

# CHAPTER 42A

## Condemnation Proceedings

### ARTICLE 1

#### General Provisions

##### 42A-1-1. Short title.

Sections 42A-1-1 through 42A-1-33 NMSA 1978 may be cited as the "Eminent Domain Code."

**History:** 1978 Comp., § 42A-1-1, enacted by Laws 1981, ch. 125, § 1.

#### ANNOTATIONS

**Recompilations.** — Laws 1981, ch. 125, § 1, recompiled former 42A-1-1 NMSA 1978, relating to compromise or settlement, as 42A-1-3 NMSA 1978.

**Cross references.** — For acquisition of sanitary sewers, see 3-26-1 and 3-26-2 NMSA 1978.

For acquisition of water facilities, see 3-27-2 to 3-27-4 NMSA 1978.

For Relocation Assistance Act, see 42-3-1 to 42-3-15 NMSA 1978.

**Statute strictly construed.** — The nature and extent of the title or right taken in the exercise of eminent domain depends on the statute conferring the power. The statute will be strictly construed; where the estate or interest is not definitely set forth, only such estate or interest may be taken as is reasonably necessary to answer the public purpose in view. *Timberlake v. Southern Pac. Co.*, 1969-NMSC-143, 80 N.M. 770, 461 P.2d 903.

**Condemnation of public property by public bodies requires statutory authority.** — Absent statutory authority, property of one public body being used for public purposes cannot be condemned by another public body. *State ex rel. State Hwy. Comm'n v. Board of Cnty. Comm'rs*, 1963-NMSC-074, 72 N.M. 86, 380 P.2d 830.

**Property description.** — Description of property in condemnation proceedings must conform to the statutory requirement. *City of Santa Fe v. Lamy*, 1930-NMSC-026, 34 N.M. 583, 286 P. 422.

**Landowner not entitled to consequential damages for traffic diversion.** — Mere diversion of traffic does not entitle landowner to a judgment for consequential damages, even though a part of the new road traverses the claimant's land for which

compensation is paid to the landowner. *Board of Cnty. Comm'rs v. Slaughter*, 1945-NMSC-019, 49 N.M. 141, 158 P.2d 859.

**Eminent Domain Code does not address effect of stay** in condemnation appeals. *City of Sunland Park v. N.M. Pub. Reg. Comm'n*, 2004-NMCA-024, 135 N.M. 143, 85 P.3d 267, cert. denied, 2004-NMCERT-002, 135 N.M. 169, 86 P.3d 47.

**Law reviews.** — For note, "The Use of Eminent Domain for Oil and Gas Pipelines in New Mexico," see 4 Nat. Resources J. 360 (1964).

For article, "Frontland Taking - Backland Value," see 9 Nat. Resources J. 237 (1969).

For article, "Survey of New Mexico Law, 1979-80: Property," see 11 N.M.L. Rev. 203 (1981).

For annual survey of New Mexico law relating to property, see 12 N.M.L. Rev. 459 (1982).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 26 Am. Jur. 2d Eminent Domain §§ 1 et seq., 126, 199, 231 et seq., 927.

Power to condemn against particular use of property, 8 A.L.R. 594.

Right to condemn property previously condemned or purchased for public use, but not actually so used, 12 A.L.R. 1502.

Exercise of eminent domain to control the use or improvement of property not taken, 23 A.L.R. 876.

Condemnation by de facto corporation, 44 A.L.R. 542.

Changing location of railroad or street railway in street or highway as a taking or damaging for which compensation must be made, 46 A.L.R. 1446.

Carrying freight on electric railway in street or highway as an additional servitude, 46 A.L.R. 1472.

Combination of public and private uses or purposes, 53 A.L.R. 9

Public benefit or convenience as distinguished from use by the public as ground for the exercise of the power of eminent domain, 54 A.L.R. 7

Establishment or extension of sewer as a public use or purpose for which power of eminent domain may be exercised, 169 A.L.R. 576.

Condemnation of materials for highway or other public or quasi-public work as affected by location of materials or of the work, 172 A.L.R. 131.

Condemnation of land by public authority to provide hunting and fishing as affected by question of necessity, 172 A.L.R. 174.

Taking of property for purposes of housing and slum clearance, 172 A.L.R. 970.

Condemnation of public utility property for public utility purposes, 173 A.L.R. 1362.

Municipal establishment or operation of off-street public parking facilities, 8 A.L.R.2d 373.

Attorney's fees as within statute imposing upon the condemnor liability for "expenses," "costs," and the like, 26 A.L.R.2d 1295.

Right to condemn property in excess of needs for public purpose, 6 A.L.R.3d 297.

Salting for snow removal as taking or damaging abutting property for eminent domain purposes, 64 A.L.R.3d 1239.

Validity of appropriation of property for anticipated future needs, 80 A.L.R.3d 1085.

Eminent domain: possibility of overcoming specific obstacles to contemplated use as element in determining existence of necessary public use, 22 A.L.R.4th 840.

Public taking of sports or entertainment franchise or organization as taking for public purpose, 30 A.L.R.4th 1226.

Seizure of property as evidence in criminal prosecution or investigation as compensable taking, 44 A.L.R.4th 366.

Eminent domain: compensability of loss of visibility of owner's property, 7 A.L.R.5th 113.

Excessiveness or adequacy of attorneys' fees in matters involving real estate - modern cases, 10 A.L.R.5th 448.

Abutting owner's right to damages for limitation of access caused by traffic regulation, 15 A.L.R.5th 821.

29A C.J.S. Eminent Domain § 201 et seq.

## **42A-1-2. Definitions.**

As used in the Eminent Domain Code, and unless the context otherwise requires:

A. "condemn" means to take or damage property under the power of eminent domain;

B. "condemnee" means a person who has or claims an interest in property that is the subject of a prospective or pending condemnation action;

C. "condemnor" means a person empowered by law to condemn;

D. "court" means a district court of this state and includes, when the context requires, any judge of that court;

E. "governmental entity" means the state or local public body;

F. "litigation expenses" includes all expenses reasonably and necessarily incurred in the condemnation proceeding including and subsequent to the filing of the petition, in preparing for trial, during trial and in any subsequent judicial proceedings including reasonable attorney's fees, appraisal fees and fees for the services of other experts where such fees were reasonably and necessarily incurred to protect the condemnee's interest in the proceeding, in preparing for trial, during trial and in any subsequent judicial proceedings;

G. "local public body" means a political subdivision of the state and its agencies, instrumentalities and institutions;

H. "person" includes a natural individual, partnership, corporation, association, other legal or fiduciary entity and a governmental entity;

I. "personal property" means any property other than real property;

J. "property" means real or personal property under the law of New Mexico;

K. "real property" means land and any improvements upon or connected with land, and includes an easement or other interest therein; and

L. "state" means the state of New Mexico or any of its branches, agencies, departments, boards, instrumentalities or institutions.

**History:** 1978 Comp., § 42A-1-2, enacted by Laws 1981, ch. 125, § 2.

## **ANNOTATIONS**

**Recompilations.** — Laws 1981, ch. 125, § 2, recompiled former 42A-1-2 NMSA 1978, relating to negotiation, as 42A-1-4 NMSA 1978.

**Recognized property interest required for "condemnee" status.** — Ownership of a recognized property interest in the property taken or damaged is what makes a party a

"condemnee". In turn, status as a condemnee is what gives a party standing to challenge the condemnation. *City of Sunland Park v. Santa Teresa Servs. Co.*, 2003-NMCA-106, 134 N.M. 243, 75 P.3d 843, cert. denied, 134 N.M. 179, 74 P.3d 1071.

Parties with debt claims against the property owner, whether unsecured or recorded, could not meaningfully participate in condemnation proceedings as "condemnees". Rather, parties with such claims must rely for relief on the allocation proceedings conducted under 42A-1-24(C) NMSA 1978. *City of Sunland Park v. Santa Teresa Servs. Co.*, 2003-NMCA-106, 134 N.M. 243, 75 P.3d 843, cert. denied, 134 N.M. 179, 74 P.3d 1071.

Tax liens in New Mexico do not create an ownership interest in the sense required by the Code in order for the lien holder to be considered a condemnee. *City of Sunland Park v. Santa Teresa Servs. Co.*, 2003-NMCA-106, 134 N.M. 243, 75 P.3d 843, cert. denied, 134 N.M. 179, 74 P.3d 1071.

### **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.

**History:** 1978 Comp., § 42A-1-1, enacted by Laws 1980, ch. 20, § 3; recompiled as § 42A-1-3 by Laws 1981, ch. 125, § 1.

### **ANNOTATIONS**

**Recompilations.** — Laws 1981, ch. 125, § 60, recompiled former 42A-1-3 NMSA 1978, relating to appraisals, as 42A-1-5 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Valuation of mineral interests in federal condemnation proceedings, 40 A.L.R. Fed. 656.

### **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.

**History:** 1978 Comp., § 42A-1-2, enacted by Laws 1980, ch. 20, § 4; recompiled as § 42A-1-4 by Laws 1981, ch. 125, § 2.

### **ANNOTATIONS**

**Recompilations.** — Laws 1981, ch. 125, § 3, recompiled former 42A-1-4 NMSA 1978, relating to preliminary efforts to purchase property, as 42A-1-6 NMSA 1978.

**Refusal to negotiate as affecting attorney's fees.** — Where a county deliberately chose to take property first and litigate afterwards, forcing the landowner to initiate the lawsuit, the district court properly concluded that the county did not have the "right" to take the property, and the condemnee was entitled to an award of attorney's fees. *Landavazo v. Sanchez*, 1990-NMSC-114, 111 N.M. 137, 802 P.2d 1283.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Sufficiency of condemnor's negotiations required as preliminary to taking in eminent domain, 21 A.L.R.4th 765.

### **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 a 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.

**History:** 1978 Comp., § 42A-1-3, enacted by Laws 1980, ch. 20, § 5; recompiled as § 42A-1-5 by Laws 1981, ch. 125, § 60.

#### **ANNOTATIONS**

**Recompilations.** — Laws 1981, ch. 125, § 4, recompiled former 42A-1-5 NMSA 1978, relating to the waiver of preliminary efforts to purchase, as 42A-1-7 NMSA 1978.

#### **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.

**History:** 1978 Comp., § 42A-1-4, enacted by Laws 1980, ch. 20, § 6; amended and recompiled as § 42A-1-6 NMSA 1978 by Laws 1981, ch. 125, § 3.

#### **ANNOTATIONS**

**Recompilations.** — Laws 1981, ch. 125, § 60, recompiled former 42A-1-6 NMSA 1978, relating to entries for suitability studies, as 42A-1-8 NMSA 1978.

**The 1981 amendment** substituted "Sections 42A-1-7 and 42A-1-27" for "Section 42A-1-5" in Subsection A, substituted "Sections 42A-1-3 through 42A-1-4" for "Sections 42A-1-1 through 42A-1-2" in Subsection B, and deleted the quotation marks surrounding "good faith" in Subsection B.

#### **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 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 42A-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.

**History:** 1978 Comp., § 42A-1-5, enacted by Laws 1980, ch. 20, § 7; amended and recompiled as § 42A-1-7 by Laws 1981, ch. 125, § 4.

#### **ANNOTATIONS**

**Recompilations.** — Laws 1981, ch. 125, § 5, recompiled former 42A-1-7 NMSA 1978, relating to orders permitting entry for suitability studies, as 42A-1-9 NMSA 1978.

**The 1981 amendment** substituted "Section 42A-1-4" for "Section 42A-1-2" in the introductory paragraph and in Subsection D, substituted "Section 42A-1-5" for "Section 42A-1-3" in the introductory paragraph and in Subsection E and substituted "condemnees" for "owners" in Subsection B.

#### **42A-1-8. Entry for suitability studies.**

A condemnor and its agents and employees may enter upon real property and make surveys, examinations, photographs, tests, soundings, borings and 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.



**History:** 1978 Comp., § 42A-1-6, enacted by Laws 1980, ch. 20, § 8; recompiled as § 42A-1-8 by Laws 1981, ch. 125, § 60.

## ANNOTATIONS

**Recompilations.** — Laws 1981, ch. 125, § 6, recompiled former 42A-1-8 NMSA 1978, relating to the deposit of probable compensation, as 42A-1-10 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Eminent domain: possibility of overcoming specific obstacles to contemplated use as element in determining existence of necessary public use, 22 A.L.R.4th 840.

### **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 42A-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 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.

**History:** 1978 Comp., § 42A-1-7, enacted by 1980, ch. 20, § 9; amended and recompiled as § 42A-1-9 by Laws 1981, ch. 125, § 5.

## ANNOTATIONS

**Recompilations.** — Laws 1981, ch. 125, § 7, recompiled former 42A-1-9 NMSA 1978, relating to the modification of orders permitting suitability studies, as 42A-1-11 NMSA 1978.

**The 1981 amendment** substituted "condemnee" for "owner" once in each subsection, substituted "Section 42A-1-8" for "Section 42A-1-6" in Subsection A, inserted "by the

condemnor" in the first sentence of Subsection B and substituted "Section 42A-1-10" for "Section 42A-1-8" in the last sentence of Subsection B.

**Jurisdiction of proceedings.** – Because the 2000 amendment to Section 62-6-4A NMSA 1978 exempted generation and transmission cooperatives from the regulatory jurisdiction of the public regulatory commission, the district court had jurisdiction under N.M. Const. art. VI, § 13 to consider an application under this section by a generation and transmission cooperative to enter and survey land for condemnation suitability studies. *Tri-State Generation & Transmission Ass'n. v. King*, 2003-NMSC-029, 134 N.M. 467, 78 P.3d 1226.

#### **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.

**History:** 1978 Comp., § 42A-1-8, enacted by Laws 1980, ch. 20, § 10; amended and recompiled as § 42A-1-10 by Laws 1981, ch. 125, § 6.

#### **ANNOTATIONS**

**Recompilations.** — Laws 1981, ch. 125, § 8, recompiled former 42A-1-10 NMSA 1978, relating to the recovery of damages resulting from entries for suitability studies, as 42A-1-12 NMSA 1978.

**The 1981 amendment** substituted "Section 42A-1-9" for "Section 42A-1-7" in Subsection A, substituted "condemnee" for "owner" in Subsection A, substituted "actual" for "lawful possession or" in Subsection A and substituted "court" for "courts" in the first sentence of Subsection B.

#### **42A-1-11. Modification of court order permitting 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.

**History:** 1978 Comp., § 42A-1-9, enacted by Laws 1980, ch. 20, § 11; amended and recompiled as § 42A-1-11 by Laws 1981, ch. 125, § 7.

### ANNOTATIONS

**Recompilations.** — Laws 1981, ch. 125, § 9, recompiled former 42A-1-11 NMSA 1978, relating to a limitation on the applicability of former Sections 42A-1-6 through 42A-1-10 NMSA 1978, as 42A-1-13 NMSA 1978.

**The 1981 amendment** substituted "Section 42A-1-9" for "Section 42A-1-7" in Subsection A.

### **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 a 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 42A-1-9 or 42A-1-11 NMSA 1978.

C. If funds are on deposit or a surety bond has been required under Section 42A-1-10 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 the 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.

**History:** 1978 Comp., § 42A-1-10, enacted by Laws 1980, ch. 20, § 12; amended and recompiled as § 42A-1-12 by Laws 1981, ch. 125, § 8.

### ANNOTATIONS

**Recompilations.** — Laws 1981, ch. 125, § 10, recompiled former 42A-1-12 NMSA 1978, relating to notice, as 42A-1-14 NMSA 1978.

**The 1981 amendment** substituted "condemnee" for "owner" in the first sentence of Subsection A and in the first sentence of Subsection C, substituted "Section 42A-1-8" for "Section 42A-1-6" in the first sentence of Subsection A, inserted "reasonable" in the first sentence of Subsection B, deleted "including reasonable attorney's fees" preceding "incurred" in the second sentence of Subsection B, substituted "Section 42A-1-9 or 42A-1-11" for "Section 42A-1-7 or 42A-1-9" in the second sentence of Subsection B and in Paragraph (2) of Subsection B and substituted "Section 42A-1-10 or 42A-1-11" for "Section 42A-1-8 or 42A-1-9" in the first sentence of Subsection C.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Eminent domain: measure and elements of lessee's compensation for condemnor's taking or damaging of leasehold, 17 A.L.R.4th 337.

Zoning regulations limiting use of property near airport as taking of property, 18 A.L.R.4th 542.

Method of determining rate of interest allowed on award to owner of property taken by United States in eminent domain proceeding, 56 A.L.R. Fed. 477.

### 42A-1-13. Entries exempt.

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

**History:** 1978 Comp., § 42A-1-11, enacted by Laws 1980, ch. 20, § 13; amended and recompiled as § 42A-1-13 by Laws 1981, ch. 125, § 9.

### ANNOTATIONS

**Recompilations.** — Laws 1981, ch. 125, § 11, recompiled former 42A-1-13 NMSA 1978, relating to the applicability of the Rules of Civil Procedure, as 42A-1-15 NMSA 1978.

**The 1981 amendment** substituted "Sections 42A-1-8 through 42A-1-12" for "Sections 42A-1-6 through 42A-1-10."

### **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.

**History:** 1978 Comp., § 42A-1-12, enacted by Laws 1980, ch. 20, § 14; amended and recompiled as § 42A-1-14 by Laws 1981, ch. 125, § 10.

### **ANNOTATIONS**

**Recompilations.** — Laws 1981, ch. 125, § 12, recompiled former 42A-1-14 NMSA 1978, relating to the applicability of Article 1 of Chapter 42A, as 42A-1-16 NMSA 1978.

**Cross references.** — For the Rules of Civil Procedure for the District Courts, see Rules 1-001 through 1-127 NMRA.

**The 1981 amendment** substituted "Sections 42A-1-3 through 42A-1-12" for "Sections 42A-1-1 through 42A-1-10" in the introductory paragraph, substituted "Rules of Civil Procedure for the District Courts" for "rules of civil procedure" in Subsection B and deleted "in civil actions" following "complaint" in Subsection B.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 27 Am. Jur. 2d Eminent Domain §§ 478, 536 et seq., 874.

Permissible modes of service of notice of eminent domain proceedings, 89 A.L.R.2d 1404.

Inclusion or exclusion of first and last days in computing the time for performance of an act or event which must take place a certain number of days before a known future date, 98 A.L.R.2d 1331.

29A C.J.S. Eminent Domain §§ 237 to 247.

### **42A-1-15. Rules of civil procedure.**

Unless specifically provided to the contrary in the Eminent Domain Code, or unless inconsistent with its provisions, the Rules of Civil Procedure for the District Courts govern matters pursuant to that act.

**History:** 1978 Comp., § 42A-1-13, enacted by Laws 1980, ch. 20, § 15; amended and recompiled as § 42A-1-15 by Laws 1981, ch. 125, § 11.

#### **ANNOTATIONS**

**Cross references.** — For the Rules of Civil Procedure for the District Courts, see Rules 1-001 through 1-127 NMRA.

**The 1981 amendment** substituted "the Eminent Domain Code" for "Sections 42A-1-1 through 42A-1-10 NMSA 1978," "its" for "their" and "that act" for "such sections" and inserted "for the District Courts."

**Application of rules of civil procedure.** — Where the Eminent Domain Code is silent, the rules of civil procedure are applicable, unless application of the rules would be inconsistent with it. *City of Sunland Park v. N.M. Pub. Reg. Comm'n*, 2004-NMCA-024, 135 N.M. 143, 85 P.3d 267, cert. denied, 2004-NMCERT-002, 135 N.M. 169, 86 P.3d 47.

### **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.

**History:** 1978 Comp., § 42A-1-14, enacted by Laws 1980, ch. 20, § 16; amended and recompiled as § 42A-1-16 by Laws 1981, ch. 125, § 12.

#### **ANNOTATIONS**

**The 1981 amendment** substituted "Sections 42A-1-3 through 42A-1-16" for "Sections 42A-1-1 through 42A-1-14" in Subsection A, substituted "Sections 42A-1-3 through 42A-1-12" for "Sections 42A-1-1 through 42A-1-10" in Subsection B and substituted "42A-1-22" for "42A-1-19" in Subsection B.

### **42A-1-17. Petition; parties.**

A. Unless otherwise specifically provided by law, if property is sought to be appropriated for public use by a person authorized to acquire property pursuant to the laws of New Mexico, and the condemnor and the condemnee cannot agree to the transfer of the property or interest in question the condemnor may file a petition with the court of the county where the property or any part thereof lies; provided however, the petition shall not include any property which is not contiguous to property to be condemned in the county of the court's jurisdiction.

B. The petition prescribed in Subsection A of this section shall include but not be limited to the following:

- (1) a designation as plaintiff each person on whose behalf the property is sought to be taken;
- (2) a statement by the petitioner of its authority to bring the action;
- (3) a general description of the public purpose for which the property is being condemned;
- (4) a statement that the action is brought pursuant to and in compliance with the provisions of the Eminent Domain Code;
- (5) an accurate surveyed description of the property to be condemned describing the property by metes and bounds or center line description tied at regular intervals to statutory corners or other monumented points incorporated in the petition with or without reference to maps or plats attached to the petition; the property of each condemnee to be condemned shall be described separately, and each tract under separate ownership shall be consecutively numbered for ease in identification; provided that interests of several owners in the same property may be described and numbered together;
- (6) the interest to be taken;
- (7) an allegation that the petitioner has been unable to agree with one or more of the defendants having an interest in a particular tract as to just compensation;
- (8) a statement of the amount offered as compensation for each tract affected;

(9) a map, plat or plan included or attached to the petition showing the improvement to be constructed and indicating the property of the condemnee to be condemned; and

(10) unless an appraisal was prepared pursuant to Section 42A-1-5 NMSA 1978, a request for the appointment of three commissioners to assess the damages which the condemnees may severally sustain in consequence of the proposed taking.

C. The petition may also include a prayer requesting that the court grant the condemnor the right of immediate possession as provided in Section 42A-1-22 NMSA 1978, and that the court hold a hearing concerning this matter within thirty days from the date of the filing of the petition.

D. The petition shall name as defendants, and shall list their addresses, if known, all the parties who own or occupy the property or have any interest therein as may be ascertained by a search of the county records, and if any such parties are known to the petitioner to be minors or persons of unsound mind or suffering under any other legal disability, when no legal representative, custodian or guardian appears in their behalf, the court shall on motion appoint a guardian ad litem to protect the interest of those under any legal disability. The following additional parties shall be named as defendants:

(1) if the record owner of the property sought to be condemned is deceased and there has been no recorded legal disposition of the property, the deceased and his known heirs shall be named as defendants, and, if the heirs are unknown to the petitioner, they shall be named and designated as defendants under the style of "the unknown heirs of . . . . ., deceased";

(2) if the estate of any such deceased person is in the process of being administered in any court of the state, the personal representative of such deceased person shall also be named as a defendant;

(3) if the property sought to be condemned is held in trust and the petitioner has knowledge of the trust, the trustee shall be named; and

(4) where the name of the party holding title or any interest therein cannot be determined, such parties shall be designated as "unknown owners or claimants of the property involved."

**History:** 1978 Comp., § 42A-1-17, enacted by Laws 1981, ch. 125, § 13.

### **ANNOTATIONS**

**Ownership interest required for standing.** — Only persons with an ownership interest capable of being taken or damaged would appear to have standing to raise issues about the basic features of such an action, such as the authority of the condemnor to



proceed, the identity of the fact finder, and the description of the property or of its value. *City of Sunland Park v. Santa Teresa Servs. Co.*, 2003-NMCA-106, 134 N.M. 243, 75 P.3d 843, cert. denied, 134 N.M. 179, 74 P.3d 1071.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 27 Am. Jur. 2d Eminent Domain §§ 511 et seq., 888.

29A C.J.S. Eminent Domain §§ 229 to 231, 288.

## **42A-1-18. Notice of condemnation.**

A. Upon filing a petition in condemnation in the district court, the clerk shall issue and give notice of condemnation which shall contain:

- (1) a copy of the petition and the appraisal, if one was prepared pursuant to Section 42A-1-5 NMSA 1978;
- (2) the title of the action;
- (3) the name or designation of the court and county in which the action is brought as well as the cause number;
- (4) a direction that the condemnee appear and answer to the petition within thirty days after service of notice, and a statement that unless the condemnee appears and answers, the petitioner will apply to the court for the relief demanded in the petition;
- (5) the name and address of the petitioner's attorney shall appear on every notice; and
- (6) a general statement of the nature of the action and a general description of the property involved in the action.

B. If the condemnor in his petition requests an order for immediate possession, notice of such request shall be incorporated in the notice provided for pursuant to Subsection A of this section.

C. If an appraisal has been prepared pursuant to Section 42A-1-5 NMSA 1978, the condemnor shall file a copy of it at the time the petition is filed and shall deposit with the clerk of the court the amount determined by the appraisers pursuant to Section 42A-1-5 NMSA 1978. The deposit shall be managed pursuant to the provisions of Subsections E through G of Section 42A-1-19 NMSA 1978.

**History:** 1978 Comp., § 42A-1-18, enacted by Laws 1981, ch. 125, § 14.

## **ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Conditions imposed to approval of proposed subdivision map or plat as constituting taking of property for public use without compensation, 11 A.L.R.2d 524.

29A C.J.S. Eminent Domain §§ 220, 237 to 247, 248 to 266.

### **42A-1-19. Appointment of commissioners; assessment of damages; payment.**

A. If appraisers have not been appointed pursuant to Section 42A-1-5 NMSA 1978 and if the court is satisfied that proper notice of the petition has been given, it shall appoint up to three disinterested commissioners who are residents of the county in which the property or a part thereof is situated and who are familiar with the property values in the area of the proposed taking. The commissioners shall assess the damages which the condemnees may severally sustain by reason of the proposed taking and make a report to the clerk of the court within thirty days, unless extended by the court for good cause shown, setting forth the amount of the damages. The clerk of the court shall file the report prepared by the commissioners. Should more than one condemnee be included in the petition, the commissioners shall state the damages allowed each condemnee separately, together with a specific description of the property for which such damages are assessed.

B. Any number of condemnees may be joined in one petition, and the damages to each tract of land shall be separately assessed by the commissioners.

C. The condemnor shall pay to the clerk the amount assessed pursuant to Subsection A of this section.

D. Upon the failure by the condemnor to pay the assessment, the court may, upon motion and notice by the party entitled to damages, enforce payment by execution.

E. By motion before entry of judgment, the condemnee may apply to the court to withdraw an amount not to exceed sixty-six and two-thirds percent of the amount deposited pursuant to Subsection C of this section. The condemnee shall specify in his motion the property for which the deposit was made and the amount requested to be withdrawn.

F. A condemnee who withdraws funds pursuant to Subsection E of this section waives all objections and defenses to the condemnation action, except for any claim to greater compensation.

G. The court shall direct that the funds deposited pursuant to Subsection C of this section and not withdrawn pursuant to the provisions of Subsection E of this section be invested by the clerk of the court in federal securities or in federally insured interest-bearing accounts in financial institutions located within the judicial district. All income from such investment shall accrue to the benefit of the condemnee. No funds in excess

of the applicable dollar insurance maximum shall be deposited in any institution. The type of investment and maturity date of the deposit or securities shall be approved by the condemnee. If there is more than one condemnee and they are unable to agree on the type of investment or maturity date, the court shall invest the deposit in the type of such investment which earns the highest interest rate, provided such deposit or investment shall mature in not more than one hundred eighty-five days.

**History:** 1978 Comp., § 42A-1-19, enacted by Laws 1981, ch. 125, § 15.

## ANNOTATIONS

**Landowner is not entitled to compensation for loss of business** resulting to him because of opening up of a more convenient route whereby traffic is diverted from his door since there is no vested right in the flow of public travel. *Board of Cnty. Comm'rs v. Slaughter*, 1945-NMSC-019, 49 N.M. 141, 158 P.2d 859.

**Warrants for amount of award.** — Where the clerk issued warrants to attorneys for condemnees for amounts of awards in eminent domain, but these warrants were not delivered to or endorsed by condemnees and funds that were deposited with clerk remained in hands of clerk, condemnees had not received benefit from judgment and were not barred from appealing judgment. *AT & T Co. v. Walker*, 1967-NMSC-049, 77 N.M. 755, 427 P.2d 267.

**Proceedings initiated by filing petition continue through appeal.** — In condemnation proceedings, the proceedings initiated by filing petition in district court for appointment of commissioners, continued through the appellate proceedings in the district court, and did not terminate with the confirmation of the commissioners' report by the district court. *State ex rel. Weltmer v. Taylor*, 1938-NMSC-035, 42 N.M. 405, 79 P.2d 937.

**Final judgment confirms commissioners' report.** — In condemnation proceeding by the state highway commission [state transportation commission], the order confirming the commissioners' report in the final judgment fixing the damages for the properties taken. *State ex rel. State Hwy. Comm'n v. Marquez*, 1960-NMSC-099, 67 N.M. 353, 355 P.2d 287.

**Effect of irregularity on final judgment.** — The failure of commissioners, appointed to appraise land condemned, to include description and other details, is an irregularity but does not authorize the vacation of a final judgment awarding damages. *Board of Cnty. Comm'rs v. Wasson*, 1933-NMSC-076, 37 N.M. 503, 24 P.2d 1098.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 26 Am. Jur. 2d Eminent Domain §§ 27 et seq., 268 et seq.; 27 Am. Jur. 2d Eminent Domain §§ 293, 459 et seq., 511 et seq., 555, 704, 705, 709, 710, 822, 825, 826, 828.

Right to compensation for damages to land left outside of levee, 20 A.L.R. 302.

Right under constitutional provision against taking or damaging, to recover in other than an eminent domain proceeding, for consequential damages to property no part of which is taken, 20 A.L.R. 516.

Right of abutting owner to compensation for railroad in street under constitutional provision against damaging property for public use without compensation, 22 A.L.R. 145.

Right of abutting owner to compensation for interference with access by bridge or other structure in public street or highway, 45 A.L.R. 534.

Valuation at time of original wrongful entry by condemnor or at time of subsequent initiation of condemnation proceedings, 2 A.L.R.3d 1038.

Zoning factor in determination of damages in eminent domain, 9 A.L.R.3d 291.

Good will as element of damages for condemnation of property on which private business is conducted, 81 A.L.R.3d 198.

Eminent domain: unity or contiguity of separate properties sufficient to allow damages for diminished value of parcel remaining after taking of other parcel, 59 A.L.R.4th 308.

Referee's failure to file report within time specified by statute, court order, or stipulation as terminating reference, 71 A.L.R.4th 889.

29A C.J.S. Eminent Domain §§ 229 to 231, 286 to 338.

## **42A-1-20. Report; notice of filing; exceptions.**

A. Upon the filing of the report of the commissioners prepared pursuant to Section 42A-1-19 NMSA 1978, the clerk of the court shall notify the attorneys of record for all of the parties to such proceeding who have entered appearances or, if not represented by attorney, all parties who have entered appearances at their respective post-office addresses of record, of the filing of the report.

B. Failure to give notice as provided in this section or failure to receive the notice shall not operate to extend the time for filing the exceptions to the report of the commissioners.

C. The report of the commissioners may be reviewed by the court in which the proceedings are had on written exceptions filed in the clerk's office by either or any party within thirty days after the time of the filing of the report in the clerk's office. The court shall either confirm the report or order a second appraisal either by the commissioners already appointed or by three other qualified commissioners to be appointed for that purpose.

**History:** 1978 Comp., § 42A-1-20, enacted by Laws 1981, ch. 125, § 16.

## ANNOTATIONS

**Section gives district judge extensive power over report** of the commissioners in condemnation proceedings, and the court may not only review the report of the commissioners upon written exceptions filed, but is authorized to make such orders as right and justice may require. *State ex rel. Davis v. District Court*, 1960-NMSC-071, 67 N.M. 215, 354 P.2d 145.

**Court may confirm report or order new appraisalment.** — District court is without statutory authority, in passing upon exceptions to commissioners' report in condemnation proceedings, to substitute its judgment on the question of damages for that of the commissioners, and its power is therefor limited to either confirming the report or ordering a second appraisalment. *State ex rel. Weltmer v. Taylor*, 1938-NMSC-035, 42 N.M. 405, 79 P.2d 937.

**Order confirming report of commissioners becomes final** unless an appeal is taken therefrom. *Transwestern Pipe Line Co. v. Yandell*, 1961-NMSC-173, 69 N.M. 448, 367 P.2d 938.

**Submission of exceptions' effect on right to disqualify judge.** — In condemnation proceedings, the submission of exceptions to the commissioners' report for a ruling thereon by district judge waived exceptor's statutory right to disqualify the judge in that case. *State ex rel. Weltmer v. Taylor*, 1938-NMSC-035, 42 N.M. 405, 79 P.2d 937.

**Confirmation is essential before judgment can be entered** and execution issued or possession of the property had. *State ex rel. City of Albuquerque v. Johnson*, 1941-NMSC-043, 45 N.M. 480, 116 P.2d 1021.

**Effect of appeal to district court for trial de novo.** — An appeal to the district court for a trial de novo is not an appeal in the usual sense, but a notice of dissatisfaction with the award of compensation and damages by the commissioners and a request for a new award to be made by a jury and the court. The trial de novo is not the beginning of a new action, but a continuation of the proceeding from the time of the filing of the original petition in condemnation. *Transwestern Pipe Line Co. v. Yandell*, 1961-NMSC-173, 69 N.M. 448, 367 P.2d 938.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 27 Am. Jur. 2d Eminent Domain §§ 511 et seq., 555, 704 et seq., 567 et seq., 736, 738.

Protection of rights of mortgagee in eminent domain proceedings, 58 A.L.R. 1534, 110 A.L.R. 542, 154 A.L.R. 1110.

Quotient condemnation report or award by commissioners or the like, 39 A.L.R.2d 1208.

Propriety of court's consideration of ecological effects of proposed project in determining right of condemnation, 47 A.L.R.3d 1267.

29A C.J.S. Eminent Domain §§ 148, 315 to 328, 335, 371 to 374, 367, 419.

## **42A-1-21. Trial.**

A. Within twenty days after the filing of the petition if an appraisal has been prepared pursuant to Section 42A-1-5 NMSA 1978 or after the final confirmation of the report of the commissioners, a party may demand trial of any issues remaining in the cause. The cause shall be tried de novo, and unless waived, the parties shall be entitled to a trial by jury.

B. If no issues other than compensation are raised, the court shall render a final judgment awarding the property to the condemnor contingent upon payment of the awarded compensation to the condemnee. In all other cases, the court shall render final judgment upon decision of all contested questions of law and fact.

**History:** 1978 Comp., § 42A-1-21, enacted by Laws 1981, ch. 125, § 17.

### **ANNOTATIONS**

**Jury trial.** — Based upon the language of Section 42A-1-21 NMSA 1978 and the statute's history, the legislature intended to provide for a jury trial on the issues of public use and necessity. *Santa Fe S. Ry. v. Baucis Ltd. Liab. Co.*, 1998-NMCA-002, 124 N.M. 430, 952 P.2d 31.

**Legislative intent.** — It was not the intention of the territorial legislature to provide for an appeal under the eminent domain statutes, in the sense that it should be a different cause. *State ex rel. Weltmer v. Taylor*, 1938-NMSC-035, 42 N.M. 405, 79 P.2d 937.

**Liberal construction in favor of trial de novo.** — This section should be construed liberally in favor of the right to trial de novo by jury. *El Paso Elec. Co. v. Milkman*, 1959-NMSC-103, 66 N.M. 335, 347 P.2d 1002.

**Trial de novo does not mean beginning of new action.** *Wells v. Arch Hurley Conservancy Dist.*, 1976-NMCA-082, 89 N.M. 516, 554 P.2d 678.

**Trial de novo continuation of original condemnation petition.** — This appeal to the district court for a trial de novo is, in effect, not an appeal in the usual sense, but rather a notice of dissatisfaction with the award of compensation and damage by the commissioners and a request for a new award to be made by a jury and the court, and the trial de novo is not the beginning of a new action but a continuation of the proceeding from the time of filing of the original petition in condemnation. *Wells v. Arch Hurley Conservancy Dist.*, 1976-NMCA-082, 89 N.M. 516, 554 P.2d 678; *Transwestern Pipe Line Co. v. Yandell*, 1961-NMSC-173, 69 N.M. 448, 367 P.2d 938.

**Either party can secure trial de novo.** — Either party to a condemnation proceeding can, as a matter of right, secure a jury trial de novo. *State ex rel. State Hwy. Comm'n v. Marquez*, 1960-NMSC-099, 67 N.M. 353, 355 P.2d 287.

**Denial of trial de novo.** — Since it was held that the order confirming the commissioners' report in eminent domain is the final judgment, unless appealed to the district court, denial of a trial de novo does not amount to a default judgment against the state. *State ex rel. State Hwy. Comm'n v. Marquez*, 1960-NMSC-099, 67 N.M. 353, 355 P.2d 287.

**Confirmation of report essential for judgment and execution.** — A confirmation of the commissioner's report by the court is essential before a judgment can be entered and an execution issued, and orderly procedure requires confirmation of the report. *El Paso Elec. Co. v. Milkman*, 1959-NMSC-103, 66 N.M. 335, 347 P.2d 1002.

**Notice of appeal from order and confirmation.** — The notice of appeal, from which a trial de novo in the district court results, is from the said order and confirmation. *State ex rel. State Hwy. Comm'n v. Marquez*, 1960-NMSC-099, 67 N.M. 353, 355 P.2d 287.

**When order becomes final.** — The order confirming the report of the commissioners, where right of entry has been granted, becomes final 20 days thereafter, if notice of appeal to the district court is not filed as provided by this section, or waived by conduct of the parties. *State ex rel. State Hwy. Comm'n v. Marquez*, 1960-NMSC-099, 67 N.M. 353, 355 P.2d 287.

**Jurisdiction of court not divested by failure to file notice.** — The failure to file a notice of appeal with the clerk of the district court does not divest it of the jurisdiction it obtained in the first place over the parties and the subject matter, but jurisdiction continues throughout the proceedings. *State ex rel. Deering v. District Court*, 1950-NMSC-045, 54 N.M. 292, 222 P.2d 609.

**Confirmed order not appealable to supreme court.** — In a condemnation case an order confirming the report of appraisers (commissioners) is not appealable to the supreme court. *Public Serv. Co. v. Wolf*, 1967-NMSC-170, 78 N.M. 221, 430 P.2d 379 (1967).

**Law reviews.** — For note and comment, "Manning v. Mining and Minerals Division: Sovereign Immunity as a Bar Against Claims for Damages Brought under the U.S. Constitution," see 37 N.M. L. Rev. 573 (2007).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 26 Am. Jur. 2d Eminent Domain § 132 et seq.; 27 Am. Jur. 2d Eminent Domain §§ 636 et seq., 714 et seq.

Appeal relating to amount of condemnation award, 50 A.L.R.2d 1386.

Right to jury, 77 A.L.R.2d 548.

Payment or deposit of award in court as affecting condemnor's right to appeal, 40 A.L.R.3d 203.

29A C.J.S. Eminent Domain §§ 367, 369, 411.

### **42A-1-22. Order of immediate possession prior to judgment.**

A. At the time of filing the petition, the condemnor may apply to the court for an order for immediate possession of the property proposed to be taken.

B. Upon filing the petition, the court shall set a time for hearing within thirty days of the filing, and notice shall be given as provided in Section 42A-1-18 NMSA 1978.

C. At the hearing, the court shall make an order authorizing the condemnor to take immediate possession of the property if it finds that the use for which the property sought to be condemned is a public use and that immediate possession is necessary.

D. If the order is granted pursuant to Subsection C of this section and no offer was made pursuant to Section 42A-1-5 NMSA 1978, the court shall require the condemnor to deposit with the court an amount established by it. Money from the deposit may be invested and disbursed as provided in Subsections E through G of Section 42A-1-19 NMSA 1978. Upon final confirmation of the report of the commissioners, the deposit made pursuant to this subsection shall be adjusted to reflect that report. The adjustment, however, shall not require the condemnee to refund any amount withdrawn pursuant to Subsection E of Section 42A-1-19 NMSA 1978, but any amount withdrawn shall be credited against the total amount awarded pursuant to Section 42A-1-24 NMSA 1978.

E. The order for immediate possession shall describe the property to which the condemnor is authorized to take possession. The description may be by reference to the petition. The order shall also state the date at which the condemnor is authorized to take possession of the property.

**History:** 1978 Comp., § 42A-1-22, enacted by Laws 1981, ch. 125, § 18.

### **ANNOTATIONS**

**Use of a natural gas pipeline was a "public use"** as required for condemnation under the Eminent Domain Code. *Kennedy v. Yates Petroleum Corp.*, 1986-NMSC-064, 104 N.M. 596, 725 P.2d 572.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 26 Am. Jur. 2d Eminent Domain §§ 155, 156, 918 et seq.; 27 Am. Jur. 2d Eminent Domain §§ 519 et seq., 854 et seq.

Provision for taking or retaining possession pending appeal in condemnation proceeding, 55 A.L.R. 201.



Condemnation proceedings as affecting insurable interest of property owner, 29 A.L.R.2d 888.

Who, as between condemnor and condemnee, bears risk of loss or destruction of property occurring after commencement but before completion of eminent domain proceedings, 89 A.L.R.2d 1076.

Injunction against exercise of power of eminent domain, 93 A.L.R.2d 465.

Right to enter land for preliminary survey or examination, 29 A.L.R.3d 1104.

29A C.J.S. Eminent Domain §§ 172 to 177, 183, 212, 267, 348, 387 to 390, 401, 413, 419.

### **42A-1-23. Possession; no effect on other rights.**

By taking possession pursuant to the provisions of Section 42A-1-22 NMSA 1978, the condemnor does not waive the right to appeal from the judgment, the right to abandon or the right to request a new trial.

**History:** 1978 Comp., § 42A-1-23, enacted by Laws 1981, ch. 125, § 19.

### **42A-1-24. Determination of compensation and damages; interest.**

A. For the purposes of assessing compensation and damages, the right thereto shall be deemed to have accrued as of the date the petition is filed, and actual value on that date shall be the measure of compensation for all property taken, and also the basis of damages for property not taken but injuriously affected in cases where such damages are legally recoverable; the amount of the award shall be determined from the evidence and not be limited to any amount alleged in the petition or set forth in the answer.

B. Whenever just compensation shall be ascertained and awarded in such proceeding and established by judgment, the judgment shall include as a part of the just compensation awarded interest at the rate of ten percent a year upon the unpaid portion of the compensation awarded from the date the petition is filed to the date of payment or the date when the proceedings are finally abandoned. The judgment shall not include interest upon the amount represented by funds deposited by the condemnor pursuant to the provisions of Sections 42A-1-19 and 42A-1-22 NMSA 1978.

C. The court shall have the power to direct the payment of delinquent taxes, special assessments and rental or other charges owed out of the amount determined to be just compensation and to make orders as the court deems necessary with respect to encumbrances, liens, rents, insurance and other just and equitable charges.

D. The judgment shall credit against the total amount awarded to the condemnee any payments or deposits paid over to him made before the date of entry of judgment by the condemnor as compensation for the property taken, including any funds which the condemnee withdrew from the amount deposited by the condemnor pursuant to the provisions of Section 42A-1-19 or 42A-1-22 NMSA 1978.

E. If the amount to be credited against the award under Subsection D of this section exceeds the total amount awarded, the court shall require that the condemnee pay the excess to the condemnor.

F. The price paid for similar property by one other than the condemnor may be considered on the question of the value of the property condemned or damaged if there is a finding that there have been no material changes in conditions between the date of the prior sale and the date of taking, that the prior sale was made in a free and open market and that the property is sufficiently similar in the relevant market with respect to situation, usability, improvements and other characteristics.

**History:** 1978 Comp., § 42A-1-24, enacted by Laws 1981, ch. 125, § 20; 2001, ch. 10, § 1; 2001, ch. 320, § 1.

## ANNOTATIONS

**The 2001 amendment**, effective June 15, 2001, substituted "the rate of ten percent" for the "rate of eight percent" in Subsection B.

Laws 2001, ch. 10, § 1 and Laws 2001, ch. 320, § 1, both effective June 15, 2001, enacted identical amendments to this section. The section was set out as amended by Laws 2001, ch. 320, § 1. See 12-1-8 NMSA 1978.

### I. GENERAL CONSIDERATION.

**"Taking of property" in constitutional sense.** — Constitutional rights rest on substance, not on form; therefore, liability to pay compensation is not to be evaded by leaving title in the owner while depriving him of the beneficial use of the property. When interference with the use of property by its owner consists of actual entry upon land and its devotion to public use for more than a momentary period, there is a taking of property in the constitutional sense, whether there has been any formal condemnation or not. *City of Albuquerque v. Chapman*, 1966-NMSC-212, 77 N.M. 86, 419 P.2d 460.

**Taking is complete where entry is made upon property by condemnor and act committed** which indicates an intent to appropriate the property. *City of Albuquerque v. Chapman*, 1966-NMSC-212, 77 N.M. 86, 419 P.2d 460.

**Having taken property, municipality cannot avoid payment therefor** on the basis that if it had not "taken" the property, it could have required a gift of the property as a

condition for use of the remainder of the tract at some future time. *City of Albuquerque v. Chapman*, 1966-NMSC-212, 77 N.M. 86, 419 P.2d 460.

**Taking not necessary for compensation, if consequential damages.** — In order for an owner to be entitled to compensation, a taking is not required. It is sufficient if there are consequential damages. *Board of Cnty. Comm'rs v. Harris*, 1961-NMSC-165, 69 N.M. 315, 366 P.2d 710.

**Effect of legislature's fixing time for assessment of market value.** — The legislature may establish some convenient time, as of which the value of the property will be assessed and the amount of compensation fixed, and while, in particular cases, the condemnee might fare better or worse under this than under another possible rule, the condemnee may not complain when, because of market fluctuations, the compensation fixed by this rule is less than the market value at some other time during the condemnation proceedings. Nor is the situation altered when the condemnor is permitted to go into possession prior to the date as of which compensation is fixed, since the market value on that date is unaffected by the identity of the party in possession. *State ex rel. State Hwy. Comm'n v. Chavez*, 1966-NMSC-222, 77 N.M. 104, 419 P.2d 759.

**Date for fixing compensation.** — The legislature's selection of the date of filing of the condemnation petition as the valuation date is impermissible because there has been no vesting of title in the condemnor on that date. The date the preliminary order of entry becomes effective is the proper date to use in assessing the value of the property and in fixing the compensation to which the owner is constitutionally entitled. *County of Dona Ana ex rel. Bd. of Cnty. Comm'rs v. Bennett*, 1994-NMSC-005, 116 N.M. 778, 867 P.2d 1160.

**Effect of subsequent higher land sales on damages.** — Landowner was damaged by the taking even though the value of the land after the date the condemnation action was filed was higher than the value of the land on the date when compensation was assessed. *City of Albuquerque v. Chapman*, 1966-NMSC-212, 77 N.M. 86, 419 P.2d 460.

**Effect of stipulation as to future damages.** — Where there is no conflict between the parties hereto as to the future damages stipulated to, of which the trial court had notice, the judgment should conform to the strict wording of the stipulation. *Transwestern Pipe Line Co. v. Yandell*, 1961-NMSC-173, 69 N.M. 448, 367 P.2d 938.

**Effect of voluntary abandonment by nonuse on underlying fee.** — Where the public use of the street surface continues, the authorities generally agree that the possibility of voluntary abandonment by nonuse is so remote and improbable that the underlying fee has no substantial value in a condemnation proceeding. *State ex rel. State Hwy. Comm'n v. Myers*, 1963-NMSC-117, 72 N.M. 319, 383 P.2d 274.

**Price for abutting lots includes value of underlying, abutting fees.** — In the absence of a special value, the price fixed for the abutting lots taken in condemnation includes any value of the underlying abutting fee in the streets and alleys carried with condemnation of such abutting lots. *State ex rel. State Hwy. Comm'n v. Myers*, 1963-NMSC-117, 72 N.M. 319, 383 P.2d 274.

**Interest from time owner's possession invaded.** — The owner of land taken in condemnation proceedings should have interest from the time his possession is invaded, either with or without an order of the court. *State ex rel. State Hwy. Comm'n v. Peace Found., Inc.*, 1968-NMSC-173, 79 N.M. 576, 446 P.2d 443.

**When immediate possession is granted to condemnor,** however, the condemnee is deprived of the use of his property between the date of such entry and the date when the compensation is paid to him. He would therefore be entitled to interest on the amount of the award from the date of entry by the condemnor. *State ex rel. State Hwy. Comm'n v. Chavez*, 1966-NMSC-222, 77 N.M. 104, 419 P.2d 759.

**Suspension of interest from date of continuance is error.** — The allowing of interest from the date the petition is filed is essential to just compensation and the trial court erred by suspending interest from date of continuance until jury verdict. *State ex rel. State Hwy. Comm'n v. Peace Found., Inc.*, 1968-NMSC-173, 79 N.M. 576, 446 P.2d 443.

**Railroad improvements not fixtures.** — The railroad improvements put upon lands included in a coal entry, previous to condemnation proceedings, even when the entry is a wilful and violent trespass, do not become a fixture of the land, and are not to be taken into consideration in estimating compensation. *Atchison, T. & S.F. Ry. v. Richter*, 1915-NMSC-008, 20 N.M. 278, 148 P. 478.

**Parties with debt claims against the property owner,** whether unsecured or recorded, could not meaningfully participate in condemnation proceedings as "condemnees". Rather, parties with such claims must rely for relief on the allocation proceedings conducted under Subsection C of this section. *City of Sunland Park v. Santa Teresa Servs. Co.*, 2003-NMCA-106, 134 N.M. 243, 75 P.3d 843, cert. denied, 134 N.M. 179, 74 P.3d 1071.

## II. COMPENSABLE DAMAGES.

**Lost profits for temporary physical taking.** — In an inverse condemnation proceeding for a temporary physical taking, lost profits may be recovered when they are the best measure of damages of the value of the lost use and enjoyment of condemned land. *Primetime Hospitality, Inc. v City of Albuquerque*, 2009-NMSC-011, 146 N.M. 1, 206 P.3d 112, *rev'g* 2007-NMCA-129, 142 N.M. 663, 168 P.3d 1087.

Where the landowner had begun constructing a hotel when the landowner accidentally ruptured an encroaching municipal waterline; the opening of the hotel was delayed, lost

business damages were the only measure of the loss of use and possession of the property during the temporary taking; and lost profits injuries were directly caused by the encroaching waterline, lost profits for the period of time during which the opening of the hotel was delayed was the best evidence of the value of the property taken.

*Primetime Hospitality, Inc. v City of Albuquerque*, 2009-NMSC-011, 146 N.M. 1, 206 P.3d 112, *rev'g* 2007-NMCA-129, 142 N.M. 663, 168 P.3d 1087.

**Excess construction costs for temporary physical taking.** — In an inverse condemnation proceeding for a temporary physical taking, construction costs that are a direct result of the taking and that are necessary to put the landowner in the position the landowner would have been had no taking occurred are compensable. *Primetime Hospitality, Inc. v City of Albuquerque*, 2009-NMSC-011, 146 N.M. 1, 206 P.3d 112, *rev'g* 2007-NMCA-129, 142 N.M. 663, 168 P.3d 1087.

Where the landowner had begun constructing a hotel when the landowner accidentally ruptured an encroaching municipal waterline; the landowner incurred additional construction costs to repair water damage and to construct a buttress wall to permit construction to proceed, the expenses were a direct result of the municipality's temporary physical taking of the property and are compensable. *Primetime Hospitality, Inc. v City of Albuquerque*, 2009-NMSC-011, 146 N.M. 1, 206 P.3d 112, *rev'g* 2007-NMCA-129, 142 N.M. 663, 168 P.3d 1087.

**Loss of growing crops.** — Where an existing crop is a condition that a willing, unobligated buyer would consider in arriving at a price for the property, crop damages may be included in a condemnation award as special or consequential damages. *El Paso Elec. Co. v. Pinkerton*, 1981-NMSC-039, 96 N.M. 473, 632 P.2d 350.

**Lessees' right to compensation just as fixed as owner.** — Appellant lessees' right to compensation is just as fixed and complete as is the right of the owner of property which had been condemned and the property actually entered. The rights of appellants are in no way altered after the date of notice by the fact that they continued to enjoy free access even though the enjoyment was in violation of the court order for which they could have been held in contempt. *State ex rel. State Hwy. Comm'n v. Chavez*, 1966-NMSC-222, 77 N.M. 104, 419 P.2d 759.

**Existence of compensable damages factual question.** — The line between noncompensable damage through an exercise of the police power, and damage for which payment must be made for a taking under eminent domain is one not easily drawn, and the supreme court has not attempted to state a rule of universal application, but will decide each case as it arises. *Board of Cnty. Comm'rs v. Harris*, 1961-NMSC-165, 69 N.M. 315, 366 P.2d 710.

**Right to access compensable.** — The right to access is a property right, and the same may not be taken or damaged without the payment of compensation. *State ex rel. State Hwy. Comm'n v. Chavez*, 1966-NMSC-222, 77 N.M. 104, 419 P.2d 759.

**Grade change not compensable, unless material.** — It is not every change of grade which would be compensable. It must be a material change, and one which causes consequential damage. Injury which is the result of the proper imposition of regulations under the police power is not compensable. *Board of Cnty. Comm'rs v. Harris*, 1961-NMSC-165, 69 N.M. 315, 366 P.2d 710.

**Loss based on unfounded fears.** — In a partial condemnation action, a property owner is entitled to receive as compensation the diminution in value of the remainder of the property caused by public perception of the use to which the condemned property will be put. Under this view, compensation is awarded for loss of market value even if the loss is based on fears not founded on objective standards. *City of Santa Fe v. Komis*, 1992-NMSC-051, 114 N.M. 659, 845 P.2d 753.

### III. MEASURE OF DAMAGES.

**Deduction for a contribution in aid of construction.** — The amount previously paid as a contribution in aid of construction of property by a condemnor to a condemnee in a condemnation action of the same property may not be deducted from the fair market value of the property that the condemnor owes the condemnee as compensation for the taking. *Moriarty School Dist. Bd. of Education v. Thunder Mtn. Water Co.*, 2007-NMSC-031, 141 N.M. 824, 161 P.3d 869.

**Credit for contribution in aid of construction.**— The contribution in aid of construction that a school district paid a regulated public utility for a water line extension to receive water service cannot be credited against the amount awarded to the utility in an action by the school district to acquire the water line extension by eminent domain. *Moriarty Mun. Sch. Dist. v. Thunder Mountain Water Co.*, 2006-NMCA-135, 140 N.M. 612, 145 P.3d 92, cert. granted, 2006-NMCERT-010, 140 N.M. 674 146 P.3d 809.

**Method of calculating damages.** — In arriving at the proper amount of compensation to be allowed in condemnation proceedings, the correct measure of damages is the difference in the value of the property immediately before the taking and the value of the property immediately after the taking, the owner being entitled to the difference in these sums, in addition to a recovery for the various elements of damage to the remaining land not taken but injuriously affected. *Transwestern Pipe Line Co. v. Yandell*, 1961-NMSC-173, 69 N.M. 448, 367 P.2d 938.

**Damages recoverable cannot exceed value of land taken.** — Where no testimony concerning compensable elements of damage were pointed out to the court except the value of the land taken, the damages recoverable could not exceed the value of the land taken. *State ex rel. State Hwy. Comm'n v. Brock*, 1968-NMSC-165, 80 N.M. 80, 451 P.2d 984.

**Before and after rule.** — The so-called before and after rule, whereby the owner of property is entitled to recover as compensation the amount the fair market value of his property is depreciated by the taking is applicable where damage to property results

from a change in grade. *Board of Cnty. Comm'rs v. Harris*, 1961-NMSC-165, 69 N.M. 315, 366 P.2d 710.

**Unity rule.** — The unity rule is applied to ascertain whether two or more parcels of property constitute a single larger tract for the purpose of calculating the fair market value of the property taken or the severance damages to the remaining land that is not subject to condemnation. To apply the unity rule, generally the following three facts should be present: physical contiguity, unity of use, and unity of ownership. The combined presence of all three factors, however, is not a prerequisite to the rule's application. *Yates Petroleum Corp. v. Kennedy*, 1989-NMSC-039, 108 N.M. 564, 775 P.2d 1281.

**Both benefits and detriments considered.** — In applying the before and after rule, the court must consider both benefits and detriments to the property by reason of the taking of the land. *Board of Trustees v. Spencer*, 1965-NMSC-159, 75 N.M. 636, 409 P.2d 269.

**Fair market value.** — Fair market value, which includes in its determination all relative elements of injury and benefit received by the landowner, is theoretically what a willing seller would take and a willing buyer offer; but as a willing seller is usually lacking in condemnation cases, the court has a special responsibility for seeing that the seller receives what is honestly due him, as well as for making sure that under the pressure of compulsion the seller does not gouge the public for more than his property is reasonably worth. *Board of Comm'rs v. Gardner*, 1953-NMSC-047, 57 N.M. 478, 260 P.2d 682.

**Value determined by highest and best use.** — When evaluating the worth of property in eminent domain proceedings one should consider the entire property worth in the market before the taking, considering not merely the uses to which it was applied at the time of condemnation but the highest and best uses for which it was adaptable. *City of Albuquerque v. Chapman*, 1966-NMSC-034, 76 N.M. 162, 413 P.2d 204; *City of Clovis v. Ware*, 1981-NMSC-076, 96 N.M. 479, 632 P.2d 356.

The value of the property is determined by considering not merely the uses to which it was applied at the time of condemnation, but the highest and best uses to which it could be put. Determination of the highest and best use should be made with regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future. *City of Albuquerque v. PCA-Albuquerque #19*, 1993-NMCA-043, 115 N.M. 739, 858 P.2d 406.

**Value not in accordance with condemnor's value.** — It has long been established that the value of the property taken by eminent domain is not appraised in accordance with any special value to the condemnor. *Board of Cnty. Comm'rs v. Vargas*, 1966-NMSC-106, 76 N.M. 369, 415 P.2d 57.

**Determination of improper award.** — Where the awards in condemnation proceeding are far below and outside the bounds of the testimony of any witness, they are improper. *AT & T Co. v. Walker*, 1967-NMSC-049, 77 N.M. 755, 427 P.2d 267.

#### IV. PROOF OF DAMAGES.

**Expert must know property values in vicinity.** — Because the expert in a condemnation case lacked knowledge of property values in the vicinity of the condemned property, he was not qualified to express an opinion quantifying the decrease in value of the property in either actual dollar or percentage terms. *City of Albuquerque v. PCA-Albuquerque #19*, 1993-NMCA-043, 115 N.M. 739, 858 P.2d 406.

**Opinions by real estate appraisers on before and after market values** must be considered in connection with related facts on which they are based, and a satisfactory explanation must be given as to how the witness arrived at his conclusion. *City of Albuquerque v. Chapman*, 1966-NMSC-034, 76 N.M. 162, 413 P.2d 204; *City of Albuquerque v. Chapman*, 1966-NMSC-212, 77 N.M. 86, 419 P.2d 460.

**Owner of realty competent to testify as to value.** — As owner of real property is presumed to have special knowledge as to its value by reason of ownership and is therefor competent to testify to value. *City of Albuquerque v. Ackerman*, 1971-NMSC-032, 82 N.M. 360, 482 P.2d 63.

**Admissibility of evidence of other sales within court's discretion.** — A trial judge is granted a wide discretion in determining the admissibility of evidence of other sales, taking into consideration, among other things, whether the price paid was sufficiently voluntary to be a reasonable index of value. *State ex rel. State Hwy. Comm'n v. Bassett*, 1970-NMSC-051, 81 N.M. 345, 467 P.2d 11.

The rule is well established that the decision of the question whether or not conditions surrounding another tract of land or the sale thereof are sufficiently similar to the circumstances of the pending case and the land involved therein so that evidence as to the sale price may be admitted to prove the value of the land in controversy rests largely within the discretion of the trial court. *State ex rel. State Hwy. Comm'n v. Bassett*, 1970-NMSC-051, 81 N.M. 345, 467 P.2d 11.

**Exclusion of evidence of other sales.** — If the trial court, in its discretion, determined that the prices paid to other landowners were not reasonable estimates of the value of the land in this case, or that the owners settled for less than the land might have brought on the open market in order to avoid litigation, the supreme court will not rule that the trial court abused its discretion in excluding the evidence. *Transwestern Pipe Line Co. v. Yandell*, 1961-NMSC-173, 69 N.M. 448, 367 P.2d 938.

**Proof of specific offers of purchase is not admissible to establish reasonable value** in condemnation proceedings. *Middle Rio Grande Conservancy Dist. v. Crabtree*, 1961-NMSC-134, 69 N.M. 197, 365 P.2d 442.



**Assessed value not evidence of value.** — By itself, the assessed value of property is not competent direct evidence of value for purposes other than taxation. *El Paso Elec. Co. v. Landers*, 1970-NMSC-001, 82 N.M. 265, 479 P.2d 769.

**Jury permitted to use knowledge gained by view of land.** — The jury is permitted under the law to use their knowledge gained by a view of the land in question, not only to interpret the evidence offered in the case, but also as independent evidence of the facts as these appeared to them individually on the view. *Board of Comm'rs v. Gardner*, 1953-NMSC-047, 57 N.M. 478, 260 P.2d 682.

**Law reviews.** — For note, "Property Owners in Condemnation Actions May Receive Compensation for Diminution in Value to Their Property Caused by Public Perception: *City of Santa Fe v. Komis*," see 24 N.M.L. Rev. 535 (1994).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 26 Am. Jur. 2d Eminent Domain §§ 136 et seq., 168 et seq., 183, 184; 27 Am. Jur. 2d Eminent Domain §§ 257, 258, 294, 295, 297, 304, 305, 314, 474, 475, 476, 477, 605, 608, 822, 825, 826, 828.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 A.L.R.2d 781.

Fire risk or hazard as element of damages in condemnation proceedings, 63 A.L.R.2d 313.

Cost to property owner of moving personal property as element of damages or compensation, 69 A.L.R.2d 1453.

Right to open and close argument in trial of condemnation proceedings, 73 A.L.R.2d 618.

Counsel's use, in trial of condemnation proceeding, of chart, diagram or blackboard, not introduced in evidence, relating to damages or the value of the property condemned, 80 A.L.R.2d 1270.

Bad reputation of condemned property derived from its illegal use for gambling, prostitution, or the like, as factor decreasing compensation or damages, 87 A.L.R.2d 1156.

Mandamus to compel ascertainment of compensation for property taken or for injuries inflicted under the power of eminent domain, 91 A.L.R.2d 991.

Changes in purchasing power of money as affecting compensation, 92 A.L.R.2d 772.

Depreciation in value, from project for which land is condemned, as a factor in fixing compensation, 5 A.L.R.3d 901.

How to obtain jury trial in eminent domain: waiver, 12 A.L.R.3d 7.

Propriety and effect, in eminent domain proceeding, of argument or evidence as to landowner's unwillingness to sell property, 17 A.L.R.3d 1449.

Propriety and effect, in eminent domain proceeding, of argument or evidence as to source of funds to pay for property, 19 A.L.R.3d 694.

Propriety and effect, in eminent domain proceeding, of instruction to the jury as to landowner's unwillingness to sell property, 20 A.L.R.3d 1081.

Charging landowner with rent or use value of land where he remains in possession after condemnation, 20 A.L.R.3d 1164.

Propriety and effect of argument or evidence as to financial status of parties in eminent domain proceeding, 21 A.L.R.3d 936.

Admissibility, on issue of value of condemned real property, of rental value of other real property, 23 A.L.R.3d 724.

Admissibility of photographs or models of property condemned, 23 A.L.R.3d 825.

Admissibility of evidence of proposed or possible subdivision or platting of condemned land on issue of value in eminent domain proceedings, 26 A.L.R.3d 780.

Good will or "going concern" value as element of lessee's compensation for taking leasehold in eminent domain, 58 A.L.R.3d 566.

Liability of condemnor in eminent domain proceedings for fees of expert witnesses who testified for property owner, 68 A.L.R.3d 546.

Unsoundness of powerline or other wire, or related structure, as element of damages in easement condemnation proceeding, 97 A.L.R.3d 587.

Recovery of value of improvements made with knowledge of impending condemnation, 98 A.L.R.3d 504.

Assemblage or plottage as factor affecting value in eminent domain proceedings, 8 A.L.R.4th 1202.

Eminent domain: measure and elements of lessee's compensation for condemnor's taking or damaging of leasehold, 17 A.L.R.4th 337.

Fear of powerline, gas or oil pipeline, or related structure as element of damages in easement condemnation proceeding, 23 A.L.R.4th 631.

Unaccepted offer for purchase of real property as evidence of its value, 25 A.L.R.4th 571.

Unaccepted offer to sell or buy comparable real property as evidence of value of property in issue, 25 A.L.R.4th 615.

Eminent domain: compensability of loss of view from owner's property - state cases, 25 A.L.R.4th 671.

Unaccepted offer to sell or listing of real property as evidence of its value, 25 A.L.R.4th 983.

Eminent domain: measure and elements of damages or compensation for condemnation of public transportation system, 35 A.L.R.4th 1263.

Admissibility of testimony of expert, as to basis of his opinion, to matters otherwise excludible as hearsay - state cases, 89 A.L.R.4th 456.

Eminent domain: compensability of loss of visibility of owner's property, 7 A.L.R.5th 113.

Excessiveness or adequacy of attorneys' fees in matters involving real estate - modern cases, 10 A.L.R.5th 448.

Validity, construction, and effect of statute or lease provision expressly governing rights and compensation of lessee upon condemnation of leased property, 22 A.L.R.5th 327.

Measure of damages or compensation in eminent domain as affected by premises being restricted to particular educational, religious, charitable, or noncommercial use, 29 A.L.R.5th 36.

Valuation of mineral interests in federal condemnation proceedings, 40 A.L.R. Fed. 656.

Method of determining rate of interest allowed on award to owner of property taken by United States in eminent domain proceeding, 56 A.L.R. Fed. 477.

29A C.J.S. Eminent Domain §§ 96 to 200, 406, 414 to 416.

## **42A-1-25. Litigation expenses.**

A. The court shall award the condemnee his litigation expenses whenever:

- (1) the condemnor has abandoned the condemnation proceeding;
- (2) the condemnation proceeding has been dismissed for any reason except when a bona fide settlement has been reached; or

(3) there is a final determination that the condemnor does not have a right to take the property sought to be acquired in the condemnation proceeding.

B. Before awarding litigation expenses pursuant to this section, the court shall review the reasonableness of such expenses and fees.

**History:** 1978 Comp., § 42A-1-25, enacted by Laws 1981, ch. 125, § 21.

#### ANNOTATIONS

**Refusal to negotiate as taking without "right".** — Where a county deliberately chose to take property first and litigate afterwards, forcing the landowner to initiate the lawsuit, the district court properly concluded that the county did not have the "right" to take the property, and the condemnee was entitled to an award of attorney's fees. *Landavazo v. Sanchez*, 1990-NMSC-114, 111 N.M. 137, 802 P.2d 1283.

#### **42A-1-26. Measure of damage to remainder in partial condemnation.**

In any condemnation proceeding in which there is a partial taking of property, the measure of compensation and damages resulting from the taking shall be the difference between the fair market value of the entire property immediately before the taking and the fair market value of the property remaining immediately after the taking. In determining such difference, all elements which would enhance or diminish the fair market value before and after the taking shall be considered even though some of the damages sustained by the remaining property, in themselves, might otherwise be deemed noncompensable. Further, in determining such values or differences therein, elements which would enhance or benefit any property not taken shall only be considered for the purpose of offsetting any damages or diminution of value to the property not taken.

**History:** 1978 Comp., § 42A-1-26, enacted by Laws 1981, ch. 125, § 22.

#### ANNOTATIONS

**No constitutional violations.** — All arguments to the effect that the predecessor to this section denies equal protection of the law, is vague, indefinite and uncertain, amounts to an unauthorized donation and is violative of the constitutional requirement of separation of the powers of government are specious and fail to find support in the law. *State ex rel. State Hwy. Comm'n v. Hesselden Inv. Co.*, 1972-NMSC-071, 84 N.M. 424, 504 P.2d 634.

**Purpose of section.** — The language of this section codifies the correct and existing rule or measure of damages in cases of a partial taking, in harmony and compliance with the payment of just compensation for the taking of private property as required by N.M. Const., art. II, § 20. *State ex rel. State Hwy. Comm'n v. Hesselden Inv. Co.*, 1972-NMSC-071, 84 N.M. 424, 504 P.2d 634.

**Date of taking.** — Clearly and logically the date of taking, whether partial or whole, was the date on which the condemnor became vested with the legal right to possession, dominion and control over the real estate being condemned. *State ex rel. State Hwy. Dep't v. Yurcic*, 1973-NMSC-059, 85 N.M. 220, 511 P.2d 546; *State ex rel. State Hwy. Comm'n v. Hesselden Inv. Co.*, 1972-NMSC-071, 84 N.M. 424, 504 P.2d 634.

**Reason for fixing date of taking.** — The reason that most eminent domain statutes fix the time as of which property taken or damaged is to be valued is that values of real estate are not constant and sometimes change greatly before proceedings are completed. The reasoning which compels this rule is not applicable to the nonfluctuating rule or measure of damages in a condemnation case and furnishes no basis for equating the valuation date with the date of taking. *State ex rel. State Hwy. Comm'n v. Hesselden Inv. Co.*, 1972-NMSC-071, 84 N.M. 424, 504 P.2d 634.

**Valuation of property after taking.** — Where part of a tract of land has been taken, the question is how much less is the tract as a whole worth with the piece taken out of it than it was worth before the taking? In determining the value of the property after the taking, the tribunal assessing the damages must take into consideration every element which a purchaser willing but not obliged to buy would consider, and separate items may be considered not as specific items of loss, but merely with respect to their effect upon the market value. *Board of Trustees v. B.J. Serv., Inc.*, 1965-NMSC-109, 75 N.M. 459, 406 P.2d 171.

In a proceeding to condemn part of a tract of land, the rule that the part taken should be valued as part of the whole does not mean that it must be valued according to its proportional value of the whole by multiplying the number of square feet therein by the square foot value of the entire tract. In assessing value of the part taken, the trier of facts must consider the part's value arising from its availability for use in conjunction with the part not taken, and any increased value inhering in the part taken as a part of the larger tract must be reflected in the award to the owners. *Transwestern Pipe Line Co. v. Yandell*, 1961-NMSC-173, 69 N.M. 448, 367 P.2d 938.

To value the entire tract before the taking and reduce that value to a square footage price tag and then use that price tag to determine the value of land remaining after the partial taking is to beg the question. It is only by considering the difference between the value of the entire tract before the taking and the value of the remainder after the taking through separate and independent valuations that the presence or absence and the extent of damages or benefits or both are determined. *Transwestern Pipe Line Co. v. Yandell*, 1961-NMSC-173, 69 N.M. 448, 367 P.2d 938.

The evidence of the market value per acre of the whole tract before the taking, employed as a basis in determining the value of the easement, does not, then, appear to represent the "full fee value" of the easement areas separated from the entire tracts. *Transwestern Pipe Line Co. v. Yandell*, 1961-NMSC-173, 69 N.M. 448, 367 P.2d 938.

When there is not substantial evidence to demonstrate that the property has been diminished in fair market value by reason of a partial taking, the "before and after" rule loses its relevancy and the proper alternative measure of compensation would be the fair market value of the property actually taken. *Yates Petroleum Corp. v. Kennedy*, 1989-NMSC-039, 108 N.M. 564, 775 P.2d 1281.

When a portion of a company's parcel of property was condemned for construction of an access road from a frontage road to a landfill, both of which were already city-owned property, the company was not entitled to compensation for any reduction in the value of the uncondemned portion of its parcel resulting from the proximity of the landfill and the increased traffic on the frontage road. *City of Albuquerque v. Westland Dev. Co.*, 1995-NMCA-136, 121 N.M. 144, 909 P.2d 25, cert. denied, 120 N.M. 828, 907 P.2d 1009, and cert. denied, 517 U.S. 1244, 116 S. Ct. 2499, 135 L. Ed. 2d 190 (1996).

**Enhancement of property value by condemnation.** — If the remaining land is enhanced in value as a result of the project requiring the condemnation, that enhancement can only be used to offset damages to the value of the remaining property. *Yates Petroleum Corp. v. Kennedy*, 1989-NMSC-039, 108 N.M. 564, 775 P.2d 1281.

**Value determined by highest and best uses.** — The value of the property is determined by considering not merely the uses to which it was applied at the time of condemnation, but the highest and best uses to which it could be put. *City of Clovis v. Ware*, 1981-NMSC-076, 96 N.M. 479, 632 P.2d 356.

**Two parcels of land may be deemed one tract** for the purpose of condemnation when they are contiguous or in near proximity and are united in use and ownership, even though the parcels are separated by a drainage channel. *State ex rel. State Hwy. Dep't v. Strosnider*, 1987-NMCA-136, 106 N.M. 608, 747 P.2d 254.

**Diminution of value where sewage facility placed on condemned tract.** — Where expert testimony is introduced into evidence showing that placement of a sewage facility on the condemned portion of a tract, regardless of whether noxious odors come from the facility, will diminish the value of the remaining land, the trial court must consider any resultant diminution in the fair market value of the remaining property. *City of Clovis v. Ware*, 1981-NMSC-076, 96 N.M. 479, 632 P.2d 356.

**When "after" value less than "before" value.** — When only a portion of the condemnee's property is actually taken, ascertainment of the fair market value of the entire property immediately before the taking and the fair market value of that remaining immediately after the taking is required and if the "after" value be less than "before" value, then this difference is the damage to which the condemnee is entitled. *Roosevelt Cnty. Elec. Coop. v. Bowley*, 1967-NMSC-121, 78 N.M. 9, 427 P.2d 894.

**Improvement costs considered.** — It is proper to consider the cost of improvements for restoration purposes and relocation costs as helpful aids in determining the

difference in the before and after values of the property. However, such prospective expenditures are not, themselves, proper elements of damage. *Board of Trustees v. B.J. Serv., Inc.*, 1965-NMSC-109, 75 N.M. 459, 406 P.2d 171.

**Application of rule where loss of irrigation water.** — The well-established measure of damages in eminent domain in this jurisdiction is the before and after rule, by which the owner is entitled to recover, as compensation, the amount by which the fair market value of his property has been depreciated by the taking and although the loss of irrigation water is not, in itself, a proper element of damage, the loss of trees, grass, shrubbery and other vegetation caused by the disruption of the water supply is a factor in the determination of the value of the property after the taking. *Board of Trustees v. Spencer*, 1965-NMSC-159, 75 N.M. 636, 409 P.2d 269.

**Unity rule.** — The unity rule is applied to ascertain whether two or more parcels of property constitute a single larger tract for the purpose of calculating the fair market value of the property taken or the severance damages to the remaining land that is not subject to condemnation. To apply the unity rule, generally the following three facts should be present: physical contiguity, unity of use, and unity of ownership. The combined presence of all three factors, however, is not a prerequisite to the rule's application. *Yates Petroleum Corp. v. Kennedy*, 1989-NMSC-039, 108 N.M. 564, 775 P.2d 1281.

**Generally, damages not recoverable due to loss of business.** — A condemnee may not recover damages by way of expenses or loss of business for temporary inconvenience, annoyance or interference with access occasioned by construction, unless the period of construction was unduly long or the conduct of the condemnor causing the loss was unreasonable, arbitrary or capricious, and where there was no evidence which would warrant a finding that the period of construction was unduly long or that the contractor or highway department acted unreasonably, arbitrarily or capriciously in accomplishing the construction, the evidence as to loss or damage by reason of construction itself merited no legal recognition, and should not have been admitted. *State ex rel. State Hwy. Dep't v. Kistler-Collister Co.*, 1975-NMSC-039, 88 N.M. 221, 539 P.2d 611.

**Or for mere frustration of future plans.** — Mere frustration of the owner's hopes or plans for the future is a noncompensable element of damages. However, compensation for frustration of future hopes or plans is not the same as compensation based on planned future uses for which the property is adaptable. *State ex rel. State Hwy. Dep't v. Kistler-Collister Co.*, 1975-NMSC-039, 88 N.M. 221, 539 P.2d 611.

**Damages for land taken by utility held improper.** — Award of damages to owners of land partially taken by public utility based on the before and after values by giving damages for the acreage taken, plus damages to the lands not taken under the guise of per utility pole location is improper. *Roosevelt Cnty. Elec. Coop. v. Bowley*, 1967-NMSC-121, 78 N.M. 9, 427 P.2d 894.

**When proceedings abandoned, no incidental damages.** — A county can unilaterally abandon condemnation proceedings following the entry of a permanent order of entry (in fact, anytime before the entry of a final judgment confirming the compensation award), subject to paying compensation for the temporary taking that occurred and other expenses necessary to do equity. In assessing these damages and expenses, however, the court should not award any damages for any reduction in value to the property based solely on its relocation. Because there is no permanent taking of property, the owner has no right to any incidental damages to what would have otherwise been the remainder of the property. *County of Bernalillo v. Morris*, 1994-NMCA-038, 117 N.M. 398, 872 P.2d 371.

**Scope of presentation to jury.** — In a condemnation suit it was proper for the jury in fixing damages to consider the property owner's plans for the development of its property. However, the jury was entitled to have presented to it for its consideration alternate plans for the further development of the property for commercial purposes, as well as evidence of other uses for which it was suitable or adaptable, in determining the before and after fair market value of the property, the development of the property for commercial purposes not being limited to the owner's plans for such development. *State ex rel. State Hwy. Dep't v. Kistler-Collister Co.*, 1975-NMSC-039, 88 N.M. 221, 539 P.2d 611.

**Law reviews.** — For article, "Solar Rights and Their Effect on Solar Heating and Cooling," see 16 Nat. Resources J. 363 (1976).

For annual survey of New Mexico law relating to property, see 13 N.M.L. Rev. 435 (1983).

For note, "Property Law – Property Owners in Condemnation Actions May Receive Compensation for Diminution in Value to their Property Caused by Public Perception: *City of Santa Fe v. Komis*," see 24 N.M. L. Rev. 535 (1994).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 26 Am. Jur. 2d Eminent Domain §§ 273, 274, 275, 276, 277, 347; 27 Am. Jur. 2d Eminent Domain §§ 511, 512.

Rights in condemnation award where land taken was subject to possible rights of reverter or re-entry, 81 A.L.R.2d 568.

Distribution as between life tenant and remainderman of proceeds of condemned property, 91 A.L.R.2d 963.

Eminent domain: measure and elements of damages or compensation for condemnation of public transportation system, 35 A.L.R.4th 1263.

Eminent domain: unity or contiguity of separate properties sufficient to allow damages for diminished value of parcel remaining after taking of other parcel, 59 A.L.R.4th 308.



Eminent domain: compensability of loss of visibility of owner's property, 7 A.L.R.5th 113.  
29A C.J.S. Eminent Domain §§ 147, 148, 191.

### **42A-1-27. Proof of payment; recording judgment.**

A. After the condemnor has made payment in full to the clerk of the district court in accordance with the judgment in the condemnation action, the clerk shall certify upon the judgment that payment has been made.

B. A copy of the judgment showing payment shall be recorded in the office of the county clerk of the county in which the property is located, and thereupon the title or interest in the property affected shall vest in the condemnor.

C. If the condemnor is a governmental entity, a copy of the judgment shall be filed with the county assessor who shall remove such property from the tax rolls.

**History:** 1978 Comp., § 42A-1-27, enacted by Laws 1981, ch. 125, § 23.

#### **ANNOTATIONS**

**Once city satisfied requirements of this section,** the city had a clear legal right to enforce. *City of Sunland Park v. N.M. Pub. Reg. Comm'n*, 2004-NMCA-024, 135 N.M. 143, 85 P.3d 267, cert. denied, 135 N.M. 169, 86 P.3d 47.

**Title vests,** according to Subsection B of this section, when the certification of deposit is recorded in the district court, not when the money is disbursed to the condemnee. *City of Sunland Park v. N.M. Pub. Reg. Comm'n*, 2004-NMCA-024, 135 N.M. 143, 85 P.3d 267, cert. denied, 2004-NMCERT-002, 135 N.M. 169, 86 P.3d 47.

### **42A-1-28. Imperfect titles.**

If the title attempted to be acquired is found to be defective from any cause, the condemnor may institute proceedings to acquire the property as provided in the Eminent Domain Code.

**History:** 1978 Comp., § 42A-1-28, enacted by Laws 1981, ch. 125, § 24.

#### **ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 26 Am. Jur. 2d Eminent Domain §§ 171 et seq., 257, 258; 27 Am. Jur. 2d Eminent Domain § 563.

29A C.J.S. Eminent Domain §§ 152, 153, 411, 417.

## **42A-1-29. Property taken or damaged without compensation or condemnation proceedings; right of action by condemnee.**

A. A person authorized to exercise the right of eminent domain who has taken or damaged or who may take or damage any property for public use without making just compensation or without instituting and prosecuting to final judgment in a court of competent jurisdiction any proceeding for condemnation is liable to the condemnee, or any subsequent grantee thereof, for the value thereof or the damage thereto at the time the property is or was taken or damaged, with ten percent per year interest, to the date such just compensation is made, in an action to be brought under and governed by the Rules of Civil Procedure for the District Courts of this state. Actions under this section shall be brought in the county where the land or any portion thereof is located.

B. Notwithstanding the provisions of Subsection A of this section or any other provision of law regarding compensation for damage in the situation described in that subsection:

(1) if the person authorized had taken or been granted for public use, pursuant to a final judgment, an order of immediate possession or private agreement, any property;

(2) the property subsequently taken or damaged was contiguous to the property taken or granted; and

(3) the person takes or damages property contiguous to property previously taken or granted from the condemnee or grantor without making just compensation or without instituting and prosecuting to final judgment in a court of competent jurisdiction any proceeding for condemnation; the condemnee or grantor shall receive compensation for the land taken or damaged at the greater of fair market value or a unit rate of five times that of the compensation or consideration he received for the land taken; provided that if the width of the property taken or damaged is not equal to the width originally taken or damaged, compensation required pursuant to this subsection shall be increased or reduced ratably in accordance with the relationship of the respective widths.

C. Any amounts paid under Subsection B of this section shall be deemed just compensation.

**History:** 1978 Comp., § 42A-1-29, enacted by Laws 1981, ch. 125, § 25; 1983, ch. 131, § 1.

### **ANNOTATIONS**

**Compiler's notes.** — Laws 1981, ch. 125, § 61 provided that all references to 42-1-23 NMSA 1978 shall be construed as references to 42A-1-29 NMSA 1978.

**Cross references.** — For the New Mexico Rules of Civil Procedure for the District Courts, see Rules 1-001 to 1-127 NMRA.

**The 1983 amendment** designated the formerly undesignated language as Subsection A, substituted "ten percent per year interest" for "eight percent per year interest" in the first sentence of Subsection A and added Subsections B and C.

**Factors to determine if pre-condemnation publicity and planning constitutes a taking.** — To determine whether pre-condemnation publicity and planning constitute a taking, a court must consider whether the government had publicly announced a present intention to condemn the property in question and whether the government has done something that substantially interferes with the landowner's use and enjoyment of its property. *Santa Fe Pacific Trust, Inc. v. City of Albuquerque*, 2014-NMCA-093, cert. granted, 2014-NMCERT-008.

**Publicity surrounding proposed condemnation was not a taking.** — Where two mayors publicly targeted plaintiff's property as a potential location for an event arena; the municipality had informed plaintiff that plaintiff's property would be taken for that purpose; the municipality adopted a development plan that included the goal of constructing an event arena on a site that included plaintiff's property and began a process to determine the feasibility of constructing the event arena; the municipality issued a request for information and a request for proposals that included plaintiff's property and publicly announced the proposed project; the municipality attempted to purchase the property from plaintiff; local newspapers published many articles about the proposed project that mentioned plaintiff's property as a potential site; the municipal council never approved the acquisition or condemnation or appropriated funding for construction of an arena; some potential buyers and tenants of plaintiff's property were deterred by the possibility of imminent condemnation; and plaintiff sued the municipality for inverse condemnation alleging that plaintiff lost potential sales and leases because of the publicity surrounding the municipality's plan to condemn plaintiff's property, plaintiff failed to establish an inverse condemnation under the takings clause of the Fifth Amendment and under the New Mexico constitution and statutory law because the municipality's planning activities, which never came to fruition, did not prevent plaintiff from possessing the property or from using it. *Santa Fe Pacific Trust, Inc. v. City of Albuquerque*, 2014-NMCA-093, cert. granted, 2014-NMCERT-008.

**Lost profits for temporary physical taking.** — In an inverse condemnation proceeding for a temporary physical taking, lost profits may be recovered when they are the best measure of damages of the value of the lost use and enjoyment of condemned land. *Primetime Hospitality, Inc. v City of Albuquerque*, 2009-NMSC-011, 146 N.M. 1, 206 P.3d 112, *rev'g* 2007-NMCA-129, 142 N.M. 663, 168 P.3d 1087.

Where the landowner had begun constructing a hotel when the landowner accidentally ruptured an encroaching municipal waterline; the opening of the hotel was delayed; lost business damages were the only measure of the loss of use and possession of the property during the temporary taking; and lost profits injuries were directly caused by

the encroaching waterline, lost profits for the period of time during which the opening of the hotel was delayed was the best evidence of the value of the property taken. *Primetime Hospitality, Inc. v City of Albuquerque*, 2009-NMSC-011, 146 N.M. 1, 206 P.3d 112, *rev'g* 2007-NMCA-129, 142 N.M. 663, 168 P.3d 1087.

**Excess construction costs for temporary physical taking.** — In an inverse condemnation proceeding for a temporary physical taking, construction costs that are a direct result of the taking and that are necessary to put the landowner in the position the landowner would have been had no taking occurred are compensable. *Primetime Hospitality, Inc. v City of Albuquerque*, 2009-NMSC-011, 146 N.M. 1, 206 P.3d 112, *rev'g* 2007-NMCA-129, 142 N.M. 663, 168 P.3d 1087.

Where the landowner had begun constructing a hotel when the landowner accidentally ruptured an encroaching municipal waterline; the landowner incurred additional construction costs to repair water damage and to construct a buttress wall to permit construction to proceed, the expenses were a direct result of the municipality's temporary physical taking of the property and are compensable. *Primetime Hospitality, Inc. v City of Albuquerque*, 2009-NMSC-011, 146 N.M. 1, 206 P.3d 112, *rev'g* 2007-NMCA-129, 142 N.M. 663, 168 P.3d 1087.

**Measure of damages for a temporary, but total, physical taking of a commercial property** in the early stages of the construction of a project on the property may include, as a separate element of damages, the excess construction costs directly related to the interruption of the construction project that would not have been incurred but for the condemnor's interference with the owners' loss of possession and use of the property and may include, as a separate element of damages, reasonable expenditures demonstrably aimed at reducing the losses suffered by the owner. *Primetime Hospitality, Inc. v City of Albuquerque*, 2007-NMCA-129, 142 N.M. 663, 168 P. 3d 1087, cert. granted, 2007-NMCERT-009, 142 N.M. 716, 169 P.3d 409, *rev'd*, 2009-NMSC-011, 146 N.M. 1, 206 P.3d 112.

**Measure of damages for a temporary, but total, physical taking of a commercial property** in the early stages of the construction of a project on the property may include, as a separate element of damages, the rental value of the property for the period of delay. *Primetime Hospitality, Inc. v City of Albuquerque*, 2007-NMCA-129, 142 N.M. 663, 168 P. 3d 1087, cert. granted, 2007-NMCERT-009, 142 N.M. 716, 169 P.3d 409, *rev'd*, 2009-NMSC-011, 146 N.M. 1, 206 P.3d 112.

**This section does not mandate attorney fees** in inverse condemnation cases. *Primetime Hospitality, Inc. v City of Albuquerque*, 2007-NMCA-129, 142 N.M. 663, 168 P. 3d 1087, cert. granted, 2007-NMCERT-009, 142 N.M. 716, 169 P.3d 409, *rev'd*, 2009-NMSC-011, 146 N.M. 1, 206 P.3d 112.

**Award of costs to a governmental entity as the prevailing party.** — Where plaintiff was authorized to supply water as a public utility in an area on the outskirts of the municipality; the municipality annexed the area and committed itself to provide water to

the subdivisions plaintiff was developing; plaintiff filed an inverse condemnation action against the municipality for a regulatory taking of its property; and the New Mexico supreme court determined the municipality's actions were not a compensable taking of plaintiff's property, the municipality, as the prevailing party, was entitled to reasonable costs pursuant to 42A-1-29 NMSA 1978 and Rule 1-054(D) NMRA. *Moongate Water Co., Inc. v. City of Las Cruces*, 2014-NMCA-075.

**Constitution guarantees compensation when private property injured.** — New Mexico Const., art. II, § 20, guarantees adequate compensation, where private property has been damaged through the methods followed or adopted in the design, construction or maintenance of a public highway. *Wheeler v. Board of Cnty. Comm'rs*, 1964-NMSC-081, 74 N.M. 165, 391 P.2d 664.

**Constitution does not require advance compensation** for damaging private property in improvement of state highway. *Summerford v. Board of Comm'rs*, 1931-NMSC-014, 35 N.M. 374, 298 P. 410.

**"Taking" occurs where all beneficial use of property lost.** — Where the landowner does not lose all beneficial use of the property, no "taking" or inverse condemnation occurs. *Aragon & McCoy v. Albuquerque Nat'l Bank*, 1983-NMSC-020, 99 N.M. 420, 659 P.2d 306.

**Risk of damage must be foreseeable.** — For an act to give rise to a claim for compensation, the act must at least be one in which risk of damage to an owner's property is actually foreseeable by the governmental actor or in which it is so obvious that its incurrence amounts to deliberate infliction of harm for purpose of carrying out the governmental project. *Electro-Jet Tool Mfg. Co., Inc. v. City of Albuquerque*, 1992-NMSC-060, 114 N.M. 676, 845 P.2d 770.

**Date of taking.** — Where village began construction of a drainage pond on a tract of land situated next to plaintiff's land and it was at this point that the plaintiff had notice that the tract would be put to public use, the date of taking for purpose of determining value of the property taken was the date construction began on September 26, 2000, and not the date of the pond's completion on February 14, 2001. *Leigh v. Village of Los Lunas*, 2005-NMCA-025, 137 N.M. 119, 108 P.3d 525.

**Regulatory restriction on use of property.** — A regulation which imposes a reasonable restriction on the use of private property will not constitute a "taking" of that property if the regulation is: (1) reasonably related to a proper purpose; and (2) does not unreasonably deprive the property owner of all, or substantially all, of the beneficial use of the property. Thus, if a regulation simply prohibits the use of property for purposes declared to be injurious to the health, morals, or safety of the community, the prohibition cannot be deemed a "taking" of property for the public benefit. *Temple Baptist Church, Inc. v. City of Albuquerque*, 1982-NMSC-055, 98 N.M. 138, 646 P.2d 565.

**Moratorium on development of land.** — A moratorium on the development of land within an area that was considered for a national monument did not amount to a compensable taking because the moratorium was imposed for a limited duration of two and one-half years, and it was designed to preserve the status quo to enable Congress to take legislative action concerning the potential national monument. *Santa Fe Village Venture v. City of Albuquerque*, 914 F. Supp. 478 (D.N.M. 1995).

**Unlawful regulation not a taking.** — A regulation not related to a proper purpose that does not deprive a property owner of all or substantially all beneficial use of property simply does not implicate an interest protected by the Takings Clause; thus, although a property owner may have a right to seek redress for an unlawful regulation, the method of redress is not a takings action. *Estate of Sanchez v. County of Bernalillo*, 1995-NMSC-058, 120 N.M. 395, 902 P.2d 550.

**Intent of section.** — This section indicates that it was intended to confer a remedy by inverse condemnation to a person whose property is damaged for public use. *McClure v. Town of Mesilla*, 1979-NMCA-112, 93 N.M. 447, 601 P.2d 80.

**Inverse condemnation is not common-law tort** based upon the negligence of a town; it is a statutory remedy. *McClure v. Town of Mesilla*, 1979-NMCA-112, 93 N.M. 447, 601 P.2d 80.

**Suit permitted where private property taken and damaged.** — This section is clear that suit is permitted by the landowner, when there has been not only a damaging of private property but a taking as well, if just compensation has not been paid, or a proper condemnation action either has not been instituted or prosecuted to final judgment. *Kaiser Steel Corp. v. W.S. Ranch Co.*, 1970-NMSC-043, 81 N.M. 414, 467 P.2d 986.

**Inverse condemnation, not trespass, proper action to maintain.** — Corporation's sending its employees onto the owner's lands, drilling holes or wells in the latter's stream bed, laying a pipeline, all without seeking permission of the landowner, or undertaking to condemn, gave owner remedy inverse condemnation, not an action in trespass. *Kaiser Steel Corp. v. W.S. Ranch Co.*, 1970-NMSC-043, 81 N.M. 414, 467 P.2d 986.

**Trespass action proper only when parties mistaken about condemnation.** — Where parties are mistaken in their belief that they had the right to condemn, a trespass action would be proper. *Kaiser Steel Corp. v. W.S. Ranch Co.*, 1970-NMSC-043, 81 N.M. 414, 467 P.2d 986.

**Authorized condemner may be liable in trespass.** — An authorized condemner may be liable in trespass to a property owner for taking more land than is reasonably necessary or for causing excessive damage by the manner in which the taking occurs, but only when there is evidence of fraud, bad faith or gross abuse of discretion. *North v. Public Serv. Co.*, 1983-NMCA-124, 101 N.M. 222, 680 P.2d 603, cert. denied, 101 N.M. 11, 677 P.2d 624.

**Damages for trespass when authorized condemnor is liable** cover only that portion of the damage over and above what results from the taking itself. *North v. Public Serv. Co.*, 1983-NMCA-124, 101 N.M. 222, 680 P.2d 603, cert. denied, 101 N.M. 11, 677 P.2d 624.

**Right to compensation enforceable through civil action.** — Constitutional right of compensation for damaging private property by construction or improvement of state highway may be enforced by civil action against the party liable therefor. *Summerford v. Board of Comm'rs*, 1931-NMSC-014, 35 N.M. 374, 298 P. 410.

**Redress of injury in law.** — Property owners and tenants occupying premises are not entitled to injunctive relief against the enforcement of a city ordinance prohibiting parking of vehicles on certain streets, where they possessed a speedy, adequate and complete remedy at law for the redress of any injury their property may have suffered. *Farnsworth v. City of Roswell*, 1957-NMSC-053, 63 N.M. 195, 315 P.2d 839.

**Inverse condemnation action would not lie if property was not acquired for public use.** *Brosseau v. N.M. State Hwy. Dep't*, 1978-NMSC-098, 92 N.M. 328, 587 P.2d 1339.

**Inverse condemnation requires damage to right of landowner.** — For inverse condemnation to be based upon a "damage," a property owner must suffer some compensable injury that is not suffered by the public in general. *Estate of Sanchez v. County of Bernalillo*, 1995-NMSC-058, 120 N.M. 395, 902 P.2d 550.

Inverse condemnation requires that the condemnee's property be damaged; in this case, there has been no damage and no taking by the electric company since it has continued to use the city's rights-of-way under the terms and conditions of the parties' franchise agreement as it did prior to this controversy. *City of Las Cruces v. El Paso Elec. Co.*, 904 F. Supp. 1238 (D.N.M. 1995).

**Prospective purchaser entitled to bring action.** — A prospective purchaser may maintain an action for damages for the taking of land for highway use by reason of his contract to purchase. *Mesich v. Board of Cnty. Comm'rs*, 1942-NMSC-054, 46 N.M. 412, 129 P.2d 974.

**Grantees not entitled to bring action.** — A public utility's entry to construct transmission lines did not entitle grantees to a right of recovery, where as of the time of the purchase, this section of the statute expressly provided that it was not applicable to any power or transmission line. *Garver v. Public Serv. Co.*, 1966-NMSC-261, 77 N.M. 262, 421 P.2d 788.

**Applicable to right of access.** — A right of access is a property right, and may not be taken or damaged without the payment of compensation. *Hill v. State Hwy. Comm'n*, 1973-NMSC-114, 85 N.M. 689, 516 P.2d 199.

**Effect of railroad's entry and possession of premises without landowner's complaint.** — When appellant's predecessor did acquire a right in the premises before appellee railroad's entry thereon, and the railroad took possession of the land and used it for its purposes without complaint by the landowners, it acquired all possessory rights to the land, and appellants have a contingent reversionary interest, subject to appellee's qualified fee in the property, until abandonment or forfeiture has been determined. *Timberlake v. Southern Pac. Co.*, 1969-NMSC-143, 80 N.M. 770, 461 P.2d 903.

**No damages recoverable when condemnation abandoned.** — Where the state highway department abandoned a condemnation proceeding, the damage that may have occurred was to the condemnees, and was only incidental. No provision is made for the recovery of such incidental damages. *State ex rel. State Hwy. Dep't v. Yurcic*, 1973-NMSC-059, 85 N.M. 220, 511 P.2d 546.

**No damages recoverable for temporary taking of highway.** — The state highway commission's (now state transportation commission's) construction of an interstate created a detour and interfered with appellees' right of access which damaged their business and caused them to travel additional distances for more than one year. This interference was not shown to be the result of unreasonable, unnecessary or arbitrary conduct of the state highway commission (now state transportation commission) so that the temporary interference with access was not compensable. *Hill v. State Hwy. Comm'n*, 1973-NMSC-114, 85 N.M. 689, 516 P.2d 199.

Where appellees' access to a highway was unchanged physically by construction, but owing to the use of the new Interstate 40 as the main highway to and from Albuquerque, the old highway on which plaintiff 's property is located was changed to a service road, plaintiff was not entitled to compensation as the abutting landowner has no vested right in the flow of traffic. *Hill v. State Hwy. Comm'n*, 1973-NMSC-114, 85 N.M. 689, 516 P.2d 199.

**Counties liable for lands taken for highway.** — Counties are liable under this section for damages to lands taken for highway purposes by them, or with their acquiescence. *Wheeler v. Board of Cnty. Comm'rs*, 1964-NMSC-081, 74 N.M. 165, 391 P.2d 664.

**City's liability continues, although it receives federal aid.** — Where a city receives federal aid for the construction of an underpass under a railroad passing through the city, upon condition that the underpass shall be constructed by the state highway commission (now state transportation commission), the underpass does not thereby become a state highway, and the city is liable for damages to adjoining property. *Springer Transfer Co. v. City of Albuquerque*, 1940-NMSC-039, 44 N.M. 407, 103 P.2d 129.

**Objections to expense and inconvenience insufficient to enjoin taking.** — In view of this section allowing compensation for property taken for public improvements, or for injury to property, such taking will not be enjoined where plaintiff 's only objection is that



he will be put to considerable inconvenience and expense if the improvement is made. *Hobbs v. Town of Hot Springs*, 1940-NMSC-063, 44 N.M. 592, 106 P.2d 856.

**Limitations of actions.** — Suit for damages resulting from obstruction of flow and appropriation of waters of a creek was governed, not by the four-year statute of limitations, but by the ten-year statute, water rights being real property. *N.M. Prods. Co. v. N.M. Power Co.*, 1937-NMSC-048, 42 N.M. 311, 77 P.2d 634.

**Three-year statute of limitations applies to inverse condemnation proceedings.** *Buresh v. City of Las Cruces*, 1969-NMSC-171, 81 N.M. 89, 463 P.2d 513.

**Party cannot raise inverse condemnation theory for first time on appeal.** — Where a party does not raise the issue of inverse condemnation at trial, it cannot raise that theory for the first time on appeal. *Aragon & McCoy v. Albuquerque Nat'l Bank*, 1983-NMSC-020, 99 N.M. 420, 659 P.2d 306.

**Section applicable to water damaged property.** — The provisions of this section are clear and unambiguous. Should property owners below hospital grounds have their property taken or damaged by water from hospital drainage without just compensation, the owner of such property could institute legal action to recover a judgment for the property taken or damaged. Property owners claiming to be adversely affected will have to show that additional waters have been cast on their lands, however, to recover. 1957-58 Op. Att'y Gen. No. 58-239.

**Condemnation against entire right-of-way preferred when highway needs widening.** — Where a right-of-way for a highway needs widening it would be unsafe in many cases to bring condemnation proceedings against merely that portion of the highway required for the increased width as the width already acquired by public use might be in doubt and there is no record title in the county or the state of the existing right-of-way, thus making it better practice to bring condemnation against the entire right-of-way, alleging the extent of the old right-of-way already claimed, and instructing the commissioners to base their assessment upon the additional strips required. 1951-52 Op. Att'y Gen. No. 52-5624.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 26 Am. Jur. 2d Eminent Domain §§ 138, 139, 140, 152.

Negligence of governmental agent causing damage to private property as "taking," "damage," or "use," for public purposes in constitutional sense, 2 A.L.R.2d 677.

Liability of municipality or other governmental subdivision in connection with flood protection measures, 5 A.L.R.2d 57.

New or additional compensation for use by municipality or public of subsurface of street or highway for purposes other than sewers, pipes, conduits for wires, and the like, 11 A.L.R.2d 180.

Municipal regulation of billboards and outdoor advertising as taking property without compensation, 58 A.L.R.2d 1314.

Liability of public utility to abutting owner for destruction or injury of trees in or near highway or street, 64 A.L.R.2d 866.

Compensable property right, restrictive covenant or right to enforcement thereof as, 4 A.L.R.3d 1137.

Zoning regulations limiting use of property near airport as taking of property, 18 A.L.R.4th 542.

Airport operations or flight of aircraft as constituting taking or damaging of property, 22 A.L.R.4th 863.

Inverse condemnation state court class actions, 49 A.L.R.4th 618.

Eminent domain: compensability of loss of visibility of owner's property, 7 A.L.R.5th 113.

### **42A-1-30. Adverse possession; statute of limitation.**

The defendant to an action brought pursuant to Section 42A-1-29 NMSA 1978 may plead adverse possession as defined by Section 37-1-22 NMSA 1978 or acquisition by prescription as a defense to the action, but no other statute of limitation shall be applicable or pleaded as a defense thereto except as provided in Section 42A-1-31 NMSA 1978.

**History:** 1978 Comp., § 42A-1-30, enacted by Laws 1981, ch. 125, § 26.

### **ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 27 Am. Jur. 2d Eminent Domain §§ 877, 878, 879, 884.

29A C.J.S. Eminent Domain §§ 6, 232, 361.

### **42A-1-31. Property taken or damaged by state agencies or political subdivisions; statutes of limitations.**

A. No action or proceeding shall be commenced against any state agency or political subdivision by any person claiming an interest in property acquired or held by a state agency or political subdivision unless such action is brought within three years from the date such person was first entitled to reclaim his interest in the property, or if the right to reclaim such property has occurred prior to the effective date of this section, within three years from the date such person was first entitled to reclaim his interest in the property or within six months after the effective date of this section, whichever date

occurs later. For the purpose of this subsection, the date a person is entitled to reclaim his interest in the property is the date of abandonment of the use for which the property was taken.

B. No action or proceeding shall be commenced pursuant to Section 42-1-23 NMSA 1978 [repealed] against any state agency or political subdivision by any person unless such action or proceeding is brought within three years from the date of the taking or damaging.

C. Nothing in this section shall be construed as reviving any cause of action, extending any time limit or statute of limitations or creating any right of action.

**History:** 1953 Comp., § 22-9-68, enacted by Laws 1974, ch. 59, § 1; 1980, ch. 20, § 2; 1978 Comp., § 42-1-40; recompiled as § 42A-1-31 by Laws 1981, ch. 125, § 60.

### ANNOTATIONS

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 1981, ch. 125, § 62 repealed 42-1-23 NMSA 1978. Laws 1981, ch. 125, § 61 provided that all references to 42-1-23 NMSA 1978 shall be construed as references to 42A-1-29 NMSA 1978.

**The 1980 amendment** deleted "reversionary" preceding, and "real" following, "interest in" near the beginning of the first sentence, deleted "in fee simple determinable acquired through the exercise of the power of eminent domain" following "political subdivision" near the middle of the first sentence, added Subsection B and redesignated former Subsection B and present Subsection C.

**Retroactivity of statute.** — The statute of limitations created by this section may be applied retroactively to bar claims arising before enactment of the statute as long as the plaintiff was given a reasonable time within which to bring his action. *Townsend v. State ex rel. State Hwy. Dep't*, 1994-NMSC-014, 117 N.M. 302, 871 P.2d 958.

**Applicability of Subsection B.** — Since the plaintiff is not bringing an action to "reclaim" an interest in the property because the state has never legally acquired or held it, he is claiming that the property has been taken or damaged without just compensation by the state removing gravel under a mineral lease. Therefore, the limitations period established by Subsection B of this section is applicable to these proceedings. *Townsend v. State ex rel. State Hwy. Dep't*, 1994-NMSC-014, 117 N.M. 302, 871 P.2d 958.

**Successive injuries.** — In inverse condemnation cases, the traditional common-law rules apply to the accrual of the statute of limitations: a new and separate action arises

with each new injury. *Valdez v. Mountain Bell Tel. Co.*, 1988-NMCA-039, 107 N.M. 236, 755 P.2d 80.

**Independent cause of actions.** — A new cause of action arose each time the highway department removed sand and gravel. Therefore, a permanent taking occurred each time the character of rocks was changed by blasting and each time a truck left the property loaded with sand or gravel. As each cause of action arose, the statute of limitations began to run as to that cause alone. *Townsend v. State ex rel. State Hwy. Dep't*, 1994-NMSC-014, 117 N.M. 302, 871 P.2d 958.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Right of owner of land not originally taken or purchased as part of adjacent project to recover, on enlargement of project to include adjacent land, enhanced value of property by reason of proximity to original land, 95 A.L.R.3d 752.

### **42A-1-32. Costs; compensation of commissioners.**

A. Except as expressly provided by law, the costs of the proceedings to condemn property shall be paid by the party seeking the condemnation, including the costs of the final report of the commissioners if applicable.

B. If applicable, the court shall allow the commissioners reasonable compensation for their services. Such compensation shall be taxed as costs in the proceedings.

**History:** 1978 Comp., § 42A-1-32, enacted by Laws 1981, ch. 125, § 27.

### **ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 27 Am. Jur. 2d Eminent Domain §§ 583 et seq., 743 et seq.

Condemner's waiver, surrender, or limitation, after award, of rights or part of property acquired by condemnation, 5 A.L.R.2d 724.

Liability for costs in trial tribunal in eminent domain proceedings as affected by offer or tender by condemnor, 70 A.L.R.2d 804.

Liability of state, or its agency or board, for costs, 72 A.L.R.2d 1379.

Liability, upon abandonment, for loss or expenses incurred by property owner, or for interest on award or judgment, 92 A.L.R.2d 355.

30 C.J.S. Eminent Domain §§ 366 to 374.

### **42A-1-33. Easement; abandonment.**

Except as specifically provided by law, when an easement has been taken by eminent domain for public use and the public use is subsequently abandoned, the easement is extinguished and the possession of the property reverts to the owner or his successor in interest of the fee free from any rights in the condemnor.

**History:** 1978 Comp., § 42A-1-33, enacted by Laws 1981, ch. 125, § 28.

#### **42A-1-34. Sign removal by local governments; compensation.**

No municipal, county or local zoning authority or any other political subdivision of the state shall remove or cause to be removed any lawfully erected and maintained advertising structure without paying just compensation. As used in this act [this section], "advertising structure" means and includes any outdoor sign, display, figure, painting, poster, billboard or similar thing designed, intended or used to advertise or inform the public of goods or services sold either on or off the premises where the advertising structure is located.

**History:** Laws 1981, ch. 284, § 1.

#### **ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Constitutionality.** — This section does not violate N.M. Const., art. IV, § 24, as it does not constitute a prohibited "special law" by granting special rights to sign owners as compared to other property owners whose property is caused to be removed by operation of a local zoning ordinance. *Battaglini v. Town of Red River*, 1983-NMSC-067, 100 N.M. 287, 669 P.2d 1082.

**Regulation of outdoor advertising valid.** — Municipal regulation of outdoor advertising for aesthetic and safety purposes, as manifested in a sign ordinance, constitutes a valid exercise of the police power, as that power is derived from authority granted by the state. *Battaglini v. Town of Red River*, 1983-NMSC-067, 100 N.M. 287, 669 P.2d 1082.

**Granting of amortization period does not constitute "paying just compensation"** as required by this section. *Battaglini v. Town of Red River*, 1983-NMSC-067, 100 N.M. 287, 669 P.2d 1082.

**Unlawfully erected signs not compensable.** — This section does not authorize payment of compensation for the removal of unlawfully erected signs. *City of Albuquerque v. Jackson*, 1984-NMCA-062, 101 N.M. 457, 684 P.2d 543.

**Sign not lawful though regulating ordinance held unconstitutional in separate case.** — Defendant charged with violations of local sign ordinance could not rely on a

judgment pending appeal in a separate case which held the ordinance unconstitutional, since city's appeal of judgment automatically stayed that court's decision; thus, his sign that did not comply with the ordinance was not lawfully erected. *City of Albuquerque v. Jackson*, 1984-NMCA-062, 101 N.M. 457, 684 P.2d 543.

## **ARTICLE 2**

### **Public Utilities**

#### **42A-2-1. Railroad, telephone or telegraph company.**

Any foreign or domestic railroad, telephone or telegraph company which is duly qualified and doing business in New Mexico shall have the power of eminent domain for acquiring property for public use for the purpose of constructing lines, microwave systems and structures and other communication or transportation structures and other facilities necessary for the operation for [of] such transportation or communication system for such entity according to the procedure for condemnation as provided in the Eminent Domain Code [42A-1-1 to 42A-1-33 NMSA 1978].

**History:** 1978 Comp., § 42A-2-1, enacted by Laws 1981, ch. 125, § 29.

#### **ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Cross references.** — For municipal airports, see 3-39-1 NMSA 1978 et seq.

For county flood commissioners condemning property, see 4-50-5 NMSA 1978.

For state game commission, see 17-4-1 NMSA 1978 et seq.

For public utilities, see 62-1-4 NMSA 1978.

For condemnation by water-works corporation of water-ways, see 62-2-16 NMSA 1978.

For pipe-lines, see 70-3-5 NMSA 1978.

For construction of water-ways, see 72-1-5 NMSA 1978.

For dominant right of eminent domain in conservancy districts, see 73-14-41 NMSA 1978.

**Railroads can acquire possessory rights when no complaints made.** — When the railroad company took possession of the land and used it for its purposes for 30 years without complaint by the landowners, it acquired all possessory rights to the land

necessary for its purposes. *Timberlake v. Southern Pac. Co.*, 1969-NMSC-143, 80 N.M. 770, 461 P.2d 903.

**Power of eminent domain belongs to telephone corporation.** — Corporation, engaged as a public utility in furnishing telephone service to the public, has the power of eminent domain. *State Hwy. Comm'n v. Ruidoso Tel. Co.*, 1963-NMSC-150, 73 N.M. 487, 389 P.2d 606.

**Railroad cannot acquire right-of-way through agricultural college.** — Railroad company was not entitled to acquire, by condemnation, a right-of-way through lands of agricultural college. 1909-12 Op. Att'y Gen. 136.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Eminent domain: unity or contiguity of separate properties sufficient to allow damages for diminished value of parcel remaining after taking of other parcel, 59 A.L.R.4th 308.

## **42A-2-2. Telephone and telegraph companies; limitations and regulations.**

No telephone or telegraph company shall, by virtue of its eminent domain power, be authorized to enter or appropriate any dwelling, barn, store, warehouse or similar building erected for any commercial, agricultural or manufacturing purposes, or to erect poles so near such structure as to materially inconvenience the condemnee in their use or to damage such structure.

**History:** 1978 Comp., § 42A-2-2, enacted by Laws 1981, ch. 125, § 30.

### **ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 26 Am. Jur. 2d Eminent Domain § 96; 27 Am. Jur. 2d Eminent Domain §§ 200, 229, 386, 395, 396, 928 et seq.

29A C.J.S. Eminent Domain §§ 76, 77, 113, 114, 135, 418.

## **42A-2-3. Property of public utilities.**

A. If the property to be condemned is held by any public utility corporation, the right to condemn such property by a railroad, telephone or telegraph company is limited to such use as shall not materially interfere with the uses to which by law the public utility corporation holding the property is authorized to use it.

B. Where no agreement can be made between the parties, the method of assessing the damages to private persons as provided pursuant to the provisions of the Eminent Domain Code [42A-1-1 to 42A-1-33 NMSA 1978] shall be used.

**History:** 1978 Comp., § 42A-2-3, enacted by Laws 1981, ch. 125, § 31.

## ANNOTATIONS

**Section gives court right to determine railroad track crossings.** — This section and Section 42A-2-4 NMSA 1978 invest in the court the right to determine the place and manner of crossing by one railroad of the tracks of another. *Atchison, T. & S.F. Ry. v. Citizens' Traction & Power Co.*, 1911-NMSC-018, 16 N.M. 154, 113 P. 810.

**No power to contract for parties.** — This statute does not say that the court shall make a contract for the parties, but that the court shall have the power to regulate and determine the matter and things with respect to which the parties might have contracted. *Atchison, T. & S.F. Ry. v. Citizens' Traction & Power Co.*, 1919-NMSC-031, 25 N.M. 345, 182 P. 871.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 26 Am. Jur. 2d Eminent Domain §§ 90, 96, 126, 199, 231, 233, 927.

Furnishing electricity to public as public use or purpose for which power of eminent domain may be exercised, 44 A.L.R. 735, 58 A.L.R. 787.

Power of eminent domain as between state and subdivision or agency thereof, or as between different subdivisions or agencies themselves, 35 A.L.R.3d 1293.

29A C.J.S. Eminent Domain §§ 59, 273.

### **42A-2-4. Jurisdiction of courts; joint use.**

Except as provided in Section 62-1-4 NMSA 1978, the court shall have the power to regulate and determine the place and manner of making railroad connections and crossings, or of using in common use as provided in Section 42A-2-3 NMSA 1978.

**History:** 1978 Comp., § 42A-2-4, enacted by Laws 1981, ch. 125, § 32.

## ANNOTATIONS

**Section invests court with right to determine railroad track crossings.** — This law applies to electric as well as steam railroads, and invests the court with the right to determine and regulate the place and manner of crossing by one railroad of the tracks of another. *Atchison, T. & S.F. Ry. v. Citizens' Traction & Power Co.*, 1911-NMSC-018, 16 N.M. 154, 113 P. 810; *Atchison, T. & S.F. Ry. v. Citizens' Traction & Power Co.*, 1919-NMSC-031, 25 N.M. 345, 182 P. 871.

**Effect of railroad's making crossing under erroneous court decision.** — Where a street railroad without right and contrary to law made a crossing over a railroad under the permission of an erroneous decision of the district court denying an injunction to prevent the construction of the crossing, which decision was later reversed by the supreme court, the railroad could by supplemental complaint pray for an order



regulating and determining the place and manner of making the crossing, and the enjoyment of its common use, and for an injunction restraining the use of the crossing until defendant complies with the order of the court, and for the recovery of money for maintenance. *Atchison, T. & S.F. Ry. v. Citizens' Traction & Power Co.*, 1919-NMSC-031, 25 N.M. 345, 182 P. 871.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 26 Am. Jur. 2d Eminent Domain § 126; 27 Am. Jur. 2d Eminent Domain § 910 et seq.

29A C.J.S. Eminent Domain §§ 67, 196, 267.

## **ARTICLE 3**

### **Public Uses**

#### **42A-3-1. State, county, municipality or school district; appropriation of property; nature of interest.**

A. Property may also be condemned by the state, any county, municipality or school district for the public use of the state, county, municipality or school district for:

- (1) public buildings and grounds;
- (2) canals, aqueducts, reservoirs, tunnels, flumes, ditches, conduits for conducting or storing water for drainage, the raising of banks of streams and the removing of obstructions;
- (3) roads, streets, alleys and thoroughfares;
- (4) public parks and playgrounds;
- (5) ferries, bridges, electric railroads or other thoroughfares or passways for vehicles;
- (6) canals, ditches, flumes, aqueducts and conduits for irrigation;
- (7) electric lines;
- (8) electric utility plants, properties and facilities consistent with the authority granted in Chapter 3, Article 24 NMSA 1978;
- (9) the production of sand, gravel, caliche and rock used or needed for building, surfacing or maintaining streets, alleys, highways or other public grounds or thoroughfares; and
- (10) public airports or landing fields incident to the operation of aircraft.

B. No land shall be condemned for the production of sand, gravel, caliche or rock that is in the possession or ownership of a person, firm or corporation engaged at the time the proceeding is brought in the actual production of such material from such land sought to be condemned. Nor shall any land be condemned for municipal purposes that may be shown by the owner or lessee to have a content of precious metal sufficient to produce the mineral in paying quantities.

C. Unless the petition to condemn specifically provides for a transfer of less than the fee, all real property acquired pursuant to this section shall be acquired and held in fee simple absolute.

**History:** Laws 1981, ch. 125, § 33; 1997, ch. 228, § 3.

### ANNOTATIONS

**Cross references.** — For eminent domain by state institutions, see 42A-3-2 NMSA 1978.

For condemnation of waterway for street improvements, see 42A-3-3 NMSA 1978.

For general powers of municipalities, see 3-18-1 NMSA 1978.

For power of eminent domain by municipality, see 3-18-10 NMSA 1978.

For municipal housing, see 3-45-1 NMSA 1978.

For drainage for counties, see 72-4-1 NMSA 1978.

For condemnation by conservancy districts, see 73-14-42 NMSA 1978.

For conservancy districts obtaining possession of land during pendency of condemnation proceeding, see 73-15-10 NMSA 1978.

**The 1997 amendment**, effective April 11, 1997, added Paragraph A(8) and redesignated the remaining paragraphs accordingly.

**Section not authority for condemnation of existing utility.** — Although subsection A(7) permits condemnation for "electric lines", since the word "property" as used in this section appears to mean only real property and not existing lines, poles, etc., this section is not statutory authority for a municipality to condemn an existing public electric utility. *City of Las Cruces v. El Paso Elec. Co.*, 904 F. Supp. 1238 (D.N.M. 1995).

**In condemnation proceeding, description of property must conform to statutory requirement.** *City of Santa Fe v. Lamy*, 1930-NMSC-026, 34 N.M. 583, 286 P. 422.

**State transportation commission must pay for use of park lands.** — The state highway commission (now state transportation commission) is not authorized to acquire either private property, or public property held in a proprietary capacity other than by purchase or condemnation, and must pay for park land it uses for highway purposes. *State ex rel. State Hwy. Comm'n v. City of Albuquerque*, 1960-NMSC-110, 67 N.M. 383, 355 P.2d 925.

**City may condemn realty for water-works system.** — A city has the power of eminent domain for the purpose of constructing a water-works system situated more than two miles from the city limits. *City of Raton v. Raton Ice Co.*, 1920-NMSC-060, 26 N.M. 300, 191 P. 516.

**No condemnation for acequias.** — No express power is conferred upon a city to condemn property already devoted to a public use in either of these sections for any purpose, and the legislature did not intend by implication to confer power upon cities to condemn acequias used to conduct water for irrigation purposes. *City of Albuquerque v. Garcia*, 1913-NMSC-006, 17 N.M. 445, 130 P. 118.

**Error to appraise property, when caliche present, by average value.** — This statute does not prevent the condemnation, for road-building purposes, of rock, sand, gravel and caliche, since none of them are metals, but as caliche has value, when processed, as a stock food, the proprietor should be given opportunity to prove special value, and it is error to appraise the property by its average value alone. *Board of Cnty. Comm'rs v. Good*, 1940-NMSC-056, 44 N.M. 495, 105 P.2d 470.

**United States joined as defendant when Indian lands sought for acquisition.** — The United States must be joined as a defendant when Pueblo Indian lands are sought for acquisition, and the United States district court is a proper forum and has the jurisdiction to try and determine the respective rights of the petitioner, the state highway commission (now state transportation commission), and the defendants, the United States and the Pueblo of Laguna. *N.M. ex rel. State Hwy. Comm'n v. United States*, 148 F. Supp. 508 (D.N.M. 1957).

**No taking of land already devoted to equivalent public purpose.** — Generally, the authority to condemn property for public use or convenience does not, by necessary implication, provide for the taking of land already devoted to equivalent public purposes. 1957-58 Op. Att'y Gen. No. 57-329.

**Exercise of power by bringing proceedings against state-held property.** — The power of eminent domain may well be exercised by the bringing of condemnation proceedings against property held by the state under tax deeds, naming as parties defendant those persons having the right of redemption or repurchase. 1957-58 Op. Att'y Gen. No. 58-57.

**County commission may condemn real property to build courthouse on it.** 1967 Op. Att'y Gen. No. 67-61.

**Sanitation association lacks power to condemn, when functioning as utility.** — A mutual domestic water and/or sewage works association, as organized under the Sanitary Projects Act, 3-29-1 to 3-29-20 NMSA 1978, does not have the power of eminent domain when the association functions as a utility. 1967 Op. Att'y Gen. No. 67-50.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 26 Am. Jur. 2d Eminent Domain §§ 41, 68, 129; 27 Am. Jur. 2d Eminent Domain §§ 393, 402, 668 et seq., 931 et seq.

State power of eminent domain over property of United States, 4 A.L.R. 548.

Right of public body to compensation where property held by it is taken for another public purpose, 56 A.L.R. 365.

Validity, construction, and effect of statutes providing for urban redevelopment by private enterprise, 44 A.L.R.2d 1414.

Necessity of condemnation where private rights are affected by regulation of bathing, swimming, boating, fishing, or the like, to protect public water supply, 56 A.L.R.2d 790.

Compensation or damages for condemning a public utility plant, 68 A.L.R.2d 392, 35 A.L.R.4th 1263.

Public school, amount of property which may be condemned for, 71 A.L.R.2d 1071.

Rights and liabilities with respect to natural gas reduced to possession and subsequently stored in natural reservoir, 94 A.L.R.2d 543.

Power to condemn property or interest therein to replace other property taken for public use, 20 A.L.R.3d 862.

Cost of substitute facilities as measure of compensation paid to state or municipality for condemnation of public property, 40 A.L.R.3d 143.

Eminent domain: possibility of overcoming specific obstacles to contemplated use as element in determining existence of necessary public use, 22 A.L.R.4th 840.

Airport operations or flight of aircraft as constituting taking or damaging of property, 22 A.L.R.4th 863.

Damages resulting from temporary conditions incident to public improvements or repairs as compensable taking, 23 A.L.R.4th 674.

29A C.J.S. Eminent Domain §§ 51, 110, 204, 418.

## **42A-3-2. Condemnation of property by state institutions.**

If it is deemed necessary by the board of regents of a state educational institution enumerated in Article 12, Section 11 of the constitution of New Mexico or of [by] the governing bodies of other state institutions to condemn property for the public use of such institutions, the governing bodies may acquire in the name of the state title to the property in the manner provided in the Eminent Domain Code [42A-1-1 to 42A-1-33 NMSA 1978].

**History:** 1978 Comp., § 42A-3-2, enacted by Laws 1981, ch. 125, § 34.

## ANNOTATIONS

**Compiler's notes.** — Laws 1937, ch. 95, § 1, ratified and confirmed any and all deeds, grants and conveyances heretofore made by any city, town or village in this state to the state of New Mexico, conveying land or other property for the use of any institution of the state.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 26 Am. Jur. 2d Eminent Domain §§ 41, 68; 27 Am. Jur. 2d Eminent Domain § 474 et seq.

### **42A-3-3. Street improvements; condemnation of ditch, canal or acequia by municipality; authorization[;] protest.**

A. The governing body of any municipality may, when it is for the best interest of such municipality for the improvement, extension or widening of any street, alley or avenue in such municipality to do away with any ditch, canal or acequia lying within, upon or adjacent to any such street, alley or avenue or contemplated street, alley or avenue or within, upon, under or adjacent to any area necessary for the extension, widening or improvement of such alley, street or avenue, proceed with the condemnation of such ditch, canal or acequia as provided in the Eminent Domain Code [42A-1-1 to 42A-1-33 NMSA 1978].

B. A sufficient defense to any condemnation action as provided in Subsection A of this section shall be a written protest signed by at least fifty percent of the persons, associations or corporations having a right to take water from the ditch, canal or acequia at or below the point at which it is to be condemned and whose rights are or may be affected by the condemnation action.

C. The protest provided for pursuant to Subsection B of this section shall be presented to the court at the time fixed for the appointment of appraisers pursuant to the Eminent Domain Code. If, after a hearing, it appears that at least fifty percent of the persons having a right to take water from the ditch, canal or acequia at or below the point at which it is to be condemned, and whose rights are or may be affected by the condemnation action, have in good faith signed such protest, the condemnation petition shall be dismissed.

**History:** 1978 Comp., § 42A-3-3, enacted by Laws 1981, ch. 125, § 35.

## ANNOTATIONS

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Effect of condemnation on existing sales contract.** — Where property the subject of a sales contract was to be subsequently condemned by a city through the exercise of eminent domain, purchasers were not able to rescind the contract to convey real estate nor recover any amounts paid. *Sapir v. Ewing*, 1958-NMSC-004, 63 N.M. 401, 320 P.2d 751.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 26 Am. Jur. 2d Eminent Domain §§ 30, 37, 61, 72, 73, 83, 84, 95, 112, 136, 157, 158, 205 et seq.; 27 Am. Jur. 2d Eminent Domain §§ 388 et seq., 497 et seq., 872, 932, 936.

29A C.J.S. Eminent Domain §§ 30, 31, 41, 42, 52 to 56, 87, 89, 104, 200, 202, 207, 222, 232, 233, 245 to 247, 264 to 286.

## ARTICLE 4

### Spanish or Mexican Land Grants

#### 42A-4-1. Spanish or Mexican land grants; parties defendant; commissioners' report.

A. If any part of a tract of land confirmed by special act of congress or by a decree of the court of private land claims as a Spanish or Mexican land grant, is sought to be condemned for any of the purposes provided for under the provisions of the Eminent Domain Code [42A-1-1 to 42A-1-33 NMSA 1978], such condemnation proceedings may be conducted by making the unknown owners and the person to whom the grant was confirmed parties defendant, designating and describing them as they were designated and described in the act or decree of confirmation, and designating the heirs and successors of the confirmees as heirs and successors in title of the confirmees and giving the name of the grant. Proceedings shall be had as are provided for under the Eminent Domain Code. No condemnation proceedings shall be had under the provisions of this section except for the purposes authorized by law to persons authorized to exercise the right of eminent domain.

B. Subsection A of this section shall not apply to condemnation of parts of tracts of land on which a final decree in a quiet title suit has been rendered.

**History:** 1978 Comp., § 42A-4-1, enacted by Laws 1981, ch. 125, § 36.

## ANNOTATIONS

**Compiler's notes.** — Although "commissioners' report" appears in the catchline, there is no text that corresponds to it in the section.

**Applicability.** — Laws 1981, ch. 125, § 64, provides that the act applies only to condemnation actions commenced on or after July 1, 1981, and provided that in any condemnation action in which an appeal or a motion can modify or vacate the verdict or judgment, or to grant a new trial, was pending on July 1, 1981, the law applicable before July 1, 1981, governs the determination of the appeal or motion.

**Severability.** — Laws 1981, ch. 125, § 63, provided for the severability of the act if any part or application thereof was held invalid.