IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

R&R, LLC,
a New Mexico Limited Liability Company,

Plaintiff – Appellee,

v. **No. S-1-SC-40720**

NEW MEXICO DEPARTMENT OF TRANSPORTATION,

Defendant – Appellant.

ON APPEAL FROM THE TWELFTH JUDICIAL DISTRICT COURT
COUNTY OF OTERO, NEW MEXICO
THE HONORABLE ELLEN R. JESSEN

ANSWER BRIEF OF R&R, LLC

Respectfully Submitted,

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INTRODUCTION

While this case ultimately turns on whether NMDOT possesses a valid right-of-way (however denominated) across Plaintiff's property, the immediate question for this Court is more straightforward: did Defendant meet its burden when faced with a motion for summary judgment? Despite its agile, ever-shifting legal arguments, Defendant still failed to meet this burden. The State failed to produce any evidence that would have created a genuine issue of material fact that would support a judgment in its favor under any legal theory. A state's right to use private property does not arise by mere fiat, wish or assertion. Faced with Plaintiff's summary judgment motion, the State bore the burden of producing evidence demonstrating why it had a right to possess or use Plaintiff's property. With no evidence supporting the State's alleged claim to Plaintiff's property, summary judgment was not only appropriate but mandatory. The district court correctly ruled the State did not have a right to use or possess Plaintiff's property. The Court of Appeals affirmed this decision in a compelling published opinion, and this Court should affirm as well.

Interestingly, the State adopts a new theory before this Court. Instead of the express and prescriptive rights that the State argued before the district and appellate courts, Appellant now, for the first time, argues that this Court should recognize the State's automatic right to use any private property adjacent to any public roadway

for any highway purpose, irrespective of whether or not it has an express right to do so and whether or not it ever used the property for any highway purpose previously. The State now claims a prospective, springing right in all property adjacent to any public highway. For this first time in its Brief in Chief, the State makes the bald claim that Plaintiff's property was "open to the public" and therefore the State can possess and use it for any highway purpose, now or in the future, without any compensation solely because of its location next to a highway. **[BIC 20]**.

This has never been the law in the State of New Mexico, nor should it be. By affirming the Court of Appeals in this case, this Court will check the State's attempted overreach onto private property it has not actually used. Such a decision will uphold the standards of New Mexico law which demand unequivocally that the government's prescriptive claims to private property are premised on its actual use of the property, and not its bare assertions.

R&R, LLC ("R&R" or "Plaintiff") owns a unique commercial property in Tularosa, Otero County, New Mexico (the "Property"). Known locally as the Tularosa "Y" or "Triangle," the Property sits at the intersection of U.S. Highways 54 and 70, with all three sides bordered by these highways. **[1 RP 2 ¶ 6]**. The Property consists of two buildings and a parking area and was until recently operated as a gas station and restaurant. **[5-8-23 CD 9:25:17]**. R&R acquired the Property in 2011. **[2 RP 491-93]**.

In 2021, Maverik, Inc., a national convenience store chain, expressed interest in purchasing the Property and entered into a purchase agreement with R&R for $720,000. **[2 RP 493 ¶¶ 19-20]**. As part of standard due diligence, Maverik contacted NMDOT to determine requirements for creating highway access points to the Property it intended to develop. **[3 RP 518 ¶¶ 24-27]**.

Instead of providing the requested access information, NMDOT employees made extraordinary claims that the State possessed an extensive, documented right-of-way covering approximately 90% of the Property. **[3 RP 519 ¶ 35; 520 ¶ 36]**. When Maverik requested verification of these claims, NMDOT made repeated promises to provide supporting materials but never followed through with producing anything. **[RP 520 ¶ 37; 5-8-23 CD 9:30:07]**.

The unsubstantiated nature of NMDOT's claims ultimately caused Maverik to terminate the purchase agreement. **[3 RP 521 ¶ 43; Dep. DD 12:9-13]**. Unable to complete the sale or otherwise utilize the Property beneficially, R&R filed an action alleging inverse condemnation.

SUMMARY OF PROCEEDINGS

While Rule 12-318(B) NMRA provides that in an answer brief "a summary of proceedings shall not be included unless deemed necessary," a summary is necessary here to understand the procedural history and the evolution of NMDOT's legal theories regarding its claimed right-of-way over Plaintiff's Property.

I. NATURE OF THE CASE

This case involves a dispute over whether NMDOT possesses any easement or right-of-way over the Property owned by R&R. R&R filed suit seeking a declaratory judgment that no such easement exists and claiming inverse condemnation based on NMDOT's assertions of rights to the Property.

II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

A. Initial Claims and Discovery

Prior to litigation, NMDOT represented to a prospective purchaser of the Property, Maverik, that it was "99.9% sure" it possessed a written easement covering 90% of the Property. **[Pltf. Ex. 10]**. R&R filed its Complaint alleging that no public records indicated the existence of any highway right-of-way easement in favor of NMDOT. **[1 RP 4 ¶ 14]**. In its Answer, NMDOT denied lacking a written easement. **[1 RP 27 ¶ 14]**.

During discovery, NMDOT produced 791 pages of recorded and unrecorded documents that it asserted demonstrated an easement over the Property. **[1 RP 45]**. As NMDOT subsequently acknowledged, none of these documents created an easement in favor of NMDOT. **[1 RP 48 ¶ 11]**.

B. Summary Judgment Proceedings

R&R moved for partial summary judgment on the issue of whether NMDOT possessed any easement over the Property. **[1 RP 42-62]**. In response, NMDOT

acknowledged that no written easement existed **[3-31-23 CD 9:17:47]** and asserted for the first time that it possessed a prescriptive easement based on use of the Property. NMDOT's response stated that:

- The easement "is implied in law based on the prescriptive use of the property" **[1 RP 111 ¶ 13]**;
- It is "a prescriptive easement through use of the two adjacent highways for more than one year" **[1 RP 116]**; and
- "Such easement was established because the shoulder abutting the highway which encroaches on the property constitutes a safety zone kept clear and used by NMDOT in the maintenance and operation of public highways." **[1 RP 114 ¶ 42]**.

The trial court found that NMDOT failed to present evidence of actual use of the Property sufficient to create a genuine issue of material fact regarding a prescriptive easement. **[5-9-23 CD 9:48:12]**. The court granted partial summary judgment in favor of R&R, finding no easement or right-of-way burdened the Property. **[2 RP 282 ¶¶ 3-4]**.

C. Trial Court Proceedings

Following summary judgment, NMDOT maintained its prescriptive easement theory in its Trial Brief, arguing that "the State has a permanent temporary right of access to land that is included within the Tularosa Triangle, and that this right of

access, which the State calls a right-of-way, stems from statute, specifically NMSA [1978, Section] 67-2-5 [(1929)], which grants an easement by prescription so long as the right-of-way is used for highway purposes." **[2 RP 305]**.

In its proposed findings of fact and conclusions of law, NMDOT requested that the court find "[t]he State has acquired a prescriptive easement through use of the land appurtenant to the two adjacent highways at issue at this intersection for more than one year." **[2 RP 333; 383]**.

NMDOT filed a Motion for Reconsideration on May 5, 2023, three days before trial, which the court denied. **[2 RP 355-60; 5-9-2023 CD 9:53:26; 2 RP 411-12]**. In that motion, NMDOT stated: "The right-of-way at issue is currently used by the State, and has been used by the State for more than one year for highway maintenance purposes." **[2 RP 357]**.

D. Trial and Final Judgment

At trial, the sole remaining issue was R&R's inverse condemnation claim. The trial court excluded evidence regarding NMDOT's prescriptive easement claims as that issue had been resolved on summary judgment. **[5-8-23 CD 9:59:33, 10:02:57, 11:10:40, 11:12:54]**. As evidence of its claim, a Maverik representative's undisputed deposition testimony, admitted at trial, established that NMDOT's false representations to Maverik regarding the existence of a written right-of-way caused Maverik to terminate the purchase agreement with R&R. **[3 RP 521 ¶ 43; Dep. DD**

12:9-3]. This interference with R&R's use and enjoyment of the Property formed the basis for the inverse condemnation claim.

At the conclusion of the trial, the court entered a declaratory judgment finding that NMDOT did not possess an easement over the Property and that an inverse condemnation had occurred. The court awarded R&R $720,000 in damages, plus interest, attorney fees, and costs. **[2 RP 490-503]**.

E. Appellate Proceedings

On appeal to the Court of Appeals, NMDOT argued it "acquired a prescriptive easement to the Property by using it for clear zones." **[COA BIC 27]**. In its Petition for Writ of Certiorari to this Court, NMDOT claimed "the Property bears markers of being used by the State for maintenance for over one year." **[Pet. 12]**.

In its Brief in Chief to this Court, NMDOT now presents a new theory, arguing that it "is not required to use the Property to acquire a right-of-way but only to hold it open for public use." **[BIC 20]**. This argument was not presented to the trial court or the Court of Appeals.

STANDARD OF REVIEW

"An appeal from the grant of a motion for summary judgment presents a question of law and is reviewed de novo." *Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, ¶ 16, 141 N.M. 21, 150 P.3d 971. "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to

judgment as a matter of law." *Id.* (internal quotation marks and citation omitted). "On summary judgment, the non-movant may not rest on the pleadings, but must demonstrate genuine issues of material fact by way of sworn affidavits, depositions, and similar evidence." *Juneau v. Intel Corp.*, 2006-NMSC-002, ¶ 15, 139 N.M. 12, 127 P.3d 548.

To the extent issues were not litigated in the lower courts, Rule 12-321 NMRA dictates they shall not be considered on appeal either. Accordingly, our appellate courts "review the case litigated below, not the case that is fleshed out for the first time on appeal." *Spectron Dev. Lab. v. Am. Hollow Boring Co.,* 1997-NMCA-025, ¶ 32, 123 N.M. 170, 936 P.2d 852, (*citing In re T.B.,* 1996-NMCA-272, ¶ 13, 121 N.M. 465, 913 P.2d 272). The Court of Appeals elaborated on the proper scope of appellate review in its decision in *Garcia v. Bittner*:

> When a trial court tries a particular case and rules correctly on the issues presented to it, and when the evidence presented to it shows a right to relief for one party or the other, we should not intervene on appeal on grounds never presented and on grounds that will not necessarily change the result.

1995-NMCA-064, ¶ 28, 120 N.M. 191, 900 P.2d 351 (internal citations omitted). For this reason, "review on appeal is limited to a consideration of the transcript of the record properly certified by the clerk of the trial court[.]" *Durham v. Guest,* 2009-NMSC-007, ¶ 22, 145 N.M. 694, 204 P.3d 19 (internal quotation marks and citation omitted); Rule 12-318(A)(4) NMRA. The court will not consider facts on appeal that

are not of record in the case. *See Rangel v. Save Mart, Inc.*, 2006-NMCA-120, ¶ 36, 140 N.M. 395, 142 P.3d 983 (stating that "[t]his Court will not consider and counsel should not refer to matters not of record in their briefs" (internal quotation marks and citation omitted)). The appellate court "will not search the record to find evidence to support an appellant's claims." *In re Heeter,* 1992-NMCA-032, ¶ 15, 113 N.M. 691, 831 P.2d 990.

ARGUMENT

Having argued throughout litigation at the district court level that it acquired rights-of-way through prescriptive use, NMDOT now faults the trial court for taking them at their word and applying prescriptive easement principles. Confronted with its inability to prove prescriptive use, NMDOT reverses course and now contends—for the first time—that its rights somehow exist automatically without any need to demonstrate prior use. **[BIC 20]**.

Throughout the proceedings, NMDOT maintained it had used the Property sufficiently to establish a right-of-way burdening Plaintiff's private property. However, when R&R's summary judgment motion required NMDOT to produce evidence supporting this claim, the State failed to present any proof of actual use. Instead of concrete evidence, NMDOT offered only general assertions about how land abutting highways may be used for clear zones, maintenance activities, or snow removal. **[1 RP 121-22 ¶¶ 7-14]**. After losing on summary judgment, NMDOT then

scrambled to identify specific uses—signage and environmental monitoring wells—in its proposed findings and Motion for Reconsideration. **[2 RP 333, 358]**. However, it presented no supporting evidence of these alleged uses nor did the State establish how, as a matter of law, these alleged uses create rights-of-way in favor of the State. The trial court correctly determined that any evidence of use that would tend to support the establishment of a right-of-way was required to be presented during summary judgment proceedings, not in unsupported assertions made after the fact.

For the first time on appeal, NMDOT advances an entirely new theory: this Court should abandon prescriptive easement requirements of actual use and recognize automatic State rights-of-way over all private property abutting roadways. **[BIC 15]**. Under this theory, such rights would materialize simply upon opening a roadway to public use, **[BIC 20]**, without requiring any proof whatsoever. **[BIC 19, 23]**.

This radical departure cannot be reconciled with established New Mexico law. To prevail on its claim to Plaintiff's Property, NMDOT must demonstrate actual use. Absent evidence that NMDOT actually used the Property, the trial court correctly found no easement existed and that the State's claims to the contrary constituted inverse condemnation.

I. SUMMARY JUDGMENT WAS PROPER WHERE THE STATE FAILED TO PRESENT FACTS CREATING A TRIABLE ISSUE ON ITS CLAIMED RIGHT-OF-WAY.

Throughout this litigation, the State has consistently claimed a right-of-way or easement covering nearly the entire Property. However, the legal theories establishing this supposed right-of-way shifted significantly, with the State's posture changing with each stage of litigation. Critically, when called upon to substantiate their claim in response to R&R's Motion for Summary Judgment, however, the State failed to produce any supporting evidence.

The State's litigation strategy reveals a consistent pattern: bold claims of right have consistently failed to materialize into proof. Initially, NMDOT told Maverik that it possessed rights to 90% of the Property based on purported written documentation. **[RP 495 ¶ 36; Pltf. Ex. 12]**. When pressed to produce this written proof, the State provided nothing and ceased communication. **[RP 495 ¶ 37; Pltf. Ex. 11]**.

After this lawsuit commenced, the State persisted in claiming a written easement. In its Answer, NMDOT denied R&R's assertion that "no available public records indicating that the Property . . . is subject to a highway right of way easement in favor of NMDOT . . . ." **[1 RP 27 ¶ 14]**. During discovery, when R&R requested documents supporting the State's easement claim, NMDOT produced 791 pages of records, including deeds, rights-of-way, and other official documents. **[1 RP 44]**.

Despite the substantial volume of materials produced, not a single document supported the State's claim of an express, recorded easement.

Based on the State's failure to produce supporting documentation, R&R moved for summary judgment on the easement or right of way issue. **[1 RP 42-62]**. R&R established its prima facie case that no easement existed, thereby shifting the burden to NMDOT to present specific facts supporting its easement claim. *Ciup v. Chevron U.S.A.*, 1996-NMSC-062, ¶ 7, 122 N.M. 537, 928 P.2d 263 ("A movant for summary judgment need only make a prima facie showing that there is no genuine issue of material fact, and that on the undisputed material facts, judgment is appropriate as a matter of law; the burden then shifts to the opponent to show at least a reasonable doubt, rather than a slight doubt, as to the existence of a genuine issue of fact.").

Faced with this burden, the State fundamentally changed its legal theory. Rather than maintaining its claim to a written easement, NMDOT suddenly abandoned this position and admitted it possessed no "piece of paper" proving the easement's existence. **[1 RP 115; 3-31-23 CD 9:18:40-56]**. Instead, the State argued that its rights stemmed from a prescriptive easement—the very legal theory it now faults the lower courts for applying. **[BIC 15]**.

The State devoted substantial portions of its summary judgment response to explaining how highway easements may be acquired through purchase,

condemnation, or operation of law, including prescription. **[1 RP 114-19]**. While R&R has never disputed these general legal principles, mere recitation of applicable law cannot defeat a motion for summary judgment. The State was required to present specific, admissible evidence demonstrating that a prescriptive easement had been established on this particular Property. Rule 1-056(E) NMRA.

Once again, when required to support its bare assertions of right with concrete evidence, the State produced nothing. This pattern—claiming rights without proof—persisted throughout the State's dealings with this Property. Pre-litigation, these baseless claims caused Maverik to terminate the purchase agreement, and ultimately, gave rise to R&R's inverse condemnation action. Then, during summary judgment proceedings, the State's continued inability to substantiate its claims proved fatal to its case. The trial court properly recognized this evidentiary void and granted partial summary judgment, finding that no easement or right-of-way burdens the Property. **[2 RP 302-03]**.

A. The Court Correctly Found that, Pursuant to New Mexico Law, Any Right Claimed by NMDOT to Plaintiff's Property Requires NMDOT Actually Used the Property for Highway Purposes.

Absent a deed or prior condemnation, NMDOT's only other source of a right in the Property was through prescriptive use. Under well-established New Mexico law, prescriptive easements require actual use of the property in question. As the district court correctly stated: "Actual use of the Property for highway purposes is

required to establish a prescriptive highway easement or right-of-way in New Mexico." **[2 RP 303 ¶ 3]**.

This requirement of actual use is fundamental to prescriptive easements. *See Baxter v. Egolf*, 1988-NMCA-047, ¶ 18, 107 N.M. 315, 757 P.2d 371 (finding road established by prescription was limited to eighteen feet because there was no evidence that more than that area had ever been actually used). The rule that "a prescriptive right encompasses only the portion of the servient estate actually used" has been consistently applied by New Mexico courts. *Maloney v. Wreyford*, 1990-NMCA-124, ¶ 13, 111 N.M. 221, 804 P.2d 412 (*citing Beibelle v. Norero*, 1973-NMSC-052, 85 N.M. 182, 510 P.2d 506; *Dyer v. Compere*, 1937-NMSC-088, 41 N.M. 716, 73 P.2d 1356). Though NMDOT attempts to characterize the existence and boundaries of a prescriptive right-of-way as a question of law **[BIC 16 ¶ 2]**, New Mexico law clearly establishes this as question of fact that must be determined on evidence of the specific portion of the property actually used. *E.g.*, *Baxter,* 1988-NMCA-047, ¶ 18.

Courts throughout the United States strictly limit prescriptive roadway easements to the land actually used for highway purposes. In *Broward County v. Bouldin*, 114 So. 2d 737, 739 (Fla. Dist. Ct. App. 1959), the court held that easements extend only to land "needed and used" for roadway support and maintenance. The Nebraska Supreme Court reached the same conclusion, determining that prescriptive

easements are confined to property actually used during the prescriptive period. *Teadtke v. Havranek*, 279 Neb. 284, 295, 777 N.W.2d 810 (2010). Colorado courts apply the same strict standard, limiting prescriptive passageways to "the extent of the actual adverse usage." *Bd. of Cty. Comm'rs v. Ogburn*, 38 Colo. App. 212, 213, 554 P.2d 700, 701 (1976).

This actual use requirement extends to all roadway infrastructure elements. When bar ditches alongside a Texas roadway were claimed as part of a prescriptive easement, the court required proof that these specific areas had been used for highway purposes. *Allen v. Keeling*, 613 S.W.2d 253, 254-55 (Tex. 1981). California courts similarly demanded evidence that a 20-foot right-of-way had actually been used for passing, not just that the paved surface was 11 feet wide. *Applegate v. Ota*, 146 Cal. App. 3d 702, 712, 194 Cal. Rptr. 331 (1983). Idaho flatly prohibits expanding prescriptive easements beyond their historic use. *Aztec Limited, Inc. v. Creekside Investment Co.*, 100 Idaho 566, 602 P.2d 64 (1979).

These decisions reveal a uniform judicial commitment: prescriptive claims cannot exceed the boundaries of demonstrated use. This principle protects landowners from governmental assertions unsupported by evidence of actual use.

With these decisions in mind, the district court's conclusion was therefore inescapable. Having conceded the absence of any written easement, NMDOT could

survive summary judgment only by presenting specific, admissible evidence that it had actually used the Property. This burden proved insurmountable.

B. The State Failed to Meet Its Burden on Summary Judgment when It Failed to Present "Specific Facts" Creating a Genuine Issue for Trial on the Issue of Alleged Use of the Claimed Easement.

Rule 1-056(E) NMRA requires that parties opposing summary judgment present "specific facts showing that there is a genuine issue for trial." NMDOT failed to meet this burden. In its response, NMDOT produced the affidavit of Mr. Smelker, a licensed professional engineer employed by NMDOT for 17 years. **[1 RP 121-23]**. The lower courts properly found that NMDOT's response contained only vague assertions, generalities, and conclusory statements rather than specific evidence of actual use of the Property. Accordingly, both the district court and the Court of Appeals concluded that NMDOT's response to summary judgment was insufficient.

The Court of Appeal's primary concern was the lack of specific evidence of actual use, determining that the Smelker Affidavit "fall[s] short of presenting admissible evidence tending to show actual use of the disputed area or that the disputed area was open for use by the public." **[DOA 14]**. The affidavit, which both courts considered in determining whether summary judgment was appropriate, presented only generalities about NMDOT standards of practice. It recites broad statements about highways, restates laws pertaining to highway rights-of-way, and

describes how highways function, including the generalized necessity for clear zones, maintenance activities, and snow removal. **[1 RP 121-22 ¶¶ 7-14]**.

The appellate court fittingly found the record lacked any evidence of highway-related activities on the Property. In its opinion, the court noted that the Smelker affidavit "does not speak to specific evidentiary facts" showing that the disputed area beyond the curbs had ever been used for storing maintenance or construction equipment, public safety purposes like pulling off the roadway, or any actual highway maintenance activities. **[DOA 14]**. The court also identified a significant contradiction with NMDOT's own definition of clear zones. While NMDOT claimed Plaintiff's Property was needed by the State to maintain "clear zones," the court found this justification was "betrayed by its own affiant." **[DOA 15]**. Smelker's affidavit defined a clear zone as "an unobstructed, traversable roadside area," **[1 RP 122 ¶ 11]**, but the facts showed that access to the property from the roadway is neither "unobstructed" nor "traversable" because it "is obstructed by curbs," **[1 RP 142 ¶ 4]**, contradicting the clear zone theory. **[DOA 15]**.

NMDOT's citation to a Federal Highway Administration website as "Federal law" is both misleading and self-defeating. The State points to no federal law or regulation. **[BIC 22]**. Instead, it cites an FHWA webpage that merely references non-governmental standards from the American Association of State Highway and Transportation Officials (AASHTO), standards that explicitly declare clear zone

considerations are "not a controlling criterion" and lack any fixed measurements. Fed. Highway Admin., *Clear Zone and Horizontal Clearance*, U.S. DEP'T OF TRANSP. (4/10/2018) https://www.fhwa.dot.gov/programadmin/clearzone.cfm?_gl=1*uc8wqq*_ga*MTg3ODEwNjQyOC4xNzM5Mzc5NzI1*_ga_VW1SFWJKBB*MTczOTQ2ODQyMS40LjEuMTczOTQ2ODU3Mi4wLjAuMA (last visited July 28, 2025). Most tellingly, this very guidance commands that utilities "should be located as close to the right-of-way line as feasible"—a directive that eviscerates NMDOT's claim to encroach onto private property. Non-binding website guidance cannot create controlling or persuasive authority where none exists. Having failed to raise this theory below, NMDOT has waived it. And even if it hadn't, the State offers no proof that the Property was ever actually used as clear zone. The argument fails at every level.

In addition to the bare contentions of use of the Property as a "clear zone," NMDOT also claims to have presented evidence of its alleged right-of-way through various versions of interdepartmental "project" maps introduced during different stages of the district court proceedings. **[BIC 27]**. Such maps accompanied Smelker's affidavit in the summary judgment response, **[1 RP 124-27]**, and were admitted both at the summary judgment hearing as Exhibit 4, **[3-31-23 CD 9:32:13]**, and at the trial as Defendant's Exhibit 10. **[5-9-23 CD 9:08:22]**. In its Brief, NMDOT emphasizes that the very presence of the maps in the record of the trial

court demonstrates that they are "relevant and material" to the question of whether the State has a right-of-way. **[BIC 27]**. NMDOT fails to acknowledge that both lower courts considered NMDOT's project maps and determined they were legally inconsequential. The trial court stated the project maps "which Plaintiff [sic] sought to introduce at the [summary judgment] hearing, contained nothing more than conclusory statements that the State believed it had an easement or right of way to the Property." **[2 RP 303 ¶ 5; 3-31-23 CD 9:24:49** (NMDOT introduced interdepartmental maps as evidence at summary judgment hearing)**]**. The Court of Appeals affirmed, finding the maps "merely indicate that NMDOT believes it has a right-of-way" but provide "no basis for that belief," showing what NMDOT thought it owned rather than providing evidence of actual prescriptive use. **[DOA 14]**. At trial, the district court appropriately sustained R&R's objection to the admission of testimony regarding the project maps which NMDOT claims depict a right-of-way over the Property because the court previously determined the State had no right-of-way on summary judgment. **[5-9-23 CD 9:08:22-9:17:37]**.

The appellate court ultimately reached the same correct conclusion as the district court regarding the legal insufficiency of the evidence: NMDOT "presents an unsupported legal argument in place of admissible evidence that creates a disputed material fact." **[DOA 16]**. Thus, in summary judgment proceedings, the State's only attempts to offer evidence—the Smelker Affidavit and maps—failed to

meet the legal requirement of creating a genuine issue of material fact concerning continuous actual use necessary to establish a prescriptive easement. This led the court to affirm the district court's partial summary judgment in favor of Plaintiff, finding no genuine issue of material fact regarding the existence of a prescriptive easement.

NMDOT makes much of the fact that the prescriptive period provided for in Section 67-2-5 is one-year of use that need not be continuous, as opposed to the traditional prescriptive period of ten years of continuous use. **[BIC 19-20]**. This is a distinction without a difference. NMDOT failed to produce evidence of actual use of the Property for any period whatsoever, continuous or intermittent, for one year, one month, or even one week.

The court properly demanded hard evidence of actual use, not generalities or departmental beliefs. It exposed the fatal contradiction in NMDOT's position: the State claimed it needed "clear zones" on property that its own evidence showed was neither clear nor traversable. This careful analysis—requiring specific facts rather than legal abstractions—exemplifies the rigorous application of summary judgment standards. This well-reasoned decision appropriately protects private property rights by ensuring government claims are backed by substantive evidence, striking the proper balance between governmental authority and property owner protections that warrants affirmance.

C. NMDOT's Subsequent Claims that It Used the Property were Insufficient and Untimely.

NMDOT first claimed it used the Property for sign placement and environmental monitoring wells only after losing on summary judgment. **[2 RP 333, 358]**. The trial court properly excluded these late-raised claims about signage and environmental monitoring wells, which NMDOT attempted to introduce through its proposed findings and Motion for Reconsideration rather than in response to summary judgment. Although NMDOT now argues that placing signage and environmental monitoring wells constitute prescriptive "use," it never presented this theory when defending against summary judgment—the appropriate time for raising such defenses. Appellant cannot point to anywhere in the record where it preserved these arguments for appeal, because it simply never made them at the proper time.

Regardless of timing, environmental monitoring wells cannot create highway rights-of-way under Section 67-2-5. The statute authorizes rights-of-way exclusively for highways and highway components "used for highway purposes." § 67-2-5. NMDOT provides no explanation for how environmental monitoring serves a "highway purpose" under the statute. Because environmental monitoring activities fall outside Section 67-2-5's scope, the State's factual assertions, even if proven, cannot support its statutory claim.

D. Allowing the State to Claim Equitable Title to Private Property Without Proving Actual Use Would Eviscerate Fifth Amendment Protections.

The State has conceded it possesses no written easement, **[1 RP 115; 3-31-23 CD 9:18:40-56]**, and the State did not initiate formal condemnation proceedings against the Property. **[2 RP 303 ¶ 6]**. Therefore, only one avenue was available to it under established New Mexico law. Only admissible evidence of actual use could have created a genuine issue of material fact regarding easement existence. Any other result would fundamentally undermine constitutional property protections, creating a Fifth Amendment end-run of staggering proportions. The district court correctly rejected any interpretation of our laws that would eliminate the essential requirement for use, properly holding that "actual use is a requirement of a prescriptive easement" and recognizing that any exemption from this requirement would be a "slippery slope for the Fifth Amendment." **[5-9-23 CD 9:50:43]**. The Court of Appeals agreed: "For prescriptive easements generally, a showing of actual use of the area within the alleged easement is required." **[DOA 12]**. The lower courts' adherence to established law protects not only this Property but the constitutional rights of all New Mexico landowners.

II. THE STATUTE RELIED UPON BY NMDOT DOES NOT GRANT THE STATE AUTOMATIC RIGHTS-OF-WAY TO PRIVATE PROPERTY NEAR HIGHWAYS.

NMDOT's post-judgment pivot to "statutory equitable title" under NMSA 1978, Section 67-2-5, represents a last-ditch attempt to resurrect a failed case through an entirely new legal theory that it conspicuously failed to raise below. This transparent effort to sidestep the trial court's well-reasoned summary judgment ruling (which the Court of Appeals affirmed) comes too late and fundamentally misreads the statute. NMDOT now makes the remarkable claim that Section 67-2-5 eliminates any obligation to prove actual use, arguing instead that the State automatically acquires rights-of-way over private property merely because it sits near a highway. **[BIC 20]**. This radical interpretation would effectively grant the State unlimited power to seize private land without compensation or evidence of need, a result the legislature could not have intended and that the New Mexico and United States Constitutions would not permit. U.S. Const. amend. V; N.M. Const. art. II, § 20.

A. The State's New Section 67-2-5 Theory Fails: The Property Contains No Highway Infrastructure, was Not Open for Public Highway Use, and was Never Used for Highway Purposes.

Having argued prescriptive easement throughout the proceedings below, NMDOT cannot now conjure a new theory on appeal. Even accepting arguendo that

Section 67-2-5 governs, NMDOT's claim fails because the statute imposes three distinct requirements—none of which the State can satisfy.

First, the State cannot meet the geographic requirement. Section 67-2-5 applies to highways and their components, including "travel lanes, roadside, shoulder, median, ditches, culverts, ramps, turnouts, and construction and maintenance easements." **[BIC 17-18];** NMAC 18.20.5.7(D). NMDOT presented no evidence that R&R's Property contains any of these elements. To the contrary, the record demonstrates that Plaintiff's property is situated wholly beyond the boundaries of the highway infrastructure and all its elements—including the roadway, shoulders, inlets, and curbs. **[DOA 5; 1 RP 142 at ¶¶ 4-5]**. There is no encroachment, actual or alleged, by Plaintiff onto any portion of the State's highway infrastructure. Accordingly, the Court of Appeals found the Property sits entirely outside the highway infrastructure, beyond "the shoulders of those roadways, the inlets of those roadways, and the curbs on the edge of those roadways." **[DOA 11-12]**. The State cannot claim what does not exist—there are no highway components on this Property.

Second, the State cannot establish that the Property was "open for use to the public" for highway purposes. § 67-2-5. The Property has operated for decades as a gas station and restaurant, serving paying customers in private commercial transactions. NMDOT's interpretation would transform every roadside business into

public property. Every McDonald's drive-through, every Walmart parking lot, every corner gas station would suddenly become a state right-of-way merely because customers can enter. The statute's "open for use to the public" language means public access for transportation and highway purposes. Public highways exist for unrestricted passage and travel, while private businesses control access, limit use to customers, and operate for commercial profit. Private businesses that welcome customers are not thereby converted into public highway infrastructure when a customer arrives.

Third, the State failed to prove the Property was ever "used for highway purposes." § 67-2-5. Even if the State could overcome the geographic and public use requirements, it presented no evidence that the Property served any highway function. The record contains no testimony about highway maintenance activities, no documents showing transportation use, and no records of any highway function performed on this commercial property. A private parking lot adjacent to a highway remains exactly that—private property serving commercial purposes and paying customers, not a public roadway or highway infrastructure. NMDOT's complete failure of proof on this element alone defeats its claim. The State cannot establish highway use by geographic proximity or theoretical possibility; it must prove actual use with actual evidence. NMDOT brought neither to the trial court and cannot manufacture them on appeal.

B. NMDOT's Interpretation of the "Open for Use to the Public" Requirement Would Unconstitutionally Permit Mass Takings Without Compensation.

NMDOT's interpretation turns the statute on its head. Under its theory, customer access to businesses transforms private property into public highways. This reading would permit mass takings without compensation. Every truck stop, restaurant, and gas station from Gallup to Tucumcari along Interstate 40 could lose its parking lot to state ownership. Agricultural lands and shopping centers near highways would become subject to appropriation by bureaucratic fiat. The State could "nationalize" any property adjacent to a roadway simply by declaring it necessary for highway purposes. This is precisely what the Court of Appeals rejected when it condemned claims based on "[t]he mere possibility of a hypothetical future use." **[DOA 16]**.

NMDOT's interpretation creates an absurd paradox: businesses that exist to serve highway travelers would forfeit their property rights by doing so. Gas stations serve motorists, restaurants feed travelers, hotels lodge them—yet under NMDOT's theory, this very service would strip property owners of their land.

More fundamentally, NMDOT's reading violates basic statutory construction. If customer access satisfied "open for use to the public," the statute's limitation to "highway purposes" becomes meaningless. *State v. Gonzales*, 2024-NMCA-062, ¶ 50 (rejecting interpretations that render statutory terms meaningless); *State v.*

Johnson, 1998-NMCA-019, ¶ 22, 124 N.M. 647, 954 P.2d 79 (same). The Legislature chose specific language—requiring public use for transportation purposes, not commercial accessibility.

Section 67-2-5 clarifies ownership of actual highway infrastructure; it does not provide a license for confiscation of adjacent property. This Court should reject an interpretation that would make every roadside business owner a tenant at will, subject to eviction whenever the State wants more land. Such a result violates both statutory language and constitutional protections against uncompensated takings.

III. THE COURT PROPERLY EXCLUDED EVIDENCE AT TRIAL WHEN THE EASEMENT ISSUE HAD BEEN RESOLVED AS A MATTER OF LAW AT SUMMARY JUDGMENT.

The very purpose of partial summary judgment is to resolve discrete legal issues before trial, thereby streamlining litigation. Therefore, it is wholly appropriate for the trial court to exclude evidence at trial aimed at proving issues that had previously been resolved on summary judgment. *See Found. Minerals, LLC v. Montgomery,* 2024-NMCA-008, ¶ 11 (finding that prior to trial the court established a permissible "ground rule" to avoid admission of evidence on a matter disposed of on summary judgment). Once the court determined as a matter of law that no easement existed, NMDOT could not relitigate that issue at trial. Allowing such re-litigation would render summary judgment meaningless and defeat the efficiency purposes it serves.

NMDOT cannot claim it was deprived of the opportunity to present evidence of its claimed right-of-way. The court specifically noted that NMDOT "had access to any evidence of actual use, if it ever existed" and that NMDOT had been "afforded thorough due process and given every opportunity to present admissible evidence of actual use, with none presented." **[2 RP 412 ¶¶ 7-8]**.

Furthermore, the court went beyond typical summary judgment procedure by explicitly inviting additional evidence at the hearing, telling the parties: "This will be the last chance to bring forth any evidence of a prescriptive easement." **[3-31-23 CD 9:11:58-9:12:28]**. Despite this extraordinary opportunity, NMDOT presented no additional evidence.

Without making proper citations to the record, the State claims in its Brief that "[t]he district court acknowledged the State had evidence which was relevant to the area of the property at issue but refused to consider it . . . ." **[BIC 24]**. Appellee finds no support in the record for the State's bald claim. In fact, the record shows the trial court repeatedly sustained R&R's relevancy objections when the State attempted to introduce evidence of its alleged prescriptive use of the Property at trial. **[5-9-23 CD 9:59:49]**. NMDOT's attempt to introduce new theories about signs and environmental monitoring wells at trial was properly rejected. Such evidence, had it been admitted, would not have changed the result, and as these claims were not raised at the summary judgment stage, they represent exactly the type of "eleventh

hour evidence" that courts will not consider. *Largo v. Atchison*, 2002-NMCA-21, ¶ 33, 131 N.M. 621, 41 P.3d 347 (materials not before the court when it granted summary judgment will not be considered for the first time on appeal).

IV. THE COURT DID NOT HOLD THAT THE 2016 QUIET TITLE ACTION IN ANY WAY IMPACTED THE STATE.

The State mischaracterizes the trial court's judicial notice of a 2016 quiet title action. As the Court of Appeals correctly concluded: "[t]he district court did not determine the rights of NMDOT based upon the quiet title action . . . ." **[DOA 17]**. The quiet title judgment became relevant only after NMDOT challenged R&R's ownership of the Property as against third parties for the first time at trial.

The Property has changed hands multiple times over the past century. To clear title defects from prior transfers, R&R prosecuted a quiet title action in 2016. **[2 RP 492 ¶¶ 8-10]**. During the inverse condemnation trial, R&R's expert appraised the Property's fair market value based on the full 2.016-acre parcel. **[Pltf. Ex. 40]**. Instead of presenting competing appraisal evidence, NMDOT attempted to undermine R&R's valuation by introducing a title report suggesting that third parties might own portions of the Property. **[5-9-23 CD 9:09:39]**.

R&R responded that the 2016 quiet title judgment had already established its ownership of the entire 2.016 acres against all third parties (excluding the State of course). The State, which cannot be sued in quiet title proceedings, was not named.

The court took judicial notice of this judgment and excluded NMDOT's third-party ownership evidence. **[5-9-23 CD 9:12:00]**.

NMDOT then pivoted to arguing that the quiet title action was ineffective because the State was a necessary party who suffered prejudice from exclusion. **[5-8-23 CD 9:12:11]**. In its Brief, NMDOT also attacks R&R's title to the Property by claiming that the State acquired its alleged right-of-way prior to R&R owning the Property. It therefore claims that the State holds "superior title." **[BIC 18]**. These arguments miss the point entirely. The trial court determined on summary judgment that the State never had an easement, pre- or post- R&R acquiring the Property. NMDOT's argument implies that a right it held was somehow extinguished, but it never held any such right. This non-existent right was neither inferior nor superior to R&R's rights to the Property.

The district court's final order simply reflects reality: the 2016 quiet title action established R&R's fee simple ownership against all non-State third parties. **[2 RP 492 ¶¶ 8-10]**. Nothing more, nothing less. The Court of Appeals affirmed this determination. "The district court did not determine the rights of NMDOT based upon the quiet title action . . . ." **[DOA 17]**.

V. NMDOT'S ACTIONS CONSTITUTED INVERSE CONDEMNATION, AND THE STATE IS NOT IMMUNE FROM SUCH CLAIMS WHEN CONSTITUTIONAL RIGHTS ARE VIOLATED.

The right to dispose of property is a fundamental aspect of property ownership. *Buchanan v. Warley*, 245 U.S. 60, 74 (1917) ("Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it."). NMDOT's false claims about owning 90% of the Property, combined with its refusal to provide documentation and subsequent silence when pressed for proof, directly interfered with R&R's fundamental right to sell its property. The uncontested evidence shows that Maverik terminated the purchase agreement specifically because of NMDOT's claims. **[Dep. DD 12:9-3]**.

While the State may have immunity for certain tort claims, it cannot claim immunity from constitutional violations. When governmental conduct rises to the level of a constitutional taking, inverse condemnation provides the appropriate remedy regardless of tort immunity.

The district court correctly found that NMDOT's conduct—slandering title and intentionally interfering with contractual relations—when undertaken without any legal basis, constitutes a taking requiring just compensation. **[3 RP 525 ¶ 6-9]**. This finding does not rest on tort liability but on the constitutional requirement that the State pay just compensation when it interferes with property rights for public purposes.

The summary judgment ruling established that NMDOT has no easement or right-of-way over the Property. This means that NMDOT's claims to Maverik about owning 90% of the Property were false. When a governmental entity makes false claims about property ownership that interfere with constitutional property rights, the property owner is entitled to just compensation through inverse condemnation, as was the case here. **[3 RP 524 ¶ 4; 525 ¶¶ 5-10; 526 ¶ 11]**; NMSA 1978, § 42A-1-29(A) (1981); *Katzin v. United States*, 120 Fed. Cl. 199, 214 (2015).

CONCLUSION

For these reasons, the district court's order granting R&R's Motion for Partial Summary Judgment, entry of Declaratory Judgment, and award of damages should be affirmed.

Respectfully Submitted,

JOHN D. WHEELER & ASSOCIATES,
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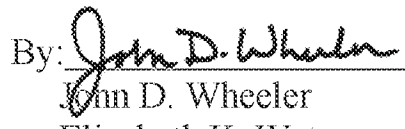
By: 

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of July, 2025, the foregoing was electronically filed using the Court's Odyssey E-File and E-Serve system, which caused the following counsel of record to be served by electronic means, as more fully reflected in the Notice of Electronic Filing.

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