

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0370

HAMLIN CONSTRUCTION AND)
DEVELOPMENT COMPANY INC., a)
Montana Corporation; JERRY HAMLIN)
and BARBARA HAMLIN, Individually)
and as TRUSTEES OF THE HAMLIN)
FAMILY REVOCABLE LIVING)
TRUST,)

Plaintiffs and Appellants,)

vs.)

MONTANA DEPARTMENT OF)
TRANSPORTATION; JOHN DOES)
1-5; JANE DOES 1-5; ABC ENTITIES,)
ORGANIZATIONS OR AGENCIES 1-5)

Defendants and Appellees.)

APPELLEES' ANSWER BRIEF

Appeal from the District Court of the First Judicial District
of the State of Montana in and for the County of Lewis and Clark
Cause No. XBDV-2018-1429
The Honorable Luke Berger

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Defendant and Appellee, Montana Department of Transportation (“MDT” or the “Department”), hereby respectfully submits its Answer Brief. In accordance with M.R.App.P. 12(2), MDT will not unnecessarily repeat a statement of the issues or the nature of the case and its procedural disposition.

STATEMENT OF FACTS

The present dispute arises from the reconstruction of Canyon Ferry Road in Lewis and Clark County (the “Road”) and Appellants’ subsequent efforts to construct a subdivision at the intersection of the Road and Lake Helena Drive. (Appellants’ App. 1 at 2). The Road is located adjacent to the northern boundary of Red Fox Meadows subdivision (the “Subdivision”) owned and developed by Appellants (“Hammins”). (*Id.*).

In 2009, MDT began reconstruction of the Road, engineered by Robert Peccia & Associates (“RPA”), an engineering firm based in Montana. (*Id.*). MDT’s reconstruction efforts included obtaining a floodplain development permit from Lewis and Clark County (the “County”) and the Montana Department of Natural Resources and Conservation (the “DNRC”). (*Id.*).

MDT’s application for a floodplain development permit included plans to install four culverts along the Road for flood relief, which were

designed to accommodate a water flow rate of approximately 512 cubic feet per second (“cfs”). (*Id.*). In May 2008, the County approved MDT’s application, issued a permit to MDT, and in 2009, MDT began its reconstruction efforts. (*Id.*).

In 2014, Hamlins obtained preliminary plat approval for the Subdivision and subsequently applied for three floodplain development permits, as the Subdivision’s internal roads cross a floodplain bisecting the Subdivision and intersecting with the Road. (*Id.*). Hamlins assert their application included the same hydrologic analysis and flow rate MDT used in its 2008 application for reconstruction of the Road. (*Id.* at 3).

Hamlins’ first two floodplain applications were ultimately denied after the County and the DNRC determined the applications projected too low of a flow rate. (*Id.*). The County informed Hamlins the floodplain applications would not be accepted or approved unless it met a minimum flow rate of approximately 1300 cfs for a 100-year flood event. (*Id.*). However, on March 5, 2018, Hamlins submitted a third permit application to the County which included a design for a detention pond to be constructed on Hamlins’ property as an alternative to their original designs rejected by the County and the DNRC. (Appellants’ App. 3 at 3). Based on the updated design, the County approved the construction of a

detention pond and issued a floodplain permit to Hamlins on July 16, 2019. (*Id.*).

Despite the issuance of Hamlins' floodplain permit, Hamlins filed suit against MDT and RPA alleging the culverts designed by RPA and constructed by MDT are undersized and therefore prevented Hamlins from obtaining final plat approval or a floodplain development permit for the Subdivision. (*Id.*). In their Complaint, Hamlins pleaded claims of public and private nuisance, inverse condemnation or takings, negligence, negligent misrepresentation, unjust enrichment, sought declaratory and injunctive relief, abatement, and damages including attorney's fees. (*Id.*).

STANDARD OF REVIEW

This Court reviews de novo a district court's grant or denial of summary judgment. *Brishka v. State*, 2021 MT 129, ¶ 9, 404 Mont. 228, 233, 487 P.3d 771, 774. Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Borges v. Missoula Cty. Sheriff's Office*, 2018 MT 14, ¶ 16, 390 Mont. 161, 415 P.3d 976. To determine whether a genuine issue of material fact exists, this Court will view all evidence and draw all reasonable inferences in the light most favorable to the non-moving party. *McLeod v. State ex rel. Dep't of Transp.*, 2009 MT 130, ¶

12, 250 Mont. 285, 206 P.3d 956. If the moving party satisfies its burden by demonstrating the absence of genuine issues of material fact and the party is entitled to judgment as a matter of law, the burden then shifts to the non-moving party to prove, by more than mere denial and speculation, that a genuine issue does exist. *Brishka*, ¶ 9; *Valley Bank v. Hughes*, 2006 MT 285, ¶ 14, 334 Mont 335, 147 P.3d 185. The non-moving party cannot create a genuine issue of material fact by putting its own interpretations and conclusions on an otherwise clear set of facts or by making conclusory statements. *Brishka*, ¶ 9 (citation omitted).

This Court reviews a district court’s ruling on a motion to dismiss de novo, using the standards set forth in M.R.Civ.P. 12(b)(6). *Puryer v. HSBC Bank USA, N.A.*, 2018 MT 124, ¶ 9, 391 Mont. 361, 419 P.3d 105.

This Court exercises plenary review of constitutional issues. *Big Sky Colony, Inc. v. Mont. Dep’t of Labor and Indus.*, 2012 MT 320, ¶ 16, 368 Mont. 66, 291 P.3d 1231 (citation omitted). The constitutionality of a statute is presumed, “unless it conflicts with the constitution, in the judgment of the court, beyond a reasonable doubt.” *Powell v. State Comp. Fund.*, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877. If any doubt exists, it must be resolved in favor of the statute. *Powell*, ¶ 13; *Mont. Cannabis Indus. Ass’n v. State*, 2016 MT 44, ¶ 12, 382 Mont. 256, 368

P.3d 1131.

This Court reviews a district court's denial of a motion to consolidate for an abuse of discretion. *Environmental Contractors, LLC v. Moon*, 1999 MT 178, ¶ 25, 295 Mont. 268, 983 P.2d 390. A district court abuses its discretion when it acts arbitrarily without employment of conscientious judgment or so exceeds the bounds of reason as to work a substantial injustice. *In re Formation of East Bench Irrigation Dist.*, 2009 MT 135, ¶ 21, 350 Mont. 309, 207 P.3d 1097 (citation omitted).

SUMMARY OF ARGUMENT

The District Court properly granted MDT's Motion for Summary Judgment with respect to Hamlins' claims of nuisance and inverse condemnation because no genuine issues of material fact remained and Hamlins were unable to establish causation.

The District Court did not err in its dismissal of Hamlins' unjust enrichment claim because Hamlins were unable demonstrate that the installation of the detention pond conferred a benefit upon MDT and therefore Hamlins were unable to establish a prima facie claim.

Mont. Code Ann. § 76-5-109(4) is constitutional under both rational basis and strict scrutiny and therefore the District Court did not err in its dismissal of Hamlins' nuisance (for damages), negligence, and negligent

misrepresentation claims.

Finally, the District Court's denial of Plaintiffs' Motion to Consolidate was within the discretion of the Court and, following MDT's recent joinder in the County lawsuit, this issue is now moot.

ARGUMENT

I. The District Court Properly Granted Summary Judgment in Favor of MDT on Plaintiffs' Inverse Condemnation or Takings Claim Because Plaintiffs Cannot Establish the Necessary Element of Causation.

The District Court appropriately granted summary judgment in favor of MDT as the undisputed, material facts demonstrate Hamlins are unable to establish the necessary element of causation and therefore cannot succeed on their claim of inverse condemnation or takings. Section I(A) below delineates why summary judgment was proper in accordance with the existing inverse condemnation standard, as established by this Court. Section I(B) sets forth why this Court should consider adopting the updated standard set forth in *Green v. City of Great Falls* and, if adopted, why summary judgment was also appropriate pursuant to that standard.

A. Existing Inverse Condemnation Standard.

The Fifth Amendment of the U.S. Constitution and Article II, Section 29 of the Montana Constitution similarly prohibit the taking of private

property for public use without just compensation.¹ Count II of Hamlins' First Amended Complaint asserts MDT's installation of the culverts, as approved by the County, has created a "hazardous condition" and "has dramatically depreciated the market value of the Hamlins' Subdivision property" amounting to an unconstitutional taking without just compensation. (Dkt. 51, ¶ 48). According to Hamlins, the "undersized" culverts constructed by MDT constitute a "defect in public infrastructure" and as a result of this purported defect, Hamlins' have been forced to decide between permanent loss of use of their adjacent property to construct the detention pond or abandonment of the Subdivision altogether. (*Id.*, ¶ 53).

This Court has defined inverse condemnation as a "cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *Adams v. Dept. of Highways*, 230 Mont. 393, 753 P.2d 846, 848 (Mont. 1988) (quoting *Thornburg v. Port of Portland* (Or. 1962), 376 P.2d 100, 101). Inverse condemnation is a property owner's "legal

¹ "Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner." Mont. Const. art. II, § 29. "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

remedy when the government takes or damages private property without first complying with the legal prerequisites of a standard government-initiated taking, condemnation, or exercise of eminent domain.” *Green v. City of Great Falls*, 8th Jud. Dist. Cause No. BDV-14-503(c), Order by District Judge Kutzman dated 12/6/2019, *3.

Montana courts recognize a cause of action for inverse condemnation without a physical taking of the property where “the result of the [government’s] actions has been to impose a servitude, a limitation upon the use and marketability of plaintiffs’ properties. . .” *Knight v. Billings*, 197 Mont. 165, 642 P.2d 141, 145 (Mont. 1982). While it has been universally recognized that a “physical invasion of the individual’s property for public use” is not required to establish entitlement to compensation, “[p]ersonal inconvenience or discomfort to the owner or interference with the business conducted on the land is not compensable unless such results are causative factors in the depreciation in value of the land.” *Adams*, 230 Mont. at 399 (citing 2A Nichols on Eminent Domain Section 6.31[2], pp. 6-221-222).

In Montana, the elements of inverse condemnation are concise: “A property owner may recover in an inverse condemnation action where actual physical damage is proximately caused to his property by a public

improvement as deliberately planned and built.” *Knight v. Missoula*, 252 Mont. 232, 243, 827 P.2d 1270, 1276 (1992); *Deschner v. State*, 2017 MT 37, ¶ 22, 386 Mont. 342, 390 P.3d 152. Further, the claimant does not need to establish negligent design, construction, or operation: “It is enough to show the damages were proximately caused by the undertaking of the project and a reasonable[y] foreseeable consequence of the undertaking. It is implicit in inverse condemnation that the extent of the damage be of such a degree as to amount to a taking of an interest in the property damaged.” *Rausser v. Toston Irrigation Dist.*, 172 Mont. 530, 538, 565 P.2d 632, 637 (1977).

The question Hamlins raise on appeal is whether the element of proximate cause, or foreseeability, can be considered in the inverse condemnation analysis when MDT did not plead superseding intervening cause as an affirmative defense.

“[P]roximate cause is one which in a natural and continuous sequence, unbroken by any new, independent cause, produces injury, and without which the injury would not have occurred.” *Thelen v. Billings*, 238 Mont. 82, 86, 776 P.2d 520 (1989) (citation omitted). “But for” causation is incorporated into this definition of proximate cause and is a test of cause in fact, not proximate cause. *Id.* The “‘but for’ test establishes that if the

act complained of had not taken place, the injury would not have resulted.” *Thelen*, 238 Mont. at 87. However, because the “but for” analysis has the potential to stretch an argument to its “logical extreme,” Montana law “requires an act to be the proximate cause of an injury before liability will attach.” *Thelen*, 238 Mont. at 87.

Hamkins cite to *Busta v. Columbus Hosp.*² and *Brishka*, to support their argument that only when a defendant asserts the affirmative defense of superseding intervening cause should there be any discussion of whether the public improvement proximately caused the injury to plaintiff’s property. However, the District Court found both cases unpersuasive when applied to the present circumstances.

First, the issue presented in *Busta* was whether the district court erred in refusing to give the defendant’s proposed jury instructions defining proximate cause. *Busta*, 276 Mont. at 357. The holding in *Busta* provides that in direct cause cases where no independent intervening forces are present, proof of causation is satisfied by proof of but-for causation and consideration of foreseeability is not required. *Busta*, 276 Mont. at 373. The holding in *Busta* does not, however, require independent intervening or multiple causes to be pleaded as an affirmative defense for proximate

² 276 Mont. 342, 916 P.2d 122 (1996).

cause to be the appropriate analysis.

The District Court found this Court's holding in *Covey v. Brishka*, 2019 MT 164, 396 Mont. 362, 445 P.3d 785 similarly unpersuasive of Hamlins' theory. *Covey* considered the applicability of proximate cause in a claim for strict liability. *Covey*, ¶ 61. The plaintiffs argued the defendants waived their superseding intervening cause arguments by failing to affirmatively plead them. *Covey*, ¶ 65. However, the Court in *Covey* did not rule on whether the plaintiffs were required to prove but-for or proximate cause to prove strict liability. Instead, *Covey* found because the defendants failed to disclose an expert in their initial expert disclosures, the district court properly excluded expert testimony apportioning liability to MDT. *Covey*, ¶ 66.

Significantly, in its Order on Summary Judgment the District Court cautioned of what might result if Hamlins were able to establish causation using only the but-for test: "Logically, allowing a plaintiff to only satisfy but-for causation would open public entities like MDT up to so much liability it would discourage public improvement. This is why the law requires the act to be the proximate cause for liability to attach, not the but-for cause of the injury." (Appellants' App. 6 at 11).

The most persuasive cases are those dealing directly with inverse

condemnation. Namely, *Thelen*, *Rauser*, and *Knight*; all of which explicitly take proximate cause and foreseeability into consideration. The District Court correctly included proximate cause in its analysis of Hamlins' inverse condemnation claim.

Not only did the District Court find proximate cause necessary to the inverse condemnation analysis, it also held that Hamlins' allegations against MDT cannot meet the proximate causation standard set forth in *Thelen*. Hamlins allege MDT "deliberately planned and built" the purportedly inadequate culverts, resulting in an unconstitutional taking of their property. *Knight*, 252 Mont. at 243. To support this position, Hamlins argue MDT improperly relied on the lowest calculation of flow rates under the Regional Frequency Analysis to design its culverts with a peak flow rate accommodation of 512.1 cfs. According to Hamlins, MDT should have utilized the USGS Rural Regression Equations that had a 100-year peak flow rate of 1,532.4 cfs, which would have prevented the need to construct a detention pond altogether. Despite this assertion, Hamlins have failed to demonstrate MDT's reliance on the Regional Frequency Analysis was flawed. In fact, MDT analyzed four separate hydrologic methods prior to designing the culverts. (MDT's App. 1, Hedstrom Aff. at ¶ 2). Three of the methods were based on measured stream flow data

from the USGS gages in the Helena Valley, and the fourth method was the USGS Rural Regression Equations. (*Id.*) The three methods based on the local gage data yielded similar results ranging from 463 cfs to 557 cfs for the 100-year flood event. (*Id.*) The results from the USGS Regression Equation were a clear outlier with a result of 1,500 cfs, three times higher than figures produced by the other three methods. (*Id.* at ¶ 3).

Furthermore, the flows from the Regional Frequency Analysis were checked against existing culverts with known capacity problems and were deemed reasonable based on known flooding issues. (*Id.* at ¶ 4). MDT relied on data yielded from streams in the Helena Valley, all with comparable flows to the conditions present near the Road and Hamlins' property. (*Id.* at ¶¶ 6-7). In sum, MDT designed and constructed the culverts in accordance with prevailing methodologies and Hamlins' only basis for claiming otherwise is that the County denied their flood plain permit application *years* after MDT constructed the culverts.

Had the County informed MDT after submitting its permit application that the culverts, built to accommodate a flow rate of 512.1 cfs, were inadequate per their guidelines, MDT would have redesigned the culverts and resubmitted its floodplain application to meet the increased standards. Instead, MDT thoughtfully designed the culverts to comply not only with

the Regional Frequency Analysis, and three of the four methodologies considered by MDT, but also with the County's own standards, as evidenced by its approval of MDT's permit application.

Just as in *Thelen*, the facts recited by Hamlins "do not go to the question of whether there was a natural, continuous, uninterrupted sequence" between MDT's construction of culverts and the County's denial of Hamlins' floodplain permit applications. They simply allege "but for." *Thelen*, 238 Mont at 86.

It is worth noting that Hamlins also mischaracterize the correspondence between MDT and the Garbers prior to Plaintiffs' ownership of the property. In Hamlins' opening brief, they assert the Garbers repeatedly questioned the sufficiency and capacity of the culverts and insinuate that MDT rebuffed their concerns. This narrative, however, is inaccurate. In meetings between RPA and the Garbers, RPA explained that installation of the larger culverts, as requested by Garbers, would require the roadway grade to be raised. (*Id.* at ¶ 11). Raising the roadway had the potential for *worsening* the flooding as it could raise the maximum water surface before overtopping the road. (*Id.*) While the Garber's requests to increase the culvert sizes were not granted, their concerns that the new roadway would flood the structures on their property were

addressed. (*Id.*).

B. Green v. City of Great Falls Standard.

In its summary judgment briefing and at oral argument before the District Court, MDT relied on *Green v. City of Great Falls*, in addition to the inverse condemnation jurisprudence set forth in *Knight* and *Deschner* above, to demonstrate Hamlins' inability to establish the element of causation. Specifically, MDT urged the District to adopt the standard set forth in *Green v. City of Great Falls* not only because it clarifies the element of causation in inverse condemnation proceedings, but also because it represents the logical continuation of Montana's inverse condemnation jurisprudence.

In *Green v. City of Great Falls*, a woman filed suit for inverse condemnation against the city of Great Falls when a sewage main backed up and sewage traveled up her lateral connection, damaging her home. *Green*, *1. In ruling on the parties' cross motions for summary judgment, the court in *Green* relied on a California Supreme Court case, *City of Oroville v. Superior Court*, to expand on the role causation plays in an inverse condemnation case involving damages caused by a public improvement. 7 Cal. 5th 1091, 250 Cal. Rptr. 3d 803, 446 P.3d 304, 315 (Ca. 2019). Similar to the facts in *Green*, in *City of Oroville* a dental

practice filed suit against the city when raw sewage backed up, resulting in damage to the dentists' building. *City of Oroville* at 1097-1098. The dental practice brought an action for inverse condemnation against the city in an attempt to recover damages for injuries to their building. *Id.* The city denied the dentists' claim for compensation and maintained that the damage occurred because the dentists failed to install a legally required backwater valve that would have prevented the sewage backup and resulting damage. *Id.* Notably, the Court in *City of Oroville* held:

A court assessing inverse condemnation liability must find more than just one causal connection between the public improvement and *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. This approach aligns with how we have previously analyzed inverse condemnation liability cases. It also protects private property owners by allocating the financial losses resulting from the public improvement across the community and provides public entities with an incentive to internalize the reasonable risks of their public improvements.

The concepts of “inherent risk” and “substantial causation” address somewhat overlapping considerations but play distinct roles in the analysis of inverse condemnation. And both must be present for a public entity to be liable. . .

Green at *6 (emphasis in original) (quoting *City of Oroville v. Superior Court*, 7 Cal. 5th 1091, 250 Cal. Rptr. 3d 803, 446 P.3d 304, 315 (Ca. 2019)). The Court further explained that: “One ‘such inherent risk’ would be deliberately cutting corners during the design and construction stage to

try to save money. *Green* at *8; *City of Oroville* at 313. Or, “deliberately deferring maintenance after construction and instead ‘wait[ing] until it breaks,’ again to try to save money. *Green*, *8; *City of Oroville* at 313-314.

In addition to identifying inherent risks, “the plaintiff must also establish substantial causation. . .Liability depends on whether some element of physical, but-for causation is present to link the public improvement and the damage. The damage must be the ‘necessary or probable result’ of the improvement, or if the ‘immediate, direct, and necessary effect’ thereof was to produce the damage.” *Green* at *8-9 (quoting *City of Oroville* at 314). The court in *City of Oroville* further noted: “Rather than training attention on the mere presence of causation, our cases have focused instead on whether there is proof that the damages ‘followed in the normal course of subsequent events’ and were ‘predominantly’ produced by the improvement.” *City of Oroville*, at 1108 (citing *Youngblood*, supra, 56 Cal. 2d. 603; *Los Angeles C. Assn. v. Los Angeles* (1894) 103 Cal. 461, 470 [37 P. 375]).

Here, MDT’s construction of the culverts did not involve any such “inherent risks” as described in *Green*. Nor can Hamlins demonstrate that denial of their permit applications was the “necessary or probable result”

following MDT's construction of the culverts. *Green* at *8-9. Rather, MDT's construction of the culverts involved careful engineering by RPA and conformed to the then-current USGS guidelines and all other requirements imposed by the County and the DNRC. MDT had neither the obligation nor the ability to predict how the County might impose USGS guidelines in the coming years and how it may affect Hamlins' future development. Hamlins purchased property in a known floodplain and invested their resources into the Subdivision with the understanding that they would first have to meet the conditions imposed by the County before development could occur. It is untenable for Hamlins to now claim that MDT has imposed an unconstitutional taking when the County is simply requiring Hamlins to follow the same procedure MDT adhered to prior to construction of the culverts. Their claims do not meet the standard set forth in *Green* as Hamlins cannot demonstrate the alleged damage was "substantially caused by an inherent risk" associated with the construction of the culverts. *Green* at *6.

Hamlins do not provide any evidence that MDT's construction of the culverts involved "inherent risks." Instead, Plaintiffs assert, without substantiation, that MDT constructed the culverts to accommodate a 100-year flow rate of 512.1 cfs instead of the 1,532.4 cfs as a "cost-saving

measure.” (Appellants’ Opening Br., at 15). Hamlins provide no factual support for this allegation. In reality, the culverts were designed to accommodate 512.1 cfs in strict compliance with the Regional Frequency Analysis, as opposed to the 1,532.4 cfs pursuant to the USGS Rural Regression Equations, because it was consistent with three of the four methods analyzed and the USGS gages in the Helena Valley. (MDT’s App. 1, Hedstrom Aff. at ¶ 12). Apart from Hamlins’ inaccurate and unsupported assumption that the Regional Frequency Analysis was used to cut costs, Plaintiffs can point to no inherent risks involved in the planning or construction of the culverts and the District Court had no obligation to anticipate such proof might be offered at trial. *Larry C. Iverson, Inc. v. Bouma*, 195 Mont. 351, 374, 639 P.2d 47 (1981).

In addition to identifying inherent risks, Hamlins must also establish substantial causation. “Liability depends on whether some element of physical, but-for causation is present to link the public improvement and the damage. The damage must be the ‘necessary or probable result’ of the improvement, or if the ‘immediate, direct, and necessary effect’ thereof was to produce the damage.” *Green* at *8-9 (quoting *City of Oroville* at 314). Logically, the “necessary or probable result” of inadequately designed culverts would be flooding or damage to Plaintiffs’ property—

not the County's denial of their floodplain permit. As illustrated in the discussion above, because MDT's culverts were adequately designed to prevent flooding in accordance with prevailing methodology, Hamlins cannot establish substantial causation.

Hamlins' allegations do not meet the causation standards set forth in *Green* and *City of Oroville* nor do they meet those delineated by the District Court in Hamlins' corresponding case against the DNRC. In an order dismissing Hamlins' claim of inverse condemnation against the DNRC, the District Court held Hamlins' inverse condemnation claim lacked merit because: "The County was the entity with the power to deny and approve Hamlins' applications and who actually did so. . . not DNRC. Therefore, Hamlins cannot establish the element of causation, or but for DNRC's actions, Hamlins would not have suffered an alleged taking or exaction." (MDT's App. 2, Order on DNRC's Motion to Dismiss at 13). Hamlins' claim of inverse condemnation against MDT includes this same fatal flaw—MDT was not the but-for cause or "the moving force" behind the alleged constitutional violation. *Bateson v. Geiss*, 857 F.2d 1300, 1303 (9th Cir. 1988). If any taking did occur in contravention to the United States and Montana Constitutions, the party denying the floodplain permit applications and requiring construction of a detention pond, in this case

the County, is the responsible party, not MDT.

The requisite causal connection “can be established not only by some kind of direct personal participation in the deprivation but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury” or were a “reasonabl[y] foreseeable consequence of the undertaking.” *Merritt v. Mackey*, 827 F.2d 1368, 1371 (9th Cir. 1987) (quoting *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978)); *Rausser* at 538, 565 P.2d at 637.

Here, Hamlins cannot demonstrate that MDT knew, or reasonably should have known, that the culverts were “undersized” or that the County would require Hamlins to construct a detention pond on their property prior to development. MDT simply submitted a floodplain permit application consistent with the then-current USGS guidelines. MDT strictly adhered to County procedures with respect to the floodplain permit application process and MDT’s permit was approved in accordance with the relevant guidelines.

The undisputed facts demonstrate that the County’s denial of Hamlins’ floodplain application permits was neither “a reasonabl[y] foreseeable consequence” of the construction of MDT’s culverts nor are they the but-

for cause of Hamlins' alleged injury. *Merritt*, 827 F.2d at 1371. Moreover, consistent with the court's holding in *Green*, the undisputed facts establish that MDT's construction of the culverts, as approved by the County and DNRC, did not involve any "inherent risks" for which MDT should be held responsible.

Should Hamlins' succeed in the present claim against MDT, the result would be to allocate their unique, individual financial losses across the community. While inverse condemnation is appropriate when a liability "can better be absorbed, and with infinitely less hardship, by the taxpayers as a whole, than by owners of the individual parcels," such a result would be improper here. *Rausser*, 172 Mont. at 539, 565 P.2d at 638. Hamlins chose to develop in a known floodplain with the understanding that development would require satisfaction of any conditions imposed by the County. While the conditions imposed by the County are more expensive than Hamlins may have anticipated, taxpayers should not be held responsible for subsidizing the cost.

The undisputed facts, namely that MDT constructed the culverts with the express approval of the County and the DNRC and in strict compliance with all relevant guidelines, demonstrate MDT was entitled to judgment as a matter of law and summary judgment in favor of MDT on Hamlins'

claims of inverse condemnation or takings should be upheld.

“Material issues of fact are identified by looking to the substantive law which governs the claim.” *Glacier Tennis Club at the Summit v. Treweek Const. Co.*, 2004 MT 70, ¶ 21, 320 Mont. 351, 87 P.3d 431. Here, the applicable substantive law is the two-pronged inverse condemnation analysis delineated in *Knight* and potentially the “substantial cause” and “inherent risk” standard adopted in *Green v. City of Great Falls*; both of which favor summary judgment. While Hamlins and the District Court correctly noted that *City of Oroville* is not presently binding on this Court, the Court in *Green* reasoned:

Obviously, *Oroville* does not bind this Court or any other Montana court. The Montana Supreme Court may ultimately reject it. But given what Ms. Green has already said about the tight logical relationship between Montana and California inverse condemnation law, it seems prudent to incorporate *Oroville* into the legal principles that apply to the competing summary judgment motions now before this Court.

Green at *12. As acknowledged by the Court in *Green*, key features of Montana inverse condemnation jurisprudence are derived from California case law. Further, in *Busta*, this Court acknowledged how plagued by confusion this area of the law is, noting: “The law of foreseeability, as it relates to liability law in Montana, has had a tortuous history” and the “misunderstanding engendered by the term ‘proximate cause’” is well

documented. *Busta*, 276 Mont. at 360, 372.³ However, even if this Court is unpersuaded by the “substantial cause” and “inherent risk” standard, summary judgment is nevertheless appropriate for Plaintiffs’ failure to demonstrate proximate cause per *Knight*.

In light of the relevant substantive legal principles, MDT has demonstrated a complete absence of any genuine issues of material fact with regard to Hamlins’ claim of inverse condemnation or takings and is entitled to judgment as a matter of law. *Bruner v. Yellowstone Co.*, 272 Mont. 261, 265, 900 P.2d 901, 904 (1995).

II. The District Court Properly Dismissed Hamlins’ Nuisance Claim for Failure to Establish Causation.

The District Court properly granted summary judgment in favor of MDT on Hamlins’ nuisance claim as Hamlins are unable to establish an alleged nuisance was proximately caused by MDT’s construction of the culverts.

Nuisance is statutorily defined as:

[a]nything that is injurious to health, indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property or that unlawfully obstructs the free passage or use, in the customary manner, of any

³ *Busta* also included the following in its opinion which aptly explains how confusing the application of proximate cause can be: “Proximate cause,” in short, has been an extraordinarily changeable concept. “Having no integrated meaning of its own its chameleon quality permits it to be substituted for any one of the elements of a negligence case when decision on that element becomes difficult. . . No other formula. . . so nearly does the work of Aladdin’s lamp.” *Busta*, 276 Mont. at 369 (quoting W. Page Keeton, et al., *Prosser and Keeton on Torts* § 42, at 272-76 (5th ed. 1984)).

navigable lake, river, bay, stream, canal, or basin or any public park, square, street, or highway...

Mont. Code Ann. § 27-30-101(1). However, “nothing that is done or maintained under the express authority of a statute may be deemed a public or private nuisance.” Mont. Code Ann. § 27-30-101(2). In *Barnes v. City of Thompson Falls*,⁴ this Court clarified the law on nuisance and held in order to maintain a claim for nuisance notwithstanding the immunizing effects of Mont. Code Ann. § 27-30-101(2), a plaintiff must establish either (1) the defendant’s conduct was completely outside its statutory authority, resulting in an absolute nuisance; or (2) if the activity or facility is authorized by the express terms of the authorizing statute or necessary implication therefrom, the defendant was negligent in carrying out its statutory authority, resulting in a qualified nuisance. *Barnes*, ¶¶ 26-27.

In applying *Barnes*, the District Court found MDT’s statutory authority to install the culverts was derived from the floodplain development permit issued by the County. (Appellants’ App. 6 at 18). Thus, the burden shifted to Hamlins to present “material and substantial evidence” to raise a genuine issue of material fact that MDT acted outside

⁴ 1999 MT 77, 294 Mont. 76, 979 P.2d 1275.

their floodplain development permit in installing the culverts. Hamlins provided no such evidence.

To the second *Barnes* prong, in order to prove their claim for qualified nuisance, Hamlins must establish MDT acted negligently and therefore prove (1) existence of a duty; (2) breach of the duty; (3) causation; and (4) damages. *Abraham v. Nelson*, 2002 MT 94, ¶ 11, 309 Mont. 366, 46 P.3d 628. However, for the same reasons Hamlins were unable to establish proximate cause with respect to their claim of inverse condemnation, Hamlins were unable to establish a proximate cause between MDT's actions and their alleged damages. Thus, the District Court did not err when it found both prongs of the *Barnes* test were left unsubstantiated and held in favor of MDT.

On appeal, Hamlins' assert the District Court erred in considering MDT's argument regarding causation because it was raised for the first time in MDT's Reply Brief. However, this argument is disingenuous. MDT relied upon this argument at oral argument and Hamlins were provided a full and fair opportunity to respond. Furthermore, the analysis relating to proximate causation on Hamlins' nuisance claim is essentially identical to the causation argument concerning their inverse condemnation claim. The bulk of both parties' briefing and oral argument

before the District Court centered around the applicability of proximate causation. Hamlins' had ample opportunity to address this issue—the District Court simply found their arguments unpersuasive.

III. The District Court Properly Dismissed Hamlins' Unjust Enrichment Claim Because Hamlins' Cannot Establish a Prima Facie Claim.

The District Court appropriately granted MDT's Motion to Dismiss Hamlins' allegations of unjust enrichment as Hamlins' cannot satisfy the elements necessary to establish a prima facie claim and therefore failed to state a claim upon which relief could be granted. M.R.Civ.P. 12(b)(6).

“Unjust enrichment is an equitable claim for restitution to prevent or remedy inequitable gain by another.” *Assoc. Mgmt. Servs. v. Ruff*, 2018 MT 182, ¶ 392, Mont. 139, 424 P.3d 571 (citing *N. Cheyenne Tribe v. Roman Catholic Church ex rel. Great Falls/Billings Dioceses*, 2013 MT 24, ¶¶ 36-39, 368 Mont. 330, 296 P.3d 450). Unjust enrichment involves “[t]he retention of a benefit conferred by another, without offering compensation, in circumstances where compensation is reasonably expected.” *Owen v. Skramovsky*, 2013 MT 348, ¶ 25, 372 Mont. 531, 313 P.3d 205. Unjust enrichment requires proof that a party unjustly gained something of value. *Assoc. Mgmt. Servs.*, ¶ 65 (citation omitted).

In order to succeed on an unjust enrichment claim in Montana, the

plaintiff must establish the following essential elements: (1) a benefit conferred on one party by another; (2) the other's appreciation or knowledge of the benefit; and (3) the other's acceptance or retention of the benefit under circumstances that would render it inequitable for the other to retain the benefit without compensating the first party for the value of the benefit. *N. Cheyenne Tribe*, ¶¶ 33, 36.

With respect to the first element, Hamlins' assert:

MDT clearly gained a benefit due to Hamlins' construction of the detention pond. As a result of the County and DNRC's determination that MDT's culverts were grossly undersized for the drainage in question, under normal circumstances that determination should have triggered MDT's statutory duty to correct the errors and deficiencies found by another government entity in its public highway.

(Appellants' Opening Br. at 21). Hamlins' unjustifiably characterize the culverts as "deficient" simply because they only accommodate a flowrate of 512 cfs in comparison to the flow rate of 1300 cfs the County and DNRC required for the Subdivision. Similarly, the only evidence Hamlins have to support their argument that the culverts are deficient is the fact that the County denied its initial permit applications. In reality, MDT's culverts are not deficient and Hamlins' unilateral claims to the contrary were insufficient to overcome MDT's Motion to Dismiss.

Since their construction, MDT's culverts have functioned precisely as they were designed—that is, to withstand a 100-year flood event; and no

flooding events or property damage as a result of the culverts has occurred. Nor has the County or the DNRC notified MDT that the culverts are somehow deficient or pose a risk to public safety. The culverts were designed and constructed in strict adherence to the relevant hydraulic methodologies *seven years* before Hamlins' first permit application was denied. The County's issuance of MDT's permit and failure to request any sort of remediation after the construction of the culverts demonstrates they were not negligently or deficiently designed.

To support their deficiency allegations, Hamlins only rely on MDT's purported failure to utilize the "correct" methodology—the USGS Rural Regression Equation. According to Hamlins, MDT's reliance on the alternative Regional Frequency Analysis allowed MDT to construct smaller culverts, ultimately requiring Hamlins to install the detention pond, and saving MDT the cost associated with constructing larger culverts. Yet, to succeed on this argument Hamlins would have to demonstrate that reconstruction of the culverts in accordance with the USGS Rural Regression Equation was an inevitability the County and the DNRC would have imposed. However, at no point has the County or the DNRC characterized the culverts as "deficient" or notified MDT that larger culverts would need to be installed.

As previously mentioned, David Hedstrom, a hydraulic engineer with MDT, noted in his affidavit that raising the grade of the road (and installing larger culverts) as suggested by Hamlins and the Garbers had the potential to actually create a *larger* flood risk as it would raise the maximum water surface before overtopping the Road. On this basis, there is the potential that the larger culverts proposed by Hamlins, as opposed to those currently in place, would be deficient as they could increase the risk of flooding and potentially damage adjacent properties. (MDT's App. 1, Hedstrom Aff. at ¶ 11).

The District Court correctly rejected Hamlins' claims regarding the allegedly deficient culverts noting, "nowhere do Hamlins allege the culverts would be defective or deficient absent Hamlins' plans to build the Subdivision. Hamlins do not allege MDT created a condition which on its own interferes with the rights of adjacent landowners. Without Hamlins' plans to create the Subdivision on their property, Hamlins do not allege the culverts would present an issue." (Appellants' App. 4 at 9).

Without substantiating their deficiency claims, Hamlins' simply cannot demonstrate the installation of the detention pond conferred a benefit upon MDT. Hamlins proposed the increased flow rate and the erection of the detention pond, not MDT, and DNRC and the County

approved this proposal, not MDT.

Further, “[a] person who, incidentally to the performance of his own duty or to the protection or improvement of his own things, has conferred a benefit upon another is not thereby entitled to contribution.” Restatement of Restitution: Quasi Contracts & Constructive Trusts § 106 (1937). Hamlins’ decision to construct a detention pond was necessitated by Plaintiffs’ decision to build a residential subdivision, of its design, in a known floodplain. Hamlins’ decision to improve its land, and the corresponding development obligations does not establish that MDT has been unjustly enriched. Rather, any alleged “benefit” to MDT is incidental to Plaintiffs’ improvements and protections for their own property. Plaintiffs’ unjust enrichment claim fails for this reason alone.

Moreover, any alleged “benefit” Plaintiffs assert they have conferred on MDT is without MDT’s appreciation or acceptance. Improvements to Plaintiffs’ property was done at their choice, so they could develop a one hundred lot residential subdivision in the middle of a known floodplain. MDT did not require Plaintiffs to purchase land for a subdivision without thorough investigation into the floodplain related issues. Nor did MDT require Hamlins to install a detention pond on land adjacent to the Subdivision. Instead, Plaintiffs made these decisions based

on their unique economic interests. Put simply, Plaintiffs chose to install extensive, costly infrastructure for their sole benefit and which MDT had no control over. MDT has neither appreciated nor accepted any benefit resulting from Plaintiffs' installation of the detention pond.

Hamlins are responsible for shouldering their private infrastructure obligations stemming from unilateral development choices associated with their for-profit ventures. Plaintiffs cannot demonstrate the culverts are deficient or that the construction of the detention pond conferred a benefit upon MDT. Accordingly, Hamlins failed to sufficiently plead their claim for unjust enrichment and the District Court did not err in its dismissal per M.R.Civ.P. 12(b)(6).

IV. MDT's Grant of Immunity Per Mont. Code Ann. § 76-5-109(4) is Constitutional and Does Not Violate Hamlins' Substantive Due Process Rights.

Before the District Court and again on appeal Hamlins bring an as-applied constitutional challenge to Mont. Code Ann. § 76-5-109(4), asserting the statute, insofar as it grants sovereign immunity to MDT, violates Hamlins' substantive due process rights. The District Court held in its August 19, 2019 Order on MDT's Motion to Dismiss that MDT does not have sovereign immunity under Mont. Code Ann. § 76-5-109(4) with respect to Plaintiffs' inverse condemnation or takings claim and, similarly,

that MDT does not have sovereign immunity over the Hamlins' nuisance claim to the extent it seeks nonmonetary relief. (Appellants' App. 1 at 4). However, the District Court held MDT does have sovereign immunity as it relates to Hamlins' negligence and negligent misrepresentation claims. Hamlins reassert their constitutional challenge on appeal and argue to the extent Mont. Code Ann. § 76-5-109(4) grants sovereign immunity to MDT, the statute is inconsistent with and violative of Mont. Const. art. II, §§ 18 and 29 and the Fifth Amendment of the U.S. Constitution.

The statute at issue provides: "An action for damages sustained because of injury caused by an obstruction for which a permit has been granted under parts 1 through 4 may not be brought against the state or the department." Mont. Code Ann. § 76-5-109(4).

In accordance with Article II, Section 29 of the Montana Constitution, "Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner." Mont. Const. art. II, § 29. This Court has identified Mont. Const. art. II, § 29 to be "self-executing," meaning it allows for the recovery of monetary damages without it first being given legislative effect. *City of Missoula v. Mont. Water Co.*, 2019 MT 139, ¶ 11, 391 Mont. 422, 428, 410 P.3d 685, 690.

Article II, Section 18 of the Montana Constitution prohibits sovereign immunity for government entities except as “provided by law by a 2/3 vote of each house of the legislature.” When the constitutionality of such a provision is challenged, the court must first determine which level of scrutiny applies—strict scrutiny, middle-tier scrutiny, or the rational basis test. *Mont. Cannabis Indus. Ass’n v. State (MCIA I)*, 2012 MT 201, ¶ 16, 366 Mont. 244, 229, 286 P.3d 1161, 1165.

Legislation implicating a fundamental constitutional right is evaluated under a strict scrutiny standard, whereby the government must show the statute is narrowly tailored to serve a compelling state interest. *Id.* (citing *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 17, 325 Mont. 148, 104 P.3d 445). Middle-tier scrutiny is applied when the legislation at issue affects a right conferred by the Montana Constitution, but not present in the Constitution’s declaration of rights. *Id.*; *Snetsinger*, ¶ 18. Finally, if neither strict scrutiny nor middle-tier scrutiny apply, the court must apply the rational basis test, which requires the legislation to be rationally related to a legitimate government interest. *Id.*; *Snetsinger*, ¶ 19.

Both the Fourteenth Amendment to the United States Constitution and Article II, section 17 of the Montana Constitution provide no person shall be deprived of life, liberty, or property without due process of law. “The

theory underlying substantive due process reaffirms the fundamental concept that the due process clause contains a substantive component which bars arbitrary governmental actions regardless of the procedures used to implement them, and serves as a check on oppressive governmental action.” *Powell v. State Compensation Ins. Fund*, 2000 MT 321, ¶ 28, 302 Mont. 518, 15 P.3d 877. It also refers to “the ability of government to restrict the freedom of action (regarding life, liberty or property) of all persons.” 2 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance & Procedure* § 15.4(a) at 823-34 (5th ed. 2012). The substantive due process analysis requires “a test of the reasonableness of a statute in relation to the State’s power to enact legislation.” *Newville v. State, Dept. of Family Services*, 267 Mont. 237, 250, 883 P.2d 793, 801 (1994).

Here, the District Court appropriately applied rational basis scrutiny to Mont. Code Ann. § 76-5-109(4)’s grant of sovereign immunity to MDT. The Montana Constitution provides citizens the right to acquire, possess, and protect property; and both the Montana and United States’ Constitutions provide no person shall be deprived of their property without due process of law and just compensation. Mont. Const. art. II, §§ 3, 17, 29; U.S. Const. amend. V. In finding MDT does not have sovereign

immunity with respect to Hamlins' inverse condemnation or takings claim or their nuisance claim to the extent it seeks nonmonetary damages, the District Court did not restrict Plaintiffs from exercising their constitutional rights to acquire, possess, and protect their property, even if MDT has sovereign immunity over the Hamlins' negligence and negligent misrepresentation claims. As such, although Mont. Code Ann. § 76-5-109(4) regulates property, it does not restrict the Hamlins' exercise of their constitutional rights.

A. Mont Code Ann. § 76-5-109(4) is Constitutional Under Rational Basis Scrutiny.

Under rational basis scrutiny, the constitutionality of a legislative enactment is prima facie presumed, and “every possible presumption must be indulged in favor of the constitutionality” of the statute. *Powell*, ¶ 13; *Davis v. Union Pacific R. Co.*, 282 Mont. 233, 240, 937 P.2d 27, 31 (1997). The party challenging the legislation bears the burden of proving its unconstitutionality beyond a reasonable doubt and, if any doubt exists, it must be resolved in favor of the statute. *Powell*, ¶ 13. Rational basis scrutiny requires the court to examine (1) whether the legislation at issue related to a legitimate governmental interest, and (2) whether the means chosen by the legislature are reasonably related to the result sought. *MCIA I*, ¶ 21.

In determining whether the statute’s objective is legitimate, the court examines the legislation’s purpose, whether expressly stated or otherwise. *MCIA I*, ¶ 22. The legislation’s purpose “does not have to appear on the face of the legislation or in the legislative history, but may be any possible purpose of which the court can conceive.” *Id.* (quoting *Walters v. Flathead Concrete Prods.*, 2011 MT 45, ¶ 28, 359 Mont. 346, 249 P.3d 913). Here, Mont. Code Ann. § 76-5-109(4) is codified in the Flood Plain and Floodway Management Act (the “Act”). The Legislature’s express purpose in enacting the Act was to, among other reasons, (i) “guide development of the floodway areas” of Montana; (ii) encourage local government to manage flood-prone lands, “including the adoption, enforcement, and administration of land use regulations; and (iii) provide the DNRC with “authority necessary to carry out a comprehensive floodway management program for the state.” Mont. Code Ann. § 76-5-102(1)(a), (e)-(f).

Mont. Code Ann. § 76-5-109(4) presents a legitimate state interest as “it is conceivable the legislature included in the Act a provision granting sovereign immunity to the state to enable the state to achieve the goals of the Act without fear of repercussion, especially where private property rights could be involved.” (Appellants’ App. 2 at 11). Thus, the grant of

sovereign immunity within the legislation serves a legitimate state interest.

Moving next to the second prong of the rational basis analysis, the District Court also correctly determined the means chosen by the legislature are reasonably related to the result sought. “A statute that is unreasonable, arbitrary, or capricious and bears no reasonable relationship to a permissible government interest offends due process.” *Goble v. Mont. State Fund*, 2014 MT 99, ¶ 40, 374 Mont. 453, 325 P.3d 1211. Alternatively, a statute that is neither unreasonable nor arbitrary “when balanced against the purpose of the legislature in enacting the statute” will not offend due process. *MCIA I*, ¶ 30 (quoting *State v. Egdorf*, 2003 MT 264, ¶ 19, 317 Mont. 436, 77 P.3d 517). “This deferential standard demonstrates the Court’s recognition that [it] ha[s] only the power to destroy, not to reconstruct.” *MCIA I*, ¶ 30 (internal quotations and citation omitted).

Here, Hamlins’ simply cannot establish Mont. Code Ann. § 76-5-109(4) is unreasonable, arbitrary, or capricious. Generally speaking, all public agencies, institutions, and political subdivisions of the state appreciate sovereign immunity “at least while performing governmental functions, since, while so engaged, they merely act for the benefit of the

state and of the public generally.” *Longpre v. School District No. 2*, 151 Mont. 345, 347, 443 P.2d 1 (1968). Without the grant of immunity provided by Mont. Code Ann. § 76-5-109(4), state entities would be left vulnerable to constant, often unwarranted, lawsuits that could halt public development and deprive Montana communities of vital infrastructure. The Legislature deliberately incorporated sovereign immunity into the statute so state and local governments could achieve the express purposes of the Act without fear of unremitting litigation that would serve only as a drain on the state’s resources. Therefore, Mont. Code Ann. § 76-5-109(4)’s grant of sovereign immunity is reasonably related to the legitimate purposes of the provision and is constitutional under rational basis scrutiny.

B. Mont Code Ann. § 76-5-109(4) is Constitutional Under Strict Scrutiny.

On appeal, Hamlins assert the District Court erred in its application of rational basis scrutiny and, because the legislation infringes upon the fundamental right to protect property, the strict scrutiny standard must be applied. Although MDT disagrees that a fundamental right is implicated, for the reasons set forth below the statute withstands strict scrutiny.

Strict scrutiny of a legislative act requires the government to show a compelling state interest for its action. *Wadsworth v. State*, 275 Mont. 287,

911 P.2d 1165, 1174 (1995). When the government intrudes upon a fundamental right, any compelling state interest for doing so must be closely tailored to effectuate only that compelling state interest. *Id.* (citation omitted). The state must also show that the choice of legislative action is the least onerous path that can be taken to achieve the state's objective. *Id.*; *Pfost v. State*, 219 Mont. 206, 216, 713 P.2d 495, 505 (1985).

Here, Mont Code Ann. § 76-5-109(4) serves a compelling state interest because it “enables the state to achieve the goals of the Act without fear of repercussion, especially where private property rights could be involved.” (Appellants’ App. 2 at 11).

Further, contrary to Hamlins’ assertions, Mont. Code Ann. § 76-5-109(4) does not entirely preclude Hamlins from recovering against the state. Hamlins had colorable, albeit unsuccessful, claims against MDT on inverse condemnation, unjust enrichment, and nuisance. What ultimately prevented Hamlins from recovering damages from MDT is not Mont. Code Ann. § 76-5-109(4) as they purport, but Hamlins’ inability to establish causation with respect to inverse condemnation and nuisance and failure to show MDT benefited from their installation of a detention pond. In short, Mont. Code Ann. § 76-5-109(4) would not prevent a citizen from

succeeding on an inverse condemnation or takings claim if a taking actually occurred.

Even if this Court disagrees with the District Court's application of the rational basis test, Mont. Code Ann. § 76-5-109(4) overcomes strict scrutiny analysis and remains constitutional as applied.

V. The District Court's Denial of Plaintiffs' Motion to Consolidate Was Within the Discretion of the District Court and is Now Moot.

The District Court did not err in denying Hamlins' Motion to Consolidate because the claims against MDT and the County are based upon the distinct conduct of each entity and the potential liability of MDT and the County will be, or has already been, determined by each entity's unique actions. Moreover, this issue is now moot as MDT has been joined as a defendant in the lawsuit pending against the County.

After filing three separate lawsuits against the County, MDT, and the DNRC, Hamlins filed two Motions to Consolidate the present matter with the pending lawsuit against the County—both of which were denied. Following the District Court's denial of their second Motion to Consolidate, Hamlins' sought a writ of supervisory control which this Court ultimately rejected. See *Hamlin Constr. & Dev. Co. v. Mont. First Judicial Dist. Court*, 2021 Mont. LEXIS 378, *3, 404 Mont. 553, 489 P.3d

882. On appeal, Hamlins' once again challenge the District Court's decision not to consolidate the separate proceedings.

If separate actions before a court involve a common question of law or fact, the court *may* consolidate the actions. M.R.Civ.P. 42(a)(2); *In re Estate of McDermott*, 2002 MT 164, ¶ 17, 310 Mont. 435, 51 P.3d 486. The objective of consolidation is to “permit trial convenience and economy in administration by avoiding unnecessary costs or delay.” *Park Cty. Stockgrowers Ass’n v. Mont. Dep’t of Livestock*, 2014 MT 64, ¶ 11, 374 Mont. 199, 320 P.3d 467 (citing *Means v. Mont. Power Co.*, 191 Mont. 395, 401, 625 P.2d 32, 36 (1981)). Moreover, a district court may deny a motion to consolidate even if two cases appear to involve common issues of law and fact if there are other factors present that convince the court consolidation is improper. *In re Formation of East Bench Irrigation Dist.*, 2009 MT 135, ¶ 39, 350 Mont. 309, 207 P.3d 1097 (citing *Ass’n of Unit Owners v. Big Sky*, 245 Mont. 64, 86, 798 P.2d 1018, 1031-32 (1990)).

First, as set forth in the District Court's order on this issue, the function of Rule 42(a)(2) is to allow a district court to manage cases *within its own* docket, not to remove a case to another court's docket as Hamlins' have requested here. (Appellants' App. at 6).

Next, a district court's decision on whether to consolidate is discretionary⁵ and the District Court on two separate occasions found consolidation unwarranted, noting:

While both cases may involve some questions of fact regarding the underlying issue of the undersized culverts, the claims against MDT and the County are based upon each entity's distinct conduct—MDT's conduct in installing the culverts and the County's conduct in handling MDT and the Hamlins' floodplain permit applications. Thus, there are questions of law and fact distinct to each case.

(Appellants' App. 3 at 8). Hamlins' once again erroneously characterize the lawsuits as "identical," asserting they arise out of the same underlying facts, seek the same form of damages, and seek recovery for the same interference with Hamlins' property rights. Plaintiffs also posit that, without consolidation, the two cases pose the risk of inconsistent judgments on issues including causation, evidentiary rulings, and jury instructions. However, the District Court found "little danger of inconsistent judgments" reasoning, "if this Court were to find MDT not liable for one or both of Hamlins' claims against it, this does not mean by default the County must be liable or vice versa." (*Id.*).

The District Court also properly rejected Hamlins' claim that consolidation would promote judicial economy. The District Court

⁵ *Hamlin Constr. & Dev. Co. v. Mont. First Judicial Dist. Court*, 2021 Mont. LEXIS 378, *3, 404 Mont. 553, 489 P.3d 882.

expressed it was unfamiliar with the intricacies of Hamlins’ suit against the County and to consolidate would require the consolidating court to familiarize itself with distinct aspects of the other proceedings. (*Id.*). Similarly, because this action has been pending before the District Court for several years, it is well-versed in the underlying facts and legal principles at play and “is in the best position to secure a just, speedy, and inexpensive determination of this action.” (*Id.* at 8-9).

The only party set to benefit from consolidation are Plaintiffs—not MDT, the County, or the District Court. While in theory consolidation of the independent proceedings may seem prudent, these cases have been litigated separately for years and consolidation at this juncture would only serve to waste the judiciary’s resources and convolute the remaining issues.

Further, this issue is now moot in light of Judge Abbott’s recent order joining MDT as a party defendant in Hamlins’ suit against the County. On July 22, 2021, following the District Court’s grant of summary judgment in favor of MDT, Judge Abbott, presiding over the County lawsuit, granted Hamlins’ request for joinder of MDT. Judge Abbott also stayed the County proceedings pending final resolution of this appeal. (Appellants’ App. 8 and 10). Considering MDT’s recent joinder in the

County suit, disposition of Hamlins' present Motion to Consolidate is no longer relevant.

CONCLUSION

For the foregoing reasons, MDT respectfully requests that this Court affirm the District Court's orders and grant of MDT's Motion for Summary Judgment.

Respectfully submitted this 7th day of January 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that the foregoing is proportionally spaced using 14-point Times New Roman font; is double spaced; and the word count calculated by the undersigned's Word Processor contains 9,589 words, excluding the table of contents, table of authorities, certificate of service and certificate of compliance.

Respectfully submitted this 7th day of January 2022.

/s/ Christian T. Nygren
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CERTIFICATE OF SERVICE

I, Christian Thomas Nygren, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 01-07-2022:

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