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

THE CITY OF MISSOULA, a Montana municipal corporation,

Plaintiff and Appellee,

vs.

MOUNTAIN WATER COMPANY, a Montana corporation; and **CARLYLE INFRASTRUCTURE PARTNERS, LP**, a Delaware limited partnership,

Defendants and Appellants.

THE EMPLOYEES OF MOUNTAIN WATER COMPANY, (Shanna M. Adams, Heather M. Best, Dennis M. Bowman, Kathryn E. 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.

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

AMICUS CURIAE BRIEF OF UNITED PROPERTY OWNERS OF MONTANA, INC.

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I. INTEREST OF AMICUS CURIAE

Amicus, United Property Owners of Montana, Inc., is one of thousands of groups in America committed to championing a set of rights its members hold dear. It is a nonprofit, 501(c)(6) organization that advocates to protect and enhance the rights of Montanans to own, use, and enjoy their property. Like the NRA, ACLU, Montana Trial Lawyers, Montana Defense Trial Lawyers, and a long list of others, it will from time to time marshal its resources to weigh in on a matter of public importance. This is a matter of public importance.

II. SUMMARY OF THE ARGUMENT

If the law provided that dangerous dogs could be destroyed by court order, the Supreme Court would require more proof than the dog could run fast, had teeth, and descended from a wolf. These attributes are in the nature of the beast. More would be required.

Well within federal constitutional boundaries, Montana could have made it easy. Montana could have said "all water systems can be condemned." Montana did not do this. It set a higher constitutional and statutory bar.

We must assume that the constitutional authors, the citizens that adopted it, and the legislature that implemented it knew much. They knew water was essential; that private water systems operated at a profit under Public Service

Commission (PSC) regulation; that a publicly elected city council would normally act in harmony with its electorate; and that the political hot potato of eminent domain bred economists who would testify credibly that condemnation of a public water system was a grand idea, and others who would testify it was a bad idea.

The trial in this matter spent most, arguably all, of the Court's time asking it to find as a matter of fact matters which could have been stipulated to. The City of Missoula is a city that acts like a city, in a manner consistent with what the drafters of the constitution and the members of the Legislature must have assumed would exist in the future. Mountain Water Company is a privately owned, profit oriented water system behaving like a privately owned water system.

Thus, the broad swath of proof in this case brings us no nearer to determining that this is a special case where condemnation is required – in fact, the opposite. The proof is little more than establishing that the circumstances of the case are exactly what we would expect if all we knew was that a city was serviced by a private water carrier.

Additionally, the math of whether the City will operate the water system more efficiently needs to be ignored. Until one knows the price that the City must absorb by bond payment of taxation, no one knows if the City will operate the

system more economically. Moreover, the City's confessed purpose is not solely to deliver water, but to use its condemned "natural monopoly" to leverage citizens to modify their behavior.

Instead of being alarmed by the City's prospective use of its leveraging this new monopoly power over a life necessity, the District Court embraced it. The District Court characterized this power as allowing "the stable pursuit of the important public purposes associated with local systems." (FOF, ¶ 139(c)). "Under public ownership, management is undertaken by democratically elected representatives who recognize the public interests that a water utility is expected to pursue." (FOF, ¶ 139(s)).

III. ARGUMENT

A. INTRODUCTION

Mr. Justice Sheehy, albeit in dissent, said it best:

> The 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.

City of Missoula v. Mountain Water Co., 228 Mont. 404, 415, 743 P.2d 590, 597 (1987).

In 1989, this Court ultimately turned back the City of Missoula's attempt to take the water system by affirming Judge Douglas G. Harkin's opinion that the

City failed in its proof. *City of Missoula v. Mountain Water Co.*, 236 Mont. 442, 771 P.2d 103 (1989). Query whether this whole effort before us now is not contemptuous as a matter of law. As the effort failed in front of Judge Harkin, "no subsequent application for the same order shall be made to any other judge." § 3-1-502(1), M.C.A. The effect of doing so is contempt. § 3-1-503, M.C.A.

Whether contemptuous or not, the policy is the same. A private property owner need not suffer seriatim attempts at condemnation barring some dramatic change in circumstances – thereby making the request for condemnation not the "same order" but in reality a different order.

Local control always sounds poetic enough, nobody is against it, until they are against it. Local control has no inherent bona fides that the public honestly embraces in all cases. Propose that federal lands be turned over to control of the 56 County Commissions in Montana and see how committed people are to the ethereal idea of "local control." Largely this nation has emasculated localities from controlling anything important. Federal labor law, environmental law, civil rights law and securities law permeate the social fabric. For better or worse, we have decided the vagaries of City Hall put too much liberty at risk. Beyond what has been imposed by fiat from afar, citizens voluntarily embrace Apple, Starbucks, religions from Asia and the Mediterranean, clothing from Bangladesh, fashion

from Paris. Even in this matter, the Court did not turn to local standards when judging the water system but "industry standards" when analyzing the water system. (FOF ¶ 57(b)).

Much is made of the undisputed fact that the water system is for sale. Yes, it is. Somehow this finding seems to be weighed on the scale of justice against condemnee. It should not have been. It is about money. The free market should and could take care of this issue. The City of Missoula wants to have monopsony status by state intervention. Who wouldn't? The willingness of the condemnee to sell should suggest that condemnation is unnecessary. Instead, it seemed to lessen the Court's resolve to assiduously protect the condemnee's rights. Perhaps this is a misreading of the Court's efforts, but it is not a misreading of Missoula's strong rhetoric on the point. In opening argument, (yes argument, not statement), counsel for Missoula railed on and on about how the case was about money. Yes, it is about money – *money that Missoula does not want to pay.*

Missoula suggests that it would be more efficient to take the water system for itself. Efficiency is the last, not first, consideration on the scales of constitutional justice. Warrantless searches are more efficient and often serve a public good. Forced confessions are very efficient and a real money saver. Criminal trials are a real burden on efficiency. Taking things by force that you do

not want to pay the seller's price for always makes things more efficient.

How, then, do we analyze these issues? It is much easier than the effort seen here. The question the Court should frame is simple, "what special features of the water company or the City require the City to take a water company?"

If the private water company is a mill run water company and the City a typical city, then this combination cannot be combined to meet the required showing. The law clearly demands more than the typical case.

B. MONTANA'S CONSTITUTION PROVIDES STRONG AND IMPORTANT SAFEGUARDS AGAINST THE TAKING OF PRIVATE PROPERTY.

When 100 Montana citizens had before them the Fifth Amendment's time honored "takings" clause from the United States Constitution, they deliberated its ability to protect private property rights and said, "not enough." Montanans need more. Much more.

The United States Constitution says: "...nor shall private property be taken for public use, without just compensation." Fifth Amendment, United States Constitution.

The Montana Constitution says more:

> **Section 29. Eminent domain.** Private property shall not be taken *or damaged* for public use without just compensation *to the full extent of the loss* having been first made to or paid into court for the owner. *In*

> *the event of litigation, just compensation shall include necessary expenses of litigation to be awarded by the court when the private property owner prevails.*

Constitution of Montana, Article II, § 29, [Emphasis supplied].

Even identical texts are not subject to identical interpretation. This Court has consistently and unanimously reminded us that the Montana Constitution affords litigants a greater degree of protection from government that the Federal Constitution.

> States are free to grant citizens greater protections based on state constitutional provisions than the United States Supreme Court divines from the United States Constitution. *State v. Sawyer* (1977), 174 Mont. 512, 515, 571 P.2d 1131, 1133 (overruled on other grounds by *State v. Long* (1985), 216 Mont. 65, 700 P.2d 153). We have chosen not to "march lock-step" with the United States Supreme Court, even when applying nearly identical language. *State v. Johnson* (1986), 221 Mont. 503, 512, 719 P.2d 1248, 1254. In addition, **we have held that Montana's unique constitutional language affords citizens a greater right to privacy, and therefore, broader protection than the Fourth Amendment in cases involving searches of, or seizures from, private property.** *Sawyer,* 571 P.2d at 1133.

State v. Bullock, 272 Mont. 361, 383-84, 901 P.2d 61, 75 (1995), [Emphasis supplied].

The Supreme Court has, in some instances, deferred to the Legislature to further provide the initial threshold definition of what some constitutional protections would look like such as, for example, the protections for persons of

their right to a free, quality education. "Therefore we defer to the Legislature to provide a threshold definition of what the Public Schools Clause requires." *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 31, 326 Mont. 304, 313, 109 P.3d 257, 263.

The statutory provisions which define the condemnee's rights, which the Court and parties have applied in this case, should be viewed as having a constitutional imprimatur. They are the "threshold" efforts of the Legislature to define "constitutional protections."

> It is well established that this Court must give meaning and effect to all statutory provisions, and that a construction which renders a provision meaningless is disfavored. *See, e.g., Montana Contractor's Ass'n v. Department of Highways* (1986), 220 Mont. 392, 395, 715 P.2d 1056, 1058; *Crist v. Segna* (1981), 191 Mont. 210, 212, 622 P.2d 1028, 1029. See also § 1–2–101, MCA.

Groves v. Clark, 277 Mont. 179, 184, 920 P.2d 981, 984 (1996)

This constitutional backdrop needs reemphasis when the Supreme Court takes this matter before it.

C. PUBLIC OPINION SHOULD NOT BE CONSIDERED AT ALL, BUT IF IT IS CONSIDERED, IT SHOULD BE A FACTOR WEIGHING HEAVILY IN FAVOR OF CONDEMNEE.

Relying on precedent from the initial *Mountain Water* case which should be revisited by this Court, Judge Townsend weighed in the judicial balance public

opinion. She should not have, and if this Court remands, the public opinion evidence should be stricken.

1. Counting public opinion is, and always will be, double counting.

We can assume in most cases that an elected governmental entity will act in harmony with its electorate. The election of a City Council is a public opinion poll resulting, in this case, in a body that wanted to take the Mountain Water Company. The fortuity that the elected body is doing its constituents' bidding is no more than evidence that the condemnor is agreeing with itself. The District Court went so far as to hold that one of the benefits derived to the City was "[s]upport of a majority of the City's elected leadership." (FOF, ¶ 204(h)).

2. Courts cannot test governmental decisions against the public will.

Let's imagine the District Court came to the opposite finding, that the public did not want a public water system. Is it the District Court's job to undo the City Council's resolution because they misread their electorate? The decision to take or not take may be legislatively necessary and unpopular. What if the condemnation was for land to build a new jail to meet constitutional challenges to an aging local jail? The condemnee might be able to drum up all sorts of popular opposition to expenses incurred to meet the constitutional rights of prisoners and detainees. How is the Court supposed to weigh those things?

3. Courts are uniquely and constitutionally charged with tuning out the public.

Having established the obvious, the condemnees are asking the Court to protect their constitutional property rights. What possible role in this calculus should the enthusiasm of the condemnor for its own efforts be in the balance? "The strength of courts lies in the fact that the judges thereof are unmindful of public opinion...." *In re Nelson*, 103 Mont. 43, 60 P.2d 365, 377 (1936).

> Sound judicial decisions are made by reflecting on principles of law, hopefully unswayed by public opinion. In fact, many judicial decisions are unpopular, as members of this Court are acutely aware. However, the unpopular decision is more often than not the legally correct one.

In re Selection of A Fifth Member to Montana Districting, 1999 WL 608661, at *13 (Mont. Aug. 3, 1999).

The Court system is not, and cannot, be swayed by pollsters – quite the opposite. The courts look out for those who may be in need of "extraordinary protection from the majoritarian political process." *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153, N. 4, 58 S.Ct. 778, 783, 82 L.Ed. 1234 (1938). Lastly, public opinion is irrelevant on the issue of whether the taking is required as "more necessary public use."

D. THE COURT CANNOT, AND SHOULD NOT, AS AN EVIDENTIARY MATTER MAKE FINDINGS THAT THE CURRENT CONSTITUTIONALLY DESIGNED SYSTEM OF GOVERNANCE IS INSUFFICIENT.

The Legislature created the Public Service Commission.

> **69-1-102. Creation of public service commission.** A public service commission is hereby created, whose duty it is to supervise and regulate the operations of public utilities, common carriers, railroads, and other regulated industries listed in this title. Such supervision and regulation shall be in conformity with this title.

§ 69-1-102, M.C.A.

Once a decision is made in a coordinate branch of government, the other branches, unless there is a lawful right to overturn the decision, must give the decision of a coordinate branch of government the due deference.

Instead, the District Court took upon itself the responsibility of reweighing the propriety of a water system regulated by the PSC and decided the Legislature blundered.

That is not the District Court's job. Once established, the Public Service Commission is the authority chosen by a democratically elected Legislature to regulate Mountain Water. Any decision the City of Missoula finds wanting it can protest and seek to overturn by judicial review. The City of Missoula cannot seek an adjudication of a "political question" by transmuting the propriety of the PSC's

regulatory power from a political question to a question of fact.

E. TO THE EXTENT THE COURT RELIED ON FACTORS THAT ARE TRUE IN ALL CASES, AND MUST HAVE BEEN KNOWN BY THE AUTHORS OF THE RELEVANT LEGISLATION, IT ERRED.

The United States Supreme Court has largely relegated the determination as to whether a taking is for a public use to the condemnor as a political question, not a justiciable one. In doing so, it simultaneously invited the states to add additional safeguards to condemnees.

> We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. As the submissions of the parties and their *amici* make clear, the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate. This Court's authority, however, extends only to determining whether the City's proposed condemnations are for a "public use" within the meaning of the Fifth Amendment to the Federal Constitution. Because over a century of our case law interpreting that provision dictates an affirmative answer to that question, we may not grant petitioners the relief that they seek.

Kelo v. City of New London, Conn., 545 U.S. 469, 489-90, 125 S. Ct. 2655, 2668, 162 L. Ed. 2d 439 (2005).

We are dealing with those safeguards here. All understand that the State Legislature could have made it clear. It could have said "all water systems can be

condemned by the municipality in which they provide service." The Legislature did not do this. Thus, the legislative intent must assume that the typical, run-of-the-mill water system was not subject to condemnation by the simple expediency of doing little more than proving that the water system had the classic features of a private water system.

The proof laid out by the City was little more than proof that the privately owned water system was a privately owned water system. We know that in all cases a private water system supplies water – a necessity of life. Private systems all operate for a profit, can have leaks, and are publicly regulated. Economists from both parties testified as if the Missoula water system fit within the milieu of privately owned water systems, could be judged on national data, behaved as private water systems behave, and would continue to do so. All of these observations simply prove what we already are well aware of, it is a private water system.

The City went on to show that it was, and acted as, a typical city.

Almost all, in fact, one could say, ALL the evidence in this case proved nothing more than this was a typical city condemning a typical private water system. One would be hard pressed to imagine how any condemnee could win a case such as this, thus protect itself by use of the legislative safeguards, if the

condemnor had to simply prove a state of affairs that exists in all cases. The additional layer of protection given to condemnees was in this case pitched overboard by the District Court's wholesale adoption of a broad range of political questions already answered.

"Statutes must be so construed that no word therein is to be considered meaningless, if such a construction can be reasonably found that will give it effect." *In re Wilson's Estate*, 102 Mont. 178, 193, 56 P.2d 733, 736 (1936). "We are required to avoid statutory interpretation that renders any sections of the statute superfluous and does not give effect to all of the words used." *State v. Berger*, 259 Mont. 364, 367, 856 P.2d 552, 554 (1993).

By concentrating nearly entirely on proof that did little more than demonstrate that the City was a city, and the private water system was a private water system, the Court failed to give any weight to the City's obligation that the "taking" is necessary. § 70-30-111(1)(b), M.C.A., and that, because the water is already being used by the public, that the water is being applied to "a more necessary public use." § 70-30-111(1)(c), M.C.A.

F. THE ECONOMIC EVIDENCE MUST LARGELY BE IGNORED.

The City opened the case with this pronouncement: "Your Honor, the evidence will show it's all about money." (T., Vol. 1, p. 10, ll. 20-21). Yes, it is

about money. The City acknowledges that the condemnee "can't wait to unload it." (T. Vol. 1, p. 11, ll. 9-10). Thus, we have a willing seller, and evidently a host of domestic and international willing buyers. (T. Vol. 1, p. 11) Why, then, "take" the system? Why not buy it?

The City, without knowing the price of the system suggests it has the power to run the system more economically. Its argument is unavailing because without knowing the debt which it will have to extinguish it cannot argue it is going to get a good buy.

Microeconomists, even ones as well known and respected as the ones who testified here, cannot calculate any economic gain or loss to the City without factoring in a method of amortizing the acquisition cost. One of a number of appropriate methods of valuation in this case would be the present value of future system income. *See Citizens and Southern Corporation v. Commissioner*, 91 T.C. 463, 498, 1988 WL 90987 (1988) (discounting future income is one of several techniques for valuing an asset); *Sacks v. C.I.R.*, 69 F.3d 982, 990 (9th Cir. 1995).

The District Court, at the behest of the City, mistakenly thought that the City could somehow operate without worrying about making a profit. Intuitively, this proposition makes no sense. The City is now taking on the full risk of a disaster; bad management; or an unexpected loss. If Mountain Water blundered,

there is no guarantee the blunder can be folded into the rate base. The City rate payers or taxpayers now have that risk. But, more importantly, if the City acquires the water system, over time, it will be paying to extinguish bonds on debt incurred to buy Mountain Water's future stream of profits.

Thus, the City is not going to argue candidly that it can charge for water without making a profit unless it expects to acquire it without paying the fair market value. The City must, under the Montana Constitution, pay to the condemnee its future stream of profits in order to insure payment of "just compensation to the full extent of the loss."

IV. CONCLUSION/RELIEF SOUGHT

For purposes of protecting property owners in Montana who might find their property in the crosshairs of City Hall, the *amicus* asks for rather simple relief. United Property Owners of Montana, Inc., seeks this Court's determination that the body of proof in this case does not sustain a single finding that the special statutory basis for proving the necessity of the taking has been proven. What the Court has before it is a normal city and a normal private water company.

DATED this 7 day of October, 2015.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that the foregoing brief is proportionately spaced, with a Times New Roman text typeface of 14 points; is double spaced; and is 3,706 words, excluding certificate of service and certificate of compliance.

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CERTIFICATE OF SERVICE

I hereby certify that I have filed true and accurate copies of the foregoing with the Clerk of the Montana Supreme Court; and that service of the foregoing was made upon the following by mailing a true and correct copy thereof and addressed as follows:

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