IN THE SUPREME COURT OF THE STATE OF MONTANA
Case 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

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

Intervenors/Appellants.

On Appeal from the Fourth Judicial District, Missoula County
Cause No. DV-14-365
Honorable Karen Townsend, District Judge

APPELLANTS/INTERVENORS' REPLY BRIEF

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STANDARD OF REVIEW

The standard of review for a mixed determination of fact and law as in this case --the application of facts regarding harm (as well as the other factors for determining whether City ownership is "more necessary") to the legal standard of "more necessary" is *de novo.* ***BNSF Ry. Co. v. Cringle,*** 365 Mont. 304, 309, 281 P.3d 203 (Mont. 2012). The City failed to address the proper standard of review for application of the facts to the law. The City also failed to address the proper standard of review for the District Court's Conclusions of Law which is whether the District Court's interpretation of the law is correct. ***Wareing v. Schreckendgust,*** 280 Mont. 196, 930 P.2d 37, 41 (1996).

PUBLIC POLICY AND THE LAW PROTECT THE EMPLOYEES OF AN ONGOING BUSINESS TAKEN FORCIBLY BY THE GOVERNMENT FROM HARM.

There is perhaps no more important policy issue that any court will face than the issue presented in this case: **Are the Employees entitled to the same protection as the chattels of the business or does the law not protect the hardworking men and women of Mountain Water Company from harm inflicted by their own government?**

While the vast majority of condemnation actions involve the condemnation of ground, and the condemnation statutes specifically address valuation of real property

and chattels, the valuation statutes are silent as to the protection of the employees of a private, ongoing business that is condemned by the government. The silence of the statutes does not and cannot reflect a public policy that chattels are protected by a government taking but people are not. It is respectfully submitted that employees **are entitled to be protected from harm** by being made whole under the established law of Montana and under the Montana Constitution. Indeed, this Court decided this issue in the first attempt by the City to condemn Mountain Water Company. In order to determine if government ownership was "more necessary" than private ownership, the Supreme Court directed the trial court to consider the harm to the employees. ***City of Missoula v. Mountain Water Co.***, 228 Mont. 404, 743 P.2d 590, 595 (Mont. 1987). In the prior action the Supreme Court cited the findings of the District Court with approval that the City's takeover of Mountain Water would harm the employees and the "detrimental impact" to the employees was against the public interest. ***City of Missoula v. Mountain Water Company***, 236 Mont. 442, 447, 771 P.2d 103, 106 (Mont. 1989). The Employees face the same harm today. The harm and hardship to the employees was one of the factors which the Supreme Court ultimately relied upon to uphold the District Court's decision to deny condemnation.

The drafters of the 1972 Montana Constitution certainly intended to protect the rights of persons to purse a livelihood and the rights of owners of private property.

Article II Section 3 protects the rights of all persons to pursue life's necessities. Article II Section 29 is the counterpart which protects the property of all persons from taking by their government. The two sections must be read together and be given effect.

Here, the evidence is undisputed that the City intends to offer employment to three of the Employees for up to 12 months and to offer employment to the remaining Employees for up to five years, at terms which do not match their present pay and benefits, with no guarantee of job security after their respective terms. The Mayor admitted these attributes of the City's plan for the Employees under cross-examination. The Mayor and the City have steadfastly refused to honor the allegations of the City in its Amended Complaint that ***all of the Employees would be retained and would be made whole.*** The Mayor was evasive at trial, stating that he wanted to "negotiate" or "craft a deal" and that over time things could change.

In its Response to this Court, the City of Missoula did not address the details of its offers to the Employees, nor mention that they expired by the time limited requirement unilaterally imposed by the City. The City's Response also ignores the Mayor's admissions under cross-examination and the detailed evidence presented by Michelle Halley on behalf of the Intervenors that establish beyond dispute that the City plans to reduce employees and not make them whole as to their pay and benefits.

Cross-examination is typically where the details or shortfalls of general statements made on direct examination are ferreted out and admissions obtained. The admissions by the Mayor on behalf of the City of Missoula and other evidence, reviewed below, ***together with recent public filings of the City before the Public Service Commission, absolutely establish that the City does not intend to retain all Employees and does intend to significantly reduce their pay and benefits by up to 32%.*** The government should not be allowed to harm employees of an existing private business by condemnation just as the owner of the chattels of the business must be paid fair market value. Employees are, and should be, afforded at least the same protection as the chattels.

THE CITY IS IN ERROR CLAIMING THAT THE EMPLOYEES' HARM CLAIM IS NOT RIPE.

The City argues at page 18 of its Response Brief that any claim of the Employees over lost wages or benefits "is not ripe." The condemnation action is in its valuation phase and the District Court has ordered that the Employees could attend the valuation proceeding but could not offer evidence of harm or shortfall in wages and benefits. The District Court did indicate in its Order Denying the Employees' Motion to Stay the Valuation Phase that:

> ***If the City moves to be put in possession, the Court can appropriately consider the harms identified by Mountain Water and Employees as attendant to the transfer of ownership.***

Order Denying Motion for Stay, p. 12. However, the District Court then ruled the Employees were not allowed to present evidence of harm at the valuation phase. *See:* Order on Plaintiff's Motions in Limine to Bar Employees from Participating in Valuation. Other than being allowed to be spectators at the valuation hearings the Employees were barred from presenting evidence. If their claim was not ripe as the City claims, then when is their remedy? It must be in this action and while the District Court stated it would "consider the harms... as attendant to the transfer of Ownership", the action is in its last phase and will likely be on appeal again, at least by the Employees from the recent Order barring the Employees from presenting evidence of harm. The District Court's Order Denying the Motion to Stay simply says the District Court can look at it at a later date. There is no later date-this is the proceeding for the Employees to protect their jobs and livelihood.

The Employee's evidence of harm clearly established a shortfall in wages, benefits, credit for years of service and permanent employment for each and every Employee. The Mayor ***steadfastly refused*** to simply say "The City will retain all Employees as permanent employees and match all benefits and wages."

THE CITY ERRONEOUSLY ASSERTS THAT THE SUPREME COURT HAS "SQUARELY HELD" THAT THE EMPLOYEES HAVE NO REMEDY.

In its Response Brief, page 24, the City stated:

> 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.

The authorities upon which the City relies have nothing to do with a claim by Employees of a private business being seized by a government entity. The City's reliance upon ***State Highway Comm. v. Robertson and Blossom***, 151 Mont. 205, 441 P.2d 181 and ***Riddock v. The City of Helena***, 212 Mont. 390, 394, 687 P.2d 1386, 1388 (1984) is clearly misplaced. The decisions state absolutely nothing with respect to protection of employees of private business under condemnation. Both decisions involved ***only condemnation of bare ground.*** The issue in ***Robertson*** was whether the corporation whose name the property was held in, or an individual shareholder of the corporation, could make the fair market value claim for the property. The issue in ***Riddock*** involved an inverse condemnation claim where the owner of the land at the time of the taking by the City of Helena did not object and the Supreme Court ruled that a subsequent owner could not later bring a claim.

The City's view of the law is clearly erroneous and the City misrepresents the holdings of the cases it cited to this Court.

The City is also in error when it argues in its Response that the Employees are not entitled to any protection. The harm to the Employees and the public interest in preventing a government entity from laying off workers and reducing wages was

squarely the basis for the result in the first condemnation suit brought by the City against this private business. This Court upheld the decision by the District Court after remand which was based in large part upon the plan of the City to reduce workers, wages and benefits. The harm to the local employees was also the foundation of the condemnation not being in the public interest. ***City of Missoula v. Mountain Water***, 236 Mont. 442, 771 P.2d 103 (Mont. 1989).

THE CITY FAILED TO ADDRESS THE UNDISPUTED TESTIMONY OF MICHELLE HALLEY

As pointed out in the Employees' Opening Brief, the City did not cross-examine Michelle Halley who testified in detail about the harm to the Employees under the City's proposals. In addition, the City did not address her summary of the City's offers and how they harmed the Employees, Exhibit 4021, Tab G – Appendix to The Employees Opening Brief.

In its Response Brief, the City states that "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 system . . ." Response Brief, pp. 33-34. The City ignored Michelle Halley's detailed testimony on direct examination and her summary of the City's shortfalls contained in Exhibit 4021. *See: Testimony of Michelle Halley, Trial Transcript, Vol. 9,* pp. 2681-2715. The City has again misstated the record and particularly the testimony of Michelle Halley. Of course, having chosen

to not cross-examine her, perhaps the City had no other alternative. *Testimony of Michelle Halley, Trial Transcript, Vol. 9*, p. 2715.

Also attached as **Appendix A** is the Affidavit of Michelle Halley filed in this Court and in the District Court in support of the Employees' Motion to Stay the Valuation Phase. The Affidavit of Michelle Halley reviews the harm that will be suffered by the Employees under public ownership and also the additional harm that would be caused by a transfer to public ownership prior to resolution of the present Appeal regarding necessity. Again, her testimony was unchallenged by the City.

THE CITY MISCHARACTERIZES THE "MINIMUM" EMPLOYMENT TERMS.

The City characterizes the offers by the Mayor of a 12 month employment term to three of the Employees and five years to the other Employees as a "guaranteed minimum." *Brief of City*, pp. 9, 36-38. The City further argues that employment would be more stable under City ownership. The problem with this argument is that the Mayor never said it was a "guaranteed minimum" and The City's argument is absolutely contradicted by the Mayor's testimony. The Mayor ***admitted*** that the three Employees would have ***no security*** after the respective periods of 12 months and 5 years:

> Q: And in one of the disputed exhibits the Judge hasn't ruled on yet, your plan is three employees only for 12 months and then they have to negotiate with you. Do you recall that?

A: A minimum of 12 months, yes, sir.

Q: Well, what job security would you have if I said, "John, I'll hire you for 12 months"?

Q: You've just got 12 months, don't you?

A: Yes, sir.

Testimony of John Engen, Trial Transcript, Vol. 1, p. 225, lines 17-25.

As to the other Missoula based Employees the City offered the Mayor ***admitted*** that they would have no security beyond five years:

Q: to get back to my question. If I said to you, "John, I'll give you a job for five years but beyond that things could change", you wouldn't have any security in five years, would you?

A: I would not.

Testimony of John Engen, Trial Transcript, Vol. 1, p. 227, lines 1-5.

In its Response, the City quotes the second offer to the Employees as "five years or the end of the individual's employment period, whichever occurs first." Response of City, pp 7-8. The City's unilateral, time limited offer to the Employees, in its own plain language, would terminate ***at the earlier of five years or the Employee's employment period!***

THE MAYOR ADMITTED THAT THE ALLEGATIONS IN THE FIRST AMENDED COMPLAINT PROMISING TO RETAIN ALL EMPLOYEES AND MAKE THEM WHOLE WERE NOT TRUE.

Again, under cross-examination, the Mayor ***admitted*** that the City's promises, made under the terms of Rule 11 of the Rules of Civil Procedure in its First Amended Complaint, Paragraphs 91-95 of full employment at full wages and benefits ***were no longer true:***

> Q: And so as in your First Amended Complaint where you say you are going to take care of all of us, in your opening remarks in response to Mr. Schneider, you want to make us whole, the bottom line is you cannot commit beyond five years to any of these?
>
> A: I'm sorry, was that a question?
>
> Q: I'm sorry. Is that correct?
>
> A: Oh, that's correct.

Testimony of John Engen, Trial Transcript, Vol. 1, p. 228, lines 17-25.

The Response Brief of the City also ignores the other admissions by the Mayor that there would be shortfalls to the Employees under City ownership. The Mayor admitted that:

- The City would not provide the same level of benefits including pension and stock purchase options. *Testimony of John Engen, Trial Transcript, Vol. 1*, pp. 221-226.

- The Mayor admitted that a twelve month offer had no job security beyond twelve months. *Id.*

- The Mayor admitted that a five year offer had no job security beyond five years. *Id.*

- The Mayor refused to commit to match merit raises presently in the benefit package of the private employer. *Testimony of John Engen, Trial Transcript, Vol. 1,* pp. p. 217, lines 7-16.

- The Mayor refused to match the market place adjustments currently in the benefit package of the private employer for the long term. *Testimony of John Engen, Trial Transcript, Vol. 1,* pp. 220, lines 1-14.

The Mayor also admitted at trial that ***he could not commit*** to keep all of the Missoula based Employees, match all of their wages, benefits and make them whole until the end of their work career:

> Q: All right. And so isn't it an easy question and doesn't require negotiation just to say, we're going to take them all on, every one of the Missoula-based people. There isn't going to be any 12 months or five years. And we'll match their pay matrices, their wages, their benefits, and we'll make them whole until the end of their work expectancy or their work career?
>
> A: ***That's the easy answer and that's not our answer.***

Testimony of John Engen, Trial Transcript, Vol. 1, pp. 226, lines 1-10.

THE CITY'S PLAN REDUCES WAGES AND BENEFITS BY 32% PERCENT.

This Court is requested, under Rule 201, Mont.R.Evid., to take judicial notice of the City's plan for the Employees filed in the public record of the Public Service Commission proceedings concerning the pending sale of Mountain Water to Liberty Utilities. The Supreme Court may take judicial notice of filings in another proceeding. ***Johnson v. Clark***, 131 Mont. 454, 311 P.2d 772 (1957) and ***State ex rel Standard Life & Accident Ins. Co. v. District Court***, 149 Mont. 107, 423 P.2d 291 (Mont. 1967). In the proceeding pending before the Public Service Commission, ***In the Matter of the Joint Application of Liberty Utilities,*** Docket No. D2014.12.99, the City filed its pre-hearing testimony of its expert Craig Close. Exhibit C to Close's testimony is attached as **Appendix B**. This same analysis, without Exhibit C, was part of the "City's Plan" for operation and money savings presented at the necessity hearing. *See:* City's Exhibit 1499. **Appendix B** shows the City's comparison of wage and benefit expenses under private ownership versus public ownership. At City bates numbers 00118170 and 00118171 of **Appendix B**, for the year 2015 the City states a reduction under public ownership of wages of more than $1 million dollars and a reduction in pension and benefits of over $400,000 which combined are a reduction of 32% or approximately $1.5 million dollars. The same reductions are projected in each of the years 2016 through 2024. And yet the City proclaims to this Court that "the City

has bent over backwards to alleviate the Employees' concerns." *Brief of City*, pp. 6-7. The record establishes that the Mayor ***refused*** to commit to make all Employees whole and keep them all employed for their work careers subject only to discharge for cause. The Mayor admitted that he couldn't simply say to the Employees "we will hire you all and match your pay, wages and benefits":

"That's the easy answer and that's not our answer."

Testimony John Engen, Trial Transcript, Vol 1, p. 226, line 9-10.

The evidence of harm is confirmed by the City's plan of operation recently filed by the City in the proceedings before the Public Service Commission. The City's arguments are clearly contradicted by the evidence, by its admissions and by its continuing course of action.

The City also attempts to blame the Employees for not negotiating. However, the City violated the mediation statute 26-1-813 M.C.A. by releasing for publication in the media mediation details during the mediation process. *See:* Employees Opening Brief, p. 5.

More importantly, nowhere in the law of condemnation are employees in this situation required to negotiate for lower pay, lesser benefits and loss of credit for vesting of retirement benefits. The standard adopted in the first condemnation action, ***City of Missoula v. Mountain Water, supra*** is the standard of harm to employees

taken over by a governmental entity by condemnation. The standard is not "close enough" or "fair and reasonable"-which the District Court used in its Findings, ¶ 197.

THE DISTRICT COURT RELIED UPON CONJECTURE AND HOPE IN ITS CONCLUSION THAT THE EMPLOYEES WOULD NOT SUFFER HARM.

In addition to the overwhelming evidence, and clear admissions by the City, that it would not retain all Employees and match their pay and benefits for the remainder of their work careers, the District Court engaged in conjecture and speculation that the City could later develop a plan to meet the needs of the Employees:

> . . . The plan can be further developed and refined to the meet the needs of the City and the Employees in operating the system.

Order on Condemnation, Findings of Fact, ¶ 195. This Finding is pure speculation and conjecture. Perhaps it is a hope, but it is not evidence that can be relied upon by the District Court in its Findings.

THE DISTRICT COURT APPLIED THE WRONG STANDARD

The District Court erred in characterizing the City's plan for the Employees as "fair and reasonable." *Order on Condemnation, Findings of Fact* ¶ 197. The law, from the prior action, however, does not apply a "fair and reasonable" standard. The District Court was bound by the prior decision of this Court to determine whether the Employees ***would suffer harm under a government takeover***. The standard is not

whether the employment offers by the City were "fair and reasonable." Nor does the law provide any standard upon which to measure against what is "fair and reasonable." There is no "fair and reasonable" standard in this Court's prior decision. There is no "close enough" standard. The standard is ***harm*** and it is clear from this Court's prior ruling that it is to be ***measured against the actual terms of employment, wages and benefits of the Employees under private ownership.***

The harm to the Employees over the course of their careers is in excess of $17 million dollars as reflected in the Employees' Statement of Claim, **Appendix C**. Even the City's plan filed with the PSC is based upon a 32% reduction in wages in benefits under City ownership. The standard is not "close enough" or "reasonable and fair". The Employees, just as the owner of chattels under condemnation, are entitled to be made whole. They should not suffer at the hands of their government.

THE DISTRICT COURT ALSO ENGAGED IN SPECULATION

The District Court also engaged in pure speculation that a sale to Liberty Utilities would result in future rate increases based upon the amount of the sale. The District Court's Finding, ¶ 125, is contrary to the Order of the Public Service Commission. *See: Testimony of John Kappes, Trial Transcript, Vol.11*, reviewing Exhibit 2580 – PSC Order No. 7149d. This Finding also ignored the testimony of the President of Liberty Utilities, Greg Sorenson, that Liberty requested the same Order

from the PSC in its pending application for acquisition of approval of the purchase of Mountain Water. *Testimony of Greg Sorenson, Trial Transcript, Vol. 9,* p. 2612.

It was also pure speculation and conjecture and, ***most importantly incorrect, that their employment under private ownership would be less secure than under City ownership.*** The Employees are 100% in favor of employment under private ownership and are 100% opposed to employment under City ownership. The reason is simple: the Mayor ***admitted*** that the Employees have no security beyond the 12 month or five year terms and he ***admitted*** that he cannot commit to all terms of their present employment. In contrast, Liberty Utilities clearly offered to match all wages and benefits while the Mayor admitted that he could not make that commitment. *See: Testimony of Greg Sorenson, Trial Transcript, Vol. 9,* pp. 2596-2626. His testimony was unchallenged and undisputed under cross-examination by counsel for the City with respect to Liberties' commitment to retain ALL Employees as permanent employees, and match wages, benefits and to in fact add a stock purchase plan to their benefits. *Id.* pp. 2626-2667.

The Employees Statement of Claim, **Appendix C** is the Employees' request to the City to make them whole—match all wages and benefits and terms or compensate them for any shortfall and it was rejected by the City. The total shortfall computed for each of the Employee's to retirement age is approximately $17 Million Dollars for all

Employees combined.

Under private ownership, the Employees have never suffered a wage freeze. The City has frozen wages of its workers. Bruce Bender admitted that the City froze wages across the board of the sewer department even though the financial problems in 2011 were in the general fund and not in the enterprise fund of the sewer department. *Testimony of Bruce Bender, Trial Transcript, Vol. 2*, pp. 523-525. Mountain Water has never frozen wages. Again, the facts of record contradict the arguments of the City.

CONCLUSION

The working men and women of Mountain Water are entitled to be protected from harm when the government seeks to take by force the private business that employs them. They are entitled to be made whole—not close, not fair and reasonable- and to be protected from harm. They deserve under the law of condemnation the same protection afforded to the owner of the chattels.

The decision of the District Court should be reversed for the same reasons that the prior condemnation attempt was denied: the Employees of Mountain Water will suffer significant harm and the public interest does not support allowing the government to cut positions and reduce wages and benefits of these local, hard-working men and women.

DATED this 22nd day of December, 2015.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the requirements of Rule 11(4)(a) and of the Montana Rules of Appellate Procedure. I certify that this brief is printed with a proportionally space Times New Roman text typeface of 14 points and is doubled spaced. The total word count in the brief is 3,962 words, excluding the caption, Table of Contents, Table of Authorities, Table of Appendices, and Certificates of Service and Compliance. The undersigned relies on the word count of the Microsoft Word system which was used to prepare this brief.

DATED this 22nd day of December, 2015.

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CERTIFICATE OF SERVICE

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APPENDIX

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