IN THE SUPREME COURT OF THE STATE OF MONTANA
No. OP 15–0375

THE CITY OF MISSOULA,

Plaintiff/Appellee,

v.

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

Defendants/Appellants.

and

THE EMPLOYEES OF MOUNTAIN WATER COMPANY, et al,

Intervenors/Appellants.

APPELLEE THE CITY OF MISSOULA'S ANSWER BRIEF TO MOUNTAIN WATER COMPANY (REDACTED)

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

Scott M. Stearns
Natasha Prinzing Jones
BOONE KARLBERG P.C.
201 West Main, Suite 300
P.O. Box 9199
Missoula, MT 59807-9199
Tel: (406)543-6646
sstearns@boonekarlberg.com
npjones@boonekarlberg.com

Harry H. Schneider, Jr.
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000
HSchneider@perkinscoie.com
Admitted *Pro Hac Vice*

William K. VanCanagan
Phil L. McCreedy
DATSOPOULOS, MACDONALD & LIND, P.C.
201 West Main, Suite 200
Missoula, MT 59802
Tel: (406) 728-0810
bvancanagan@dmllaw.com

Counsel for the Appellee City of Missoula

Additional Counsel Information on Following Page

William T. Wagner Stephen R. Brown Kathleen L. DeSoto Peter J. Arant GARLINGTON, LOHN & ROBINSON, PLLP 350 Ryman Street P.O. Box 7909 Missoula, MT 59807-7909 Telephone: (406) 523-2500 Fax: (406)523-2595 wtwagner@garlington.com srbrown@garlington.com kldesoto@garlington.com pjarant@garlington.com	Joe Conner Adam Sanders D. Eric Setterlund BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, P.C. Suite 1800, Republic Centre 633 Chestnut Street Chattanooga, TN 37450-1800 Telephone: (423) 756-2010 Fax: (423)756-3447 jconner@bakerdonelson.com asanders@bakerdonelson.com esetterlund@bakerdonelson.com
Counsel for the Appellant Mountain Water Company	
William W. Mercer Michael P. Manning Adrian A. Miller HOLLAND & HART LLP 401 N. 31st St., Suite 1500 P.O. Box 639 Billings, MT 59103-0639 Telephone: (406) 252-2166 Fax: (406)252-1669 wwmercer@hollandhart. wwmercer@hollandhart.com mpmanning@hollandandhart.com aamiller@hollandhart.com *Counsel for Appellant Carlyle Infrastructure Partners, LP*	Gary M. Zadick UGRIN, ALEXANDER, ZADICK & HIGGINS, P.C. P.O. Box 1746 Great Falls, MT 59403 gmz@uazh.com *Counsel for Appellant Intervenors*

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3. Whether the City's condemnation action is barred by collateral estoppel.

4. Whether the District Court abused its discretion in its management of the discovery, pretrial, and trial proceedings.

STATEMENT OF THE CASE

The City of Missoula filed this condemnation action on April 2, 2014, seeking to acquire Missoula's water supply and distribution system ("Water System"), currently owned and operated by Defendants Carlyle Infrastructure Partners LP ("Carlyle") and Mountain Water Company ("Mountain Water"). (Court Record ("CR") 1.) Montana law requires condemnation actions to proceed expeditiously and be given priority consideration. Mont. Code Ann. §§ 70–30–202, 70–30–206(5). Condemnation actions have two distinct phases under Montana law—a "necessity" phase and a valuation phase. *Id.* at §§ 70–30–206, 70–30–207, 70–30–301. The judge

determines necessity; a condemnation commissioner panel or jury determines value. *Id.*

The District Court issued its Findings of Fact, Conclusions of Law, and Preliminary Order of Condemnation on June 15, 2015, concluding it is "more necessary" for the City to own the Water System than Mountain Water, Carlyle, or another private entity. (Appendix ("A") 001.) Mountain Water appeals from that order.

The valuation phase is underway in the District Court. Carlyle and Mountain Water filed a joint statement of claim for just compensation in the amount of [redacted]. (CR 323.) Judge Townsend appointed three condemnation commissioners who determined the fair market value of the Water System is $88.6 million. (A 69-71; 72-73.) Should either party appeal that valuation, a jury trial to determine value begins on January 11, 2016. (CR 363.)

STATEMENT OF FACTS

Missoula is the only one of Montana's 129 municipalities that does not own its own water system. (A 029.) Despite having some of the cleanest, easiest-to-access groundwater in Montana (the Water System is fed by an underground aquifer that does not require costly treatment and filtration), Missoulians pay among the highest rates in

the State. (Trial Transcript ("TR") 466:8-24; Trial Exhibit ("TE") 41-001-002.) In fact, water rates in Missoula are roughly 50% higher than what consumers pay in Kalispell, a comparably-sized groundwater system, (TE 41–003), and are even higher than several comparably-sized surface water systems in Montana that require expensive treatment plants. (TR 466:8–24.)

Although they pay unusually high rates, Missoulians do not enjoy an operationalyl sound system. Far from it. The Water System is alarmingly deteriorated, leaking more water than it delivers to customers. (A 18; TR 938:10–14.) All the while, the high revenue derived from Missoula's Water System is used to pay millions in dividends to Carlyle, unnecessary "home office" expenses, and inflated salaries for out-of-state executives. (A 25-26; TE 1246-035, 1506; TR 819:24–824:11.)

After several months of discovery, motion practice, and a three-week trial, the District Court issued a 68-page written decision with detailed factual findings, showing the City's ownership of the water system is "more necessary" than ownership under Carlyle or a foreign corporation. Those findings are supported by substantial credible evidence.

I. Carlyle Has Prioritized Corporate Profits Over Maintaining and Repairing the Water System.

While its customers are local, Mountain Water is not locally owned. Mountain Water is a for-profit company ultimately owned by Carlyle, a global hedge fund whose sole mission, by its own account, is to maximize profit for its investors. (TR 2810:6–2812:3.) In between the ownership chain anchored by Carlyle and Mountain Water are two holding companies owned by Carlyle: Western Water Holdings and Park Water Company. (A 006-007.) Western Water Holdings' sole equity is Park Water Company, and Park Water Company's sole equity is three water utilities: Mountain Water and two California utilities, Central Basin Water Company and Apple Valley Ranchos Water Company. (A 006-007.)

Robert Dove is Carlyle's Managing Director and the individual exercising the greatest control over the affairs of Mountain Water. (TR 2813:9–2815:8, 2846:15–2851:4.) Dove testified that Carlyle's "one goal" is making a return on investments and "performing for [its] investors." (TR 2810:12–14.) Carlyle's Mission Statement is "to generate superior investment returns." (TR 2811:6–14.) Putting the investor first is more than a professional duty for Dove: "[Doing]

what's in the best interest of [Carlyle's] investors" is "my values." (TR 2837:4–13.)

Mountain Water generates significant profits because the Montana Public Service Commission ("PSC") has allowed it to earn up to a 9.8% return on investment. (A 028.) In three years of ownership, Carlyle paid itself between $11 million and $11.5 million in dividends. (TR 2812:20–2812:23.) Despite these returns, Carlyle has not put any money back into the System for much needed repairs, maintenance, and capital investment. (TR 2812:4–2812:8.)

With this and other evidence presented at trial, the District Court found that, unlike Carlyle, the City will not be motivated by earning a profit, and instead of using revenue to pay investors, unnecessary "home office" expenses, and inflated executive salaries, the City will reinvest that money back into the Water System for much-needed capital improvements and maintenance. (A 011, 028-029, 034-035, 039, 041-042, 043, 050-051, 063.)

II. Carlyle Has Left the Water System Degraded.

Carlyle's primary interest in generating a profit has left the Water System in poor condition. The overwhelming evidence shows

Carlyle has been far more interested in sending money to investors than maintaining an aged, leaking system in Montana.

The industry standard for leakage is 20–25%. (TR 394:7–10, 937:22–938:14.) Using Mountain Water's own data, leakage in the Water System has been as high as 56% in recent years and consistently greater than 50%. (TR 938:10–14; A 018.) Thus, the Water System loses more water than it delivers, but Missoulians still pay for both water that is delivered and water that leaks into the ground. (A 019; TE 77-003.) In 2009 alone, Mountain Water's customers paid $588,000 to pump and treat water that leaked out of the Water System. (A 019; TE 77-003; TR 983:10–984:6.)

The District Court correctly found "Mountain Water's leakage rate reflects poor utilization of a valuable resource [and] failure to conform to industry standards . . . ." (A 023.) Leakage is a problem not only because customers are paying for lost water, but also "is a significant measure of the quality and condition of a water system." (A 018.)

In Missoula, much of the main and service line infrastructure is old and has exceeded its useful life. (A 017-018; TR 935:1–5, 993–96.) Other assets, such as wells and pumps, are also antiquated and

operating well below industry standards for efficiency. (A 017; TR 932–81.)

Given its condition, one would expect fixing the Water System would be a top priority for Carlyle. That has not been the case. (A 022-023.) Mountain Water's own studies show—and its own experts admit—Mountain Water is replacing half to less than a third of the minimum amount of pipe that must be replaced. (TE 40-014, 40-017, 40-023; TR 1876:5–1879:9, 2170:1–2171:20.) This rate is "not sustainable." (A 017- 020.) As the District Court found:

> Overall, the Water System is aging and requires capital investment to remedy deferred maintenance of key assets. Significant capital expenditures will be required in the future regardless of the identity of the owner of the Water System. Under municipal ownership, long term planning for maintenance and capital expenditures can occur under the management of a stable, long term owner.

(A 023.)

III. Carlyle Has Forced Missoula Ratepayers to Pay Unnecessary Administrative Expenses.

Instead of investing in the Water System, Carlyle has taken millions of dollars annually ($2.2 to $2.5 million each year) out of Missoula through an administrative services agreement. (A 025-026.)

This agreement funds Park Water's "Home Office Expenses" for its California office. (A 025-026.) In 2011, for example, Mountain Water customers paid $1.3 million for California staff salaries, $48,000 for "travel and entertainment," a $103,000 "Board of Directors Fee," a $108,000 "Trustee's Fee," $257,000 for California facilities maintenance, and $28,722 for a regulatory commission expense. (A 026; TE 1246-035, 1506; TR 819:24–824:11.)

The City demonstrated the millions of dollars for administrative services would not be necessary under City ownership. (A 026-027; TR 818:3–838:13, Tr.-6, 1555:18–1557:11, 1593:5–1595:1.) In addition, City ownership would mean other substantial savings such as elimination of $4 million in annual taxes, lower insurance premiums, and cost reductions through coordination of operations with other City departments. (A 027-028.) The City also has access to grants, low-interest bonds, and loan programs that are not available to the private sector; these financial tools can be used to save millions of dollars over time. (A 035, 064.) The evidence presented at trial left no doubt City ownership will result is substantial savings. (A 025-026.)

IV. The Evidence Supporting City Ownership Is Overwhelming.

The District Court issued its Preliminary Order of Condemnation because City ownership of the Water System is more necessary than ownership under Carlyle or the next private investor in line. Though an exhaustive summary of the evidence is impossible given word limits, a brief summary of the main points follows:

- Carlyle's primary goal is generating a profit, which has led to among the highest water rates in the state with insufficient capital investment (A 028-029, 044, 063.);
- Carlyle has left the Water System in a degraded condition (A 017-023.);
- City oversight will be more transparent than PSC oversight (A 029-035, 044, 063.);
- City ownership offers several financial benefits and opportunities for cost savings (A 025-028, 035-047, 063-064.);
- the City has a credible plan for operating the Water System (A 023-025, 064.);
- continued private ownership will result in substantial rate increases (A 035-039.);
- the City will save $4 million annually by not having to pay taxes (A 028, 06.);
- City ownership will offer more stability than private ownership (A 041-042, 043, 048-051, 063.);

- City ownership will improve the efficiency of the System and coordination with other services and utility providers (A 039-045, 063;

- City ownership offers more benefits for public health, safety, and welfare (A 047-055, 063.)

- City ownership will reduce the proliferation of private wells (A 020, 052-053);

- City ownership will likely benefit the current Mountain Water employees by offering more job stability (A 056-061);

- City Ownership will promote better fire safety (A 024, 045, 052, 053, 063); and

- the public supports the City's acquisition of the Water System (A 015-017, 064).

Contrary to Defendants' protestations, all of the District Court's findings are supported by substantial credible evidence.

STANDARD OF REVIEW

The Court reviews a district court's case management and evidentiary rulings for abuse of discretion. *McClue v. Safeco Ins. Co. of Ill.*, 205 MT 222, ¶¶ 7–14, 380 Mont. 204, 354 P.3d 604; *Stevenson v. Felco Indus., Inc.*, 2009 MT 299, ¶ 32, 352 Mont. 303, 216 P.3d 763.

The Court reviews a district court's factual findings for clear error. A factual finding is clearly erroneous only "if it is not supported

by substantial evidence, if the court misapprehended the effect of the evidence, or if our review of the record convinces us that a mistake has been made." *In re C.J.M.,* 2012 MT 137, ¶ 10, 365 Mont. 298, 280 P.3d 899 (citation omitted).

SUMMARY OF ARGUMENT

Mountain Water makes four arguments on appeal. Each fails.

First, the District Court did not abuse its discretion by limiting valuation testimony during the public necessity phase. The value of the property being condemned is determined by a panel or jury only after the district court concludes condemnation is "necessary." Regardless, the District Court did allow Mountain Water to present certain valuation evidence, and in fact considered the very evidence Mountain Water asks to present with this appeal—four possible values of the Water System, ranging from $75 million to $140 million.

Second, the District Court did not commit clear error in making its findings of fact. They are supported by specific and substantial credible evidence and testimony.

Third, the City's condemnation case is not barred by collateral estoppel. As a threshold matter, Mountain Water has waived its argument. It fails on the merits regardless. Needless to say, the facts

and circumstances addressed in the 1980s litigation are different than those at issue more than 30 years later.

Fourth, the District Court did not abuse its discretion in its management of the discovery, pretrial, and trial proceedings, including its denials of Mountain Water's motions for continuance. Mountain Water does not point to any specific prejudice it suffered. Instead, it impermissibly attempts to incorporate Carlyle's opening brief by reference.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY LIMITING VALUATION EVIDENCE IN THE NECESSITY TRIAL.

The District Court correctly limited Mountain Water's valuation evidence and testimony at trial. Regardless, the District Court allowed Mountain Water to present evidence of alleged value ranges.

A. Value Is Separately Decided by a Panel or Jury Only after Public Necessity is Decided by the Judge.

Montana's eminent domain statutes divide eminent domain proceedings into two phases—a "public necessity" phase and a valuation phase. By law, the two phases occur independently and consecutively.

In the public necessity phase, the district court determines whether the government's acquisition of the property is a "more necessary public use than to which it has already been appropriated." Mont. Code Ann. § 70–30–103(1)(c). This Court has enumerated several factors to consider in determining whether a municipality's ownership of a water system is more necessary: public savings, rates and charges, cooperation between the utility and the City, the effect of having the utility's home office in the municipality, the effect on utility employees, and public interest. *City of Missoula v. Mountain Water Co.*, 228 Mont. 404, 414, 743 P.2d 590, 595–96 (1987) *("Mountain Water I").* The value of the Water System is not one of those factors. The value of the property is determined only by condemnation commissioners or a jury after the district court issues a preliminary order of condemnation. Mont. Code Ann. §§ 70–30–207, 70–30–304.

Mountain Water claims the District Court should have heard evidence and made findings as to fair market value, but this cannot be squared with the eminent domain statutes or this Court's precedent. Allowing valuation evidence in the public necessity phase would defeat the express legislative intent, confuse the two distinct phases created by Montana law, and bias the valuation phase of the

case. (*See* CR 328.) Notably, Mountain Water does not argue the subject statutes are unconstitutional or otherwise challenge them; it asks the Court to impermissibly blend the two phases in a way that violates the plain statutory language. This Court should decline the invitation.

B. The District Court Allowed Mountain Water to Present Limited Valuation Evidence and Testimony at Trial.

Mountain Water would have the Court believe it was barred from offering any valuation evidence at trial: "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 . . . ." (Opening Br., pp. 24–25.) The District Court did not "suppress all evidence of value." Rather, it did precisely what Mountain Water now requests.

At trial, Mountain Water attempted to elicit testimony on the specific value of the Water System. The District Court excluded that testimony and allowed Mountain Water to make an offer of proof on the opinions of its five valuation experts. (TR 2412:3–2436:19.) It stated: "[T]his stage of the proceedings is not to discuss specific value.

[W]e only get into that particular issue if in fact I find there's necessity." (TR 2126:23 –2127:1.) The District Court did not, however, exclude all valuation evidence: "I would allow him [Joseph Mantua] to offer an opinion based on his calculations, and what he has heard what the City has said previously, whether or not he thinks the City can afford [the Water System]." (TR 2125:23–2126:1.)

Instead of eliciting valuation testimony from Mantua, however, Mountain Water chose to have a different witness—Frank Perdue—offer that testimony. Perdue offered lengthy testimony related to four different purchase-prices: $75 million, $100 million, $125 million, and $140 million. (TR 2242:18–2324:14; TE 2510, 2510a, 2514, 2514a.) Remarkably, this is precisely the testimony that Mountain Water now claims it should have been allowed to present.

In its offer of proof, Mountain Water argued the Water System is worth $142 million, but it was allowed to present testimony on the alleged effect of a $140 million purchase price, among others. Generally, Perdue testified the City would have to increase water rates if the purchase price is $75 million or above. (TR 2253:21–2255:10) His testimony was not credible, however. He failed to account for several critical factors including: (1) the City's administrative savings,

(2) savings on Park Water salaries, (3) growth rates that would offset the need for rate increases, and (4) the fact that future rate increases under private ownership would be greater than any increases under City ownership. (TR 2302:1–2307:8, 2311:21–2314:9; A 036-039.)

When the Court excluded testimony on specific valuation numbers, it indicated it would further explain its rationale for doing so in a written memorandum, which it did on August 3, 2015. (TR 2436:12–19, CR 328.) The memorandum was not an improper "attempt[ ] to justify its decision," as Mountain Water now argues. (Mountain Water Brief, pp. 19–20.) Rather, the memorandum makes it abundantly clear the District Court followed Montana law when it allowed only limited valuation testimony to inform its public necessity findings.

C. Mountain Water's Argument is Either Moot or Premature.

Mountain Water argues the District Court's exclusion of specific valuation evidence affected its substantial rights and the outcome of the trial. It did not. Indeed, given the status of the valuation phase of the case, Mountain Water's argument is either moot or, at best, premature.

After a six-day trial on fair market value, the condemnation commissioners determined the fair market value of the Water System was $88.6 million. (A 072-073.)[1] The commissioner's award is $54.2 million less than the $142.8 million Mountain Water argued in its offer of proof, [redacted]. (TR 2419:22–24.) As such, any analysis of future water rates based on Mountain Water's $142.8 million valuation would have been factually incorrect and therefore irrelevant. Mont. R. Evid. 401. Mountain Water's valuation argument is moot in light of the commissioners' determination.

Moreover, if Mountain Water appeals the commissioners' award, and if a jury determines the fair market value of the Water System is anything less than $142.8 million, then the purported effect of a $142.8 million purchase price on the City's future water rates is entirely irrelevant. This illustrates the problem with trying to unlawfully blend the public necessity and valuation phases. It puts the cart ahead of the horse.

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[1] The condemnation commissioner hearing was held after Mountain Water filed its appeal, but the Montana Supreme Court may take judicial notice of court records "at any stage of the proceedings." Mont. R. Evid. 202(b)(6), (f)(1); *see In re Est. of Gopher*, 2013 MT 264, ¶ 13, 372 Mont. 9, 310 P.3d 521.

In summary, the District Court correctly followed the law in keeping the public necessity phase separate from the valuation phase and, regardless, Mountain Water was allowed to present evidence and testimony on a range of possible purchase prices.

II. THE DISTRICT COURT'S FINDINGS OF FACT ARE NOT CLEARLY ERRONEOUS.

Mountain Water argues some of the District Court's findings of fact are too "generalized" (Mountain Water's Brief, pp. 27–33), but provides little elaboration for this bald assertion. An honest review reveals the District Court's findings are extremely detailed, specific, and supported by substantial credible evidence.[2]

The District Court's findings are directed at whether the City's ownership of the Water System is "more necessary" than private ownership. Mont. Code Ann. § 70–30–103(1)(c); *see also id.* at § 70–30–111(1)(c). "'Necessary,' in the context of eminent domain, does not mean absolute or indispensable, but reasonable, requisite and proper for the accomplishment of the intended objective." *Shields Valley TV Dists. v. Adams*, 2004 MT 295, ¶ 17, 323 Mont. 370, 100 P.3d 640.

[2] Mountain Water itself apparently believed it was important for Judge Townsend to consider the "general" effects of municipal ownership. It called Dr. Arthur Laffer to offer testimony on the public policy and economics of municipal ownership. (*See* Tr.-8, 2194 *et seq.*)

Thus the District Court's findings must sufficiently explain why City ownership is more "reasonable, requisite and proper" than private ownership, and be supported by substantial credible evidence. That standard is easily satisfied here.

"Substantial credible evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." *LeFeber v. Johnson*, 2009 MT 188, ¶ 18, 351 Mont. 75, 209 P.3d 254 (citation omitted). Thus, Mountain Water's burden on appeal is heavy: Evidence may be substantial "even if it is inherently weak and conflicting." *Id.* The Court does not consider "whether evidence would support findings different from those made by the District Court." *Id.* at ¶ 19. "The district court is in the best position to observe and determine the credibility of witnesses and [the Court] will not second guess its determination regarding the strength and weight of conflicting testimony." *State v. Pound*, 2014 MT 143, ¶ 19, 375 Mont. 241, 326 P.3d 422 (citations omitted). "On appeal, the district court's findings of fact are construed in favor of the prevailing party, and the district court's findings will be upheld even if the evidence could have supported different findings." *Id.*

Judge Townsend heard testimony from 40 witnesses, considered 332 exhibits, and issued more than 50 pages of factual findings, all supported by substantial credible evidence. As set forth below, no clear error was committed in making these findings.

A. The City's Operation of the Water System Will Not Be Motivated by Profit.

Carlyle's aggressive profit motive and the City's lack of the same favors condemnation. Carlyle's "one goal," its "values," is to do "what's in the best interest of [Carlyle's] investors." (TR 2810:12–14, 2837:4–13.) Carlyle imposes its profit motive down through its chain of subsidiaries to Mountain Water. Even Mountain Water's Chief Engineer—Logan McInnis—recognizes that profit comes before customer needs under Carlyle's ownership:

> **Q.** Right. You would agree with me that owners of the water company wouldn't choose to invest in capital needed for pipe replacement if they didn't have the ability to make a profit, correct? That's a fair statement?
>
> **A. That's a fair statement.**

(TR 2014:8–13.)

Carlyle imposes its "values" on its subsidiaries by making sure the interests of the managers and directors of those subsidiaries are

"squarely aligned" with Carlyle's interest. (A 057; TR 2846:5–2851:4.) Carlyle ensures a majority of directors for its subsidiaries are Carlyle appointees, and it grants equity interests—"Class B share agreements"—to executives, including John Kappes, president of Mountain Water. (A 057.) Under these agreements, nine executives, including Kappes, will share roughly $14.4 million if Park Water is sold to Algonquin Power & Utilities Corporation/Liberty Utilities under a merger agreement executed six months after the City filed this condemnation action. (TR 2848:16–2850:15.)

While limiting capital investment over its short period of ownership, Carlyle has paid itself between $11 million and $11.5 million in dividends. (TR 2812:20–2812:23.) Carlyle has not put a single dollar back into Missoula's Water System. (TR 2812:4–2812:8.)

Unlike Carlyle, the City will not be driven by profit. The evidence demonstrated that, instead of using revenue to pay investors, unnecessary "home office" expenses, and executive salaries, the City will reinvest that money back into the Water System for much-needed capital improvements, repairs, and maintenance. (A 011, 028-029, 034-035, 040, 041-042, 043, 050-051, 063; TR 405:1–6, 720:12–721:1, 921:12–932:4, 1202:7–1203:20, 1430:25–1435:18, 1438:2–

1441:25, 1444:10–1446:15, 2014:8–13, 2679:6–2680:25; Depo. Ramharter, 87–92, 106; TE 1151-001.)

B. Carlyle Has Left the Water System Degraded.

Mountain Water argues the District Court clearly erred when it found: (1) the Water System's rampant leakage is an indication of the overall poor quality of the System, (2) the leakage rate reflects poor utilization of the water as a resource and a failure to conform to industry standards, and (3) Mountain Water has failed to maintain key assets. Each of these findings is supported by substantial credible evidence.

Water leakage is "the canary in the coal" mine for the overall condition of a water distribution system. (TR 404:12–15; A 023.) Mountain Water's own expert testified the industry standard for leakage is 20–25%. (TR 394:7–10, 937: 22–938:14.) However, using Mountain Water's own data, leakage in the Water System has been consistently greater than 50%, losing more water than it delivers. (TR 938:10–14; A 018-019.) Mountain Water's customers are charged for all the water that is lost. (A 019; TE 77-003.) In 2009 alone, they paid $588,000 to pump and treat water that leaked out of the Water System. (TR 983:10–984:6; TE 77-003.)

Craig Close, an engineer and expert in water utility operations, management, finances, and ratemaking, has studied water system leakage across the country. He testified Mountain Water's leakage of 50% or more is "almost unprecedented." (TR 918:17–921:3, 1011:13–20.) It amounts to more than 4 billion gallons of lost water per year. (TE 1505-113; TR 995:10–15.) Mountain Water loses nearly seven times as much water to leakage as the national average. (TR 2174:1–7; TE 1505-114.)

Even Mountain Water's own expert—Joseph Mantua—testified Mountain Water's alarming amount of water loss is a "red flag." (TR 2166:17–25, 2172:14–2173:1.) He testified:

> Q. Industry standards would make that a concerning amount of water loss in this system, true?
>
> A. That's generally higher than you are going to find at most utilities, yes.

(TR 2167:1–5, 2173:10–22.)

Mountain Water Chief Engineer Logan McInnis testified he "believes" much of the leakage can be attributed to service lines that deliver water from the main lines. (TR 1901:19–1902:2.) Mountain Water, though, has not done a single study to support that claim, and

service lines cannot possibly account for that much leakage. (TR 993:20–996:8.) Mountain Water is trying to shift blame, but the evidence lends it no support.

As the District Court found, leakage is "is a significant measure of the quality and condition of a water system." (A 018.) If the almost unprecedented leakage rate were not enough, however, other evidence at trial confirmed the Water System's degraded condition:

- nearly 50% of the Water System's main lines are 45 years or older and 20% of the mains have exceeded their useful life (A 017; TR 935:1–5);
- well assets are in fair to poor condition and are relying on "antiquated" pumping equipment; pipes are "seriously corroded"; HVAC systems are in "extremely poor condition"; there are problems with chemical feed systems, well pumps and booster stations are "operating well below efficiency industry standards" (A 017-018; TR 932–81);
- the average age of water meters is over 20 years (A 018; TR 989–93);
- 75% of the service lines have exceeded their useful life (A 018; TR 993–96);
- the Rattlesnake Wilderness Dams and Intake dams have not been maintained and show problems with leakage, seepage, slope stability, erosion of the embankments and spillway problems, safety recommendations from annual inspections have been repeatedly deferred (A 018; TR 997–1009); and

- total capital investment in the range of $66–$95 million is needed in order bring the Water System up to industry standards (A 020; TR 1033:23–1034:7).

On appeal, Mountain Water argues it should only be expected to make capital investment if doing so is "cost effective." Its argument, however, is belied by its own report:

> It is important to note that MWC believes it needs to plan for replacement of its aging buried infrastructure prior to catastrophic failure. Therefore, most main replacement projects will not be economical solely from the savings in reduced leakage but from the avoided future cost associated with catastrophic failure.

(TE 40-009.) By Mountain Water's own admission, its rate of pipe replacement is "not sustainable" because "the current rate of water main replacement is not adequate to avoid main failures." (A 019-020; TE 40-009, 40-014, 40-017, 40-023; TR 2170:1–2171:20, 1876:5–1879:9.)

Far from "generalized conclusions," the District Court relied on a mountain of specific credible evidence to find Carlyle has left the Water System in a degraded condition, and that the City will be better equipped to make the significant and necessary capital investment. (A 023.)

C. City Ownership Will Offer More Local Control and Transparency.

Mountain Water does not dispute City ownership will offer more local control and transparency than private ownership, it simply complains the District Court's findings in this regard were too "generalized." (Mountain Water's Brief, p. 28.) However, this argument ignores the specific factual findings explaining how Carlyle has left local leadership in the dark and concealed information from local employees. (*E.g.*, A 012, 059-060.) It also ignores the specific factual findings that Missoula consumers will have greater access to decision makers under City ownership compared to private ownership and oversight by the PSC, which was based on testimony from, inter alia, Missoula Mayor John Engen, City Councilman Bryan Von Lossberg, City Councilman Jason Wiener, Alec Hansen (former Executive Director for the Montana League of Cities and Towns for 32 years), and David Nielsen (a current lobbyist and past Interim Director for the Montana League of Cities and Towns). (A 030-031, 034-035, 038-044, 063; TR 1109:10–24, 1113:9–1114:11, 1114:12–1115:17, 1201:23–1202:6, 1217:21–1218:6, 1385:1–1388:15,

1435:19–1441:25, 1470:24–1473:1, 1476:6–1481:25, 1613:12–1614:5.)

Further, Ken Toole, a former PSC Commissioner, offered expert testimony explaining why—in these unique circumstances—the City's regulation is preferable to the PSC's regulation. (TR 1627–48; A 032.) City Councilman Wiener testified PSC regulation is less transparent and more prohibitive than City regulation. (TR 1480:13–23.) Based on this and other evidence, the District Court agreed the PSC process is prohibitively cumbersome when compared to the City's legal obligation to operate the Water System with complete transparency and ensure opportunities for public participation. (A 035.)

D. City Ownership Means Specific Financial Benefits for Water Consumers.

The District Court's findings that City ownership will result in a number of financial savings for ratepayers are well supported. First, as discussed above, an immediate and obvious financial benefit of City ownership is that the City will not operate for profit. That means its rates will not be driven by the need to generate up to a 9.8% rate of return. (A 028.)

Next, the City has access to grants, low-interest bonds, and loan programs that are not available to the private sector, and can save millions of dollars on interest payments alone. (A 035, 064.)

The City will also save millions in tax payments (about $4 million annually) because it is tax exempt. (TR 903:12–13.) Mountain Water suggests this will not be a savings because the City will lose some of its tax base. However, the evidence was uncontroverted that Mountain Water presently represents only 0.2% of Missoula County's tax base. (TR 903:12–13.) The City's Central Services Director, Dale Bickell, testified the slight reduction in tax base would be mitigated by payment in lieu of taxes on a gradually declining basis to impacted entities. (TR 902:24–903:15.) Mountain Water did not offer any testimony or evidence at trial showing how the elimination of $4 million annually in taxes would be "a detriment, or at best, a wash," as it now argues on appeal.

The City will also save millions of dollars annually by eliminating unnecessary "home office" expenses that are sent to California under Carlyle's ownership. As discussed, Mountain Water has historically paid Park Water $2.2 million to $2.5 million annually for these administrative expenses. (A 025-026.) According to Mountain Water

president Kappes, these expenses are disclosed to the PSC with very little detail and are simply described as "contractual services" with no reference to the fact that they are being provided out-of-state or what services, specifically, are provided. (TR 3030:14– 3131:20; TE 2112, 2116.)

In total, Mountain Water's local administrative costs and the California Home Office Expenses amount to $4 million annually. (TR 823:4–7.) That is the highest administrative cost of any water system in Montana by at least $2 million. (A 026; TR 825:4–13.) Billings, for instance, has a much larger, more complex water system with additional surface treatment requirements, but its administrative costs are $2 million. (TR 825:4–826:24.) Mountain Water presently spends 24.1% of its revenue on administrative costs. (TR 825:4–826:24.) Billings, by comparison, spends only 9%. (TR 825:4–826:24.)

Dale Bickell (the City's Central Services Director), Leigh Griffing (the City's Assistant Finance Director), and Nick Dragisich (an executive at a public financial and management consulting firm) all testified that none of the $2.2 to $2.5 million annual Home Office Expense for administrative services charged by Park Water would be

necessary under City ownership. (A 026, 027; TR 818:3–838:13, 1555:18–1557:11, 1593:5–1595:1.) The City, for instance, does not have "travel and entertainment" expenses or Board of Directors fees. Even Carlyle recognizes that, under City ownership, the administrative services could be "performed for less cost or even for no cost in the City of Missoula." (A 075-076.)

Finally, the District Court did not consider all these savings in a vacuum. For example, as noted, it heard testimony from Mountain Water on how four potential purchases prices—$75 million, $100 million, $125 million, and $140 million—would affect the City's water rates in the future. The District Court simply found the totality of the evidence did not weigh in favor of private ownership. (A 036-039.) Even if there is some scenario under which City rates would go up, those rates would not go up as much as they would if the Water System remains privately owned. (A 036-039.) Mountain Water did not present any evidence to the contrary.

E. The City has a Credible Plan for Operating the Water System.

Mountain Water does not challenge any of the District Court's specific factual findings related to the City's plan for operating the

Water System. Once again, it simply complains the findings were not specific enough.

Contrary to Mountain Water's argument, the evidence presented at trial established specific details on how the City will operate the Water System, including essential aspects of operation such as governance, organization, staffing, financial management, cash management, customer billing and service, ratemaking, emergency management, taxes, environmental quality, acquisition financing, future capital investment, and coordination and integration of resources and services (e.g. wastewater services). These details of the plan were presented through the credible testimony of:

- Mayor John Engen (TR 196:12–199:8, 201:8–18, 208:11–212:15);
- City Chief Administrative Officer Bruce Bender (TR 452:22–455:19, 473:18–475:5, 483:11–484:17, 503:24–504:25, 508:6–13, 511:6–512:8, 517:12–518:15, 544:14–546:8, 548:19–549:9, 641:9–14, 645:18–647:21);
- City Public Works Director John Wilson (TR 1159:2–1160:9);
- City Central Services Director Dale Bickell (TR 751:15–781:3, 806:24–840:3);
- City Assistant Finance Director Leigh Griffing (TR 1304:23–1321:11);

- City Fire Chief Jason Diehl (TR 1354:8–1355:15);
- City Development Services Director Mike Haynes (TR 1649:22–1668:13); and
- Environmental Health Supervisor of Missoula's Water Quality District Peter Nielsen (TR 1693:7– 1724:4, Tr.-7, 1736:17–1766:7.)

The City's written business plan provided a summary of these details. (TE 1499.)

The District Court also correctly found the City has the capacity and expertise to operate the Water System because, through its ownership and operation of the Wastewater System, the City has demonstrated "experience in managing a complex water utility that is critical to public health, safety and well-being." (A 024; TR 198:2–199:8, 452:22–455:19, 473:18–475:5, 680:21–692:9, 1600.)

Indeed, the City-operated wastewater treatment facility is far more complex and costly than the treatment required for the Water System. (TR 483:11–484:17.) Karen Knudsen, the Executive Director of the Clark Fork Coalition (a watchdog organization that monitors Missoula's water and wastewater) testified:

> The City of Missoula has a track record of excellent performance with a utility that is a complex biological and physical system. Frankly, much more complex than pumping and treating

> water to serve the customers. And we've been really heartened the last 25 years watching that, as the wastewater treatment plant, under the City's guidance, management and leadership, has actually improved conditions in the Clark Fork River and reduced risk for groundwater.

(TR 1817:10–19.)

F. Algonquin/Liberty's Proposed Acquisition Would Result in Substantial Rate Increases.

Six months after the City filed this condemnation action, Carlyle entered into a tentative merger agreement with Algonquin Power & Utilities Corporation and its subsidiaries ("Algonquin/Liberty"). As part of the deal, Algonquin/Liberty would acquire Park Water Company and its three utilities, including Mountain Water for $327 million. (TR 2603:1–5.)

Mountain Water argues the District Court erred by finding Algonquin/Liberty would seek to recover its acquisition cost through an "acquisition premium." (Mountain Water's Brief, pp. 33–34.) However, the District Court did not find Algonquin/Liberty would seek approval for a specific "acquisition premium" from the PSC – it found Algonquin/Liberty would seek to recover its acquisition costs through heavy capital investment, on which it could earn a significant rate of return. (A 036-039.) That is undeniably true.

Carlyle's Dove testified investors in the water utility business aim to acquire utilities at a "good price, work to improve the return, and then at some point exit." (TR 2811:15–2812:3; *see also* A 048-049.) In other words, investors "buy and flip" the utilities, just as Carlyle did.

The trial testimony showed that an aged, leaking system like Missoula's "is a gold mine for a privately [owned] profit-oriented company." (TR 405:1–6.) The poor condition of the system is attractive to private investors because it provides abundant opportunity to invest capital at a favorable and predictably recoverable rate of return. (TR 405:1-6, 429:3–15; 519:20–25; Tr.-5, 1442:21–1443:17, 1202:7–1203:20.) Since the Water System has extensive leakage, a private owner could justify major capital expenditures to the PSC, which would allow the private owner to recoup that investment, as well as its costs of borrowing, plus a guaranteed profit or return on investment (presently up to 9.8%) from Missoula consumers. (A 028; TR 429:3–15; 519:20–25.)

Carlyle marketed the sale of Park Water by touting the "significant capital investment opportunities driven by replacement of aging infrastructure, system improvement, and growth." (TE 59-007.)

Carlyle's marketing brochure for Park Water and its subsidiaries predicted a growth in rate base and water rates of 13% per year, compounding annually. (TE 59-009.) For Mountain Water alone, Carlyle's marketing brochure forecasted a 50% increase to the rate base between 2013 and 2019. (TE 59-112.) That would result in a corresponding 50% increase in water rates. (TE 438:20–439:5.)

The District Court's finding that Algonquin/Liberty would substantially raise water rates in the future is also supported by Algonquin/Liberty's own testimony. At trial, Greg Sorensen, an officer of Liberty Utilities, testified that Algonquin/Liberty is in the business of maximizing return for its investors. (TR 2628, 2631, 2641.) David Pasieka, president of Liberty Utilities (Canada), testified Liberty would earn a return on investment by using revenue of the operating companies to fund infrastructure improvements which, in turn, would increase the rate base and provide a return on capital. (Deposition of David Pasieka, 48:11–49:13.) John Young, one of Mountain Water's experts, testified he would not be surprised if the rate base was increased from $39.7 million to $59.6 million over the next four years. (TR 2384:4–12.)

The Water System, which is presently in poor and degraded condition, needs significant capital investment, and Algonquin/Liberty views capital investment as an opportunity to raise rates, generate more profit, and recover its costs. (A 029.) The City can make more capital investment than Algonquin/Liberty without as much of a rate increase or even raising rates at all. (A 063.)

G. City Ownership Offers More Stability.

At trial, Carlyle's Dove testified owning a Water System is like buying and flipping a house: "You buy a house today, you redecorate it and you sell it." (TR 2840:8–9.) And yet, Mountain Water argues it was clear error to find City ownership will offer more long-term stability than private ownership.

The Water System needs substantial capital investment and long-term planning. (A 023.) City experts Drs. Thomas Power (a professor of Economics (Emeritus) specializing in natural resource economics) and Dr. Kees Corsmitt (a Water Utiilty Economist with a Ph.D. in Natural Resource Economics with a specialty in Water Economics) testified that neither is possible when a private corporation operates under a buy-and-flip mentality. (TR 1201:15–22, 1206:1–1209:2, 1435:1–1438:1.) Instead of looking to the long-

term future, Carlyle has focused on maximizing profits over the short term and selling the Water System for a premium when the market is favorable. When, for example, it marketed the Water System to Algonquin/Liberty, Carlyle claimed Algonquin/Liberty could maximize profits in the short term by increasing its ratebase and water rates by 50% over 6 years. (TE 59-112.)

Under City ownership, the Water System will not be operated for the purpose of maximizing short-term profits. The City will focus on long-term planning, which will stabilize rates and ensure adequate capital is being invested in the System. The District Court's findings that City ownership offers more stability are supported by substantial credible evidence.

H. The Public Supports the City's Acquisition.

The City retained Harstad Strategic Research Inc. to conduct a public opinion survey regarding the City's acquisition of the Water System. Among other findings, the survey showed that 70% of the surveyed active voters in the City of Missoula favored the City purchasing the Water System at a fair price and operating it as a City-owned utility. (TR 1505:24–1507:7; TE 1209, 417–002.)

Prior to trial, Mountain Water moved to exclude the results of the survey, claiming it was methodologically flawed. The District Court properly rejected that argument. (*See* CR 267 (citing *Tunnell v. Ford Motor Co.*, 330 F. Supp. 707, 717 (W.D. Va. 2004).)

At trial, Michael Kulisheck, a Harstad employee who led the survey offered specific, credible testimony explaining the survey methodology, its reliability, and its conformity with industry standards for public opinion surveys. (TR 1501:18–1504:6.) Mountain Water did not provide any testimony to the contrary.

In its findings of fact, the District Court acknowledged the arguments Mountain Water now raises on appeal but found: "The methodology used by Harstad followed generally accepted methodology in line with industry standards and is a reasonably reliable measure of the opinions of the surveyed population." (A 016.) It further found "[t]he public opinion poll conducted by Harstad provides credible evidence of public support for City ownership of the Water System by City voters." (A 017.) This finding was further supported by the testimony of Mayor Engen and City Councilmen Von Lossberg and Wiener that there is "strong support for City ownership of the Water System." (A 015.) As Wiener testified, "It's not even a

close call." (A 015-016.) Three Missoula residents—Miles McCarvel, Dr. James Burchfield, and Deena Mansour—also offered specific testimony describing why they support the City's acquisition of the Water System. (TR 782:17–806:19, 1134:18–1144:7, 1290:16–1296:11.)

III. THE DISTRICT COURT CORRECTLY CONCLUDED THIS CASE IS NOT BARRED BY COLLATERAL ESTOPPEL.

In 1984, Ronald Reagan was president. Mass marketing of cellular phones to the general public had just begun. The Olympic Games were boycotted by the Soviet Union. The Berlin Wall still stood. That same year, the City of Missoula filed an eminent domain proceeding to condemn the Water System, owned by Sam Wheeler and his family-owned company.

Much has changed in 30 years. The City's 1984 action was ultimately unsuccessful for reasons that were peculiar to the facts and circumstances as they existed in the 1980s. Nonetheless, Mountain Water argues the City is collaterally estopped from pursuing its condemnation action on account of its unsuccessful attempt to do so in the 1980s. Its argument fails.

A. Mountain Water has Waived Its Argument.

Mountain Water's collateral estoppel argument is based entirely on a set of facts it did not rely on or argue below. On appeal, Mountain Water bases its argument on the District Court's findings of fact. (*See, e.g.*, table at Opening Br., 42–43.) But, when Mountain Water moved for summary judgment on collateral estoppel, it did not rely at all on the District Court's findings of fact. Indeed, it moved for summary judgment months before the public necessity trial and months before the District Court issued its Findings of Fact and Conclusions of Law. With this appeal, Mountain Water is attempting to make factual arguments that it did not present to the District Court.

The Court does not consider arguments or facts on appeal that were not first presented to the district court. *See, e.g.*, *State v. St. Dennis*, 2010 MT 229, ¶ 38, 358 Mont. 88, 244 P.3d 292 (declining to consider factual arguments not presented to the district court and raised for the first time on appeal). With this appeal, though, Mountain Water asks the Court to do just that. It has therefore waived those factual arguments.

B. This Case Involves Different Issues than the 1980s Decisions, so Collateral Estoppel does not apply.

The earlier litigation resolved issues related to the need for City ownership of the Water System in the 1980s. Because circumstances have changed over the last 30 years, the issues related to City ownership of the Water System today raise different issues from those resolved in the earlier litigation. In order for an issue to be barred by collateral estoppel, Montana law requires that "the identical issue raised was previously decided in the prior adjudication." *Baltrusch v. Baltrusch*, 2006 MT 51, ¶ 18, 331 Mont. 281, 130 P.3d 1267 (emphasis added). The United States Supreme Court has long held "that changes in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues." *Montana v. United States*, 440 U.S. 147, 159 (1979). The legal basis of Mountain Water's argument is the remarkable proposition that public necessity questions "are unchanged by the passage of time"—here, for over 30 years. Mountain Water is wrong.

1. Profit Motive

The 1980s decisions did not determine the profit motives of a private owner would always weigh against condemnation under any

set of facts. Nor did it compare the profit motives of a family-owned business to a hedge fund that took $11.5 million in dividends in three years of ownership. Instead, the District Court considered the profit motive of then-family-held-owner, Sam Wheeler, and under the facts as they existed at that time, decided the factor did not weigh in the City's favor. (MWC Supp. App. 10, 9.). Notably, it reached that conclusion because it assumed that profits would be reinvested into the system for capital improvements. (MWC Supp. App. 10, 9.)

As discussed above, Carlyle is a billion-dollar hedge fund whose primary goal is to maximize profits for its investors. Its profit motive is far different than what was expressed in the 1980s, and it has not, in any way, translated to the promise of "substantial capital improvements." To the contrary, Mountain Water has used profits to pay investor dividends rather than much needed infrastructure, maintenance, and repair.

Municipal ownership will be much different. Under City ownership, earning a profit would not be a priority. Instead, the City would prioritize the public health, safety, and welfare of Missoula residents in the management of the Water System. (A 028-029, 050-051, 063; TR 378:14–380:17.) The circumstances surrounding

Mountain Water's profit motive have changed dramatically in the last 30 years, and the District Court correctly concluded the 1980s decisions do not have a preclusive effect.

2. Home Office Expenses

According to Mountain Water, the "Home Office Expenses" it pays annually to Park Water have remained unchanged for 30 years. It argues, based on the 1980s decisions: "Home Office Expenses represent valuable services as approved by the MPSC, and their cost cannot be eliminated simply by a change of ownership." (MWC Supp. App. 8, 3–4.)

Again, the facts and circumstances related to Home Office Expenses have changed. The evidence and testimony in this case showed Mountain Water pays Park Water Company $2.2 million to $2.5 million annually for Home Office Expenses. These expenses were not at issue in the 1980s cases, and the credible evidence and testimony showed they will be eliminated under City ownership. The 1980s decisions therefore have no preclusive effect on this case.

3. Water System Consumers Living Outside Missoula

Mountain Water next argues the 1980s decisions conclusively decided the Water System must be regulated by the PSC because

consumers living outside Missoula will otherwise have no voice in the ratemaking process. Not so.

The fact that some Mountain Water consumers live outside the City limits does not justify PSC regulation. As with every other municipality in Montana, water consumers who live outside the City limits have a statutorily guaranteed right to participate in the ratemaking process, just as City residents do. *See* Mont. Code Ann. §§ 7–13–4304(4); 69–7–101 (ratemaking is open to all city inhabitants and "other persons served by the municipal utility system.") Instead of having to drive to Helena, though, to voice their concerns, consumers in Missoula County can participate directly with their city neighbors in Missoula.

4. Public Opinion

Mountain Water argues the City should be collaterally estopped from asserting that public opinion favors municipal ownership. Its argument is puzzling. The public is fundamentally different today than 30 years ago. Missoula's population has doubled over that time, and its attitudes and culture have changed. Mountain Water's claim that public opinions have remained static is unsupported and meritless.

Aside from the fact that public opinions have changed over the past 30 years, the type of public-opinion evidence considered in the 1980s decisions was different than the evidence considered by the District Court here. In the 1980s litigation, public opinion regarding acquisition of Mountain water was measured through a City Council vote and a ballot initiative rather than a commissioned public opinion poll, which was used in this case. *Mountain Water Co.*, 228 Mont. at 414.

Mountain Water does not provide any support for its argument that the public's opinion at issue in the1980s litigation is identical to and preclusive of the public's opinion of condemnation today. Instead, Mountain Water's collateral estoppel argument is a collateral attack on the poll's reliability, which fails for the reasons above.

5. Efficiency Gains

Mountain Water argues the City should have been estopped from arguing it will operate the Water System efficiently. In the 1980s, the District Court noted that "no city employees have any significant experience in operating the [water] system." (MWC Supp. App. 10, 7.) At that time, the City proposed to reduce the number of employees and the remaining employees' salaries. (MWC Supp. App. 10, 7.) It

determined "[t]his factor, together with a lesser number of employees operating the system, would impair the availability and quality of water services to the consumer." (MWC Supp. App. 10, 7.)

Today, the City does not intend to cut the number of employees (or their salaries) as it did in the 1980s. In fact, the City offered continuing employment to every Mountain Water employee at their current salaries and with the same (or equivalent) benefit levels. (A 020-022.) The details of those offers are discussed in the City's response to the Employees' opening brief. As the District Court found, employment with the City "is reasonable and fair" and offers "advantages" and "stability" that private employment does not. (A 061.)

Further, as discussed above, the City today has a credible plan to operate the Water System. (A 023-025, 060-061.) It presently operates the City's wastewater system, which is more complex than the Water System, and the Water System will be under the direct supervision of Public Works Director John Wilson, who has previous experience operating Kalispell's and Whitefish's water systems, among other utilities. (TR 483:11–484:17, 1147:6–1155:9, 1817:10–19.)

The facts and issues related to the City's ability to operate the Water System and its plans for employing the current Mountain Water employees are very different than in the 1980s. The City was not estopped from presenting evidence related to its ability to efficiently operate the Water system.

6. Taxes

In the 1980s case, the District Court determined the City's tax-exempt status did not weigh in favor of condemnation because "[t]he $260,000 annual property tax presently paid by Mountain Water would merely be shifted to other property owners of the community." (MWC Supp. App. 8, 4.). This was not a conclusive determination that tax-exempt status would never support condemnation.

The Water System today is not the same system that was at issue in the 1980s—it has aged and expanded over the past 30 years. The millions of dollars in annual tax savings today could go a long way to repairing and upgrading the aged and severely leaking system.

In this case, City Central Services Director Dale Bickell testified that, in order to mitigate the slight reduction in the tax base that will result from City ownership of the Water System —0.2%—the City intends to provide payment in lieu of taxes on a gradually declining

basis to affected entities. (TR 902:24–903:15.) The minimal reduction in tax base is dwarfed by the substantial cost savings for the Water System.

The City's tax-exempt status will also result in a number of benefits that are not available to Mountain Water, such as low-interest bonds and other loan programs that are not available to the private sector. These financial tools can be used to finance the City's acquisition of the Water System and save millions of dollars over time. (TR 902:24–903:15.)

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ITS CASE MANAGEMENT DECISIONS.

The District Court did not violate Mountain Water's due process rights in its management of the discovery and pretrial proceedings. Montana law requires condemnation actions to proceed expeditiously. Mont. Code Ann. §§ 70–30–202, 70–30–206(5). Mountain Water summarily claims it was prejudiced by the "tight schedule," but it offers no specific examples of how it was prejudiced—it does not point to any evidence or testimony that it would have presented at trial or arguments it would have made but for the schedule of the proceedings.

Mountain Water's argument is based on Carlyle's brief, which it incorporates by reference. The Court should reject Mountain Water's argument on that basis alone—parties may not incorporate arguments by reference. *See State v. Whalen*, 2013 MT 26, ¶ 35, 368 Mont. 354, 295 P.3d 1055; *State v. Ferguson*, 2005 MT 343, ¶¶ 41–42, 330 Mont. 103, 126 P.3d 463. To the extent the Court considers Mountain Water's incorporated argument, however, the City incorporates its response to Carlyle's brief.

CONCLUSION

The Court should affirm the District Court's Findings of Fact, Conclusions of Law, and Preliminary Order of Condemnation. First, limiting valuation testimony in the public necessity phase of this case was required under Montana law and was not an abuse of discretion. Second, the District Court's factual findings are supported by substantial credible evidence and Mountain Water has not met its heavy burden to demonstrate clear error. Third, this case is not barred by collateral estoppel because the issues relating to condemnation have not remained static for over three decades. Finally, the District Court did not abuse its discretion by following

Montana's eminent domain statutes in managing discovery, pretrial, and trial proceedings. The District Court should be affirmed.

DATED this 9th day of December 2015.

Natasha P. Jones

Natasha Prinzing Jones
Scott M. Stearns
BOONE KARLBERG P.C.

William K. VanCanagan
Datsopolous, MacDonald & Lind

Harry H. Schneider, Jr.
PERKINS COIE LLP
Pro Hac Vice

Attorneys for Appellee, City of Missoula

CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rules of Appellate Procedure 11 and 14(9), I certify that this brief is printed with a proportionally spaced Bookman Old Style text typeface of 14 points; is double-spaced, except for footnotes and for quoted an indented material; and the word count calculated by Microsoft Word is not more than 10,000 words pursuant to Montana Rule of Appellate Procedure 11(4)(a), being 9,307 words, excluding the Caption, Table of Contents, Table of Authorities, Signature Block, Certificate of Compliance, Certificate of Service, and Exhibits.

Natasha Prinzing Jones
Scott M. Stearns
BOONE KARLBERG P.C.

CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by email (by agreement of all parties) upon the following counsel of record at their addresses this 9th day of December 2015:

William T. Wagner Stephen R. Brown Kathleen L. DeSoto Peter J. Arant GARLINGTON, LOHN & ROBINSON, PLLP P.O. Box 7909 Missoula, MT 59807-7909 wtwagner@garlington.com srbrown@garlington.com kldesoto@garlington.com pjarant@garlington.com	Joe Conner Adam Sanders D. Eric Setterlund BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, P.C. Suite 1800, Republic Centre 633 Chestnut Street Chattanooga, TN 37450-1800 jconner@bakerdonelson.com asanders@bakerdonelson.com esetterlund@bakerdonelson.com
William W. Mercer Michael P. Manning Adrian A. Miller HOLLAND & HART LLP P.O. Box 639 Billings, MT 59103-0639 wwmercer@hollandhart.com mpmanning@hollandhart.com aamiller@hollandhart.com	Gary M. Zadick UGRIN, ALEXANDER, ZADICK & HIGGINS, P.C. P.O. Box 1746 Great Falls, MT 59403 gmz@uazh.com

Tina Sunderland