IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 20-0609

ARIANE WITTMAN and
JEREMY TAYLEN,

Plaintiffs/Appellants,

vs.

CITY OF BILLINGS,

Defendant/Appellee.

BRIEF OF APPELLANTS

On Appeal from the Montana Thirteenth Judicial District Court
Yellowstone County, Cause No. DV 19-1124. Hon. Michael G. Moses

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STATEMENT OF THE ISSUES

Did the District Court err by injecting an "intent to damage" element into Montana inverse condemnation law, forsaking over forty-years of *Rauser's* foreseeability test, in determining that grease accumulating in City sewers and causing sewage overflows is not an inherent risk of operating a public sewer system?

STATEMENT OF THE CASE

Ariane Wittman and Jeremy Taylen own and occupy the home located at 1024 Claremore Lane in the Billings Heights, which is connected to the City's public sewer system. On June 20, 2019, a grease-clog in the City's public sewer main blocked the regular gravity-flow, causing sewage to backup and surcharge the Wittman/Taylen lateral sewer service line and flood their basement with nearly 1,000 gallons of raw sewage. The sewage overflow caused significant damage to the Wittman/Taylen home. The City of Billings ("City") denied responsibility for the sewage overflow, and Ms. Wittman and Mr. Taylen filed a one-count complaint against the City for inverse condemnation.[1]

[1] The June 20, 2019 grease accumulation/sewer discharge damaged two neighboring properties, one owned by Wittman/Taylen and the other owned by Dave and Heidi Christensen. The Christensens similarly filed a one-count complaint against the City for inverse condemnation, and that claim was resolved before the Court's Order (which is the subject of this appeal) was issued.

In the last 40 years in Billings, private property owners have experienced raw sewage inundating their homes and businesses due to a blockage on the sewer main an average of 10-15 times per year, every year. Grease discharge and accumulation is a regular and pervasive cause of sewer-main overflow events, locally and around the developed-world.

In March 2020 Ms. Wittman and Mr. Taylen moved for partial summary judgment, seeking an order from the Court concluding that grease accumulating in public sewer mains is an inherent and inescapable consequence of operating public sewers, allowing the District Court to determine that the property had been damaged for public use, without just compensation, as a matter of law. *See Buhmann v. State*, 2008 MT 465, ¶ 56, 348 Mont. 205, 222, 201 P.3d 70, 84 (the weight of authority tends to support the view that the right to jury trial in inverse condemnation suits is limited solely to the issue of damages).

Relying on inverse condemnation law from Nebraska, Oregon, and Texas the District Court determined that because there was no "intent for a constitutional taking," the grease buildup could not "qualify as a deliberate government action for inverse condemnation." Based on this conclusion, the Court dismissed Plaintiffs' inverse condemnation claim, and this appeal follows.

STATEMENT OF FACTS

Ariane Wittman owns the home at 1024 Claremore Lane in Billings, Montana. *Dkt.*[2] *# 1, ¶ 1*. Because Ms. Wittman's home is located within the Billings City limits, she and her partner Jeremy Taylen are required to have their home connected to the City's public sewer system. Deposition of Scott Emerick, 18:22-19:1 (February 11, 2020) (Tab 3[3]). There is no way for an individual who owns a home within City limits to "opt-out," or choose not to connect to the City's public sewer system. *Id*. at 18:1-21.

On June 20, 2019 at approximately 10:45 am, a grease-buildup in the City's sewer main blocked the regular gravity-flow of wastewater, surcharging the Wittman/Taylen lateral sewer service line, and causing nearly 1,000 gallons of raw sewage to backup into their home. *Dkt. #1, ¶¶ 4-5*; *City Public Works Memorandum* (Tab 9). There is no dispute as to the location of the grease accumulation – it was in the City-owned sewer main. Depo. Emerick, 78:14-17 (Tab 3). This scenario – where a stoppage on the City-owned sewer main causes a sewage overflow onto private property – is referred to as a Sanitary Sewer Overflow ("SSO") event.

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[2] "Dkt." refers to the District Court Docket, and "#" identifies in which document the information may be found in the record on appeal.

[3] "Tab" refers to the numbered-tab in the Appendix attached to this brief where the document can be found.

Asked about the inevitability of SSO events in the regular operation of a public sewer system, the City's superintendent of distribution and collection had the following to say:

> [Y]ou can't control what people flush. So you're always – you're always going to have some SSOs. I don't care what system you look at. Every – every community has sanitary sewer overflows. You could have a brand new system similar to this, and you're going to have an SSO because somebody's flushing something that they shouldn't be in the wastewater system.

Id. at 37:6-13. Mr. Emerick even agreed that private property overflow events are a "necessary part of the design" of public sewer systems. *Id*. at 37:14-16. Speaking specifically about grease accumulation, Mr. Emerick stated that "it's going to collect no matter what type of pipe it is. It collects on the pipe walls, and it just keeps collecting until it eventually chokes off the pipe, the flow." *Id*. at 53:2-6. The City's proposed expert witness, superintendent of the Bozeman sewer system John Alston, stated something similar in his expert witness disclosure:

> This [grease] problem is nationwide and occurs when homeowners don't scrape their dishes, put food down the disposal or pour excess grease down the drain.

Dkt. # 17, p. 6. Asked if grease accumulation is an inevitable part of operating a public sewer system, the Bozeman superintendent responded, "Sure it is." Deposition of John Alston, 62:23-25 (June 29, 2020) (Tab 4)[4]. The City has even

[4] While discussing the "nationwide problem" of grease accumulation in sewer lines, Mr. Alston referenced a "big glob that weighed over a ton of grease and flushable wipes" in the London,

gone so far as to advertise in the Billings Gazette, imploring Billings' citizens to avoid discharging grease into the sewer. Depo. Emerick, 37:14-20 (Tab 3).

Grease accumulation in City sewers is such a pervasive problem that the City has a specific ordinance prohibiting industrial sewer users from discharging "any water or waste containing free or floating oil and grease, or any discharge containing animal fat or grease by-product in excess of one hundred milligrams per liter (100 mg/L)." City Code Billings, Montana, § 26-604(9). In affidavits submitted to the Court in response to the Wittman/Taylen motion for partial summary judgment, Messrs. Emerick and Alston both stated that municipalities "can do virtually nothing to physically stop a resident from" discharging grease into the public sewer. *See Dkt. # 15, Ex. 1, ¶ 10*; *Dkt. # 15, Ex. 2, ¶ 6*.

Despite the pervasive evidence that grease accumulation is an inherent and inescapable consequence of operating public sewer systems, the Court denied the Wittman/Taylen motion for partial summary judgment and dismissed the case because there was no "intent for a constitutional taking," and the grease buildup thus could not "qualify as a deliberate government action for inverse condemnation." *Dkt. #32, pp. 8-9* (Tab 1).

England sewer system. (Depo. Alston, 29: 1-3). The undersigned found a 2019 article in the Billings Gazette regarding the instance Mr. Alston was discussing, which is attached as Tab 5 for the Court's easy reference.

STANDARD OF REVIEW

This Court reviews a district court's summary judgment ruling *de novo* by applying the same M. R. Civ. P. 56 criteria as the district court. *Landa v. Assurance Co. of Am.*, 2013 MT 217, ¶ 13, 371 Mont. 202, 307 P.3d 284. An Article II, § 29 inverse condemnation claim requires no proof of negligence or other tortious conduct by the government – only proof that a public use or improvement, as deliberately designed, constructed, or maintained, caused a "taking" or "damaging" of private property. *Rauser v. Toston Irr. Dist.*, 172 Mont. 530, 538, 565 P.2d 632, 637 (1977).

SUMMARY OF THE ARGUMENT

In rendering judgment for the City, the District Court blurred the lines between the power of eminent domain, which arises as an inherent attribute of sovereignty, and an Article II, § 29 **inverse** condemnation claim, which serves as a check on the government's ability to cause private property damage incident to governmental undertakings. *See Burbank-Glendale-Pasadena Airport Auth. v. Hensler*, 83 Cal. App. 4th 556, 561, 99 Cal. Rptr. 2d 729, 733 (2000); Mont. Const. art. II, § 29. The distinction is subtle, but important:

> There are also important practical differences between condemnation proceedings and actions by landowners to recover compensation for "inverse condemnation." Condemnation proceedings, depending on the applicable statute, require various affirmative action on the part of the condemning authority. To accomplish a taking by seizure, on the other hand, a condemning authority **need only occupy the land in**

> **question**. Such a taking thus shifts to the landowner the burden to discover the encroachment and to take affirmative action to recover just compensation.

United States v. Clarke, 445 U.S. 253, 257, 100 S. Ct. 1127, 1130, 63 L. Ed. 2d 373 (1980) (emphasis added). Disregarding this distinction, the District Court concluded in its summary judgment order that:

> Inverse condemnation requires **deliberate affirmative action** by the municipality to take the property. Thus, the government cannot accidentally, inadvertently, or erroneously assert the **power of eminent domain** for public use.

Dkt. # 32, p. 8 (Tab 1) (emphasis added). This is a misreading of over 120 years of Montana inverse condemnation law.

An inverse condemnation claim in Montana does not require proof of negligence or other tortious conduct by the government – only proof that a public use or improvement, as deliberately designed and built, caused a taking or damaging of private property. *Rauser*, 172 Mont. at 538, 565 P.2d at 637 (1977). The "deliberateness" requirement is satisfied when a public improvement, as deliberately designed and built, presents inherent risks of damage to private property, and the inherent risks materialize and cause damage. *P. Bell v. City of San Diego*, 96 Cal. Rptr. 2d 897 (Cal. App. 4th Dist. 2000)[5]. Here, the inevitable

[5] Hon. Dirk M. Sandefur, while occupying the District Court bench, compiled a very thorough and complete history of inverse condemnation claims in Montana, as distinct from formal "takings" of private property, in his December 31, 2012 Order in *Evenhus v. City of Great Falls*. In doing so, Judge Sandefur relied on *P. Bell v. City of San Diego*, 96 Cal. Rptr. 2d 897 (Cal.

introduction of grease into a city sewer line "collects on the pipe walls, and it just keeps collecting until it eventually chokes off the pipe, the flow." Depo. Emerick, 53:2-6 (Tab 3); Depo. Alston, 62:23-25 (Tab 4).

The common vein running through Montana's long history of inverse condemnation law is the principle that the inevitable, consequential damage resulting from a deliberate governmental undertaking is compensable under the Montana Constitution. The District Court's decision that "[i]nverse condemnation requires deliberate affirmative action" runs afoul of this long-standing principle, and the Court's order denying the plaintiffs' motion for partial summary judgment and dismissing their claim for inverse condemnation should be reversed. The Court should further conclude that SSO events caused by grease accumulation are an inherent and necessary consequence of the operation of public sewers, allowing it to conclude that Ms. Wittman and Mr. Taylen's property was damaged for a public use, without just compensation, as a matter of law.

ARGUMENT

Despite its caption reference to "eminent domain," Article II, § 29 is not the source of the State's eminent domain power. Eminent domain derives from the power of sovereignty and is the right of the state to take private property for public

App. 4th Dist. 2000). This Order was included with Plaintiff's Motion for Partial Summary Judgment (Dkt. #14, pp. 28-47) and is included here as Tab 6.

use. *Montana Talc Co. v. Cyprus Mines Corp.*, 229 Mont. 491, 501, 748 P.2d 444, 450 (1987) (citing Mont. Code Ann. § 70-30-101, *et seq*); *First Eng. Evangelical Lutheran Church of Glendale v. Los Angeles Cty., Cal.,* 482 U.S. 304, 321, 107 S. Ct. 2378, 2389, 96 L. Ed. 2d 250 (1987). "At its heart, the sovereign's right of eminent domain is little more than an embodiment of the principle that the rights of the individual sometimes pale in comparison with the needs of the common welfare." *Lake v. Lake Cty.*, 233 Mont. 126, 130, 759 P.2d 161, 163 (1988) (citing *Butte, Anaconda & Pacific Ry. v. Montana Union Ry. Co.*, 16 Mont. 504, 536, 41 P. 232, 243 (1895)). The decision to exercise the power of eminent domain is a legislative function. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240, 104 S. Ct. 2321, 2329, 81 L. Ed. 2d 186 (1984).

In contrast, Article II, § 29 is part of a broader declaration of fundamental rights this Court has repeatedly concluded are entitled to "the highest level of protection." *Walker v. State*, 2003 MT 134, ¶ 74, 316 Mont. 103, 120, 68 P.3d 872, 883 ("We have repeatedly recognized the rights found in Montana's Declaration of Rights as being 'fundamental,' meaning that these rights are significant components of liberty, any infringement of which will trigger the highest level of scrutiny, and, thus, the highest level of protection by the courts.")

Essentially, Article II, § 29 is a Montana citizen's check on the state's power to passively take or damage private property incident to governmental

undertakings without providing just compensation:

> Where government does not recognize that a particular circumstance amounts functionally to a taking for public use or otherwise fails to pay the requisite compensation for the property in question, the property's owner can, as here, pursue an "inverse condemnation" action.

City of Oroville v. Superior Ct., 7 Cal. 5th 1091, 1102, 446 P.3d 304, 310 (2019). The US Supreme Court has drawn the distinction between eminent domain and inverse condemnation by stating that, under the latter theory, "a condemning authority need only occupy the land in question," with no other "affirmative" action required by the government. *Clarke*, 445 U.S. at 257, 100 S. Ct. at 1130. Under this framework, Ms. Wittman and Mr. Taylen's claim for inverse condemnation succeeds.

I. Montana Inverse Condemnation Law Allows for the Recovery of Damages "Inadvertently" Caused and Does Not Require "Deliberate Affirmative Action" by the Government.

An Article II, § 29 inverse condemnation ("IC") claim requires no proof of negligence or other tortious conduct by the government. *Rauser*, 172 Mont. at 538, 565 P.2d at 637; *Deschner v. State of Montana, Dep't of Highways*, 2017 MT 37, ¶ 17, 386 Mont. 342, 390 P.3d 152. Prevailing on an IC claim allows for the recovery of uncommon consequential damage to un-taken private property directly or indirectly caused by a nearby public property use, improvement, or activity. *Less v. City of Butte*, 72 P. 140, 141 (1903) (consequential damage may impose

more serious loss than temporary spoliation or invasion of property); *Root v. Butte, Anaconda & Pac. Ry. Co.*, 20 Mont. 354, 356-60, 51 P. 155, 156-57 (1897) (consequential impairment of use, enjoyment, and value of residential property from railroad traffic in adjoining street).

The Montana Supreme Court has been examining IC cases for more than 120 years, with an IC-specific provision appearing in both the 1889 and 1972 Montana Constitutions. There are few legal principles in Montana that have deeper roots.

In *Root – Butte* (1897), the Montana Supreme Court considered whether a property owner could recover against the Butte, Anaconda, & Pacific Railway Company ("BAP") for the consequential damages suffered incident to the operation of BAP's short line railroad through town in Anaconda. *Root-Butte*, 20 Mont. at 354, 51 P. at 155. The property owner alleged that additional noise, shaking windows, and ringing bells depreciated the value of his property. *Id*. The *Root* Court viewed the property owner's IC claim favorably:

> While it may be conceded that in estimating the plaintiff's damages the jury would not be permitted to take into account the consequences of the operation of the railroad which were common to the community at large, no sound reason exists for excluding from consideration such elements of inconvenience, annoyance, danger, and loss as result to the property, its use and enjoyment, from 'smoke, noises, and sparks of fire occasioned by running of locomotives and cars along the track in front of the same,' if it be shown that these caused special injury and depreciation to the property."

Id. at 156–57.

This basic principle – that uncommon, incidental, consequential harms occasioned by public undertakings are compensable for affected private property owners – has survived over 120 years of judicial scrutiny. *See Knight v. City of Billings*, 197 Mont. 165, 172-73, 642 P.2d 141, 144-45 (1982) (disparate consequential impairment of use, enjoyment, and value of residential property from increased traffic, noise, and pollution caused by an adjoining street was compensable under Article II, § 29); *Knight v. City of Missoula*, 252 Mont. 232, 241, 827 P.2d 1270, 1275 (1992) (consequential impairment of use and enjoyment of residential property from increased traffic, dust, and run-off in adjoining street was similarly compensable under IC jurisprudence); *Buhmann*, ¶ 69 (appropriation of private land for public use "will cause determinable consequential damages to property owners affected thereby").

In *Less* (1903), the Montana Supreme Court considered whether a homeowner could recover from the City of Butte for its re-grading of the street in front of his house, which resulted in the level of the street dropping seven feet in elevation from its prior grade. *Less v. City of Butte*, 72 P. 140, 141 (1903). Discussing the evolution in the law as it existed at the time, the *Less* Court noted that:

> By the common law, municipal corporations were not held liable for **consequential damages** resulting to property owners by reason of

> changes in street grades…The rule *damnum absque injuria*[6] was held to apply to all such [public improvement] cases, unless the injury could be shown to have resulted from **the negligent or improper manner** in which the work was done… The framers of our Constitution **abrogated this harsh rule** by section 14, art. 3[7], which reads as follows: "Private property shall not be taken or damaged for public use without just compensation having first been made to or paid into court for the owner."

Id. (emphasis added). The homeowner could thus recover for the City "inadvertently" damaging his property by dropping the grade of the street, even though this damage did not result from the "negligent or improper manner" in which the road grade was changed. *Id*.

Acting as a foundation stone of Montana IC law, the *Less* Court's reasoning was immediately applied to resolve the identical issue for three different sets of homeowners who were also affected by the re-grading of East Broadway Street in Butte. *See Hanley v. City of Butte*, 28 Mont. 36, 72 P. 1103, 1103 (1903); *Holland v. City of Butte*, 28 Mont. 34, 72 P. 1103 (1903); *O'Donnell v. City of Butte*, 28 Mont. 35, 72 P. 1103, 1103 (1903). Fifteen years later, the Court in *Eby v. City of Lewistown* invoked the *Less* reasoning once again. *Eby v. City of Lewistown*, 55 Mont. 113, 173 P. 1163, 1165 (1918). The *Rauser* Court likely had *Less* in mind when it stated that IC claims allow for recovery of "unexplained and unplanned for problems," and that "[i]n many instances there is no negligence or other wrongful

[6] "Loss or damage without injury"
[7] The 1889 Montana Constitution's counterpart to Art. II, § 29 in the 1972 Constitution.

conduct or omission on the part of the defendant." *Rauser*, 172 Mont. at 538, 565 P.2d at 637. The *Rauser* Court later synthesized *Root-Butte* and *Less* by importing the concept of foreseeability into Montana's IC analysis:

> Where, as here, the damages are known or knowable and are an **inevitable result** of the intentional undertaking of the project, **there is no need to show negligent design, construction or operation**. It is enough to show the damages were proximately caused by the undertaking of the project **and a reasonabl[y] foreseeable consequence of the undertaking**.

Rauser, 172 Mont. at 538, 565 P.2d at 637 (emphasis added).

From *Root-Butte*, *Less*, *Rauser*, and their significant progeny, this Court can conclude that IC claims in Montana 1) allow for the recovery of sufficiently peculiar damages which are the inevitable or reasonably foreseeable consequence of governmental undertakings, and 2) there is no need for the property owner to prove negligence, intent, or other tortious conduct on the part of the condemning party to prevail on an IC claim.

Despite a deep-well of Montana IC law, dating all the way back to the 1889 Montana Constitution, the District Court here relied on IC law from Nebraska, Oregon, and Texas to conclude that:

> Inverse condemnation requires **deliberate affirmative action** by the municipality to take the property. Thus, the government cannot accidentally, inadvertently, or erroneously assert the **power of eminent domain** for public use.

See Dkt. #32, p. 8 (Tab 1) (emphasis added).

This passage from the District Court's Summary Judgment Order demonstrates a fundamental misapprehension of the issue before the Court. First, at no point during the briefing or argument did Plaintiffs/Appellants suggest that the City had asserted "the power of eminent domain" against them. Appellants do not assert that the City enacted an ordinance stating that it would be in the interest of the public good to store the City's untreated sewage in the Wittman/Taylen basement for a few hours. While the distinction between the affirmative (legislative) exercise of the power of eminent domain and the passive taking or damaging of property incident to governmental undertakings is subtle, it is nonetheless necessary for a proper analysis under either standard.

Second, the District Court's creation of the need to find "deliberate affirmative action" before a taking or damaging can be found under a Montana IC analysis runs afoul of well-settled Montana law. *See above, generally*. This misapprehension of the applicable standard is highlighted on page nine of the District Court's analysis, where the Court reasoned that to find liability under an IC analysis, the defendant/government must have acted **intentionally** – "**the intent must be to damage private property**." *Id*. at p. 9 (Tab 1) (emphasis added). Far from *Rauser's* holding that even negligent conduct is unnecessary to find liability under an IC theory in Montana, the District Court here works upstream from Montana's century-old precedent and injects an "intent to damage" element. As

this Court has held, "[t]he difference between the negligent and intentional versions of the cause of action lies, not in the elements of the tort, **but in the nature and culpability of the defendant's conduct**." *Sacco v. High Country Indep. Press, Inc.*, 271 Mont. 209, 238–39, 896 P.2d 411, 429 (1995). Said another way, affirming the District Court's decision here would place a burden on the private property owner **greater than** the negligence standard specifically **rejected** by the *Rauser* Court more than four decades ago.

The analytical framework employed by the District Court runs contrary to well-established, century-old IC law in Montana. For this reason, and those set out below, the Court's Order on Partial Summary Judgement should be reversed.

II. Accumulating Grease is an Inherent Consequence of Operating a Public Sewer System and was the Sole Cause of the Private Property Damage Suffered.

The purpose behind IC jurisprudence in Montana is to "prevent the government from forcing a few individuals to bear an economic burden which should be borne by society as a whole." *Kafka v. Montana Dep't of Fish, Wildlife & Parks*, 2008 MT 460, ¶ 78, 348 Mont. 80, 201 P.3d 8. The cost of damage caused by the inherent, inevitable consequences of a governmental undertaking "can better be absorbed, and with infinitely less hardship, by the taxpayers as a whole, than by owners of the individual parcels." *Rauser*, 172 Mont. at 539, 565 P.2d at 638.

This Court finds a compensable consequential taking when "'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Kafka*, ¶ 69 (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631 (1978)). There is no "set formula" for determining when the consequential cost of a public improvement must be spread among the tax-paying public. *Penn Central*, 438 U.S. at 124, 98 S. Ct. at 2659.

Presented with the identical issue of a stoppage in a public sewer main causing private property damage, Judge Kutzman in Cascade County noted that the policy espoused by Montana's lengthy IC jurisprudence finds its corollary in strict product liability:

> So, without undertaking to settle the parties' skirmish about exactly what "strict liability" means, the Court notes in passing that this concept of risk-spreading played a critical role in Montana's adoption of strict *tort* liability for *dangerous products*. *Brandenburger v. Toyota Motor Sales, U.S.A., Inc.*, 162 Mont. 506, 514, 513 P.2d 268, 273 (1973) ("The cost of injury may be overwhelming to the person injured while the risk of injury can be insured by the manufacturer *and be distributed among the public as a cost of doing business*")

Green v. City of Great Falls, et al, *Order Denying Plaintiff's and City's Cross Motions for Summary Judgment on Inverse Condemnation*, Cascade County Cause No. BDV-14-503(c), p. 6 (December 6, 2019) (emphasis in original) (Tab 7).

As far back as *Root-Butte*, this Court has looked to the Supreme Court of

California for guidance on the shaping and progression of Montana IC law. *See Root-Butte*, 51 P. 155 at156 (citing *Eachus v. Railway Co.*, 103 Cal. 614, 37 Pac. 750); *Less*, 72 P. at 141 (same); *Eby*, 173 P. at 1166 (citing *Potter v. Ames*, 43 Cal. 75, 75 (1872) and *Sala v. City of Pasadena*, 162 Cal. 714, 124 P. 539 (1912)). The Court in *Rauser* adopted the five-factor test from *Albers v. County of Los Angeles*, 62 Cal.2d 250, 42 Cal.Rptr. 89, 398 P.2d 129, and this Court clarified in *Deschner* that these five factors still guide Montana IC jurisprudence today. *See Rauser*, 172 Mont. at 539, 565 P.2d at 638; *Deschner*, ¶ 17. The Court in *Knight-Missoula* similarly found the *Albers* factors persuasive. *Knight-Missoula*, 252 Mont. at 243, 827 P.2d at 1276.

The Court in *Kafka* cited to *San Remo Hotel*, 27 Cal.4th 643, 41 P.3d 87, for the proposition that states with constitutional provisions like the one in Article II, § 29 that include the words "or damage[d]," protect a "somewhat broader range of property values than does the corresponding federal provision." *Kafka*, ¶ 29. The Court in *Buhman* relied on *Customer Co. v. City of Sacramento*, 10 Cal.4th 368, 895 P.2d 900 for the proposition that IC claims should be limited to "the realm of eminent domain and public works," refusing to extend the doctrine to municipal police action. *Buhmann*, ¶ 68. Because the Montana Supreme Court has historically relied on California precedent in advancing IC law here, a recent California decision should bear heavy on the question currently before the Court.

In *City of Oroville v. Superior Ct.*,[8] the Supreme Court of California examined a claim where tree roots entered a public sewer main, causing a blockage and subsequent surcharge onto private property. *City of Oroville v. Superior Ct.*, 7 Cal. 5th at 1100, 446 P.3d at 308. At the outset, the *Oroville* Court set forth a principle underlying California IC jurisprudence that will sound familiar to Montana jurists:

> [A] court assessing inverse condemnation liability must find more than just a causal connection between the public improvement and the damage to private property. What we hold is that the damage to private property must be **substantially caused by an inherent risk** presented by the deliberate design, construction, or maintenance of the public improvement.

Id. at 1105, 312 (emphasis added). The *Oroville* Court went on to explain that the concepts of "inherent risk" and "substantial causation" overlap somewhat, but "play distinct roles in the analysis of inverse condemnation." *Id*. at 1106, 312. The *Oroville* test should be adopted in Montana and is plainly satisfied here.

A. Accumulating Grease is an Inherent, Inescapable Consequence of Operating a Public Sewer System.

The "inherent risk assessment" in *Oroville* seeks to strike a balance between dangers inherent in the operation of a public improvement and private property damage that simply bears some causal connection to a public improvement. *Id*. at 1106, 312-13. By way of example, the *Oroville* Court points to the inherent risk in

[8] Judge Kutzman relied heavily on *Oroville* in *Green v. City of Great Falls*, supra (Tab 7).

operating a water-distribution utility by adopting the "wait until it breaks" plan of maintenance: the damages that result from this maintenance plan are inherent and should thus be compensable under an IC theory of liability. *Id*. at 1107, 313-314. This standard compliments' the *Rauser* Court's logic in imposing IC liability against the Toston Irrigation District: "Here, the damage done by the project was **foreseeable and foreseen**." *Rauser*, 172 Mont. at 538, 565 P.2d at 637 (emphasis added). To satisfy the "inherent risk" element of the *Oroville* test, then, the injury to private property must be an "inescapable or unavoidable consequence" of the public improvement. *Id*. at 1108, 314. Such is the case here.

Discussing the inevitability of SSO events and the discharge of grease into public sewers, the City's superintendent of water distribution and collection had the following to say:

> [Y]ou can't control what people flush. So you're always -- you're always going to have some SSOs. I don't care what system you look at. Every -- every community has sanitary sewer overflows. You could have a brand new system similar to this, and you're going to have an SSO because somebody's flushing something that they shouldn't be in the wastewater stream.
>
> **Q. And that's just kind of a necessary part of the design of these systems; is that correct?**
>
> A. **That's correct.** You can -- you can --we -- we have put our fliers in -- in our bills, we've had publications in the Gazette. We've had things on Facebook and on our website, you know, **please don't flush grease**.

Depo Emerick, 37:6-20 (Tab 3) (emphasis added).

> And we had grease issues by – by restaurants. You know, if restaurants don't maintain their grease traps adequately, **a lot of times that grease will go right to the sewer**. It gets in the sewer and it coagulates on the lines; pretty soon it chokes them off. **That was the case with this one**.

Id. at 43:4-9 (emphasis added).

> [I]f somebody's discharging grease, **it's going to collect no matter what type of pipe it is**. It collects on the pipe walls, and it just keeps collecting until it eventually chokes off the pipe, the flow. Or it's choked off enough that maybe something gets hung up on it so it will obstruct the flow.

Id. at 53:2-8 (emphasis added). The City's retained expert witness echoed this sentiment:

> Well, sewer systems are designed to basically put down toilet paper, fecal matter, and urine. However, that's not the case at all. People treat their sewer systems as trash cans. We have problems with fats, oils, and grease nationwide.

Depo. Alston, 27:19-24 (Tab 4).

> **Q: And you said that this was a nationwide problem. Did I hear that right?**
>
> A: Yeah. Yes, it is.

Id. at 28:16-24.

> A: …we, in the City of Bozeman, have several neighborhoods that we're struggling with and working with and reaching out to about fats, oils, and grease.

Id. at 66:19-22

Further demonstrating the inevitability of grease discharge into public

sewers, both Mr. Emerick and Mr. Alston provided affidavits in opposition to the Plaintiffs' motion for partial summary judgment, stating the following:

> 10. This grease buildup which caused the backup was the product of a resident or residents of the City of Billings illegally discharging grease into the line. **The City can do virtually nothing to physically stop a resident from doing that**. If the resident or residents who illegally discharged grease had complied with the law, this backup would not have happened.

See Dkt. # 15, Ex. 1, ¶ 10 (emphasis added).

> 6. This grease buildup which caused the backup was the product of a resident or residents of the City of Billings illegally discharging grease into the line. **The City can do virtually nothing to physically stop a resident from doing that.** If the resident or residents who illegally discharged grease had complied with the law, this backup would not have happened.

Id., Ex. 2, ¶ 6 (emphasis added).

The law Messrs. Emerick and Alston refer to does not actually apply to residential users, but rather "Industrial Users," defined as users "of or pertaining to industry, manufacturing, agriculture, commerce, trade, or business **as distinguished from domestic or residential**." *See* Dkt. #17, p. 6 (citing City Code Billings, Montana, § 26-604(9)); City Code Billings, Montana § 26-602 (defining "industrial" and "industrial user") (emphasis added). The specific ordinance states that:

> An industrial user may not introduce into a [Publicly Owned Treatment Works]…(9) any water or waste containing free or floating oil and grease, or any discharge containing animal fat or grease by-product in excess of one hundred milligrams per liter (100 mg/L) except:

(i) A food service establishment that has installed and is properly operating and maintaining a grease interceptor and implementing required BMPs; or

(ii) An industrial user that is permitted as for trucked and hauled waste and discharges its waste at a discharge point specified by the city and in full compliance with its permit.

City Code Billings, Montana § 26-604(9).

Notwithstanding the fact that this ordinance does not apply to residential users, its mere existence further demonstrates the inevitability of grease discharge and accumulation in the sewer. Asked how a homeowner might comply with this ordinance, if the ordinance in fact applied to residential sewer users, Mr. Alston had the following to say:

Q: …can you tell me how a user is supposed to measure the amount of grease or oil in the water they're discharging to make sure that they're not in violation of this ordinance?

A: I can't.

Q: There's no standard tool that a homeowner could buy or might be required to buy in order to not run afoul of this?

A: Not that I'm aware of.

Depo. Alston, 61:15-23 (Tab 4). Pressed further, Mr. Alston even admitted that he had likely violated this ordinance at one time or another, because grease discharge is inherent in the operation of public sewers:

Q: Do you know, John, as you sit here, if you've ever discharged oil, fat, or grease in excess of a hundred milligrams per liter?

A: I'm sure I have.

Q: Is that also something that is inherent in a city sewer system, discharge of grease?

A: Sure it is.

Id. at 62:19-25.

The record here is perfectly clear: grease discharge and subsequent accumulation is an inherent, inescapable consequence of operating a public sewer system. The first element of the *Oroville* test is satisfied.

B. The Grease Accumulation Here was not only a Substantial Cause of the Private Property Damage – it was the Sole Cause.

In *Oroville*, the California Supreme Court considered the fact that all buildings within the City were required by law to install and maintain a backflow prevention valve on lateral sewer service lines to prevent the very type of sewage overflow at issue in that (and this) case. *Oroville*, 7 Cal. 5th at 1110, 446 P.3d at 315. This requirement was part of the design of the City of Oroville's gravity flow sewer system. *Id*. It was undisputed that the Plaintiffs in *Oroville*, three dentists doing business as WGS Dental Complex ("WGS"), failed to install the legally required backflow prevention valve on their building's lateral sewer service line. *Id*. at 1098, 307. Discussing the "substantial cause" element of California's IC jurisprudence, and the fact that the trial and lower appellate Courts had ignored

WGS' failure to install the legally required backflow valve, the *Oroville* Court stated the following:

> Consider what it means to ignore the missing backwater valve in this case. We'd be airbrushing out of the picture not only the City's considered judgment about what it would take to balance safety and practical considerations for this public improvement, but WGS's noncompliance with an ordinary planning code requirement that would have eliminated or at least mitigated risks of sewage backup damage. That is hardly different from turning inverse condemnation into a basis for automatic imposition of liability on the public entity if even a tenuous causal connection exists between the public improvement and private property damage, irrespective of whether a plaintiff's act or omission materially contributes to the risk. And it ignores that the City, like all public entities in an imperfect world of scarce resources, is in the business of weighing safety, the availability of resources, and possible risks that may result from its public improvements.

Id. at 1110–11, 316.

Here, unlike *Oroville*, there is no evidence in the record suggesting that Ms. Wittman or Mr. Taylen contributed to the risk of grease accumulation resulting in a sewage overflow. A sampling of the City's maintenance records for the last ten years shows that grease-related overflows happen all over town – with no discernable rhyme or reason. *See Grease-Related SSO Reports* (Tab 10). There is no requirement for backflow prevention valves on Billings sewer lateral lines and, as discussed above, the ordinance relied upon by Messrs. Emerick and Alston applies to industrial users only.

Both elements of the *Oroville* test are satisfied here. Accumulating grease is an inherent consequence of operating a public sewer system and the grease accumulation was the sole cause of the damage sustained by Ms. Wittman and Mr. Taylen. As a result, this Court should conclude that Ms. Wittman and Mr. Taylen's property was damaged by a public improvement as deliberately designed and implemented, without just compensation, as a matter of law.

III. The Distinction Between "Open" and "Closed" Systems in the District Court's Order is Incongruent with Montana IC Law.

In its effort to distinguish a public sewer utility from a public water distribution utility – the latter of which two prior district court orders had already concluded were subject to IC liability[9] – the District Court here created an "Open vs. Closed System" element out of whole cloth:

> Municipal water systems are closed systems that do not allow the general public or users to enter the system. Due to this nature, municipal water systems choose to avail themselves to the costs of long-term deterioration and leaks, which was held in *Pacific Bell* to be deliberate government action sufficient for an inverse condemnation claim… Sewer systems [in contrast] are open systems because they allow users of the system to input into the system by flushing toilets… Plaintiffs fail to establish that the City's deliberate actions caused the damage through preventative maintenance of the sewer lines and the nature of the open system.

See Dkt. #32, pp. 7-8 (Tab 1). This new "Open vs. Closed System" element is contrary to century-old Montana IC jurisprudence.

[9] *Evenhus* (Tab 6) and *Leonard v. City of Billings*, order attached hereto as Tab 8.

In *Root-Butte*, the public improvement at issue was a short-line railroad. *Root-Butte*, 20 Mont. At 354, 51 P. at 155. In *Less*, *Hanley*, *Holland*, *O'Donnel*, and *Eby* it was a public road. *Less*, 28 Mont. 27; *Hanley*, 28 Mont. 36; *Holland*, 28 Mont. 34; *O'Donnell*, 28 Mont. 35; *Eby*, 55 Mont. 113. The same is true for *Knight-Billings*, *Adams*, and *Knight-Missoula*. *Knight-Billings*, 197 Mont. 165; *Adams v. Dep't of Highways of State of Mont.*, 230 Mont. 393, 398, 753 P.2d 846, 849 (1988); *Knight-Missoula*, 252 Mont. 232. The public improvement at issue in *Rauser* was an irrigation ditch. *Rauser*, 172 Mont. 530.

As the Court can plainly see, even if an "Open vs. Closed System" analysis could be justified, Montana law makes it perfectly clear that open systems, i.e. systems wherein "users of the system [are allowed] to input into the system," are **almost exclusively** susceptible to IC liability. Public railroads, streets, and irrigation ditches are, after all, available for their users' ready access. Notwithstanding, this newly formed element does not find support in any of Montana's IC jurisprudence, and the District Court erred by relying on this analysis in denying Ms. Wittman and Mr. Taylen's motion for partial summary judgment.

CONCLUSION

Inverse condemnation law in Montana has always allowed for the recovery of uncommon consequential damages caused by the inherent, inescapable risks of

governmental undertakings. By injecting an "intent to damage" element into its analysis, and by blurring the lines between the legislative power of eminent domain and the constitutional reprieve from inadvertent takings, the District Court and the City seek to rewrite more than a century of IC jurisprudence in Montana. Grease discharge and accumulation is an inherent, inescapable risk of operating public sewer systems in Montana, and this risk materialized in the form of 1,000 gallons of raw sewage in the Wittman/Taylen basement. Ms. Wittman and Mr. Taylen should not be forced to bear the financial burden of this immanent risk alone. The cost should rather be spread among the sewer using public in general. The District Court's Memorandum and Order In Re: the Plaintiffs' Motions for Partial Summary Judgment (Tab 1) and subsequent Judgment (Tab 2) should be reversed, and this Court should determine as a matter of law that Ms. Wittman and Mr. Taylen's property was damaged for public use without the City first paying just compensation.

DATED this 30th day of March, 2021.

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CERTIFICATE OF SERVICE

I Tucker P. Gannett, hereby certify that I have served true and accurate copies of the foregoing Brief of Appellants to the following on March 30, 2021:

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Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Brief of Appellants is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count is 6,871 words, excluding Certificate of Service and Certificate of Compliance.

DATED this 30th day of March, 2021.

By /s/ Tucker P. Gannett

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