The supreme court pointed out that a distinction had to be drawn between consequential damages to land remaining after a part of a tract had been condemned and consequential damages to a tract where no property was taken. In the latter case, damages were payable only if the injury was peculiar to that land and was not suffered in common with the general public. In the former case, however, it did not matter if others suffered the same type of injury to the land remaining after a taking. Special damages included any decrease in actual value of the remainder of the condemnee's property which was the direct and proximate consequence of the taking. In other words, as a general rule, special damages included all injuries or damages which caused a diminution in the value of the remaining property.

This same rule applied to the condemnee's claim for damages due to loss of view and breeze. He claimed that prior to the construction he could see 75 percent of his cultivated land, but the elevated highway would restrict his view to about one-third of his land. He also testified that the elevated highway would cut off a wonderful breeze which had favored his residence in the summertime. The appellate court stated that no argument was needed to demonstrate that the value of a homesite might be impaired by the construction of a nearby highway at such an elevation as to obstruct view and favorable breezes. It pointed out that it made no difference on the issue of special damages that loss of view and breeze did not constitute a taking of property, because the applicable statutes required that any special damages resulting from the taking of a portion of a tract for a right-of-way be considered in assessing compensation.

That court agreed with the State that circuity of travel, as a result of severing the tract into two parts, could not be considered as a separate item, but that it had to be considered in determining the diminution in the value of the remaining land caused by the taking. (South Carolina State Highway Department v. Touchberry, 148 S.E.2d 747, 1966)

184-3 HIGHEST COURT OF NEW MEXICO DECIDES OWNERS NOT ENTITLED TO COMPENSATION FOR CIRCUITY OF TRAVEL WHERE THEY RETAIN REASONABLE ACCESS TO A MAIN HIGHWAY TO WHICH THEY HAD PREVIOUSLY HAD DIRECT ACCESS

The private persons in this case owned two tracts of land separated by State Road 422. This road was a four-lane highway, running generally north and south. There were two southbound and two northbound lanes, with a depressed medial divider and a fence down the center of the median in the vicinity of the owners' property. The larger tract was located on the east side of the highway and has always been unimproved. The smaller tract was raised, in part, to coincide with the grade of Road 422, after the owners had obtained a driveway permit to enter that road. This permit had never been revoked. The owners then filled in the State's right-of-way between the smaller tract and the highway. Upon completion of a service station, the owners operated the station from February 1, 1960 until March 1, 1961. They had direct access to the southbound lanes of Road 422, but could not directly reach the northbound lanes due to the fence in the median.

In February 1961 the State highway commission started a highway project which involved the construction of two frontage roads, one on either side of State Road 422, within the original right-of-way. Guard fences were placed between the frontage roads and the original Road 422 to prevent traffic from moving between them except at an interchange which was about 1,760 feet

away from the owners' lands. Consequently, in order to move a vehicle from the through lanes of Road 422 to the owners' tracts, a person had to travel the distances and grades of the interchange and go about one-third of a mile along the frontage roads.

The construction of the barrier fence between the frontage roads and the main highway caused a decrease in value to both tracts. The trial court concluded that the owners had suffered compensable damage by reason of deprivation of access to the improved tract, but no compensable damage to the other tract. The commission appealed from the finding as to the smaller tract. The supreme court reversed the judgment. That court noted that the State, in the exercise of its police power, in the interest of the safety of the traveling public, had the right to control or limit access to certain highways. Mere inconvenience resulting from the closing of a street did not give rise to a legal right to a person so inconvenienced, when he had another reasonable, though perhaps not equally accessible, means of access to the main street system. If that person's property did not abut upon the closed portion, he had no special damage if he still had reasonable access to the main highway. Compensation was not payable for diversion of traffic or circuity of travel so long as the latter was not unreasonable. The appellate court stated that it could not comply with the commission's wish to establish a rule by which reasonable circuity could be measured in each case because the number and type of curves, as well as the attainable speed, all had a bearing on this question.

That court noted that the owners contended that this case differed from another case in which the court had ruled that no compensation was payable where the frontage road was made from the old highway, because in this case the frontage roads were entirely new. The court could not understand why a person's rights to compensation should differ if the State decided to use the old road for a frontage road or use it for the through lanes of a limited-access highway. Under the definition of reasonable access in the State, such a difference could make no change in the right to compensation for impairment of access.

The fact that the owners in this case had received a driveway permit, which had never been revoked, did not enhance their position. The owners still had access to Road 422 since they were still permitted to cross the State's right-of-way from their property to the pavement of the frontage road. But even if it were assumed that the permit had been revoked, the owners were not entitled to any relief because the permit could be revoked in the exercise of the police power of the State, whether or not the power of revocation had been reserved, and even though the owners had expended money in reliance on their permit. (State ex rel. State Highway Comm'n v. Mauney, 411 P.2d 1009, March 1966)