oil or gas is produced in paying quantities from

229. 43 C.F.R. § 3210.10 (2017).

230. Case law from the Interior Board of Land Appeals interpreting the U.S.C. and C.F.R. refers to the primary term as a lease's "fixed term of years," while the secondary term is referred to as the "extended term." See *Celsius Energy Co. v. Southland Royalty Co.*, 99 IBLA 53 (1987) (which turns on the IBLA's interpretation of Congress' use of the word "term").

231. *Celsius Energy Co.*, 99 IBLA at 59:

If segregation occurs when a lease is in a fixed term of years [i.e. primary term], the term of each segregated lease is the remainder of that term, but no less than 2 years, and so long thereafter as oil or gas is produced in paying quantities. . . . Even if the lease already is producing during its fixed term of years when segregation occurs, the lease is still considered to be in a fixed term of years.

232. 43 C.F.R. § 3107.5-1 (2016).

233. *Id.* § 3107.5-2.

234. *Id.* § 3107.5-3.

235. *Id.*; *Celsius Energy Co.*, 99 IBLA 53.

the unit.²³⁶ Additionally, note that segregation does not occur when portions of a lease are released from a unit, and such portions will continue for so long as oil or gas are produced in paying quantities.²³⁷

Federal lands will be unitized or communitized in order to promote conservation when it is determined to be in the public interest.²³⁸ As stated in Section III, unitization should not be confused with pooling and communitization. While the latter combine two or more leases to create spacing or production units, unitization is the combination of “an entire field [or pool] to be operated as a single entity.”²³⁹ The C.F.R. provides a model onshore unit agreement for unproven areas²⁴⁰ while non-federal unit agreements may be used where less than ten percent of the lands included in the unit are federal.²⁴¹ Approval from the New Mexico State Land Office is required where federal and state lands are communitized.²⁴²

The benefits of unitization are that unit operations and production are attributed to each individual lease in the unit area. Such leases will continue for so long as they are subject to the unit plan.²⁴³ Portions of leases eliminated from the unit area will continue for the longer of the lease’s term or two years from elimination from the unit plan or termination of said plan, *and* for so long as oil or gas is produced in paying quantities.²⁴⁴ Segregation only occurs when portions of a lease are *committed* to a unit plan and does not occur when portions of a lease are *eliminated* from a unit plan.

Once production in paying quantities is obtained, a unit operator must submit a participation schedule, which sets forth the “percentage of unitized substances to be allocated to each tract in the participation

236. “The statute does not give the segregated, nonunitized [sic] lease a new term at the time of segregation; it continues the term of the lease as it was prior to segregation, but for at least 2 years.” Thus, lands segregated from a base lease in its extended term will continue for so long as oil and gas are produced in paying quantities. *Celsius Energy Co.*, 99 IBLA at 59.

237. *Id.* at 58.

238. 43 C.F.R. § 3107.2-2 (2016).

239. See MARTIN & KRAMER, *supra* note 78.

240. 43 C.F.R. § 3186.1 (1998); note the C.F.R. does not provide a Model Onshore Unitization Agreement for enhanced recovery operations.

241. *Id.* § 3181.1.

242. *Id.* § 3181.4.

243. 43 C.F.R. § 3107.3-1 (2016).

244. *Id.* § 3107.4.

area.”²⁴⁵ Different pools or zones constitute separate participation areas,²⁴⁶ and production is allocated on an acreage basis.²⁴⁷

Prior to January 29, 1990, unleased federal lands committed to a unit were designated a “Not Committed Tract.” However, a 12.5% compensatory royalty is now due the federal government for federal unleased lands located in a unit, with the working interest from the unleased lands apportioned to the working interest owners upon a unit tract factor basis.²⁴⁸

Surface operations are governed by the C.F.R. and are explained in the Gold Book published by the BLM.²⁴⁹ Surface operations include geophysical operations, applications for permits to drill (APD), drilling and production, split estate procedures,²⁵⁰ and numerous other important topics. The Gold Book, however, does not cover operating within the Designated Potash Area (DPA). When operating within the DPA, the Secretary of the Interior’s Order No. 3324 re: Oil, Gas, and Potash Leasing and Development Within the Designated Potash Area of Eddy and Lea Counties, New Mexico, is essential reading.²⁵¹ It describes “island living” at its finest!²⁵²

245. *Id.* § 3186.1 (Model Onshore Unitization Agreement for Unproven Lands, § 11) [hereinafter MOUA].

246. *Id.*

247. MOUA, § 12.

248. *Id.* §§ 17, 12.

249. See U.S. DEP’T OF THE INTERIOR BUREAU OF LAND MGMT., BLM/WO/ST-06/021+3071/REV 07, THE GOLD BOOK: SURFACE OPERATING STANDARDS AND GUIDELINES FOR OIL AND GAS EXPLORATION AND DEVELOPMENT (2007). For a layman’s overview of the federal drilling process, see Leigh Black Irvin, *BLM Outlines Drilling Permit Process on Federal Lands*, FARMINGTON DAILY TIMES, May 27, 2017, <https://perma.cc/5W38-5YRH>.

250. Split estates refer to lands with private surface ownership and federal mineral ownership (hence “split”). For a good overview of split estates, see U.S. DEP’T OF THE INTERIOR BUREAU OF LAND MGMT. SPLIT ESTATE: RIGHTS, RESPONSIBILITIES, AND OPPORTUNITIES (2007).

251. U.S. DEP’T OF THE INTERIOR, ORDER NO. 3324 (Dec. 3, 2012), <https://perma.cc/9PLY-2PXC>. For a good overview of the Designated Potash Area, see Turner, Jr., *supra* note 38.

252. Under Order No. 3324, operations within the DAP must be conducted from established “Drilling Islands,” hence the pun; ORDER NO. 3324, *supra* note 251.

VII. STATE LANDS AND THE STATE LAND OFFICE

Aubrey Dunn, the Public Lands Commissioner (at least until January 2019),²⁵³ is a leading expert on oil and gas in New Mexico. A former banker and lifetime cattleman, Dunn is charged with optimizing State revenues while protecting New Mexico's heritage and future.²⁵⁴ Under his watch, the State Land Office in Santa Fe oversees the administration of nine million surface acres and thirteen million mineral acres, comprising the State's public lands.

The Enabling Act, the State Constitution, and the New Mexico Statutes vest authority to manage all state lands in the Public Lands Commissioner, subject to oversight by the courts.²⁵⁵ The New Mexico Administrative Code (NMAC), published in the *New Mexico Register*, is the body of law that implements and clarifies the statutes. The Commissioner is explicitly authorized to execute oil and gas leases in the name of the State of New Mexico covering State lands.²⁵⁶ Such leases cover oil and "gas of the hydrocarbon kind," as well as carbon dioxide gas, and helium gas (if executed after June 9, 1963).²⁵⁷ State leaseholds prior to June 9, 1963 did not include helium, but helium can be included in such leaseholds by application with the State Land Office (SLO) to stipulate the prior lease's terms to the current State lease form.²⁵⁸

State lands available for leasing are divided into two categories: restricted and unrestricted.²⁵⁹ The Commissioner of Public Lands may designate known productive areas as Restricted Districts, with such lands leased by competitive bid at a "Regular" sale.²⁶⁰

253. N.M. STAT. ANN. § 19-1-1 (1953) provides for the creation of the State Land Office and provides that the Public Lands Commissioner "shall have the management, care, custody, control and disposition thereof in accordance with the provisions of this chapter and the law or laws under which such lands have been or may be acquired." It is this authority the Commissioner exercises when leasing the State's oil, gas, and mineral resources; N.M. STAT. ANN. §§ 19-10-1 - 70.

254. The State Land Office's mission statement is "Optimize revenues while protecting our heritage and future." OIL AND GAS MANUAL, *supra* note 83, at 6.

255. As background, *see supra* Section III.

256. N.M. STAT. ANN. § 19-10-1 (1953).

257. *Id.* § 19-10-2 (defines natural gas to include carbon dioxide, helium, and gas of the hydrocarbon kind); N.M. ADMIN. CODE § 19.2.100.8.

258. N.M. ADMIN. CODE § 19.2.100.55.

259. N.M. STAT. ANN. § 19-10-3 (1985).

260. *Id.* § 19-10-16. The restricted districts are as follows: "townships 3 to 15 south inclusive, ranges 34 to 39 east inclusive; townships 16 to 20 south inclusive,

Restricted lands are further classified as regular or premium, with ratings assigned on a one to twenty percent scale for each of the following factors: oil and gas trends, oil and gas traps, reservoir volume and recovery rating, lease bonus rating, and exploration and activity.²⁶¹ If the cumulative rating is seventy-five percent or higher, the Restricted lands are classified as premium, with lower-scoring Restricted lands classified as Regular.²⁶² All state lands not classified as restricted are non-restricted lands and are leased to the highest bidder at monthly sales.

New Mexico employs several different statutory oil and gas lease forms, the use of which is contingent upon the categorization of the lands outlined above. Non-restricted lands are leased by Exploratory form,²⁶³ while the Commissioner may choose between the Discovery²⁶⁴ form or the Exploratory form when leasing Regular Restricted lands.²⁶⁵ The foregoing two forms, as well as an additional Development form, may be used to lease Premium Restricted lands.²⁶⁶

Upon payment of the highest bid, as well as the first-year rental to the Oil, Gas, and Minerals Division of the SLO,²⁶⁷ the State will issue Discovery and Development leases for a primary term of five years and for so long thereafter as oil or gas is produced in paying quantities.²⁶⁸ The

ranges 28 to 39 east inclusive; and townships 21 to 26 south inclusive, ranges 34 to 39 east inclusive, N.M.P.M.”

261. *Id.* § 19-10-3.

262. *Id.*

263. N.M. ADMIN. CODE § 19.2.100.A (2018); *see* N.M. STAT. ANN. § 19-10-4.1 (1985) for the Exploratory form.

264. *See* N.M. STAT. ANN. § 19-10-4.2 (1985) for the Discovery form.

265. N.M. ADMIN. CODE § 19.2.100.B (2018).

266. *Id.* § 19.2.100.C; *see* N.M. STAT. ANN. § 19-10-4.3 (1985) for the Development form.

267. There are two divisions of the Oil, Gas, and Mineral Resources Section of the State Land Office: the Oil, Gas, and Minerals Division (OGMD), which oversees leasing activities, and the Royalty Management Division (RMD), which oversees collection of royalty payments.

268. N.M. STAT. ANN. §§ 19-10-4.2, 19-10-4.3 (1985). The SLO issues numbers for its oil and gas leases in the following format: two-character alphanumeric prefix + four-digit number + assignment number (if any). For example: VC-1234-02. The prefix determines the type of lease and when it was granted, while the number denotes the lease’s order within that series (VA-1, VA-2, etc.), while the final number notates the number of times the lease has been assigned, if any. All leases granted prior to 1981 were for a primary term of 10 years and a 1/8 royalty. Since that time, the following prefixes have been utilized: LH – 10 Year Exploratory (1/8 royalty); VA – 5 Year Exploratory (1/8 royalty); V0 – Five Year Discovery (1/6 royalty); VB – Five Year Development (3/16 royalty); and

Discovery form provides for a one-sixth lessor's royalty, while the Development form provides for a royalty no less than three-sixteenths but no more than one-fifth.²⁶⁹ Shut-in royalty payments for both leases are authorized, equal to the greater of twice the annual rental or \$320.00 for each well per year.²⁷⁰ Shut-in royalties due fifteen years after the grant of a Discovery lease and ten years after the grant of a Development lease are equal to the greater of four times the annual rental or \$2,000.00. Initial annual rentals are to be not less than twenty-five cents per acre and no more than one dollar per acre, to be increased to the higher of double the rental or the highest rental rate prevailing in the area in the "secondary" term of a ten-year lease.²⁷¹

The Discovery and Development lease forms additionally provide numerous savings clauses.²⁷² Where production in paying quantities has not been established during the primary term, a lease may be maintained by diligently prosecuted continuous operations, upon lessor's approval of lessee's written application submitted prior to the end of the primary term.²⁷³ Additionally, in the event production in paying quantities ceases during the secondary term, the lessee must recommence operations within sixty days of cessation.²⁷⁴ In both instances, reports are due every thirty days, and cessation of operations for more than twenty continuous days results in automatic termination of the lease.²⁷⁵

An Exploratory lease is granted for a primary term of five years and for so long thereafter as oil and gas, or either of them, is produced in paying quantities and provides for a one-eighth lessor's royalty.²⁷⁶ Unique to the Exploratory form is a five year "secondary term" akin to an option to extend the primary term contingent upon payment of yearly rentals equal to twice the annual rental rate set forth in the lease.²⁷⁷ Inclusion of the secondary term is at the Commissioner's discretion.²⁷⁸ The shut-in royalty provisions, the rental provisions, and the savings clauses of the

VC – Five Year Development (1/5 royalty). OIL AND GAS MANUAL, *supra* note 83, at 73-74.

269. OIL AND GAS MANUAL, *supra* note 83, at 73-74.

270. *Id.*

271. N.M. ADMIN. CODE § 19.2.100.14 (2018).

272. N.M. STAT. ANN. §§ 19-10-4.2, 19-10-4.3 (1985); both at Paragraphs 14 & 15.

273. *Id.*

274. *Id.*

275. *Id.*

276. N.M. STAT. ANN. § 19-10-4.1 (1985).

277. *Id.*

278. *Id.* § 19-10-7(A).

Exploratory form are identical to those found in the Discovery form, detailed above.²⁷⁹

Once granted, a State of New Mexico oil and gas lease conveys “record title” to no more than two lessees,²⁸⁰ which includes the leasehold, the obligation to pay rent, and the right to assign and relinquish the lease. Dual ownership of record title results in a tenancy-in-common, subjecting both owners to joint-and-severable liability for all lease responsibilities.

A record title owner may enter into any agreement regarding the development of the leasehold, including the creation of contractual rights, overriding royalties, and production payments, without the approval of the state.²⁸¹ Although undefined, the author considers contractual rights in state leases to be similar to federal operating rights (sublease), as creation of such contractual rights generally bestows upon the grantee the right to enter upon the leased lands to conduct drilling and related operations including production of oil or gas, but does *not* relieve the record title owner of his responsibilities under the lease.²⁸²

Assignments of “record title” in state leases should be submitted to the SLO on the approved form, in triplicate, with the appropriate fee within 100 days of execution by the assignor(s).²⁸³ An assignment will not be approved if it is granted to two or more persons or entities, is for less than the assignor’s entire interest in any legal subdivision, or is for less than a legal subdivision, among other restrictions.²⁸⁴ Approval of an assignment

279. *Id.*; N.M. ADMIN. CODE § 19.2.100.14 (2018).

280. N.M. ADMIN. CODE § 19.2.100.20 (2018). The State of New Mexico has a very strict two-person or legal entity record title policy. No lease will be granted to more than two persons or entities and no assignment of record title will be granted to more than two persons or entities. Assignments of record title vest 50% interest in each of the two assignees.

281. *Id.* § 19.2.100.43. The NMAC corollary to Federal record title is “record owner,” while operating rights are not explicitly defined therein. The author, however, considers operating rights to be implied as a record owner may “enter into any other agreements with respect to the development of the leasehold premises.” N.M. STAT. ANN. § 19-10-13 (1953).

282. N.M. ADMIN. CODE § 19.2.100.43 (2018).

283. *Id.* § 19.2.100.39-40.

284. *See id.* § 19.2.100.41 for the full list of restrictions. As discussed in the OIL AND GAS MANUAL, *supra* note 83, at 107, New Mexico employs a curious procedure when assigning record title. If only one record title owner wishes to convey her interest, the other owner must be included as an assignor *and* as an assignee. For example, Sam Ehlinger and Tom Herman are record title owners of Lease VB-0405. In order for Sam Ehlinger to convey his interest in VB-0405 to

relieves the original lessee(s) or subsequent assignor(s) of all duties under the lease and transfers such duties to the assignee(s).²⁸⁵ All rights carved out of record title, including operating rights, overriding royalties, etc., may be filed with the SLO as a miscellaneous instrument,²⁸⁶ however, filing with the SLO and its approval is not required.²⁸⁷

As discussed in Section VI, New Mexico is a notice recording jurisdiction.²⁸⁸ As a result, recordation of an instrument affecting real property in the local county records provides constructive notice to the world of the instrument's contents from the time of recording.²⁸⁹ Unrecorded instruments are ineffective against a good faith purchaser without knowledge of the instrument.²⁹⁰ Additionally, all instruments transferring an interest in oil and gas royalties in production must be recorded in the local county records to impart constructive notice to the world. If unrecorded, such instruments are ineffective against a good faith purchaser without knowledge.²⁹¹

Assignments of record title must be recorded in the SLO, while miscellaneous instruments may be recorded in either the SLO or the local county records.²⁹² Unlike recordation of instruments with the BLM, recordation of all instruments in the SLO imparts constructive notice to the world.²⁹³ This requirement results in two chains of title, both of which must be examined and reconciled since miscellaneous instruments often include detailed and complex provisions not found in assignments of record title filed with the SLO.

In order to further conservation of the state's oil and gas resources, the Commissioner may communitize or pool state lands with federal and/or

NM O&G Co., both Sam Ehlinger *and* Tom Herman would need to join as assignors to convey their interests to NM O&G Co. *and* Tom Herman.

285. N.M. ADMIN. CODE § 19.2.100.43 (2018).

286. Miscellaneous instruments are any instrument that does not affect "record title" and include operating rights, overriding royalty interests, farm-in/farm-out agreements, as well as certificates of merger, name changes, probate proceedings, powers of attorney, etc. OIL AND GAS MANUAL, *supra* note 83, at 16.

287. *Id.*

288. N.M. STAT. ANN. § 14-9-1 (1991).

289. *Id.* § 14-9-2.

290. *Id.* § 14-9-3.

291. N.M. STAT. ANN. §§ 70-1-1, 70-1-2 (1953).

292. N.M. ADMIN. CODE § 19.2.100.43 (2018).

293. N.M. STAT. ANN. §§ 19-10-31, 19-10-13 (1953). For an excellent discussion on State lease recording requirements, see Zach Oliva & Robert "Eli" Kiefaber, *New Mexico State Lease Recording Requirements*, KIEFABER & OLIVA, <https://perma.cc/45RV-X35P> (last visited Feb. 26, 2018).

fee lands²⁹⁴ and may additionally enter into co-operative and/or unit agreements for development.²⁹⁵ Again, it is important to note that communitization is the combination of state, federal, and/or fee lands to satisfy the Oil Conservation Division's proration unit requirements for well spacing, while unitization is the combination of "an entire field [or pool] to be operated as a single entity."²⁹⁶

Communitization agreements covering state, federal, and/or fee lands will be granted for a two-year period, while all agreements including only state, or state and fee lands, are granted for a one-year period and for so long thereafter as oil or gas is produced in paying quantities.²⁹⁷ The state's communitization forms must be utilized and only the signature(s) of the record title owner(s) is required.

During its secondary term, a communitization agreement will automatically terminate in the absence for more than sixty days of production in paying quantities, shut-in gas royalty payments, or commencement of reworking operations. An Operator must file written notice of reworking operations with the SLO within thirty days of cessation of production and must provide progress reports every thirty days thereafter. Cessation of operations for more than twenty consecutive days is considered abandonment of the communitized area and will result in lease termination. Additionally, a communitization agreement will terminate if the size of its underlying proration unit is changed.²⁹⁸

Approval of a communitization agreement automatically conforms the terms of the communitized state lease(s) to the terms of the agreement.

294. N.M. STAT. ANN. § 19-10-53 (1955).

295. N.M. ADMIN. CODE § 19.2.100.51 (2018); N.M. STAT. ANN. § 19-10-45 (1961).

296. See MARTIN & KRAMER, *supra* note 78.

297. There are five Communitization Forms provided by the State: 1) State/State or State/Fee Communitization Form, 2) State/Federal or State/Federal Fee Communitization Form, 3) Consolidation of State Oil and Gas Leases, 4) Short Term Communitization Agreement Form, and 5) Carbon Dioxide or Helium Communitization Agreement Form; see generally OIL AND GAS MANUAL, *supra* note 83, at 165-95.

298. The OIL AND GAS MANUAL, *supra* note 83, at 174 includes this helpful example:

If, for example, a 320-acre communitization is formed for a gas well, but the gas well eventually depletes and is reclassified as an oil well, then the 320-acre communitization terminates and the oil pool proration unit becomes effective. If it is an 80-acre oil proration unit, then another communitization agreement will have to be approved if two separate tracts are involved.

Production of communitized substances is considered production from all leases included in the agreement and is allocated on a surface acreage basis. Segregation does not occur when only a portion of a state lease is included in a communitized area such that production of communitized substances maintains the entirety of the lease. Segregation, however, can occur when a state lease is committed to a co-operative or unit agreement, discussed *infra*.

To promote conservation, the Commissioner may dedicate state leases to co-operative or unit agreements. An application for such agreements must demonstrate that the agreement will promote conservation, that the state and each beneficiary institution will receive their fair share of the recoverable oil and gas in place in lands subject to the agreement, and that the agreement is in the best interest of the trust.²⁹⁹ The application must additionally include complete geologic and engineering information, which will be held confidential for six months or until the agreement is approved.³⁰⁰ Note that the Commissioner will not approve an agreement that includes unleased State lands.³⁰¹

Approval of a co-operative or unit agreement automatically amends the terms of the underlying state lease(s) to conform to the terms of the agreement but only as to the lands contained in the agreement; all lands lying outside of the agreement's boundaries maintain the original lease's terms and provisions.³⁰² Finally, it is important to note that production in paying quantities will generally maintain the entirety of a state lease.³⁰³ Assignment of a portion of the lease before or after production is obtained does *not* segregate the lease for maintenance purposes.³⁰⁴

There is an exception to this rule. State leases can be segregated in the event an approved co-operative or unit agreement so provides.³⁰⁵ For example, production from a state/fee Exploratory Unit will not hold the portion of the lease outside of the unit boundary (strict segregation),³⁰⁶

299. N.M. ADMIN. CODE § 19.2.100.51 (2018); N.M. STAT. ANN. § 19-10-45 (1961). See OIL AND GAS MANUAL, *supra* note 83, at 203-53.

300. See OIL AND GAS MANUAL, *supra* note 83, at 203-53.

301. *Id.* at 272.

302. *Id.*; N.M. STAT. ANN. § 19-10-53 (1955).

303. N.M. ADMIN. CODE § 19.2.100.38 (2018).

304. *Id.*

305. N.M. STAT. ANN. § 19-10-54 (1955).

306. See OIL AND GAS MANUAL, *supra* note 83, at 223 (Section 13 of the Form State/Fee Exploratory Unit Agreement). Louisiana civil law has the following corollary: Production from a conventional or compulsory unit embracing all or part of the tract burdened by a mineral servitude interrupts prescription [i.e. modified segregation], but if the unit well is on land other than that burdened by

while production from a state/federal/fee Exploratory Unit from a well located on the State lease inside the unit will hold all portions of the state lease inside and outside of the unit boundary (modified segregation).³⁰⁷ Finally, production from lands outside of a unit boundary will perpetuate those lands included within the unit even absent unit production.

In the event of a precipitous fall in the price of oil, the NMAC allows a record owner(s) to petition the SLO to decrease its royalty obligations. The royalty rate for each approved well will be lowered to five percent for a three year period upon the Commissioner's finding that the lessee has taken reasonable steps to minimize operating costs, the oil well will be plugged and abandoned in the near future if costs are not reduced, the well will produce for a longer period and more oil will be recovered at the reduced royalty rate, and a lower royalty rate will maximize revenue to the trust beneficiaries.³⁰⁸

The NMAC also allows the Commissioner to temporarily shut-in wells in the event of a severe reduction in the price of oil upon determination that the beneficiaries of state trust lands will be better served if wells are temporarily shut-in rather than produced at low prices.³⁰⁹ The wells will be shut-in for a two-year period unless extended or terminated sooner by the Commissioner.³¹⁰

The state's lands in southeast New Mexico contain some of the richest potash deposits in the world. NMOCC's Order No. R-111-P³¹¹ (Order) provides guidelines to drilling and producing in the state's "Potash Area." The purpose of the Order is to prevent waste, protect correlative rights, and assure maximum conservation of the oil, gas, and potash resources located within the Potash Area described in the Order.³¹²

the servitude, the interruption extends only to that portion of the servitude tract included in the unit [i.e. strict segregation]. LA. REV. STAT. § 31:37 (1975).

307. See OIL AND GAS MANUAL, *supra* note 83, at 237, 253, 270 (Section 18(i) of the Form State/Federal/Fee Exploratory Unit Agreement, Section 20(g) of the Form State/Fee Waterflood Unit Agreement, and Section 22(f) of the State/Federal/Fee Waterflood Unit Agreement).

308. N.M. ADMIN. CODE § 19.2.100.68 (2018).

309. *Id.* § 19.2.100.71.

310. *Id.*

311. N.M. OIL CONSERVATION COMM'N, ORDER NO. R-111-P (Nov. 23, 1987), <https://perma.cc/C25D-8LM3>.

312. *Id.*

CONCLUSION

Upon conclusion of this article, the reader should be convinced of Governor Lew Wallace's appraisal of the state: "All calculations based on our experiences elsewhere fail in New Mexico." Her Spanish civil law heritage, the history of her land titles, and the historical variances in her community property and descent and distribution regimes pose unique challenges to the oil and gas practitioner. The inclusion of Federal and State lands and their regulatory agencies further compound such challenges. This article, then, should be considered a strong foundation upon which to base further study, as all of New Mexico's revelations lead to further inquiries. She has thus earned her moniker: the land of enchantment.