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 CARLYLE INFRASTRUCTURE PARTNERS, LP

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

Counsel for the 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*

TABLE OF CONTENTS

TABLE OF AUTHORITY

CASES

STATUTES

RULES

TREATISES

CONSTITUTIONAL PROVISIONS

INTRODUCTION

The City of Missoula ("City") seeks to acquire, through eminent domain, 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"). After months of discovery, motion practice, and a three-week trial, the District Court issued a 68-page decision, setting forth its analysis and determination that City ownership and control of the Water System is a more necessary public use. Carlyle challenges the District Court's rulings on certain pretrial motions, and certain findings of fact and conclusions of law supporting the preliminary order of condemnation. The challenged rulings are based on a sound and careful review of the facts and law, and should be affirmed.

STATEMENT OF THE ISSUES

1. Whether the power to exercise eminent domain over a private water supply system is limited to only those cities with a franchise or contract with the current owner.

2. Whether the District Court correctly determined Carlyle, as the acknowledged ultimate owner of the Water System, is a proper party to this eminent domain action.

3. Whether the District Court violated Carlyle's due process rights in declining to continue the trial.

4. Whether the District Court committed clear error in finding the construction of a second, competing water system in Missoula is not feasible.

5. Whether the District Court correctly applied the more necessary public use test by declining to impose additional requirements not found in Montana's eminent domain statutes or case law.

STATEMENT OF THE CASE

The City filed its Amended Complaint on May 5, 2014. (Court Record ("CR") 6.1.)

Carlyle moved for dismissal under Rule 12(b)(6), arguing it did not own the Water System and was not a proper party. (CR 10.7.) The District Court denied Carlyle's motion to dismiss on July 3, 2014. (Appendix ("A") 1-10.)

Carlyle moved for summary judgment arguing, again, that it did not own the Water System. Carlyle further argued the City had no eminent domain power absent a franchise or contract with Mountain Water. (CR 93.) The District Court denied Carlyle's summary motion judgment on February 23, 2015. (A 11-31.)

Trial on the issue of necessity was accorded expeditious and priority consideration, pursuant to Mont. Code Ann. § 70-30-202.

The trial date, March 18, 2015, was set by agreement of the parties at a Scheduling Conference with the District Court on July 7, 2014 (CR 35), and pursuant to the parties' Stipulated Rule 16 Scheduling Order, entered on August 13, 2014 (CR 49).

Despite its stipulation to a trial date, Mountain Water attempted to use manufactured discovery disputes to obtain a continuance. Mountain Water's first motion to continue was denied on December 23, 2014 (A 32-36), and its second was denied on February 18, 2015 (A 37-44). Mountain Water then sought a writ of supervisory control, which this Court denied on March 6, 2015. (A 45-47.) This Court determined Mountain Water had "not made a compelling case that it cannot be ready for trial," and the District Court's "denial of the motion for continuance was within the court's broad discretion in matters of trial administration." (A 46.)

Carlyle did not join in Mountain Water's motions for continuance or petition for writ. However, one week before trial, Carlyle for the first time joined in Mountain Water's Motion to Exclude Newly Disclosed Expert Opinions or, in the Alternative, Motion for a Continuance. (CR 256.) The motion was denied in an oral ruling on March 19, 2015. (A 48-66.)

The District Court, sitting without a jury, held trial, commencing on March 18, 2015 and ending on April 2, 2015. On June 15, 2015, it issued its Findings of Fact, Conclusions of Law, and Preliminary Order of Condemnation. (A 67-134.) This appeal followed.

STATEMENT OF FACTS

The City seeks to acquire and operate Missoula's Water System at cost for the benefit of ratepayers, to more aggressively repair leaks and invest in the system's long-term health, to be a more responsible steward of the community's environmental resources, and to coordinate the expansion and maintenance of the Water System with current City-owned utilities.

Carlyle, a Washington D.C. based company, purchased the Water System from the family corporation of Henry "Sam" Wheeler in December 2011. (A 72-74.) More specifically, Carlyle acquired ownership of Park Water Company, a California corporation wholly owned by Western Water Holdings, LLC, a limited liability company wholly owned by Carlyle. (A 72.) Park Water Company is a holding company, its only business being the ownership of three water companies – two in California and one in Missoula. (A 72.)

Carlyle is the General Partner or Managing Member of the companies that own and operate the Water System, and is directly responsible for any decision regarding operations, maintenance, capital investments and the sale of Mountain Water. (A 73, 77-81; TE 111; TR 167:23-168:7.) For this reason, it was Carlyle, not Mountain Water, with whom the City negotiated about purchasing the Water System. (A 77-80.) These discussions first began in 2010. (A 77.) The City agreed to support Carlyle's purchase of the Water System before the Montana Public Service Commission in exchange for Carlyle's guarantee that it would consider in good faith any future offer from the City to buy the Water System. (A 78.) No officer or employee of Mountain Water participated in these discussions. (A 78-79.) In fact, Carlyle asked the City to refrain from informing Mountain Water about the discussions. (A 78-79.)

On October 21, 2013, the Missoula City Council passed Ordinance 3509, authorizing acquisition of the Water System through a negotiated purchase or, if necessary, by exercise of the City's power of eminent domain. (A 79; TE 25.)

Despite its express agreement to consider the City's offers in good faith, Carlyle rejected the City's offers out of hand, without so

much as performing a valuation of Mountain Water or presenting a counter-offer to the City. (A 79-80; Trial Transcript ("TR") 2805:23-2806:1, 2808:14-25, 2815:13-2817:19; Trial Exhibit ("TE") 54-002, 137, 138, 1141, 1359, 1365.) Instead, Carlyle secretly developed a sophisticated marketing plan to sell all three Park Water companies together to the highest bidder. (TE 59-87.) These efforts culminated in a tentative merger agreement with Algonquin Power & Utilities Corporation, a Canadian corporation, six months after the City filed this action. (A 81.)

As a result of Carlyle's refusal to negotiate as promised, the City was forced to pursue condemnation. Carlyle publicly promised to make the process as long and expensive for the City as possible (CR 16, Ex. A), and it delivered. Carlyle filed numerous motions with little or no legal support and, along with Mountain Water, created discovery disputes in order to repeatedly seek continuances of the trial.

After several months of litigation, extensive motion practice, and a three-week trial, the District Court ultimately determined the City's ownership of the Water System is more necessary than its current use

as a privately owned for-profit enterprise.[1] (A 132-133.) Carlyle appeals, taking issue with certain pretrial rulings and the District Court's findings of fact and conclusions of law. The District Court should be affirmed in all respects.

STANDARD OF REVIEW

This Court reviews a district court's findings of fact for clear error. *AAA Constr. of Missoula, LLC v. Choice Land Corp.*, 2011 MT 262, ¶ 17, 362 Mont. 264, 264 P.3d 709. Clear error exists if substantial credible evidence does not support the findings of fact, if the district court misapprehended the evidence's effect, or if there is a definite and firm conviction that the district court made a mistake. *Pastimes, LLC v. Clavin*, 2012 MT 29, ¶ 18, 364 Mont. 109, 113, 274 P.3d 714, 71.

Questions of law, including decisions on motions for summary judgment and motions to dismiss, are reviewed de novo. *Citizens Awareness Network v. Mont. Dept. of Envtl. Rev.*, 2010 MT 10, ¶ 13, 355 Mont. 60, 227 P.3d 583; *H & H Dev., LLC v. Ramlow*, 2012 MT

[1] The District Court's specific findings of fact and conclusions of law are not a focal point of Carlyle's brief, but are addressed in some detail in the City's Answer Brief to Mountain Water.

51, ¶ 13, 364 Mont. 283, 286, 272 P.3d 657, 660; *Dennis v. Brown*, 2005 MT 85, ¶ 5, 326 Mont. 422, 424, 110 P.3d 17, 18.

The decision to grant or deny a motion to continue trial is within the sound discretion of a district court and reviewed for abuse of discretion. Mont. Code Ann. § 25-4-503; *In re Marriage of Eslick*, 2013 MT 53, ¶10, 369 Mont. 187. A district court's discretionary decisions, such as its decision to deny a continuance, constitute a due process violation only if the decision is "so unduly prejudicial that it renders the trial fundamentally unfair." *See Kelly v. California*, 129 S. Ct. 564, 566 (2008). When the constitutional issue of denial of due process as a matter of law underlies the action, the review is plenary. *State v. Pyette*, 2007 MT 119, ¶¶ 11-12, 337 Mont. 265, 268-69, 159 P.3d 232, 235.

SUMMARY OF ARGUMENT

Each of the District Court's decisions identified by Carlyle should be affirmed. First, Carlyle's dispositive motions were correctly denied. Montana law does not limit the power to exercise eminent domain over a private water system to only those cities which happen to have a franchise or contract with the current owner. As the plain meaning of the applicable statutes attest, and as this Court

determined in the City's prior condemnation action against Mountain Water, where there is no negotiated agreement between the parties to transfer ownership, Mont. Code Ann. § 7–13–4404 allows a City to pursue an eminent domain action. *City of Missoula v. Mountain Water Co.*, 228 Mont. 404, 411, 743 P.2d 590, 595 (1987) ("*Mountain Water I*").

Further, Carlyle is a proper party to this proceeding, and its motions arguing otherwise were appropriately denied. The record is replete with Carlyle's representations, including under oath, that it is the "ultimate owner" of Mountain Water. The undisputed evidence demonstrates Carlyle is, in fact, the final decision maker when it comes to the operation and potential sale of the Water System.

The District Court's denial of Carlyle's motion for a continuance did not violate Carlyle's due process rights, prejudice Carlyle or render the trial fundamentally unfair. Nor did the District Court abuse its discretion in declining to continue trial. Defendants failed to show good cause to modify the scheduling order. Their allegations of discovery abuse are unfounded, and they suffered no prejudice regardless. Tellingly, Carlyle does not identify a single piece of

evidence or a single argument it was prevented from presenting at trial.

Carlyle's arguments against the District Court's findings of fact and conclusions of law are also without merit. The District Court did not commit clear error when it determined it is not feasible for the City to develop or construct a competing water system. That finding was supported by Carlyle's own documented admissions. Indeed, because the evidence on this point was uncontroverted, Carlyle did not raise the issue prior to this appeal.

In addition, the District Court appropriately applied the "more necessary public use" standard at trial. *See* Mont. Code Ann. § 70-30-111(1)(c). Carlyle's suggestion that a proposed public use that is identical to the current use cannot be more necessary has been soundly rejected. *Mountain Water I*, 228 Mont. at 412-14, 743 P.2d at 595-96. Moreover, Carlyle's argument that the District Court should have imposed additional requirements – that it should have required the City to prove it did more to challenge Carlyle's ownership prior to seeking condemnation – finds no support in the law and disregards the actual facts.

ARGUMENT

I. THE POWER OF EMINENT DOMAIN IS NOT LIMITED TO ONLY THOSE CITIES WITH A FRANCHISE OR CONTRACT WITH THE CURRENT OWNER.

Carlyle argues Montana law forbids a city from exercising eminent domain over a private water system unless that city first produces a franchise or contract with the owner. Carlyle's theory, based on a tortured reading of the applicable statutes and case law, was correctly rejected by the District Court.

This Court has already recognized the City's right to proceed under Montana's condemnation statutes to acquire Mountain Water. In the 1980s, the City followed the very same procedure it has followed in this case. *See Mountain Water I*, 228 Mont. at 407, 743 P.2d at 592. No franchise or contract with Mountain Water was produced in the 1980s. Rather, the City passed an ordinance authorizing acquisition of the Water System. *Id.* The City then attempted to negotiate a purchase of the Water System and, when those negotiations failed, it brought its condemnation case. *Id.* This Court considered the procedure employed by the City and held:

> Under § 7–13–4403, MCA, the City properly exercised its right of offering to purchase the water system. Where, as here, there is no

> agreement to purchase, § 7–13–4404, MCA, provides that the City shall "proceed to acquire the plan or water supply under the laws relating to the taking of private property for public use."

Id., 228 Mont. at 411, 743 P.2d at 595 (emphasis added). *See also id.*, 228 Mont. at 415, 743 P.2d at 597 (Sheehy, J., dissenting) (agreeing with majority that "§ 7-13-4404, MCA, requires that when a municipality is unable to acquire a private water supply system by offering to purchase the same, then it may proceed to acquire the plant or water supply 'under the laws relating to the taking of private property for public use.'")

The above analysis is equally applicable today. Before filing this action, the City passed Ordinance No. 3509, which authorized the City to acquire the Water System. (TE 25-003.) Unable to reach a negotiated agreement with Carlyle, the City filed its eminent domain action. As this Court previously confirmed, the applicable statutes provide that where there is no agreement to purchase, Mont. Code Ann. § 7–13–4404 allows the City to seek to condemn the Water System. *Id.*

Contrary to Carlyle's argument, this Court's holding in *Mountain Water I* was supported by the plain and unambiguous language of the applicable statutes:

> **Mont. Code Ann. § 7–13–4403. Acquisition of private water supply system.** (1) It is provided that whenever a franchise has been granted to or a contract made with any person or persons, corporation, or corporations and such person or persons, corporation, or corporations, in pursuance thereof or otherwise, have established or maintained a system of water supply or have valuable water rights or a supply of water desired by the city or town for supplying the city or town with water, the city or town granting such franchise or entering in such contract or desiring such water supply shall, by the passage of an ordinance, give notice to such person or persons, corporation, or corporations that it desires to purchase the plant and franchise and water supply of such person or persons, corporation, or corporations. . . .
>
> **Mont. Code Ann. § 7–13–4404. Use of eminent domain powers to acquire water supply system.** (1) If agreement is not reached pursuant to 7–13–4403, then the city or town shall proceed to acquire the plant or water supply under Title 70, chapter 30. . . .

Mont. Code Ann. § 7–13–4403 does not make a franchise or contract a prerequisite to seeking eminent domain; it merely sets out the procedure the City must follow when, in fact, there is a franchise or contract in place. Interpreting § 7–13–4403 in the manner

suggested by Carlyle would require the Court to read it in isolation and disregard the next statute, which provides "[i]f agreement is not reached pursuant to § 7–13–4403, then the city or town shall proceed to acquire the plant or water supply under title 70, chapter 30 [i.e., by eminent domain]." Mont. Code Ann. § 7–13–4404(1).

"Statutes are not to be read in isolation, but as a whole." *In re Adoption of K.P.M.*, 2009 MT 31, ¶ 14, 349 Mont. 170, 201 P.3d 833. "The legislative intent is to be ascertained, in the first instance, from the plain meaning of the words used." *Western Energy Co. v. Dept. of Revenue,* 1999 MT 289, ¶ 11, 297 Mont. 55, 990 P.2d 767. "Statutory construction is a 'holistic endeavor' and must account for the statute's text, language, structure, and object." *S.L.H. v. State Compensation Mutual Insurance Fund,* 2000 MT 362, ¶ 16, 303 Mont. 364, 15 P.3d 948; Mont. Code Ann. § 1-2-101.

Here, the plain meaning of the words used in § 7–13–4403 and § 7–13–4404 is that where there is no agreement to purchase pursuant to § 7–13–4403, then the city shall proceed "to acquire the plant or water supply under title 70, chapter 30." Mont. Code Ann. § 7–13–4404(1); *see also, Mountain Water I*, 228 Mont. at 411, 743 P.2d at 595 As the District Court correctly concluded:

> [Carlyle's] proposed interpretation fails to adhere to a plain reading of the language used by the Legislature. Giving effect to all the words used in the enactment, it is plain that the Legislature intended to define the process to be used whenever a contract or franchise exists rather than to impose a prohibition on the power of a municipality to secure a water supply system by eminent domain to only those instances where there is a contract or franchise.

(A 24.)

Carlyle argues "the Legislature knows full well how to draft statutes allowing for the possibility that a particular section or subsection will not apply." (Carlyle's Brief, p. 29.) Quite so. And if the Montana Legislature had intended to limit the power of eminent domain over water supply systems to only those systems operated pursuant to a franchise or contract between the private owner and the city, it easily could have done so.

In its quest to effectively redraft § 7–13–4404, Carlyle points to three entirely unrelated statutes in which the legislature used the phrase "if [a particular statute or subsection] does not apply. . . ." (Carlyle's Brief, p. 30 (citing Mont. Code Ann. §§ 72–38–1005(3), 30-3-512(1)(c) and (2)(b), 39-71-745(2).) Because the legislature did not use the same phrase in § 7-13-4404, the argument goes, one can

assume it intended to bar cities without a franchise or contract from exercising the power of eminent domain. Carlyle ignores the fact that it would be wholly unnecessary and superfluous, in § 7-13-4404, to state a city can proceed to condemn "if § 7-13-4403 does not apply." The statute already makes clear eminent domain is available "[i]f agreement is not reached pursuant to 7–13–4403."

It is also telling that, in arguing for an interpretation that puts cities without a franchise or contract in an entirely different class than those that do have such agreements, Carlyle does not even attempt to construct a policy rationale for such an arbitrary classification, much less produce legislative history that supports it. The taking of a water system by a municipality asks whether the proposed public use is "more necessary" than the current use. *See City of Missoula v. Mountain Water Co.*, 236 Mont. 442, 447-48, 771 P.2d 103, 108 (1989) ("*Mountain Water II*"). There is no conceivable reason the question can be asked only in cases in which the city happens to have a franchise or contract with the current owner. Such a classification would lack any rational basis, which is presumably why the Montana Legislature never considered it.

Furthermore, "[i]t has long been a rule of statutory construction that a literal application of a statute which would lead to absurd results should be avoided whenever any reasonable explanation can be given consistent with the legislative purpose of the statute." *See Chain v. Dept. of Motor Vehicles,* 2001 MT 224, ¶ 15, 306 Mont. 491, 36 P.3d 358). Even assuming Carlyle presented a correct "literal application," such application would lead to the absurd result of arbitrarily stripping cities without a franchise or contract of the power of eminent domain.[2]

Nor is Carlyle correct the District Court failed to "give meaning to the words 'pursuant to 7-13-4403.'" (Carlyle's Brief, p. 28.) It is Carlyle that seeks to read language into the statute that is not there. Rather than reading § 7-13-4404(1) as written, Carlyle would have the Court read it as follows: "If an agreement is not reached pursuant to 7-13-4403, [and the city or town was required under 7-13-4403 to seek agreement as the grantor of a franchise or contract], then the

[2] Carlyle suggests municipalities without a contract or franchise have no cause to worry because they are still "protected" by the PSC's oversight over private water utilities. (Carlyle's Brief 31.) Equating the power to condemn with the "protection" afforded by the PSC is a far stretch. Indeed, local regulation and control over the water system – something now enjoyed by every Montana municipality but Missoula – formed an important part of the District Court's necessity finding. (A 101.)

city or town shall proceed to acquire the plant or water supply under Title 70, chapter 30." Again, that is not what § 7-13-4404 says.

Carlyle also reads § 7-13-4403 too narrowly. The statute indeed applies "whenever a franchise has been granted to or a contract made with" the water system owner. It does not say, however, that the franchise or contract must have been granted by the municipality seeking to acquire the system. To the contrary, the statute provides "the city or town granting such franchise or entering in such contract or desiring such water supply shall, by the passage of an ordinance, give notice. . . ." Mont. Code Ann. § 7–13–4403(1) (emphasis added). The statute further states the owners subject to its provisions include those who maintain a water system or possess valuable water rights "in pursuance [of a franchise or contract] or otherwise. . . ." Mont. Code Ann. § 7–13–4403(1) (emphasis added). Carlyle is simply wrong to assert "7-13-4403 applies only if a municipality and the water system's owner have a franchise agreement or contract. . . ." (Carlyle's Brief, p. 26.)

Finally, Carlyle ignores municipalities' inherent authority to exercise eminent domain. This Court has recognized "[g]enerally, the power of eminent domain is viewed as an inherent attribute of

sovereignty existing without reliance on constitutional acknowledgement." *Lake v. Lake Cnty.*, 233 Mont. 126, 130, 759 P.2d 161, 163 (1988). The power is "an embodiment of the principle that the rights of the individual sometimes pale in comparison with the needs of the common welfare." *Id.* This is in keeping with the Montana Constitution's "intent to endow cities with a broad grant of power." *Id.*; Mont. Cost. Art. XI, 4(2) ("The powers of incorporated cities and towns and counties shall be liberally construed"); Mont. Code Ann. § 7-1-106 ("[E]very reasonable doubt as to the existence of a local government power or authority [is to] be resolved in favor of the existence of the exercise of that power or authority."). *See also Lake*, 233 Mont. at 129-33, 759 P.2d at 162-65 (finding the plaintiffs took "an overly narrow view of Ronan's power of eminent domain" when they interpreted statutes to say the formation of a joint airport board precluded the city's independent exercise of eminent domain).

In summary, the City has satisfied all the requirements under § 7–13–4403 and § 7–13–4404. Carlyle owns the Water System. The City desires the system, and passed an ordinance giving notice to Carlyle that it wished to purchase the system. When no agreement

was reached under § 7–13–4403(1), City filed this condemnation action.

II. THE DISTRICT COURT CORRECTLY DETERMINED CARLYLE IS A PROPER PARTY TO THIS PROCEEDING.

Carlyle argues it does not technically own the Water System and is not, therefore, a proper party. Despite numerous representations, including under oath, that it is the "ultimate owner" of Mountain Water, and despite the fact that Carlyle has sought affirmative monetary relief in this condemnation action, Carlyle now hopes to disavow its interest by drawing upon dubious technical legal distinctions. The District Court correctly rejected these arguments.

The undisputed facts prove Carlyle has represented itself to be the ultimate owner of the property to be condemned, and is in fact the final decision maker when it comes to the operation, maintenance, capital investment, and potential sale of the Water System. (A 73, 77-81; TE 111; TR 167:23-168:7.) As the District Court found, "[i]n December 2011, Carlyle Infrastructure acquired ownership of Park Water and assumed ultimate ownership of Mountain Water and the Water System. . . ." (A 74.) Carlyle is the General Partner or Managing Member of the companies or partnerships that own and

operate the Water System. (A 73.) The management and members of the boards of directors of Western Water, Park Water, and Mountain Water serve at the pleasure of and take direction from Carlyle, and the boards of each of these companies is majority controlled by Carlyle. (A 73.)

The undisputed evidence leaves no doubt "Carlyle Infrastructure consistently held itself out as the corporate entity that was responsible for negotiating any sale of assets of the company, and claimed to have a role in operating the Water System along with Mountain Water." (A 7.) For this reason, the City negotiated at all times with Carlyle, not Mountain Water, regarding the potential sale of the Water System to the City. Carlyle did not even inform Mountain Water of the discussions or its plans to sell the Water System. (TE 1383; TR 152:21-153:5, 161:12-163:11.)

Carlyle offers no rebuttal to the fact that it is the ultimate owner of Mountain Water. It does not disagree that, barring a successful condemnation action, it has absolute control over Mountain Water's destiny. Instead, Carlyle relies on the fact that Mountain Water holds legal title to Water System's assets. This fact, alone, does not permit Carlyle to pretend it is not the property owner.

In the District Court, Carlyle cited cases standing for the unremarkable and uncontested proposition that a shareholder in a corporation does not have legal title to the corporation's property. However, not one of the cases cited by Carlyle presents anything close to an analogous situation – where an entity that wholly owns and controls the company with legal title is, by its own admission, the ultimate owner and entity to bargain with to purchase the property. Under these circumstances, although Carlyle may not have legal title, it is a proper party as the actual owner of the property. *See, e.g., Jacobucci v. District Court In and For Jefferson County*, 541 P.2d 667, 673-74 (Colo. 1975) (en banc) (finding shareholders were proper parties to an eminent domain action over corporate property because "[w]hile the 'naked title' may stand in the name of [the corporation], the ditch, reservoir, and water rights are actually owned by the [shareholder] farmers who are served thereby.")

Carlyle contends it is merely an upstream corporate owner and cites a legal treatise stating "[s]hareholders of a corporation, however, are not normally parties to the condemnation of corporate owned lands." 7 Nichols on Eminent Domain G1A.02[3][c] (emphasis added). However, this treatise only underscores the fact that determining the

proper parties to a condemnation proceeding depends on the facts of each case, not a mere examination of title.[3]

In addition, if Carlyle truly had no ownership interest in the property being taken, it would have no claim to monetary compensation for the proposed taking. However, in the valuation trial, Carlyle affirmatively sought $4.6 million in compensation for pension plan liabilities it would allegedly suffer if the City acquires the Water System. (A 135.)[4] Carlyle cannot have it both ways.

Carlyle is no mere shareholder. It is the one and only entity with ultimate and complete control over the property at issue in this case. For this reason, the District Court correctly denied Carlyle's motion to dismiss and motion for summary judgment.

III. THE DISTRICT COURT DID NOT VIOLATE CARLYLE'S DUE PROCESS RIGHTS BY DECLINING TO CONTINUE THE TRIAL.

---

[3] The treatise cites one case for the quoted proposition, *EFCO-FA v. State of New York*, 266 A.D.2d 338 (N.Y. Div. 1999). In that case, the State of New York was seeking to condemn the property of a corporation. *Id.* An elderly, 35% stockholder and corporate officer sought a trial preference due to his age and health. *Id.* The request was denied because, "as a corporate officer and partial stockholder," he was not a "real party in interest." *Id.* The contrast between a minority stockholder and an entity like Carlyle that exercises complete control over the property at issue could hardly be more stark.

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

Carlyle argues the District Court violated its due process rights by denying its motion for a continuance. As a threshold matter, Carlyle has waived this argument because it did not make a due process argument below. Nevertheless, Carlyle has not met the heavy burden of establishing a due process violation. Carlyle must show the denial of a continuance was "so unduly prejudicial that it renders the trial fundamentally unfair." *See Kelly*, 129 S. Ct. at 566; *Singh v. Holder*, 638 F.3d 1264, 1268–69 (9th Cir. 2011) (applying "fundamental unfairness" standard when reviewing denial of a continuance); *In re B.B.*, 2006 MT 66, ¶ 26, 331 Mont. 407, 133 P.3d 215.

Rulings on motions for a continuance are addressed to the sound discretion of the district court. *In re Mental Health of T.M,* 2004 MT 221, ¶ 7, 322 Mont. 394, 396, 96 P.3d 1147, 1149. The denial of a motion for a continuance will not be overruled unless there is an affirmative showing of prejudice. *Fair Play Missoula, Inc. v. City of Missoula*, 2002 MT 179, ¶ 34, 311 Mont. 22, 32, 52 P.3d 926, 932; *In re Marriage of Pospisil*, 2000 MT 132, ¶ 18, 299 Mont. 527, 532-33, 1 P.3d 364, 369. Not every alleged abuse of discretion constitutes a

due process violation—a discretionary ruling only amounts to a due process violation if "render[ed] the trial fundamentally unfair." *See Kelly*, 129 S. Ct. at 1268–69. Regardless, the District Court properly exercised its discretion in denying a continuance because Defendants failed to show good cause to modify the scheduling order to which they had stipulated.

Scheduling orders "may be modified only for good cause and with the judge's consent." Mont. R. Civ. P. 16(b)(4). *See also, e.g. Lindey's, Inc. v. Prof. Consultants, Inc.,* 244 Mont. 238, 243, 797 P.2d 920, 923–24 (1990) (no good cause to amend scheduling order); *In re Marriage of Smith,* 270 Mont. 263, 270–71, 891 P.2d 522, 526–27 (1995) (same). "Good cause is generally defined as a 'legally sufficient reason' and referred to as 'the burden placed on a litigant (usu. by court rule or order) to show why a request should be granted or an action excused.'" *Brookins v. Mote*, 2012 MT 283, ¶ 29, 367 Mont. 193, 292 P.3d 347. In this case, the good cause standard is informed by the Montana Legislature's express demand that in eminent domain actions, "parties shall proceed as expeditiously as possible" and that the Court "give the proceedings expeditious and priority consideration." Mont. Code Ann. § 70-30-206(5).

The summons in this case was served on May 5, 2014. (CR 8.) By statute, the trial should have commenced on November 5, 2014, unless shortened or lengthened for good cause. Mont. Code Ann. § 70-30-202. To accommodate Defendants' demands for more time, the parties agreed, and the District Court approved, a summons-to-trial period of over 10 months – a period about 67% longer than the period generally provided by statute. Carlyle stipulated to the Scheduling Order setting the March 18, 2015 trial date. (CR 49.)

Carlyle argues it was prejudiced by the City's discovery conduct, and should have been granted a continuance, because: (1) some documents were initially produced by the City in a format that was not to the liking of Carlyle's third party document vendor, (2) some email communications with one expert were produced late, and (3) certain of the City's experts supplemented their disclosures shortly before trial.

Before explaining why Carlyle's complaints are unfounded, it should be noted what Carlyle does not say. Carlyle does not identify a single piece of evidence or a single argument it was prevented from presenting at trial. Stripped down, Carlyle's complaints concern inconveniences for its counsel; they do not support an argument for

actual prejudice, much less a violation of due process which rendered the trial fundamentally unfair.

A. No Discovery Abuse Occurred or Caused Prejudice.

Carlyle's allegations of discovery abuse are incorrect and, regardless, the alleged misconduct occasioned no prejudice. The District Court did not abuse its discretion holding Carlyle to the trial date to which Carlyle had agreed.

Moreover, only Mountain Water, not Carlyle, filed the first two motions for continuance and sought a writ of supervisory control. (CR 119, 186.) The only motion Carlyle did file was a Joint Motion To Exclude Newly Disclosed Expert Opinions or, in the Alternative, Motion for a Continuance filed on the eve of trial, which was denied in an oral ruling on March 19, 2015. (A 48-66.) The only issue raised in that motion was the alleged late supplementation of expert reports. (CR 257.) Having failed to raise the other issues in the District Court (*i.e.*, PDF documents and Roger Wood emails), Carlyle is precluded from raising them here. *See Pilgeram v. Greenpoint*, 2013 MT 354, ¶¶ 20-21, 373 Mont. 1, 313 P.3d 839, 843-44. For this reason alone, Carlyle's due process argument fails. Nonetheless, each of the discovery disputes identified by Carlyle is addressed below.

1. PDF Documents

Carlyle asserts the "most egregious[]" conduct by the City was "deliberately converting its documents to an unusable format." (Carlyle's Brief, p. 41.) Carlyle provides few details, but is referring to the fact that the City initially produced emails as PDF files, rather than in their native format. These emails were produced by the City at a very early stage in the litigation – most more than six months before trial – and were utilized extensively by Defendants in depositions, in preparing experts, and at trial. Carlyle's complaint really boils down to the fact that the emails were initially produced in a format its third party document vendor found inconvenient.

Mountain Water complained to the Special Master about the PDFs. (CR 81.) The City pointed out Defendant's discovery requests did not specify that emails be produced in a particular format and the format used by the City was appropriate. (CR 98.) Indeed, courts have universally held "[w]ithout specific instructions otherwise, pdf format – a familiar format for electronic files that is easily accessible on most computers – is presumptively a 'reasonably usable form.'" *Rahman v. the Smith & Wollensky Rest. Group, Inc.*, 2009 WL 773344 at *4 (S.D.N.Y. Mar. 18, 2009); *see also Covad Comms. Co. v. Revonet,*

Inc., 267 F.R.D. 14 (D.D.C. 2010) (unless a party specifically requests native-format files or metadata, there is no need to provide either).

The City produced e-mails in PDF Portfolio form not to obstruct, but because doing so allowed the City to Bates stamp the e-mails and make them more usable. A PDF Portfolio is simply an electronic folder that groups PDF documents so as to provide full search capability, sortable fields (e.g., by sender, recipient, date, etc.), all attachments, and metadata – it is essentially an email inbox in PDF form. (CR 98, Ex. A.) Although it turned out Defendants' third party vendor wanted a different format, the Rules do not require production in the most convenient format for uploading to a third-party vendor's database. Instead, production must be in "a reasonably usable form," Mont. R. Civ. P. 34(b)(2)(E)(ii), and the PDF Portfolios satisfied that requirement.[5]

On February 3, 2015, the Special Master ordered the City to "re-produce the emails previously produced as PDF portfolios. . . ." (CR 170 at 4.) Although the City strongly disagrees with the Special

[5] By comparison, Defendants produced individual PDFs or image files that required the City to open each file separately and did not allow the City to search across multiple documents, or categorize and sort documents. (CR 98, Ex. B and C.)

Master's decision, in the interests of time and economy it re-produced the documents and did not appeal the matter to the District Court.

Despite Carlyle's allegations of "egregious" misconduct, the Special Master specifically pointed out his ruling "is not to say that producing documents in PDF portfolios is per se unreasonable." (CR 170 at 4.) Rather, given the volume of documents, Defendants' alleged difficulty in searching PDFs, and the City's access to e-discovery software through its Seattle counsel, the Special Master decided to have the City re-produce the emails. (CR 170 at 4.) The Special Master found no discovery abuse. The fact that neither the Special Master, nor the District Court, ever found the City guilty of any discovery abuse, in addition to the fact that Defendants themselves never sought any discovery sanction against the City, undermines Carlyle's allegations of misconduct and renders its legal authority inapt. *Compare First Bank v. Heidema*, 219 Mont. 373, 376, 711 P.2d 1384, 1386 (1986) (concerning party's willful refusal to attend deposition, to produce documents, and ignoring court orders directing compliance).

Thus, although Carlyle complains about "a dump of 26,581 documents just weeks before trial" (Carlyle's Brief, p. 42), these were

all documents Carlyle had had in its possession already, and it used the same documents long before they were re-produced in another format. For this reason, Carlyle cannot point to one document it was unable to review, or was otherwise prevented from using at trial.

2. Roger Wood Emails.

Carlyle next complains the City "refused to produce any communications from one expert until twelve days before trial. . . ." (Carlyle's Brief, p. 42-43.) That statement is false. The City produced more than 10,000 pages of email communications between the City and the subject expert almost five months before trial. (CR 172, 3.)

Carlyle is referring to the internal office emails of Roger Wood of Moelis & Company. Of note, Roger Wood[6] did not even testify at either the necessity trial or at the valuation hearing. Like each of the discovery disputes raised by Carlyle, this is a non-issue.

In discovery, Defendants requested communications between the City and Mr. Wood, which the City produced. (CR 172, 4-5, Ex. A.) Specifically, the City searched for and located every e-mail message that contained an address ending in "@moelis.com," a search term

[6] Roger Wood is an investment banker who was prepared to assist the City with a negotiated transaction. But, Carlyle refused to negotiate.

that captured all communications sent to or received electronically from Wood or any representatives of Moelis. (CR 172, 4-5, Ex. A.)

Mountain Water later complained, at oral argument before the Special Master, that the City did not produce internal office emails between Wood and other members of his firm. As the City pointed out, the City was not in possession of the communications, and Defendants had not asked for them in discovery. (CR 172, 4-12, Ex. A, C.) Indeed, Defendants did not request or produce any internal communications from their own experts. (CR 172, Ex. B.) Finally, any relevant, substantive communication to or from Wood would have necessarily included City representatives, and the City had already produced those communications.

Despite these points, the Special Master ordered Mr. Wood's internal office emails produced. (CR 169.) The City produced them, at significant expense. In the end, just as the City had argued, the internal office emails contained nothing of substance that was not duplicative of the thousands of emails it had already produced. Indeed, Carlyle cannot point to an email it received as part of the alleged late production that it did not already have or was somehow prevented from using at trial.

3. Expert Supplements

Carlyle next argues the City "litigated by ambush" because it supplemented its expert disclosure after the close of discovery. (Carlyle's Brief, p. 42.) Carlyle fails to mention Defendants supplemented their own expert disclosure seven times after the close of discovery, including one supplement the day before trial and two during the trial itself. Indeed, Defendants' late supplements included documents that placed an additional $15 million at play in the case, including the following:

> A new valuation analysis by Defendants' expert Robert F. Reilly, which purported to value the Water System at nearly $12 million above Defendants' previous valuation.
>
> Cost estimates by Defendants' Hydrometrics experts for repairs to the 10 Rattlesnake Wilderness Dams, estimating top priority repairs of at least $3 million.
>
> A new "Rate Impact Analysis" by Defendants' expert Montague DeRose and Associates that, among other things, recalculated the City's bond rating, provided a new analysis of the operating revenues for seven Montana water supply systems, and attached 130 pages of new appendices.
>
> An exhibit list which listed more than 200 new exhibits not previously provided or identified,

> including a new five-year projection of Mountain Water's capital expenditures.

(CR 271, 3-4.)

Although both parties had to deal with rapid schedule, Carlyle suggests it was unfairly prejudiced by the City's late expert supplements. The only supplementation Carlyle took issue with in the District Court, and the only one arguably preserved on appeal, concerns the City's summary Preliminary Business Plan ("Plan"), and in particular its calculation of administrative costs. Carlyle argues it was "ambushed" by the City's summary Plan when the City supplemented Bruce Bender's and Dale Bickell's expert disclosures with the Plan nine days before trial. The facts tell a different story.

First, the Plan was mostly a mere summary of information Defendants had had for months. The City's plan to manage and operate the Water System was the subject of extensive discovery and testimony at trial. Defendants took 37 depositions of which19 were city employees/officials and another 16 were city witnesses and experts. Defendants questioned the 37 witnesses deposed at length about the City's plans upon acquisition of the Water System. Then, at trial, the following City employees/officials specifically testified as

to how the City's planned management and control of the Water System would differ from the operation by a profit-driven hedge fund like Carlyle:

- City 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);
- Environmental Health Supervisor of Missoula's Water Quality District Peter Nielsen (TR 1693:7– 1724:4, Tr.-7, 1736:17–1766:7.)
- City Councilman Jason Weiner (TR 1466:25-1489:22.)
- City Councilman Bryan von Lossberg (TR 1102:1-1131:20.)

The voluminous testimony provided by City witnesses was simply reduced to condensed written summary in a 14-page written document with appendices. (TE 1499.)

The only aspect of the Plan that was arguably new was the calculation of the City's administrative costs in operating the Water System. The Plan stated Mountain Water's administrative costs are presently $4,465,960 (by far the highest in the State), but the City could provide the same services for $2,415,082. (TE 1499.)

This was indeed a new opinion because Caryle refused to provide the City access to critical information until after the Special Master issued an order compelling the disclosure. The City's Central Services Director, Dale Bickell, had previously estimated the City could provide administrative services for approximately $1,000,000. (CR 271, Ex. A, 154:2-156:10.) That opinion was provided before Carlyle was ordered to provide access to information which allowed for a more accurate calculation.

Bickell and Bruce Bender, the City's Chief Administrative Officer, are the City employees responsible for managing the City's administrative services. They, in conjunction with the Mayor, needed to assess how the employees of Mountain Water could be

administratively integrated into the City's organizational structure, as well as the financial efficiencies of that integration. That assessment necessarily depends on information related to the salaries of Mountain Water employees and Mountain Water's current operations, plans, and finances. From the outset of this case, however, Defendants refused access to City employees to those documents, designating them all as "attorney's eyes only" ("AEO"). (CR 80; CR 165; CR 271, Ex. A, 154:2-156:10.) Defendants' gross overuse of AEO designations prevented the City's attorneys from sharing information with their own clients.

The City's inability to view these documents prevented it from calculating administrative costs with any precision. Nevertheless, Bickell estimated administrative costs would be approximately $1 million. (CR 271, Ex. A, 154:2-156:10.) Without access to the AEO documents, he had to base the estimate on the administrative costs of other municipalities, the City's own administrative costs in running its wastewater utility. (CR 271, Ex. A, 154:2-156:10.)

The City was ultimately forced to file a motion to compel to allow the Mayor, Bickell and Bender to review the AEO documents. (CR 80.) On January 22, 2015, the Special Master ordered: "Over the

objection of the Defendants, the SM ORDERS the Defendants to provide access to the AEO documents to Mayor Engen, Bruce Bender and Dale Bickell." (CR 165, 2.) As the Special Master recognized, the volume of AEO documents the Mayor, Bickell, and Bender needed to review was "voluminous." (CR 165, 2.) As soon as the review was complete, the City updated its expert disclosure.

Even assuming the City's alleged late supplementation was not Defendants' own doing, Defendants have failed to explain how they were prejudiced by the supplement nine days before trial. There are no facts suggesting Defendants were prevented from presenting any evidence at trial due to the City's supplement.

In summary, the discovery disputes cited by Carlyle did not prejudice Defendants in any way. As this Court held in denying Mountain Water's petition for writ of supervisory control:

> Simply stated, the Company has not made a compelling case that it cannot be ready for trial. We observe that the Company waited two weeks from the entry of the District Court's order to seek this writ. It does not appear that the Company sought sanctions as alternative relief in either of its motions to continue, despite the scheduling order's specific statement that failure to fairly and accurately respond to discovery may result in appropriate sanctions. An extra four months already has been built into the schedule,

> and the Special Master did not actually find any discovery abuses.
>
> In addition, it does not appear that the District Court is laboring under a mistake of law that it cannot grant a continuance. In its February 18 order denying the Company's motion for continuance, the court considered the totality of the circumstances. It concluded that good cause for continuing the trial was not demonstrated by the bare assertion that the Special Master's rulings allow for new discovery to be provided within a few weeks of trial, particularly given the "extreme and expensive disruption for everyone involved" that would occur if the trial were to be moved. It appears that the court's denial of the motion for continuance was within the court's broad discretion in matters of trial administration.

(A 46.)

B. Denying a Continuance Did Not Violate Due Process.

Carlyle asserts a due process violation. It did not raise this argument in the District Court and, apart from vague allegations that it needed more time for discovery, does not explain on appeal how its constitutional rights were violated.

The guarantee of due process, under the Fourteenth Amendment to the United States Constitution and the Montana Constitution at Article II, § 17, has both a procedural and a substantive component. *Englin v. Board of County Com'rs,* 2002 MT 115, ¶ 14, 310 Mont. 1, ¶

14, 48 P.3d 39, ¶ 14. Claiming the denial of a continuance "left [a party] with inadequate time to prepare their case . . . is procedural in nature, and therefore constitutes a procedural due process claim." *Montanans for Justice v. State ex rel. McGrath*, 2006 MT 277, ¶ 29, 334 Mont. 237, 247-48, 146 P.3d 759, 767.

"Under both federal and state jurisprudence the requirements for procedural due process are (1) notice, and (2) opportunity for a hearing appropriate to the nature of the case." *Id.*, ¶ 30. Here, there is no argument that Carlyle was denied notice of the claims or allegations against it. Instead, Carlyle argues the denial of additional time to conduct discovery prevented a meaningful hearing.

Carlyle relies on *Wilson v. Department of Public Service Regulation*, 260 Mont. 167, 858 P.2d 368 (1993) for support, but its reliance is misplaced. In a later case in which this Court expressly rejected the argument that an abridged timeframe for trial preparation constituted a violation of procedural due process, this Court distinguished *Wilson* and called attention to its narrow and fact-specific holding:

> Proponents rely on *Wilson v. Dept. of Public Service Reg.,* for the proposition that a "meaningful hearing can not *[sic]* be had when a

> party is made to proceed without the ability to discover the evidence and allegation to be advanced against them." 260 Mont. 167, 858 P.2d 368 (1993). We note at the outset that *Wilson* was an appeal from a Public Service Commission (PSC) proceeding and not an appeal regarding a ballot initiative. Therefore, there was no legal or circumstantial requirement for expediency in *Wilson*—a distinction of significant consequence. That said, we did conclude that appellants in *Wilson* were denied discovery in violation of their due process rights. 260 Mont. at 172, 858 P.2d at 371. However, denial of the Wilsons' discovery motion was not the sole basis for our determination. Rather, we relied on cumulative circumstances to conclude that fundamental fairness and due process of law were denied. Specifically, the *decision appealed from* contained "no specification of the orders, rules or statutes which the Wilsons [were] alleged to have violated[,]" the Wilsons were not "afforded adequate, timely notice of the persons who [would] testify" nor did they know the "nature of the evidence" that would be presented in support of the PSC's revocation of their "valuable property right" in a transportation certificate. *Wilson,* 260 Mont. at 172, 858 P.2d at 371.

Montanans for Justice, ¶ 37.

There are no circumstances, cumulative or otherwise, that suggest Carlyle was denied its right to notice and a meaningful hearing or that the trial was fundamentally unfair. As in *Montanans for Justice*, the District Court's decisions were guided by specific

statutes requiring expediency. This was not inconsistent with due process, and the District Court did not blindly adhere to arbitrary deadlines. Quite to the contrary, the District Court considered these matters carefully, first in consultation with the parties in setting a trial schedule, then in weighing Defendants' specific arguments when seeking a continuance.

IV. THE DISTRICT COURT DID NOT COMMIT CLEAR ERROR IN FINDING CONSTRUCTION OF A SECOND, COMPETING WATER SYSTEM IN MISSOULA IS NOT FEASIBLE.

Carlyle attacks the District Court's finding of fact that "it is not feasible or practical for the City to develop or construct a competing water system." (A 81.)[7] Carlyle claims the finding is "wholly unsupported by the record." (Carlyle's Brief, p. 36.) Carlyle's position is surprising, given the District Court's finding is largely based on Carlyle's own admissions. (Tr. 21:8-22:2; TE 59.)

Carlyle's own materials marketing the sale of Mountain Water explain quite compellingly there are "significant barriers to entry" into a community that already has a water system. (TE 59-35.) Carlyle's

[7] The District Court actually issued two findings in this regard. The first, not cited by Carlyle, provides "[i]t is not feasible or practical for the City to build a second water system to serve the community due to the prohibitive capital cost to construct a new system." (A 77.)

materials state "[e]ven where no specific authority is required to construct a water distribution system, the capital cost to build a competing system to serve a community is largely prohibitive." (TE 59-35 (emphasis added).) Thus, to prospective bidders in the sale of Mountain Water, Carlyle touted the fact that building a competing water system is not feasible and thus "enhance[es] opportunities for incumbents":

> The high construction cost of a new water utility system, the need to secure stable and cost-efficient water sources and the challenge of complying with increasingly complex regulatory requirements inhibit competitive entrants. Water utilities require more capital invested per dollar of revenue than any other regulated industry, limiting the scope of competitors willing to enter the market and enhancing opportunities for incumbents.

(TE 59-14.)

It is true the feasibility of constructing a second, competing water system in Missoula was not a major focus at trial. Carlyle attempts to capitalize on this fact, but the dearth of discussion was not due to a lack of evidence. The opposite is true. The evidence on this point was uncontroverted.

Carlyle did not dispute the evidence at trial about the "significant barriers" and "largely prohibitive" capital costs of building a competing system, presumably because these were Carlyle's own conclusions. Nor did Carlyle raise the issue in the numerous motions it made before, during, and after trial. Even if its argument had support in the record, which is does not, Carlyle may not raise an argument for the first time on appeal. *Pilgeram*, ¶¶ 20-21 ("It is fundamentally unfair for a party to withhold an argument at trial, take a chance on a favorable outcome, and then assert a separate legal theory when the trial strategy fails.")

Carlyle also misapplies the legal standard. Carlyle suggests part of the City's prima facie case was to prove it could not construct a competing water system. Carlyle cites *Mountain Water I* as support, but that opinion never mentioned the possibility of building a competing water system. 228 Mont. at 412, 743 P.2d at 595. Rather, this Court discussed "the broad range of considerations in determining whether a proposed public use is more necessary than the present use." *Id.*

In the 1980s litigation, this Court found the pivotal question was whether the taking was a "reasonable, requisite, and proper means to

accomplish the improvement." *Id.* With this in mind, the City does not dispute in cases where there is evidence the construction or purchase of another property is a realistically feasible alternative (Carlyle presents a hypothetical involving the construction of a parking garage), that evidence may appropriately be part of the "broad range of considerations" in the necessity analysis. However, it is not part of the condemnor's prima facie case, and the evidence at trial was uncontroverted that building a second, competing water system in Missoula is not feasible.

V. THE DISTRICT COURT CORRECTLY DETERMINED CITY OWNERSHIP AND CONTROL IS A MORE NECESSARY PUBLIC USE.

Carlyle suggests the City cannot prove its use is a "more necessary public use" under Mont. Code Ann. § 70-30-111(1)(c) because its proposed public use is identical to the current use. That position has been squarely rejected by this Court.

In the 1980s litigation, this Court recognized a city may take a privately owned water utility, even if the water utility will be devoted to an identical purpose, if the evidence demonstrates municipal ownership is "more necessary." *Mountain Water I*, 228 Mont. at 412-14, 743 P.2d at 595-96. It rejected the District Court's "apparent[]"

conclusion that "so long as Mountain Water is running an economical system which is not charging an excessive rate and is furnishing adequate service, there can be no basis for acquisition by the City." *Id.*, 228 Mont. at 412, 743 P.2d at 595. Carlyle cites to Justice Sheehy's dissent in *Mountain Water I*, but even the dissent confirmed "[s]ection 70-30-111(3) is not limited to a situation where the condemnor proposes to devote the property to a different public use." *Id.*, 228 Mont. at 417, 743 P.2d at 598 (emphasis added).

Carlyle is also incorrect that "at least one case suggests an identical use cannot be 'more necessary.'" (Carlyle's Brief, p. 39.) The case cited, *State ex rel. Butte-Los Angeles Mining Co. v. District Court*, 103 Mont. 30, 60 P.2d 380, 381-84 (1936), involved competing claims by two mining operations to use a tunnel to transport ore. *Id.* Although the Court noted both miners intended to use the tunnel for the same purpose (transporting ore), it did not find this to be a bar to eminent domain. Rather, it considered all the evidence – in particular the fact that the plaintiff could still reach its ore by other means – and found the taking was not warranted. *Id.*

Carlyle next argues that, even if eminent domain is permitted for an identical use, the "more necessary" test must involve more than

"an abstract political question whether municipal or private ownership is preferable." (Carlyle's Brief, p. 40.) In light of the copious amount of evidence submitted over the course of the three-week trial and the District Court's extensive findings, Carlyle's attempt to characterize the District Court's analysis as answering an "abstract political question" is baseless. In this regard, Carlyle urges the Court to adopt two prerequisites to a municipal taking that are nowhere to be found in the statutes or case law.

Carlyle argues that, where the city intends to use property for an identical purpose, it must first: (1) express concern to the property owner, regulatory authority, and others about problems with the current use, and (2) take action to address the problems outside of eminent domain. (Carlyle's Brief, p. 40.) There is no legal authority for the notion that the City's alleged failure to do more to challenge Carlyle's ownership before filing suit can operate as some kind of bar to condemnation. To the extent the evidence is credible or even relevant, it at most weighs upon the broad range of considerations that inform the necessity analysis. Carlyle had the opportunity to present its evidence at trial.

Moreover, Carlyle fails to mention the City's decision to not fight Carlyle in the PSC or challenge it more aggressively before filing the eminent domain action was due to Carlyle's own wrongful conduct. Carlyle convinced the City to support its purchase of Mountain Water in 2011 by promising it would sell the Water System to the City after one year. (A 78.) Instead, Carlyle took affirmative steps to prevent the City from acquiring the Water System, and rejected the City's offers out of hand. (A 79-80; TR 2805:23-2806:1, 2808:14-25, 2815:13-2817:19; TE 54-002, 137, 138, 1141, 1359, 1365.) Thus, by arguing the City did not do enough to challenge Carlyle's ownership before filing suit, Carlyle seeks to take advantage of its own misconduct. Regardless, the City's strategic decisions before filing suit have little, if anything, to do with the question of public necessity.

CONCLUSION

Carlyle's dispositive motions were correctly denied because Montana law does not limit the power to exercise eminent domain over a private water system to only those cities which happen to have a franchise or contract with the current owner, and because Carlyle admitted it is the "ultimate owner" of Mountain Water. The District

Court did not abuse its discretion in declining to continue trial because Defendants' allegations of discovery abuse are without merit and, regardless, caused no prejudice or denial of due process. The District Court's findings of fact and conclusions of law issued after trial are also sound. It was not clear error to find it is not feasible to develop or construct a competing water system, as the finding is supported by Carlyle's own documents. In weighing this and other evidence, the District Court appropriately applied the "more necessary public use" standard. The District Court's challenged rulings should be affirmed.

DATED this 9th day of December, 2015.

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

William K. VanCanagan
Datsopolous, MacDonald & Lind

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

Attorneys for 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 Times New Roman 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 9,999 words, excluding the caption, Table of Contents, Table of Authorities, Signature Block, Certificate of Compliance, Certificate of Service, and Exhibits.

Natasha P. Jones

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

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:

William T. Wagner Stephen R. Brown Kathleen L. DeSoto Brian J. Smith Peter J. Arant GARLINGTON, LOHN & ROBINSON, PLLP P.O. Box 7909 Missoula, MT 59807-7909 wtwagner@garlington.com srbrown@garlington.com kldesoto@garlington.com bjsmith@garlingtonc.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 Adrian A. Miller HOLLAND & HART LLP P.O. Box 639 Billings, MT 59103-0639 wwmercer@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