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

DEFENDANT-APPELLANT'S BRIEF IN CHIEF

CARRILLO LAW FIRM, P.C.

By: */s/ Raúl A. Carrillo, Jr.*
Raúl A. Carrillo, Jr. (Bar No. 5600)
P.O. Box 457
Las Cruces, NM 88004
575/647-3200
575/647-1463 facsimile
raul@carrillolaw.org
Counsel for Defendant-Appellant

A. TABLE OF CONTENTS

STATEMENT OF COMPLIANCE

Pursuant to Rule 12-318(G) NMRA this brief complies with the type-volume limitations set forth in Rule 12-318(F)(3) NMRA and is prepared in a proportionally-spaced typeface, 14-point Times New Roman, and the body of the brief contains 10,197 words. This brief was prepared using Microsoft Word, version 2010.

B. TABLE OF AUTHORITIES

C. SUMMARY OF PROCEEDING

I. Nature of the Case

To benefit the public, the Legislature grants a special form of equitable title called a right-of-way, adjacent to public highways. See, NMSA 1978, Section 67-2-5, (the "Statute"). The public interest in these rights-of-way cannot be divested without the State's express consent. In this case, a private developer is seeking to divest the State's interest in its rights of way. This appeal is from the intermediate court's decision affirming the district court's pretrial grant of partial summary judgment rejecting the State's assertion of equitable title to rights of way over land inside the intersection of US Highways 54 and 70 (the "Tularosa Triangle" or "The Triangle"), which the State has used to maintain both highways for the travelling public in Otero County.

In contrast to the conclusions reached by the courts below, the State asserts in this case, and in this appeal, that it holds, and has held, since at least 1960, superior equitable title to rights-of-way on either side of each highway, which limit the rights of the fee owner of the property located inside the highway intersection. The State also appeals the lower courts' decision that any rights the State may hold to the land in question were properly vacated by a judgment in a quiet title action the State was not a party to in the past. The State has never vacated its interest in the property in question, and the rights-of-way cannot be divested without the State's express consent, which has never been given.

Finally, the State appeals the lower courts' conclusions that the State is not immune from claims of slander of title and interference with contractual relations relied upon by the Appellee.

The lower courts' rulings turn on an incorrect conclusion the State has only claimed a *prescriptive easement* on the property in question. [1] In fact, although the terms are used interchangeably by all parties and the courts, the State claims it owns equitable title not a prescriptive easement to the disputed property. Because the State satisfied the "prescriptive period" of one year of use, or alternatively established open use for the public for a period of one year, as required by the statute to obtain equitable title, the State's interest is now superior to that of the fee owner. *This distinction in nomenclature, and the legal effect thereof, lies at the core of this dispute.* The legal right to the State's equitable title was obtained through use or enjoyment of a property or land for one year - the prescriptive period - without the need for a formal agreement or permission from the owner of the property pursuant to NMSA 1978, 67-2-5. *See*, (https://thelawdictionary.org/prescription/), for the definition of a prescriptive right.

Appellee, a private land developer who purchased land in 2011 the intersection of Highways 54 and 70 rejects the State's assertion of equitable title, and claims the State has not offered sufficient facts to create a factual dispute regarding "use" of the property.

---

[1] The state argued on appeal to the intermediate court that equitable title to a **right-of-way** was at issue: "...[T]here exists a **statutory easement and equitable title** burdening the property which accrue to the State of New Mexico for maintenance of the two State Highways", *See*, Appellate Court BIC, p.7; *see also*, Appellate Court BIC, p.9, para. 10: "[A]ppellant argues that this **easement or right-of-way** is created by statutory authority which **vests equitable title in the right-of-way** the State under NMSA Sec. 67-2-5."; *id.*, p. 12, para. 26: "Per Mr. Smelker's Affidavit, the appellant is in possession of **public right-of-way maps** indicating the width of the state highway which includes clear zones and maintenance area, is 100 feet from the centerline of state highways 54 and 70."; id., p. 40: "the District Court committed reversible error when it concluded that the State inversely condemned property which the Appellee had purchased that **was already subject to the State's prescriptive easement, right-of-way, and equitable title** which were obtained prior to the Appellee's purchase."

Appellee seeks to unlawfully convert the State's public interest to aid his own private endeavor – the sale of the triangular plot of land to a private corporation. Appellee also asserted, in the courts below, that the State's interest is not recorded, and therefore is not defined, and as such is non-existent. However, the Appellee purchased the property in 2011, subsequent to the creation of the State's rights-of-way at issue in this appeal, and whether the State's interest is recorded or not, the developer holds inferior title where the land is traversed by the rights-of-way. Appellee seeks monetary damages, alleging the State's claim prevented the sale of the land in question Appellee also argues that because it initiated and won a quiet title action in 2016 against a private party, in an action the State was not notified of or involved in, its judgment defeats the State's right-of-way. See, discussion, infra. The Appellee further claims its title has been slandered, and that the State's assertion of equitable title has interfered with a contract for sale of the property.

At the core of the dispute is the district court judge's award of partial summary judgment based on the application of traditional prescriptive easement law, a conclusion the district court reached after choosing not to consider testimony and public records describing the statutorily granted rights-of-way. On appeal, the intermediate court, like the district court, misapplied the law based on its conclusion that the question presented is governed by prescriptive easement law. Neither lower court started its analysis in the correct place – i.e., the controlling statute that provides the public right-of-way. This erroneous approach steered the intermediate court away from clear statutory provisions which prescribe the vesting period antecedent to the grant of superior title to the State, and thus to an erroneous decision to affirm the district court. The State's interest is and

always was established by the controlling statute, and cannot be diminished by a boundary dispute over ownership "in fee" because the State's permanent and ever present interest is in use and maintenance of the highway by use of the public right of way.

The State now seeks relief from this Court to uphold the vested interest in, and the public's need for, equitable title to clear zones and maintenance zones adjacent to state highways. The errors of the lower courts should be remedied, because those errors, left unchecked and uncorrected, will significantly impact the public use and safety of those State and federal highways. Even if this particular case focuses on a certain place – or the property in dispute – the unchecked decisions made below will impact *all* public highways in New Mexico.

a. Course of Proceedings

Appellee, R&R, LLC, a New Mexico Limited Liability Company, initiated this lawsuit in the Twelfth District Court of New Mexico in Otero County, on February 11, 2022. On November 14, 2022, the Appellee filed a Motion for Partial Summary Judgment as to the Existence of an Easement Across Real Property. *See,* [RP 42-43]. The district court heard the motion on March 31, 2023, and found in favor of the Appellee. This ruling is the origin of the present appeal. *See,* Order Granting Plaintiff's Motion for Partial Summary Judgment As To The Existence of an Easement Across Real Property, [RP 302-304], April 24, 2023.

All issues argued here were preserved in the lower court record in the following manner: Appellant responded to the summary judgment motion with supporting affidavits and public record documents on Dec. 23, 2022. Appellant filed a trial brief addressing the issue of it's use of the property in question, on April 24, 2023. *See,* [RP

304-315]. Defendant's Notice of Supplemental Authority was filed on May 2, 2023, then Defendant's Motion to Reconsider Order of April 24, 2023 was filed on May 5, 2023, and Defendant's Amended Proposed Findings of Facts and Conclusions of Law were filed on May 7, 2023, followed by Defendant's Post Trial Findings of Fact and Conclusions of Law, filed May 19, 2023. *See, Record Proper* [RP 305-314; 321-322; 355-360; 381-387; 413-421]. The parties asserted their respective legal and factual arguments in the supporting briefing and at the hearings held on April 24, 2023, and the trial held on May 8, 2023 and May 9, 2023.

b. Disposition of Lower Courts

Trial occurred on May 8, 2023 in the Twelfth Judicial District Court, the Hon. Ellen R. Jessen, now retired, presiding. The District Court entered judgment in favor of the Appellee following the trial in its Order Entering Declaratory Judgment for Plaintiff, filed June 16, 2023. The State filed its timely Notice of Appeal on July 6, 2023. The Court of Appeals entered its *de novo* opinion on Dec. 3, 2024, and this appeal timely ensued when the Petition for Writ of Certiorari was filed on Feb. 17, 2025, and granted, on all issues, on March 31, 2025.

II. Summary of Facts Relevant to the Issues Presented for Review, and Essential Points of the Decisions in the Courts Below.

1. Appellee, a New Mexico limited liability company, is the owner in fee simple of property located at 1202 St. Francis Drive, Tularosa, New Mexico, commonly referred to as the "Tularosa Triangle." [RP 2].
2. The property at issue lies within a triangular area created by the intersection of US Highways 54 and 70. [RP 2-3]

3. Appellee alleged that in July of 2021, it entered into a purchase and sale agreement (PSA) with a national convenience store operator, by which it would sell the property at issue to the national operator. [RP 3]
4. Before the completion of the sale, the NMDOT notified the parties to the PSA that the State had a highway maintenance right-of-way that burdened the property. [RP 3]
5. Appellee alleged that due to the notification, the purchaser terminated the PSA on February 2, 2022. [RP 4]
6. The NMDOT argues the noticed right of way has existed since at least 1960. [BIC 13, 21]
7. Appellee filed its Complaint nine days after the termination of the PSA, on February 11, 2022. [RP 1-10]
8. The District Court agreed with Appellee that the State does not have a documented, recorded, ownership interest, right-of-way or other lawful claim to ownership, use, or possession of the property. [RP 4, 44, 502]
9. The State agrees it does not possess a written or express document granting its right-of-way on the property in dispute, and asserts that it does not need one. [RP 306] By operation of NMSA 1978, §67-2-5, the State has held equitable title, in the form of a right of way which was perfected after one year of prescriptive use. [BIC 13, 21]
10. The Affidavit of Michael Smelker, a licensed professional engineer N.M. Lic. No. 15350, employed with Appellant for approximately 17 years at the time, and the New Mexico Department of Transportation's Assistant District Engineer, Technical Support, was submitted in support of the State's opposition to Appellee's motion for partial summary judgment. [RP 121-23 (the "Smelker Affidavit")].

11. Smelker testified about the requirements for maintenance and safety of public rights-of-way, and that such public highway rights-of-way "include the total land area acquired for the construction and maintenance of a public highway." *Id.*

12. Smelker explained public highway rights-of-way can be "acquired by prescription", and the width of the right-of-way "accommodates all the elements of a roadway cross section, *including but not limited to*, the travelling path/roadway itself, *traffic safety clear zones, drainage features, maintenance use and access, pedestrian facilities, bike paths, and public utility facilities and infrastructure." Id.* (emphasis added).

13. Smelker explained the width of the public right-of-way on these highways can be "determined and augmented by recommended 'clear zones' defined in the AASHTO Roadside Design Guide," that are determined based on a risk analysis assessing "key safety factors including traffic volumes, types of traffic ... speeds, and geography including slopes, curves, fixed features and other obstacles which could cause vehicles to rollover, among other factors." *Id.* In addition to clear zones, the width of public rights-of-way also account for "areas used for maintenance activities." *Id.*

14. Smelker further explained that the State has a public right-of-way, inclusive of clear zone and maintenance areas, extending 100 feet from the centerlines of Highways 54 and 70, which extends the State's use of the land for the highway right-of-way into the disputed property. *Id.*

15. Maps attached to, and supporting Smelker's testimony, depict the right-of-way held by the State since at least 1960. *Id.* [RP 124-27]. The maps specifically include the right-of-way map project F-021-1(4) (traced in 1960), and the right-of-way map project 2100921 (2018). Both right-of-way maps were provided with the Smelker

Affidavit as a part of the response in opposition to the motion for partial summary judgment. See, Response to Motion for Summary Judgment, [RP 124-127.

16. Smelker demonstrated the State satisfied the prescriptive condition, *i.e., use by passage of time,* necessary for title to vest in the State by maintaining and using the right-of-way in question in an open and continuous manner for more than one year. [RP 122-23]

17. The State also presented testimony of actual use of the disputed property for the placement of monitoring devices and signage - a clear impingement on the land in question – over a period of years. *See*, Defendants proposed Amended Findings of Fact and Conclusions of Law filed with the District Court at paragraph 15, [RP 38] and [RP 124-127].

18. Appellee's trial expert, Larry Sterling, a surveyor, submitted testimony to the effect that the curbs along the highway near the property are not actually located within the exterior boundaries of the Triangle but are located on land owned by the State or someone else nearby. Therefore, witness Sterling concluded that inlets along the highway near the property were not located within the exterior boundaries of the property, and that all the shoulders along the highway near the property are not located within the exterior boundary, but instead are located on land owned by the State. RP at 237. Neither Sterling nor the Appellee contest the existence of a right-of-way, only its purported boundaries.

19. The district court admitted, without objection, an NMDOT public record "Title Report" on day two of the trial. That Title Report contains the history of property ownership of the Tularosa Triangle, and in particular contains the official public

record depicting the maps relied upon by the State which reflect the right-of-way relied upon by Smelker and used by the State to this day. See, Defendant's Trial Exhibit 10, BATES Nos. 1062 and 1064 [RP 258-259].

Action by the District Court

20. Despite the Smelker Affidavit and the public record right-of-way maps provided in support, the district court determined that there was no triable issue of material fact as to whether the State possesses a prescriptive easement *or* right-of-way on or across the property. The District Court ruled, erroneously: "Actual use of the property for highway purposes is required to establish a prescriptive easement or right-of-way in New Mexico." *See*, Order Granting Motion for Partial Summary Judgment at para. 3". [RP 303] The district court granted Appellee's motion for partial summary judgment on grounds that the State had not established the existence of a *prescriptive easement* on land owned by the Appellee. [RP 303] *Emphasis added.*
21. Before the first day of trial, Appellant had moved the district court to reconsider its summary judgment decision, and provided additional evidence of its actual use of the land inside the Triangle for placement of monitoring devices and signage. [RP 355, 358, 360]
22. Appellant asked the district court to vacate the trial setting to argue the motion to reconsider, however, the district court declined to rule on the motion until after trial. *See* Tr. of Proceedings Bench Trial Day 1, 5/8/2023, Tr. 10:25-11:16, 12: 18-13:5, 13: 13-14: 10.

23. On the day of the trial, the district court refused to consider the State's record evidence, regarding the existence of the right-of-way and the extent to which it transverses the Appellee's property:

> I know you had some items [INAUDIBLE] motion for summary judgment decision. You had some maps that may been relevant to the issue of whether or not [INAUDIBLE]. But the Court does not need to see any maps at this point, the decision having been made. And so, we will proceed today with the trial.

Id. Tr. 16:4-10.

24. After trial, the district court denied Appellant's motion to reconsider. [RP 411-12]

Action by the Intermediate Court

25. The intermediate court affirmed the district court on all grounds. [DOA 1].

26. In its ruling, the intermediate court began by characterizing the lawsuit as a *prescriptive easement* case. [DOA 1]. (emphasis added).

27. The intermediate court characterized the question of the existence of a "prescriptive easement" as dispositive to the issue of whether the district court's exclusion of evidence regarding the claimed prescriptive easement during trial was error. [DOA 7]. The intermediate court then ruled that partial summary judgment was appropriate because the State did not present sufficient admissible evidence to create a genuine issue of material fact as to the existence of a prescriptive easement. [DOA 7].

28. In its ruling, the intermediate court took pains to clarify the "slight distinction" between the terms "easement" and "right of way". The court noted that the terms have been intermingled throughout the proceedings in the District Court. *Id.*

29. The intermediate court explained, the vesting of title of highway rights-of-way is addressed by statute, citing NMSA 67-2-5 (1929). The intermediate court then

articulated the distinction that an "easement" grants a right to use or control without title to the property, thus the party that owns the property maintains title and their interest in the property is encumbered by the easement. [DOA 10]. These legal conclusions are undisputed.

30. The intermediate court agreed that in practice and in some contexts the phrases right-of-way and easement may be used interchangeably. Id., [DOA 11]. This assertion is undisputed, and Appellant acknowledges that the terms were sometimes intermingled in the proceedings below.

31. The intermediate court also articulated that N.M.S.A. Section 67-2-5 does not result in the establishment of easements by prescription because a right to use or control, *not* title to the land, is granted by easement by prescription. [DOA 11]. This legal conclusion is undisputed, but does not address the question of the prescriptive period of time necessary to vest equitable title, *which is distinct from* the establishment of a prescriptive easement.

32. The intermediate court noted that Appellee does not dispute that the roadways of US Highways 54 and 70, the shoulders of those roadways, the inlets of those roadways, and the curbs on the edge of those roadways are rights-of-way that belong to the State. The intermediate court specifically concluded that the disputed area is the land that spans between the non-roadway side of the curbs and the buildings in the middle of the triangular lot bordered by the roadways representing a large portion of the 2.016 acre lot that the Appellee attempted to sell. [DOA 12] The State disputes the conclusion regarding the boundaries of the property in dispute.

33. The intermediate court then concluded that the State relied upon a prescriptive easement theory which it believes resulted in the concession that the State has no right to the land by express easement title. Id., [DOA 12]. This assertion, and any purported concession, are disputed by the State.

34. Having thus narrowed the State's argument and presentation, the intermediate court determined that the substantive law governing the summary judgment dispute is that of prescriptive easements, and therefore the question to be determined was whether the elements of a prescriptive easement were met for the disputed portion of the property. [DOA 12} On that basis, the intermediate court affirmed the district court decision that the State had not established the elements of a prescriptive easement. [DOA 12].

D. ARGUMENT

The lower courts misapprehended the State's argument, and reached the conclusion that the State does not have a property interest in land within the Tularosa Triangle based on "prescriptive easement law" - which is the wrong tool for the facts presented. The choice of the wrong substantive law to be applied to complete the analysis of the State's right to use portions of the Triangle resulted in error. If the lower courts had begun with the proper premise, i.e. an inspection of the language of NMSA 1978, 67–2-5, to frame the question of whether the State holds equitable title, for use and maintenance, to rights-of-way on US highways 54 and 70 within the Tularosa Triangle, the proper analytical framework and conclusions would include:

1) The State of New Mexico presented facts sufficient to defeat summary judgment, and which tended to show that the State holds superior equitable title to rights-of-way that

traverse Appellee's property because it demonstrated that it fulfilled the requirements of NMSA 67-2-5 by showing use of the property for one year;

2) The existence of equitable title to the encroaching right-of-way can be decided as a question of law; and the State should have been permitted to present its testimony concerning use of the property to prove the vesting of ownership. The District Court had before it testimony and information which establish the State's use of the land for one year, but chose to ignore those facts which otherwise created a disputed issue for trial; and

3) The existence of the State's equitable title, which gives the State the right to use land appurtenant to the highways, combined with the lack of waiver of immunity, dictate that claims for inverse condemnation, slander of title and interference with a contract are improper and must fail. [BIC 10-13, 19-29, 36-39).

I. The decision to apply "prescriptive easement" law, which underlies the summary judgment ruling, and which resulted in the subsequent decisions to exclude evidence of the State's use of property within the Triangle, lead to an erroneous determination that the State did not support the existence of a statutory right-of-way within the disputed property.

Legal Standard

The granting of summary judgment is reviewed *de novo*. *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 7, 148 N.M. 713, 242 P.3d 280. Summary judgment is a drastic remedial tool which demands the exercise of caution in its application, and the record is reviewed in the light most favorable to support a trial on the merits. *Woodhull v. Meinel*, 2009-NMCA-015, ¶ 7, 145 N.M. 533, 202 P.3d 126. Summary judgment is proper where no genuine issues of material fact exist and the movant is entitled to judgment as a matter of law. *Carrillo v. My Way Holdings, LLC*, 2017-NMCA-024, ¶ 24, 389 P.3d 1087. On appeal from the grant of summary judgment,

the court reviews the whole record in the light most favorable to the party opposing summary judgment to determine if there is any evidence that places a genuine issue of material fact in dispute. *City of Albuquerque v. BPLW Architects & Eng'rs, Inc.*, 2009-NMCA-081, ¶ 7, 146 N.M. 717, 213 P.3d 1146.

The Governing Statutes and Regulations

NMSA 1978, Section 67-2-1 defines "public highways" as "[a]ll roads and highways, except private roads, established in pursuance of any law of New Mexico, and roads dedicated to public use, that have not been vacated or abandoned, and such other roads are recognized and maintained by the corporate authorities of any county in New Mexico[.]" There is no dispute that highways 54 and 70 are highways contemplated under NMSA 1978 Sec. 67-2-4(A). There is no dispute that the land subject to the appeal is the land within the intersection of those state highways.

NMSA §67-2-5 [Rights-of-way vest in state after use as highway for a year] provides:

> When any state highway in the state of New Mexico, is continuously used by, or open for use to the public, as such, for a period of one year from and after the time this act [] goes into effect, or for a period of one year at any time thereafter, and the same has not been so used or occupied under any lease, contract or agreement recognizing the ownership of the right-of-way thereof in any person, firm or corporation, other than the state, such right-of-way shall be and become the property of and fee thereto shall vest in the state of New Mexico for such highway purposes, and the title thereto shall not thereafter be divested by adverse possession or in any other manner except with the consent of the state of New Mexico, so long as such right-of-way is so used for highway purposes.

The term "'highway right-of-way' means all roads, patrol yards, and rest areas owned, controlled or maintained by the Department. The term 'road' means the entire width of the right of way *and shall include* but not be limited to: travel lanes, roadside, *shoulder, median, ditches,*

culverts, ramps turnouts and construction and maintenance easements." NMAC 18.20.5. 7(D)(emphasis added).

A. The lower courts committed error when they determined the evidence presented by Appellant did not support the establishment of the statutory right to equitable title within the disputed property area.

In furtherance of the Statute, established case law provides that under NMSA 1978, Sec. 67-2-5, superior title to rights-of-way in real property vests in the State when the property has been used continuously, *or* has been open for public use, for a one-year period. S*ee State ex rel. State Highway & Transp. Dep't v. City of Sunland Park*, 1999-NMCA-143, ¶¶ 14-15, 128 N.M. 371 (noting when the Section 67-2-5 conditions are met, the State holds equitable title that is superior to legal title). The preconditions for vesting superior equitable title pursuant to Section 67-2-5 are akin to, but not the same as, the elements necessary for obtaining a prescriptive easement. *See Lovelace v. Hightower*, 1946-NMSC-013, ¶ 8, 50 N.M. 50 (recognizing that public roads may be created by prescription); *see also Algermissen v. Sutin*, 2003-NMSC-001, ¶ 10, 133 N.M. 50 (adopting the Restatement (Third) of Property: Servitudes definition for prescriptive easement: "an easement by prescription is created by an adverse use of land, that is open or notorious, and continued without effective interruption *for the prescriptive period*") (citation omitted) (emphasis added). The distinction between prescriptive easement and equitable title is revealed in the right created – after one year of open and undisputed use (i.e., the "prescriptive period") superior equitable title vests in the State regardless of other ownership, thereby limiting the use of the property. As the intermediate court here concluded, a prescriptive easement, by contrast, only burdens the land and does not divest the fee owner of a property right.

i. Both of the lower courts relied on the wrong body of law in reaching their conclusions.

Overlooked by both lower courts was the operative law that established the State's equitable title in the rights-of-way on Highways 54 and 70. Rather than focusing on the Statute's mandate that equitable title vests after one year of use, or after the property is open to the public for use for one year, the courts below applied the general non-statutory test for prescriptive easements and sought proof of continuous use for an undefined prescriptive period. This analytical misstep resulted in both courts' failures to detect the relevant dispute for trial: Given that equitable title to the rights-of-way exists, what is the width of the rights of way that traverse the Triangle? Or, stated differently, how far does the State's equitable title extend into the Triangle? This is the trial question that would properly be before the district court on remand. S*ee Dutton v. Slayton*, 1979-NMSC-031, ¶ 92 N.M. 668 (reversing the grant of summary judgment because "questions of fact as to the existence of a public easement are raised"). **[BIC 19-29]**.

The law generally applicable to prescriptive easements, and the law regarding vesting of equitable title by statute, are different. One readily ascertainable difference is the time needed (the prescriptive period) to establish the existence of the property right. NMSA 1978, §67-2-5 confers equitable title to the State for any highway, and highway right-of-way, which is open for public use for a period of one year.

A shorter prescriptive period is appropriate in the context of public rights of way appurtenant to highways. In *Lovelace v. Hightower, 50 NM 50,* 168 P.2d 864, 866 (N.M. 1946), this court considered whether a highway had been established under the applicable state statute, and if so what the time period for establishment was under the circumstances presented. This Court determined: "…[W]e are of the opinion that if in this state a highway can be established over public land by a public user alone (that is, if the offer to dedicate can be accepted by the public without some action by the public authorities), the continued use of the road by the general

public for such time and under such circumstances as to clearly prove an acceptance of the offer by it, the highway is established, whether the time of user is six months or fifty years." Id., *Lovelace at para. 11.*

Similarly, in *State ex rel. State Highway & Transportation Dep't of New Mexico v. City of Sunland Park, 1999-NMCA-143, ¶ 14, 128 N.M. 371, 375, 993 P.2d 85*, the Court of Appeals was tasked with determining whether or not NMSA 1978, §67-2-5 conferred sufficient title to property at issue that it would give standing to the New Mexico Highway Department to oppose the annexation of land by the City of Sunland Park, concluded that NMSA 1978, §67-2-5 granted sufficient ownership interest to the New Mexico Highway Department to confer standing, because Highway 136 was a state highway that was open for public use for more than one (1) year.

A second distinction between establishment of a prescriptive easement and a right to vested superior equitable title for highway maintenance under NMSA 67-2-5 is the requirement that the use be continuous. To establish a general prescriptive easement the adverse and notorious use of the land must be "continued without effective interruption for the prescriptive period (of ten years). *See, Algermissen v. Sutin, 2003-NMSC-001, ¶ 10, 133 N.M. 50, 54, 61 P.3d 176, 180.* Under the plain language of NMSA §67-2-5 however, there is not a requirement that the State demonstrate continuous use by the public for even one (1) year - *there is only a requirement that the area be open for public use for one (1) year*. As such, the question is not whether the area was *in use* by the State or the public, only that the area was *open for* public use. Here, the State has produced supported testimony and public records illustrating that the State has actually used the disputed land for more than a year for maintenance of clear zones, signage and environmental monitoring.

Given that NMSA 1978, Sec. 67-2-5 was enacted on or about March 31, 1978, the State developed its interest in the highway and the disputed area one (1) year later. The latest the State could have developed its interest in the area was April 1, 1979 – before the Plaintiff purchased the land at issue in April 2011.

ii. Relevant and material facts that were considered by the district court, but misread by virtue of the inappropriate application of law, establish the State's right to equitable title, and mandate reversal of both lower court decisions.

In the Smelker Affidavit, which was supported by public records; in the Trial Brief; in the Motion for Reconsideration; and in its post-trial proposed Amended Findings of Fact and Conclusions of Law, the State presented and referenced testimony demonstrating its ongoing maintenance and use of the rights-of-way appurtenant to the highway in the Triangle - to include the posting of Highway signage in the Triangle, as well as environmental monitoring sites - and this evidence should have been considered in analyzing whether the elements of the Statute were met. Smelker 's testimony established the State held rights-of-way to the highways when it satisfied the conditions imposed by Section 67-2-5 as far back as 1960. **[BIC 10-13].**

New Mexico regulation NMAC 18.20.5.7(D) defines highway rights-of-way as "all roads, . . . controlled or maintained by the Department. The term 'road' means the entire width of the right of way and shall include but not be limited to: travel lanes, roadside, shoulder, median, ditches, culverts, ramps turnouts and construction and maintenance easements"). Consistent with NMAC 18.27.6.7 (P)(5), The Smelker Affidavit explains the width of a clear zone for highway maintenance is dependent on and is based on a risk analysis which assesses key safety factors including traffic volumes, types of traffic (heavy truck, passenger . . .), speeds, and geography including slopes, curves, fixed features and other obstacles which could cause vehicles to rollover, among other factors. **[BIC 12, 14, 21, 27-28; RB 9-14]** (emphasis added). Furthermore,

Smelker testified to the obligations of the State to maintain the public rights-of-way including those within the Triangle, which may consist of, for example, snow removal in the clear zone. *Id.*

Federal law also supports and tracks the New Mexico regulations defining the width of the highway right-of-way. As defined by federal regulation, clear zones are based on traffic volumes and speeds, irrespective of whether there is or is not a curb. *See* 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*MTg3ODEwNjQy OC4xNzM5Mzc5NzI1*_ga_VW1SFWJKBB*MTczOTQ2ODQyMS40LjEuMTczOTQ2ODU3 Mi4wLjAuMA (last visited Feb. 13, 2025) ("Since curbs are now generally recognized as having no significant containment or redirection capability, clear zone should be based on traffic volumes and speeds, both without and with a curb.").

The incorporeal nature of rights-of-way does not diminish their concrete reality. Had evidence produced and submitted by the State been considered below, the disputed issue concerning whether the width of the right-of-way extends past the curb into the disputed property would have prevented the grant of partial summary judgment in favor of the Respondent. **[BIC 26-36]**

Record evidence provided in opposition to the summary judgment motion made the fact-issue evident because the State's evidence demonstrated that since at least 1960, the State has held a right-of-way that extends approximately 100 feet from the centerlines on either side of both Highways 54 and 70. **[BIC 12-13, 21]** The District Court should not have granted summary judgment once this disputed material fact was presented and the intermediate court, in its *de novo* review, similarly misapprehended the impact of the information presented, and its relationship to the controlling Statute.

Both Parties produced evidence in support of their positions— the Appellee argues the rights-of-way do not extend past the top edge of the property, or, according to its expert, argues that the rights-of-way do not extend inward beyond the curbs on the roadway, while the State produced evidence to the contrary. This contradiction in facts, acting alone, had it been considered below, suffices to establish a material factual dispute, and summary judgment granted inappropriate. **[BIC 28; AB 16, 23-24]** The contradiction in facts presents the trial question very clearly: What is the width of the rights-of-way, and to what extent do they encroach onto Appellee's private property? **[BIC 19-29; RB 12]**

The intermediate court relied on the fact that curbs encircle the Tularosa Triangle and edge the perimeter of the traveled highway paths. After so concluding, the intermediate court held that the evidence presented by the State was insufficient to establish a disputed material fact with regard to the mandate for "clear zones" that are part of the State's rights-of-way. As set forth above, the existence of a "curb" has little if anything to do with the appropriate width of a right away, and reliance on the existence of curbs is an unsupportable means of calculating a roadway boundary.

The Court of Appeals also determined that the Petitioner's evidence was not sufficient to demonstrate "continuous", "actual use" for the purposes of establishing a prescriptive easement. As set forth above, the controlling statute does not require such proof. Clearly, the Court of Appeals imposed a false standard to the detriment of the State.

B. The appellate court erred in affirming the District Court's exclusion of admissible evidence that demonstrated use of the contested property area by Appellant.

"The decision to exclude evidence rests within the discretion of the district court, 'and the court's determination will not be disturbed on appeal in the absence of a clear abuse of that discretion." *Coates v. Wal-Mart Stores, Inc.,* 1999-NMSC-013, ¶ 36, 127 N.M. 47, 976 P.2d 999

(internal quotation marks and citation omitted). 'An abuse of discretion occurs when the ruling is clearly against the logic and effects of the facts and circumstances of the case, is clearly untenable, or is not justified by reason.' *State v. Balderama*, 2004-NMSC-008, ¶ 22, 135 N.M. 329, 88 P.3d 845. On appeal, a party 'must show the erroneous ... exclusion of evidence was prejudicial in order to obtain a reversal.' *Coates,* 1999-NMSC-013, ¶ 37, 127 N.M. 47, 976 P.2d 999 (internal quotation marks and citation omitted); *see also* Rule 11-103(A) NMRA ("A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party[.]")." *See, Progressive Cas. Ins. Co. v. Vigil,* 413 P.3d 850, 855 (N.M. 2018)

The decision to exclude consideration of relevant and material testimony at trial is not justified because the inappropriate legal standard was applied to reach that decision, resulting in reversible error. Appellant attempted to introduce affidavit testimony and supporting public record materials at the district court trial. The district court chose not to examine this evidence, having already ruled at the summary judgment stage the State held no right of way or prescriptive easement. The evidence the State sought to introduce at trial further demonstrates that the limited requirements of the Statute were fulfilled, because the State used, has been using, and continues to use the disputed property as a right-of-way for maintenance and safety and as a location for environmental monitoring.

The Court of Appeals and the District Court committed prejudicial error when they respectively excluded and chose to uphold the exclusion of evidence based on application of the wrong legal standard. The district court acknowledged the State had evidence which was relevant to the area of the property at issue but refused to consider the evidence because it felt it had already decided the issue of whether or not a right of way existed by using general prescriptive easement law not statutory highway law. Given its early, erroneous ruling, the district court then

determined it was not necessary to consider any evidence which reflected upon or relied on the existence of the right of way. [RP 497]. The public record map which the State sought to introduce illustrates the area which is encumbered by the right of way and shows that the State has been continuously using the disputed area since at least September 2012, the date of the map.

The intermediate court took a different tangent and concluded the disputed property could not be used as a highway safety clear zone because the area had curbs. [DOA 15]. As set forth above, the existence of curbs is a red herring – they make no legal difference to the vesting of right-of-way or to the definition of a right-of-way boundary. As Smelker testified, the width of a clear zone is dependent on use, and is based on a risk analysis which assesses key safety factors including fixed features and other obstacles. The right-of-way is not defined by the existence of a curb.

The State also moved the district court to reconsider its partial summary judgment ruling and presented a Right-of Way map which shows that the State has placed environmental monitoring wells in the right of way area. *See, Motion to Reconsider pg. 4 Ex. 1 and Brief in Chief Appeals Court pg. 26 – 27.* [RP 355-360]. These monitoring wells have been in place since at least September 27, 2012, the date the Right of Way Map was finalized. *See, id.*.

Because the district court improperly determined that the State *did not* have the right-of-way at the summary judgment stage, it decided the evidence which the State sought to introduce was unnecessary. Then, because the right of way question was incorrectly analyzed, the resulting exclusion of evidence was also improper, and amounts to an abuse of discretion, because the ruling is clearly against the weight of established law, logic, and the facts and circumstances of the case, and is therefore not justified by reason. If the Court had appropriately determined that the Appellant held the statutory right of way as a matter of law, and therefore had title to an

undefined portion of property, the extent of the area claimed by the State would need to be examined and should have been examined at trial.

HOW WAS THE ISSUE PRESERVED FOR THE APPEALS COURT:

The foregoing issues were preserved for appellate review in the Defendant's Response In Opposition to Partial Motion for Summary Judgment filed on December 23, 2022, Defendant's Trial Brief filed on April 24, 2023, Defendant's Notice of Supplemental Authority filed on May 2, 2023, Defendant's Motion to Reconsider Order of April 24, 2023 filed on May 5, 2023, Defendant's Amended Proposed Findings of Facts and Conclusions of Law filed on May 7, 2023, and Defendant's Post Trial Findings of Fact and Conclusions of Law filed May 19, 2023. *See, Record Proper* [RP305-314; 321-322; 355-360; 381-387; 413-421]. The parties asserted their respective legal and factual arguments in the supporting briefing and at the hearings held on April 24, 2023, and the trial held on May 8, 2023 and May 9, 2023.

C. The appellate court erred in failing to treat the question of public highway right of way" and the width and conditions of the right of way as a question of law.

To the extent that the question implicates statutory interpretation, the appellate courts review issues concerning legislative intent de novo. *State v. Fleming,* 2006–NMCA–149, ¶ 9, 140 N.M. 797, 149 P.3d 113. *See also, Ortiz v. Overland Express*, 237 P.3d 707, 712 (N.M. 2010). "Generally, this Court interprets statutory provisions with the primary goal of determining and giving effect to the intent of the legislature. *See, Junge v. John D. Morgan Constr. Co.,* 118 N.M. 457, 463, 882 P.2d 48, 54 (Ct.App.1994)." *See, Espinosa v. Albuquerque Pub. Co.,* 943 P.2d 1058, 1060 (N.M. App. 1997).

The actions of the legislature reflected in the language of NMSA 1978, 67 -2-5 are clear, and undisputed by the Appellee. The Legislature intended to provide a path for the State to obtain equitable title to land appurtenant to State highways for maintenance and safety purposes.

As set forth above, the Appellee only contests the width of the right-of-way at issue, not the existence of the right-of-way. Appellee believes that the roadbed which the highway traverses is State property, or at least does not contest that the roadway is State property. The only dispute is whether the definition of roadway and thereby right-of-way extends to traversed property beyond the roadbed, or as the intermediate court suggested, beyond the curbs. As set forth above, the definition of the highway right-of-way adopted and New Mexico regulations, and federal regulations makes clear that the right-of-way extends beyond the roadbed.

At trial, the district court admitted public record maps showing the existence of the right-of-way as measured 100 feet from the centerline of the roadway into the adjacent property. See, Trial Transcript, p. 134. The maps, part of Defendant's Exhibit 10, a New Mexico Department of Transportation Title Report, show Lots 11 and 12 of the subject property superimposed on the 1950's and 1960's map of the 100' rights-of-way for Project F-021-1 (8), which was the map for the intersection of Highways 54 and 70. See, Trial Exhibit 10, BATES No. DOT 01062. In addition, Trial Exhibit 10, BATES No. 1064, part of the same official Title Report document, also reflects 100 foot right-of-way measured inward toward the Triangle from the center of the road. This uncontested Trial Exhibit was admitted by the district court, which must have deemed the exhibit both relevant and material, and is the best public record, and an uncontested public record, of the legal width of the rights-of-way as determined by the State, superimposed on the property owned by the Appellee. The Trial Exhibit further reflects the right-of-way which accords with state regulations, and demonstrates that the curbs on the edge of the roadway are not proper boundary markers. The maps are self authenticating public records, which are records of documents affecting property. The Trial Exhibit is not subject to attack at this stage as there was no objection, and it would be admissible under any circumstances under Rules 11-

803(6),(8), and (15) of the Rules of Evidence. Thus, the district court had before it – and chose to ignore – admitted facts that demonstrate a contest over the appropriate boundary. This issue should have been resolved by a trier of fact, not by summary judgment.

Therefore, as a matter of law, the lower courts could have, and should have determined as a matter of law that the highway rights-of-way exist and that the use reflected on the public records submitted for trial was uncontested, thereby establishing the boundary claimed by the State.

HOW WAS THE ISSUE PRESERVED FOR THE APPEALS COURT:

The foregoing issues were preserved for appellate review in the Defendant's Response In Opposition to Partial Motion for Summary Judgment filed on December 23, 2022, Defendant's Trial Brief filed on April 24, 2023, Defendant's Notice of Supplemental Authority filed on May 2, 2023, Defendant's Motion to Reconsider Order of April 24, 2023 filed on May 5, 2023, Defendant's Amended Proposed Findings of Facts and Conclusions of Law filed on May 7, 2023, and Defendant's Post Trial Findings of Fact and Conclusions of Law filed May 19, 2023. *See, Record Proper* [RP305-314; 321-322; 355-360; 381-387; 413-421]. The parties asserted their respective legal and factual arguments in the supporting briefing and at the hearings held on April 24, 2023, and the trial held on May 8,

2023 May 9, 2023.

D. The appellate court erred by affirming the district court's reliance on facts presented in relation to claims of slander of title and interference with contractual relations in support of Respondent's inverse condemnation against the State when the State did not waive immunity.

Questions of law are reviewed de novo on appeal, meaning the appellate court gives no deference to the legal conclusions of the district court and considers the issue independently. This standard applies broadly to legal determinations, including statutory interpretation, immunity,

and the interpretation of regulations or official documents. "[A]n 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, ¶ 15, 141 N.M. 21, 26, 150 P.3d 971, 976; *Self v. United Parcel Serv., Inc.,* 1998-NMSC-046, ¶ 6, 126 N.M. 396, 399, 970 P.2d 582, 585. Similarly, legal issues, such as the interpretation of federal regulations or documents issued pursuant to statutory authority, are subject to *de novo* review. *Marchand v. Marchand*, 2008-NMSC-065, ¶ 18, 145 N.M. 378, 382, 199 P.3d 281, 285.

ii. The District Court committed reversible error when it concluded that the 2016 Quiet Title action determined the rights of the parties in this matter.

The District Court commit reversible error when it concluded that a 2016 quiet title action where the State was not named as a party- was determinative of the rights of the parties in *this* litigation, because the State is immune to such claims under NMSA §42-6-12.

It is well settled that the state or an agency thereof is immune to suit absent its consent to be sued: "No citation of authority is necessary for the fundamental proposition that the State cannot be sued without its consent." *Maes v. Old Lincoln Cnty. Mem'l Comm'n, 1958-NMSC-115, ¶ 8, 64 N.M. 475, 477, 330 P.2d 556, 558*. Consent to a suit must be granted by the legislature. Under NMSA §42-6-12 the State gives limited consent to specific instances of suit to quiet title: "Upon the conditions herein prescribed for the protection of the state of New Mexico, the consent of the state is given to be named a party in any suit which is now pending or which may hereafter be brought in any court of competent jurisdiction of the state to quiet title to or for the foreclosure of a mortgage or other lien upon real estate or personal property, for the purpose of securing an adjudication touching any mortgage or other lien the state may have or claim on the premises or personal property involved." *See, NMSA §42-6-12*. In *Maes* this Court held: "This section was enacted for the limited purpose of aiding a mortgagee who discovers that the State

has acquired an interest in the mortgaged property and is unable to pass a marketable title to the purchaser at a foreclosure sale unless the state can be joined in the foreclosure suit. Maes, at para. 10.

Nevertheless, at the Appellee's request, the district court took judicial notice of the previous action to quiet title in cause number D-1215-CV-2015-00630, an action filed by the Appellee in November 23, 2015. *See, Order entering Declaratory Judgment ¶8-10.* [RP 492]. The action was filed solely against the Estate of Cecil L. Glover and John Does 1 through infinity, but does not list the State of New Mexico or any agency thereof as a party. The district court then determined the resolution of this quiet title action by default judgment granted the Appellee the entire property with free and clear title, despite the fact the action was filed against a private party, and the State was not heard. *See, Order Entering Declaratory Judgment ¶8 -10.* [RP 492]. The State has immunity from quiet title actions to which it has not consented, and could not have had its claim adjudicated, or its statutorily granted rights revoked by the District Court in D-1215-CV-2015-00630 because the State was never noticed as a party in that matter.

Appellant requests this court enter an order overturning the District Court's Finding of Fact that the Default Judgment entered in D-1215-CV-2015-00630 granted Appellee free and clear title to the property, as the State is immune to quiet title claims to which it has not consented, and the State was not noticed as a party in D-1215-CV-2015-00630, and therefore could not have granted consent.

iii. The lower courts committed reversible error in upholding the viability of the slander of title claims

Whether the lower courts properly found Appellee's slander of title claims viable is also a question of law reviewed under a *de novo* standard. Under New Mexico case law slander of title is a tort. *See, Superior Construction, Inc. v. Linnerooth, 103 N.M. 716, 712 P.2d 1378 (1986)*

(considering slander of title as an action based in defamation law); see also Ruiz v. Varan, 110 N.M. 478, 797 P.2d 267 (1990). "The tort of slander of title occurs when one who, without the privilege to do so, willfully records or publishes matter which is untrue and disparaging to another's property rights in land, as would lead a reasonable man to foresee that the conduct of a third purchaser might be determined thereby. *See Dowse v. Doris Trust Co.,* 116 Utah 106, 208 P.2d 956 (1949)." *See, Den-Gar Enterprises v. Romero,* 611 P.2d 1119, 1124 (N.M. App. 1980)

Appellant has a claim for equitable title in those areas of the Triangle which are traversed by the maintenance and clear zones for safety rights of way. If Appellant's argument is accepted by the Court, then there can be no slander of title because the State has superior equitable title in those areas of the disputed property. To maintain their claim for slander of title the Appellee must show that the Appellant had no privilege to publish its claim that it had an interest in the property. If the Appellant has equitable title to the public right of way, then it has the privilege to publish its claim and challenge contrary claims.

Alternatively, the State is immune from claims for slander of title under the circumstances presented here. Under the New Mexico Tort Claims Act, NMSA §41-4-4 the State has immunity from tort claims, including defamation, except those where immunity has been waived:

> A governmental entity and any public employee while acting within the scope of duty are granted immunity from liability for any tort except as waived by the New Mexico Religious Freedom Restoration Act and by Sections 41-4-5 through 41-4-12 NMSA 1978. Waiver of this immunity shall be limited to and governed by the provisions of Sections 41-4-13 through 41-4-25 NMSA 1978, but the waiver of immunity provided in those sections does not waive immunity granted pursuant to the Governmental Immunity Act.
>
> *See, NMSA 1978 §41-4-4 (A)*

The provisions of the New Mexico Religious Freedom Restoration Act, and those sections of the New Mexico Tort Claims Act which provide for instant waivers of immunity do not apply to defamation claims: "The Court agrees that the NMTCA has not waived immunity for claims of defamation or malicious abuse of process against the Mayor and the Transit Department Director. *See* NMSA 1978, § 41–4–4(A) (noting waivers of immunity in §§ 41–4–5 through–12)" *See, Salazar v. City of Albuquerque*, 776 F. Supp. 2d 1217, 1243 (D.NM. 2011). As such, there is no waiver of the State's immunity in this case, and the state has not consented to waiver of the immunity provided against defamation under NMSA 1978 §41-4-4(A). "The TCA delimits the scope of liability for government entities and their employees by: (1) retaining immunity for torts not waived by the TCA, *see* Section 41–4–2(A) (1976); and (2) waiving immunity and recognizing liability, subject to certain protections, for employees acting within their scope of duty, *see* § 41–4–4 (1996). The TCA specifically provides that it is "the exclusive remedy ... for any tort for which immunity has been waived." *See* § 41–4–17(A) (1982). *See, Celaya v. Hall*, 85 P.3d 239, 242 (N.M. 2004)

Appellant has not waived its immunity from the tort of defamation in this case, and the Appellee has not shown that its claim for slander of title is entitled to waiver under NMSA 1978 §41-4-5 – §41-4-12. As such, the district court erred in granting the Appellee's claim for slander of title and any damages stemming therefrom on the basis that the State has not waived its immunity from the torts of defamation or slander of title.

iv. The lower courts committed reversible error when they concluded the State inversely condemned property which the Appellee purchased subject to the State's equitable title

The lower courts committed reversible error when they concluded that the State inversely condemned property which the Appellee purchased subject to the State's equitable title for a maintenance and the preservation of clear zones.

In order to succeed on a claim for inverse condemnation the Appellee would need to show that there was a deliberate taking or damaging of private property for public use, by an entity authorized to exercise the power of eminent domain, where there has been no compensation paid nor condemnation initiated. *See, Electro-Jet Tool Mfg. Co., Inc. v. City of Albuquerque, 114 N.M. 676, 845 P.2d.770, 772 1992-NMSC-060.* In this matter, there can be no taking or damage to private property for public use if the State already has equitable title in the land at issue, as there would be no private property ownership to damage or take from

Again, the Appellant's right, interest and title in the disputed property was conferred by NMSA §67-2-5. The Statute contemplated was enacted in 1979, and has been in effect since then. The Appellee did not obtain the property until April 15, 2011. *See,* Order Entering Declaratory Judgment ¶2. By operation of the Statute the State's interest in the public highway was acquired one (1) year after the act was enacted, or for a period of one year anytime thereafter. Appellee cannot and does not argue that State Highway 54 and 70 had not been open for use by the public for one year or more prior to their acquisition of the property in in question in 2011. Because the State already had a vested interest in the property at issue prior to the acquisition by the Appellee, there could not be any damage to the Appellee such that it would constitute a taking of private property as required to state a claim for inverse condemnation.

v. The lower courts committed reversible error in not dismissing Appellee's intentional interference with contractual relations claim because inverse condemnation is the exclusive remedy for an alleged taking of property for public use.

A property owner is entitled to just compensation when his property is taken or damaged for public use. N.M. Const. art. II, § 20. The eminent domain statute provides the means for the ascertainment and payment of those damages. *See* NMSA 1978, § 42–1–1 et seq. (repealed effective July 1, 1981 and replaced by NMSA 1978, § 42A–1–1 et seq.) As long as the property has been taken or damaged for public use, inverse condemnation provides the exclusive remedy for the property owner if the condemnor takes or damages property without paying just compensation or without initiating proceedings to condemn. *Zobel v. Public Service Company,* 75 N.M. 22, 399 P.2d 922 (1965); *Garver v. Public Service Company of New Mexico*, 77 N.M. 262, 421 P.2d 788 (1966).

Appellant referred to this matter prior to trial in its argument that the Court did not have jurisdiction to hear this claim because the inverse condemnation statute is the exclusive remedy for the damages that Appellee seeks. *See, Transcript Day 1 pg. 5 ll. 12 – pg. 6 ll.2.* Appellee's counsel admitted to the court that normally a claim for intentional interference with contractual relations claims would not lie against the State. *See, Transcript Day 1 pg. 7 ll. 21 – 25,* but nevertheless argued that in the context of an inverse condemnation claim specifically Appellee was allowed to bring this claim as supportive of the takings claim under inverse condemnation. *See, Transcript Day 1 pg. 8 ll. 5 – 22.* In this context, the Appellee's counsel suggested the facts which support the claim for inverse condemnation would likewise support tortious interference with contract claims, but did not explain how that entitled Appellee to a finding of liability and damages on such a claim when the Appellee is proceeding with an inverse condemnation claim, "as the main claim." *See, id.* Main claim or otherwise, the Appellee's inverse condemnation theory. Whether or not the facts of the case may support a claim for tortious interference of

contract as well as an inverse condemnation claim is an academically moot point as the case law only permits recovery under inverse condemnation theory.

HOW WAS THE ISSUE PRESERVED FOR THE APPEALS COURT:

The foregoing issues were preserved for appellate review in the Defendant's Response In Opposition to Partial Motion for Summary Judgment filed on December 23, 2022, Defendant's Trial Brief filed on April 24, 2023, Defendant's Notice of Supplemental Authority filed on May 2, 2023, Defendant's Motion to Reconsider Order of April 24, 2023 filed on May 5, 2023, Defendant's Amended Proposed Findings of Facts and Conclusions of Law filed on May 7, 2023, 647322and Defendant's Post Trial Findings of Fact and Conclusions of Law filed May 19, 2023. *See, Record Proper* [RP305-314; 321-322; 355-360; 381-387; 413-421]. The parties asserted their respective legal and factual arguments in the supporting briefing and at the hearings held on April 24, 2023, and the trial held on May 8,

2023 and May 9, 2023.

CONCLUSION

It is imperative for this Court to address the oversights below. The State has long held rights-of-way over the disputed property area, as a result of its obligations to maintain highways for public use. **[BIC 13, 21]** Subsequent purchasers of land subject to the State's rights-of-way do not have the option to convert the right of way to private use. The lower courts' decisions, however, sanction and memorialize just that: a private corporation's claim that it may ignore the public rights-of-way at issue - in derogation of New Mexico law and public policy - for private gain.

Appellant requests that this Court overturn the conclusions of the intermediate court and the district court regarding summary judgment on prescriptive easement grounds, and overturn

the improper exclusion of evidence of the rights of way, and either decide the issue as a matter of law, i.e., the public record and uncontested testimony prove the existence of a 100 foot right of way measured from the center of the highways at issue, or, alternatively, remand this matter for trial to determine the appropriate boundary of the rights of way vested by the Statute for the benefit of the public.

For the reasons stated above, the errors made by both lower courts require this Court's attention, so that State's and the public's interest in safe use of highways are not diminished in the face of a private desire for private gain at severe public expense.

Respectfully submitted,

CARRILLO LAW FIRM, P.C.

By: */s/ Raúl A. Carrillo, Jr.*
Raúl A. Carrillo, Jr. (Bar No. 5600)
P.O. Box 457
Las Cruces, NM 88004
575/647-3200
575/647-1463 facsimile
raul@carrillolaw.org
Counsel for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of May, 2025 a true and correct copy of the foregoing document was filed through the Odyssey Electronic Filing System and that a true and correct copy was served on the following:

Supreme Court:
(Via Facsimile)

Chief Clerk Elizabeth E. Garcia
New Mexico Supreme Court
237 Don Gaspar, Rm. 104
Santa Fe, NM 87501
Fax: (505) 827-4837

Trial Judge:
(Via electronic mail)

Vacant
Twelfth Judicial District Court
1000 New York Avenue
Alamogordo, NM 88310
aladdiv2proposedtxt@nmcourts.gov

Court Services Manager:
(Via electronic mail)

Phil Hester
Twelfth Judicial District
Court's Service Manager
1000 New York Avenue
Alamogordo, NM 88310
aladphh@nmcourts.com

Trial Counsel of Record:
(Via electronic mail)

Elizabeth K. Watson
John D. Wheeler
John D. Wheeler & Associates, P.C.
Attorneys for Plaintiff
ekw@jdw-law.com
jdw@jdw-law.com

/s/ Raúl A. Carrillo, Jr.
Raul A. Carrillo, Jr.