

MINUTES

MONTANA HOUSE OF REPRESENTATIVES
51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON LOCAL GOVERNMENT

Call to Order: By Chairman Darko, on January 26, 1989, at
2:30 p.m.

ROLL CALL

Members Present: All except:

Members Excused: Rep. McDonough

Members Absent: None

Staff Present: Lee Heiman, Legislative Council

Announcements/Discussion: None

HEARING ON HOUSE BILL 244

Presentation and Opening Statement by Sponsor: Rep. Bernie Swift, District 64, stated that the objective of this bill is to protect the location of shooting ranges in Montana and provides for the relocation of approved ranges if they become unsafe due to changes in zoning and development. It was requested by the National Rifle Association which has 22,000 members in Montana.

List of Testifying Proponents and What Group They Represent:

Gary Marbut, Montana Rifle and Pistol Association
Bill Bigelow, National Rifle Association Field Representative
Alfred M. "Bud" Elwell, Montana Weapons' Collectors
H. Terry Smith, Yellowstone Rifle Club
Mike Milodragovich, Missoula Shooters, Hellgate Civilian Shooters Association
Bob Lane, Attorney, Department of Fish, Wildlife and Parks
Roger Koopman, Bozeman businessman

List of Testifying Opponents and What Group They Represent:

None

Testimony:

Gary Marbut, proponent, stated that he had sent a letter to each of the committee members asking for a change in the bill as written. If there is sufficient public pressure to require the moving of a shooting range to a new location. The bill provides that the agency requesting the move be forced to pay the cost of the move. A move might be required when a range has been in existence for a number of years and the community grows enough that the two are not longer compatible. There are a number of ranges that are threatened with closure and this bill would protect the investment in time, energy and money in the range and appoints Fish, Wildlife and Parks as a mediating authority. Amendment is Exhibit 1. Statement of Intent is Exhibit 2.

Bill Bigelow, proponent, has been evaluating ranges throughout the state and is beginning to see encroachment problems in Montana. Kalispell has moved their shooting range four times since 1950. This bill would attempt to alleviate the problems before they become too serious.

Alfred M. "Bud" Elwell, proponent, cited as an example the range outside of Helena. Housing developments have been moving closer to the range. The range is completely operational and the new residents know that when they purchase the property but after purchase think the range is a nuisance.

H. Terry Smith, proponent, stated that the Yellowstone Rifle Club has been experiencing problems with development of the land surrounding the club. The club was built on 125 acres 5 miles outside of Billings in 1966. He showed aerial photographs beginning in 1950 through 1979 showing the gradual movement of homes toward the gun club. The club has made major improvements since 1972. New property owners are beginning to complain. Billings has already lost one range to development and is concerned about losing another. They are trying to be good neighbors by restricting the hours that can be used for shooting and by providing time for police departments to use the range.

Mike Milodragovich, proponent, said the Missoula range has been in its present position since 1930. Since then the surrounding property has been sold and mobile homes are on each side of the range. He cited Tacoma Sports Range as being a fine example

of a range in an urban area (with residences on three sides) and still be a "safe" range.

Bob Lane, Department of Fish, Wildlife and Parks' attorney, is not opposed to the bill but thinks FWP is not prepared to act as a mediating agency whenever there is a dispute between the owners of the range and the relocating agency. Exhibit 3.

Roger Koopman, proponent, stated that Montana has close to the highest membership in the NRA but very few public ranges. In his travels through the state he found a great deal of concern with encroachment and the possibility of losing one's investment so new ranges are not being built. LEA's trainees are now traveling from Bozeman to Lewistown because there is not a suitable range in the Bozeman area. The trap range was closed as was a practice range in nearby Kelley Canyon because of concerns with approaching developments.

Questions From Committee Members:

Rep. Johnson asked Mr. Bigelow about the reasoning behind excluding noise pollution. Mr. Bigelow answered that he was unsure of the decibel level but he knew that it was under 100. They try to stay below that level during waking hours which is within the acceptable level on noise charts.

Rep. Wyatt asked Mr. Bigelow about the specific exclusion of brass, copper and lead as litter. Mr. Bigelow stated that generally there is very little litter since many shooters retrieve their spent shells for reloading. The exclusion is to preclude problems that have been experienced nationally such as using pollution as a reason to close the range.

Rep. Wallin asked Mr. Marbut about the proposed amendments. Mr. Marbut distributed copies of it. The amendments provide that the agency requesting the move be made to pay for it and that the "down time" be limited to no more than six months.

Rep. Johnson asked Mr. Smith about zoning exemptions. Mr. Smith stated that the bill would not allow the range to be rezoned after it has been built. Existing ranges should be grandfathered in as an existing use because they were there before the developments around them. The range was in place before the 4-1/2 mile limit was imposed.

- Rep. Brooke asked Mr. Marbut asked if the zoning would be similar to the situation in Missoula with the airport and Sentinel High School. Mr. Marbut answered that if the range was there first and the local government wanted the range to move because of recent development around it then local government would have to pay the cost of relocating the range. They are not trying to make money on the arrangement but simply want a place to shoot.
- Rep. Wallin asked Mr. Marbut about the closing of the Law Enforcement Academy range in Bozeman and if this bill would change the situation that developed. Mr. Marbut was unsure why the range was closed and they looked at many alternatives that were unsuitable for a variety of reasons including possible encroachment. This bill would offer a new procedure under such circumstances.
- Rep. Brooke asked Bob Lane if he had looked at the amendments and if FWP did inspections with the NRA standards for shooting ranges. Mr. Lane responded that they do not do inspections and he does not feel that it would be within the expertise of the department to do them.
- Rep. Johnson asked Mr. Marbut if the relocation process is a practice among other entities such as filling stations. Mr. Marbut was not sure if it was common but it has happened and he cited an example of a bulk storage plant that the city council of Missoula is considering moving to a less populated area. It is for the public benefit and to reduce public hazard. Ranges should be treated similarly.
- Rep. Hansen asked Mr. Marbut if the land purchase would be included. Mr. Marbut stated that the bill would provide that the range operators would end up with the same ownership interest that they had in the old location, such as, ownership of the land if it was owned before or leasing land if it was leased before. The relocating agency would arrange for the ownership interest and receive the range's ownership interest in the old property. Developers should be sharing some of the responsibility since they are somewhat responsible by being required to post bond but he is unsure that is happening.

HOUSE COMMITTEE ON LOCAL GOVERNMENT

January 26, 1989

Page 5 of 12

Rep. Good asked Mr. Marbut about the proposed amendment and the use of the words "reasonably agreeable" and would it not be more workable with "mutually agreeable". Mr. Marbut said that is the reason that they request FWP to mediate - to resolve such disputes.

Rep. Good asked Mr. Lane if they wanted to mediate such disputes. Mr. Lane said no and that the department is not in a position to offer anything in a relocation dispute. They do not have that expertise and there are other options such as an appointed arbitrator.

Closing by Sponsor: Rep. Swift said that the amendment would be acceptable and that FWP would be an appropriate agency to be the rulemakers. He stressed that this bill covers designated and approved ranges only. It does not include the hundreds unapproved ranges throughout the state and that there are possibly only 52 ranges in the state that would be affected.

DISPOSITION OF HOUSE BILL 244

No Action Taken.

HEARING ON HOUSE BILL 237

Presentation and Opening Statement by Sponsor: Rep. Richard Nelson, District 6, stated that HB 237 is a "housekeeping" bill that deals with the publications of notices in the newspaper about school district budget hearings. The bill would change the publication from the official county newspaper to the newspaper that the trustees of the district deem the one of highest and widest circulation in the particular district. Rural counties are particularly affected.

List of Testifying Proponents and What Group They Represent:

Bruce W. Moerer, Montana School Board Association
Richard Moe, Boulder Public Schools
Dave Bishop, School Administrators of Montana

List of Testifying Opponents and What Group They Represent:

None

Testimony:

Bruce Moerer, proponent, stated that when the school district is advertising for bids or when they publish election notices, they advertise with the newspaper with the widest circulation. There are examples of the official county newspaper not being read at all in the school district.

Richard Moe, proponent, said that the bill would directly affect them since the Whitehall Ledger is the official county newspaper but the public in their area is generally served better by publishing in the Boulder Monitor, The Independent Record and the Montana Standard but few read the Whitehall paper.

Dave Bishop stated that his organization supports this bill.

Questions From Committee Members: None

Closing by Sponsor: Rep. Nelson stated that there is a similar situation in the Flathead Valley with the Kalispell News being the official county paper and many other smaller papers serving the valley. He asked that if the bill is approved unanimously that it be placed on the Consent Calendar.

DISPOSITION OF HOUSE BILL 237

Motion: Rep. Brooke moved that HB 237 DO PASS. Rep. Wyatt seconded.

Discussion: None.

Amendments and Votes: None.

Recommendation and Vote: HB 237 was recommended DO PASS with a unanimous vote. The bill will be requested to be placed on the Consent Calendar.

HEARING ON HOUSE JOINT RESOLUTION 10

Presentation and Opening Statement by Sponsor: Rep. Jan Brown, District 46, stated that the bill was to help gain more exposure for MacGruff in Montana as the statewide safety figure.

List of Testifying Proponents and What Group They Represent:

Colleen McCarthy, Montana State Crimestoppers and Crime
Prevention Association
Rep. Mark O'Keefe, District 45
Martin Dye, Crime Control Commission
Jim Meldrum, Self

List of Testifying Opponents and What Group They Represent:

None

Testimony:

Colleen McCarthy stated that MacGruff is the National Crime Prevention Council's spokesperson for their crime prevention campaign. MacGruff is 99% recognizable among 6 to 12 year old even more than Mickey Mouse or Smokey Bear. 97% of those children will do what MacGruff tells them to do. The MacGruff house program encourages adults to be approved by the local law enforcement agency to receive a MacGruff House poster. The house is not a safe house but a block parent house - a place where a child can seek refuge if they feel threatened. Stop signs are uniform and so should a safe symbol. The aim is to have a uniform symbol nationwide. A legal ruling recently said that "safe" should be replaced. No one can guarantee a "safe" house so they are requesting a change to "block parent".

Rep. Mark O'Keefe wanted to add his support to this legislation.

Marvin Dye stated that the National Crime Prevention Council is highly in support of the MacGruff program. He has dressed up as Macgruff himself and is convinced that MacGruff is highly recognized and respected among youngsters.

Jim Meldrum supports the legislation and asks favorable consideration.

Questions From Committee Members: Rep. Rehberg asked if this program would replace the "Helping Hand" program. Ms. McCarthy said that it is replacing that program but with the full cooperation of those involved in it. The goal is to have one, uniform block parent program not only in Montana but nationwide.

Closing by Sponsor: Rep. Brown stated that there are many MacGruff houses in her district and that she supported the amendment requested by Ms. McCarthy.

DISPOSITION OF HOUSE JOINT RESOLUTION 10

Motion: Rep. Gould moved HJR 10 DO PASS. Rep. Dave Brown seconded.

Discussion: None.

Amendments and Votes: Rep. Gould moved to amend the bill replacing "safe" with "block parent". Rep. Guthrie seconded. The motion PASSED unanimously.

Recommendation and Vote: Rep. Gould moved HJR 10 DO PASS AS AMENDED. Rep. Good seconded. The vote was unanimous.

HEARING ON HOUSE BILL 261

Presentation and Opening Statement by Sponsor: Rep. Stella Jean Hansen, District 67, stated that the bill is an attempt to add water supply systems to the list of property that can be condemned under the powers of eminent domain. The court has ruled that presently water supply systems. It authorizes the taking of private property that the government entity has concluded is necessary for the public use. It would have to conform to the proceedings of eminent domain.

List of Testifying Proponents and What Group They Represent:

Jim Nugent, Missoula City Attorney
Al Sampson, President, Missoula City Council
Charles Gibson, City of Missoula Fire Chief
Alec Hansen, Montana League of Cities and Towns
John Toole, Mayor of Missoula

Testimony:

Jim Nugent felt that the title was misleading as to the effect of the bill. Cities and towns already possess the power of eminent domain with respect to the acquisition of water systems. It is expressly listed in the Montana statutes. Most cities already own their water system. It is not creating a new power for cities and towns but clarifying the existing statutes.

Al Sampson stated that the bill merely clarifies that a

water system is a municipal and public use. They want water systems to be added specifically to the statute affecting eminent domain. Under new tax codes the city is being forced to pay additional funds to the water company amounting to 140% of the cost of the water main extensions.

Charles Gibson stated that from a fire service standpoint the fire department should have more control over the water systems especially the fire hydrants and water mains, their maintenance and upkeep.

Alec Hansen said the City of Missoula has made an effort to condemn its' water system and this bill would clarify some of the ambiguities in the law. The League of Cities and Towns adopted a resolution in support of this bill at their annual meeting.

John Toole expressed his support of the bill and described the laws governing this issue as a "mishmash". He is perplexed about the amount of money that has been spent on attorney fees. He says this is a classic case of economic exploitation.

List of Testifying Opponents and What Group They Represent:

Lee Magone, General Manager, Mountain Water Company
Sherman Lohn, Attorney for Mountain Water Company
Bob Sanders, Meagher County Preservation Association
Art Wittich, Montana Power Company
Robert Ellis, Montana Water Resources Association
Julie Hacker, Missoula Freeholders Association
Lorna Frank, Montana Farm Bureau
Ottis Bryan, Teton County rancher
Kim Enkerud, Montana Stockgrowers

Testimony:

Lee Magone opposed the bill and felt that they were operating a very good system. He provided written testimony. Exhibit 4.

Sherman Lohn opposed the bill because the city has failed to prove their expression of need and failed to find anything wrong with the system to prompt condemnation proceedings. He also stated that the city's action is only aimed at one of the three water companies in Missoula and no attempt has been made to acquire the other two. Exhibit 5. The statement of the court, Exhibit 6.

Bob Sanders stated that he could not add much to the previous testimony but did say that the bill would "destroy condemnation and substitute confiscation". It would also enable any municipalities to condemn agricultural water rights.

Art Wittich stated that the bill would be a dangerous precedent and that the system is subject to regulation by the Public Service Commission. Exhibit 7.

Robert Ellis expressed his opposition to the bill and presented testimony from Jo Brunner. Exhibit 8

Julie Hacker stated that the bill would further erode the tax base in Missoula and that eminent domain should not be used to acquire private property or business.

Lorna Frank expressed opposition to the bill because municipalities would not have to show need. See Witness Statement.

Ottis Bryan is opposed to the bill and described how this legislation would affect farmers and ranchers with water rights throughout the state. He gave as an example the recent situation in Choteau where the city wanted more water flowing into the aquifers that provide the city with water. This bill would cause undue harm.

Kim Enkerud concurred with previous testimony opposing the legislation.

Questions From Committee Members:

Rep. Gould asked Mr. Ellis if an analogy to changing the rules in midstream would be appropriate here. Mr. Ellis said the it would be fair to say that it is at least an attempt to loosen the rules.

Rep. Good asked Mr. Sampson what would happen to the approximately 7,000 users outside the city limits and about the other water companies in the area. Mr. Sampson said that the city is going to buy the other two companies if this effort is successful. Missoula does not have a charter but operates under state law.

Rep. Good asked Mr. Lohn about the city water system serving residents that live outside the city limits. Mr.

Lohn responded that the law does allow city systems to operate outside their limits.

- Rep. Rehberg asked Mr. Lohn about the danger of annexation if the city buys the system. Mr. Lohn said that they cannot refuse service to someone but they can put conditions on the service such as annexation.
- Rep. Darko offered the information that City of Libby purchased their system from Pacific Power and Light and they are still obliged to serve those in the outlying districts.
- Rep. Rehberg asked Mr. Sampson if the city has addressed the loss of tax revenue if the system was city owned. Mr. Sampson said that the tax revenue loss would be recouped because they would not have to pay fire hydrant rental and water use. Mr. Sampson did not think the city would have to have the water rates as high as the private company who has to make a profit. The city would probably not reduce rates but would not have to have the same increases as the private company.
- Rep. Rehberg asked Mr. Sampson what amount of tax revenue the city received in correlation to the cost of the water. Mr. Sampson did not have an accurate figure. Mr. Magone said the company's yearly tax bill for the county is roughly \$250,000 per year. The county dispenses the funds to the appropriate agencies. He thought approximately \$30,000 directly to the city. City residents benefit from the tax though since city residents would not be paying as high a tax with the water company paying taxes.
- Rep. Guthrie asked Mr. Lohn about the acquisition of the water system - if it included the water rights or just the system and how would the transfer of those water rights be handled if this legislation were passed. Mr. Lohn stated that it would be handled through condemnation - they would be condemning the business, the employees, the office equipment and the water rights. Rep. Guthrie noted that the water rights are not addressed in the bill. Mr. Lohn agreed but added that they are covered under the concept of the water system. Mr. Nugent stated that the water rights are included in the litigation and that they are inherent in the water system.

Closing by Sponsor: Rep. Hansen remarked that just because this is an old law does not imply that the law is sacred. Water is the staff of life. There is little agricultural activity in Missoula County. The bill is a step in the right direction.

DISPOSITION OF HOUSE BILL 261

No action taken.

ADJOURNMENT

Adjournment At: 5:10 p.m.



REP. PAULA DARKO, Chairman

PD/TD

2211.MIN

DAILY ROLL CALL

LOCAL GOVERNMENT

COMMITTEE

51st LEGISLATIVE SESSION -- 1989

Date

1/26/89

[illegible]

STANDING COMMITTEE REPORT

January 27, 1989

Page 1 of 1

Mr. Speaker: We, the committee on Local Government report that House Bill 237 (first reading copy -- white) do pass; and by unanimous vote of committee be placed on the Consent Calendar.

Signed: Paula Darko

Paula Darko, Chairman

STANDING COMMITTEE REPORT

January 27, 1989

Page 1 of 1

Mr. Speaker: We, the committee on Local Government report that House Joint Resolution 10 (first reading copy -- white) do pass as amended .

Signed: Paula Darko, Chairman

And, that such amendments read:

1. Title, line 6.

Strike: "SAFE HOUSE"

Insert: "BLOCK PARENT"

2. Page 1, line 15.

Strike: "safe house"

Insert: "block parent"

3. Page 1, line 17.

Strike: "safe"

4. Page 1, line 21.

Strike: "safe"

Insert: "block parent"

5. Page 2, line 4.

Strike: "safe house"

Insert: "block parent"

6. Page 2, line 11.

Strike: "safe"

Insert: "block parent"

1
DATE 1/26/89
HB 244

3.

MONTANA RIFLE AND PISTOL ASSOCIATION
OFFERED AMENDMENT TO HB 244
FOR HOUSE LOCAL GOVERNMENT COMMITTEE

NOTE: The following amendment is offered by the MRPA to correct a flaw in the final form of HB 244 so as to cause it to conform to the intent of the authors.

Amendment # 1: On pages 2 and 3, strike NEW SECTION. Section 5 entirely and replace it with the following replacement NEW SECTION.

"NEW SECTION. Section 5. Relocation and closure of shooting ranges -- limitations -- relocation costs. (1) Except as provided in subsection (2), an established shooting range may not be prevented from operation by any state agency, unit of local government, or court unless the range presents a clear and provable safety hazard to adjacent population and also fails to meet the minimum range safety standards established by the National Rifle Association of America.

"(2) If a pressing public need exists because of incompatibility with nearby population or nearby land use, an established shooting range may be relocated by an agency of state government, a unit of local government, or a court, but only if all of the following conditions are met:

- (a) pressing public need is documented through hearings, testimony, and a clear and precise statement of such need by the agency, unit of local government or court involved, and
- (b) a suitable alternative site for the range is located and obtained by the agency, unit of local government or court involved, and
- (c) the agency, unit of local government or court ordering relocation pays the entire cost of relocating the range, including replacement of improvements, to a reasonably suitable and reasonably similar facility and to a location that is a similar distance from the population served by the original range, and
- (d) the maximum amount of time that a range may be out of operation because of such relocation is six months.

Upon final relocation of a range pursuant to this section, the range operators shall relinquish their property interest in the previous location in favor of the relocating agency and shall be granted by the relocating agency a property interest in the new location similar to that enjoyed by the range operators in the vacated location.

"(3) If a shooting range presents a clear and provable safety hazard to adjacent population and if the range fails to meet the minimum range safety standards established by the National Rifle Association of America, such range may be suspended from operation if:

- (a) reasonable notice and opportunity to respond and be heard is afforded to the range operators, and
- (b) reasonable opportunity is afforded to the range operators to correct safety defects and cause the range to meet the minimum range safety standards of the National Rifle Association of America.

If a shooting range is suspended from operation for reason of safety defects, and if the range operators are able to obtain a current certificate of compliance with range safety standards from the National Rifle Association of America, any order of an agency of the state, unit of local government, or court to suspend range operation is thereby vacated."

MONTANA RIFLE AND PISTOL ASSOCIATION

HB244 - STATEMENT OF LEGISLATIVE INTENT

NOTE: HB244 offers rulemaking authority to the Fish and Game Commission. Some opinion exists that such offer of authority requires a legislative statement of intent to accompany such authority. The MRPA offers its intent for this rulemaking authority for the consideration of the legislature.

- Begin -

"Under the rulemaking authority in HB244, the Fish and Game Commission, and therefore the Department of Fish, Wildlife and Parks, is expected to assume a role of definition and mediation concerning relocation and safety of shooting ranges in the State. Since all of the range relocation terms in HB244 cannot be defined in reasonable length, such terms as "similarly suitable" and "similar distance from population served" can best be defined by Commission regulation.

"Also, HB244 calls for "shooting safety guidelines" and "minimum safety standards" for shooting ranges. "Guidelines" are intended to be soft or advisory only. "Standards" are intended to be firm or obligatory.

"Generally, it is intended that the role and involvement of the Fish and Game Commission in shooting range relocation and safety, and therefore that of the Department of Fish, Wildlife and Parks, will help offset the possible need for litigation to establish or resolve terms and processes."

- End -

EXHIBIT 3
DATE 1/26/89
NO. 244

HB 244
January 26, 1989

Testimony presented by Bob Lane, Department of Fish, Wildlife & Parks

The Department has recently completed surveys of our counties, sportsmen's groups and Hunter Education instructors. All indicate a need for additional shooting ranges, and we believe it's important to protect the opportunities that public safe shooting ranges provide.

The department has comments on Section 11, which grants the Fish and Game Commission rule making authority. The department does not believe the commissison should be involved in rule making specific to Sections 1, 2 and 5. We suggest those matters would be better handled at the local level or by the courts. In particular, the rule making regarding relocation costs in Section 5 is outside the expertise and jurisdiction of the commission. It is inappropriate to require the commission to referee a dispute between a local land-planning unit or agency and a shooting range over the proper cost of relocation. Disputes of this nature are within the proper jurisdiction of the courts. If a dispute should occur, any decision by the commission could be appealed to the district court.

We do believe it's appropriate for the commission to provide shooting safety guidelines and minimum safety standards for shooting ranges if and when local interests need that information.

The department offers the attached amendment to correct our concerns with the rule making authority of Section 11.

AMENDMENT TO HB 244
INTRODUCED (WHITE) COPY

1. Page 5, lines 15 through 19

Following: "authority."

Strike: "The fish and game commission may adopt rules in
accordance with [sections 1, 2, and 5] for the relocation of
shooting ranges. The rules must include reasonable provisions
for notice and hearing."

Testimony by Lee Magone
General Manager of Mountain Water Company
Missoula, Montana
in opposition to

HOUSE BILL 261

House Local Government Committee
January 26, 1989

Good afternoon, Madam Chairman, and members of the Committee, my name is Lee Magone. I am the General Manager of the Mountain Water Company in Missoula. Our company owns and operates the community water supply system serving the residents of the City of Missoula and outlying areas. I have been the manager of the water system for 9½ years, having previously served as Superintendent for the system for 9 years when The Montana Power Company owned it.

Currently, this system serves some 17,000 connections. Since the system was acquired by Mountain Water Company, 9½ years ago, many improvements have been made to it, as well as substantial rehabilitation. It is now recognized as one of the most efficient and well-run community water supply systems in Montana.

For several years, the City of Missoula has been attempting to take over this water system through the power of eminent domain. Much litigation has taken place, and is still ongoing, with an appeal now pending in the Montana Supreme Court. Under current law, as I understand it, the City must prove in court that it is in the public interest for the City to take over the system, otherwise condemnation cannot be exercised. To date, even though represented by able legal counsel, the City of Missoula has not been able to convince the courts that the public's interest would be better served by the City owning and operating the system.

While the reasons that the City has failed to convince a court of law of the necessity to purchase this water system by condemnation are abundant, two of those reasons should be addressed briefly for the benefit of this committee's members.

It is a matter of record that the City of Missoula conducted an election in 1985 to determine whether the voters in the City of Missoula would support an attempt to purchase the water system.

While the results of that election favored City ownership by 531 votes out of a total of 7,481 votes cast, over 4,000 Mountain Water customers in the County of Missoula were ineligible to vote. In addition, as determined by the court, the ballot issue, worded in the negative, was very confusing.

I believe you would all agree that it is of primary importance to maintain the existing tax base in the State of Montana and the County and City of Missoula.

During the period of time from 1979 through 1987, Mountain Water Company paid total taxes in the amount of 4,347,821 dollars, of which 2,842,485 dollars were paid to Montana state, county and city governments.

If this tax base is lost by virtue of City take-over, the taxes lost must come from tax increases in other areas.

While it can be asserted that we are merely collecting these tax funds from our customers, it is also true that our water rates are not higher than those in other major cities in Montana, and, in fact, are considerably lower than rates in Helena and Billings, even though Mountain Water Company pays state, county and city taxes and their systems do not.

Having failed to prove its case in court, the City now wants to eliminate the requirement that it must prove the public's interests would be better served if the City owned and operated the system. In other words, if House Bill 261 is adopted, the City would simply be able to decide that question for itself - proving public interest in court would no longer be necessary. The only question for the court to address would be how much the system is worth, (the amount the City would have to pay Mountain Water Company for its assets).

We believe this bill is nothing more than an attempt by the City of Missoula to change the existing law so the city can take over our water system without regard for the public's interest. The City's residents, and thousands of outlying residents, are now being adequately served by an up-to-date and efficiently run water system. We see no reason why these residents would be better served if the City owned the system, and the courts have supported our beliefs.

For these reasons, we strongly recommend that House Bill 261 be killed, and the question of whether the City should be able to take over the system be allowed to be resolved as it is now, in the courts.

I have asked our legal counsel, Mr. Sherman Lohn of the law firm of Garlington, Lohn & Robinson in Missoula, to explain to you in more detail what has transpired to date in the courts.

I thank you for your time and attention.

5

EXHIBIT 5
DATE 1/26/89
RE 261

TESTIMONY OF SHERMAN V. LOHN
PARTNER, GARLINGTON, LOHN & ROBINSON
MISSOULA, MONTANA
IN OPPOSITION TO

HOUSE BILL 261

HOUSE LOCAL GOVERNMENT COMMITTEE
JANUARY 26, 1989

I am appearing before this Committee as a resident of the City of Missoula and as an attorney for Mountain Water Company, a Montana corporation, in opposition to House Bill 261. This bill seeks to amend a portion of an ancient Montana law which has its genesis in enactments made by the territorial government, the law remaining basically unchanged and unused. The proposed amendment is, on its face, a simple one. It merely adds to a list of special items regarding streets, alleys, waterways, sewers, ditches, etc., the acquisition of a water supply system under the provisions of another section of Montana, which is also an ancient and unused provision. The kicker is contained in the existing statute, a portion not amended, which states in part "The ordinance authorizing the taking of private property for any such use is conclusive as to the necessity of the taking . . . " (Emphasis supplied).

The City of Missoula in 1984 filed a condemnation action against Mountain Water seeking to condemn the entire operation of the privately owned water system. The attempt has been unsuccessful because, after 4 years of active litigation, the City has been unable to establish that the proposed condemnation is in the public interest or is necessary. There have been three appeals to the Supreme Court, numerous hearings in District Court, a lengthy trial and a subsequent evidential hearing. The case is once again pending on appeal in the Supreme Court, which has in its past decisions made it very clear that for the condemnation to succeed it must be in the public interest, and the City simply has not been able to meet that burden.

By this proposed amendment the City seeks to achieve the result it has been unable to secure to date under existing law, simply by providing that no showing of necessity or public interest is necessary.

The concept of condemnation is an awesome one -- private property can be taken by the government against the wishes of the owner. This concept is accepted, though often with protest, because the government can show a need. However, couple the taking by the government as an absolute without any showing

that the taking is necessary or in the public interest and the concept is down right frightening.

In this state, the Montana state government does not have the power which this amendment would grant to every City Council in the State. The County governments do not have such power. It is accepted that each governmental body must establish need based on public interest. By this piece of legislation, the City of Missoula, apparently admitting that it cannot establish a public need, seeks to change the law for its benefit.

It should be noted that most condemnation actions with which we are familiar involve highways, power lines, gas lines, access roads, etc. where the necessity is clear and the general public will be benefitted. However, this amendment deals with an operating business, involving people and jobs, not just a piece of land with some improvements. A business in which the employees are to be considered as the most important asset and are vitally involved in determining the public interest.

Mountain Water serves a substantial number of County residents who certainly would not be benefitted by a City acquisition but would be deprived of the protection of the Public Service Commission as to rates, charges, service complaints, fire protection etc.

The Rural Fire District representing a great number of Missoula County residents protested the attempt of the City to acquire the system asserting that such an acquisition would substantially harm the District.

As has been noted, a substantial tax base would be lost by School Districts, the County and the State.

Recognizing that this forum is not one in which we should re-litigate a public interest issue which the City lost in Court, but believing that you should be advised of specific findings of the District Court, there is attached to this statement a copy of "Additional Findings". I would suggest that you might find this document of interest to understand more fully why the City wants to condemn a business, not only against the will of the owner, but without the necessity of establishing that it is in the public interest.

I would suggest to you that in addition to establishing a bad precedent in condemnation actions, the adoption of this amendment in its present form may well grant new powers of condemnation to all City Councils beyond that which might presently be contemplated. The original law is not divided into sections (a) through (d), as is contained in this bill. As a consequence the act has been interpreted not to give a City unlimited authority to condemn for "(d) any other municipal and

public use". If such an interpretation was correct, the City surely would not need this enactment. As redesigned, the passages of this bill would read:

(1) The City or Town Council has power to condemn private property for:

(d) Any other municipal and public use --

This result would hardly be acclaimed by the public in general as being either necessary nor in the public interest.

In 1923 our Supreme Court, commenting on condemnations by municipalities stated:

The power to condemn private property against the will of the owner is a stringent and extraordinary one, based upon public necessity or an urgent public policy.

State ex rel. McLeod v. District Court, 67 Mont. 164.

Do not by the adoption of this bill, a piece of special legislation, wipe out a doctrine that has been established for so long and has protected the public so well.

Thank you.

6
DATE 1/26/89
HB 261

1
2
3
4
5
6
7
8 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

9 * * * * *
10 THE CITY OF MISSOULA, a Montana)
municipal corporation,)
11 Plaintiff,) No. 60539
12 -vs-) COURT'S ADDITIONAL
13 MOUNTAIN WATER COMPANY,) FINDINGS OF FACT,
a Montana corporation,) CONCLUSIONS OF LAW
14 Defendant.) AND JUDGMENT,
15) AFTER REMAND
16 Warren Bache, LaMarr Baldwin,)
17 Jacqueline D. Beck, Linda D. Dunn,)
18 Dennis L. Falk, Sharon R. Fraser,)
19 Gary L. Frey, Georgette Gerlach,)
Shirley S. Guy, Bradley E. Hafar,)
20 Diane R. Hamilton, Arvid M. Hiller,)
M. Susan Hunt, Jerry E. Kirkpatrick,)
21 Gerald L. Lukasik, Louis F.)
McConaughy, Edmond L. Magone,)
22 Gary M. Mitchell, Ray W. Mitchell,)
Richard A. Morse, Michael L. Ogle,)
23 Susan L. Ori, Timothy J. Schwenk,)
Julie K. Stanley, Robert B. Ward,)
and Bonita L. Wilder,)
Intervenors.)
24 * * * * *

25 THIS MATTER originally came before the Court on March 18,
26 1986. A four-day trial was conducted without a jury. Evidence
27 was submitted to the Court in the form of oral testimony and
28 documentary evidence. On August 20, 1986, the Court issued its
Opinion and Judgment finding that the City of Missoula (City) had
failed to carry its burden of proving by a preponderance of the
evidence that it was necessary for the City to acquire the
Mountain Water Company (Mountain Water). The City appealed.

29 On appeal, the Supreme Court affirmed the judgment in
30 part, reversed it in part, and remanded for further consideration
of several factors. On December 9, 1987, the Court heard
31 evidence on the specific issues raised by the Supreme Court in
its opinion. The City was represented by Dexter L. Delaney and
James P. Nugent. Mountain Water was represented by Sherman V.
32 Lohn. The Intervenors (Employees) were represented by William H.

1 Coldiron. After receiving such additional evidence and having
2 weighed all the evidence in the entire record of both hearings,
3 the Court herein adopts findings and conclusions previously made,
and now makes additional Findings, Conclusions and Judgment as
follows:

4 FINDINGS OF FACT

5 1. Mountain Water is a Montana corporation which owns
6 and operates a water distribution system serving 16,201
7 customers; 11,720 customers are within the Missoula city limits
8 and 4,481 customers (27.3%) reside outside the city limits.

9 2. Mountain Water acquired the water system from the
10 Montana Power Company in 1979. In January, 1979, Mr. Kenneth
11 Dodd, a representative of Park Water Company, which owns all the
12 shares of stock of Mountain Water, met with Missoula Mayor Bill
13 Clegg, members of his staff and members of the Missoula City
14 Council. Also present was Vice-president Jack Burke of the
15 Montana Power Company, which company then owned the water
16 system and wished to sell it. (Tr. 596, l. 17) (Exhibit 100,
17 p. 112) The purpose of the meeting was two-fold:

18 (1) To inform the Mayor that Montana Power
19 was in position to sell the water system.

20 (2) To see if the Mayor and the City of
21 Missoula were interested in purchasing the
22 company. (Tr. 597, l. 8)

23 The reason behind all of this was that Park Water Company did not
24 want to purchase Mountain Water if they would just be faced with
25 a condemnation action. (Tr. 597, l. 13) Park Water Company had
26 other subsidiaries condemned by local governments in California.
27 (Tr. 537, l. 16)

28 The City of Missoula did not express any interest in
29 purchasing the water system (Tr. 599, l. 1) and based upon that
30 lack of interest Park Water Company purchased the system in early
31 1976. (Tr. 559, l. 5)

1 3. On August 6, 1979, the City passed a resolution
2 declaring its intent to acquire the system. No further official
3 action was taken upon this resolution until October 1984. The
4 proceedings of the City's meetings for July 30, 1979,
5 (Exhibit 100) and August 6, 1979, (Exhibit 101) clearly show
6 knowledge by the city commission of the acquisition by Park Water
7 Company and of City's inaction. During the 1979 to 1984 five
8 year period, the City adopted a wait and see attitude. Also
9 during this time Mountain Water was engaged in long deferred
10 maintenance of the system.

11 4. In 1983, Giardia infested Rattlesnake Creek causing
12 the water from that source to be harmful to human consumption.
13 Mountain Water quickly obtained additional wells to eliminate use
14 of Rattlesnake Creek water. At the present time, 100% of the
15 system's water supply comes from wells. Mountain Water retains
16 its water rights in the Rattlesnake Creek.

17 5. Mountain Water is a Montana Corporation, the
18 capital stock of which is solely owned by Park Water Company of
19 California. Henry Wheeler owns nearly all the capital stock of
20 Park Water Company. Park Water Company's headquarters are
21 located in California. Mountain Water is a public utility
22 subject to the requirements of the Montana Public Service
23 Commission, it's regulations and the Montana statutes.

24 6. Early in 1984, the City started negotiations to
25 purchase Mountain Water. An agreement for purchase could not be
26 reached and the City then adopted a resolution reaffirming its
27 1979 ordinance authorizing the City to acquire the system by
28 purchase or condemnation. In the latter part of 1984, the City
29 brought the present condemnation proceeding against Mountain
30 Water.

31 7. In September 1985, some citizens of Missoula
32 started an initiative to stop condemnation proceedings under

1 City's ordinances of 1979 and 1984. A lawsuit ensued because the
2 City did not think the subject matter a proper one for
3 initiative, hence public vote. The Court ordered the election to
4 take place deeming the City's action legislative in character,
5 therefore subject to initiative. That ruling was not appealed.
6 The question presented on the ballot was whether the city voters
7 would prohibit the City from purchasing Mountain Water. Because
8 the question was complex, the ballots were confusing. The
9 ambiguous ballot included unnecessary multi-syllable words and
10 was expressed in the negative. As such, it is impossible to tell
11 whether it was truly representative of the will of those who
12 voted. No motion or other effort was made to the Court to
13 "clean up" the language of the ballot. The ballot, with the
14 exact question submitted, reads as follows:

15
16 PROPOSITION
17

18 MISSOULA CITY INITIATIVE NO. 2

19 INITIATIVE TO ENACT AT THE NEXT REGULAR ELECTION IN THE CITY OF
20 MISSOULA LOCAL GOVERNMENT AN ORDINANCE WITHDRAWING NOTICE
21 PREVIOUSLY GIVEN TO MONTANA POWER COMPANY AND PARK WATER COMPANY,
22 INC., A CALIFORNIA CORPORATION PURSUANT TO CITY ORDINANCE 2045
23 AND CITY RESOLUTION 4385 EXPRESSING THE CITY OF MISSOULA'S DESIRE
24 TO PURCHASE BY NEGOTIATION OR BY EMINENT DOMAIN THE WATER SYSTEM
25 SERVING THE CITY OF MISSOULA CURRENTLY OWNED BY PARK WATER
26 COMPANY, INC., A CALIFORNIA CORPORATION.

27 The election ballot issued requests City electors to vote that it
28 is now their will that the City of Missoula does not purchase or
29 acquire by eminent domain the Mountain Water water system serving
30 the Missoula community which is currently owned by Park Water
31 Company, a California corporation. A vote for enactment of the
32 proposed ordinance is a vote to prohibit the City of Missoula's
acquisition of Mountain Water water system by withdrawing the
statutorily required notice previously given to Park Water Company
by ordinance and reaffirmed by resolution expressing the City's
desire to acquire the Mountain Water system serving Missoula.



FOR prohibiting the City of Missoula's
acquisition of the Mountain Water water
system currently owned by Park Water
Company, a California corporation, by
enacting proposed ordinance.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32



AGAINST prohibiting the City of Missoula's acquisition of the Mountain Water water system currently owned by the Park Water Company, a California corporation, by enacting proposed ordinance.

The ballot is not accurate because it recites the water system sought to be condemned is owned by Park Water Company, Inc., a California corporation. The system was and is owned by Mountain Water Company, a Montana corporation, which is the sole Defendant in this action. Only forty-two percent of all of the persons registered to vote within the city limits voted at the election, of the total 7765 voting, 7481 voted on this issue. Of the total voting on this issue (including absentee ballots) 4006 voted to support the City and 3474 against. In the 23 precincts within the city of Missoula which exclusively use Mountain Water, 3339 supported the City's efforts to acquire Mountain Water and 2744 voted against that effort. In the 9 precincts within the City who are only partially served by Mountain Water, 626 voters supported the City and 704 supported Mountain Water. Five small precincts within the city are not served by Mountain Water at all; the vote in these precincts was 22 for the City and 21 for Mountain Water. The campaign upon this issue involved the expenditure of considerable funds on both sides. From the turn out of only 42% of all persons eligible to vote, one can conclude that ownership by the public is not an important issue in the minds of most city residents.

Whether the water users outside of Missoula supported the position of the City or Mountain Water, is not possible to demonstrate with certainty. However, the loss of substantial tax revenue to the County and the School Districts as a result of a condemnation, as demonstrated by the prior testimony, would support a finding that county residents would be opposed to City acquisition with its result of increased taxes to such residents.

1 There is another reason water users outside the city
2 would not support city ownership, and that is the issue of
3 enforced annexation of these outside areas into the City. It was
4 an item of great concern to a State Senator and others at the
5 City's March 5, 1984, proceeding and other public meetings
6 concerning City's acquisition of Mountain Water. While the
7 City's position was that ownership of water would not provide
8 significant power to force annexation, it could be used to get
9 compliance by providing service only if an owner agrees to not
10 protest annexation. (Ex. 104, pages 5,9,10,11, 12,13)

11 In 1979, Alderman Toole said: (Ex. 100, p. 113)

12
13 "... the ownership of the water system
14 by Montana Power has given us good service
15 at low rates and has posed a tremendous
16 political problem in this community, in
17 fact it's posed a problem which is beyond
18 repair, we now have 25,000 people living
19 outside the city and as the Mayor said
20 tonight we can't get them in, if we had
21 50,000 people we could get immense sums
22 from the federal government to help us
23 with our problem, why did the Montana
24 Power Company deliberately go out and
25 extend it's water service to people
26 beyond the corporate limits of the city.

27

28 Alderman Toole asked (Mr. McCann) if they
29 couldn't do what Great Falls and Billings
30 did and just say no water unless they annex."

31 This additional factor would make it appear the 27.3% of the
32 Mountain Water users outside the city would not support city
ownership. They would probably vote to stop the condemnation
proceedings of the water system. One could easily conclude that
if they wanted into the City, they would already be there.

8. Twenty-six people are employed by Mountain Water
for the purpose of operating its system. If the City acquired
the system, at least seven such employees would lose their jobs.
Those employees remaining would suffer salary reductions which

1 would work an extreme hardship upon them. The severe hardship of
2 the employees resulting from the City's acquisition of the system
3 is one factor which must be considered in determining whether the
4 taking is necessary. Since 1979, Mountain Water has added
5 thirteen employees to its payroll, all of whom are necessary to
6 its operation.

7 9. City claims there will be substantial savings to
8 the City resulting from the reduction in the employees' salaries
9 and the termination of certain other employees. The Court finds
10 City has made assumptions in arriving at these alleged savings
11 which are unrealistic. Nor has the City proved that there will
12 be any savings of any consequence to the City by the proposed
13 reduction in the number of employees and the salaries of the
14 employees remaining at Mountain Water. On the other hand, these
15 proposals would work substantial and severe hardships upon the
16 employees for no real gains. The employees are loyal to Mountain
17 Water and their morale is high. They provide water to the
18 consumers in an exemplary and economical fashion. Rather than
19 being overpaid, the salaries that the employees now receive
20 provide them with a reasonable standard of living. The public
21 interest would not be served by such a detrimental impact upon
22 these employees.

23 10. Mountain Water employees have a substantial amount
24 of experience in operating this water system; whereas, no city
25 employees have any significant experience in operating the
26 system. Were the City to acquire the system and begin operating
27 it, there would be at least a temporary decrease in the present
28 efficiency in operation of the system. This factor, together
29 with a lesser number of employees operating the system, would
30 impair the availability and quality of water service to the
31 consumer. This result would not be in the public interest.

32 The City offered to prove an instance in 1987 where

1 there was lack of cooperation between the City and Mountain
2 Water. That offer was refused because it was an issue which had
3 been previously determined; this instance arose clearly after the
4 trial of this cause. If this issue were allowed, it would open
5 the door for all of the parties to bring in essentially new
6 issues such as fines City has paid for discharging sewage into
7 the Clark Fork River, making a virtual serial proceeding out of
8 it. The Court has considered none of these circumstances in
9 making these findings, nor has it based these findings upon any
10 offer of proof.

11 11. The City contended at the original hearing that
12 water from Rattlesnake Creek must be utilized. The use of this
13 water is not necessary; a more than adequate supply of water is
14 available from existing wells. Interesting but heretofore
15 unnoted information was noticed during the re-reading of the
16 transcript (Tr. 667, l. 5) of the 1986 trial and Exhibit 104,
17 page 6. In 1949, the whole city of Missoula was without water
18 for eleven days because the entire water system was frozen. At
19 that time, the basic supply was surface water from Rattlesnake
20 Creek. Rattlesnake water entered the system at temperatures as
21 low as 31°F, or below freezing. When water enters the system at
22 that low temperature, and when ground frost depth is 5 or 6 feet,
23 the system will freeze. Well water, pumped from greater depth,
24 has a higher temperature, and for these purposes, is more
25 desirable because it poses less danger of freezing the whole
26 system.

27 12. Mountain Water has realized annual profits in the
28 past and, under present projections, will realize annual profits
29 in the future. The City contends that it would operate the
30 system without realizing a profit and would be able to pass on
31 those savings to the consumer. The Court finds that the profits
32

1 began rebuilding and re-equipping the water system, which had
2 fallen into bad repair. This extensive modernization was done
3 at great cost to Mountain Water and resulted in substantial
4 benefits to the users of the system and to the City as a whole.
5 It infused capital into Missoula economy by the non-Montana
6 owners of Mountain Water Company since mid-1979 as follows:

7	1979 (six months)	\$1,915,350
8	1980	\$1,308,509
9	1981	\$ 672,353
10	1982	(\$ 537,443)
11	1983	(\$ 767,671)
12	1984	\$ 803,895
13	1985	\$ 253,403

14 The capital for 1982 and 1983 did not actually leave Montana but
15 instead was invested in the plant and equipment. Mountain Water
16 has long-range plans to continue this modernization which will
17 result in further benefits to the public. In addition, new water
18 sources were developed through the drilling of additional wells.
19 Mountain Water has a formal five-year plan which is updated
20 annually and informal ten to twenty-year plans which are more
21 flexible and designed to meet future needs of the City. Mountain
22 Water has cooperated to a high degree with the City in order to
23 accommodate the City's planning. The great amount of money spent
24 by Mountain Water in the past in renovating the system and the
25 substantial expenditures that will take place in the future for
26 capital improvements demonstrate its commitment to the citizens
27 of Missoula of providing the highest quality water system
28 possible. There has been no substantial complaint of the
29 services provided by Mountain Water by its customers. The Court
30 finds that the citizens long-range access to water will be
31 assured through the continued ownership of Mountain Water.
32 There is no substantial proof to the contrary.

1 15. The City maintained that during the first five
2 years of ownership, the rate payers would enjoy a net savings of
3 \$3,500,000.00. To support this contention, the City made several
4 unsupported assumptions. First, the City assumed that it could
5 purchase the system for \$11,000,000.00 and could float a bond
6 issue of \$14,000,000.00 to finance the purchase. The City did
7 not authorize or conduct any appraisals to determine the worth of
8 the Mountain Water Company's assets, and did not contest the
9 expertise of the present owner of the system who valued those
10 assets at approximately \$19,000,000.00. Furthermore, no expert
11 testified that a \$14,000,000.00 bond issue was feasible or
12 appropriate. The City did not make an evaluation of the amount
13 of a bond issue needed in the event that it could not purchase
14 the system for \$11,000,000.00. If the City cannot purchase the
15 system for \$11,000,000.00, then its projections of savings
16 dramatically decrease as the cost of purchase increases.

17 The City also assumed that it would not increase rates
18 for at least five years and that Mountain Water would increase
19 rates every year. This claim is nothing more than an assumption.
20 No witness for the City guaranteed that the rates would not be
21 increased during the first five years of operations, nor could
22 anyone guarantee the effects of inflation. As revenue demands
23 increase, new administrations could very well increase water
24 rates. The City's assumption that Mountain Water would raise
25 rates every year beginning in 1984 for the next five years
26 explains some of their assumptions but is completely unfounded.

27 City's financial projections assume it could spend no
28 more than \$500,000.00 annually for capital improvements. This
29 estimate is completely unrealistic in light of the amount of
30 money Mountain Water has spent in the past to upgrade and the
31 systems requirement of future capital expenditures. Because of the
32 needs of the system, the Court finds that expenditures of less than

1 \$500,000.00 annually will result in a disservice to the public.

2 City claims the services provided by Mountain Water's
3 home office in California could be replaced by the City at no
4 cost. This assertion is contrary to the rulings of the Public
5 Service Commission which found that the services provided by the
6 home office are valuable and allowed those costs to be included
7 in the present rate base. Contrary to the City's assertion, the
8 home office provides such services as planning, finances,
9 consultation, engineering, and overall support. The City would
10 not be able to run the system efficiently without these services.

11 The City represents it would not build a filtration
12 plant for Rattlesnake Creek during the first five years of its
13 ownership, and it did not, therefore, include the cost of a
14 filtration plant in its financial projections. But City also
15 represents it is committed to the construction of the filtration
16 plant, that the plant is needed immediately, and that the
17 Rattlesnake Creek surface water must be used. If the City were
18 to construct the plant now, as it contends that it would do, the
19 effect would be to increase the cost of water to the consumer and
20 eliminate all claims of savings.

21 Over the next five years, Mountain Water would pay over
22 \$1,300,000.00 in taxes to various city and county entities. Were
23 the City to acquire the water system, these tax revenues would be
24 lost to the public interest, and other taxes reshuffled to make
25 up the loss.

26 16. 4,481 customers of Mountain Water live outside the
27 Missoula city limits and were unable to express their voice on
28 the ballot initiative. Were the city to acquire the system, a
29 significant number of those customers would be forced to convert
30 to the City's system without ever having had the opportunity to
31 express their opinion on the subject. Those customers would have
32 no means of expressing their voice in or vote in the affairs of

1 city government. The City would be allowed to make rate
2 increases of up to 12% per year on its own initiative and without
3 any control by the Public Service Commission. At present, the
4 rate making process for Mountain Water is controlled by the
5 Montana Public Service Commission and all Mountain Water
6 customers have some voice in the rate making process. Were the
7 City to acquire the system, 27.3% of the system's users would
8 have no voice in the rate making process. This result would not
9 be in the public interest. Because of these additional
10 considerations, the Court finds that the City resolution and
11 results of the initiative election is entitled no greater weight
12 than other factors that must be considered under the
13 determination of necessity.

14 From the foregoing Findings of Fact, the Court makes
15 the following:

16
17 CONCLUSIONS OF LAW

18 1. Section 7-13-4404, M.C.A., provides:

19
20 Before property can be taken, City must
21 show by a preponderance of evidence that
22 the public interest requires the taking
23 based on the following findings:

- 24 (1) that the use to which it is to
25 be applied is a use authorized
26 by law;
27 (2) that the taking is necessary to
28 such use;
29 (3) if already appropriated to some
30 public use, that the public use
31 to which it is to be applied is
32 a more necessary public use.

33 Considering relevant factors set out in the original findings,
34 and these findings, including the City resolution and the public
35 vote, the Court concludes that the City has failed to meet its
36 burden of proving by a preponderance of the evidence that it is

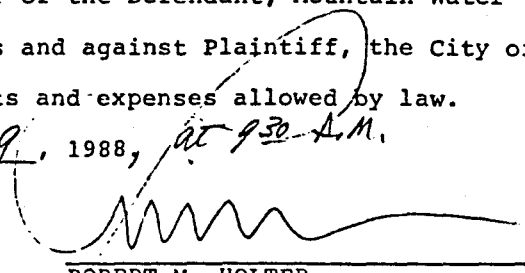
1 necessary that the City operate the Mountain Water system. Since
2 this property is already a public utility, and hence to some
3 degree dedicated already to a public use, it is not more
4 necessary the City take over its operation. The public interest
5 will be best served by the City not being permitted to condemn
6 Mountain Water.

7 2. Having failed to carry its burden of proof, the
8 Court now denies the City relief in this proceeding.

9
10
11 JUDGMENT

12 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that
13 Judgment be entered in favor of the Defendant, Mountain Water
14 Company, and the Intervenor and against Plaintiff, the City of
15 Missoula, together with costs and expenses allowed by law.

16 DATED January 19, 1988, at 9:50 A.M.

17
18 
19 _____
20 ROBERT M. HOLTER
21 District Judge
22
23
24
25
26
27
28
29
30
31
32

The Montana Power Company opposes HB 261. Title 70 of the Montana Code presently grants parties the power to condemn private property for certain public uses. This eminent domain right extends to both public and private entities, upon (1) a finding of public necessity and (2) a determination of the value of just compensation.

Title 7 supplements the general eminent domain statutes by allowing a municipal government the right to condemn, without proving necessity, for inherently public uses (i.e., streets, parks, sewers, etc.). This is understandable, since these public uses would not be provided, unless municipalities were involved.

HB 261 would expand Title 7 by including water supply systems under those uses that a municipality may condemn without proof of necessity. This expansion is ill advised and wrong.

The bill is obviously intended to address the current conflict in Missoula. It is interesting to note that until about 10 years ago, The Montana Power Company owned and operated Missoula's water utility. MPC sold the system to the current owners of the Mountain Water Company, and some of the present employees operating the system were previous MPC employees. The Mountain Water Company, like every other public utility in Montana, devotes its property to a public service, which is regulated by the Montana Public Service Commission.

Based on the existing eminent domain statutes in Title 70, the City of Missoula attempted to condemn the utility, but failed to prove a public necessity for the condemnation. The case was appealed to the Montana Supreme Court, who remanded the case back to district court. The City again failed a second time to prove necessity at the district court, and the case is again being appealed.

HB 261, if passed, sets a dangerous precedent by allowing a municipality the expedited right to condemn a privately owned public utility, including one that is in compliance with the legal requirement of providing adequate service at reasonable charges.

In addition, HB 261 would allow the taking of a privately owned business with no corresponding greater benefit to the public. The very fact that the private sector owns and operates the Missoula water system is sufficient evidence that the system is not inherently public in nature.

Please vote against HB 261.

8

MONTANA WATER RESOURCES ASSOCIATION

Jo Brunner.....

January 26, 1987.....Local Government Committee

HB261.....Representative Stella J.Hansen

Oppose.....

Mr. Chairman, Members of the Committee, for the record, My name is Jo Brunner and I am Executive Secretry of the Montana Water Resources Association. I represent MWRA today before this committee in opposition to HB 261.

It is the conviction of MWRA that the process necessary to confiscate, and to take, private property, through condemnation, is in place today, and that a municipality, or other entity desiring to do so, can through those means present their case for such taking.

We believe such takings of private property should be firmly controlled that the individual rights might be protected. We have experienced serious drought the last few years, and it is easy to choose up sides as to who should get whose water--apparently for the good of the people. While we may dispute just what the definition of 'good of the people' may be, we believe that if an entity wants anothers water, they ought to show cause and intent for that need.

We do not believe that city parks, lawns, swimming pools, tennis courts and so on have a priority over the uses of existing rights. Should a public entity endeavor to practice condemnation, as seems to be the case in this instance, should not that entity make every effort to minimize existing uses within the entity, before the taking of others rights?

And having done so, then move to existing legal proceedings? And should those legal proceedings not allow such condemnation, do we then change the law until it suits the requestor.

We can see problems rising in every municipality, or other water thirsty entity,with a near stream if this law is passed. Without the precautions that exist to protect the water right holder, what good is that right?

Just cause and need must be proven for the taking of water rights.

We ask that you do not pass this bill.

WITNESS STATEMENT

NAME Lorna Frank BILL NO. HB-261

ADDRESS 622 Breckenridge, Helena

WHOM DO YOU REPRESENT? MT. Farm Bureau

SUPPORT _____ OPPOSE X AMEND _____

COMMENTS: _____

Madam Chairman, members of The
Committee, for The record my name is
Lorna Frank, representing Montana
Farm Bureau members throughout The state.

We feel that if this bill passes,
municipalities would not have to show
need. Farm Bureau opposes HB-261
because of The need to protect ^{PRIVATE} property
rights There must be a clear-cut need
for The betterment of The public good.

Lorna Frank

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

to be filled out by a person testifying as a person who would not like to stand up and speak but wants their testimony entered into the record.

WITNESS STATEMENT

NAME

Judith Harker

BUDGET

ADDRESS

Brainer

WHOM DO YOU REPRESENT?

Mont. Co. Taxpayers Assoc.

SUPPORT

OPPOSE

X

AMEND

COMMENTS:

1. Eminent domain should not be used by a government to acquire private property or a business

2. Property should not be taken off tax rolls or reduce taxable valuation

3. City of Missoula should solve its problem with a legitimate business deal agreeable to both seller & buyer.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

Local Government

COMMITTEE

BILL NO. 237

DATE _____

SPONSOR R Nelson

[illegible]

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FO

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Local Government COMMITTEE

DATE 1/26/89

[illegible]

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

Local Government COMMITTEEBILL NO. 261DATE 1/26/89

SPONSOR _____

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
R.E. SANDERS	W.S. Springs		✓
CAROL H. SANDERS	W.H. F. SULTHUR SP.		X
TIM BAKER	PSC		
Al Sampson	M. Ssalen	X	
Jack Ruel	" "	X	
Sherran V. Solen	" "		X
Charles H. Gibson	Mussonla	X	
Lee Magone	"		X
Harold I. Sukut	"		X
Otto Bryan	Choteau		X
Carol Mesher	Mt. Little Horn		X
Lerna Frank	Mt. Farm Bureau		X
Louie Hacker	Moia Co. Truckholders		X
Kim Enkerud	MT Stockgrowers		X
J.D. Rice	Choteau		X
Martin Barber	A. P. A		X
Walter D. Malone	CHOTEAU		
Art WITICH	BUTTE		X
Mary White	Helena		X
Leonard Steiner	Choteau, mt.		X

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

John SalmonPLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.Fred J. DoreyHelena

VISITORS' REGISTER

Local Government COMMITTEE

BILL NO. 261

DATE 1/26/89

SPONSOR Hansen

[illegible]

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Local Government COMMITTEE

DATE 1/26/89

SPONSOR Jan Brown

[illegible]

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

1 realized by Mountain Water enable it to make substantial capital
2 improvements to the overall system resulting in a more efficient,
3 economical, and modern system to the consumer. Mountain Water
4 will spend approximately 1.5 million dollars each year for
5 capital improvements to the system over the next five years. The
6 City maintains that it can operate the system with less than one-
7 half million dollars each year in capital improvements. This
8 projection is either unrealistic, or, if that amount is actually
9 expended by the City, will result in a steadily declining water
10 system with problems occurring more and more frequently. This
11 result would not be in the best interest of the public.

12 Profit realized by Mountain Water is regulated by the
13 Montana Public Service Commission; which also assures utilities
14 will not make excessive profits at the expense of the service
15 provided to the consumer. The Court finds that the continuing
16 efficiency of the system, annual improvements to the system, and
17 overall exemplary service provided to the consumer is, in part, a
18 result of the profit incentive of Mountain Water. The City does
19 not have that same incentive.

20 13. The City alleged it is in the public's best
21 interest for the City to acquire the water system because
22 Mountain Water is presently owned by an out-of-state company.
23 City asserts it has reason to look out for the best interests of
24 its citizens and will do what is in the City's overall best
25 interest as it relates to its citizens' water needs; whereas, an
26 out-of-state company will not because it has no allegiance to the
27 City or this state, being motivated primarily by profit. The
28 proof of these assumptions fails. There is no showing the service
29 rendered by Mountain Water is any less than that rendered by any
30 other water company or that the City will give more or better
31 service.

32 Contrary to the City's position, the Court finds that

1 Mountain Water has acted at all times with the best interest of
2 the consumer in mind. It has done a commendable job in providing
3 the City with an efficient, modern water system. Mountain
4 Water's quick response to the Giardia infestation problem amply
5 demonstrates its concern for the health of the citizens of
6 Missoula who use its water. Mountain Water's plan for capital
7 improvements to the system also demonstrates its concern that the
8 citizens have the healthiest and most efficient water system
9 possible. Mountain Water has, at all times, cooperated fully in
10 community planning and has supplied the City with annual updates
11 of its five-year plans. All these facts clearly demonstrate that
12 Mountain Water has acted, and will continue to act, with the
13 health and welfare of its customers and citizens of Missoula and
14 has done as much to benefit the City in relation to the water
15 system as would the City itself have done.

16 14. The City argues a problem exists because a large
17 number of its citizens are dependent for their supply of water
18 upon a privately owned company. It asserts that a resource so
19 vital to the health of its citizens should not rest in the hands
20 of one person but should be controlled by the citizens themselves
21 through their elective government. The Court is cognizant that
22 it may be more comforting to the City and some of its citizens to
23 know that their water supply is controlled by the City itself.
24 But the City has not submitted any evidence which shows that the
25 citizens long-range access to supplies of water would be
26 endangered in any way by the continued ownership thereof by
27 Mountain Water. Again, Mountain Water operation is regulated in
28 accordance with law and regulations promulgated for the operation
29 of utilities.

30 Mountain Water has done an excellent job in providing
31 and expanding water supplies to the citizens. Upon taking over
32 ownership from Montana Power Company, Mountain Water immediately