IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

RAYMOND L. KYSAR, PATSY SUE KYSAR, AND THE KYSAR FAMILY TRUST,

Plaintiffs/Appellants,

Ct. App. No. 29756

WILLIAM KARL JOHNSON and MARY M. JOHNSON, his wife, and all of their heirs and successors, known and unknown; BP AMERICA PRODUCTION COMPANY, f/k/a AMOCO PRODUCTION COMPANY; BP; the heirs and successors of MAUDE KEYS, including, but not limited to OLIE MAE McCOY, LAURA A. TOVEY, CLARENCE RIDDLE, EUGENE RIDDLE, JOYCE (JOY) RIDDLE LEE and TOMMY RALPH RIDDLE, BEN CASE, HENRY and GEORGIA KNOWLTON; ONOFRE R. JAQUEZ and ALVINA JAQUEZ, his wife, and all of their heirs and successors, known and unknown; COLEMAN OIL & GAS, INC.; WILLIAM HOLMBERG and JOYCE HOLMBERG, his wife; SHIRLEY M. HOLMBERG, and UNKNOWN ENTITIES A-Z; JOHN DOES I-X (as yet unidentified agents, employees or contractors of BP America Production Company, BP, or Unknown Entities A-Z, who have trespassed on the Kysar Ranch); and all other persons unknown, claiming any right, title, estate, lien, easement, or interest in the real property described in the complaint adverse to plaintiffs' ownership, or any cloud on plaintiffs' title thereto.

Defendants/Appellees.

Appeal from the Eleventh Judicial District Court
County of San Juan
Case No. D-116-CV 2005-824-1
The Honorable Robert A. Aragon

BRIEF-IN-CHIEF

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TABLE OF CONTENTS

This brief, according to the word count provided by WordPerfect Version X3, the body of the foregoing brief contains 10,704 words, exclusive of those parts excepted by Rule 12-213(F)(1). The text of the brief is composed in a 14-point proportionally-spaced typeface (Calisto MT).

TABLE OF AUTHORITIES

New Mexico Cases:

Cases from Other Jurisdictions:

New Mexico Statutes and Court Rules:

Other Authorities:

A. NATURE OF THE CASE

This is an action for trespass and quiet title by Mr. and Mrs. Kysar against BP America Production Company's use of the Back Gate Road on the Kysar ranch to access certain gas wells on their property. Specifically, the Kysars assert that BP is trespassing when it crosses the surface of the Jaquez oil and gas lease in section 34 to reach certain wells on the Keys leases in sections 22, 27 and 28. In the present case, the Kysars seek to enforce the decisions rendered by the New Mexico Supreme Court and the Tenth Circuit in prior litigation between the parties: *Kysar v. Amoco Production Co.,* 2004-NMSC-025, 135 N.M. 767, 93 P.3d 1272 [hereafter referred to as "*Kysar I*"]; and *Kysar v. Amoco Production Co.,* 379 F.3d 1150 (10th Cir. 2004)[hereafter "*Kysar II*"]. The two *Kysar* decisions established that BP does not have the right to cross the surface of the Jaquez lease in section 34 to access the Keys leases in sections 22, 27, and 28, because the oil and gas instruments do not grant an easement for access to other oil and gas tracts nearby, and such an easement will not be implied by the courts.

In this case, which involves exactly the same property and the same oil and gas leases, the Kysars seek to enforce and apply *Kysar I* and *Kysar II* to the rest of their property. These earlier decisions constitute the law of the case,

res judicata, and collateral estoppel, so they are binding on BP and the Kysars. Furthermore, *Kysar I* and *II* are also the law of the land in New Mexico, so they are binding on every landowner and every oil company within the State.

Kysar I and II establish that BP does not have the right to use the surface of the Jaquez oil and gas leases to reach certain gas wells that are located on the Keys leases, because the Jaquez leases do not contain a provision granting an easement across the leases for the purpose of developing other adjacent oil and gas leases from Maude Keys. Both the New Mexico Supreme Court and the Tenth Circuit have ruled that BP has no such right, yet BP continues to trespass. As a matter of *res judicata*, collateral estoppel, and law of the case, the Kysars are entitled to partial summary judgment that BP is trespassing when it uses the Back Gate Road across the Jaquez lease in section 34 for the purpose of accessing and developing the wells on the Keys leases.

Following the rulings in favor of the Kysars in 2004, the Kysars negotiated with BP over possible access rights. For a payment of $400,000, the Kysars agreed to grant BP an easement along the Back Gate Road to reach the Sullivan Gas Com E-1 well only. However, the Kysars refused to grant BP easements to other wells. On June 20, 2005, the Kysars filed this lawsuit and posted the Back Gate Road. Despite the lawsuit and the posting, BP has

continued to use the road, and the Kysars did not use physical means to stop them. Instead, the Kysars sought injunctive relief to bar BP's future unauthorized use of the access route, as well as damages for BP's past trespasses.

During pre-trial proceedings, and just before commencement of trial, the District Court made several rulings which nullified *Kysar I* and *II* and made it impossible for the Kysars to pursue their trespass claims. The District Court then entered a directed verdict in favor of BP, and the Kysars appealed.

B. FACTS

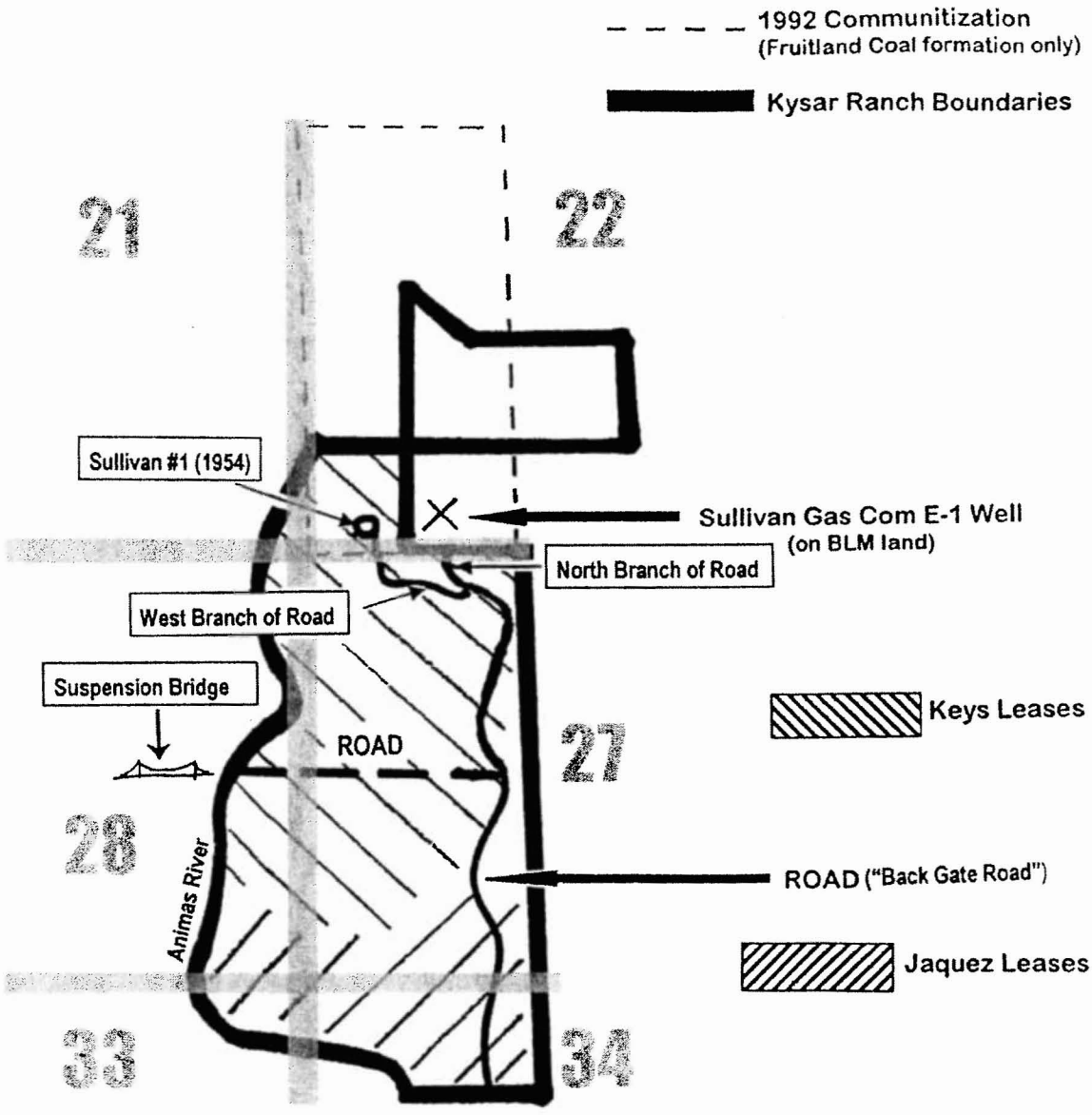
The facts, which are undisputed on many issues, have been summarized in *Kysar I* and *II*, so this summary is condensed.

The Kysars own a ranch of some 600 acres of irrigated land along the Animas River north of Cedar Hill, New Mexico, just south of the Colorado border. The schematic map from *Kysar I* (between ¶ 6 and ¶ 7) is reproduced at the end of this section. The northern portions of the ranch had been previously owned by Maude Keys, and the southern portions had been previously owned by Onofre Jaquez. Keys and Jaquez executed separate oil and gas leases on their respective properties. These leases allowed the lessor to go on the surface of the leased property to explore and develop oil and gas beneath the surface of the lease (sometimes called "subjacent minerals").

However, the leases did not grant an easement allowing the lessor to cross the property for the purpose of developing other tracts nearby (sometimes called "adjacent minerals"). The leases allowed communitization, but provided that no unit could exceed 320 acres, or cross any section line. *Kysar I*, 2004-NMSC-025, ¶¶ 40-45; *Kysar II*, 379 F.3d at 1155-56.

Ray Kysar acquired the ranch in 1982. On several occasions he questioned BP's right to use all of the surface of his property, and asked BP to produce all of the agreements and conveyances supporting its claims. BP asserted that it had the right to cross all of Kysars' property for any oil and gas purpose because BP was "the dominant estate," and because the oil and gas instruments gave BP those rights. However, BP refused to produce the oil and gas instruments. After the Kysars filed suit in *Kysar I* and obtained the documents through discovery, the Supreme Court and Tenth Circuit ultimately determined that the instruments in question did not give BP the sweeping rights which BP had claimed.

The Kysars and BP also had disagreements about damages being caused by BP's unreasonable and careless use of the surface. On January 1, 2000, the Kysars and BP negotiated a settlement agreement covering the surface damage issues, such as the prairie dog control, road damage, weed control, etc., but not easement or access issues.



For ease of reference on appeal,
on the attachment the section lines described in the leases
have been added to the schematic which appears at App. 33

Diagram is schematic and approximate

C. COURSE OF PROCEEDINGS

On May 26, 2000, the Kysars filed the *Kysar I* suit against BP, asserting that the oil and gas leases and communitization agreements did not give BP the right to use the Jaquez and Keys leases to access a well which BP had drilled on BLM land just north of the Kysar Ranch, developing a unit that contained a 37 acre portion of the Keys leases.

Kysar I was removed to federal court and ultimately heard by the Tenth Circuit, which then *sua sponte* certified two critical questions of state law to the New Mexico Supreme Court for a decision. In an extensive opinion for a unanimous Court, Justice Minzner ruled that if the signed oil and gas leases do not contain an express provision granting an easement across the property for the purpose of developing adjacent oil and gas tracts, the courts will not create such an easement by implication.

> Amoco's right to use either the Bridge Road or the Back Gate Road to develop and service a well outside the leased property must derive from the express intent of the parties. If Amoco is to use those roads, the parties must negotiate an agreement to do so. Such an agreement may define the scope and limits of an easement, as well as the consideration for use of the road and possible present and future maintenance.

Kysar I, 2004-NMSC-025, ¶ 50.

> We conclude that Amoco's reliance on the 1992 Communitization Agreement is misplaced. Amoco enjoys an implied right of access by virtue of that agreement only within those portions of the Kysars ranch that are subject to the agreement. We hold that Amoco is not entitled by virtue of that agreement to use the Bridge Road or the portions of the Back Gate Road that cross the land the Kysars obtained from Keys to access the Sullivan E Well. Our answers on the questions certified to this Court are as follows: (1) on the first question, we conclude that a mineral rights lessee, by virtue of a communitization agreement the lessee was authorized to execute by a prior owner of the fee, enjoys a right of access over the surface estate of the portion of the leased area subject to the agreement, although the lessee did not expressly grant this right; and (2) on the second question, we conclude that a mineral rights lessee, by virtue of a communitization agreement the lessee was authorized to execute by a prior owner of the fee, does not enjoy a right of access over the surface estate of the portion of the leased area not subject to the agreement when the lease did not expressly grant this right.

Id. ¶ 52.

After the Tenth Circuit received the Supreme Court's opinion, the Tenth Circuit applied the Supreme Court's decision and held that BP did not have the right to cross the Jaquez leases to develop oil and gas outside the Jaquez leases.

> We note, however, that the New Mexico Supreme Court's answer to the second certified question above appears to foreclose Amoco's arguments when it concluded that Amoco did "not enjoy a right of access

> over the surface estate of the portion of the leased area not subject to the [communitization] agreement when the lease did not expressly grant this right." *Id.* at 28. We hold that Amoco is not entitled by virtue of the 1992 Communitization Agreement to use the portions of the Back Gate Road that cross the land covered by the amended Jaquez lease (in Sections 27 and 34) to access the Sullivan E Well.

Kysar II, 379 F.3d at 1156.

After *Kysar I* and *II*, BP and the Kysars negotiated an express easement and access agreement giving BP a limited easement to access the Sullivan Gas Com E-1 well only, in exchange for a payment of $400,000 ("the 2005 easement"). This settlement was delayed for months because BP attempted to draft the doc uments so as to give itself a blanket easement across the entire Kysar property. The Kysars adamantly refused, and BP ultimately agreed that the $400,000 was for access to one well only, the Sullivan Gas Com E-1, not to any other well. [Exhibit 5 to Kysars' Preliminary Outline of Points and Authorities, RP 1307, 1340-53]

On June 20, 2005, the Kysars filed the complaint in the present case, and posted the Back Gate Road against BP's use of the road across the Jaquez leases to reach wells located on the Keys leases, *i.e.*, Keys Gas Com A1A, Keys Gas Com A2, Keys Gas Com A1, Keys Gas Com G1R, and Sullivan Gas Com 1. (The Kysars did not contest BP's use of the Back Gate Road to

reach wells on the Jaquez leases, or to reach the Sullivan Gas Com E-1 well per the 2005 agreement. [Complaint ¶ 15, RP 5]) The Kysars sought relief in Court rather than resorting to self-help; the Kysars did not block the road. BP continued to use the Back Gate Road despite the lawsuit and the posting.

In response to this lawsuit, BP raised many of the same arguments it had presented without success in *Kysar I* and *II*, including easement by implication or necessity; dominant versus subservient estate; and the Jaquez and Keys conveyances. BP also argued that it had obtained an easement by prescription, or alternatively, an easement by estoppel. The Kysars admitted that they had given consent to BP to use the Back Gate Road, but they claimed that BP had obtained their consent by misrepresentation or concealment, because BP claimed rights it did not have, based upon documents which it refused to produce. [Complaint ¶ 23, RP 6] As decided in *Kysar I* and *Kysar II*, those instruments did not convey the sweeping rights which BP claimed. Furthermore, it is not disputed that the Kysars withdrew their consent on June 20, 2005. [Complaint ¶ 20, RP 6; Exhibit M to Affidavit of Ray Kysar, RP 302]

The Kysars demanded a jury. The case was assigned to the Hon. Robert Aragon in Gallup. Judge Aragon made a number of pretrial rulings which

eviscerated the Kysars' case. On October 23, 2007, Judge Aragon ruled that the Kysars could not recover damages for trespass occurring prior to the filing of the lawsuit in 2005. [RP 1693-94] The Kysars submit that this ruling contradicts long-established law that damages may be recovered even for innocent or good faith trespass. This ruling also infringed the jury's role in finding the relevant facts. *See* Points 2, 3, 4 and 5.

On September 13, 2007, Judge Aragon entered an order granting summary judgment to BP. The import of this order is unclear, but the order appears to nullify *Kysar I* and *Kysar II*. *See* Point 1. For whatever reason, the District Court considered *Kysar I* and *II* to be irrelevant.

On June 26, 2009, the District Court entered an order barring the Kysars from presenting any evidence that their consent to BP's use of the Back Gate Road was induced by BP's misrepresentations about its rights, and BP's refusal to produce the oil and gas instruments, and its threats against the Kysars if they interfered with BP's rights. The Kysars submit that this is reversible error, because consent obtained through misrepresentation is invalid. *See* Points 2, 3 and 6.

Before the commencement of trial, the District Court prohibited the Kysars from testifying about the value of their property by offering proof of the

amounts actually paid by oil companies to the Kysars for easements along the Back Gate Road. At that time Coleman Oil and Gas had paid the Kysars about $750,000 for the right to use the Back Gate Road, and BP had paid the Kysars $400,000 for use of the same road. The Kysars submit that this ruling violates UJI 13-716 and 13-717 NMRA. *See* Points 4 and 5.

BP argued as a fallback position that it had obtained an easement by estoppel to use the Back Gate Road. In response, the Kysars pointed out that (a) New Mexico does not recognize the doctrine of easement by estoppel; (b) the Kysars' consent was obtained by misrepresentation, concealment, and duress, which makes the consent ineffective, for estoppel or otherwise; and (c) the elements of estoppel are missing, including the element of reliance, since BP relied on its own interpretation of the conveyances and the law, not on the Kysars' permission. Nonetheless, the District Court allowed BP to present easement by estoppel at trial, whilst at the same time barring the Kysars from presenting evidence that BP obtained by their consent through misrepresentation and concealment. These rulings violate long-established New Mexico precedent that the landowner may give consent to another to cross his property and then may withdraw his permission at any time, even after many years have passed. *See* Point 6.

After the jury was selected, but before opening statements, the District Court ruled that the Kysars could not mention the rulings in *Kysar I* and *Kysar II*. The District Court found that *Kysar I* and *Kysar II* were irrelevant. By barring *Kysar I* and *Kysar II*, the ruling made it virtually impossible for the Kysars to prevail on their trespass claim, or to explain to the jury why they posted the property. *See* Point 1.

In light of all these rulings, the District Court directed a verdict in favor of BP, in a form stipulated by the parties. The directed verdict expressly preserved all of the Kysars' claims on appeal. *See* Point 8.

The District Court did not explain the basis for most of its rulings, but it is evident that it did not regard *Kysar I* and *II* as controlling, even though those appellate decisions construed the very same oil and gas leases. *Kysar I* and *II* constitute the law of the case as between the Kysars and BP, so BP is precluded from re-arguing the issues which it argued unsuccessfully during the earlier appeals. Moreover, *Kysar I* and *II* constitute the law of the land in New Mexico. For whatever reasons, the District Court simply refused to follow *Kysar I* and *II*. Under *Kysar I* and *Kysar II*, the Kysars are entitled to partial summary judgment on the issue of trespass across the Jaquez lease.

D. ARGUMENT

Standard of Review: All of the points below raise questions of law which are decided *de novo* by this Court.

1. The District Court refused to follow the decisions of the New Mexico Supreme Court and the Tenth Circuit in *Kysar I* and *Kysar II*.

The Supreme Court and the Tenth Circuit have already construed the very same deeds, and oil and gas leases, and communitization agreements which are at issue in this case. *Kysar I* and *II* held that there was no implied easement that gave BP the right to use the Back Gate Road to cross the Jaquez lands to gain access to wells on adjacent tracts. The fact that the Kysars had subsequently acquired surface rights to the Keys Ranch did not give Amoco expanded access rights.

In this case, the Kysars simply sought to apply the rules of law in *Kysar I* and *II* to establish that BP is trespassing when it crosses the surface of the Jaquez leases via the Back Gate Road to reach wells on the Kysar property beyond the Jaquez leases, because the Jaquez leases do not contain a provision allowing access across the lease. The Tenth Circuit ruled on exactly this point. *See Kysar II*, 379 F. 3d at 1156, quoted above.

However, on September 13, 2007, the District Court entered partial summary judgment quieting title in favor of BP and against the Kysars, affirming BP's claim that it had the right to enter upon the Keys and Jaquez leases and use as much of the surface as necessary to develop the oil and gas covered by said lease. [RP 1597-1600] The import of this ruling is unclear, but the ruling seems to adopt the broad contention which BP argued in *Kysar I* and *II* – an implied easement for "whatever is reasonably necessary" on the lands – even though the Supreme Court and the Tenth Circuit rejected BP's contention.

Additionally, at the beginning of trial, the District Court entered an order excluding the *Kysar I* and *II* decisions and the law set forth therein. The District Court later memorialized its ruling on July 23, 2009: "Order Excluding Prior Court Rulings in Related Litigation between Kysar and BP." [RP 2014-15] This is plain reversible error of law, because the District Court is obligated to obey and apply these decisions as the law of the land, and as the law of the case, and as collateral estoppel, and as *res judicata*. These doctrines of issue preclusion bar BP from arguing the sweeping contentions that were rejected in *Kysar I* and *II*. Yet this is what BP did: it reargued the same issues, and it somehow convinced the District Court to disregard the prior

rulings of the Supreme Court and the Tenth Circuit, as though those decisions were legally irrelevant.

The oil and gas documents simply do not grant BP the right to cross the surface of the Jaquez lease in Section 34 to reach the Keys leases in Sections 22, 27 and 28. This issue is absolutely and clearly decided by the careful rules of law laid down by Justice Minzner in the prior litigation, and the Tenth Circuit's follow-up opinion applying Justice Minzner's rules to the Jaquez lease.

There is only one factual variation, which makes no difference to the legal analysis: the earlier litigation focused on the Sullivan Gas Com E-1 well, which was located just off the Kysar Ranch in Section 22, right next to the Keys lease. The Sullivan Gas Com E-1 extracts gas from 37 acres of the Keys lease in Section 22. *Kysar I*, ¶¶ 6, 12. The wells in the present case extract gas from the Keys leases in Sections 27 and 28, and are located on the surface of Kysar Ranch. While BP makes much of this surface distinction, it is irrelevant under Justice Minzner's rules of law, which are based on the boundaries of the oil and gas leases and communitization agreements, not surface boundaries. The legal resolution of this case, just like the earlier cases, is controlled by the

terms and boundaries set forth in the oil and gas documents, not in surface boundaries.

The prior litigation involved exactly the same property and the same conveyances that are at issue here, so the construction of these documents is a matter of law that can and must be decided by this Court on appeal, if the prior precedents are to have any meaning at all. Under the law of the land and the law of the case, the Kysars are entitled to a directed verdict, or at a minimum a jury instruction, that BP has no right to cross the Jaquez leases in Section 34 to develop the Keys leases in Sections 22, 27, and 28.

The District Court simply did not know what to do with the legal analysis of these instruments, even though they had already been construed by the Supreme Court and Tenth Circuits. Instead of following and applying the earlier decisions, the District Court somehow formed the erroneous opinion that the earlier decisions were irrelevant, and prohibited the Kysars from even mentioning them. This is the law of the case turned upside down.

In *Kysar I*, Justice Minzner made an exhaustive analysis of the Jaquez and Keys leases, the communtization agreements, and the various deeds on the Kysar Ranch. *Kysar I*, ¶¶ 5-23. She also engaged in an extensive discussion of oil and gas law, the statute of frauds, and the law of real

property. Then she reached several rulings of crucial importance. These rulings control the present case:

Ruling # 1. The Jaquez and Keys leases do not contain a provision allowing an oil company access across the lease to reach nearby leases. "The Jaquez lease also contained no provision allowing the mineral lessee the use of the surface to reach other tracts located outside the land covered by the lease." *Kysar I*, ¶ 10.

Ruling # 2. The Jaquez and Keys leases do contain several provisions limiting the effect of any communitization agreement: no unit can cross a section line; no unit can exceed 320 acres; and production within a unit does not continue the lease on portions of the lease outside the unit. *Kysar I*, ¶¶ 43, 44.

Ruling # 3. The 1992 communitization agreement did not benefit the Kysars as surface owners, and they did not sign or agree to it. Therefore the 1992 agreement did not modify the earlier leases or bind the Kysars. *Kysar I*, ¶¶ 45, 51.

Ruling # 4. Therefore, BP does not enjoy an implied right of access across one lease to develop oil and gas in a different lease, or a different unit,

or a different section. The implied right of access is limited to the confines of a particular 320 acre unit. *Kysar I*, ¶¶ 51, 52.

Ruling # 5. If BP needs or wants expanded access rights, it must negotiate and pay for a written access agreement with the Kysars. "[O]n these facts the right for which Amoco has argued ought to arise from an express agreement." *Kysar I*, ¶ 47.

> Amoco's right to use either the Bridge Road or the Back Gate Road to develop and service a well outside the leased property must derive from the express intent of the parties. If Amoco is to use those roads, the parties must negotiate an agreement to do so. Such an agreement may define the scope and limits of an easement, as well as the consideration for use of the road and possible present and future maintenance.

Kysar I, ¶ 50.

Once it received Justice Minzner's unanimous opinion, the Tenth Circuit applied it to the Jaquez lease. The Tenth Circuit noted that the Supreme Court's opinion "did not directly consider 'Amoco's right to use those portions of the Back Gate Road that cross the surface of the Kysars' property acquired from Jaquez.'" *Kysar II*, 379 F.3d at 1156. However, the Circuit held that "the New Mexico Supreme Court's answer to the second certified question above appears to foreclose Amoco's arguments when it concluded that Amoco did 'not enjoy a right of access over the surface estate

of the portion of the leased area not subject to the [communitization] agreement when the lease did not expressly grant this right.'" *Id.*

Ruling # 6. Therefore, the Tenth Circuit held that "Amoco is not entitled by virtue of the 1992 Communitization Agreement to use the portions of the back gate road that cross the land covered by the amended Jaquez lease (in Sections 27 and 34) to access the Sullivan E Well." *Id.*

These rulings absolutely foreclose BP's stubborn insistence that the Keys and Jaquez leases give it the right to cross the surface of the Jaquez leases in Section 34 to reach wells on the Keys lease. First, the Jaquez lease has no provision for access to other leases. Second, the Keys wells are in a different lease. Third, the Keys wells are in a different unit and different section from the Jaquez land in Section 34. Fourth, the leases provide that no unit shall cross a section line, or contain more than 320 acres.

Note that Justice Minzner's analysis does not depend on surface ownership, which can change many times after the oil and gas is leased. The analysis depends on the terms of the oil and gas leases, and in this case the lessees (BP's predecessors) did not bargain and pay for access across the leases to reach other leases. Nevertheless, BP contemptuously refuses to follow Justice Minzner's ruling that it must obtain a written access agreement from

the Kysars. BP is wilfully refusing to obey the New Mexico Supreme Court and the Tenth Circuit.

Not only did the District Court refuse to follow and apply *Kysar I* and *II*, the Court went so far as to order that the Kysars not even mention the earlier decisions. This ruling made it impossible for the Kysars to present a true historical narrative. Why did the Kysars withdraw their permission to post the Back Gate Road? Because they were relying on the decisions in their favor by the New Mexico Supreme Court and the Tenth Circuit Court of Appeals. By excluding any mention of these decisions, the District Court rulings would make it appear to the jury that the Kysars were acting unreasonably and arbitrarily, for no good reason, when in fact they were relying on two appellate court decisions in their favor. The ruling is extremely prejudicial, because it makes it appear that the Kysars were acting without justification. Furthermore, without mentioning these decisions, the Kysars have no way of presenting the facts about their dealings with BP over the years.

2. **There is a duty of good faith and fair dealing between an oil company and a surface owner. This duty obligates an oil company to produce the pertinent oil and gas leases and agreements when requested by the surface owner.**

After Ray Kysar bought the ranch, BP repeatedly told him that BP had the right to go anywhere on his property and drill wells wherever it wanted. Ray Kysar was skeptical about BP's claim that it had a blanket easement across all of his property, so he repeatedly asked BP to give him all of the oil and gas documents, so that he could find out whether BP had the sweeping rights BP claimed. [Affidavit of Ray Kysar ¶ 11 & Exhibits J, K and L, RP 266-67, 296-301] BP refused to produce its oil and gas documentation, but it continued to claim a blanket easement across all of the Kysars' land. Ray Kysar then tried to obtain the pertinent documents from a local title company, but the title insurer informed him that many oil and gas agreements are not filed in the County records, and that title companies do not issue title insurance or title opinions on oil and gas matters. [*Id.* ¶ 12, RP 267] Without the relevant documents, the Kysars had no way to challenge BP's claims. So the Kysars reluctantly consented to BP's use of the Back Gate Road to access all of his property, based upon BP's misrepresentations.

In *Kysar I*, the Kysars used the civil discovery process to force BP to produce all the oil and gas documents, including the Keys and Jaquez leases

with modifications, the communitization agreements, and the operating agreements. Once all of these instruments were produced, and analyzed by the Supreme Court (in exhaustive detail) and the Tenth Circuit, the documents did not support the sweeping access claims which BP had been making during all the years it refused to provide the documentation. In particular, the deeds, leases, and communitization agreements did not grant BP the right to cross the Jaquez leases to access the Keys leases. Therefore, after the *Kysar I* and *II* rulings, the Kysars withdrew their consent to BP's use of the Back Gate Road to access wells on the Keys property. [*Id.*, Exhibit M, RP 302] The Kysars also claimed that BP had fraudulently obtained their consent by misrepresenting its rights and refusing to provide the pertinent documents in its possession. In New Mexico, the law is clearly established that a landowner may give permission to another to use his land, and then withdraw his permission, even after many years, without creating an easement. *Algermissen v. Sutin*, 2003-NMSC-001, ¶ 11, 133 N.M. 50, 61 P.3d 176 (quoting *Hester v. Sawyers*, 41 N.M. 497, 505, 71 P.2d 646, 651 (1937)).

The Kysars asserted that BP's concealment and misrepresentation violated BP's duty of good faith, honesty, and fair dealing. [Count VI of the Complaint, RP 14-15] In response, BP denied that an oil and gas company

owes any duty of good faith and fair dealing to a subsequent surface owner, and denied that it had any obligation to give the Kysars copies of the oil and gas agreements affecting the Kysar Ranch. Both parties filed summary judgment motions asking the Court to decide whether a duty of good faith existed. [RP 242-305, 613-53]

The District Court denied the motions for summary judgment [RP 565-66, 1597-1600], but it did not rule directly on the existence of a duty of good faith between oil companies and surface owners. However on October 23, 2007, the District Court ruled that the Kysars could not present evidence that BP had obtained their consent by misrepresenting its rights and concealing the relevant documents. [RP 1691-92] Furthermore, on June 26, 2009 the Court entered another order preventing the Kysars from proving that BP withheld information from them. [RP 1979-80] These rulings necessarily assume as a matter of law that there is no duty of good faith. The Kysars submit that these rulings are legally erroneous, because it is well established that there is a reciprocal duty of good faith between an oil and gas lessee and lessor, and their successors. The existence of a duty is a question of law for this Court to decide.

It is important to recognize that there are multiple roots for the duty of good faith:

- The Tenth Circuit has been consistent in recognizing that the covenant of good faith and fair dealing is implied in an oil and gas lease. *See, e.g., Amoco Production Co. v. Heimann*, 904 F.2d 1405, 1413 (10th Cir. 1990) and *Boone v. Kerr-McGee Oil Indus., Inc.*, 217 F.2d 63 (10th Cir. 1954).

- Furthermore, oil and gas leases are contracts, and "Every contract in New Mexico imposes the duty of good faith and fair dealing upon the parties in the performance and enforcement of the contract." *Allsup's Convenience Stores, Inc. v. North River Ins. Co.*, 1999-NMSC-006, ¶ 33, 127 N.M. 1, 976 P.2d 1 (quoting *Paiz v. State Farm Fire and Cas. Co.*, 118 N.M. 203, 212, 880 P.2d 300, 309 (1994)).

- Additionally, a duty of good faith arises by the very nature of the relationship between a surface owner and the lessee of the subsurface estate. Some courts call it the prudent operator standard. *See, e.g., Libby v. De Baca,* 51 N.M. 95, 99, 179 P.2d 263, 265 (1947); *State ex rel. Shell Petroleum Corp. v. Worden,* 44 N.M. 400, 103 P.2d 124 (1940). Other courts call it the accommodation doctrine, or the due regard doctrine, or correlative rights. Still

others analyze the duties as the cooperation principle. 5 Howard R. Williams and Charles J. Meyers, *Oil and Gas Law* § 802.1, at 11 (2004). By whatever name, the cases recognize that there are reciprocal duties owed by the oil company and by the landowner. *See, e.g., Gerrity Oil & Gas Corp. v. Magness,* 946 P.2d 913, 927 (Colo. 1997); *Sun Oil Co. v. Nunnery,* 251 Miss. 631, 170 So. 2d 24, 29-30 (1964); and *see Amoco Production Co. v. Carter Farms Co.*, 103 N.M. 117, 703 P.2d 894 (1985), abrogated on other grounds by *McNeil v. Burlington Res. Oil and Gas Co.*, 2008-NMSC-022, 143 N.M. 740, 182 P.3d 121.

- Both BP and the Kysars have a common law duty to not engage in misrepresentations. The Kysars acknowledge that they owe a duty of good faith, honesty, and fair dealing towards BP, but BP contends it owes no such duties toward the Kysars. By necessity, the surface owner and the subsurface owner are joined together, inescapably, in the same piece of land – at the surface. So they must act in good faith towards each other, or guerilla warfare would erupt throughout New Mexico. The parties need to negotiate with one another for placement of wells and placement of ingress and egress routes that will optimize their competing interests, but they should be on equal footing as they negotiate those points. The surface rights holder is entitled to be armed

with full knowledge of the extent and strength of the claims to the surface by the oil and gas lessee. This is particularly true where the oil and gas lessee's right to the surface is somewhat unclear, and the key documents are in the exclusive possession of the oil company. Without all of the oil and gas documents, it is impossible for a landowner to know the extent of the oil company's rights, so the oil company can win by concealment. In this case BP obtained the Kysars' consent by falsely claiming rights that it did not have, by refusing to produce the relevant documents, and by threatening the Kysars if they interfered with BP's supposed rights.

A jury could find that BP violated the covenant of good faith and fair dealing by withholding key documents from the Kysars. To put it simply, BP played "hide the ball," by refusing to produce key documents despite numerous requests from Ray Kysar.

The duty of "due regard" to the current surface owner necessarily includes the duty of "good faith" to the current owner. Without this duty, oil companies would have a license to act in bad faith towards the owners of millions of acres of land in New Mexico, because most of the property owners in New Mexico own land where the minerals were severed by a prior owner, or reserved by the United States. Unless the current surface owners are

protected by the duty of good faith, they will be subjected to predatory bad faith conduct by oil and mining companies.

3. The District Court erred by ruling that the Kysars could not recover damages for trespass occurring prior to the complaint.

On October 23, 2007, the District Court entered an order prohibiting the Kysars from claiming damages for any alleged trespass occurring prior to June 20, 2005, the date on which the Kysars filed their complaint. [RP 1693-94]

This is reversible error, because it is well established that the landowner may recover damages for trespass that occurred prior to the filing of a complaint, even if the trespasser acted under a reasonable good faith belief that he was not trespassing. BP is liable in tort even for "good faith trespass" prior to June 20, 2005, as distinguished from its "wilful trespass" after June 20, 2005.

> The difference in the measure of damages allowed for an innocent and a willful conversion lies in public policy" . . . . If the owner . . . were to be limited to compensation, there would be no inducement for the evil-minded conversioner to refrain from the trespass. The wrongdoer might, for instance, in a coal mine encroach upon his neighbor, take away his coal, and reap a handsome profit, after paying the owner merely compensatory damages. To prevent this the rule is applied that the willful trespasser must reap no advantage through his wrongdoing, not strictly as a matter of right to the property owner, but as a deterrent to wrongdoers.

Annotation, *Right of Trespasser to Credit for Expenditures in Producing, as Against His Liability for Value of, Oil or Minerals*, 21 A.L.R.2d 380, 393 (1952). The liability of the innocent or good faith trespasser is usually determined to be the value of the minerals "in place." Some courts have analogized this measure of damages to a royalty on the minerals removed, thereby allowing the wrongful trespasser a set-off for costs of production. The difficulty with this measure of damages is the determination of what the *reasonable* costs of production may be. *See generally* 1 Howard R. Williams and Charles J. Meyers, *Oil and Gas Law* § 226.2 (2008). Reasonable production costs allowed as an off-set usually include the reasonable costs of "drilling, completing, equipping and operating the well and producing the oil, less the reasonable value of the equipment salvaged." *Id.* at 386.16-387. However, non-beneficial costs, such as the cost of drilling a dry hole, are generally not allowed as an off-set. *See Carter Oil Co. v. McCasland,* 207 F.2d 728 (10th Cir. 1953) and *Edwards v. Lachman,* 534 P.2d 670, 678 (Okla. 1974). This is a corollary to the ancient common law doctrine that trespass is an intentional tort, but the only intent required is the intent to go on the land, not the intent to commit trespass. The trespassers' good faith may affect the measure and amount of damages, but damages are nonetheless recoverable.

BP asserted that the Kysars cannot obtain trespass damages prior to the posting of the Back Gate Road because the Kysars had given permission to BP to use the Back Gate Road. However, when a landowner gives permission due to misrepresentations (whether fraudulent or merely mistaken) by the party who enters his land, the permission is legally ineffective, and the landowner may collect trespass damages for the invasion of his property rights. This rule of law is spelled out in Restatement (Second) of Torts §§ 173, 174, 892A, and 892B (1965 & 1979).

Section 892B(2) provides:

> If the person consenting to the conduct of another is induced to consent by a substantial mistake concerning the nature of the invasion of his interests or the extent of the harm to be expected from it in the mistake is known to the other or is induced by the other's misrepresentation, the consent is not effective for the unexpected invasion or harm.

The Official Comments add that fraud or mistake or duress invalidates the consent, "rendering it ineffective and entitling the plaintiff to maintain any tort action that would be available to him if the consent had not been given." Restatement (Second) of Torts § 892B cmt. a (1979); *see also Food Lion Inc. v. Capital Cities/ABC, Inc.*, 951 F. Supp. 1217, 1221-22 (M.D.N.C 1996) and

People v. Segal, 78 Misc. 2d 944, 358 N.Y.S.2d 866, 871-72 (N.Y. Crim. Ct. 1974).

Restatement (Second) of Torts § 173 expressly invalidates any consent to trespass that is obtained by misrepresentation or mistake: "The rules stated in § 892B as to consent induced by misrepresentation or mistake apply to entry or remaining on land." Furthermore, § 174 expressly applies this rule to mistakes about a person's legal authority to enter on the land of another. Section 174 provides that the rule "as to consent induced by fraud or mistake as to the validity of purported legal authority applies to entry or remaining on land." This section applies exactly to this case. In reality, the Jaquez leases did not grant BP an easement for the purpose of developing adjoining tracts. BP was wrong about the law, so it is liable for trespass damages. Furthermore, it is up to the jury to decide whether BP was acting in good faith.

It has long been established under the common law that a trespasser is not excused from liability even though he had a good faith – but mistaken – belief that he had the legal right to enter on another's property. *See* Restatement (Second) of Torts § 164 (1965):

> One who intentionally enters land in the possession of another is subject to liability to the possessor of the land as a trespasser, although he acts under a mistaken

> belief of law or fact, however reasonable, not induced by the conduct of the possessor . . .

BP has not cited any New Mexico case holding that an oil company can obtain a valid consent from a landowner through fraud, mistake or concealment.

4. The District Court committed error by preventing the Kysars from testifying about the value of their property and the amounts they have received for granting oil and gas easements.

As landowners, the Kysars have negotiated and granted express oil and gas easements along the Back Gate Road. BP paid the Kysars $400,000 for an easement and Coleman Oil and Gas has paid the Kysars more than $750,000 through February 2009.[1]

At the outset of trial, the District Court ruled that the Kysars could not testify about the amounts which they have actually received for oil and gas easements. This ruling is contrary to UJI 13-716 and UJI 13-717, which explicitly allow property owners to testify about the value of their property. UJI 13-716 specifically gives the Kysars the right to testify on this issue:

> An owner may testify to the fair market value of his property, and that testimony may be considered by

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[1] An easement is a non-exclusive right, so a landowner can sell the same easement multiple times to different users.

> you the same as that of any other witness expressing an opinion as to the fair market value of the property.

As the official use note says, "The landowner . . . has the right to express an opinion as to the fair market value of the property."

Furthermore, UJI 13-717 allows the landowner to testify about "the price paid for similar or comparable property in the open market," which includes actual sales and "the purchase price of the property actually involved" in the case. Use Note and Committee Comment to UJI 13-717. In this case, the property actually involved is an easement along the Back Gate Road for oil and gas access. Serendipitously, there have already been two sales of this easement. Its value is based on actual events, rather than estimates and opinions.

The common law is well established that a property owner has a right to testify about the value of his property in any case where damages are at issue, not merely in condemnation cases. The issue arises most often in condemnation cases, so UJIs 13-716 and 13-717 simply state the general rule in the context of a condemnation case. But the general rule is not limited to condemnation cases. For examples in *Richardson v. Rutherford*, 109 N.M. 495, 787 P.2d 414 (1990), the Court addressed a complaint alleging conversion of property, fraud, and a number of additional property claims and determined

that the landowners testimony of the value he placed on his own land was admissible. *Id.* at 500, 787 P.2d at 419; *see also Tres Ladrones, Inc. v. Fitch*, 1999-NMCA-076, ¶ 18, 127 N.M. 437, 982 P.2d 488 (quiet title action in which the land owner was allowed to testify about value of land he possessed); *City of Albuquerque v. Ackerman*, 82 N.M. 360, 482 P.2d 63 (1971); and *State ex rel. State Highway Commission of New Mexico v. Chavez*, 80 N.M. 394, 456 P.2d 868 (1969).

To give another example: suppose a homeowner suffers property damage from wind storm, or from vandalism. The insurance company refuses to pay adequate compensation, so the property owner is forced to sue the insurance company. Is the property owner barred from testifying about the value of his property? Of course not.

The Kysars are not aware of any case in which a property owner has been prohibited from testifying about the amounts he has actually received for use of the property.

5. **Diminution of property value is not the only measure of damages for trespass. Damages may also be based on the trespasser's gain, or the fair value of an easement.**

BP argued, and the District Court agreed, that damages for trespass can only be measured by the decrease in the value of the trespassed property. This

is plain legal error, diminution of property value is not the sole and exclusive measure of damages for trespass. *De Palma v. Weinman*, 15 N.M. 68, 87-88, 103 P.782, 787 (1909) (where, in consequence of a trespass, one's business is destroyed, damages for loss of profits may be recovered, if proven).

It is well established that one element of damages for trespass is the fair value of the right to use the property as the trespasser did. The rule is especially well developed in mineral trespass cases like this one. The court in *Raven Red* summed it up like this:

> Defendant had no moral or legal right to enrich itself by this illegal use of plaintiff's property. To limit plaintiff to the recovery of nominal damages for the repeated trespasses will enable defendant, as a trespasser, to obtain a more favorable position than a party contracting for the same right. Natural justice plainly requires the law to imply a promise to pay a fair value of the benefits received.

Raven Red Ash Coal Co. v. Ball, 39 S.E.2d 231, 238 (Va. 1946) (citing *Pomeroy's Remedies and Remedial Rights, 2 Ed.,* pp. 610-635)). *See also Phillips Petroleum Co. v. Cowden*, 241 F.2d 586 (5th Cir. 1957); 1 Dan B. Dobbs, *Dobbs Law of Remedies* § 5.8(1) & (2) (1993).

Both of these facts are probative evidence for the jury to consider relative to damages for trespass (Count III [RP 11-12]) and also for unjust enrichment (Count VIII [RP 15-16]).

The District Court erroneously excluded the $400,000 price because it misinterpreted the confidentiality clause in the Agreement for Settlement and Easement and Mutual Release, dated March 23, 2005.

The 2005 agreement [RP 1340-51] contains a confidentiality clause, but it also contains an express exception for court ordered disclosure: "Except as may be required by a court of competent jurisdiction . . . the parties hereby agree that they shall not, directly or indirectly, disclose the terms of this Agreement." [*Id.* ¶ 17] The parties negotiated and agreed to this exception because both parties knew that the payment of $400,000 was for access to one well only (the Sullivan Gas Com E-1), and that the parties continued to disagree over access to all other wells. [*Id.* ¶¶ 6, 10, 15]

The Coleman payments are not subject to any confidentiality provisions at all, and they are clearly probative evidence of what an oil company will pay in an arms-length transaction for the right to use the Back Gate Road. The admissibility of this evidence is inherent in the very definition of fair market value – the amount that a willing buyer will pay. *See* UJI 13-711(fair market value) and 13-712 (fair rental value).

Of course BP will offer all sorts of arguments, and perhaps some evidence, in an attempt to discredit the Coleman payments. But this only goes

to the weight of the evidence, not its admissibility. If sales of comparable properties are admissible, then the sales of the actual property are certainly admissible. The District Court erred when it excluded this evidence and invaded the province of the jury, because the probative value and weight of this evidence is for the jury to decide.

The Kysars respectfully ask the Court to realize the enormity of the Court's decision on this point, not only for the Kysars but for all land owners in the State of New Mexico. The point is this: *if landowners are limited to a diminished value measure of damages, then it will always pay for oil companies to trespass.* In the vast majority of cases, the landowner does not have enough resources to sue an oil company for trespass, and so in the vast majority of cases the oil company will be able to trespass for free. In essence this gives an oil company *de facto* right of condemnation without payment. If the landowner does sue, and manages to prevail after great expense,[2] then the oil company will only have to pay the diminished value of the land, which is much less than the value of a right-of-way to lucrative oil wells. So if the Court were to limit landowners to diminished value, then the rational

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[2] This case is a good example: The Kysars have spent almost 10 years litigating against BP; they have won the prior appeals and established their rights; and yet BP continues to trespass.

economic decision for an oil company will be to trespass. In most cases the oil company will pay nothing at all, because the landowners cannot afford to sue. And in the worst case, the oil company will pay less than the fair value of the access route.

This case illustrates the problem in stark terms. The Kysars have actually received more than $1,150,000 for the use of the road. Yet BP tendered a hired appraiser who opines that use of the road is only worth $55,200 in total. How can the road only be worth $55,200 when the Kysars have already been paid $1,150,000 for shared non-exclusive use of the road? The District Court's ruling prohibited the Kysars from proving, with the strongest form of evidence, what the road is actually worth. Given these rulings, the Kysars had no way of refuting BP's "hired gun" appraiser.

In trespass cases against a mineral trespasser, there are special rules that have evolved as possible measures of damages. The liability of the innocent or good faith mineral trespasser is often determined to be the value of the minerals "in place." Some courts have analogized this measure of damages to a royalty on the minerals removed, thereby allowing the wrongful trespasser a set-off for costs of production. The difficulty with this measure of damages is the determination of what the *reasonable* costs of production may be. *See*

generally 1 Williams & Meyers, *supra* § 226.2. Reasonable production costs allowed as an off-set usually include the reasonable costs of "drilling, completing, equipping and operating the well and producing the oil, less the reasonable value of the equipment salvaged." 1 Williams & Meyers, *supra* § 226.2, at 386. However, non-beneficial costs, such as the cost of drilling a dry hole, are generally not allowed as an off-set. *See Carter Oil Co. v. McCasland,* 207 F.2d 728 (10th Cir. 1953) and *Edwards v. Lachman,* 534 P.2d 670, 678 (Okla. 1974). *See also* Annotation, *Right of Trespasser to Credit for Expenditures in Producing, as Against His Liability for Value of, Oil or Minerals*, 21 A.L.R.2d 380, 393 (1952); *Alvarado Mining and Mill Co. v. Warnock,* 25 N.M. 694, 698-99, 187 P. 542, 544 (1919).

In virtually all contract and tort cases, there are several alternative measures of damages, and the plaintiff has a right to pursue the measures that best fit the circumstances of his particular case. This principal applies to the tort of trespass as well as other torts. It must be remembered that the gravamen of trespass is the invasion of the right of exclusive possession, not property damage. (There are separate torts to deal with property damage.)

In addition to trespass, the complaint includes a claim for unjust enrichment, *see* Count VIII, with damages "measured by the amount of that

defendant's unjust enrichment from unauthorized or unlawful use of the Kysar Ranch." [Complaint ¶¶ 70-71, RP 15-16]

In this case, BP has been unjustly enriched because it has used an access road which it had no right to use, without paying any compensation whatsoever. Coleman Oil also had no right to use the Back Gate Road, but Coleman had the decency to come to the Kysars in good faith and negotiate an arm's length price for using the road. The Coleman price establishes a baseline value for the use of this road, but BP is unwilling to pay anything at all. As a matter of corporate policy, BP has decided to pay its lawyers rather than landowners, because it is more profitable to trespass than to pay for a right of way – even in the face of two rulings by the New Mexico Supreme Court and Tenth Circuit.

6. The District Court erred when it allowed BP to argue easement by estoppel, because easement by estoppel has never been recognized in New Mexico.

Because the oil and gas instruments do not grant BP the right to cross the Jaquez leases, BP argued as a fallback that it had an easement by estoppel. BP claimed that it had obtained an easement by estoppel because it had crossed the Kysars land for many years with the Kysars' consent. The Kysars

asked the Court to exclude this argument as legally erroneous, but the District Court refused.

This is an error of law, because New Mexico has never recognized easement by estoppel, and is unlikely to do so, because that would nullify the statute of frauds and the cases cited by Justice Minzner in *Kysar I*. *Inter alia*, Justice Minzner relied upon NMSA 1978, § 47-1-5 (Laws 1851-52); *Cox v. Hanlen*, 1998-NMCA-015, ¶ 26, 124 N.M. 529, 953 P.2d 294; and *Ritter-Walker Co. v. Bell*, 46 N.M. 125, 126, 123 P.2d 381, 382 (1942).

In *Luevano v. Maestas*, 117 N.M. 580, 874 P.2d 788 (Ct. App. 1994) and *Luchetti v. Bandler*, 108 N.M. 682, 777 P.2d 1326 (Ct. App. 1989), the courts rejected attempts to create an easement by estoppel. Even assuming, for purposes of analysis, that such a hypothetical easement might exist under some facts, the courts held that the circumstances did not warrant the creation of a new cause of action.

In New Mexico, both the Legislature and the courts have decided that the concept of easement by estoppel is outweighed by the public policies in favor of protecting the stability of land titles and preventing inadvertent loss of land rights. *See also Algermissen v. Sutin*, 2003-NMSC-001, ¶ 12; *Garmond v. Kinney*, 91 N.M. 646, 579 P.2d 178 (1978); *Starks v. White*, 49 Fed. Appx.

798 (10th Cir. 2002). These cases hold that permissive use does not create an easement.

In *Kysar I*, the Supreme Court necessarily rejected an unwritten easement by estoppel, when Justice Minzner relied on the Statute of Frauds in holding that BP must negotiate a written easement with Kysar. *See Kysar I*, ¶ 50 (quoted on page 6 above) and ¶ 51 (statute of frauds requires easements to be written and "subscribed").

Even in those jurisdictions which have adopted easement by estoppel, it is recognized that the doctrine of estoppel is problematic when applied to land:

> However, courts should be very cautious in establishing servitudes on the basis of estoppel because they tend to penalize neighborly cooperation, and they undercut the policies encouraging the use of written documents for land transactions.

Restatement (Third) of Property (Servitudes) § 2.10 cmt. c (2000).

Moreover, the elements of valid permission and reasonable reliance are absent from this case, so the question of estoppel never arises. BP has always maintained that it did not need the Kysars' permission to cross the Ranch, so it never relied on the Kysars' permission. BP personnel testified as follows:

> Q: Okay. But my question goes to: Did BP believe that the leases, among other things, gave it the right to use the back gate road to access the entire Kysar property?
> A: Yes.

Q: With or without Kysar's permission?
A: That's my understanding.
Q: And that's your understanding that that was BP's position and belief all along; isn't that correct?
A: Well, that was Amoco back then, but yes.

[Stephen A. Reinert Dep. 60-61 (Apr. 24, 2007), attached to Exhibit 1 to Motion To Supplement the Record Proper, filed herewith]

BP obtained the Kysars' permission by misrepresenting and concealing the oil and gas agreements, so the Kysars' permission is ineffective to create an estoppel. *See* Restatement (Second) of Torts §§ 173,174, 892A, and 892B, discussed in Point 3 above. Furthermore, permissive use does not create an easement. *Algermissen, supra.* The Kysars should not be forced to defend against a claim that does not exist under the law of New Mexico.

7. The District Court mistakenly prevented Ray Kysar from testifying about the Prairie Dog Agreement which he signed in 2000, and the subsequent conduct of the parties, and another limited settlement agreement in 2005.

At the outset of trial, the District Court prohibited Ray Kysar from testifying about the scope and intent of the limited settlement agreements which he and BP signed in 2000 and 2005. The District court later memorialized its ruling on July 23, 2009: "Order Excluding Evidence Concerning 2005 Agreement." [RP 2003-04]

In 2007, BP retroactively claimed that the 2000 agreement, known as the Prairie Dog Agreement, granted a blanket easement to BP to use the entire surface of the Kysar Ranch. This was an entirely new "theory," which BP had never claimed in its dealings with Kysar from January 1, 2000, the date of the Agreement, until April 16, 2007, when BP raised the argument for the first time in a "supplement" to a fully briefed motion for partial summary judgment. [RP 1225-39] This argument was clearly an afterthought, because BP never mentioned it when it negotiated with Kysar on access issues in the years 2000 to 2007. BP did not even raise this claim when it sued Kysar in federal court in 2005, or even in BP's Answer to the Kysars' complaint.

To refute BP's claim that he signed a blanket global release, Ray Kysar intended to present testimony and documents about the intent and scope of the 2000 agreement. He also intended to testify about BP's own subsequent conduct, which showed that BP did not interpret the limited 2000 settlement as a global settlement release. This was demonstrated in 2005, when BP pushed for a global release, which would have been unnecessary if BP had already obtained a global release in 2000. Kysar refused to sign a global release in 2000, and again in 2005.

However, the District Court ruled erroneously that BP could introduce the 2000 Prairie Dog Agreement, but Ray Kysar could not testify about it. The District Court's rulings are contrary to *Hansen v. Ford Motor Co.*, 120 N.M. 203, 211, 900 P.2d 952, 960 (1995) in which the Supreme Court held that global omnibus releases are ambiguous as a matter of law:

> The current state of the law has led to our conclusion that boilerplate universal release language is circumstantially ambiguous and serves only to trap unwary plaintiffs into surrendering claims when it is not necessary to do so in order to prtect the party with whom they are settling.

In this case, the 2000 Prairie Dog Agreement does not even contain global omnibus release language, and it does not contain language granting a blanket easement to BP.

8. BP is trying to repudiate its own stipulation and the judgment of the Court.

The foregoing rulings destroyed the Kysars' case and effectively precluded recovery. The Kysars vigorously and repeatedly objected to these rulings, but the judge refused to change any of them. Given those rulings, BP and the Kysars stipulated that a reasonable jury would not have a legally sufficient evidentiary basis to find for the Kysars on any of their claims, so that the rulings forced the dismissal of the case via directed verdict. At the same

time, BP and Kysar also agreed that "This stipulation is without prejudice to either party's rights to challenge the court's aforementioned decisions and rulings on appeal." [RP 1972]

In its final judgment, the District Court reviewed and approved the stipulation, finding it to be well-taken. The Court agreed that its rulings effectively precluded recovery by the Kysars. Therefore, the Court dismissed the case. [RP 1969] At the same time, the Court expressly preserved the Kysars' rights on appeal.

> 3. In light of the Court's decisions and evidentiary rulings to date, the parties stipulated that a reasonable jury would not have a legally sufficient evidentiary basis to find for Plaintiffs on any of the claims raised by Plaintiffs' complaint. In so stipulating, each party reserved the right to challenge the Court's aforementioned decisions and rulings on appeal.
>
> 4. In light of the parties' stipulation, which is well taken, the Court determines that the claims raised by Plaintiffs' complaint, insofar as they pertaind to BP America Production Company, should be dismissed and finds that BP America Production Company is entitled to judgment as a matter of law.

[RP 1969]

Now, on appeal, BP apparently is trying repudiate its own stipulation, as well as the District Court's judgment. In its Memorandum in Support of

Proposed Disposition, BP has cited *Rancho del Villacito Condominiums, Inc. v. Weisfeld*, 121 N.M. 52, 908 P.2d 745 (1995), and BP now claims that the Kysars forfeited their rights on appeal.

Rancho del Villacito actually supports the Kysars' position, because it recognizes that a plaintiff may appeal when the lower court's rulings "effectively preclude recovery by the plaintiff," or are "completely dispositive of the case," or there is a lack of consent or voluntariness. 121 N.M. at 55, 908 P.2d at 748. All of these circumstances apply to this case. The stipulation and the final judgment expressly provide that the rulings made it impossible for the jury to find in favor of the Kysars on any of their claims. So the rulings effectively precluded recovery, and were completely dispositive. By contrast, in *Rancho*, the rulings did not effectively preclude recovery, and the plaintiff voluntarily chose not to present its case.

In this appeal, BP is trying to renege on its stipulation below. This is impermissible. *Wilson v. Rowan Drilling Co.*, 55 N.M. 81, 105, 227 P.2d 365, 380 (1950) (defendant may not repudiate stipulation). Stipulations are enforced by courts. *State v. Candelaria*, 2008-NMCA-120, ¶ 21, 144 N.M. 797, 192 P.3d 792 ("[c]ourts generally honor stipulations," "no basis for not enforcing the stipulation"); *Ballard v. Miller*, 87 N.M. 86, 91, 529 P.2d 752,

757 (1974) ("Courts look with favor upon stipulations . . . ."). BP stipulated that under the District Court's rulings, "a reasonable jury would not have a legally sufficient evidentiary basis to find for Plaintiffs on any of the claim raised by Plaintiffs' complaint." BP also agreed that the Kysars preserved their rights on appeal. Yet on appeal, BP is trying to repudiate both parts of its own stipulation.

Furthermore, BP is attacking and trying to set aside the District Court's judgment. The District Court found that its rulings deprived the Kysars of a case for the jury. The District Court also preserved the Kysars' appeal. Yet BP is now asking this Court to ignore and set aside the judgment itself.

BP is attempting to do a complete about-face on appeal. Such tactics are not allowed; BP is estopped from disavowing its own stipulation on appeal, and it cannot ignore the judgment itself.

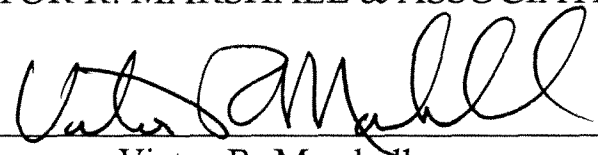
E. CONCLUSION

As a matter of law – the law set forth in *Kysar I* and *Kysar II* – the Kysars are entitled to a partial summary judgment in their favor, limited to the issue of trespass across the Jaquez leases. The other issues are for the jury to decide, such as breach of good faith, misrepresentation, unjust enrichment, and damages. Therefore, the Kysars respectfully request this Court to reverse

the District Court, to enter partial summary judgment in accordance with *Kysar I* and *Kysar II*, and to remand for further proceedings on the remaining issues.

Respectfully submitted,

VICTOR R. MARSHALL & ASSOCIATES, P.C.

By 

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I hereby certify that a true and correct copy of the foregoing was mailed to Bradford C. Berge, Esq., Holland & Hart, 110 North Guadalupe, Suite 1, Santa Fe, New Mexico 87501 this 22nd day of February 2101.