

APPENDIX 1

App. No. _____

Fritz v. Washoe County, Nevada
**On Application for Extension of Time
to File a Petition for Writ of Certiorari
to the Supreme Court of Nevada**

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**IN THE SECOND JUDICIAL DISTRICT COURT OF
THE STATE OF NEVADA IN AND FOR THE
COUNTY OF WASHOE**

JOHN AND MELISSA FRITZ,

Plaintiffs,

v.

Case No.: CV13-00756

WASHOE COUNTY,

Dep. No.: 1

Defendant.

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT AFTER
BENCH TRIAL**

On April 9-11, 2018, the parties appeared before the Court for a bench trial in this matter on the claim of Inverse Condemnation alleged in the *Third Amended Complaint*. Plaintiffs John Fritz and Melissa Fritz (collectively the “Fritzes” or “Plaintiffs”) were represented by Counsel Luke Busby, Esq., and the Defendant Washoe County (“Washoe County” or “Defendant”) was represented by Counsel Michael Large, Esq. and Stephan Hollandsworth, Esq. of the Washoe County District Attorney’s Office. The Plaintiffs were present, testimony was presented, exhibits were identified and admitted and the evidence was argued before the Court. The Court now issues a decision on the matter.

I. FINDINGS OF FACT

1. The subject parcel in this dispute is located at 14400 Bihler Road, APN No. 142- 241-63, (the “Property”) in unincorporated Washoe County. (*List of Undisputed Facts* ¶ 1, Mar. 25, 2018). The Property is bounded uphill to the west by Bihler Road. (Ex. 128). The Property is a 2.5 acre

1 parcel referred to as a Government Parcel created by federal patent under the Small Tracts Act. (*List*
2 *of Undisputed Facts* at ¶ 2). The Property contains a 33-foot access and utility easement on each side,
3 but no drainage easements. (*Id.*; Ex. 130, generally).

4 2. Bihler Road was constructed by the developer of the Lancer Estates subdivision around
5 1990 as an easement for access to the Governmental Parcels. (*See* Ex. 130, generally). Bihler Road
6 is now a private road that is owned and maintained by the residents of the adjoining properties,
7 including Plaintiffs in this matter. (*List of Undisputed Facts* at ¶ 4).

8 3. The Whites Creek watershed is approximately 11.2 square miles that stretches to the peaks
9 of Mt. Rose in the Sierra Nevada Mountains. (*Tr. Vol. 2* at 129:16-130:1, 133:7-20, Apr. 16, 2018;
10 Ex. 84 at 22-23). Whites Creek bifurcates into four channels. (*Tr. Vol. 1* at 204:1-2, Apr. 15, 2018).
11 Whites Creek #1 and #3 run consistently year around. (*Tr. Vol. 3* at 69:16-23, Apr. 16, 2018). Whites
12 Creek #2 and #4 are ephemeral streams that respond to local precipitation and local run off that flow
13 only during storm events. (*Tr. Vol. 2* at 125:6-12; *Tr. Vol. 3* at 70:1-7, 252:19-253:2).

14 4. Whites Creek #4 crosses through the southeast corner of the Property. (*List of Undisputed*
15 *Facts* at ¶ 3; *Tr. Vol. 1* at 21:18-20).

16 5. In 1984, Washoe County became a member of the National Flood Insurance Program
17 (“NFIP”). Under the NFIP, the Federal Emergency Management Agency designates certain areas as
18 floodplains. (*List of Undisputed Facts* at ¶ 5). In 1984, the area in and around Whites Creek #4 was
19 designated as a floodplain by FEMA. (*Id.*; *Tr. Vol. 1* at 221:13). This floodplain extends onto the
20 Property covering the southeast portion of the Property, and the Plaintiffs knew that the Property was
21 within the FEMA floodplain when they purchased it. (*Tr. Vol. 1* at 125:19-125:2, 167-23-168:1).
22 FEMA relocated the limits of the floodplain in the areas of Whites Creek #4 in 2009, which widened
23 the floodplain and moved it further onto the Property. (*Id.* at 222:21-223:3; Ex. 124 A, B, C).

24 6. Two culverts run underneath Bihler Road south of the Property. (*Tr. Vol. 2* at 74:18-20; Ex.
25 26 at Ex. 4). Culvert #1 is a 48-inch culvert in the bed of Whites Creek #4. (*Tr. Vol. 1* at 231:17-21,
26 225:23-226:1; *Tr. Vol. 3* at 19:6-17; Ex. 26 at Ex. 4). Culvert #1 is not on the Property and is located
27 on two private parcels south of the Property. (*Tr. Vol. 3* at 142:5-7; *Tr. Vol. 2* at 43:17-23).
28

1 7. Culvert #2 is a smaller culvert which runs under Bihler Road from west to east north of and
2 somewhat parallel to Culvert #1. (*Tr. Vol. 3* at 19:14-17; Ex. 26 at Ex. 4). Culvert #2 channels water
3 from the Governmental Parcels and Trails End Lane directly onto the Property. (Ex. 26 at Ex. 4). The
4 output of Culvert #2 is on the east side of Bihler Road and on the southerly side of the Property. (*Id.*;
5 Ex. 84 at 44; Ex. 44 at 2).

6 8. Plaintiffs John Fritz and Melissa Fritz purchased the Property on August 24, 2001 from
7 John and Dora Du Puy and recorded a grant deed on the Property with the Washoe County Recorder.
8 (*List of Undisputed Facts* at ¶ 6).

9 9. After the purchase, in 2001 and 2002, Plaintiffs obtained building permits and built a home
10 with two adjoining structures (a garage and a shop) on the Property. (*List of Undisputed Facts* at ¶ 7).
11 Plaintiffs placed driveways running from Bihler Road downhill from west to east to the garage and
12 the shop. (Ex. 120).

13 10. Plaintiff John Fritz is a general contractor having built about 100 homes. (*Tr. Vol. 1* at
14 122:14-16). John Fritz selected the location for the house, shop and garage on the Property. (*Id.* at
15 126:22-24, 127:2-3). He graded the Property to accommodate the structures. (*Tr. Vol. 2* at 94:11-14).
16 Further, Plaintiffs landscaped the area around the house and planted approximately 30-40 trees. (*Tr.*
17 *Vol. 1* at 127:13-16).

18 11. From 2002 until 2015 Plaintiffs consistently rented the Property to tenants. The rent
19 collected during this timeframe is as follows:

20
21 Jason Fritz: from 2002 to 2007 for \$800 per month;
22 Allison Power: from 2007 to 2008 for \$1300 per month;
23 Chris Fritz: from 2008 to 2009 for \$800 per month;
24 Jessica Pahl: from 2009 to 2011 for \$1300 per month;
25 Jim Bedland: from 2011 to 2015 for \$1300 per month.

26 (*Id.* at 188:21-189:24). In total, Plaintiffs received approximately \$166,000.00 in rental income from
27 2002 through 2015 for the Property. (*Id.* at 190:18-191:2). For the past 17 years, John Fritz has
28 continued to use the shop for storage of his personal property, i.e. construction material. (*Id.* at 50:1-

1 3, 52:24-53:7, 128:1-5, 191:3-7). Plaintiffs have used the southern side of the parcel for parking of
2 trailers and vehicles. (Id. at 175:7-12; Ex. 30 at 2).

3 12. During their ownership, Plaintiffs graded the southern side of the Property which resulted
4 in removing the natural vegetation. (Id. at 192:5-9; Ex 23 at 3).

5 13. In 2015, Plaintiffs moved into the house on the Property and still live there today. (Id. at
6 189:25-190:1).

7 **A. Lancer Estates**

8 14. In 1984, a tentative map was approved by Washoe County for the Lancer Estates
9 subdivision development. (Ex. 2 at 1). A resubmittal of the tentative maps was approved in 1990. (Ex.
10 2). Lancer Estates is located to the south and uphill from the Property. (Id. at 3). It stretches from
11 Whites Creek #4 on the north to Mt. Rose Highway on the south. (Ex. 124). Lancer Estates is an
12 eleven phase subdivision project built by private developers and their team of engineers that consists
13 of 231 homes. (Ex. 2 at 3).

14 15. Between September 13, 1988 and June 17, 1997, Washoe County accepted roadway
15 dedications of Lancer Estates Units 1 through 8. (Ex. 16 at 1-15). On August 17, 1999, Washoe
16 County accepted the roadway dedications of Lancer Estates Unit 11. (Id. at 18).

17 16. On October 16, 2001, following the purchase of the Property by the Fritzes, Washoe
18 County accepted the roadway dedications of Lancer Estates Unit 9 and Unit 10. (Id. at 16-17).

19 17. By accepting roadway dedication, Washoe County is responsible for the operation,
20 maintenance, repair, replacement, snow plowing, et cetera of the public improvement. (Id. at 231:11-
21 19). Washoe County accepted dedication of the drainages in Lancer Estates. (*Tr. Vol. 3* at 247:7-11).

22 **B. Monte Rosa Development**

23 18. In 2005, Washoe County approved the final map for the Reserve at Monte Rosa, a
24 residential development ("Monte Rosa"). (Ex. 15). Monte Rosa is located uphill from Lancer Estates.
25 (Ex. 26 at Ex. 4).
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1 19. Monte Rosa is a two-phased development; Unit 1 consisted of 32 homes and Unit 2
2 consisted of 32 homes. (Ex. 166; Ex. 167). Construction began in 2005 and was completed by 2007.

3 (Id.)

4 20. Detention basins were installed in the Monte Rosa development, two of which are
5 interconnected to the storm drain system in Lancer Estates, the contents of which drain into Whites
6 Creek #4. (Ex. 26 at Ex. 4).

7 21. Washoe County has not accepted any dedications of roadways or drainages from Monte
8 Rosa, both of which are private. (*Tr. Vol. 3* at 230:11-231:8).

9 **C. Flooding Activity**

10 22. In a letter dated August 30, 1990, CFA, the contractor for Lancer Estates sent a letter to
11 Larry Bogden of the Washoe County Engineering Division which addressed the storm flows for
12 Lancer Estates. The letter provided in part:

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14 At our meeting on August 30, we concluded that the detention ponds shown on the
15 tentative map will be deleted, storm flows will be directly discharged into the flood
16 zone of Whites Creek, and the developer will provide all of the erosion control at
17 the outlets. In addition, runoff caused by this development will not be retained on
18 site.

19 (Ex. 1).

20 23. Washoe County approved the deletion of the detention ponds. (*Tr. Vol. 3* at 197:17-
21 198:3). The Lancer Estates detention ponds were eliminated because their proposed location would
22 have impacted FEMA regulations (44 CFR 60.3) [flood plain management] and Section 404 [Clean
23 Water Act] since it was necessary to show that they would not have caused a cumulative rise of more
24 than one foot, and they would have. (Id. at 197:17-22).

25 24. In April of 1994, Washoe County accepted a Preliminary Whites Creek Basin
26 Management Study prepared by Cella Bar Associates (“Cella Bar Study”), which had been
27 commissioned by Washoe County to study the hydrology of the Whites Creek area. (Ex. 4).

28 25. The Cella Bar Study indicates that “Existing Problem Areas” include “[s]ome of the
residential lots backing up adjacent to the south of [Whites Creek] Channel No. 4 have potential for

1 flooding during a 100-year event.” (*Id.* at 15). The Plaintiffs’ Property is located in the area identified
2 as a problem area in the Cella Bar Study. (Ex. 4)

3 26. On June 13, 1996, the Nevada Department of Transportation (“NDOT”) wrote a letter to
4 Washoe County requesting the assistance of the County to correct “a drainage problem on the north
5 side of SR-431 [Mt. Rose Highway] between Telluride Drive and Sundance Drive.” (Ex. 14; *Tr. Vol.*
6 3 at 133:7-14). In part, the letter provided that:

7 During discussions in April of 1993 it was decided between the department and
8 Washoe County that all flows between Telluride Dr. and Sundance Dr. exceeding
9 10 cfs [cubic feet per second] would be conveyed northerly through the Lancer
10 Estates Property.¹

11 (Ex. 14).

12 27. The Lancer Estates storm drainage system was designed to carry out the directive from
13 Washoe County to divert water from Mt. Rose Highway that exceeded 10 cfs through Lancer Estates
14 and into Whites Creek #4. (Ex. 5, 6, 8, 15, 26; *Tr. Vol. 3* at 115:10). Defendant’s expert did not dispute
15 that water was diverted from Mt. Rose Highway, and did not address water from Mt. Rose Highway
16 in his reports in Exhibits 84 and 85. (*Tr. Vol. 3* at 158:9-24).

17 28. Impervious surfaces on developed land, which consist of rooftops, streets and driveways,
18 result in increased runoff as compared to runoff over undeveloped land that can be absorbed into the
19 ground. (*Tr. Vol. 1* at 223:19-224:11). The construction of Lancer Estates and Monte Rosa increased
20 runoff; that runoff along with the runoff that exceeds 10 cfs from the Mt. Rose Highway, is diverted
21 into the Lancer Estates storm drainage system which consists of 6 main drains that flow into Whites
22 Creek #4 west of Bihler Road and then through Culvert #2 under Bihler Road. (*Id.*; Ex. 26 at Ex. 4).

23 29. The Lancer Estates storm drainage system is designed to accommodate a 10-year event as
24 opposed to a 100-year event. (*Tr. Vol. 3* at 118:3-9)

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28 ¹ Lancer Estates is generally bounded on the west side by Telluride Dr. and on the east side by Sundance Dr.. (Ex. 124,
Demo. A).

1 30. Prior to the construction of the Lancer Estates storm drainage system, a large percentage
2 of the water that flowed through Lancer Estates drained east of Bihler Road or past a point where it
3 would have drained onto the Property. (Id. at 98:21-100:20; Ex. 6A).

4 31. The six drains in the Lancer Estates storm drainage system that drain to Whites Creek #4
5 west of Bihler Road range in diameter from 12 inches to 36 inches and have a peak capacity that
6 ranges from 1.54 cfs to 29 cfs. (*Tr. Vol. 3* at 116:11-120:14; Ex 5 at 7).

7 32. An additional source of runoff is an approximate 33-acre drainage area west and uphill
8 from the Property that consists of other Government Parcels and Trails End Lane, which drains into
9 Culvert #2 under Bihler Road or over Bihler Road onto the Property, principally toward the area of
10 the Property that Plaintiffs have graded. (*Tr. Vol. 3* at 110:24-111:14; Ex. 84, Figure 4; Site Visit,
11 Apr. 13, 2018).

12 33. The first time Plaintiffs had a problem with flooding on the Property was in 2005. (*Tr.*
13 *Vol. 1* at 51:9-11, 129:2-5). Plaintiffs did not discover what had occurred with the upstream
14 developments (Lancer Estates and Monte Rosa) until 2010. (Id. at 144:22-145:13).

15 34. In 2005, a winter storm inundated the area. (*Tr. Vol. 1* at 51:9-11, 129:2-5). During the
16 storm, water ran through the Property, reached the Plaintiffs' shop and placed several inches of water,
17 dirt and alluvial soil in garage. (Id. at 51:18-52:12, 53:8-54:7). There was no damage to the house,
18 however, Plaintiffs did suffer damage to their personal property in the garage. (Id. at 52:21-53:7).

19 35. After the 2005 flood, the Plaintiffs did not file an insurance claim for any damage to the
20 Property. (Id. at 104:10-12).

21 36. There was some winter storm activity in 2014. (Id. at 150:2-3, 159:5-6). No evidence was
22 introduced regarding flooding of the Plaintiffs' home, shop or garage, however, water pooled in the
23 southeastern graded portion of the Property. (Ex. 28 at 5).

24 37. In 2017, a series of atmospheric river events caused historic amounts of water and snow
25 melt in the region. (*Tr. Vol. 3* at 219:15-220:9). Ultimately, this led to two Presidentially-declared
26 flood disasters. (Id. at 219:17).

1 38. The 2017 storms caused the Whites Creek watershed to overflow into Whites Creek #4.
2 (Id. at 151:12-16).

3 39. The Property flooded during the 2017 storm. (Ex. 20). Plaintiffs contend that the flooding
4 on the Property was the result of the public improvements associated with Lancer Estates, Mt. Rose
5 Highway and Monte Rosa and has gradually increased over time as upland developments matured.
6 (Ex. 20 and Ex. 26, generally).

7 40. Plaintiffs' expert testified that the flooding on the Property is beyond the ability of the
8 Plaintiffs to resolve because it would require the use of land not owned by the Plaintiffs and the
9 construction of a drainage system similar to what has been constructed in a neighboring housing
10 development. (*Tr. Vol. 2* at 13:6-15).

11 41. Exhibit 47, a video taken by Mrs. Fritz of the 2017 storm activity, shows large amounts
12 of water coming from the overflow of Whites Creek #4, heading north on Bihler road and flooding
13 the Property. (*Tr. Vol. 1* at 85:9-15).

14 42. The Defendant's expert claims that the Lancer Estates storm drainage system is designed
15 to capture only frequent storm event flows from the subdivision and that during more extreme events
16 (like the 2017 storm), much of the storm water bypasses the drainage system inlets and continues to
17 run in the streets where it exits the subdivision into Whites Creek east of Bihler Road below the
18 Property and did not cause the flooding. (Ex. 84 at 12-13, Figure 3).

19 43. The flows of Whites Creek #4 exceeded the capacity of Culvert #1. (Id. at 75:2-8). Culvert
20 #1 was overtopped with water. (Id.) Flood water spread to the north along and over Bihler Road onto
21 adjoining properties, including the Property causing erosion, scarring and changes to the topography
22 on the graded portion of the Property. (Ex. 44 at 2; Ex. 84 at 44; Ex 47). This erosion was pronounced
23 in the area of the 33-foot easement and at the outlet of Culvert #2. (Id.) Scarring of the graded area is
24 apparent on southern side of the Property. (Id.; Site Visit).

25 44. During the 2017 storm, the Fritzes' house, garage, and shop received no water damage or
26 flooding of any kind. (*Tr. Vol. 1* at 174:9-22). Their landscaping and the areas around on the northern
27 half of the Property received no damage. (*Tr. Vol. 1* at 174:20-22).

1 45. Washoe County has not instituted formal eminent domain proceedings to condemn the
2 Property. (*List of Undisputed Facts* at ¶ 8).

3 46. Washoe County has not paid just compensation for the Property. (*Id.* at ¶ 9).

4 **II. CONCLUSIONS OF LAW AND ANALYSIS**

5 The Takings Clause of the United States Constitution provides that private property shall not
6 “be taken for public use, without just compensation.” U.S. Const. amend. V. Similarly, the Nevada
7 Constitution provides that “[p]rivate property shall not be taken for public use without just
8 compensation having been first made.” Nev. Const. art. 1, § 8(6). When a governmental entity takes
9 property without just compensation, or initiating an eminent domain action, an aggrieved party may
10 file a complaint for inverse condemnation. State, Dep’t of Transp. v. Cowan, 120 Nev. 851, 854, 103
11 P.3d 1, 3 (2004).

12 **A. Standing**

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14 The Defendant contends that Plaintiffs do not have standing because their claim in inverse
15 condemnation is barred by the statute of limitations, and that if any taking occurred, it occurred prior
16 to the Plaintiffs’ purchase of the Property in 2001, since this is when the bulk of the activity that is
17 alleged to have caused the flooding on the Property occurred. (*Washoe Cnty’s Closing Arg.* 10:6-7,
18 Apr. 17, 2018). Plaintiffs’ contend that the taking occurred when the flooding commenced in 2005.
19 (*Pl.’s Post-Trial Br. In Lieu of Closing Arg.* 4:24-25, Apr. 17, 2018).

20 The Nevada Supreme Court has held that the fifteen-year statute of limitations set forth in
21 NRS 40.090 applies where a party contends that there has been a taking of property by a governmental
22 entity. White Pine Lumber v. City of Reno, 106 Nev. 776, 780, 801 P.2d 1370, 1371 (1990).
23 Accordingly, the Plaintiffs are required to have commenced this case within fifteen years of the
24 alleged taking. As to when the taking occurred, the Nevada Supreme Court has held that “[t]akings
25 claims lie with the party who owned the property *at the time the taking occurred.*” Argier v. Nev.
26 Power Co., 114 Nev. 137, 139, 952 P.2d 1390, 1391 (1998). (Emphasis added). A taking occurs
27 when the government encroaches upon or occupies private land for its own proposed use. Palazzolo
28 v. Rhode Island, 533 U.S. 606, 617, 125 S. Ct. 2448, 2457 (2001). While the bulk of the activity that

1 is claimed to have caused the flooding did indeed take place prior to the Plaintiffs taking ownership
2 of the Property in 2001, the evidence in this case shows that the first encroachment on the Property
3 (i.e., flooding) took place in 2005, after the Plaintiffs took ownership of the property. Pursuant to
4 Algier and Palazzolo, this is the operative event for purposes of determining whether a taking has
5 occurred. Plaintiffs commenced this action in 2013, eight years after the initial flooding event and
6 well within the fifteen-year statute of limitations.

7 The Defendant's claim that the Plaintiffs' lack standing is not only contrary to the case law
8 set forth above, it is contrary to the fair and balanced application of the Takings Clause as recognized
9 by the U.S. Supreme Court. In Palazzolo the U.S. Supreme Court considered whether the petitioner's
10 acquisition of title after a regulations' effective date barred his takings claim. In finding that the
11 petitioner's claim was not barred, the U.S Supreme Court held:

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13 Petitioner's acquisition of title after the regulations' effective date did not bar his
14 takings claims. This Court rejects the State Supreme Court's sweeping rule that a
15 purchaser or a successive title holder like petitioner is deemed to have notice of an
16 earlier-enacted restriction and is barred from claiming that it effects a taking. Were the
17 Court to accept that rule, the postenactment transfer of title would absolve the State of
18 its obligation to defend any action restricting land use, no matter how extreme or
unreasonable. A State would be allowed, in effect, to put an expiration date on the
Takings Clause. This ought not to be the rule. Future generations, too, have a right to
challenge unreasonable limitations on the use and value of land.

19 Id. at 608, 125 S. Ct. at 2453.

20 This Court notes that the instant case is based on a possessory taking and not a government
21 enacted regulation, but finds Palazzolo analogous nonetheless. Accepting the Defendant's argument
22 would result in absolving the government from a former owner's claim since the encroachment did
23 not occur during their ownership, and would absolve the government from the Plaintiffs' claim
24 because the Plaintiffs did not timely commence their case, which ripened before they owned the
25 Property.

26 Accordingly, this Court finds that Plaintiffs have standing to pursue their claim for inverse
27 condemnation.

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B. Inverse Condemnation

Inverse condemnation requires a party to demonstrate the following: (1) a taking (2) of real or personal interest in private property (3) for public use (4) without just compensation being paid (5) that is proximately caused by a governmental entity (6) that has not instituted formal proceedings. Fritz v. Washoe Cty., 132 Nev. Adv. Op. 57, 376 P.3d 794, 796 (2016), reh'g denied (Oct. 27, 2016), reconsideration en banc denied (Dec. 21, 2016).²

1. Proximate Cause

There are two main issues regarding proximate cause this Court must address: 1) whether government activities can constitute *substantial involvement* in the development of private land for public use which unreasonably injured the property of another; and 2) whether the design, construction, or maintenance of the improvement is a proximate cause of the damage. Fritz v. Washoe Cty., 132 Nev. Adv. Op. 57, 376 P.3d 794, 797 (2016)

i. Substantial Involvement

When a private party and a government entity act in concert, government responsibility for any resulting damage to other private property may be established by demonstrating that the government entity was substantially involved “in the development of private lands for public use which unreasonably injure[d] the property of others.” Fritz, 132 Nev. Adv. Op. 57, 376 P.3d at 797 (citing Cty. of Clark v. Powers, 96 Nev. 497, 505, 611 P.2d 1072, 1077 (1980)). “It is well-established that the mere planning of a project is insufficient to constitute a taking for which an inverse condemnation action will lie.” Fritz, 132 Nev. Adv. Op. 57, 376 P.3d at 797 (quoting Sproul Homes of Nev. v. State, Dep't of Highways, 96 Nev. 441, 443, 611 P.2d 620, 621 (1980)). Further, the mere approving of subdivision maps, on its own, does not does not convert the private development into a public use that gives rise to inverse condemnation liability. Fritz, 132 Nev. Adv. Op. 57, 376 P.3d at 798 (citing Ullery v. Contra Costa County, 202 Cal.App.3d 562, 248 Cal.Rptr. 727 (1988)).

² This Court addresses the elements of inverse condemnation in the order in which the factual chronology of the case occurred.

1 In Fritz, the Supreme Court overturned the District Court’s grant of summary judgment issued
2 in favor of Washoe County, stating that “inverse condemnation is a viable theory of liability and
3 genuine issues of material fact remain as to the County’s substantial involvement in the development
4 of the drainage system at issue.” Fritz, 132 Nev. Adv. Op. 57, 376 P.3d at 795. The Supreme Court
5 acknowledged that Fritz is distinguishable from Powers, noting that the county in Powers was held
6 liable for inverse condemnation for acting in conjunction with various private parties to cause large
7 amounts of water to be cast upon the plaintiffs’ land which included “participat[ing] actively in the
8 development of these lands, both by its own planning, design, engineering, and construction activities
9 and by its adoption of the similar activities of various private developers as part of the County’s
10 master plan for the drainage and flood control area.” Fritz, 132 Nev. Adv. Op. 57, 376 P.3d at 797
11 (citing Cty. of Clark, 96 Nev. at 505, 611 P.2d at 1074.³ The Supreme Court further noted that
12 drawing the distinction with Powers was not dispositive of the substantial involvement issue in Fritz.
13 While the Supreme Court has not limited the range of actions that constitute substantial involvement
14 to physical engagement in private activities as was present in Powers, they have nonetheless, provided
15 that claims based on mere planning are outside the scope of substantial involvement. Fritz, 132 Nev.
16 Adv. Op. 57, 376 P.3d at 797 (quoting Sproul Homes of Nev., 96 Nev. at 443, 611 P.2d at 621).

17
18 The Supreme Court noted that Fritz presents a novel question: “whether government activities
19 *short of physical labor, but with more engagement than mere planning*, can constitute substantial
20 involvement in a private development sufficient to constitute public use in support of an inverse
21 condemnation.” Fritz, 132 Nev. Adv. Op. 57, 376 P.3d at 797. (Emphasis added). The Supreme
22 Court noted that the Plaintiffs provided evidence that, among other activities, Washoe County
23 formally accepted dedications of the streets in the developments and entered into an agreement with
24 the Nevada Department of Transportation to direct water from the developments north into Whites
25 Creek, rather than to allow the water to follow its natural path down Mt. Rose Highway. This
26

27 ³ Ultimately, the “collecting waters interfered seriously with the respondents’ use and enjoyment of their land, and became
28 a breeding ground for stench, mosquitoes and disease.” Cty. of Clark, 96 Nev. at 505, 611 P.2d at 1074. The court found
that the county had taken the Powers parcel “in its entirety: the property no longer had a practical use other than as a flood
channel.” Id. at 1075.

1 confluence of activity led the Supreme Court to declare the Plaintiffs' claim for inverse condemnation
2 "actionable." Id. at 798.

3 Given the direction provided by the Supreme Court, it is incumbent on this Court to determine
4 if Washoe County's actions rose to the level of "substantial involvement" sufficient to constitute
5 public use in support of inverse condemnation. The following facts in this case substantiate the
6 finding that the Defendant's involvement was substantial.⁴

7 In 1984, a tentative map was approved by Washoe County for the Lancer Estates subdivision
8 development. A resubmittal of the tentative maps was approved in 1990. Between 1988 and 2001,
9 Washoe County accepted the roadway dedications of Lancer Estates Units 1 and Unit 11. Washoe
10 County accepted dedication of the storm water system in Lancer Estates. By accepting dedication,
11 Washoe County is responsible for the operation, maintenance, repair, replacement, snow plowing, et
12 cetera of the public improvement.

13 Approval of the final map for Lancer Estates resulted in evacuating the Lancer Estates runoff
14 into Whites Creek #4 west of Bihler Road, requiring it to flow through Culvert #1 when, prior to the
15 development of Lancer Estates the parties agree that the vast majority of the runoff from Lancer
16 Estates evacuated east of Bihler Road or beyond Culvert #1. The significance of this is that the
17 Property is located on the east side of Bihler Road. Changing the point of evacuation to the west side
18 of Bihler Road meant that water would be evacuated on the uphill side of Bihler Road before reaching
19 the Property as opposed to the downhill side of Bihler Road, past the Property. This is relevant
20 because the Plaintiffs claim that the water that entered Whites Creek #4 before Culvert #1 from the
21 Lancer Estates storm drainage system caused the flooding on the Property in 2017.

22 In 1990, Washoe County approved the deletion of the detention ponds proposed by the
23 developer for Lancer Estates to manage the runoff at Lancer Estates. This constitutes action by the
24 County that overrode the developers preferred method for addressing the runoff and/or storm flows
25 from Lancer Estates.
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27
28 ⁴ Whether this substantial involvement constituted public use in support of inverse condemnation is addressed below in Paragraph (1)(ii).

1 In April of 1994, Washoe County accepted a Preliminary Whites Creek Basin Management
2 Study (“Cella Bar Study”) prepared by Cella Bar Associates, which had been commissioned by
3 Washoe County to study the hydrology of the Whites Creek area. The Cella Bar Study indicates that
4 “Existing Problem Areas” include “[s]ome of the residential lots backing up adjacent to the south of
5 [Whites Creek] Channel No. 4 have potential for flooding during a 100-year event.” (Ex. 4 at 15).
6 The Plaintiffs’ Property is located in the area identified as a problem area in the Cella Bar Study. (Id.)

7
8 In June 1996, at the request of the NDOT, Washoe County agreed to correct “a drainage
9 problem on the north side of SR-431 [Mt. Rose Highway] between Telluride Drive and Sundance
10 Drive” by agreeing that all flows between Telluride Dr. and Sundance Dr. exceeding 10 cfs would be
11 conveyed northerly through Lancer Estates. Consequently, any drainage on the Mt. Rose Highway
12 that exceeded 10 cfs was added to the storm flows from Lancer Estates that would be discharged
13 directly into Whites Creek #4.

14 Thereafter, in 2005, Washoe County approved the final map for Monte Rosa which included
15 the installation of detention basins, two of which are interconnected to and discharge runoff through
16 the storm drain system in Lancer Estates, the contents of which drain into Whites Creek #4, all to the
17 west of Bihler Road.

18 Lancer Estates consists of 231 home sites. Monte Rosa consists of 64 home sites. The
19 Defendant’s expert testified that impervious surfaces on developed land such as rooftops, streets and
20 driveways increase runoff. Accordingly, the development of Lancer Estates and Monte Rosa
21 increased runoff from these developments.

22 The facts in this case show that the Defendant undertook numerous actions over the course of
23 a decade that modified the natural drainage of Lancer Estates causing the runoff from Lancer Estates,
24 Monte Rosa and the Mt. Rose Highway to be directed into the Lancer Estates storm drainage system
25 and discharged into Whites Creek #4. Accordingly, this Court finds that the actions of Washoe
26 County are sufficient to constitute substantial involvement in the development of private lands and
27 this Court turns to whether or not the result of these actions constitute public use in support of inverse
28 condemnation.

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ii. Causation

A taking must be proximately caused by a government entity. Fritz, 132 Nev. Adv. Op. 57, 376 P.3d at 797 (citing Gutierrez v. Cty of San Bernardino, 198 Cal.App. 4th 831, 130 Cal.Rptr.3d 482, 485 (2011)). Unlike Powers, where the water came from a single identifiable source (an ephemeral stream through which water was increased, accelerated and diverted over the entire length of the Powers parcel)⁵, the water that is capable of flooding the Property emanates from multiple sources including (1) the 11.2 mile Whites Creek watershed that extends up the Sierra Nevada mountains and flows into Whites Creek #4 during significant storm events, similar in nature to the storm in January 2017; (2) the 33-acre drainage area directly west of the Property that accepts runoff from other Governmental Properties and flows over Trails End Lane through Culvert #2 under and, at times, over Bihler Road and onto the Property; (3) Bihler Road, which runs downhill south to north past the Property and which carries water toward the Property; (4) the Lancer Estates storm drainage system; and (5) Whites Creek #4. Defendant contends that the first three of these sources and the grading activity undertaken by the Plaintiffs on the Property are the cause of the flooding. *Washoe Cnty's Closing Arg.* 7:11-9:23, Apr. 17, 2018). Plaintiffs contend that the flooding was caused by the confluence of runoff from Lancer Estates, Monte Rosa and Mt. Rose Highway that flows through the Lancer Estates storm drainage system into Whites Creek #4. (*Pl. 's Post-Trial Br. In Lieu of Closing Arg.* 8:4-8; , Apr. 17, 2018).

While it is clear that the development activity related to Lancer Estates, Monte Rosa and the Mt. Rose Highway changed the path of the runoff, increased the runoff, and diverted it to Whites Creek #4 west of Bihler Road, it is not clear that these activities were the proximate cause of the flooding that occurred on the Property. The Defendant's expert claims that the storm drainage system is designed to capture only frequent storm event flows from the subdivision and that during more extreme events (like the 2017 storm), much of the storm water bypasses the drainage system inlets and continues to run in the streets where it exits the subdivision into Whites Creek east of Bihler Road below the Property and did not cause the flooding. The capacity of the Lancer Estates storm drainage

⁵ Cty. of Clark v. Powers, 96 Nev. 497, 501, 611 P.2d 1072, 1074 (1980).

1 system to evacuate large amounts of water as discussed above, arguably undermines the statements
2 of the Defendant's expert, but there is no evidence in the record that verifies the amount of water that
3 is evacuated from the Lancer Estates storm drainage system during either common or significant
4 storm events.⁶

5 Central to Plaintiffs' claim regarding the source of the flooding on the Property is Plaintiffs'
6 Exhibit 47, a video taken by Mrs. Fritz during the 2017 storm which she testified shows large amounts
7 of water coming from the overflow of Whites Creek #4, heading north on Bihler road and flooding
8 the Property. That White's Creek #4 is the source of the flooding on the Property as shown in Exhibit
9 47 was confirmed by the Defendant's expert witness. (*Tr. Vol. 3*, at 192:23-193:6). Ms. Fritz testified
10 that the video shows that there is only a "little bit" of water flowing on Trails End Lane. (*Tr. Vol. 1*
11 at 83:13-192). The Defendant's expert essentially concurred with Mrs. Fritz and stated that there was
12 no water coming from Trails End Lane. (*Tr. Vol. 3* at 107:3-9). Mrs. Fritz further stated that in
13 Exhibit 47 the water on Bihler Road was coming from two sources: five percent was flowing down
14 the left side of the road and attributable to the storm; the other ninety-five percent flowing down the
15 other side of Bihler road was attributable to the Whites Creek #4 overflow. The Defendant's expert
16 also agreed that the video shows very little water on Bihler Road not attributable to Whites Creek #4
17 overflow. (*Id.* at 193:9-12).

18
19 Plaintiffs contend that the video was taken at the beginning of the 2017 storm and that the
20 source of the water that is overflowing from Whites Creek #4 and flooding the Property is from the
21 Lancer Estates storm drainage system. However, the Defendant's expert disagrees. He contends that
22 Exhibit 47 must have been taken later in the storm since the amount of water overflowing from Whites
23 Creek #4 can only be from the White's Creek watershed which would only occur later in the storm
24 (as that is the time it takes for the water from the Whites Creek watershed, high in the Sierra Nevada
25

26 ⁶ The Plaintiffs did not present information in this regard. The Court undertook questioning of the Defendant's expert
27 regarding such measurements. (*Tr. Vol. 3* at 191:16-20). The expert confirmed that none were calculated since he did
28 not deem them relevant because the drainage from Lancer Estates is at the very bottom of the watershed and would "report
very quickly" to Whites Creek #4 ahead of the Whites Creek runoff that flows far upstream and would show up much
later during a storm event. (*Tr. Vol. 3* at 191:21-192:8).

1 mountains, to reach Culvert #1 under Bihler Road); and moreover, it is not probable for the Lancer
2 Estates storm drainage system to produce that output from the rainfall that occurred. (Id. at 194-22-
3 195:3).

4 This Court finds that the principal source of the water that is seen in Exhibit 47 that resulted
5 in the flooding to the Property in 2017 is from the Whites Creek watershed and not the Lancer Estates
6 storm drainage system. This must be the case given the evidence in Exhibit 47. The Lancer Estates
7 storm drainage system is a local source of runoff as is Bihler Road and Trails End Lane. Accordingly,
8 if the Lancer Estates storm drainage system was evacuating the copious amount of runoff seen in
9 Exhibit 47, the other local sources of runoff—Bihler Road and Trails End Lane, would also be
10 experiencing significant or at least notable amounts of drainage at the same time. But as testified to
11 by Mrs. Fritz and the Defendant’s expert, Exhibit 47 reveals that they were not. Moreover, as
12 evidenced by the Site Visit, these three sources of runoff are all literally within 5 minutes walking
13 distance of one another. It is not conceivable that one of them, Lancer Estates, would be deluged by
14 precipitation to the extent that it was evacuating the water seen overflowing from Whites Creek #4 in
15 Exhibit 47 while the other two sources were dormant. While water from the Lancer Estates storm
16 drainage system was undoubtedly flowing into Whites Creek #4, based on Exhibit 47 it could not
17 have been making a substantial contribution.⁷

18
19 Accordingly, this Court finds that the actions of Washoe County were not the proximate cause
20 of the flooding on the Property and did not constitute a public use in support of inverse condemnation
21 and therefore, the Plaintiffs’ claim for inverse condemnation fails.⁸

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26 ⁷ No similar evidence of the cause of the flooding that occurred in 2005 was offered into evidence.

27 ⁸ In spite of this finding, this Court undertakes a discussion of whether the damage that occurred to the Property would
28 have amounted to a taking since this issue was raised by the Nevada Supreme Court in Fritz v. Washoe County, 132 Nev.
Adv. Op. 57, 376 P.3d 794 (2016). As to the remaining elements of inverse condemnation, the parties stipulated (1) that
the Property is real property; (2) that Washoe County has not paid just compensation for the Property; and (3) that Washoe
County has not instituted formal eminent domain proceedings to condemn the Property.

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2. Taking

For a taking to occur, a claimant must have a stick in the bundle of property rights. ASAP Storage, Inc. v. City of Sparks, 123 Nev. 639, 647, 173 P.3d 734, 740 (2007). The bundle of property rights includes all rights inherent in ownership, including the inalienable right to possess, use, and enjoy the property. Id. At the time of the alleged takings (2005 and 2017), Plaintiffs owned the subject parcel in this dispute located at 14400 Bihler Road. (*List of Undisputed Facts* at ¶ 1). Plaintiffs' ownership interest carried with it the right to possess, use, enjoy, and protect that property. Accordingly, Plaintiffs had a protected property interest in their land.

A taking can arise when the government regulates or physically appropriates an individual's private property. Physical appropriation exists when the government seizes or occupies private property or ousts owners from their private property. ASAP Storage, Inc., 123 Nev. at 647, 173 P.3d at 740 (citing Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537, 125 S. Ct. 2074 (2005)). This case involves the actual physical invasion of water on the Plaintiffs' property.

A taking occurs where real estate is invaded by superinduced additions of water so as to effectually destroy or impair its usefulness. Clark Cty., 96 Nev. at 502, 611 P.2d at 1075 (citing Pumpelly v. Green Bay Company, 80 U.S. (13 Wall.) 166, 181(1871)). The result is no different when property is subjected to intermittent, but inevitable flooding that causes substantial injury. Clark Cty., 96 Nev. at 502, 611 P.2d at 1075 (citing United States v. Cress, 243 U.S. 316, 328, 37 S. Ct. 380, 385 (1917)).

Plaintiffs contend there has been a taking as evidenced by the physical invasion of flood waters and substantial injury to the Property. Plaintiffs' expert Mr. Stoner testified that the flooding on the Property is beyond the ability of Plaintiffs to resolve because it would require the use of land not owned by Plaintiffs and the construction of a drainage system similar to what has been constructed in a neighboring housing development. Further, Plaintiffs aver that the FEMA floodplain moved further onto the Property since it was purchased by the Plaintiffs.

The Defendant argues Plaintiffs have been able to prove only minor property damage compared to the substantial injury required for the taking element of an inverse condemnation claim.

1 (Def.'s Closing Arg. at 2:5-7). The intermittent flooding on the Plaintiffs' Property does not amount
2 to a "substantial injury." (Id. at 2:15-22). Plaintiffs further exacerbated injury to the Property due to
3 Plaintiffs' building of the boulder berm placed on the west side of the Property and Plaintiffs' grading
4 of the Property. (Id. at 2:23-3:9). As to the FEMA maps, Defendant contends that changes to the
5 2009 flood map were FEMA's decision, not Washoe County's, and no evidence was presented as to
6 why FEMA decided to change the boundaries therein. (Id. at 3:10-4:2). Further, Plaintiffs leased the
7 Property from 2002 to 2015 and currently reside on the Property, thus Plaintiffs have not been
8 deprived of the Property's economically beneficial use due to the flooding. (Id. at 4:3-9).

9
10 The evidence presented at trial shows that the flooding on the Property has not been
11 continuous. Plaintiffs testified that the first time the Property flooded was in 2005 during which
12 several inches of water flooded their shop. In 2014, water pooled in the southeastern graded portion
13 of the Property due to winter storm conditions. In 2017, there was an historic amount of water and
14 snow melt in the region, causing Whites Creek #4 to overflow and flood the Property. The flows of
15 Whites Creek #4 exceeded the capacity of Culvert #1, causing runoff to spread to the north along and
16 over Bihler Road onto the adjoining properties, including the Plaintiffs' property.

17 The foregoing evidence shows that the Plaintiffs' property was flooded in 2005 and 2017, and
18 suffered from pooling of water in 2014. The inevitability of flooding on the Property is almost
19 exclusively related to extreme weather conditions that occurred twice in twelve years, and there was
20 no evidence presented that proved or disproved the likelihood of reoccurring flooding on the Property.
21 Flooding not shown to be inevitably recurring occupies the category of mere consequential injury or
22 tort. Pinkham v. Lewiston Orchards Irr. Dist., 862 F.2d 184, 189 (9th Cir. 1988). "To constitute a
23 compensable taking by inverse condemnation where no permanent flooding of land is involved, proof
24 of *frequent* and *inevitably recurring* inundation due to governmental action is required." Id. (citing
25 United States v. Cress, 243 U.S. 316, 328, 37 S. Ct. 380, 385 (1917)). In Pinkham, the Court stated
26 that two floodings occurring in 1959 and 1984 (within twenty-five years of one another) were
27 insufficient to amount to a constitutional taking. This case is not identical to but is comparable to
28 Pinkham, in that the Property was subject to only two floodings over a twelve year period.

1 Further, the flooding on Plaintiffs' property, which consisted of erosion and channeling on the
2 south side of the parcel in the graded area away from the house, shop and garage, was not sufficient
3 to show that it destroyed or impaired its usefulness such that there was substantial injury to the
4 Property. See Clark Cty., 96 Nev. at 502, 611 P.2d at 1075. The evidence presented and stipulated to
5 by the parties, shows that Plaintiffs purchased the Property on August 24, 2001. The testimony
6 presented at trial provides that for the past seventeen years, John Fritz has continued to use the shop
7 for storage of his personal property, which flooded once in 2005. (*Tr. Vol. 1* at 50:1-3, 191:3-7). In
8 2015, following the filing of the Complaint in this case, Plaintiffs moved onto the Property and still
9 live there. Subsequent to purchasing the Property, Plaintiffs have not only used the land, but have
10 generated revenue in the amount of \$166,000.00 by leasing the Property to various tenants.

11
12 It is clear to the Court, based on the foregoing, that the Property has been used for practical
13 purposes other than as a flood channel. See Clark Cty., 96 Nev. at 501-502, 611 P.2d at 1075 (stating
14 that the lower court found that the county had taken the subject parcel in its entirety because the
15 property no longer had a practical use other than as a flood channel). This Court does not find that
16 an appropriation, occupation or seizure of the Property has taken place sufficient to prove that a taking
17 has occurred.

18 Accordingly, and good cause appearing,

19 IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of the
20 Defendant Washoe County on Plaintiffs John Fritz and Melissa Fritz's Claim for Inverse
21 Condemnation.

22 DATED this 24th day of April, 2017.

23
24 
25 KATHLEEN DRAKULICH
26 DISTRICT JUDGE
27
28

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of the Second Judicial District Court of the State of
3 Nevada, in and for the County of Washoe; and that on this date I electronically filed the foregoing
4 with the Clerk of the Court by using the ECF system which will send a notice of electronic filing
5 to the following:
6

7 **STEPHAN J. HOLLANDSWORTH, ESQ.**

8 **MICHAEL W. LARGE, ESQ.**

9 **LUKE ANDREW BUSBY, ESQ.**

10 DATED this 24th day of April, 2018.
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14 DANIELLE KENT
15 Judicial Assistant
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