No. DA 15-0375

IN THE

Supreme Court of the State of Montana

THE CITY OF MISSOULA,

Plaintiff/Appellee,

VS.

MOUNTAIN WATER COMPANY, ET AL.,

Defendants/Appellants,

AND

THE EMPLOYEES OF MOUNTAIN WATER COMPANY,

Intervenors.

ON APPEAL FROM THE MONTANA FOURTH JUDICIAL DISTRICT COURT,
MISSOULA COUNTY, HON. KAREN TOWNSEND, PRESIDING
CASE NO. DV-14-352

CARLYLE INFRASTRUCTURE PARTNERS, LP'S OPENING BRIEF

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STATEMENT OF THE ISSUES

This appeal centers on a preliminary order of condemnation allowing the City of Missoula to take by eminent domain a water supply system owned by Mountain Water Company. The issues are:

1. Whether sections 7-13-4403, 7-13-4404, and 70-30-102(6), MCA, preclude a municipality from using eminent domain to take a water system if the system's owner does not have a franchise agreement or contract to supply the municipality with water.

2. Whether one of the district court's mandatory fact findings—that the taking is necessary for the public use—must be reversed where no record evidence supports the court's underlying finding that it is not feasible for the City to develop a competing water system, and the City conceded that it did not undertake a feasibility analysis.

3. Whether the district court wrongly held that the City proved that its ownership of the water system was a "more necessary public use" where the City intends to use the water system for an identical purpose and never expressed any concern to Mountain Water or the Public Service Commission (PSC) about Mountain Water's ownership prior to instituting condemnation proceedings.

4. Whether the district court violated the defendants' due process rights by refusing to continue trial even though the City's dilatory discovery tactics deprived the defendants of the ability to fully, fairly, and meaningfully litigate the merits.

5. Whether the district court erred by ruling that Carlyle is a properly-named defendant even though it does not own the assets the City seeks to condemn.

STATEMENT OF THE CASE

A. Nature of the Case

This is a condemnation case that presents important questions about a municipality's ability to take a privately-owned water system by eminent domain. For more than a century, Montana law has recognized that eminent domain creates a fundamental tension with a property owner's constitutional right to own real property. To alleviate that tension, the law has developed several safeguards. Namely, the authority to condemn property must derive from a legislative grant, *Mont. Talc Co. v. Cyprus Mines Corp.*, 229 Mont. 491, 495, 748 P.2d 444, 447 (1987), there must always be rigorous compliance with the provisions of that grant, *State ex rel. McMaster v. Dist. Ct.*, 80 Mont. 228, 231, 260 P. 134, 135 (1927), and any grant allowing condemnation

must be strictly construed in favor of the property owner's rights, *McCabe Petroleum Corp. v. Easement and Right-of-Way*, 2004 MT 73, ¶ 14, 320 Mont. 384, 87 P.3d 479.

The legislative grant at issue here is found in Montana Code Annotated sections 70-30-102(6) and 70-30-103(1)(c), which permit a city or town to use eminent domain to condemn "water and water supply systems." That grant is subject to other restrictions in the Code, including that any condemnation of a water system comply with the provisions of Title 7, chapter 13, part 44, which condition a municipality's use of eminent domain on the existence of a franchise agreement or contract under which the system's owner provides the municipality with water. If a franchise agreement or contract exists, the municipality must still make other required showings, including that the taking is necessary to the public use and that the use the municipality proposes for the water system is more necessary than its current use.

In allowing the City to condemn the water system owned by Mountain Water, the district court's interpretation and application of eminent domain law went far astray. The court interpreted both the

statutes and evidence liberally in favor of eminent domain, allowed the City to take the water system even though it never had a franchise agreement or contract for the supply of water, made findings and conclusions unsupported by the evidence, and violated the defendants' due process rights. Left uncorrected, the court's preliminary condemnation order endorses a scheme under which public ownership will always prevail. Any municipality will be able to take a privately owned water system by eminent domain simply because it wants to.

B. Course of Proceedings and Disposition Below

1. 1980s Litigation

This is the City's second attempt to take the water system by eminent domain. It first tried in a four-day trial in 1984. *See City of Missoula v. Mountain Water Co.*, 228 Mont. 404, 407, 743 P.2d 590, 592 (1987). The district court rejected the City's case, holding that it had not met its burden. A195-200.[1] This Court affirmed in large part, but also remanded for consideration of additional factors relevant to the necessity analysis. *City of Missoula*, 228 Mont. at 413-14, 743 P.2d at 595-96.

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[1] Citations to A__ refer to the separately-bound Appendix to Carlyle's Opening Brief.

On remand, the district court again held that the City had not met its burden. A201-215. The City appealed a second time and this Court affirmed in full. *City of Missoula v. Mountain Water Co.*, 236 Mont. 442, 452, 771 P.2d 103, 110 (1989). Among the holdings affirmed in both appeals were: (1) a private owner's profit motive is an incentive to provide exemplary service; (2) the PSC is a neutral, objective ratemaking authority and the City is not; and (3) the City's tax-exempt status is not in the public's interest because the taxes paid by Mountain Water would be lost under City ownership, raising the probability that they would be shifted to other property owners in the community. A195-215.

2. Early Stages of this Litigation

The City filed a first amended complaint on May 5, 2014 seeking a second time to condemn the water system for a use identical to Mountain Water's current use. *See* A244, 290-93. Almost immediately, Carlyle moved to dismiss, arguing that it was not a proper party because it does not own the water system's assets.[2] A69. The district

[2] Carlyle is an upstream corporate parent, three levels removed from Mountain Water. Carlyle is the controlling member of Western Water Holdings, LLC, which owns all the outstanding capital stock of Park Water Company. Park Water owns all the outstanding capital stock of

court denied Carlyle's motion, reasoning that "the difference between being a complete upstream owner of a company, or a shareholder, and actually owning the assets" sought to be condemned is "lost on [the] Court." A74-76.

A few days later, the district court announced its intention to fast track the case and set trial within six months of service of the summons. A216-19. In response, both parties conveyed that six months was too soon, and the defendants argued that any expedited schedule still needed to provide adequate time for discovery and trial preparation. *Id.* The court thus set a three-week trial for March 18, 2015. *Id.*

3. Carlyle's Summary Judgment Motions

Before trial, Carlyle filed two summary judgment motions. First, it filed a dispositive motion, renewing its argument that it is not a proper defendant in this case. A103-121. Alternatively, it argued that that the City cannot condemn the water system under Montana Code Annotated sections 7-13-4403 and 4404 because it does not have a

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Mountain Water. A276. Mountain Water owns every asset used to operate the water system. A341-43.

franchise agreement or contract under which Carlyle agreed to supply the City with water. *Id.*

Second, Carlyle filed a motion for partial summary judgment, arguing that the City was collaterally estopped from re-litigating certain issues decided in the 1980s litigation. Even though the district court found in the first litigation that a private owner's profit motive, the PSC's status as a neutral ratemaking authority, and the City's tax exempt status all weighed *against* condemnation, the City reasserted those same considerations in this case, arguing that each now weighs in the City's favor.

The district court denied both motions. On Carlyle's first motion, the court again held that Carlyle was a proper party notwithstanding that it does not own the water system's assets. A115-121. The court also rejected Carlyle's alternative argument, wrongly interpreting the statutes to allow a municipality to condemn a water system absent a franchise agreement or contract for the supply of water. A113-15.

Denying Carlyle's second motion, the district court held that the issues in the 1980s litigation are not identical. A178. Rather than addressing each issue specifically, the court simply opined that "[p]ublic

interest is not static." *Id.* It did not, for example, explain how a private owner's profit motive is a different issue today than it was in the mid-late 1980s. Nor did it explain how oversight by a neutral ratemaker or the City's tax exempt status have changed over time such that collateral estoppel does not apply. A145-180.

4. Discovery and Continuance Issues

From the outset, the district court cautioned the parties that "all discovery is to be fairly and accurately responded to and failure to do so may result in appropriate sanction." A222. Despite that warning, the City's discovery conduct gave rise to a number of disputes, ultimately prejudicing the defendants' ability to try this case.

The discovery disputes—all submitted to a special master—took several forms. First, Mountain Water filed two motions to compel due to the City's failure to produce documents based on improper privilege claims. Specifically, the City withheld documents based on a non-testifying expert privilege and refused to produce any communications between the City and financial advisors, bond writers, or lending institutions regarding the City's ability to finance the acquisition cost of the water system, citing attorney-client and work product privileges. A457-62. Although the City eventually produced 6,784 pages of

documents it previously withheld, it did so two weeks after its expert disclosure deadline. A481-83. It also continued to withhold thousands of documents relevant to its experts' testimony, eventually producing them piecemeal in nearly two dozen supplements it dribbled out through the middle of trial.[3] During depositions in November 2014, several of the City's experts testified under oath that the City had not asked them for copies of documents supporting their opinions despite outstanding discovery requests, demonstrating that the City never even attempted to gather responsive documents and had no intention of complying with the October 15, 2014 expert disclosure deadline. A484-506.

Second, Carlyle and Mountain Water filed a separate motion to compel because the City produced tens of thousands of documents in an unusable format. A463-80. The City converted e-mails and attachments from their native form into PDF portfolios, which were largely unsearchable. *Id.* Even though the defendants asked the City

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[3] The City produced its twenty-third supplement to its expert disclosures on March 24, 2015, six days into trial. A423-25. Each of the City's fifteenth through twenty-third supplements to its expert disclosures were produced after the close of discovery. A374-425.

not to produce documents in PDF portfolio form as early as September 9, 2014, the City continued to do so through the close of discovery. *Id.*

Realizing that the City's discovery conduct would make deposition and trial preparation extraordinarily difficult, Mountain Water filed a motion to continue trial on November 26, 2014, citing the pending motions to compel. The district court denied Mountain Water's motion, acknowledging the complexities of the case, but holding that ten months from summons to trial was sufficient. A82. Alternatively, the court noted that even if additional time might be justified, "[t]his Court and this Courthouse have no sufficient blocks of time or available space to change the date of this hearing for the foreseeable future." *Id.*

As the discovery deadline approached in early 2015, the special master began ruling on the outstanding discovery motions. On January 28, he ordered the City to produce the communications of its expert Roger Wood, which the City had previously not even requested from Wood despite discovery requests seeking those documents. A84-86. On February 3rd—three days after the close of discovery—the special master finally ruled on the defendants' motion to compel the City to produce documents in a usable format. The special master found that

the City's productions were "not a reasonably usable format" in violation of the Rules of Civil Procedure, and that the City "effect[ively] converted electronically stored information from the form in which it is ordinarily maintained into a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in litigation." A90-91. The special master thus ordered the City to reproduce tens of thousands of documents barely a month before trial, acknowledging that his failure to rule on the motion in a more timely manner "precluded the ability to use [ ] these e-mails in a more efficient fashion in litigation." A91.

Three days after receiving the special master's February 3rd order, defendants filed a second motion to continue, arguing that it would not receive usable documents from the City until a few weeks before trial. As such, the defendants would have no reasonable opportunity to thoroughly review the documents prior to trial, much less re-depose witnesses using the new material.[4] The district court denied the second motion to continue for the same reasons as the first,

[4] The defendants made a significant effort to prepare under the constraints posed by the district court's fast-track schedule, including deposing 43 of the City's 67 potential witnesses.

adding that receiving discovery "close to the date of trial," was an "insufficient ground[ ]" for a continuance. A99-100.

On February 23, 2015, just three weeks before trial, the City produced 26,581 documents in usable format for the first time. A362. Even then, it refused to provide Wood's communications, instead filing a motion for reconsideration of the special master's order on that issue. A123-128. The special master denied the motion, but gave the City until March 6, 2015 to produce Wood's documents, meaning that the defendants received them twelve days before trial. *Id.*

Mountain Water filed a petition for a writ of supervisory control with this Court on March 5, 2015, asking the Court to vacate trial and allow the defendants adequate time to prepare in light of the City's discovery abuses. With Justice Rice dissenting, the Court denied the petition the next day, though it noted that it was "troubled by what appears to be the City's obstruction of discovery to gain a tactical advantage." A192-94.

The same day, the district court denied the defendants' motion to exclude a number of the City's expert witnesses due to late disclosure, reasoning that they were rebuttal experts not required to be disclosed

by the scheduling order, even though the scheduling order did not even allow for rebuttal experts. A129-144. The court reasoned that the "parties [were] laboring under a challenging schedule" and that "[t]he extent to which Mountain Water and Carlyle experienced prejudice by the disclosure is offset by the benefits of pre-trial disclosure." A142-43. Thus, the court effectively held that the City could disclose experts whenever it pleased—with no regard for the expert disclosure or discovery deadlines—so long as it did so before trial.

On March 9, 2015, nine days before trial, the City disclosed yet another round of new expert opinions as part of its twenty-first supplement to its expert disclosures. A508-511. Specifically, the City disclosed that: (1) Bruce Bender, the City's Chief Administrative Officer, would testify about a newly drafted plan to operate the water system even though he and other City witnesses testified in depositions that the City had no such plan; and (2) Dale Bickell, the City's Central Services Director, would testify to a completely revised analysis of the administrative costs associated with the water system under both Mountain Water's ownership and the City's prospective ownership. *Id.* So that they would not be forced to explore those new opinions for the

first time on the fly in trial, the defendants again moved to exclude or continue trial. The district court did not issue a written order, but allowed the City to present testimony at trial about its new operating plan and new costs analysis over the defendants' objections. A248-49, 261, 266-68.

5. Trial and Final Order

Under that backdrop, the case proceeded to a three-week bench trial on March 18, 2015. Following trial, the parties submitted proposed findings of fact and conclusions of law. A347. The district court then issued a 67-page order allowing the City to condemn the water system. A1-68. The court's order found for the City on nearly every point, crafting tests that will *always* disfavor private ownership of public utility assets. *Id.* Among other findings, the court determined that a private owner's profit motive weighs in favor of condemnation, that rate setting by a municipality is preferable to PSC regulation, and that the "coordination" of a water system with a municipality's other public health safety and welfare functions outweighs private ownership, even when the private owner is admittedly a "a good corporate citizen" that "engages in cooperative efforts with the City." A28-29, 34-35, 54-55.

STATEMENT OF THE FACTS

A. Regulation

Unlike most private businesses, Mountain Water is not free to simply serve its 23,500 customers as it sees fit. A232, 283. Because the water system is a public utility, it is regulated by the PSC, a government agency tasked with balancing ratepayers' concerns about utility costs and services with the utility's need to earn a fair rate of return on its investment. A269, 282.

PSC regulation of the water system takes several forms. First, the PSC must approve any rate increase requested by Mountain Water. A282. The rate approval procedure is formal; it allows parties to intervene, provides for discovery and briefing followed by a hearing, and contains a right of appeal to district court. *Id.* The PSC closely scrutinizes Mountain Water's operations, expenses, financial statements, and proposed capital investments. For example, since 1979, the PSC has approved an Administrative Services Agreement under which Mountain Water obtains certain administrative services from Park Water. A284. In every rate case, the PSC reviews the Administrative Agreement, and audits Park Water to ensure that the

expenses incurred under the Administrative Agreement benefit customers. A286.

Second, the PSC requires Mountain Water to make adequate and continuing capital investments in the water system, and to justify its capital expenditures. A282. The PSC reviews Mountain Water's operating expenses, costs, and returns to ensure that Mountain Water does not earn excessive profits. *Id.* Additionally, the Montana Consumer Counsel (MCC) represents the interests of consumers in all PSC proceedings. A257, 281.

B. Carlyle's Upstream Interest and Mountain Water's Ownership

Carlyle purchased Park Water's stock in December 2011. A272. The City supported the purchase, with the Mayor testifying to the PSC about the overall benefit of a sale to Carlyle. A228. The Mayor had "a high degree of confidence" in the partnership between Mountain Water and the City and admitted both that the City had a good working relationship with Mountain Water and that the "folks who work for Mountain Water do a fine job." A239, 446, 451-53. Even in an early affidavit the City filed before deciding to support the sale, the Mayor

detailed Mountain Water's extensive cooperation with the City with respect to:

> (A) requests for water system expansions; (B) fire hydrant locations; (C) excavation permits; (D) coordinated repair and maintenance of water line work, especially in advance of street projects the City may be planning; (E) utilizing water from fire hydrants for street sweeping and cleaning; (F) coordinating underground utility structure replacement, repair, and improvements; and (G) park and field regulation.

A443-47.

As part of the City's support, it executed a three-party letter agreement with Carlyle and the Clark Fork Coalition in which the City agreed that "the proposed transaction" was "in the public interest and should be approved by the Commission." A426-430. The letter agreement did not grant Carlyle or Mountain Water a franchise or otherwise obligate those entities to supply the City with water. *Id.* In fact, neither Carlyle nor Mountain Water has entered into *any* franchise agreement or contract to supply water to the City. A245.

By the City's own admission, Mountain Water remains a good steward of the water system and its quality of service has not diminished in any respect since the City supported Carlyle's purchase in 2011. A240, 243-44, 456. That admission is consistent with the

City's conduct. The City has never complained to Carlyle about leakage rate, capital expenditures, or metering even though the parties have had an active dialogue since 2010. A260, 275. And although the City has intervened in nearly every PSC rate case initiated by Mountain Water during Mayor Engen's tenure, it has not opposed any rate increases, complained about unaccounted for water loss, or protested the number of unmetered customers. A233, 277-80. Indeed, the City has *never* complained to the PSC in a Mountain Water rate case about leakage rates, inadequate capital expenditures, administrative fees paid to Park Water, or any of the other issues it now claims warrant condemnation. A289. Likewise, the City has never communicated any concerns about the water system to the MCC. A291.

The City has not tried to address those issues outside of PSC regulation either. It has not passed an ordinance requiring homeowners to replace leaking service lines, something only it has the power to do. A238, 240. It has not passed or even considered an ordinance requiring residents to have meters to measure water consumption. A431-455. Nor has it tried to work with Mountain Water by, for example, offering incentives such as relief from paying pavement

penalties to encourage a more expedited main replacement program. A238, 450-455.

In short, both before and after Carlyle's acquisition of Park Water, the City has consistently failed to (1) demand that the defendants address any of the alleged shortcomings it invokes to justify condemnation, or (2) take any unilateral actions to address its purported concerns through ordinances, any type of financial incentives, or other City Council action. A238-240, 440, 453-55. Instead, the City has been content to simply receive its share of Mountain Water's $1.2 million annual property taxes without so much as a word of complaint until it decided it wanted to take the water system. A267-68.

STATEMENT OF THE STANDARD OF REVIEW

Questions of law, including a district court's statutory interpretation and its "application of a statute to a particular set of circumstances," are reviewed de novo for correctness. *CHS, Inc. v. Mont. Dep't of Rev.*, 2013 MT 100, ¶ 16, 369 Mont. 505, 299 P.3d 813. Courts must strictly construe eminent domain statutes, favoring a property owner's fundamental rights. *McCabe*, ¶ 14.

A district court's fact findings are reviewed for clear error. *Holtz v. Diesz*, 2003 MT 132, ¶ 15, 316 Mont. 77, 68 P.3d 828. "A district

court's findings are clearly erroneous if they are not supported by substantial credible evidence, if the trial court misapprehended the effect of the evidence, or if a review of the record leaves this Court with the definite and firm conviction that a mistake has been committed." *Id.*

Normally, this Court reviews a district court's decision to continue trial for an abuse of discretion. *McCormack v. Andres*, 2008 MT 182, ¶ 23, 343 Mont. 424, 185 P.3d 973. Whether a person has been denied the right to due process, however, is a question of constitutional law subject to plenary review. *In re A.S.*, 2004 MT 62, ¶ 9, 320 Mont. 268, 87 P.3d 408.

SUMMARY OF THE ARGUMENT

The district court committed fundamental errors in issuing a preliminary condemnation order allowing the City to take Mountain Water's private property. This Court should reverse for five independent reasons.

First, the district court misinterpreted and misapplied the controlling statutes. A municipality may take a water system by eminent domain only "[i]f agreement is not reached pursuant to 7-13-4403," a Code section that applies only if the municipality and water

system's owner have entered a franchise agreement or other contract for the supply of water. *See* § 7-13-4404(1); *see also* §§ 7-13-4403, 70-30-102(6). Thus, absent a franchise agreement or contract, the parties cannot fail to reach agreement *pursuant to* section 7-13-4403, and the municipality may not proceed to acquire the water system by eminent domain. By holding to the contrary, the district court either read the words "pursuant to 7-13-4403" out of the statute or the words "or if 7-13-4403 does not apply" into section 7-13-4404(1). Either result is equally untenable; the court is not entitled to recraft the statute's plain language. Moreover, even if the statute is ambiguous, the court was required to interpret it to favor the defendants' property rights.

Second, the district court's statutorily-required finding that the City's taking is necessary to the public use is not supported by substantial credible evidence. That finding required the court to make an underlying finding that the City "must take Mountain Water's property in order to have its own system," *City of Missoula*, 228 Mont. at 412, 743 P.2d at 595, which the court did by concluding that "it is not feasible for the City to develop or construct a competing water system." The City, however, did not introduce any evidence about the feasibility

or capital cost of constructing its own system. In fact, the City admitted that it never even analyzed the issue.

Third, the district court wrongly held that the City's use of the water system would be a "more necessary public use." That test is not defined by statute or discussed in case law, but should be informed by Montana's stringent protection of public property rights. The court's test would allow a government entity to take private property and put it to an identical use without expressing any concern about the owner's stewardship of the assets or taking any action within its control to correct its concerns. At the least, a private property owner should be afforded notice of alleged deficiencies in its ownership and an opportunity to correct them before being subjected to a condemnation proceeding where the government does not intend to put the assets to a different use.

Fourth, the district court's refusal to continue trial violated the defendants' due process rights by denying them a full and fair opportunity to litigate the merits. The City deliberately converted documents into an unusable format, producing more than 25,000 documents in usable form only three weeks before trial. The City also

played games with experts, producing nine supplements to its expert disclosures after discovery closed, including new disclosures and documents it produced *during* trial and then used with its experts on the stand. The court nevertheless refused to continue trial so that the defendants could adequately review the documents and disclosures and use them as appropriate in discovery and trial. Worse, the court used some of the late-produced material to find against the defendants, implicitly condoning the City's tactics.

Fifth, the district court committed reversible error by refusing to dismiss Carlyle as a party. The record indisputably establishes that Mountain Water, not Carlyle, owns the water system assets potentially subject to condemnation.

ARGUMENT

I. The District Court Misinterpreted the Controlling Statutes.

A. A Municipality May Use Eminent Domain to Condemn a Water System Only if the System's Owner Has a Franchise Agreement or Contract to Supply the Municipality with Water.

Condemnation of a water system under Montana law is governed by a series of unambiguous statutes. The starting point is section 70-30-102(6), which provides that the right of eminent domain may be

exercised for "water and water supply systems." But a municipality cannot simply use the provisions of Title 70, Chapter 30—the eminent domain section of the Code—to take a water system. Rather, eminent domain may be used for a water system only "as provided in Title 7, chapter 13, part 44," the Code section concerning local government's regulation of water supply. § 70-30-102(6), MCA.

Within Title 7, chapter 13, part 44, section 7-13-4404 is the only statute that addresses a municipality's use of eminent domain. It cross-references another statute, providing that a city may acquire a "plant or water supply" by eminent domain, "[i]f agreement is not reached pursuant to 7-13-4403." § 7-13-4404(1), MCA. Section 7-13-4404 is thus premised on the application of section 7-13-4403. It does not, for example, provide that a city may use eminent domain to acquire a water system "[i]f agreement is not reached pursuant to 7-13-4403 *or if 7-13-4403 does not apply*." Instead, it presumes that section 7-13-4403 applies and spells out that the sole instance in which a municipality may condemn a water system is if an agreement is not reached "pursuant to" that section.

Section 7-13-4403 is similarly narrow. It sets out the procedure by which a municipality must try to reach agreement for purchase of a water system, and applies only if the municipality has granted a franchise to or entered a contract with the water system's owner to supply the municipality with water. In full, section 7-13-4403 reads:

> (1) It is provided that *whenever a franchise has been granted to or a contract made* with any person or persons, corporation, or corporations and such person or persons, corporation, or corporations, in pursuance thereof or otherwise, have established or maintained a system of water supply or have valuable water rights or a supply of water desired by the city or town for supplying the city or town with water, the city or town granting such franchise or entering in such contract or desiring such water supply shall, by the passage of an ordinance, give notice to such person or persons, corporation, or corporations that it desires to purchase the plant and franchise and water supply of such persons, corporation, or corporations.
>
> (2) The city or town shall have the right to so purchase the plant or water supply upon such terms as the parties agree.

§ 7-13-4403, MCA (emphasis added).

Read together, the statutes contain a clear roadmap. *First*, a city can exercise eminent domain over a water system only as provided in Title 7, chapter 13, part 44. § 70-30-102(6), MCA. *Second*, Title 7,

chapter 13, part 44 permits a city to use eminent domain to take a water system only if agreement is not reached under 7-13-4403. § 7-13-4404(1), MCA. *Third*, section 7-13-4403 applies only if a municipality and the water system's owner have a franchise agreement or contract under which the owner supplies the municipality with water. § 7-13-4403(1). Accordingly, if a city does not have a franchise agreement or contract with the water system's owner, it may not use eminent domain to take the water system.

B. The District Court's Interpretation Is Contrary to the Statutes' Plain Language.

Denying Carlyle's summary judgment motion, the district court rejected the interpretation above as "fail[ing] to adhere to a plain reading of the language used by the Legislature." A115. The court reasoned that the Legislature intended to define a process to be used when a franchise or contract exists, but not to limit a municipality's use of eminent domain to those instances. *Id.* Specifically, the court held that the proper interpretation turns on the phrase "whenever a franchise has been granted or a contract made" in section 7-13-4403, and that Carlyle's reading distorts that phrase to mean "eminent domain is prohibited unless a franchise has been granted or a contract

has been made."[5] *Id.* The court's reasoning is fundamentally flawed in multiple respects.

1. The district court ignored the operative language in section 7-13-4404(1).

Foremost, the district court focused on the wrong phrase in the wrong statute. Section 7-13-4403 is *not* the eminent domain provision in Title 7, chapter 13, part 44, and the appropriate analysis does not turn on the meaning of the phrase "whenever a franchise has been granted or a contract made." That phrase means exactly what it says: if a city has a franchise agreement or contract under which a water system's owner supplies the city with water, the city must pass an ordinance to give notice to the owner that it wants to purchase the water system. *See* § 7-13-4403(1), MCA. There is no need to read a prohibition on eminent domain into that statute and Carlyle never asked the court to do so.

The correct question is whether the eminent domain statute—section 7-13-4404—permits a municipality to invoke the general

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[5] The district court employed the same reasoning to deny Mountain Water's summary judgment motion. A188-190. The defendants submitted proposed conclusions of law on the issue both before and after trial, A344-49, but the court did not address them in its final order. A1-68.

condemnation procedures in Title 70, chapter 30 even if section 7-13-4403 does not apply. To answer that question, the district court should have considered whether the first clause of section 7-13-4404(1)—"[i]f agreement is not reached pursuant to 7-13-4403"—conditions a city's exercise of eminent domain on the applicability of section 7-13-4403. Properly interpreted, that clause undermines the court's understanding of the statutes.

"It is an elementary rule of statutory construction that every word, phrase, clause and sentence in an act must be given meaning if it is possible to do so." *City of Polson v. Pub. Serv. Comm'n*, 155 Mont. 464, 471, 473 P.2d 508, 512 (1970) (quoting reference omitted); *see also* § 1-2-101, MCA. The district court's interpretation, however, gives no meaning to the words "pursuant to 7-13-4403." By the court's reasoning, section 7-13-4404(1) could simply read, "[i]f an agreement is not reached, then the city or town shall proceed to acquire the plant or water supply under Title 70, chapter 30." That wording would effect precisely the result the court reached—it would encompass a city's failure to reach agreement under the procedure outlined in section 7-13-4403 when a franchise agreement or a contract exists, while also

allowing a city without a franchise agreement or contract to effectively proceed straight to condemnation.

If the district court did not intend to read "pursuant to 7-13-4403" *out* of the statute, the only other way to reach that result is to read *in* language that does not exist. At base, the court interpreted section 7-13-4403 to mean "[i]f agreement is not reached pursuant to 7-13-4403 *or if 7-13-4403 does not apply*, then the city or town shall proceed to acquire the plant or water supply under Title 70, chapter 30." But that result is equally untenable. Just as a court may not omit from a statute "what has been inserted" by the Legislature, it may not "insert what has been omitted." § 1-2-101, MCA; *Kluver v. PPL Montana, LLC*, 2012 MT 321, ¶ 59, 368 Mont. 101, 293 P.3d 817.

Indeed, the Legislature knows full well how to draft statutes allowing for the possibility that a particular section or subsection will not apply. For example, Montana's Uniform Trust Code provides that "[a] beneficiary may not commence a proceeding against a trustee for breach of trust more than 3 years after the date the beneficiary or a representative was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of

the time allowed for commencing a proceeding." § 72-38-1005(1), MCA. Because that section presupposes that the beneficiary or a representative received the required report, the Code provides an alternative, outlining the limitation period "[i]f subsection (1) does not apply." § 72-38-1005(3), MCA; *see also e.g.*, § 30-3-512(1)(c), MCA ("If the note is not payable on demand and subsection (1)(b) does not apply . . . ."); § 30-3-512(2)(b) ("If the draft is payable on demand and subsection (2)(a) does not apply . . . ."); § 39-71-745(2) ("[I]f concurrent employment under 39-71-123 does not apply . . . ."). That the Legislature did no such thing in section 7-13-4404 is thus telling; it suggests that the Legislature did not intend to imply that a city can proceed under the eminent domain statutes even if section 7-13-4403 does not apply. *See, e.g. Cross v. VanDyke*, 2014 MT 193, ¶ 19, 375 Mont. 535, 332 P.3d 215 (given the explicit inclusion of the phrase "active practice" in Article VI, Section 3(2) of Montana's Constitution, the Court was "reluctant to conclude" that the framers meant to imply a similar requirement in Article VII, Section 9(1), where the phrase does not appear).

Simply put, the Court must interpret section 7-13-4404 without rendering the words "pursuant to 7-13-4403" meaningless and without inserting an alternative the Legislature did not include. To do that, the phrase "[i]f agreement is not reached pursuant to 7-13-4403" must mean that a city may take a water system by eminent domain only if section 7-13-4403 applies. If section 7-13-4403 does not apply, then the parties have not failed to reach agreement *pursuant to* that section, and the city may not proceed to acquire the water system by eminent domain.[6]

2. The district court failed to strictly construe the statutes.

The district court's statutory interpretation is further undermined by the nature of this case. Since statehood, private property ownership

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[6] If the district court was concerned that the statutes' plain language is too limiting, that concern was unfounded. Not only is the scope of eminent domain power the Legislature's province, the law does not leave municipalities without a franchise or contract unprotected, or allow utilities to provide inadequate service without recourse. The PSC is authorized to make "just and reasonable" orders to address inadequate and unreasonable service, § 69-3-330(3), MCA, and has done so in the context of oversight of a privately-held water utility, by requiring divesture of the assets of the Butte Water Company. *See Butte Water Company*, Docket No. 90.12.93 (Montana Commission May 17, 1991) (Order No. 5536a).

has been a fundamental, inalienable right in Montana. Mont. Const. art. II, § 3. For nearly as long, this Court has strongly guarded against the taking of private property, cautioning that "[t]he right to take private property from its owner against his will can only be invoked pursuant to law, and there must always be a rigorous compliance with its provisions when this right is sought to be exercised, and authority for the exercise of such right must be clearly expressed in the law before it will be allowed." *McMaster*, 80 Mont. at 231, 260 P. at 135 (citing cases). To that end, the Court has held that "[t]he legislature's grant of the eminent domain power . . . must be strictly construed," and that "any statute which allows [the taking of] a person's property must be given its plain interpretation, favoring the person's fundamental rights." *McCabe*, ¶ 14 (quoting *City of Bozeman v. Vaniman*, 264 Mont. 76, 79, 869 P.2d 790, 792 (1994)).

The district court did not even acknowledge those rules of statutory construction, much less apply them. To the contrary, the court interpreted sections 7-13-4403 and 4404 as broadly as possible in favor of eminent domain. The court not only interpreted the interplay between sections 7-13-4403 and 4404 to allow a city without a franchise

agreement or contract to proceed directly to condemnation, it asserted that it was "plain that the Legislature intended" that result. A115.

On that point, the district court was simply wrong. The phrase, "[i]f agreement is not reached pursuant to 7-13-4403" does not plainly convey that a city may "proceed to acquire" a water system by eminent domain even if section 7-13-4403 does not apply. *See* § 7-13-4404(1), MCA. Nor is there anything else in the statute that obviously dictates that result. *Id.* As discussed above, the proper statutory interpretation counsels the opposite result. Moreover, *McCabe* required the court to strictly construe the statutes to favor the defendants' fundamental property rights. *See McCabe*, ¶ 14. It thus should have resolved any ambiguity *against* the City's exercise of eminent domain.

C. Applying the Correct Statutory Interpretation to the Undisputed Facts, the City Had No Authority to Condemn the Water System.

Factually, it is undisputed that the City has not granted a franchise to or made a contract with the defendants to supply the City with water. At trial, the Mayor testified that the City did not have a franchise agreement with Carlyle or Mountain Water, A245, and it is unrebutted that the parties did not have a contract for the supply of water either. *See* Carlyle's Summary Judg. Br., at 4 (Oct. 30, 2014);

City's Resp. Br. (Dec. 1, 2014); Mountain Water's Summary Judg. Br., at 3 (Feb. 6, 2015); City's Resp. Br. (Feb. 24, 2015).

Without a franchise agreement or contract, section 7-13-4403 does not apply. As a result, there is nothing in Title 7, chapter 13, part 44 that authorizes the City to condemn the water system, and the City did not invoke other authority in any event. As such, the district court should have held that the City could not exercise eminent domain. *See Mont. Talc Co.*, 229 Mont. at 495, 748 P.2d at 447 (the authority to condemn property "must derive from a legislative grant" (citing *State Highway Comm'n v. Crossen-Nissen Co.*, 145 Mont. 251, 400 P.2d 283 (1965))). Its failure to do so is reversible error, and this Court should order that judgment be entered for the defendants.

II. There Is No Evidence Supporting the District Court's "Necessary to the Public Use" Finding.

Even if the district court did not improperly interpret and apply the statutes discussed above, this Court should still reverse. As a prerequisite to taking property under Montana law, a condemnor must prove that "the public interest requires the taking." § 70-30-111, MCA. That standard requires several mandatory fact findings, including that "the taking is necessary to the public use." § 70-30-111(1)(b), MCA. The

necessity finding involves two questions: (1) whether it is "necessary that the City have its own water system;" and (2) whether the City must "take Mountain Water's property in order to have its own system." *City of Missoula*, 228 Mont. at 412, 743 P.2d at 595. The court's finding on the second question warrants reversal.[7]

In its order, the district court twice found that "it is not feasible for the City to develop or construct a competing water system," elaborating that its finding was based on the "prohibitive capital cost to construct a new system." A11, 15. The problem is that the City did not introduce any evidence about the feasibility or capital cost of constructing its own system. In fact, Mayor Engen—the only witness to testify about the issue—admitted that the City never considered building its own water system:

> Q: During your tenure as mayor of Missoula, the City did not consider the feasibility of constructing its own water distribution system instead of acquiring Mountain Water Company's assets, has it?

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[7] Carlyle also incorporates Mountain Water's argument that the court's necessity finding should be reversed because it is: (1) tainted by its erroneous exclusion of valuation evidence; and (2) based on underlying findings that are either not supported by substantial evidence or barred by collateral estoppel. *See* Mountain Water's Br., at 20-26, 41-45.

A: Fleetingly.

Q: When did that happen?

A: We simply said we can't build our own.

Q: Who did the analysis?

A: I actually had a—I actually had someone in my office from—an investor from somewhere, whose name I don't even recall, on completely different matters who said why don't you just build your own.

Q: When was that?

A: A year ago.

Q: And who within the City was involved in reviewing that analysis?

A: There was no analysis. It was simply me saying I don't think that's feasible.

A245.

In the face of that admission, the district court's finding stands wholly unsupported by the record. Because the City itself never analyzed the issue, there is no record evidence about the capital cost of constructing a new system or whether the City could afford that cost. And even if there were, the court excluded evidence related to the value of Mountain Water's system, A264-65, so it had no way to compare the unknown cost of building a new system to the expense of condemning the existing system. In other words, there is no evidence from which

the court could have determined that the cost of a new system exceeded the cost of condemnation, or by how much. Given that, the court could hardly conclude that the cost to the City of constructing a new system was "prohibitive." A11.

The Mayor's baseless speculation that building a new system was not feasible does not change the result. As a matter of law, speculation does not constitute substantial credible evidence. *See In re Marriage of Maedje*, 263 Mont. 262, 266, 868 P.2d 580, 583 (1994). Moreover, if a government official's unsupported personal conclusion suffices for the second prong of the necessity test, the test is toothless; it substitutes the condemnor's baseless opinion for proof. For example, assume a town sought to condemn a privately-owned parking garage, even though constructing a new garage on a vacant lot already owned by the town would be more cost effective. If the town refused to investigate building its own garage—thus remaining willfully ignorant about the feasibility of other options—it could nevertheless prove that it "must" take the privately-owned garage in order to have its own merely because a town official speculated that new construction would be infeasible.

In this record, speculation is all that exists. The district court should have concluded that the City did not meet its burden of demonstrating that it must "take Mountain Water's property in order to have its own system." *See City of Missoula*, 228 Mont. at 412, 743 P.2d at 595. Thus, it should have held that the City did not prove that "the taking is necessary to the public use." *See* § 70-30-111(1)(b), MCA. The court's contrary finding is not supported by any evidence, much less substantial credible evidence. This Court should reverse for that reason alone.

III. The District Court's Application of the "More Necessary" Test Permits a City to Take a Water System Simply Because it Wants To.

If, as here, property is already "appropriated to public use," a would-be condemnor must prove that it will take the property "for a more necessary public use than that to which it has already been appropriated." § 70-30-111(1)(c). Simply pointing out that the condemnor's new use will be identical to the current use does not satisfy that burden; the condemnor must still prove that its use is "more necessary." *City of Missoula*, 228 Mont. at 416-17, 743 P.2d at 598 (Sheehy, J., dissenting) (citing *Butte-Anaconda Pac. Rwy. Co. v. Mont. Union Rwy.*, 16 Mont. 484, 41 P. 248 (1895)).

There is little authority on what constitutes a more necessary public use when the condemnor intends to utilize the condemnee's assets in an identical way. In fact, at least one case suggests an identical use cannot be "more necessary." *State ex rel. Butte-Los Angeles Mining Co. v. Dist. Ct.*, 103 Mont. 30, 60 P.2d 380, 385 (1936) (because both parties sought to use a tunnel for the same purpose "neither c[ould] say his purpose is more useful than the other"). That said, assuming a water system can be condemned for an identical public use, the "more necessary" test should be informed by the Montana Constitution's strong protections for private property owners and the Legislature's narrow limitation of the circumstances under which a municipality may use eminent domain to take a water system. It surely cannot be the case that a municipality may overcome those protections merely by instituting an eminent domain action even though it has never expressed any concerns about the deployment or condition of the water system to either the property's owner or the regulatory agency with authority over it, particularly when the municipality has failed to take any action within its unilateral control to affect changes.

For property rights to have meaning, the "more necessary" test should, at the least, afford a water system's owner an opportunity to address concerns about the utility. Absent that opportunity, the "more necessary" test applied by the district court will simply ask the abstract political question whether municipal or private ownership is preferable, without regard to the specific property owner's stewardship of its own assets. Given Montana's long history of protecting private property rights, it is hard to imagine that the Legislature intended to enact an eminent domain scheme under which government can take private property simply because it believes it would be a better owner, particularly when the City has not complained regarding stewardship of the public utility.

Here, it is undisputed that the City (1) intends to use Mountain Water's property for an identical purpose, (2) has not expressed any concern to Mountain Water, the PSC, or the MCC about problems with the water system, and (3) has not taken any action within its own control to address its alleged concerns. A233, 238-40, 244, 275-280, 289-91, 431-55. Accordingly, the district court should have held that

the City did not meet its burden of proving that its ownership is a "more necessary" public use.

IV. The District Court's Refusal to Continue Trial Violated the Defendants' Due Process Rights.

Under the Montana Constitution, no person may be deprived of property "without due process of law," which includes "the opportunity to be heard at a meaningful time and in a meaningful manner." Mont. Const. art. II, § 17; *Geil v. Missoula Irrigation Dist.*, 2002 MT 269, ¶ 61, 312 Mont. 320, 59 P.3d 398. Similarly, the due process clause of the Fourteenth Amendment of the U.S. Constitution guarantees a party a "full and fair opportunity to litigate the merits." *Kremer v. Chem Constr. Corp.*, 456 U.S. 461, 462 (1982). Here, despite those fundamental protections, the district court failed to afford the defendants a full, fair, and meaningful trial. By refusing to continue the trial date due to the City's host of discovery abuses, the court prejudicially impaired the defendants' ability to prepare and present their case.

A. The City's Discovery Conduct Compromised the Defendants' Right to a Full and Fair Trial.

To the defendants' prejudice, the City repeatedly violated both the rules and spirit of discovery. Perhaps most egregiously, it refused to

produce usable documents throughout discovery, acquiescing only after the special master found that it violated the Rules of Civil Procedure by deliberately converting its documents to an unusable format. Even then, the result of the City's compliance with the special master's order was a dump of 26,581 documents just three weeks before trial. A352-373.

Reviewing those documents in any meaningful way would take more than three weeks under any circumstance. Here, the district court's refusal to continue the trial meant that the defendants had no realistic chance to review them at all, much less use them in discovery or at trial. The defendants could not simply drop everything three weeks before trial to turn their attention to new material; they had to continue their trial preparation.

The City played similar games with experts. It produced nine supplements to its expert disclosures after the close of discovery, preventing the defendants from using the discovery process to explore the information in those disclosures. A374-425. It refused to produce any communications from one expert until twelve days before trial, adding 653 PDF files to the long list of documents the defendants had

no meaningful opportunity to review or use at trial. A352-373, 390-93. And it continued to supplement its expert disclosures *during* trial, including with new documents that its experts used on the stand.[8] A423-25. Simply put, the City litigated by ambush, a tactic this Court has repeatedly disavowed. *See, e.g.*, *McCulley v. U.S. Bank of Mont.*, 2015 MT 100, ¶ 27, 378 Mont. 462, 347 P.3d 247; *Richardson v. State*, 2006 MT 43, ¶ 22, 331 Mont. 231, 130 P.3d 634 ("Modern instruments of discovery, together with pre-trial procedures, make trial less of a game of blindman's bluff and more of a fair contest with the basic issues and facts disclosed to the fullest practicable extent.").

Two examples are particularly telling. First, throughout discovery, the defendants sought information about whether the City had a formal plan to operate the water system should the City acquire it. In response, the City's witnesses consistently testified that no such plan existed and never even hinted that the City was developing one. A507-541. Bruce Bender, the City's Chief Administrative Officer and one of its disclosed experts, testified that the City's plan was simply to

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[8] For example, the City's twenty-third supplement included additional expert documents pertaining to Peter Nielsen, who testified about those documents just two days later. A423-25.

offer continued employment to Mountain Water's employees and have them operate the system. A509. He also testified that the City had no plan for capital expenditures or fixing leaks other than "to plan to have a plan upon acquisition." A528. Said differently, Bender repeatedly testified that the City would develop a plan if it actually acquired the water system, but not before.

Then, nine days before trial, the City supplemented Bender's expert disclosure. A508-12. In that supplement (its twenty-first), the City included a formal "Preliminary Business Plan for Acquisition." *Id.* The defendants, of course, had no opportunity to conduct discovery about that plan, although they sought information about a plan from the outset. Nevertheless, the district court refused to continue trial, allowed City witnesses to testify about the plan, and used the late-disclosed evidence to rule in the City's favor, finding in its final order that "[t]he City has a credible plan for operating the Water System." A24.

Second, another of the City's experts, Dale Bickell, testified in his deposition that he had no idea what the City's administrative costs would be to run the water system, but guessed that they would be about

$1 million. A535-36. He also testified that the cost of the administrative services provided to Mountain Water by Park Water were $2,069,960. A536. The defendants thus prepared for trial on that basis.

But nine days before trial, the City also supplemented Bickell's expert disclosure with an entirely new analysis. A508-12. Although Bickell admitted that the true cost of having the City provide administrative services would be $2,415,082—nearly $1.5 million higher than his original guess and more than he previously testified it cost to get the services from Park Water—he also revised his calculation of the cost of Park Water's services, upping his original sworn testimony by more than $2 million to $4,465,960. *Id.*

Again, the defendants had no opportunity to conduct any discovery, forcing them to address Bickell's newly disclosed analysis for the first time during trial. Ignoring the prejudice to the defendants, the district court then relied on Bickell's analysis, devoting an entire section of its final order to administrative costs and finding that the City will be able to operate the water system less expensively than Mountain Water. A27-28.

B. The District Court Improperly Put Other Considerations Ahead of the Defendants' Due Process Rights.

In steadfastly refusing to continue trial, the district court relied on §§ 70-30-202 and 206(5), MCA, which contemplate that a condemnation trial should ordinarily begin within six months and should "proceed as expeditiously as possible." A79-83, 94-101. Specifically, the court held that the statutes did not allow more time for trial, and that, in any event, the court had no sufficient blocks of time available to move the trial. *Id.* That holding both ignored the law and improperly placed scheduling concerns ahead of the defendants' due process rights.

Nothing in the statutes mandates the type of unyielding schedule the district court imposed. To the contrary, section 70-30-206(5) specifically cautions that even though the condemnation process should proceed expeditiously, it must do so "without prejudicing any party's position." That is, the statute actually *precludes* courts from imposing a fixed, fast track schedule if doing so will prejudice a party's due process rights, as it did here.

Due process itself also precludes such a rigid approach. "Due process is flexible and calls for such procedural protections as the particular situation demands." *Montana v. West*, 2008 MT 338, ¶ 32,

346 Mont. 244, 194 P.3d 683 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). "Indeed, the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Id.* (quoting *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961)).

Applying those general principles in light of the flexibility inherent in the condemnation statutes, the district court should have granted the defendants a continuance.[9] The defendants were indisputably "entitled to due process which includes, among other things, the ability to discover information relevant to the case against them along with the identity of the witnesses . . . and the substance of the expected testimony." *Wilson v. Dep't of Pub. Serv. Regulation*, 260 Mont. 167, 172, 858 P.2d 368, 372 (1993). Due to the City's conduct, the defendants did not receive that process. *See, e.g., id.*; *First Bank v. Heidema*, 219 Mont. 373, 376, 711 P.2d 1384, 1386 (1986) ("Litigants who are willful in halting the discovery process act in opposition to the authority of the court and cause impermissible prejudice to their

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[9] While the court was certainly entitled to consider its own calendar when ruling on the motions to continue, scheduling issues should not trump a party's fundamental rights.

opponents."). Although the defendants did not seek discovery sanctions, they repeatedly sought a continuance that would have alleviated the prejudice. By denying a continuance and then relying on the City's late-produced evidence to rule against the defendants, the court not only violated the defendants' due process rights, it implicitly condoned the City's dilatory discovery tactics. *Contra Richardson*, ¶ 56 ("This Court strictly adheres to the policy that dilatory discovery actions shall not be dealt with leniently."). Regardless of the district court's other errors, this Court should thus reverse and remand to afford the defendants a full, fair and meaningful trial.

V. The District Court Erred as a Matter of Law by Refusing to Dismiss Carlyle as a Party to this Case.

In refusing to dismiss Carlyle, the district court fundamentally misunderstood the *in rem* nature of an eminent domain action. Because the court's jurisdiction in a condemnation case is premised on the real property the government seeks to take, *Housing Authority v. Bjork*, 109 Mont. 552, 556, 98 P.2d 324, 326 (1940), Montana law requires that a complaint contain "the names of all owners, purchasers under contract for deed, mortgagees, and lienholders of record and any other claimants of record of the property sought to be taken . . . ." Mont. Code Ann. § 70-

30-203(1)(b); *see also State By and Through Dept. of Highways of State of Mont. v. McGuckin*, 242 Mont. 81, 84, 788 P.2d 926, 928 (1990) ("The policy underlying the [eminent domain] constitutional provision is to make the *landowner* whole after the State takes his property.") (emphasis added). Here, it is undisputed that Carlyle does not own a single asset the City seeks to take. A250, 342-43. As a result, the court should have held that Carlyle was not a proper party.

The analysis does not change simply because Carlyle is an upstream corporate owner. *See, e.g.*, 7 *Nichols on Eminent Domain* § GIA.02; *Lobato v. Taylor*, 70 P.3d 1152, 1164 (Colo. 2003); *Port of Grays Harbor v. Bankruptcy Estate of Roderick Timber Co.*, 869 P.2d 417, 420 (Wash. Ct. App. 1994). Simply put, Carlyle's level of control over Mountain Water does not matter; this is not a voluntary sale. Tellingly, the City admits that it is not seeking to condemn Carlyle's equity interest in Mountain Water, Park Water, or Western Water. A543. Nor did the City name Park Water or Western Water as defendants even though Carlyle's interest in Mountain Water exists only through those entities. A294-96. Instead, it initiated an action

that, if successful, will result in an involuntary transfer of *Mountain Water*'s assets—a transfer to which Carlyle will be unnecessary.

In short, basic jurisdiction principles, case law, and common sense all confirm that the district court cannot enter judgment against Carlyle "for the physical taking of . . . property" it does not own. *See Bakken v. State*, 142 Mont. 166, 168, 382 P.2d 550, 551 (1963) (describing the outcome of a condemnation action). This Court should thus reverse and order the district court to dismiss Carlyle from the case.

CONCLUSION

For the reasons above, this Court should reverse.

Dated: October 8, 2015.

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Mont. R. App. P. 11(4), this response brief is proportionately spaced, has a typeface of 14 points or more, and contains 9,990 words, as determined by the undersigned's word processing program.

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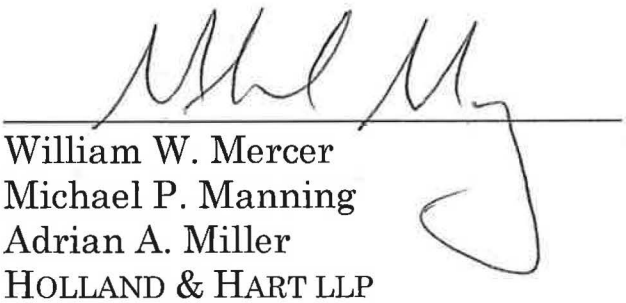

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