

9-9-2021

## PREVIEW; Wittman v. City of Billings: *Compensable Takings Under Montana's Inverse Condemnation Doctrine.*

Blake Koemans

University of Montana, [blake.koemans@umontana.edu](mailto:blake.koemans@umontana.edu)

Follow this and additional works at: [https://scholarworks.umt.edu/mlr\\_online](https://scholarworks.umt.edu/mlr_online)

**Let us know how access to this document benefits you.**

---

### Recommended Citation

Blake Koemans, PREVIEW; State v. Peoples: PREVIEW; Wittman v. City of Billings: *Compensable Takings Under Montana's Inverse Condemnation Doctrine.*, 82 Mont. L. Rev. Online 1 (2021), [https://scholarship.law.umt.edu/mlr\\_online/vol82/iss1/1](https://scholarship.law.umt.edu/mlr_online/vol82/iss1/1).

This Oral Argument Preview is brought to you for free and open access by the Alexander Blewett III School of Law at ScholarWorks at University of Montana. It has been accepted for inclusion in Montana Law Review Online by an authorized editor of ScholarWorks at University of Montana. For more information, please contact [scholarworks@mso.umt.edu](mailto:scholarworks@mso.umt.edu).

**PREVIEW; Wittman v. City of Billings: *Compensable Takings*  
Under Montana’s Inverse Condemnation Doctrine.**

**Blake Koemans\***

The Montana Supreme Court will hear oral argument in *Wittman v. City of Billings* on Friday, September 10, 2021, at 9:30 a.m. telephonically over Zoom.<sup>1</sup> Tucker Gannett and Amanda Sowden of Gannett Sowden Law, PLLC, are expected to appear on behalf of appellants Ariane Wittman and Jeremy Taylen. Gerry Fagan and Afton Ball of Moulton Bellingham PC are expected to appear on behalf of appellee, the City of Billings. The Court has also granted Montana Trial Lawyers Association leave to participate in oral argument as amicus on behalf of Appellants.

**I. INTRODUCTION**

In *Wittman v. City of Billings*, the Court is asked to consider whether, in a claim for inverse condemnation, a claimant must show the condemning body acted with an intent to damage or take the property. If the Montana Supreme Court is interested in jurisprudential explication, this case presents the opportunity to clarify what constitutes a taking under Article II, § 29 of the Montana Constitution and the related inverse condemnation doctrine. However, if the Court does not wish to draw a hardline rule it will likely find the case is resolvable on procedural grounds under existing law.

**II. FACTUAL AND PROCEDURAL BACKGROUND**

On June 20, 2019, clogged grease in a sewer main caused nearly 1,000 gallons of raw sewage to build up and discharge into the basement of Ariane Wittman’s and Jeremy Taylen’s (“Wittman”) home.<sup>2</sup> For at least two hours, 1.5 inches of untreated sewage inundated Wittman’s basement.<sup>3</sup> The event, known as a sanitary sewer overflow (“SSO”), caused significant damage to Wittman’s home.<sup>4</sup> The City of Billings (“City”) determined the SSO event was caused by users illegally pouring grease down their drain.<sup>5</sup>

---

\* J.D. Candidate, University of Montana School of Law Class of 2023.

<sup>1</sup> A livestream of the argument can be viewed on the Court’s website. <http://stream.vision.net/MT-JUD/>.

<sup>2</sup> Brief of Appellants at 1, *Wittman v. City of Billings*, (Mont. Mar. 30, 2021) (No. DA 20-0609).

<sup>3</sup> Memorandum and Order in re: The Plaintiffs’ Motions for Partial Summary Judgment at 3, *Wittman v. City of Billings*, (Mont. Dist. Ct. Sept. 29, 2020) (No. DV 19-1124) [hereinafter Order].

<sup>4</sup> Brief of Appellants, *supra* note 2, at 1.

<sup>5</sup> See Brief of Appellee at 2, *Wittman v. City of Billings*, (Mont. June 6, 2021) (No. DA 20-0609).

The City’s sewer system consists of over 500 miles of sewer lines and serves more than 32,000 customers.<sup>6</sup> The sewer system is owned and maintained by the City.<sup>7</sup> Any home within city limits, including Wittman’s, must connect to the municipal system.<sup>8</sup> The City’s maintenance of the sewer system is extensive. Every year the city spends \$1.6 million maintaining the system which includes cleaning all 500 miles of sewer line.<sup>9</sup> Despite the extensive maintenance employed by the City, SSO events are an inevitable consequence of municipal sewer systems.<sup>10</sup> On average, Billings experiences 10–15 SSO events every year.<sup>11</sup>

On August 13, 2019, Wittman filed a single count complaint against the City, claiming damages for inverse condemnation.<sup>12</sup> In March 2020, Wittman moved for summary judgment, arguing that the damage to their home constitutes a taking, requiring just compensation under the Montana Constitution.<sup>13</sup> The district court, denying the motion for summary judgment, ruled Wittman failed to show that the City had “deliberately exercised its right of eminent domain” and could not establish a claim for inverse condemnation.<sup>14</sup> Further, the district court distinguished between a “closed system” – one in which users cannot input into the system – and an “open system” – allowing user input.<sup>15</sup> The Court then dismissed the case *sua sponte*.<sup>16</sup> Following denial of their 60(b) motion for relief, Wittman filed for appeal with the Montana Supreme Court.<sup>17</sup>

### III. ARGUMENTS

#### A. *Appellant’s Arguments*

Wittman argues both that the district court incorrectly applied Montana law, and that the Court should adopt a new standard for inverse condemnation claims. Wittman first asserts that the district court erred in ruling claimants must show intent on behalf of the government in an inverse condemnation claim.<sup>18</sup> Next, Wittman urges the Court to adopt

---

<sup>6</sup> *Id.* at 3.

<sup>7</sup> Order, *supra* note 3, at 3.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 8.

<sup>10</sup> Brief of Appellants, *supra* note 2, at 19–22.

<sup>11</sup> *Id.* at 2.

<sup>12</sup> Complaint and Demand for Jury Trial, *Wittman v. City of Billings*, (Mont. Dist. Ct. Sept. 29, 2020) (No. DV 19-1124).

<sup>13</sup> *Id.* at 1.

<sup>14</sup> Order, *supra* note 3, at 10.

<sup>15</sup> *Id.* at 7–8 (distinguishing Appellants’ facts from those in *Pacific Bell v. City of San Diego*, Cal Rptr. 2d 897 (Cal. Ct. App. 2000), in which the claimant’s property was damaged when a city water pipe burst. The California Court of Appeal held that any actual physical damage to property proximately caused by a public improvement is compensable.)

<sup>16</sup> *Id.* at 10.

<sup>17</sup> Brief of Appellee, *supra* note 5, at 2.

<sup>18</sup> Brief of Appellants, *supra* note 2, at 10.

California’s rule for liability in inverse condemnation actions.<sup>19</sup> Finally, Wittman challenges the district court’s ruling that sewer systems and public water distribution systems are not analogous for inverse condemnation purposes.<sup>20</sup> In addition to these specific arguments, Wittman asserts, throughout their brief, the district court’s ruling, that a claimant must show the government acted with an intent to damage, has created a new element in inverse condemnation law that is adverse to the public policy concerns the doctrine is meant to protect.<sup>21</sup>

Wittman first argues the district court erred in ruling that claimants must show a condemning authority “deliberately exercised its right of eminent domain” to proceed on an inverse condemnation action.<sup>22</sup> Wittman asserts that Montana law on inverse condemnation, as it has existed for over 100 years, requires no showing of intent. Relying first on a series of cases involving the 1897 widening of Broadway Street in Butte, Wittman argues an inverse condemnation action requires only a showing of damage to property.<sup>23</sup> Tracing the influence of the *Less* line of cases through the 20th and 21st centuries, Wittman states that current inverse condemnation law in Montana allows for the recovery of “sufficiently peculiar” damages and does not require a claimant to show the condemning authority acted negligently or with an intent to damage.<sup>24</sup>

Next, Wittman asserts that SSO events caused by grease buildup are an inherent consequence of operating a public sewer system.<sup>25</sup> Because SSO events are inevitable, Wittman argues, fairness requires all members of the system bear the burden of the costs. Here, Wittman relies heavily on *City of Oroville v. Superior Court*,<sup>26</sup> which articulated California’s inverse condemnation standard.<sup>27</sup> Under *Oroville*, a party claiming inverse condemnation must show “the damage to private property must be substantially caused by an inherent risk presented by the deliberate design, construction, or maintenance of a public improvement.”<sup>28</sup> Wittman points to the record of the case showing witnesses on both sides agree that grease buildups are an inevitable consequence of a sewer system, and that a

---

<sup>19</sup> *Id.* at 19 (citing *City of Oroville v. Superior Ct.*, 446 P.3d 304 (Cal. 2019)).

<sup>20</sup> *Id.* at 26.

<sup>21</sup> *Id.* at 27–28.

<sup>22</sup> *Id.* at 10; Order, *supra* note 3, at 10.

<sup>23</sup> See Brief of Appellants, *supra* note 2, at 12–13 (citing *Less v. City of Butte*, 72 P. 140 (1903)).

<sup>24</sup> *Id.* at 14. See also *Rausser v. Toston Irrigation Dist.*, 565 P.2d 632, 637 (1977) (holding that when damages are known, knowable, or an inevitable result of a project, claimant need not show negligent design, construction, or operation). See also *Deschner v. State Dep’t of Highways*, 390 P.3d 152 (Mont. 2017) (holding that a plaintiff in an inverse condemnation claim must prove only (1) that a public improvement was deliberately planned and built, and (2) as planned and built, the public improvement was the proximate cause of the damage to plaintiff’s property).

<sup>25</sup> Brief of Appellants, *supra* note 2, at 16.

<sup>26</sup> 446 P.3d 304 (Cal. 2019).

<sup>27</sup> Brief of Appellants, *supra* note 2, at 19.

<sup>28</sup> *Oroville*, 446 P.3d at 312.

grease buildup was the cause of SSO event that damaged Wittman's home. Knowing that Montana law does not currently support this argument, Wittman attempts to assuage any concern by pointing to the long history of California takings law being imported into Montana.<sup>29</sup>

Finally, Wittman charges the district court with making up "out of whole cloth" the distinction between open and closed systems for inverse condemnation analysis.<sup>30</sup> Wittman's argument here is two-fold. First, Wittman argues the district court's distinction between open and closed systems has no precedential support in Montana.<sup>31</sup> Second, Wittman argues that even if the Court finds the distinction useful, the overwhelming weight of precedent shows that open systems are subject to inverse condemnation action.<sup>32</sup>

### B. Appellee's Arguments

In response, the City argues the district court was correct in its analysis of Montana inverse condemnation law, several other States have ruled that sewage backups are not a compensable taking, and that the rule in *Oroville* should not be adopted and would not change the outcome regardless.<sup>33</sup> In addition to its primary arguments, the City also urges the Court to consider the sweeping policy implications of Wittman's arguments as well as the police power exceptions to inverse condemnation claims.<sup>34</sup>

The City first argues the district court was correct in ruling Wittman failed to show the City acted with the intent necessary to support an inverse condemnation claim.<sup>35</sup> Citing *Deschner v. State Department of Highways*,<sup>36</sup> the City asserts that the root authority of an inverse condemnation claim in Montana is the eminent domain provision of the Montana Constitution.<sup>37</sup> Because Article II, § 29 requires a condemning authority to intentionally take or damage property for a public purpose, the City argues, any inverse condemnation action must include a similar intent to take or damage.<sup>38</sup>

Next the City walks through an array of decisions in other states which hold that the unintended escape of sewage is not a compensable taking and

---

<sup>29</sup> Brief of Appellants, *supra* note 2, at 18; See also Montana Trial Lawyers Association's Amicus Curiae Brief at 1, *Wittman v. City of Billings*, (Mont. Mar. 18, 2021) (No. DA 20-0609).

<sup>30</sup> Brief of Appellants, *supra* note 2, at 26.

<sup>31</sup> *Id.* at 27.

<sup>32</sup> *Id.*

<sup>33</sup> See generally Brief of Appellee, *supra* note 5.

<sup>34</sup> Brief of Appellee, *supra* note 5, at 9–10, 19.

<sup>35</sup> *Id.* at 10; Order, *supra* note 3, at 6.

<sup>36</sup> 390 P.3d 152 (Mont. 2017).

<sup>37</sup> Brief of Appellee, *supra* note 5, at 7; MONT. CONST. art. II, § 29.

<sup>38</sup> Brief of Appellee, *supra* note 5, at 12.

does not support an action for inverse condemnation.<sup>39</sup> Most notably, the City cites to a Nebraska Supreme Court holding that there was no compensable taking under the Nebraska Constitution where raw sewage backed up in a sewer line and flooded claimant's home.<sup>40</sup> The City points out the similarity in the takings clauses of the Nebraska and Montana Constitutions, and argues the case is instructive of how the court should dispose of Wittman's claims.<sup>41</sup>

Finally, the City argues that adoption of the *Oroville* standard is inappropriate for three distinct reasons.<sup>42</sup> First, the city contends Wittman never raised the *Oroville* standard at trial and should be barred from now raising the issue.<sup>43</sup> Second, taking up *Oroville* would require the Court to overturn *Deschner*, decided only four years ago.<sup>44</sup> Third, even under *Oroville*, the City argues, Wittman cannot show that a deliberate choice by the City in the design or maintenance of the sewer system substantially caused the SSO event.<sup>45</sup>

#### IV. ANALYSIS

It is settled law in Montana that a taking occurs under inverse condemnation when a public property improvement or use, as designed, constructed, or maintained proximately causes damage to a claimant.<sup>46</sup> There is no dispute between the parties that the City's wastewater treatment system constitutes a public improvement. Further, there is no dispute that Wittman's property was damaged by the SSO event.<sup>47</sup> The dispute in this case, and the district court's ruling, primarily turns on the issue of what constitutes causation in an inverse condemnation action. The case presents the Court with the opportunity to define how closely the actions of a condemning authority and the damage to property must be to constitute a taking. However, the peculiar way in which the district court disposed of the case may provide a more restrained court with the

---

<sup>39</sup> *Id.* at 20–30.

<sup>40</sup> *Id.* at 20–21 (citing *Henderson v. City of Columbus*, 827 N.W.2d 482, 483 (Neb. 2013)).

<sup>41</sup> *Id.* at 21 n. 3 (comparing the text of the two constitutions).

<sup>42</sup> *Id.* at 30.

<sup>43</sup> *Id.* at 31. *But see* Reply Brief of Appellants at 13, *Wittman v. City of Billings*, (Mont. Aug. 12, 2021) (No. DA 20-0609) (arguing in response that *Oroville* is consistent with both *Rauser* and *Deschner* and is simply additional authority for their theory of the case).

<sup>44</sup> Brief of Appellee, *supra* note 5, at 34.

<sup>45</sup> Brief of Appellant, *supra* note 2, at 40.

<sup>46</sup> *See Deschner v. State Dep't of Highways*, 390 P.3d 152, 158 (Mont. 2017); *Rauser v. Toston Irrigation Dist.*; *Evenhus v. City of Great Falls*, No. DDV-06-900 (Mont. Dist. Ct. Dec. 31, 2012) (adding the additional requirements that the damage be of a kind which is uncommon to other users of the system or the public in general, and that the property owner suffer an actual loss—elements not included in *Deschner*); 656 P.2d 632, 638 (Mont. 1977) (holding that a showing of damages proximately caused by the undertaking of a public project is sufficient, particularly where the damage is a reasonably foreseeable consequence of the undertaking).

<sup>47</sup> *See* Order, *supra* note 3, at 6.

opportunity to avoid pronouncement of any new law, and simply send the case back down for further proceedings.

a. *The District Court's Interpretation of Law*

The district court, in dismissing the case, appears to have introduced at least two new requirements to inverse condemnation law. The Court will likely need to address the district court's rulings on the law before addressing the dismissal of the case. First the court will likely address the district court's understanding of causation and the intent necessary to effectuate a taking.<sup>48</sup> Second, the Court may need to consider the distinction between "open" and "closed" systems made by the court below.<sup>49</sup>

The district court ruling, that causation in inverse condemnation requires "deliberate affirmative action by the municipality to take the property", that the City "deliberately [exercise] its right of eminent domain" is a significant expansion of current law. Wittman argues, and the Court is likely to agree, the district court has imposed a new burden on claimants seeking redress for inverse condemnation.<sup>50</sup> A city need not act for the purpose of effectuating a taking, it must merely undertake a deliberate public improvement which, as planned and built, proximately causes damage.<sup>51</sup> Contrary to the district court's reasoning below, inverse condemnation regularly arises out of the erroneous or inadvertent taking of property.<sup>52</sup> In *Wohl v. City of Missoula*,<sup>53</sup> Missoula mistakenly relied on incorrect survey information to widened a road which infringed on adjacent property owners' homes. In *Rausser*, seeping water from an irrigation project supported the Plaintiff's takings claim.<sup>54</sup> The Court has never held an intent to exercise the eminent domain power is a required showing in an inverse condemnation action, and it is unlikely to do so now.

Next the Court may address the district court's distinction between "open" and "closed" systems.<sup>55</sup> Wittman relies on *Pacific Bell v. City of San Diego*,<sup>56</sup> a case in which a city was found liable for inverse condemnation because it insufficiently maintained cast iron water pipes. The district court distinguished Wittman's case by finding open system

---

<sup>48</sup> *Id.* at 8.

<sup>49</sup> *Id.* at 6.

<sup>50</sup> Brief of Appellant, *supra* note 2, at 10.

<sup>51</sup> *Knight v. Missoula*, 827 P.2d 1270, 1276 (Mont. 1992) (citing *Rausser v. Toston Irrigation Dist.*, 565 P.2d 632 (Mont. 1977)).

<sup>52</sup> Order, *supra* note 3, at 8.

<sup>53</sup> 300 P.3d 1119 (Mont. 2013).

<sup>54</sup> *Rausser v. Toston Irrigation Dist.*, 565 P.2d 632, 635 (Mont. 1977).

<sup>55</sup> Order, *supra* note 3, at 7.

<sup>56</sup> Cal Rptr. 2d 897 (Cal. Ct. App. 2000).

sewer lines not analogous to water pipes.<sup>57</sup> The district court does not cite any Montana authority for this distinction, likely because there is not any authority to cite. Inverse condemnation cases often revolve around public improvements, which may be considered “open systems.”<sup>58</sup> The court is unlikely to adopt this new distinction in inverse condemnation law.

*b. The District Court’s Dismissal*

While the Court may consider the district court’s interpretations of the law, the primary issue is whether the district court properly dismissed Wittman’s claim. As noted, this case reaches the Court following dismissal by the district court.<sup>59</sup> On review, it’s likely this Court will treat the case as if a cross-motion for summary judgment had been granted.<sup>60</sup> Summary judgment is only appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.<sup>61</sup> The Court will review *de novo* a grant of summary judgment.<sup>62</sup>

Here, any disputed question of material fact as to whether the city’s maintenance or design of the sewer system caused the clog would make summary judgment inappropriate. In depositions, City employees testified that SSO events are a known problem.<sup>63</sup> As the district court pointed out, the City spends \$1.6 million annually cleaning the sewer lines.<sup>64</sup> Wittman will likely argue that this amount is insufficient as 10–15 SSO events continue to occur annually on the city system.<sup>65</sup> The City takes care to mention that the maintenance of its sewer lines is more robust than any other city in Montana.<sup>66</sup> Robust as the City’s maintenance may be, its sufficiency is likely a material fact in the City’s liability and dispute as to its sufficiency should be enough to prevent summary judgment. The Court will likely rule that dismissal was erroneous.

Further, while the district court characterized the discharge of grease into the sewer as “illegal,” Wittman argues that this is a

---

<sup>57</sup> Order, *supra* note 3, at 7.

<sup>58</sup> See *Knight v. Missoula*, 827 P.2d 1270, 1276 (Mont. 1992) (reversing the district court’s summary judgment ruling because interference resulting from the public’s heavy use of a dirt road may be compensable if it is of sufficient magnitude and peculiar character).

<sup>59</sup> Order, *supra* note 3, at 10.

<sup>60</sup> See *Lee v. Great Divide Ins. Co.*, 182 P.3d 41, 44 (Mont. 2008) (holding that on a motion for summary judgment, a cross-motion is not required for the judge to dismiss the case where it is apparent there is no genuine issue of material fact); see also Order Denying Plaintiff’s 60(b) Motion for Relief from the Court’s Order re: Plaintiffs’ Motion for Partial Summary Judgment at 2, *Wittman v. City of Billings* (Mont. Dist. Ct. Nov. 24, 2020) (No. DV 19-1124) (citing *Lee* and clarifying that the dismissal operates as a summary judgment).

<sup>61</sup> MONT. R. CIV. P. 56(c)(3).

<sup>62</sup> *Knight*, 827 P.2d at 1276.

<sup>63</sup> Brief of Appellant, *supra* note 2, at 19–24.

<sup>64</sup> Order, *supra* note 3, at 3.

<sup>65</sup> Brief of Appellant, *supra* note 2, at 2.

<sup>66</sup> Brief of Appellee, *supra* note 5, at 3.



mischaracterization.<sup>67</sup> The ordinance prohibiting grease discharge appears to apply only to “industrial users.”<sup>68</sup> Wittman is likely to argue that by allowing residential users to discharge material into the sewer, which the city is aware causes SSO events, the City’s operation of the system is the proximate cause of their damage.<sup>69</sup> Wittman will find strong support for this argument in the plain language of the inverse condemnation standard. Regardless, the applicability of the city code raises issues of material fact that likely make summary judgment inappropriate.

While Wittman has a strong argument that summary judgment was improper, the City will likely point to the narrow language of Montana inverse condemnation caselaw. Most notably, while Wittman draws a broad reading of *Rausser*, the City argues that the holding was restricted to situations in which damage was an inevitable result of the “intentional undertaking” of a public project.<sup>70</sup> The City is likely to argue that incidental damage, occurring long after the construction of a public project cannot form the basis of an inverse condemnation claim. Given the implications of holding a municipality liable for damages related to an improvement project long after the design and construction of that project, the Court will likely be sympathetic to the City’s argument for a narrow reading of the standard. However, even under a narrow formulation of the law, dispute over the facts likely makes summary judgment improper.

Additionally, the City is likely to argue that the district court was right to decide causation at the summary judgment stage. Generally, in litigation, questions of law are to be decided by the court and the jury is tasked with deciding questions of fact. Unlike other areas of the law, in inverse condemnation causation is often considered a question of law rooted in facts.<sup>71</sup> In *Buhmann*, the court found strong support for the proposition that, in an inverse condemnation action, the only question for the jury is the amount of damages; causation being decided as a matter of law.<sup>72</sup> However, the *Buhmann* standard is not always used.<sup>73</sup> The full extent to which *Buhmann*’s holding regarding causation should be employed is unclear. However, where factual disputes must first be resolved to determine if a taking has occurred, causation is a question for the jury.<sup>74</sup> Here, the question of causation relies heavily on factual circumstances likely making the application of *Buhmann* inappropriate.

---

<sup>67</sup> Brief of Appellant, *supra* note 2, at 22–23.

<sup>68</sup> CITY OF BILLINGS, MONT. ORDINANCE § 26-604(b)(9) (2021).

<sup>69</sup> Brief of Appellant, *supra* note 2, at 22–24.

<sup>70</sup> *Rausser v. Toston Irrigation Dist.*, 565 P.2d 632, 637 (Mont. 1977).

<sup>71</sup> *Buhmann v. State*, 201 P.3d 70, 84 (Mont. 2008) (citing *City of Monterey v. Del Monte Dunes at Monterey, LTD.*, 526 U.S. 687, 721 (1999)).

<sup>72</sup> *Id.*

<sup>73</sup> *See Deschner v. State Dep’t of Highways*, 930 P.3d 152, 157 (Mont. 2017) (finding the jury was properly instructed on the issue of causation).

<sup>74</sup> *Buhmann*, 201 P.3d at 84–85.

Because disputed question of fact remain, the Court is likely to rule that the district court was incorrect in granting summary judgment for the City.

## V. CONCLUSION

Montana has a clear standard for establishing an inverse condemnation claim. The district court in this case appears to have introduced new elements which will require this Court to consider if the district court's holding is consistent with existing law. The Court is likely to rule narrowly that the procedural dismissal of the case at the summary judgment stage was improper. Given that this case was not fully argued below, the Court is unlikely to use it to adopt new law. Instead, the Court will likely reiterate the standard from *Deschner* and remand the case for further proceeding under current Montana law.<sup>75</sup>

---

<sup>75</sup> *Deschner*, 930 P.3d at 157.