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

THE CITY OF MISSOULA, a Montana Municipal corporation,

Plaintiff and Appellee,

v.

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

Defendants and Appellants.

THE EMPLOYEES OF MOUNTAIN WATER COMPANY, (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, Douglas R. Harrison, Jack E. Heinz, Josiah M. Hodge, Clay T. 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 and Appellants.

APPELLANT MOUNTAIN WATER COMPANY'S REPLY BRIEF

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

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FILED _____, 2015
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I. INTRODUCTION

The conception, foundation and presentation of the City's Answer Brief to Mountain ("City Brief") reflect its strategy and approach to this takeover, which derives from a subjective ideological agenda favoring municipalization at any cost. That bias blurs the distinction between fact and perception, precedent and anecdote, practical reality and political expediency. The City vaguely maligns Mountain as mismanaged, but ignores that the Montana Department of Environmental Quality ("DEQ"), as recently as October 2013, called Mountain and its management "exceptional" and "effective." Tr. 2971; Ex. 1286. Before this litigation, the City never complained to the Montana Public Service Commission ("MPSC") about Mountain's administrative costs (Tr. 269-270, 2957-2967), and testified there was no necessity to condemn Mountain in 2011 (Tr. 299, 309-310, 313-314, 316, 2920-2921).

Fundamental to the City Brief is its ideological view that municipal ownership is *ipso facto* better because of the private enterprise "profit motive." The City's position on "profit" demonstrates that it, and the District Court, is against any private entity owning a Water System when the City wants to own it. The City heavily criticizes Carlyle for not making enough capital investment (City Br. 20-25), while criticizing Liberty for planning to do more. City Br. 33-36. The City (and District Court below) betrays an immovable preference for municipal

ownership—a preference that does not exist in the statute. This ideological foundation is nowhere more evident than in its summary that the "District Court simply found the totality of the evidence did not weigh in favor of private ownership." City Br. 30. The District Court acted as if it were deciding abstractly whether public utility ownership is better than private, which is entirely wrong. Instead, the City must overcome the strong presumption favoring property ownership by requiring a municipality to show the "public use to which it is to be applied **is a more necessary** public use" than the current use. *See Missoula v. Mountain Water Co.*, 228 Mont. 404, 743 P.2d 590, 595 (1987) (emphasis added); Mont. Code Ann. §70-30-111. The City ignores this critical standard.

Not only does the City ignore critical facts and sidestep the appropriate standard, it makes inaccurate, pejorative and overzealous factual claims that are unsupported by the record or the Preliminary Order of Condemnation ("POC") (CR 310).

- **City falsely claims "Carlyle has left the water system degraded,"** (City Br. 5, 9), relying on the leakage percentage of the System. *Id.* at 3. The POC makes no such conclusion. Contrary to the City's claim, leakage has declined by 19% under Carlyle ownership since 2011. Tr. 1869-1870; Ex. 2091.

- **City falsely claims "Carlyle has taken millions of dollars annually . . . out of Missoula through an administrative services agreement,"** (City Br. 3, 5, 7, 28-29), claiming it could eliminate these expenses. *Id.* at 7-8. In reality, Mountain receives substantial

services for these expenses, which have been audited and approved by the PSC through a robust vetting. Tr. 2965-2966.[1]

- **City falsely claims "Carlyle has not put any money back into the System for much needed repairs, maintenance, and capital investment."** City Br. 5. However, *all* of Mountain's profit is put back into the System (Tr. 2977-2978 (Kappes); Tr. 2812 (Dove)) – to the tune of $14+ million between 2011 and 2014. Tr. 1974-1976; Ex. 2104 & 2078.

- **City falsely claims "unlike Carlyle, the City will not be motivated by earning a profit, and instead . . . will reinvest that money back into the Water System . . . ."** City Br. 5; *see also* 27. But, the City will have to borrow money (via bonds) to pay the full fair market value of the System, and the bondholders will require payment of interest. Tr. 2297-2299. Unlike Mountain's "profit" which is reinvested in the System, the profits the City pays to bondholders as interest will simply go in the bondholders' pockets.

- **City falsely and misleadingly claims "much of the main and service line infrastructure is old and has exceeded its useful life."** City Br. 6. Rather, only 20% of the main had exceeded its useful life (City Br. 24) and, while 75% of the service lines have exceeded their useful lives, those are not owned by Mountain. Tr. 1901-1902.

- **City falsely and misleadingly claims "public savings, rates and charges . . . and public interest" are factors to consider, but the "value of the Water System is not one of those factors,"** City Br. 13 (citing to the 1980's case). This ignores that value was considered in that case, as it is critical to claimed "public savings" and the "rates and charges" under the City ownership.

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[1] The City makes other editorializing characterizations, with no citation to the record, such as "Carlyle's primary interest in generating a profit has left the Water System in poor condition," and "[t]he overwhelming evidence shows Carlyle has been far more interested in sending money to investors than maintaining an aged, leaking system in Montana." City Br. 5-6. There is no evidence to that effect in the record, and the POC does not so conclude.

- **The City misleadingly claims "[e]ven Mountain Water's Chief Engineer—Logan McInnis—recognizes that profit comes before customer needs under Carlyle's ownership."** City Br. 20. It is neither nefarious nor surprising that a utility would not "invest in capital needed for pipe replacement if they didn't have the ability to make a profit," because, *by definition*, that would not be a "reasonable and prudent" investment. Tr. 2014 & 2889. Mr. McInnis did not juxtapose earning a regulated profit on capital investment with "customer needs"—this is a dilemma invented by the City.

- **City falsely claims "Mountain Water's valuation argument is moot in light of the commissioners' determination" the fair market value is $88.6 million.** City Br. 17. The Commissioners' award—over twice the City's proof of value—was a stunning repudiation of all of the City's financial assumptions. This value, determined as of May 6, 2014, will have mandatory statutory interest, mandatory statutory attorney's fees, and bond issuance expenses added to it to reach a total bond amount far in excess of $100 million. This demonstrates the harm of the valuation evidence exclusion.

Rather than addressing its own burden to show a "more necessary public use" under §70-30-111, the City embarked on a smear campaign. It has chosen to follow ideology rather than appropriate application of fact and law to drive its effort to unnecessarily take the private property of a Montana corporate citizen.

II. STANDARD OF REVIEW

As set forth in Mountain's opening brief, the linchpin "more necessary public use" standard is a legal one, requiring not just factual findings regarding whether this-or-that is a benefit of municipal or private ownership, but a comparative analysis to determine whether, as a matter of law, the specific benefits of the proposed use (municipal ownership) are "more necessary" than the current

use (private ownership). This weighing to determine "more necessary public use" is an application of legal principles to factual findings, and is reviewed *de novo*. *See BNSF Ry. Co. v. Cringle*, 2012 MT 143, ¶16, 365 Mont. 304, 281 P.3d 203.

III. SUMMARY OF THE REPLY ARGUMENT

First, the City uses the wrong legal standard. Rather than acknowledge that the "more necessary public use" standard is a legal one, requiring the application of facts to a legal standard, it paints the appeal with the broad brush of the "clearly erroneous" standard. This is simply wrong and unsupportable.

Second, the Court erred in its treatment of valuation evidence. This exclusion is reviewed for correctness, as it was based on statutory interpretation. Exclusion was error because this Court has made clear the claimed financial benefits of the transaction (public savings, rates and charges) cannot be analyzed without cost-related findings. Mountain was not permitted to present "valuation evidence," being limited to presenting certain rate impact proof that was devoid of context and based on the City's unsupported assumptions. Finally, the Commissioners' award shows the bond would exceed $100 million, which undercuts the City's claimed financial benefits.

Third, the City does not address Mountain's argument that the District Court impermissibly gave an ideological preference to municipal ownership, even in the face of this Court's declination to so find 30 years ago. This was error.

Fourth, the City's reliance on whether "substantial credible evidence" supports the six critical factual findings challenged on this appeal ignores the broader and applicable definition of "clearly erroneous." That definition includes when the District Court misapprehended the effect of the evidence, or this Court is left with a definite and firm conviction of a mistake. Here, the District Court clearly erred with respect to six categories of findings, addressed in the opening brief and addressed further below.

Fifth, the Court's POC violates the principles of collateral estoppel. This issue was properly and fully raised to the District Court, and is a proper issue in this appeal. The facts have not changed and the City's attempts to distinguish them have no support in the record.

Finally, Mountain incorporates the response of Carlyle regarding the pretrial process.

IV. ARGUMENT

A. The City Uses the Wrong Standard of Proof, Trying to Reduce the Issue to Solely a "Clearly Erroneous" Review.

The City Brief sidesteps the applicable standard, seeking to transform the appeal into a battle of facts instead of dispute of law. This is plain from the "Standard of Review" section of the City Brief, which gives the standards for reviewing evidentiary rulings and factual findings, but omits the standard for conclusions of law and for the application of legal principles to factual findings.

The City's position is inconsistent with case law and contrary to its own arguments in this case.

The law is clear that application of legal principles to factual findings is a question of law reviewed *de novo*. *See BNSF Ry. Co*, 2012 MT 143. The City itself acknowledged in its own briefing: "The ultimate issue of law in this case is whether the City's ownership of the Water System is a public necessity—that is, a 'more necessary public use' of the System . . . ." CR 230 at 12. "More necessary" is logically a legal standard—it requires a comparative weighing of importance of various factual findings, and this weighing is not itself a "fact." Thus, Mountain's original brief differentiated a legal question (did the District Court err in relying on general views favoring municipalization in applying the legal standard?) from factual questions (whether critical factual findings were clearly erroneous?). The City's claims that the appeal solely concerns a "finding of fact" and can only be reviewed for clear error is wrong.

B. The Court's Exclusion of Value Evidence was Prejudicial to Mountain.

The District Court excluded all evidence of valuation. Value evidence is critical to every argument concerning the purported financial benefits of the transaction and whether municipal ownership of the assets for an identical use is "more necessary." The City inconsistently argues (1) the evidence was properly excluded, (2) the evidence was properly considered, and/or (3) the evidence was

either wrong or premature. City Br. 12-18. The City put alleged financial benefits as the centerpiece of its argument that municipalization is a "more necessary public use." However, with no valuation evidence offered by the City, its touted financial benefits are illusory. Worse, by excluding Mountain's valuation evidence, the City's assumptions were allowed to stand unrebutted. Unsurprisingly, the City cites the wrong standard of review. City Br. 10 (abuse of discretion). The District Court's decision was based on the legal application of a statute, meaning it is reviewed for correctness. *State v. Mackrill*, 2008 MT 297, ¶37, 345 Mont. 469, 191 P.3d 451.

1. The Value Evidence Was Improperly Excluded.

The City first claims value evidence should never be heard. This is based on the claim "value of the Water System is not [a] factor[]" this Court has enumerated as relevant to necessity. City Br. 12-14 (emphasis in original). In addition, the City points to the statutory bifurcation of condemnation proceedings between a necessity phase and valuation phase, inferring value-related evidence is inadmissible in the necessity phase. *Id.* The City cites to the earlier opinion of this Court as not including value as one of the "several factors to consider in determining whether a municipality's ownership of a water system is more necessary." City Br. 13. Among the proper factors to consider, the City says, are "public savings [and] rates and charges." *Id.* Yet the City ignores that it is

impossible to know what "public savings [and] rates and charges" will be, and which party they weigh in favor of, without considering the price the City would likely have to pay for the assets. This is because public savings and rates and charges are entirely a function of the price to be paid for the System.

The findings from the 1980's case included "[i]f the City cannot purchase the system for $11,000,000.00, then its projections of savings dramatically decrease as the cost of purchase increases." Supp. App. 10 at 12. That finding was upheld by this Court. Supp. App. 11. The City's claim that the 1980's court did not consider this evidence is specious. The City brought a condemnation, claiming public ownership provides such financial benefits over private ownership that public ownership is a "more necessary public use." This requires a comparison, including the financial impact of the taking. From rate impact, to available capital to reinvest, to "profit motive," the District Court's key factual findings must make implicit valuation assumptions. Without evaluating purchase price assumptions, it is impossible to analyze: (a) the cost of the debt service (interest) that will be paid to bondholders for the acquisition costs; (b) the capital the City will have available to invest, which will be funded by debt as well; (c) the impact of the acquisition on rates, and whether the City's aspirational 5-year rate freeze is likely. Thus, acquisition price (and therefore valuation) directly impacts public savings and charges, two considerations the City admits are directly involved in the analysis.

But the District Court did not stop at excluding Mountain's proof. It went farther, and held the City could actually afford the System: the "City can afford to acquire the Water System within the parameters of the bonding consultant estimates for capacity and the valuation appraisals conducted by the City." CR 310, ¶118. This finding is totally unjustified. The City did nothing to support the reasonableness of its $77 million assumed bond issuance. This is critical because the City's whole case relies on claimed financial benefits of the purchase. Savings based on claimed reductions in administrative expenses, lower cost of capital, or lack of "profit motive" cannot be considered without understanding the whole—that being, how much will the City have to purchase the System for, and will the cost of the debt capital outweigh those claimed benefits. By simply finding it was "affordable," and then considering these alleged "savings" in the abstract, the District Court avoided the pivotal question and committed reversible error.

The City concludes "Mountain Water does not argue the subject statutes are unconstitutional. . . ." City Br. 14. This is misleading, for Mountain contends the Court erroneously relied on the statutes to exclude such evidence, not that they truly require such an exclusion. Moreover, Mountain specifically argued the exclusion of the evidence "violated Mountain's due process rights." Mountain's Opening Br. 25-26, Oct. 9, 2015 (citing *Bozeman v. Vaniman*, 264 Mont. 76, 869 P.2d 790 (1994)).

2. Mountain Was Not Permitted to Present Valuation Evidence.

After claiming the evidence was properly excluded, the City flip-flops and argues that Mountain was, in fact, allowed to introduce "valuation evidence." City Br. 14-16. However, Mountain's offer of proof shows what valuation evidence it would have proven, including the expert witnesses who would present it. Supp. App. 17, 2411-2436. Even a cursory review of the record shows the valuation proof would have been far different than the testimony allowed.

The City apparently is referring to the testimony of Frank Perdue, a municipal investment adviser. Tr. 2230-2231. But Perdue did not present valuation evidence, testifying instead what would happen to water rates *if* the City had to issue bonds at various alternative amounts. He gave no testimony regarding what the City's *likely* bond issuance would need to be, because he was not qualified to opine on the fair market value of the System. In fact, counsel made it very clear that Perdue was only going to address the differences in bonding treatment at percentages above the City's assumed $77 million acquisition bond amount. Tr. 2241 ("He has not conducted a fair market analysis. He will not be testifying as to the fair market value of this system.")

All Perdue was permitted to do was calculate: "using the 77 million as a basis, . . . if they are wrong and it increases by 10 percent, 20 percent, 30 percent, what happens to rates?" Tr. 2242 (District Court). He then testified about these

percentage differences: (a) at $75 million bond, the rates would increase on average 2% per year; (b) at 33% more, or $100 million, "there will be a significant rate increase in year one on ratepayers approaching 12 percent," with 2% per year after that; (c) at 60% more, or $125 million, there would be a 24% increase in year one. Tr. 2256. This is not "valuation evidence," it is rate impact proof. This rate impact proof was deprived of context and meaning by the exclusion of evidence regarding the *likely* purchase price. There was no support for the $77 million bond issuance, because the City did not support it, and there was no valuation evidence by Mountain regarding the likely price, because the District Court excluded it.

Finally, the City's statement that Mountain did not take the opportunity to have Mr. Mantua testify about value is misleading. City Br. 15. Mr. Mantua is not an appraiser, but an engineer, with no opinion of fair market value. In fact, after the District Court indicated it would allow Mr. Mantua to offer such proof, it immediately rescinded its statement, at the City's request, holding, as to Mr. Mantua, "so I'm not going to allow testimony about this. It's refused." Tr. 2125-2126. The City quotes only the District Court's first statement, omitting its immediate rescission of the same. City Br. 15. This misleading tactic is unavailing. Mountain was never permitted to offer any valuation proof.

3. The Commissioners' Award Does Not Support the City's Argument.

The City's final argument is that because the valuation proceedings are continuing, the harm is either moot (because a commissioner panel set the value at $88.6M), or premature (because the jury trial is not scheduled until January 2016). City Br. 16-18. As to the Commissioners' award: (a) it is double the City's trial proof of $43.7 million value; and (b) as of May 6, 2014, the award was $88.6 million. City App. 72. Moreover, "value" is only one component of the "bond amount" that Perdue was addressing. To this value amount one must add: (1) mandatory statutory interest at 10% per year, Montana Code Annotated §70-30-302; (2) mandatory statutory attorney's fees for Mountain and Carlyle, as the party which received a higher value, §70-30-305; (3) the other costs of bond issuance (Tr. 2255), and funding working capital. Tr. 2260-2263. Thus, the Commissioners' award requires a bond issuance, at the conservative end, of over $100 million.

It is difficult to understand the City's reliance on the Commissioners' award as supporting its argument. Coupling the Commissioners' findings with the uncontroverted testimony of Perdue demonstrates that, at this acquisition price, there will be a rate impact of over 12% in the first year, a consideration the District Court could not and did not factor because of the lack of evidence on the expected purchase price. The District Court's implication that the City could likely freeze

rates for five years is now flatly disproved by the real-world Commissioner award. While the City cites lack of profit motive as a plus, a $100 million bond will require annual interest (i.e. bondholder profit) in excess of the annual profit earned by Mountain. Given the City's case-in-chief, it was prejudicial for the Court to rely on one party's profit (Mountain) in supporting the right to take, but refuse to consider another party's profit (the City's bondholders) on the very same issue.

The City's competing arguments that the valuation evidence was either properly excluded, properly admitted, or premature are not supportable and lack foundation in law or fact. The evidence was wholly excluded on a legally incorrect basis. This exclusion prejudiced Mountain's ability to show the fallacies of the City's assumptions of claimed financial benefits.

C. The Court Improperly Applied the "More Necessary" Standard By Considering General (and Unapplied) Differences.

"More necessary public use" requires an actual comparative analysis of whether the specific benefits of this City's ownership outweigh the specific benefits of this private company's ownership. This is not an abstract opinion on whether municipal utility ownership is better than private. As explained by this Court, there is an "absence of a declared policy by the Legislature giving greater or lesser weight to public ownership as compared to private ownership of a water system" (Supp. App. 9 at 11), and "the City has the burden to prove by a preponderance of the evidence that the condemnation is necessary." *Id.* at 13. The

City spends a great deal of time bolstering the legitimacy of Court findings about the virtues of municipal ownership in the abstract. However, the City does not address Mountain's argument that the Court's reliance on these abstract findings betrays a non-legislatively-sanctioned judicial preference for public ownership, and runs contrary to the law's protection of private property owners and requirement of a specific showing that this taking by this municipality of this private company's property is for a "more necessary public use."

D. The City's Attempts to Change and Bolster the District Court's Opinion Are Not Effective.

The City spends much of Section II of its Brief attempting to justify and bolster the Court's factual findings. City Br. 18-39. Mountain argued six specific factual findings were clearly erroneous, and addresses those facts here. As to the standard of review applicable to findings of facts, the City only uses the language of "substantial credible evidence." City Br. 18-19. However, the "clearly erroneous" inquiry is broader, including instances when "the district court has misapprehended the effect of the evidence" (*see Fletcher v. Park County*, 2015 MT 188N, ¶13, 379 Mont. 538, 353 P.3d 508 (table)), as happened here, or where "although evidence supports it, a review of the record leaves this Court with the definite and firm conviction that a mistake has been committed." *Id.*

1. The District Court was Clearly Erroneous in Finding that the "Acquisition Costs" Would Impact Rates.

Mountain challenged the District Court's finding regarding the Liberty transaction as clearly erroneous. That finding states: "The Court does not find it credible that revenue requirements due to Liberty's acquisition costs will have no effect on rates." CR 310, ¶123. The City's Brief tries to put a palatable spin on what the Court must have meant, claiming the Court merely meant Liberty would cost the ratepayers more by making capital investment in the System. City Br. 33-36. But this has nothing to do with Liberty's "acquisition costs" having an "effect on rates." Liberty's capital investment is not what the Court is referring to, but, rather, its acquisition costs. The Court's finding on acquisition adjustment is clearly erroneous and the City Brief fails to provide any support.

2. The Administrative Expense Savings Were Not Supported by Mr. Bickell.

The City totally disregards the proof of what Mountain receives pursuant to the administrative services contract, as if Mountain is gifting money to Park Water. City Br. 7. These were not gifts, but PSC-approved expenses that were audited and found to be beneficial to ratepayers. Tr. 273 & 2965-2966. The City's claims it could eliminate this expense are wholly unsupported, for reasons explained above.

3. Property Tax Base for Missoula County Has Nothing to Do with the Lost Revenue to Missoula Schools.

The City claims its acquisition will bring financial savings to ratepayers, including elimination of tax expense. City Br. 27-28. Rather than addressing the obvious question – how the City plans to mitigate the loss of $1.2 million in property tax revenue from Mountain – it notes "Mountain Water presently represents only 0.2% of Missoula County's tax base." City Br. 28. The County tax base has nothing to do with the loss of real and significant dollars to local government, including $350,000 annual property tax revenue paid to the Missoula schools. Tr. 877-878, 906. The City also claims the loss of tax revenue will be "mitigated by payment in lieu of taxes ["PILOT"] on a gradually declining basis to impacted entities." City Br. 28 (citing Tr. 902:24-903:15). But a PILOT means there is no tax "savings" after all, while the phase-out simply means that the "shift[ing] to other property tax payers" spoken of by Justice Sheehy will simply be deferred a few years. Supp. App. 9 at 20.

4. Leakage Standing Alone is an Incomplete and Misleading Argument.

The City repeats its fallacy that leakage, standing alone, measures the current owner's competence and devotion to the System, and conclusively demonstrates that City ownership is more necessary. The American Water Works Association itself specifically notes percentage indicators of water leakage,

standing alone, are not helpful, as not addressing the economics of the issue. Tr. 1893. Thus, "industry averages" and "sustainability" are misleading. The City (a) ignores that Mountain has reduced the leakage rate by 19% over the past 7 years, with much of that improvement occurring under Carlyle's ownership (Tr. 1869-1870; Ex. 2091); (b) ignores it was not necessary to condemn the System in 2011, when the leakage rate was higher (Tr. 238-239); and (c) criticizes Liberty for planning to invest, while criticizing Carlyle for not investing enough. City Br. 35-36. Likewise, the City disregards the uncontroverted cost-benefit analysis which shows that leakage returns to the aquifer at marginal pumping cost to ratepayers. The City's strident approach to claiming leakage is somehow the seminal fact supporting condemnation is unsupported and unrelated to the true issues in the case.

5. Municipal Ownership Is Not More Stable and There is No Proof to Support that it Would be.

The City does not address that it sold a system to Mountain previously.

6. The City Criticisms of the Statutorily-Created PSC Give Rise to a New Preference for City-Ownership.

As stated previously, the City Brief includes a remarkable level of rhetoric criticizing the PSC. While the City criticizes the process, it does so without regard to the fact that the legislature (a) has not declared a preference for municipal ownership, and (b) created the very body whose regulation the City decries as

worthless. In addition, the City has been silent instead of seeking to have the PSC address Mountain's alleged shortcomings.

E. MWC Did Not Waive the Collateral Estoppel Argument, and the Abstract and General Issues Have Not Changed.

The City claims Mountain waived its collateral estoppel argument. This is wrong. When Mountain and Carlyle moved for summary judgment on collateral estoppel grounds, it specifically identified to the District Court the issues determined in the 1980's litigation which must be given preclusive effect here. Contrary to this prior precedent, the Court then proceeded to make contrary findings in its POC. Thus, contrary to the City's arguments, the issue of collateral estoppel is well-preserved.

Regarding the City's substantive arguments why collateral estoppel does not apply, first, it is false that the Court in the 1980s assumed a "far different" profit motive and capital investment incentive than exists today. The City's entire argument in this regard relies on the misapprehension that capital investment ceased under the upstream ownership of Carlyle simply because Carlyle did not infuse "new capital." In fact, the undisputed evidence at trial showed capital investment increased since the Carlyle acquisition, and is financed not by infusion of "new capital," but by Mountain recycling all of its profits right back into the System, as capital investments. The City's statement "Mountain Water has used profits to pay investor dividends rather than much needed infrastructure,

maintenance, and repair" is pure fiction. City Br. 42. Mountain has, in fact, never issued a dividend. Tr. 1244-1245 (Kappes); Tr. 1079 (Dove).

Second, the City incorrectly states "facts and circumstances related to Home Office Expenses have changed." City Br. 43. Indeed, the opposite is true. In the 1980s, like today, Mountain paid the home office expenses to Park Water Company. In the 1980s, like today, Park Water Company was located in California. In the 1980s, like today, these expenses were not "gifts" to the parent as the City implies, but were for valuable services such as engineering and design services, HR work, and the like. And in the 1980s, like today, these home office expenses were approved by the Montana PSC as reasonable, prudent, and of benefit to the ratepayers. The City's attempts to conjure material "differences" between the PSC's approval of these expenses in the 1980s and today are unavailing.

Finally, the City's misstatements about property taxes must be corrected. It is undisputed that, just like in the 1980s, the burden of property taxes currently paid by Mountain will need to be shifted to other taxpayers. Tr. 284-285. The City's minimization of the loss of $1.2+ million in tax revenues aside, the fact remains that the loss of tax revenues was already determined not to favor condemnation in the 1980's litigation, and it was error for the Court to find oppositely here.

F. Mountain Incorporates Carlyle's Response to the Procedural Mistakes the District Court Made in the Progress of the Discovery and Trial And Legal Error Regarding the Authority of a Municipality to Condemn a Water System in the Absence of a Franchise or Contract

As it did in its opening brief, Mountain incorporates the arguments made by Carlyle.

V. CONCLUSION

The District Court should be reversed.

DATED this 23rd day of December, 2015.

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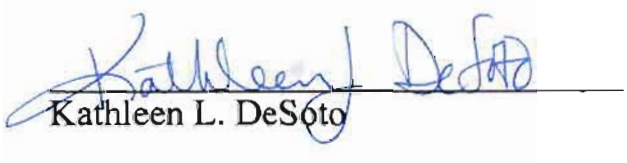
CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I certify that this Brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Office Word 2010 is 4,995 words, excluding Certificate of Service and Certificate of Compliance.



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CERTIFICATE OF SERVICE

I hereby certify that I served true and accurate copies of the foregoing Appellant Mountain Water Company's Opening Brief by depositing said copies into the U.S. mail, postage prepaid, addressed to the following:

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