IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 15-0375

THE CITY OF MISSOULA, a Montana Municipal corporation,

Plaintiff and Appellee,

v.

MOUNTAIN WATER COMPANY, a Montana Corporation, and CARLYLE INFRASTRUCTURE PARTNERS, a Delaware limited partnership,

Defendants and Appellants.

THE EMPLOYEES OF MOUNTAIN WATER COMPANY, (Shanna M. Adams, Heather M. Best, Dennis M. Bowman, Kathryn F. Datsopoulos, Wayne K. Davis, Valarie M. Dowell, Jerry E. Ellis, Greg A. Gullickson, Bradley E. Hafar, Michelle Halley, Douglas R. Harrison, Jack E. Heinz, Josiah M. Hodge, Clay T. Jensen, Kevin M. Johnson, Carla E. Jones, Micky A. Kammerer, John A. Kappes, Susan M. Lowery, Lee Macholz, Brenda K. Maes, Jason R. Martin, Logan M. McInnis, Ross D. Miller, Beate G. Newman, Maureen L. Nichols, Michael L. Ogle, Travis Rice, Eric M. Richards, Gerald L. Schindler, Douglas J. Stephens, Sara S. Streeter, Joseph C. Thul, Denise T. Tribble, Patricia J. Wankier, Michael R. Wildey, Angela J. Yonce, and Craig M. Yonce),

Intervenors and Appellants.

APPELLANT MOUNTAIN WATER COMPANY'S OPENING BRIEF

On Appeal from the Fourth Judicial District Court,
Missoula County, Montana
Cause No. DV-14-352
Honorable Karen S. Townsend

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I. STATEMENT OF THE ISSUES PRESENTED

Mountain Water Company ("Mountain") owns and operates a water system (the "System"). The City of Missoula ("City") seeks to condemn the System under Montana Code Annotated §70-30-111 ("§70-30-111"), which requires the City prove that its municipal ownership is a "more necessary public use." App. 1. The District Court's Preliminary Order of Condemnation ("POC"), found that it was. App. 6 (CR 310). The issues are:

1. Whether the District Court's exclusion of evidence pertaining to the System's likely purchase price, which relates to every financial finding used to support the necessity determination, was material error.
2. Whether the District Court's reliance on general views regarding municipal ownership in finding City ownership a "more necessary public use" is incorrect.
3. Whether the critical findings regarding rate-impacts, municipal "savings" on administrative services and taxes, condition of the System, stability of ownership, and public opinion were clearly erroneous.

4. Whether the District Court's finding that collateral estoppel did not bar the City from relitigating issues from a prior condemnation case was incorrect.

5. Whether the District Court violated Mountain's procedural due process rights by its unfair and inequitable management of the pretrial and discovery processes.

II. STATEMENT OF THE CASE

The City brought this condemnation action to take the entire System, suing Mountain and Carlyle Infrastructure Partners, LP ("Carlyle"). The City claims municipal ownership of the System is a "more necessary public use" than private ownership. *See* §70-30-111(1)(c). Park Water Company ("Park"), which also owns two other water systems, wholly owns the stock of Mountain. CR 310 at 6, ¶¶4-5. Carlyle owns the stock of Western Water Holdings, LLC ("WWH"), which owns the stock of Park. *Id*. ¶4. Mountain, Carlyle, and the Employees of Mountain Water Company ("Employees") denied the City's claim. After an abbreviated discovery period, an 11-day hearing was held before the District Court on the issue of whether the City could prove the statutory basis. The POC concluded that the City's proposed use as a municipally-owned water company was "more necessary" than the current use

as a privately-owned water company. CR 310 at 66, ¶11. This appeal followed.

III. STATEMENT OF THE FACTS

The City is a municipal corporation (*id.* at 5, ¶1), and Mountain is a regulated, public utility corporation with its principal place of business in Missoula, Montana (*id*. at 6, ¶2). Mountain and its predecessors have provided access to potable water for customers inside and outside the City for over 100 years. Tr. 312. Mountain is "a good corporate citizen" of the City, and its "engagement" and "cooperative efforts" with the City and the community "is part of the good customer service provided by Employees." CR 310, ¶¶176-177; *see*, *e.g.*, Tr. 2986-2989 (local water safety and education efforts), Tr. 2690-2691, 2987-2988 (charity). On October 8, 2013, the Montana Department of Environmental Quality ("DEQ") commended the company, saying:

> [Mountain] does an exceptional job of operation, maintenance, safety, and management. A system of this complex design would rapidly deteriorate if inadequately managed and maintained. The efficiency of the system operation at the time of this inspection directly reflects that effectiveness of management and maintenance.

Tr. 2971; Ex. 1286.

A. CITY'S CLAIMS ARISE IN 2011, AFTER THE CARLYLE PURCHASE.

The impetus for this condemnation action arose in 2011, two years before the DEQ statements. Missoula Mayor John Engen, confirmed his "high degree

of confidence" in the partnership between Mountain and the City in 2011, when Carlyle acquired the stock of WWH. Tr. 312. The Mayor stated that, at least as late as 2011, there was no "opportunity" and it "wasn't necessary for the [City] to try to condemn" the System. Tr. 238-239.

> Q. So up until [the Carlyle transaction in 2010-2011] it wasn't necessary for the City to try to condemn the water system, was it?
> A. No.

Id. Throughout all times relevant here, the same Mountain employees managed the System and Mountain remained the owner. Tr. 2920-2921. The Mayor admitted that Mountain's quality of service did not diminish in any respect after the 2011 Carlyle acquisition. Tr. 299, 309-310, 313-314, 316, 2920-2921.

B. THE PROOF RELATED TO A "MORE NECESSARY PUBLIC USE."

Given the City's intention to use the System for the exact same public purpose, the relevant proof at trial focused on what, if anything, the City will comparatively do better than Mountain such that City ownership is "more necessary." The evidence can be characterized under three general subjects: (1) the financial implications of a taking, including the impact on customer rates; (2) the operational implications of a taking, including the City's post-takings operation of the System; and (3) the administrative implications of the taking, including the regulatory efficacy of the Montana Public Service Commission ("MPSC").

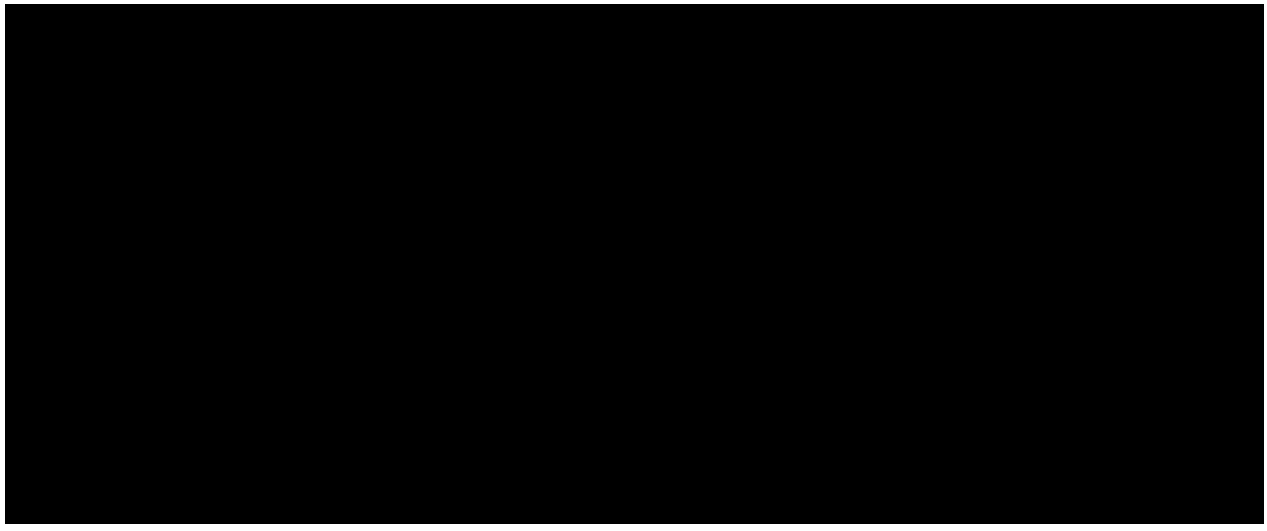
1. The Financial Proof (And Exclusion of Purchase Price Evidence).

The City's case focused on the alleged financial benefits to be gained from the taking. Dale Bickell, Central Services Director for the City, testified to certain "savings" that would allegedly be enjoyed by the City if it takes the System. Tr. 837-838. Bickell admitted the City's entire plan assumes, with no supporting proof, a "77 million dollar acquisition bond" which will cover, among other things, the System purchase price and acquisition cost. Tr. 884-885. Multiple witnesses for the City affirmed that the customer rates the City would eventually charge under its ownership directly depend on the purchase price, as the largest component of the acquisition bond. Tr. 521, 639. Missoula Chief Administrative Officer Bruce Bender admitted that whether the City could hold customer rates steady "depends upon how much we have to pay to acquire [the System]," which is the "critical link" between future improvements and City-rates. Tr. 520-521, 639. Automatic City-rate increases would occur if necessary to service the City acquisition debt, the likelihood of which rises with the cost of the System to the City. Tr. 282-283 (Mayor Engen).

Despite its centrality to the City's claims, the District Court excluded all of Mountain's value-related evidence. After the City submitted evidence on the theoretical financial benefits of municipal ownership—premised on the City's $77 million acquisition bond assumption—Mountain sought to introduce a

value-related exhibit. App. 4, 2124. The City objected (App. 4, 2124-2125), and the District Court excluded all of Mountain's value-related evidence. App. 4, 2125-2126; *see also* Tr. 2230. Mountain then made an offer of proof. Supp. App. 17 (Tr. 2411-2436).

Mountain would have shown that under various likely valuations of the System, the financial implications of the purchase by the City would change dramatically. *Id*. An understated purchase price (value) would lead to an understated acquisition bond (assumed to be $77 million), affecting the financial implications of everything after this "critical link." Mountain's excluded evidence, as set forth fully in the offer of proof, would have shown:



Id. The District Court declined to rescind the exclusion. *Id*.

One benefit the City claimed was that it will not raise rates for five years if allowed to condemn. Tr. 870. However, only one municipal bond expert testified at trial, Frank Perdue. Mr. Perdue showed that at four different

assumed acquisition prices, the City would be obligated by the rate covenants in its acquisition revenue bond to increase rates by anywhere from 2% to 31% in the very first year after acquisition, with yearly increases afterward. Tr. 2256-2257. Because Mountain's value-related proof was excluded, Perdue's testimony expressed the acquisition price obliquely, as a percentage of the City's assumed bonding of $77 million. App. 4, 2236-2243; Tr. 2251-2257. For example, if the acquisition bond was around $140 million (which is a 90% increase over the City's assumed bond), then rates would immediately increase by 30% in the first year. Tr. 2256-2258.

The City also challenged the value of services Mountain receives from its parent, Park, via an Administrative Services Agreement ("ASA"). Mountain's President, John Kappes, testified extensively about the expertise and support provided by Park, including financing and cash management, financial planning, benefit audits, financial reporting, accounting services, IT services, human resources, engineering, risk management, and others. Tr. 2957-2966. Before approving them, the MPSC staff and Montana Consumer Counsel ("MCC") carefully inspect these ASA-expenses. Tr. 2965-2966. MPSC and MCC Staff review the administrative services actually provided and evaluate the benefits, costs and need for the services. *Id*. Park's other two water systems also obtain administrative services through Park, facilitating resource-

sharing and economies of scale. Tr. 2957-2964. Mountain currently pays about $2 million annually to Park for administrative services. Tr. 2957, 3025-3026.

While intervening in many of Mountain's cases before the MPSC, the City has never challenged the terms, conditions, and expense of the ASA. Tr. 269-270, 2957-2967. Of course, the City, upon acquisition, would not pay Park for the ASA-expenses, but the services would still be needed. Tr. 2279-2281. While the MPSC has consistently determined that $2 million is a reasonable and prudent expense for the Park services, Dale Bickell claimed it would only cost the City $100,000 to replace all of the ASA services, alleging that current City or Mountain employees could do the work. Tr. 849. Apparently as an afterthought in response to the deficiencies in the administrative aspect of their proposal, the City produced a "preliminary plan" on the eve of trial that simply reclassifies current Mountain expenses under other City departments, to make it look like water-related expenses are reduced. Tr. 850-857, 860-861; Ex. 1499; Tr. 260 (Mayor admitting no plan). However, the City did not perform any independent study or provide any evidence that its or Mountain's employees have the capacity or expertise to assume the significant, necessary ASA services at little or no cost. Tr. 841-843, 1078-1080.

Finally, Bickell testified that as a tax-exempt entity, the City could save money by not paying the taxes Mountain was obligated to pay, including $1.2

million in property taxes. Tr. 874. Bickell suggested that the City might agree to a temporary payment in lieu of taxes ("PILOT"), phased out in order to account for the loss in tax revenue. He admitted, however, that the City had not discussed this with the local school system superintendent, who singularly stood to lose the $350,000 that the schools receive annually from Mountain property taxes. Tr. 877-878, 906.

2. The Operational Proof (And Mountain's Cost-Effective System).

The System's assets are many and complex. Tr. 2931-2938. As stated by the DEQ: "The Missoula area distribution system is a complex mesh of plastic, iron, steel and AC pipe with numerous pressure zones controlled by booster facilities, pressure regulating valves, storage tanks and source well pump assemblies." Tr. 2971; Ex. 1286. Mountain's 39 employees have the expertise and skill necessary to run it. Tr. 2949-2955. The City, by contrast, does not have the experience, personnel, and expertise necessary to operate the System. Tr. 246-247, 270-272, 528, 625-626, 860 (Mr. Bender acknowledging it would be a "crisis" and "difficult task" and Mr. Bickell acknowledging it would be an "incredibly difficult situation" if Mountain's employees did not come to work for the City).

The Missoula Aquifer, which is the source of Mountain's water, is uniquely situated directly below the City and is one of the most productive

aquifers in the world. Furthermore, Missoula is underlain by "incredibly porous soils," that make leak detection difficult because the leaks rarely surface. Tr. 1866-1867, 2047. When water leaks from pipes, it is not being wasted or lost. Rather, it simply flows back down into the Aquifer, without any adverse environmental impact. Tr. 1865-1867, 2052, 2342-2344, 2959-2960, 2966-2967.

Although a persistent theme of the City's case was that City ownership is more necessary because Mountain's System is ***leaky*** and ***inadequately maintained***, the proof showed Mountain invests heavily in the System, including over $34.8 million in the past 10 years. Tr. 1974-1976. System leakage has decreased by approximately 19% since 2011. Tr. 1869-1870; Ex. 2091. Cash flow improved when Carlyle purchased the System, allowing capital projects to be planned earlier in the year and better coordinated with the City. Tr. 2921-2922. New, trenchless technologies were implemented. Tr. 2922. The amount of water main replaced significantly increased. Tr. 2922-2923. The City has no plan to reduce leakage that is any different from Mountain. Tr. 258-260.

Mountain Chief Engineer, Logan McInnis, is "quite qualified." Tr. 633. McInnis addressed Mountain's responsible and cost-effective leak management. Tr. 1874-1880, 1890. Joseph Mantua was the only engineering expert witness

to analyze physical pipe samples. He testified that the system is operated effectively and efficiently, is in good condition, and given the conditions, the leakage rate is not a cause for serious concern. Tr. 2051-2052. John Young, also an experienced water company engineer, testified that System leakage is not a significant problem and that Mountain is "doing exactly" what it should. Tr. 2341-2351.

The American Water Works Association ("AWWA")—an industry leading organization—states leakage rates are a "misleading and unreliable measure of utility performance" that "reveal[] nothing about water volumes and associated costs, the two most important factors in assessing water waste within a distribution system." Tr. 1893; Ex. 2555. Instead, "[t]he best means of setting [specific leakage reduction] targets include performing an economic assessment of various loss control methods." Tr. 1895-1896. Mountain presented such an assessment and a plan to address leakage in a responsible manner and to avoid customer rate shock. Tr. 1879-1880. No countervailing economic assessment of leak mitigation was presented by the City. In fact, with the soil porosity in the Missoula Valley, and the water leaking directly back to the Aquifier, the only loss is the additional cost to pump and treat the water. *Id*. The City presented no specific plan for leak remediation, other than claims of increased capital expenditures, which are directly dependent on the acquisition

bonding capacity. Tr. 1874-1879; Ex. 77 (Mountain's plan for water loss mitigation).

3. The Administrative Proof (And Governance of Rates).

Mountain is regulated by the MPSC, a statutorily created regulatory body that was maligned by the City as inefficient, out of touch, or otherwise not effective. Tr. 1241, 1633, 1636. However, under the MPSC rate-setting process, the interests of all of Mountain's customers are represented by the MCC (a right guaranteed under the article XIII, section 2 of the Montana Constitution), a sophisticated and experienced group that advocates for customers before the MPSC. Tr. 2888-2889. Comparatively, under municipal ownership, the municipality sets its own rates and the MCC has no role. Tr. 281-283. In a City-ownership scenario, customers must personally contact their representative or attend a City Council hearing, which "very few people" do. *Id.* The differences are striking: the MPSC is an adversarial process, based on full and complete financial and operational review, with full discovery; the municipal process occurs by mailing a postcard noticing a rate increase, followed by a public meeting, with no financial or operational disclosures or auditing. Tr. 281-283, 2874-2885.

Approximately 1,500 customers of Mountain reside outside the Missoula city limits (CR 310, ¶52), and will have no representative on the Council

because they are not eligible to vote in the City elections. *Id*. ¶111; Tr. 248. *See generally* App. 2. This subjects these non-voters to a diminution of their present rights. In fact, specific evidence in the sewer context showed that the City price-discriminates against commercial customers, smaller occupancy homes and non-City residents. *See* Tr. 263 (commercial sewer ratepayers subsidize residential sewer ratepayers); Tr. 262-264 (discriminatory Sewer development fees for City versus non-City residents that do not reflect cost of service); Tr. 2339-2340 (small houses charged the same as large houses for sewer, versus the use-based charges by Mountain).

4. The City's Previous Attempt to Forcibly Take the System.

This is not the City's first attempt to take the System. In the late-1980s, the City tried to take the System in a lawsuit spanning five years (from 1984-1989). The trial Judge, Robert Holter, found "it is not more necessary [for] the City take over its operation." Supp. App. 10 at 15. The case was the subject of two separate appeals, in which Justice John Sheehy authored a dissent (on the first appeal) and the majority opinion of the court (in the second appeal). Supp. App. 9, 11. The similarities of the cases are many, including:

- ***Price***: How much the City would ultimately pay for the purchase was critical, with Justice Sheehy writing: "if the fair market value of the [System] fixed by the condemnation jury were between $11

million and $19 million [the City assumed $11 million], the entire economic projections of the city became untenable and any purported savings a myth." Supp. App. 9 at 20.

- ***Taxes***: Justice Sheehy wrote: "The [City] claimed a reduction in the rates to water users would result because the plant and property under a governmental entity would not be taxed. However, the District Court rejected this claim saying that the savings in property taxes would simply be shifted to other property tax payers, some of whom live outside the city [or] in the county of Missoula." *Id.*
- ***MPSC Oversight***: Justice Sheehy summarized the vagaries of ratemaking by the municipality compared to the MPSC, noting that "[t]he statutes authorizing a city to operate a water supply system do not grant to a city council or commission the frightening power to take by itself conclusive action in condemning the property of another. I say frightening because city utilities may levy charges without regulation by the [MPSC], and may raise those charges up to 12% per year." *Id*. (citing Mont. Code Ann. §69-7-101).

IV. STATEMENT OF THE STANDARD OF REVIEW

The grant of the power of condemnation "to governmental bodies must be strictly construed." *Bozeman v. Vaniman*, 264 Mont. 76, 869 P.2d 790, 792 (1994). Because "[p]rivate real property ownership is a fundamental right," pursuant to article II, section 3 of the Montana Constitution, "any statute which allows the government to take a person's property must be given its plain interpretation, favoring the person's fundamental rights." *Id*.; *Glass v. Basin Mining & Concentrating Co.*, 22 Mont. 151, 55 P. 1047, 1048 (1899).

Conclusions of law are reviewed *de novo* for "correctness." *Baltrusch v. Baltrusch*, 2003 MT 357, ¶23, 319 Mont. 23, 83 P.3d 256. The central question here—whether the taking proposed is a "more necessary" public use—involves the application of legal principles to factual findings and is reviewed *de novo*. *See BNSF Ry. Co. v. Cringle*, 2012 MT 143, ¶16, 365 Mont. 304, 281 P.3d 203.

In *Fletcher v. Park County*, 2015 MT 188N, ¶13, 379 Mont. 538, 353 P.3d 508 (table), this Court recently reiterated the "clearly erroneous" standard for review of findings of fact. Under that standard, "[a] district court's findings are clearly erroneous if [1] the findings are **not supported by substantial evidence in the record**, or [2] the district court has **misapprehended the effect of the evidence**. The Court may still determine that the trial court's findings are clearly erroneous when, [3] although evidence supports it, a review of the

record leaves this Court with the definite and **firm conviction that a mistake has been committed**." *Id*. (emphasis added) (citation omitted); *see also Ray v. Nansel*, 2002 MT 191, 311 Mont. 135, 53 P.3d 870.

V. SUMMARY OF THE ARGUMENT

The controlling statute, §70-30-111, has a two-step condemnation framework. The first phase is the "right-to-take phase." It requires that "[b]efore property can be taken," the City must "show by a preponderance of the evidence" both that "**the taking is necessary**" to a public use and "if already appropriated to some public use"—like here—"**that the public use to which it is to be applied is a more necessary public use**." *See Missoula v. Mountain Water Co.*, 228 Mont. 404, 743 P.2d 590, 595 (1987) (emphasis added); *see also* Mont. Code Ann. §70-30-103(1)(c). If the "necessary" and "more necessary" conditions precedent can be proven, the case moves to a value determination in the "just compensation phase." *See* Mont. Code Ann. §§70-30-301-303.

The City's and Mountain's proof tracked along the general financial, operational and administrative implications of a municipal takeover. The City's last minute "plan" for operation of the System was merely a preliminary "plan to plan," cobbling together general statements of the advantages of municipal ownership without any specific and concrete steps to demonstrate "more

necessary" operations when compared specifically to MWC's operations. Conversely, Mountain's proof focused on the specifics of **each particular issue** in great detail. The District Court believed that public ownership is more necessary, but did not properly interpret and apply the meaning of "more necessary" set forth in §70-30-111, and made significant errors in applying philosophy over proven fact. If this Court upholds the District Court finding that a public entity can take a private business simply because it believes public ownership is better, this decision will have a dramatic and detrimental impact on private property rights in Montana, in contravention of the historical protections given to these fundamental rights.

First, the City offered no proof in support of its assumed purchase price, and the District Court excluded all of Mountain's value-related proof based on an erroneous reading of the condemnation statutes. Without purchase price evidence, any purported financial benefits are pure speculation. The District Court's findings of financial benefits were contrary to the approach of the 1980s case and impeded the comparative analysis contemplated by the standard. This was clearly erroneous. The mistake was compounded by the legal error of excluding all of Mountain's contrary proof.

Second, the District Court found that the "more necessary" standard was satisfied by generalities about municipal ownership, rather than facts particular

to these circumstances. Application of facts to a statutory standard is a question of law. Unlike the District Court's approach, Montana does not automatically favor municipal ownership over private; rather, the specific advantages and disadvantages of ownership by this City in particular must be weighed against those of ownership by Mountain in particular.

Third, the District Court made several key findings unsupported by the substantial weight of the evidence. These include, *inter alia*,

- that a recent "acquisition premium" would be recovered through rates (CR 310, ¶123), despite it being unlawful to do so and the acquirer's sworn statement that it will not attempt to recover it;
- that the City will be able to save money on administrative expenses (*id*. ¶¶82, 84, 87), despite no proof it can do so;
- that the fact the City will not have to pay property taxes on the System (*id*. ¶86), without considering that these taxes will be made up for by Missoula taxpayers in other ways;
- that System leakage indicates poor quality (*id*. ¶¶54-63, 68-69), despite overwhelming evidence to the contrary;
- that municipal ownership is more stable than private (*id*. ¶63), despite the history of the City selling a water company; and
- that the Harstad Survey is reliable to show public support for the taking (*id*. ¶¶46-53), despite its manifest methodological flaws.

Fourth, the District Court erred by ignoring the collateral estoppel effect of the 1980s decisions. Many of the same issues were litigated in the earlier case, but the District Court departed from these prior findings despite no changed circumstances. This was error.

Finally, the District Court violated Mountain's procedural due process rights by impairing Mountain's ability to defend its constitutionally protected property in the way the proceedings were conducted.

VI. ARGUMENT

The propriety of the taking here turns on whether the City is able to meet the "more necessary" condition precedent required by §70-30-111. If municipal ownership of a public water utility is inherently better than private, the statute could easily have so provided. It does not. The specific facts of City ownership versus Mountain ownership are to be weighed from the standpoint of the customers and potential customers of the System. *See, e.g., Butte A. & Pac. Ry. v. Mont. Union Ry. Co.*, 16 Mont. 504, 41 P. 232 (1895).

A. THE DISTRICT COURT ERRED IN MAKING FINANCIAL FINDINGS PREMISED UPON AN ASSUMPTION OF VALUE THE CITY DID NOT PROVE AND MOUNTAIN WAS NOT PERMITTED TO REBUT.

The District Court committed reversible error in accepting without questioning the City's assumed acquisition price, and excluding all of Mountain's contrary value-related proof. The District Court excluded all of Mountain's evidence probative of the likely purchase price of the System, including that price's impact on rates, capital investment, and other claimed financial benefits. App. 4, 2125-2126, 2236-2242; Supp. App. 17, 2436. Long after the trial, the District Court issued a Memorandum attempting to justify its

decision to exclude all valuation proof except the City's assumed and unsupported bonding of $77 million during the trial. App. 7 (CR 328). As justification for its ruling, the District Court cited: (1) the overall schema of the "statutes governing eminent domain," which "prescribe sequential steps which must be exercised in a specified order"; and (2) concerns about tainting the valuation commissioner pool for the subsequent just compensation phase. *Id*. at 4-5, 7.

"[J]udicial discretion must be guided by the rules and principles of law; thus, our standard of review is plenary to the extent that a discretionary ruling is based on a conclusion of law." *State v. Mackrill*, 2008 MT 297, ¶37, 345 Mont. 469, 191 P.3d 451. To the extent not based on a legal conclusion, exclusion is generally reviewed for "abuse of discretion," meaning the District Court acted "arbitrarily without conscientious judgment or exceed[ed] the bounds of reason." *Martin v. BNSF Ry. Co.*, 2015 MT 167, ¶10, 379 Mont. 423, 352 P.3d 598. Reversible error occurs when "a substantial right of the appellant is affected" or "the evidence in question was of such character as to have affected the outcome of the trial." *Id*.

1. Excluding Essential Purchase Price Evidence in Right-to-Take Phase Was Legal Error and/or an Abuse of Discretion.

There is nothing expressly or implicitly prohibiting evidence of value or purchase price at the right-to-take phase, and it was an error of law to so find.

As an obvious predicate, District Judge Holter and Justice Sheehy relied on the valuation proof in the case in the 1980s, demonstrating the relevance, admissibility and importance of such proof. Supp. App. 9 at 3, 20. Here, private property rights are being forcibly taken by a municipality under a statute where the City bears the burden of proof to show the condition precedent of a "more necessary public use." Constitutionally-protected rights mandate the City to meet this head-on and prove its assumptions. As to the exclusion of Mountain's evidence, the condemnation proceedings are governed by the "Montana Rules of Civil Procedure and the Montana Rules of Evidence," Montana Code Annotated §70-30-201, where Rule 402's broad "relevance" standard controls. Mont. R. Evid. 402. The right-to-take phase must be conducted "**without prejudicing any party's position**, with all aspects of the preliminary condemnation proceeding, including discovery and trial." Mont. Code Ann. §70-30-206 (emphasis added).

Indeed, the majority opinion in 1987 specifically announced a broad standard of evidence, noting that "there are no statutory guidelines to assist the District Court in weighing the various factors" and that it should, on remand, consider "all relevant factors." Supp. App. 9 at 13. It is impossible to do such a ***comparative analysis*** as required here without two comparison points being established: for example, what rates will be under City ownership and private

ownership. By excluding Mountain's valuation evidence, the District Court could not meaningfully compare these rates, especially in light of Perdue's testimony regarding requisite rate increase under municipal ownership at different acquisition prices. *See* Tr. 2252-2260.

The District Court never cited a specific statutory section that mandates exclusion of value-related proof in the right-to-take phase. There is none. The District Court ordered the exclusion because the condemnation proceedings move sequentially from the right-to-take phase to the just compensation phase. CR 328 at 4-5. This does not follow and, if it did, would have required exclusion of the same type of evidence in the 1980s case. The City claims specific financial benefits from taking this entire company as primary and actual grounds to support its "more necessary public use." Consequently, it is highly relevant whether those benefits are premised on realistic (or untenable) assumptions of the purchase price. The District Court did not allow Mountain an opportunity to challenge this critical assumption, *i.e.* it allowed the City to make this the pivotal basis for the taking and then shielded it from contradictory proof. Without testing this assumption, the City's taking is based on a strawman.

The City presented no factual proof supporting its $77 million acquisition bond estimate. Without proof of value, every financial benefit claimed by the

City is pure speculation, and it was error for the District Court to credit these unfounded claims. This evidentiary issue was compounded with the prejudicial exclusion of Mountain's proof, which would have shown that the City's valuation assumption was wholly unreliable and vastly understated. Valuation evidence would have impacted the District Court's "more necessary" analysis on the following issues:

- **Rate increases**. The potential and amount of rate increases based on the likely cost of the System is much greater than argued by the City. If the City's assumed acquisition bond of $77 million is low (as would have been proven by Mountain), the City will need to raise customer rates, decrease capital investment, defer maintenance, etc.
- **Capital Investments**. The District Court found that the City would invest more (CR 310, ¶¶59-63), but countervailing evidence of the cost of debt service of the likely purchase price would have shown that such anticipated capital would not be available.
- **Profit**. The District Court found that elimination of the profit earned by an investor-owned utility was positive (*id.* ¶¶88-91), ignoring that the City would finance the purchase with government issued revenue bonds, with interest paid to bondholders and

> requirements that rates will be raised if necessary to support the bond covenants. Of course, the question is not "profit," *per se*, but, rather, comparative benefits.

Without any proof of the purchase price, the District Court could not realistically or meaningfully adjudge whether the City's claimed financial benefits are credible expectations. Essentially, this makes the "comparison" one that is in a vacuum, without the ability to fully explore the relative merits.

The District Court also based its exclusion on a perceived possibility of interference with the just compensation phase, namely that commissioners could be prejudiced by learning of a purchase price claim made in the right-to-take phase. While Montana Code Annotated §70-30-207 requires that appointed commissioners have "not formed an unqualified opinion or belief as to the compensation," this simply requires commissioners who have not in-fact prejudged the issue. It does not require appointing commissioners who are completely unaware of the numbers introduced in a right-to-take trial. The possible prejudice of hearing the same evidence (just more fully) in the just compensation phase as was presented in the right-to-take phase is difficult (or impossible) to quantify because there is none. The District Court could have heard the evidence to determine a realistic and preliminary range—as was done in the 1980s litigation—with the exact price for the purchase to be determined

later. It did not need to suppress all evidence of value on this attenuated and legally incorrect basis.

2. The Exclusion of the Purchase Price Evidence Affected a Substantial Right and Affected the Outcome of Trial.

Mountain's proof would have shown that at a plausible purchase price informed by any realistic valuation methodology, all purported financial benefits from a City acquisition would evaporate. Supp. App. 17, 2411-2436. The District Court's exclusion of valuation evidence and failure to consider the risk of an acquisition price resulting in no financial benefits violated Mountain's due process rights and was a marked change from what the District Court had said through the pretrial process.[1] In *Vaniman*, 869 P.2d 790, Bozeman sought to condemn certain property "to build a rest area and visitor center located along Interstate 90 near Bozeman, Montana." *Id.* at 792. There, the trial court, in issuing a preliminary order of condemnation, "deferred judgment on the question of whether [a private entity], in agreement with the City intends to occupy a portion of the visitor center." *Id*. at 794. The Court held this was error and that the trial court, "in so doing, violat[ed] the Vanimans' due process rights" by preventing the Vanimans from adequately

[1] On several occasions, the District Court explicitly stated valuation evidence **would be accepted during the necessity trial**: (a) the July 7, 2014 Scheduling Conference; (b) the December 1, 2014 Order (CR 124 at 3); and (c) the March 16, 2015 Final Pretrial Conference. Tr. 2411-2436 (offer of proof).

attacking the necessity of the taking. *Id*. Likewise, exclusion of the valuation proof here—which was necessary for Mountain to adequately attack the alleged necessity of the taking—violated Mountain's due process rights.

The District Court's exclusion affected the outcome of the trial. *See Unmack v. Deaconess Med. Ctr.*, 1998 MT 262, ¶17, 291 Mont. 280, 967 P.2d 783. Numerous findings are implicated in the District Court's exclusion of valuation evidence, namely, the District Court's assignment of credibility to the City's untested purchase price assumption, and the downstream financial "benefits" that follow therefrom. Perhaps most critically, the District Court found "[t]he City can afford to acquire the Water System within the parameters of the bonding consultant estimates for capacity and the valuation appraisals conducted by the City," despite no testimony from this "bonding consultant" or the conductors of the City's "valuation appraisals." CR 310, ¶118. In other words, the District Court concluded the City can afford to acquire Mountain based solely on the City's valuation numbers and, at the same time, prevented Mountain from presenting its own valuation evidence which would have factually demonstrated that the City's critical valuation was materially understated. As Mountain was precluded from showing the fatal deficiencies in these assumptions, the case must be reversed.

B. GENERAL OR ABSTRACT FINDINGS IN FAVOR OF MUNICIPAL OWNERSHIP ARE NOT SUFFICIENT TO FIND A "MORE NECESSARY PUBLIC USE" UNDER §70-30-111.

In determining whether the proposed use is a "more necessary public use," §70-30-111 **requires specific findings** that show particular benefits from the proposed use so outweigh the benefits of the prior use that the taking is "more necessary." For instance, in *Butte*, 41 P. 232, the Court's "more necessary" decision turned on very specific findings: that the land to be taken was currently unused, that it would be put to use by the proposed use, that it would be cost-prohibitive to build the proposed railroad elsewhere, and that the public would be harmed by the monopolization of a certain route if the railroad were not built. Here, in contrast to the particularized findings in *Butte*, the District Court favored municipal ownership in the abstract, without sufficient specificity.

The District Court's interpretation and application of §70-30-111 is reviewed for correctness. *See Blackmore v. Dunster*, 2012 MT 74, ¶6, 364 Mont. 384, 274 P.3d 748. The City has framed the "more necessary" question the same way: "The ultimate **issue of law** in this case is whether the City's ownership of the Water System is a public necessity—that is, a 'more necessary public use' of the System than Carlyle[,] [Liberty,] and Mountain Water's ownership. Mont. Code Ann. § 70-30-111(1)(c)." CR 230 at 12 (emphasis

added). There is no disagreement between the City and Mountain that this is an issue of law, but, rather whether the legal standard requires generalities (like the City presented) or specifics (like Mountain presented) on the actual impact of proposed City ownership.[2]

1. The District Court's Opinion Reflects an Overall Preference for Municipal Ownership in and of Itself.

The District Court's Opinion reflects an abstract policy preference for municipal ownership in and of itself. This is nowhere more evident than in Part G of the Decision, entitled "Economics and Public Policy." CR 310, ¶¶134-145. There, the District Court abstractly finds that the City's ownership would have positive public and economic consequences, without looking at anything particular about this System and this City—municipalities have "greater transparency" (*id.* ¶135(j)), they "lack [] a profit motive" (*id.* ¶136), state regulation is inherently "less attuned to the community" (*id.* ¶139(g)), etc.

These generalized justifications for condemnation, applicable to all cities and all utilities, amount to a court-declared public policy favoring municipalization—a policy the legislature has never established. *See* Supp. App. 9 at 11 (noting the "absence of a declared policy by the Legislature giving

[2] Many of the factual issues discussed in this (and the next) argument are directly impacted by the findings in the earlier 1980s case. To avoid duplication, this overlap of issues is singularly covered in the collateral estoppel section. Virtually every issue, however, could have included a reference to the 1980s case.

greater or lesser weight" to public or private ownership of a water system). In short, the District Court's logic amounts to a finding that the City is a city and therefore is preferable as the System's owner. Such a declaration is contrary to the statutory law, its interpretation by this Court and long-standing Montana policy protecting private property rights.

2. The District Court's Findings Regarding Financial, Operational and Administrative Implications Do Not Meet the Statutory Standard.

The District Court made findings regarding the financial, operational and administrative implications of City ownership that are equally general. Each of these findings reflect a general preference for municipal ownership, rather than an as-applied finding.

a. Financial Impact of Municipal Ownership.

The District Court made several findings about municipal ownership based on an alleged impact on rates. CR 310, ¶¶115-133. The Opinion's short "analysis" of why municipal ownership will facilitate low rates reduces to: (a) the availability to municipalities of low-interest bonds; (b) under "municipal ownership, the cost of capital improvements will not be increased by a rate of equity;" and (c) financial decisions can be based on "promoting public health, safety and welfare rather than on decisions regarding returns on investments." *Id.* ¶¶88-91, 131. In other words, the District Court simply found because

municipalities are non-profit entities, rates will be more favorable under municipal ownership. This was error.

Without proof regarding the purchase price, the District Court's general preference for municipal ratemaking cannot support the idea that rates under municipal ownership would be better for the public. These general findings, however, ignore Perdue's testimony as to the effect of the purchase price on the ability to finance new investment. Perdue clearly testified that at certain purchase prices (which Mountain could support, but was not allowed to), any benefit from municipal financing rates washes out. Tr. 2254-2259, 2278. In addition, the District Court did not actually consider the impact on customers under a full analysis under the different valuation scenarios. Of course, the private "profit" versus bondholder "interest" is one component of that comparative analysis. Consider the following:

- **Private Ownership Profit**: Mountain has the potential to earn a regulated rate of return of 9.25% on its rate base, roughly $40 million. Tr. 1092, 2929.
- **City Ownership Bond Payments**: The City will have to pay principal and interest payments to investor-bondholders, along with the required multiplier for coverage of the debt service **for the entire FMV purchase price** (Tr. 2278, 2876-2880), which

includes numerous assets upon which Mountain earns no rate of return because they are not included in the MPSC's calculation of rate base. Tr. 2880.

The range of issues – from the price paid, to coverage ratios, lender requirements, and operational costs – must be compared and considered as a whole. This was not possible under the evidence presented. Thus, whether the City's non-profit status will be a net benefit or net detriment is unknown, because it is not known or knowable on the existing proof what the actual impact will be. Obviously, under this paradigm, a lower interest rate on a higher debt can be one net detriment, but, because the District Court did not make any findings regarding the credibility of the City's assumed purchase price, it eliminated any possibility of a financial comparative analysis.

b. General Operational Claims With No Plans to do Anything Different.

The District Court generally found the condition of the System to be "aging" and in need of repair, due to leakage rates. The City proposed no unique plan for addressing the issue of leakage, claiming instead that its plan was simply to invest more money in infrastructure replacement and repair. Tr. 260. In fact, the City's "Preliminary Business Plan" contains no specific operational plan for capital investment, and without evidence to support its assumed acquisition price, contains no credible evidence that it could exceed, or

even match, Mountain's current capital investment plan. Tr. 641-642 (Bender: once the City acquires the system it will have a more detailed plan). The City's "preliminary plan to plan," which is entirely dependent on the ultimate purchase price, failed to establish a use "more necessary" than continued Mountain ownership.

c. Maligning the Administrative Oversight of the MPSC.

The District Court found certain administrative implications favor municipal ownership, namely that other cities do it, the MPSC is somehow inferior, and the City would treat non-City residents fairly. CR 310, ¶¶92-114. The District Court misunderstood the standard. While the District Court generally opined that because other cities and towns in Montana have the ability "to set water rates fairly and effectively," the City could do so as well (*id.* ¶110), this is a far cry from showing that the municipal rate-setting process is "more necessary" than MPSC oversight. The legal standard looks at whether City ownership is "more necessary," and the condition precedent of "more necessary" is statutorily driven by an analysis of whether it will be better.

The District Court also gave preference to municipal rate-setting by finding the MPSC process cumbersome. *Id.* ¶114. Significantly, though, the Montana legislature, which created both §70-30-111 and the MPSC, created no statutory preference for municipal rate-setting over MPSC regulation.

Although the District Court asserted that municipal ownership is common in other Montana cities and towns, the condition precedent is "more necessary," not "more common." To go from one legislatively-allowed system to another, where customers will lose constitutional representation by the MCC they previously enjoyed, does not demonstrably show a greater benefit to the public. The question is which system is comparatively better ***for the ratepayers***– not in how they navigate a process, but comparatively better in how that process analyzes, evaluates and sets water rates. *See* Tr. 2874-2876. That question was not answered by the District Court. None of the District Court's abstract and general findings support a finding of "more necessary" under §70-30-111.

C. THE DISTRICT COURT'S FACTUAL FINDINGS WERE CLEARLY ERRONEOUS ON KEY QUESTIONS AND MUST BE REVERSED.

In addition to those discussed above, many of the key District Court findings are **clearly erroneous**, greatly affected the District Court's analysis, and constitute reversible error.

1. Recovering the "Acquisition Premium" Through Rates.

For a regulated utility, "rate base" refers to the depreciated original cost of assets upon which a regulated utility is entitled to earn a rate of return. An "acquisition premium" refers to any sum above rate base that a purchaser of a regulated utility pays to acquire it. On September 14, 2014, a Plan and Agreement of Merger was entered into whereby Liberty Utilities Co.

("Liberty") agreed to purchase all the capital stock of WWH from Carlyle. CR 310 at 8-9, ¶¶12-14. With almost no explanation, the District Court found it unlikely that Liberty would not bill ratepayers with increased rates to cover the acquisition premium it is paying to acquire Park. *Id*. ¶123.

This finding was clearly erroneous, both factually and legally. Greg Sorensen, President of Liberty (Tr. 2596), testified that Liberty's acquisition costs will not affect rates (Tr. 2605), and that Liberty had made the same commitment to the MPSC. *Id*. Liberty committed to the exact same pledge as Carlyle did in the 2011 MPSC Order, where Carlyle pledged not to pass through an acquisition premium to Missoula ratepayers. Tr. 3096; Ex. 2580. The City introduced no evidence to controvert these facts. The District Court was also inconsistent in its treatment of this issue. It found on the one hand, that Liberty's acquisition will affect rates, but excluded valuation evidence regarding the impact of the City's purchase price on rates, on the other hand. Moreover, for non-municipally owned systems, acquisition adjustments are not lawfully passed on to the ratepayers through MPSC regulated rates. *See In re Nw. Corp.*, 259 P.U.R.4th 493, at *93 (Mont. 2007) ("The action of selling a utility, absent any compelling reason, is not sufficient to allow an adjustment in rate base to reflect acquisition costs."). *See also* Mont. Code Ann. §69-3-109 (prohibiting the MPSC from increasing rate base over original cost). The

District Court's disbelief of the only testimony on the subject, against all evidence and law, is clearly erroneous.

2. Administrative Expense "Savings" Without Any Proof that the City Can Replace the Actual Services.

The District Court erroneously found that under municipal ownership "the Home Office Expenses to [Park] would be eliminated" (CR 310, ¶84), and that these necessary administrative services could be performed by the City. *Id.* ¶87. The District Court found that Mountain "offered no testimony or evidence that the [ASA] services obtained from Park . . . require unique qualifications or special expertise." *Id*. ¶82. The District Court accepted Bickell's assertion that Park essentially performs no worthwhile services, and charges $2 million for it. *Id*. ¶¶84, 87. However, the back-of-the-envelope calculation the District Court accepted from Bickell is against the great weight of the evidence. This is supported by, at least, (a) the testimony of Kappes, who was in a much better position to know on a day-to-day basis what services are provided, and who clearly identified the "who" and "what" of the services (Tr. 2957-2965); (b) that the MPSC has reviewed and approved these charges with much more sophistication and detail (Tr. 2957-2958); and (c) that the City did not prove "who" at the City would be doing the "what" of the services, leaving a $1.9 million gap that cannot be filled with conjecture, such as who would be doing the customer billing, the operational training, how the customer service for the

20,000 customers would be handled, how utility books and expenses would be handled, etc. These unanswered questions show the complete lack of proof supporting the District Court's findings.

3. Property Tax "Savings" Will Have to be Recovered Elsewhere.

The District Court further found the elimination of property taxes on System assets makes City ownership "more necessary." CR 310, ¶86. This is sleight of hand that has no benefit to the actual ratepayers. Any supposed benefit that the City would reap by "eliminating" the property tax expense would be offset by (a) a temporary PILOT and, when that is phased out, (b) replacement of the tax revenue elsewhere. While the City claims the tax elimination as a benefit, there will be necessary tax increases or loss in services in other sectors to cover the shortfall. Thus, it was error to consider the tax-exempt nature of municipal utilities a net benefit of the taking, rather than a detriment, or at best, a wash.

4. The Fallacy of Claiming "Leakage" as an Indication of "Poor System Quality."

Operationally, the District Court made several clearly erroneous factual findings that are key to its conclusion that the taking is "more necessary." *Id.* ¶¶54-63. These specific findings include that: (a) the leakage percentage is a significant measure of the condition of a water system (*id.* ¶61); (b) Mountain's

leakage rate reflects "poor utilization of a valuable resource, failure to conform operations to industry standards and . . . failed coordination with the City and other stakeholders" (*id.* ¶62); (c) "maintenance of key assets," including the dams, well equipment, meters, service lines, and mains, has been deferred (*id.* ¶60); and (d) the City's "ownership and operation of the Wastewater System" supports the City's contention that it can operate the System effectively and efficiently. *Id.* ¶¶68-69.

The District Court erred in finding that "leakage" percentage, standing alone, is a significant indicator of System condition. Every decision about System repair requires an economic cost-benefit analysis. Under private or municipal ownership, ratepayers bear the cost of leak repair. Tr. 1880. Uncontroverted testimony showed that the ratepayer-borne costs of repairing a leak—including digging up the street, buying new pipe, fuel, repaving, etc.—often far exceed the marginal expense of the leak itself. Tr. 1889-1890. For example, in 2009, the MPSC instructed Mountain to study mitigating water loss. Tr. 1894-1895; Ex. 77-003. This study showed it would cost approximately $128 million just to replace all water mains more than 40 years old, a sum that would cause customers' rates to increase by 107%, and that enormously exceeds the actual cost of leakage. Tr. 1872-1873; Ex. 77-015, 016. This exorbitant expenditure would address, at most, 50% of total leakage,

since it is believed that at least half of all leakage comes from customer-owned service lines. Tr. 1873.

The District Court's factual finding that Mountain deferred maintenance on "dams, well equipment, meters, service lines, and mains," (CR 310, ¶60), is simply unsupported and unsupportable: the **dams** are not necessary to the operation of the system (Tr. 1081-1082), and the City admittedly would "notch" them to make them inoperable (Tr. 1785); the **well equipment** was running within industry standard temperatures (Tr. 2074-2076); and Mountain has replaced **all** of its manual-read **meters** with automated read meters, thus increasing efficiency. Tr. 2927. The District Court ignored that the DEQ commended Mountain for its operational expertise and record in 2013, after the Mayor said it was necessary to condemn. Tr. 2971; Ex. 1286. In addition, while the District Court found the City's operation of the sewer demonstrated it was competent and had a "credible plan" for operation of Mountain's System, "competence" is not the measure of the "more necessary" statutory standard. Therefore, the District Court erred in finding that this metric shows municipal ownership is "more necessary."

5. The Incorrect Foundational Finding that Municipal Ownership is More "Stable."

The District Court found municipal ownership is more necessary because "[u]nder Municipal ownership, long term planning . . . and capital expenditures

can occur under the management of a stable, long term owner." CR 310, ¶63. The District Court's view that municipalities, simply by virtue of being municipalities, are "stable, long term owners" and therefore more necessary owners is also error. This finding has nothing to with the City, the System or actual facts here. In fact, in 2001 the City sold the Missoula Water Works system—the only water system the City has ever owned—to Mountain. Tr. 2919. It was both overbroad and factually unsupported for the District Court to hold that municipal ownership is inherently more "stable" and "long-term." *See also* Tr. 201, 226, 232 (Mayor Engen admitting that, as the potential CEO of the System, he doesn't "have any security beyond four years").

6. The Harstad Survey's Reliability Cannot Survive its Methodology Flaws.

The District Court's finding that "[t]he public opinion poll conducted by Harstad provides credible evidence of public support for City ownership of the Water System by City voters" (CR 310, ¶¶46-53) was clearly erroneous for multiple reasons. The City's polling testimony was through Michael Kulisheck, of Harstad Strategic Research. Tr. 1497-1548. In identifying the group to be surveyed, Harstad was directed by the Mayor to only poll active City voters, **excluding the 1,500 customers who are not City residents**. Tr. 252. *See generally* App. 3; Supp. App. 16.

Moreover, the polling process was dubious, with Kulisheck monitoring only 12 out of 510 of the phone interviews. Tr. 1514; *see also* Tr. 1513-1514 (Aspen Research was hired to make the calls). The flaws in the polling were many, based on the 80 call transcripts produced out of the 510 calls made. *See* Tr. 1531-1534 (respondent asking her husband how to answer a question); 1536-1537 (pollsters falsely saying the survey relates to a "ballot measure" that was going to be in an upcoming election). Kulisheck candidly admitted that these were problematic. Tr. 1532 ("[I]t wasn't an ideal interview"), and 1537 ("That definitely should not have been stated that way.").

In addition, the survey was misleading, in that it did not ask if the participant was in favor of the City purchasing the system under any circumstance, including eminent domain, or a price that would cause rates to rise. Tr. 1522-1523. Some participants volunteered disapproval of condemnation, like one who stated "I just don't like the way [the City is] going about it" (Tr. 1537-1538), and another who said "I think [the System] should be owned by The City. But how our City is going about it is bad. So I have got kind of a double fisted view of that." Tr. 1538-1539. Neither of these opinions was reflected in the poll. One call in particular demonstrates the problem with blindly relying on the results of the poll, in that the caller started in favor of private ownership, qualified the opinion, and then changed their mind:

> Q. And do you favor or oppose City purchasing Missoula water system at a fair price and operating it as a city-owned utility?
>
> A. If they don't raise the rates and stuff, I'm in favor of it.

Tr. 1535-1536; Ex. 2552. This qualified and changed position was simply listed in favor of city ownership—clearly not indicative of the person's actual opinion which did not make it into the poll.

These polling issues should have informed the decision of whether the survey is trustworthy (it is not), in order to even be admissible; they clearly inform whether it should be found credible (it should not have been). Given these problems, it was clearly erroneous for the District Court to admit the Harstad Survey and ignore the issues associated with this important necessity question.

D. THE DISTRICT COURT'S ORDER DID NOT PROPERLY CONSIDER THE COLLATERAL ESTOPPEL EFFECT OF THE 1980S ORDER ON THE CITY'S ARGUMENTS AND CLAIMS.

The District Court erred in refusing to recognize the estoppel effect of the City's attempt to condemn the System in the 1980s. Collateral estoppel, or issue preclusion, bars the reopening of an issue that has been litigated and determined in a prior suit. *Baltrusch v. Baltrusch*, 2006 MT 51, ¶51, 331 Mont. 281, 130 P.3d 1267 (listing the elements of collateral estoppel). The 1980s litigation involved the same necessity questions, which are unchanged by the

passage of time. The District Court found it must "consider use in the present" with regard to specific facts and current public interest. App. 5 at 34 (CR 303). This is a legal question, reviewed to determine its correctness.

Though thirty years ago, the guiding financial, operational and administrative issues were identical to the instant litigation. Here, the District Court erred because it re-adjudicated the precise issues decided before **with no changed circumstances**; it simply came to an opposite conclusion than the 1980s court. *See* Supp. App. 15 (CR 199). While some of the minute, underlying facts may have changed, the objective and general principles announced by the 1980s court are equally applicable today. The unwarranted second bite at the apple granted to the City on these issues resulted in drastic changes in position from the 1980s court as demonstrated in this chart showing the disparity in approaches by the two courts:

1980S DECISIONS	**2015 POC**
Profit	
A profit motive incentivizes investment and good customer service. Supp. App. 10 at 9.	A profit motive incentivizes greed, while a lack of profit motive incentivizes greater and faster investment. CR 310, ¶89, 91.
Home Office Expenses	
Home Office Expenses represent valuable services as approved by the MPSC, and their cost cannot be	Home Office Expenses can and will be eliminated by a change of ownership. CR 310, ¶84.

eliminated simply by a change of ownership. Supp. App. 8 at 3-4.	
Mountain Users Outside Missoula	
Mountain customers outside Missoula are harmed because they have no vote and thus no voice in the ratemaking process. Supp. App. 10 at 15-16.	Mountain customers outside Missoula are fine because this situation happens everywhere in Montana. CR 310, ¶¶110-111.
Public Opinion	
Mountain customers outside Missoula would not favor condemnation. Supp. App. 10 at 6.	Mountain customers outside Missoula are not considered as to whether they favor condemnation. CR 310, ¶52.
Efficiency	
Efficiency will decrease, at least temporarily, under municipal ownership because it has no experience or expertise. Supp. App. 10 at 7.	Even without experience and expertise operating the water system, the City will still be efficient. CR 310, ¶¶69, 71.
Taxes	
Tax revenue will simply shift as a result of a change in ownership, not disappear. Supp. App. 8 at 4.	Taxes will be eliminated by a change in ownership and will provide a savings. CR 310, ¶205(e).

Each of these issues is addressing the same question (whether the proposed use is "more necessary"), with the same parties (the City and Mountain), in the same context (a forcible taking of the System). It was error for the District Court to consider the same issues and come to the opposite conclusion. As such, the case should be remanded, requiring the District Court to constrain its

analysis based on the estoppel effect of the 1980's litigation as detailed by Mountain's briefing in Supplemental Appendix 11-15 (CR 135, 175, 199).

E. THE DISTRICT COURT VIOLATED MOUNTAIN'S PROCEDURAL DUE PROCESS IN THE MANNER IN WHICH IT CONDUCTED THE PROCEEDINGS.

As set forth in Carlyle's brief, which is incorporated/adopted here by reference, the District Court violated Mountain's procedural due process rights. This case proceeded hastily, with a short period of time divided equally between the several defendants, requiring that this bet-the-company case was tried very rapidly. As set forth in Carlyle's Appeal Brief, the parties repeatedly and unsuccessfully petitioned the District Court for relief from an aggressive schedule. The prejudicial effects of the tight schedule were compounded by the City's discovery misconduct, ranging from unreasonable delays with expert witness depositions (CR 115.5 at 3) to converting documents to a degraded format that impeded their searchability and use. CR 173 at 3. Mountain twice moved for trial continuances. They were denied. Mountain's procedural due process rights were violated. The POC should be reversed.[3]

[3] In addition, as set forth in Carlyle's brief, the City's effort should fail because it lacks the statutory authority to condemn Mountain. Mountain has no franchise agreement with the City, and the City did not prove it was not feasible to construct an alternative System. In the interest of judicial economy, these arguments are not duplicated in this submission, but, instead, incorporated by reference herein.

VII. CONCLUSION

The District Court's exclusion of purchase price evidence was legally incorrect, an abuse of discretion, and materially affected the outcome since many financial findings were based on this lack of proof. The District Court's consideration of a multitude of abstract or general findings was also legally incorrect, as §70-30-111 requires the finding of a "more necessary public use" to be fact-specific, not applicable to any hypothetical utility and any hypothetical municipality. In addition, the only specific findings made by the District Court were clearly erroneous, from finding the Liberty acquisition costs would be passed on to ratepayers, to the elimination of valuable services and tax liability, to operational misstatements that do not fit the proof, to reliance on an obviously flawed public opinion poll. Finally, the District Court incorrectly ignored the collateral estoppel-effect of the district court orders and this court's opinions in the 1980s case.

Given these material errors, Mountain requests the POC be reversed in its entirety for the failure of the City's proof, or reversed and remanded for a new trial consistent with the requirement that a finding of "more necessary public use" under §70-30-111 be made with specificity, as applied to these specific facts, that the District Court admit Mountain's value-related evidence, and that

the District Court be precluded from re-adjudicating those issues already litigated in the 1980s case.

DATED this 9th day of October, 2015.

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I certify that this Brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Office Word 2010 is 9,990 words, excluding Certificate of Service and Certificate of Compliance.

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I hereby certify that I served true and accurate copies of the foregoing Appellant Mountain Water Company's Opening Brief by depositing said copies into the U.S. mail, postage prepaid, addressed to the following:

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