Case No.

IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA ex rel. NEVADA DIVISION OF FORESTRY; STATE OF NEVADA ex rel. BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER EDUCATION ON BEHALF OF THE UNIVERSITY OF NEVADA, RENO,

Appellants,

v.

THE HONORABLE SCOTT N. FREEMAN, SECOND JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE,

Respondent.

ON APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT
CASE NO. CV17-00225

PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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ROUTING STATEMENT

This Court should hear the State's petition for a writ of mandamus. The State's petition seeks to have this Court clarify a novel and urgent issue of first impression involving inverse condemnation law that presents a constitutional question of statewide public importance. NEV. R. CIV. P. 17(a)(10)-(11). The District Court's orders threaten to merge takings and negligent property tort law in Nevada, constitutionalizing the latter and thereby effectively forcing the taxpayers of Nevada to indemnify property owners and their insurers for all negligent property torts traceable to the State. The District Court's orders below, denying Nevada Division of Forestry's (NDF) and University of Nevada Reno's (UNR) motions to dismiss the inverse condemnation claim, were legally erroneous. This Court should clarify that an accidental, state-caused invasion to property does not, alone, constitute a taking. The District Court's decision to the contrary threatens to displace an entire species of what has historically been recognized as tort law and subject to balancing by the Legislature.

This Court should reiterate that takings are distinguished from negligent property torts in that the State, to effect a taking, must intend

to invade private property or know that its activity, *properly carried out*, is reasonably certain to work such an invasion.

ISSUE PRESENTED

Plaintiffs allege that property damage from a fire that escaped from a controlled burn conducted by the Nevada Department of Forestry on property owned by the University of Nevada, Reno, was a constitutional taking. The State contends that these facts state, at most, a negligent property tort. Takings are unlike torts in that takings require an invasion of property occurring as a result of intentional state action, properly carried out, for public benefit, advantage, or utility. Otherwise every car crash caused by a negligently driven state vehicle would be a taking. Yet the District Court adopted the plaintiffs' view and held that an allegation of state-caused negligent destruction of property, alone, is enough to establish a takings claim. The question presented is:

Did the District Court err by holding that, as a matter of law, a state-caused "diminution in value to property is sufficient to establish a taking of real property," thus (a) collapsing the distinction between negligence and takings and (b) ignoring a requirement of state public-use intent?

I. INTRODUCTION AND RELIEF SOUGHT

In the long history of Nevada takings jurisprudence, a "taking" has never been considered a mere synonym for negligent property torts by governmental actors. Yet that is effectively what the plaintiffs argue in this case and what the District Court below accepted. If that ruling stands, in addition to perverting Nevada law, two unjustifiable consequences result.

First, the rule in Nevada will be that if your insured and replaceable house burns down as a result of government negligence, then your insurance company will be fully repaid by Nevada's taxpayers. This is because, under the lower court decision, the state may be forced to indemnify losses for the very sort of accident that individuals buy insurance to protect against. This aggressive and unsupported reformulation of takings law effects a transfer of responsibility from private insurer to state taxpayer, overruling the balance struck by Nevada's Legislature.

Second, a distinction without basis in law or reason is created between property damage and personal injury, elevating property over harm to life and limb. The District Court's decision makes the state fully

liable for all unintended property damage to, say, a fully insured, replaceable mansion destroyed by an escaped controlled burn. But if the same fire physically injures (or worse, kills) someone that is in the home at the time, then her recovery for that irreparable, uninsurable personal injury is limited to $100,000 (the State's tort damages cap set by the Legislature). The decision below has stunning implications far beyond fires or the loss of homes. If a Nevadan's fully insured and replaceable Bentley automobile is wrecked by a negligently driving state employee, his insurance won't have to pay a dime—Nevada's taxpayers will cover his considerable property losses in full. But if the same person gets hit by the same negligent state driver and sustains massive personal injuries, those irreparable injuries will be compensated by the state—up to $100,000, and no more.

People of good will can debate whether the state should cap personal injury or property damages due to the state's negligence—a policy question vested in Nevada's Legislature. What cannot be debated is whether the framers of Nevada's Constitution intended to constitutionalize and fully indemnify insurance companies for insurable and reparable *property* injury caused by the State's mere negligence, yet

somehow allow the Legislature to aggressively protect Nevada's taxpayers when it comes to irreparable *personal* injuries caused by the same negligence. They did not. There is zero evidence that the authors of Nevada's Constitution and statutes ever intended such an absurdly disparate arrangement. Instead, consistent with how a majority of courts have interpreted the takings clauses in their constitutions—including the federal courts—a taking has long been understood, as its plain meaning indicates, to require a public-use *intent* on the part of the government.

Relying on a few outlier, minority decisions from jurisdictions with differently phrased takings clauses, plaintiffs and their insurance companies effectively ask Nevada's courts to judicially revise the meaning of Nevada's takings clause. Their plea has a superficial attractiveness—nobody likes to see an injury go uncompensated. But litigation is a blunt and dangerous instrument by which to amend a constitution. Re-characterizing negligent property torts as "takings" will create an inexplicable disconnect in Nevada law between how personal injury and property damage due to governmental negligence is treated. Worse, it will constitutionalize that change, making it difficult or

impossible for the Legislature to perform its vital role of weighing competing policy considerations in this area and making necessary adjustments. In short, if Nevada property owners and insurance companies want to raise the caps for property damage caused by the State's negligence, they should address that request to the Legislature, not ask Nevada's courts to water down the definition of a taking.

This Court should grant the State's petition for writ of mandamus and instruct the District Court to grant NDF's and UNR's motions to dismiss with prejudice as to the consolidated plaintiffs' inverse condemnation cause of action. The District Court's holding has no support in the Nevada Constitution's text, this Court's precedent, Nevada's statutes on eminent domain, the consensus view of takings and public use under federal and state law, or the traditional distinction between torts and inverse condemnation.

II. STATEMENT OF THE CASE

A. The individual property owners and subrogated insurers' inverse condemnation complaints

This writ of mandamus petition arises out of the aftermath of an escaped controlled burn known as the Little Valley Fire. A controlled burn is a technique used in forest management to reduce fuel buildup

and decrease the likelihood of later uncontrolled, hotter fires. Because fire is a natural part of forest ecology, controlled burns are necessary every so often to reduce the risk of dangerous naturally occurring fires. But here, the controlled burn became uncontrolled and escaped, causing significant property damage. Consolidated plaintiffs in this appeal consist of two groups. Individual property owners filed eight individual civil actions alleging property damage.[1] And a group of subrogated insurers filed four additional civil actions. (II APP0348-405 and IV-V APP0993-1003). All of these actions were eventually consolidated. (IV APP1380-82).

The consolidated plaintiffs allege that the University of Nevada, Reno and the Nevada Division of Forestry conducted a controlled fire in the Whittell Forest and Wildlife Area from October 4, 2016, to October 7, 2016. (See e.g. I APP0003).[2] A wildfire arose after high winds carried embers outside the controlled fire area owned by UNR on October 14,

[1] *See* I APP001-30, 276-282, 276-282; V APP1004-10; VII APP1719-32; and VIII APP 1789-1801. Since the District Court's orders denying the State's motions to dismiss, one further action was filed, Case #CV17-01799. *See* VIII APP1789-1801.

[2] The allegations made by the consolidated plaintiffs are largely identical, and therefore, citation is made to the first filed action.

2016. (See e.g. I APP0004). This writ petition concerns only the consolidated plaintiffs' inverse condemnation claim.

The consolidated plaintiffs allege that a "taking" occurred because NDF initiated the controlled fire despite a risk of high winds. (I APP0003). Though they filed separate complaints, the individual property owners' and subrogated insurers' allegations are the same. For example, the individual property owners allege that NDF's failure to control the controlled fire was the result of recklessness, negligence, or willfulness because high winds were allegedly forecast for the week scheduled for the controlled fire. (I APP0003 and I APP0005-6). Subrogated insurers allege that the controlled fire escaped because "[p]redictable and anticipated westerly winds introduced oxygen to smoldering portions of the Prescribed Burn that Defendants did not extinguish …." (II APP0351-52).

Likewise, the individual property owners' and subrogated insurers' public use allegations are similar. The individual property owners allege that NDF initiated the controlled fire to provide a "partial shaded fuel brake" for residents of the western part of Washoe Valley. (I APP0003). The subrogated insurers allege NDF initiated the

controlled fire to further public goals, such as the need to protect firefighters from future wildfires, to protect homeowners from future wildfires, to reduce fuels, to reduce the impact of future wildfires on watershed health, to create a zone of defense from future wildfires, and to protect property value from the threat of future wildfire. (II APP0356-57).

B. The District Court's denial of the motions to dismiss

Consistent with NRS 527.126(4)'s statutory immunity scheme, NDF moved to dismiss all causes of action except gross negligence. (I-II APP0234-252). UNR moved to dismiss all causes of action under NRS 527.126(4) and NRS 41.032(2). (I APP00070-213). The District Court held a hearing as to the motions to dismiss against the individual property owners' complaints on August 8, 2017. (VI APP1268-1352). The subrogated insurers simply joined the individual property owners' counsel's oral arguments. (VI APP01310-11).[3]

As to plaintiffs' inverse condemnation claims, the State argued that dismissal was appropriate based the distinct elements of a taking. (VI

[3] The Subrogated Insurers opposition papers are part of the record. *See* VI APP01449-71 and VI-VII APP01479-1509.

APP01289). The State articulated that a taking is defined as "the natural and probable result of the action properly performed." (VI APP01291). The State further argued that the public use element of a taking requires that, to constitute a taking, the occurrence that effected the alleged "taking" (here, the escape of the controlled burn) must have provided a public benefit (or at least was intended to do so). (VI AP01293).

The consolidated plaintiffs offered two different theories of what is a taking. **First**, consolidated plaintiffs argued that the State took private property because "[it] chose to disregard basic issues: fuels adjacent to the burn, fire behavior, fire modeling, the potential of fire spreading outside of the unit." (VI APP01299). **Second**, the consolidated plaintiffs argued for a strict liability theory of eminent domain found on a "causation-based analysis." (*Id.*).

The consolidated plaintiffs' public use argument mirrored their respective complaints' allegations, focusing on the general public benefits of the controlled burn, rather than any supposed public benefit from the *escape* of the controlled burn. According to the consolidated plaintiffs, NDF initiated the controlled fire to achieve a government goal "to prevent

a catastrophic wildfire reaching the west side of Washoe Valley and surrounding Franktown residences and ranches." (*Id*). Therefore, any damage that consequentially occurred must, they claim, be for a public benefit. (*Id*).

The District Court denied the State's motions to dismiss on two grounds. **First**, the District Court held, citing *Culley v. Cty. of Elko*, 101 Nev. 838, 711 P.2d 864 (1985), that "evidence of a diminution of value is sufficient to establish a taking." (VII APP01735). Second, the District Court broadly held, without legal analysis or factual citation, that "the actions of NDF constituted a public use." (VII APP01736).

III. REASONS FOR GRANTING THE WRIT OF MANDAMUS

A. This Court should clarify Nevada's inverse condemnation law to prevent the inefficiency of this case proceeding on an erroneous legal theory.

The Nevada Constitution empowers this Court to issue writs of prohibition and mandamus. NEV. CONST. art. 6, § 4. Writ relief is an extraordinary remedy and the decision to entertain a writ petition ultimately lies within this Court's discretion. *Cheung v. Eighth Jud. Dist. Ct.*, 121 Nev. 867, 869, 124 P.3d 550, 552 (2005).

With regard to orders denying motions to dismiss, writ relief is available "when either (1) no factual dispute exists and the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule, or (2) an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." *Int'l. Game Tech., Inc. v. Second Jud. Dist. Ct.*, 124 Nev. 193, 197-98, 179 P.3d 556, 559 (2008). Recently, this Court has used the writ process to instruct a district court to enter dismissal to allow plaintiffs "to appropriately plead their case and prevent this matter from proceedings under an erroneous application of the law." *Parametric Sound Corp., et al. v. Dist. Ct.*, 133 Nev. Adv. Op. 59, at 8 (Sept. 14, 2017). In another example, in eminent domain law, this Court entertained a writ, in part, because the petition "raised an important issue regarding Nevada's takings laws…" *State of Nevada ex. rel. Dep't of Transp. v. Dist. Ct.*, 133 Nev. Adv. Op. 70 at 6 (Sept. 27, 2017) (citing *NDOT v. Dist. Ct.*, 131 Nev. ____, 351 P.3d 736 (Adv. Op. 41, June 25, 2015)).

Consistent with these authorities, the State's petition raises an important issue of Nevada law that controls tens of millions of dollars in claims brought by the plaintiffs in this case. Nevada's Legislature has

immunized the State, and all state and local government actors, from tort liability absent gross negligence. NRS 527.126(4). The Legislature has also granted a limited waiver of sovereign immunity for causes of action sounding in tort committed by government actors up to $100,000. NRS 41.035(1). The District Court's orders effectively nullify these laws. According to the District Court, a negligent government actor takes private property for a public use based on mere identity as a government actor.

Granting this petition also affords this Court the opportunity to clarify and define the elements of an inverse condemnation cause of action. In *Fritz v. Washoe Cty.*, this Court described inverse condemnation's elements, but did not define them. 132 Nev. ___, 376 P.3d 794, 796 (Adv. Op. 57, Oct. 27, 2016). The State's writ petition allows this Court to define the taking power and to define public use.

Finally, entertaining the petition furthers the interests of judicial economy and administration. The consolidated plaintiffs' tort theories are subject to the tort cap of $100,000, but their inverse condemnation theory is limited only by the just-compensation principle. The parties and the District Court will waste significant resources and months, if not

years, of litigation if the consolidated plaintiffs proceed under an erroneous understanding of inverse condemnation law.

B. Plaintiffs' inverse condemnation theory thwarts the Nevada Legislature's statutory scheme limiting State exposure to tort liability arising from controlled fires.

Nevada's Legislature authorized any agency of this state or any political subdivision of this state to commence a controlled fire after receiving authorization from the person responsible for fire protection in the area designated for the controlled fire. *See* NRS 527.122(1); *see also* NRS 527.126(1). A controlled fire means the "controlled application of fire to natural vegetation under specified conditions and after precautionary actions have been taken to ensure that the fire is confined to a predetermined area." NRS 527.126(2).

The Legislature immunized state agencies and political subdivisions from liability arising out of controlled fires in two ways. **First**, controlled fires that comply with air pollution laws are not public or private nuisances. NRS 527.126(3). **Second**, state agencies, political subdivisions, the State of Nevada, local governments, and any officer or employee are immune from liability for damages, regardless of whether

the injury was to a person or property, absent gross negligence, in the conduct of the controlled fire. NRS 527.126(4).

At the same time, the Legislature has waived—but only partially—Nevada's sovereign immunity from tort liability. NRS 41.031(1). Nevada's waiver of sovereign immunity is limited to $100,000 in monetary damages and may not include punitive damages. NRS 41.035(1).

If consolidated plaintiffs' inverse condemnation theory fails, then their gross negligence claim is subject to Nevada's tort cap. Nevada's Legislature erected a tort cap and immunity barriers to limit state taxpayers' responsibility from this very type of claim. Consolidated plaintiffs' novel inverse condemnation theory nullifies the legislative will.

C. The District Court's definition of the taking power is contrary to Nevada's Constitution, this Court's precedent, the consensus view of federal and state courts, and the traditional distinction between torts and inverse condemnation.

To prevail on a takings claim, a plaintiff must prove "(1) a taking (2) of real or personal interest in private property (3) for public use (4) without just compensation being paid (5) that is proximately caused by a

governmental entity (6) that has not instituted formal proceedings." *Fritz,* 132 Nev. ___, 376 P.3d 794 at 796. If any element is missing, the claim fails. *Sproul Homes of Nev. v. State ex. rel., Dep't of Highways*, 96 Nev. 441, 611 P.2d 620 (1980) (affirming dismissal where plaintiff failed to allege facts supporting the "taking" element). Whether a taking has occurred can present an issue of law. *City of Las Vegas v. Cliff Shadows Prof'l Plaza, LLC*, 129 Nev. ___, 293 P.3d 860 (Adv. Op. 2, Jan. 31, 2013); *see also Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg., a Div. of Wells Fargo Bank, N.A.,* 388 P.3d 970, 974 (Nev. 2017).

1. In concluding that an economic loss is the equivalent of a taking, the District Court ignored the text of Article 1, Section 8(6).

The District Court ignored the text of Nevada's just compensation clause. A court should first look to the text of the constitutional provision to resolve a constitutional question. *Strickland v. Waymire*, 126 Nev. 230, 234, 235 P.3d 605, 608 (2010) (citing *Sec'y of State v. Burk*, 124 Nev. 579, 590, 188 P.3d 1112, 1120 (2008)).

The text of Nevada's just compensation provision is found at Article 1, § 8(6):

> Private property shall not be taken for public use without just compensation having been first made, or secured, except in

> cases of war, riot, fire, or great public peril, in which case compensation shall be afterward made.

NEV. CONST. art. 1, § 8(6). A court must give the language in Nevada's Constitution its plain effect. *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 645-46, 173 P.3d 734, 739 (2008). Here, drafters of this section did not use the phrase "diminution in value" as the test for whether a taking occurred. The District Court, by equating "diminution in value" with a taking for public use, effectively wrote out the remainder of the clause, in particular the intent requirement that the taking be "for public use."

The phrase "for public use" is not ambiguous. The phrase instructs the court to examine the purpose of the government's activity as properly carried out, not the extent of any damage that may have consequentially occurred by accident. As this Court explained, a lower court erred when it

> [P]resuppose[d] a constitutional provision allowing just compensation for damage as well as taking. The Constitution of the State of Nevada provides for compensation based solely on a taking by the state of private property, not for damage thereto.

Sloat v. Turner, 93 Nev. 263, 268, 563 P.2d 86, 89 (1977). The District Court's holding below, that a mere diminution in value of private

property is a taking, cannot be reconciled with this Court's interpretation of Nevada's constitution's text in *Sloat*.

The District Court also erred by relying on *Culley v. Cty. of Elko*, 101 Nev. 838, 711 P.2d 864 (1985). This Court did not hold in *Culley* that a diminution in private property value alone, caused by the government, is a taking. In *Culley*, Elko County intentionally lengthened a runway. Lengthening the runway cut off the plaintiff's direct access to the public highway, as the county knew it would. 101 Nev. at 839-40, 711 P.2d at 865. The rule in *Culley* is that the government cannot implement a public works project that it knows is bound to substantially impair an abutting landowner's public highway access without paying just compensation. 101 Nev. at 840, 711 P.2d at 866 (citing *State ex rel. Dep't Highways v. Linnecke,* 86 Nev. 257, 468 P.2d 8 (1970)). The issue in *Culley* was not whether the government acted appropriately in light of known risks to the owner's access to the highway, but whether the county's *intended* design of the runway caused a substantial enough interference to be compensable.

Culley actually demonstrates why an escaped controlled fire is not a taking. In *Culley*, the interference to private property rights occurred

because the county's construction design was executed precisely according to plan. In contrast to *Culley*, NDF designed the controlled fire at issue in this case to stay in the Whittell Forest on state land. NDF did not intend to have the controlled fire escape its borders and harm private property.

2. The District Court erred by ignoring this Court's historical understanding of eminent domain law.

Even if the phrase "taken for public use" used in Article 1, Section 8(6) were somehow ambiguous, the District Court's orders are still erroneous. The District Court ignored this Court's and the Nevada Legislature's consistent interpretation of eminent domain in Nevada as expressed in this Court's decisions and state eminent domain statutes.

The District Court's reliance on *Vacation Village, Inc. v. Clark Cty.*, 497 F.3d 902 (9th Cir. 2007) was misplaced. The *Vacation Village* opinion did no more than apply the holding of *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 669, 137 P.3d 1110, 1127 (2006). This Court in *Sisolak* reached its decision by stating that Nevada "may place stricter standards on [the state's] exercise of the takings power through its state constitution or state eminent domain statutes." *Id.* That Nevada can do so, however, says nothing about *how* Nevada actually has defined the

government's taking power, or whether, more specifically, Nevada has intentionally departed from the majority understanding that a taking requires intentional, not merely negligent, action the state actor's part.

To the contrary, this Court, in *Sisolak*, as in its other takings cases, simply assumed that the taking power is characterized by intentional state conduct that seeks to use private property for a public use. 122 Nev. 645, 669, 137 P.3d 1110, 1127 (2006). This Court wrote:

> To clarify regulatory takings jurisprudence under the Nevada Constitution, a per se regulatory taking occurs when a public agency ***seeking*** to acquire property for a public use enumerated in NRS 37.010, fails to follow the procedures set forth in NRS Chapter 37, Nevada's statutory provision on eminent domain, and appropriates or permanently invades private property for public use without first paying just compensation.

Sisolak, 122 Nev. at 670, 137 P.3d at 1127 (emphasis added). A public agency does not *negligently* or *accidentally* "seek[] to acquire public property"; it intentionally does so. Like in all other takings cases, the character of government action in *Sisolak* was that of an intentional act.

This Court has explained that the nature of the taking power is comparable to adverse possession, not to a tort. In *White Pine Lumber Co. v. City of Reno*, 106 Nev. 778, 780, 801 P.2d 1370, 1371 (1990), the Court held that a government using its taking power is the equivalent of

a private actor adversely possessing land: "We feel that had the 'taker' in this case been a private party, the applicable limitations period would have been the one for acquiring title by adverse possession." 106 Nev. at, 780, 801 P.2d at 1371. Here, if a private party on its own land had set a controlled fire that accidentally became uncontrolled, the private property damage incurred by neighbors would be analyzed under tort law. The District Court should have analyzed the State's liability for property damage under tort law too.

This Court has already implicitly rejected the consolidated plaintiffs' theory of a taking—that every economic loss caused by the government is a taking. The case of *Nevadans for the Prot. of Prop. Rights, Inc. v. Heller*, 122 Nev. 894, 923, 141 P.3d 1235, 1254-55 (2006) is instructive. In *Heller,* this Court examined a proposed initiative that would have added 14 new provisions to Nevada's just compensation clause. 122 Nev. at 899-900, 141 P.3d at 1238-39. Of particular relevance, was proposed clause 8:

> *Government action which results in substantial economic loss to private property shall require the payment of just compensation.* Examples of such substantial economic loss include, but are not limited to, the down zoning of private property, the elimination of any access to private property, and limiting the use of private airspace.

Heller, 122 Nev. at 900, 141 P.3d at 1239 (emphasis added). The Court struck this section because it was deemed not even germane to the concept of the state's taking power. *Id.* at 900, 141 P.3d at 1239. Yet what was not even considered germane to the concept of a taking in *Heller* has, by the District Court's orders, now become the *definition* of a taking in this case going forward.

Justice Maupin, in his concurring opinion in *Heller*, was even more explicit. He correctly diagnosed that the "government action" theory was "a new and completely different cause of action" for property owners who incur substantial damages from state action. *Id.* at 919, 141 P.3d at 1251-52. Likewise, Justice Hardesty, in his concurring opinion in *Heller*, described the proposed clause 8 as "a new and as of yet undefined claim known as 'government action' (the legal elements of which appear to be defined only by whether the plaintiff has sustained 'substantial economic loss,' a term which is also undefined and left solely to future judicial discretion"). *Id.* at 923, 141 P.3d at 1254-55.

The District Court's definition of a taking as "diminution in value" is no different than the economic loss theory soundly rejected in the *Heller* decision. Under the District Court's erroneous view of takings,

every car accident with a state vehicle would require just compensation because the state actor's mere negligence was the cause of substantial economic loss. In fact, under the consolidated plaintiffs' theory, all torts involving property damage would no longer be torts, but instead takings.

The District Court's orders also find no support in the Nevada Legislature's eminent domain statutes. For example, NRS 37.110(3) provides that damages shall be paid as part of a taking if "the property, though no part thereof is taken, will be damaged by the construction of the proposed improvement …." This statute does not mean, as the District Court concluded, that the State must pay damages merely because it negligently caused an unintended economic loss. Rather, this provision stands for the reasonable proposition that even if a state project is not expected to permanently deprive a person of his property, compensation is nonetheless required if the project, as planned and constructed, is expected to damage the property. The Legislature's phrase "proposed improvement" evinces the expectation that the damage to private land occurs by design or is reasonably certain to occur. In fact, in NRS 37.110(2) and 37.110(4), the subsections immediately preceding and following the provision relied upon by the District Court, severance

damages and special benefits are assessed to the remainder property based upon "the construction of the improvement in the manner proposed by the plaintiff." Read together, these provisions provide compensation (and offsets) based upon the effect on the property of the planned project in the manner proposed by the condemnor—not based upon any unintended damages resulting from a negligent implementation of the construction. And the Legislature's phrase "will be damaged" in NRS 37.110(3) demonstrates that the concept of just compensation applies only where the damage occurs as a necessary result of the government's design. If unexpected damage occurs as a result of the State's negligence, that is a tort. Nevada's eminent domain statutes are designed against the common understanding of a taking resulting from an intentional act, not a mere negligent tort.

The District Court's orders, if allowed to stand, severely undercut Nevada's state immunity statutes. Nevada's limited waiver of sovereign immunity restricting tort recovery to $100,000 would be a nullity for any injury to property. Every negligent car accident involving a state motor pool car, for example, will suddenly be a taking. NRS 41.035(1). Or state agencies given statutory immunity from suits based on negligent

inspection of public facilities will have to pay just compensation if, say, a sewer line breaks and destroys property. NRS 41.033(3).

In sum, the District Court's orders, which focus on the magnitude of the damage caused by the Little Valley Fire, are contrary to the text of Article 1, Section 8(6), this Court's precedent, Nevada statutory law on eminent domain, and reason and public policy. Accidental injuries, even those caused by gross negligence, are still torts, not takings.

3. The District Court's orders are inconsistent with the consensus federal and state view of the taking power.

The District Court's orders and the consolidated plaintiffs' allegations are inconsistent with the consensus understanding of the distinction between a negligence tort and a taking. The consolidated plaintiffs allege NDF's unreasonable conduct in going forward with the controlled fire, despite predictable high winds, caused the fire to escape its planned borders. In other words, they argue that the property damage occurred as the natural and probable consequence of NDF ignoring a risk it knew or should have known of. These allegations may support a finding of proximate cause in tort, but they have nothing to do with the nature of a taking as traditionally understood.

The Seventh Circuit has nicely explained the distinction between government accidents that may cause consequential damage (i.e., torts), and the government's exercise of its taking power. The question of whether the government is using its takings power simply asks if the government program "properly carried out, would be permissible." *In re Matter of Chicago, Milwaukee, St. Paul and Pac. R.R. Co.*, 799 F.2d 317, 326 (7th Cir. 1986). To demonstrate the concept of an intentional, foreseeable result, the Seventh Circuit provided this important illustration: If the government reserves airspace over a farm to conduct low flights which will inevitably result in the destruction of livestock, that may be a taking—even though the *direct* goal of the government is not the killing of livestock—because it is the foreseeable *result* of the government intentionally allowing constant low overflights over the farm. *Id.* In that situation, the government's actions are reasonably certain to result in the destruction of livestock regardless of how carefully the government conducts its low flights. In contrast, if a stray military plane crashes into the farm because of a pilot's negligence and obliterates an equal number of livestock, that is a tort. *Id.* In that situation, the government does not intend to damage the livestock nor is the

destruction of livestock a reasonably certain foreseeable result of the government's purpose in flying the plane. Moreover, in the latter circumstance, the destruction of livestock had nothing to do with the government's purpose; in fact, it was the opposite of the government's purpose. The government obviously did not desire to crash the plane; just as obviously the government in this case did not desire to lose control of the controlled burn.

Most states that have analyzed the definition of the taking power agree with the distinction explained by the Seventh Circuit. Even states such as Texas, Nebraska, and New Mexico, whose constitutions' just compensation clause includes the word "damage" (unlike Nevada's), still require the plaintiff in an inverse condemnation action to prove that the government intended to take their property, or that damage to their property would be the reasonably certain foreseeable result of the government's action. *See City of Dallas v. Jennings,* 142 S.W.3d 310 (Tex. 2004); *Henderson v. City of Columbus*, 827 N.W.2d 486 (Neb. 2013); *Electro–Jet Tool Mfg. v. Albuquerque,* 845 P.2d 770 (N.M. 1992). More examples are easy to find. *See*, *e.g.*, *Edwards v. Hallsdale-Powell Util.*

Dist. Knox Cty., Tenn., 115 S.W.3d 461, 466 (Tenn. 2003).[4] The majority rule is clear—accidents are not takings.

D. The District Court erred by ignoring the requirement that the taking itself be for a public use.

An essential element of any inverse condemnation claim is that the plaintiff proves that the state actor took private property "for public use." *Fritz*, 376 P.3d at 796. "Public use" means that the taking itself be for a public utility, benefit, and advantage. *Dayton Mining Co. v. Seawell*, 11 Nev. 394, 408 (1876); *see also Milchem Inc. v. Dist. Ct.*, 84 Nev. 541, 548, 445 P.2d 148, 152 (1968). The Court erred in defining a taking solely by considering whether (1) the State (2) caused harm—without any consideration of whether such harm even intended a public benefit.

Importantly, this Court in *Fritz* cited the Washington Supreme Court's decision, *Dickgieser v. State*, 105 P.3d 26, 29 (Wash. 2005) (en

[4] *Edwards* cites to five more states who similarly define a taking as an intentional government act. *See Nat'l By–Products, Inc. v. City of Little Rock*, 916 S.W.2d 745, 747 (Ark. 1996); *Sullivant v. City of Okla. City*, 940 P.2d 220, 225 (Okla. 1997); *Vokoun v. City of Lake Oswego*, 56 P.3d 396, 400–01, 402 (Or. 2002); *Lizza v. City of Uniontown*, 28 A.2d 916, 918 (Pa. 1942); *City of Abilene v. Smithwick*, 721 S.W.2d 949, 951 (Tex. Ct. App. 1986).

banc), to establish the elements of inverse condemnation. 376 P.3d at 796. The court in *Dickgieser* defined the circumstance when government damage to property can be "for public use" in order to support a claim for inverse condemnation. The court wrote:

> We conclude that damage to private property that is **reasonably necessary** to [the state activity] is for a public use, requiring compensation under article 1, section 16.

Dickgeiser, 105 P.3d at 540-41 (emphasis added).

Consolidated plaintiffs in this case have argued a public benefit only by ignoring the taking itself—that is, the uncontrolled fire that damaged their insureds' property—and focusing instead on the fact that the controlled burn plan itself was for a public advantage. But approaching public use at such a high level of generality effectively writes it out of the requirement for a taking. Anytime a government actor acts negligently, it is against the backdrop of some public mission. A negligent state driver is inevitably driving a state car for some general public good. But there is no public purpose to her departing from her public mission by driving negligently. If the public use requirement is to have any meaning in the context of a taking, it must be considered at the level of the specific action that allegedly effectuated the taking. Did the

state actor burn down the house or wreck the car in deliberate furtherance of some public benefit, or because he departed from that mission by acting negligently? Negligent torts do not become takings merely because the defendant is the government and therefore is always, in some general way, pursuing a public mission. *See, e.g., Sanguinetti v. United States,* 264 U.S. 146, 148 (1924).

E. All courts to have considered whether property damage caused by an escaped controlled fire can be the basis of an inverse condemnation claim have granted the government's motion to dismiss.

Plaintiffs cite not a single case to support their takings theory arising from an escaped controlled fire. Courts presented with this type of case have always dismissed a takings claim.

In *Thune v. U.S.*, the U.S. Court of Federal Claims dismissed an inverse condemnation claim based on nearly identical facts. 41 Fed. Cl. 49 (1998). There, the plaintiff—like plaintiffs here—pleaded negligence and inverse condemnation. *Id*. at 50. The government had set controlled fires to clear brush to improve elk habitat. The fire escaped due to unfavorable winds and consumed the plaintiff's hunting camp. The court affirmed the lower court's dismissal because, even if the change in wind conditions was foreseeable, that itself could not convert a tort into a

taking. *Id.* at 53. Damage to property caused by faulty execution of an authorized project sounds in tort, not eminent domain law. *Id.* at 52-53.

In *Am. Family Mut. Ins. Co. v. Am. Nat'l Prop. & Cas. Co.*, the Colorado Court of Appeals dismissed an inverse condemnation claim on nearly identical facts to those in this case. 370 P.3d 319 (Colo. Ct. App. 2015). There, high winds carried embers from a controlled burn site outside the burn perimeter and caused a wildfire that consumed structures and caused a loss of life. *Id.* at 324. The court held that the public purpose element was lacking because "[t]he ensuing wildfire was the precise scenario the controlled burn was ignited to avert." *Id.* at 328.

In *McNeil v. City of Montague*, in the California Court of Appeal, a plaintiff pled claims for negligence and inverse condemnation just as plaintiffs have done in this case. 124 Cal. App. 2d 326 (1954). The plaintiff alleged that city workers burned brush and weeds on city property and caused a fire that spread and consumed plaintiff's property. *Id.* at 326-27. Affirming a lower court's demurrer, the appellate court ruled that, unlike instances where an employee negligently damages property, a taking for a public use must concern and benefit the general public. *Id.* at 328.

IV. CONCLUSION

Whether a taking for public use has occurred is not determined by the identity of the defendant or the magnitude of the property damage. It turns, instead, on the intent behind the government's action. The District Court erroneously ignored this critical factor and so collapsed the distinction between negligence and takings and wrote out of Nevada's Constitution the requirement of public-use intent by the state. This Court should grant the State's petition for a writ of mandamus and direct the District Court to dismiss the consolidated plaintiffs' inverse condemnation claim with prejudice. The Little Valley Fire was a tragedy. It could be a tort. But, as a matter of law, it was not a taking for a public use.

Dated this 20th day of October, 2017.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or

interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 20th day of October, 2017.

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CERTIFICATE OF SERVICE

Pursuant to NEV. R. APP. P. 25(5)(c), I hereby certify that, on the 20th day of October 2017, service of the **PETITION FOR WRIT OF MANDAMUS OR PROHIBITION** was made this date by depositing a true and correct copy of the same for mailing, first class mail, at Las Vegas, Nevada, addressed follows:

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VERIFICATION

On October 20th, 2017, the affiant, Steven G. Shevorski appeared before me, a notary public, who knows the affiant to be the person whose signature appears on this document, who stated:

"I am counsel for Petitioner, State of Nevada ex rel. Nevada Division of Forestry, I have read the foregoing petition for writ of mandamus or, in the alternative, writ of prohibition and all factual statements in the petition are either within affiant's personal knowledge and true and correct or supported by citations to the appendix accompanying the petition."

"The exhibits in the appendix are true and correct copies of the original documents."

Steven G. Shevorski

GIVEN UNDER MY HAND AND SEAL OF OFFICE on this 20th day of October, 2017.

NOTARY PUBLIC
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My Appt. Expires Feb. 9, 2020

Carol A. Knight
NOTARY PUBLIC In and For the State of Nevada