IN THE SUPREME COURT
OF THE STATE OF NEVADA

JOHN FRITZ; AND MELISSA FRITZ, Appellants, vs. WASHOE COUNTY, Respondent.	No. 75693

ORDER OF AFFIRMANCE

(Filed May 31, 2019)

This is an appeal from a district court judgment after a bench trial in a real property action regarding an inverse condemnation claim. Second Judicial District Court, Washoe County; Kathleen M. Drakulich, Judge.

The property at issue in this dispute is a 2.5 acre parcel on Bihler Road in unincorporated Washoe County that has periodically flooded over the years. The property is within the White's Creek watershed. White's Creek bifurcates into four channels, two of which run consistently and two of which run depending upon seasonal local precipitation and runoff that flows during storm events. One of the latter two channels, White's Creek #4, runs through the southeast corner of the property.

John Fritz and Melissa Fritz purchased the property in 2001. After purchasing it, they built a home, garage, and shop on the property. Part of that

construction included grading the property to accommodate the structures and landscaping the area around the house. From 2002 until 2015, the Fritzes consistently rented the property to other tenants, and received approximately $166,000 in rental income in those years. Since they have owned the property, John has continued to use the shop for storage of construction materials and used the southern side of the parcel for parking of trailers and vehicles. The Fritzes moved into the home in 2015, and still live there today.

The Fritzes first experienced flooding on their property in 2005. A winter storm inundated the area and caused water to run through their property. The water reached the shop on the property and placed several inches of water, dirt, and soil in the garage. There was no damage to the house; however, there was damage to the personal property stored in the garage. Nevertheless, the Fritzes did not file an insurance claim for that incident. The Fritzes experienced some flooding again during a winter storm in 2014. However, no evidence was introduced in the district court regarding the impact of that flooding on the Fritzes' home, shop, or garage. That said, there was evidence presented that water pooled in the southeastern graded portion of the property. Then, in 2017, the Fritzes experienced flooding again. Specifically, in that year, there were historic amounts of precipitation and snow melt in the area, leading the federal government to declare two flood disasters. Melissa took a video of that event showing large amounts of water coming from the overflow of White's Creek #4, heading north on Bihler Road, and

flooding the property. However, even with the historical amount of flooding in 2017, the Fritzes' house, garage, and shop were not damaged during that event.

The Fritzes contend that all the flooding on the property was the result of public improvements to two upland developments, Lancer Estates and Monte Rosa, as well as improvements to upland Mount Rose Highway. The Fritzes argue that improvements to those developments have gradually increased over time as those developments expanded.

The Fritzes filed a complaint in the district court for inverse condemnation, alleging that Washoe County substantially participated in the planning and development of Lancer Estates and Monte Rosa, and that those developments have substantially increased and accelerated the flow of water across White's Creek #4. Initially, the district court dismissed the Fritzes' claim by summary judgment. The Fritzes appealed, and we reversed, concluding that the district court's findings were insufficient to determine if there was a taking, and that genuine issues of material fact existed as to whether Washoe County actions constituted substantial involvement in the development of the drainage system in that area. *Fritz v. Washoe Cty. ("Fritz I")*, 132 Nev. 580, 586, 376 P.3d 794, 796 (2016).

After remand, the district court reopened discovery. The case eventually proceeded to a three-day bench trial on the taking and proximate cause elements of the inverse condemnation claim. The court concluded that, as a matter of law, the flooding on the

Fritzes' property did not rise to the level of a taking, and that there were other factors other than those involving Washoe County that caused the Fritzes' property to flood. The Fritzes now appeal that determination.

The district court did not err in concluding there was not a taking

The Fritzes contend that the district court made clearly erroneous findings of fact regarding the evidence of recurring flooding and future flooding.[1] Washoe County responds that the Fritzes were not substantially injured, as required by *Buzz Stew*,

[1] The Fritzes contend that the district court erroneously determined that no taking occurred because the district court applied the incorrect standard of law. Specifically, the Fritzes complain that the district court used the standard set forth in *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 648, 173 P.3d 734, 741 (2007), when it should have used *Buzz Stew, LLC v. City of N. Las Vegas*, 131 Nev. 1, 7, 341 P.3d 646, 650 (2015). As an initial matter, *Buzz Stew* did not overturn, distinguish, or clarify the standard used for a taking. 131 Nev. at 7, 341 P.3d at 650. In fact, the supposed clarified standard the Fritzes rely on in *Buzz Stew* directly cites to *ASAP Storage* and *Clark County v. Powers*, 96 Nev. 497, 501 n. 3, 611 P.2d 1072, 1075 n.3 (1980). *Id.* The district court used both of those cases to determine whether a taking occurred. Thus, the Fritzes' argument that the district court applied an incorrect standard of law has no merit.

The Fritzes also argue that numerous other findings of fact by the district court were clearly erroneous or not supported by substantial evidence. However, each of the remaining findings they dispute relate to the proximate cause element of the district court's decision, rather than the taking element. Because we conclude the Fritzes failed to demonstrate a taking occurred, we need not address those arguments.

because water pooling on a property during a storm event is not substantial injury. We agree.

Inverse condemnation requires: "(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 I*, 132 Nev. at 584, 376 P.3d at 796. "Whether a taking has occurred is a question of law that this court reviews de novo." *City of Las Vegas v. Cliff Shadows Prof'l Plaza, LLC*, 129 Nev. 1, 11, 293 P.3d 860, 866 (2013).[2] Additionally, we have "repeatedly held that findings of fact and conclusions of law, supported by substantial evidence, will not be set aside unless clearly erroneous." *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 486, 117 P.3d 219, 223 (2005) (internal quotation and citation omitted).

For a taking by flood water to occur, there must be a physical invasion of flood waters resulting in substantial injury. *Buzz Stew*, 131 Nev. at 7, 341 P.3d at 650. For substantial injury to exist, the physical invasion must "effectually destroy or impair [the property's] usefulness." *Clark Cty.*, 96 Nev. at 501 n.3, 611 P.2d at 1075 n.3. "[W]hen property is subjected to intermittent, but inevitable flooding which causes substantial injury," the requirement is no different. *Id.*

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[2] Because whether a taking occurred is a question of law, we reject the Fritzes' contention that the case should have been tried by a jury.

We conclude that the district court correctly determined that there was no taking. Since the Fritzes bought the property, it has only flooded three times and none of those times resulted in substantial damage sufficient to destroy or impair the property's usefulness. Only once did the flooding invade the garage that John used for storage of his personal property, and he has continued to use the building for that same purpose since. The flooding has merely resulted in erosion and channeling in a graded area of the property away from the house, shop, and garage. Further, the Fritzes have been able to lease the property out to various tenants since they have owned the property, generating just over $160,000 in revenue. The Fritzes moved back onto the property in 2015 and continue to reside there today. Thus, the district court was correct in concluding that the flooding did not result in substantial injury to the Fritzes.

We additionally conclude that the district court's finding regarding future flooding on the property was not clearly erroneous. The Fritzes argue that their expert presented evidence that flooding will continue and increase the more urbanization of that area increases. However, the evidence of future flooding was scant and speculative, particularly when coupled with evidence that the property has only flooded three times in roughly twenty years, none of which resulted in substantial damage. Given the evidence available, the district court's finding does not rise to clear error. Accordingly, the district court did not err in holding that no taking occurred. We thus

ORDER the judgment of the district court AFFIRMED.[3]

/s/ Pickering, J.
Pickering

/s/ Parraguirre, J.
Parraguirre

/s/ Cadish, J.
Cadish

cc: Hon. Kathleen M. Drakulich, District Judge
David Wasick, Settlement Judge
Luke A. Busby
Washoe County District Attorney/Civil Division
Fennemore Craig P.C./Reno
Blanchard, Krasner & French
Washoe County District Court Clerk

[3] We have considered the Fritzes' remaining arguments and conclude they are without merit.

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

JOHN AND MELISSA FRITZ,

Plaintiffs,

v.

WASHOE COUNTY,

Defendant. /

Case No.: CV13-00756

Dep. No.: 1

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

(Filed Apr. 24, 2018)

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

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

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

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

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

6. Two culverts run underneath Bihler Road south of the Property. (*Tr. Vol. 2* at 74:18-20; Ex. 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, 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 on two private parcels south of the Property. (*Tr. Vol. 3* at 142:5-7; *Tr. Vol. 2* at 43:17-23).

7. Culvert #2 is a smaller culvert which runs under Bihler Road from west to east north of and somewhat parallel to Culvert #1. (*Tr. Vol. 3* at 19:14-17; Ex. 26 at Ex. 4). Culvert #2 channels water from the

Governmental Parcels and Trails End Lane directly onto the Property. (Ex. 26 at Ex. 4). The output of Culvert #2 is on the east side of Bihler Road and on the southerly side of the Property. (Id.; Ex. 84 at 44; Ex. 44 at 2).

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

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

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

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

Jason Fritz: from 2002 to 2007 for $800 per month;
Allison Power: from 2007 to 2008 for $1300 per month;

> Chris Fritz: from 2008 to 2009 for $800 per month;
> Jessica Pahl: from 2009 to 2011 for $1300 per month;
> Jim Bedland: from 2011 to 2015 for $1300 per month.

(Id. at 188:21-189:24). In total, Plaintiffs received approximately $166,000.00 in rental income from 2002 through 2015 for the Property. (Id. at 190:18-191:2). For the past 17 years, John Fritz has continued to use the shop for storage of his personal property, i.e. construction material. (Id. at 50:1-3, 52:24-53:7, 128:1-5, 191:3-7). Plaintiffs have used the southern side of the parcel for parking of trailers and vehicles. (Id. at 175:7-12; Ex. 30 at 2).

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

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

A. Lancer Estates.

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

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

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

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

B. Monte Rosa Development

18. In 2005, Washoe County approved the final map for the Reserve at Monte Rosa, a residential development ("Monte Rosa"). (Ex. 15). Monte Rosa is located uphill from Lancer Estates. (Ex. 26 at Ex. 4).

19. Monte Rosa is a two-phased development; Unit 1 consisted of 32 homes and Unit 2 consisted of 32 homes. (Ex. 166; Ex. 167). Construction began in 2005 and was completed by 2007. (Id.)

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

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

C. Flooding Activity

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

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

(Ex. 1).

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

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

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

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

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

(Ex. 14).

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[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).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

41. Exhibit 47, a video taken by Mrs. Fritz of the 2017 storm activity. shows large amounts of water

coming from the overflow of Whites Creek #4, heading north on Bihler road and flooding the Property. (*Tr. Vol. 1* at 85:9-15).

42. The Defendant's expert claims that the Lancer Estates 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. (Ex. 84 at 12-13, Figure 3).

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

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

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

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

II. CONCLUSIONS OF LAW AND ANALYSIS

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

A. Standing

The Defendant contends that Plaintiffs do not have standing because their claim in inverse condemnation is barred by the statute of limitations, and that if any taking occurred, it occurred prior to the Plaintiffs' purchase of the Property in 2001, since this is when the bulk of the activity that is alleged to have caused the flooding on the Property occurred. (*Washoe*

Cnty's Closing Arg. 10:6-7, Apr. 17, 2018). Plaintiffs' contend that the taking occurred when the flooding commenced in 2005. (*Pl.'s Post-Trial Br. In Lieu of Closing Arg.* 4:24-25, Apr. 17, 2018).

The Nevada Supreme Court has held that the fifteen-year statute of limitations set forth in NRS 40.090 applies where a party contends that there has been a taking of property by a governmental entity. White Pine Lumber v. City of Reno, 106 Nev. 776, 780, 801 P.2d 1370, 1371 (1990). Accordingly, the Plaintiffs are required to have commenced this case within fifteen years of the alleged taking. As to when the taking occurred, the Nevada Supreme Court has held that "[t]akings claims lie with the party who owned the property *at the time the taking occurred.*" Argier v. Nev. Power Co., 114 Nev. 137, 139, 952 P.2d 1390, 1391 (1998). (Emphasis added). A taking occurs when the government encroaches upon or occupies private land for its own proposed use. Palazzolo v. Rhode Island, 533 U.S. 606, 617, 125 S. Ct. 2448, 2457 (2001). While the bulk of the activity that is claimed to have caused the flooding did indeed take place prior to the Plaintiffs taking ownership of the Property in 2001, the evidence in this case shows that the first encroachment on the Property (i.e., flooding) took place in 2005, after the Plaintiffs took ownership of the property. Pursuant to Algier and Palazzolo, this is the operative event for purposes of determining whether a taking has occurred. Plaintiffs commenced this action in 2013, eight years after the initial flooding event and well within the fifteen-year statute of limitations.

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

> Petitioner's acquisition of title after the regulations' effective date did not bar his takings claims. This Court rejects the State Supreme Court's sweeping rule that a purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking. Were the Court to accept that rule, the postenactment transfer of title would absolve the State of 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.

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

This Court notes that the instant case is based on a possessory taking and not a government enacted regulation, but finds Palazzolo analogous nonetheless. Accepting the Defendant's argument would result in absolving the government from a former owner's claim

since the encroachment did not occur during their ownership, and would absolve the government from the Plaintiffs' claim because the Plaintiffs did not timely commence their case, which ripened before they owned the Property.

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

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

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

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 [sic] 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)).

In Fritz, the Supreme Court overturned the District Court's grant of summary judgment issued in favor of Washoe County, stating that "inverse condemnation is a viable theory of liability and genuine issues of material fact remain as to the County's substantial

involvement in the development of the drainage system at issue." Fritz, 132 Nev. Adv. Op. 57, 376 P.3d at 795. The Supreme Court acknowledged that Fritz is distinguishable from Powers, noting that the county in Powers was held liable for inverse condemnation for acting in conjunction with various private parties to cause large amounts of water to be cast upon the plaintiffs' land which included "participat[ing] actively in the development of these lands, both by its own planning, design, engineering, and construction activities and by its adoption of the similar activities of various private developers as part of the County's master plan for the drainage and flood control area." Fritz, 132 Nev. Adv. Op. 57, 376 P.3d at 797 (citing Cty. of Clark, 96 Nev. at 505, 611 P.2d at 1074.[3] The Supreme Court further noted that drawing the distinction with Powers was not dispositive of the substantial involvement issue in Fritz. While the Supreme Court has not limited the range of actions that constitute substantial involvement to physical engagement in private activities as was present in Powers, they have nonetheless, provided that claims based on mere planning are outside the scope of substantial involvement. Fritz, 132 Nev. Adv. Op. 57, 376 P.3d at 797 (quoting Sproul Homes of Nev., 96 Nev. at 443, 611 P.2d at 621).

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[3] Ultimately, the "collecting waters interfered seriously with the respondents' use and enjoyment of their land, and became 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.

The Supreme Court noted that Fritz presents a novel question: "whether government activities *short of physical labor, but with more engagement than mere planning*, can constitute substantial involvement in a private development sufficient to constitute public use in support of an inverse condemnation." Fritz, 132 Nev. Adv. Op. 57, 376 P.3d at 797. (Emphasis added). The Supreme Court noted that the Plaintiffs provided evidence that, among other activities, Washoe County formally accepted dedications of the streets in the developments and entered into an agreement with the Nevada Department of Transportation to direct water from the developments north into Whites Creek, rather than to allow the water to follow its natural path down Mt. Rose Highway. This confluence of activity led the Supreme Court to declare the Plaintiffs' claim for inverse condemnation "actionable." Id. at 798.

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

In 1984, a tentative map was approved by Washoe County for the Lancer Estates subdivision development. A resubmittal of the tentative maps was approved in

[4] Whether this substantial involvement constituted public use in support of inverse condemnation is addressed below in Paragraph (1)(ii).

1990. Between 1988 and 2001, Washoe County accepted the roadway dedications of Lancer Estates Units 1 and Unit 11. Washoe County accepted dedication of the storm water system in Lancer Estates. By accepting dedication, Washoe County is responsible for the operation, maintenance, repair, replacement, snow plowing, et cetera of the public improvement.

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

In 1990, Washoe County approved the deletion of the detention ponds proposed by the developer for Lancer Estates to manage the runoff at Lancer Estates. This constitutes action by the County that overrode the developers preferred method for addressing the runoff and/or storm flows from Lancer Estates.

In April of 1994, Washoe County accepted a Preliminary Whites Creek Basin Management Study ("Cella Bar Study") prepared by Cella Bar Associates, which had been commissioned by Washoe County to study the hydrology of the Whites Creek area. 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 flooding during a 100-year event." (Ex. 4 at 15). The Plaintiffs' Property is located in the area identified as a problem area in the Cella Bar Study. (Id.)

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

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

Lancer Estates consists of 231 home sites. Monte Rosa consists of 64 home sites. The Defendant's expert

testified that impervious surfaces on developed land such as rooftops, streets and driveways increase runoff. Accordingly, the development of Lancer Estates and Monte Rosa increased runoff from these developments.

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

ii. *Causation*

A taking must be proximately caused by a government entity. Fritz, 132 Nev. Adv. Op. 57, 376 P.3d at 797 (citing Guiterrez 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

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

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

Central to Plaintiffs' claim regarding the source of the flooding on the Property is Plaintiffs' Exhibit 47, a video taken by Mrs. Fritz during the 2017 storm which she testified shows large amounts of water coming from the overflow of Whites Creek #4, heading north on Bihler road and flooding the Property. That White's Creek #4 is the source of the flooding on the Property as shown in Exhibit 47 was confirmed by the Defendant's expert witness. (*Tr. Vol 3*. at 192:23-193:6). Ms. Fritz testified that the video shows that there is only a "little bit" of water flowing on Trails End Lane. (*Tr. Vol. 1* at 83:13-192). The Defendant's expert essentially

[6] The Plaintiffs did not present information in this regard. The Court undertook questioning of the Defendant's expert regarding such measurements. (*Tr. Vol. 3* at 191:16-20). The expert confirmed that none were calculated since he did 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).

concurred with Mrs. Fritz and stated that there was no water coming from Trails End Lane. (*Tr. Vol. 3* at 107:3-9). Mrs. Fritz further stated that in Exhibit 47 the water on Bihler Road was coming from two sources: five percent was flowing down the left side of the road and attributable to the storm; the other ninety-five percent flowing down the other side of Bihler road was attributable to the Whites Creek #4 overflow. The Defendant's expert also agreed that the video shows very little water on Bihler Road not attributable to Whites Creek #4 overflow. (Id. at 193:9-12).

Plaintiffs contend that the video was taken at the beginning of the 2017 storm and that the source of the water that is overflowing from Whites Creek #4 and flooding the Property is from the Lancer Estates storm drainage system. However, the Defendant's expert disagrees. He contends that Exhibit 47 must have been taken later in the storm since the amount of water overflowing from Whites Creek #4 can only be from the White's Creek watershed which would only occur later in the storm (as that is the time it takes for the water from the Whites Creek watershed, high in the Sierra Nevada mountains, to reach Culvert #1 under Bihler Road); and moreover, it is not probable for the Lancer Estates storm drainage system to produce that output from the rainfall that occurred. (Id. at 194-22-195:3).

This Court finds that the principal source of the water that is seen in Exhibit 47 that resulted in the flooding to the Property in 2017 is from the Whites Creek watershed and not the Lancer Estates storm drainage system. This must be the case given the

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

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

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

[8] In spite of this finding, this Court undertakes a discussion of whether the damage that occurred to the Property would have amounted to a taking since this issue was raised by the Nevada

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

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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.

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. (*Def's Closing Arg.* at 2:5-7). The intermittent flooding on the Plaintiffs' Property does not amount to a "substantial injury." (Id. at 2:15-22). Plaintiffs further exacerbated injury to the Property due to Plaintiffs' building of the boulder berm placed on the west side of the Property and Plaintiffs' grading of the Property. (Id. at 2:23-3:9). As to the FEMA maps, Defendant contends that changes to the 2009 flood map were FEMA's decision, not Washoe

County's, and no evidence was presented as to why FEMA decided to change the boundaries therein. (Id. at 3:10-4:2). Further, Plaintiffs leased the Property from 2002 to 2015 and currently reside on the Property, thus Plaintiffs have not been deprived of the Property's economically beneficial use due to the flooding. (Id. at 4:3-9).

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

The foregoing evidence shows that the Plaintiffs' property was flooded in 2005 and 2017, and suffered from pooling of water in 2014. The inevitability of flooding on the Property is almost exclusively related to extreme weather conditions that occurred twice in twelve years, and there was no evidence presented that proved or disproved the likelihood of reoccurring flooding on the Property. Flooding not shown to be inevitably recurring occupies the category of mere consequential injury or tort. Pinkham v. Lewiston Orchards Irr. Dist., 862 F.2d 184, 189 (9th Cir. 1988). "To

constitute a compensable taking by inverse condemnation where no permanent flooding of land is involved, proof *of frequent* and *inevitably recurring* inundation due to governmental action is required." Id. (citing United States v. Cress, 243 U.S. 316, 328, 37 S. Ct. 380, 385 (1917). In Pinkham, the Court stated that two floodings occurring in 1959 and 1984 (within twenty-five years of one another) were insufficient to amount to a constitutional taking. This case is not identical to but is comparable to Pinkham, in that the Property was subject to only two floodings over a twelve year period.

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

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

Accordingly, and good cause appearing,

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

DATED this 24th day of April, 2017.

/s/ KATHLEEN DRAKULICH
DISTRICT JUDGE

CERTIFICATE OF SERVICE

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

STEPHAN J. HOLLANDSWORTH, ESQ.

MICHAEL W. LARGE, ESQ.

LUKE ANDREW BUSBY, ESQ.

DATED this 24th day of April, 2018.

/s/ Danielle Kent
DANIELLE KENT
Judicial Assistant

IN THE SUPREME COURT
OF THE STATE OF NEVADA

JOHN FRITZ; AND MELISSA FRITZ, Appellants, vs. WASHOE COUNTY, Respondent.	No. 75693

ORDER DENYING REHEARING

(Filed Aug. 29, 2019)

Rehearing denied. NRAP 40(c).

It is so ORDERED.

/s/ Pickering, J.
Pickering

/s/ Parraguirre, J.
Parraguirre

/s/ Cadish, J.
Cadish

cc: Hon. Kathleen M. Drakulich, District Judge
Luke A. Busby
Washoe County District Attorney/Civil Division
Fennemore Craig P.C./Reno
Blanchard, Krasner & French
Washoe County District Court Clerk

IN THE SUPREME COURT
OF THE STATE OF NEVADA

JOHN FRITZ; AND MELISSA FRITZ, Appellants, vs. WASHOE COUNTY, Respondent.	No. 75693

ORDER DENYING EN BANC RECONSIDERATION

(Filed Nov. 22, 2019)

Having considered the petition on file herein, we have concluded that en banc reconsideration is not warranted. NRAP 40A. Accordingly, we

ORDER the petition DENIED.

/s/ Gibbons, C.J.
Gibbons

/s/ Pickering, J.
Pickering

/s/ Hardesty, J.
Hardesty

/s/ Parraguirre, J.
Parraguirre

/s/ Stiglich, J.
Stiglich

/s/ Cadish, J.
Cadish

/s/ Silver, J.
Silver

cc: Hon. Kathleen M. Drakulich, District Judge
Luke A. Busby
Washoe County District Attorney/Civil Division
Fennemore Craig P.C./Reno
Blanchard, Krasner & French
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IN THE SUPREME COURT
OF THE STATE OF NEVADA

JOHN AND MELISSA FRITZ,

Plaintiff-Appellants,

vs. CASE NO. 75693

WASHOE COUNTY,

Defendant-Respondent, /

PETITION FOR EN BANC RECONSIDERATION

(Filed Sep. 10, 2019)

The Appellants, JOHN AND MELISSA FRITZ, petition this Court, pursuant to Nevada Rule of Appellate Procedure ("NRAP") 40A, to reconsider its May 31, 2019 Order of Affirmance. This petition presents the following primary issue:

> If such use does not destroy all economic uses of a property, then may the government intentionally superinduce, divert, and drain surface floodwaters from a highway and housing developments through private property without first paying just compensation without violating the takings clauses of the 5th

Amendment to the United States Constitution and Article 1 Section 8(3) of the Nevada Constitution?

The conclusion of law in the Order of Affirmance that for substantial injury to exist, an intermittent but inevitable physical invasion of surface drainage waters must effectually destroy or impair a property's economic usefulness[1] is inconsistent with the United States Supreme Court and this Court's takings jurisprudence because this ruling confounds differing standards stated in prior cases for different types of flooding cases. This Court should grant this petition to secure and maintain uniformity in its decisions regarding what constitutes a taking in cases involving the drainage of surface waters by the government through downstream private lands.

Background

The facts in this case revolve around Washoe County's own development activities and substantial involvement in the development of land by private parties upstream of the Fritzes' property.

At a November 14, 2017, Final Pre-Trial Conference, the District Court bifurcated the trial in this matter into liability and damages phases. AA Vol. 1 at 187. In April of 2018, the District Court held a bench trial in the liability phase of this matter and issued the District Court's Findings of Fact, Conclusions of Law and

[1] See Order of Affirmance at 5.

Judgment After Bench Trial ("District Court's Order" at AA. Vol. 5 at 914) on April 24, 2018. The District Court found the following facts:

(1) Whites Creek No. 4 drains through the Fritzes property and is an ephemeral stream that only flows in response to local precipitation and runoff. *Id.* at 915-919.

(2) Lancer Estates and Monte Rosa are two subdivisions upstream from the Fritzes property along Whites Creek No. 4 consisting of 231 homes in Lancer Estates and 64 homes in Monte Rosa (*Id.* at 917-918);

(3) Washoe County directed the developers of Lancer Estates to divert all water above 10 Cubic Feet per Second ("CFS") flowing from Mt. Rose Highway through Lancer Estates and into Whites Creek No. 4 (*Id.*);

(4) The development of Lancer Estates and Monte Rosa created a large area of impervious surfaces that increased stormwater runoff into Whites Creek No. 4 by virtue of the construction of rooftops, streets, and driveways, resulting in increased runoff as compared to predevelopment conditions (*Id.*); and

(5) The water from Mt. Rose Highway and the stormwater runoff from Lancer Estates and Monte Rosa are diverted into Whites Creek No. 4 through the Fritzes property, where before development, the water from Mt. Rose Highway, Lancer Estates, and Monte Rosa flowed into Whites Creek No. 4 below the Fritzes property. *Id.* at 919-920.

At trial, the District Court admitted the following evidence showing flooding conditions on the Fritzes property:

(1) Trial Exhibit 23, which are photos that depict flooding damages on the Fritzes property from early 2017 (AA Vol. 6 at 1302-1307);

(2) Trial Exhibit 28, which are photos that depict flooding on the Fritzes property in August of 2014 (AA Vol. 6 at 1340-1344);

(3) Trial Exhibit 30, which are photos that depict damages and flooding on the Fritzes property occurring in early 2017 (AA Vol. 6 at 1345-1381);

(4) Trial Exhibit 47, which is a video showing the early 2017 storm occurring and water from Whites Creek #4 flooding the Fritzes property (AA Vol. 6 at 1384); and

(5) Trial Exhibit 51, which is a video that shows the Fritzes expert following the path of water from Whites Creek #4 to the Fritzes property and explaining how the 2017 flooding and damage to the property occurred. AA Vol. 7 at 1401.

Use of the Fritzes property for surface water stormwater drainage was intentional and foreseeable and was planned by Washoe County in coordination with the developers of Lancer Estates and Monte Rosa. Although construction of the developments started in the mid-1990s, John Fritz testified that he did not know what was causing the flooding on the property until he discovered the "NDOT Letter" in Trial Exhibit

14 in 2010. AA Vol. 6 at 1220. The NDOT letter was authored by a District Engineer at the Nevada Department of Transportation on June 13, 1996 and proves that Washoe County directed the developers of Lancer Estates to transfer all water in excess of 10 CFS from Mt. Rose Highway into Whites Creek No. 4. AA Vol. 2 at 378-380. Trial Exhibit 1, which is a 1990 letter from CFA, the engineering firm that designed Lancer Estates, showed that Washoe County and the developers of Lancer Estates knew that development of the site would increase runoff into Whites Creek No. 4 through the Fritzes property. AA Vol. 5 at 977-978. The CFA letter states, "In addition, the ***increased*** runoff caused by this development will not be retained on site." [***emphasis added***] See trial exhibit 1 at AA Vol. 5 at 978 compared to Order at AA Vol. 5 at 918:14. The District Court found that:

> The Lancer Estates storm drainage system was designed to carry out the directive from Washoe County to divert water from Mt. Rose Highway that exceeded 10 cfs through Lancer Estates and into Whites Creek #4.

AA Vol. 5 at 919.

The District Court found that the flooding on the Fritzes property from Whites Creek No. 4 resulted in erosion and channeling on the graded portion of Fritzes property away from the structures on the property, which constitutes approximately one half of the

2.5-acre parcel. *Id.* at 914 and 933.[2] The District Court further concluded that because Washoe County took numerous actions that modified the natural course of drainage of surface waters of Lancer Estates, Monte Rosa, and Mt. Rose Highway, that Washoe County's actions constituted substantial involvement in the development of private lands for which Washoe County could be held liable in inverse condemnation. AA Vol. 5 at 926. *Fritz v. Washoe County*, 132 Nev. 580, 586, 376 P.3d 794, 798 (2016). The District Court's Order also found that Washoe County's expert did not dispute that water was diverted from Mt. Rose Highway and did not address water from Mt. Rose Highway. *Id.* at 919.

Despite the evidence presented at trial showing the damages to the Fritzes property, the District Court's Order and this Court's Order of Affirmance concluded that no taking occurred in this case because the Fritzes property otherwise has some economic use, that there was no substantial injury. *See* AA Vol 5 at 916 and Order of Affirmance at 5. This Court issued the Order of Affirmance without conducting oral argument.

Standard of Review

Under NRAP 40A(a), *en banc* reconsideration is warranted where reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals, or the

[2] A photo of the Fritzes 2.5 acre property with boundaries may be found at AA Vol. 6 at 1300, with associated photos of the area suffering channeling and erosion in 2017 at AA Vol. 6 at 1302-1306.

proceeding involves a substantial precedential, constitutional or public policy issues. This case squarely meets these two standards because: (1) This case involves the fundamental Constitutional right to just compensation when the government takes private property for public use; and (2) The Order of Affirmance departs from and confounds existing takings jurisprudence by authorizing physical invasion of private property by the government unless a property is entirely destroyed.

Argument

1. The Order of Affirmance is Directly Contrary to Arkansas Game & Fish Comm'n v. United States

In *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012), the U.S. Supreme Court held that when the government physically takes possession of an interest in property for some public purpose, the government has a categorical duty to compensate the owner under the 5th Amendment. *Id.* at 518 citing *Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002) citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115, 71 S.Ct. 670, 95 L.Ed. 809 (1951).

Washoe County has expropriated the Fritzes property by taking an unlimited flowage easement for the public purpose of protecting upland houses in Lancer estates and Monte Rosa and Mt. Rose Highway from

flooding. This conclusion follows *ipso facto* from the facts found by the District Court described above and as found by this Court in its Order of Affirmance, i.e. that Washoe County superinduced, diverted, and drained surface waters into Whites Creek No. 4 and (at a minimum) the Fritzes property suffers channeling and erosion as a result. As stated in the NDOT Letter at AA Vol. 5 at 1220, all storm flows from Mt. Rose Highway above 10 CFS were diverted through the Fritzes property, so there is no limit to the amount of water that may flow from that source through the Fritzes land.

The *Arkansas Game & Fish Comm'n v. United States* Court stated that it accepted certiorari, " . . . to resolve the question whether government actions that cause repeated floodings must be permanent or inevitably recurring to constitute a taking of property." *Id.* at 518. The Supreme Court ruled that: (1) a taking may arise from a single flooding event; (2) relevant to the takings inquiry is the degree to which the invasion is intended or is the foreseeable result of authorized government action; and (3) there is no "temporary-flooding" exception to the takings clause. *Id.* at 512. It is clear from the facts found by the District Court that Washoe County and the developers of Lancer Estates and Monte Rosa intended to use the Fritzes property as a floodway and that flooding has in fact occurred.

This Court's Order of Affirmance runs directly afoul of the ruling in *Arkansas Game & Fish Comm'n v. United States* by in practical effect authorizing Washoe County to intentionally superinduce, divert, and direct floodwaters onto the Fritzes property during

storm events so long as the flooding is temporary and the resulting channeling and erosion does not render the entirety of the property completely useless.

2. The Order of Affirmance is inconsistent with, confounds, and misstates the prior holdings of this Court and the US Supreme Court regarding takings by the drainage of surface waters

In footnote 3 in *Clark County v. Powers*, 96 Nev. 497, 502, 611 P.2d 1072, 1075 (1980), this Court noted:

> It has long been established that a taking occurs "where real estate is actually invaded by superinduced additions of water . . . so as to effectually destroy or impair its usefulness," *Pumpelly v. Green Bay Company*, 80 U.S. (13 Wall.) 166, 181, 20 L.Ed. 557 (1871), and the result is no different when property is subjected to intermittent, but inevitable flooding which causes substantial injury, *United States v. Cress*, 243 U.S. 316, 328, 37 S.Ct. 380, 385, 61 L.Ed. 746 (1917).

In *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 167, 20 L. Ed. 557, 13 Wall. 166 (1871), the erection of a dam across a river by a canal company raised the level of Lake Winnebago, and the superinduced water created by the dam invaded Pumpelly's property. *Id.* at 167. Under *Pumpelly*, where a property is invaded by superinduced waters that effectually destroy or impair its usefulness a taking occurs. Almost 40 years after the *Pumpelly* decision, the Supreme Court found that even where a property is only affected

by intermittent floodwaters, a taking may still occur, i.e., where intermittent but inevitable flooding causes substantial injury.[3] In *United States v. Cress*, 243 U.S. 316, 328, 37 S.Ct. 380, 385 (1917), the building of a lock and a dam created intermittent flooding on Cress' land that was sure to recur due to the nature of the government improvement. *Id.* at 327. In *Cress*, the Court found that even though Cress' entire property did not flood and the value of Cress' property only depreciated by one-half, a taking still occurred, ruling that: " . . . it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking." *Id.* at 328.

However, in the District Court's Order and the Order of Affirmance, for substantial injury to exist, the physical invasion must effectually destroy or impair any economic use of the property. *See* Order of Affirmance at 4-5 citing *Clark County v. Powers* and AA Vol. 5 at 932, " . . . Plaintiffs have not been deprived of the Property's economically beneficial use due to the

[3] The District Court's Order found that "there was no evidence presented that proved or disproved the likelihood of reoccurring flooding on the Property." AA Vol. 4 at 932. This finding is clearly erroneous as the District Court otherwise found that water from Mt. Rose Highway and the stormwater runoff from Lancer Estates and Monte Rosa was diverted into Whites Creek No. 4 through the Fritzes property, where prior to development, the water from Mt. Rose Highway, Lancer Estates, and Monte Rosa flowed into Whites Creek No. 4 below the Fritzes property. *Id.* at 919-920. *Jackson v. Groenendyke*, 369 P.3d 362, 365 (Nev. 2016). The fact that the water at issue is being diverted through permanent infrastructure by definition means that the flooding will inevitably occur.

flooding." These rulings confound the two different standards described in the *Pumpelly* and *Cress* decisions, which analyze two separate types of flooding situations. The result is an unprovable standard for intermittent surface water flooding cases. This is the case because property that is subject to intermittent flooding, but is not always flooded or where only part of the property is flooded, will have some usefulness when not flooded, as the Fritzes property does. The US Supreme Court grappled with a similar situation in *United States v. Dickinson*, 331 U.S. 745, 751, 67 S. Ct. 1382, 1386, 91 L. Ed. 1789 (1947), and found a taking had occurred although Dickinson was not deprived of all economic uses and had reclaimed most of the damaged land after the initial flooding events occurred:

> . . . no use to which Dickinson could subsequently put the property by his reclamation efforts changed the fact that the land was taken when it was taken and an obligation to pay for it then arose.

Id. at 751.

Returning to *Arkansas Game & Fish Comm'n v. United States*, the US Supreme Court explained how *Cress* expanded the scope of takings claims based on flooding beyond the test established in *Pumpelly*:

> Following *Pumpelly*, the Court recognized that seasonally recurring flooding could constitute a taking. *United States v. Cress*, 243 U.S. 316, 37 S.Ct. 380, 61 L.Ed. 746 (1917), involved the Government's construction of a lock and dam, which subjected the plaintiff's

> land to "intermittent but inevitably recurring overflows." *Id.*, at 328, 37 S.Ct. 380. The Court held that the regularly recurring flooding gave rise to a takings claim no less valid than the claim of an owner whose land was continuously kept under water. *Id.*, at 328–329, 37 S.Ct. 380.

Arkansas Game & Fish Comm'n v. United States, 568 U.S. at 32, (2012).

The *Arkansas Game & Fish Comm'n v. United States* decision lowered the bar for intermittent flooding cases even more than *Cress* by holding that a single flooding event intentionally caused by the government gives rise to a taking claim. *Id.* at 512.

The problem that the Fritzes face, and that any similarly situated property owner in similar circumstances will face if the Order of Affirmance stands, is that there is no limit to any degree of flooding that would be permitted to occur on their property due to the intentional diversion of water from the permanent stormwater drainage infrastructure in Lancer Estates, Monte Rosa, and Mt. Rose Highway. A sufficiently large storm may very well destroy the Fritzes home,[4] and the portion of the Fritz property that has already been flooded, approximately half of their 2.5-acre parcel, is not reasonably suitable for any use or development because the Fritzes know that it will flood again.

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[4] See Stoner report at AA Vol. 5 at 1289 " . . . and when the 100-year flood event planned for during design of Sterling Ranch finally occurs, damages to the Subject Parcel [the Fritzes property] will likely be disastrous."

But the Fritzes cannot wait for such an extreme event to bring their claim: "An owner of land flooded by the Government would not unnaturally postpone bringing a suit against the Government for the flooding until the consequences of inundation have so manifested themselves that a final account may be struck." *United States v. Dickinson*, 331 U.S. 745, 749, 67 S. Ct. 1382, 1385, 91 L. Ed. 1789 (1947).

In footnote 1, the Court's Order of Affirmance concludes that the Fritzes argument that the incorrect standard of law was applied by the District Court was without merit because the District Court cited both *Clark County v. Powers* and *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 173 P.3d 734 (2007). But the words "substantial injury" only appear in the *Clark County v. Powers* in footnote 3 quoted above where the *Pumpelly* and *Cress* cases are separately described, and the term is not otherwise defined in *Clark County v. Powers* in the manner the Court defined the term in its Order of Affirmance at pages 4 and 5. Further, the Order of Affirmance, in analyzing the standard set forth in footnote 3, incorrectly states on page 5 that the "requirement" is no different, but the *Clark County v. Powers* Court states in footnote 3 that the "result" is no different. By substituting the word "requirement" for the word "result," the meaning of footnote 3 in *Clark County v. Powers* is confounded such the two standards from *Pumpelly* and *Cress* appear to be the same when they are not.

The Order of Affirmance further concluded that the District Court did not err by applying the "ouster" takings standard in *ASAP Storage, Inc. v. City of*

Sparks, 123 Nev. 639, 648, 173 P.3d 734, 741 (2007) in determining whether "substantial injury" occurred on the Fritzes property. *See* Order of Affirmance at fn. 1. The words "substantial injury" do not appear in the *ASAP Storage, Inc. v. City of Sparks* decision at all, because the *ASAP Storage* case involved allegations of a taking by substantial interference with property rights, i.e. a taking by physical appropriation or "ouster" as an emergency measure. The *ASAP Storage* case did not involve an allegation that the City of Sparks caused flooding via surface water drainage, but rather involved whether the response to the flood by the City appropriated ASAP Storage Inc.'s property by barricading off access to the property such that they were unable to remove their property before the floodwaters destroyed it. *Id.* at 641-642. Application of the *ASAP Storage* standard by the District Court to the Fritzes claim was in error because the takings claim in *ASAP Storage* involves an entirely different type of taking standard, i.e. for "ouster," not the standard for cases involving physical invasion and substantial injury caused specifically by the drainage of surface waters. By applying the "ouster" standard in *ASAP Storage*, this Court and the District Court are imposing an incorrect and inapplicable standard from a different type of taking to the Fritzes drainage of surface waters claim.

In 2015 this Court held that a plaintiff in an inverse condemnation takings action specifically involving the drainage of surface waters must show both a physical invasion of floodwaters and resulting

substantial injury. *Buzz Stew, LLC v. City of N. Las Vegas*, 131 Nev. Adv. Op. 1, 341 P.3d 646, 650 (2015). In *Buzz Stew*, the Court found that no taking occurred based on the following finding of facts:

> Although Buzz Stew presented evidence that during a 100—year flood event water may pool on one corner of the property, the evidence did not demonstrate that any pooling had occurred while Buzz Stew owned the property or that Buzz Stew suffered any substantial injury from any water diversion.

Id. at 650.

Thus, under the *Buzz Stew* decision, it follows that a taking may be shown where water pooing [sic] on a property occurs, but in the Order of Affirmance, this Court concluded, "Washoe County responds that the Fritzes were not substantially injured, as required by Buzz Stew, because water pooling on a property during a storm event is not substantial injury. We agree." Order of Affirmance at 3-4. Even though this case was first filed on April 4, of 2013 (AA Vol. 1 at 1) at trial the Fritzes presented evidence of multiple actual flooding events at their property resulting from the diversions at issue in 2005, 2014, and in 2017. See AA at Vol. 5 920-921: "The foregoing evidence shows that the Plaintiffs' property was flooded in 2005 and 2017, and suffered from pooling of water in 2014." *Id.* at 932. In other words, the 2014 and the 2017 events on the Fritzes property occurred during the course of litigation in this case.

In *Clark County v. Powers*, this Court found that Clark County had taken the Powers' parcel in its entirety because the property no longer had any practical use other than as a flood channel, but when making this finding the *Clark County v. Powers* Court was not establishing this as a bedrock rule or minimum standard that must be met to show that any taking whatsoever occurred, rather the Court was describing that the circumstances surrounding the Powers' property were so extreme that there could be no reasonable question that a taking of the ***entire*** parcel occurred. *Id.* at 501, 611 P.2d 1072, 1075 (1980). The District Court applied the findings of fact in the *Clark County v. Powers* as a new and higher standard of law on the Fritzes, essentially requiring them to show total destruction of their property to prove any taking. By requiring the Fritzes to in essence show an entire loss of any economic use[5] in a case involving intermittent physical invasion by surface waters, i.e. by requiring a showing that ***any*** usefulness for the entire property is destroyed or impaired, this Court is imposing what is in effect the much higher standard for showing a regulatory taking, not a taking where there is an associated physical invasion by the government. The standards as described in the Order of Affirmance are not consistent nor uniform with long-standing takings jurisprudence and result in moving goalposts for any litigant attempting to

[5] The District Court's Order concluded, "Further, Plaintiffs leased the Property from 2002 to 2015 and currently reside on the Property, thus Plaintiffs have not been deprived of the Property's economically beneficial use due to the flooding" AA Vol. 5 at 932.

show a taking by the physical invasion resulting from the intentional diversion of storm waters.

Prior to the Order of Affirmance, this Court has never defined what "substantial injury" is for purposes of determining where a taking occurs and does not occur in cases involving the physical invasion by drainage of surface waters by the government through private land. This Court should not adopt a regulatory takings standard requiring a showing of complete deprivation of any economic use as a requirement to show a taking in cases where there is a physical invasion of private property. "In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 2893 (1992) citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).

As things stand, the Court's Order of Affirmance permits flowage easement across the Fritzes property in favor of Washoe County that: (1) Washoe County has not paid for; (2) is unlimited in scope; (3) devalues the Fritzes land;[6] (4) causes erosion and channeling on the Fritzes land; and (5) precludes the Fritzes from any use or development of the portion of the property that is subject to the flooding. This result is unjust and is inconsistent with this Court and the US Supreme

[6] The specific dollar amount of damage to the Fritzes property was never presented to the Court because this matter was bifurcated into liability and damage phases.

Court's jurisprudence surrounding the taking of private property for public use described above.

CONCLUSION

WHEREFORE, the Fritzes pray that this Court grant this Petition and reconsider its decision this matter.

Respectfully submitted:

By /s/ Luke A. Busby Dated: 9/10/2019

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition for en banc reconsideration complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Calibri 15 point font.

2. I further certify that this petition for rehearing complies with the page or type-volume limitations

of NRAP 40 or 40A because it does not exceed 4,667 words. This Petition contains 4,448 words and 479 lines.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that I have on this day served the foregoing document upon the following parties by U.S. Mail and/or Electronic Service and/or hand delivery to:

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IN THE SUPREME COURT
OF THE STATE OF NEVADA

JOHN AND MELISSA FRITZ,

Plaintiff-Appellants,

vs. CASE NO. 75693

WASHOE COUNTY,

Defendant-Respondent, /

APPELLANT'S OPENING BRIEF

(Filed Sep. 18, 2018)

COMES NOW the Appellant(s), JOHN AND MELISSA FRITZ, a married couple (hereinafter "the Fritzes") by and through the undersigned counsel, and hereby file the following Appellant's Opening Brief pursuant to Nevada Rule of Appellate Procedure ("NRAP") 28, seeking that the Court reverse the Findings of Fact, Conclusions of Law and Judgment After Bench Trial [ii] ("District Court's Order") (AA at 914) issued in Docket No. CV13-00756 by the Second Judicial District Court dated April 24, 2018, in favor of Respondent Washoe County, a political subdivision of the State of Nevada.

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

John and Melissa Fritz, a married couple – Appellants.

Washoe County, a political subdivision of the State of Nevada – Respondent.

Attorney of record for John and Melissa Fritz

Respectfully submitted:

By /s/ Luke A. Busby Dated: 9/18/2018

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* * *

[v] TABLE OF AUTHORITIES

Constitutional Provisions

Statutes

Cases

* * *

[5] (6) Prior to the construction of Lancer Estates, a large percentage of water that flowed through Lancer Estates drained into Whites Creek No. 4 below the Fritzes Property (AA Vol. 5 at 926:13); and

(7) Because Washoe County took numerous actions that modified the natural drainage of Lancer

> Estates, Monte Rosa, and Mt. Rose Highway, that Washoe County's actions constituted substantial involvement in the development of private lands (AA Vol. 5 at 926:5).

Despite finding these facts, the District Court concluded that the actions of Washoe County did not constitute public use (AA Vol. 5 at 930) and that the actions of Washoe County were not the proximate cause of the flooding on the Fritzes Property (AA Vol. 5 at 930:19). The District Court also found that because the Fritzes' property has been used for practical purposes other than a flood channel, that no taking had occurred (AA Vol. 5 at 933:1).

V. STATEMENT OF THE FACTS

7. The Fritzes claim their property at 14400 Bihler Rd., Washoe County APN No. 142-241-63 (the "Property") was taken by Washoe County for public use without just compensation in violation of the Fifth Amendment to the United States Constitution and the Constitution of the

* * *

[45] provided photographic evidence that flooding occurred on the Property in 2014 (AA Vol. 6 at 1340-1344), which was also admitted by the District Court in Trial Exhibit 28.

e. The District Court cited and applied the incorrect standard of law for determining whether a taking has occurred and erred in finding that a taking did not occur

i. Standard of Review

67. Whether the District Court applied the incorrect standard as to whether a taking occurred or erred in finding a taking did not occur is a question of law. Errors of law are subject to *de novo* review. *Jackson v. Groenendyke*, 369 P.3d 362, 365 (Nev. 2016).

68. The Court's Order cites *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 647, 173 P.3d 734, 739, 2007 WL 4532664 (2007) (citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537, 125 S. Ct. 2074 (2005)) in concluding that a taking can arise when the government regulates or physically appropriates an individual's private property and that physical appropriation exists when the government seizes or occupies private property or ousts owners from their private property (AA Vol. 5 at 931:9) In 2015, eight years [46] subsequent to the issuance *ASAP Storage, Inc. v. City of Sparks*, this Court issued its opinion in *Buzz Stew, LLC v. City of N. Las Vegas*, 131 Nev. Adv. Op. 1, 341 P.3d 646, 650, 2015 WL 392722 (2015) (*Buzz Stew II*), and clarified that a taking occurs in surface water flooding cases where there is (1) physical invasion of flood waters, and (2) resulting substantial injury. The District Court's Order does not cite to *Buzz Stew II*. The District Court's Order, by its own analysis shows that the Fritzes established at trial that their property was physically invaded by flood waters, and that

substantial injury occurred: On page 7 line 16 of the District Court's Order at AA Vol. 5 at 920, the District Court finds that during the 2005 winter storm, the Fritzes' property was flooded, the shop on the property was flooded with water and alluvial soil. Further, the evidence showed that the entire purpose of the design, construction, and maintenance of the drainage system in Lancer Estates is to convey increased flows from Lancer Estates, Monte Rosa, and Mt. Rose Highway into Whites Creek #4 above the Fritzes' parcel, where in its natural condition the water from these projects flowed around the Fritzes' Property.

[47] 69. In analyzing this case under the *ASAP Storage* standard for regulatory takings, the District Court makes several findings that are not applicable under the *Buzz Stew* standard, including that: "Plaintiffs have not been deprived of the Property's economically beneficial use due to the flooding" (AA Vol 5 at 932:7). The Fritzes have clearly alleged a taking by physical invasion by floodwaters and resulting substantial injury. A physical taking occurs where the state grants itself possession or reserves part of the property for the public. *McCarran Intl Airport v. Sisolak*, 122 Nev. 645, 662, 137 P.3d 1110, 1122, 2006 WL 1914784 (2006) The "all economically beneficial use" test applied in this case by the District Court only applies in cases involving a regulatory taking, which the Fritzes do not and have not alleged. "Categorical rules apply when a government regulation either (1) requires an owner to suffer a permanent physical invasion of her property or (2) completely deprives an

owner of all economical beneficial use of her property." *Id.* citing *Kelly v. TRPA*, 109 Nev. 638, 648, 855 P.2d 1027, 1033 (1993). The reason for this categorical distinction is obvious, i.e. a state cannot build an interstate highway (or use as a floodway) half of a property [48] owner's land and then claim there was no taking because the property still has some economically beneficial use.

70. The District Court also found: "This Court does not find that an appropriation, occupation or seizure of the Property has taken place sufficient to prove that a taking has occurred" (AA Vol. 5 at 933:15) based on its conclusion that flooding not shown to be inevitably recurring occupies the category of mere consequential injury or tort, citing *Pinkham v. Lewiston Orchards Irr. Dist.*, 862 F.2d 184, 185, 1988 WL 125592 (9th Cir. 1988) (Order at 19:21).

71. In *Pinkham v. Lewiston Orchards Irr. Dist.*, plaintiffs brought an action for damages caused by the flooding of water onto plaintiffs' allotted land in April 1959, and again around April 24, 1984 that occurred because a canal carrying water across plaintiffs' allotted land broke. *Id.* at 184. The Court found that flooding was not "inevitable" because the plaintiff's complaint did not allege that a flood of the type that injured their property in April 1959 and April 1984 would recur frequently and inevitably. *Id.* at 189. The Fritzes' case is very clearly a different set of circumstances from those in *Pinkham v. Lewiston Orchards Irr. Dist.* because the flooding is being [49] caused by the intentional diversion of stormwater from Mt. Rose

Highway, Lancer Estates, and Monte Rosa through the permanent infrastructure of Lancer Estates and Monte Rosa, not the temporary or unintended breaking of a canal. The Fritzes very clearly alleged that their property is subject to intermittent but inevitable flooding from water from Lancer Estates and Monte Rosa, causing substantial injury. (See Third Amended Complaint at AA Vol. 1 at 23:13). This case does not involve a tort because it is not a situation where the injury is the result of a non-recurring activity such as a spill or a non-recurring trespass. The Fritzes proved the inevitability of the flooding at trial by showing that the 10-year stormwater output from Lancer Estates alone was enough to overwhelm the culvert on Bihler Rd. and cause flooding on the Fritzes' Property as described at length above. "[T]he government may be liable if it concentrates and gathers water into artificial drains or channels and discharges it upon adjoining lands in quantities greater than or in a manner different from the natural flow." *Dickgieser v. State*, 153 Wash. 2d 530, 543, 105 P.3d 26, 33, 2005 WL 171346 (2005) citing 18 Eugene McQuillin, The Law of Municipal Corporations § 53.144, at 538 (3d rev. ed.1963).

[50] 72. A talking occurs where government interference with property rights is "permanent, continuous, or inevitably recurring." *ASAP Storage Inc. v. Sparks*, 123 Nev. 639, 649, 173 P.3d 734, 741 (2007). Where the government intentionally induces flooding or flooding is the foreseeable result of authorized government action, a taking occurs. *See Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 133 S. Ct.

511, (2012). The District Court's conclusion that because damage to the property was caused by extreme weather events in 2005 and 2017 this proves that a taking did not occur is not reasonable, nor is it supported by the facts, nor is it consistent with well-established Constitutional law cited above.

73. As described above, the 2005 and 2017 events were examples of flooding occurring on the property resulting from the intended design of the stormwater system in Lancer Estates and Monte Rosa and the diversion of water through these developments from Mt. Rose Highway. As described above, the evidence at trial proved that because the 10-year flood capacity of Lancer Estates alone is sufficient to cause flooding on the Fritz's Property, they can expect flooding with at least such a frequency and that the Fritzes to be expected to bear the costs associated the diversion of stormwater [51] with 10-year or greater weather events to protect Lancer Estates, Monte Rosa, and Mt. Rose Highway. Even a minimal "permanent physical occupation of real property" requires compensation under the Fifth Amendment. *Tapio Inv. Co. I v. State by & through the Dept of Transp.*, 196 Wash. App. 528, 539, 384 P.3d 600, 606, 2016 WL 6301605 (2016) citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982)).

VIII. CONCLUSION

WHEREFORE, the Fritzes pray that this Court reverse the District Court's Order in this matter and remand this case for trial by jury. If the Court finds that no right to a jury exists in the liability phase on an inverse condemnation proceeding, the Fritzes pray that the Court reverse the District Court's Order and conclude: (1) A taking occurred; (2) The taking was proximately caused by Washoe County; and (3) The taking was for [public] use.

[52] Respectfully submitted:

By /s/ Luke A. Busby Dated: 9/18/2018

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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, vs. WASHOE COUNTY Defendant(s), /	CASE NO. CV 13-00756 DEPT NO. 1

THIRD AMENDED VERIFIED COMPLAINT

(Filed May 12, 2014)

COMES NOW, JOHN FRITZ and MELISSA FRITZ, a married couple ("Plaintiffs"), residents of Washoe County, Nevada, by and through the undersigned counsel and hereby files the following Complaint, requesting an order from the Court requiring the named Defendants herein below to compensate Plaintiffs for the taking and condemnation of their property at 14400 Bihler Rd., Washoe County APN No. 142-241-63 (hereinafter "the Property" or "Plaintiffs

Property"). The Property that has been taken is more particularly described in Exhibit 1, attached hereto and incorporated herein by reference.

Party Identification

1. Plaintiffs at all times relevant hereto were residents of Washoe County, State of Nevada.

2. Washoe County is a political subdivision of the State of Nevada.

3. The names of all owners, occupants of and claimants to the Property that has been condemned by Washoe County herein insofar as known to Plaintiffs are as follows: a) Bank of America, NA as holder of a Revolving Credit Deed of Trust on the Property; b) Wells Fargo Bank, NA as holder of a Deed of Trust on the Property); and (c) Mr. James Bedlam, who leases the Property from Plaintiffs.

Allegations of Fact

4. Plaintiffs are informed and believe, and thereupon allege, the following facts:

5. Washoe County is authorized to exercise the power of eminent domain and to condemn property.

6. Washoe County is a member in and participates in the National Flood Insurance Program, ("NFIP").

7. By virtue of its membership in the NFIP, Washoe County is required to manage floodplains

within Washoe County in ways that meet or exceed standards set by the Federal Emergency Management Agency ("FEMA").

8. Washoe County manages floodplains in ways that meet or exceed the standards set by FEMA by placing restrictions on the development of and supervising the development of private land and by adopting the activities of developers, pursuant to various provisions of the Washoe County Code and Washoe County's Master Plan.

9. Washoe County manages the flow of water in the Whites Creek Hydrological Basin above the Plaintiff's Property by controlling at least one diversion structure on Whites Creek located near Whites Creek County Park for water rights and flood control purposes.

10. Since approximately 1984, Washoe County substantially participated in the planning and development of and has approved the building plans for housing developments located within Washoe County commonly known as Lancer Estates and Monte Rosa.

11. Washoe County has approved of and adopted the activities of the developers of Lancer Estates and Monte Rosa pursuant to Article 416 of the Washoe County Code (which regulates flood hazards), Article 418 of the Washoe County Code (which regulates Significant Hydrologic Resources), Article 420 (which regulates Storm Drainage Standards), and other provisions of the Washoe County Code and Washoe County's Master Plan.

12. For both Lancer Estates and Monte Rosa, Washoe County approved of and adopted the activities of the developers of Lancer Estates and Monte Rosa by requiring the submittal of planning applications and tentative maps which directed the developers of Lancer Estates and Monte Rosa to build Lancer Estates and Monte Rosa in accordance with Washoe County's applicable rules and regulations regarding the drainage of water from Lancer Estates and Monte Rosa.

13. For both Lancer Estates and Monte Rosa, Washoe County approved of and adopted the activities of the developers of Lancer Estates and Monte Rosa by issuing Action Orders based on the submittal of planning applications and tentative maps, which directed the developers of Lancer Estates and Monte Rosa to build Lancer Estates and Monte Rosa in accordance with Washoe County's applicable rules and regulations regarding the drainage of water from Lancer Estates and Monte Rosa into the natural drainage commonly known as Whites Creek No. 4.

14. On or about November 29, 1984, Washoe County accepted dedication of the curbs, gutters, and storm drains in Lancer Estates Unit 2 by approving the final map for Lancer Estates Unit 2 or by later accepting dedication of said facilities and such facilities drain water from Lancer Estates to the Plaintiff's Property.

15. On or about April 1, 1991, Washoe County accepted dedication of the curbs, gutters, and storm

drains in Lancer Estates Unit 3 by approving the final map for Lancer Estates Unit 3 or by later accepting dedication of said facilities which drain water from Lancer Estates to the Plaintiff's Property.

16. On or about June 26, 1992, Washoe County accepted dedication of the curbs, gutters, and storm drains in Lancer Estates Unit 4 by approving the final map for Lancer Estates Unit 4 or by later accepting dedication of said facilities which drain water from Lancer Estates to the Plaintiff's Property.

17. On or about May 23, 1993, Washoe County accepted dedication of the curbs, gutters, and storm drains in Lancer Estates Unit 5 by approving the final map for Lancer Estates Unit 5 or by later accepting dedication of said facilities which drain water from Lancer Estates to the Plaintiff's Property.

18. In April of 1994, Washoe County accepted a Preliminary Whites Creek Basin Management Study ("Cella Bar Study") prepared by Cella Bar Associates, which had been commissioned by Washoe County to study the hydrology of the Whites Creek area.

19. The Cella Bar Study indicates on page 15 that "Existing Problem Areas" include "Some of the residential lots backing up adjacent to the south of [Whites Creek] Channel No. 4 have potential for flooding during a 100-year event." (See Exhibit 2)

20. The Plaintiffs Property is located in the area identified as a problem area in the Cella Bar Study.

21. On or about May 17, 1994, Washoe County accepted dedication of the curbs, gutters, and storm drains in Lancer Estates Unit 6 by approving the final map for Lancer Estates Unit 6 or by later accepting dedication of said facilities which drain water from Lancer Estates to the Plaintiff's Property.

22. On or about September 20, 1994, Washoe County accepted dedication of the curbs, gutters, and storm drains in Lancer Estates Unit 7 by approving the final map for Lancer Estates Unit 7 or by later accepting dedication of said facilities which drain water from Lancer Estates to the Plaintiff's Property.

23. On or about June 20, 1995, Washoe County accepted dedication of the curbs, gutters, and storm drains in Lancer Estates Unit 8 by approving the final map for Lancer Estates Unit 8 or by later accepting dedication of said facilities which drain water from Lancer Estates to the Plaintiff's Property.

24. On or about July 30, 1999, Washoe County accepted dedication of the curbs, gutters, and storm drains in Lancer Estates Unit 10 by approving the final map for Lancer Estates Unit 10 or by later accepting dedication of said facilities which drain water from Lancer Estates to the Plaintiff's Property.

25. On or about December 13, 2005, Washoe County accepted dedication of certain storm drains and/or detention ponds in Monte Rosa Unit 1 by approving the final map for Monte Rosa Unit 1 or by later accepting dedication of said facilities which drain water from Monte Rosa to the Plaintiff's Property.

26. On or about November 21, 2007, Washoe County accepted dedication of certain storm drains and/or detention ponds in Monte Rosa Unit 2 by approving the final map for Monte Rosa Unit 2 or by later accepting dedication of said facilities which drain water from Monte Rosa to the Plaintiff's Property.

27. To the best of the Plaintiff's knowledge and belief, development at Monte Rosa is ongoing at the time of the filing of this amended complaint.

28. The development Monte Rosa by Washoe County and various third parties has caused alteration, diversion, channeling, and acceleration of rain, nuisance, and flood waters onto the Plaintiff's Property by substantially increasing the amount of water and accelerating the flow of that water across the natural drainage commonly known as Whites Creek No. 4, which crosses the Plaintiff's Property.

29. The development Lancer Estates by Washoe County and various third parties has caused alteration, diversion, channeling, and acceleration of rain, nuisance, and flood waters onto the Plaintiff's Property by substantially increasing the amount of water and accelerating the flow of that water across the natural drainage commonly known as Whites Creek No. 4, which crosses the Plaintiff's Property.

30. Water from Lancer Estates and Monte Rosa drains onto Plaintiff's Property and is causing substantial and ongoing damage to the Property including but not limited to the cutting of a large ditch on the corner of the Fritz's property, flooding of buildings on

the Fritz's property, and sheet flooding over a large area of the Property during storm events.

31. The development of Lancer Estates and Monte Rosa, and other activities of Washoe County, have altered the FEMA floodplain on Whites Creek No. 4 such that it covers a greater area of the Plaintiff's Property than previous to the development of Lancer Estates and Monte Rosa.

32. Movement of the FEMA floodplain as described above makes a large area of the Plaintiff's Property unsuitable for further development or improvement without incurring substantial cost and efforts to prevent flooding.

33. Various improvements required or made by Washoe County in the development of Lancer Estates and Monte Rosa, and other activities of Washoe County involving drainage of water into Whites Creek No. 4, are public improvements, i.e. made for the benefit of the public at the expense of the Plaintiff, and are the cause of the Plaintiff's damages.

34. Washoe County has allowed and has substantially participated in the development of Lancer Estates and Monte Rosa, which adds to and accelerates flows of water in Whites Creek No. 4 despite knowing since at least 1994 upon receiving the Cella Bar Study that the area where the Plaintiff's Property is located in an existing problem area subject to flooding.

35. The use of the Plaintiff's Property by Washoe County for a floodway for the runoff of water from

upstream properties as described above constitutes a public use.

36. The Plaintiffs have suffered damages as a result of the taking of their Property by Washoe County.

Claim for Relief

Inverse Condemnation

37. Plaintiffs re-allege the foregoing paragraphs as though the same were set forth hereat verbatim, incorporating every one herein by this reference into the claims listed below.

38. Per NRS 278.390, title to dedicated facilities in Lancer Estates and Monte Rosa passed to Washoe County either on recordation of the final maps or subsequent acceptance by Washoe County.

39. By virtue of Washoe County's substantial involvement in the development of Lancer Estates and Monte Rosa and Washoe County's adoption of the activities of the developers of Lancer Estates and Monte Rosa as part of Washoe County's Master Plan and requirements in the Washoe County Code for the drainage and flood control of the area, Washoe County has exercised the power of eminent domain over the Plaintiff's Property in violation of II Article 1, Sections 8 and 22 of the Constitution of the State of Nevada, the takings clause of the Fifth Amendment of the United States Constitution, and without complying with the procedures set forth in Chapter 37 of the Nevada Revised Statutes (which a government entity is required

by law to follow before taking private property for public use).

40. Washoe County has taken the Plaintiff's property for public use.

41. Storm waters from the drainage system on Lancer Estates and Monte Rosa in Whites Creek No. 4 has actually invaded the Plaintiff's Property by super-induced additions of water so as to effectually destroy or impair its usefulness. *Pumpelly v. Green Bay Company*, 80 U.S. (13 Wall.) 166, 181 (1871).

42. The Plaintiff's Property is subjected to intermittent-but-inevitable flooding from waters from Lancer Estates and Monte Rosa, which causes substantial injury and damages to the Property. *United States v. Cress*, 243 U.S. 316, 328 (1917).

43. The continuing flooding on the Plaintiff's Property caused by the development of 'Lancer Estates and Monte Rosa, and other activities of Washoe County constitutes a permanent physical invasion of the Property. *McCarron Intl Airport v. Sisolak*, 122 Nev. 645, 662 (Nev. 2006).

44. The Plaintiff has suffered damages as a result of the taking of their Property by Washoe County.

45. Plaintiff has been required to seek professional engineering and legal services to prosecute this action, and, accordingly, each is entitled to recover their reasonable attorney fees together with other costs incurred therefor.

WHEREFORE, Plaintiffs pray for judgment against the Defendants as follows:

a. For the taking of the Plaintiff's Property as described herein, damages in an amount in excess of $10,000;

b. For reasonable attorneys' fees and costs per NRS 37.185;

c. For compensatory damages as permitted by law;

d. For consequential damages as permitted by law;

e. For statutory damages as permitted by law;

f. For interest as permitted by law;

g. For such other relief as is just and proper

NRS 23913.030(4) AFFIRMATION

Pursuant to NRS 239B.030 as well as Rule 10 of the Washoe District Court Rules, the undersigned hereby affirms that this document does not contain the social security number of any person.

Respectfully submitted this Monday, May 12, 2014.

By /s/ Luke A. Busby
Luke Busby
Nevada Bar No. 10319
543 Plumas St.
Reno, NV 89501
775-453-0112
luke@lukeandrewbusbyltd.com
Attorney for John and Melissa Fritz

VERIFICATION

STATE OF NEVADA)
)ss:
COUNTY OF WASHOE)

John Fritz, being first duly sworn, deposes and says:

That he is the Plaintiff in the forgoing [sic] action. That he has read the foregoing THIRD AMENDED VERIFIED COMPLAINT and knows the contents thereof. That the contents of the THIRD AMENDED VERIFIED COMPLAINT are true and correct to the best of his knowledge, information and belief, and as to those matters he believes them to be true.

/s/ John Fritz
John Fritz

Subscribed and sworn to before me

This 12th day of May, 2014[, by xx John Matthew Frtiz xx]

/s/ Kimberly K. Foster
NOTARY PUBLIC in and for
said County and State

[SEAL]	KIMBERLY K. FOSTER Notary Public - State of Nevada Appointment Recorded in Washoe County No. 98-0552-2 - Expires July 13, 2015

CERTIFICATE OF SERVICE

I hereby certify that I have on this day served the foregoing document upon the following parties by electronic service to:

Washoe County DA's Office
Attn: Terrence Shea, Esq.
Washoe County District Attorney Civil Div.
P.O. Box 11130
Reno, NV 89520

Respectfully submitted this Monday, May 12, 2014.

/s/ Luke A. Busy
Luke Busby