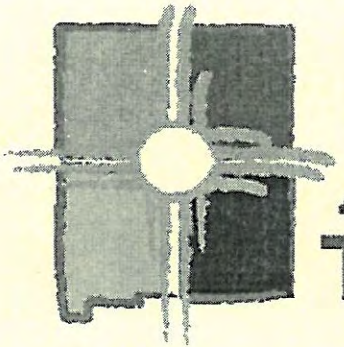

New Mexico DEPARTMENT OF
TRANSPORTATION

RIGHT OF WAY ACQUISITION

RIGHT OF WAY BROCHURE

ACQUISITION

New Mexico Department of Transportation
Right of Way Bureau
1120 Cerrillos Road
P.O. Box 1149
Santa Fe, NM 87504-1149
(505) 827-5104

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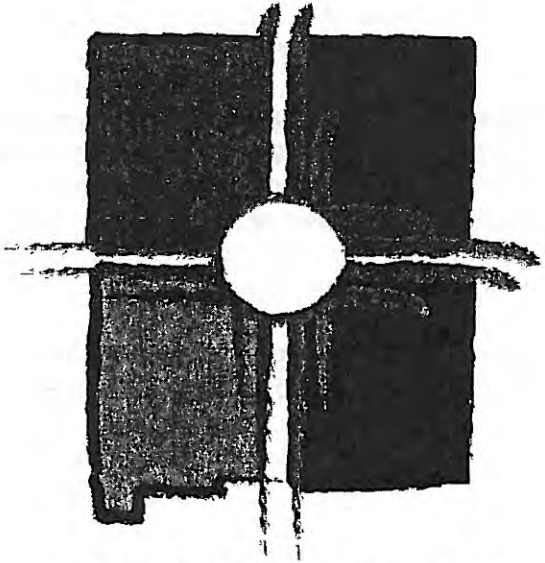
SECTION 1 - PURPOSE OF BROCHURE

This brochure has been prepared to inform the property owner of certain policies and procedures related to the construction of transportation facilities in New Mexico.

One of the basic needs in highway construction is land on which to build new transportation facilities or make the necessary improvements on present transportation facilities. In line with our democratic legal tradition, the federal, state or municipal government has the right to acquire the property it needs in order to provide such public services as schools, water systems, or highways. It is also a part of our legal tradition that no private property may be acquired for public use without just compensation to the property owner.

In this brochure, the property owner whose land may be needed for transportation facility improvements will find answers to some questions about why the land is needed and how to be paid for it.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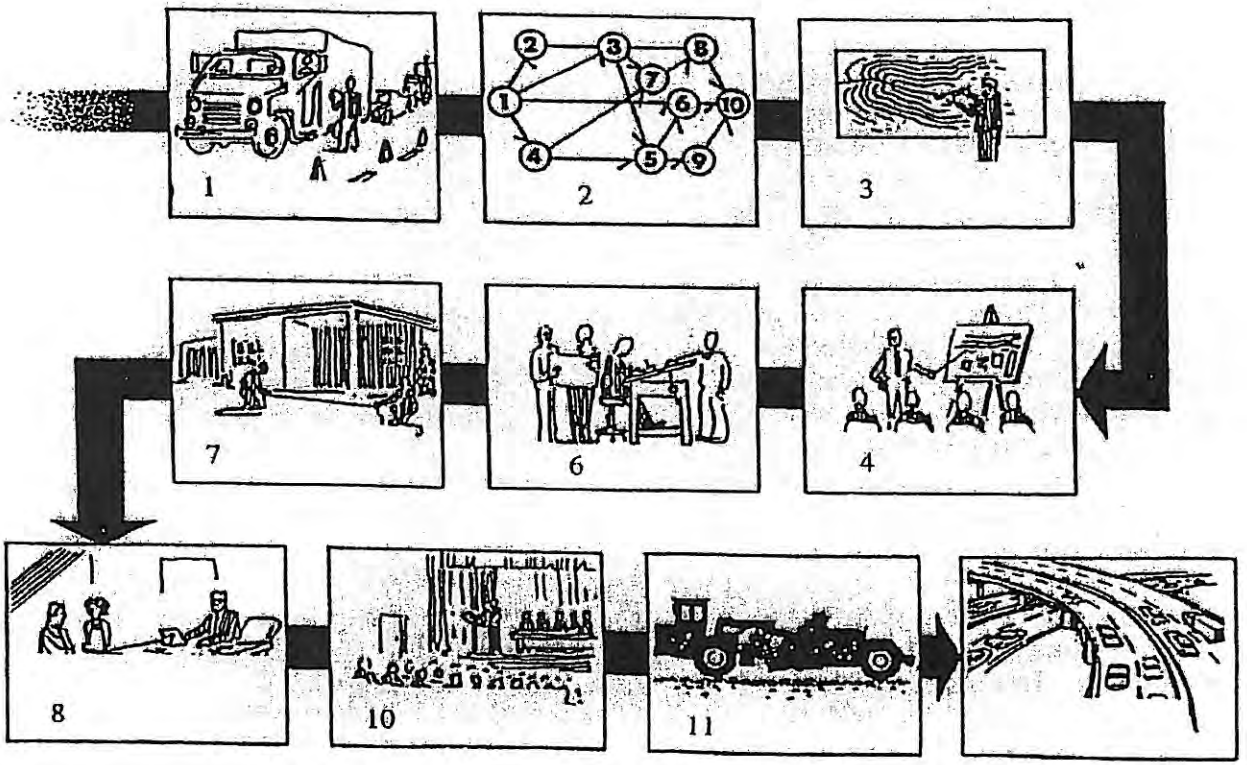
SECTION 2 – WHY NEW AND BETTER TRANSPORTATION FACILITIES ARE NEEDED

Sound progress in the development and maintenance of a modern transportation network is of vital importance to everyone. An up-to-date transportation system will not only contribute to the general economic health of New Mexico, but will also be a deciding factor in attracting new industry. A large part of New Mexico's economy depends on out-of-state visitors, and the safety and convenience of our transportation facilities play a major role in determining their return year after year.

Modern freeways make possible the safest and fastest travel, but their construction requires more land than the old fashioned two-lane or four-lane highways. An essential feature of freeways is control of access, which permits entrance to, and exit from, the mainstream of traffic only at specifically designated points called interchanges. These interchanges, which require considerable acreage and are costly to build, make it possible for vehicles to enter or leave the highway without crossing lanes of fast-moving traffic. By restricting access and egress in this fashion, traffic congestion is adverted, the highway does not become obsolete, and the public investment in its construction is protected.

Frontage roads, city streets, or other roads that connect with established interchanges provide access to farms, residences, or businesses along the freeway. In this way, local traffic is accommodated as well as the high-speed through traffic on the freeway.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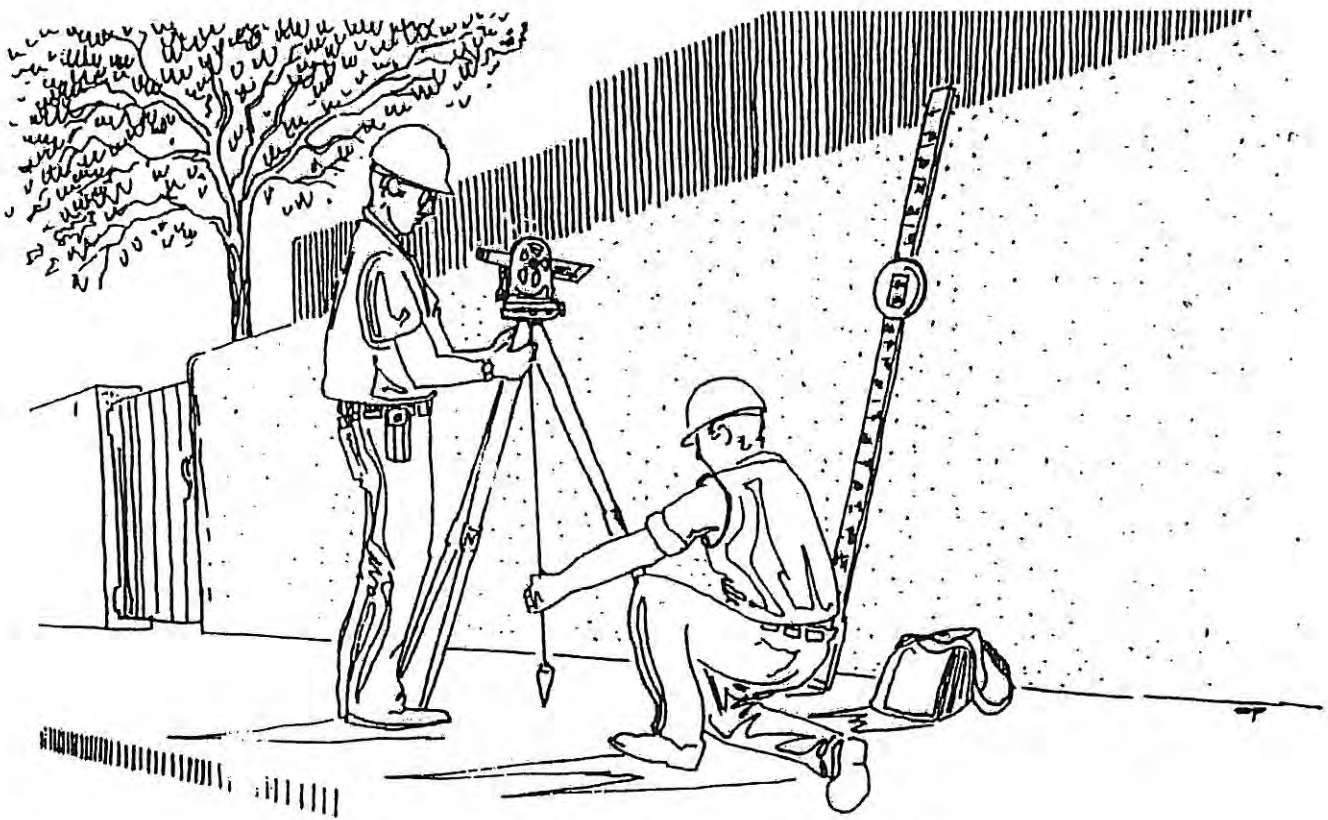
SECTION 3 – PLANNING AND BUILDING A TRANSPORTATION FACILITY

It takes many months and considerable work to plan and build a modern transportation facility. The main steps in the process are listed below:

1. Traffic Surveys
2. Programming
3. Preliminary Engineering
4. Environmental Impact Statement
5. Public Hearings
6. Final Design
7. Right of Way Appraisal
8. Right of Way Negotiations
9. Relocate Displacees
10. Contracts Awarded
11. Construction

As a citizen, you have probably not been greatly concerned with the financial or engineering problems involved with transportation construction. But as a property owner whose land may be required for a new transportation facility, you are bound to take a more personal view of road building and right of way acquisition.

The following pages will attempt to provide information on those phases of highway construction in which you may have an immediate interest. If you do not find the answers to all your questions, you can get them from your Right of Way Agent, or you may write to New Mexico Department of Transportation, Right of Way Operations Chief, P.O. Box 1149, Santa Fe, NM 87504-1149.

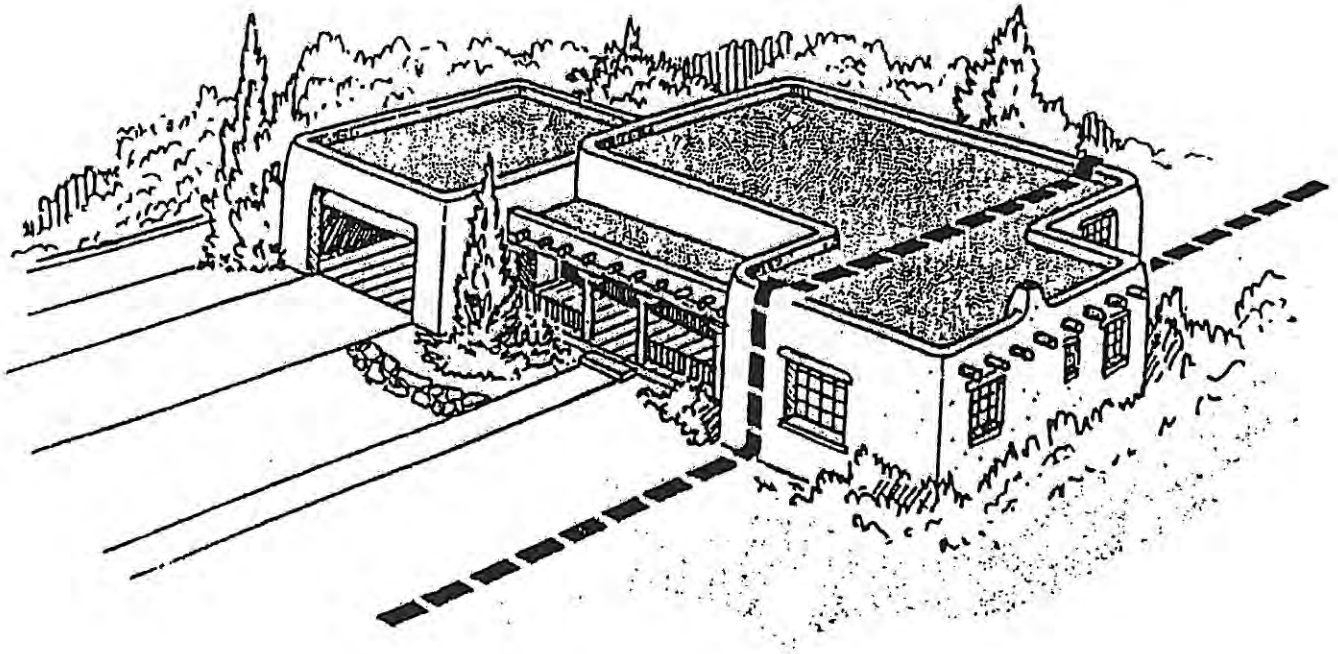


SECTION 4 – THE INITIAL SURVEY

The first person from the New Mexico Department of Transportation that you are likely to meet is the surveyor. It is the job of the surveyor to locate all natural and man-made features and take all measurements that may have some bearing on the location of a highway across or adjacent to your property.

New Mexico law provides that written consent of the owner and, if applicable, any other person known to be in actual physical occupancy, must be obtained in order for the Department to enter upon private property for surveying or other suitability studies. The Department requests the cooperation of the property owners in furnishing the written consents. If the written consent cannot be obtained, the Department may seek an order of the Court allowing entry.

In most instances, a public hearing is held to give residents an opportunity to present their views on the proposed highway location. These views are considered and many planning and engineering procedures are followed before a final decision is made to acquire right of way for a new road.



SECTION 5 – DETERMINATION OF A TRANSPORTATION FACILITY LOCATION

You may be sure that the choice of a highway location is not made idly. Behind the choice are many hours of work by experts with scientific instruments. Counters have measured the volume of traffic in your community. Engineers have studied the land in your area to determine the most economical location for the new highway, and they have taken into account such matters as proper grade and curvature. You can be confident that the decisions made are the best that can be made in the circumstances. They have selected the route that will best meet the needs of the highway user with the least inconvenience to the property owner.

Questions of finance have also been answered. Can funds be spared from other badly needed projects? Under what conditions can federal funds be obligated? Is the expense in the public interest? If the answers are favorable, the order to purchase the right of way is then given.

Now, and only now, can you, the property owner, be given specific answers to your questions.

SECTION 6 – HOW MUCH WILL THE STATE PAY

The State will pay you the cash market value of your property. This means that you will receive the same amount you would get if you sold your property to any buyer under normal conditions. Moreover, you will get cash for your property when you sell to the State and you will save the sales commission and most of the paper work. The sum of money exchanged in these transactions is not meant to enrich the individual at the expense of the State, or enrich the State at the expense of the individual.

If the State needs only a portion of your property, the amount of the offer made to you will be the difference between the market value of your property before the highway is built and its value after the State has acquired what it needs for the highway construction.

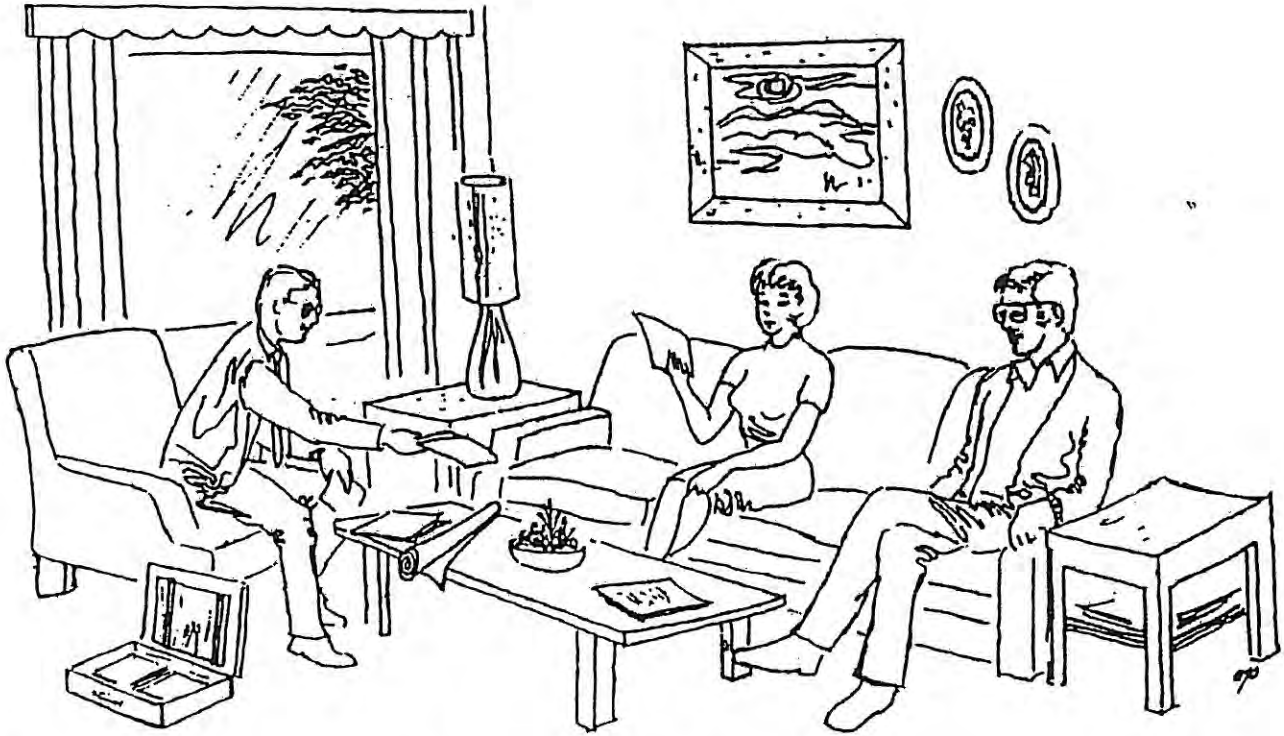
It would be well for you to keep in mind that in this kind of transaction, you play a dual role. You are both a seller and buyer. As a property owner, you are a seller and want a fair price for your property. As a New Mexico property owner, represented by the New Mexico Department of Transportation Commission, you become the buyer and want your property and all others to be acquired at a fair price.

SECTION 7 – DETERMINATION OF JUST COMPENSATION

An appraisal of your real property is to be made before negotiations are started. (Real property is defined as the right and interests possessed in land and generally whatever is erected, or growing upon, or affixed to, land.) You, or a representative you designate, must be given an opportunity to accompany the appraiser during inspection. This provision affords you an opportunity to point out any unusual or hidden features the property may possess.

In preparing the appraisal, the appraiser may not consider an increase or decrease in the value of your property, prior to the date of valuation, which results from the highway project or the likelihood that your property will be acquired for the project. However, any physical deterioration within your reasonable control will be considered in the valuation of your property.

The completed appraisal(s) must be reviewed by the New Mexico Department of Transportation. Based on a review of the appraisals, the New Mexico Department of Transportation will establish the amount it believes to be the just compensation to be offered for the property.



SECTION 8 – NEGOTIATIONS

The New Mexico Department of Transportation must make a prompt offer to purchase the property for the full amount it has determined to be just compensation. At the initiation of negotiations, a written statement must be provided to you. This statement must include the amount offered and an explanation of the basis for determining this amount. In cases where only a part of the property is to be acquired, the statement must separate the amount of compensation to be paid for the property being acquired and the amount (if any) for damages to the remainder. If the acquisition leaves you with an uneconomic remnant, the New Mexico Department of Transportation must offer to purchase it.

The New Mexico Department of Transportation may not take any action which would coerce you into accepting its offer. Prohibited actions include advancing the time of condemnation, deferring negotiations or condemnation, or postponing the deposit of funds in court for your use.

New Mexico law requires that the Department and the property owner make their appraisals, if prepared, available to each other during the negotiation period. The Department will provide the property owner an opportunity to inspect its appraisal upon request.

If no agreement is reached with the property owner, the Department will give the property owner written notice of its intent to file a condemnation action. This action will request that a Court or jury give the Department possession and title of the necessary property and award the property owner just compensation. After the notice of intent to file a condemnation action, the property owner has twenty-five (25) days to request that an appraisal be prepared by three appraisers. The property owner's request must be written and mailed or delivered to the Department. After notice by the property owner, the Department and the property owner have fifteen (15) days to appoint their respective appraisers. Then the appraiser for the Department and the appraiser for the property owner shall have fifteen (15) days to jointly appoint a third appraiser. Naturally, each party will pay the fees and expenses of their appraiser and will share the fees and expenses of the jointly appointed appraiser.

The three appraisers that are appointed will attempt to determine the amount of just compensation due the property owner by a joint appraisal if possible. An offer will be made to the property owner by the Department as a result of the meeting of the appraisers; this offer must be accepted or rejected within fifteen (15) days. If this process does not result in

a settlement, then the Department and property owner will have the amount of just compensation determined by a court or jury.

The Department has attempted to outline the negotiation process for the property owner's convenience. Included in this brochure and labeled as Appendix A is a copy of the statutes that deal with the negotiation process and property entry for suitability studies. If the property owner has questions, he or she should refer to the language of the statutes and consult his or her lawyer.

SECTION 9 – POSSESSION

If you must move because your home has been acquired, or if you must relocate your business or farm operation because of acquisition of your property, you will be given at least 90 days written advance notice of the date by which you are required to move. If you have to move from your home, a decent, safe and sanitary replacement dwelling must be available to you, on a nondiscriminatory basis, prior to your displacement. Further details on moving and replacement housing are given in a separate relocation brochure.

You are not required to surrender possession of your property until:

1. You have been paid the agreed purchase price, or

2. An amount at least equal to the New Mexico Department of Transportation's approved appraisal of the value of your property is deposited with the Court for your benefit.

Once the New Mexico Department of Transportation has acquired your property, it may decide to rent it, subject to termination on short notice. The amount of rent the New Mexico Department of Transportation may charge you, or another tenant, may not exceed the fair rental value of the property for a short-term occupier.

SECTION 10 – CONDEMNATION

When you cannot reach an agreement on the sale of your property to the New Mexico Department of Transportation, the New Mexico Department of Transportation can acquire your property by the exercise of the power of eminent domain. If a situation such as this does not occur, the New Mexico Department of Transportation must institute formal condemnation proceedings. The New Mexico Department of Transportation may not intentionally force you to begin legal proceedings to prove that your real property has been taken without payment of just compensation.

SECTION 11 – IMPROVEMENTS

Sub-Section 11.1 - Buildings and Structures

When the New Mexico Department of Transportation obtains an interest in your land, it must acquire at least an equal interest in any buildings located on the acquired land, if these improvements are required to be removed or if the transportation project will adversely affect them.

Sub-Section 11.2 - Just Compensation

For the purpose of determining the just compensation to be paid for any building, structure or other improvement required to be acquired, the building, structure, or other improvement shall be deemed to be part of the real property to be acquired, not going against the right or obligation of a tenant, as against the owner of any other interest in the real property, to remove the building, structure, or improvement at the expiration of the lease.

Sub-Section 11.3 - Tenant Owned Buildings, Structures and Improvements

The New Mexico Department of Transportation is required to pay for property as if it were in a single ownership, and the contributory value of the tenant's improvements will be paid to the tenant. In other words, if you are a tenant who owns a building on land required for a transportation facility, you will ordinarily be paid either the fair market value which your building contributes to the real property or the fair market value of the improvements for removal from the real property, whichever is greater.

However, no payment will be made to a tenant for an improvement unless the owner of the land involved disclaims all interest in the improvements. Also, in consideration for payment, you must assign, transfer and release to the New Mexico Department of Transportation all your right, title and interest in and to such improvements.

SECTION 12 – REIMBURSEMENT OF INCIDENTAL EXPENSES

You are entitled to be reimbursed for fair and reasonable expenses you necessarily incurred for:

1. Recording fees, transfer taxes, and similar expenses incidental to conveying your real property to the New Mexico Department of Transportation.

2. Penalty costs for prepayment of any pre-existing, recorded mortgage, entered into good faith, encumbering your property.

3. The pro rata portion of real property taxes you have paid which are allocable to the period after title passes to the acquiring agency, or the date of effective possession, whichever is earlier.

These costs will be paid to you as soon as practicable after:

1. The date of payment of the purchase price.

2. The date of deposit in court of funds to satisfy the award of compensation in a condemnation proceeding to acquire real property.

You are entitled to appeal and seek judicial review if you believe the Department has failed to properly determine eligibility for the reimbursement of incidental expenses.

SECTION 13 – REIMBURSEMENT OF LITIGATION EXPENSES

If any one of the three following conditions exist, The New Mexico Department of Transportation must reimburse you for your reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees which you have actually incurred. Such litigation expenses are reimbursable only under these conditions:

1. If the New Mexico Department of Transportation starts a condemnation action, but the court decides that the New Mexico Department of Transportation does not have authority to acquire your property by condemnation, or
2. If the New Mexico Department of Transportation starts a condemnation action and abandons it, or
3. If you, as owner, successfully maintain an inverse condemnation proceeding. (Inverse condemnation is a legal process by which an owner brings suit against the New Mexico Department of Transportation to prove that the New Mexico Department of Transportation has taken compensable property rights without payment of just compensation.)

The property owner has a right to appeal and seek judicial review to recover damages, costs and expenses under certain situations if he or she believes that the Department has failed to properly determine reimbursement of litigation expenses. [Please refer to Appendix A at Section 42A-1-12 N.M.S.A. 1978 Comp. (as amended). The property owner should consult the lawyer of his or her choice if there are questions about whether additional compensation may be due.]

SECTION 14 – DONATIONS

There is nothing to prevent a person whose real property is being acquired for a federally-aided highway project from making a gift or donation of such property, or any part thereof, or of any of the compensation paid therefore, after such person has been fully informed of his/her right to receive just compensation for the acquisition of his/her property.

SECTION 15 – CIVIL RIGHTS

All the right of way acquisition functions shall be conducted in such a way and manner as to assure that no person shall, on the ground of race, sex, age, handicap, religion, or national origin, be denied the benefits to which the person is entitled, or be otherwise subjected to discrimination.

APPENDIX A

CONDEMNATION PROCEEDINGS, NMSA 1978

42A-1-3. AGREEMENT

At any time before or after commencement of a condemnation action, the parties may agree to and carry out a compromise or settlement as to any matter, including all or any part of the compensation or other relief.

42A-1-4. NEGOTIATION; OTHER APPRAISALS

A. A condemnor shall make reasonable and diligent efforts to acquire property by negotiation.

B. Unless prohibited by federal law, if the condemnor or condemnee has had prepared appraisals for the property, he shall make such appraisals available to the other party during the negotiation period.

42A-1-5. APPRAISAL; OFFER

A. If the parties are unable to negotiate a settlement, the condemnee may, within twenty-five days after written notice by the condemnor of its intent to file condemnation action in district court, give written notice to the condemnor requesting an appraisal to determine the amount that would constitute just compensation for the taking of the condemnee's property and obtained from:

1. One appraiser appointed by the condemnor;
2. One appraiser appointed by the condemnee; and
3. One appraiser jointly appointed by the appraisers for the condemnor and the condemnee

B. The condemnee and condemnor shall appoint their respective appraisers within fifteen days after notice has been given by the condemnee to the condemnor pursuant to the provisions of Subsection A of this section and the third appraiser shall be jointly appointed within fifteen days thereafter.

C. The appraisals shall be in writing and signed by the appraisers. The appraisers shall deliver copies to each party personally or by registered mail or certified mail, return receipt requested.

D. The fees and expenses of the appraisers shall be paid by the appointing parties; provided however, the condemnee and condemnor shall share equally in paying the fees and expenses of the jointly appointed appraiser.

E. After receiving a copy of the appraisals provided for pursuant to this section, the condemnor may establish an amount which it believes to be just compensation and may submit to the condemnee an offer to acquire the property for the full amount so established. If the condemnor tenders an offer pursuant to this section, the amount offered for the property shall not be less than the amount of compensation shown by the final common appraisal of the three appraisers or if all three appraisers do not agree, the offer shall not be less than the appraisal prepared by the condemnor's appraiser. The condemnee must reject or accept the offer made by the condemnor pursuant to this section within fifteen days after the offer is tendered.

42A-1-6. PRELIMINARY EFFORTS TO PURCHASE

A. Except as provided in Sections 42A-1-7 and 42A-1-27 NMSA 1978, an action to condemn property may not be maintained over timely objection by the condemnee unless the condemnor made a good faith effort to acquire the property by purchase before commencing the action.

B. An offer to purchase made in substantial compliance with Sections 42A-1-3 through 42A-1-4 NMSA 1978 is prima facie evidence of good faith under Subsection A of this Section.

42A-1-7. PURCHASE EFFORTS WAIVED OR EXCUSED

A condemnor's failure or inability to make reasonable and diligent efforts to acquire property by negotiation, make appraisals available pursuant to subsection B of Section 42A-1-4 NMSA 1978 or appoint appraisers upon the request of the condemnee pursuant to Subsection A of Section 42A-1-5

NMSA 1978 does not bar the maintenance of a condemnation action in the manner authorized by law, notwithstanding timely objection, if:

A. Compliance is waived by written agreement between the condemnee and the condemnor;

B. One or more of the condemnees of the property are unknown, cannot with reasonable diligence be contacted, are incapable of contracting and have no legal representative or own an interest which cannot be conveyed under the circumstances;

C. Due to the conditions not caused by or under the control of the condemnor, there is a compelling need on the part of the condemnor to avoid the delay in commencing the action which compliance would require;

D. The condemnee fails to provide any appraisals required pursuant to Subsection B of Section 42A-1-4 NMSA 1978; or

E. The appraisers provided for pursuant to Section 42-A-1-5 NMSA 1978 fail to submit the appraisals to the parties within thirty days from the date that the jointly appointed appraiser was appointed.

42A-1-8. ENTRY FOR SUITABILITY STUDIES

A condemnor and its agents and employess may enter upon real property and make surveys, examinations, photographs, tests, soundings, borings samplings, or engage in other activities for the purpose of appraising the property or determining whether it is suitable and within the power of the condemnor to take for public use, if the condemnor secures:

A. The written consent of the owner and, if applicable, any other person known to be in actual physical occupancy of the property to enter upon the property and undertake such activities; or

B. An order for entry from the court.

42A-1-9. COURT ORDER PERMITTING ENTRY FOR SUITABILITY STUDIES

A. If the condemnor is unable to secure the written consent of the condemnee pursuant to Section 42-A-1-8 NMSA 1978 and, if applicable, any other person known to be in actual physical occupancy of the property, he may apply to the court in the county where the property to be entered is located for an order permitting entry.

B. After the notice by the condemnor to the condemnee and, if applicable, any other person known to be in actual physical occupancy of the property and unless good cause to the contrary is shown, the court shall make its order permitting and describing the purpose of the entry and setting forth a description of the property and the nature and scope of activities the court determines are reasonably necessary to accomplish the purposes of the proposed taking and authorized to be made upon the property. The order may include terms and conditions with respect to the time, place and manner of entry and authorized activities upon the property which will facilitate the purpose of the entry and minimize damage, hardship and burden, and may require a deposit pursuant to Section 42A-1-10 NMSA 1978.

C. The condemnor shall have delivered any order issued by the court to the condemnee, if known and, if applicable, any other person known to be in actual occupancy of the property personally or by registered mail or certified mail, return receipt requested.

42A-1-10. DEPOSIT OF PROBABLE COMPENSATION

A. An order permitting entry under Section 42A-1-9 NMSA 1978 shall include a determination by the court of the probable amount that will fairly compensate the condemnee and any other person in actual physical occupancy of the property for damages, if any, for physical injury to the property and for substantial interference with possession or use of the property found likely to be caused by the entry and activities authorized by the order, and may require the condemnor to deposit with the court before entry that amount or a surety bond in that amount from a surety acceptable to the court.

B. If a deposit is required, such funds shall be deposited in an interest-bearing account at an institution acceptable to the court. Interest on such deposit shall accrue for the benefit of the condemnor.

C. Any amount deposited shall be retained on deposit until released by the court.

D. Surety bonds shall remain in effect until the surety is released by the court.

42A-1-11. MODIFICATION OF COURT ORDER PREMITTING SUITABILITY STUDIES

A. After notice and hearing, the court may modify an order made under Section 42A-1-9 NMSA 1978.

B. If a deposit or surety bond is required or the amount required to be deposited or the amount of the surety bond is increased by an order of modification, the court shall specify the time within which the required amount must be deposited or the surety bond increased, and shall direct that any further entry or specified activities or studies under the order as modified be stayed until the required deposit or increase in the surety bond has been made.

42A-1-12. RECOVERY OF DAMAGES, COSTS AND EXPENSES

A. A condemnor is liable to the condemnee and, if applicable, to the person in actual physical occupancy of the property for physical injury to and for substantial interference with possession or use of property caused by its entry and activities upon the property made pursuant to Section 42A-1-8 NMSA 1978. This liability may be enforced in civil action against the condemnor or by application to the court in the circumstances provided by Subsection C of this section.

B. In an action or other proceeding for recovery of damages under this section, the prevailing claimant shall be allowed his reasonable costs. In addition, the court shall award the claimant his litigation expenses incurred in any proceeding under Section 42A-1-9 or 42A-1-11 NMSA 1978 if it finds liability pursuant to Subsection A of this section and that the condemnor:

1. Entered the property unlawfully; or

2. Failed without just cause to substantially comply with or wrongfully exceeded or abused the authority of an order made under Section 42-A-1-9 NMSA 1978 or 42A-1-11 NMSA 1978.

C. If the funds are on deposit or a surety bond has been required under Section 42A-1-10 NMSA 1978 or 42A-1-11 NMSA 1978, the condemnee or other person claiming damages under Subsection A of this section may apply to the court for an award of the amount he is entitled to recover. The court shall determine the amount and award it to the person entitled thereto and direct that the payment be made out of the money on deposit or pursuant to provisions of the bond. If the amount on deposit or the amount of the surety bond is insufficient to pay the full amount, the court shall enter judgment against the condemnor for the unpaid portion.

42A-1-13. ENTRIES EXEMPT

The provisions of Sections 42-A-1-8 through 42A-1-12 NMSA 1978 apply only to entries for suitability studies made outside of the exterior boundaries of any municipality.

42A-1-14. NOTICE

If notice of a hearing or any other matter pursuant to Sections 42A-1-3 through 42A-1-12 NMSA 1978 is required, except for specific notice requirements as otherwise provided, notice shall be given:

A. By mailing a copy thereof at least ten days before the time set for the hearing or determination of other matters by certified, registered or ordinary first class mail addressed to the person being notified;

B. By service of a copy thereof at least ten days before the time set for the hearing or determination of other matters upon the person being notified in the manner provided by the Rules of Civil Procedure for the district courts for service of summons and complaint; or

C. If the address or name of any person is not known and cannot be ascertained by reasonable diligence, by publishing a copy thereof at least once a week for two consecutive weeks, in a newspaper of general circulation in the county in which the hearing is to be held, the last publication of which is to be at least five days before the time set for the hearing.

42A-1-15. RULES OF CIVIL PROCEDURE

Unless specifically provided to the contrary in the Eminent Domain Code [42A-1-1 through 42A-1-33 NMSA 1978], or unless inconsistent with its provisions, the Rules of Civil Procedure for the district courts govern matters pursuant to that act.

42A-1-16. APPLICATION

A. The provisions of Sections 42A-1-3 through 42A-1-16 NMSA 1978 apply to all condemnation actions brought pursuant to the laws of New Mexico including those actions brought pursuant to Sections 42-2-1 through 42-2-24 NMSA 1978.

B. The provisions of Sections 42A-1-3 through 42A-1-12 NMSA 1978 shall not affect the right of possession and occupancy provided for in Sections 42A-1-22 and 42-2-6 NMSA 1978.

REVISED JUNE, 2004

RIGHT OF WAY BUREAU
NEW MEXICO DEPARTMENT OF TRANSPORTATION

SANTA FE, NEW MEXICO

New Mexico Department of Transportation
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Santa Fe, New Mexico 87504-1149