

New Mexico Title Issues from a Texas Title Perspective

Drew Potts

Kirby, Mathews & Walrath, PLLC

Overview

New Mexico \neq Texas

This presentation will focus on areas of law related to oil and gas, limited to instances in which the law in New Mexico is *not* the same as the equivalent law in Texas.

Overview: Topics of Discussion

- Community Property
- Probate
- Trusts
- Forced Pooling
- Acknowledgments
- Joint Tenancy
- Intestate Succession
- Royalty Payments
- Patents
- Recording & Notice

Patents TEXAS

- Prior to September 1, 1895
 - Patents of land from the State of Texas include all minerals.
- September 1, 1895 – May 29, 1931
 - Relinquishment Act: Surface owner acts as agent for State; split profits 50/50.
- May 29, 1931 – June 19, 1983
 - 1931 Land Sales Act: 1/16 of minerals reserved to State as a free royalty.
- Tip: Obtain mineral classification letter from GLO for patents after 1895.

Patents

NEW MEXICO

- Patents issued by the United States
- Deeds from the State of New Mexico
 - Early patents included surface and minerals.
 - Later patents from the United States began to reserve minerals.
 - Problem: Patents filed in the county records are frequently on a template form, and are not an exact copy of the original patent.
 - Tip: Consult the records of the New Mexico State Land Office (State) and/or the records of the Bureau of Land Management (Federal).

Community Property: Presumption TEXAS

- Real property acquired during marriage is CP. (Tex. Fam. Code § 3.002)
 - Whether acquired in the name of one or both spouses.
 - Whether marriage is ceremonial or at common law.
- Rebuttable Presumption: “Clear and Convincing” evidence standard.
- Exceptions: gift, devise/descent; SP funds used; non-CP domicile.

Community Property: Presumption NEW MEXICO

Prior to July 1, 1973

- Wife: Real property conveyed to a married woman, in her name alone, was presumed to be her separate property.
- Husband: Real property conveyed to a married man, in his name alone, was presumed to be his community property.
 - (N.M.S.A. § 40-3-12)

Community Property: Presumption NEW MEXICO

July 1, 1973 - Present

- Property acquired during marriage by either husband or wife, or both, is presumed to be community property.
 - (N.M.S.A. § 40-3-12)

Community Property: Conveyances TEXAS

- “Sole management” community property:
 - If acquired in the name of only one spouse, the property may be conveyed by that spouse without joinder of the other spouse.
 - Tex. Fam. Code § 3.102
- Exception: Homestead
 - Tex. Fam. Code § 5.001
- Exception: Prior to January 1, 1968, husband was statutorily the sole manager of community property, even if title only in the name of wife.
 - Required joinder of husband, and a “privy” acknowledgement by wife.

Community Property: Conveyances

NEW MEXICO

- Both spouses must join in the execution of any conveyance of community property, including mineral/royalty deeds, oil and gas leases, and leasehold assignments.
 - Execution by one spouse void; *English v. Sanchez*, 110 N.M. 343 (1990).
- Exception: Valid power of attorney appointing spouse as AIF. (N.M.S.A. § 40-3-13)
- Caveat: After June 18, 1993, non-signing spouse may later ratify the conveyance.
 - N.M.S.A. § 40-3-13
 - Curative Tip: Request *both* spouses to execute ratification.
 - Curative Tip: Include granting language in ratification.

Separate Property: Conveyances TEXAS

- Prior To August 23, 1963:
 - Wife could not convey her separate property without husband's joinder; and required to include a "privity" acknowledgment.
 - Tex. Rev. Civ. Stat. art. 1299 (1925).
- After August 23, 1963:
 - Spouse may convey his or her separate property without joinder of other spouse.
 - Exception: Homestead. (Tex. Fam. Code § 5.001)

Separate Property: Conveyances

NEW MEXICO

- Both spouses must join in all conveyances of any interest in separate real property owned by the spouses as cotenants in joint tenancy or tenancy in common.
 - N.M.S.A § 40-3-13
 - If only one spouse owns a SP interest in the property, no joinder requirement.
 - Exception: Power of Attorney
 - Caveat: Ratification

Joint Tenancy

TEXAS

- Right of survivorship associated with joint tenancy abolished by statute.
 - Tex. Estates Code § 101.002 – Passes to heir/devisees; not surviving joint tenant.
- Exception: Written agreement, signed by all joint owners.
 - Tex. Estates Code § 111.001 and § 112.051.
 - Agreement may not be inferred from fact that property was held in “joint ownership.”

Joint Tenancy

NEW MEXICO

- Spouses may hold property as joint tenants (survivorship), tenants in common (separate property), or as community property.
 - N.M.S.A. § 40-3-2
- Property obtained by spouses as joint tenants presumed to be CP.
 - N.M.S.A. § 40-3-8(B)
- The right to hold property as joint tenants, including right of survivorship, is not altered by community property laws (except for spousal joinder requirement).
 - N.M.S.A. § 40-3-8(F)

Intestate Succession: Community Property TEXAS

- Prior to September 1, 1993
 - Surviving spouse retains 1/2 CP; children vested with 1/2 CP of deceased parent.
 - No probate proceedings required by statute.
- September 1, 1993 – Present
 - Surviving spouse vested with 8/8 of CP; no probate proceedings required by statute.
 - Exception: Not all children of deceased are children of surviving spouse.
 - Tex. Estates Code § 201.003 & 453.002

Intestate Succession: Community Property NEW MEXICO

- Prior to June 12, 1959
 - Surviving wife vested with 5/8 of CP (retained 1/2; plus 1/4 of decedent's 1/2); remaining 3/8 to children.
 - Surviving husband vested with 8/8 of CP.
 - No probate proceedings required by statute.
- June 12, 1959 – July 1, 1973
 - Surviving spouse vested with 8/8 of CP; no probate proceedings required by statute.
- Post July 1, 1973
 - Surviving spouse vested with 8/8 of CP.
 - Administration proceedings required to establish marketable title in heir(s).
 - N.M.S.A. § 45-2-102B and § § 45-3-101 through 45-3-103

Intestate Succession: Separate Property

TEXAS

- No surviving issue: $\frac{1}{2}$ to spouse
- Survived by issue: $\frac{1}{3}$ life estate to spouse
- No spouse or issue; one parent: $\frac{8}{8}$ to parent; unless parent is also survived by descendants; then $\frac{1}{2}$ to parent and $\frac{1}{2}$ to descendants
- Tex. Estates Code § 201.001 & 201.002

NEW MEXICO

- No surviving issue: $\frac{8}{8}$ to spouse
- Survived by issue: $\frac{1}{4}$ to spouse
- No spouse or issue; one parent: $\frac{8}{8}$ to parent; regardless of whether or not there are also surviving descendants of parent
- N.M.S.A. § 45-2-102 & 45-2-103

Intestate Succession: Half Bloods

TEXAS

- If the estate of the deceased is inherited by siblings (“collateral kindred”), those of the half blood inherit one-half as much as siblings of the whole blood.
 - Tex. Estate. Code § 201.057

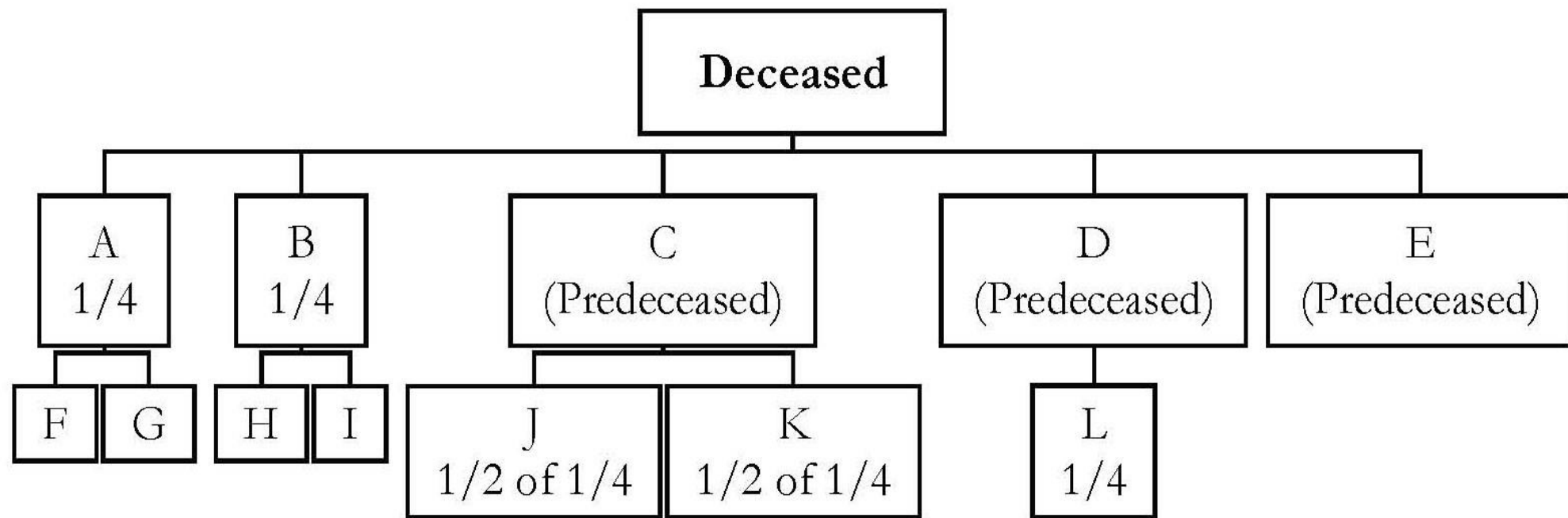
NEW MEXICO

- Relatives of the half blood inherit the same share they would inherit if they were of the whole blood.
 - N.M.S.A. § 45-2-107

Intestate Succession: “Per Stirpes”

- Property is divided into as many equal shares as there are:
 - surviving children of the deceased; and
 - predeceased children of the deceased who left surviving descendants.
- Each surviving descendant in the nearest generation is allocated one share.
- The share of each predeceased child with surviving descendants is divided in the same manner, with subdivision repeating at each succeeding generation until the property is fully allocated among surviving descendants of the predeceased child.

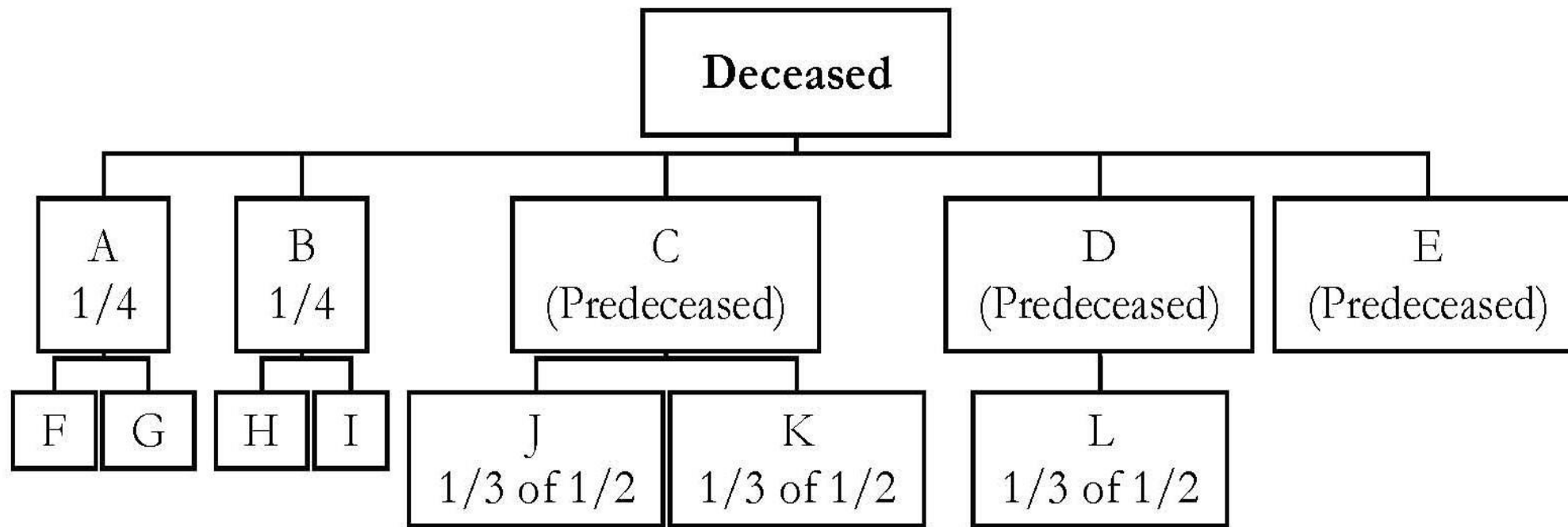
Intestate Succession: “Per Stirpes”



Intestate Succession: “Right of Representation”

- Property is divided into as many equal shares as there are:
 - surviving children of the deceased; and
 - predeceased children of the deceased who left surviving descendants.
- Each surviving descendant in the nearest generation is allocated one share.
- The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the decedent.

Intestate Succession: “Right of Representation”



Intestate Succession: “Right of Representation” & “Per Stirpes”

TEXAS

- First degree (or same degree if no first) of relationship: Per Capita
- Other descendants: Per Stirpes
- Tex. Estates Code § 201.101

NEW MEXICO

- Prior to 1993: Per stirpes
- After 1993: By representation
- N.M.S.A. § 45-2-106

Intestate Succession: Affidavits of Heirship

TEXAS

- If an Affidavit of Heirship is: 1) executed, 2) properly acknowledged and sworn, and 3) and filed of record for 5 years in the county where land is located or deceased was domiciled, then the statements contained therein are *prima facie* evidence of the identity of the deceased's heirs, and will be admitted as evidence in a judicial determination of heirship.
- Statements in Affidavit may still be rebutted by “anyone interested in a proceeding in which the affidavit or instrument is offered in evidence.”
 - Tex. Estates Code § 203.001

Intestate Succession: Affidavits of Heirship

NEW MEXICO

- No statutory recognition of Affidavits of Heirship.
- Appoint a Personal Representative in the administration of the Estate.
 - N.M.S.A. § 45-3-103
 - Preferably (PLEASE!!!), obtain a determination of heirship in the administration.
- Obtain Distribution Deed from Personal Representative.
 - N.M.S.A. § 45-3-711 and N.M.S.A. § 45-3-907
- Distribution Deed is “conclusive evidence” of grantee heir’s interest.
 - N.M.S.A. § 45-3-908

Probate: Time to File TEXAS

- Within 4 Years of Death
 - Tex. Estates Code § 256.003
 - Exceptions: Yes – Tex. Estates Code § 501.001
 - Caution: A person who for value, in good faith, and without knowledge of the existence of a will purchases property from a decedent's heirs after the fourth anniversary of the decedent's death shall be held to have good title to the interest that the heir or heirs would have had in the absence of a will, as against the claim of any devisee under any will that is subsequently offered for probate.
 - Tex. Estates Code § 256.003(c)

Probate: Time to File

NEW MEXICO

- Within 3 Years of Death
 - N.M.S.A. § 45-3-108
 - Excluded from Time Limit: A proceeding to probate a will previously probated at the testator's domicile (foreign wills).
- Exceptions: Yes – N.M.S.A. § 45-3-108(A)(1-5)

Probate: Holographic Wills

TEXAS

- Recognized by Statute
- A Will written wholly in the testator's handwriting is not required to be attested by subscribing witnesses.
 - Tex. Estates Code § 251.052
- Two witnesses required if not holographic

NEW MEXICO

- No Statutory Recognition
- Exception: A holographic will is valid if its execution complies with the law at the time of execution of the place where the will is executed **or** of the law of the place where at the time of execution or at the time of death the testator is domiciled.
 - N.M.S.A. § 45-2-506

Probate: Foreign Wills

TEXAS

- A foreign Will can be recorded in the County records if:
 - the Will disposes of land in Texas;
 - the Will has been probated according to the laws of state/country in which it was originally probated;
 - the Order Admitting to Probate is attached; and
 - both the Will and Order are *exemplified*
 - Tex. Estates Code § 503.001(a)

Probate: Foreign Wills

TEXAS

- In order to be *exemplified*, the Will and Order must:
 - be attested by and include the signature of the court clerk or other official who has custody of the will or who is in charge of probate records (“Certified”);
 - include a certificate with the signature of the judge or presiding magistrate of the court stating that the attestation is in proper form; and
 - have the court seal affixed, if a court seal exists.
 - Tex. Estates Code § 501.002(c) and 503.002

Probate: Foreign Wills

TEXAS

- An exemplified Will/Order filed in the County records is:
 - *Prima facie* evidence that the instrument has been admitted to probate according to the laws of the state or country in which it was allegedly admitted to probate; and
 - Valid as, and has the same effect as, a recorded deed of conveyance of all property in this state (insofar as the County in which recorded) covered by the instrument
 - Tex. Estates Code § 503.001(b)(1) and Tex. Estates Code § 503.051

Probate: Foreign Wills

NEW MEXICO

- No Authority to File Foreign Will in County Records
 - To be effective to prove the transfer of any property or to nominate a personal representative, a Will must be declared to be valid by an order of informal probate by the probate court or an adjudication of probate by the district court.
 - N.M.S.A. § 45-3-102

Probate: Foreign Wills

NEW MEXICO

- Post July 1, 1976, “informal” or “short form” probate is available if:
 - Deceased owned property in New Mexico;
 - No probate proceedings filed in New Mexico; and
 - Probate admitted in a different state.
 - N.M.S.A. § 45-4-204
- Authorizes foreign Personal Rep. to convey New Mexico property.
 - N.M.S.A. § 45-4-205
- *See also* Ancillary (“Formal”) Probate Proceedings. N.M.S.A. § 45-4-207

Probate: Foreign Wills

NEW MEXICO

- In order to obtain informal probate, file with the court of a county in which property belonging to the decedent is located “authenticated” copies of:
 - appointment (Order Admitting and Letters Testamentary);
 - any official bond he has given; and
 - a statement of the domiciliary foreign personal representative’s address.
- “Authenticated” – Either certified or exemplified post Jan. 1, 2012.
 - N.M.S.A. § 45-4-204 and § 45-1-201(A)(3)

Probate: Distribution Deeds

TEXAS

- No Requirement
 - Statutes focus on authority to sell.
 - Tex. Estates Code § 356.002
 - Tex. Estates Code § 401.006
 - Good practice to obtain anyway.
 - Estates remain open until closed.
 - Tex. Estates Code § 405.004-009

NEW MEXICO

- Required After 1975:
 - ...the personal representative shall execute an instrument or deed of distribution assigning, transferring or releasing the assets to the distributee as evidence of the distributee's title to the property.
 - N.M.S.A. § 45-3-907

Probate: Anti-Lapse Statutes

TEXAS

- Statute Applies To:
 - Descendants of testator's parents
- Fairly straightforward statute.
 - Tex. Estates Code § 255.153

NEW MEXICO

- Statute Applies To:
 - Descendants of testator's grandparents
 - Grandparents
 - Stepchildren
- Much more complex statute with much larger group of persons who might fit the description.
 - N.M.S.A. § 45-2-603

Trusts: “Blind” Trusts

TEXAS

- If property is conveyed to a person as “trustee,” but the conveyance does not identify a trust or the name of a beneficiary, the “trustee” may convey the property without subsequent question by a person who claims to be a beneficiary under a trust, or by the person designated as trustee in that person’s individual capacity.
- Reference to “trustee,” without more, does not:
 - Create a trust
 - Give notice or put others upon inquiry that a trust exists
 - Give notice that any person other than the “trustee” has a beneficial interest.
- Tex. Property Code § 101.001 & 114.082

Trusts: “Blind” Trusts

NEW MEXICO

- No Statutory Protections for “Blind” Trusts.
- Reference to “trustee,” without more, **does**:
 - Give notice or put others upon inquiry that a trust exists
- Unlike Texas, when a conveyance is made to a “trustee”:
 - Inquiry must be made into the authority of the “trustee”
 - A copy of the trust agreement (or certification of trust) should be recorded
 - N. M.S.A. § 46A-10-1013 – Sets forth requirements of a certification of trust

Attorney-in-Fact: Leasing Powers

TEXAS

- A “naked” power of sale does not include the power to lease for oil and gas.
 - *Bean v. Bean*, 79 S.W.2d 652 (Tx.App. 1935)
- As of September 1, 1997, a statutory durable PoA that includes a power of sale over “real property transactions” automatically includes the authority to execute oil and gas leases.
 - Tex. Estates Code § 752.102(a)(9)

NEW MEXICO

- A “naked” power of sale does not include the power to lease for oil and gas.
 - *James v. Anderson*, 39 N.M. 535 (1935)
- The instrument creating the power of attorney should expressly include the authority to execute oil and gas leases.

Recording & Acknowledgements

TEXAS

- An instrument affecting real property containing a ministerial defect, omission, or informality in the certificate of acknowledgment that has been filed for record for longer than two years is considered to have been lawfully recorded and to be notice of the existence of the instrument on and after the date the instrument is filed.
 - Tex. Civ. Prac. & Rem. Code § 16.033

NEW MEXICO

- Acknowledgments that have been filed of record for a period of ten years without challenge are considered valid, notwithstanding [certain enumerated problems]...are hereby confirmed and made valid to the extent as though the certificate of acknowledgment and the record thereof had been in the form prescribed by law.
 - N.M.S.A. § 14-13-25

Recording & Notice

NEW MEXICO

- Federal Leasehold
 - Federal leasehold instruments are required to be filed with the BLM.
 - No New Mexico statute provides that filing federal lease with BLM provides constructive notice.
 - To establish constructive notice, must file federal documents in County records of County where lease is located.
 - Note: To establish unquestionable constructive notice, some Operator's prefer to file a counterpart to the Federal document in the County records, utilizing a non-Federal form containing present grant/assignment language.

Recording & Notice

NEW MEXICO

- State Leasehold
 - State leasehold instruments may be filed in the State Land Office or recorded in the applicable county records.
 - Recording in either location constitutes constructive notice.
 - N.M.S.A. § 19-10-13 and § 19-10-31
 - Tip: When researching state leasehold, the search must include both State Land Office and county records.

Forced Pooling TEXAS

- Mineral Interest Pooling Act “MIPA”
 - Tex. Nat. Res. Code § 102.001, *et seq.*
 - Does not apply to any reservoir discovered and produced before March 8, 1961.
 - Does not apply to lands owned by the State.
 - Recent increase in utilization; but historically very rarely used.

Forced Pooling

NEW MEXICO

- N.M.S.A. § 70-2-17
 - Frequently used to force pool various tracts of land to allow for production.
 - Represents a large portion of the workload handled by the Oil Conservation Division.
 - State participation in pooling ("communitization") permitted [N.M.S.A. § 19-10-53].
 - Unleased owners receive 1/8 royalty interest.
 - Production costs allocated on a surface-acreage basis.
 - 30 days to elect to participate; 200% risk penalty for non-consenting owners within the unit.
 - Operator must commence drilling within 120 days of the end of 30 day notice period.

Forced Pooling

NEW MEXICO

- N.M.S.A. § 70-2-18
 - If an operator fails to obtain either voluntary or forced pooling, the operator is required to pay each interest owner located within the spacing or proration unit the greater of the amount that owner would have received: 1) if the interest was pooled, or 2) if the interest was not pooled.
 - Almost certainly results in excess royalty payments.
 - Contrast with royalty payments attributable to allocation wells drilled in Texas.

Royalty Payments TEXAS

- Tex. Nat. Res. Code § 91.402
 - 120 days after the end of the month of the first sale of production from the well.
 - 60 days after the end of the calendar month of subsequent oil production sales.
 - 90 days after the end of the calendar month of subsequent gas production sales.
 - If lease specifies different dates, lease controls.

Royalty Payments

NEW MEXICO

- N.M.S.A. § 70-10-3
 - 6 months after the first day of the month following the date of first sale.
 - 45 days after the end of the calendar month in which payment for production received.
 - If lease specifies different dates, lease controls.
- N.M.S.A. § 70-10-4
 - Unknown Royalty Owners: Operator may create a suspense account or interplead funds to court (Interest rate of Prime + 1.5%).

Royalty Payments

NEW MEXICO

- N.M.S.A. § 70-10-5
 - Known Royalty Owners: Unpaid royalties accrue 18% per year interest **unless**:
 - Good-faith title dispute based on a title opinion rendered by a New Mexico-licensed attorney
 - Good-faith question about entitlement to payment exposing Operator to risk
 - Total amount owed to owner at the end of the month is less than \$100
 - Owner has not executed a division order

Deed Construction: “Four Corners”

TEXAS

- Applied by Texas Courts
 - Requires the examination of an instrument in its entirety in order to determine the intent of the parties to the instrument, harmonizing all provisions as much as possible.
 - “The controlling intention is not the subjective intention the parties may have had but failed to express, but the intention actually expressed in the deed; that is, the question is not what the parties meant to say, but the meaning of what they did say.”
 - *Luckel v. White*, 819 S.W. 2d 459 (Tex. 1991)
 - *See also Concord Oil Co. v. Pennzoil Exploration & Prod. Co.*, 966 S. W. 2d 451 (Tex. 1998).

Deed Construction: “Four Corners”

NEW MEXICO

- *NOT* Applied by New Mexico Courts
 - Extrinsic evidence of the intent of parties, including “circumstances surrounding the making of the contract and of any relevant usage of trade, course of dealing, and course of performance” to a deed or contract is allowed in order to inform the interpretation of the deed or contract in question.
 - *C.R. Anthony Co. v. Loretto Mall Partners*, 112 N.M. 504 (1991)

Surface Operations

TEXAS

- No surface protection statutes.
- Caselaw created body of law.
- Accommodation Doctrine
 - *See, e.g., Getty Oil*, 470 SW2d 618 (Tex. 1971); et al.
 - “Reasonable use”

NEW MEXICO

- Surface Owners Protection Act (“SOPA”)
- Applies to private/state lands; fed unclear.
- Notice Requirements: 5 day and 30 day.
- Surface Use Agreement: Post bond if agreement is not obtained.
- Requires restoration of surface to substantially same condition as existed prior to operations.

Disclaimer

Information included herein is subject to change without notice.

The information included in this presentation does not constitute legal advice, and should not substitute as a replacement for obtaining a title opinion or other legal advice from an attorney licensed in the state of New Mexico.

Seriously, this presentation hasn't made anyone an expert.

Questions or Comments?

Drew Potts

dpotts@kmwenergylaw.com

