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## Precap: *The City of Missoula v. Mountain Water Co.*

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**PRECAP; *The City of Missoula v. Mountain Water Co.*****Nick LeTang****I. QUESTION PRESENTED**

Whether the district court erred in concluding that municipal ownership of Missoula's water system is a "more necessary public use" than current private ownership under Mountain Water Company.

**II. FACTUAL AND PROCEDURAL BACKGROUND***A. Summary of the Case*

This is the city of Missoula's ("City") second action to condemn Mountain Water Company ("MW"), a Montana corporation.<sup>1</sup> The City's first attempt to condemn MW failed upon remand from the Montana Supreme Court in 1989.<sup>2</sup> Seeking a second chance to condemn the water system, the City filed an amended complaint in Missoula County District Court in May of 2014.<sup>3</sup> The City won its case in district court, and a Preliminary Order of Condemnation was entered in June of 2015.<sup>4</sup> The defendants appealed to the Montana Supreme Court.

*B. Mountain Water I:<sup>5</sup> the City's 1980s Attempt to Condemn the MW*

The City's first attempt to condemn MW failed in 1989.<sup>6</sup> The City had filed its condemnation action in 1984.<sup>7</sup> After a four-day trial, the district court held that the City had not met its burden of proving a public necessity for the taking.<sup>8</sup> The City appealed.<sup>9</sup> In 1987, the Court remanded the case for consideration of additional factors relevant to the public necessity analysis.<sup>10</sup> On remand, the district court again held that the City

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<sup>1</sup> Appellant Carlyle Infrastructure Partners, L.P.'s Brief at 4, *City of Missoula v. Mountain Water Co.*, <https://supremecourtdocket.mt.gov/view/DA%2015-0375%20Appellant's%20Opening%20-%20Brief?id=%7BD0D76650-0000-CA10-A106-9769D9542332%7D> (Mont. Oct. 9, 2015) (No. DA 15-0375).

<sup>2</sup> *Id.* at 5.

<sup>3</sup> *Id.* at 14.

<sup>4</sup> Appellant Intervenors' Brief at 3, *City of Missoula v. Mountain Water Co.*, <https://supremecourtdocket.mt.gov/view/DA%2015-0375%20Appellant's%20Opening%20-%20Brief?id=%7B00984950-0000-CB10-A8F6-2EC7D82F6671%7D> (Mont. Oct. 8, 2015) (No. DA 15-0375).

<sup>5</sup> *City of Missoula v. Mt. Water Co.*, 743 P.2d 590 (Mont. 1987).

<sup>6</sup> Appellant Carlyle Infrastructure, L.P.'s Brief, *supra* note 1, at 5.

<sup>7</sup> *Id.* at 4.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

had not met its burden.<sup>11</sup> The City appealed a second time, and the Court affirmed in full in 1989.<sup>12</sup>

### C. Mountain Water II: *Impetus for a Second Action*

In late 2011, MW's ownership, Park Water Company, was seeking to sell MW to Carlyle Infrastructure Partners, L.P. ("Carlyle").<sup>13</sup> Prior to any sale, approval from the Montana Public Service Commission ("PSC") was necessary.<sup>14</sup> The City supported the sale to Carlyle, with Missoula Mayor John Engen testifying to the PSC about the overall benefits the City would realize from the sale.<sup>15</sup> In another demonstration of support, the City penned a three-party letter to the PSC, stating that the sale was "in the public interest and should be approved by the Commission."<sup>16</sup> The PSC approved the sale on a conditional basis: as a condition of the sale, the PSC obligated Carlyle to give the City a good faith opportunity to buy the water system should Carlyle decide to sell MW in the future.<sup>17</sup>

Three years later in 2014, the City offered Carlyle \$65 million to purchase MW—a deal Carlyle ultimately rejected.<sup>18</sup> Carlyle had valued the water system at no less than \$120 million.<sup>19</sup> Seemingly irked at Carlyle's refusal to sell at its price, the City filed its amended Complaint to condemn MW on April 2, 2014, stating within its Complaint "Carlyle's valuation and refusal to negotiate in good faith are contrary to its promise made to the City in 2011."<sup>20</sup> Named as defendants in the condemnation action were MW and Carlyle.<sup>21</sup> Multiple parties filed motions to intervene, including the Employees of Mountain Water ("Employees"), the PSC, and Liberty Utilities. Except for the Employees', these motions were denied.<sup>22</sup> Further, the District Court limited the participation of the Employees to only their employment interests.<sup>23</sup>

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<sup>11</sup> *Id.* at 5.

<sup>12</sup> Appellant Carlyle Infrastructure, L.P.'s Brief, *supra* note 1, at 5.

<sup>13</sup> *Id.* at 16.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 17.

<sup>17</sup> Jenna Cederberg, *Mountain Water ownership officially transferred to Carlyle Group*, MISSOULIAN (Dec. 28, 2011), [http://missoulain.com/news/state-and-regional/mountain-water-ownership-officially-transferred-to-carlyle-group/article\\_e9437e78-31d1-11e1-b4dd-001871e3ce6c.html](http://missoulain.com/news/state-and-regional/mountain-water-ownership-officially-transferred-to-carlyle-group/article_e9437e78-31d1-11e1-b4dd-001871e3ce6c.html).

<sup>18</sup> Kayla Szpaller, *Missoula files for eminent domain takeover of water system*, MISSOULIAN, (Apr. 3, 2014), [http://missoulain.com/news/local/missoula-files-for-eminent-domain-takeover-of-water-system/article\\_d7e7703e-ba9c-11e3-97ad-0019bb2963f4.html](http://missoulain.com/news/local/missoula-files-for-eminent-domain-takeover-of-water-system/article_d7e7703e-ba9c-11e3-97ad-0019bb2963f4.html).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Appellant Intervenors' Brief, *supra* note 4, at 2–3.

<sup>23</sup> *Id.* at 2.

#### D. Trial and Preliminary Order of Condemnation

After a contentious pre-trial period that led MW to file for a writ of supervisory control to the Court,<sup>24</sup> a three-week bench trial began on March 18, 2015.<sup>25</sup> Since the City planned to use the water system for the same purpose, the relevant evidence at trial necessarily focused on what the City thought it could comparatively do better than MW.<sup>26</sup> It was the City's argument that MW's operations had left the water system in a leaky, degraded condition, all the while charging its customers some of the highest rates in Montana.<sup>27</sup> Generally, the evidence presented at trial included (1) evidence concerning the financial implications of municipal ownership, including whether the City—absent a profit motive—could charge relatively lower customer rates; and (2) the operational implications of municipal ownership, including whether the City could operate the water system more effectively than MW and its regulatory overseer, the PSC.<sup>28</sup>

On June 15, 2015, Judge Karen Townsend found the City had met its burden of proving City ownership was a “more necessary public use” and subsequently entered her Findings of Fact, Conclusions of Law and Preliminary Order of Condemnation.<sup>29</sup> MW, Carlyle, and the Employees appealed the District Court's decision to the Court.

### III. EMINENT DOMAIN IN MONTANA

*City of Missoula v. Mountain Water Co.* is a condemnation action—an action that effectuates a governmental entity's inherent power to take privately owned property for a *public use* (commonly referred to as “eminent domain”).<sup>30</sup>

#### A. Eminent Domain Power: The Montana Constitution

The power to take private property for public use is granted in the Montana Constitution.<sup>31</sup> Article II, section 17 grants governmental entities the power to deprive private property so long as due process of the law has

<sup>24</sup> Appellant Carlyle Infrastructure, L.P.'s Brief, *supra* note 1, at 12.

<sup>25</sup> *Id.* at 14.

<sup>26</sup> Appellant Mountain Water Co.'s Brief at 4, *City of Missoula v. Mountain Water Co.*, <https://supremecourtdocket.mt.gov/view/DA%2015-0375%20Appellant's%20Opening%20-%20Brief?id=%7B705E6750-0000-C611-A092-E2321B79C093%7D> (Mont. Oct. 9, 2015) (No. DA 15-0375).

<sup>27</sup> Appellee's Response Brief to Mountain Water Company at 4, *City of Missoula v. Mountain Water Co.*, <https://supremecourtdocket.mt.gov/view/DA%2015-0375%20Appellee's%20Response%20-%20Brief?id=%7BA0189251-0000-C619-BFB2-5F7A36C842EB%7D> (Mont. Oct. 9, 2015) (No. OP 15-0375).

<sup>28</sup> Appellant Mountain Water Co.'s Brief, *supra* note 26, at 4.

<sup>29</sup> Appellant Intervenors' Brief, *supra* note 4, at 3.

<sup>30</sup> EMINENT DOMAIN, Black's Law Dictionary (10th ed. 2014).

<sup>31</sup> Mont. Const. art. II, § 17.

been afforded.<sup>32</sup> Further, the Montana Constitution directly addresses eminent domain in Article II, section 29:

Private property shall not be taken or damaged for the public use without just compensation to the full extent of the loss having been first made to or paid into the court for the owner. In the event of litigation, just compensation shall include necessary expenses of litigation to be awarded by the court when the private property owner prevails.<sup>33</sup>

#### B. Condemnation Action: Procedural Law

Procedurally, condemnation actions have two distinct phases in Montana: (1) a “Necessity Phase,” and (2) a “Valuation Phase.”<sup>34</sup> A judge determines the Necessity Phase, and, should the judge determine a public necessity supports the taking, the Valuation Phase will commence. During the Valuation Phase, a commissioner panel selected by the parties determines the “just compensation” due to the condemnee.<sup>35</sup>

#### C. Condemnation Action: The Necessity Phase

The Necessity Phase requires three elements be satisfied before a judge can enter an Order of Condemnation. The three elements, found in MCA § 70–30–111, serve as a legislative check on government’s eminent domain power. In Montana, a governmental entity may exercise its eminent domain power only after proving, by preponderance of the evidence, that (1) the property is being taken for a *public use* enumerated in the Code;<sup>36</sup> (2) the property is *necessary* for the public use; and (3) if *property is already put to a public use* (MW’s situation), that the public use for which the property is proposed to be used is a “**more necessary public use.**”<sup>37</sup>

The “more necessary public use” test is not defined by statute or discussed in case law.<sup>38</sup> In *Mountain Water I*, the Court determined that a “broad range of considerations” is necessary to determine whether a proposed public use is “more necessary” than the present use.<sup>39</sup> Along with limitless factors to consider, Montana district courts are without statutory guidance to assist in weighing the numerous factors it must consider.<sup>40</sup> In

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at art. II, § 17.

<sup>34</sup> Appellee City of Missoula’s Brief, *supra* note 27, at 1.

<sup>35</sup> *Id.* at 1–2.

<sup>36</sup> MONT. CODE ANN. § 7–30–111 (2015) (emphasis added).

<sup>37</sup> *Id.* at § 70–30–103(c) (emphasis added).

<sup>38</sup> Appellant Carlyle Infrastructure, L.P.’s Brief, *supra* note 1, at 22.

<sup>39</sup> *Mountain Water Co.*, 743 P.2d at 595.

<sup>40</sup> *Id.* at 596–97.

essence, for cases like *Mountain Water I & II*, the legal standard for determining the “more necessary public use” test amounts to one large, unbounded balancing act.

In *Mountain Water I*, the Court provided some limited guidance about how certain factors should be considered upon remand. The Court held that: (1) the City’s ordinance authorizing the taking is not conclusive proof that the taking was necessary; (2) the effect on MW’s employees by the proposed city acquisition is not, alone, sufficient to defeat the finding of public necessity; (3) issues of profit and out-of-state ownership of a private company operating the City’s water system are required to be considered and weighed in determining whether public interest requires the City’s taking of water system.<sup>41</sup>

#### IV. ISSUES ON ORAL ARGUMENT

Between the three appellants (MW, Carlyle, and the Employees), that are many issues on appeal. The primary issue on appeal is whether the district court’s ultimate conclusion of law—that the City has a “more necessary public use” supporting condemnation—is a correct application of the law as determined by factual findings supported by substantial evidence.<sup>42</sup> Directly related to the primary issue are issues concerning: (1) the exclusion of MW’s valuation evidence; and (2) whether certain findings of fact are not clearly erroneous and supported by substantial evidence.<sup>43</sup>

There are numerous “secondary” issues on appeal as well, including (1) whether the City’s claim is barred by collateral estoppel; (2) whether the district court abused its discretion in its management of discovery and pretrial proceedings; (3) whether the Code supports the City’s taking of the water system without first (a) having a franchise agreement or contract with MW to supply the municipality with water, or (b) making a showing that it is not feasible for the City to develop a competing water system.<sup>44</sup> Though some of these issues may have merit, the Court directed the parties to focus oral argument on the primary issue stated above.

Expect oral argument to focus on (1) the role that MW’s valuation evidence should have in determining the “more necessary public use” test during the Necessity Phase; (2) whether the “more necessary public use” test is satisfied by general findings about the advantages municipal ownership or whether the test requires findings specific to the parties in question; and (3) whether error, if any, warrants a reversal by the Court.

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<sup>41</sup> *Id.* at 594–96.

<sup>42</sup> Appellant Mountain Water Co.’s Brief, *supra* note 26, at 16–18.

<sup>43</sup> *Id.*

<sup>44</sup> Appellant Carlyle Infrastructure, L.P.’s Brief, *supra* note 1, at 20–23.

A. *Issue One: Exclusion of Mountain Water's Valuation Evidence*

The first main issue on appeal is whether the district court's exclusion of MW's evidence pertaining to the water system's likely purchase price was material error.<sup>45</sup> At trial, MW attempted to put on valuation evidence that contradicted the anticipated \$77 million acquisition bond proffered by the City—a price that was key to the City's argument that the cost savings it could pass on to customers made municipal ownership a “more necessary public use.”<sup>46</sup> The \$77 million acquisition bond is the total bond debt the City estimated it needed to finance the taking.<sup>47</sup> The City thought this number would cover both the water system purchase price and acquisition costs associated with the taking.<sup>48</sup> The City admitted that this number was the “critical link” to passing on cost savings to customers in the future: Missoula Chief Administrative Officer Bruce Bender stated that the ability of the City to hold rates steady in the future “depended[ed] upon how much we have to pay to acquire [the water system] . . .”<sup>49</sup> Rather than allowing MW to put on its own valuation evidence, the district court let MW attack the City's \$77 million value through testimony about how customer rates could change at different purchase prices: \$100 million, \$125 million, and \$140 million.<sup>50</sup>

After the conclusion of trial, the district court issued a memorandum justifying its reason for denying MW's valuation evidence, citing (1) the overall schema of statutes governing eminent domain, which prescribe sequential steps that must be exercised in a specified order; and (2) concerns about tainting the valuation commissioner pool for the subsequent just compensation phase. The District Court did not cite a specific statutory section in its reasoning.<sup>51</sup>

1. *Mountain Water's Argument*

MW argues that the district court erred by making its financial findings based upon the City's \$77 million acquisition bond that MW was not permitted to rebut at trial.<sup>52</sup> MW claims that the \$77 million was an assumption, supported by no evidence.<sup>53</sup> Rebutting the City's \$77 million value with evidence of a higher value was key to MW's contention that the City would likely have to raise customer rates to finance the taking—

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<sup>45</sup> Appellant Mountain Water Co.'s Brief, *supra* note 26, at 19.

<sup>46</sup> *Id.* at 18–19.

<sup>47</sup> *Id.* at 5.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Appellee City of Missoula's Brief, *supra* note 27, at 15.

<sup>51</sup> Appellant Mountain Water Co.'s Brief, *supra* note 26, at 33.

<sup>52</sup> *Id.* at 19.

<sup>53</sup> Appellant Mountain Water Co.'s Brief, *supra* note 26, at 5.

a factor that favors against the City's "more necessary public use" of the water system.<sup>54</sup> MW states that the district court excluded all of its evidence relevant to the likely acquisition price of the water system, including the price's impact on rates, capital investment, and other claimed financial benefits.<sup>55</sup> MW argues that had it been able to offer evidence that the City's \$77 million value was too low, it would have proven that the taking would put the City in the position of having to raise customer rates, decrease capital investment, and defer maintenance on the water system.<sup>56</sup>

## 2. *City's Argument*

The City responded to MW's argument by stating the district court memo's justifications for excluding MW's valuation evidence.<sup>57</sup> The City argues that the value of the water system should be determined only during the Valuation Phase and after the court issues its order of condemnation.<sup>58</sup> It further argues that allowing valuation evidence in the Necessity Phase defeats the express legislative intent of the eminent domain statutes, confuses the two distinct condemnation phases, and bias the Valuation Phase.<sup>59</sup> The City also makes a harmless error argument, pointing to the MW's opportunity to attack the City's \$77 million value through testimony about how customer rates could be affected under a series of higher hypothetical values.<sup>60</sup>

## 3. *Analysis*

The district court's refusal to allow valuation evidence is likely MW's best argument for a reversal. This is evident by the district court's decision to issue a lengthy memorandum justifying its decision to exclude such evidence after the trial had finished.<sup>61</sup> In cases like *Mountain Water II*—where a municipality argues that it can charge relatively lower rates—it is important that a fair, credible acquisition value is known before determining whether lower customer rates are likely under municipal ownership. A lower acquisition value will favor municipal ownership, since the City will not have to raise customer rates to service acquisition debt; a high acquisition value will favor MW ownership, since the City will have to raise customer rates to service acquisition debt.<sup>62</sup>

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<sup>54</sup> *Id.*

<sup>55</sup> Appellant Mountain Water Co.'s Brief, *supra* note 26, at 19.

<sup>56</sup> *Id.* at 23.

<sup>57</sup> Appellee City of Missoula's Brief, *supra* note 27, at 12–13.

<sup>58</sup> Appellee City of Missoula's Brief, *supra* note 27, at 13.

<sup>59</sup> *Id.* at 13–14.

<sup>60</sup> *Id.* at 14–16.

<sup>61</sup> Appellant Mountain Water Co.'s Brief, *supra* note 26, at 19.

<sup>62</sup> *Id.* at 5.

The district court's decision to exclude MW's valuation evidence illustrates the difficulty in applying Montana's two-step condemnation process to the taking of a public utility: that a neutral FMV determination is not completed until the latter Valuation Phase, despite the importance that acquisition value has in the Necessity Phase for proving whether City ownership can bring future cost savings to customers.<sup>63</sup> The dilemma can aptly be described as a circular reference problem: Before a commissioner-determined value is decided in the Valuation Phase, necessity must be determined; yet, before necessity is determined in the Necessity Phase, a credible acquisition value is needed to determine whether cost savings under City ownership is probable.<sup>64</sup>

At oral argument, expect the Court to ask the City why MW's valuation evidence was not relevant—or—if it is relevant, why it was proper for the district court to exclude it anyway. This will likely be difficult for the City to overcome since MW has a strong argument that its valuation evidence was relevant and not barred by any law. “Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable that it would without the evidence.<sup>65</sup> All relevant evidence is admissible, except as otherwise provided by constitution, statute, Montana Rules of Evidence, or other rules applicable in the courts of Montana.<sup>66</sup> Since the City asserted the cost savings it could pass on to customers meant it had a “more necessary public use” for the water system, any evidence of the water system's value is relevant; further, MW's valuation evidence was directly relevant to disproving the City's smaller acquisition value. Further, no law exists to exclude MW's valuation evidence.<sup>67</sup> Though the general schema of Montana's statutes governing condemnation has the Necessity Phase and the Valuation Phase occur sequentially, these statutes do not prohibit MW from offering its own valuation evidence.<sup>68</sup>

In addition to being relevant and not barred by law, MW will likely argue that disallowing MW's valuation evidence for fear of tainting the valuation commission is not a valid legal reason for excluding such evidence. Montana's condemnation statutes require only that those commissioners ultimately selected for the Valuation Phase have not prejudged the issue by having “discussed, communicated, overheard, or read any discussion or communication from any party” concerning the value of the water system—a mandate that can be satisfied even if MW had given its valuation evidence.<sup>69</sup>

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<sup>63</sup> Appellee City of Missoula's Brief, *supra* note 27, at 1.

<sup>64</sup> *Id.*

<sup>65</sup> Mont. R. Evid. 401.

<sup>66</sup> Mont. R. Evid. 402.

<sup>67</sup> Appellant Mountain Water Co.'s Brief, *supra* note 26, at 20.

<sup>68</sup> MONT. CODE ANN. §§ 70-30-201 to 207 (2015).

<sup>69</sup> MONT. CODE ANN. § 70-30-207.

Though MW may have a credible argument for error, expect the Court to ask MW why any error on this matter warrants a reversal. Being that the district court allowed MW to attack the City's \$77 million number through a series of hypotheticals, MW must explain how the valuation evidence "was of such a character as to have affected the outcome of the trial."<sup>70</sup> It will be difficult for MW to argue that the exclusion of its evidence affected the outcome of the trial for numerous reasons, including (1) the district court heard testimony about how the customer rates could change under hypothetical values; thus, the court weighed evidence that customer rates could go up when deciding both its findings and ultimate determination that City ownership was "more necessary"; and (2) what the City may or may not charge customers in the future is but *one factor* the district court considered when making its determination that City ownership was "more necessary."

*B. Issue Two: Findings of Fact—Insufficient Supporting Evidence;  
Clear Error*

The second main issue on appeal concerns the findings of fact relied upon by the district court in concluding that the City has a "more necessary public use" for the water system. This issue includes arguments concerning (1) whether certain district court findings supporting City ownership were too general, ostensibly turning the "more necessary public use" test into a standard that will always favor municipal ownership; and (2) whether any clear error warrants reversal.

*1. Mountain Water's Argument*

MW argues that the district court relied on several abstract or general findings of fact in reaching its ultimate legal conclusion that City ownership was a "more necessary public use."<sup>71</sup> It is MW's argument that this was a legal error, reviewable *de novo*, since the Necessity Phase requires the finding of a "more necessary public use" to be fact-specific, not satisfiable by generalities about municipal ownership.<sup>72</sup>

First, MW argues the district court's findings exhibited an overall preference for municipal ownership.<sup>73</sup> Specifically, MW points to the district court's findings that municipalities have greater transparency, lack a profit motive, and that state regulation under the PSC is inherently "less attuned to the community."<sup>74</sup> These generalized justifications for

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<sup>70</sup> Appellant Mountain Water Co.'s Brief, *supra* note 26, at 20.

<sup>71</sup> Appellant Mountain Water Co.'s Brief, *supra* note 27, at 45.

<sup>72</sup> *Id.* at 20.

<sup>73</sup> *Id.* at 17.

<sup>74</sup> *Id.* at 28.

condemnation, MW argues, reflect an impermissible court-declared public policy favoring municipal ownership over private ownership.<sup>75</sup>

Second, MW states that the district court's general findings that non-profit municipal ownership will result in favorable rates is not supported by credible evidence in this case.<sup>76</sup> This argument is derived from the district court's refusal to allow MW's valuation evidence: Because the District Court refused this evidence—evidence vital to determining future rates the City must change to service its acquisition debt—MW argues that it is not possible to determine whether the City's non-profit status will result in a net benefit.<sup>77</sup>

Third, MW argues that the district court's general findings that City ownership would result in more effective operation of the water system is not supported by credible evidence.<sup>78</sup> MW argues that the City had proposed no unique plan for addressing the issue of water system leakage at trial and merely stated that it would invest more money in infrastructure replacement and repair.<sup>79</sup> MW points to the City's Preliminary Business Plan, stating that it contains no specific operation plan for capital investment and no credible evidence that the City could exceed or match MW's current capital investment plan.<sup>80</sup>

Fourth, MW argues that the district court maligned the PSC's rate-setting process through its general findings favoring municipal rate setting.<sup>81</sup> MW argues that the district court used the wrong legal analysis when describing the PSC's rate-setting process as, essentially, cumbersome.<sup>82</sup> MW argues that the district court misunderstood the standard when it found that because other municipalities in Montana have the ability to set water rates fairly and effectively, the City could do so as well.<sup>83</sup> The legal standard of "more necessary," MW argues, should analyze which parties' system is comparatively better for the rate payers—not in how the parties navigate a process, but rather which process best analyzes, evaluates, and sets water rates.<sup>84</sup>

Next, MW argues that the district court made a series of clearly erroneous factual findings, including:

- (1) That Liberty (impending purchaser of Carlyle's MW holdings) would be able to raise its customer rates to cover its acquisition

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 29.

<sup>77</sup> Appellant Mountain Water Co.'s Brief, *supra* note 27, at 30.

<sup>78</sup> *Id.* at 31.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 32.

<sup>82</sup> *Id.*

<sup>83</sup> Appellant Mountain Water Co.'s Brief, *supra* note 27, at 32.

<sup>84</sup> *Id.* at 33.

costs for acquiring MW, despite the fact that Liberty is barred by law from doing so;<sup>85</sup>

(2) That customers could save on administrative expenses MW outsources, despite the fact that the City made no proof that it could replace the actual services;<sup>86</sup>

(3) That customers will save money under City ownership since the City will not have to pass on property taxes assessed on the water system, despite the fact that the City will have to make up for lost property taxes elsewhere;<sup>87</sup>

(4) That the water system's leakage is an indication of poor water systems quality, despite substantial evidence to the contrary;<sup>88</sup>

(5) That municipal ownership of a utility is more stable, despite the fact that the City itself sold the only water system it ever owned, Missoula Water Works, to MW in 2001; further, MW argues this finding is overbroad and factually unsupported;<sup>89</sup>

(6) That the City's Harstad Survey, which demonstrates Missoula resident's support for City ownership of the water system, is unreliable due to its methodology flaws.<sup>90</sup>

## 2. *Employees' Argument*

The Employees also argue for clear error, stating that the district court erred when it found the employment terms proposed by the City under municipal ownership were "fair," "reasonable," "comparable," and "more secure."<sup>91</sup> The Employees argue that the undisputed evidence showed that the City would not match the wages, benefits, and terms of employment of the Employees.<sup>92</sup>

## 3. *City's Argument*

The City refutes MW's claim about the district court's findings being too general, arguing that the district court's findings are extremely

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 35.

<sup>87</sup> *Id.* at 36.

<sup>88</sup> *Id.*

<sup>89</sup> Appellant Mountain Water Co.'s Brief, *supra* note 27, at 38.

<sup>90</sup> *Id.* at 39.

<sup>91</sup> Appellant Intervenors' Brief, *supra* note 4, at 19.

<sup>92</sup> *Id.* at 19–20.

detailed, specific, and supported by substantial credible evidence.<sup>93</sup> Substantial credible evidence, the City argues, requires only evidence that a reasonable mind might accept as adequate to support a conclusion.<sup>94</sup> The City further argues that its position as appellant requires the Court to construe the district court’s findings in its favor and all findings should be upheld even if the evidence is inherently weak and conflicting or could have supported different findings.<sup>95</sup>

#### 4. Analysis

Arguing for error in the District Court’s findings is likely a weaker argument for MW and the Employees. First, MW and the Employees (“Appellants”) carry the heavy burden of demonstrating error. At trial, Judge Townsend heard testimony from 40 witnesses and examined 332 exhibits before issuing more than 50 pages of findings of fact.<sup>96</sup> Second, assuming Appellants meet the high burden of demonstrating error for any of the district court’s findings, the Appellants must still convince the Court that any error affected the outcome of the trial. Since the district court considered numerous factors before concluding that City ownership was “more necessary,” it will be difficult for MW to argue that any error affected the outcome of the trial—this is especially true considering, absent controlling statute or case law, the district court was free to weigh the various factors however it chose.<sup>97</sup> Likewise, the Employees’ employment interests, as stated by the Court in *Mountain Water I*,<sup>98</sup> is but one factor in the District Court’s application of the “more necessary public use” test.

## V. SUMMARY

The City won its condemnation action in June of 2015, successfully arguing in Missoula County District Court that it had a “more necessary public use” for the water system. MW, Carlyle, and the Employees have appealed. Oral argument, scheduled for Friday, April 22, will likely focus on the District Court’s exclusion of MW’s valuation evidence and whether the findings were sufficiently supported by the evidence. The exclusion of the valuation evidence is likely MW’s best argument for reversal; however, MW will have difficulty showing that the exclusion of this evidence affected the trial outcome. Further, the Appellants carry the heavy burden of proving the District Court made

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<sup>93</sup> Appellee City of Missoula’s Brief, *supra* note 27, at 18

<sup>94</sup> *Id.* at 19.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 20.

<sup>97</sup> Appellant Carlyle Infrastructure, L.P.’s Brief, *supra* note 1, at 22.

<sup>98</sup> *Mountain Water Co.*, 743 P.2d at 595.

material error in its findings. Lastly, since the district court considered both the employment interests of the Employees and issues of profit and out-of-state ownership at trial, it will be difficult for the Appellants to successfully argue that the District Court misapplied *Mountain I*.