IN THE SUPREME COURT, STATE OF WYOMING

THOMAS HAMANN, Appellant (Plaintiff), v. HEART MOUNTAIN IRRIGATION DISTRICT, a Wyoming Public Irrigation District, Appellee (Defendant).	S-24-0234

BRIEF OF APPELLANT

Austin Waisanen
WSB No. 8-7023
Jeffrey W. McCoy*
PACIFIC LEGAL FOUNDATION
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
AWaisanen@pacificlegal.org
JMcCoy@pacificlegal.org

Attorneys for Appellant
**Admitted pro hac vice*

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STATEMENT OF JURISDICTION

This is an appeal of the Order Granting Defendant Randy Watts and Defendant Heart Mountain Irrigation District's Motions for Summary Judgment entered by the Park County District Court, Judge William H. Simpson presiding, on June 3, 2023. Record on Appeal (hereinafter R.) at 981–83. Mr. Hamann timely filed his Notice of Appeal on July 1, 2024, and this appeal was docketed in the Wyoming Supreme Court on September 6, 2024. R. at 984–87; W.R.A.P. 2.01, 6.01. Therefore, jurisdiction is vested in this Court.

STATEMENT OF THE ISSUES

I. Whether Public Entities Are Liable Under Wyo. Stat.§ 1-26-516 (Inverse Condemnation) When Public Employees Take Or Damage Property Within The Scope Of Their Duties.

STATEMENT OF THE CASE

I. Introduction

A public or governmental entity cannot avoid its constitutional obligation to provide just compensation when its employee causes a taking or damaging of private property merely because the employee was not acting under an express instruction to do so. Inverse condemnation liability may lie when a public employee takes or damages property within the general scope of his or her duties. The record establishes here that an irrigation district manager and employee entered private property while acting within the general scope of their duties, intentionally causing several thousand dollars of property damage (and severe bodily injury) to facilitate the district's maintenance of public infrastructure. The district court ignored relevant law and erroneously held that Mr. Hamann was required to show that the irrigation district took "official action", i.e., that it specifically requested its manager and employee to enter and damage the property, in a meeting held in accordance with the Wyoming Public Meetings Act. This was error and the district court's order granting summary judgment to Heart Mountain Irrigation District should be vacated.

II. Facts

A. The Hamann Property

Thomas Hamann and his family (collectively "Hamann Family" or "Appellant") own a 100-acre property in Park County, Wyoming, which they use to raise hay and pasture their herd of red angus cattle. *See* R. at 1, 10, 269. The Hamann Family property is subject to the Heart Mountain Irrigation District ("HMID"), an irrigation district which has been delegated certain governmental powers under Wyoming law, including the power of

eminent domain to take private property for its purposes. Wyo. Stat. § 41-7-108, R. at 269, 297. The Hamann Family property is transected by "Lateral 79," a canal belonging to the district. Since the construction of Lateral 79, a road has existed on its northside providing the irrigation district with access to maintain and operate the canal.

(This Map of Hamann Property provided for illustration only.)

B. HMID's New South Side Road

In 2016, the Hamann Family learned that HMID intended to build another road through their property, along the *south* side of Lateral 79. R. at 270–71 ("HMID needed to construct a road along the south side of Lateral 79…"). HMID asserted it held an unrecorded easement along both the north and the south sides of Lateral 79 which would allow it to construct a road through the Hamann property. R. at 338, 955. The Hamanns disputed HMID's easement claim, and objected to the building of a new road on the south

side of Lateral 79, noting that HMID can conduct all maintenance, monitoring, and operation of Lateral 79 from the existing north side road like it has always done, *see* R. at 302, and that HMID was claiming the right to build a roadway where the Hamann Family had placed fencing, a log archway, and pastured livestock. *See* R. at 270, 296, 329. HMID's Manager, Randy Watts, told Mr. Hamann that his fencing would interfere with the HMID's planned roadway. *See* R. at 303.

C. The Hamann Family Allowed HMID Access to Remove a Concrete Bowl Servicing a Neighbor's Land

In 2018, HMID received a request to move a concrete bowl located on the Hamann property which provided irrigation water to the neighboring Riolo property (the "Riolo bowl"). R. at 271. The Riolos were not able to irrigate all their land because the bowl likely sat too low in elevation. R. at 311, 411. Accessing and removing the Riolo bowl would require HMID staff to enter Hamann's property along the south side of the canal, in the area of the planned road and disputed easement. R. at 974, 315, 317–318, 410, 529, 535. The Hamanns granted HMID's request, and "authorized [HMID] in limited fashion and scope to go only onto the corner of [Hamann's] property south of Lateral 79 in order to remove concrete bowl serving neighboring Riolo property." R. at 271–272, 316.

D. HMID's Bowl Removal Morphs Into a New Southside Road

On June 28, 2018, Randy Watts, arrived at the Hamann Family property with another employee, Kenny Unruh, and heavy equipment including an excavator. R. at 272. Mr. Watts was already in the area; he and other employees had just finished clearing and grading the southside road along the canal on the properties which adjoin the Hamann

property. R. at 532, 548. HMID argued that Mr. Watts and Mr. Unruh were at the Hamann property to move the Riolo bowl, R. at 272, but Mr. Watts testified that they were merely going to "check the drops on the Hamann property and shoot the elevation of the [Riolo] bowl." R. at 410, 549.

Mr. Hamann had removed a fence panel on the eastern boundary of his property to facilitate HMID's access to the Riolo bowl. R. at 315. But shortly after HMID's employees entered Mr. Hamann's property, a dispute erupted between Mr. Watts and Mr. Hamann regarding the scope of access given to HMID. As Mr. Watts put it, he "told [Mr. Hamann] the scope of what we were going to do, access all drops and do what we were going to do … and [Mr. Hamann] walked off." R. at 416. Mr. Watts believed that "Mr. Hamann was going to allow us entire access to that side [the south side] of the lateral." R. at 536. But Mr. Hamann had allowed HMID access only to a portion of his property to remove the Riolo bowl ("79-2"), *see* R. at 271-272, 309, 316. Fearing that HMID's manager would try to exceed the scope of his permission, and remembering earlier encounters where HMID's manager told Mr. Hamann "he had more power than the sheriff", *see* R. at 4, Mr. Hamann left to call his attorney and the Park County Sheriff. R at 605.

While Mr. Hamann was away calling for help, Mr. Watts and Mr. Unruh began destroying several fences and a log archway on Mr. Hamann's land which Mr. Watts believed to be blocking HMID's claimed easement on the south side of the canal. R. at 606, 602, 559–560, 322. According to Mr. Unruh, Mr. Watts told him to hurry up with the removal and destruction of fencing because Watts knew sheriff deputies would be arriving. R. 561 ("We've got 15 minutes before the deputies get here.").

Mr. Hamann and a neighbor who arrived pleaded with Mr. Watts and Mr. Unruh to stop destroying Mr. Hamann's property. R. at 321. At some point, while Mr. Hamann was trying to stop him from destroying any more fencing or improvements, Mr. Watts struck Mr. Hamann with the bucket of his excavator. R. at 956. The Sheriff eventually arrived, but only after HMID's employees had caused nearly ten thousand dollars in property damage to the property and severe bodily injury to Mr. Hamann. R. at 793 (fractured C3 vertebrae), 233 (archway damage estimate), 546–547, 782 (Watts' testimony regarding damaged fencing), 602.

Mr. Hamann sued, alleging a state law claim for inverse condemnation predicated on property damage against HMID and Randy Watts, and federal claims against both parties under 42 U.S.C. § 1983 predicated on violations of the Fifth and Fourteenth Amendments. R. at 1–16. Mr. Hamann did not allege any state law tort claims against either HMID or Randy Watts.[1] *See id.*

After extensive discovery, Mr. Watts and HMID moved for summary judgment. R. at 265–416, 428–465. HMID argued that "at no point in the Complaint does Plaintiff allege that Watts and Unruh were acting with express authority granted by HMID" and that "[t]here are no board minutes which would indicate Watts had permission to cross

[1] Mr. Hamann has at all times contended that Mr. Watts was acting within the scope and course of his employment. State law says that employees and government entities are immune from tort liability for actions taken by employees within the scope and course of employment. Wyo. Stat. § 1-39-104. And this Court already held in a case concerning Mr. Watts' predecessor—a former manager of HMID—that there has been no statutory waiver of immunity for irrigation district managers who strike property owners with irrigation equipment. *See Krenning v. Heart Mountain Irr. Dist.*, 2009 WY 11, ¶ 1, 200 P.3d 774, 776 (Wyo. 2009).

Plaintiff's real property using equipment owned by HMID, or to remove fence posts." R. at 273–74. According to HMID, "the HMID Board of Commissioners never took action to authorize Defendant Watts to enter onto Plaintiff's property, for any purpose *other than work on the* [Riolo] *water bowl*...." and therefore "[a]bsent an act by the Board authorizing Watts to enter Plaintiff's real property[2], Plaintiff's claim against HMID for inverse condemnation is legally deficient." R. at 276–77 (emphasis added).

Mr. Watts testified that the Board and/or Board's attorney authorized him to damage and remove the fencing on the Hamann property. According to Mr. Watts, the "entire board" directed Watts to enter Hamann's property on the day in question, R. at 530-31, and once there, he "could access the entire easement … [and] do whatever we needed to…" R. at 533. Nevertheless, he argued in his own motion for summary judgment that as an individual, he lacks the power of eminent domain, and consequently, he can't be held liable in an inverse condemnation action. R. at 432. In short, HMID asserted it was not liable for inverse condemnation even though it possesses the power of eminent domain because it was its employees, while acting on their own, who damaged the property, while Mr. Watts claimed he could not be held liable because he can't take property. The cross-pointed-fingers defense of the co-defendants was thus perfected.

The district court granted summary judgment to HMID and Randy Watts. *See* Appendix 1a–3a; R. at 981–83. The court determined that because some of HMID's board

[2] HMID did not explain why its tacit concession that Watts was authorized to work on the Riolo water bowl on the Hamann property was not "an act by the Board authorizing Watts to enter Plaintiff's real property…." R. at 277.

members testified that they did not specifically authorize Mr. Watts to destroy fencing and other property of Mr. Hamann to access the disputed easement, and because Wyoming's sunshine laws void any action not taken in open session at a public meeting, HMID had presented what it termed a "prima facie case" of "no official action." R. at 965. It held that "inverse condemnation occurs through government action" and that "there must have been some action by the district that led to inverse condemnation." R. at 964. Mr. Hamann appealed.[3]

SUMMARY OF ARGUMENT

Government entities are liable when public employees take or damage property within the scope of their duties. The district court misapplied a rule of federal takings law when it held that because HMID's board did not specifically authorize its manager to damage Mr. Hamman's property, HMID could not be held liable for inverse condemnation under Wyo. Stat. § 1-26-516. The authorization rule does not require that specific or express authority support a public employee's actions for inverse condemnation liability to lie; instead, all that must be shown is that the public employee was acting within the general scope of his or her duties when he or she took or damaged property. The actions of HMID's manager and employee easily meet this test, so the district court's grant of summary judgment should be vacated. Additionally, Wyoming is one of several states which constitution provides private property owners greater protection than what is afforded under the federal Constitution. Specifically, Wyo. Const. art 1, § 33, states that "[p]rivate

[3] Before briefing, Mr. Hamann dropped his claims against Randy Watts in his individual capacity. *See* Order Dismissing Party.

property shall not be taken *or damaged* for public or private use without just compensation." (emphasis added). The district court's application of the "authorization" rule is incompatible with Wyoming's heightened protection of property rights.

ARGUMENT

I. PUBLIC ENTITIES ARE LIABLE IN INVERSE CONDEMNATION WHEN PUBLIC EMPLOYEES TAKE OR DAMAGE PROPERTY WITHIN THE SCOPE OF THEIR DUTIES

The federal courts have long held that for there to be a taking, a public employee or official's actions must have been authorized. *See, e.g.*, *United States v. N. Am. Transp. & Trading Co.,* 253 U.S. 330, 333 (1920) ("In order that the government shall be liable it must appear that the officer who has physically taken possession of the property was duly authorized so to do, either directly by Congress or by the official upon whom Congress conferred the power.") The district court held in its order on summary judgment that because no "official action" was taken authorizing Mr. Watts to damage or enter Mr. Hamann's property, Mr. Watts' actions were "unauthorized" and thus no inverse condemnation liability could lie.[4] This was the district court's own unique application of the "authorization" rule from federal takings law, a rule that has never been treated by this Court. "This Court affords no deference to the district court's ruling, but instead reviews a "summary judgment in the same light as the district court, using the same materials and following the same standards." *Bogdanski v. Budzik*, 2018 WY 7, ¶ 18, 408 P.3d 1156, 1161 (Wyo. 2018).

[4] The court based its finding of no "official action" on the law providing that actions not taken in public meetings are "null and void." *See* Wyo. Stat. § 16-4-403.

A. The "Authorization" Rule Only Requires That Actions Taken by a Public Employee or Government Official Be "Fairly Chargeable" to the Government

The "authorization" requirement is satisfied when a government official or employee's actions are "fairly chargeable" to the government. *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358 (Fed. Cir. 1998).

In *Del-Rio*, Del-Rio Drilling owned several federal leases for oil and gas in an area where the surface estate was held by the federal government in trust for the Ute Indian Tribe. *Id.* at 1360. Before drilling, Bureau of Land Management regulations required Del-Rio to get the tribe's permission for a right-of-way through the surface estate. *Id.* After the tribe refused to grant Del-Rio any more rights-of-way, Del-Rio was forced to cease drilling operations. *Id.* Del-Rio sued the United States alleging a taking of its interests under the leases. *Id.* at 1361. The United States argued that the Tribal Consent Act authorized the BLM to condition Del-Rio's leases on the tribe's consent. *Id.* Del-Rio disagreed, and argued that BLM was acting without, and in contravention to, any statutory authority. *Id.*

When Del-Rio "refused to concede the validity of the government's actions," the government's defense strategy shifted to the "authorization" requirement. The government argued a necessary element of a takings claim was that the government's conduct must have been authorized, and since Del-Rio had argued that the BLM regulation requiring consent was not authorized, a conclusion the court agreed with in an earlier order, Del-Rio had not stated a takings claim. *See id.* at 1361–62. The Court of Federal Claims agreed, dismissing Del-Rio's complaint for failure to state a claim. *Id.* at 1362.

On appeal, the Federal Circuit reversed, explaining that in takings cases, "government agents have the requisite authorization if they act within the general scope of their duties…." *Id.* The Court explained further that "government conduct is not 'unauthorized' for purposes of takings law, merely because the conduct would have been found legally erroneous if it had been challenged in court." *Id.* at 1363.

Here, the district court reasoned in a mistaken manner very similar to the reversed court in *Del-Rio*, by holding that since Wyo. Stat. § 16-4-403 voids any action not taken at a public meeting, there was no "official action" by HMID which could make it liable for property damage caused by its manager and employees. *See* R. at 964–66. Like the lower court in *Del-Rio*, the district court's decision here missed the forest for the trees. Perhaps Mr. Hamann would have had a remedy in a petition for judicial review to enjoin Mr. Watts' damaging of his property while it was occurring. Perhaps other legal theories would give rise to other forms of relief. But the moment for injunctive relief has passed, and Mr. Hamann seeks to recover for damages caused to his property when HMID's manager decided he was entitled to greater access to it than Mr. Hamann had allowed, under a constitutional and statutory provision providing a remedy for damage to property. Wyo. Stat. § 1-26-516; Wyo. Const. art. 1, § 33.

If some other legal insufficiency might be proven regarding Mr. Watts' conduct, that should not vitiate Mr. Hamann's claim for just compensation. Indeed, common sense and fairness would suggest that when government agents illegally damage your property—such as when the i's and t's for "official action" are not dotted and crossed under the Wyoming Public Meetings Act—the property owner's case for compensation would be

stronger than had the government agents "legally" damaged the property. *See Del-Rio*, 146 F.3d at 1364. After all, a basic premise of every *inverse* condemnation lawsuit is that the government did not follow ordinary procedures in taking (or damaging) property. *Cheyenne Airport Bd. v. Rogers*, 707 P.2d 717, 729 (Wyo. 1985) ("Inverse condemnation … [is] opposed to a taking by formal procedure….").

Del-Rio also relied on then-Judge Scalia's opinion for the D.C. Circuit in *Ramirez*. *Ramirez de Arellano v. Weinberger*, 724 F.2d 143, 151 (D.C. Cir. 1983), *reh'g granted and opinion vacated* (May 1, 1984), *on reh'g*, 745 F.2d 1500 (D.C. Cir. 1984), *cert. granted, judgment vacated*, 471 U.S. 1113, 105 S. Ct. 2353, 86 L. Ed. 2d 255 (1985) (application of authorization rule withstanding later proceedings). There, Mr. Ramirez was the owner of certain companies with large land holdings in Honduras. *Id.* at 146. In 1983, the Department of Defense decided it needed to establish a training center in Honduras to train soldiers for the civil war in El Salvador. *Id.* The American military established the training center on Mr. Ramirez's land, so he sued, alleging that his property had been seized without statutory or constitutional authority and due process of law. The government motioned to dismiss, arguing among other things that the relief requested (like injunction) would be inappropriate in the matter due to sensitive national security concerns. The district court dismissed Ramirez's complaint on justiciability grounds. *Id.* at 146.

On appeal, Circuit Judge Scalia, writing for the panel, affirmed the judgment of the lower court for a different reason: Mr. Ramirez had other options than the present lawsuit; he could sue to obtain monetary relief in the Court of Federal Claims. Mr. Ramirez tried to sustain his lawsuit by arguing that such relief would be unavailable if the military's actions

were in fact unauthorized, a position the dissent agreed with. But as Judge Scalia explained, "if a taking occurs while [a government officer] is acting within the normal scope of his duties … a [just compensation] remedy normally lies…." *Ramirez*, 724 F.2d at 151. This is exactly the case here. Watts acted within the scope of his duties when he intentionally damaged Hamann's property, regardless of whether HMID's board specifically requested Mr. Watts and its other employees to do so.

B. Actions Taken by Public Employees Within the General Scope of Their Duties Are Normally *Fairly Chargeable to the Government*

The Federal Circuit's recent decision in *Darby Development* underscores this point. *See Darby Dev. Co. v. United States,* 112 F.4th 1017 (Fed. Cir. 2024). In 2021, in response to the COVID-19 pandemic, the Center for Disease Control issued a nationwide moratorium purporting to make it unlawful for certain property owners to evict non-paying and other defaulting tenants. *Id.* at 1020. Darby Development sued, alleging that CDC's moratorium effected a taking of its property under the Fifth Amendment. *Id.* Shortly after the owners in *Darby Development* filed suit, the Supreme Court held in a different case, *Alabama Association of Realtors v. HHS*, 594 U.S. 758 (2021), that the eviction moratoria most likely exceeded the scope of the CDC's statutory authority. *See id.* at 763 (saying of petitioners challenging the CDC that "it is difficult to imagine them losing.").

After losing *Alabama Realtors*, the federal government's defense to Darby Development's takings claims shifted to the authorization rule that the district court misapplied here. The government motioned to dismiss, arguing that because the CDC's eviction moratoria were imposed without statutory authority, they were unauthorized, and

thus no takings liability could lie. *Darby Dev.,* 112 F.4th at 1022. The Court of Federal Claims accepted this argument and dismissed the case. *Id*.

On appeal, the Federal Circuit reversed, explaining what makes a government action "authorized" for takings liability. The court held that the "ultimate inquiry" is whether the government agents' acts are "chargeable to the government" and that actions taken within the scope of agent's duties normally satisfy this inquiry. *Id.* at 1024 ("An action will normally be deemed authorized if it was done by government agents 'within the general scope of their duties….'").

C. HMID's Manager and Other Employees Were Acting Within the General Scope of Their Duties When They Damaged Mr. Hamann's Property

Summary judgment should not have been entered on the authorization question because the record establishes that HMID's manager and employees were acting within the general scope of their duties. Randy Watts was the "manager" of HMID. R. at 712. According to the district's bylaws, the manager "shall have general charge of the District and the employment of personnel thereon." R. at 389. The manager is in charge of day-to-day operations of the district and responsible for implementing the district's projects. R. at 573. Mr. Watts' general job duties included operating the excavator he used to strike Mr. Hamann's property. *See* R. at 853. According to several commissioners of the district, the Board "[did not] supervise [Mr. Watts]". R. at 591, *see also* 573, 852. Instead, Mr. Watts "ha[d] a lot of construction experience[,]" R. at 595, and the Board "would give suggestions of projects" to him. R. at 712. According to Watts, "[he] was given a great deal of latitude to perform [his] construction abilities and the legal part of it[.]" R. at 801. Watts' job as

manager was to "operate the district." R. at 832. According to Watts, he was authorized by the Board to go onto the Hamann property to work on the concrete bowl and "do whatever we needed to…" R. at 533, 913, 957.

Kenny Unruh, one of the other irrigation district employees who the district court found had entered and damaged some of Hamann's property, was likewise acting within the scope of his general duties. *See* R. at 559 (establishing that Unruh had been operating district equipment on nearby properties). Mr. Unruh testified that his boss, Randy Watts, asked him to operate an excavator and remove Mr. Hamann's fencing and log archway, R. at 564–66, and that Mr. Watts regularly threatened to fire Mr. Unruh if he did not perform as requested. R. at 563. At least some of the Board knew of Mr. Watts' habit of threatening his subordinates with termination if they did not do as he instructed. *See* R. at 842.

In summary, we have an irrigation district whose commissioners are tasked with providing water to lands within the district and constructing and maintaining the infrastructure necessary for the same. *See* Wyo. Stat. § 41-7-303 *et seq*. We have the manager those commissioners hired to have "general charge" of the district. We have another employee of the district whose general job duties included assisting Mr. Watts perform construction work and maintenance of public infrastructure within the district. On June 18, 2022, these individuals, during regular work hours, operating equipment owned by the district, entered Mr. Hamann's land to either work on the Riolo bowl or make sure the district's claimed easement on the south side of the canal was accessible. *See* R. at 796 (Watts explaining that his plan for the day was "cleaning the easement, being able to access it, and then do the elevations and check the drops."). Either of these endeavors fall within

the scope of an irrigation district employee's job duties. Indeed, the district court specifically found in its dismissal of Mr. Hamann's civil rights claims that "Mr. Watts had the authority to access private property in furtherance of his job duties, in this case, the ability to go on private land along the district's canal for maintenance and repair purposes." R. at 974.

In the process, Mr. Watts and the other employee both testified that they destroyed portions of Mr. Hamann's property to facilitate their work.[5] Because Watts and the other HMID employee were acting with the general scope of their duties, it is immaterial that, as the district court erroneously found, "[n]othing in the record shows any formal action by the HMID board directing Mr. Watts to proceed onto the Hamann property on the day in question." R. at 957; *but see* R. at 276–77 (HMID claiming that the Board had authorized Mr. Watts to enter the Hamann property to work on the Riolo bowl.).

Furthermore, because the district court's ruling didn't consider the authority question much beyond remarking that Wyoming law requires agency action to be taken at a public meeting, it ignored that an agent does not need specific authority to do every single thing his principal tasks him with, especially a high-ranking agent, who "unsupervised", has "general charge" of an enterprise. As the Restatement (Second) Of Agency explains "[i]t is seldom that the words of a principal are sufficiently specific to include or exclude all the acts which he expects the agent to do or not to do," § 35 cmt. b., and the authority

[5] And this testimony was credited by the district court, albeit dismissively. "The Court is not clear how the district has … damaged any of Hamanns' property *other than fence posts and an entryway structure*.". R. at 965 (emphasis added).

to manage a business typically "includes authority … to make repairs reasonably necessary for the proper conduct of the business[.]" *Id.* § 73(b).

D. A "Scope of Duties" Rule for Inverse Condemnation Liability Is Consistent with Wyoming's Heightened Protection of Property Rights

The lower court's application of the authorization rule—requiring Mr. Hamann to prove express authority—is incompatible with Wyoming's heightened protection of property rights. Specifically, the Wyoming Constitution provides that property shall not be taken *or damaged* for public use. Wyo. Const. art. 1, § 33 (emphasis added). Damaging clauses like this, "by virtue of including 'damage' to property as well as its 'taking'"… "'protects a somewhat broader range of property' values than does the corresponding federal provision." *San Remo Hotel L.P. v. City and Cnty. of San Francisco*, 27 Cal. 4th 643, 664, 41 P.3d 87, 100 (2002); *see also City of Tupelo v. O'Callaghan*, 208 So. 3d 556, 561–63 (Miss. 2017). The North Dakota Supreme Court aptly explains why state constitutions enacted or amended after the federal constitution include this broader protection:

> When the Fifth Amendment to the Constitution of the United States was adopted, it was therein provided that private property could not be taken by the United States for public use without just compensation. And the earlier State Constitutions likewise so provided. But this guaranty was too narrow. It insured compensation only in those cases where property was taken. The severity of the rule and the injustice resulting from its application were recognized.

King v. Stark Cnty., 67 N.D. 260, 271 N.W. 771, 773 (1937).

The framers of the Wyoming Constitution specifically adopted Article 1, § 33, to recognize the government's obligation to pay compensation exists for more than just

"takings." That is recognized not only by the text of the Wyoming Constitution but also Wyoming law. Wyo. Stat. § 1–26–516 provides that "[w]hen a person possessing the power of condemnation takes possession of or damages land in which he has no interest … the owner of the land may file an action in district court seeking damages for the taking *or* damage…." (emphasis added). And the Wyoming Constitution is clear: such actions constituting "damage" and not a "taking" also entitle a property owner to just compensation. *See* Wyo. Const. art. 1, § 33.

The federal authorization rule owes its origin in part to a concern by courts that recognizing takings liability for 'unauthorized' actions would allow low-level government employees to make decisions that should have been made by the legislature but weren't, like the decision to spend public money to acquire a property by an exercise of eminent domain. *See Langford v. United States*, 101 U.S. 341, 345 (1879); U.S. Const. art. I, § 8, cl. 1 (vesting in Congress the spending power). A separate reason for the rule is that an owner whose property is taken wrongfully or without authority may be entitled to a return of the property, rather than merely just compensation. *See United States v. Great Falls Mfg. Co*., 112 U.S. 645, 656 (1884). But the Fifth Amendment provides just compensation only for 'takings' of private property, and damage to property which falls short of a 'taking' may not be recoverable against the United States. In a damage-to-property case such as this one, there is no property to be restored to the possession of the owner and no concern that low-level government officers are making decisions which ought to be made by the legislature but weren't, like the decision to acquire a property through eminent domain. Property damage which occurs incidental to a public entity's use of private property for

maintenance or construction of public works will likely normally occur without any deliberation by legislatures or other governing bodies.

There is thus little reason to require that express authority support a public employee's *damage* to private property when this is not even required under federal law to prove a *taking*. *See Darby Dev.,* 112 F.4th at 1022. Indeed, recognizing that a public employee's acts taken within the scope of duties may create liability in inverse condemnation is the only way to give effect to Wyoming's damaging-or-taking clause because any other rule would likely frustrate altogether a property owner's ability to recover under Wyoming's statutory and constitutional provisions providing that the government must pay for property it damages for public use. For those actions which damage property but fall short of a taking, it is likely a rare set of circumstances when government decisionmakers have granted specific or express authority to cause the damage. Even when government decisionmakers have expressly authorized their employees to damage property, proving such a grant of authority could be difficult, where as here, the public board or governing body may simply point to its minutes or ordinances and claim a lack of "official" authorization, i.e. authorization in compliance with the Public Meetings Act or other Wyoming laws.

The only purpose which the lower court should have been guided by in applying the authorization rule is marking a difference between a government employee or officer's private acts and those which appear to be taken on behalf of the government.[6] The federal

[6] For example, imagine that Mr. Watts and Mr. Unruh had taken HMID's excavator and

courts' recognition that actions taken "within the scope of duties" may create liability under the Fifth Amendment strikes an appropriate balance among these concerns, a balance that Wyoming law elsewhere recognizes.

For example, the Wyoming Governmental Claims Act recognizes that it is fair to hold government liable for the torts of its agents taken within the scope of duties. *See* Wyo. Stat. §§ 1-39-103(a)(v), 1-39-104(a). Wyoming's tort law also holds employers liable for the torts of employees taken within the scope of employment. *See, e.g.*, *Stockwell v. Morris*, 46 Wyo. 1, 22 P.2d 189, 190 (1933). Even when employers have done everything they can to prevent the tort by, for example, prohibiting torts or training employees to prevent torts from occurring, Wyoming law still recognizes that it is generally fair to hold the employer liable. *See* Restatement (Second) of Agency § 230 (1958); *cf.* Bogdanski, 2018 WY at ¶ 22, 408 P.3d at 1163.

None of this is to suggest that Hamann's inverse condemnation claim is a tort claim. It is not. As this Court explained in *Smith v. Bd. of Cnty. Comm'rs of Park Cnty.*, 2013 WY 3, ¶ 19, 291 P.3d 947, 953 (Wyo. 2013), "[i]nverse condemnation is not a tort … it is a constitutional and statutory remedy…." But a rule that suffices for private parties in the vast arena of tort liability, and in other circumstances the government, *see* Wyo. Stat. §§ 1-39-105–112, is the just rule for inverse condemnation claims: the government cannot avoid liability in inverse condemnation by making the plaintiff prove that a specific grant

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other equipment to Mr. Hamann's property on the weekend to build their children a motorcross track. It might not be entirely fair to make HMID (and its larger body of assessment-paying landowners) pay for damage caused by this "unauthorized" effort.

of express authority preceded every damage or taking by a government employee. To prove authority, it is enough to show that the action constituting a taking or 'damage' was taken within the general scope of a public employee's duties. *See Darby Dev.*, 112 F.4th at 1024.

CONCLUSION

The order on summary judgment should be vacated and the case remanded for further proceedings.

Respectfully submitted this 21st day of January, 2025.

s/ *Austin Waisanen*
Austin Waisanen
WSB No. 8-7023
Jeffrey W. McCoy*
PACIFIC LEGAL FOUNDATION
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
AWaisanen@pacificlegal.org
JMcCoy@pacificlegal.org

Attorneys for Appellant

**Admitted pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2025, I electronically filed the foregoing document via the Wyoming Supreme Court C-Track Electronic Filing System.

I further certify that service of the foregoing will be accomplished upon the following participants in this case, who are registered users of the Wyoming Supreme Court C-Track Electronic Filing System, by the Wyoming Supreme Court C-Track Electronic Filing System at the participants email address as recorded this date in the Wyoming Supreme Court C-Track Electronic Filing System:

Thomas A. Thompson
Local Government Liability Pool
6844 Yellowtail Road
Cheyenne, WY 82009
tthompson@lglp.net
Attorney for Appellee
Heart Mountain Irrigation District

I further certify that the foregoing document is the exact copy of the written document filed with the Wyoming Supreme Court Clerk and has been scanned for viruses and is free of viruses. Additionally, I certify all required privacy redactions have been made, and with the exception of those redactions, every document submitted in digital form is an exact copy of the written document filed with the Wyoming Supreme Court Clerk.

DATED: January 21, 2025.

s/ *Austin Waisanen*
Austin Waisanen