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

THE CITY OF MISSOULA, a Montana municipal corporation,

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 THE EMPLOYEES OF MOUNTAIN WATER COMPANY, et al (REDACTED

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

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2. Whether the Employees have a compensable interest in this case.

3. Whether the District Court's findings are supported by substantial credible evidence.

4. Whether Algonquin/Liberty Utilities would likely attempt to increase water rates if it purchased the Water System.

STATEMENT OF THE CASE

The City of Missoula ("City") 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 granted the Mountain Water Company Employees' (the "Employees") motion to intervene on June 27, 2014. (CR 28.) In a December 22, 2014 order, the District Court clarified the scope of the Employees' intervention, limiting it to 12 discrete areas related to their "employment interests." (CR 145.2, 4.)

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") 001-068.) 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 [redacted]. (CR 323.) Judge Townsend appointed three condemnation commissioners who determined the fair market value of the Water System is $88.6

million.[1] (A 070.) Should either party appeal that valuation, a jury trial to determine value begins on January 11, 2016. (CR 363.)

STATEMENT OF THE FACTS

The City seeks to join the remaining 128 municipalities in Montana as the owner of its water system. The Employees are the 39 individuals employed at Mountain Water at the time the City served its First Amended Complaint on May 4, 2014. (A 9.) For well over a year, the City has attempted prospectively to reach agreement with the Employees to become employees of the City should the City prevail in acquiring the Water System. The City's proposal has been to transition the employees to municipal employment at the same wages, the same (or equivalent) benefits, and with guaranteed terms of employment. The Employees, though, have refused to discuss or negotiate the terms of their employment with the City. (Trial Transcript ("TR") 211:10–16.) They have chosen instead to litigate in opposition to City ownership.

[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.

I. THE CITY ATTEMPTED TO HIRE THE EMPLOYEES BEFORE AND DURING LITIGATION.

The City has consistently expressed its desire to hire the Employees with no reduction in their pay, benefits, or job security. (*See, e.g.*, TR 211:23–212:15.) The City has backed up that commitment with detailed, written job offers. (A 56.) The Employees' claim that the City is offering reduced wages or inferior job security is contradicted by the record.

At least as early as September 2011, Missoula Mayor John Engen confirmed, publicly and under oath, the City's desire to hire the Employees on fair terms. In a hearing before the Public Service Commission (a transcript of which was filed with the District Court in the necessity trial of this case), Mayor Engen testified regarding Carlyle's attempted purchase of the Water System and the City's desire to eventually buy the Water System from Carlyle. (Trial Exhibit ("TE") 33.) He addressed the Employees' concerns:

> [W]ere the City of Missoula to acquire Mountain Water, I think we'd negotiate up-front the terms of employment with employees. I have no interest in causing the citizens of my community that happen to work for Mountain Water pain or heartburn. In fact, I think that's counterproductive.

(TE 33-13.)

Mayor Engen elaborated on any perceived distrust between Mountain Water and the City from a condemnation action 30 years ago:

> I think there is a history that's achieved almost mythical proportions about the animosity between the City of Missoula and Mountain Water. And that animosity does not, I think—if it exists at all—I don't think it exists at the level of the City of Missoula thinks Mountain Water employees are bad people that ought to get canned, or they ought to have their pay cut, and the list goes on. In fact, it's quite to the contrary.
>
> The City of Missoula, I think at least during my tenure as mayor, has demonstrated over and over again that we are believers in our workers.

(TE 33-14.)

In January 2014, Mayor Engen sent a letter to the Missoula City Council, asking for approval to make a final offer to Carlyle for the purchase of the Water System and advising that, because Carlyle seemed unwilling to honor earlier agreements to sell the Water System to the City, condemnation could be necessary. That letter specifically addressed the Employees:

. . . . .

> **What will it mean to Mountain Water employees?**
> We believe the employees of Mountain Water are experts in operating the system and our goal will be to preserve their jobs and maintain their wages and benefits. Over time, we may learn that some management and professional positions may not be practical or necessary as part of a municipal operation, but we'll work on agreements that allow for a reasonable, humane transition.

(TE 15-3.)

With the Council's approval, the City made a formal offer to Carlyle for the purchase of the Water System. (TE 16.) The offer expressly provided that the City would extend employment offers to the Employees as part of the purchase.[2] (TE 16.)

When the City filed this condemnation action, it made clear that it will ensure Mountain Water Employees' positions with the City remain as good as or better than the status quo under Carlyle's ownership. (CR 6.1, 34–35.) The City has bent over backwards to

[2] Employees make much of the reference to "at-will employment offers" in that letter. As the Mayor explained to Employees' counsel in his deposition, this was simply a mistaken use of the phrase; Mayor Engen was attempting to make the obvious point that city employment would be optional *to the Employees*—that they were free to decline the City's offer. More importantly, the actual offers from the City do not attempt to offer "at-will employment."

alleviate the Employees' concerns.[3] The City and Mayor Engen made repeated attempts to engage the Employees and their counsel and meet with them face-to-face in a good faith attempt to resolve any anxiety they may have about the City's intentions. (*See, e.g.*, TR 208:11–21, 211:10–16.) Those efforts included two detailed, written employment offers to the Employees, successively attempting to meet every concern the Employees expressed. (A 56; CR 233, Exhibits F, I.)

On February 9, 2015, the City made its second formal offer to the Employees.[4] The offer specifically addressed each of the twelve concerns raised by the Employees in this lawsuit. (*See* CR 28, describing the Employees' concerns.) In particular, the City offered, among other things, the following:

> a. The City will enter into full-time (or the employee's equivalent) employment contracts with each Mountain Water Employee for a

[3] Contrary to the Employees' assertion in their brief, the City did not object when the Employees moved to intervene in this action. (CR 22, 1) ("**The City has no objection to the Motion to Intervene**, so long as Intervenors' participation is limited to addressing the specific issue of whether public ownership is more necessary than the status quo because of the effect it might have on Mountain Water employees") (emphasis added).

[4] Many of the complaints raised in the Employees' brief concern the City's first offer that was explicitly rejected by the Employees. As set forth herein, those previous concerns are resolved by the City's most recent offer and therefore moot.

period of five years or the end of the individual's employment period, whichever occurs first. The wages will match or exceed the amount of each Mountain Water Employee's wages as of February 9, 2015. This includes reasonable COLA increases, merit increases, and market adjustments granted by Mountain Water during the pendency of this lawsuit upon disclosure to and approval by the City of such reasonable increases.

b. The City will enter into full-time (or the executive's equivalent) employment contracts with each of the defined Local Executives [John Kappes, Sara Streeter and Ross Miller] for a period of twelve months or the end of the individual's employment period whichever occurs first. The wages will match or exceed the amount of each Local Executive's wages as of February 9, 2015. This includes reasonable COLA increases, merit increases, and market adjustments granted by Mountain Water during the pendency of this lawsuit upon disclosure to and approval by the City of such reasonable increases. Such wages shall not include any incentive based wage benefits such as bonuses, Class B Unit Agreements, stock options, etc.

c. Each Mountain Water Employee and Local Executive will be given credit for years of service at Mountain Water when calculating vacation and sick leave.

d. Each Mountain Water Employee and Local Executive will be provided the benefits package currently enjoyed by City employees. In addition, a neutral third party mutually

> agreed upon by the City and a majority of the Mountain Water Employees who sign this Agreement will be commissioned, at the City's expense, to evaluate the benefits enjoyed by each applicable Mountain Water Employee and Local Executive as of February 9, 2015, and compare it to the benefits package provided to the same individual by the City. If the neutral third party determines the benefits provided to the individual by Mountain Water were superior in any respect to the benefits provided by the City, the neutral third party will calculate the bi-weekly monetary value of the deficiency. This sum, if any, will be added to the employee's bi-weekly wages for the contractual period of employment as set forth above in Sections 2(a) or 2(b).

(CR 233, Exhibit F, 4–6.)

The City's offers did not "freeze" wages, as the Employees now argue. Under the City's offers, the Employees would start at their current wages. Far from limiting any term of employment, the City offered a guaranteed minimum term that the Employees do not currently have. (TR 211:23-212:15.) If any doubt remained about the proposal's fairness, the City offered to hire a neutral third-party evaluator to calculate appropriate compensation for any decrease in benefits the Employees would experience and the City proposed to

ask that the District Court resolve any disputes. (CR 233, Exhibit F, 5–6.)[5]

At trial, Mayor Engen reiterated the City's desire to hire every Employee:

> We do not want to terminate employees nor do we want to reduce their salaries and benefits.
>
> In fact, I've tried my best to convey over and over again that we think the Employees of Mountain Water, the folks who are doing the daily work, are doing a fine job. And we would like them to work for the City of Missoula with me, with the other roughly 500 souls who work for the City of Missoula, who have also worked there for a very long time.

(TR 208:11-21.)

Engen affirmed the City's commitment to every Employee:

> Q: As you sit here today under oath, as a representative of the City, are you prepared to assure the Court that if you acquire the water system, the current employees that serve the water system will be able to be employed by the City at their current levels of income?

[5] The Employees accuse the City of violating the mediation privilege by sharing general information about its employment offers with the Missoula City Council. Any offers presented by the City at the mediation were consistent with its offers made prior to and after the mediation, which were publicly disclosed. The City also was obligated to apprise the City Council of these offers, but did not divulge information specific to the mediation. The District Court found the Employees have rebuffed the City's offers and reject the City's attempts to negotiate (A 56), a situation that has been constant throughout the process, including before and after the mediation.

A: Yes, sir.

Q: And how long are you willing to guarantee it?

A: Five years, and that's a minimum.

Q: And with respect to the top one or two people?

A: One year.

Q: Current salaries?

A: Yes.

Q: And would it be your hope and expectation to continue to employ them thereafter?

A: (Witness nods head).

(TR 211:23-212:15.) Mayor Engen, Bruce Bender (the City's Chief Administrative Officer), and Dale Bickell (the City's Central Services Director) offered credible testimony that provided details of the City's preliminary and flexible Business Plan for operating the Water System. (TR 208:11–212:15, 508:6–13, 511:6–516:3, 548:19–549:9, 854:8–857:4.) The Employees are central to the City's transition to ownership of the Water System and the System's ongoing operation.[6]

[6] The Employees argue that Missoula Ordinance 3495 (TE 2553), which requires certain City department heads to reside within Missoula city limits, would prevent three current Mountain Water employees who currently live

By contrast, the uncontroverted evidence at trial was that the Employees have no guaranteed minimum term of employment under Carlyle's ownership. (TR 350:22-351:3.)

On cross-examination, counsel for the Employees questioned Mayor Engen about the five-year guaranteed minimum, contending the City was selling the Employees "down the river" by declining to guarantee lifetime employment:

> Q: So if you won't go beyond five years you are still the river, aren't you?
>
> A: What I am is a chief executive of a municipal corporation that would love to have negotiation with employees that made them feel whole. And to date I haven't had that opportunity. We might be able to craft a deal that made nothing but sense to those employees, and I would much prefer to do that that way rather than on the spot try to answer questions a little bit at a time.

(TR 223:10-20.)

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outside Missoula from serving as director of the Water System under municipal operation. This argument fails because, as Mountain Water's Chief Engineer, Logan McInnis, acknowledged at trial, Ordinance 3495 is expressly limited to certain enumerated department heads and supervisory managers. The enumerated department heads do not include either the future director of the Missoula's water system or its closest equivalent, the Wastewater Department. (TE 2553; TR 2003:3-2004:6.)

II. UNDER INVESTOR-DRIVEN OWNERSHIP, MOUNTAIN WATER IS A CORPORATE COMMODITY WITH AN UNCERTAIN FUTURE FOR THE EMPLOYEES.

Before 2011, Mountain Water was owned by Sam Wheeler's family-held corporation. (A 7.) While deprived of the benefits of permanent local ownership, Mountain Water and its employees were at least in relatively stable hands compared to ownership under Carlyle. That changed in 2011 when Carlyle bought the holding company that includes Mountain Water. (A 58–59.) That sale resulted in "significant and permanent changes . . . to the culture of employment stability at Mountain Water." (A 58–59.)

By the beginning of 2014, Carlyle began secretly marketing Mountain Water to other corporations. (A 59–60.) Carlyle kept local employees in the dark as it planned its exit. (*E.g.*, A 012, 059-060.) In 2014, Carlyle signed an agreement with Liberty Utilities ("Liberty") to sell Park Water Company, which includes its subsidiary Mountain Water and two California water utilities. (TE 2534.) Liberty is a subsidiary of the Canada-based international corporation Algonquin Power and Utilities ("Algonquin").[7] (A 8.)

[7] Alarmed by the quick "flip" of Missoula's essential infrastructure, the City issued a deposition notice and subpoena duces tecum to Ian Robertson, the CEO and a Director of Algonquin and Liberty, to learn what the

Liberty's contract for the purchase of Mountain Water provides that Liberty will guarantee the Employees only 18 months of work—far less than the City's five-year minimum guarantee. (TE 2534.) At trial, however, Greg Sorensen, a Liberty representative, testified that Liberty would agree to match the City's offer, but that Liberty did so only after the City had already made its offer. (TR 2657:13–2658:23; *see also* A 059.) He could not explain at trial why Liberty decided to match the City's offer. (TR 2610:1-5; 2658:2-23.)

The District Court found that the City's employment offer to the Employees is "reasonable and fair." Ample evidence supports that conclusion. (A 061.) Indeed, employment with the City offers more stability and better access to information, managers, and decision-makers than employment with Carlyle or Algonquin Liberty. (A 061.) "So long as Mountain Water is a part of a large

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astronomical purchase price and foreign ownership might portend for Missoulians. (A 071- 075.) Neither Robertson nor any other representative of Algonquin or Liberty appeared for the scheduled deposition or provided the requested documents. (A 071- 075.) On the City's motion, the standing master appointed by the District Court ordered Robertson to comply with the subpoena. (A 071- 075.) That Order was not appealed, and thereby became an Order of the District Court. Despite the order, Robertson did not comply with the City's subpoena duces tecum and did not appear for a deposition. The City also subpoenaed Robertson to appear and testify at the necessity trial. (A 076-080.) Robertson did not appear at trial. (TR 1802:15-25.) However, Greg Sorensen, a lower-ranking Liberty officer with limited knowledge of the relevant facts, did appear to testify for the Defendants. (TR 2595:20-2596:13.)

for-profit enterprise, Employees have no guarantees regarding continuity of ownership or job security." (A 060.) This instability leads to "potentially drastic personal consequences without notice, including changes in compensation, benefits, working conditions, changes to job descriptions and organizational structures and income and benefit disparities." (A 060.) Certainly, Carlyle has not kept the Employees informed of its attempts to sell Mountain Water and deliberately hid that information from Mountain Water's President, John Kappes. (*See, e.g.*, A 12, 059–060.) Under Carlyle's ownership, the Employees have been "excluded from important decisions regarding their future . . . ." (A 059.)

For all these reasons, among others, the District Court's finding that the Employees will not be harmed by the City's ownership of the Water System is supported by substantial credible evidence. To the contrary, City ownership offers benefits for the Employees.

STANDARD OF REVIEW

The Court reviews de novo a district court's conclusions of law. *Steer, Inc. v. Dept of Revenue of State of Montana*, 245 Mont. 470, 474-475, 803 P.2d 601, 603 (1990).

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). "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). 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.*

SUMMARY OF THE ARGUMENT

The Employees argue that (1) the District Court did not properly consider the effect of the City's ownership of the Water System on the Employees, (2) the District Court clearly erred when it made its factual findings regarding the effect of condemnation on the Employees, and (3) the District Court clearly erred when it concluded that Algonquin/Liberty Utilities would likely raise rates if it were to purchase the Water System. Each of these arguments fails. In essence, the Employees contend that because Judge Townsend's reasoned decision based on her careful consideration of all the evidence differs from theirs, she must have erred.

First, Judge Townsend correctly applied the law with respect to the effect of condemnation on the Employees, as set forth by this Court in *Missoula v. Mountain Water Company*, 228 Mont. 404, 743 P.2d 590 (1987) ("*Mountain Water I*"). The effect of condemnation on the Employees (if any) is a single factor among many for the district court to consider. Contrary to the Employees' argument, the effect on them is not dispositive of whether condemnation is a public necessity. The District Court made several specific findings showing that the Employees will not be harmed by the City's

acquisition of the Water System. And the Employees make no argument explaining how any alleged effect on them outweighs all the other factors weighing in favor of condemnation.

Second, the Employees' claim they have a compensable interest in this case and must be "made whole" by the City is legally unsupported. The City is committed to working with the Employees on favorable terms for the Employees. But they have no compensable claim in this case. The City is not condemning the Employees' salaries or benefits. Any claim the Employees believe they have cannot be a part of this action and is not ripe.

Third, the District Court's findings of fact are supported by substantial credible evidence. The Employees current salaries are comparable to those of other City employees (with the exception of the top executives at Mountain Water); the City's employment offer to the Employees is reasonable and fair; and the City's offer provides benefits and job security the Employees do not currently have.

Finally, the District Court's finding that Algonquin/Liberty would likely raise its rates in the future is supported by substantial credible evidence. Contrary to the Employees' argument, the

District Court did not find that Algonquin/Liberty would seek an "acquisition premium." Instead, it found that Algonquin/Liberty would likely seek to recover its costs through heavy capital investment on which it could raise rates and earn a significant rate of return (currently up to 9.8%). This finding is consistent with testimony from both Carlyle and Algonquin/Liberty. The District Court correctly found that the City can make the same capital investment without a rate of return, which would result in substantial cost savings for rate payers.

ARGUMENT

I. THE DISTRICT COURT PROPERLY CONSIDERED POTENTIAL HARM TO THE EMPLOYEES AS ONE FACTOR IN THE NECESSITY EVALUATION.

The Employees argue that any potential effect on them from the City's condemnation of the Water System is dispositive of whether the condemnation is "more necessary." (Opening Br., 38–40.) They are wrong.

Employees rely solely on this Court's decision in the City's condemnation case in the 1980s, but they misconstrue its holding. In *Mountain Water I*, the district court had concluded that the "City's calloused plan for Mountain Water's twenty-six employees,

standing alone, is enough to defeat a finding of public necessity." 228 Mont. at 412, 743 P.2d at 595. This Court explicitly rejected that rationale:

> We hold that the effect on Mountain Water employees is one factor to be considered in determining whether the acquisition is necessary, but that factor alone is not dispositive.

228 Mont. at 413; 743 P.2d at 595 (emphasis added).

Here, Judge Townsend did exactly what this Court required in the 1980s case: She considered the potential impact of condemnation on the Employees, along with other relevant factors, such as the condition of the Water System; public opinion; the City's ability to operate a utility; financial considerations; economics and public policy; and public health, safety and welfare. (*See, e.g.*, A 015–064.) The Employees do not point to any authority showing that the potential effect of condemnation on them bars condemnation. This Court's precedent is squarely to the contrary. Further, the Employees make no effort to show how any effect on them weighs against all the other factors favoring City ownership.

The Employees also argue that Judge Townsend erred because she analyzed the potential impact on Employees as a factual finding rather than a legal conclusion:

> The issue of harm to the Employees is a mandatory factor which the Court had to address as a matter of law. However, the District Court ***did not even address or even mention*** harm as a legal factor that must be considered as part of the legal conclusion that private ownership is "more necessary" in its Conclusions of law.

(Opening Br., 39 (emphasis original).)

The Employees, of course, attempt to cast this issue as a question of law rather than a question of fact in order to subject it to de novo review rather than review for clear error. The Employees' argument, however, fails.

Montana's eminent domain law is clear—the factors considered in determining whether condemnation is "more necessary" are factual considerations, not legal questions. Montana Code Annotated § 70–30–111, titled "**Facts** necessary to be found before condemnation" (emphasis added), states, in part:

> [T]he condemnor shall show by a preponderance of the evidence that the public interest requires the taking based on the following findings: . . . (c) if already being used

> for a public use, that the public use for which the property is proposed to be used is a more necessary public use . . . .

In *Mountain Water I*, the Court specifically observed that Section 70–30–111 "sets forth the standard of proof and **the facts** which must be found . . . ." 228 Mont. at 411, 743 P.2d at 595 (emphasis added). The Court expressly held that the effect of condemnation on the employees is one of those facts the district court must consider. 228 Mont. at 412–13, 743 P.2d at 590. The Court did not hold, as the Employees now argue, that the effect of condemnation on them and how that effect relates to the finding of necessity is somehow a question of law. Indeed, the very finding of necessity itself is a factual finding under Section 70–30–111.

As a practical matter, construing the effect of condemnation on the Employees as a legal question simply makes no sense. The effect of condemnation on utility employees will vary depending on the facts of the case. That effect is not something that can be determined as a matter of law. The Court should therefore review the District Court's effect-related factual findings for clear error and not review them de novo, as if they were questions of law.

II. THE EMPLOYEES DO NOT HAVE A COMPENSABLE INTEREST IN THIS CASE.

The Employees claim they are entitled to just compensation in this case. (Opening Br., 20–24.) They are not.

The total compensation in a condemnation case is (1) the value of the condemned property and (2) severance damages.[8] *K&R P'ship v. City of Whitefish*, 2008 MT 228, ¶ 27, 344 Mont. 336, 189 P.3d 593. The only property the City is condemning in this case is the Water System assets and water rights. (A 62.) The Employees have never claimed they own any condemned property or that they are entitled to any severance damages. In its order striking the Employees' claim for just compensation, the District Court concluded: "Employees have offered scant legal justification for their

[8] "Severance damages constitute the 'depreciation in the current fair market value of the property not actually taken but injuriously affected.'" *K&R P'ship*, ¶ 27 (quoting Mont. Code Ann. § 70–30–302(1)). "Accordingly, severance damages are calculated by determining the difference between the fair market value of the property pre-condemnation and the fair market value of the remaining property post-condemnation." *Id.* (citations and internal quotation marks omitted). The only party with standing to make a claim for severance damages is the owner of the property being condemned. *Id.* at ¶ 35. The property owner must show a unity of ownership, unity of use, and contiguity between the condemned property and the remaining property. *Id.* Here, the Employees do not claim they are entitled to severance damages. They do not claim they own any property being condemned, and there is no unity between their salaries and the Water System, which is the only property being condemned.

claims that they must be compensated by the City as part of its acquisition of the Water System." (CR 375, 13.)

The Employees, however, argue they should be compensated because they have a property interest in their jobs. That argument is a red herring. Regardless of whether the Employees have a property interest in their jobs, the City is not condemning that interest.

The Employees do not point to a single case where employees of a utility or any kind of ongoing business were entitled to compensation in a condemnation action. Instead, the Montana Supreme Court has squarely held that a third-party—like the Employees—may not make a claim for damages in a condemnation case. *See id.* (citing *State Highway Commn. v. Robertson & Blossom Inc.*, 151 Mont. 205, 219, 441 P.2d 181, 188 (1968) and holding that severance damages apply only to property that shares "unity of ownership," "unity of use," and "contiguity" with the condemned property); *see also Riddock v. City of Helena*, 212 Mont. 390, 394, 687 P.2d 1386, 1388 (1984) ("The only person entitled to recover damages for condemnation is the owner of the land at the time of the taking." (citations and internal quotation marks omitted)).

There is another very practical reason why the Employees are not entitled to any compensation as part of this case: Their damages (if any) are entirely speculative and not ripe. The City has made the Employees two offers to hire them at their current wages and benefit levels. (A 56.) The Employees, however, have refused to negotiate the terms of those offers. (TR 211:10–16, 223:10-20.)

Until the City takes possession of the Water System and negotiates complete employment agreements with the Employees, the Employees have no alleged damages. All they can do is speculate as to what damages (if any) they *might* suffer once the City takes ownership and once they decide to accept or reject the employment offers.

The City has committed to work with the Employees who want to work for the City of Missoula. For all the Employees except the top three executives, the City offered to hire them at their current wages and benefit levels for a period of at least five years. (A 056.) For the top three executive positions, who currently earn substantially more than comparable City employees, the City offered to hire them at their current wages and benefit levels for a period of at least one year. (A 056.) As discussed in more detail

below, the terms of the City's offers are better than what the Employees face under private ownership. (A 060–061.)

III. THE DISTRICT COURT'S FINDINGS OF FACT ARE SUPPORTED BY SUBSTANTIAL CREDIBLE EVIDENCE.

The District Court made numerous factual findings related to the potential effect of City ownership on the Employees. Those findings took into account the potential effect of condemnation on the Employees' salaries, benefits, and job security, the employment offers from the City, the City's proposed organizational structure for the Employees, and the consequences of transitioning to a third corporate owner in five years. The District Court ultimately found that City ownership will not harm the Employees and will, instead, likely benefit them. (A 060–061.)

The Employees take issue with three of the District Court's findings: (1) with the exception of the top three executives, the Employees' current salaries are comparable to those in the municipal environment; (2) the City's offer of employment is "reasonable and fair" to the Employees; and (3) City ownership will offer advantages to the Employees in terms of job security and stability, as well as access to information, managers, and decision

makers. (Opening Br., 19 (citing findings of fact at ¶¶ 182, 196, 197).) Each of these findings, though, is supported by substantial credible evidence.

A. With the Exception of the Top Executives, the Employees' Current Salaries are Comparable to Those in the Municipal Environment.

The Employees argue the District Court clearly erred when it found that their current salaries are "comparable" to the salaries of similar municipal employees. The Employees are wrong. The District Court's finding is supported by substantial credible evidence.

Mayor Engen testified that he had reviewed the salaries of Mountain Water Employees and found they are generally comparable to salaries paid by the City with the exception of the top two executives. (TE 1498 (filed under seal); TR 209:18–210:24.) Dale Bickell, the City's Central Services Director, also compared the salaries and reached precisely the same conclusion. (TR 777:1–15, 808:14–810:1, 1800:6–16[9]; TE 1498.) The Employees do not dispute that Mayor Engen and Bickell had all the information

[9] Bickell's testimony was submitted under seal as part of the court record.

needed to make the comparison and that they were qualified to do so.

The City employees' salaries are public record, and the Employees had every opportunity to cross examine Mayor Engen and Bickell on any discrepancy between the two categories. But they did not, leaving their testimony undisputed.

The Employees argue that, contrary to Mayor Engen's plain testimony, he did not compare the salaries. (Opening Br., 32.) They write: "The Mayor ***admitted*** that he had not in fact performed a comparison." (Opening Br., 32 (emphasis original) (citing TR 228:17–25)) The Employees' assertion is misleading to say the least.

The portion of Mayor Engen's testimony that the Employees quote relates only to the salaries of the top two executives at Mountain Water. (TR 228:17–25.) In that testimony, the Employees' counsel had asked Mayor Engen how the top executives' salaries compared to the salaries of other executives in the <u>private</u> industry (such as NorthWestern Energy, Energy West, and Washington Corporation), not among other municipal employees. (TR 228:4–16.) Unremarkably, Mayor Engen stated he had not

compared those salaries. (TR 228:8–16.) The Employees' argument takes Mayor Engen's testimony out of context and twists it into something it is not.

Mayor Engen, however, did testify that there is a "fairly remarkable disparity" between the pay of the top executives and similar municipal employees. (TR 228:1–3; *see also* TR 210:6–10.) Bickell reached the same conclusion. (TR 777:1–15, 808:14–810:1, 1800:6–16; TE 1498.) The Employees do not challenge that finding on appeal.

The simple fact is that Mayor Engen and Bickell both credibly testified that they examined the salaries of the Employees and the salaries of similar municipal employees. For all but the top executives, Mayor Engen and Bickell found the salaries comparable. The Employees presented no evidence to the contrary. The District Court's finding to that effect is therefore supported by substantial credible evidence.

B. The City's offer of Employment is Reasonable and Fair to the Employees.

The Employees argue the district court erred in finding that the City's offer was reasonable and fair. (*See* A 061.) That finding,

however, like the others, is supported by substantial credible evidence.

Mayor Engen testified at length about the City's attempts to hire the Employees and reaffirmed the City's desire and willingness to do so on the favorable terms previously offered—starting at current wages, with the same (or equivalent) benefits, for at least one year for the top executives and at least five years for all other employees. (TR 211:23–212:15.) The City put its commitment to the Employees in a detailed written offer. (CR 233, Exhibits F, I.) And the City presented evidence of a detailed, but flexible, plan for integrating the Employees. (TE 1499; TR 507:10–516:3.)

The Employees base much of their argument on purported "admissions" in Mayor Engen's deposition testimony. (Opening Br., 5.) Mayor Engen's deposition testimony is not in the trial record and therefore cannot be considered by the Court on appeal. *Hinkle v. Shepherd Sch. Dist. No. 37*, 2004 MT 175, ¶ 24; 322 Mont. 80, 87; 93 P.3d 1239, 1244 ("we refuse to consider such references because these depositions were never published and are therefore not a part of the record on appeal.")

Even so, the Employees' contention that Mayor Engen backed off the City's commitment to the Employees in his deposition is incorrect. To the contrary, Engen again repeated the City's desire to hire all Employees on mutually satisfactory terms:

> What we have tried to do, and what we will continue to try to do here is provide as much, if not more security than any other buyer . . . Our intent here remains, has always been, to provide the employees the best deal possible.

(A 082.)

The Employees also argue that Mayor Engen "admitted" at trial that the City would refuse to provide certain benefits to Employees. (Opening Br., 28-29.) Mayor Engen "admitted" no such thing. Indeed, in the City's second written offer, he promised to provide reasonable COLA adjustments and merit raises. (CR 233, Exhibit F, 4–6.) What the Mayor refused to do at trial was participate in forced negotiations from the witness stand on precisely how the City would provide or substitute specific benefits:

> What I am is a chief executive of a municipal corporation that would love to have negotiation with employees that made them feel whole. And to date I haven't had that opportunity. We might be able to craft a deal that made nothing but sense to those employees, and I would much prefer to do that that way rather than on

> the spot try to answer questions a little bit at a time.

(TR 223:10-20.) Mayor Engen also repeated his desire to work with the Employees to resolve whatever remaining concerns they have:

> The one thing I have not been able to do, Mr. Schneider, is have a negotiation with those employees. What I don't have today is any written documentation from employees about what they want from the City. We made a number of offers through stipulation, through mediation. What I would love is to have a place to begin a negotiation.

(TR 211:10–16.)

Next, the Employees insist that five years of guaranteed employment is a "harm." The Employees, though, undisputedly have no guaranteed employment under Carlyle's ownership. Mayor Engen repeated at trial that the City's offer is not a five-year limit but a five-year minimum; the City has no intention or desire to eliminate the Employees at the end of five years and hire all new staff. (TR 211:23-212:15.) The five-year guarantee is meant to provide the Employees security and peace of mind, which they have remarkably construed as a detriment.

The Employees further argue "the City's eight other unions are watching to see what occurs in this case." (Opening Br., 10.) The

only mention of the unions in the record is a question to Mayor Engen from the Employees' attorney, asking him whether he "checked with them on what will happen if you bring Mountain Water people to work." (TR 227:6–25.) The Employees' attorney asked whether Mayor Engen thought the other unions would "ask the Mayor and the City to match us all, bring us all up."[10] (TR 227:13–16.) Mayor Engen explained that it would be inaccurate to assume the Employees presently have better benefits than City employees. (TR 227:17–18.) In some instances, they do, but Mayor Engen explained: "The rank-and-file folks compare pretty favorably." (TR 227:25.) Regardless, any impressions the City unions have about the City's offers to the Employees have no bearing on the reasonableness and fairness of those offers.

Lastly, the Employees argue the trial testimony of Mountain Water employee Michelle Halley proves the Employees will be harmed by City ownership. Halley's testimony shows only that the Employees oppose City ownership. Halley testified that the Employees feel insulted by the City pointing out flaws in the Water

[10] The Employees offered no testimony or evidence that the City's unions have any issues with bringing Mountain Water Company's employees on board. Thus allegations of alleged union issues are purely speculative.

System—which the City has always recognized is the fault of Carlyle's insufficient investment in the Water System, not the Employees—and are opposed to condemnation on principle. (Opening Br., 11-12.) The Employees opposition to condemnation on principle has no bearing on the reasonableness and fairness of the City's offer.

At its core, the Employees' fundamental argument is that (1) an offer from the City will not be reasonable and fair unless the Employees are "made whole" and (2) the City should not be allowed to take ownership of the Water System unless it makes the Employees whole.

The Employees' argument has no support in the law. The Employees do not point to any authority requiring the City to make the Employees whole. While the City is committed to negotiating all terms of employment with the Employees, the City is not required to "make them whole" on every term, and the Employees cannot point to any statute, case law, or other authority that requires the City to do so. Indeed, in *Mountain Water I*, the Court held that the potential effect of condemnation on the Employees is <u>not</u> a determinative factor. 228 Mont. at 412–13, 743 P.2d at 595. In the

1980s case, the City's plan to outright terminate many employees and reduce the pay of others was not enough, standing alone, to bar condemnation. *Id.* The effect of condemnation on the Employees is simply one factor, among many, the District Court must consider in evaluating the necessity of City ownership. *Id.* The Employees' arguments have no basis in Montana law and, in fact, demand far more than Montana law requires.

Moreover, the Employees make no attempt whatsoever to show how any alleged effect of condemnation on the Employees weighs against the other factors the District Court must consider (e.g., public savings, rates and charges, cooperation between the utility and the City, the effect of having the utility's home office in the municipality, and public interest). *Mountain Water I*, 228 Mont. at 414, 743 P.2d at 595–96. That is their burden on appeal—to show that the alleged effect of condemnation on the Employees weighs against all the other factors favoring condemnation. Yet the Employees are silent on this point. For this reason alone, the Employees' arguments fail.

Ultimately, though, the District Court's finding that the City's employment offers are "reasonable and fair" is supported by

substantial credible evidence. The City guaranteed employment to all the Employees—all but the top three executives would have guaranteed employment for five years at the same salary and the same (or equivalent) benefits; the top three executives would have the same guarantee for one year. This offer is "adequate to support a conclusion" that the offer is "reasonable and fair." *See LeFeber*, ¶ 18. This is particularly true on appeal, since "the district court's findings of fact are construed in favor of [the City], and the district court's findings will be upheld even if the evidence could have supported different findings." *Pound*, ¶ 19.

C. Employment with the City will benefit the Employees and offer more stability.

The District Court found that employment with the City will offer a number of benefits:

> Employees face disruption and uncertainty in the immediate future under an imminent change of ownership. Employment by Liberty exposes Employees to the vagaries of employment by an extremely large for-profit enterprise. Employment by the City confers advantages on Employees in terms of job security, the benefits of stability of ownership and much greater accessibility to information, managers and decision makers.

(A 61.) The Employees do not agree that employment with a private corporation is less secure than municipal employment. (Opening Br., 33–36.) The Employees argue this finding is not supported by substantial evidence and is contradicted by Mayor Engen's testimony. Not so—the finding is firmly supported by the trial record.

At trial, Mayor Engen re-affirmed the City's offer to the Employees—to hire them at the same wage and the same (or equivalent) benefits. (TR 211:23–212:15; A 56.) All but the top executives would be guaranteed employment for five years; the top executives would be guaranteed employment for at least one year. (A 56.)

By contrast, the Employees have no guaranteed long-term employment under Carlyle or any other private employer. In its Merger Agreement, Algonquin/Liberty agreed to only an 18-month employment guarantee, far less than what the City guaranteed. (A 059.) In February 2015, the City and the Employees participated in a confidential mediation. Algonquin/Liberty, however, was not part of that mediation. Nevertheless, within days after the confidential mediation, Algonquin/Liberty suddenly decided to match the City's

guarantee. (TR 2657:13–2658:23.) At trial, Greg Sorensen could not explain why they decided to make that match so soon after the confidential mediation. (TR 2658:2–23.)

Moreover, under City employment, the Employees will have a stable, constitutionally-guaranteed pension. Mont. Const. art. 8, sec. 15. Presently, the Employees have a pension administered by Park Water's home office in California that is underfunded by millions of dollars. (CR 344, 17–19.)

Municipal ownership is more stable than private ownership by Carlyle's own admission. 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 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 48–49.) In other words, investors "buy and flip" the utilities, just as Carlyle did. Dove described it: "You buy a house today, you redecorate it and you sell it." (TR 2840:8–9.)

Carlyle's profit-above-all-else motive is far different than any family-owned longevity that might have existed under Sam

Wheeler's ownership (from whom Carlyle purchased Mountain Water). Drs. Thomas Power (Professor Emeritus of Economics at the University of Montana) and Kees Corssmit (a water utility economist) offered credible testimony that investors in the water utility business are no longer in the business for longevity—profits are best earned under short-term, buy-and-flip ownership. (TR 1201:15–22, 1206:1–1209:2, 1435:1–1438:1.)

Absent City ownership, the Employees cannot say with confidence who the next owners of the Water System will be, even five or ten years down the road. Carlyle, for instance, repeatedly kept the Employees and John Kappes, Mountain Water's President, uninformed and concealed its plans to sell the utility. (*See, e.g.*, A 012, 059–060.) As the District Court found, the "Employees were excluded from important decisions regarding their futures . . . ." (A 059.) There is nothing in the record that shows Algonquin/Liberty would operate the Water System any differently.

The District Court's findings accurately reflect the instability of employment under a private owner:

> Mountain Water changed hands in 2011 and will change hands again upon the closing of the Merger Agreement with Liberty. So long as

> a Mountain Water is part of a large for-profit enterprise, Employees have no guarantees regarding continuity of ownership or job security. Changes in corporate ownership, changes in corporate structures and changes in corporate management subject Employees to potentially drastic personal consequences without notice, including changes in compensation, benefits, working conditions, changes to job descriptions and organizational structures and income and benefit disparities.

(A 060.)

The City will operate the Water System as a public asset that is vital to Missoula and its future, not as a profit-generating machine. (A 011.) That motivation puts the City in a very different position than an investor-driven corporate owner for whom the Water System is simply a commodity that can be bought and sold as the market changes. The substantial credible evidence shows that this long-term stability will invariably benefit the Employees.

IV. THE DISTRICT COURT CORRECTLY FOUND THAT ALGONQUIN/LIBERTY'S PROPOSED PURCHASE OF MOUNTAIN WATER WOULD LIKELY RESULT IN FUTURE RATE INCREASES.

The Employees argue the District Court erred when it found that Algonquin/Liberty would attempt to recover its acquisition costs through an "acquisition premium" or "acquisition

adjustment." (Opening Br., 41–42.) As a threshold matter, the Employees do not have standing to make this argument. The District Court limited the Employees' participation to 12 distinct areas related "to their employment interests." (CR 145.2, 4.) The future effect of Algonquin/Liberty's proposed purchase on water rates is not an area the in which the Employees were allowed to present evidence or testimony. (CR 28, 145.2.) The Employees do not challenge on appeal the limitations of their intervention. (CR 28, 145.2.) The Court should therefore disregard their argument.

Regardless, the Employees mischaracterize the District Court's findings. The District Court did not find that Algonquin/Liberty would seek approval for a specific "acquisition premium" from the PSC, as the Employees claim. (*See* Opening Br., 42.) Instead, it found that Algonquin/Liberty would seek to recover its acquisition costs through future, heavy capital investment, on which it could earn a significant rate of return. (A 036–039.)

Dove testified that 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 Missoula's Water 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, 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. (CR 310, 28; 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 consistent with 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)—further testified that 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 that 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.)

Certainly, the Water System, which is presently in poor and degraded condition, needs significant capital investment. The

problem with that, though, is 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 36–39.)

The Employees claim, though, that City's purchase "could" harm the Employees through a "wage freeze." (Opening Br., 43–44.) They argue that if the City's purchase price creates a "financial shortfall," then that "could" require the City to freeze wages. The Employees' argument is nothing more than unsubstantiated speculation. The Employees point to the City employees' voluntary decision in 2011 to accept a temporary freeze in order to alleviate budgetary issues created, in part, by the recession. (TR 523:13–526:8.) While many employees across the country lost their jobs as a result of the recession, the City employees did not. (TR 526:3–8.) The temporary wage freeze had nothing to do with the City's operation or purchase of any utility.

The Employees did not present any evidence showing that the City might have to freeze wages as a result of its purchase of the Water System. Indeed, the $88.6 award from the condemnation

commissioners—[redacted] than what they demanded in their Statement of Claim—is well within the City's bonding capacity. (A 035–036.) Nevertheless, without out any support for their argument, the Employees baldly claim that a wage freeze is a "real possibility." (Opening Br., 44.) The Employees' speculative assertion is not supported by the evidence and is not enough to overcome the District Court's specific factual findings.

The District Court's finding that Algonquin/Liberty's proposed purchase of the Water System will likely result in future rate increases is supported by substantial credible evidence. The Employees' claim that they will be harmed by City ownership is not.

CONCLUSION

The Court should affirm the District Court's Findings of Fact, Conclusions of Law, and Preliminary Order of Condemnation. The District Court properly considered the effect of condemnation on the Employees as a single, but not dispositive, factor among many factors. Contrary to their argument, the Employees do not have a compensable property interest in this case. The District Court

correctly found that the City's offer of employment to the Employees is reasonable, fair, and will benefit the Employees. The District Court also correctly found that Algonquin/Liberty Utilities would likely increase rates if it were to acquire the Water System. The Employees have not met their heavy burden to demonstrate clear error by the District Court.

DATED this 9th day of December, 2015.

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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 9,152 words, excluding the caption, Table of Contents, Table of Authorities, Signature Block, Certificate of Compliance, Certificate of Service, and Exhibits.

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CERTIFICATE OF SERVICE

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

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