No. DA 15-0375

IN THE

Supreme Court of the State of Montana

THE CITY OF MISSOULA,

Plaintiff/Appellee,

VS.

MOUNTAIN WATER COMPANY, ET AL.,

Defendants/Appellants,

AND

THE EMPLOYEES OF MOUNTAIN WATER COMPANY,

Intervenors.

ON APPEAL FROM THE MONTANA FOURTH JUDICIAL DISTRICT COURT,
MISSOULA COUNTY, HON. KAREN TOWNSEND, PRESIDING
CASE NO. DV-14-352

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

INTRODUCTION

The City dedicates large portions of its response to reforming Carlyle's arguments and hurling unfounded accusations, while avoiding legal standards it does not like and problems with its proof. Each of its specific arguments is unavailing.

First, the City does not account for the applicable principles of statutory construction, most notably that the Court must strictly construe the statutes in favor of Mountain Water's property rights. The City's interpretation of sections 7-13-4403 and 4404 inappropriately favors eminent domain, fails to give meaning to every word, and would yield absurd results.

Second, the City's feasibility argument ignores the legal test. It also attempts to substitute generic marketing statements about the monopolistic nature of water systems for proof that it was not feasible for the City to construct a system of its own, despite the Mayor's admission that the City never analyzed the issue.

Third, neither the City's false assertion that Carlyle promised to sell it the water system nor its incorrect recitation of case law addresses the "more necessary" argument Carlyle actually made—that the test must comport with the Montana Constitution's strict protection of

private property rights. The City would have the Court hold that its identical use of the water system is "more necessary" than Mountain Water's even though it never notified Mountain Water or the Public Service Commission (PSC) of the alleged problems it now contends justify condemnation.

Fourth, in inaccurately recounting the myriad discovery issues, the City again avoids the real issue. The defendants had to conduct discovery without documents they could reliably search, received searchable documents with inadequate time to review them for use at trial, and were repeatedly forced to confront newly disclosed evidence for the first time at trial, depriving them of their right to a full, fair, and meaningful proceeding.

Finally, Carlyle's upstream corporate ownership and control of the water system is relevant only to a voluntary sale. This is an *in rem* proceeding in which the district court cannot enter judgment against Carlyle for the physical taking of property it does not own.

ARGUMENT

I. The City's Statutory Interpretation Suffers from the Same Flaws as the District Court's.

A. The Proper Interpretation of Sections 7-13-4403 and 4404 Has Not Been Previously Decided.

As a threshold issue, *City of Missoula v. Mountain Water Co.*, 228 Mont. 404, 743 P.2d 590 (1987) (*Mountain Water I*) did not decide if a municipality's ability to condemn a water system is predicated on the existence of a franchise agreement or contract. The case contains no analysis of that issue or the interplay between sections 7-13-4403 and 4404. *See generally id.* Accordingly, any suggestion in *Mountain Water I* that the City followed the appropriate condemnation procedure is not instructive. *See, e.g., State v. Holt*, 2011 MT 42, ¶ 52 n.3, 359 Mont. 308, 249 P.3d 470 (prior decision that assumes, but does not consider, a particular statutory interpretation is not dispositive as to the correct interpretation); *see also Ensey v. Mini Mart, Inc.*, 2013 MT 94, ¶ 15, 369 Mont. 476, 300 P.3d 1144 (prior decision interpreting statute not dispositive as to specific issue not considered). Now that the issue is squarely presented, the Court must decide if the phrase "pursuant to 7-13-4403" means that section 7-13-4403 must apply

before a municipality may invoke eminent domain to take a water system.

B. The City Focuses on the Wrong Statutory Language and Ignores the Principles of Statutory Construction Applicable to Eminent Domain Statutes.

1. The City misinterprets section 7-13-4404.

It is the City, not Carlyle, that is attempting to redraft section 7-13-4404. To reach the result it wants, the City reads the words "[i]f agreement is not reached pursuant to 7-13-4403" as the equivalent of "stat[ing] that a city can proceed to condemn if § 7-13-4403 does not apply." Resp. Br. 16 (internal quotation marks omitted). That logic does not work.

Fundamentally, allowing a party to institute condemnation proceedings if an agreement is not reached *pursuant* to a statute is different than allowing condemnation if the statute *does not apply*. To equate the two, the Court must do one of two things. *First*, it could hold that the failure to reach *any* agreement about the sale of a water system—whether "pursuant to 7-13-4403" or not—allows a municipality to initiate condemnation proceedings. Of course, that result impermissibly excises "pursuant to 7-13-4403" from the statute. *See* § 1-2-101, MCA. *Second*, it could keep "pursuant to 7-13-4403" and

add the phrase, "or if 7-13-4403 does not apply." But adding words the Legislature did not include is equally untenable. *Id.*

At base, the City falls into the same trap as the district court: its interpretation effectively reads "pursuant to 7-13-4403" out of the statute. To give meaning to every word, *City of Polson v. Pub. Serv. Comm'n*, 155 Mont. 464, 471, 473 P.2d 508, 512 (1970), the Court must hold that if section 7-13-4403 does not apply, then the parties have not failed to reach agreement *pursuant* to that section. Thus, section 7-13-4404 does not apply either, meaning that the City may not proceed to acquire the water system by eminent domain. *See* § 7-13-4404(1), MCA.

2. The City misinterprets section 7-13-4403.

To avoid the plain language of section 7-13-4404, the City insists that section 7-13-4403 does not require the municipality to be the party that grants the franchise or enters the contract. *Id.* The City's argument fails in every respect.

First, the City ignores the history and context of the statute. Section 7-13-4403 derives from paragraph 64 of Political Code § 4800, Codes of Montana 1895. *Mountain Water I*, 228 Mont. at 408-10, 743 P.2d at 593-94. Paragraph 64 provided that a municipality could issue bonds to acquire a water system, with the condition that "no city or

town, having a water supply furnished by private parties, under a contract or franchise, entered into or granted *by the city or town*," could construct its own water system, but instead had to acquire the system already in operation. *Id.* at 409, 743 P.2d at 593 (emphasis added).

Sandwiched between those provisions was language nearly identical to that currently in sections 7-13-4403 and 4404, describing the same procedure that exists today for passing an ordinance and giving notice "whenever a franchise has been granted to, or a contract made with" the water system's owner. *Id.* That context makes abundantly clear that the municipality must be the party to grant the franchise. Indeed, *Mountain Water I* described that the statutory language now found at sections 7-13-4403 and 4404 applies to "negotiations with a *franchiser* for purchase." *Id.* at 410, 743 P.2d at 594 (emphasis added).

Second, the City ignores the last clause of section 7-13-4403(1). In the conjunctive, the clause provides that a municipality must pass an ordinance to give notice that it "desires to purchase the plant *and franchise* and water supply." § 7-13-4403(1) (emphasis added). That language makes sense only if the statute is predicated on an existing

franchise agreement or contract with the municipality for the supply of water, such that the municipality must buy out the agreement.

Nevertheless, the City seizes on two phrases in section 7-13-4403—"or desiring such water supply" and "in pursuance thereof or otherwise"—illogically suggesting that they allow the statute to apply so long as the municipality wants a privately-owned water system for itself, with no other considerations. That interpretation raises a host of problems. It divorces the statute's first clause—"whenever a franchise has been granted or a contract made"—from the rest of the statute; it renders the conjunctive nature of the last clause meaningless; and it creates absurd results.

For example, under the City's logic, if Mountain Water has a contract with John Doe for janitorial services, the statute's first clause will be satisfied because "a contract has been made with a corporation." Then, the City can pass an ordinance, negotiate, and proceed to eminent domain if no agreement is reached because the corporation (Mountain Water) maintains a water system that the City desires. After all, according to the City, the statute's use of the phrase "in pursuance thereof or otherwise" means that it does not matter if the water system

is subject to the contract on which the statute's application is premised. And the phrase "or desiring such water supply" makes it equally irrelevant whether the municipality is the party that granted the contract.

The Legislature cannot possibly have intended that result. The statute's purpose is to outline a procedure by which a municipality must give its franchisee notice that it desires to purchase the water system *and* franchise. *See* § 7-13-4403(1), MCA. So interpreting the words "whenever a franchise has been granted to or a contract made" to mean that the statute can be implicated by *any* unrelated franchise or contract between the water system's owner and some other party is nonsensical.[1] *See Mont. Sports Shooting Ass'n, Inc. v. Dept. of Fish, Wildlife, and Parks*, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003 ("Statutory construction should not lead to absurd results if a reasonable interpretation can avoid it.").

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[1] Similarly, Carlyle does not need section 7-13-4404 to read, "[i]f an agreement is not reached pursuant to 7-13-4403, [and the city or town is required under 7-13-4403 to seek agreement as the grantor of a franchise or contract.]" *See* Resp. Br. 17. Inserting the language in brackets would be redundant of "pursuant to 7-13-4403."

3. The statutes cannot be interpreted to favor eminent domain.

Overriding this entire discussion is the City's refusal to acknowledge that the statutes must be strictly construed to favor Mountain Water's property rights. *McCabe Petroleum Corp. v. Easement and Right-of-Way*, 2004 MT 73, ¶ 14, 320 Mont. 384, 87 P.3d 479. The City does not dispute the rule, but it does not explain how its interpretation meets the standard either. Rather, like the district court, it interprets the statutes to favor eminent domain instead of private property rights.

Applying the correct standard, if there is any ambiguity about whether section 7-13-4404 conditions a municipality's ability to invoke eminent domain on the application of section 7-13-4403, the Court must hold that it does. And if there is an ambiguity about whether section 7-13-4403(1) applies absent a franchise or contract between the water system's owner and the municipality, the Court must hold that it does not.

C. Carlyle Was Not Required to Advance a Public Policy Justification for the Correct Statutory Interpretation, But Several Exist.

Whether Carlyle proffered a policy reason justifying the Legislature's decision to limit a municipality's ability to condemn a water system has no bearing on the correct statutory interpretation. It is indisputably the Legislature's province, not the Court's, to prescribe the bounds of the government's authority to condemn property. *See Mont. Talc Co. v. Cyprus Mines Corp.*, 229 Mont. 491, 495, 748 P.2d 444, 447 (1987).

That said, it should hardly be surprising that the Legislature would choose to limit eminent domain power. Private property ownership has long been a fundamental right in this State, Mont. Const. art. II, § 3, and it is one that the Legislature has guarded closely, including by strictly construing the government's right to take private property, *see, e.g., State ex rel. McMaster v. Dist. Ct.*, 80 Mont. 228, 231, 260 P. 134, 135 (1927). Protecting property rights is reason enough to limit a municipality's ability to condemn water utility assets.

As to the particular limitation here, however, a perfectly good explanation exists in original version of the statutes. That is, the Legislature did not want a municipality to grant a franchise to a private

water company only to turn around and compete with its franchisee by constructing its own water system. *See Mountain Water I*, 228 Mont. at 409, 743 P.2d at 593 (reciting the 1895 statutes). So it precluded such competition, but gave municipalities a limited right to acquire a water system by eminent domain when the system is encumbered by a franchise agreement granted by the municipality. *Id.* In all other circumstances, municipalities can simply borrow money or issue bonds to construct their own system.

To be sure, that policy concern may have been more pressing in the late 1800s when cities' infrastructures were less developed. But over the last century, eminent domain has remained an important and hotly debated issue in this State. *See, e.g.*, *MATL LLP v. Salois*, 2011 MT 126, ¶ 3, 360 Mont. 510, 255 P.3d 158 (describing House Bill 198 in the 2011 Legislature). Yet the Legislature has not given municipalities broader condemnation power over water systems or amended the applicable statutes to address the City's concerns, and it is not this Court's place to second guess the Legislature's reasoning.

D. The City Has No "Inherent Authority" to Condemn a Water System Beyond that Provided in the Statutes.

The Court should summarily reject the City's assertion that it has "inherent authority" to exercise eminent domain over a water system. Resp. Br. 18-20. Any general notion that municipalities have broad powers, *see, e.g.*, § 7-1-106, MCA, is superseded here by section 70-30-102(6), which provides that the government has the power to take a water system by eminent domain only "as provided in Title 7, chapter 13, part 44." *See Taylor v. Dep't of Fish, Wildlife & Parks*, 205 Mont. 85, 91, 666 P.2d 1228, 1231 (1983) ("We recognize the rule of statutory construction which provides that special statutes will prevail over general statutes."); *see also Mont. Talc Co.*, 229 Mont. at 495, 748 P.2d at 447 (the authority to condemn property must derive from a legislative grant); § 1-2-102, MCA. The only eminent domain statute in Title 7, chapter 13, part 44 is section 7-13-4404. Thus, if the City does not meet the requirements of that statute, it cannot condemn the water system.

Moreover, the only "inherent authority" the City invoked in its amended complaint was section 7-1-4124. *See* Amend. Compl., ¶ 11. Although that statute sets out the "general powers" of a municipality,

subsection 14 states that its eminent domain powers are "as provided in Title 70, chapter 30." § 7-1-4124(14), MCA. Thus, even under the authority the City cited, it was subject to the specific provisions of section 70-30-102(6). It has no authority to condemn a water system independent of that statute.

* * *

Interpreting the statutes under the correct standards, the Legislature conditioned a municipality's ability to condemn a water system on the existence of a franchise agreement or contract for the supply of water with the water system's owner. Because the City does not dispute that no such franchise agreement or contract exists between it and either Carlyle or Mountain Water, the Court should reverse and direct entry of judgment for the defendants.

II. The City's Feasibility Arguments are Meritless.

A. Feasibility is Indisputably Part of the Necessity Test.

The City is right that necessity involves a broad range of considerations. But one of the two overarching questions involved in the analysis is, "[m]ust the City take Mountain Water's property in order to have its own system?" *Mountain Water I*, 228 Mont. at 412,

743 P.2d at 595. Thus, the City's contention that the requirement was not part of its *prima facie* case ignores the law.

B. Carlyle's Argument is Preserved.

The City wrongly asserts that Carlyle did not raise its feasibility argument prior to appeal. Resp. Br. 10, 44. In fact, Carlyle asserted both in its closing argument and in its proposed findings and conclusions that the City did not meet its burden of proving that it must take Mountain Water's property in order to have its own system. A349; Defs.' Second Amended Proposed Findings and Conclusions, at 125; Trial Tr. 3562.

Additionally, the City ignores the nature of the issue. It was the City's burden to put forth evidence to support its condemnation claim, including the requirement that it must take Mountain Water's property in order to have its own system. § 70-30-111, MCA; *Mountain Water I*, 228 Mont. at 412, 743 P.2d at 595. From the outset, Carlyle denied that City was entitled to condemn the water system, and the issue was tried to the district court. Accordingly, Carlyle's objection to the sufficiency of the evidence is preserved. *See Kurtzenacker v. Davis Surveying, Inc.*, 2012 MT 105, ¶¶ 32-33, 365 Mont. 71, 278 P.3d 1002.

C. Carlyle's Marketing Materials Do Not Constitute Substantial Evidence of Infeasibility.

Without even mentioning Mayor Engen's admission that the City never conducted any analysis of the feasibility of constructing a competing system, the City claims that Carlyle's marketing materials constitute "uncontroverted evidence" that the capital cost of doing so would be prohibitive. Resp. Br. 42-44. In doing so, the City ignores both the nature of the marketing materials and that the record is devoid of any specific evidence comparing the capital cost of building a new system in Missoula with the cost of condemning Mountain Water's system.

Not surprisingly, Carlyle's marketing materials tout that the capital cost of building a water system usually inhibits competition. *See* Resp. Br. 43. Those generic statements were directed at generating a *private* buyer for all three Park Water-owned systems; they shed no light on whether the capital cost of constructing a single system in Missoula would be prohibitive to the *City*. For example, it is often true that a private company would not generate enough revenue from building a competing water system to warrant the cost, thus "inhibit[ing] *competitive* entrants," just as the marketing materials

suggest. *See* Ex. 59, at 14 (emphasis added). But the calculus may be different for a municipality that is admittedly not seeking to operate the system for an approved rate of return and repeatedly proclaims that it can borrow at unusually low rates.

Here, there is no way to know the answer. The City admits that it conducted no feasibility analysis, A245, and the district court refused to admit valuation evidence, A264-65. Thus, there was no evidence that allowed the district court to compare the City's cost to build and operate a new system with its cost to condemn and operate the existing system. As such, the district court's finding that the cost to the City of constructing its own system was "prohibitive," A11, is based on speculation, not substantial evidence.

III. The City's "More Necessary" Analysis Misses the Point and Skews the Facts.

In arguing that the City failed to prove that its identical use of the water system is a "more necessary public use," Carlyle's point is not that there is legal authority expressly requiring the City to complain about any alleged problems with the water system or take separate action to alleviate the problems. To the contrary, Carlyle specifically acknowledged that there is little authority on how the "more necessary"

test should operate, particularly when the government wants to take property to put it to an identical use.[2] *See* Open. Br. 39. Rather, in the absence of on-point case law, Carlyle urged that the test should be guided by the Montana Constitution's strong protection of private property rights. To that end, Carlyle argued that allowing the government to involuntarily take a regulated water system without so much as a complaint to the PSC or the system's owner about the alleged failures that supposedly render public ownership "more necessary" is inconsistent with the Constitution's protections. *See* Open. Br. 38-40.

The City did not rebut that point, much less propose a test of its own. Instead, it blamed its failure to express any concern about

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[2] Carlyle assumed that a water system may be condemned for an identical public use. *See* Open. Br. 39. But the City is wrong that *State ex rel. Butte-Los Angeles Mining Co. v. District Court* does not suggest that an identical use may bar eminent domain:

> [N]either party to this action could, by any proceeding under the provisions of the *statutes relating to eminent domain*, acquire, in our opinion, the exclusive right to the use of that part of the tunnel located on the ground of the other, for the very simple reason that both parties contend they are using, or intend to use, the tunnel for the same purpose; consequently, neither can say his purpose is more useful than the other.

103 Mont. 30, 60 P.2d 380, 385 (1936) (emphasis added).

Mountain Water's stewardship on Carlyle, accusing it of "promising" that the City would be able to purchase the water system after a year and then rejecting the City's offers "out of hand." Resp. Br. 48. Those accusations simply are not true.

Carlyle's obligations to the City are spelled out in the parties' letter agreement. A426-430. They included giving the City notice of any offer to purchase Mountain Water or the water system, and allowing the City 120 days to submit its own proposal. A427. But Carlyle had no obligation to accept an offer from the City within a year or any other time frame. A426-30; Trial Tr. 338:12-17. Nor did it have any obligation to counter-offer. A426-30. If the City offered to purchase Mountain Water or the water system, Carlyle's only obligation was to consider the offer in good faith. A428; Trial Tr. 339:8-13. That is precisely what it did.

Through an investment banker, the City submitted an offer to purchase Mountain Water's stock for $65 million in February 2013. Ex. 3049. After consulting regulatory counsel, tax counsel, bond counsel, and accountants in two states, Carlyle rejected it, providing the City with a detailed explanation of its reasons. Ex. 3050. In November

2013, the City made the same offer. Ex. 1140. Carlyle again considered it in good faith—consulting advisors to supplement its own analysis—and again rejected it, providing another detailed explanation of its reasons. Ex. 1143. In January 2014, the City submitted a final offer to purchase Mountain Water's assets on a debt-free basis for $50 million. Ex. 1146. Even though the offer was significantly worse than those it previously rejected, Carlyle considered it in good faith yet again. Ex. 1147. Simply put, the City's assertions that Carlyle had an obligation to sell and negotiated in bad faith are false.[3]

The City's conduct proves precisely why the "more necessary" requirement needs to protect private property owners. If it doesn't, any time a municipality cannot get the deal it wants, it will be able to use unvoiced complaints about a water system or water supply as the supposed justification for the superiority of public ownership, all the while representing to the owner that it is doing a good job.

That result creates the problem described in the United Property Owners of Montana's amicus brief. If public ownership can be found

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[3] The City's insinuation that Carlyle "secretly" sold Park Water, Resp. Br. 6, is also demonstrably false. Carlyle gave the City the required notice 121 days before it consummated the sale. Ex. 1360.

"more necessary" without affording the private owner notice of its alleged failings, much less an opportunity address and correct them, the "more necessary" factor effectively makes a political judgment: it allows a municipality to take a water system or water supply for itself simply because it is the government and the owner is not. *See* UPOM Br. 2, 13-14.

This Court should reject that idea and hold that the analysis must comport with the Montana Constitution's robust protection of private property rights. Given the City's actions here, the Court should hold that it did not meet its burden of proving that its identical public use of the water system is "more necessary" than Mountain Water's.

IV. The City's Discovery Tactics and the District Court's Refusal to Continue Trial Rendered the Trial Unfair.

A. Carlyle's Argument is Preserved.

Again, the City makes a meritless waiver argument. Resp. Br. 24. Carlyle filed two briefs asking the district court to continue trial. *See* Carlyle's Br. in Support of Mot. to Continue (Feb. 17, 2015); A507-520. Although neither specifically used the term due process, both argued that the City's discovery abuses rendered the proceedings unfair because the defendants were unable to adequately prepare for

depositions and trial, precisely the same argument Carlyle is making on appeal.

B. The City is Trying to Shift the Burden for Its Discovery Failures to the Defendants.

The City characterizes the discovery issues as posing mere "inconveniences" for the defendants' counsel, asserting that there was no actual prejudice because the defendants were not prevented from presenting evidence at trial. Resp. Br. 26. But Carlyle does not contend that there is some piece of evidence it never received; the problem is that the City's dilatory tactics resulted in trial by ambush. The defendants did not have adequate time to review or make strategy decisions about many of the City's documents, and were forced to deal with new evidence on the fly at the eleventh hour. The City's attempts to explain away specific issues fall flat.

PDF portfolios. The formatting problem had nothing to do with Carlyle's third-party vendor. The record contains an entire hearing explaining why PDF portfolios are not adequately searchable. *See* Jan. 13, 2015 Transcript. After that hearing, the special master conceded that he did not previously grasp the importance of the issue and correctly concluded that the City converted documents from their

original form to one more difficult for the defendants to use efficiently in the litigation. A89 n.1; A91. The result was that the defendants had no way to adequately review 25,000-plus documents, and thus no way to decide whether or how to effectively use them in depositions or at trial.

The City's assertion that the defendants' discovery requests did not specify a specific format for production is beside the point. As the special master found, "[w]ithin days of the City's first production of emails in the form of PDF portfolios, [Mountain Water] notified the City that the PDF portfolios were virtually unusable . . . and could only be made usable by [Mountain Water] expending significant time and money by having a third-party vendor attempt to reconstruct the email strings and attachments. Nonetheless the City made 3 more email productions in the [PDF] portfolio format." A89.

Wood e-mails. The City makes much of the Roger Wood e-mails, which Carlyle used as example in its Statement of the Case. Carlyle's recitation was correct. Mountain Water asked for Wood's complete file—which included the relevant e-mails—in its first discovery requests. *See* A487. But the City did not even ask him to search for e-mails until the day before his November 21, 2014 deposition. A85.

Thus, the only e-mails available to the defendants at the deposition were those between Wood and the City, and even then only those the defendants managed to find given the extreme difficulty posed by the PDF portfolio issue. After the deposition, the City continued to refuse to produce Wood's other e-mails—which were "clearly discoverable"—until the special master ordered it to do so. A85-86.

Expert supplements. Suggesting that the defendants should have pieced together the 98-page operation plan the City manufactured shortly before trial borders on ridiculous in the face of Bruce Bender's deposition testimony. For example, the defendants prepared for trial based on Bender's testimony that the City had no plan for capital expenditures and that it would simply operate the system using Mountain Water's employees. *See* A509. But the late-disclosed plan included a five-year capital expenditure section with specific figures in the millions of dollars, and an organization chart detailing the City's plan to integrate Mountain Water employees in the City's employment structure. *Id.* Those are just two of many examples of how the City's new plan changed the playing field at the last minute.

In a similar maneuver, the City sprung a new administrative costs analysis on the defendants on the eve of trial, purportedly because Dale Bickell did not previously have access to attorneys' eyes only (AEO) documents. Resp. Br. 37. Bickell, however, testified that another of the City's experts could have performed the late-disclosed analysis at any time because he had access to AEO documents all along. A540-41. Additionally, the defendants offered to give Bickell access to the documents in November, 2014, but the City rejected their proposal, choosing instead to sandbag the defendants with the new analysis, which played a critical role in the district court's findings. A516-17.

* * *

In sum, the City's discovery conduct caused extreme prejudice to the defendants. They were forced to undertake discovery without documents they could reliably search, received searchable documents with inadequate time to review and use them at trial, and tried the case by ambush, frequently dealing with newly disclosed, critical evidence that the district court then used to find against them. Cumulatively, that prejudice rendered the trial unfair, violating the defendants' rights

to a full, fair, and meaningful trial. *See Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 462, (1982).

V. The City Misunderstands the Ownership Issue.

It is absolutely true that Carlyle is the upstream corporate owner of Mountain Water and has the ultimate say in any *sale* of the water system. All the ownership-related facts the City recites would be pertinent if this case involved a voluntary sale. But it is an *in rem* proceeding for the involuntary taking of real property that Carlyle does not directly own. *Housing Authority v. Bjork*, 109 Mont. 552, 556, 98 P.2d 324, 326 (1940); A250, 342-43. As such, Carlyle is not a proper party. The district court cannot enter judgment against Carlyle for the physical taking of the water system, and should have dismissed it from the case long ago.

The result does not change merely because Carlyle sought compensation in the valuation stage. Resp. Br. 23. Certainly, parties are permitted to advance alternative arguments. Having been forced to participate as a party, Carlyle was thus entitled to advance any argument it has for compensation. If, as it should, this Court holds that Carlyle is not a proper party, Carlyle will obviously not be entitled to prevail on its alternative argument for compensation.

CONCLUSION

For the reasons above, this Court should reverse.

Dated: December 22, 2015.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Mont. R. App. P. 11(4), this response brief is proportionately spaced in 14-point Century Schoolbook, and contains 4,991 words, as determined by the undersigned's word processing program.

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