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 REPLY IN SUPPORT OF BRIEF IN CHIEF

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INTRODUCTION

Plaintiff R&R, LLC continues to create distractions to avoid the obvious: Roadways require maintenance. Maintenance requires access via an easement or right of way. The State has and has always had a right of way abutting Highways 54 and 70, and especially and also where they meet in Tularosa, New Mexico. Lacking an effective means of rebutting both historical use and the legal implications of the statutory right-of-way that vests in the State under NMSA 1978, § 67-2-5, R&R engages in an exercise of distraction—deliberately avoiding the central statutory question and instead attempting to recast this case as a "proof of use" dispute under prescriptive easement doctrine.

New Mexico law has long imposed a burden on purchasers to exercise due diligence by retrieving and reviewing public records before acquiring property. NMDOT's Trial Exhibit No. 10—a certified Title Report— admitted at the trial without objection from R &R contains the right-of-way documents that were matters of public record available to R&R. A purchaser who ignores the public record cannot later displace statutorily vested public rights-of-way by claiming ignorance. Plaintiff's Answer Brief rests on two fundamental misconceptions: first, that the State must prove "actual use" in the narrow, physical-incursion sense to establish a statutory right-of-way under § 67-2-5; and second, that the State's reliance on § 67-2-5 is somehow a "new theory" never preserved below. Neither of these assertions is correct.

Section 67-2-5 is not an obscure afterthought; it was expressly raised, cited, and argued by NMDOT in the district court, on appeal, and in the Petition for Writ. That statute does not require a cramped showing of visible "highway infrastructure" on the disputed property; it vests title in the State upon one year of continuous public use or openness for public use, without the owner's permission, for highway purposes. The Legislature's choice of language reflects a broader and operational concept of "use" tied to the entire functional envelope of a highway—including safety clear zones, drainage systems, signage, utilities, and maintenance areas—not merely the paved lanes or curb line.

Plaintiff's attempt to frame the case as a failure of "proof of use" ignores the uncontroverted evidence: the Smelker Affidavit, official right-of-way maps dating back to 1960, and testimony regarding placement of signage, environmental monitoring wells, and clear-zone maintenance activities. These materials directly establish the statutory vesting elements. The

lower courts erred by excluding or disregarding this evidence, and Plaintiff's Answer Brief does not address that legal error.

Plaintiff's repeated assertion that NMDOT seeks "mass takings" without compensation is pure rhetoric. Section 67-2-5 has existed for nearly a century, operating within constitutional bounds and under consistent judicial interpretation. Applying it here does not expand State power—it preserves long-recognized statutory rights essential to the safe operation, maintenance, and future adaptability of the State's critical transportation infrastructure.

I. § 67-2-5 vests the State with equitable title to highway rights-of-way after one year when the way is "used by, or open for use to, the public." The statute does not require proof of continuous "actual use" of each square foot - a beaten path analysis is inappropriate.

Section 67-2-5 provides that when "any state highway … is continuously used by, or open for use to the public … for a period of one year," the "right-of-way shall be and become the property of" the State and "the title thereto shall not thereafter be divested … except with the consent of the state." The Legislature thus created two alternative vesting routes: "used by" or "open for use to the public." It also provided a potent anti-divestiture rule reflecting the public-safety function of highway rights-of-way. R&R insists only "actual use" counts. That collapses the disjunctive "or open for use" and rewrites the statute. The Brief in Chief correctly applies the plain language: vesting occurs upon one year of public highway use or openness, not a decade of adverse use under the *Algermissen* prescriptive-easement framework.

II. The right-of-way includes clear zones, drainage, utilities, and maintenance areas—well beyond the curb line—and the trial court record created (at minimum) a triable issue on the width of an already existing right of way.

New Mexico regulations define "highway right-of-way" and "road" to include "the **entire width** (emphasis added) of the right-of-way," not just the paved lanes, and to encompass "shoulder, median, ditches, culverts, ramps, … and construction and maintenance easements." NMAC 18.20.5.7(D). Related rules define the "public right-of-way" to include drainage, utilities, landscaping, berms, fencing, rest areas, and the defined clear zone. The Appellant ties those definitions to standard highway-safety engineering: clear-zone widths set by AASHTO/FHWA risk analysis (volumes, speeds, slopes, curves, fixed objects) and exist irrespective of curbs. These safety buffers are part of the right-of-way because they are necessary to operate and maintain the highway. This explanation is given in various places in the Court record, including the Petition for Writ of Cert and in various places in the trial record.

NMDOT submitted the sworn Smelker Affidavit explaining that (i) public highway rights-of-way include clear zones, drainage features, maintenance access, pedestrian and bike facilities, and utilities; (ii) for US-54/US-70, the clear-zone/maintenance-area right-of-way extends 100 feet from each centerline; and (iii) NMDOT has in fact used the area for signage, maintenance, and environmental monitoring wells for years. Historic and 2018 right-of-way maps accompanied the affidavit.

Contrary to the assertions in the response, these are not "eleventh-hour" claims. They were offered in opposition to summary judgment, again with the reconsideration motion before trial, and were preserved repeatedly. The district court also admitted NMDOT's Title Report, Exhibit 10, without objection, which is a public record at trial—mapping the 100-foot rights-of-way that burden the Tularosa Triangle— but then ignored the exhibit for trial purposes. That was legal error: the admitted Title Report contains very easily understood maps that are self-authenticating public records of documents affecting property. This is exhibit, already in the

record, established the State's version of facts that are contrary to the Appellee's claims – and which, when recognized, should have defeated summary judgment. Appellee, tries to equate the phrase "open for public use" with "the beaten path" or "pavement only," but the statutory/regulatory definitions and engineering evidence show otherwise: the right-of-way includes the safety and maintenance envelope adjacent to the traveled way, and that envelope is necessarily open for public highway use (e.g., for errant vehicles, sight distance, crash recovery, drainage, and the placement/servicing of public facilities). The statute does not require proof that the public physically walked on each square foot; it requires a highway that is used by, or open for use to, the public for one year. Defendants' Trial exhibit 10 shows the history of the property going back in time to at least the 1930s, showing the limitations and burden created by the right-of-way into the private properties extending beyond the so called "paved" or "beaten path".

In *Hall v. Lea County Elec. Co-op.*, 438 P.2d 632, 78 N.M. 792 (N.M. 1968) the court recognized the well-established principle that "a public highway established by prescription is not, as a matter of law, restricted in width to the track of actual travel, but includes the travelled track and whatever additional lands as are necessarily used and incidental thereto for highway purposes. See also, *Hoban v. Bucklin*, 88 N.H. 73, 184 A. 362; 186 A. 8 (1936); Broward County v. Bouldin, 114 So.2d 737 (Fla.Ct.App.1959); *Yturria Town & Improvement Co. v. Hidalgo County*, 125 S.W.2d 1092 (Tex.Civ.App.1939); and *Nicolai v. Wisconsin Power & Light Co.*, 227 Wis. 83, 277 N.W. 674 (1938).

III. The proper use of summary judgment analysis here requires reversal and remand to the District Court.

Summary judgment is a "disfavored" tool requiring courts to view the whole record in the non-movant's favor and to proceed with caution. See *Romero v. Philip Morris* (de novo);

Woodhull v. Meinel (caution); *Carrillo v. My Way Holdings* (no genuine disputes); *City of Albuquerque v. BPLW* (whole record in light most favorable to non-movant). The lower courts short-circuited those rules by (1) applying the wrong substantive law, and (2) refusing to credit the Smelker evidence and admitted public-record maps. *Dutton v. Slayton* reconfirms that disputes over the existence/width of a public way are tried, not resolved against the State at summary judgment on a paper record that contains both competing sworn engineering testimony and official maps.

IV. R&R's "new theory" claim is wrong: The State has always relied on § 67-2-5; the so-called "prescriptive easement" terminology was a mislabel, not a new issue.

The Petition explains why "right-of-way" and "easement" are sometimes used interchangeably in practice, but § 67-2-5 speaks in vesting terms, i.e., "**title**" not mere use rights. The Court of Appeals erred by allowing the dispute to be bound by *Algermissen*'s 10-year prescriptive easement adverse-use rubric. NMDOT repeatedly cited § 67-2-5 below and preserved the vesting issue in its summary-judgment papers, reconsideration motion, and post-trial submissions. Clarifying, on appeal, that the correct characterization is "equitable title under § 67-2-5," not "prescriptive easement," does **not** inject a new issue; it corrects the legal label for the same facts, statute, and relief.

V. The 2016 quiet-title judgment is a red herring and the ruling in that case cannot divest the State's previously vested highway right-of-way.

The State has not consented to be sued to quiet title to its real estate interests, § 42-6-12, and courts strictly construe any waivers of sovereign immunity. *Maes v. Old Lincoln Cnty. Memorial Comm'n*, 1985-NMCA-106, ¶ 13, 103 N.M. 707, 712, confirms that absent such consent, quiet-title judgments cannot bind the State or cut off a statutorily vested right-of-way.

The record and procedural history of this case demonstrate that R&R's litigation strategy was developed well before the filing of the present lawsuit. The evidence and timing of events support a conclusion that the 2016 quiet-title action—a proceeding in which R&R strategically chose not to name the State as a defendant, was leveraged into an assertion before the District Court here that somehow the quiet title action resolved all disputes as to the ownership and use of the Tularosa Triangle. It is clear the judgment in the quiet title action was used to obtain a judgment that could later be wielded as purported proof of "clear title.," Nevertheless, the argument ignores the simple fact that the State cannot be sued in a quiet title action without its consent, and the State was not a party to the 2016 action. Had the State been named in the 2016 quiet title claim, and consented to litigation, a review of the public record would have revealed historic right-of-way maps, the Smelker Affidavit, and the clear-zone and maintenance-use history of the property presented in this case. In that scenario, R&R could not have obtained the "clean" fee title it has used in this litigation as a distraction from the clear language of the statute.

The district court in the present case compounded the problem by considering and relying on the quiet-title judgment to conclude that "no other entity or person" had a real interest in the property. That reliance was legally improper as section 42-6-12 prohibits quiet-title suits against the State unless the Legislature expressly consents, and the State was not even a party to the 2016 proceeding. A judgment entered in such circumstances is ineffective to adjudicate or extinguish the State's vested property rights.

Appellee's reliance on the 2016 quiet-title judgment is doubly flawed: (1) the judgment cannot bind the State or affect its property interests under established immunity doctrine; and (2) it was procured through a litigation strategy that deliberately excluded the one party—the State—whose statutory right-of-way was the true obstacle to R&R's business objectives. The

2016 quiet-title judgment provides no support for R&R's position, and the District Court's reliance on it was reversible error. The State's vested highway right-of-way, conferred by § 67-2-5, remains intact and unaffected by that prior judgment.

VI. R&R's inverse-condemnation theory collapses once the State's vested right-of-way is recognized; and tort evidence (slander of title/interference) cannot substitute for a taking.

The district court's handling of the inverse-condemnation claim inverted the proper analysis. It first excluded the State's right-of-way evidence—maps, sworn engineering testimony, and the Title Report—and then permitted R&R to prove "inverse condemnation" almost entirely through tort-style evidence about alleged interference with a potential third-party sale. That approach is precisely backwards.

If the State holds equitable title to a statutory right-of-way under NMSA 1978, § 67-2-5, then the State's assertion of that vested public property interest is not a "taking" of private property. It is, rather, the exercise of the State's lawful ownership in the highway corridor. A party cannot claim "damages" for the State's refusal to cede or disavow a property access right it already possesses. The Legislature enacted § 67-2-5 in 1979. The statute provides that when a state highway is "continuously used by, or open for use to, the public" for one year, the right-of-way "shall be and become the property of the state" and "shall not thereafter be divested … except with the consent of the state." By operation of law, the State's equitable title to the highway right-of-way in question vested at least one year after the statute's enactment—or, at the latest, one year after any subsequent period of qualifying public use.

The undisputed record shows that U.S. Highways 54 and 70 were in public operation and open for public use for many years prior to R&R's April 15, 2011 acquisition of the parcel.

Indeed, R&R has never argued otherwise. As a matter of law, then, the State's vested interest in the disputed right-of-way existed long before R&R purchased the property. That preexisting public interest precludes any constitutional "taking" from R&R, because there was no private property interest in that strip of land left to be taken. See *State ex rel. State Highway & Transp. Dep't v. City of Sunland Park*, 2000-NMCA-044, ¶ 8, 129 N.M. 151, 3 P.3d 128 ("all conditions necessary for the state's acquiring title had been satisfied").

The trial court's willingness to let R&R fill this void with tort-style proof—suggesting slander of title or interference with contract—cannot cure the absence of a compensable taking. The State has not waived immunity for such tort claims. See NMSA 1978, § 41-4-4(A) (general immunity); *Maes v. Old Lincoln Cnty. Mem'l Comm'n*, 1985-NMCA-106, ¶ 13 (strict construction of waivers). Allowing those theories and their attendant damages evidence to "stand in" for a takings claim not only violates immunity doctrine but also distorts the constitutional inquiry under Article II, § 20 of the New Mexico Constitution.

Inverse condemnation is not a catch-all remedy for every alleged harm involving State property. It requires proof that the State's action resulted in the taking or damaging of private property for public use without just compensation. Where, as here, the property interest in question was vested in the State years before the claimant acquired title—and long before the alleged injury—there is no private property to be taken. Without that threshold element, the inverse-condemnation claim fails as a matter of law, and the judgment based on it cannot stand.

VII. The Right-of-Way is part of the public record giving Plaintiff constructive notice and Plaintiff cannot claim otherwise.

Beyond the statutory vesting under § 67-2-5, the State's right-of-way in this case has been recorded in the public records multiple times over the last seventy years. Official right-of-way maps, surveys, and project plats were recorded in 1956, 1985, and 1989, all of which depict the boundaries of the highway right-of-way at the Y-intersection in Tularosa. These records were publicly available and remain a matter of record. Even more compelling, Plaintiff's own chain of title and purchase documents expressly reference the existence of the right-of-way at issue.

Under New Mexico law, recorded instruments impart constructive notice to all subsequent purchasers. NMSA 1978, § 14-9-2 provides in mandatory terms: "Such records shall be notice to all the world of the existence and contents of the instruments so recorded from the time of recording." By operation of that statute, Plaintiff is deemed to have notice of the highway right-of-way from the time those maps, plats, and surveys were recorded—decades before Plaintiff's 2011 acquisition. Constructive notice operates irrespective of whether the purchaser chooses to examine the public record; it is a legal imputation that protects vested interests and ensures stability of title.

The Plaintiff's posture in this case—claiming surprise or disputing the existence of the right-of-way—is not credible. Plaintiff seeks to avoid the unavoidable by ignoring the very public records that define the property it acquired. Indeed, Plaintiff's own Trial Exhibit No. 28, the "Abstract of Title for a tract of land in the SE 1/4 of the SW 1/4 of Section 19, T14S, R10E, NMPM, Tularosa, Otero County, New Mexico, commonly referred to as the Y-intersection," prepared at Plaintiff's request by Pioneer Abstract & Title Company, conclusively undermines Plaintiff's claims. At page 436, the abstract depicts the actual width and length of the right-of-way vested in the State and demonstrates that the only property available for use and disposition by the owner is the inside triangle of the Tularosa Triangle—0.511 acres, more or less—exactly

as depicted by NMDOT. See, Plaintiff's Trial Exhibit 28, "Abstract of Title" at p. 436. [RP 216-220]

The law does not permit a purchaser to ignore the public record, mischaracterize its own title documents, and then seek compensation for a property interest that never existed. Because the right-of-way was both statutorily vested and repeatedly recorded, R&R acquired its parcel subject to the State's interest, with constructive notice of that encumbrance. Its claims of surprise, takings, or interference are legally and factually unsustainable.

VIII. *Algermissen* is distinguishable and thus not controlling to the issue presented to the Court.

R&R anchors its opposition with *Algermissen v. Sutin*, 2003-NMSC-001, a case dealing with the creation of ***private*** prescriptive easements - not a public statutory grant - that reliance is misplaced. *Algermissen* does not speak to statutory highway rights-of-way or the vesting of public property interests in the State. It simply reaffirmed the common-law rule that private parties may establish an easement by prescription if they can prove open, notorious, adverse, and continuous use for ten years. The case was about private rights between private parties, not the State's statutory acquisition of highway corridors.

The present dispute is governed by NMSA 1978, § 67-2-5, which expressly defines how and when the State acquires title to a highway right-of-way. The Legislature's choice of language shows that § 67-2-5 was intended to supersede common-law prescription in the specific context of state highway rights-of-way. It replaces the ten-year adverse-use requirement with a one-year statutory period, eliminates the need to prove adversity, and creates a vested public right that can be divested only with the State's consent.

Moreover, the statutory framework has been applied and enforced by New Mexico courts for decades. In *State ex rel. State Highway & Transportation Dep't v. City of Sunland Park*, 1999-NMCA-143, the Court of Appeals recognized that § 67-2-5 operates by its own terms to vest title in the State once the statutory conditions are satisfied. In *Lovelace v. Hightower*, 1946-NMSC-013, the Court held that a public highway right-of-way is not limited to the beaten path but extends to the width reasonably necessary for safe public travel and maintenance. In *Baxter v. Egolf*, 1988-NMCA-047, the Court confirmed that public highway easements encompass adjacent areas needed for safety and drainage, not just the paved portion. And in *Dutton v. Slayton*, 1979-NMSC-031, this Court held that once statutory vesting occurs, the scope of the right-of-way is a matter of law, not fact. These cases, not *Algermissen*, supply the controlling authority for disputes over the State's right-of-way.

Applied here, the statutory conditions were satisfied long before R&R acquired the parcel in 2011. U.S. Highways 54 and 70 had been constructed and continuously open to public use for decades. By operation of § 67-2-5, the State's equitable title to the highway right-of-way vested at least one year after the statute's enactment in 1979, or one year after any subsequent period of continuous public use. R&R does not and cannot argue otherwise. Because the State's right-of-way interest vested decades earlier, R&R never acquired unencumbered title to the disputed property, and its inverse-condemnation theory necessarily fails. For these reasons, *Algermissen* is distinguishable, and not properly applied here.

IX. The right-of-way's public-safety and critical-infrastructure function confirms the Legislature's design and underscores why R&R's reading is untenable.

Highway rights-of-way are not mere surveying conveniences. They are the safety and operations envelope around the traveled way—where the State must place and service drainage, signage, signals, utilities, and environmental monitoring; where errant vehicles recover; and

where maintenance crews work. New Mexico's regulations codify this by defining the right-of-way to include clear zones, utilities, and maintenance areas. Engineering guidance (AASHTO/FHWA) requires those features regardless of whether a curb exists. If "right-of-way" were shrunk to the curb line—as R&R proposes—NMDOT could not lawfully or safely operate state highways. That is precisely why § 67-2-5 vests equitable title after one year of public highway use/openness and bars later divestiture without the State's consent.

CONCLUSION

R&R's theory would collapse the Legislature's carefully drawn safety envelope into the curb line and convert a vesting statute into an easement-by-prescription obstacle course. That is not New Mexico law. The record contains the very evidence—statutory text, controlling cases, sworn engineering testimony, and public right-of-way maps—the lower courts were required to credit – but refused to acknowledge. The judgment below should be reversed. 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,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of August , 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:

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