

IN THE SUPREME COURT OF THE STATE OF MONTANA
SUPREME COURT CAUSE NO: DA 15-0375

THE CITY OF MISSOULA, a
Montana municipal corporation,

Plaintiff,

v.

MOUNTAIN WATER COMPANY, a
Montana corporation; and CARLYLE
INFRASTRUCTURE PARTNERS,
LP, a Delaware limited partnership,

Defendants.

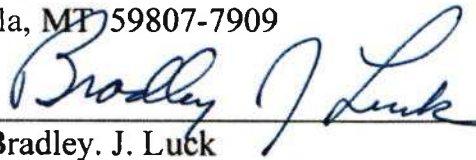
**MOUNTAIN WATER
COMPANY'S RULE 17(6) ORAL
ARGUMENT HANDOUT**

Mountain Water Company, pursuant to Montana Rule of Appellate
Procedure Rule 17(6), provides the attached oral argument handout. Pursuant to
the Rule, copies have been provided to the entire Court and opposing counsel.

DATED this 22nd day of April, 2016.

GARLINGTON, LOHN & ROBINSON, PLLP
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Missoula, MT 59807-7909

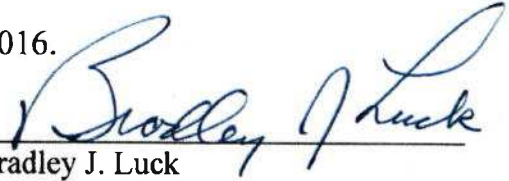
By


Bradley J. Luck

CERTIFICATE OF SERVICE

I hereby certify that I personally served a true and accurate copy of the
foregoing document upon all counsel of record appearing for the oral argument in
this matter.

DATED this 22nd day of April, 2016.


Bradley J. Luck

On a record strikingly similar to this one, Judge Holter found, and this Court affirmed, that the more necessary standard could not be reached on a record documenting:

- Unsupported assumptions on purchase price and on bonding amount
- All economic projections become untenable and purported savings a myth
- All potential savings dramatically decrease when price increases
- Purported tax savings would simply be redistributed

- MWC profits allow for:
 - Substantial improvements-efficient and economical system
- PSC regulated-assures consumer protection-no excessive profits
- Continuing efficiency, annual improvement, exemplary service
- The City does not have the same incentive
- Strong considerations in the public vs. private discussion

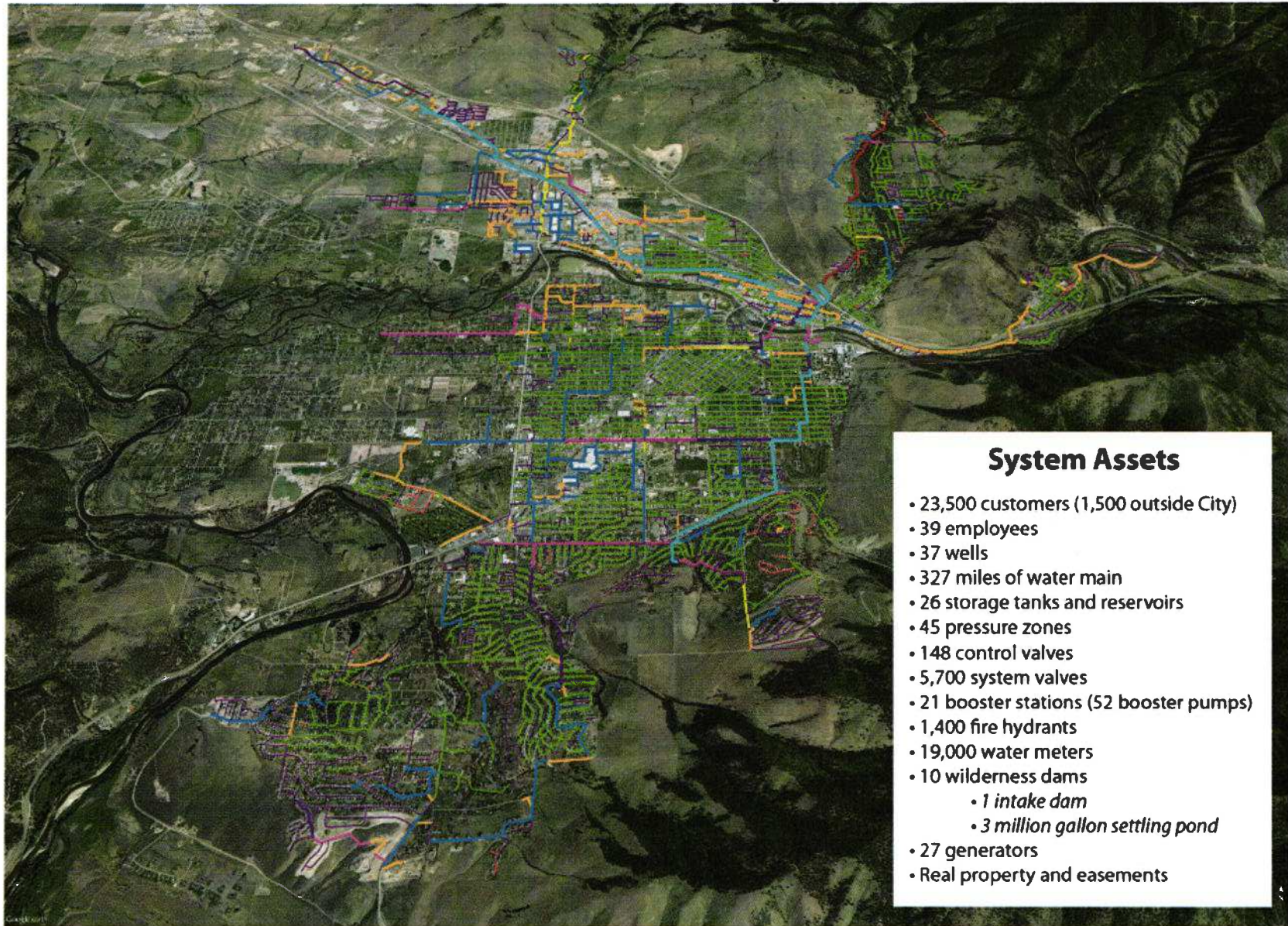
- Home office savings claims contrary to PSC audits and approval
 - Home office service standards are high
 - City would secure these services at undetermined cost
 - Consultants would have to be hired to make up for services
- Unsupported assumptions of 5 year rate freeze

- No findings support a lack of cooperation between company and City
- Private utilities plan as well or better than municipal government
- MWC invests substantial \$ in system—the money stays in community
- No showing the service rendered by MWC any less than other cities

- No showing the City could run the system as efficiently
- No evidence long range access to water in danger
- MWC operates under the laws and PSC regulation
- No showing service less with out of state owner
- MWC has acted in the best interest of the consumer

- No complaints to the PSC
- Out of City customers—not have access to PSC process/protection
- City resolution does not create a presumption of necessity
- MWC employees have operating experience—City does not

The Mountain Water System



Getting Better All The Time: 1984 v. 2014

Item	1984 Situation	2014 Situation	% Change
# customers (total excluding hydrants)	16,055	23,504	46%
# unmetered customers	10,755	4,223	-61%
% of customers unmetered	67%	18%	
# employees	30	39	30%
Miles of Main	181	320	77%
Capital Additions by MWC	\$1,184,565	\$3,940,798	233%
Capital Additions by Others	\$119,105	\$766,469	544%
Total Capital Additions 1984-2014	\$98 million (\$69 million funded by MWC, \$29 million developer funded)		
System Acquisitions	NA	Clark Fork Water-1991 Linda Vista-1998 Missoula Water Works-2001	
Water Rights	59,923 GPM 81,963 Acre-FT	70,186 GPM 92,313 Acre-FT/YR	17% 13%

The City's condemnation is neither "necessary" nor "more necessary," as required by MCA 70-30-111 or *City of Missoula v. Mountain Water Company*, 743 P.2d 590 (1987). The record verifies the City wants, but does not need to take, the Mountain Water system.

Mayor Engen Didn't Think it Necessary Until Decided to Take

- Up until 2011 it "wasn't necessary for the City to try to condemn the water system" (TR239)
- Had a "high degree of confidence" in the partnership between Mountain Water and the City in 2011 (TR309)
- "Quality of service has not diminished in any respect since 2011" (TR316-17)
- July 2, 2013 e-mail: "Mountain Water and Carlyle are good stewards of the asset and I'm not worried about that." (TR344; Ex. 172)

City Never Complained to PSC

- Mayor: City has intervened in "almost every rate case filed by Mountain Water" (TR258) and Ex. 2581, pp. 4-5 & 12-17, where City stipulates in D2008.9.119 that a \$2 million rate increase is "fair and equitable" and "result[s] in reasonable and just rates to Mountain Water customers," and further stipulates "Neither the MCC nor the City object to the cost of service allocation or rate design proposed by Mountain in its Application in this docket")
- Mayor: Has been "aware of system leakage" since at least the "early 2000s" due to involvement in PSC cases, but City "has never raised an objection to the Commission in regards to system leakage" (TR258 and 259)
- Mayor: In fact, City has never raised an objection to *any* aspect of Mountain Water's operation - leakage, the administrative services agreement, capital expenditures, metering, rates, etc. - in any of the numerous PSC cases it has intervened in. (TR96-97, 259, 272-73, 279, 859)

Missoulians Are Pleased With Mountain Water

- In Dep't of Natural Resources & Conservation "Montana Statewide Water and Wastewater Rate Study," Mountain Water has extremely favorable Customer Satisfaction rating of 4.5 out of 5. This is higher than municipally-owned systems in Whitefish, Kalispell, Billings, Bozeman, Miles City, Helena, and Great Falls (TR1171-72; Ex. 2542)
- Even considering flaws in the City-commissioned poll, 75% of participants were satisfied with Mountain Water, as opposed to only 68% who were satisfied with the City (TR1516-17; Ex. 309)
- Karen Knudsen of Clark Fork Coalition:
 - "no basis to believe a water system run by government employees would be superior to a system run by Mountain Water employees" (TR1845)
- "Mountain Water Company has conveyed a substantial and beneficial use to the inhabitants of Missoula" (TR1845)

The State of Montana and City of Missoula have repeatedly verified the quality of the Mountain Water system and operations. The present claims of disrepair, leakage, failure to expend necessary capital, etc. attempting to justify the taking are totally inconsistent with record facts:

"I've spent a lot of time with Carlyle's folks. I believe they will be good stewards of the utility, take care of Mountain Water's valuable employees, and provide quality service to customers. I also believe their stewardship includes good environmental practices. . . . The Public Service Commission should approve the [Carlyle purchase] transaction. It will benefit the citizens of our city long after we're gone and forgotten."

~Mayor Engen (Ex. 1150)

"Q: There are no deficiencies that necessitate the takeover, correct? A: Correct. . . . [and agrees that] "Mountain Water Company has and continues to confer a benefit, convenience, and advantage on the citizens and inhabitants of Missoula."

~City expert economist Kees Corssmit, Ph.D. (TR1224-25, 1234)

"I am very impressed at the extreme efforts Mountain Water Company has taken to provide greater security to all of the water system facilities, along with the (sic) incorporating the improved technologies to provide a more dependable water quality and service to your customers."

~2010 Montana DEQ Inspection
(Ex. 1285, p. 4)

"Mountain Water Company does an exceptional job of operation, maintenance, safety, and management. A system of this complex design would rapidly deteriorate if inadequately managed and maintained. The efficiency of the system operation at the time of this inspection directly reflects the effectiveness of management and maintenance."

~2013 Montana DEQ Inspection
(Ex. 1286, p. 4; TR3510)

Mountain Water Company has "delivered clean water and is a good steward of the water resource and she is not aware of any water quality issues with Mountain Water in the last ten years."

~Karen Knudsen
(TR1830-1831; 1845)

Agrees it is true that "Mountain Water Company currently confers the benefit, convenience and advantage on the citizens and inhabitants of Missoula" and also agrees nothing in City planning "suggests that in order to have growth, consistent with the goals set forth in this policy that the City of Missoula needs to own the water distribution utility."

~Missoula Development Services
Director Michael Haynes
(TR1676; 1669)

Despite contrary assurances, Court excluded all valuation evidence. Because of this:

DEFENDANTS

PREVENTED FROM SHOWING:

- Likely rate increases
- City will pay more in interest to Bondholders than MWC earns as “profits”
- Unrealistic City capital spending estimates
- Purported “savings” offset by cost of financing

COURT SHOULDN'T HAVE FOUND:

- City would invest more (¶59-63)
- Eliminating “profit” is a net benefit (¶88-91)
 - Potential low-interest rates on City bonds favors taking (¶116)
- 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” (¶118)
 - Various line-item savings, like taxes and insurance, favors taking (¶86-87)

Assurance:

Scheduling Order said objections that “could have been resolved by a pre-trial motion in limine will be deemed waived,” & City never raised valuation evidence until mid-trial

Assurance:

July 7, 2014 Scheduling Conference: In response to MWC saying “value is critical in the necessity part of this case,” Court said “I don’t think what I’m suggesting prevents you from . . . showing value”

Assurance:

March 16, 2015 Final Pretrial Conf.: MWC counsel said valuation proof will be necessary to rebut City claims about affordability & rate impact. Court agreed, saying it is “inevitable that we’re going to have some numbers floating around . . . we just can’t avoid it, I think”

Assurance:

Dec. 1, 2014 Order: “the Court is certain that matters of valuation of Mountain Water or its assets along with rate structure, debt financing, bonding capacity, and other monetary matters will likely play a significant role in the necessity hearing”

Justice Sheehy and Judge Holter both agreed that the higher cost of the system made the City’s economic projections untenable, and any purported savings a myth.

The Missing Piece: Everything Turns on (Excluded) Cost-Related Evidence

Bruce Bender

- It "all depends upon how much we have to pay to acquire" the System (TR521)
- Financing and water rates are "totally dependent on how much the system ultimately cost" (TR639)
- Agrees "This plan is subject to change based on the actual acquisition, revenue bond issue, input from the integration team, and final changes in the public capital improvement plan adoption process that culminates in City Council approval" (TR521)
- "The cost of the assets, it will be the critical link of how much money is left to do these improvements without raising rates" (TR521)

Dale Bickell

- Agrees "Until you know what the issuance costs are, until you know what the interest rates are, until you know what a jury ultimately rules this system is worth, you can't say if the City can afford it or not" (TR898)

Leigh Griffing

- Whether City can afford to purchase depends on purchase price (TR1303)

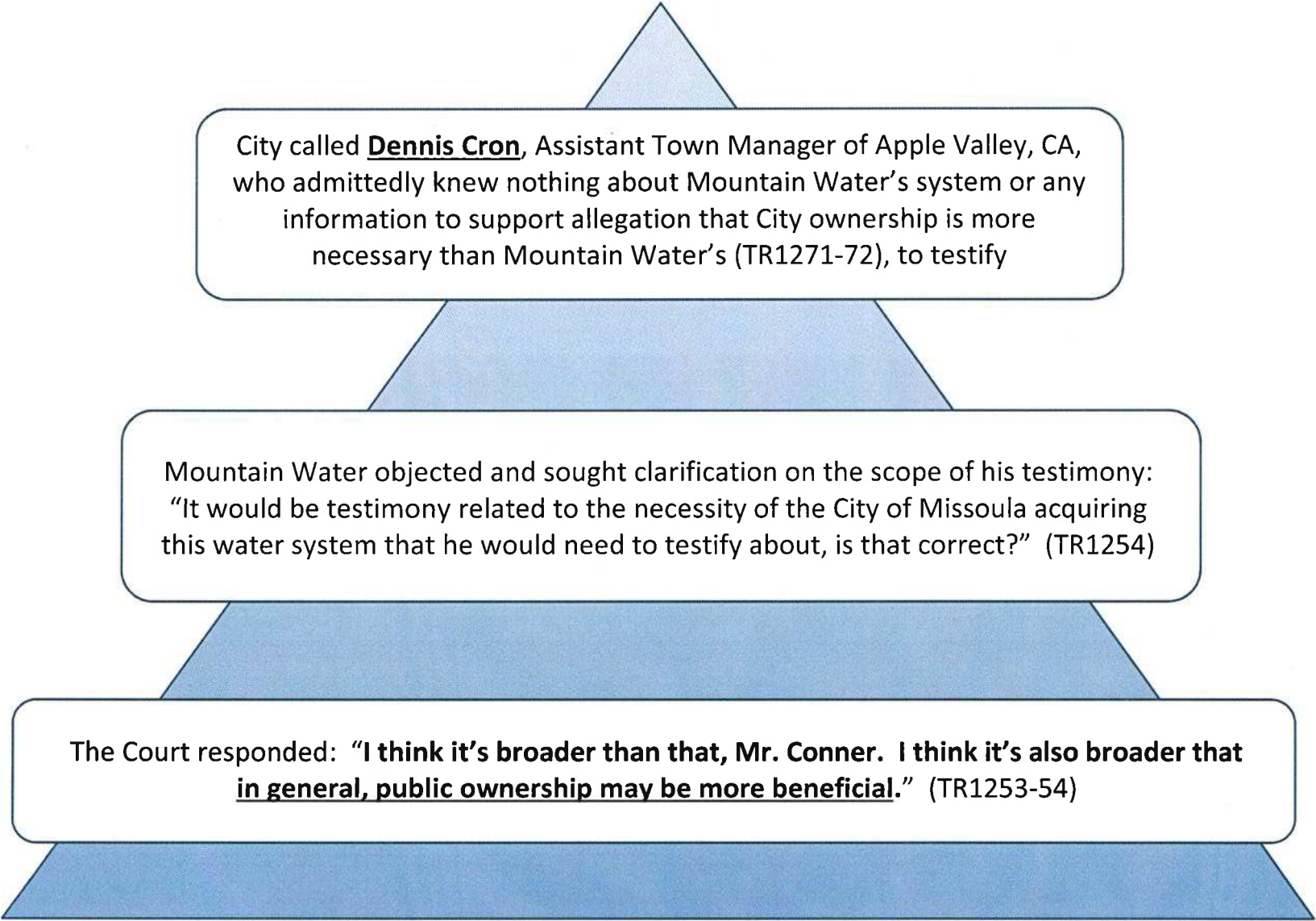
Nick Dragsich

- Amount of money available for capital improvements depends on purchase price (TR1560 & 63)

City Witnesses Favored Municipal Ownership, Yet Either Knew Nothing About System or Admitted Mountain Water Provided Quality Service

<p>Alec Hansen</p> <ul style="list-style-type: none"> •Agrees he “has no specific knowledge of Mountain Water’s operation and management” (TR710) 	<p>Dr. Thomas Power</p> <ul style="list-style-type: none"> •Agrees “great opportunity for the City of Missoula, but it’s not to criticize the way Mountain Water provides water to the citizens of Missoula” (TR1454) •Doesn’t believe that Mountain Water “has failed to provide quality water for the citizens of Missoula” (TR1452) 	<p>Dr. Stephen Running</p> <ul style="list-style-type: none"> •Admitted in coming to his opinions “he didn’t examine any data or any information particular to Mountain Water” (TR384) •Agrees when asked “you don’t know anything in particular about the operations of Mountain Water?” (TR385) 	<p>John Rundquist</p> <ul style="list-style-type: none"> •Agrees he “doesn’t know anything about the operation of Mountain Water” (TR1619) •Not aware of any problems with fire and water coordination or city and water coordination (TR1619) 	<p>Dennis Cron</p> <ul style="list-style-type: none"> •No factual information to support allegation by City that it is in the better public interest for the City to own the System than Mountain Water (TR1271) <p>John Wilson</p> <ul style="list-style-type: none"> •Doesn’t know about any issues or challenges the system has (TR1165) 	<p>David Nielson</p> <ul style="list-style-type: none"> •Did not attempt to investigate any facts regarding Mountain Water operations (TR1399) •Is not aware of any service complaints (TR1399) •Considered no financial data about Mountain Water (TR1399) •No idea what Mountain Water’s capital plan is, or what they spend on capital improvements (TR1403) •No idea what the City will do with the System (TR1409) •But still is sure that it is more necessary for City to own the System, because public ownership is always better than private (TR1399)
<p>Kees Corssmit</p> <ul style="list-style-type: none"> •No operational deficiencies in system that impact water quality and no deficiencies necessitating a takeover (TR1224) 					

An improper preference for municipal over private ownership: Reliance on Cron



City called **Dennis Cron**, Assistant Town Manager of Apple Valley, CA, who admittedly knew nothing about Mountain Water's system or any information to support allegation that City ownership is more necessary than Mountain Water's (TR1271-72), to testify

Mountain Water objected and sought clarification on the scope of his testimony: "It would be testimony related to the necessity of the City of Missoula acquiring this water system that he would need to testify about, is that correct?" (TR1254)

The Court responded: **"I think it's broader than that, Mr. Conner. I think it's also broader that in general, public ownership may be more beneficial."** (TR1253-54)

An Improper Preference for Municipal Over Private Ownership: Reliance on Corssmit

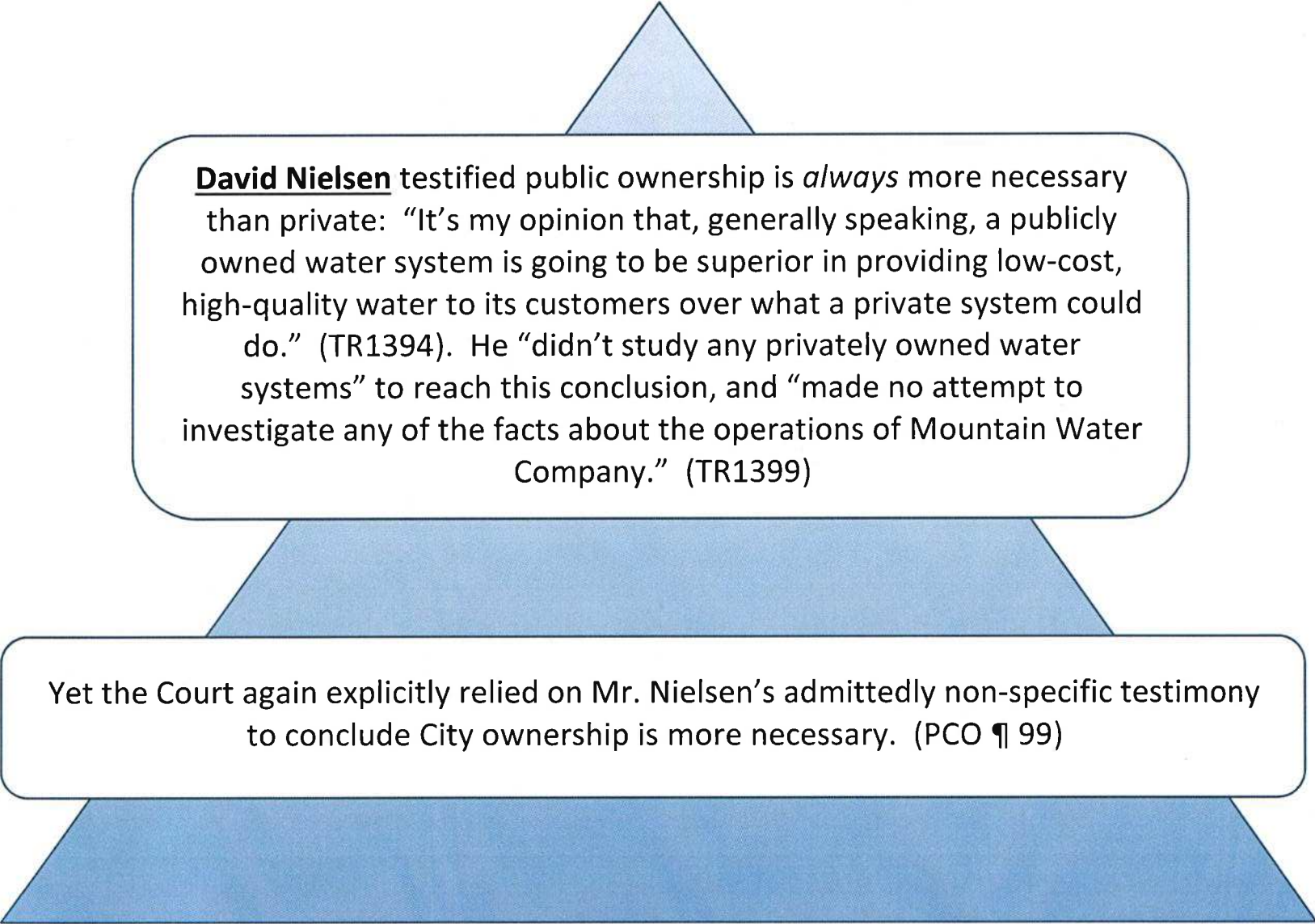
Kees Corssmit testified he *always* favors public ownership over private and that when engaged he “already had the opinion that public ownership was better than private ownership In the United States . . . public ownership is preferred to private ownership.” (TR1244)

Corssmit further testified there are “no deficiencies that necessitate the takeover” and “Mountain Water Company has and continues to confer a benefit, convenience, and advantage on the citizens and inhabitants of Missoula.” (TR1224-25, 1234)

Yet the Court relied on his de-particularized testimony: “Dr. Corssmit’s testimony is credible and supports a finding that City ownership is more necessary than the present use. Important public policy objectives are promoted by municipal ownership, including predictability and stability in rates, ability to obtain low cost financing not available in the private sector, lack of a profit motive, coordination with City services, planning and development efficiencies, greater transparency and accessibility to leadership and reflection of local preferences including conservation and stewardship.” (Preliminary Condemnation Order (“PCO”) ¶ 136)

These factors are purportedly inherent to municipalities, and would favor municipal ownership *every time*, thus evidencing a judicial preference for municipal ownership

An improper preference for municipal over private ownership: Reliance on Nielsen



David Nielsen testified public ownership is *always* more necessary than private: “It’s my opinion that, generally speaking, a publicly owned water system is going to be superior in providing low-cost, high-quality water to its customers over what a private system could do.” (TR1394). He “didn’t study any privately owned water systems” to reach this conclusion, and “made no attempt to investigate any of the facts about the operations of Mountain Water Company.” (TR1399)

Yet the Court again explicitly relied on Mr. Nielsen’s admittedly non-specific testimony to conclude City ownership is more necessary. (PCO ¶ 99)

The Court made multiple findings that reveal a preference for municipal ownership on the basis of characteristics inherent to *cities as cities* and *companies as companies*

- “Protection and promotion of the public health, safety and welfare is the fundamental duty of a municipality. Private corporations have no duty to protect and promote the public health, safety and welfare.” (PCO ¶ 151)
- “Ownership of the Water System by a private corporation separates the management and control of a vital natural resource from those most dependent upon it.” (PCO ¶ 157)
- “The Court recognizes that Mountain Water engages in cooperative efforts with the City. The Court makes a distinction between cooperation and coordination. When cooperation occurs between the City and Mountain Water, each entity retains its separate identity, is governed separately, serves different purposes and has distinctly different duties. Cooperation is beneficial to both entities but does not provide the greater benefits of coordination, that is, the integration of the Water System with other public health, safety and welfare functions under stable ownership and local control.” (PCO ¶ 177)