



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

**STEPHANIE GARCIA RICHARD,
COMMISSIONER OF PUBLIC LANDS
OF THE STATE OF NEW MEXICO,**

Plaintiff-Respondent,

v.

No. S-1-SC-40983

**MARATHON PETROLEUM
CORPORATION,**

Defendant-Petitioner,

and

**BC & D OPERATING, INC.; DOMINION
PRODUCTION COMPANY, LLC;
NACOGDOCHES OIL AND GAS, INC.;
NORDIC OIL USA 2, LLLP; DOE
CORPORATIONS 1-10; DOE LIMITED
LIABILITY COMPANIES 1-10; and DOE
PARTNERSHIPS 1-10,**

Defendants.

**COMMISSIONER OF PUBLIC LANDS'
ANSWER BRIEF**

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TABLE OF CONTENTS

STATEMENT REGARDING CITATIONS	ii
STATEMENT OF COMPLIANCE.....	ii
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
ARGUMENT	3
I. The Court of Appeals Correctly Concluded that the Commissioner’s Tort Claims are Premised on Alleged Breaches of Duties Independent of Lease Obligations.....	4
A. The Court of Appeals correctly identified the longstanding common-law and statutory duties invoked by the Complaint	5
B. Marathon fails to identify any compelling reason for this Court to reverse the Court of Appeals on the issue of independent duties.....	10
II. The Court of Appeals Correctly Held that the Leases, Section 19-10- 13, and Applicable Regulations Do Not Limit an Assignor’s Liability for Past Misconduct or Ongoing Legal and Statutory Duties	16
A. The Court of Appeals reasonably concluded that the assignment provision in the Leases is ambiguous, making it ineffective as a matter of law to release an assignor of liability for its misconduct	17
B. The Court of Appeals correctly concluded that Section 19-10-13 does not relieve an assignor of tort liability	28
i. Marathon fails to present a reasonable, consistent interpretation of the language of Section 19-10-13	30
ii. The context and history of Section 19-10-13 support the Court of Appeals interpretation that the statute is intended to relieve an assignor of its contractual obligations	33
iii. The Court of Appeals correctly identified the unreasonable and deleterious outcomes of Marathon’s interpretation of Section 19-10- 13	40
III. Marathon’s Right for Any Reason Arguments Remain Inadequate to Support Dismissal of the Commissioner’s Claims	43
CONCLUSION	45

STATEMENT REGARDING CITATIONS

References to the CD containing the digitally recorded audio of the proceedings below are cited in the format specified by Section XI of the Appendix to Rule 23-112 NMRA. A citation includes the date of the recording followed by “CD” and the time of the passage cited as indicated when played on “For the Record” software (e.g., September 7, 2022, counter 1:19:47 to 1:20:09 is cited as **[09-07-22 CD 1:19:47-20:09]**).

STATEMENT OF COMPLIANCE

This answer brief was prepared in 14 point Times New Roman, a proportionally-spaced typeface. In compliance with Rule 12-318(F)(3), (G) NMRA, the body of this answer brief as defined in Rule 12-318(F)(1), including headings, footnotes, and quotations, contains 11,000 words according to the word count function of Microsoft Word 2021.

TABLE OF AUTHORITIES

New Mexico Cases

<i>Acquisto v. Joe R. Hahn Enters., Inc.</i> , 1980-NMSC-126, 95 N.M. 193	18, 19, 20, 41
<i>Amrep Sw., Inc. v. Shollenbarger Wood Treating, Inc.</i> , 1995-NMSC-020, 119 N.M. 542	15
<i>Bachmann v. Regents of Univ. of N.M.</i> , 2021-NMCA-050, 496 P.3d 604.....	25
<i>Bernalillo Cnty. Deputy Sheriffs Ass'n v. Cnty. of Bernalillo</i> , 1992-NMSC-065, 114 N.M. 695	13
<i>Bogle Farms v. Baca</i> , 1996-NMSC-051, 122 N.M. 422	41
<i>C.R. Anthony Co. v. Loretto Mall Partners</i> , 1991-NMSC-070, 112 N.M. 504	18, 22
<i>Chavez v. Bridgestone Am. Tire Ops., LLC</i> , 2022-NMSC-006, 503 P.3d 332	30
<i>Cobb v. Gammon</i> , 2017-NMCA-022, 389 P.3d 1058.....	43
<i>Cockrell v. Bd. of Regents of N.M. State Univ.</i> , 2002-NMSC-009, 132 N.M. 156	13
<i>ConocoPhillips Co. v Lyons</i> , 2013-NMSC-009, 299 P.3d 844	17, 25
<i>Cottonwood Enters. v. McAlpin</i> , 1991-NMSC-044, 111 N.M. 793	6
<i>De Palma v. Weinman</i> , 1909-NMSC-009, 15 N.M. 68	6
<i>Dean v. Paladin Exp. Co.</i> , 2003-NMCA-049, 133 N.M. 491	11
<i>Delfino v. Griffio</i> , 2011-NMSC-015, 150 N.M. 97	4
<i>Elane Photography, LLC v. Willock</i> , 2013-NMSC-040, 309 P.3d 53	22

<i>Garrison v. Navajo Freight Lines, Inc.</i> , 1964-NMSC-099, 74 N.M. 238	21
<i>Greer v. Salmon</i> , 1971-NMSC-002, 82 N.M. 245	42
<i>Hansen v. Ford Motor Co.</i> , 1995-NMSC-044, 120 N.M. 203	20
<i>Holcomb v. Rodriguez</i> , 2016-NMCA-075, 387 P.3d 286	8, 14
<i>Jacob v. Spurlin</i> , 1999-NMCA-049, 127 N.M. 127	35
<i>Kreischer v. Armijo</i> , 1994-NMCA-118, 118 N.M. 671	10, 15
<i>Lujan v. Healthsouth Rehab. Corp.</i> , 1995-NMSC-057, 120 N.M. 422	20
<i>Madrid v. Village of Chama</i> , 2012-NMCA-071, 283 P.3d 871	3
<i>Mannick v. Wakeland</i> , 2005-NMCA-098, 138 N.M. 113	8, 14
<i>Mark V, Inc. v. Mellekas</i> , 1993-NMSC-001, 114 N.M. 778	17, 22, 23, 24
<i>McNeill v. Burlington Res. Oil & Gas Co.</i> , 2008-NMSC-022, 143 N.M. 740	7, 11, 42
<i>Moruzzi v. Fed. Life & Cas. Co.</i> , 1938-NMSC-002, 42 N.M. 35	20
<i>NM-Emerald, LLC v. Interstate Dev., LLC</i> , 2021-NMCA-020, 488 P.3d 707	14, 15, 22, 34
<i>Rauth v. N.M. Med. Bd.</i> , 2023-NMCA-059, 534 P.3d 1037	29
<i>Richard v. Marathon Petroleum Corp.</i> , _NMCA-, _ P.3d _ (A-1-CA-40747, May 14, 2025)	passim
<i>Rio Grande Jewelers Supply, Inc. v. Data Gen. Corp.</i> , 1984-NMSC-094, 101 N.M. 798	20
<i>Rivera v. Flint Energy</i> , 2011-NMCA-119, 268 P.3d 525	29

<i>Sangre de Cristo Dev. Corp., Inc. v. City of Santa Fe</i> , 1972-NMSC-076, 84 N.M. 343	13
<i>Schmitz v. Smentowski</i> , 1990-NMSC-002, 109 N.M. 386	9
<i>Smith v. Interinsurance Exch. of Auto. Club</i> , 2025-NMSC-004, 563 P.3d 868	19
<i>State ex rel. Helman v. Gallegos</i> , 1994-NMSC-023, 117 N.M. 346	29
<i>State ex rel. Quintana v. Schnedar</i> , 1993-NMSC-033, 115 N.M. 573	39
<i>State ex rel. Udall v. Colonial Penn Ins. Co.</i> , 1991-NMSC-048, 112 N.M. 123	12, 18, 19, 20
<i>State v. Cleve</i> , 1999-NMSC-017, 127 N.M. 240	29
<i>Tafoya v. Rael</i> , 2008-NMSC-057, 145 N.M. 4	7
<i>TAL Realty, Inc. v. Kaushal</i> , 2023-NMCA-027, 527 P.3d 702	29
<i>United Rentals Nw., Inc. v. Yearout Mech., Inc.</i> , 2010-NMSC-030, 148 N.M. 426	39, 41
<i>Valdez v. State</i> , 2002-NMSC-028, 132 N.M. 667	3
<i>Viking Petroleum Inc. v. Oil Conservation Comm'n</i> , 1983-NMSC-091, 100 N.M. 451	42
<i>Wallis v. Smith</i> , 2001-NMCA-017, 130 N.M. 214	3

Federal Cases

<i>Hess Oil Virgin Islands Corp. v. UOP, Inc.</i> , 861 F.2d 1197 (10th Cir. 1988)	14
<i>Isler v. Texas Oil & Gas Corporation</i> , 749 F.2d 22 (10th Cir. 1984)	11, 20
<i>U.S. ex rel. Custom Grading, Inc. v. Great Am. Ins. Co.</i> , 952 F.Supp.2d 1259 (D.N.M. 2013)	15

Cases From Other Jurisdictions

<i>Geiger v. Sanitary Farm Dairies</i> , 178 N.W. 501 (Minn. 1920).....	26
<i>Kansas City-Leavenworth R. Co. v. Langley</i> , 78 P. 858 (Kan. 1904)	26
<i>Seagull Energy E&P, Inc. v. Eland Energy, Inc.</i> , 207 S.W.3d 342 (Tex. 2006).....	27
<i>W. Oil Sales Corp. v. Bliss & Wetherbee</i> , 299 S.W. 637 (Tex. Comm’n App. 1927).....	36
<i>Wilson v. Gerhardt</i> , 13 P. 705 (Colo. 1885).....	36, 37

New Mexico Rules, Statutes, & Session Laws

1925 N.M. Laws, ch. 137, § 7	37
1929 N.M. Laws, ch. 125, § 4.....	34
1931 N.M. Laws, ch. 18, § 2.....	17
NMSA 1978, Section 19-10-13 (1951).....	2, 28, 31, 42
NMSA 1978, Section 19-10-4.1 (1985).....	11, 12, 13, 17
NMSA 1978, Section 19-13-8 (1967).....	38
NMSA 1978, Section 19-6-3 (1912).....	5, 8, 9
NMSA 1978, Section 19-6-4 (1912).....	32
NMSA 1978, Sections 19-10-1 through -70 (1925, as amended through 2025).....	38

Other Authorities

David Patton, <i>Bad Moon Rising</i> , 53 Rocky Mountain Mineral Law Inst. 31-1 (2007)	27
Howard R. Williams & Charles J. Meyers, <i>Oil and Gas Law</i> (2010)	7, 35

INTRODUCTION

In a case integral to the ability of the Commissioner of Public Lands (the “Commissioner”) to protect state trust land from harm caused by oil and gas operations, the Court of Appeals correctly concluded that the Commissioner may pursue claims sounding in tort against prior lessees of oil and gas leases notwithstanding the Commissioner’s approval of the assignment of those leases.

In the underlying suit, the Commissioner seeks to hold various defendants accountable for damage to state trust land caused by decades of continuous oil and gas operations conducted under two adjacent state oil and gas leases (the “Leases”). One defendant, Marathon Petroleum Corporation (“Marathon”) is the successor to a prior lessee of both Leases, Tesoro Petroleum Corporation (“Tesoro”). In her *First Amended Complaint* (the “Complaint”) [RP 45-81], the Commissioner brought claims sounding in both tort and contract against Marathon, as Tesoro’s successor, for damage to the leased land caused by Tesoro during its time as lessee and as operator of many of the wells on the leased premises, as well as for ongoing acts of trespass.

Marathon moved to dismiss the Commissioner’s claims, relying on language in a provision of the Leases, statute, and regulation providing that the assignor of a state oil and gas lease is “relieved from all obligations to the state with respect to the lands embraced in the assignment” upon approval of an assignment. [RP 173-81;

236-37]; *see also* NMSA 1978, § 19-10-13 (1951). The district court granted Marathon’s motion, agreeing that even the Commissioner’s claims sounding in tort are legally insufficient because they concern the same conduct that formed the basis of the breach of contract claim and because Tesoro stood relieved of all obligations to the state upon approval of the Lease assignments. **[RP 406-07]**

In a well-reasoned and thorough opinion, the Court of Appeals reversed, concluding that the Commissioner’s tort claims sound in common-law and statutory duties independent of the Leases, that the assignment provision in the Leases is insufficient as a matter of law to limit tort liability, and that Section 19-10-13 was intended to only relieve an assignor of its contractual obligations upon assignment. *Richard v. Marathon Petroleum Corp.*, __NMCA__, __P.3d__, (A-1-CA-40747, May 14, 2025) (hereinafter “Opinion” or “Op.”). Considering the history and context of Section 19-10-13, the Court of Appeals concluded that the Legislature intended to limit application of the common-law rule that an assignor remains bound by the express covenants of a lease even after assignment and therefore enacted a statute which provides that the assignor of a state oil and gas lease retains no contractual obligations upon assignment. *Id.* ¶¶ 53-59.

Marathon now asks this Court to overturn the Court of Appeals, relying on arguments which ignore the precedents of this Court and which challenge the ability of appellate courts to thoroughly consider the questions before them. Importantly,

Marathon fails to reconcile the inconsistencies noted by the Court of Appeals in its proposed plain language interpretation of the contractual and statutory language at issue, indeed now adding a new mischaracterization of that language as a legislative covenant or promise not to sue. Marathon offers no compelling reasons for this Court to overturn the reasoning and conclusions of the Court of Appeals, and the Commissioner respectfully requests that this Court affirm the Court of Appeals.

ARGUMENT

“New Mexico is a notice-pleading state, requiring only that the plaintiff allege facts sufficient to put the defendant on notice of [the plaintiff’s] claims.” *Madrid v. Vill. of Chama*, 2012-NMCA-071, ¶ 17, 283 P.3d 871. Accordingly, “[a] motion to dismiss for failure to state a claim under Rule 1-012(B)(6) NMRA . . . tests the legal sufficiency of the complaint, not the facts that support it.” *Wallis v. Smith*, 2001-NMCA-017, ¶ 6, 130 N.M. 214. A motion to dismiss for failure to state a claim “is only proper when it appears that [the] plaintiff can neither recover nor obtain relief under any state of facts provable under the claim.” *Valdez v. State*, 2002-NMSC-028, ¶ 4, 132 N.M. 667 (internal quotation marks and citation omitted). Appellate courts review dismissal of a complaint for failure to state a claim de novo and “accept all well-pleaded factual allegations in the complaint as true and resolve all doubts in favor of sufficiency of the complaint.” *Id.*

The Court of Appeals properly applied these standards, conducting a de novo review of Marathon's grounds for dismissal of the Commissioner's tort claims and concluding that those grounds were insufficient to support the district court's grant of Marathon's motion to dismiss.

I. The Court of Appeals Correctly Concluded that the Commissioner's Tort Claims are Premised on Alleged Breaches of Duties Independent of Lease Obligations

The Commissioner, as the state official with the authority and responsibility for the care, custody, control and disposition of state trust land in New Mexico, brought claims in the underlying case against various oil and gas companies for the negligent, wasteful, and trespassory damage to that state trust land. [RP 45-46 ¶ 1, 56-58 ¶¶ 66-76] There is nothing unusual about a landowner seeking recovery in tort from an occupant for damage to the landowner's property, and the Court of Appeals correctly concluded that the Commissioner has alleged cognizable tort claims that Marathon breached common-law and statutory duties. *Op.* ¶¶ 14-15, 18. The Commissioner is not asking the courts to recognize novel duties, and Marathon has the burden to demonstrate that the Commissioner "is not entitled to recover under any theory of the facts alleged in [her] complaint," with all doubts resolved "in favor of the sufficiency of the complaint." *Delfino v. Griffio*, 2011-NMSC-015, ¶¶ 9, 12, 150 N.M. 97 (internal quotation marks and citation omitted). Marathon failed to do so below and fails again to do so in its Brief in Chief.

A. The Court of Appeals correctly identified the longstanding common-law and statutory duties invoked by the Complaint

In her Complaint, the Commissioner brings claims alleging common-law negligence, trespass, waste, and negligence per se for violations of NMSA 1978, Section 19-6-3 (1912) against Marathon, as Tesoro's successor. The gravamen of these claims is that during the course of Tesoro's oil and gas operations on the leased premises, during which time Tesoro was lessee, unit operator, and well operator for many of the individual wells on those premises, Tesoro discarded debris and caused oil to contaminate the leased premises, conditions which persist today. [RP 54 ¶ 50, 56 ¶¶ 62-64, 56-57 ¶¶ 67-68, 57 ¶ 71, 58 ¶ 74] This same alleged conduct forms the basis of the Commissioner's now-dismissed breach of contract claim against Marathon, based on provisions in the Leases holding the lessee liable for all damage to the surface of the leased premises and requiring that the lessee comply with all applicable laws, including State Land Office regulations requiring full reclamation and remediation of lease sites. [RP 54-55 ¶¶ 49-52, 58 ¶¶ 78-80]

In its order, the district court dismissed the Commissioner's tort claims in part on the ground that "no duty in tort can be imposed where the same duties and obligations are specifically defined by the parties' contract, and the Commissioner's tort claims are based upon the same facts and seek the same relief as her contract claims, which the Commissioner conceded should be dismissed." [RP 407] As correctly noted by the Court of Appeals, *Op.* ¶ 12, this holding is a conclusion that

the same conduct cannot form both the basis of a breach of contract claim and claims sounding in tort.

That conclusion is contrary to this Court’s long-standing precedent providing precisely the opposite—that the same conduct can breach both contractual obligations and duties arising independently of a contract and that a party may therefore be liable in both contract and tort for the very same misconduct. *E.g.*, *Cottonwood Enters. v. McAlpin*, 1991-NMSC-044, ¶ 11, 111 N.M. 793 (“Although the genesis of most duties and obligations between parties to a title insurance contract generally stem from the contract of insurance itself, in which case a breach thereof may give rise to a contract claim, the tort of negligence must be based upon a duty other than one imposed by the contract.”); *De Palma v. Weinman*, 1909-NMSC-009, ¶ 14, 15 N.M. 68 (recognizing that “in many cases, an action for tort or an action as for breach of contract may be brought by the same party on the same state of facts”) (internal quotation marks and citation omitted). The first question presented by Marathon’s motion to dismiss is therefore whether the Commissioner’s tort claims allege breaches of “dut[ies] other than one imposed by the contract.” *Cottonwood Enters.*, 1991-NMSC-044, ¶ 11. There is no reasonable dispute that the Complaint does exactly that.

This Court has long recognized that an oil and gas lessee may be held liable in a common-law negligence action for the “unreasonable, excessive or negligent

use of the surface estate” during oil and gas operations. *McNeill v. Burlington Res. Oil & Gas Co.*, 2008-NMSC-022, ¶¶ 32-33, 143 N.M. 740 (internal quotation marks and citation omitted); *see also* 1 Howard R. Williams & Charles J. Meyers, *Oil and Gas Law* § 218.10 at 251 (2010) (“The usual ground for recovery by a surface owner for damages suffered as a result of the operations of a mineral owner or lessee has been negligence by the operator.”). By holding that an oil and gas lessee’s unreasonable, excessive, and negligent damage to the surface estate of leased land is actionable in tort, this Court implicitly acknowledged that such lessees owe a legal duty of care to the owners of that land. *McNeill*, 2008-NMSC-022, ¶¶ 33-34 (recognizing that claims sounding in negligence for unreasonable or excessive damage to the surface estate are actionable and emphasizing that such actions “must be alleged from a breach of the mineral lessee’s duty”). Although *McNeill* does not specifically articulate the duty owed by oil and gas lessees to landowners, the holding that unreasonable and excessive damage to the surface is actionable in negligence is consistent with the established law in New Mexico that “every person has a duty to exercise ordinary care for the safety of the person and the property of others.” *Tafoya v. Rael*, 2008-NMSC-057, ¶ 14, 145 N.M. 4 (internal quotation marks, citation, and brackets omitted). Contrary to Marathon’s arguments, **[BIC 20]** it is precisely because *McNeill* does not discuss the terms of the lease in that case and yet still holds that excessive and unreasonable damage to the surface is

actionable in tort that it stands for the proposition that oil and gas lessees owe a duty to exercise ordinary care to avoid such damage, independent of any lease provision concerning damage to the surface.

Liability under the common-law tort of trespass requires only that “the defendant entered the plaintiff’s land without authorization, remains on the land, or fails to remove from the land a thing which the defendant has a duty to remove.” *Holcomb v. Rodriguez*, 2016-NMCA-075, ¶ 12, 387 P.3d 286. New Mexico courts thus recognize the legal duty of every person to obtain authority to enter and remain on the land of another.

New Mexico courts have additionally recognized for at least a century the common-law tort of waste, which imposes liability on a person legally in possession of real property for the destruction, misuse, alteration or neglect of that property. *Mannick v. Wakeland*, 2005-NMCA-098, ¶¶ 15-16, 138 N.M. 113, *aff’d but criticized on other grounds sub nom. Coppler & Mannick, P.C. v. Wakeland*, 2005-NMSC-022, ¶¶ 1, 10-14, 138 N.M. 108. By adopting the common-law tort of waste, the courts of this state have recognized the legal duty of every person in possession of real property to refrain from acts of destruction, misuse, alteration, or neglect of that real property while in possession.

Section 19-6-3 prohibits any person or corporation from entering or using state trust land for any purpose without authority. That statute additionally requires

that state lessees vacate the site of a lease within thirty days of the expiration or cancellation of that lease and prohibits any person or corporation, “whether lessee or not, [from] committing waste upon any state lands.” Section 19-6-3. As the Court of Appeals correctly concluded, *Op.* ¶ 18, Section 19-6-3 imposes an extra-contractual duty on state lessees upon lease termination to promptly vacate previously leased state trust lands and a duty on all persons, whether lessee or not, from committing acts of waste on state trust land.

In her Complaint, the Commissioner alleges with sufficient detail that Tesoro’s acts of discarding trash and debris on the leased premises, causing oil to contaminate the premises, and leaving those conditions to persist breached the common-law and statutory duties discussed above. *See Schmitz v. Smentowski*, 1990-NMSC-002, ¶ 9, 109 N.M. 386 (“[N]otice pleading does not require that every theory be denominated in the pleadings—general allegations of conduct are sufficient,” so long as they provide a “fair idea of the action about which the party is complaining and can see the basis for relief.”); **[RP 56 ¶¶ 67-68 (negligence per se), 57 ¶¶ 71-72 (common-law trespass and waste), 58 ¶¶ 74-75 (negligence)]**. Marathon claims to scrutinize the Complaint to show that all of the Commissioner’s tort claims are premised on the alleged breach of contractual duties, yet only cites paragraphs in the Commissioner’s breach of contract count. **[BIC 13-14 (citing RP 58 ¶¶ 78-80)]** It should come as no surprise that the Commissioner alleges that the

defendants “failed to honor their contractual obligations” while making a claim for breach of contract, [RP 58 ¶ 80] but that does not demonstrate that the Commissioner’s tort claims are premised on this contractual breach.

The Court of Appeals correctly determined that the Commissioner’s tort claims rely not on contractual duties but on long recognized common-law duties and clearly established statutory duties which required little explanation. *Op.* ¶¶ 13-18. Simply put, the duties invoked by the Commissioner’s tort claims are imposed by law and not by agreement and are therefore sufficient to form the basis of claims sounding in tort. *See Kreischer v. Armijo*, 1994-NMCA-118, ¶ 6, 118 N.M. 671.

B. Marathon fails to identify any compelling reason for this Court to reverse the Court of Appeals on the issue of independent duties

Marathon makes two main arguments against the Court of Appeals’ conclusion: That any independent extra-contractual duties are “subsumed” within contractual obligations concerning damage to land and compliance with law; and that any independent, extra-contractual duties arise only from the contractual relationship between the parties. These arguments are misplaced.

First, Marathon argues because the Leases contain provisions speaking to damage to the leased premises, the previously identified common-law and statutory duties were “subsumed” into those contractual obligations and no longer exist as independent, extra-contractual duties. [BIC 14-16] Marathon relies primarily on a provision in each Lease providing that the lessee “shall be liable and agree to pay

for all damages to the range, livestock, growing crops or improvements caused by lessee's operations on [the leased] lands.” NMSA 1978, §19-10-4.1 (1985); **[RP 49 ¶ 21, 65 (explaining that Lease X0-0662 was conformed to the current statutory form of the lease); RP 71]**. This provision holds a lessee liable for all damage to the surface estate, whether negligent or not. *Dean v. Paladin Exp. Co.*, 2003-NMCA-049, ¶¶ 12-14, 133 N.M. 491. The Leases therefore impose a contractual obligation on the lessee to go further than the common law requires and address all damage to the surface, including reasonable impacts for which the lessee would not be liable under the common-law. *See McNeill*, 2008-NMSC-022, ¶¶ 32-34. However, this provision is not the only source of a lessee's duty to exercise reasonable care to avoid unreasonable, excessive, or negligent damage to the surface, which is a duty imposed by the common law. *See id.* Nothing in the damage provision limits a lessee's liability for breach of that common-law duty.

Marathon's current argument is simply a repackaging of its prior argument that “the existence of an independent duty in tort does not entitle a party to assert tort claims where a contractual obligation speaks to the same duty.” *Op.* ¶ 16; (quoting Marathon's Court of Appeals (“COA”) Answer Brief 30). As it has done since the district court, Marathon makes this argument in reliance on a federal case, *Isler v. Texas Oil & Gas Corporation*, 749 F.2d 22 (10th Cir. 1984) **[BIC 15-16] [RP 238-40, 371-76]**, which the Court of Appeals correctly concluded concerned

the express limitation of the alleged tort liability in the parties' contract. *Op.* ¶ 31 (discussing *Isler*, 749 F.2d at 23-24). Indeed, this Court has rejected the very argument made by Marathon, premised on the very same misreading of that same federal case. *State ex rel. Udall v. Colonial Penn Ins. Co.*, 1991-NMSC-048, ¶ 37, 112 N.M. 123 (rejecting an argument, based in part on *Isler*, that “a cause of action [in tort] cannot be maintained where the misrepresentation is the same conduct upon which the claim for breach of contract is premised”). It is settled law in New Mexico that a contract does not preclude tort liability for conduct simply because the contract also speaks to obligations concerning that conduct.

Marathon's argument that the compliance with laws provision of Lease X0-0662¹ somehow negates the existence of independent duties is similarly misplaced. **[BIC 18-19]** Lease X0-0662 contains a provision providing that the lessee “shall at [its] own expense fully comply with all laws, regulations, rules, ordinances and requirements . . . in all matters and things affecting the premises and operations thereon.” Section 19-10-4.1 **[RP 49 ¶ 21, 65]**. But there can be no reasonable dispute that a lessee's obligation to comply with the law does not arise only from its contractual relationship with the Commissioner or that a lessee has an obligation to

¹ Lease X0-0662 contains the compliance with laws provision because the contracting parties agreed to conform that lease to the applicable current form of statutory lease found under Section 19-10-4.1. **[RP 49 ¶ 21, 65]** Lease B0-1276 does not contain such a compliance with laws provision. **[See RP 70-72]**

comply with the law outside of the contract. This provision does not create a lessee's obligation to comply with the law, it simply makes that lessee's noncompliance with the law a breach of the lease in addition to an unlawful act. In fact, this provision states that a lessee's noncompliance with any applicable law "is enforceable by the [Commissioner] in any manner provided in this lease or by law." Section 19-10-4.1. Marathon cites no authority for its bold proposition that a compliance with law provision in a lease means the lessee has no independent obligation to comply with the law or that such a provision extinguishes a lessee's tort liability for its misfeasance.²

Second, Marathon argues that every common-law and statutory duty invoked by the Complaint arises only from the contractual relationship between the Commissioner and Tesoro. **[BIC 17-18]** This argument misstates the basis for many

² Marathon only cites a case concerning federal caselaw on incorporation of the Fair Labor Standards Act ("FLSA") into a contract to determine that, for the purposes of an insurance coverage dispute, a breach of contract claim premised on a violation of the FLSA did not give rise to an independent action in tort. *Bernalillo Cnty. Deputy Sheriffs Ass'n v. Cnty. of Bernalillo*, 1992-NMSC-065, ¶ 13, 114 N.M. 695; **[BIC 19]**. This Court has clarified that "this observation [in *Bernalillo County*] was made in the specific context of a breach of contract claim, not a claim for damages directly under the FLSA." *Cockrell v. Bd. of Regents of N.M. State Univ.*, 2002-NMSC-009, ¶ 17, 132 N.M. 156. *Bernalillo County* did not consider, and therefore does not answer, whether compliance with law provisions in contracts extinguish tort liability for the contracting parties. See, e.g., *Sangre de Cristo Dev. Corp., Inc. v. City of Santa Fe*, 1972-NMSC-076, ¶ 23, 84 N.M. 343, ("The general rule is that cases are not authority for propositions not considered.").

of the extra-contractual duties invoked by the Complaint. As the Court of Appeals concluded, *Op.* ¶ 18, the duty to avoid waste imposed by Section 19-6-3 applies to any person or corporation “whether lessee or not” and the duty of a lessee to promptly vacate state trust land is imposed upon lease termination. Likewise, the common-law duty to obtain authorization to enter or remain on the property of another applies to all persons. *Holcomb*, 2016-NMCA-075, ¶ 12. Marathon’s argument additionally ignores that the Tenth Circuit, applying the caselaw on which Marathon has consistently relied, has recognized that “[a] party be liable in tort for breaching an independent duty towards another, even where the relationship creating such a duty originates in the parties’ contract.” *Hess Oil V.I. Corp. v. UOP, Inc.*, 861 F.2d 1197, 1201-02 (10th Cir. 1988). Indeed, Marathon’s argument would negate the entire common-law tort of waste, which specifically recognizes an independent legal duty to those in authorized possession of real property, such as tenants or lessees. *See Mannick*, 2005-NMCA-098, ¶ 15.

The Commissioner’s tort claims are not, as Marathon would have it, an attempt to rewrite the Leases and seek damages in tort for breaches of contractual duties. **[BIC 11, 20]** This is not a case where a plaintiff seeks recovery in tort for breaches of duties which are imposed only by contract, finding no basis in the common-law or statute. *See NM-Emerald, LLC v. Interstate Dev., LLC*, 2021-NMCA-020, ¶¶ 16-25, 488 P.3d 707 (concluding that the independent duty owed to

subsequent purchasers was inapplicable and that the plaintiff failed to identify any other extra-contractual duty owed by the defendant to retain, supervise, and inspect the work of its subcontractors); *Kreischer*, 1994-NMCA-118, ¶ 6 (holding that a plaintiff could not bring a tort claim premised on an alleged breach of an “obligation to properly construct the [plaintiff’s] house,” which was a duty “created by the contract and was not an obligation imposed by law”).³ The Commissioner is not, for instance, seeking recovery in tort for failure to pay rent or royalties, duties imposed only by the Leases with no basis in common-law.

Instead, the Commissioner’s tort claims are rooted in the common law and statute. Marathon’s arguments concerning the lack of independent duties ultimately boil down to a simple proposition already rejected by this Court—that because the Leases include provisions concerning damage to land, the Commissioner is precluded from bringing any claims sounding in tort for damage to that land.

³ Marathon additionally cites a case which concerns the economic loss doctrine. *Amrep Sw., Inc. v. Shollenbarger Wood Treating, Inc.*, 1995-NMSC-020, ¶¶ 25-28, 119 N.M. 542. **[BIC 11]** Marathon made no arguments concerning the economic loss doctrine below. Moreover, the economic loss doctrine has only ever been applied in the context of products liability in New Mexico. *NM-Emerald*, 2021-NMCA-020, ¶ 9. Finally, the doctrine “prevents plaintiffs from recovering in tort economic losses to which their entitlement flows only from contract” but “does not bar tort claims arising from an independent duty of care.” *U.S. ex rel. Custom Grading, Inc. v. Great Am. Ins. Co.*, 952 F. Supp. 2d 1259, 1269 (D.N.M. 2013) (internal quotation marks and citations omitted) (emphasis added).

Consistent with this Court’s precedent in *Colonial Penn*, the Court of Appeals was correct to hold that the district court erred by dismissing the Commissioner’s tort claims on the ground that those claims “are based upon the same facts and seek the same relief as her contract claims, which the Commissioner conceded should be dismissed.” *Op.* ¶ 25.

II. The Court of Appeals Correctly Held that the Leases, Section 19-10-13, and Applicable Regulations Do Not Limit an Assignor’s Liability for Past Misconduct or Ongoing Legal and Statutory Duties

The Court of Appeals next considered the district court’s ruling that the approval of Tesoro’s assignments of the Leases “absolved Tesoro, and therefore Marathon, of its legal liability for damage to the leased land allegedly caused by Tesoro’s operations.” *Op.* ¶ 26. The district court accepted that there are three sources supporting Marathon’s claim that Tesoro was absolved of tort liability and any ongoing obligation to comply with legal or statutory duties upon approval of its assignments: The assignment provision in the Leases themselves, Section 19-10-13, and State Land Office regulation 19.2.100.43 NMAC. **[RP 406]** The Court of Appeals considered each of these sources and correctly concluded that none of them support the district court’s ruling.

A. The Court of Appeals reasonably concluded that the assignment provision in the Leases is ambiguous, making it ineffective as a matter of law to release an assignor of liability for its misconduct

Both Leases are in forms mandated by statute and each contains a provision which provides that the lessee may assign the lease in whole or in part, with the Commissioner's consent, and that:

Upon approval in writing by the lessor of an assignment, the assignor shall stand relieved from all obligations to the lessor with respect to the lands embraced in the assignment and the lessor shall likewise be relieved from all obligations to the assignor as to such tract, and the assignee shall succeed to all of the rights and privileges of the assignor with respect to such tracts and shall be held to have assumed all of the duties and obligations of the assignor to the lessor as to such tracts.

Section 19-10-4.1; 1931 N.M. Laws, ch. 18, § 2 [RP 49 ¶ 21, 65]; [RP 71 ¶ 7].

Appellate courts review the terms of oil and gas leases de novo, applying “the rules governing contract interpretation.” *ConocoPhillips Co. v Lyons*, 2013-NMSC-009, ¶ 23, 299 P.3d 844. “The purpose, meaning and intent of the parties to a contract is to be deduced from the language employed by them; and where such language is not ambiguous, it is conclusive.” *Id.* (internal quotation marks and citation omitted). “A contract term may be ambiguous if it is reasonably and fairly susceptible to different constructions.” *Id.* (internal quotation marks, citation, and brackets omitted). The meaning of ambiguous terms is typically a question of fact, to be determined by the fact-finder. *Mark V, Inc. v. Mellekas*, 1993-NMSC-001, ¶ 13, 114 N.M. 778.

Applying these standards in consideration of the assignment provision of the Leases, the Court of Appeals concluded that: 1) New Mexico law requires that parties must expressly and clearly contract for limited liability; 2) the assignment provision in the Leases is ambiguous as to its intent; and 3) because the Leases “do not express a clear intent to waive an assignor’s tort liability,” they do not do so as a matter of law. *Op.* ¶¶ 34, 39-40. These conclusions are consistent with the law in New Mexico concerning contractually limited tort liability.

This Court has held in multiple cases that a contractual limitation of tort liability must be expressly bargained for and clearly set forth. In *Colonial Penn*, this Court held that “the concept of freedom of contract and notions of contractually assumed duties and liabilities can act to limit general tort liability in certain circumstances when limited liability is expressly bargained for.” 1991-NMSC-048, ¶ 37. This holding echoes *Acquisto v. Joe R. Hahn Enterprises, Inc.*, in which this Court held that “[w]hile the law allows one to exculpate [them]self by contract, it will do so only if the exculpation is set forth with such clarity that the intent to negate the usual consequences of tortious conduct is made plain.” 1980-NMSC-126, ¶ 7, 95 N.M. 193, *overruled on other grounds by C.R. Anthony Co. v. Loretto Mall Partners*, 1991-NMSC-070, ¶¶ 13-15, 112 N.M. 504.

As a preliminary matter, Marathon now makes for the first time an undeveloped and inconsistent argument that it is inappropriate to apply the holding

of *Colonial Penn*, decided in 1991, to Leases executed in 1922 and 1932. [BIC 38-40] Marathon’s new retroactivity argument ignores that New Mexico courts apply “a rebuttable presumption of retroactivity to civil cases” which may “be overcome by a sufficiently weighty combination” of several factors, including “whether the decision to be applied prospectively establishes a new principle of law.” *Smith v. Interinsurance Exch. of Auto. Club*, 2025-NMSC-004, ¶¶ 6-8, 563 P.3d 868 (internal quotation marks and citations omitted). Importantly, *Colonial Penn* and *Acquisto* did not establish new principles of law and were instead premised on foundational concepts of contract and tort law. *See Colonial Penn*, 1991-NMSC-048, ¶ 37 (applying the “concept of freedom of contract and notions of contractually assumed duties and liabilities”); *Acquisto*, 1980-NMSC-126, ¶ 7 (stating that it is “merely a restatement of the common law rule of tort liability” that “responsibility for loss . . . due to negligence must be borne by the negligent party”). Finally, Marathon’s retroactivity argument is inconsistent and self-serving, making no attempt to explain why the cases it has relied on since the district court, decided in the 1980s, should be considered when *Colonial Penn* and *Acquisto* should not.⁴ [BIC 40 (relying on

⁴ Marathon makes a similarly undeveloped argument that these cases articulate a different standard than *Colonial Penn* and *Acquisto*. [BIC 40] Because Marathon fails to actually discuss how these cases differ from *Colonial Penn* and *Acquisto*, the Commissioner simply directs the Court to the well-reasoned and succinct rejection of this argument by the Court of Appeals. *Op.* ¶¶ 31-34.

***Rio Grande Jewelers Supply, Inc. v. Data Gen. Corp.*, 1984-NMSC-094, 101 N.M. 798 and *Isler*, 749 F.2d 22)] [RP 238-40]**

The language of the assignment provision does not satisfy the standards established by this Court—that limited liability must be “expressly bargained for,” *Colonial Penn*, 1991-NMSC-048, ¶ 37, and “set forth with such clarity that the intent to negate the usual consequences of tortious conduct is made plain,” *Acquisto*, 1980-NMSC-126, ¶ 7. The statement in the assignment provision providing that the assignor is “relieved from all obligations to the lessor” simply does not read like the kind of express and clear release of tort liability recognized as effective. *See Moruzzi v. Fed. Life & Cas. Co.*, 1938-NMSC-002, ¶ 28, 42 N.M. 35 (holding that language providing for “release and discharge, of any and all claims made or to be made . . . and all liability of the company by reason of such injury or sickness” precluded future claims); *see also Lujan v. Healthsouth Rehab. Corp.*, 1995-NMSC-057, ¶¶ 3, 20, 120 N.M. 422 (considering as effective a release “of and from any and all claims, causes of action, rights suits, covenants, contracts, agreements, judgments and demands of whatsoever kind or nature that Releasors have or may have against Releasee for damages to Releasors' person or property.”) (emphasis in original omitted); *Hansen v. Ford Motor Co.*, 1995-NMSC-044, ¶ 3, 120 N.M. 203 (releasing “any and all claims, demands, damages, actions, causes of action or suits”) (emphasis in original omitted); *Garrison v. Navajo Freight Lines, Inc.*, 1964-NMSC-

099, ¶ 7, 74 N.M. 238 (releasing “claims for damage to the extent of the prorata share of the liability”). For this reason, the Commissioner’s position has consistently been that the assignment provision unambiguously does not release an assignor of tort liability. **[RP 335-337]**; Commissioner’s COA Brief in Chief 29-31. However, the conclusion of the Court of Appeals that the language of the assignment provision is ambiguous results in the same outcome—the continued tort liability of assignors after assignment.

The Court of Appeals focused its analysis on the meaning of the word “obligations” to conclude that the assignment provision is ambiguous. *Op.* ¶¶ 38-40. Contrary to Marathon’s arguments, **[BIC 20-21, 35]** this analysis was appropriately focused on the arguments made by the parties. Since the proceedings in the district court, Marathon has repeatedly intoned that “all means all” and that, therefore, the assignor being “relieved from all obligations to the lessor” upon assignment unambiguously means that the assignor is relieved of tort liability and all ongoing extra-contractual duties. **[RP 237, 370]**; Marathon’s COA Answer Brief 13, 15-16. The Commissioner’s position has consistently been that the use of “all obligations” in the assignment provision of the Leases by its plain language does not relieve of an assignor of its “obligations and liabilities” and therefore does not operate as a contractual release of tort liability. **[RP 335-337]**; Commissioner’s COA Brief in Chief 29-31.

The Commissioner’s arguments put the meaning of “obligations” squarely before the Court of Appeals. The Court of Appeals simply answered this question, rather than conducting the kind of issue creation avoided by New Mexico courts. *See, e.g., Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶¶ 69-71, 309 P.3d 53 (declining to consider a constitutional issue only presented by a “single three-sentence paragraph”); *NM-Emerald*, 2021-NMCA-020, ¶¶ 9-12 (declining to consider the issue whether the economic loss doctrine properly applied to claims at issue where both parties assumed its application and made no arguments on the issue). Although both parties advanced arguments that the assignment provision was unambiguous, appellate courts are not bound by the agreement of the parties and must conduct their own analysis. *NM-Emerald*, 2021-NMCA-020, ¶ 10. Moreover, whether a contract is ambiguous is a matter of law, perfectly suitable for determination by an appellate court. *C.R. Anthony Co.*, 1991-NMSC-070, ¶ 17.

That legal determination of ambiguity by the Court of Appeals in the Opinion was based in large part on a comparison of the language in the Leases relieving the assignor of “all obligations to the lessor” with the language of a contract considered by this Court in *Mark V, Inc.*, 1993-NMSC-001. *Op.* ¶¶ 38-39. In *Mark V, Inc.*, the parties to a real estate listing agreement executed an addendum stating that “all obligations agreed to are hereby cancelled” but disagreed on whether that language relieved the property owners from an obligation to pay a commission allegedly

earned by the real estate agent before execution of the addendum. 1993-NMSC-001, ¶¶ 1, 2, 5. This Court conducted a de novo review of the district court’s legal determination that this language was unambiguous, concluding the language could be interpreted to have been intended to cancel further obligations under the listing agreement or interpreted as “a complete discharge of any right to compensatory damages for past as well as future nonperformance.” *Id.* ¶¶ 14-19. While this Court reminded district courts that extrinsic evidence may be admitted in considering ambiguity, *id.* ¶¶ 9-12, the Court’s determination that the particular provision at issue in that case was ambiguous turned on the plain language of the document, *id.* ¶¶ 15-18. As such, and contrary to Marathon’s arguments [**BIC 36**], this Court’s analysis of the contractual language in *Mark V, Inc.* supports the conclusion of the Court of Appeals that it is unclear whether the assignor being “relieved from all obligations to the lessor” would apply prospectively or retroactively. *Op.* ¶ 23.

The Court of Appeals also did not err by concluding it was not necessary to remand the case to the district court to resolve the ambiguity in the assignment provision. *Op.* ¶ 40; [**BIC 36-37**] While this Court in *Mark V, Inc.* did remand the case for an evidentiary hearing in part to resolve the ambiguity identified in the contract, that case concerned the discharge of contractual obligations and not the release of tort liability. 1993-NMSC-001, ¶¶ 3, 6, 21 (concerning the seller’s contractual obligation to pay commission for contractual performance by the real

estate agent). As such, the requirement that a limitation of tort liability must be expressly bargained for and clearly set forth was not applicable. The Court of Appeals correctly determined that the standards of *Colonial Penn* and *Acquisto* mean the ambiguity itself was sufficient to determine that the assignment provision does not limit an assignor's tort liability. Moreover, in *Mark V, Inc.*, the parties had actually presented extrinsic evidence concerning their intentions which the district court declined to consider, and this Court remanded the case so that the offered evidence could be heard. 1993-NMSC-001, ¶¶ 6-7.

Here, Marathon offered no extrinsic evidence concerning the meaning of the assignment provision, [*see generally* RP 234-43, 367-78] and does not argue now that any such evidence exists to support its position [*see* BIC 34-36]. Therefore, although the Court of Appeals did not resolve the contractual ambiguity, it would have been appropriate had it done so. *Id.* ¶ 13 (“[I]n the event the parties do not offer evidence of the facts and circumstances surrounding execution of the agreement and leading to conflicting interpretations as to its meaning, the court may resolve any ambiguity as a matter of law by interpreting the contract using accepted canons of contract construction and traditional rules of grammar and punctuation.”). Marathon's demand that the case be remanded for further proceedings [BIC 36-37] is nothing more than a plea for a second bite at the apple, to contrive extrinsic evidence it had the opportunity to present below but did not.

Indeed, Marathon now makes an argument it never advanced below—that interpretation of the assignment provision should be controlled by alleged “course of dealing” evidence concerning the lack of any suit by prior Commissioners in tort against assignors of state oil and gas leases. **[BIC 37]** This argument is premised on statements of counsel at oral argument taken out of context by Marathon. To begin, Marathon points to no actual evidence in the record, presented to the fact-finder, concerning any alleged “course of dealing.” *See, e.g., Bachmann v. Regents of Univ. of N.M.*, 2021-NMCA-050, ¶¶ 25-28, 496 P.3d 604 (considering the testimony of the vice president of the human resources department which oversees implementation of the employment contract at issue in that case). Additionally, the “course of dealing” evidence relied on by Marathon does not indicate how any prior Commissioner actually interpreted the assignment provision of state oil and gas leases, in contrast to the kind of course of dealing evidence previously considered when interpreting state oil and gas leases. *See Lyons*, 2013-NMSC-009, ¶¶ 1, 25 (considering a letter from a previous Commissioner directing lessees to remit oil and gas royalties in a specific manner as course of dealing evidence relevant to a dispute about the proper calculation of such royalties). This is particularly true in the context of counsel’s statement at oral argument which Marathon conveniently ignores, that this Commissioner has generally increased efforts to generally hold all lessees and operators accountable under both the common-law and contract for damage to state

trust land held under oil and gas leases. Court of Appeals Oral Argument 15:04-16:55. Marathon essentially argues that because prior Commissioners have not sought to bring negligent oil and gas lessees and operators to account for their damage to state trust land, no Commissioner may ever do so. Such a contention should be rejected by the Court.

Marathon similarly fails to make a compelling argument that the assignment provision is an expressly bargained for and clearly set forth limitation of tort liability. **[BIC 39-40]** The cases cited by Marathon in support of this argument involve contracts with plain language concerning claims and liabilities in complete contrast to the assignment provision's mere use of "all obligations." *See Geiger v. Sanitary Farm Dairies*, 178 N.W. 501, 502-03 (Minn. 1920) (concerning the incorporation of a new company which would, by shareholder resolution, assume "all existing indebtedness and liabilities of [the prior corporation]" and a sale contract stating that the new corporation assumed "all debts and obligations of whatsoever character" of the prior corporation) (internal quotation marks and citation omitted) (emphases added); *Kansas City-Leavenworth R. Co. v. Langley*, 78 P. 858, 861 (Kan. 1904) (concluding that a company charter providing that a new company would be "subject to all of the obligations and liabilities to the state" of several former corporations included "demands arising out of tort") (internal quotation marks and citation omitted) (emphasis added).

Marathon's further attempt to argue that the assignment provision at issue has already been understood to limit tort liability similarly misreads the source Marathon cites. **[BIC 39]** The industry-focused journal article cited by Marathon specifically concerns the continuing contractual obligations of assignors of oil and gas leases after assignment without an express clause excusing the assignor from those contractual obligations. David Patton, *Bad Moon Rising*, 53 Rocky Mountain Mineral Law Inst. 31-1, § 31.01[1], [3], § 31.02 (2007) (discussing the issues presented by *Seagull Energy E&P, Inc. v. Eland Energy, Inc.*, 207 S.W.3d 342 (Tex. 2006), a case concerning an assignor's continued post-assignment contractual obligation to cover operating costs under an operating agreement). The recommendation in that article that oil and gas lessees include language mirroring that found in the assignment provision of New Mexico state oil and gas leases is offered as a way to be excused from continuing contractual obligations after assignment. *Id.* § 31.05. That article does not address tort liability after assignment and offers no help to Marathon's argument that the assignment provision clearly releases an assignor of tort liability.⁵

⁵ This article is in fact further support for the general rule that assignment of a lease does not relieve an assignor of its express covenants unless the lessor expressly agrees that it does so, discussed *infra* II(B)(ii). See Patton, *supra*, at § 31.04[1].

Whether the assignment provision of the Leases is understood as unambiguously not a release of tort liability, as the Commissioner has argued, or ambiguous as to its intended effect on tort liability, as the Court of Appeals held, the end result is the same: The assignment provision is not an unambiguous release of the assignor's tort liability. As such, it fails to satisfy the requirement under *Colonial Penn* and *Acquisto* for an expressly bargained for and clearly set forth limitation of liability. The Court of Appeals correctly determined that the Leases do not release an assignor of extra-contractual tort liability as a matter of law. *Op.* ¶ 40.

B. The Court of Appeals correctly concluded that Section 19-10-13 does not relieve an assignor of tort liability

Under Section 19-10-13, oil and gas leases to state trust land are assignable upon the Commissioner's approval. As with the assignment provisions in the statutory lease forms, the Legislature has explained in Section 19-10-13 the effect of an assignment of a state oil and gas lease:

Upon approval by the [C]ommissioner of an assignment the assignor shall stand relieved from all obligations to the state with respect to the lands embraced in the assignment and the state shall likewise be relieved from all obligations to the assignor as to such tract or tracts, and thereupon the assignee shall succeed to all of the rights and privileges of the assignor with respect to such tracts and shall be held to have assumed all of the duties and obligations of the assignor to the state as to such tracts.

Id.

New Mexico appellate courts review matters of statutory construction de novo with the primary goal of giving effect to the Legislature’s intent. *TAL Realty, Inc. v. Kaushal*, 2023-NMCA-027, ¶ 3, 527 P.3d 702. Statutory analysis begins “with the plain meaning of the statute’s words and construe[s] its provisions together to produce a harmonious whole.” *Rivera v. Flint Energy*, 2011-NMCA-119, ¶ 4, 268 P.3d 525. The “[p]lain language of a statute is the primary indicator of legislative intent, and [courts] will not read into a statute language which is not there.” *Rauth v. N.M. Med. Bd*, 2023-NMCA-059, ¶ 9, 534 P.3d 1037 (internal quotation marks, brackets, and citation omitted).

However, this Court “exercise[s] caution in applying the plain meaning rule. Its beguiling simplicity may mask a host of reasons why a statute, apparently clear and unambiguous on its face, may for one reason or another give rise to legitimate (i.e., nonfrivolous) differences of opinion concerning the statute’s meaning.” *State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 23, 117 N.M. 346. This Court therefore “examine[s] the context surrounding a particular statute, such as its history, its apparent object, and other statutes in pari materia, in order to determine whether the language used by the Legislature is indeed plain and unambiguous.” *State v. Cleve*, 1999-NMSC-017, ¶ 8, 127 N.M. 240. Finally, the Court “take[s] care to avoid adoption of a construction that would render a statute’s application absurd or unreasonable or lead to injustice or contradiction.” *Chavez v. Bridgestone Am. Tire*

Ops., LLC, 2022-NMSC-006, ¶ 40, 503 P.3d 332 (internal quotation marks, brackets, and citation omitted).

The Court of Appeals properly applied these standards of construction to conclude that Section 19-10-13 does not limit an assignor's liability for prior misconduct or limit its ongoing extra-contractual duties.

i. Marathon fails to present a reasonable, consistent interpretation of the language of Section 19-10-13

Marathon argues that the meaning of Section 19-10-13 is plain and that the question before the Court is simple—"does Section 19-10-13 mean what it says?" **[BIC 23, 25]** However, Marathon fails to offer the Court a reasonable, consistent interpretation of what it thinks the plain language of Section 19-10-13 actually does say.

Although Marathon argues that the statute "makes sense as written" and that the Commissioner's position reads language into the statute, **[BIC 23, 25]** Marathon consistently and misleadingly refers to the statute as a "release from all liability" despite the lack of any mention of "liability" in the statutory text. **[BIC 2, 3, 4, 20]** Marathon's repeated use of the word "liability" to describe what is released by Section 19-10-13 is telling. Like the assignment provisions discussed above, nothing in the plain language of Section 19-10-13 states that an assignor is relieved of any liability or that the State releases the assignor of any and all claims for damage it may have against the assignor. For this reason, the Commissioner's argument

throughout these proceedings has been that the lack of any language clearly and unambiguously limiting an assignor's tort liability indicates that the Legislature did not intend any release of tort liability. [RP 358-59]; Commissioner's COA Brief in Chief 31-33. Marathon's argument does precisely what it says should not be done and reads language into the statute.

That the Legislature was not concerned with the transfer of tort liability upon assignment is furthermore consistent with the language of Section 19-10-13 as a whole. Immediately following the language at issue in this case, the statute provides that a state oil and gas lessee may enter into agreements with third parties concerning the development of the leasehold premises but that doing so will not "relieve the record title owner of such lease from complying with any of the terms or provisions [of the lease]." Section 19-10-13. The lack of any specific language concerning tort liability, together with the language of Section 19-10-13 as a whole, indicates that the Legislature was concerned with defining which party was responsible for compliance with the terms of state oil and gas leases—which impose various ongoing obligations, such as the payment of rent and production royalties—at any given time.

The Court of Appeals also correctly acknowledged that accepting Marathon's argument—that Section 19-10-13 relieves assignors of "all obligations with respect to the leased premises regardless of their source"—would lead to absurd results. *Op.*

¶¶ 46, 48-49 (quoting Marathon’s COA Answer Brief 13); **[RP 236-37]**. As the Commissioner has consistently argued, that interpretation would mean that an assignor would be free, for instance, from statutory and common-law obligations to obtain authority before taking resources from state trust land. *See, e.g.* NMSA 1978, § 19-6-4 (1912) (prohibiting the taking, removal, or extraction of resources from state trust land without authority); **[09-07-22 CD 1:36:37-40:06]**; Commissioner’s COA Brief in Chief 32-34. Marathon has previously conceded that an assignor would retain these obligations, Marathon’s COA Answer Brief at 21, which the Court of Appeals rightly concluded is irreconcilable with Marathon’s “all means all” position. *Op.* ¶ 49. This may not be the factual situation alleged in this case, but the Court of Appeals was correct to note this outcome as a natural consequence of adopting Marathon’s interpretation. *Id.* Marathon fails to even attempt to reconcile this inconsistency in its Brief in Chief. **[BIC 24-25]**

In fact, Marathon now adds more confusion to its apparent plain language interpretation, making the new and perplexing argument that the release of “all obligations” upon assignment does not include obligations under the Leases to pay rent and royalties to the Commissioner. **[BIC 32-33]** If Marathon thinks an assignor being “relieved from all obligations to the state” upon assignment does not include a release of contractual obligations to pay rent and royalties, it is difficult to understand what Marathon thinks the plain language of Section 19-10-13 says or

means. By Marathon’s account, “all obligations unambiguously means all obligations” [BIC 22]—except for certain obligations.

To add to Marathon’s inconsistent reading of Section 19-10-13, for the first time before this Court Marathon now repeatedly mischaracterizes the assignment provision as a “covenant” or a contractual “promise” not to sue after approval of an assignment. [See BIC at 1 (“legislative covenant” and “contractual promise to lessees that they are relieved of all liability to the state”), 2 (“legislative covenant and contractual promise”), 6-7 (“statutory covenant”), 21, 23, 27, 28 n.7, 29, 39]. Marathon, however, fails to provide any legal support for its new argument that Section 19-10-13 is some sort of legislative promise to assignors. More importantly, Marathon’s latest mischaracterization of the statute conflicts with the well-reasoned conclusion of the Court of Appeals that Section 19-10-13 simply functions as a limitation on the extent of the lessee’s obligation to perform lease covenants it otherwise would be obligated to perform under the lease notwithstanding an assignment.

ii. The context and history of Section 19-10-13 support the Court of Appeals interpretation that the statute is intended to relieve an assignor of its contractual obligations

The Court of Appeals found Section 19-10-13 ambiguous, its determination turning on the definition of “obligations” in dictionaries contemporary with the passing of the statute. *Op.* ¶¶ 44-46. Marathon does not offer any reason to question

the substance of the Court of Appeals’ analysis regarding the ambiguous meaning of “obligations” in the statute and instead makes the argument that it was improper for the Court of Appeals to have conducted such an analysis at all. **[BIC 23]** But, as discussed previously, the Court of Appeals’ discussion is directed precisely at the disagreement between the parties, and appellate courts are certainly empowered to conduct their own research and analysis. *NM-Emerald*, 2021-NMCA-020, ¶ 10.

Due to both the ambiguity in the plain language of the statute and concerns about the absurd results of Marathon’s interpretation, the Court of Appeals considered the statute’s purpose in light of the context and history surrounding its enactment. *Op.* ¶ 50. This analysis demonstrates that Section 19-10-13 was intended as a limitation on an assignor’s obligations to perform lease covenants it would otherwise be obligated to perform even after assignment. *Id.* ¶¶ 52-59. Marathon’s arguments concerning the relevant statutory history do not meaningfully challenge that conclusion.

Although Section 19-10-13 has been amended since its original enactment, the language at issue in this case has remained unchanged since the statute was first enacted in 1929. *See* 1929 N.M. Laws, ch. 125, § 4. The Court of Appeals properly considered common law rules concerning assignments, established by the time Section 19-10-13 was enacted, to consider the purpose of that statute.

New Mexico follows the general rule of lease assignments that “without an express release of the lessee by the lessor, the fact that a lease is assigned does not relieve the lessee of its express covenant[s].” *Jacob v. Spurlin*, 1999-NMCA-049, ¶¶ 10-11, 127 N.M. 127. This general rule applies in the specific context of oil and gas leases, with a leading treatise acknowledging that an oil and gas lessee continues to be obligated to the lessor for breach of an express covenant of the lease occurring after its assignment of the lease, unless the lease contains a clause excusing it from further obligation after the assignment. 2 Williams & Meyers, *supra*, § 403.1 (“The original lessee continues [to be] liable to the lessor for a breach of an express covenant of the lease occurring after his assignment of the lease unless the lease contains a clause excusing him from further liability after assignment.”) (footnotes omitted); *id.* § 403.2.

The Court of Appeals correctly noted that while there is no New Mexico caselaw from the time Section 19-10-13 was enacted clearly articulating this rule, it had been established by that time in several other jurisdictions, including in the context of oil and gas leases. *Op.* ¶¶ 54-55 (collecting and discussing cases). Marathon challenges the Court of Appeals’ reliance on these out-of-state cases, arguing that they actually support Marathon’s position because in some the assignor was held to have been relieved of express covenants under the lease [**BIC 30-31**] and those in which the assignor remained bound by those express covenants did not

contain a clause like that in Section 19-10-13. **[BIC 31-32]** But that is precisely the Court of Appeals’ point—that an assignment may relieve an assignor of its express covenants under the lease, but only if the lessor expressly agrees that the assignment does so. *Op.* ¶¶ 54-59. The Commissioner and the Court of Appeals agree that Section 19-10-13 does that, relieving the assignor of its express covenants under the state oil and gas lease upon approval of an assignment. *Id.* ¶ 59; Commissioner’s COA Brief in Chief 34-35. With this argument, Marathon tilts at windmills.

What Marathon does not show is that any of the cases it discusses support its position that a release of express covenants under the lease also includes a release of tort liability for prior wrongful conduct or the release of extra-contractual common-law or statutory duties. That is because none of those cases hold as such. *See, e.g., W. Oil Sales Corp. v. Bliss & Wetherbee*, 299 S.W. 637, 638 (Tex. Comm’n App. 1927) (“When a contract is assignable, a party may assign the benefits of his contract to another, and delegate to his assignee the performance of his obligations under the contract; but he remains liable for the proper performance of those obligations, unless the other party to the contract consents for the assignment to have the effect of releasing him.”) (emphases added); *Wilson v. Gerhardt*, 13 P. 705, 705 (Colo. 1885) (concerning the assignor’s continued obligations under the contract after assignment, including “express covenants to pay rent”).

The additional statutory history discussed by Marathon [BIC 25-28] likewise does not conflict with the well-reasoned conclusion of the Court of Appeals. Marathon relies heavily on an earlier law concerning oil and gas leases on state trust land which provided that

All oil and gas leases issued under the provisions of this Act may be assigned in whole or in part with the consent and approval of the Commissioner of Public Lands, and after such approval the assignee shall become entitled to all of the rights and privileges and be bound by all of the obligations of the lease only in so far as the lands assigned are concerned.

1925 N.M. Laws, ch. 137, § 7. This earlier statute does not support an interpretation that the Legislature intended the 1929 law to release an assignor from tort liability for its own wrongful acts or its obligation to comply with extra-contractual duties after assignment.

The fact that the 1925 law did not release an assignor of its obligations upon assignment in fact supports the Court of Appeals' conclusion that the Legislature in 1929 added that language specifically to avoid application of the general rule discussed above. *See Op.* ¶ 56. Under the 1925 law, the assignor would have still been bound by the express covenants of the lease and liable to the Commissioner for the assignee's failure to perform. *See, e.g., Wilson*, 13 P. at 705 (holding that the "mere fact of [the lessor's] assent to the assignment" did not release the assignor from the express covenants of the lease). It is reasonable to conclude that the Legislature in 1929 sought to prevent that outcome and therefore added language

avoiding application of the common-law rule and relieving an assignor of its express covenants upon assignment.

Likewise, the change from the assignee being “bound by all of the obligations of the lease only in so far as the lands assigned are concerned” under the 1925 law to the assignor being “held to have assumed all of the duties and obligations of the assignor to the state as to [the assigned] tracts” under the 1929 law does not support Marathon’s position. The plain language of the 1925 law makes clear that the Legislature’s concern is with compliance with lease obligations after assignment and, while Section 19-10-13 does not contain the phrase “obligations of the lease,” the context of that section in a statutory scheme concerning oil and gas leases specifically, *see* NMSA 1978, Sections 19-10-1 through -70 (1925, as amended through 2025), the additional language in Section 19-10-13 concerning the lessee of record maintaining lease obligations even if it enters into contracts with third parties for development of the lease, and the general common-law rule concerning an assignor’s continued lease obligations after assignment support a conclusion that the Legislature is concerned with performance of the covenants of each assigned state oil and gas lease.

The language of an unrelated statute, NMSA 1978, Section 19-13-8 (1967), likewise does not indicate that the Court of Appeals erred. [***See BIC 28***] That statute concerns the relinquishment of geothermal leases on state trust land. *Id.* It therefore

covers a different kind of lease, involving a distinct activity and lease terms, as well as the relinquishment of those leases, which involves the termination of the lease rather than the substitution of assignee for assignor. As such, whether Section 19-13-8 is *pari materia* is questionable at best. *See, e.g., State ex rel. Quintana v. Schnedar*, 1993-NMSC-033, ¶ 4, 115 N.M. 573 (“[T]wo statutes covering the same subject matter should be harmonized and construed together when possible in a way that facilitates their operation and the achievement of their goals.”) (internal citations omitted). Even if it were *pari materia*, the differences between Sections 19-13-8 and 19-10-13 do not themselves support Marathon’s reading of the language of the statute at issue. *See United Rentals Nw., Inc. v. Yearout Mech., Inc.*, 2010-NMSC-030, ¶ 27, 148 N.M. 426 (“Our precedents have repeatedly cautioned against using wording variations in *pari materia* statutes as a conclusive determinant of differing legislative intent.”) That the Legislature, decades later in a statute concerning the relinquishment of an entirely different kind of lease, clearly articulated what obligations and liabilities do and don’t continue after relinquishment does not make

Section 19-10-13 state with any more clarity that assignors are relieved of tort liability upon assignment.⁶

As the Court of Appeals held, the context and history of Section 19-10-13 support a conclusion that the Legislature intended that upon approval of an assignment of an oil and gas lease by the Commissioner the assignor stands relieved of all contractual obligations. *Op.* ¶ 59. Marathon does not provide any reason to reverse this holding in favor of its interpretation that such an assignor additionally stands relieved of all liability for its own misconduct or its extra-contractual obligations to follow the law.

iii. The Court of Appeals correctly identified the unreasonable and deleterious outcomes of Marathon's interpretation of Section 19-10-13

In addition to the history and context of Section 19-10-13 supporting the Commissioner's position, the Court of Appeals properly considered the absurd and deleterious effects of accepting Marathon's position, specifically noting that if assignors are relieved of all liability for their own tortious conduct the State may be

⁶ Proposed changes to the State Land Office geothermal leasing rule are immaterial. As Marathon correctly notes, the Commissioner is free to amend the geothermal leasing rules concerning assignments. The Commissioner's decision to potentially remove language similar to that under Section 19-10-13 and 19.2.100.43 NMAC does not support Marathon's unreasonable interpretations of that statute and regulation.

left with the cost of conducting remediation and reclamation on unreasonable, excessive, and negligent damage to state trust land. *Op.* ¶ 58.

Even if the financial wherewithal of later assignees to a state oil and gas leases is not considered, Marathon’s position that assignors are released from all liability for their own tortious conduct is contrary to the general principle of tort law, recognized by this Court, that there is social value in holding wrongdoers responsible for their own harmful conduct. *See, e.g., United Rentals*, 2010-NMSC-030, ¶ 20 (recognizing the “societal benefits that can be promoted by holding wrongdoers responsible for the harmful consequences of their own behavior”); *Acquisto*, 1980-NMSC-126, ¶ 7 (applying “the common law rule of tort liability” that “responsibility for loss . . . due to negligence must be borne by the negligent party”). If assignors were relieved of liability for even reckless or intentional damage to the leased state trust land during their tenure as lessee and that liability shifted to later assignees, the fundamental purposes of tort law would be undermined. Ensuring that tortfeasors are responsible for their own damage to state trust land also specifically satisfies the “strong public interest in the protection of state land and its products.” *Bogle Farms v. Baca*, 1996-NMSC-051, ¶ 25, 122 N.M. 422.

The Commissioner’s position, adopted by the Court of Appeals, is consistent with these principles. Upon the Commissioner’s approval of an assignment, the assignor stands relieved of the obligations of the lease, such as the covenants to pay

rent and royalties. *See, e.g., Greer v. Salmon*, 1971-NMSC-002, ¶ 17, 82 N.M. 245 (construing royalty obligation as an express covenant). This would include the express covenant of the lease requiring that the lessee to go beyond the common-law and repair or pay for even reasonable damage to the surface. *Op.* ¶ 57. But the assignor remains liable for unreasonable, excessive, or negligent damage caused by its own misconduct. *See McNeill*, 2008-NMSC-022, ¶¶ 33-35. Additionally, if that assignor remains an operator of any well on the land it previously leased, it remains bound by common-law and statutory duties to avoid waste as well as any and all regulatory obligations concerning the safe and prudent operation of oil and gas wells. *See Viking Petroleum Inc. v. Oil Conservation Comm'n*, 1983-NMSC-091, ¶ 1, 100 N.M. 451 (differentiating lease holder from operator); Section 19-10-13 (acknowledging that state oil and gas lessees may enter into contracts with third parties for the development of the leasehold).

This interpretation of Section 19-10-13 is supported by its language, the context surrounding its enactment, the absurd consequences of Marathon's contrary

interpretation, and public policy concerning both the purpose of tort law and the protection of state trust land.⁷

III. Marathon's Right for Any Reason Arguments Remain Inadequate to Support Dismissal of the Commissioner's Claims

Marathon finally maintains the arguments it made before the district court concerning the inapplicability of Section 19-6-3 to form the basis for the Commissioner's negligence per se claim under a right for any reason theory. [BIC 41-45] These arguments remain unpersuasive as a basis to uphold the district court.

First, Marathon advances several related arguments concerning the fact that Section 19-6-3 imposes criminal and not civil penalties and therefore cannot form the basis of a tort claim. [BIC 41-42, 43-44, 44-45] As discussed, Section 19-6-3 specifically prohibits trespass and waste on state trust land and requires lessees to promptly vacate the leased premises upon lease termination. It is inconsequential that Section 19-6-3 imposes criminal penalties because the Commissioner is not bringing a suit directly under Section 19-6-3, but instead alleges that Tesoro and Marathon's violations of that statute form the basis of a negligence per se claim. *See, e.g., Cobb v. Gammon*, 2017-NMCA-022, ¶ 43, 389 P.3d 1058 (explaining that a

⁷ The district court also ruled that State Land Office regulation 19.2.100.43 NMAC supported dismissal of the Commissioner's tort claims. As the Court of Appeals concluded, no arguments were advanced that this regulation, which contains virtually identical language, should be interpreted differently than Section 19-10-13. *Op.* ¶ 59 fn.6. Marathon does not challenge this conclusion.

claim for negligence per se is based on the breach of a statute or regulation which defines a standard of conduct); [RP 56-58 ¶¶ 66-76]. For this reason, Marathon's continued insistence on relying on the criminal statute of limitations is also misplaced.⁸ [BIC 43-44]

Marathon's right for any reason arguments also rely on Marathon's persistent mischaracterization that an approval of an assignment by the Commissioner means that the lease is "deemed in good standing." [BIC 42] Section 19-10-13 gives the Commissioner the discretion to deny an assignment when the lease is not in good standing, not the duty to do so. Section 19-10-13 ("The [C]ommissioner shall have the right to refuse approval of any assignment . . . when the lease is not in good standing as to the assigned tracts."). Because it is not the case that an assignment must be denied if the lease is not in good standing, the approval of an assignment cannot reasonably be considered a finding that the lease necessarily is in good standing.

Finally, Marathon repeats its strange assertions that because Tesoro was once a lessee with a legal right to occupancy, the Commissioner cannot possibly assert

⁸ To the extent Marathon argues that the criminal statute of limitations is persuasive in showing that the Commissioner waited too long to bring this action against Marathon, Marathon did not move to dismiss the Complaint on the grounds of laches or any similar doctrine. This issue was not before the district court or before this Court on appeal.

claims of waste or trespass against Tesoro and Marathon. [BIC 44] Marathon need not concede liability, but it cannot reasonably argue that the Commissioner has not at least alleged that Tesoro and Marathon discarded trash, debris, and equipment on the leased property, contaminated the soil, and left those conditions to persist, past Tesoro's period of legal occupancy and the existence of the Leases. [RP 54 ¶ 50, 56 ¶¶ 62-64, 56-57 ¶¶ 67-68, 57 ¶ 71] This is sufficient to plead a case of waste and trespass against a former lessee.

CONCLUSION

For the foregoing reasons, the Commissioner respectfully requests that the Court affirm the well-reasoned, thorough, and correct Opinion of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 2, 2026, I filed a true and correct copy of the foregoing *Answer Brief* electronically through the Odyssey File & Serve system, thereby providing electronic service to all counsel of record, and sent a copy of the *Answer Brief* by email to:

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