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City of Missoula v. Mountain Water. Is Municipal Ownership a More Necessary Public Use?

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**CASENOTE; *City of Missoula v. Mountain Water*: Is Municipal
Ownership a More Necessary Public Use?**

Emily Gutierrez

I. INTRODUCTION

The saga of the City of Missoula's (City) attempt to gain control of the privately held water system has concluded for now.¹ In *City of Missoula v. Mountain Water*,² the Montana Supreme Court found that the City's ownership of the aging, privately held water system constituted a "more necessary public use." The majority applied the correct standard of review and properly affirmed the lower court's decision in accordance with precedent and relevant statutes. *Mountain Water* shed light on the "more necessary public use" analysis and the specificity of factual findings required to support the determination.

II. FACTUAL AND PROCEDURAL BACKGROUND

Mountain Water, a Montana corporation, has owned Missoula's water system since purchasing it from Montana Power Company in 1979.³ After failed negotiations to purchase Mountain Water, a giardia outbreak in the Rattlesnake, and mounting frustration with Mountain Water's ownership of the water system, the City initiated its first condemnation proceeding against Mountain Water in 1984.⁴ A lengthy legal battle ensued, with two appeals to the Montana Supreme Court, but the City ultimately did not succeed in condemning Mountain Water.⁵

The City, after its 2014 offer to purchase the water supply system for \$50 million was rejected, filed a condemnation action in the Fourth Judicial District Court in Missoula, seeking to exercise its power of eminent domain.⁶ The City initiated its condemnation action against Mountain Water and Carlyle Infrastructure Partners, LP (Carlyle), a global investment partnership and Mountain Water's controlling shareholder.⁷ The employees of Mountain Water (Employees) intervened in the suit.⁸

The district court issued a 68-page Findings of Fact, Conclusions of Law, and Preliminary Order of Condemnation subsequent to a three-

¹ *City of Missoula v. Mountain Water Co.*, No. DA 15-0375, ___ P.3d ___, 2016 WL 4124135 (Mont. Aug. 2, 2016) (Rice, J. dissenting; McKinnon, J., dissenting); see generally *City of Missoula v. Mountain Water Co.*, 742 P.2d 590 (Mont. 1987) (Sheehy, Holmstrom, JJ., dissenting) (*Mountain Water I*); *City of Missoula v. Mountain Water Co.*, 771 P.2d 103 (Mont. 1989) (*Mountain Water II*).

² 2016 WL 4124135, at *1.

³ *Mountain Water I*, 742 P.2d at 592.

⁴ *Id.*

⁵ See *Mountain Water I*, 742 P.2d at 595; *Mountain Water II*, 771 P.2d at 110.

⁶ *Mountain Water*, 2016 WL 4124135, at *1.

⁷ *Id.*

⁸ *Id.* at *2.

week bench trial, finding that Missoula's ownership of the water system constituted "a more necessary public use."⁹ Defendants appealed the district court's order and appropriately filed a claim for just compensation with the district court.¹⁰ The district court appointed commissioners, per statutory requirement, who determined the fair market value of Mountain Water at \$88.6 million.¹¹ Mountain Water did not appeal the commissioners' assessed value of \$88.6 million.¹² Appellants Mountain Water, Carlyle, and Employees raised eight issues, including procedural, due process, and substantive claims; however, the main dispute centered on whether the City had proven, by a preponderance of evidence, whether its ownership of the water system constituted a "more necessary public use."¹³

III. MAJORITY HOLDING

Justice Cotter wrote the majority opinion, joined by Chief Justice McGrath and Justices Shea, Baker, and Wheat.¹⁴ The majority was unpersuaded by the Mountain Water's procedural arguments, finding no reversible error with the district court's rulings.¹⁵ Of the issues presented, the Court devoted the most time to analyzing the district court's findings that led to its conclusion that the City's acquisition of Mountain Water constituted "a more necessary public use."¹⁶ The Court systematically addressed the district court's findings and determined that the factual findings were "supported by substantial credible evidence and are not the product of bias in favor of public ownership."¹⁷

IV. JUSTICE RICE'S DISSENT

Justice Rice's dissent forcibly argues that Mountain Water was deprived of due process due to an unconstitutional burden shift, various discovery abuses, rulings on inadmissibility of evidence, and the district court's "judicial preference for condemnation."¹⁸ Justice Rice agreed with Mountain Water that the district court's findings aired an implicit bias that

⁹ Findings of Fact, Conclusions of Law and Preliminary Order of Condemnation, *City of Missoula v. Mountain Water Co.*, <https://perma.cc/ZWP3-Y75K> (Mont. Dist. Ct. June 15, 2015) (No. DV-14-352).

¹⁰ *Mountain Water*, 2016 WL 4124135, at *7–8.

¹¹ *Id.* at *3; see MONT. CODE ANN. § 70–30–206.

¹² *Mountain Water*, 2016 WL 4124135, at *3.

¹³ *Id.* at *1.

¹⁴ *Id.* at *26.

¹⁵ *Id.* at *4, 7, 9, 10 (holding that that the district court did not err in denying defendant's motions for a continuance, refusing to dismiss Carlyle, excluding evidence of valuation, or precluding the claim based on collateral estoppel).

¹⁶ See *Id.* at *19–27.

¹⁷ *Id.* at *27.

¹⁸ *Id.* at *28, 30, 32 (Rice, J., dissenting).

avored private ownership to municipal ownership.¹⁹ This presumption, Justice Rice stated, resulted in an unconstitutional burden shift and allowed the City to escape its burden of proving that its ownership of the water system was a “more necessary public use.”²⁰

V. JUSTICE MCKINNON’S DISSENT

Justice McKinnon authored a separate dissent that emphasized the majority’s error in applying the “more necessary” requirement. She also joined Justice Rice’s dissent regarding the discovery violations.²¹ According to Justice McKinnon, the majority departed from precedent and erroneously applied the “more necessary public use” requirement.²² According to Justice McKinnon, § 70–30–111(1)(c) and precedent require that the proposed public use be *different* from the current public use.²³ When the uses are identical, property cannot be taken for the same public use without express or implied legislative authorization.²⁴ Justice McKinnon characterized the majority’s use of the “more necessary” requirement as both legally incorrect and overstepping the role of the judiciary by rule-making in an arena where policy makers are making important decisions about the necessity and desirability of public ownership.²⁵

VI. ANALYSIS

The majority and Justice McKinnon’s application and interpretation of the “more necessary public use” requirement stand in sharp contrast. Justice McKinnon asserts that the analysis should not be applied when the proposed use is the same as the current use. The majority holds that the proposed use can be the same as the current use, emphasizing that municipal ownership destroys the for-profit use of the water system. Based on precedent and the correct interpretation of the statutes, the majority properly applied and analyzed the “more necessary public use” requirement. Further, although the discovery tactics used by the City were troubling, the majority properly found that the City’s actions did not result in a deprivation of Mountain Water’s due process.

¹⁹ *Id.* at *30–31; Appellant Mountain Water Co.’s Opening Brief, *City of Missoula v. Mountain Water*, 2015 WL 6407430 at *17–18 (Mont. Aug. 2, 2016).

²⁰ *Mountain Water*, 2016 WL 4124135, at *30–31; MONT. CODE ANN. § 70–30–111.

²¹ *Mountain Water*, 2016 WL 4124135, at *41–42 (McKinnon, J., dissenting).

²² *Id.* at *35.

²³ *Id.* at *35, 39.

²⁴ *Id.* at *36.

²⁵ *Id.* at *40.

A. Eminent Domain in Montana

Eminent domain refers to a government's inherent power to take private property for public use.²⁶ The Montana legislature recognized certain public uses subject to the government's power to exercise eminent domain, which includes "water and water supply systems."²⁷ Condemnation proceedings are split into two procedural phases by statute: the necessity phase and the valuation phase.²⁸ Condemnation proceedings commence with a necessity phase, and depending on the outcome of the necessity phase, conclude in a valuation phase.²⁹ The first phase is based on a district court's factual findings that determine whether the "public interest requires the taking."³⁰

Before a property can be condemned, a condemnor must show by a "preponderance of the evidence that *the public interest requires the taking* based on the following findings . . . if already being used for a public use, that the public use for which the property is proposed to be used is a *more necessary public use*."³¹ The "more necessary public use" requirement of § 70–30–111(1)(c) can be seen as an exception to the prior public use doctrine.³² According to the prior public use doctrine, if a property is already dedicated to a public use, then an entity cannot exercise its power of eminent domain over the property for a different public use unless the legislature has specifically authorized it.³³ Both the language of § 70–30–111(1)(c) and the prior public use doctrine presume a conflict or incompatibility of public uses.³⁴ That is, the "more necessary public use" analysis will only be employed "when we have two public uses that are not compatible uses."³⁵

Court precedent seemingly requires an initial inquiry before applying the "more necessary public use" analysis. In *Montana Talc Co. v. Cyprus Mines Corp.*,³⁶ the Court found that if the proposed public use

²⁶ 26 AM.JUR.2D. *Eminent Domain* § 2 (WestlawNext through Sept. 2016); *see also* MONT. CODE ANN. § 70–30–101 (2015).

²⁷ *McTaggart v. Mont. Power Co.*, 602 P.2d 992, 995 (Mont. 1979); MONT. CODE ANN. § 70–30–102(6).

²⁸ MONT. CODE ANN. § 70–30–206; *Mountain Water*, 2016 WL 4124135, at *3.

²⁹ MONT. CODE ANN. §§ 70–30–206 to 207.

³⁰ *Id.* at § 70–30–111.

³¹ *Id.* (emphasis added).

³² *Mountain Water*, 2016 WL 4124135, at *36 (McKinnon, J., dissenting).

³³ 26 AM.JUR.2D. *Eminent Domain*, *supra* note 26, § 103; *see* *Cocanougher v. Ziegler*, 112 P.2d 1058, 1061 (Mont. 1941) (explaining that property already dedicated to a public use cannot be condemned for a different public use without clear or implied legislative intent).

³⁴ *See* MONT. CODE ANN. § 70–30–111 ("if already being used for a public use, that the public use for which the property is proposed to be used is a more necessary public use"); 26 AM. JUR. 2D. *Eminent Domain*, *supra* note 26, § 103 ("Ordinarily, land devoted to one public use cannot be taken for another *inconsistent* public use unless . . .") (emphasis added).

³⁵ *Mont. Power Co. v. Burlington N. Ry. Co.*, 900 P.2d 888, 894 (Mont. 1995) (citing *Mont. Talc Co. v. Cyprus Mines Corp.*, 748 P.2d 444, 451–52 (Mont. 1987); *Cocanougher*, 112 P.2d at 1061; *Butte, Anaconda & Pac. Ry. Co. v. Mont. Union Ry. Co.*, 41 P. 232, 244 (Mont. 1895).

³⁶ 748 P.2d at 452.

affects the owner's rights "such that his use will be defeated or seriously interfered with . . . the statute requiring a 'more necessary' public use comes into play." Similarly in *Cocanougher v. Zeigler*,³⁷ the Court determined that the "more necessary public use" analysis is used when "the latter use is such as will destroy the prior use." In *Butte, Anaconda & Pacific Railway Co. v. Montana Railway Union Co.*,³⁸ the Court concluded "[w]e cannot agree that the statute which authorizes lands to be appropriated for a more necessary public use means a different public use in all cases. If the legislature had intended that construction . . . they could easily have said a *different* public use."

These Montana cases help produce a framework for determining whether uses are compatible, and thus whether to engage a "more necessary public use" analysis. The relevant analysis could be phrased: (1) are the proposed uses incompatible (using guidance from *Montana Talc*, *Cocanougher*, and *Butte, Anaconda & Pacific Ry. Co.* to determine whether uses are compatible); and if so (2) is municipal ownership of a water system a more necessary public use than private ownership of a water system?

B. Application of the More Necessary Public Use Analysis

The proposed public use of municipal ownership of the water system is incompatible with the former public use as a privately owned water system simply because the City's ownership would destroy Mountain Water's "right to the use of the [water system]."³⁹ Or put another way, the City's condemnation of the water system would result in Mountain Water's being "completely deprived of [its] public use of appropriated property, such that [its] use will be defeated or seriously interfered with by the proposed condemnor's right if granted."⁴⁰

Although Justice McKinnon devotes much of her opinion to assert that the majority misapplied the "more necessary public use" analysis, the majority only briefly addresses Justice McKinnon's argument and its application of the "more necessary public use" analysis: "the City's acquisition of the water system would 'inhibit' Mountain Water's use of its property by wholly depriving it of the use of the water system, the uses are not compatible, thus requiring the 'more necessary' analysis to be conducted."⁴¹

According to Justice McKinnon, the "more necessary use" requirement assumes that the use is incompatible with the current public use and that the use that forms the basis for the condemnation must be a

³⁷ *Cocanougher*, 112 P.2d at 1060.

³⁸ 41 P. at 246–247 (emphasis added).

³⁹ *Cocanougher*, 112 P.2d at 1060.

⁴⁰ *Montana Talc*, 748 P.2d at 452.

⁴¹ *Mountain Water*, 2016 WL 4124135, at *21.

different use.⁴² Without the requirement of a different use, the “more necessary” analysis “is necessarily reduced therefore to the virtues of private and public ownership.”⁴³ Although Justice McKinnon is correct that the two uses must be incompatible for the Court to employ a “more necessary” analysis, she incorrectly interprets the statute and precedent to require that “incompatible” equal “different.”

The majority properly interpreted and applied the “more necessary public use” analysis. The Court in *Butte, Anaconda & Pacific Ry. Co.* explicitly rejected the requirement that the uses must be different.⁴⁴ Further, both *Coconougher* and *Montana Talc* use language indicating that when one use will “destroy” or “completely deprive” the prior owner’s use, then they are incompatible and the “more necessary” test is employed.⁴⁵ A municipality’s proposed public use can be incompatible with a private company’s ownership of the water system, despite being dedicated to the same use, simply because the municipality’s ownership of the water system is incompatible with Mountain Water’s ownership of the water system.

C. Factual Findings in Support of the More Necessary Public Use

“‘Necessary,’ in the context of eminent domain, does not mean absolute or indispensable, but reasonable, requisite and proper for the accomplishment of the intended objective.”⁴⁶ This standard is flexible and dependent on the circumstances of the exercise of the power of eminent domain.⁴⁷ In determining whether a proposed public use is a “more necessary public use,” the Court looked at a broad range of factors, including:

The owner’s profit motive, the consequences of out-of-state ownership, the effect on public savings, rates, and charges, the effect of having the home office in the municipality, the public interest as expressed by city residents, the effect on the water system’s current employees, and ‘the importance of the City obtaining ownership of the water rights themselves, in order that the City may assure its inhabitants of long range access to water.’⁴⁸

⁴² *Id.* at *35.

⁴³ *Id.* at *38.

⁴⁴ *Butte, Anaconda & Pacific Ry. Co.*, 41 P. at 246–47.

⁴⁵ *Cocanougher*, 112 P.2d at 1060; *Montana Talc*, 748 P.2d at 452.

⁴⁶ *Park County v. Adams*, 100 P.3d 640, 643 (Mont. 2004) (defining “necessary” under 70–30–111(b) “the taking is necessary to the use.” The Court in *Mountain Water* transfers the definition of “necessary” under subsection (b) and applies it to subsection (c) “a more necessary public use.”).

⁴⁷ *Mountain Water*, 2016 WL 4124135, at *21.

⁴⁸ *Id.* (quoting *Mountain Water I*, 743 P.2d at 595–96).

Justices Rice and McKinnon agreed with Mountain Water that the district court's findings were based on a general preference for municipal ownership and not the specific factual findings that § 70–30–111(1)(c) requires.⁴⁹ Defendants asserted that the factual findings were insufficient for the district court to find that the City's acquisition was a more necessary public use. According to Mountain Water, the district court's refusal to allow additional evidence of Mountain Water's valuation in during the condemnation phase prevented the district court from truly assessing the financial circumstances and the impact on the savings, rates, and charges.⁵⁰ The district court, in interpreting the statutory requirements of condemnation proceedings, held that allowing evidence of valuation in during the necessity phase would infringe on decisions left to the jury and the commissioners.⁵¹ The Court noted counsel's assertion during oral argument that Mountain Water was no longer seeking a remand for a new trial, but rather, was seeking outright dismissal of the case.⁵²

The Court evaluated the district court's exclusion of valuation evidence to determine if it was severe enough to require dismissal of the case and found that the district court did not abuse its discretion in refusing to admit evidence of the valuation.⁵³ It is hard to predict whether or not counsel's assertion was the death knell of this issue on appeal, but it seems that the Court would have remained unpersuaded given that some evidence of valuation was admitted, including evidence of rate increases in the event of a higher-than-expected acquisition price.⁵⁴ Additionally, the ruling on the admissibility of further evidence of valuation is within the district court's discretionary power to admit evidence.⁵⁵

Due to the fact-intensive nature of the lower court proceeding, a clearly erroneous standard was applied to much of the district court's Preliminary Order of Condemnation.⁵⁶ A clearly erroneous standard is the appropriate standard to apply to factual findings in support of a "more necessary public use" conclusion. Section 70–30–111 itself is titled "Facts Necessary to be Found Before Condemnation."⁵⁷ Precedent establishes that determining whether a proposed public use is a "more necessary

⁴⁹ Appellant Mountain Water Co.'s Opening Brief, *supra* note 19, at *17–18; *Mountain Water*, 2016 WL 4124135, at *28, 40 (Rice, J., dissenting; McKinnon, J., dissenting).

⁵⁰ Appellant Mountain Water Co.'s Opening Brief, *supra* note 19, at *21–23.

⁵¹ *Mountain Water*, 2016 WL 4124135, at *7.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at *8.

⁵⁵ *See Seltzer v. Morton*, 154 P.3d 561, 582 (Mont. 2007) ("When reviewing a district court's evidentiary rulings we do not determine whether this Court would have made the same ruling. Rather, we determine whether the district court abused its discretion.") (internal citations omitted).

⁵⁶ *Mountain Water*, 2016 WL 4124135, at *3 ("We review a district court's findings of fact to determine if they are clearly erroneous.").

⁵⁷ MONT. CODE ANN. § 70–30–111.

public use” is a “fact-specific, judicial determination.”⁵⁸ Under this standard, a district court’s factual findings will not be disturbed unless “the trial court has misapprehended the effect of the evidence, or a review of the record ‘leaves this Court with the definite and firm conviction that a mistake has been committed.’”⁵⁹ However, when a lower court applies factual findings to the appropriate legal framework, the Court employs a de novo review.⁶⁰

The Court exhaustively discussed the lower court’s 63 pages of factual findings.⁶¹ The Court found evidence to support the district court’s findings that the public supported the condemnation and that municipal ownership would promote long-term stability, efficiency, and infrastructure improvements.⁶² Additionally, the Court reviewed the City’s evidence about its ability to manage the water system and the financial considerations “including administrative expenses, profit motive, rate setting, and the cost of acquisition and needed capital improvements.”⁶³ The evidence at trial regarding the financial considerations came from experts, city employees, and testimony about the ability of the City to access state and federal grants that would not be available to a private owner.⁶⁴ The district court also weighed public and economic policy factors, which included testimony from experts on the generalities of municipal ownership of water utilities.⁶⁵ The district court also reviewed evidence regarding the effect on the public health, safety and welfare.⁶⁶ Finally, the district court assessed the impact of condemnation on Mountain Waters employees.⁶⁷

While it is true that the district court used broad-brush language in some of its factual findings, there was not a lack of specificity sufficient to overturn its factual findings, particularly when noting the broad deference inherent in a clearly erroneous standard. Based on the extensive factual findings made by the district court, the majority was bound to uphold them in light of the highly deferential standard imposed in reviewing findings of fact. Since the Court did not find error with the district court’s detailed factual findings, the Court similarly found no error in the court’s conclusion that the City’s acquisition of the water system

⁵⁸ *Mountain Water*, 2016 WL 4124135, at *9 (citing *Mountain Water I*, 743 P.2d at 594; *Helena v. Rogan*, 68 P. 798, 802 (Mont. 1902); *Butte, Anaconda & Pac. Ry.*, 41 P. at 243).

⁵⁹ *Id.* at *10 (quoting *Mont. Power Co.*, 900 P.2d at 890).

⁶⁰ *BNSF Ry. Co. v. Cringle*, 281 P.3d 203, 206 (Mont. 2012) (reviewing de novo “the district court’s application of controlling legal principles to its factual findings”).

⁶¹ *Mountain Water*, 2016 WL 4124135, at *22.

⁶² *Id.*

⁶³ *Id.* at 23.

⁶⁴ *Id.* at 24.

⁶⁵ *Id.* at 25.

⁶⁶ *Id.* at 26.

⁶⁷ *Id.*

constituted a more necessary use than its current use as a private, for-profit utility.⁶⁸

D. Constitutional Due Process Concerns

At its core, eminent domain is concerned with balancing fundamental interests: the public's interest and private property owners' procedural due process rights. Threaded through the eminent domain statutes are phrases that point to this tension: "just compensation"; "public use"; "more necessary"; and the various constitutional, notice, and procedural requirements of the laws governing eminent domain.

The Montana Constitution designates the right to possess and protect property as an inalienable right.⁶⁹ Because of Montana's constitutional protection for property ownership, the power of eminent domain "must be strictly construed."⁷⁰ Additionally, the eminent domain statutes "must be given its plain interpretation, favoring the person's fundamental rights."⁷¹ Due to the nature of eminent domain proceedings, § 70–30–206 instructs a district court to "give the proceedings expeditious and priority consideration."⁷² The same statute likewise instructs the parties to proceed "as expeditiously as possible . . . through all aspects . . . including discovery and trial."⁷³ Ensuring that Mountain Water's due process rights were not violated necessitates that Mountain Water "receive notice and a meaningful opportunity to be heard before Missoula deprive[s] it of its property."⁷⁴ Further, due process encompasses "the ability to discover information relevant to the case against the defendants along with the identity of the witnesses who are expected to testify and the substance of the expected testimony."⁷⁵

Mountain Water's due process claim focused on the City's discovery tactics that resulted in Mountain Water's perceived unpreparedness for trial and unfair prejudice. According to Justice Rice, the City engaged in deliberately harmful discovery tactics that deprived Mountain Water of its due process.⁷⁶ The majority disagreed, maintaining that Mountain Water conducted discovery effectively and were aware of who was to testify and the expected substance of testimony.⁷⁷ The majority noted that Mountain Water "ha[d] demonstrated inconvenience and

⁶⁸*Id.* at *27.

⁶⁹ MONT. CONST. art. II, § 3.

⁷⁰ *City of Bozeman v. Vaniman*, 869 P.2d 790, 792 (Mont. 1994) (citing *State v. Aitchison*, 30 P.2d 805 (Mont. 1934)).

⁷¹ *Id.*

⁷² MONT. CODE ANN. § 70–30–206.

⁷³ *Id.*

⁷⁴ *Mountain Water*, 2016 WL 4124135, at *29 (Rice, J., dissenting).

⁷⁵ *Id.* at *5 (majority).

⁷⁶ *Id.* at *32 (Rice, J., dissenting).

⁷⁷ *Id.* at *5 (majority) (the Court denied Mountain Water's writ of supervisory control, indicating that if prejudice resulted the issue could be raised on appeal).

frustration” but concluded Mountain Water had not proved that the district court abused its discretion or that Mountain Water suffered actual prejudice.⁷⁸ The majority also noted that Mountain Water had prepared an effective and full defense.⁷⁹

The majority may have been overly dismissive in concluding that Mountain Water’s due process rights were not violated, and it could be argued that the holding was influenced by the fact that the case involved prolonged and complex litigation between sophisticated parties. The majority noted Mountain Water’s presentation of a full and competent defense. However, Mountain Water’s argument and Justice Rice’s dissent detail the City’s discovery tactics and persuasively assert that the City deliberately abused the discovery process. Even so, given the district court’s discretion to control the discovery process and the nature of the litigation, Mountain Water did not provide enough evidence to support a conclusion that the trial was unfair or that Mountain Water did not receive sufficient notice and hearing. Due process is a tantamount concern in eminent domain proceedings, but the district court is given wide latitude in controlling the discovery process, and the parties are under specific instructions to proceed expeditiously in light of the unique circumstances that surround a condemnation proceeding (uncertainty to employees, ownership, importance to public etc.).

E. The Future of Eminent Domain in Montana

Both dissenters point out the need for legislative action on this issue. Justice Rice’s directive is express, evidenced in a section of his dissent titled “A Word for the Legislature” In this section, Justice Rice encourages the legislature to revisit the statute to clarify the “more necessary public use” requirement.⁸⁰ Justice McKinnon also would defer to the legislature. She identifies municipal ownership of utilities as an important public policy concern, best suited to resolution via the legislative process, not judicial intervention.⁸¹ However, Missoula’s water system was the only water system in Montana not owned by a municipality; therefore, we may not have the chance to see a municipality exercise its power of eminent domain over a water supply system again.⁸²

VII. CONCLUSION

When a municipality attempts to exercise its power of eminent domain to condemn a water system already dedicated to public use, a court

⁷⁸ *Id.* at *6.

⁷⁹ *Id.*

⁸⁰ *Id.* at *34–35 (Rice, J., dissenting).

⁸¹ *Id.* at *40–41 (McKinnon, J., dissenting).

⁸² *Id.* at *1 (majority opinion).

should employ the “more necessary public use” analysis even when the proposed public use and the prior public use are the same. The majority properly applied the “more necessary public use” analysis and, given the broad deference inherent in review of factual findings, properly affirmed the district court’s Preliminary Order of Condemnation. Although *Mountain Water* helped to establish some framework for assessing competing public uses, the Court relied on the inherent flexibility in the deferential standard of review and circumstantial and factual nature of the determination of a “more necessary public use.” Trial courts should engage in very clear fact-finding. But because of the deference enjoyed by trial courts in fact finding, it seems likely that district court decisions will remain undisturbed without legislative intervention and guidance on the application of the “more necessary public use” analysis.