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GO NOT WHERE THERE IS A PATH: PRESCRIPTIVE EASEMENT LAW IN NEW MEXICO AFTER *ALGERMISSEN V. SUTIN*

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I. INTRODUCTION

Rooted deep in ancient common law, with little guidance from legislatures, the acquisition and utilization of implied servitudes[1] has long proved to be one of the most complex bodies of Anglo-American law.[2] Courts are forced to sift through great bodies of case law in order to parse out the analogous facts needed to justify decisions that, by nature, are fact intensive. Furthermore, since servitudes involve usage, rather than ownership,[3] the difficulty of finding proof of the existence of an activity (or lack thereof) over long periods of time makes the job of both the advocate and the fact finder infinitely more complicated. As a result, this area of law has emerged as one replete with legal fictions and capable of multitudinous interpretations.[4]

In *Algermissen v. Sutin*,[5] the New Mexico Supreme Court attempted to clarify and restate the law of prescriptive easements[6] in New Mexico, leading to a questionable result and raising a few particularly interesting issues. In a unanimous opinion authored by Justice Minzner, the court dismissed the plaintiffs' claim to an easement by prescription.[7] More importantly, the court used the *Algermissen* opinion as a vehicle to reevaluate the traditional common law elements of the prescriptive easement claim, turning to persuasive secondary sources[8] in an attempt to simplify future law.[9]

This Note will examine the historical background behind acquisition by prescription in order to understand the context of the court's decision.[10] It will then attempt to focus on what the court in *Algermissen* saw as the difference between the law of

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* Class of 2006, University of New Mexico School of Law. This Note is dedicated to Apolinar Taveras and Leandro Skye Taveras. Their courage inspires my work and their lives enrich my own.

1. Black's Law Dictionary defines a servitude as "[a]n encumbrance consisting in a right to the limited use of a piece of land...without possession of it." BLACK'S LAW DICTIONARY 1400 (8th ed. 2004). There are four types of servitudes: (1) easements, (2) irrevocable licenses, (3) profits, and (4) real covenants. *Id.* This Note will focus on a claimant's ability to acquire an easement in New Mexico when such a right is not expressly provided for. *See infra* note 6.

2. Within the English tradition, the law of servitudes developed as a branch of property law dealing with incorporeal hereditaments, or non-possessory rights that are treated as property. 1 THOMPSON ON REAL PROPERTY § 5.04(g)(1) (David A. Thomas ed., 1994); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § Scope (2000) (describing servitudes as among the "most complex and archaic bodies of 20th century American law").

3. *See supra* note 1.

4. *See infra* Part II.

5. 2003-NMSC-001, 61 P.3d 176.

6. An easement is "an interest in land...consisting in the right to use or control the land...for a specific limited purpose." BLACK'S LAW DICTIONARY 548 (8th ed. 2004). Prescription is one method through which title to an easement can be acquired. The elements that must be properly met in order to acquire an easement by prescription vary across jurisdictions. The elements that must be met in order to acquire an easement by prescription in New Mexico are the subject of this Note.

7. *Algermissen*, 2003-NMSC-001, ¶ 1, 61 P.3d at 179.

8. The court relied heavily on the rationale of the RESTATEMENT (THIRD) OF PROP.: SERVITUDES (2000), and much of the opinion was dedicated to reconciling New Mexico case law with the *Restatement*.

9. *Algermissen*, 2003-NMSC-001, ¶ 10, 61 P.3d at 180.

10. *See infra* Part II.

New Mexico as it was and the simplified version the court was adopting.[11] Subsequently, this Note will analyze alternative approaches the court could have taken in light of its expressed objectives.[12] Finally, this Note will conclude by assessing the decision's implications for the law of New Mexico.[13]

II. HISTORICAL BACKGROUND

In order to evaluate the change to New Mexico law affected by the supreme court's ruling in *Algermissen*, it is necessary to examine the historical development of prescriptive easements. In fact, it may be this history that compelled the court to attempt a simplification of the law.[14] Unlike possessory rights, which were often protected by adverse possession statutes, rights to usage without possession generally did not enjoy the support of legislatures.[15] As a result of this legislative omission, courts developed the doctrine of prescription.[16]

The development of easements by prescription dates back to 1275, when the English Parliament enacted a statute prohibiting challenges to possessory rights if those possessory rights could be traced to the inception of Richard I's reign in 1189.[17] Although Parliament's law only applied to rights of seisin,[18] the courts extended the same protection to showings of continuous usage "in the nature of an easement or profit."[19]

As time passed, however, usage extending back to 1189 became more difficult to prove, and English courts responded by creating a series of helpful presumptions.[20] The first of these presumptions assumed that if use had existed beyond the memory of any living person, it would be understood to have existed from 1189.[21] In 1623, this standard began to shift when a statute was enacted prohibiting suits for ejectment[22] beyond twenty years; judges looked to this statute and held that, if a prescriptive use extended back more than twenty years, it would be presumed to extend back to 1189.[23] For prescription to be a sustainable doctrine, however, a more definite standard was needed to protect the usage rights of

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11. *See infra* Part IV.

12. *See infra* Part V.

13. *See infra* Part VI.

14. *See Algermissen*, 2003-NMSC-001, ¶ 10, 61 P.3d at 180; *see also* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § Scope (2000) (acknowledging the historical complexity of the law of servitudes).

15. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 811 (5th ed. 2002).

16. *Id.*

17. *Id. See generally* THOMPSON ON REAL PROPERTY, *supra* note 2, § 5.04(g)(2) (summarizing the emergence of legal fictions and the statutory history of the parallel law of profits). Profits, like easements, are a type of servitude involving the use of land without ownership. *See supra* note 1. Specifically, a profit is "[a] servitude that gives the right to pasture cattle, dig for minerals, or otherwise take away some part of the soil." BLACK'S LAW DICTIONARY 1247 (8th ed. 2004).

18. In its original context, the concept of seisin simply meant possession and applied to both land and tangible property. CORNELIUS J. MOYNIHAN & SHELDON F. KURTZ, INTRODUCTION TO THE LAW OF REAL PROPERTY § 11, at 27 (3d ed. 2002). Eventually, in relation to land, seisin came to refer specifically to possession under claim of ownership. *Id.* Therefore, a tenant may have possession but not seisin; seisin is retained in the landlord. *Id.*

19. DUKEMINIER & KRIER, *supra* note 15, at 811.

20. *Id.* at 812.

21. *Id.*

22. Ejectment refers to a cause of action in which a person with title to property seeks to recover possession from an occupier of the property. *See* BLACK'S LAW DICTIONARY 556 (8th ed. 2004).

23. DUKEMINIER & KRIER, *supra* note 15, at 812.

easement holders.[24] The result was the creation of the fiction of the "lost grant," which established that, if a use could be shown to have existed for twenty years, "the presumption of a grant could not be rebutted by evidence that no grant had...been made."[25] Although useful, the extent of fiction inherent in this development was not lost on English courts:

> Juries were first told that from user, during living memory, or even during twenty years, they might presume a lost grant or deed; next they were recommended to make such presumption; and lastly, as the final consummation of judicial legislation, it was held that a jury should be told, not only that they might, but also that they were bound to presume the existence of such a lost grant, although neither judge nor jury, nor any one else, had the shadow of a belief that any such instrument had ever really existed.[26]

In the United States, where proving usage since 1189 would have been impossible, most jurisdictions ignored the traditional English presumptions and developed an independent law of prescription by analogizing to statutes of limitations applicable to the recovery of possession.[27]

The adoption of the statute of limitations applicable to possessory claims was only one half of the equation. The type of usage that would generate a prescriptive right had to be defined as well, and American courts generally required the same elements be met as those necessary for the assertion of possessory rights.[28] This is the context in which the law of New Mexico was formulated. The court in *Algermissen* acknowledged that "[t]he elements of [a prescriptive easement] claim are the product of many years of historical development," and pointed to *Hester v. Sawyers*[29] as the genesis of that development in New Mexico.[30]

Keeping true to the historical spirit of the law, the court in *Hester* prefaced its discussion of prescriptive easement law in New Mexico by pointing out that the state had no statute that expressly authorized the acquisition of an easement by prescription.[31] In fact, the court in *Hester* expressly rejected the servient tenement[32] owner's argument that the state's adverse possession statute should apply to the easement holder's claim and, therefore, incorporate that statute's requirement of

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24. *See id.* "[T]hese presumptions did not provide an effective system of prescription because they were only presumptions and could be overcome by evidence showing that some time since 1189 (perhaps 25 years before the lawsuit) the use could not or did not exist." *Id.*

25. *Id.*

26. Bryant v. Foot, 2 L.R.–Q.B. 161, 181 (1867).

27. DUKEMINIER & KRIER, *supra* note 15, at 812. The manipulation of adverse possession statutes for prescriptive claims is discussed in *Hester v. Sawyers*, 41 N.M. 497, 502–03, 71 P.2d 646, 649–50 (1937). *See infra* notes 31–37 and accompanying text. New Mexico, like the majority of American jurisdictions, "adopted the rule that the period of use for acquiring such title by prescription corresponds to the local statute of limitation for acquiring title to land by adverse possession." *Hester*, 41 N.M. at 502, 71 P.2d at 649.

28. DUKEMINIER & KRIER, *supra* note 15, at 812.

29. 41 N.M. 497, 71 P.2d 646 (1937).

30. *Algermissen*, 2003-NMSC-001, ¶ 10, 61 P.3d at 180. The court in *Hester* contemplated usage that was "open, uninterrupted, peaceable, notorious, adverse, under a claim of right, and continue[d] for a period of ten years with the knowledge or imputed knowledge of the owner" as requisite to establishing an easement by prescription. *Hester*, 41 N.M. at 504, 71 P.2d at 651.

31. *Hester*, 41 N.M. at 501, 71 P.2d at 649.

32. The servient tenement refers to the property that will be encumbered by the prescriptive right. *See* BLACK'S LAW DICTIONARY 1400 (8th ed. 2004).

color of title for acquisition of possessory rights.[33] According to the supreme court in *Hester*, "[t]he statutes of limitations do not directly apply to actions in which...easements[]...are involved, but only to actions for the recovery of land."[34]

While disqualifying the applicability of the adverse possession statute in relation to claims of prescriptive easements, the supreme court in *Hester* still held that the period necessary to create an easement is determined by that statute.[35] The logic of the holding is rooted in the historical concerns surrounding the development of the prescription doctrine.[36] The court's attempt through common law to establish a grant since time immemorial set no specific time period for the manifestation of an easement. Instead, this attempt led the courts to analogize to the law of adverse possession and apply that statute of limitations in easement cases.[37]

The distinction between this law as adopted by American jurisdictions and the traditional English application is in the foundational strength of the presumption of a grant.[38] In New Mexico, the presumption of a grant is conclusive, and once sufficient time has passed to satisfy the prescriptive period, the presumption will not be undermined by evidence to the contrary.[39]

The inquiry, of course, does not end here. The character of usage necessary to acquire rights to an easement still needed to be established.[40] In doing so, the supreme court in *Algermissen* relied on the elements articulated in *Hester*[41] in accordance with what seems to be the overwhelming practice of New Mexico courts.[42]

III. STATEMENT OF THE CASE

A. Facts

Defendants in this case were several families who owned property located between the east side of the Rio Grande River and Rio Grande Boulevard in Albuquerque, New Mexico.[43] The plaintiffs were recreational trail users who wished to cross this property on a long dirt pathway known as "Elfego Road."[44] This

33. *Hester*, 41 N.M. at 503, 71 P.2d at 650. The current version of the New Mexico adverse possession statute retains the color of title requirement. *See* NMSA 1978, § 37-1-22 (1973).

34. *Hester*, 41 N.M. at 502, 71 P.2d at 649 (citation omitted).

35. *Id.* at 503, 71 P.2d at 650.

36. *See supra* notes 15–27 and accompanying text.

37. *Hester*, 41 N.M. at 503, 71 P.2d at 650. The supreme court in *Hester* emphasized that the adoption of the necessary period is the extent of the statute's applicability. "Statutes of limitation are not otherwise involved or material." *Id.*

38. *See supra* notes 20–25 and accompanying text.

39. *Hester*, 41 N.M. at 504, 71 P.2d at 650. The adoption of this rule is consistent with the doctrinal adjustments made by most jurisdictions to the difficulties inherent in the English common law insistence on tracing grants back to 1189. *See supra* notes 15–27 and accompanying text.

40. *See supra* note 30.

41. *Algermissen*, 2003-NMSC-001, ¶ 10, 61 P.3d at 180; *see supra* note 30.

42. *See, e.g.*, Bloom v. Hendricks, 111 N.M. 250, 253, 804 P.2d 1069, 1072 (1991); Brooks v. Tanner, 101 N.M. 203, 207, 680 P.2d 343, 347 (1984).

43. *Algermissen*, 2003-NMSC-001, ¶ 3, 61 P.3d at 179. Although there are more than ten families or individuals named as defendants, the court's opinion only references two defendant families, the Alleys and the Sutins.

44. *Id.* ¶ 3, 61 P.3d at 179.

pathway connected the defendants' homes, beginning at Rio Grande Boulevard and ending at the Rio Grande River in Rio Grande State Park.[45]

Elfego Road served to provide private ingress and egress over the defendants' property and was not maintained by the City of Albuquerque or by any other government entity.[46] While evidence of its precise course was not presented to the court, the road had remained in place over essentially the same property throughout its existence[47] and had been in use since at least the 1940s.[48] Most of the landowners along the road only maintained private residences on their property, although the defendant family, the Alleys, also ran a horse business.[49] Defendant family, the Sutins, however, did not maintain a residence, nor had they ever lived on their property.[50]

In 1992 or 1993, the Alleys constructed a fence and a gate that closed off their driveway and forced anyone wishing to access the Rio Grande River via Elfego Road to traverse property belonging to the Sutins.[51] When a 1995 attempt by the Sutins to sell their property fell through because the commitment for a title insurance policy contained exceptions for the possibility of prescriptive easements, they too constructed fences and a gate that effectively precluded anyone from crossing the property.[52] The combined effect of these actions was to cut off Elfego Road completely and prevent plaintiffs' access to Rio Grande State Park.[53]

B. Procedural Disposition

Following a bench trial in May 2000, the district court dismissed plaintiffs' claim to an easement by prescription, with prejudice.[54] Plaintiffs appealed to the court of appeals, which certified the matter to the New Mexico Supreme Court.[55]

IV. RATIONALE

In its opinion, the New Mexico Supreme Court began by discussing the appropriate standard of review[56] before considering each element of a prescriptive easement claim individually.[57] The court's ruling was rooted in the elements of prescriptive easements, but it did briefly address other arguments made by the defendants.[58] First, the court considered the defendants' assertion that prescriptive

45. *Id.*
46. *Id.* ¶ 4, 61 P.3d at 179.
47. *Id.*
48. *Id.* ¶ 5, 61 P.3d at 179.
49. *Id.* ¶ 4, 61 P.3d at 179.
50. *Id.*
51. *Id.* ¶ 6, 61 P.3d at 179.
52. *Id.*
53. *See id.*
54. *Id.* ¶ 1, 61 P.3d at 179.
55. *Id.*
56. In its consideration of the standard of review, the court considered both the claimants' burden of proof at the trial court level and the appropriate appellate deference to trial court discretion. *Id.* ¶ 9, 61 P.3d at 180; *see also infra* Part IV.A.
57. *Algermissen*, 2003-NMSC-001, ¶ 9, 61 P.3d at 180.
58. *Id.* ¶¶ 8, 26, 61 P.3d at 180, 184–85.

easements may not be granted purely for leisure and recreational purposes.[59] Second, the court raised, although it did not address, the peculiar nature of a public easement by prescription and the constitutional implications such a finding might entail.[60]

A. Burden of Proof and Appellate Review

At trial, the district court concluded that plaintiffs had not met their burden of proof in establishing all of the elements of a prescriptive easement.[61] It is the rule in New Mexico that, in establishing such a claim, each of these elements must be proven by clear and convincing evidence.[62] Further, in reviewing such a fact-intensive finding, great deference is given to the discretion of the trial court.[63] The supreme court expressed its reluctance to overturn a finding against the party with the burden of proof whenever there could be a rational basis for the district court to "disbelieve the evidence offered in support of the contrary finding."[64] The court determined that when elements are to be proven by clear and convincing evidence, it is the fact finder's job to weigh that evidence and determine where the truth lies.[65]

In its evaluation of the district court's decision, the scope of the supreme court's review was detailed and extensive.[66] The court stated that it is not enough that the general claim be proven by clear and convincing evidence; rather, it is necessary that each and every element of the claim meet that standard.[67] Therefore, if the plaintiffs failed to meet this burden as to any individual element, the court mandated that their claim must fail and the district court's decision must be affirmed.[68]

In order to establish an easement by prescription, the court determined that it was the responsibility of the plaintiffs to show that the public used the passageway for

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59. *Id.* ¶ 26, 61 P.3d at 184–85. The district court had concluded that prescriptive easements cannot be held for recreational purposes or purely for convenience, a proposition suggested by the defendants. *Id.* Although the supreme court based its decision on other grounds, the court did express doubt as to the validity of the district court's conclusion on this issue. *Id.*; *see infra* notes 158–162 and accompanying text.

60. *Algermissen*, 2003-NMSC-001, ¶ 26, 61 P.3d at 185. *Schlieter v. Carlos*, 108 N.M. 507, 510, 775 P.2d 709, 712 (1989), was cited in support of the jurisprudential principle of avoiding constitutional questions unless compelled to answer them. *Algermissen*, 2003-NMSC-001, ¶ 26, 61 P.3d at 185. The defendants claimed that any public easement granted would be a taking of private property without compensation. *Id.* Among its concerns, the supreme court noted "that no government entity is a party to this lawsuit, and it would therefore be impossible to decide who should pay such compensation." *Id.* Because the court affirmed the trial court's ruling that the elements of a prescriptive easement were not met, however, it declined to address this argument. *Id.*

61. *Algermissen*, 2003-NMSC-001, ¶ 8, 61 P.3d at 180. As noted earlier, the district court also held that prescriptive easements cannot be awarded for purely recreational purposes, *see supra* note 59, but this proposition was disregarded by the supreme court and, as such, is not addressed in this Note. *See Algermissen*, 2003-NMSC-001, ¶ 26, 61 P.3d at 185.

62. *Algermissen*, 2003-NMSC-001, ¶ 9, 61 P.3d at 180 (citing Village of Capitan v. Kaywood, 96 N.M. 524, 524, 632 P.2d 1162, 1162 (1981) (requiring substantial evidence of the elements for a prescriptive easement)); Scholes v. Post Office Canyon Ranch, Inc., 115 N.M. 410, 411, 852 P.2d 683, 684 (Ct. App. 1992) (requiring each element be satisfied by clear and convincing evidence).

63. *See Algermissen*, 2003-NMSC-001, ¶ 9, 61 P.3d at 180.

64. *Id.* (citing Sosa v. Empire Roofing Co., 110 N.M. 614, 616, 798 P.2d 215, 217 (Ct. App. 1990)).

65. *Id.* (citing State *ex rel.* Dep't of Human Servs. v. Williams, 108 N.M. 332, 335, 772 P.2d 366, 369 (Ct. App. 1989)).

66. *Id.* (considering each of the elements separately).

67. *See id.* (citing *Scholes*, 115 N.M. at 411, 852 P.2d at 684 (holding that "each element required to establish a prescriptive easement has been proven by clear and convincing evidence") (quoting Maloney v. Wreyford, 111 N.M. 221, 224, 804 P.2d 412, 415 (1990))).

68. *Id.*

a period of ten years in an "'open, uninterrupted, peaceable, notorious, [and] adverse' manner, under a claim of right," and with the knowledge of the owner.[69] On appeal, the plaintiffs claimed that they had met their burden as to each required element and, so, the supreme court addressed each separately.[70]

Despite acknowledging the historical pedigree of the aforementioned elements, the court nevertheless announced that it would not constrain its analysis to the traditionally enumerated elements and would use this case to "clarify the law of prescriptive easements."[71] In so doing, the traditional elements were criticized as being redundant and a seemingly more succinct approach, modeled on the *Restatement (Third) of Property: Servitudes*, was proposed.[72] It was the court's claim that the elements embodied in the *Restatement* encompass all of the historical requirements and the remainder of the opinion attempted to reconcile this secondary source with precedent.[73]

B. Adverse Use and the Impact of Presumptive Reasoning

Once the problem was laid out, the first element attended to by the court was the adverse nature of the plaintiffs' use.[74] The opinion began by turning its attention to the *Restatement* in order to derive a working definition of "adverse use."[75] The court settled on "use made without the consent of the landowner...[and] also the type of use that would normally give rise to a cause of action in tort."[76]

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69. In acknowledging these elements, the court quoted *Village of Capitan v. Kaywood*, 96 N.M. 524, 525, 632 P.2d 1162, 1163 (1981). *Algermissen*, 2003-NMSC-001, ¶ 9, 61 P.3d at 180. *Village of Capitan*, itself, cited *Lovelace v. Hightower*, 50 N.M. 50, 65, 168 P.2d 864, 873 (1946), for this list. *Village of Capitan*, 96 N.M. at 525, 632 P.2d at 1163. *Lovelace*, like the court in *Algermissen*, traced the historical development of these elements to *Hester v. Sawyers*, 41 N.M. 497, 504, 71 P.2d 646, 651 (1937). *Algermissen*, 2003-NMSC-001, ¶ 10, 61 P.3d at 180; *Lovelace*, 50 N.M. at 65, 168 P.2d at 873. The great majority of the cases cited in the *Algermissen* opinion point directly to *Hester* as the source of these elements. *See, e.g.*, Sanchez v. Dale Bellamah Homes of N.M., Inc., 76 N.M. 526, 528, 417 P.2d 25, 27 (1966).

70. *Algermissen*, 2003-NMSC-001, ¶ 9, 61 P.3d at 180.

71. *Id.* ¶ 10, 61 P.3d at 180.

72. *Id.* (citing RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 2.16–2.17 (2000)). "A prescriptive use is...a use that is adverse to the owner of the land or the interest in land against which the servitude is claimed...." RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.16 (2000). "A servitude is created by a prescriptive use of land...if the prescriptive use is: (1) open or notorious, and (2) continued without effective interruption for the prescriptive period." *Id.* § 2.17. In its incorporation of the *Restatement*'s logic, the New Mexico Supreme Court followed the example of numerous federal and state jurisdictions that have referred to the *Restatement* in discussing servitudes. *See* Tannaz Simyar, Comment, Hiner v. Hoffman: *An Analysis of the Hawai'i Supreme Court's Decision and Its Impact on Hawai'i's Common Interest Communities*, 26 U. HAW. L. REV. 177, 196–97 n.175 (2003); *see also, e.g.*, Lobato v. Taylor, 71 P.3d 938, 950 (Colo. 2002) (finding the *Restatement* consistent with Colorado precedent); Cook v. Hartman, 77 P.3d 231, 237–38 (Mont. 2003) (comparing Montana easement law to sections 2.16 and 2.17 of the *Restatement*); Schmiehausen v. Zimmerman, 2004 Ohio 3148, ¶ 40 (Ct. App. 2004) (claiming that the *Restatement* view "would certainly simplify [the court's] analysis").

73. *Algermissen*, 2003-NMSC-001, ¶ 10, 61 P.3d at 180. It should be noted that the court recognized the unique analytical problems inherent in easements sought by public prescription. *Id.* Section 2.18 of the *Restatement* involves these issues and clearly states that "[t]he public may acquire servitudes by dedication and prescription." RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.18 (2000). In considering the facts before the court, however, the opinion claimed that the analysis of this type of prescriptive easement would be the same if the plaintiffs had only requested a private prescriptive easement. *Algermissen*, 2003-NMSC-001, ¶ 10, 61 P.3d at 180–81.

74. *Algermissen*, 2003-NMSC-001, ¶ 11, 61 P.3d at 181.

75. *Id.*

76. *Id.* (citing RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.16 cmt. b (2000)). The comment mentions that typical causes of action in tort include trespass, nuisance, and waste. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.16 cmt. b (2000).

The court then pointed out that, under many sets of ambiguous circumstances, this definition is of little assistance in and of itself due to the difficulty of proving a particular type of usage over the passage of time.[77] In response to this challenge, the court acknowledged the helpfulness of employing a series of presumptions.[78] The first of these presumptions was that usage originating in permission is presumed to continue as permissive until an overt, affirmative event takes place that alerts the landowner to a right hostile to that owner's interests.[79] The second presumption was less favorable to landowners, suggesting that, absent proof of express permission, if all other elements of a prescriptive easement claim are satisfied, the use will be presumed to be adverse.[80]

In defense of its analysis to follow, the court cautioned that both in accordance with its own rules[81] and the case law of the state[82] these two presumptions were merely persuasive "rhetorical devices."[83] The court further noted that the *Restatement*, whose rule the court was attempting to adopt, takes no official position on the use of presumptions.[84]

With this foundation, the court first inquired into whether or not the defendants ever granted the plaintiffs permission to use Elfego Road as access to Rio Grande State Park.[85] It was quickly pointed out by the court that New Mexico case law does not construe "permission" so narrowly as to mandate express permission; evidence of implied permission will suffice to rebut the presumption of adversity.[86] The court noted that *Hester v. Sawyers*,[87] which established the presumption of adversity in New Mexico, specifically stated, "[I]f a use has its inception in permission, express *or* implied, it is stamped with...permissive character."[88] Conversely, once evidence rebutting the presumption of adverse use is presented, the claimants are not necessarily denied, but they must present evidence of adversity sufficient to meet their burden of proof.[89]

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77. *Algermissen*, 2003-NMSC-001, ¶ 11, 61 P.3d at 181.

78. *Id.*

79. *Id.* (citing Hester v. Sawyers, 41 N.M. 497, 505, 71 P.2d 646, 651 (1937)).

80. *Id.* (citing Vill. of Capitan v. Kaywood, 96 N.M. 524, 525, 632 P.2d 1162, 1163 (1981); Sanchez v. Dale Bellamah Homes of N.M., Inc., 76 N.M. 526, 529, 417 P.2d 25, 27 (1966)).

81. *Id.* (citing Rule 11-301 NMRA).

82. *Id.* (citing Mortgage Inv. Co. of El Paso v. Griego, 108 N.M. 240, 244, 771 P.2d 173, 177 (1989)).

83. *Id.* (quoting *Griego*, 108 N.M. at 244, 771 P.2d at 177).

84. *Id.* (citing RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.16 cmt. g (2000)).

85. *Id.* ¶ 12, 61 P.3d at 181. In order to understand how the presumptions could be applied, it can be supposed that, if permission had been granted originally, the court should continue to consider the plaintiffs' usage permissive unless the plaintiffs could present evidence that permission had been revoked. If permission was not granted but the plaintiffs established all the other elements of a prescriptive claim, they then would have been entitled to a presumption of adversity.

86. *Id.*

87. 41 N.M. 497, 71 P.2d 646 (1937).

88. *Algermissen*, 2003-NMSC-001, ¶ 12, 61 P.3d at 181 (quoting *Hester*, 41 N.M. at 505, 71 P.2d at 651 (emphasis added)).

89. *Id.* ¶ 13, 61 P.3d at 181. Here, the supreme court discussed the shifting of procedural responsibilities of the parties. First, assuming all other elements of the prescriptive easement claim are met, the trier of fact may presume adversity and it is up to the landowner to rebut such a presumption with evidence of permission, either express or implied. *Id.* Once done, however, the burden shifts back to the claimant to establish the condition of adversity by clear and convincing evidence. *Id.*

The court quickly dismissed any evidence of permission derived from the Sutin defendants, stating that such permission was impossible considering the Sutins' admission that they did not even know that the plaintiffs were using their property.[90] Notwithstanding this admission on the part of the Sutins, evidence of permission was available in relation to other defendant families, specifically the Alleys.[91] As an example of actions consistent with permission, some of the plaintiffs testified that they would greet and talk with people who lived in the area.[92] One witness even testified that, in the 1940s, the previous owner of the Sutin tract gave the entire neighborhood permission to cross their land.[93]

Relying on the presumption that usage originating in permission remains permissive, the district court had determined that the presumption of adversity had been sufficiently rebutted by the actions of the plaintiffs and the permission granted by the Sutins' predecessor in interest.[94] Accordingly, the use of Elfego Road, at least until the erection of fences and gates by defendants in the mid-1990s, was found to have always been permissive.[95] Absent additional evidence of an act on the part of the plaintiffs, which would have notified the defendants of a claim of right hostile to their interests in the land, the supreme court ruled that the district court was at liberty to weigh the evidence of permission more heavily than the presumption of adversity.[96]

The court further stipulated that the district court may have ruled partially on a second exception to the presumption of adversity known as the "neighbor accommodation exception."[97] Largely in response to the expansive and sparsely populated nature of the state, the court in *Algermissen* noted that New Mexico law has carved out this exception to the presumption of adversity when the "claimed right-of-way traverses large bodies of open, unenclosed, and sparsely populated privately-owned land."[98] The supreme court wasted little time in pointing out the neighborhood accommodation exception's lack of relevancy in the case at hand.[99] First, that exception was shown "to apply only to 'large bodies of unenclosed land...where the owners thereof could not reasonably know of passings over said lands.'"[100] Here, it was undisputed that many of the defendant landowners knew of

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90. *Id.* ¶ 14, 61 P.3d at 182.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* ¶ 15, 61 P.3d at 182.
95. *Id.*
96. *Id.* It should additionally be noted that this is only a portion of the finding. The presumption of adversity applies when all of the other elements of an easement by prescription are met. *Id.* ¶ 11, 61 P.3d at 181. Even if the district court did not weigh the defendants' rebuttal evidence more heavily than the presumption of adversity, had it seen fit to deny another element of the prescriptive easement claim, one can suppose the presumption would have been likewise defeated.
97. *Id.* ¶ 16, 61 P.3d at 182.
98. *Id.* (quoting Scholes v. Post Office Canyon Ranch, Inc., 115 N.M. 410, 412, 852 P.2d 683, 685 (1992) (citation omitted)).
99. *Id.* ¶ 17, 61 P.3d at 182.
100. *Id.* (quoting Maestas v. Maestas, 50 N.M. 276, 279–80, 175 P.2d 1003, 1006 (1946)). The court also cited *Village of Capitan v. Kaywood*, 96 N.M. 524, 525, 632 P.2d 1162, 1163 (1981), as an example of a case in which the neighbor accommodation exception did not apply in a populated subdivision. *Algermissen*, 2003-NMSC-001, ¶ 17, 61 P.3d at 182.

the plaintiffs' usage of Elfego Road.[101] For those defendants who were unaware of this usage, the court further stated that they could have reasonably learned of such usage.[102] Secondly, and more importantly, resort to the neighbor accommodation exception was not necessary as there was enough evidence to support the district court's holding based on findings of permissive usage alone.[103]

C. Knowledge from Open and Notorious Use

The first significant change in analysis between the traditional approach and the one adopted by the court in *Algermissen* relates to the elements of open and notorious usage.[104] According to the court, these elements are the exclusive methods by which the landowner can be imputed with knowledge.[105] The court found noteworthy that the elements of open and notorious usage have frequently been treated as distinct and went to some length to point out that this treatment is divergent from the characterization of these terms by the *Restatement*.[106] This procedural conflict was easily reconciled by the court's treating "open" and "notorious" not as distinct elements of a prescriptive claim, but as two interrelated descriptors of the same requirement—that the landowner have knowledge of claimant's use.[107]

These distinctions are no longer important as the court formally rejected the conjunctive approach in its application and adopted the *Restatement*'s rationale that the terms "are all part of the same requirement."[108] The court held that a finding that usage was open *or* notorious would satisfy the claimant's requirement because both

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101. *Algermissen*, 2003-NMSC-001, ¶ 21, 61 P.2d at 183. Furthermore, it is not likely that the court considered Albuquerque remote, unenclosed, or sparsely populated.

102. *Id.* ¶ 17, 61 P.3d at 182. The court noted that the defendants offered another "trigger" of the neighborhood accommodation exception—that such exception applies when a "generally friendly neighborhood attitude exists." *Id.* ¶ 17 n.2, 61 P.3d at 182 n.2. However, the court did not resort to the neighbor accommodation exception in making its decision and so did not rule on the validity of this second potential condition. *Id.*

103. *Id.*

104. *Id.* ¶ 19, 61 P.3d at 183 ("The *Restatement* simplifies or rationalizes the [traditional] definition of a prescriptive easement by acknowledging that [open and notorious] are [both] part of the same requirement.") (citations omitted).

105. *Id.* ¶ 18, 61 P.3d at 183 (citing Silverstein v. Byers, 114 N.M. 745, 748, 845 P.2d 839, 842 (Ct. App. 1992)).

106. "The *Restatement* uses the terms 'open' and 'notorious' in the disjunctive ('open or notorious'), while our cases have repeatedly used them conjunctively ('open and notorious')." *Id.* ¶ 19 n.3, 61 P.3d at 183 n.3.

107. *Id.* ¶ 18, 61 P.3d at 182–83. This does not mean that "open" and "notorious" can be given equivalent meanings. "'Open' generally means that the use is not made in secret or stealthily. It may also mean that it is visible or apparent. 'Notorious' generally means that the use is actually known to the owner, or is widely known in the neighborhood." RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. h (2000).

108. *Algermissen*, 2003-NMSC-001, ¶ 19 & n.3, 61 P.3d at 183 & n.3. The court in *Algermissen* claimed that the disjunctive approach, now formally adopted, was already the law of New Mexico. *Id.* ¶ 19, 61 P.3d at 183. The court cited two cases to demonstrate how "open" has been manipulated. *Id.* (citing *Silverstein*, 114 N.M. at 748, 845 P.2d at 842 (holding that frequent use of a road was so plainly apparent that the requirement of open and notorious use was satisfied); Maestas v. Maestas, 50 N.M. 276, 280, 175 P.2d 1003, 1006 (1946) (holding that use of a relatively narrow strip of land, adjacent to the landowner's residence, in the presence of the landowner satisfied this requirement)). Likewise, an additional case was included to demonstrate the historical application of "notorious." *Id.* (citing Cunningham v. Otero County Elec. Coop., Inc., 114 N.M. 739, 742, 845 P.2d 833, 836 (Ct. App. 1992) (holding that, when landowner actually saw a power line, the open and notorious requirement was satisfied)).

actual knowledge of usage *and* knowledge that a reasonable owner should have possessed are adequate to create the easement.[109]

The supreme court pointed out that the district court did not make specific findings of fact related to open or notorious use.[110] Rather, in accordance with the new spirit of application, a good deal of evidence related to whether or not the plaintiffs' manner of use could be interpreted to endow defendants with knowledge of that use was taken by the court.[111] First, in relation to the Sutin defendants, the supreme court's prior findings already established that the Sutins were unable to grant permission due to a lack of knowledge that plaintiffs were traversing their property.[112] Even for the other defendants who were on the land regularly, the district court had found that the plaintiffs "who used Elfego Road were 'not readily distinguishable from the property owners and their guests and invitees.'"[113] The supreme court reasoned that this factor, combined with the brief amount of time it would take individual plaintiffs to cross the property, and the heavily wooded nature of the property, could have been taken into account by the district court.[114] Naturally, contrasting facts were also taken into evidence, including a concession by the Alleys that they actually saw three of the plaintiffs using the trail.[115] Still, in accordance with the information taken above, the district court reached the finding that the public users the Alleys saw were indistinguishable from the landowners on Elfego Road and their guests.[116]

The Alleys' difficulty identifying the plaintiffs' use proved instructive and allowed the supreme court to reach the same result for the Sutin defendants.[117] The court found that the Sutins' lack of actual knowledge was not sufficient to undermine the establishment of open or notorious usage on its own.[118] As discussed above, knowledge that a reasonable landowner should have had is enough to serve as constructive notice of prescriptive usage.[119] In light of findings related to the difficulty had by the Alleys, who were present in the neighborhood during the prescriptive period, the supreme court concluded that the district court could have rationally found that the Sutins would not have had knowledge of the plaintiffs' usage of their land even had they been more diligent.[120] Thus, the supreme court held that it could not make a finding of open or notorious use if knowledge were not imputed to the defendants.[121]

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109. *Id.* ¶ 19 n.3, 61 P.3d at 183 n.3.
110. *Id.* ¶ 20, 61 P.3d at 183.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* ¶ 21, 61 P.3d at 183.
116. *Id.*
117. *Id.* ¶ 20, 61 P.3d at 183.
118. *Id.* ¶ 21, 61 P.3d at 183–84.
119. *See supra* notes 108–109 and accompanying text.
120. *Algermissen*, 2003-NMSC-001, ¶ 21, 61 P.3d at 183–84.
121. *Id.* ¶ 22, 61 P.3d at 184. Ironically, after spending a good deal of time on the new disjunctive standard, the court still disqualified both elements specifically in a conjunctive way: "The use by the public was not apparent, *and* it was not of such a character that it was widely known in the neighborhood." *Id.* (emphasis added).

D. Continuous and Uninterrupted Use

Although the plaintiffs' failure to prove any element of a prescriptive easement claim would have been sufficient to defeat their cause of action,[122] the supreme court chose to address the remaining elements. Like the concepts of "open" and "notorious," the terms "continuous" and "uninterrupted" were interpreted by the court to be less than synonymous, but closely related elements of the same requirement.[123] The court determined that continuity is to be examined in relation to claimants' behavior and the nature of their usage; evaluating whether that usage is interrupted calls for examination of the landowners' conduct.[124] Taken together, the usage relied upon to support a claimant's contention cannot be sporadic, random, or arbitrary; rather, to create an easement by prescription, the use must be normal and allowed to persist for the prescriptive period.[125]

Therefore, under the court's analysis, defining "normal" became a critical component in supporting the plaintiffs' claim.[126] The court cited to the standard articulated in *Maloney v. Wreyford*,[127] which held that "normal" means reasonably frequent use of the property, whenever needed, and in a manner corresponding to the natural use of such a property.[128] In *Algermissen*, the plaintiffs' claim that they used the alleged easement continuously was, for the most part, not disputed by the defendants.[129] Rather, the defendants anchored their arguments in continuity's sister element, interruption.[130]

Interruption, as stated above, requires action on the part of the owner and takes one of two forms: (1) a physical interruption or (2) a legal action to halt usage.[131] Naturally, an effective interruption will have the corollary effect of breaking the continuity of the plaintiffs' usage.[132] The Alleys made a claim that a physical interruption was made in 1992 or 1993 when they fenced off their driveway, forcing travelers to divert from the traditional route and move along the Sutin property instead.[133] The court responded by labeling this shift "slight" and refusing to characterize it as an "effective" interruption.[134]

Unable to reach a finding of effective interruption, the court examined a second feature of continuity: a showing that the path traveled remains constant.[135] The

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122. *See supra* Part IV.A.

123. *Algermissen*, 2003-NMSC-001, ¶ 23, 61 P.3d at 184 (citing RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17(2) (2000) ("A servitude is created by a prescriptive use of land...if the prescriptive use is...continued without effective interruption for the prescriptive period.")).

124. *Id.* (citing Maloney v. Wreyford, 111 N.M. 221, 224, 804 P.2d 412, 415 (Ct. App. 1990)).

125. *See id.*

126. *See id.*

127. 111 N.M. 221, 804 P.2d 412 (Ct. App. 1990).

128. *Algermissen*, 2003-NMSC-001, ¶ 23, 61 P.3d at 184 (citing *Maloney*, 111 N.M. at 224, 804 P.2d at 415 ("The general requirement of continuity has been construed using a reasonableness standard. Continuity is to be determined in relation to the right claimed, and is sufficient if the property is used whenever needed, if it is reasonably frequent.") (citation omitted)).

129. *Id.* ¶ 24, 61 P.3d at 184.

130. *Id.*

131. *Id.* ¶ 23, 61 P.3d at 184 (citation omitted).

132. *Id.*

133. *Id.* ¶ 24, 61 P.3d at 184.

134. *Id.*

135. *Id.* ¶ 25, 61 P.3d at 184.

supreme court traced this requirement back to *Hester* and noted that the district court had found that this element was lacking.[136] Notably, the plaintiffs did not even attempt to define the dimensional scope of their claim or provide a specific location for the easement, but rather relied on the court to create such an easement based on the evidence presented.[137] Considering the lack of evidence in support of Plaintiffs' position and its previous findings related to the other elements of the prescriptive claim, the court declined to reevaluate the trial court's holding on this point.[138]

E. Holding

The supreme court found sufficient evidence that each of the district court's findings with regard to the elements of the plaintiffs' prescriptive easement claim was rational.[139] As a result, the supreme court declined to address any other element of the plaintiffs' pleading and denied the specific plaintiffs, and the public, any rights to an easement by prescription.[140]

V. ANALYSIS

According to Professor Susan French,[141] the "*Restatement* presents a comprehensive modern treatment of the law of servitudes that substantially simplifies and clarifies one of the most complex and archaic bodies of 20th century American law."[142] This simplification aims to make the law "more useful to developers, owners in common interest communities, local governments, conservation and historic preservation organizations, and other land owners."[143] This does seem to be the intention of the New Mexico Supreme Court in the *Algermissen* decision.[144] However, in its attempt to clarify the law in New Mexico, the supreme court also raised several novel questions about how easement law is applied in the state and the policy support for that application. Unfortunately, the method by which these

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136. *Id.* "A way claimed by prescription must be a definite, certain, and precise strip of land....To acquire a prescriptive right of way by consent and uninterrupted use, the use must relate strictly to the identical land over which the right is claimed." *Id.* (quoting Hester v. Sawyers, 41 N.M. 497, 506, 71 P.2d 646, 652 (1937)). It should be noted that more recent holdings have not been narrow in their construction of the precise path standard. In *Silverstein v. Byers*, the court of appeals noted that "slight divergence would not defeat such [a] right, especially so, where such slight divergency was not the voluntary act of the preemptor, but due to force of circumstances beyond his control, and the result of acts and conduct of the adverse party." 114 N.M. 745, 749, 845 P.2d 839, 843 (Ct. App. 1992) (quoting Murff v. Dreeben, 127 S.W.2d 577, 581 (Tex. Civ. App. 1939)).

137. *Algermissen*, 2003-NMSC-001, ¶ 25, 61 P.3d at 184. The court noted that, if all the other elements of a prescriptive easement claim had been met, remand would have been appropriate in order to make these determinations. *Id.* However, due to its disposition on the other elements of the claim, remand was not necessary. *Id.*

138. *See id.*

139. *Id.* ¶ 27, 61 P.3d at 185.

140. *Id.*

141. Professor Susan F. French was the Reporter for the RESTATEMENT (THIRD) OF PROP.: SERVITUDES (2000).

142. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § Scope (2000).

143. Susan F. French, *Highlights of the New Restatement (Third) of Property: Servitudes*, 35 REAL PROP. PROB. & TR. J. 225, 242 (2000).

144. *See Algermissen*, 2003-NMSC-001, ¶ 10, 61 P.3d at 180 ("We believe that this is an appropriate time to consolidate these elements into a more succinct and less redundant test for determining when a court should grant a prescriptive easement. In doing so, we follow the example of the recently published RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES (2000).").

questions were raised further convolutes the already murky waters of easement law and severely prejudices plaintiffs who would attempt to vindicate prescriptive rights.[145] Not only is the traditional law not clarified, but the decision can be seen to raise challenges heretofore not faced by litigants in prescriptive easement cases.[146]

A. Public versus Private Easements

1. Considerations Unique to Public Easements

The plaintiffs in *Algermissen*, although not a government entity, sought a public easement by prescription, a scenario which the New Mexico Supreme Court admitted created "unique analytical problems."[147] The United States Supreme Court has recognized the public's right to acquire a physical easement over private land pursuant to a state's power of eminent domain.[148] The *Restatement* concurs and extends this possibility to acquisition by prescription but acknowledges theoretical challenges faced by the courts.[149]

Although most jurisdictions recognize that use by the public can lead to prescriptive rights,[150] those rights have commonly been limited to highways and beaches.[151] While this, alone, did not undermine the plaintiffs' claim to a public easement in *Algermissen*, there are several complications that weaken their claim. These complications lead to questions relating to the nature of the land itself, actions taken by local municipalities, and the nature of the public's usage.[152]

The nature of the land in question is important because many courts have found mere usage insufficient to establish a presumption of adverse use when the traversed

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145. *See infra* Part VI.

146. *See infra* Part VI.

147. *Algermissen*, 2003-NMSC-001, ¶ 10, 61 P.3d at 180.

148. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831–32 (1987) (holding that a state may create public easements across private land when the state proceeds pursuant to its power of eminent domain). The states' power of eminent domain is subject to the limitations of the Takings Clause. *See* U.S. CONST. amend. V. For a discussion of the Takings Clause and the complexity it presents to an analysis of public easements, both under federal and New Mexico law, see *infra* Part V.A.2.

149. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.18 & cmt. f (2000).

> Courts that used a statute-of-limitations-based theory of prescription faced the problem that use by the public created multiple causes of action against various individuals, but no cause of action against the public. Courts that used the lost-grant theory faced the problem that the grant required a definite grantee. Most courts got around these theoretical difficulties either by ignoring them or by adopting an implied-dedication theory.

Id. § 2.18 cmt. f.

150. *See, e.g.*, Weidner v. Dep't of Transp. & Pub. Facilities, 860 P.2d 1205, 1209 (Alaska 1993) (holding that a public way may be created by public use of private property for the ten-year prescriptive period); Limestone Dev. Corp. v. Vill. of Lemont, 672 N.E.2d 763, 768 (Ill. App. Ct. 1996) (holding that the public could acquire an easement by prescription pursuant to the Illinois Highway Code).

151. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.18 cmt. f (2000). In fact, several states have statutes providing that public use of a road for a certain amount of time creates a public highway. *See, e.g.*, 605 IDAHO CODE § 40-202 (2004); ILL. COMP. STAT. 5/2-202 (1993). Other states have utilized this doctrine to recognize public rights to beaches. *See, e.g.*, City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 75 (Fla. 1974) ("It is possible for the public to acquire an easement in the beaches of the State by the finding of a prescriptive right to the beach land."); Villa Nova Resort, Inc. v. State, 711 S.W.2d 120, 127 (Tex. Ct. Civ. App. 1986) (awarding the public an easement by prescription for usage of heavily traversed beach property along the Gulf of Mexico).

152. *See infra* notes 153–165 and accompanying text.

land is open, wooded, or unimproved.[153] This theory is grounded in the policy that landowners who are not currently utilizing specific tracts of land should not be required to incur the expense of otherwise unnecessary affirmative action to prevent the creation of a public road on their land.[154] This seems to be the rule in New Mexico, as evidenced by the supreme court's acknowledgment of the neighbor accommodation exception to the general presumption of adversity.[155]

In light of this recognition, the court in *Algermissen* properly interpreted the purpose of the neighbor accommodation exception in denying the defendants' reliance on that doctrine.[156] The land in question was developed (as evidenced by the number of private residences located on it), was not remote (being within the city limits of Albuquerque), and was of such a character that it did not prevent landowners from learning of the plaintiffs' activities on their land.[157]

The defendants in *Algermissen* also argued that the plaintiffs' claim to a right-of-way must fail because of the recreational nature of the plaintiffs' use.[158] While New Mexico cases are silent on this issue, the *Restatement* cautions that most jurisdictions "have been reluctant to recognize prescriptive rights to recreational uses other than on beaches."[159] Additionally, cases in other jurisdictions suggest that in instances of casual recreational usage, license,[160] rather than prescription, might be inferred.[161] The supreme court in *Algermissen* declined to rule on this question, but made it clear that it saw no policy reason to apply such an inference in New Mexico cases.[162]

While public easements for roadway purposes can be established in most states,[163] some jurisdictions require government participation, in addition to simple public

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153. *See, e.g.*, Ford v. Ala. By-Products Corp., 392 So. 2d 217, 218–19 (Ala. 1980) ("[W]here the road runs over unimproved or 'turned out' lands there is no presumption of dedication by mere use; rather there is a presumption of permissive use and the user must establish his use as adverse to that of the owner."); Stevens County v. Burrus, 40 P.2d 125, 127 (Wash. 1935) ("[W]here the land is unenclosed...vacant and unoccupied, the mere travel across it without objection from the owners does not enable the public to acquire a public road or highway over it.").

154. *Ala. By-Products Corp.*, 392 So. 2d at 219.

155. *See, e.g.*, Maestas v. Maestas, 50 N.M. 276, 279–80, 175 P.2d 1003, 1006 (1946) (holding the neighbor accommodation exception expressly limited to large, unenclosed tracts of land); Scholes v. Post Office Canyon, Inc., 115 N.M. 410, 410–11, 852 P.2d 683, 683–84 (Ct. App. 1992) (holding that the neighbor accommodation exception does not apply to fenced land); *see also supra* notes 97–100 and accompanying text.

156. *Algermissen*, 2003-NMSC-001, ¶ 17, 61 P.3d at 182; *accord* Vill. of Capitan v. Kaywood, 96 N.M. 524, 525, 632 P.2d 1162, 1163 (1981) (declining to apply the exception to a relatively small tract in a populated subdivision).

157. *See supra* Part IV. The supreme court's commentary on the neighbor accommodation exception in *Algermissen* is dicta. Although the court performed a brief analysis and determined that the exception would not apply, the court stated that "resort to this exception is unnecessary, because we hold that substantial [other] evidence supported the district court's finding of permissive usage." *Algermissen*, 2003-NMSC-001, ¶ 17, 61 P.3d at 182.

158. *Algermissen*, 2003-NMSC-001, ¶ 26, 61 P.3d at 184–85.

159. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.18 cmt. f (2000).

160. BLACK'S LAW DICTIONARY 938 (8th ed. 2004) (defining license as "an agreement...that it is lawful for the licensee to enter the licensor's land to do some act that would otherwise be illegal").

161. *See, e.g.*, Demoski v. New, 737 P.2d 780, 785 (Alaska 1987) (holding that landowner's failure to object to casual use by sightseers and hunters did not equivocate a dedication to public use); Anderson v. Felten, 612 P.2d 216, 218 (Nev. 1980) (attributing occasional use by skiers, hikers, and hunters to license).

162. *Algermissen*, 2003-NMSC-001, ¶ 26, 61 P.3d at 185 ("[T]here is no support in our cases for such a rule, and the arguments in this case provide no policy basis to create one.").

163. *See supra* notes 150–151 and accompanying text.

usage, in order to do so.[164] This element of the plaintiffs' claim in *Algermissen* was not explored by the supreme court's opinion, although the court did point out that Elfego Road was created as a private easement and was not claimed or maintained by any municipality.[165] The court's acknowledgment of this fact indicates that the extent of governmental involvement might be relevant in a future case.

2. The Role of the Takings Clause

The potential for the New Mexico Supreme Court to be concerned about a lack of government involvement in establishing a public easement is evident in the *Algermissen* opinion. The opinion's treatment of the defendants' argument that a public prescriptive easement would amount to an uncompensated violation of the Takings Clause[166] makes this apparent. Although the court did not address the constitutional claim, it did point out that such an analysis would be complicated by the fact that no government entity was a party to the action, and deciding who should compensate the landowners would be impossible.[167] However, another case, *Luevano v. Maestas*,[168] set precedent on this issue in New Mexico by adopting the *Restatement*'s position that "[a]cquisition by prescription is not a taking and does not require compensation to the landowner for the servitude."[169]

Despite the court of appeals' position in *Luevano*, it does not appear that the rule on whether a prescriptive acquisition by the public requires compensation is fully settled in New Mexico.[170] The supreme court in *Algermissen* referred to the position of the court in *Luevano* only as a "general rule" and cited for comparison *Pascoag Reservoir & Dam, LLC v. Rhode Island*,[171] a Federal District of Rhode Island case, which takes a contrary view.[172]

The application of a Takings Clause analysis to a prescriptive claim in *Pascoag* was a matter of first impression for the federal courts.[173] The *Pascoag* decision stands for the proposition that matters of property law (which allow acquisition of private property without compensation) and constitutional law (which require compensation when private property is taken for public uses) are not mutually

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164. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.18 cmt. f (2000); *see, e.g.*, Bruno v. Evans, 408 S.E.2d 458, 461 (Ga. Ct. App. 1991) ("[U]se by the public of a road without acceptance of that road by legitimate public authority will not support a claim of public road by prescription.") (emphasis omitted); Schroeder v. Urban, 766 P.2d 188, 190 (Kan. Ct. App. 1988) (holding that positive action on the part of public officials, such as improving or maintaining a road, is necessary to sustain a finding of the public's intent to establish a public easement).

165. *Algermissen*, 2003-NMSC-001, ¶ 4, 61 P.3d at 179.

166. *Id.* ¶ 26, 61 P.3d at 185. "[P]rivate property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V.; *see also* N.M. CONST. art. II, § 20 ("Private property shall not be taken or damaged for public use without just compensation.").

167. *Algermissen*, 2003-NMSC-001, ¶ 26, 61 P.3d at 185.

168. 117 N.M. 580, 874 P.2d 788 (Ct. App. 1994).

169. *Id.* at 587, 874 P.2d at 795 (quoting Draft RESTATEMENT § 2.18 cmt. e (Apr. 5, 1993)); *accord* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.18 cmt. f (2000).

170. *See infra* notes 171–172 and accompanying text.

171. 217 F. Supp. 2d 206 (D.R.I. 2002), *aff'd*, 337 F.3d 87 (1st Cir. 2003).

172. *Algermissen*, 2003-NMSC-001, ¶ 26, 61 P.3d at 185 (citing *Pascoag*, 217 F. Supp. 2d at 217–27).

173. *Pascoag*, 217 F. Supp. 2d at 217. The *Pascoag* decision has subsequently been affirmed by the United States Court of Appeals for the First Circuit, 337 F.3d 87 (1st Cir. 2003), and denied certiorari by the United States Supreme Court, 540 U.S. 1090 (2003).

exclusive.[174] The U.S. Supreme Court clearly stated in *Nollan v. California Coastal Commission*[175] that a public easement is a permanent physical occupation for the purposes of establishing a per se taking under the Fifth[176] and Fourteenth[177] Amendments.[178] With this understanding, *Pascoag* directly addressed the unique quagmire faced by landowners subject to prescriptive claims by the public.

> [I]n the case of a prescriptive easement, the record owner could bring an action for trespass and ejection. There is no property interest, yet, that has been taken away from the record owner. Therefore, there has been no taking prior to the completion of the statutory period....If the takings clock were to stop at the moment the adverse possession clock has run, then the record owner as against the government is in a curious Catch-22 situation. He or she had no takings claim prior to the completion of the adverse possession prescription period, but would be similarly barred from having a takings claim after the period was completed. This Court does not sanction this bonanza for the government at the intersection of property law and constitutional law.[179]

It was the contention of the court in *Pascoag* that the simple fact that adverse possession and prescription are well-settled, ancient tenets of state law does not exempt them from constitutional mandates.[180]

Even if the New Mexico Supreme Court had fully accepted the *Pascoag* doctrine, it is still doubtful that the court would have found an unconstitutional taking in the *Algermissen* case.[181] In order to sustain a claim under the Takings Clause, a landowner must prove three elements: (1) a government taking of private property,[182] (2) the taking was without just compensation,[183] and (3) the taking was effected for a public purpose.[184] While it can be argued that the defendants in *Algermissen* made a showing of insufficient compensation for the taking of a recognized property interest intended to benefit the public, the first element of the analysis is clouded by the lack of a municipality as a party to the litigation and a failure to show the transfer of title in an easement to a government entity.[185] Finally, applying the logic of *Pascoag* is predicated on the defendants asserting a takings

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174. *Pascoag*, 217 F. Supp. 2d at 209.

175. 483 U.S. 825 (1987).

176. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

177. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law... ." U.S. CONST. amend. XIV, § 1.

178. *Nollan*, 483 U.S. at 832 ("We think a 'permanent physical occupation' has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.").

179. *Pascoag*, 217 F. Supp. 2d at 224.

180. *Id.* at 225.

181. *See infra* notes 182–187 and accompanying text.

182. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987) ("[G]overnment action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation.'") (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

183. *Id.* at 315.

184. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 239–41 (1984) (discussing the public use requirement).

185. *See supra* note 60.

claim under federal law and within the context of the Federal Constitution.[186] Such matters are not controlling over the New Mexico Supreme Court, especially in cases where the landowner's argument is based on the Takings Clause of the New Mexico Constitution, which bears slight textual differences from that of its federal counterpart.[187]

B. Use of Presumptions

The New Mexico Supreme Court arrived at its decision in *Algermissen* by utilizing a series of common law presumptions in order to reach findings related to the adverse nature of the plaintiffs' use of the claimed easement.[188] These presumptions are intended to compensate for the difficulty of proving usage over a period of time.[189] Regrettably, the court in *Algermissen* applied these presumptions in an inconsistent manner, and thereby diluted their usefulness.

The *Restatement* takes no official position on these presumptions, although it does acknowledge the frequency of their application and the effect they have on case law across all jurisdictions.[190] New Mexico, like many American jurisdictions, begins with the assumption that unexplained usage that meets all the other traditional elements of prescription is adverse.[191] The counter to this presumption is the servient tenement owner's ability to overcome it with rebuttal evidence.[192] The *Restatement* addresses four categories of rebuttal evidence, which the *Algermissen* court could have applied.[193]

The first category addressed by the *Restatement* was actually considered by the *Algermissen* court: evidence that the land in question was wild, vacant, and unenclosed.[194] New Mexico's neighbor accommodation exception[195] seems to be in line with the philosophy held by many jurisdictions that when the servient estate is in a sparse, natural, and unenclosed condition the presumption of adversity is

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186. *Pascoag*, 217 F. Supp. 2d 206, was a federal court case tried under federal law in the District of Rhode Island. As such, the New Mexico Supreme Court is not bound by its holding.

187. *See supra* note 166.

188. *See supra* Part IV.B. Although the court went to the trouble of pointing out that these presumptions "have no mandatory effect upon [a] decision," *Algermissen*, 2003-NMSC-001, ¶ 11, 61 P.3d at 181 (quoting Mortgage Inv. Co. of El Paso v. Griego, 108 N.M. 240, 244, 771 P.2d 173, 177 (1989)), they are relied upon heavily in affirming the analysis of the district court. *Id.* ¶¶ 11–17, 61 P.3d at 181–82.

189. *See supra* notes 20–25 and accompanying text.

190. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.16 cmt. g (2000).

191. *See* Vill. of Capitan v. Kaywood, 96 N.M. 524, 525, 632 P.2d 1162, 1163 (1981); Sanchez v. Dale Bellamah Homes of N.M., Inc., 76 N.M. 526, 529, 417 P.2d 25, 27 (1996); *see also, e.g.*, United States v. 43.12 Acres of Land, 554 F. Supp. 1039, 1041 (W.D. Mo. 1983) ("[O]nce the claiming party establishes that the use was open, notorious, continuous, and uninterrupted for the ten year period, a presumption is raised that the use was adverse and under a claim of right...."); Greenco, Inc. v. May, 506 N.E.2d 42, 45 (Ind. Ct. App. 1987) ("The party asserting the prescriptive right may make a prima facie case by showing an open and continuous use of another's land with the owner['s] knowledge, creating a rebuttable presumption that such use is adverse and under a claim of right.") (citations omitted).

192. *See supra* note 89.

193. The four categories are: (1) evidence that the land is wild, vacant, and unenclosed; (2) evidence that the right-of-way was built and used by the owner; (3) evidence of a close relationship between claimant and landowner; and (4) evidence of a local custom of neighborly accommodation. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.16, Reporter's Note, cmts. g, a–d (2000).

194. *See supra* notes 97–103 and accompanying text.

195. *See supra* notes 97–103 and accompanying text.

overcome.[196] Furthermore, the court's denial of a neighbor accommodation exception claim in *Algermissen* is in line with other jurisdictions that narrowly apply such exceptions only to cases where the servient estate is truly remote and unimproved.[197]

One exception to the assumption of non-permissive use not considered by the court in *Algermissen* was evidence that the road was built by the owner of the claimed servient estate and used by the owner during the claimed prescriptive period.[198] In some states, this exception further dilutes the presumption of adversity by simply requiring that the road existed when the alleged adverse use began.[199] Under the former standard, had the other elements of the prescriptive claim in *Algermissen* been met, it would have been up to the defendants to show evidence of their construction of Elfego Road to meet this exception. Under the latter standard, the usage of the plaintiffs in *Algermissen* could never have been presumed adverse without the plaintiffs providing evidence that the public traversed the defendants' property before the construction of Elfego Road.

The remaining two exceptions to the general presumption of adversity are interrelated, although only one was addressed in the *Algermissen* decision.[200] These exceptions are met when there is a close relationship between the claimant and the owner of the servient estate and when a local custom of neighborly accommodation exists.[201] In order to find permissive use, the district court in *Algermissen* pointed to evidence of friendly relationships between defendant family, the Alleys, and several plaintiffs.[202] The supreme court, in examining the findings of the district court, classified this evidence as fitting into the category of close relationships, but did not address the defendants' argument that a local custom of neighbor accommodation

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196. *See* Matsu v. Chavez, 96 N.M. 775, 779, 635 P.2d 584, 588 (1981) (holding presumption of adversity will be overcome only where large bodies of open and unenclosed land preclude owner from reasonably being expected to be aware of use); *see also* Stahl v. Thompson, 641 S.W.2d 721, 722 (Ark. Ct. App. 1982) ("The use of wild, unenclosed, and unimproved land is presumed to be permissive....").

197. *See, e.g.*, Carpenter-Union Hills Cemetery Ass'n v. Camp Zoe, Inc., 547 S.W.2d 196, 202–03 (Mo. Ct. App. 1977) (finding exception to presumption not sustainable when road claimed passes adjacent to "farm homes and buildings, two school houses, a hay field, [a] cemetery..., fenced areas, and at least one large cultivated field"); Shepard v. Gilbert, 249 N.W. 54, 56 (Wis. 1933) (limiting the exception to the presumption of adversity "to lands that are wild, unoccupied, or of so little present use as to lead legitimately to the inference that an owner would have no motive in excluding persons from passing over the land").

198. This omission may simply have been due to a lack of evidence in the factual record. While the opinion did mention that Elfego Road is used "by the people who live and work along it," it did not contain any information about its creation except to say that it was "created as a private easement for ingress and egress over private property." *Algermissen*, 2003-NMSC-001, ¶ 4, 61 P.3d at 179.

199. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.16 Reporter's Note, cmts. g, b (2000); *see, e.g.*, Melendez v. Hintz, 724 P.2d 137, 140 (Idaho Ct. App. 1986) (holding that an owner overcomes the presumption of adverse use when he constructs a pathway for his own use, and the use of others in no way interferes with the owner's use); Jackson v. Hicks, 604 P.2d 105, 106 (Nev. 1979) ("Where a roadway is established or maintained by a landowner for his own use, the fact that his neighbor also makes use of it, under circumstances which in no way interfere with use by the landowner himself, does not create a presumption of adverseness.") (quoting Turrillas v. Quilici, 303 P.2d 1002, 1003 (Nev. 1956)).

200. *See infra* notes 202–203 and accompanying text.

201. *See, e.g.*, Chaconas v. Meyers, 465 A.2d 379, 384 (D.C. 1983) (finding that a property owner who was always friendly and who had restrained his dog to allow neighbors to pass over his property had rebutted the presumption of adversity); Burns v. Plachecki, 223 N.W.2d 133, 136 (Minn. 1974) (presuming permissive use due to close family relationship between the parties); Greenwalt Family Trust v. Kehler, 885 P.2d 421, 425 (Mont. 1994) (denying presumption of adversity when a community understanding exists).

202. *Algermissen*, 2003-NMSC-001, ¶¶ 5, 14, 61 P.3d at 179, 182. Some plaintiffs, themselves, testified that they often greeted people who lived in the area and would "stop and chat." *Id.* ¶ 14, 61 P.3d at 182.

should likewise defeat the presumption of adversity.[203] Perhaps in future cases, where evidence of express permission is not found, this interpretation of the neighbor accommodation exception will be persuasive in New Mexico courts.

Finally, it is important to consider that there are several jurisdictions that do not employ any general presumptions at all.[204] In these jurisdictions, various other factors are given effect.[205] The considerations range from an analysis of the intent of the servient estate's owner[206] to a general burden of proof placed on one or both of the parties.[207] Considering the pedigree of the presumptions as fictions created to allow the common law to continue tracing easement rights back to time immemorial, it could be deemed truer to the spirit of the *Restatement* to discard the presumptions as archaic remnants of a bygone era. In cases like *Algermissen*, where the claims go back no further than the 1940s, it may be fairer to simply hold litigants to a preponderance of the evidence standard and let the trial courts resolve matters based on the facts put before them.

C. Open and Notorious in the Disjunctive

A collateral effect of the consolidation of the elements for prescriptive easements may be that plaintiffs find it increasingly difficult to meet the elements that remain. As discussed earlier, the *Restatement* attempts to simplify the law of servitudes in order to better serve the interests at play in modern uses of land.[208] One clear example of this effort is the amalgamation of the traditional elements of "open" and "notorious" into dual components of a single requirement that a landowner have knowledge of the prescriptive use.[209] In accordance with the theme of the new *Restatement*, the purpose of this requirement "is to give the owner of the servient estate ample opportunity to protect against the establishment of prescriptive rights."[210]

As incorporated by the *Algermissen* opinion, the terms have traditionally been stated conjunctively, but are actually disjunctive in their application.[211] In order to meet the policy objective of the new *Restatement* (protection of the servient estate owner), this is the proper interpretation of these elements. Furthermore, the court in *Algermissen* claimed that this interpretation was in accordance with the traditional approach in New Mexico.[212] By drawing a distinction between "open" and "notorious," the *Restatement* simply replaces those elements with a notice

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203. *Id.* ¶ 17 n.2, 61 P.3d at 182 n.2. ("[A] fuller discussion of [the neighbor accommodation exception] is unnecessary here. There is substantial evidence to support the trial court's finding that the use was permissive, without the need to resort to [this exception].").

204. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.16 cmt. g (2000).

205. *See infra* notes 206–207 and accompanying text.

206. *See* Swift v. Kniffen, 706 P.2d 296, 304 (Alaska 1985) (remanding in an effort to determine if landowner intended to permit use of disputed roadway).

207. *See* Reynolds v. Soffer, 459 A.2d 1027, 1030 (Conn. 1983) ("[A]lthough the burden of proof is on the party claiming a prescriptive easement there is no presumption of permissive use to be overcome. All that is required is a showing by a fair preponderance of the evidence that the use was adverse.") (citations omitted).

208. *See supra* notes 141–143 and accompanying text.

209. *See supra* notes 104–109 and accompanying text.

210. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. h (2000).

211. *Algermissen*, 2003-NMSC-001, ¶ 19 n.3, 61 P.3d at 183 n.3.

212. *See supra* note 108.

requirement imposed upon the claimant of the easement.[213] Actual knowledge suffices even when activities are not open and notorious,[214] and open activity satisfies the requirement even when neighbors have no knowledge of it.[215]

The knowledge requirement is also related to the traditional common law element of continuity. "Sporadic and casual uses are generally not open or notorious,"[216] and while a use need not be constant,[217] it must be open or notorious enough to be capable of conveying knowledge to the landowner that a prescriptive right is being claimed.[218] Additionally, claimants asserting a right-of-way must confine their path to a precise and regular course in order that the owner of the servient tenement can determine accurately what is actually being claimed.[219]

The degree of precision required, unfortunately, is not a hard standard and both the New Mexico Supreme Court in *Algermissen*[220] and the *Restatement*[221] leave it open to individual courts to interpret based on the nature of the easement claimed and the facts of the case. While claims for a right-of-way "must be based on...a regular route,"[222] slight alterations based on circumstances are occasionally permitted based on the party making the change,[223] the extent of the deviation,[224] and

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213. *Algermissen*, 2003-NMSC-001, ¶ 19 & n.3, 61 P.3d at 183 & n.3. It should be noted that constructive notice will suffice. *See id.* ¶ 19 n.3, 61 P.3d at 183 n.3. Constructive notice has long been an acceptable substitute for actual knowledge in actions concerning real property in New Mexico. *See* Taylor v. Hanchett Oil Co., 37 N.M. 606, 609, 27 P.2d 59, 60 (1933) ("'Knowledge' does not necessarily mean 'actual knowledge,' but means knowledge of such circumstances as would ordinarily lead upon [reasonable] investigation...to a knowledge of the actual facts....In its broadest interpretation it means constructive notice.").

214. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. h (2000); *see* Cataldo v. Grappone, 381 A.2d 1194, 1196 (N.H. 1977) (holding that actual knowledge on the part of the landowner is equivalent to a showing of open and notorious usage) (citing Pease v. Whitney, 98 A. 62, 64 (N.H. 1916)).

215. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. h (2000); *see* Swift v. Kniffen, 706 P.2d 296, 304 (Alaska 1985) (holding that owners are imputed with knowledge a duly alert owner would possess).

216. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. h (2000).

217. Usage must generally conform to the "normal" usage of the land in question. *See, e.g.*, S.D. Warren Co. v. Vernon, 697 A.2d 1280, 1282 (Me. 1997) (holding intermittent use for logging operations sufficient to establish easement by prescription); Ellison v. Fellows, 437 A.2d 278, 280 (N.H. 1981) (holding that use of an easement to haul hay was continuous when its use was limited to haying season).

218. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. h (2000). *See S.D. Warren Co.*, 697 A.2d at 1282 ("Intermittent use may be continuous for purposes of establishing a prescriptive easement if it is consistent with the normal use that an owner of the property would make and is sufficiently open and notorious to give notice to the [servient estate] owner....") (quoting Great N. Paper Co. v. Eldredge, 686 A.2d 1075, 1077 (Me. 1996)).

219. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. h (2000); *see, e.g.*, Warsaw v. Chi. Metallic Ceilings, Inc., 676 P.2d 584, 587 (Cal. 1984) ("[T]he existence of a prescriptive easement must be shown by a definite and certain line of travel for the statutory period."); Oshita v. Hill, 308 S.E.2d 923, 926 (N.C. Ct. App. 1983) (holding that, although a metes-and-bounds description is not necessary, the pathway claimed must be able to be identified and located from the testimony given).

220. The supreme court's analysis of continuity in *Algermissen* is incomplete due to the plaintiffs' failure to specify a precise path over which their claim rests (leaving it up to the court to create based on the court's power in equity). 2003-NMSC-001, ¶ 25, 61 P.3d at 184. The supreme court did say that, had all the other elements of the prescription claim been met, remand would have been appropriate to determine if a precise path existed. *Id.*

221. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. g (2000) (requiring use which is "reasonably definite").

222. *Id.* § 2.17 cmt. h.

223. *See* Murff v. Dreeben, 127 S.W.2d 577, 581 (Tex. Civ. App. 1939) ("[A] slight divergence would not defeat [a prescriptive] right, especially so, where such...divergency was not the voluntary act of the preemptor, but due to...conduct of the adverse party.").

224. *See* Silverstein v. Byers, 114 N.M. 745, 749, 845 P.2d 839, 843 (Ct. App. 1992) ("[S]light deviation[] from the accustomed route will not defeat an easement...." (quoting Matthiessen v. Grand, 268 P. 675, 678 (Cal. Dist. Ct. App. 1928))).

even acts of nature.[225] The combined impact of these varying considerations is to add a complicating effect to what was espoused by the court as a simplification of easement analysis.

VI. IMPLICATIONS

This analysis raises the question of whether the newly clarified law announced in *Algermissen* is discernibly different than the law of New Mexico before *Algermissen*. Specifically, is the court's approach truly in the spirit of the *Restatement* that the court purports to follow? Under the *Restatement* model, "an easement by prescription is created by an adverse use of land, that is open or notorious, and continued without effective interruption for the prescriptive period (of ten years)."[226] The remainder of this Note will be dedicated to reconciling that definition with the state of the law in New Mexico after *Algermissen*.

Common to both the traditional and modern definitions of prescription is the element of adversity.[227] As discussed, the use of presumptions has historically been critical in this analysis.[228] Under the law announced in *Hester*, it is clear that a usage that originates in permission cannot ripen into an adverse use without an overt act of adversity on the part of the claimant.[229] However, absent evidence of permission, *Village of Capitan v. Kaywood*[230] makes it likewise clear that in New Mexico unexplained usage will be presumed adverse by default if all the other elements of a prescriptive claim are met.[231] In light of that default approach, the type of rebuttal evidence that a property owner will be allowed to present to undermine the presumption of adversity is equally important. A study of the *Restatement* demonstrates that, in adopting an approach to presumptions, the New Mexico Supreme Court had several alternatives.[232] Determining whether the court chose correctly when it chose to presume unexplained use as adverse requires looking to the initial purposes of presumptions and the varying difficulties of their application in modern settings.

With the adoption of the statute of limitations for adverse possession as determining the requisite time for establishing a prescriptive use, much of the utility of presumptive reasoning has been undermined. It is difficult to argue that New Mexico's requirement that usage be proven for the relatively brief and finite period

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225. *Id.* at 749–50, 845 P.2d at 843–44 (holding that a quarter-mile deviation in a roadway after a canyon washout during the prescriptive period did not create a new prescriptive period).

226. *Algermissen*, 2003-NMSC-001, ¶ 10, 61 P.3d at 180 (citing RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 2.16–2.17 (2000)).

227. See *supra* Part IV.B for the New Mexico Supreme Court's analysis of adverse use in *Algermissen*.

228. Although the original purpose of presumptions was to allow courts to trace a prescriptive use back to a time immemorial, *see supra* notes 20–27 and accompanying text, modern courts have also found them useful due to the factual difficulty of proving a particular usage over any significant length of time when the original parties may not be available. *See supra* notes 77–80 and accompanying text.

229. Hester v. Sawyers, 41 N.M. 497, 505, 71 P.2d 646, 651 (1937).

230. 96 N.M. 524, 632 P.2d 1162 (1981).

231. *Id.* at 525, 632 P.2d at 1163.

232. There are three logical approaches: (1) presumption that an unexplained use is adverse, (2) presumption that an unexplained use is permissive, and (3) a decision not to employ presumptive reasoning. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.16 cmt. g (2000). Having chosen to presume that unexplained use is adverse, New Mexico is also faced with determining what, if any, evidence is appropriate to rebut the presumption. *See supra* Part V.B.

of ten years[233] requires reliance on fictions whose utility was necessitated solely by a historic requirement that use be proven to time immemorial.[234] Furthermore, the application of New Mexico's presumption of adversity is beleaguered with exceptions, each of which has its own doctrinal elements and specific case law.[235]

Algermissen does little to alleviate these concerns or even to provide guidance as to how practitioners should employ these presumptions in the future. Most critically, the court in *Algermissen* varies the nature of the presumption employed with each prescriptive element analyzed. The supreme court in *Algermissen* determined that use by the plaintiffs had its inception in permission.[236] Applying the presumption that usage originating in permission is not adverse, the usage should have remained permissive until an overt act on the part of the plaintiffs indicated that it was of right.[237] Yet, the court still analyzed the erection of fences by the defendants as attempts to interrupt adverse usage.[238]

Conversely, if the court had presumed the plaintiffs' usage to be adverse, contradictions would still be implicit. The court acknowledged that the neighbor accommodation exception was not applicable because the defendants could have reasonably discovered the plaintiffs' usage of their land.[239] As a result, that exception was not available as rebuttal evidence to the presumption of adversity. Nevertheless, the court later determined that it was not irrational for the district court to find that the circumstances of the plaintiffs' use made it such that knowledge should not have been imputed to the defendants.[240]

The statutory period for the acquisition of an easement by prescription is ten years in New Mexico.[241] The parties in *Algermissen* were able to provide evidence as to the character of the use of Elfego Road back to the 1940s.[242] There is no reason to think that, as the length of time since significant development began in the western American states increases, parties in the future will not be able to provide evidence that goes back just as far. Accordingly, it may be simpler to abandon presumptions entirely and simply require a plaintiff to establish the requisite elements of an easement by a preponderance of the evidence standard over any consecutive ten-year period. Furthermore, by placing the initial burden on the plaintiff to prove each of the elements, rather than on the landowner to rebut the presumption of adversity, such a system would be more in keeping with the objectives of the *Restatement*.

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233. *See Algermissen*, 2003-NMSC-001, ¶ 10, 61 P.3d at 180.

234. *See supra* notes 20–27 and accompanying text.

235. *See supra* notes 97–103 and accompanying text. The court in *Algermissen* specifically discusses the neighbor accommodation exception and the exception due to a close relationship between the parties. *See also supra* Part V.B.

236. *Algermissen*, 2003-NMSC-001, ¶ 15, 61 P.3d at 182.

237. *See supra* notes 88–89 and accompanying text.

238. *See Algermissen*, 2003-NMSC-001, ¶ 24, 61 P.3d at 184. The court ruled that the erection of a fence by the Alleys was not effective interruption. *Id.* However, having already concluded that the trial court could have reasonably found that the plaintiffs' use was permissive, there would have been no adverse use to interrupt. *Id.* ¶ 15, 61 P.3d at 182.

239. *Id.* ¶ 17, 61 P.3d at 182.

240. *Id.* ¶ 22, 61 P.3d at 184.

241. Hester v. Sawyers, 41 N.M. 497, 503, 71 P.2d 646, 650 (1937).

242. *See Algermissen*, 2003-NMSC-001, ¶ 5, 61 P.3d at 179.

Nevertheless, despite labeling presumptions as merely "rhetorical devises"[243] and professing to adopt the outlook of the *Restatement*,[244] it seems clear that the use of presumptions remained an essential part of the court's analysis. The impact of that approach is significant. One consequence of allowing landholders the presumption of permission in an urban setting,[245] as was the case in *Algermissen*, while concomitantly presuming adversity for claimants only when every other element is met is that an easement by prescription becomes significantly more difficult to acquire.

When the other elements of a prescriptive easement claim are considered in the context of the decision in *Algermissen*, the extent to which the new law favors landowners might be even more overwhelming. For example, the court suggests that the consolidation of the elements "open" and "notorious" into a notice or knowledge requirement is simply a more succinct method for describing the law that already existed.[246] However, if the two elements are easier to understand as one requirement, it now is significantly harder for plaintiffs to prove that requirement. The facts of *Algermissen* consisted of one landowner family, the Alleys, who had actual knowledge that the claimants had been using their property,[247] and another landowner family, the Sutins, whom the court found had constructive knowledge.[248] If this scenario does not qualify as "knowledge," what type of proof will lawyers in New Mexico need to offer in order to prove this element?

Finally, even though the court did not directly address the constitutional question put forth by the defendants in *Algermissen*, its refusal to dismiss the question's potential relevancy adds another challenge for future plaintiffs. It is counterintuitive to describe public easements as presenting "unique analytical problems "[249] and as challenges requiring analysis no different from private easements.[250] This, combined with the court's awareness of significant federal developments in this area of law,[251] only serve to complicate the analysis of potential litigants in the future.

VII. CONCLUSION

In its effort to clarify the law of prescriptive easements,[252] the New Mexico Supreme Court has also elevated the bar a party attempting to claim an easement must hurdle. While the attempt to clarify a body of law dependent on fact finding and confusing common law is laudable, the court should revisit its analysis in *Algermissen v. Sutin*. Rather than simplifying the law of prescriptive easements in the state, it solidified the use of vague presumptions to establish adversity, raised the

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243. *Id.* ¶ 11, 61 P.3d at 181 (citing Mortgage Inv. Co. of El Paso v. Griego, 108 N.M. 240, 244, 771 P.2d 173, 177 (1989)).

244. *Id.* ¶ 10, 61 P.2d at 180. The *Restatement* takes no position with reference to the use of presumptions. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.16 cmt. g (2000).

245. The setting in *Algermissen* is in opposition to the sparsely populated, rural setting envisioned by the neighbor accommodation exception. *See supra* notes 194–197 and accompanying text.

246. *See supra* note 108.

247. *See supra* note 101.

248. *See supra* note 102.

249. *Algermissen*, 2003-NMSC-001, ¶ 10, 61 P.3d at 180.

250. *Id.* ¶ 10, 61 P.3d at 180–81.

251. *See supra* Part V.A.2.

252. *Algermissen*, 2003-NMSC-001, ¶ 10, 61 P.3d at 180.

landholder knowledge requirement to a height impossible for any plaintiff to meet, and inspired a constitutional complication heretofore not a part of the case law.