

SYNOPSIS OF THE CASE

2016 MT 183: 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, LP**, a Delaware limited partnership, Defendants and Appellants. **THE EMPLOYEES OF MOUNTAIN WATER COMPANY**, Intervenors and Appellants.¹

Mountain Water Company (Mountain Water) owns the water system that provides potable water to the residents of Missoula (the City). Mountain Water is ultimately owned by Carlyle Infrastructure Partners, LP (Carlyle), a global investment firm that invests in utilities. The City desired to own the water system that serves its residents because City officials believe a community's water system is a public asset best owned and operated by the public. In January 2014, the City offered to purchase the water system from Carlyle for \$50 million, but Carlyle declined the offer. On May 5, 2014, the City sought to exercise its power of eminent domain by filing a complaint in the Fourth Judicial District Court, Missoula County, to condemn the water system. Carlyle, Mountain Water, and the employees of Mountain Water (collectively the Defendants) opposed the condemnation.

As a municipality, the City of Missoula has the power under Montana's constitution to take private property for public use as long as the private property owner is justly compensated. Water supply systems are one of the forms of private property that may be condemned for public use. In order to exercise its power of eminent domain, the City had to prove that the water system would be put to a public use, and that the City's ownership of the water system is more necessary to that public use than private ownership.

Beginning on March 18, 2015, Judge Karen Townsend of the Fourth Judicial District Court conducted a three-week bench trial to determine whether the City could prove that its ownership of the water system was more necessary than private ownership. On June 15, 2015, Judge Townsend concluded that the City had borne its burden of proof, and issued a preliminary order of condemnation.

On June 23, 2015, the Defendants appealed the preliminary order of condemnation to the Montana Supreme Court. On appeal, the Defendants challenged several of the District Court's orders that preceded the condemnation order, including rulings on

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pre-trial motions and evidentiary rulings at trial. The Defendants also challenged the District Court's ultimate finding that public ownership of the water system was more necessary than private ownership.

The Montana Supreme Court reviews a district court's legal rulings to ensure they are correct, but reviews factual findings for clear error. The Court will affirm a district court's factual finding if it is supported by substantial credible evidence, even if there is conflicting evidence in the record that might have supported a different finding.

The Montana Supreme Court held that the District Court's factual finding that City ownership of the water system is more necessary than private ownership was supported in the record by substantial credible evidence. That evidence included testimony about public support for condemnation; evidence about the condition of the water system and the implications of such a condition under public or private ownership; evidence regarding the City's ability to effectively manage the water system if it were condemned; evidence from all parties about the financial considerations relating to owning and operating the water system, including administrative expenses, profit motive, rate setting, and the cost of acquisition and needed capital improvements; evidence about the effect of condemnation on the Mountain Water employees; and evidence concerning economic and public policy factors like coordination of water services with other municipal services, urban planning, environmental conservation, and public health, safety, and welfare. The District Court received evidence and testimony from all parties concerning all the above factors, and concluded that although there was conflicting evidence in the record, overall the evidence favored condemnation. The Supreme Court conducted a thorough review of the record and was satisfied that the District Court's finding that public ownership of the water system was more necessary than private ownership was based upon substantial credible evidence. The Supreme Court therefore affirmed the District Court's preliminary order of condemnation.

Justice Rice dissented from the Court's decision, and would have reversed the judgment. In Justice Rice's view, the City violated the Defendants' constitutional rights by engaging in abusive litigation tactics that were not corrected by the District Court, undermining the Defendant's due process rights to a meaningful opportunity to be heard and to a fair trial. The District Court failed to protect the Defendants' due process rights by refusing their repeated requests to reschedule the trial in light of the City's improper withholding of evidence and its failure to disclose evidence until right before the trial or during the trial. Further, the District Court applied an erroneous legal standard that improperly shifted the burden of proof, which must be satisfied by the government before

depriving a person of life, liberty, or property rights, to the Defendants, thus further violating the Defendants' basic constitutional guarantee of due process.

Justice McKinnon dissented maintaining that the law was applied incorrectly because the property was already subject to a prior public use and condemnation for the same, identical public use is inconsistent with a determination that the taking is necessary—which is a fundamental requirement of eminent domain law. The dissent maintained that a statute did exist, § 7-5-4106, MCA, which granted a municipality a conclusive presumption as to necessity for the taking, but that an earlier decision of the Supreme Court in *Mountain Water I* held the presumption inapplicable in municipal condemnation proceedings of water facilities. Justice McKinnon argued that absent such a statutory presumption, it is difficult—if not impossible—for a municipality to establish necessity for a taking. Justice McKinnon also dissented because the extensive and substantial discovery abuses by the City had the cumulative effect of denying Mountain Water a fair trial.