

**Legal Issues**

**in**

**New Mexico's Colonia Communities**

**A Report**

**July 2010**

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# Legal Issues In New Mexico’s Colonia Communities

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## PREFACE

This report is a compendium of the legal issues facing residents of New Mexico's colonias. Its purpose is to provide an overview of these legal needs for policymakers and providers of civil legal assistance in New Mexico and to emphasize the need for increased resources to address these legal issues.

Colonia residents have the same needs as do other New Mexicans, such as needing legal assistance with family law matters, consumer fraud, domestic violence, etc. And like all low-income households, they can ill-afford a lawyer and most often do not have access to free or low-cost legal assistance. Residents of colonias, however, face a range of additional legal issues that are uncommon to other people, low-income or not.

This report is an introduction to the issues and does not purport to provide an exhaustive list or discussion of all of the legal needs present in colonia communities. It focuses primarily on systemic legal issues particular to colonias, though it attempts to catalogue the more frequently encountered individual legal needs that are common to colonia residents as well.

Information for this report was compiled over a yearlong period (2008–2009) from conversations with colonia residents and various organizations and advocates that work in New Mexico's colonias, as well as from follow-up research on the various issues that surfaced. All of the legal issues mentioned in the report were raised by community members. Whatever work is eventually done to address these issues should be done with the full participation and input from the colonia communities.

This report was produced by the New Mexico Center on Law and Poverty. The Center on Law and Poverty is a nonprofit law firm and advocacy organization dedicated to social and economic justice in New Mexico. If you have comments or suggestions regarding this document

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## **EXECUTIVE SUMMARY**

Colonias are communities in the southwestern portion of the United States in close proximity to the US-Mexico border that have historically lacked certain infrastructure and services such as potable water supplies, sewage systems, and decent, safe, and sanitary housing. Demographically, colonias are inhabited by a large number of Mexican immigrants or descendents of immigrants and have exceedingly high rates of poverty. New Mexico is home to the second highest number of colonias in the country, behind Texas, with over 135,000 people living in 141 federally recognized colonias in our state. The number of people living in colonias is growing faster than the state's overall population growth.

While several state agencies and nonprofit organizations work directly with colonia communities, most of these organizations do not offer legal assistance for the civil legal needs of colonia residents. Certain legal issues recur in most colonias, and many of these can be addressed by systemic advocacy through legislative and administrative action or litigation. This report documents the more pervasive legal needs of residents of New Mexico's colonias and discusses some of the systemic changes that can be made to address these needs. The issues covered in-depth in this report are outlined below.

- Unregulated real estate contracts. New Mexico's real estate contract law offers weak protections to land and homebuyers, leaving purchasers vulnerable to harsh treatment from sellers. Buyers in colonias are more susceptible to abuse, since they are generally less aware of their legal rights and existing protections due to lack of knowledge about

the law surrounding real estate contracts, as well as language and cultural barriers.

Private attorneys are unaffordable to most colonia residents, and few free legal services are available. Litigation on a case-by-case basis will not suffice to prevent buyers from losing their land under these contracts. Additionally, to alleviate the inequities, advocates could press for a legislative proposal to regulate the use of real estate contracts in New Mexico.

- Illegal and improperly created subdivisions. Illegal and improperly created subdivisions contribute to the conditions of poverty that proliferate in colonias. While laws to control illegal subdivisions exist in New Mexico, enforcement has been sporadic in many areas and, in many cases, done little to deter developers from breaking the law. Lack of easements in illegal subdivisions can lead to undeveloped and/or substandard infrastructure, including ill-maintained roads or no roads at all; absence of or limited basic utility services such as water, gas, electricity and waste disposal; limited or no public school transportation for children; and limited emergency services such as fire or ambulance. However, procuring the necessary legal easements in a colonia is a difficult and protracted undertaking.
- Environmental justice threats. New Mexico's colonias are prime targets for the placement of environmentally hazardous facilities. Colonia residents and advocates regularly find themselves in the position of opposing corporations wanting to locate environmentally hazardous facilities in their communities. On a systemic level, there is a need for effective legislative and administrative advocacy to improve and enforce the

laws and regulations that govern the permitting of environmentally hazardous facilities. Further administrative advocacy is necessary to hold state agencies, officials, and policymakers accountable for addressing environmental justice issues.

- Lack of participation in public benefit programs. Many colonia residents would benefit from participating in public benefits programs, which provide an important safety net for low-income people. While the process of applying for benefits can be cumbersome and intrusive for all applicants due to, among other reasons, a shortage of caseworkers in New Mexico, immigrants face extra obstacles, including language barriers, improper demands for unnecessary information concerning immigration status, and fear of retaliation against undocumented family members who are not applying for benefits. In addition, colonia residents face logistical challenges such as lack of addresses and mailboxes and lack of documentation for utility expenditures and income. Advocates can press New Mexico's Human Services Department to improve language services, better train staff on the correct information to ask of applicants, develop an affidavit that caseworkers accept in lieu of receipts or bills, and inform non-English speakers of their right to free language interpretation.
- Immigration and inadequate access to legal services. The greatest legal need in the communities is assistance with immigration matters. Free and low-cost legal resources in this area are extremely scarce in New Mexico. Immigration cases common in colonias include family-based petitions, naturalization, Violence Against Women Act (VAWA) cases, and removal defense. However, even with free immigration legal assistance,

colonia residents face additional barriers when it comes to accessing services. These barriers include lack of transportation to legal clinics and the inability to afford the rising costs of fees required to accompany the various applications. Potential solutions include having domestic violence shelters provide legal assistance in VAWA cases; increasing funding to civil legal service organizations to provide free and/or low-cost immigration legal assistance; and increasing the number of immigration attorneys willing to take pro bono cases.

- Predatory lending. Predatory lending is a pervasive problem for colonia communities. Predatory lending involves a wide range of abusive and unethical business practices designed to exploit people in need of money by marketing loans that trap borrowers into a cycle of debt. The most frequent types of predatory loans experienced by colonia residents include payday loans and title loans. New Mexico remains one of only four states that do not regulate title loans in any way. Litigation on a case-by-case basis is not enough to protect consumers against unscrupulous predatory lending practices. Legislation to regulate the installment lending industry is needed, as well as an education campaign targeting colonia residents.
- Lack of access to individual legal representation. Residents of colonias have many other legal needs for which they require individual legal assistance, as do other New Mexicans. For example, they need representation for issues such as child support enforcement, consumer fraud, employment problems, improper denial or termination of public benefits, domestic violence, and foreclosure, eviction, and other housing issues.

However, like other low-income New Mexicans, legal assistance is typically difficult to obtain for colonias residents. First, they cannot afford an attorney from the private bar. Second, they generally cannot access the state system of free or low-cost legal assistance for low-income New Mexicans, because the system—consisting largely of nonprofit organizations such as New Mexico Legal Aid, Law Access New Mexico, and DNA People’s Legal Services—has the resources to meet only about a fourth of the legal needs of low-income New Mexicans. Moreover, most colonias are rural, often far from the population centers typically served by legal aid providers, making it difficult for their residents to access legal assistance. Additionally, the largest providers, Legal Aid and DNA, also have funding restrictions that prevent them from serving certain colonia residents due to their immigration status.

Colonia residents have a desire to improve their communities and are working to address the issues outlined above. However, many advocates and residents have stated that their lack of legal resources greatly hampers their success. Increased civil legal services for colonia communities would make a substantial difference. State policymakers and leaders in the civil legal services system and legal community should seize the opportunity to increase legal assistance to people who are living in the particularly difficult circumstances common to New Mexico’s colonias. Ideally, legal service providers would work closely together with colonia residents to identify the areas and levels of legal support desired to address their unmet legal needs.



## I. BACKGROUND

### A. What is a colonia?

In the southwestern United States, the term *colonias* usually refers to communities that, for the most part, fit within the definition used by the U.S. Department of Housing and Urban Development (HUD) and derived from the 1990 Cranston-Gonzalez National Affordable Housing Act. This definition designates a colonia as: (1) an “identifiable community” in Arizona, California, New Mexico, or Texas; (2) within 150 miles of the U.S.-Mexico border; (3) in existence before November 1990; and (4) lacking a potable water supply, adequate sewage systems, and decent, safe, and sanitary housing.<sup>1</sup> HUD uses this definition to identify whether a community is eligible for federal housing and infrastructure programs specially targeted to colonias. However, this report, in focusing on systemic solutions to problems across New Mexico’s colonias, will also consider a community in New Mexico that is further than 150 miles from the border but meets the definition of colonias in every other respect. This community is Pajarito Mesa, located in Bernalillo County just outside of Albuquerque, New Mexico. Pajarito Mesa is referred to extensively in this report. It fulfills all of the definitional requirements of a colonia except that it is situated approximately 200 miles away from the Mexican border.

While every colonia is unique in size, demographics, level of development, and age, three additional characteristics outside HUD’s definition are found in almost all colonias: (1) exceedingly high rates of poverty; (2) a large number of Mexican immigrants or descendants of immigrants live in these communities; and (3) their largely rural nature.

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<sup>1</sup> 42 U.S.C. § 1479(f)(8) (2000).

## B. History of New Mexico's colonias

New Mexico is home to the second highest number of colonias in the country, behind Texas. According to HUD, there are 141 federally recognized colonias in New Mexico<sup>2</sup>, though there are other New Mexican communities that, while not federally recognized, are colonias in every essential definition of the term.

Many factors have contributed to the proliferation of colonias in New Mexico over the past 60 years. One was the devaluation of Mexico's peso, first in 1982 and again in 1994, which drove large numbers of Mexican laborers northward in search of work.<sup>3</sup> Another reason was the passage of the Immigration Reform and Control Act (IRCA) of 1986, which gave legal immigration status to undocumented residents living in the United States who entered before 1982 and maintained continuous residence since then.<sup>4</sup> This law also granted amnesty to seasonal agricultural workers who could prove they had worked in the United States for at least 90 days between May 1, 1985 and May 1, 1986.<sup>5</sup> Yet another factor was the passage of the North American Free Trade Agreement (NAFTA) in 1992, which spurred the industrialization of the U.S.-Mexico border region, creating many jobs on both sides of the border.<sup>6</sup> These factors led to a need for cheap housing along the border, causing colonia communities to spring up in rural areas where land was affordable.

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<sup>2</sup> See U.S. Dep't of Housing & Urban Dev., Designated Colonias in New Mexico, <http://www.hud.gov/local/nm/groups/coloniasnm.cfm> (last visited July 16, 2009).

<sup>3</sup> See ADRIAN X. ESPARZA & ANGELA J. DONELSON, COLONIAS IN ARIZONA AND NEW MEXICO: BORDER POVERTY AND COMMUNITY DEVELOPMENT SOLUTIONS 77 (2008).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Nancy L. Simmons, *Memories and Miracles—Housing the Rural Poor Along the United States-Mexico Border: A Comparative Discussion of Colonia Formation and Remediation in El Paso County, Texas, and Doña Ana County, New Mexico*, 27 N.M. L. REV. 33, 43 (1997).

### C. Demographics of New Mexico's colonias

The demographic information discussed below comes with a caveat. Attempts to gather data on demographics in colonias have proven difficult and yielded questionable information. The same difficulties that face data collection efforts in lower income and disenfranchised communities everywhere exist in colonias as well. These difficulties are exacerbated in colonias by characteristics such as a lack of roads and addresses and a higher than average immigrant population. Therefore, that the population estimates presented here are low is a reasonable assumption. Additionally, the income estimates appear exceedingly high. Although we do not have quantitative data, the authors of this report conducted many interviews with colonia residents. None of them had annual incomes anywhere near the figures that the Census supplies, and which are stated below.

There are over 135,000 people living in New Mexico's colonias.<sup>7</sup> Of New Mexico's 141 plus colonias, only 14 are incorporated villages, towns, or cities, while all others remain unincorporated.<sup>8</sup> An unincorporated community is not part of any municipality and does not have its own government. These communities rely on county governments for support, which generally have minimal resources that they must allocate to many competing demands.<sup>9</sup>

New Mexico's colonias are located in 11 counties: Doña Ana, Grant, Otero, Catron, Hidalgo, Luna, Eddy, Sierra, Chavez, Socorro, and Lincoln. Doña Ana, Grant, and Catron counties have the bulk of New Mexico's colonias within their borders, hosting 103 of the 142 colonias in the state.<sup>10</sup> The number of people living in colonias is growing faster than the state's

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<sup>7</sup> ESPARZA & DONELSON, *supra* note 3, at 46.

<sup>8</sup> See U.S. Dep't of Housing & Urban Dev., *supra* note 2.

<sup>9</sup> ESPARZA & DONELSON, *supra* note 3, at 4–5.

<sup>10</sup> See U.S. Dep't of Housing & Urban Dev., *supra* note 2.

overall population. Between 1990 and 2005, New Mexico’s total population grew by 27% while the state’s colonia population grew by 51%.<sup>11</sup>

**Federally Recognized Colonias in New Mexico by County<sup>12</sup>**

<b>New Mexico County</b>	<b>Unincorporated</b>	<b>Incorporated</b>
Doña Ana	34	1
Grant	31	3
Otero	16	1
Catron	33	1
Hidalgo	5	2
Luna	4	1
Eddy	4	1
Sierra	0	1
Chavez	0	1
Socorro	0	1
Lincoln	1	1
<b>TOTAL</b>	<b>127</b>	<b>14</b>

Colonia communities have a higher rate of people living in poverty than New Mexico as a whole. In a study of colonias dating through 2005, the percentage of people living below the federal poverty level in unincorporated colonias was 23%, while the poverty rate for the state overall was 17%.<sup>13</sup> The median household income for unincorporated colonia residents was \$33,094, while the median household income for New Mexico as a whole was \$39,156.<sup>14</sup> Forty-seven percent (47%) of the people in unincorporated colonias spoke Spanish at home, compared to 29% of people in the state overall.<sup>15</sup> Finally, 71% of colonia residents had completed high school as of 2005 compared to 81% for the state as a whole.<sup>16</sup>

<sup>11</sup> ESPARZA & DONELSON, *supra* note 3, at 47.

<sup>12</sup> See U.S. Dep’t of Housing & Urban Dev., Designated Colonias in New Mexico, <http://www.hud.gov/local/nm/groups/coloniasnm.cfm> (last visited Jan. 24, 2010).

<sup>13</sup> ESPARZA & DONELSON, *supra* note 3, at 49.

<sup>14</sup> *Id.* at 46.

<sup>15</sup> *Id.* at 49.

<sup>16</sup> *Id.*

## Social and Economic Characteristics of New Mexico Overall and New Mexico Colonias<sup>17</sup>

	New Mexico Overall	New Mexico Unincorporated Colonias
<b>Population Growth 1990–2005</b>	27%	51%
<b>Living in Poverty</b>	17.3%	23.4%
<b>Median Household Income</b>	\$39,156	\$30,393
<b>Spanish Spoken in Home</b>	29%	46%
<b>High School Graduates</b>	80.8%	71.1%

### D. Main actors in New Mexico’s colonias

Several state agencies and nonprofit organizations are directly involved with colonia communities and the issues they face. Most of these organizations do not offer legal assistance for the civil legal service needs of colonia residents, except for the offices of New Mexico Legal Aid that serve the counties in which colonia communities are located. However, New Mexico Legal Aid offices are prevented from representing many colonia residents due to funding restrictions of the Legal Services Corporation.<sup>18</sup> Furthermore, Legal Aid offices have minimal resources and do not have the capacity to accept all the cases that pass through their doors. The following is a list of various organizations that work in part or in full on colonia issues:

#### Colonias Development Council

The Colonias Development Council (CDC) is one of the principal organizations in southern New Mexico that advocates for the rights of colonia residents. The CDC is located in the colonia of Chaparral, New Mexico, and focuses on social, environmental and economic justice issues.<sup>19</sup>

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<sup>17</sup> *Id.* at 46–49.

<sup>18</sup> See Regulations of the Legal Services Corporation, Restrictions on Legal Assistance to Aliens, 45 C.F.R. 1626 (Oct. 1, 2006), available at <http://www.lsc.gov/lscgov4/45cfr1626.PDF>.

<sup>19</sup> See Colonias Development Council, About Us, [http://www.colonias.org/about\\_us.html](http://www.colonias.org/about_us.html) (last visited Jan. 24, 2010).

### Department of Housing and Urban Development (HUD)

HUD's Colonias Initiative Program works to improve the lives of people along the U.S.-Mexico border by coordinating resources and collaborating with federal, state, and local partners. The Program's main objectives are to: improve housing, environmental, socioeconomic, and community development conditions for colonia communities; conduct outreach and coalition building; work with federal, state, and local partners; and identify obstacles and barriers to colonia residents.

### Doña Ana County Health and Human Services Department

Doña Ana County established the Colonias Initiative program to help improve the lives of people living in Doña Ana County's colonias and serve as a liaison between the county and the residents of its colonias. The Colonias Initiative seeks to identify people in the community who can act as leaders and provides them with leadership development opportunities. The program assists these individuals in preparing, coordinating, and facilitating their own community meetings with the goal of organizing and empowering the community's residents. According to Erica Gonzales, the coordinator of the Colonias Initiative, every year the program takes leaders from all 37 of the county's colonias to Santa Fe during the state's legislative session so that they may learn about the legislative process. The overall goal of the Initiative is to address not only the infrastructure issues present in all of the colonias, but also the social and economic issues faced by colonia residents.

### Doña Ana County – Public Works Department and Resolution 0522

The Doña Ana County Public Works Department is charged with maintaining the existing county roads and constructing new ones, in addition to maintaining and constructing various other types of infrastructure within the county. Due to the creation of illegal

subdivisions typical in colonia communities as discussed later in this report, many colonias do not have legal public roads. The county has no authority to maintain these roads because they are located on private property.

To help with this problem, in 2005 the Doña Ana County Commission passed Resolution 0522, an ordinance that allows the county to accept private roadways as rights of way for county maintenance if they are properly dedicated. The owner of the land where the road exists or is to be constructed must offer up this land for dedication for public use. All affected property owners along the proposed right of way must be willing and able to dedicate the land. This Resolution has allowed the county to construct safe roads that previously would not have been developed. However, because many people do not have clear title to their land, they are unable to dedicate their land to participate in the program, leaving many roads unmapped, unsafe, and ill maintained.

#### Southwestern, South Central and Southeastern Council of Governments

These councils of government provide regional planning and technical assistance to southern New Mexico in the areas of transportation, economic development and infrastructure issues. Much of their work is dedicated to improving the conditions of colonias in their respective areas of the state.

#### American Civil Liberties Union (ACLU) – Border Rights Project

The ACLU Border Rights Project, located in Las Cruces, New Mexico, provides outreach and public education services as well as legal services to the immigrant communities of southern New Mexico. The ACLU educates immigrants about their civil and constitutional rights. Although the organization does not solely work with colonia residents, many of the people the ACLU serves in the Border Rights Project reside in colonias. The ACLU recently

represented several families from Chaparral, New Mexico, who were illegally searched and detained by Immigration and Customs Enforcement, which subsequently led to the deportation of several of the family members. The organization entered into a settlement agreement with the Otero County Sheriff's Department, which led to the changing of its policies towards suspected undocumented immigrants as well as a monetary settlement for the families affected.

### Medius, Inc

Medius, Inc. is a for-profit company located in Las Cruces, New Mexico, that was hired by the state to coordinate and oversee the Colonias Initiative Grants.<sup>20</sup> Medius, Inc. provides technical assistance and community planning services to local governments in rural communities, focusing on infrastructure and housing needs in colonias.

### The Colonias Initiative

The New Mexico State Colonias Initiative is a state funding source that supports infrastructure development in colonia communities. The Initiative came into existence in 2005 with strong support from Governor Bill Richardson. Since then, an average of \$5 million dollars per year has been set aside for Colonias Initiative projects. The priorities of the Initiative are: long-term land use planning and zoning; flood control and drainage; property planning and rectifying encroachment issues; waste and wastewater infrastructure; roads; and housing. This funding is critical as it often supports the beginning phases of infrastructure projects that must be completed before larger federal grants can be obtained. The various requests for funding are a small scale example of the dire need for infrastructure funding in the colonias. Currently, partly due to Colonias Initiative funding, all of the colonias in southern New Mexico have access to potable water and electricity.

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<sup>20</sup> Minutes of the Council of the Town of Silver City 1 (Nov. 6, 2007), [http://www.townofsilvercity.org/2007\\_minutes/2007\\_11\\_06\\_Minutes\\_Joint\\_Work\\_Session.pdf](http://www.townofsilvercity.org/2007_minutes/2007_11_06_Minutes_Joint_Work_Session.pdf).



## **II. PERVASIVE LEGAL ISSUES IN NEW MEXICO'S COLONIAS**

From September 2008 to November 2009, New Mexico Center on Law and Poverty (NMCLP) staff met with various representatives of nonprofit organizations and governmental entities that work on colonia matters to ask what they thought were the most pervasive legal issues present in the communities. Staff conducted subsequent research surrounding the issues identified during these meetings to determine what legal action could be taken to address them. In addition to the colonia-specific policy issues that were raised, NMCLP staff also learned of the numerous needs for direct legal services. While this report will focus on the systemic policy issues uncovered in New Mexico's colonias, it will also list the areas of law where direct legal service is direly needed in colonia communities. The following is a discussion of the policy-related issues that were brought to NMCLP's attention.

### **A. Real estate contracts**

A primary and major source of the problems faced by colonia residents in New Mexico is the weak protection afforded to land and homebuyers under New Mexico's real estate contract law. Real estate contracts are the most common instrument used for the purchase of property in colonias because they allow people to purchase land and homes with little or no down payment and without a credit check. However, in New Mexico, there are no statutes that regulate this type of contract, and, thus, minimal protections exist for buyers. Purchasers under real estate contracts are left vulnerable to harsh treatment from sellers that they would not experience under mortgage agreements, making them particularly easy prey for unscrupulous sellers. Buyers, after making timely payments on their land for years, face losing their land, the homes they have built, and all their equity by missing just one payment. Buyers in colonias are generally less aware of

the equitable protections that exist, and of their legal rights and remedies due to language and cultural barriers and a lack of understanding of property and contract law. These barriers make them less likely to seek out legal remedies. Colonia residents who are undocumented immigrants are even easier targets for abusive sellers because they are the least likely to seek redress due to their immigration status. Even when they are ready and willing to assert their rights, most colonia residents cannot afford an attorney and the availability of free or low-cost legal services is extremely limited.

*1. How do real estate contracts work?*

Real estate contracts are agreements for the purchase and transfer of real estate between a buyer and a seller where the buyer pays the seller monthly installments toward the purchase price of the real estate and, unlike mortgage agreements, the seller retains legal title to the property until the last payment is made. After the buyer has made all payments and performed any other obligations required by the contract, a warranty deed is transferred to the buyer giving the buyer full legal title to the property. Until then, the buyer has only “equitable title” to the property, i.e., is entitled to use and enjoy the property and, under equitable principles, is viewed as the owner of the property even though the seller still holds legal title.

Real estate contracts are generally used to buy and sell land in colonias because it allows a buyer who has little or no cash for a down payment and who does not qualify for conventional bank financing to purchase property.

It should be noted that the term for this type of real estate contract differs within New Mexico and between other states. In New Mexico, the contracts have been called “contracts for sale,” “for deed contracts,” “real estate installment contracts,” “installment land contracts” or simply “real estate contracts,” after the title of the standardized form contract commonly used in

these transactions. Common names for these contracts in other states include, “contracts for deed,” “bonds for title,” and “land contracts.” This report refers to them as “real estate contracts”.

Real estate contracts in New Mexico provide extensive protections for sellers but lack basic protections for buyers that are provided by conventional financing instruments such as mortgages. Under real estate contracts, interest rates and late fees may be set exorbitantly high, and sellers may set notice provisions that give buyers inadequate time to cure a default should they find themselves unable to make a timely payment. The seller may also forbid prepayment or early payoff of the balance of the contract, or impose unfairly severe penalties for abrogation of the agreement. If the buyer misses a payment and fails to cure the default within the period of time provided in the contract, the “forfeiture provision” in the contract allows the seller to terminate the buyer’s rights in the property. In such cases, the buyer relinquishes all improvements and payments made on the property, and is forced off the land. The seller may then market and sell the land and improvements at a higher price to a subsequent buyer under the same type of contract.

By contract, under a mortgage in New Mexico, the buyer has many protections not proffered by real estate contracts. For example, under a mortgage, the buyer has full legal title to the financed property at the outset—the mortgage merely serves as a lien on the property and the buyer’s equity in the property is protected. If a buyer defaults on a mortgage in New Mexico, the holder of the mortgage note must pursue judicial foreclosure in district court—a process that can take several months, and where the mortgagor (buyer) has a right of redemption for up to nine months after the foreclosure sale. This right allows the buyer to redeem the property by paying the purchaser of the property at the foreclosure sale the purchase price plus 10% interest and all

other taxes, interest, and penalties. If the buyer is unable to regain possession of the property in this way, the buyer is entitled to recover the remaining proceeds from the sale of the foreclosed property after the mortgage loan is repaid. Thus, defaulting buyers are able to regain some of the equity in their home even after foreclosure. Conversely, under New Mexico's real estate contracts, if the buyer misses even a single payment, the real estate contract allows the seller to quickly repossess the property and retain all payments and the value of improvements without having to go through any official proceedings, as would be required under a mortgage.

One of the primary reasons a purchaser would forego the protections of a mortgage and use a real estate contract instead is that it is often difficult for low-income buyers to qualify for mortgages. A mortgage obtained through a bank generally requires a minimum down payment of 5% to 20% of the purchase price and requires the buyer to demonstrate the ability to meet monthly payments and have a credit history that meets certain standards. These requirements help ensure that the purchaser can afford to purchase the property while providing some security to the seller or mortgage holder. Parties selling property under real estate contracts generally do not require down payments, proof of income, or credit checks. The advantages such contracts afford a seller, such as setting terms and providing for forfeiture, mitigate the need to ensure that a buyer can afford to purchase under the terms. A consequence of this arrangement is that a buyer's breach often results in more advantage to the seller than if the buyer complies with all terms of the contract: the seller can regain control of the property, keep all the payments and improvements made thereon without compensating the buyer, and the seller can turn around and enter into the same type of contract for a higher purchase price with another buyer.

## 2. How does New Mexico law regulate real estate contracts?

Currently there are no statutes that regulate the use of real estate contracts in New Mexico. There is, however, an extensive body of case law where New Mexico courts have provided equitable relief for defaulting buyers who challenge the sellers' termination of real estate contracts. In general, the courts are reluctant to interfere with the provisions of real estate contracts unless the outcome results in an unconscionable inequity. The courts adhere to the policy that the advantages of these types of contracts to buyers far outweigh the disadvantages when thousands of people have been able to purchase property who otherwise could not.<sup>21</sup> The court will step in and disallow strict enforcement of a forfeiture provision only when to do otherwise would result in an "unfairness, which shocks the conscience of the court."<sup>22</sup> The courts' decisions are not entirely consistent, tending to allow varying degrees of equitable relief for buyers while also allowing forfeiture provisions to stand where buyers have been grossly negligent or in severe, repeated default.<sup>23</sup> While the case law does not appear to deal specifically with real estate contracts in colonias, the trend indicates that equitable relief may be available for individual colonia residents through the courts if they are willing to assert their rights. In most cases this, of course, would necessitate low cost or pro bono legal assistance.<sup>24</sup>

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<sup>21</sup> See *Bishop v. Beecher*, 67 N.M. 339, 342 (1960).

<sup>22</sup> See *id.* at 343.

<sup>23</sup> See, e.g., *Davies v. Boyd*, 73 N.M. 85 (1963) (upholding forfeiture where Buyer paid no down payment, monthly payments approximated fair rental value, and reasonable notice was given to Buyer); *Hale v. Whitlock*, 92 N.M. 657 (1979) (allowing Buyers an additional 15 days to pay off contract where Seller routinely acquiesced to late or missing payments in the past, even though Buyers owed Seller for 25 delinquent installments); *Huckins v. Ritter*, 99 N.M. 560 (1982) (providing that forfeiture of both the real estate and Buyer's \$45,000 down payment was unwarranted); *Manzano Industries v. Mathis*, 101 N.M. 104 (1984) (upholding forfeiture where Buyer was late in making payments 23 times, failed to keep the property in good repair, and failed to pay taxes and insurance); *Buckingham v. Ryan*, 124 N.M. 498 (Ct. App. 1998) (upholding forfeiture where Buyer paid \$28,500 of \$107,000 purchase price and where property value significantly decreased due to Buyer's gross negligence); *Miller v. Johnson*, 125 N.M. 175 (Ct. App. 1998) (upholding forfeiture where Buyer paid over \$100,000 on the purchase price, made over \$123,000 in rental profits, and where property decreased in value by \$150,000 during Buyer's possession).

<sup>24</sup> Attorneys fees are generally not awarded to prevailing parties.

### *3. What are the problems with unregulated use of real estate contracts?*

Lack of regulation allows real estate contracts to be used as predatory instruments, particularly in economically depressed areas and among vulnerable populations. Additionally, the lack of rules surrounding their use presents serious threats to clear title to property.

Because real estate contracts are often the only means by which colonia residents can purchase property, their unregulated use provides opportunities for unscrupulous developers to exploit the disadvantaged position of immigrants who are not sophisticated in contract language and who may not yet speak or read English, but who are pursuing the American dream to own property and build a home for their families. Many colonia residents have unfairly lost their property as a result of not understanding the harsh terms of real estate contracts. The language in the contracts is difficult and often printed in English only. As a result, colonia residents who enter into real estate contracts often believe that they hold legal title to their property and that their payments and improvements provide them with equity they can use to further improve their properties. Many buyers in colonias also do not realize that oral agreements and promises made by sellers (often conducted in Spanish) may not be reflected in the written contract (printed in English). For instance, some sellers in colonias have verbally misled buyers into believing that infrastructure improvements such as water, sewer, power, and roads would soon be installed by the seller or developer, yet such promises were absent from the written contract. And because the sellers retain legal title to the property until the last payment is made, the buyers cannot use their equity to obtain loans to make these kinds of improvements to their properties themselves. The abuses resulting from lack of regulation of real estate contracts perpetuate the impoverished conditions in New Mexico's colonias and shift the cost of installing infrastructure in these communities from private developers to federal, state, and county governments.

The absence of a law in New Mexico that mandates the recording of all real estate contracts contributes to clouding of title to land and inhibits future infrastructure development on lands sold primarily under real estate contracts. Under current real estate installment practices, buyers under contract can sell the property to other buyers under contract, who can then contract with yet another buyer to purchase the same property. These serial and concurrent contracts on the same piece of land are often not recorded, and subsequent buyers are often unaware of their existence. In such situations, if the original buyer defaults, the original seller can take back the land, giving subsequent buyers no recourse unless they challenge the seller in court. Additionally, if a subsequent buyer pays off the property under their contract, they do not acquire full legal title to their property unless the sellers have paid off their own contractual obligations regarding the property. Because legal title to property may be two, three, or more times removed from the equitable owner in this way, such an owner, lacking clear title to their land, is unable to grant easements through their land, creating yet another barrier to obtaining utilities, sanitation services, and roads in colonia communities.

The unregulated use of real estate contracts, and their attendant potential consequences, impacts middle income buyers as well as colonia residents and others living in poverty. As foreclosures reach record levels, many former mortgagors may turn to financing property with real estate contracts,<sup>25</sup> thus widening the pool of potential victims for unscrupulous sellers.

The New Mexico Center on Law and Poverty is exploring the sensitive territory of how to provide basic consumer protections for buyers who enter into real estate contracts, while minimally affecting the use of these contracts by honest and ethical sellers. This type of

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<sup>25</sup> See, e.g., Steve Brandt, *Applying an Old Tool to Sell Foreclosed Houses*, MINNEAPOLIS-ST. PAUL STAR TRIBUNE, Jan. 12, 2009, <http://www.startribune.com/local/stpaul/37212659.html?page=1&c=y> (describing a city program encouraging redevelopment organizations to sell foreclosed properties under contracts for deed to buyers who cannot qualify for mortgages under current credit-strapped conditions).

financing instrument provides colonia residents and other low-income people a chance to own property, and has been one way to meet the need of affordable housing for immigrants near the U.S.-Mexico border. However, continuing to allow real estate contracts to go unregulated is to allow continued abuse of vulnerable purchasers and contributes to persistent conditions of poverty and lack of infrastructure improvements in colonia communities.

*4. New Mexico is the only border state without regulations over real estate contracts—Texas law provides a strong model.*

In other states that share a border with Mexico and are home to colonias, statutes and case law more strongly regulate the use of real estate contracts in favor of greater protections for buyers and help prevent the proliferation of unplanned communities lacking essential infrastructure. Although equitable relief for buyers is available through New Mexico courts, the state has been behind other border states in addressing real estate contract issues in colonias through legislation (see table below). As other border states strengthen their laws to stanch the growth of colonias in their jurisdictions, the growth rate of colonias in New Mexico may continue to increase dramatically in the absence of legislation and enforcement.



**Number of Colonias, Population of Colonias, and Existence of Statutes Regulating Real Estate Contracts in Border States<sup>26</sup>**

	<b>Texas</b>	<b>New Mexico</b>	<b>Arizona</b>	<b>California</b>
<b>Number of colonias</b>	2,294	<b>141 plus</b>	87	16
<b>Estimated population in colonias</b>	400,000	<b>135,008</b>	363,585	Not available
<b>Statutes regulating real estate contracts?</b>	Yes <sup>27</sup>	<b>No</b>	Yes <sup>28</sup>	Yes <sup>29</sup>

Comprehensive laws passed by the Texas legislature to regulate real estate contracts could provide a model framework for creating legislation in New Mexico. Texas has the strongest statutes regulating real estate contracts (referred to there as “contracts for deed”). Passed in 1995 and amended in 2001 and 2005, the Colonias Fair Land Sales Act (“the Texas Act”) provides comprehensive legislation that seeks to vigorously protect buyers who enter into contracts for deed.<sup>30</sup> Texas has by far the largest population of people living in colonias with 400,000 residents populating 2,294 colonias.<sup>31</sup>

<sup>26</sup> See ESPARZA & DONELSON, *supra* note 3, at 6, 42–43, 46; Tex. Sec’y of State, Colonias Frequently Asked Questions, <http://www.sos.state.tx.us/border/colonias/faqs.shtml> (last visited Jan. 24, 2010).

<sup>27</sup> See TEX. PROP. CODE ANN. §§ 5.061–5.085.

<sup>28</sup> See ARIZ. REV. STAT. ANN. §§ 33-741–750; *see also* Appendix A at the end of this report.

<sup>29</sup> See CAL. CIV. CODE §§ 2985.1–2985.6; *see also* Appendix A at the end of this report.

<sup>30</sup> TEX. PROP. CODE ANN. §§ 5.061–5.085.

<sup>31</sup> Tex. Sec’y of State, *supra* note 26.

The Texas Act applies to both real estate contracts and leases containing options to purchase.<sup>32</sup> By law, the contract and all other documents pertaining to the land transaction must be printed in the language of the buyer. Forfeiture of payments and improvements is allowed only where the buyer has paid less than 40% of the purchase price. If the buyer has paid 40% or more of the purchase price or the equivalent of 48 monthly payments at the time of default, the seller must follow a foreclosure-like process to regain full title to the land; the seller may sell the property, but the previous buyer is entitled to the proceeds of the sale that exceed the debt owed.

The Texas Act provides that the seller must disclose information as to whether the property is in an illegal subdivision or a floodplain, and has utility and sanitation services or maintained roads.<sup>33</sup> The Texas Act further provides that the seller's failure to provide such information constitutes a false, misleading, or deceptive act within the Texas business code and entitles buyers to cancel the contract and receive a full refund of payments from the seller.

The Texas Act provides for consumer-friendly financing terms such as no prepayment penalties, complete disclosure of the total amount that will be paid under the contract including principle and interest, and a requirement that the seller provide an annual statement to the buyer. Several provisions allow the buyer to cancel the contract if the seller has not conformed to the law, while others require the seller to reimburse the buyer for all payments made when certain provisions of the law are violated.

Under the Texas Act, buyers may also convert their installment contract into a more secure instrument, such as a deed of trust. Under a deed of trust, the provisions of the contract

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<sup>32</sup> TEX. PROP. CODE ANN. § 5.062(a)(2). The original 1995 Act applied to contracts for deed only, causing developers to circumvent the law with lease-to-own contracts as an alternate vehicle for abuse. *See* TEX. LOW INCOME HOUSING INFO. SERV., HOUSING MATTERS: HOME BUYER SCAMS PREY ON POOR IMMIGRANT FAMILIES, available at <http://www.texashousing.org/webnews/issues/news006.pdf>. The Texas legislature has since closed this loophole by amending the law to include lease-to-own contracts among those regulated by the statute.

<sup>33</sup> TEX. PROP. CODE ANN. § 5.069.

remain intact, except the seller is not permitted to exercise the forfeiture provision and must instead foreclose on the property in the event of default.

To complement the Colonias Fair Land Sales Act, Texas also legislated funding for several programs designed to improve safety and infrastructure in colonias. The Bootstrap Loan Program provides up to \$30,000 of government-financed loans to very low-income families who contribute at least 60% of the labor for home construction or rehabilitation. The Self-Help Centers Program provides funding for nonprofit corporations to train colonia residents in infrastructure building, new home construction, home rehabilitation, grant writing, and credit counseling.<sup>34</sup> Additionally, the Contract for Deed Conversion Program provides funding for other nonprofit groups to assist colonia residents with converting installment contracts into traditional mortgages or deeds of trust.<sup>35</sup>

*5. What can be done to help alleviate the inequities caused by real estate contracts for colonia residents in New Mexico?*

a. Legislation

In considering a legislative proposal to regulate the use of real estate contracts in New Mexico, proponents must seek extensive input from colonia residents and advocates, in particular, but also from other stakeholders, such as the real estate industry. Collaboration with residents and advocates of colonias throughout New Mexico is essential to deciding how and to what extent real estate contracts should be regulated.

Legislation to address the systemic abuses of real estate contracts in colonias should be aimed at resolving a few basic issues at the crux of the problem. Buyers who are not proficient in English should be protected by a requirement that real estate contracts and all other documents

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<sup>34</sup> TEX. GOV'T CODE ANN. § 2306.582–2306.587.

<sup>35</sup> TEX. GOV'T CODE ANN. § 2306.255.

pertaining to the transaction be printed in the language of the buyer, as well as in English. The law should require certain disclosures, such as the condition of title, the existence and cost of infrastructure (if any) and whether legal access exists. The actual contracts should be in a recordable format and be recorded with the county to provide transparency to the chain of title. Failure of sellers to comply with these provisions should result in sanctions that not only deter sellers, but that are also advantageous to buyers, such as providing that a buyer may cancel the contract and be reimbursed for all payments in the event of non-compliance.

Furthermore, buyers should be protected from unfair forfeiture provisions and provided an opportunity to protect their investment and realize their equity after they have paid a certain percentage of the purchase price of the property or for a certain period of time. For instance, advocates of the law could consider adopting the Texas provision that precludes forfeiture after the buyer has paid 40% or more of the purchase price of the land or the equivalent of 48 monthly payments. If the buyer defaults after reaching that level of equity in the property, the seller must notify the buyer of his or her default and provide an opportunity to cure the problem before placing the land up for sale. Such a provision would give the buyer a right to redeem the property through refinancing and may encourage the seller to work with the buyer before proceeding with the sale. When the property is sold, the buyer would be entitled to retain all proceeds that exceed the debt and costs owed to the seller. In Arizona, the analogous law states that the more money the buyer has paid into the land, the more time they would be given in which to cure default. (See Appendix A.) Such provisions protect and standardize transactions for buyers and sellers who enter into real estate contracts.

Existing laws could be amended to provide relief for low-income colonia residents involved in real estate contracts. The New Mexico Subdivision Act, discussed later in this

report, provides some limited relief for buyers who purchase land in illegal subdivisions.<sup>36</sup> That, and the New Mexico Unfair Trade Practices Act<sup>37</sup> could each be amended to include provisions applicable to real estate contracts.

These are just a few of the legislative options available to help ameliorate the problems of real estate contracts in colonias. Other issues to consider include enforcement resources and the feasibility of implementing programs that would operate concurrently with the law, similar to the self-help and bootstrap loan programs that exist in Texas. Further research and collaboration with colonia residents, advocates, and other stakeholders will likely produce additional solutions as well as uncover additional issues to consider.

#### b. Litigation

Litigating against the unfair provisions in real estate contracts is another option to help individuals gain relief. Since New Mexico case law examines the facts and circumstances of each case in deciding whether to grant equitable relief, litigation would likely only help certain individuals and not provide a systemic solution. However, as the role of these contracts in the continued proliferation of colonias are brought to the attention of the courts, the courts may choose to implement changes in its jurisprudence regarding the unfair use of these contracts. Decisions from the bench are unpredictable though, and could result in unintended negative consequences for colonia residents. Other creative legal arguments may be made, including possible due process violations, fraud, and questioning the ethics and legality of title transfers by an escrow agent. The Center will continue to research the issues to determine the viability of such claims and whether they could have a positive systemic impact on colonias.

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<sup>36</sup> N.M. STAT. § 47-6-2 *et seq.*

<sup>37</sup> N.M. STAT. § 57-12-1 *et seq.*

## **B. Illegal and improperly created subdivisions**

Along with the use of real estate contracts, the illegal or improper creation of subdivisions is a major factor contributing to the difficult living conditions in the colonias. These conditions include: inadequate or non-existent water and wastewater systems, inadequate or non-existent flood control and drainage systems, substandard housing, lack of access to public utilities and make-shift roads that are not maintained and often dangerous. Illegal subdivisions exist when landowners divide large tracts of land into smaller lots and sell them without following state or local subdivision laws. Improperly created subdivisions are those created and/or approved due to loopholes in the subdivision laws. In both cases, the developers do not go through the planning and zoning procedures required by law, thus avoiding the official scrutiny meant to ensure that subdivisions meet minimum standards. This maneuver often results in subdivisions and developments that are, intentionally or not, seriously flawed. For example, easements or rights of way for use in providing infrastructure to developments are omitted, subdivisions and developments are created in flood zones, and lots are created without a way to access them.

The lots within these subdivisions are usually sold using installment real estate contracts that afford the buyer the fewest protections, and are sold to people who are less likely to protest problems with the property when they become aware of them. In this way, real estate contracts and illegal and improperly created subdivisions together contribute to the formation of colonias and their untenable living conditions.

New Mexico subdivision statutes have been improved throughout the years, closing some of the loopholes that had enabled land developers to create conditions ripe for the formation of

colonias.<sup>38</sup> Despite the increased strength of the law, landholders continue to either take advantage of the loopholes that still exist or subdivide illegally. They do so because it is profitable and because they can get away with it—the laws are rarely enforced in colonias and other isolated areas.

Subdivision laws are meant to ensure that land is developed consistently with the plans and capacities of the city or county in which the subdivision lies. The laws are also meant to ensure that individual lots are legally accessible by roads and utility services, and the responsibility for this is placed on the subdivider.

Meeting the requirements of subdivision law can be burdensome on developers as they maneuver through county permitting processes. The construction and excavation costs of providing infrastructure to a subdivision are generally built into the price of each lot offered for sale in a subdivision. However, creating a legal subdivision involves significant capital outlay and risk that plans will not be approved, and profits may not be realized for quite some time.

Unscrupulous developers who wish to avoid these risks and turn a quick profit take advantage of the loopholes in the law or ignore the subdivision laws and permitting processes altogether. One way to do this is by investing in and subdividing cheap land in isolated areas away from the watchful eye of county authorities. These lands often have no roads and substandard access to water, power, gas, or waste disposal services. The developers simply divide up the land into lots and sell them relatively cheaply to low-income individuals and families who want to own property but cannot afford to buy real estate anywhere else. The buyers usually do not realize the problems they will face in living on the property or that they are buying a lot in an illegal or improperly created subdivision.

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<sup>38</sup> For a detailed discussion of New Mexico's Subdivision Act, see Appendix B at the end of this report.

### *1. Previous enforcement efforts of subdivision laws in New Mexico colonias*

While the state and county governments have provided strong regulations to prevent illegal subdivisions, enforcement has been sporadic and done little overall to deter developers from breaking the law. New Mexico suffers from a lack of enforcement resources, not necessarily a lack of subdivision laws.<sup>39</sup> As a result, unscrutinized subdivisions continue to contribute to impoverished conditions in colonias.

The New Mexico Attorney General and Doña Ana County began filing major lawsuits against colonia developers in 1990.<sup>40</sup> However, these enforcement efforts lasted only a few years, as resources within the Attorney General's office were shifted to other projects. Currently, the Attorney General's Web site expresses the following support for enforcement efforts: "In recent years, the state's policy on land development has resulted in county regulations to prevent the further development of 'colonias,' or developments lacking basic infrastructure. Keeping an eye out for loopholes and supporting a solid enforcement system is well within the Attorney General's authority and interest."<sup>41</sup> There does not seem to have been any state-supported enforcement efforts since the mid-1990s.

### *2. Considerations moving forward*

Aggressive enforcement of current subdivision laws may not be the best solution to illegal subdivision problems faced by colonia residents. Nancy Simmons, an Albuquerque attorney who represented colonia residents in the past, points out in a 1997 New Mexico Law Review article, that regulated subdivision development may be too costly for colonia populations to afford, thus pushing them into multi-family housing in urban areas or even worse,

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<sup>39</sup> Simmons, *supra* note 6, at 62.

<sup>40</sup> Simmons, *supra* note 6, at 59.

<sup>41</sup> Office of N.M. Att'y Gen. Gary King, Immigrant Services, <http://www.nmag.gov/office/Immigrant/Default.aspx> (last visited Jan. 24, 2010).



homelessness.<sup>42</sup> She suggests that the subdivision laws be changed to provide flexibility for colonia communities to slowly build infrastructure to allow their subdivisions to meet legal requirements over time, instead of the current requirement that all infrastructure be installed and paid for upfront.<sup>43</sup> Such flexibility would encourage self-help efforts and investment of sweat equity by community members and provide an affordable way for colonia residents to attain homeownership.

Further understanding of land ownership patterns, current practices, and problems in each colonia is needed before an informed decision can be made as to whether strict enforcement of the subdivision laws will produce tangible and positive results for colonia residents. At the very least, a highly publicized enforcement campaign could serve to temporarily deter further illegal subdividing. Any future legislation in the subdivision realm on behalf of colonias should continue to close loopholes and provide flexibility for existing colonias to legally develop infrastructure in their communities over time. For more detailed information on the infrastructure and land use challenges in colonias, particularly Pajarito Mesa, see Appendix C at the end of this report.

### **C. Environmental justice issues**

Minority communities more often bear the brunt of hazardous waste facilities, landfills, industrial activities, and other risk-producing practices compared to non-minority communities.<sup>44</sup> As low-income, rural communities with high numbers of minorities, New Mexico's colonias are prime targets for the placement of environmentally hazardous facilities and other types of

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<sup>42</sup> Simmons, *supra* note 6, at 69.

<sup>43</sup> Simmons, *supra* note 6, at 74. Ms. Simmons suggests formalizing the current informal system so that the costs of infrastructure could be distributed between the developer and the individual lot owner over time.

<sup>44</sup> CLIFFORD RECHTSCHAFFEN & EILEEN GAUNA, ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION 3 (2002).

establishments. The New Mexico Center on Law and Poverty has not yet conducted extensive research on environmental justice in New Mexico's colonias. However, for the purpose of this report, one colonia in particular provides an understanding of what environmental *injustice* in a colonia looks like.

### *1. The Chaparral colonia and the Rhino case*

Chaparral is an unincorporated colonia in southern New Mexico that stretches from southeastern Doña Ana County to southwestern Otero County. An accurate population of the colonia is difficult to ascertain. While the 2000 Census put the number of people living in the community at 6,117,<sup>45</sup> an estimate based on water bill data for the portion of Chaparral that sits in Doña Ana County puts the number at 20,000 as of 2006.<sup>46</sup> Approximately 72% of the population is Hispanic, and the median income is \$22,540 per year.<sup>47</sup>

Chaparral is home to a substantial number of hazardous industrial facilities, and additional undesirable facilities are located within a 10-mile radius of the colonia. These facilities include a petroleum-contaminated soil remediation site; the McCombs Municipal Landfill; the El Paso sewage sludge monofill; the Newman Power Plant; the Fred Hervey Water Reclamation Plant; an abandoned, illegal landfill containing construction and demolition debris; the Chaparral Sand and Gravel Quarry; the Otero County Prison; the White Sands Missile Range; and the Rinchem Hazardous Waste Container Storage Facility.<sup>48</sup> The majority of these sites require air contaminant and/or water discharge permits from the New Mexico Environment

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<sup>45</sup> U.S. Census Bureau—Population of Chaparral, New Mexico, [http://factfinder.census.gov/home/saff/main.html?\\_lang=en](http://factfinder.census.gov/home/saff/main.html?_lang=en) (type “Chaparral” into fact sheet search box and choose New Mexico as the state) (last visited Jan. 24, 2010).

<sup>46</sup> Kristina G. Fisher, *The Rhino in the Colonia: How Colonias Development Council V. Rhino Environmental Services, Inc. Set a Substantive State Standard for Environmental Justice*, 39 ENVTL. L. 397, 401 (2009).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 403.

Department (NMED), the Texas Commission on Environmental Quality, or the EPA.<sup>49</sup> Most permits requested by these facilities have been granted by the appropriate agency.

The high number of hazardous waste and emissions facilities situated within or near to Chaparral appears to be adversely affecting the health of colonia residents. In an informal survey of 172 Chaparral households conducted by the Colonias Development Council (CDC) from 2006 to 2007, approximately 60% of households surveyed reported at least one member with a chronic illness.<sup>50</sup>

The legal options available to colonia residents to counter disproportionate placement of hazardous waste and industrial facilities vary. Legal advocacy in the colonias could include working with a community to oppose permit applications, filing complaints against existing facilities that are not operating in compliance with the law, or suing hazardous facilities in tort for damages. The law governing a particular situation will vary depending under which statute the facility has been granted its permit.

Colonia residents in Chaparral have demonstrated that they, themselves, are capable of taking the lead in confronting environmental injustices in their community. In 1999 Rhino Environmental Services applied for a permit from NMED under the Solid Waste Act to open a landfill in Chaparral. The 135-acre proposed landfill was designed to accept petroleum-contaminated soils, sewage sludge, slaughterhouse offal, industrial solid waste, and other types of hazardous waste.<sup>51</sup> The Colonias Development Council (CDC) and the Chaparral Community Health Council organized the community to oppose the application. Both organizations filed motions in 2001 challenging the validity of the public notice, which ran only in Doña Ana County newspapers (and not in Otero County newspapers). Rhino conceded that the publication

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 402–03.

<sup>51</sup> *Id.* at 404.

was insufficient, and the permit hearing was rescheduled with an appropriate notice sent to all Chaparral residents. This was an important initial victory for the Chaparral community.

Despite overwhelming opposition to the landfill at the permit hearing, NMED approved the landfill permit. The CDC appealed the decision, arguing that NMED did not take into consideration the social impact on the community of an additional solid waste facility, which was in violation of the Solid Waste Act. The case eventually reached the New Mexico Supreme Court, which overruled the granting of the permit.<sup>52</sup> The court held that the permitting process under the Solid Waste Act required NMED to take into consideration, among other factors, the social impact of the proposed facility, which they did not do.<sup>53</sup> The decision was a huge win for the environmental justice movement in New Mexico, particularly in the colonias.

As this case demonstrates, colonia residents have the knowledge, capacity and willingness to fight for justice in their communities. In the *Rhino* case they worked alongside attorneys, resulting in a success for the community. In dealing with environmental justice issues (and in all policy issues that affect the colonias), civil legal service providers should remain cognizant that they are but one component in the overall effort. Clearly, colonia residents should remain the leaders of that effort, working with legal providers when they feel it is necessary.

On a systemic level, there is need for effective legislative and administrative advocacy to improve and enforce the laws and regulations that govern the permitting of environmentally hazardous facilities. In November 2005, NMED published a report on environmental justice in New Mexico. The report contained a section on “Permitting Reform,” with suggestions on how to improve the permitting process, including: considering social and cumulative impacts on the affected area; requiring comprehensive demonstration that the burden of proof is met and not

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<sup>52</sup> *Id.* at 414; *see also* Colonias Dev. Council v. Rhino Env'tl. Serv., Inc., 117 P.3d 939 (N.M. 2005).

<sup>53</sup> *Id.* at 415.

relying on the permit applicant's unsupported assertions; providing improved notice and outreach to affected communities on permit applications; providing language translation; and defining technical terms in plain language.<sup>54</sup> Additionally, although the *Rhino* court's decision that "social impacts" be considered for permit applications under the Solid Waste Act does not extend to other hazardous facility permitting laws, it is still expected to cause NMED to re-evaluate its environmental permitting regulations under the other environmental statutes it administers.<sup>55</sup> Using the report and the *Rhino* case for support, colonia residents and legal counsel can work together to advocate against the placement of additional hazardous facilities in colonia communities. They can also work together to support legislation in Santa Fe that furthers environmental justice.

## 2. *New Mexico Executive Order 2005-056*

Further administrative advocacy could involve holding state agencies accountable to Executive Order 2005-056. In 2005, New Mexico Governor Bill Richardson signed this Executive Order, which declared New Mexico's commitment to environmental justice. The Order states, "New Mexico is committed to affording all of its residents, including communities of color and low-income communities, fair treatment and meaningful involvement in the development, implementation, and enforcement of environmental laws...."<sup>56</sup> The Executive Order directs cabinet level departments, boards, and commissions involved in decision-making around public health and environmental quality issues to provide meaningful opportunities for the public to be involved with those decision-making processes. The Order further instructs these decision-making bodies to provide significant public health and environmental information

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<sup>54</sup> See N.M. ENV'T DEP'T, A REPORT ON ENVIRONMENTAL JUSTICE IN NEW MEXICO (2007), available at <http://www.nmenv.state.nm.us/Justice/Reports/NMEDFinalReport-Dec07-04.pdf>.

<sup>55</sup> Fisher, *supra* note 46, at 419.

<sup>56</sup> N.M. Exec. Order No. 2005-056 (Nov. 18, 2005), available at [http://www.nmenv.state.nm.us/Justice/EO\\_2005\\_056.pdf](http://www.nmenv.state.nm.us/Justice/EO_2005_056.pdf).

to the public in both English and Spanish. Finally, the Order created a multi-agency taskforce with the purpose of making recommendations to state agencies regarding actions to be taken to address environmental justice issues. However, according to taskforce member Richard Moore, executive director of the Southwest Network for Environmental and Economic Justice, the taskforce has not been made a priority by policymakers and has not been as productive as it has the potential to be. While the Order is a step in the right direction, it is meaningless without pressure for its enforcement. Since executive orders do not carry the same weight as law, colonia residents, environmental justice advocates and attorneys working alongside colonia communities must apply pressure to state officials and policymakers and hold them accountable for addressing environmental justice issues.

#### **D. Barriers to receiving public benefits**

Public benefits programs provide an important safety net for people who find themselves unable to maintain their health, safety and welfare. These programs can help people—especially children, the disabled and the elderly—avoid permanent damage from malnutrition and lack of healthcare or shelter. Furthermore, public benefits can help sustain people during periods of low-income and improve their situation. Many public benefits programs are administered by the Income Support Division of the New Mexico Humans Services Department (HSD).

Many residents of colonias would benefit greatly from public benefits programs, but they face considerable barriers to participation. Applying for benefits can be cumbersome and intrusive for all applicants, and, due to a shortage of caseworkers in New Mexico, the process can be fraught with error, frustrating and very long. Extensive documentation is required; applicants who are working may have to miss work to apply; and the process may take several

visits to state offices. In addition to these difficulties, immigrants face extra barriers when applying for public benefits, including language barriers, improper demands for unnecessary information concerning immigration status, and fear of retaliation against undocumented family members who are not applying for benefits.

### *1. Language barriers*

Many residents of New Mexico's colonias are not proficient in English and must overcome language barriers in order to participate in public benefits programs. Federal law mandates that any entity receiving federal funds must provide meaningful access to their programs by persons who are not proficient in English.<sup>57</sup> Additionally, New Mexico has state regulations that ensure the rights of applicants to have information about their application and benefits programs explained in a language they understand.<sup>58</sup> Nevertheless, applicants who are not proficient in English still have a difficult time applying for benefits in New Mexico. Many HSD offices have a shortage of Spanish-speaking caseworkers, resulting in applicants meeting with caseworkers who are not proficient in Spanish, waiting for extremely long periods of time to speak with a Spanish-speaking caseworker, or not applying at all. If the applicant meets with a caseworker who is not proficient in Spanish, miscommunication is likely to occur that can result in an application being denied. Additionally, critical notices informing clients whether their benefits applications have been approved or denied are printed in English only, as are the adverse-action notices telling clients about benefits termination. For immigrants, language barriers can translate into an eligible, needy family not applying for or being wrongfully denied benefits.

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<sup>57</sup> U.S. Dep't of Health & Human Serv., Civil Rights, Guidance to Federal Financial Assistance Recipients Regarding Title VI and the Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons—Summary, <http://www.hhs.gov/ocr/civilrights/resources/laws/summaryguidance.html> (last visited Jan. 24, 2010).

<sup>58</sup> N.M. ADMIN. CODE § 8.100.100.16(D).

The New Mexico Center on Law and Poverty has made numerous suggestions to HSD on how to improve language services and continues to advocate for improvements such as implementing a system to identify and track the language needs of non-English speakers, translating key notices, training staff on language assistance policies, providing sufficient foreign language signage, recruiting more bilingual staff, and informing non-English speakers of their right to free language interpretation.

## *2. Demands for unnecessary documentation*

Another barrier for immigrants in the public benefits arena is HSD's request for unnecessary information about people living in the applicant's home who are not applying for benefits. Formerly, the HSD application for public benefits included an illegal request for the social security numbers of all people living in the home, which is unnecessary for the determination of an applicant's eligibility. While applicants for public benefits programs must be citizens or "qualified aliens," the law clearly stipulates that the citizenship status and social security numbers of non-applicant household members are not relevant and thus unnecessary. Requiring this information acts as a deterrent to eligible applicants who do not wish to endanger any undocumented family members living in the home and understandably causes them to fear applying for benefits. In 2008, a federal district judge ordered HSD to amend its application to no longer demand social security numbers of non-applicants in the home.

While the official policy of HSD is now that caseworkers are not to request the immigration status of family members of an applicant who are not applying for benefits, some caseworkers continue to do so. Requesting the immigration status and the social security numbers of non-applicants is a deterrent for parents who may be undocumented but wish to apply for benefits for their qualified children. Advocates and colonia residents also continue to



report that some caseworkers threaten adverse immigration consequences based on a valid application for benefits. Fear of retaliation due to immigration status results in eligible poor children not being enrolled in benefits programs, meaning an increase in the number of unassisted people living in poverty in New Mexico. Working in conjunction with the immigrant community and immigrant advocates, the New Mexico Center on Law and Poverty continues to advocate HSD to put an end to this practice by its employees.

### *3. Added difficulty meeting documentation requirements*

In addition to the public benefits obstacles urban immigrants face, immigrants in colonias contend with yet another layer of barriers. One of these is the lack of documentation for expenditures. The general application form for various benefits programs requires the applicant to list the household's monthly utility expenses and provide documentation in the form of bills and receipts, something that cannot be provided, in many cases, by colonia residents. For example, there is no running water in Pajarito Mesa. Many residents purchase water from a person nearby with a well who illegally sells water. This person refuses to provide any type of receipts to residents, since the water sales are illegal. Therefore, when HSD requests documentation on water utility expenses, Pajarito Mesa residents are unable to provide any. This limits what they can claim on their monthly expense total, which may result either in the benefit amount decreasing or a determination that the family is ineligible for benefits. The same challenge arises in a variety of other situations where receipts cannot be obtained. The New Mexico Center on Law and Poverty is working to encourage HSD to develop an affidavit that caseworkers accept in lieu of receipts. In the meantime, the Center has formulated an affidavit to use in lieu of receipts that is being distributed to Pajarito Mesa residents.

Because of the nature of colonias, many households do not have addresses or mailboxes, which can turn into a barrier to the public benefits programs. A large portion of contact with HSD happens through the mail; applying for and renewing benefits can be difficult without a mailbox. Applicants must set up an alternative way to receive their mail (often using another family member's address) and be vigilant in checking it to ensure time-sensitive documents are not missed. Additionally, some caseworkers have been known to incorrectly advise people without mailing addresses that they cannot apply for benefits.

The layers of obstacles to colonia residents seeking public benefits are numerous and can seem insurmountable. Because these programs are an important lifeline to keep families from being seriously hurt by poverty, these barriers must be addressed either with systemic solutions or individual advocacy on a case-by-case basis.

#### **E. Immigration and inadequate access to legal services**

According to several colonia advocates and residents, the most pressing legal need in the communities is for assistance with immigration matters. Free and low-cost legal resources in this area are scarce in New Mexico. For example, the Family Unity and Citizenship Program through the Roman Catholic Diocese of Las Cruces is currently not taking new clients as they are going through an internal reorganization. Diocesan Migrant and Refugee Services (DMRS) and Las Americas both provide low-cost, and sometimes free, immigration legal services to residents of southern New Mexico, but people needing their services must travel to El Paso to access those services. In January of 2009, DMRS received a one-year grant to fund one attorney at clinics in two colonias in Doña Ana County, New Mexico. This attorney rotates between the two clinics and provides low-cost, and sometimes free, immigration legal services to the communities. The

program began in January 2009, and the clinic served over 100 families. While these programs were available in Doña Ana County, there remained a major gap in services as they are unable to meet all local needs, and there are several other counties across the southern border of New Mexico that cannot access the services due to distance and the limited resources available to the attorney. Currently, DMRS and Catholic Charities are collaborating to seek funds to continue immigration legal services that will serve the 10 southern counties of New Mexico, as the current funding expired at the end of 2009.

Immigration cases in the colonias of Chaparral and Anthony include family-based petitions, naturalization, Violence Against Women Act (VAWA) cases, and removal defense. Family-based petitions are the most common and entail a U.S. citizen or legal permanent resident filing a petition to bring a family member, usually a child, spouse, or parent, from another country into the United States. There are also a high number of naturalization cases, where a lawful permanent resident applies for citizenship. Immigration cases under VAWA involve spouses of citizens or legal permanent residents who are victims of domestic violence. VAWA allows these spouses to petition for residency on their own so that they do not have to rely on their abusive partners to do it for them. The need for representation in VAWA cases is likely higher than what is currently known, as clients may not be coming to the clinic for help due to a fear of the abuser as well as a lack of trust between residents of the colonias and attorneys. Finally, DMRS handles removal defense cases. Removal defense involves representing an individual in Immigration Court who is facing removal or deportation from the United States by an Immigration Judge. While the El Paso DMRS office handles removal cases for people who have been detained both in El Paso and southern New Mexico, DMRS's removal defense caseload is extremely high, and there is an immense need for additional assistance.

When working with colonia residents, colonia advocates indicate that an organization offering services must establish trust in the colonia communities before the residents will seek its help. There have been many immigration raids in the past few years throughout New Mexico. Several of these raids occurred in the colonia of Chaparral in Otero County, which have led to an immense fear and distrust of outsiders in the community. When working in the colonias on immigration cases, civil legal service providers will need to remain aware of this fact and approach the situation cautiously and with much understanding.

Even when low cost/free immigration legal assistance is available, colonia residents face additional obstacles when it comes to accessing services. Transportation can be a substantial barrier, as there is a complete lack of public transportation, and many people do not have the means to arrive at an appointment at the Chaparral or Anthony clinics. Additionally, even if people are able to access this legal immigration assistance, many cannot afford the rising costs of fees required to accompany various applications. For example, an application for naturalization currently costs \$675, and a petition to apply for residency for a spouse can be as high as \$1,365. In 2007, the federal government increased the fees and made the rules around fee waivers more stringent. Cases that would have previously qualified for a fee waiver no longer do so.

The need for free or low-cost immigration legal assistance is dire in the colonias. Although some services are currently available, the continued funding for those services is uncertain. Even if additional funding is secured, it is difficult to find qualified attorneys to do this work. One possibility is that domestic violence shelters could be equipped to provide legal assistance in VAWA cases. Additionally, as the sole attorney at DMRS's New Mexico program points out, if more immigration attorneys were willing to take pro bono cases, a lot of the stress on the current providers could be alleviated. In Texas, a certain number of pro bono hours are

required, leading to more pro bono attorneys being available to do this work. A similar requirement of New Mexico attorneys could generate the same results. Increasing funding to existing civil legal service organizations to hire immigration attorneys is another solution. Finally, another—and perhaps the ideal—solution is to open up a new immigration clinic in southern New Mexico that focuses solely on immigration law.

## **F. Predatory lending**

Predatory lending involves a wide range of abusive and unethical business practices designed to exploit people in need of money by marketing loans that trap borrowers into a cycle of debt. Although anyone could potentially become the victim of predatory lending, poor minorities are, by far, the populations most adversely affected by this problem. In a study administered by the Center for Responsible Lending in Los Angeles, it was found that Latinos and African Americans made up a disproportionate share of payday loan borrowers, and that the racial and ethnic composition of a neighborhood is the primary predictor of payday lending locations.<sup>59</sup>

According to advocates who work in New Mexico's colonias, predatory lending is a pervasive problem for their communities. The harsh economic realities that colonia residents face push many to turn to unfavorable loans when emergencies and unexpected costs arise. The most frequent types of predatory loans experienced by colonia residents include payday loans and title loans.

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<sup>59</sup> Ctr. for Responsible Lending, Predatory Profiling, <http://www.responsiblelending.org/payday-lending/research-analysis/predatory-profiling.html> (last visited Jan. 24, 2010).

### *1. Payday loans*

In New Mexico, a payday loan is defined as a short-term loan for less than \$2,500 secured by either a borrower's check or a debit authorization for the amount of the principal and fees.<sup>60</sup> Payday lenders were unregulated in New Mexico until 2007, when the legislature amended the New Mexico Small Loan Act of 1955 (NMSLA) to provide some protections for people obtaining payday loans in New Mexico.<sup>61</sup> Provisions of the law include requirements that: (1) payday lenders cannot make a loan of more than 25% of the borrower's gross monthly income;<sup>62</sup> (2) the maximum duration of a payday loan is 35 days and the minimum is 14 days, unless the borrower agrees in writing to a shorter term;<sup>63</sup> (3) the payday lender is allowed to charge an administrative fee of up to \$15.50 for each \$100 borrowed, as well as an additional \$.50 for the cost of verifying the loan's feasibility;<sup>64</sup> and, (4) a disclosure be made as to the cost of the loan expressed as an annual percentage rate,<sup>65</sup> and a disclosure that the borrower has a right to enter into a payment plan if unable to pay the loan in full at the end of the first payment period.<sup>66</sup>

Despite these protections, borrowers often still find themselves trapped into debt by payday lending institutions. After the new regulations were implemented, payday lenders began to push "installment loans," which are not regulated under the payday loan laws. Installment loans are regulated by the New Mexico Bank Installment Loan Act of 1959,<sup>67</sup> which offers minimal protections to consumers. Installment loans differ from payday loans in that they do not

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<sup>60</sup> OFFICE OF N.M. ATT'Y GEN. GARY KING, BROCHURE: PAYDAY LENDING, *available at* <http://www.nmag.gov/pdf/payday%20lending.pdf> (last visited Jan. 24, 2010).

<sup>61</sup> N.M. STAT. §§ 58-15-1 to -39.

<sup>62</sup> N.M. STAT. § 58-15-32(A).

<sup>63</sup> N.M. STAT. § 58-15-32(B).

<sup>64</sup> N.M. STAT. § 58-15-33.

<sup>65</sup> N.M. STAT. § 58-15-32 (citing 12 C.F.R. 226).

<sup>66</sup> N.M. STAT. § 58-15-38.

<sup>67</sup> N.M. STAT. §§ 58-7-1 *et seq.*

have to be paid in full by the borrower's next payday and instead are paid back in installments over a period of time. Installment loans are larger than payday loans and can often be obtained without collateral. Despite the protections New Mexico has enacted around payday loans, payday lenders are able to circumvent these protections by offering installment loans to their customers.

## *2. Title loans*

A title loan is a loan where the borrower provides a car title as collateral. Borrowers can obtain these loans through storefronts or online. Loans are usually for a fraction of the vehicle's value, ranging from a few hundred dollars to a few thousand dollars, and must be repaid in a single payment at the end of a 30-day cycle.<sup>68</sup> If it is not repaid within 30 days, the borrower risks forfeiture and repossession of the car or will have to enter into a payment plan with astronomically high interest rates. According to the Consumer Federation of America, title loan providers charge a median 25% finance charge per month, which translates to 300% annual interest, plus additional fees averaging \$25 per loan.<sup>69</sup>

New Mexico law does not regulate title loans, and there are no rate caps on the amount of interest that a title loan company can charge a borrower. Some New Mexico lenders' Web sites contain a "choice of law clause" asserting that transactions are deemed to have taken place in New Mexico in order to benefit from the state's lack of regulation.<sup>70</sup> For example, "Fastbucks," a licensed lender in New Mexico, states in its Web site disclosure that "[a]ll aspects and transactions on this site will be deemed to have taken place in our office in New Mexico,

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<sup>68</sup> See CONSUMER FED'N OF AM., DRIVEN INTO DEBT: CFA CAR TITLE LOAN STORE AND ONLINE SURVEY (Nov. 2005), available at

[http://www.consumerfed.org/elements/www.consumerfed.org/file/finance/Car\\_Title\\_Loan\\_Report\\_111705.pdf](http://www.consumerfed.org/elements/www.consumerfed.org/file/finance/Car_Title_Loan_Report_111705.pdf).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

regardless of where you may be viewing or accessing this site.”<sup>71</sup> New Mexico remains one of only four states that do not regulate title loans in any way.

In 2004, title loan lenders in New Mexico repossessed nearly 2,000 vehicles, less than 1,000 of which were returned to borrowers after the loan balance and repossession costs were paid.<sup>72</sup> A vehicle is among a family’s most valued assets, often necessary for transportation to work and therefore livelihood. Colonia advocates state that when colonia residents find themselves in a financial bind, they often turn to title loans as their only means of acquiring cash quickly. Because there are no caps on the interest rates, they often find themselves in a debt trap, acquiring an additional title loan to pay off the first. Alternatively, families lose their vehicles to repossession.

### *3. Potential resolutions*

In order to strengthen protections around payday lending, there are several actions New Mexico can take that would tighten the law around these loans to provide increased protection to borrowers. The Center for Responsible Lending suggests the following:<sup>73</sup>

- A minimum loan term of 90 days to enable borrowers to recover from financial emergencies (New Mexico has a minimum loan term of 14 days and a maximum of 35 days);
- Repayment in installments (with no prepayment penalty) to enable borrowers to get back on their feet incrementally;
- Meaningful limits on rollovers, extensions, and back-to-back transactions to stop loan flipping; and

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<sup>71</sup> *Id.* (citing Fastbucks, Car Title Loan Program Description, <http://www.fastbucks.com/cartitleloans.asp>).

<sup>72</sup> *Id.*

<sup>73</sup> CTR. FOR RESPONSIBLE LENDING, FACTSHEET: PREDATORY PAYDAY LENDING TRAPS BORROWERS (2005), available at <http://www.responsiblelending.org/payday-lending/tools-resources/2b002-payday.pdf>.



- Restrictions on mandatory arbitration clauses that serve to deny a borrower’s rights to take a claim to court and require that the dispute be settled by an arbitrator, which more often than not results in favor of the lender.

In the case of title loans, there is great need for improvement in New Mexico’s laws.

Allowing a financial product that preys on poor people—often sending them into further debt—to go completely unregulated in one of the poorest states in the country is deplorable. Consumer advocates have made several policy recommendations, including:<sup>74</sup>

- Establishing longer loan terms;
- Providing borrowers an affordable installment repayment schedule rather than requiring one massive lump sum payment shortly after the loan is made;
- Capping rates at reasonable amounts;
- Requiring lenders to consider a customer’s ability to repay before making a title loan;
- Restricting lenders from penalizing borrowers for prepaying loans;
- Providing borrowers with protections in the event of default;
- Monitoring lenders through licensing, bonding, reporting, and examination requirements;
- Ensuring that borrowers are not barred from private rights of action and rights to void contracts if the contract is in violation of statutory requirements; and
- Restricting binding mandatory arbitration clauses that operate to deny borrowers a fair chance to challenge abuses in court.

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<sup>74</sup> CTR. FOR RESPONSIBLE LENDING, CAR TITLE LENDING: DRIVING BORROWERS TO FINANCIAL RUIN (2005), available at [http://www.responsiblelending.org/other-consumer-loans/car-title-loans/rr008-Car\\_Title\\_Lending-0405.pdf](http://www.responsiblelending.org/other-consumer-loans/car-title-loans/rr008-Car_Title_Lending-0405.pdf).

The New Mexico Supreme Court recently moved in the right direction in a 2009 decision which held that the one-sided arbitration clause in a predatory lender's loan contract mandating arbitration for borrowers and reserving the right of the lender to take any case to court was unconscionable.<sup>75</sup> This case is a good example of what can be accomplished through the court system to address predatory lending. However, meeting the legal test for unconscionability is difficult and only addresses one specific issue within certain contracts. Litigation alone will not be enough to protect consumers against unscrupulous predatory lending practices. It is imperative to utilize a multi-faceted strategy, as outlined below.

#### a. Legislation

Legislative advocacy is needed to push for laws that protect consumers and model legislation after states that have taken a progressive stance against predatory lenders. There exists the opportunity for colonia residents and other low-income New Mexicans and their advocates and attorneys working with the communities to collaborate and push for legislation that provides for more regulation of lenders when it comes to payday and car title loans. Additionally, opportunities exist for collaboration with the Attorney General's Office as well as with other advocacy organizations that have a vested interest in seeing increased legal protections for consumers.

#### b. Educational campaigns

Since it is unlikely that predatory lending will be eradicated completely, educational campaigns promoting financial literacy and warning colonia residents of the risks of utilizing these types of loans would be beneficial. Ideally, colonia advocates or promotoras would be trained on the issue and, in turn, take this information to the communities. In addition to

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<sup>75</sup> *Cordova v. World Finance Corp. of N. M.*, 208 P.3d 901 (N.M. 2009), available at <http://www.nmcompcomm.us/nmcases/NMSC/2009/09sc-021.pdf>.

educating residents about predatory lending dangers, training should include suggesting viable alternatives to predatory lending products.

New Mexico is a state that only loosely regulates the predatory lending industry. Much work is needed to stop lenders from abusive practices that cause poor New Mexicans to fall into the endless cycle of debt that all too often follows a title or payday loan. Improving consumer protection around payday lending and addressing the absence of title loan regulation is imperative if our state wishes to better protect its low-income citizens.

### **III. CONCLUSION**

Many people living in colonias immigrated to the United States from communities that harbored similar or worse conditions. Like most immigrants, these families came to the United States for an opportunity and a chance to increase their standard of living through hard work. While their living conditions may change little after crossing the border, their hopes for stable, decent-paying jobs and upward social and economic mobility for their families are what beckons them to the United States.

For many low-income and very low-income immigrants, there are not many alternatives to living in colonias. Many feel that, despite the risks surrounding the acquisition of their properties, as well as the lack of infrastructure and environmental concerns, their families are safer and better off in colonias. The alternative of living in low-rent urban housing, for example, means contending with the different but nonetheless impoverished conditions of urban life, including high crime rates and keeping their small children out of traffic and teenage children out of the reach of gangs. Above all, though, colonias are preferable to many immigrants because they offer a better sense of hope that they may someday own their own home and improve their

living conditions. This hope is borne out by the high rate of home ownership among colonia residents, who have a higher rate of home-ownership than the mainstream.<sup>76</sup>

Most colonia residents value hard work and self-sufficiency and seek assistance from others only as a last resort. Some are content with their living conditions, and prefer to be left alone to raise their families without interference. Nevertheless, while communities are capable of doing much of this work on their own, there are times when legal services are necessary. In these cases, the absence of legal services can pose a major barrier to overcoming poverty.

The civil legal services system in New Mexico could and should seek ways to serve the colonia communities. The Access to Justice Commission, the State Bar of New Mexico, the grant making community and civil legal services organizations should direct resources toward working with colonia residents. The resources should be directed in full consultation with and deference to community considerations and local leadership and made with long-term commitment. This aid could be in a variety of forms. For example, regular legal clinics could be held in various colonias organized by a local service or advocacy organization and staffed by one of the nonprofit legal aid providers in the state in partnership with pro bono private attorneys. Systemic advocacy efforts of local organizations, such as the efforts underway to bring much needed infrastructure to various colonias, could be served by attorneys from organizations that address systemic issues. Legal services providers could seek state and private funding to systematically address widespread individual issues that have no systemic solutions, such as the morass of land title issues that bedevil efforts to procure rights-of-way for roads and utilities.

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<sup>76</sup> Guillermina G. Núñez-Mchiri, *The Political Ecology of the Colonias on the U.S.-Mexican Border: Human-Environmental Challenges and Community Responses in Southern New Mexico*, 24 S. RURAL SOC. 67, 76 (2009); see also ESPARZA & DONELSON, *supra* note 3, at 53 (estimating 82% rate of home ownership in New Mexico's colonias).

These are but a few of the many possibilities for the state legal services system to increase access to justice in New Mexico's colonias.

## APPENDIX A

### Arizona and California Statutes Regulating Real estate contracts

#### *Arizona Statutes Regulating Real Estate Contracts*

Arizona has approximately 363,585 residents living in 87 colonias.<sup>1</sup> The statute regulating real estate contracts in Arizona applies to a “contract through which a seller has conveyed to a purchaser equitable title in property and under which the seller is obligated to convey to the purchaser the remainder of the seller’s title in the property...on payment in full of all monies due under the contract.”<sup>2</sup>

The statute regulates the forfeiture provisions contained in the contracts by imposing notice requirements and “grace” periods within which forfeiture may not be exercised depending on the amount of the purchase price that the buyer has paid (see table on next page).<sup>3</sup>

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<sup>1</sup> ESPARZA & DONELSON, *supra* note 3, at 42–43. Population is calculated as of 2005 and estimated from a linear extrapolation of 1990 and 2000 census data, keeping in mind that census geography does not always correspond with colonias boundaries, and census workers are likely to have undercounted residents in communities with large numbers of unauthorized immigrants.

<sup>2</sup> ARIZ. REV. STAT. ANN. § 33-741(2). This language describes the common type of real estate contract used in colonias.

<sup>3</sup> *Id.* § 33-742.

**Statutory Time Periods Provided to Buyer Prior to Forfeiture<sup>4</sup>**

<b>% of purchase price paid by Buyer</b>	<b>Less than 20%</b>	<b>20%–30%</b>	<b>30%–50%</b>	<b>50% or more<sup>5</sup></b>
<b># of days before Seller can deliver notice of forfeiture to Buyer</b>	30 days	60 days	120 days	9 months
<b>Additional # of days required between notice of forfeiture and date forfeiture becomes effective</b>	20 days	20 days	20 days	20 days
<b>Total # of days Buyer has to cure default</b>	<b>50 days</b>	<b>80 days</b>	<b>140 days</b>	<b>9 mos. 20 days</b>

Additionally, if the seller has accepted partial, missed, or late payments in the past, the seller must serve written notice on the buyer that strict performance of the buyer’s obligations under the contract is required. The buyer would then have 20 days after the notice in which to remit payment before the statutory “grace” period begins.<sup>6</sup> The seller must wait out the required statutory grace period before initiating forfeiture and must deliver a notice of forfeiture to the

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<sup>4</sup> *Id.* §§ 33-742 to -743.

<sup>5</sup> Note that this 9-month notice provision provides the buyer with a similar amount of time to redeem the property as if foreclosure was required. However, unlike foreclosure, there is no provision that entitles the buyer to receive the remainder of the proceeds of the sale of the property after the debt has been covered.

<sup>6</sup> ARIZ. REV. STAT. ANN. § 33-742(C).

defaulting buyer giving the buyer an additional 20 days in which to remit all payments due under the contract.<sup>7</sup>

While the Arizona statute is less comprehensive than the Texas law, Arizona has far fewer colonias than Texas. On the other hand, the Arizona law provides much more protection for buyers in colonias than current New Mexico law, even though New Mexico has nearly twice as many colonias as Arizona.

### *California Statutes Regulating Real Estate Contracts*

Of the four states that share a border with Mexico, California is home to the lowest number of colonias at 16.<sup>8</sup> California contract laws provide some protection for buyers involved in what that state refers to as “real property sales contracts.”

The California Civil Code specifies that a buyer may escape forfeiture by making full compensation to the seller, except where the buyer was grossly negligent, willful, or fraudulent in his breach of duty.<sup>9</sup> If the buyer shows an absence of gross negligence, willfulness, or fraud, California law requires the buyer be given an opportunity to pay the full balance owed on the contract before the seller exercises forfeiture (the buyer would essentially refinance).

Newer provisions of the Code place further responsibilities on the seller in real property sales contracts. If the parcel of land involved in the contract resulted from a subdivision of land after January 1st, 1978, the seller must disclose whether that division of land was in compliance with the subdivision laws. If the seller fails to disclose this information or provides false information to this effect, the buyer is entitled to either (1) void the contract and be awarded

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<sup>7</sup> *Id.* §§ 33-742(D), 33-743(A).

<sup>8</sup> ESPARZA & DONELSON, *supra* note 3, at 6.

<sup>9</sup> CAL. CIVIL CODE § 3275. This section of the Code applies to all types of contracts, including contracts for the sale of land.



damages equal to recovery of all payments made on the land plus interest, or (2) recover damages from the buyer equal to the cost of bringing the subject property into compliance with the subdivision laws. In addition, the seller must apply installment payments to the payments of liens on the property or face criminal sanctions, and prepayment of the contract cannot be restricted.

## APPENDIX B

### Details of the New Mexico Subdivision Act

New Mexico began taking a comprehensive approach to subdivision regulation in 1973, granting local authority to counties to regulate infrastructure and platting in subdivisions.<sup>1</sup> The regulations left substantial loopholes, though, and over the years, landowners exploited them to create subdivisions that contributed to the proliferation of colonias.<sup>2</sup>

In 1995 the state passed the New Mexico Subdivision Act, designed to close many of these loopholes and, in large part, to address the burgeoning problems of colonias.<sup>3</sup> The 1995 Act defines a subdivision as “the division of a surface area of land...into two or more parcels for the purpose of sale, lease or other conveyance...”.<sup>4</sup> It provides exceptions to the definition, such as where land is divided and conveyed to family members, and where land is used for certain purposes other than residential use.<sup>5</sup>

The Act also requires a subdivider of land to have a final plat certified by a registered surveyor that shows all points of legal access and utility easements, and a delineation of flood plain areas.<sup>6</sup> Additionally, every plat recorded with the county clerk must be accompanied by an affidavit that states whether the proposed subdivision lies within the regulation jurisdiction of the county, and a copy of the plat must be provided to everyone acquiring an interest in the subdivided land.<sup>7</sup> If the subdivision contains roads offered for dedication for public use, the final

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<sup>1</sup> Simmons, *supra* note 6, at 56.

<sup>2</sup> For example, the 1973 Act did not apply to the subdivision of land into four parcels or less. *Id.* at 57.

<sup>3</sup> Simmons, *supra* note 6, at 61.

<sup>4</sup> N.M. STAT. § 47-6-2(L).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* § 47-6-3 (A).

<sup>7</sup> *Id.* § 47-6-4.

plat must contain a certificate stating whether the board of county commissioners accepted or rejected such roads offered for dedication.<sup>8</sup>

The Act requires a subdivider to disclose certain information in writing to prospective purchasers prior to conveying any land in a subdivision containing five or more parcels.<sup>9</sup> The board of county commissioners for each county may require such disclosure statements be printed in both English and Spanish.<sup>10</sup> Additionally, the disclosure statement must be filed with the county clerk, the board of county commissioners, and the Attorney General's office prior to selling, leasing, or otherwise conveying land in a subdivision.<sup>11</sup> However, since the law requires the "subdivider" to furnish such disclosure statements, neither subsequent purchasers nor real estate agents are required to provide disclosure statements.<sup>12</sup> For subdivisions with five or more parcels, the subdivider's disclosure statement must include the following information:

**Water.** The annual requirements of water for the subdivision and whether water is available to meet those requirements, the quality of the water available, the means of water delivery, and the average well depth if the subdivision is to rely on groundwater.<sup>13</sup>

**Price and Financing.** The size of the largest and the smallest parcels offered, and the proposed range of selling or leasing prices, including financing terms.<sup>14</sup>

**Condition of Title.** The condition of title, including any encumbrances, and the name and address of the person who is recorded as having legal and equitable title to the land.<sup>15</sup>

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<sup>8</sup> *Id.* § 47-6-5.

<sup>9</sup> *Id.* § 47-6-17(B).

<sup>10</sup> N.M. STAT. § 47-6-17(D).

<sup>11</sup> *Id.* § 47-6-17(F)(1)–(2).

<sup>12</sup> *Id.* § 47-6-17(A) (requiring "subdividers" to provide disclosure statements to prospective purchasers); § 47-6-2(K) (defining subdivider as "any person who creates or has created a subdivision...; however, 'subdivider' does not include any duly licensed real estate broker or salesperson acting on another's account").

<sup>13</sup> *Id.* § 47-6-17(B)(11)–(12), (15)–(16).

<sup>14</sup> *Id.* § 47-6-17(B)(4).

<sup>15</sup> *Id.* § 47-6-17(B)(6)–(7).

**Infrastructure.** Availability and cost of public utilities, means of solid and liquid waste disposal, description of access to the subdivision, whether roads and other improvements will be maintained by the county, the subdivider, or a landowner's association, and provisions for terrain management.<sup>16</sup>

**Opinion of State Agencies.** A summary of opinions issued by state agencies concerning any of the water or infrastructure points listed above.<sup>17</sup>

**Permits.** A statement advising that permits must be issued by state or county officials before improvements are constructed, and advising the potential buyer to investigate before purchase whether such permits will be available.<sup>18</sup>

**Recording Requirements.** A statement that the subdivider shall record the deed, real estate contract, lease, or other instrument of conveyance in the subdivided land with the county clerk within 30 days of signing such instrument.<sup>19</sup>

In addition to these disclosure requirements, the statute provides for other forms of protections for consumers seeking to buy land in subdivisions. For instance, a buyer has the right to rescind the purchase within six-months of entering into the contract if the purchaser did not inspect the parcel before the time of purchase.<sup>20</sup> Also, the statute's advertising standards regulate the content of brochures, publications, and other advertising related to subdivided land to ensure such materials do not mislead consumers.<sup>21</sup>

**Consumer Protection.** While some of the Act's provisions provide protection for consumers, the Act also contains provisions that are detrimental to landowners who have

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<sup>16</sup> N.M. STAT. § 47-6-17(B)(10), (13)–(14), (17)–(19).

<sup>17</sup> *Id.* § 47-6-17(B)(20).

<sup>18</sup> *Id.* § 47-6-17(B)(22).

<sup>19</sup> *Id.* § 47-6-17(B)(21).

<sup>20</sup> *Id.* § 47-6-23.

<sup>21</sup> *Id.* § 47-6-18.

unwittingly purchased parcels in illegal subdivisions. First, the Act prohibits any water, sewer, electric, or gas utility service from connecting service to individual parcels within an unapproved subdivision, and allows a county to fine a utility up to \$500 for providing such a service.<sup>22</sup> Thus, even if a buyer obtains legal access and easements to his parcel and raises the money to pay the utility company to run gas or power lines to the property, the utilities are prohibited from providing this service. Second, buyers who have purchased lots in an illegal subdivision are not legally permitted to sell their parcels until the subdivision is approved by the county.<sup>23</sup> This places unsophisticated buyers in a precarious position: once they unwittingly purchase property in an illegal subdivision, they are not only stuck with the land and legally unable to sell it, but they also cannot even take steps to improve infrastructure to the property and bring in utilities to make it habitable. Despite this law prohibiting the sale of land in an illegal subdivision, many buyers sell their land anyway without being stopped or sanctioned. While selling the land without punishment may be a good thing for otherwise innocent buyers, it also may provide a loophole for subdividers who can subdivide the property and simply transfer all the lots to a middleman. The middleman then markets and sells the parcels to innocent buyers without fear of prosecution because he did not perform the subdividing, and the subdivider cannot be sued by the private individuals who purchased from the middleman.

**Enforcement.** The board of county commissioners, the district attorney, or the Attorney General may file suit in district court against a person violating the Act.<sup>24</sup> The Act provides for four civil remedies: (1) injunctive relief to prevent a subdivider from conveying an interest in the

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<sup>22</sup> N.M. STAT. § 47-6-27.2.

<sup>23</sup> *Id.* § 47-6-8; *see also* Simmons, *supra* note 6, at 63. Ms. Simmons points out that the Texas subdivision laws do not penalize buyers of lots in illegal subdivisions in this way. In Texas, purchasers are not prohibited from selling their parcels and counties may not prevent utilities from connecting services if it would cause hardship to the resident. *Id.*

<sup>24</sup> N.M. STAT. § 47-6-26(A).

land until he complies with the state and county subdivision regulations; (2) mandatory injunctive relief to require compliance with the provisions of the state and county subdivision laws; (3) rescission and restitution for persons who have purchased or leased an interest in illegally subdivided property;<sup>25</sup> or (4) a fine of up to \$5,000 for each parcel *created* knowingly, intentionally, or willfully in violation of the state and county subdivision laws.<sup>26</sup>

Additionally, the Act provides for criminal penalties for material violations of the Act: the first offense constitutes a misdemeanor punishable by a fine of up to \$10,000 and/or one year imprisonment, while a second or subsequent conviction is a fourth degree felony punishable by up to 18 months imprisonment and/or a \$25,000 fine.<sup>27</sup>

Private actions brought by purchasers/lessees under the Act must be instituted within six years from the time of conveyance. Such private remedies include: (1) rescission of the conveyance of subdivided land not approved by the county, and recovery of all money, property, or anything else paid to the seller; (2) recovery of actual damages for any loss of money or property suffered by the purchaser as a result of violations of the Act or county codes; and (3) specific performance of any improvement proposed by a subdivider set forth in the disclosure statement, contract, or advertising involving a subdivision approved by the county.<sup>28</sup> In order to bring a private action under this provision of the Act, the subdivision must have been created

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<sup>25</sup> This rescission clause of the Act's enforcement provision would allow a buyer to void his purchase of the land and obtain restitution from the seller, however, this is not the most attractive option. The county and/or state attorneys must have the resources and willingness to prosecute these cases on behalf of buyers, and the sellers must be solvent in order to pay restitution to the buyers. By exercising this option, buyers may be put into the position of giving up their land and any improvements made without receiving a penny from an insolvent seller, losing everything and having no place to live as a result.

<sup>26</sup> N.M. STAT. § 47-6-26(A) (emphasis added to highlight that this provision applies to the subdivider and not to a subsequent owner, i.e., a middleman).

<sup>27</sup> *Id.* § 47-6-27.

<sup>28</sup> *Id.* § 47-6-27.1.

after the effective date of the Act (July 1, 1996).<sup>29</sup> The prevailing party can recover costs, and the court may, in its discretion, award attorney's fees to the prevailing party.<sup>30</sup> A purchaser who wishes to bring a cause of action after the six-year limitation period provided in the Act may search for a remedy under the common law or other statutes of the state, but has no private remedy under this statute.<sup>31</sup>

The New Mexico Subdivision Act mandates that counties promulgate their own regulations pertaining to subdivisions that conform to the Act.<sup>32</sup> The county regulations may contain more stringent regulations if the county has a comprehensive plan that requires such additional regulations.<sup>33</sup> As a result, each county in New Mexico has a subdivision ordinance identical to or more detailed and stringent than the state's subdivision act.<sup>34</sup>

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<sup>29</sup> *Id.* § 47-6-27.1(F). Effective date obtained from a Santa Fe County ordinance issuing an emergency development moratorium. *See* Board of Commissioners, Santa Fe County, Ordinance No. 2009-001 5, *available at* <http://www.sfar.com/documents/DevelopmtMoratoriumOrdJan09.pdf>.

<sup>30</sup> N.M. STAT. § 47-6-27.1(D).

<sup>31</sup> *Id.* § 47-6-27.1(E).

<sup>32</sup> *Id.* § 47-6-9(A).

<sup>33</sup> *Id.* § 47-6-9(C).

<sup>34</sup> *See* NMCLP Memorandum discussing subdivision laws of Bernalillo and Doña Ana Counties (on file with NMCLP).

## APPENDIX C

### Addressing Other Land Use Challenges in Colonias, Particularly Pajarito Mesa

#### *Access to Potable Water Supplies*

Up until May 2010, the community of Pajarito Mesa did not have a safe source of potable water available within the community. When they purchased land residents were often told that water and other utilities would be available soon. Before May 2010, colonia residents resorted to a variety of methods to procure water. They carried water tanks in pick-up trucks and drove miles into Albuquerque to fill them, the lucky ones obtaining water from family members who live in the city. Those without this option purchased water from local stores, nearby residents with wells, or city residents who are connected to the city water system. They often filled up their water tanks from these sources with garden hoses, a potentially hazardous practice for two reasons. First, many garden hoses are made of plastic stabilized with lead that leaches into the water. Packaging for garden hoses often contains a label warning people not to drink from the hose.<sup>1</sup> Second, water containers, if not cleaned properly, are susceptible to mold and easily contaminated. People drinking from unsanitary water containers or garden hoses can become ill.

For over 10 years, the residents of Pajarito Mesa negotiated with federal, state, and county authorities to obtain resources to establish a water source. Residents of this community formed the Pajarito Mesa Mutual Domestic Water Consumers Association (Water Association) in 2000 to address this issue. The Water Association ran into many obstacles while trying to provide water to Mesa residents. After receiving a grant from the USDA to drill a community well, the grant expired because title to the proposed drilling ground could not be cleared.

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<sup>1</sup> See ABC News, *Dangerous Lead Levels Found in Some Garden Hoses*, July 12, 2007, <http://abclocal.go.com/wtvd/story?section=triangle&id=5474870>.



Additionally, tests indicated high levels of arsenic in the groundwater, making this area unsuitable for a well.

In 2008, the Water Association entered into an agreement with the Albuquerque–Bernalillo County Water Utility Authority to install a water filling station within the Mesa, which would tap into another water system being completed nearby for the South Valley of Albuquerque. The water filling station is now fully operational and providing potable water to the residents of Pajarito Mesa. It should be noted that this is merely a filling station and does not provide piped water into the residents’ homes. Residents still must fill their water containers and take them back to their homes but they will no longer have to travel all the way into Albuquerque to do so. Construction of the filling station began in September 2009 and was completed in May 2010. While this step will help alleviate the need for water in the Mesa, it provides only a short-term solution. The agreement with the city and county limits use of the filling station to only 150 households (out of the more than 400 households currently residing on the Mesa). Title to lands must be cleared, and roads and easements must be legalized in order to provide city water that is piped into the homes of residents of Pajarito Mesa. Until then, community members must continue to live with inadequate indoor plumbing.

#### *Easements for Roads, Property Access, and Utilities*

As with many colonias, most land parcels on Pajarito Mesa do not have legal access. These landlocked parcels create both private and public concerns. Private concerns caused by lack of legal access include the possibility that surrounding neighbors will block access to a parcel (which may be within their legal right to do). Landlocked parcels are difficult to sell, and owners of such properties are unlikely to obtain conventional loans to improve their properties.

The public concerns are most compelling. The prevalence of landlocked parcels of land in colonias is an important reason for the lack of public services and utilities available to residents.

Because of provisions in the anti-donation clause of the New Mexico Constitution, counties may not maintain roads that traverse over private property. Yet in order to reach the many landlocked parcels throughout most colonias, roads must traverse private lands. These roads are in poor condition and lack street names and addresses, preventing police, fire, and emergency medical services from promptly responding to emergency calls. For example, if Pajarito Mesa residents call 911 from their cell phone, they must travel to the eastern edge of the Mesa (called “the escarpment”) to meet the emergency vehicles and guide them to the scene of the emergency, which can be miles away along severely rutted, washed-out, and debris-covered roads. This whole process may take an hour or more, essentially depriving many Pajarito Mesa residents of basic emergency services. Bernalillo County is in the process of establishing a protocol for responding to emergencies in a more timely fashion by establishing a grid system in which residents give responders a more precise identification of their location. However, this protocol will only narrow down the area of the emergency and not provide a specific location.

School buses cannot traverse Pajarito Mesa because many existing roads are not located on legal easements and are in poor condition, making lack of school transportation an important issue for the residents. Albuquerque Public Schools (APS) transportation makes only one stop (at the escarpment) to pick up children who live on the 28-square-mile Mesa. Children must catch the school bus at the escarpment, which can be as far as seven miles away from some of the families’ homes. If a family does not own a vehicle, their children must either walk to the bus stop or not go to school at all.

New Mexico’s school transportation regulations obligate each school board to ensure safe transportation for all “eligible” students within its jurisdiction.<sup>2</sup> Eligible students are those who reside farther than between one and two miles from the school, depending on grade level.<sup>3</sup> Since over 400 families reside on Pajarito Mesa, there are a number of eligible students who are currently not receiving safe transportation to school.

State law and regulations do allow local school boards to provide a per capita or per mile reimbursement to parents or guardians where school bus transportation is not available due to distance, road conditions, or sparseness of population.<sup>4</sup> The New Mexico Center on Law and Poverty conducted a public records request to ascertain whether and under what circumstances such reimbursements have been made by APS in the past. The search found that APS has never made a reimbursement to parents or guardians under these conditions. Until proper roads are built in colonias, arrangements must be made between school systems and communities to provide school transportation to eligible children who are not served by current transportation policies of local school boards.<sup>5</sup>

Finally, lack of legal access and legal easements in colonias, particularly in Pajarito Mesa, prohibit the communities from obtaining utility services. Power lines, gas lines, sewer lines, and water lines can be neither laid nor installed to households unless legal easements are in place authorizing these types of use. But procuring the necessary legal easements is a difficult and protracted undertaking due to the many landlocked parcels with numerous title issues to clear, correct and formalize. This barrier, combined with the penalties levied against utilities

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<sup>2</sup> N.M. ADMIN. CODE § 6.41.4.8.

<sup>3</sup> *Id.* § 6.41.4.7(D).

<sup>4</sup> N.M. STAT. § 22-16-6; N.M. ADMIN. CODE § 6.43.2.15(A). The statute and regulations say that the school board *may* provide reimbursement; thus, reimbursement is not mandatory.

<sup>5</sup> Options include having a bus stop on other edges or areas of the Mesa where practicable, providing a special vehicle able to traverse the roads, and/or providing reimbursement to a parents or parents in the community who have a vehicle adequate for picking up children on the Mesa and transporting them to the existing bus stop.

under the New Mexico Subdivision Act for providing services in illegal subdivisions, dims the prospect of improving infrastructure in these communities.

Until roads and easements are properly created, residents will continue to be denied basic utility services and have to drive long distances to obtain water for their homes, buy expensive gasoline to power generators, and travel to fill and refill small, portable propane tanks for cooking and heating. Additionally, many children living in these communities will continue to miss school because they have no transportation, and residents will continue to be deprived of the quick response from emergency services that most Americans take for granted.

### *Illegal Dumping*

Illegal dumping is a chronic problem in some colonias. Anyone who tours Pajarito Mesa, for example, will be astounded at the quantity and variety of discarded items strewn across the surface of this 28-square-mile community. Most of the trash does not originate with Mesa residents, as evinced by its content: televisions, computers, and appliances, for example. (Mesa residents do not have electricity to run these machines, and any bit of wattage squeezed from generators or small solar panels is generally reserved for necessities.) The trash likely originates with urban dwellers who take advantage of the isolation and dark Mesa nights to dump their trash undetected. Whether ignorance, laziness, or thrift is to blame for their actions, these people view the Mesa as a dumping ground for anything they cannot throw out with their regular household trash: tires of every size, mattresses, overstuffed sofas and La-Z-Boy rockers, mountains of asphalt and concrete rubble, and paint cans and drums holding who-knows-what kind of corrosive or carcinogenic cocktails.

Illegal dumping presents a danger to the health and safety of colonia residents. Without access to television, Internet, or video games, children on Pajarito Mesa play outside and are

significantly at risk of being injured or poisoned by physically and chemically hazardous wastes.<sup>6</sup> Understandably, children find it irresistible to play “house” or “fort” within piles of discarded furniture, construction rubble, scrap tires, rusty nails, and broken glass. Hundreds of discarded tires scattered and piled about the Mesa hold stagnant water after a rain, which can serve as an incubator for potentially disease-carrying mosquitoes.<sup>7</sup> Residents gather periodically for community clean-up days, assisted by trucks and dumpsters provided by the county and private individuals. While several truckloads of trash are picked off the landscape, these efforts barely scratch the surface of the problem. These clean-up days serve as more of a gesture of community pride and cohesion than an actual eradication of trash on the Mesa.

The U.S. Environmental Protection Agency warns that “[i]f not addressed, illegal dumps often attract more waste, potentially including hazardous wastes such as asbestos, household chemicals and paints, automotive fluids, and commercial or industrial wastes.”<sup>8</sup> To protect the health and safety of colonia residents, additional measures must be taken to remove trash dumped on or near colonias and prevent further illegal dumping.

In 2005, the New Mexico legislature passed the Recycling and Illegal Dumping Act<sup>9</sup> to “protect the health and welfare of current and future residents of New Mexico by providing for the prevention and abatement of illegal dumpsites.”<sup>10</sup> The Act created a Recycling and Illegal

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<sup>6</sup> U.S. EPA, *ILLEGAL DUMPING PREVENTION GUIDEBOOK 3* (1998), available at [http://www.epa.gov/reg5rcra/wptdiv/illegal\\_dumping/downloads/il-dmpng.pdf](http://www.epa.gov/reg5rcra/wptdiv/illegal_dumping/downloads/il-dmpng.pdf).

<sup>7</sup> U.S. EPA reports that “mosquitoes can multiply 100 times faster than normal in the warm, stagnant water standing in scrap tire casings.” *Id.* Diseases carried by mosquitoes include West Nile virus, encephalitis, and dengue fever. *Id.*; see also U.S. Ctr. For Disease Control, Div. of Vector-Borne Infectious Diseases, West Nile Virus, <http://www.cdc.gov/ncidod/dvbid/westnile/index.htm> (last visited Jan. 24, 2010).

<sup>8</sup> U.S. EPA, *supra* note 125, at 2.

<sup>9</sup> N.M. STAT. §§ 74-13-1 to -20.

<sup>10</sup> *Id.* § 74-13-2 (describing purposes of the Act). The Act is administered and enforced by the New Mexico Environment Department. *Id.* § 74-13-6.

Dumping Fund to be used for abatement of illegal dumpsites and other recycling efforts.<sup>11</sup>

Grants are awarded from the fund to municipalities, counties, Indian tribes or pueblos, land grant communities, cooperative associations, or solid waste authorities for recycling projects and abatement of illegal dumpsites.<sup>12</sup> While priority for funding is given to the abatement of illegal scrap tire dumpsites and the recycling of scrap tires, one-third of the fund is allocated to abatement of illegal dumping of other solid wastes.<sup>13</sup> Since colonias involuntarily host a number of illegal dumpsites containing both scrap tires and other solid waste, counties, cooperative associations,<sup>14</sup> or solid waste authorities could apply for a grant through the New Mexico Environment Department (NMED) to eliminate illegal colonia dumpsites.

NMED, counties, or cooperative associations may bring an abatement action in district court against persons who knowingly create, perform, or maintain a public nuisance pursuant to N.M.S.A. § 30-8-8.<sup>15</sup> Since many of the illegal dumpsites exist on vacant, private land—as on Pajarito Mesa—landowners may not know that their parcels are hosting illegal dumpsites. However, once a landowner is notified that an illegal dumpsite exists on his land and fails to ameliorate the condition, he may then be subject to an abatement action. Section § 30-8-8(B) also allows a private citizen to bring an abatement action in the name of the state. If judgment is held against the defendant in an abatement action, the defendant must pay court costs and

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<sup>11</sup> *Id.* § 74-13-19; Here, an abatement action seeks to end the activity of illegal dumping, or eliminate an illegal dump site.

<sup>12</sup> *Id.* § 74-13-17.

<sup>13</sup> *Id.*

<sup>14</sup> The Act defines “cooperative association” as “a refuse disposal district created pursuant to the Refuse Disposal Act, a sanitation district created pursuant to the Water and Sanitation District Act, a special district created pursuant to the Special District Procedures Act or other associations created pursuant to the Joint Powers Agreements Act or the Solid Waste Authority Act.” *Id.* § 74-13-3(G).

<sup>15</sup> N.M. STAT. § 74-13-11; *See also* N.M. STAT. § 30-8-1.

reasonable attorney fees.<sup>16</sup> Any costs not covered by the defendant may be reimbursed to the county or cooperative association through the fund where an abatement contract is authorized.<sup>17</sup>

Additionally, “[t]he Secretary of Environment may act administratively to eliminate illegal dumpsites pursuant to provisions of the Recycling and Illegal Dumping Act.”<sup>18</sup> The Secretary may issue a compliance order to any person violating the Act, which may assess a fine of up to \$5,000 for each day noncompliance continues.<sup>19</sup> The Secretary may also commence a civil action in district court for injunctive or other appropriate relief.<sup>20</sup> The Act requires the Environmental Improvement Board to implement a field citation program, where local government authorities or certain employees of NMED could issue field citations.<sup>21</sup> Anyone who knowingly violates the provisions of the Act may be assessed criminal penalties.<sup>22</sup> Criminal penalties may apply to persons who engage in open burning of scrap tires and engage in, maintain, or allow illegal dumping.<sup>23</sup>

While the Act provides financial support and enforcement provisions to abate illegal dumping, one drawback is that abatement actions in district court could take years to resolve while trash continues to pile up in colonias. Compliance orders may compel absentee landowners to take swifter action to clean up their properties, however, if the order is ignored it must be enforced through district court.<sup>24</sup> In other words, there does not seem to be a way, even with funding, to more immediately clean up illegal dumpsites on private property. Owners must

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<sup>16</sup> N.M. STAT. § 30-8-8(C).

<sup>17</sup> N.M. STAT. § 74-13-12.

<sup>18</sup> *Id.* § 74-13-11(B).

<sup>19</sup> *Id.* § 74-13-13.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* § 74-13-14; a search of the New Mexico Register indexes from 2005 through 2008 indicates that the field citation program rules have yet to be implemented.

<sup>22</sup> *Id.* § 74-13-16. A violation involving less than 5,000 pounds of scrap tires is a misdemeanor, while a violation involving more than 5,000 pounds of scrap tires is a fourth degree felony. *Id.*

<sup>23</sup> N.M. STAT. § 74-13-4(F), (J).

<sup>24</sup> *Id.* § 74-13-13(B)–(E).

be compelled to clean up sites, or, after lengthy litigation, the courts may equitably grant authority to the county to clean up the sites. Advocates may have to work with the county and/or NMED to find a more immediate solution to eliminate illegal dumpsites.