

APPLICATION FOR

**DISTRICT COURT JUDGESHIP
Eleventh Judicial District**

A. PERSONAL INFORMATION

1. Full Name: Richard Patrick DeJana
 - a. What name do you commonly go by? Rich
2. Birthdate: [REDACTED] Are you a U.S. citizen? Yes
3. Home Address: [REDACTED]
Phone: [REDACTED]
4. Office Address: 120 4th Street West, P.O. Box 1757, Kalispell, MT 59903-1757
Phone: 406 752 4120
5. Length of residence in Montana: 65 years
6. List your place of residence for the last five years:

<u>Dates</u>	<u>City</u>	<u>State</u>
June 1977 – current	Kalispell	MT

B. EDUCATIONAL BACKGROUND

7. List the names and location of schools attended, beginning with high school:

<u>Name</u>	<u>Location</u>	<u>Date of Degree</u>	<u>Degree</u>
Holy Redeemer Collage (Minor Seminary)	Oakland, CA	N/A	

Great Falls Central High School	Great Falls, MT	June 1968	Diploma
Rockhurst College (Now University)	Kansas City, MO	May 14, 1972	BA English Lit. with honors
University of Montana School of Law	Missoula, MT	June 12, 1977	J.D., with High Honors

8. List any scholarships, awards, honors and citations that you have received:

1968 -72 Honors Scholarship; Honors Program; Student Body President; Alpha Sigma Nu (National Jesuit Honor Society); Scribner medal for journalism (year book); honor roll six semesters; and Alpha Psi Omega (Honor Society for Theater).

9. Were you a member of the Law Review? If so, please state the title and citation of any article that was published and the subject area of the article.

No

C. PROFESSIONAL BACKGROUND AND EXPERIENCE

10. List all courts (including state and federal bar admissions) and administrative bodies having special admission requirements in which you are presently admitted to practice, giving the dates of admission in each case.

<u>Court or Administrative Body</u>	<u>Date of Admission</u>
Montana Supreme Court and state courts	6/13/1977
Montana Federal District Court	6/13/1977
Ninth Circuit	2/20/1985

11. Indicate your present employment (list professional partners or associates, if any).

Self-employed at Richard DeJana & Associates, PLLC. Since 2005 the firm has been myself but the name was retained based on contracts.

12. State the name, dates and addresses of all law firms with which you have been associated in practice, all governmental agencies or private business organizations in which you have been employed, periods you have practiced as a sole practitioner, and other prior practice:

<u>Employer's Name</u>	<u>Position</u>	<u>Dates</u>
Warden, Walterskirchen and Christiansen	Associate	1977 June - 1980 Dec.
DeJana Law	Sole Proprietor	1981 - 1982
Olsen/DeJana Law Firm	Partner	1982 -1984
De Jana Law	Sole Proprietor	1984 - 2000
Richard DeJana & Associate, PLLC	Member manager (50 employees)	2000 - 2005
Richard DeJana & Associate, PLLC	Member manager (1 employee)	2005 - current

13. If you have not been employed continuously since the completion of your formal education, describe what you were doing.

NA

14. Describe the nature of your present law practice, listing the major types of law that you practice and the percentage each constitutes of your total practice.

My practice is a general practice with emphasis in real property transactions and litigation. The real property litigation comprises approximately 50% of my practice and such litigation includes zoning and land use issues, lien litigation, related administrative hearings and matters, and boundary or easement litigation. Other civil litigation comprises 10 -15 % of my practice. Paid estate planning and probate make up about 15% of my current practice. (I note that approximately 20% of my time is pro bono usually in Will preparation and estate work along with miscellaneous advise to primarily senior citizens. I do not include pro bono in the practice percentages.) Other general business and general practice consulting and document preparation makes up the rest of my business.

15. List other areas of law in which you have practiced, including teaching, lobbying, etc.

In the past I did limited work in domestic and family law. I have done some criminal work primarily in Libby at the "request" of retired Judge Keller. I have testified before the legislature but not for pay or as a lobbyist. Over the last 11 years, I have taught an average of at least one real property or land use class annually.

I have been trained and served as a mediator for US Youth Soccer.

I have testified as an expert witness in a number of attorney fee hearings for various parties including the State of Montana.

16. If you specialize in any field of law, what is your specialty?

I emphasize real property and land use transactions and litigation.

17. Do you regularly appear in court? Yes
What percentage of your appearance in the last five years was in:

Federal court	less than 4% (1 case)
State or local courts of record	86%
Administrative bodies	10%
Other	_____ %

18. During the last five years, what percentage of your practice has been trial practice? 65-70%

19. How frequently have you appeared in court? 2- 3 times per month on average.

20. How frequently have you appeared at administrative hearings?
Less than 1 time per month on average.

21. What percentage of your practice involving litigation has been:

Current:

Civil	100%
Criminal	_____ 0 %
Other	_____ 0 %

Over My Career

Civil	90%
Criminal	_____ 5 %
Other	_____ 5 %

22. Have you appeared before the Montana Supreme Court within the last five years? If so, please state the number and types of matters handled. Include the case caption, case citation (if any), and names addresses and phone numbers of all opposing counsel for the five most recent cases.

In the last 5 years I have appeared before the Supreme Court 11 times. (I have appeared 38 times in my career).

I have included details on seven cases because in two of them I did not write the appeal briefs.

Harbor Village Home Owner's Association v Waldenberg et al

DA 15 0337

I represent Waldenberg et al. Just commencing briefing.

The case originated as a covenant enforcement action. The district court found two sets of covenants invalid based upon Waldenberg's claims. Based upon an estoppel theory, it found Harbor Village Home Owner's Association could function as the homeowners association despite the fact another association was named in the valid covenants. That latter issue is the primary issue on appeal.

Opposing counsel is: Paul A. Sandry, Esq., 406-755-5537, Johnson, Berg, & Saxby, PLLP., P.O. Box 3038, Kalispell, MT 59903 - 3038.

Konopatzke v Bauch

DA 15 0056

I represent Konopatzke. Briefed and sent to the Court July 20, 2015

The case originally concerned easements. After an apparent settlement, there erupted a disagreement as to the identity of the easements being released. In particular the disagreement focused on whether one easement had been plead and whether a potential prescriptive easement (of course unrecorded) were to be included in the easement. Bauch sought summary judgment enforcing the settlement agreement. Konopatzke raised objection to the easements and raised the issue that the agreement was to be performed by a specific date which had passed over a year before the motion. The district court granted the motion, ordered performance, but then struck references to unrecorded easements and changed the specified easement to that claimed by Konopatzke. Konopatzke appealed claiming the agreement was terminated by the delay and since the court changed the final agreement to coincide with why he would not accept the easement release, the agreement should be found to be void.

Opposing counsel is: Randall A, Snyder, Esq., 406 837 4383, P.O. Box 717, Bigfork, Montana, 59911

Guardianship of H.O.

DA-14-0119

I was one of the attorney's for the Appellee, **I did not brief this case.** Decided on October 28, 2014.

The Appellants objected to a change of venue order. The Supreme Court Affirmed.

Co-Counsel: Fred Simpson, Esq., 406-541-4100, Reep, Bell, Laird & Simpson, PC, PO Box 16960, Missoula, MT 59808.

Counsel for H. O., a protected person: Emily K. Judd, Esq. 406-751-6080, Office of the Public Defender, 1205 South Main Street, Kalispell, MT 59901

Opposing counsel: John Michael Myers, Esq., 406-862-7451, Myers Law, PLLC

309 Wisconsin Avenue, Whitefish, MT 59937.
(John H. Osorio appeared pro se).

Sudan v Anacker

DA 13 0537

Appellant's counsel. Decided March 18, 2014.

Appeal of a decision setting aside a lien based upon a claim that because a judgment which had previously been reversed was recorded, that the lien was extinguished. The Supreme Court reversed.

Opposing Counsel: Doug Scotti, Esq., (406) 862-9600, Morrison & Frampton, PLLP, Frank Lloyd Wright Building, 341 Central Avenue, Whitefish, MT 59937.

Guardianship of H.O

DA 13 0394

Appellant's counsel. Decided March 18, 2014

The district court improperly entered a restraining order and injunction. Appeal followed. After learning about the mistake, the district court withdrew the orders. Supreme Court dismissed the appeal.

Opposing counsel: John Michael Myers, Esq., 406-862-7451, Myers Law, PLLC
309 Wisconsin Avenue, Whitefish, MT 59937.

(John H. Osorio appeared pro se).

Allen et al v. Lakeside Neighborhood Planning Committee and Flathead County

DA 13 0054

Counsel for two appellants, **I did no write the brief.** Decided August 20, 2013.

Appellants lost a summary judgment motion with respect to an open meeting claim. Supreme Court affirmed.

Co - Counsel: Tammi E. Fisher, Esq., and Noah H. Bodman, Esq., (406)755-4212 ,Fisher & Bodman PC, PO Box 1038, Kalispell MT 59903

Appellees' Counsel: Paul Nicol, Esq., Office of the Flathead County Attorney, 406-758-5630, 920 S Main Ste 201, Kalispell MT 59901.

Tungsten Holdings v Freyder

DA 12 0782

Counsel for Appellee. Decided October 8, 2013.

Tungsten appealed a decision determining that it did not have an easement (under several theories) across the Freyder property. The Supreme Court affirmed.

Opposing Counsel: Thane Johnson, Esq., 406-755-5537, Johnson, Berg, & Saxby, PLLP., P.O. Box 3038, Kalispell, MT 59903 - 3038.

Other cases in the last 5 years:

Estate of Bjornrud, DA 12 0473 – determination of ownership of property which had not been probated through 4 generations.

Jones v Shaurette, DA 12 0153 – suit to remove a trespassing portion of a cabin.

Lakeside Shores v McCleary DA 10 0275 Purchase agreement litigations, dismissed by stipulation.

Matter of Estate of Burrell, DA 10 0224 Enforcement of a settlement agreement.

23. State the number of jury trials that you have tried to conclusion in the last ten years.

Since 1999, I have not tried a jury case to conclusion. I have settled prior to trial 9 cases. In my career I have tried in excess of 22 jury trials to completion).

24. State the number of non-jury trials that you have tried in the last ten years

In the last five years I have tried 31 non-jury trials to conclusion. I have resolved through motion practice or settlement 57 cases.

25. State the names, addresses and telephone numbers of adversary counsel against whom you have litigated your primary cases over the last two years. Please include the caption, dates of trial, and the name and telephone number of the presiding judge. If your practice does not involve litigation, give the same information regarding opposing counsel and the nature of the matter.

Caption	Date of trial	Judge	Other counsel
<i>Cameron vs Paveco, LLC</i> DV 14 746 B 11 th Jud. Dist.	Pending	Robert B. Allison 406 758 5906	Sarah Simkins, Esq. Johnson, Berg, Saxby, PLLP P.O. Box 3038 Kalispell, MT 59903-3038 406 755 5535
<i>Sykes v Anderson et al</i> DV- 09 -987 C 11 th Jud. Dist.	Settled 7/2/2015	Heidi J. Ulbricht 406 758 5906	C. J. Johnson, Esq, P.O. Box 8568 Missoula, MT 59807 406 721 9800 Daniel W, Hileman, Esq. P.O. Box 728 Kalispell, MT 59903 406 755 5783

Caption	Date of trial	Judge	Other counsel
<i>Steed v Berget</i> DV 14 60 19 th Jud. Dist.	Pending	John W. Larson 406 258 4773	Amy Guth, Esq. 408 Main Street Libby, MT 59923 406 293 2322 Gregory L. Bonilla, Esq. 2717 Skyway Dr, Suite F Helena, MT 59602 406 441 5471 (Co- counsel listed below) J. Tiffin Hall, Esq. 124 Riverside Dr., Suite 101 Eureka, MT 59917 406 297 7026
<i>Solo v Lincoln County and Steed</i> DV 11 224 19 th Jud. Dist.	Settled 4/25/2014	Loren Tucker 406 683 3745	Same as Steed v Berget
<i>Community Association for North Shore Conservation, Inc. Flathead County...</i> DV 15 121 11 th Jud. Dist.	Pending	Robert B. Allison 406 758 5906	Tara Fugina, Esq. Caitlin Overland, Esq. David W, Randall, Esq. Flathead County Attorney 920 South Main Kalispell, MT 59901 406 758 5630 Donald R. Murray, Esq. P. O. Box 1178 Kalispell, MT 59903 406 755 6919
<i>Hornsteiner v Thomas T. Tornow, PC</i> DV 13 960 B 11 th Jud. Dist.	Settled 5/12/ 2015	Robert B. Allison 406 758 5906	Gary Crowe, Esq. P.O. Box 924 Kalispell, MT 59903 406 752 7711

Caption	Date of trial	Judge	Other counsel
<i>Harbor Village Homeowners</i> DV 14 746 B 11 th Jud. Dist.	Oct. 27-29 2014	Heidi J. Ulbricht 406 758 5906	Paul Sandry, Esq. Johnson, Berg, Saxby, PLLP P.O. Box 3038 Kalispell, MT 59903-3038 406 755 5535
<i>Sudan Drilling, Inc. v. Anacker</i> DV 05 305A 11 th Jud. Dist.	Settled after two appeals July 1, 2015	Douglas G. Harkin 406 758 5906(on pleadings)	Doug Scotti, Esq. 341 Central Ave Whitefish, MT 59801 406 862 9600
<i>Centennial Contracting And Development, LLC v. Salminen</i> DV 10 179 B 11 th Jud. Dist	Stipulated Judgment	Heidi J. Ulbricht 406 758 5906	Randy S. Ogle, Esq. P.O. Box 899 Kalispell, MT 59903 406 752 7550 David Sandler, Esq. Amy Eddy, Esq. 33 Second St. East, Suite 1 Kalispell, MT 59901 406 752 3303 Marcel Quinn, Esq. P.O. Box 7210 Kalispell, MT 59901 406 755 2225

26. Summarize your experience in adversary proceedings before administrative boards or commissions during the last five years.

I am generally retained with respect to real estate development issues. More often than not, I prepare the client to attend planning board or board of adjustment hearing and I remain on call if needed. My actual appearances before planning boards in the last 5 years have been 3 dealing with development. Prior to 2008, the average was 1 to 1.5 a year. In addition, I appeared before boards of adjustment in the last 5 years approximately 4 times seeking variances. Three were contested. I have also represented two parties before the auditor but the cases resolved without a hearing. Finally, I also represented an organization on an alleged campaign violation before the commissioners. That also settled.

27. If you have published any legal books or articles, other than Law Review articles, please list them, giving citations, dates, and the topics involved. If you lectured on legal issues at continuing legal education seminars or otherwise, please state the date, topic and group to which you spoke.

CLASSES TAUGHT AND PUBLICATIONS

National Business Institute Land Use Law: Practical Guide to zoning and Land Use Law. Roadmap for Navigating the Approval Process, Richard DeJana, Esq.; Constitutional Limitations on Zoning Actions, Richard DeJana, Esq., and Challenging or Appealing an Administrative Zoning Decision, Richard DeJana, Esq., Copyright © 2015 National Business Institute; Richard DeJana.

National Business Institute: Top Title Defects - Cured. Break in Chain of Title, Richard DeJana, Esq.; Judgments and Liens, Richard DeJana, Esq., and Legal Description Errors, Richard DeJana, Esq. Copyright © 2014 National Business Institute; Richard DeJana.

National Business Institute Land Use Law: Current Issues in Subdivision, Annexation and Zoning. Take A Comprehensive Look At Land Use Law Richard DeJana, Esq. edited by Kristin L. Omvig; Understanding The Development And Utilization Of The Comprehensive Plan, Richard DeJana, Esq., Ethics In Land Use Copyright © 2013 National Business Institute; Richard DeJana.

National Business Institute Land Use Law: Current Issues in Subdivision, Annexation and Zoning. Overview Of Development And Land Use LAW Richard DeJana, Esq.; Effective Land Use Procedures Richard DeJana, Esq., Copyright © 2011 National Business Institute; Richard DeJana.

National Business Institute Examining and Resolving Title Issues. Application Of Corrective Tools To Obtain Marketable Title Richard DeJana, Esq.; Examination Of Curative Actions Available To Obtain Clear Title, Richard DeJana, Esq. Copyright © 2011 National Business Institute; Richard DeJana.

CLE Institute State Bar of Montana Eminent Domain Update. Interaction Of Land Use Planning And Eminent Domain Richard DeJana, Esq., Copyright © 2010 CLE Institute State Bar of Montana; Richard DeJana (video available State Bar).

National Business Institute Mastering Land Use And Planning Processes. Overview Of Development And Land Use Law Richard DeJana, Esq.; Effective Land Use Procedures Richard DeJana, Esq., Copyright © 2009 National Business Institute; Richard DeJana.

National Business Institute Mastering Land Use and Planning Processes in Montana Overview Of Development And Land Use LAW Richard DeJana, Esq.; Avoiding Surprises During The Planning Process Richard DeJana, Esq., Effective Land Use Procedures Richard DeJana, Esq.; Draw The Line: Ethical Issues In Land Use

Richard DeJana, Esq.; "New" Land Use Issues Richard DeJana, Esq. Copyright © 2006 National Business Institute; Richard DeJana, [including discussions on A. Oregon Measure 37 B. Why Aren't "Takings" Treated the Same? And C. Are There Equal Rights to a Healthy and Clean Environment].

National Business Institute Montana Land Use: Current Issues in Subdivision, Annexation and Zoning Law Annexation (Annexation Legal And Practical Considerations) Richard DeJana, Esq.; Land Use Law Richard DeJana, Esq.; Copyright © 2004 National Business Institute; Richard DeJana.

National Business Institute Montana Boundary Law: Critical Issues and Solutions Every Practitioner Needs to Know Dealing With Unwritten Title Transfers Richard DeJana, Esq.; Resolution Of Boundary Disputes Richard DeJana Esq.; Ethics - It's Legal, But Is It Right? Richard DeJana, Esq.; Water Boundaries - What Are Your Rights And Liabilities? Richard DeJana, Esq., Copyright © 2004 National Business; Richard DeJana.

D. PROFESSIONAL AND PUBLIC SERVICE

28. List all bar associations and legal professional societies of which you are a member and give the titles and dates of any office that you have held in such groups and committees to which you belong. These activities are limited to matters related to the legal profession. List the dates of your involvement.

1978 - 1980	Executive Committee Northwest Montana Bar Association
1982 - 83	President Northwest Montana Bar Association
2005 - 2007	Served on Flathead County Subdivision Committee.
2014 - current	Executive Committee Northwest Montana Bar Association

ABA June 1977 – present

2010 - present	Solo, Small Firm and General Practice Division
2012 - present	Environment, Energy and Resources Law
2012 – present	Real Property, Trust and Estate Law

August 13, 2013 (to current) Appointed to ABA, Solo, Small Firm and General Practice Division/ Real Estate Law Committee.

29. List organizations and clubs, other than bar associations and professional societies, of which you have been a member during the last five years. Please state the title and date of any office that you have held in each organization. If you held any offices, please describe briefly your activities in the organization.

I have served as JV soccer coach for the Flathead High School Bravettes from 2001 - 2007. In 2007, I became the assistant varsity coach for the Glacier High Women's soccer program. I retired from soccer in 2012.

2012 - CURRENT: Board of Directors Flathead Business and Industry Association, currently president. – Member since 2000.

2014 - CURRENT Saint Matthews Catholic Church Finance Council.

30. Have you ever run for or held public office? If so, please give the details.

Ran for Mayor in 1987 lost in three way election.
2010 lost in a primary for district judge.

Political offices:

1979 - 1995	Co-Char of Pat Williams for Congress for Flathead County
1984-85	Chairman Flathead County Democratic Central Committee
1983- 85	Treasurer Montana Democratic Party

31. Please explain your philosophy of public involvement and practice of giving your time to community service.

As professionals we are obligated to give to the community. The last three years have honestly been a bit of a respite for me. As you can see from the following, my involvement in the community started shortly after I arrived in 1977. Among the activities to which I have devoted my time are the following:

1978 – 1985	Board of Directors Flathead Industries for the Handicapped. 1983-84 Vice President 1984-85 President
1983 -84	Vice President Hike Bike and then President Hike Bike – was the Primary Fund raiser for FARC - (Flathead Association for Retarded Citizens)

In 1987, I somehow was brought into the world of youth soccer. Having started out to be an English teacher and basketball coach, it was easy to draw me into coaching first my son's teams in Pee Wee baseball, both the minors and majors. In the fall of 1985, I was

talked into coaching my oldest daughter's kindergarten soccer team. That became the beginning of almost 30 years of soccer.

In 1987, I and another coach were asked to form the first girls' competitive team in the Flathead. After the second season, I became the head coach for the team. That team, which played at the under 19 level, in the four years I was blessed to coach the team, never failed to make the semi- finals and brought home two Championships and one second place. I continued coaching girls teams at a number of levels and only once failed to take a team to at least the semi-finals.

I served on the Board of Directors for both Greater Kalispell Youth Soccer (GKYSA) and the Flathead Force. I was president of GKYSA and during that term help set up the first High School tournament held in Kalispell. At that time, I was also on the original committee which created Kid's Sport, the youth recreational facility in Kalispell.

I served for 6 years on the Board of Directors of Montana Youth Soccer and then four years as its President. While president, I was appointed to the commission revising the US Youth Soccer Bylaws and then served on the six person drafting committee for the Bylaws of US Youth Soccer. (Required under a USOC ruling).

I was trained in the first group of "soccer mediators" for US Youth Soccer. The group's obligation was to resolve dispute within soccer organizations.

I was honored to serve three years on the Board of Directors of US Youth Soccer, the largest youth sports organization in the world. (3.2 Million Players.) I was and I still am the only Montanan to serve on this Board. My biggest highlight was securing passage of a recommendation for States to play small sided games with youth players. This had been tied up for three years and I took on the responsibility of securing passage. That action has and will continue to raise the level of the sport in this country.

In 2000, I was honored to be named to the Governance Task Force for the United States Soccer Federation which "reformed US Soccer."

From 1989 until 2012, I also served as a referee and referee instructor under US Soccer.

After my youngest child graduated from high school, I received a call from the Flathead High School Bravettes's head coach telling me I was not done going to high school soccer games. He had just the job for me. I served as JV coach for the Flathead High School Bravettes from 2001 - 2007. In 2007, I became the assistant varsity coach for the Glacier High Women's soccer program. At the suggestion of my wife and grandchildren who wanted me to be available to visit, I retired from soccer in 2012.

2008 – 2012 I worked with the Glacier High School and Stillwater Christian School "We the People" programs

I continue to be involved in my church. I have taught religious education. From 1986 to 1992, I served on Saint Matthews Catholic Church Parish / Pastoral council, including two years as president. I was named a delegate to the Roman Catholic Diocesan Synod in Helena held in 1988, the first synod in the diocese to involve the laity.

Previously, I listed my current community activities. On the whole, it has been clear to me that giving and in particular giving to school programs and youth programs was enriching for both me and the broader community. I am not sure what direction I will be going with service, but I am already beginning to move in other directions.

E. PROFESSIONAL CONDUCT AND ETHICS

32. Have you ever been publicly disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, give the particulars.

No

33. Have you ever been found guilty of contempt of court or sanctioned by any court for any reason? If so, please explain.

No

34. Have you ever been arrested or convicted of a violation of any federal law, state law, county or municipal law, regulation or ordinance? If so, please give details. Do not include traffic violations unless they also included a jail sentence.

No

35. Have you ever been found guilty or liable in any civil or criminal proceedings with conduct alleged to have involved moral turpitude, dishonesty and/or unethical conduct? If so, please give details.

No

36. Is there any circumstance or event in your personal or professional life which, if brought to the attention of the Commission, the Governor or the Montana Supreme Court would affect adversely your qualifications to serve on the court for which you have applied? If so, please explain.

No

F. BUSINESS AND FINANCIAL INFORMATION

37. Since being admitted to the Bar, have you ever engaged in any occupation, business or profession other than the practice of law? If so, please give details, including dates.

I have served as a director for a number of small corporations including taverns when the clients required an independent director. I have not received compensation for any such activity

38. If you are an officer, director, or otherwise engaged in the management of any business, please state the name of the business, its nature, and the nature of your duties. If appointed as a district court judge, state whether you intend to resign such position immediately upon your appointment.

Currently, I am a director of Del's Inc., a liquor establishment in Somers, Montana. I am not compensated. I would feel obligated to resign if appointed.

39. State whether during the last five years you have received any fees or compensation of any kind, other than for legal services rendered, from any business enterprise or organization. If so, please identify the source and the approximate percentage of your total income it constituted over the last five years.

I annually receive approximately \$600.00 for leasing the family homestead in Teton County.

40. Do you have any personal relationships, financial interests, investments or retainers that might conflict with the performance of your judicial duties or which in any manner or for any reason might embarrass you? If so, please explain.

No

41. Have you filed appropriate tax returns as required by federal, state, local and other government authorities? Yes No

If not, please explain.

42. Do you have any liens or claims outstanding against you by the Internal Revenue Service (IRS)?
Yes No

If yes, please explain.

43. Have you ever been found by the IRS to have willfully failed to disclose properly your income during the last five years? If so, please give details.
No

G. WRITING SKILLS

44. In the last five years, explain the extent to which you have researched legal issues and drafted briefs. Please state if associates or others have generally performed your research and the writing of briefs.

I am either writing or researching almost daily. I do not have associates or others who assist with this in any way
45. If you have engaged in any other types of legal writing in the last five years, such as drafting documents, etc., please explain the type and extent of writing that you have done.

Real estate attorneys regularly write opinions, draft covenants and governing documents for home owners' associations. Deeds, well agreements, road agreements and various easements are common drafting exercises. In addition, wills, powers of attorney and medical directives are done regularly. With the estate planning documents, I do use an estate planning software but I usually make manual changes in the produced documents.
46. Please attach a writing sample of no more than ten pages that you have written yourself. A portion of a brief or memorandum is acceptable.
47. What percentage of your practice for the last five years has involved research and legal writing?

100 % when not physically in court or meetings.
48. Are you competent in the use of Westlaw and/or Lexis?

Yes, more so lately in Lexis but I have used Westlaw. I also use Fastcase.

H. MISCELLANEOUS

49. Briefly describe your hobbies and other interests and activities.

My favorite activity is simply enjoying time with Mary, my wonderful wife of 43 years. Honestly, when the kids leave, it is fun to simply get to know each other again.

As you look at my discussion of civic involvement, you can readily see that until the end of 2012 my adult life was fairly absorbed in youth soccer. When I retired from the sport, a large gap appeared. The first interest which I am now allowed to pursue is spending more of my free time with my grandchildren, who presently live in Denver, Portland and Louisville.

After leaving soccer, I bought my first pick up. I've now learned the hobby of doing the tree trimming in my yard myself and hauling it to the dump. I'm not sure we can call this a hobby, but it seems to become a weekend preoccupation.

Growing up and through college I played guitar and piano. Over the last four months, I have finally been able to take the time to start picking up the guitar again. I hope this fall, after getting the old piano tuned, to begin playing again. I look forward to getting back into my music.

The other joy has been being able to take the time for recreational reading. I was always able to read a book on surveying or another law book or even a coaching manual, but I did not do much recreational reading. I'm now consuming about a novel a month. About a third are the classics that as an English literature major I was supposed to have read but really didn't. The remainder have been simple novels by new authors which I find as recommendations from Amazon or books which clients think I should read. Currently I'm sailing through a wonderful dog story and gradually crawling through the Confessions of St. Augustine.

Mary and I are avid Griz football fans. We look forward to another season of traveling to Missoula for the games. Our hope this year is to also see the Lady Griz soccer team in action.

And finally, probably my greatest interest at this time – aside from my wife – is what most my friends refer to as my youngest child, my eight-year-old Sheltie, "Barrister."

50. Describe the jobs that you have held during your lifetime.

My working career began at the age of 10 when I started cutting lawns for my neighbors. That work, expanded and included more than my immediate neighbors, continued through high school. Looking back even more surprising is that I began babysitting during the winter when I was 12 years old. I have trouble imagining now that I was changing diapers at that age.

Commencing the night of my high school graduation, I worked a summer swing shift job for the US Post Office in Great Falls. The job entailed sorting mail, moving boxes and at two a.m.

running a special package to one of the Great Falls banks. It was a great job. I quit two weeks before college started. That was probably a mistake as I ended up going to college after shoulder surgery, having been injured in a sandlot football game three days after leaving the job.

My first college job was working in the library. It was one of the things you could do with one arm. I learned many things, not the least of which was don't follow someone in a job who sorted title cards using "the" as the first word of the title. My first three weeks were spent putting the cards where they belonged. The nice part was I got a good handle on how many books were in the library.

When I was able to use my shoulder, I looked for other work. I was fortunate enough to begin working for the Southtown YMCA in Kansas City Missouri. I coached football (flag), soccer, basketball and baseball. I also filled in on weekends managing the office. I was very lucky to have been asked to take three teams to the citywide basketball tournament. I don't know how many of you have had the pleasure of coaching a fourth grade team in a basketball tournament where they played in front of several hundred people. Those were my first two teams. Both teams won the tournament primarily because I had taught a four-corner offense and there was no shot clock. In my junior year, our YMCA was allowed to send two teams at the junior high level. I was asked to take the second team. And shock of shocks, the second team met the first team in the finals and won in overtime.

Unfortunately, my senior year I could not return to the YMCA due to commitments arising by becoming student body president. Looking back, the 2 ½ years working for the YMCA were probably my most enjoyable work experience.

Meanwhile, we had summers. I returned Great Falls and looked for work. The post office job wasn't available my second year primarily because I went back to have final shoulder surgery. Being late to get into the job market, I was fortunate to get to work for a local contractor who had acquired some lots which to say the least were inundated with weeds. That summer was spent pulling, digging, spraying and cutting weeds in the sun 5 days a week 10 hours a day. Fortunately, my next two summers were spent working as a coordinator for our local Opportunities Incorporated, with the Neighborhood Youth Corps.

After graduation, I remained in Kansas City looking for work. It was not the most successful time. I was fortunate to find some part-time work cleaning a local girl school's sports field and then probably one of the most exciting jobs of my life was when I was hired to be a professional pallbearer. The few funerals that I and five fraternity brothers worked turned out to be always for older people who had no family. The mourners regularly said how happy they were to see that there were young people who still loved the deceased. What we thought was somewhat of a lark, turned out to be very meaningful and emotional. But, you always have to come home, to your roots, Great Falls.

It was the summer of George McGovern running for President. It is also the summer of Tom Judge running for Governor. From July through the election, I managed the future Governor Judge's desk in Great Falls. There was an advantage to this. After spending eight hours a day for Tom Judge, I was able to volunteer both McGovern's campaign and Lee Metcalf's last Senate

campaign. It was a wonderful summer. Being able to be part of Lee's last campaign meant and still means a lot to me.

That was followed with another one of those jobs which turned out to be more interesting than one would ever imagine, six months as a clerk in a state liquor store. My boss still believes that the most important lesson I learned was there actually is a bourbon known as "George Dickel."

Helping a governor become elected, sometimes leads you to interesting jobs. The Montana Department of Highways, Urban Research Division, provided me with my first experience and education in urban planning. Little did I know that land use planning would be such a big part of my life. The division wrote up the traffic studies for the major cities. Great Falls was my primary project. I learned some lessons. My decision to leave and go back to school developed strangely. I was told that we needed to justify building a "couplet" in the northern part of Great Falls. Unfortunately, we had no traffic counts on one of the roads. My boss made it simple: "Rich, figure out how to do it." So, after playing with numbers, I **invented** a calculation which only worked because I picked the right roads to get the results I wanted. I brought it to my boss who "put it in engineering terminology." Three months later my boss won an award from the Department of Transportation for "his equation." Knowing what I knew about the equation, I decided it was probably time to look elsewhere for work that I could actually believe.

The elsewhere was law school. While in law school I was fortunate to work for Mike (Sheldon) Williams, Esq., as a clerk. I spent my summers adjusting insurance for State Farm. During the school year students had to account for their working time and file affidavits. I think someone took offense when I also included on my affidavit my other job, the hours for housework I was doing because my wife was the main breadwinner. All I remember about turning in my second year affidavit is that I was in line with the number of my friends in the Women's Law Caucus and when the secretary commented about the "housework not being real work," I simply walked away and let my cohorts explain the situation. Affidavits were no longer required after that year.

The rest of my career is the practice of law.

51. Please identify the nature and extent of any pro bono work that you have personally performed during the last five years.

When I first went out on my own, I committed myself to give 20% of my time in one way or another to either those who needed my work, the community or religious groups. I have consistently maintained that approach.

In my "pure pro bono" file where I keep track of my totally free pro bono time, I have recorded 590.50 hours since January 1, 2010. This ledger includes the free time provided for such activities as wills and estate planning documents – poa's, living wills and deeds etc., -- for seniors and others of limited means; consultations for people of limited means; one justice court case;

preparation of letters to help deal with harassment; corporate and related documents for several small churches, attendance at a number of community activities where a lawyer's advice was sought and litigation assistance to pro se litigants.

I also represent a number of people at less than half my hourly rate and people whom I knew that when I accepted the case they will never have the resources to pay their bill. In litigation I always bill some fee. The late Judge Salansky told me years ago that the parties have to have a dog in the fight. He gave me that advice after he heard my third pure pro bono trial. He suggested that some cases would resolve if the clients felt they had some risk. The lowest fee I have charged in the last five years to this group of "clients" is \$5.00 an hour and the highest is \$150.00. These include one case where I have recorded 363.92 hours for which I have been paid \$1,800 including the \$1,600 in sanctions received from the other side. That is one of three current cases which are at substantially reduced fees and which I do not anticipate getting paid even a third of what I am billing. These are not the "dead beat clients," but those who actually have a need, and know that I am working at reduced rates. I have required them to agree that before they pay me anything, they take care of their personal needs. And no, these are not contingency fee cases.

I do not have a full count of the hours I have spent with "We the People" and lecturing to or assisting other youth, school and civic groups, but over the five years at issue, I have expended approximately another 25 hours at a minimum.

52. In the space provided, please explain how and why any event or person has influenced the way you view our system of justice.

If this had been asked while I was in law school, I certainly would not make the response I do today. There are so many people from Joe Mara who handled my father's legal affairs to Pat Williams who demonstrated what integrity in the legislative arena meant, to the clients with no money who believe they can get justice. But in reality, there is one person who has influenced me more than anyone in how I view and address the law. The words of Professor Gardner Cromwell who taught property and constitutional law, still resonate in my ears.

To attend class with Professor Cromwell, was to live through the *Paper Chase*. The good professor could destroy not only every argument we wide-eyed students could put forward, he would do it in such a way that your ego would not recover for days. So why him? Fundamental in Professor Cromwell's teaching was how to understand a case. He wanted us to fully grasp what was meant by precedent and how to draw it correctly from the case.

One begins reviewing the facts of the case set out by the Court. Then one must focus on the issue in the case. Those two limitations lead to an understanding of the law of the case. So what does that mean? Let us take one example. *Brown v Board of Education* is a landmark case. But what was the actual precedent. "In a single school district with a history of discrimination, one permissible remedial action by the court is to require busing of students to different schools." It was

not a requirement for busing. It was not a rubber stamp on court intervention in schools without an historic basis. Yet, often we hear broad meanings being applied to the case. There is nothing wrong with building on precedent but it is wrong to misstate or misapply it.

So why is this limiting of precedent important? Obviously if we are to follow common law, we need to know how to read the cases. Today, with computer research, cases are cited for reasons having nothing to do with the determinations made in the case. Dicta is not the law to be followed, but we as lawyers and sadly often Judges and their clerks rely not on the precedent but on the word they find in the annotations or in their word search. I am now regularly reading briefs and sadly decisions which cite cases not on point. Obviously this means neither the court nor counsel read the case. If we are to follow the law, then we must respect what the law actually says and not just quote words from a case which have nothing to do with the purported precedent.

Yes, I did not realize the importance of the lesson while in law school, but within my first two years of practice, the lesson became important. Professor Cromwell taught the fundamentals. If we lose the fundamentals, we lose our system of justice.

53. In the space provided, explain the qualities that you believe to be most important in a good district court judge.

Judges confront various situations requiring differing qualities, yet there are some which are constantly needed. First, they must be “problem solvers.” They must resolve disputes. This requires that they be decisive. For attorneys who try cases this is a common trait. Those attorneys must make their decisions on the spot. Decisiveness brings prompt decisions to the bench.

Judges should not have egos or agendas. They should be scholars of the law. They thus, must be humble and intellectual. A judge must make his decisions based upon the law. Too often those who have sat the bench for a long time begin substituting their desires and their concepts of justice for the law as determined by Legislature and precedent from higher courts. That attitude has provoked me numerous times to appeal from justice court or district court at no charge to the client, in an effort to assure that the judges recognize it is the law and not their concept of what should be the law which must govern our decisions.

A judge must be protective. From the birth of our country, the role of the court has been to hold the line between government action and the rights of the individual. This balancing is the fundamental protection which each of our citizens should enjoy. But that enjoyment will cease to exist unless we have judges with a clearer desire to protect the constitutional rights of our citizens.

A judge must honestly be hard working. The job of being a judge is more than a job. It is an honored profession. Someone who needs to go to work at the courthouse to make a living, probably should not be the one we choose to decide our cases. Those whose only goal is to sit on the bench and who have had limited experience in the practice of law, don't belong as judges in our primary trial courts.

A good judge must have a broad range of experience. A judge should be the person you would hire if you needed representation. If he or she is not qualified to represent you, then how can he or she be qualified to determine your legal rights.

A judge must be respectful. Those who appear before the court must be treated with courtesy and respect. The rules of court must reflect that the court works for the people. That does not mean that a judge must lose the dignity of the court. Rather it means that he must preserve the dignity by treating those before him with respect.

54. In the space provided, explain how a court should reach the appropriate balance between establishment of a body of precedent and necessary flexibility in the law.

I will assume that anyone answering this question recognizes the difference between appellate courts and trial courts. The former makes precedent, while the latter's obligation is to follow the existing law. A trial court is bound legally by precedent, constitutional law and statutory law.

With that understanding, it is worth noting that it is at the trial court level where precedent begins. The trial court first sees those legal issues to which there is currently neither statutory nor precedential controlling law. The court must face new issues; issues totally controlled by existing law; and issues where there may be existing law but the manner of application is questionable. The trial court must have a systematic approach in its analysis. That approach is what brings the balance.

A trial court must begin its inquiry by a determination of the facts. Failure to determine the facts first, leaves the court susceptible to "adjusting" the facts to fit the conclusion the court desires. From the facts, the court must examine what the parties claim is the governing law. When there is statutory law or precedent directly on point, there is no further inquiry. (See discussion in item 52, above). If there is no controlling law or the existing law does not totally decide the issues because of some fact difference, the court must then exercise its flexibility to reach a conclusion correct for the case before it and such that could serve as a future precedent. In doing so, the court must articulate its reasoning clearly and concisely so that the appellate court will understand the differences between the existing law and the justifications for the approach.

I would not attempt to violate either exiting precedent, constitutional law or statutory law for the sake of "flexibility." That being said, I recognize the trial court may well find the controlling precedent wrong. If that is truly the case, the district court should not and in fact cannot ethically rule contrary to the precedent. The district court can and should articulate its findings and apply the existing law, while clearly stating that in the court's opinion it can do nothing else but the law should be changed and why.

Clearly the trial court's only flexibility exists when there are issues not completely controlled by existing law or where there is no applicable existing law. Anything creating more "flexibility" confounds the predictability of the law which is the touch stone of an organized civilization.

55. In the space provided, state the reasons why you are seeking office as a district court judge.

I sought this job as a young man, only to be greeted by Governor Schwinden telling me I needed a few grey hairs. I now have them. Instead, the Governor appointed me to the Tramway Commission. Much later, I looked at the new judgeship that was created for Flathead County and became concerned that the front runners would not be the correct choices for the bench. This was an observation based upon the lack of experience litigating cases. I did not win. The next election came. I was asked to run again because of similar concerns, but frankly, I decided I did not need to give up my clients and my freedom to pick my work.

But now, I truly believe I do. The lack of experience in litigation on the bench in Flathead is dragging the system down. The loss of three experienced judges and equally important, a long time court administrator has left us in confusion. Delays are rampant. Scheduling orders have no relationship to the complexity of the cases. Rulings are being made just before pretrial conferences causing more expensive litigation. Attorneys appear for hearings and are told because the judge's clerk is off, the judge is not prepared. Ruling by the same judge in different cases are contradictory. Often there is no concern for precedent but rather head notes.

I have often said we have the kindest judges in the state. But the overall experience level is failing the system. So why am I running? Someone with experience has to step in. I was reluctant to include in any application a full statement of the concerns with respect to the condition of the 11th Judicial District. But by at least saying this publicly, perhaps we can begin to address the problems and solutions which I believe if conducted by one judge, would eventually carry through to the other sitting judges.

I am not attacking the character of any of our judges. What we have is a lack of experience. Two of our judges sat on lower courts. One of those two barely practiced law at all. It is not surprising that they do not have a concept of exactly what is needed to move a civil case forward. Our third remaining judge was engaged in a broad practice, but one can safely say never engaged in substantial or complex litigation. That judge is the best of our sitting judges but still suffers from some of the difficulties that will be outlined herein. These difficulties are surmountable, but need to be recognized as problems. I recognize the problems and believe I have the ability to solve the problems. I will love discussing the solutions with you.

So, why am I applying? At my age I can try to return the court to a functioning system, without fearing reprisals. I have tried my cases. I have shown I can try them, evaluate them and settle them. I can decide matters. It is time to use 37 years of experience in all types of litigation for more than just my clients. I have the grey hair and the ability to make a difference.

56. What items or events in your career have distinguished you or of which you are most proud?

I am most proud of the quiet events relating to caring for a family who was tragically involved in Ruby Ridge. It began when a local attorney was asked to recommend a lawyer who would take care of one of the daughter's legal issues in Montana, like a "father." The local attorney advised he knew one man in Kalispell like that. Thus, I took on the one client and eventually the needs of the family.

I was asked about two years ago to become involved with the return of the evidence from the Ruby Ridge investigation. This was one of my extended pro-bono activities. I had the pleasure of working closely with the FBI and with the family. Three agents and members of the family went through the first exchange. At first, I went back and forth between the parties. I had to prepare the family if something highly sensitive or emotional was being presented. As the long day continued, there was a growing feeling of comradery. Walls came down and all shared their thoughts, concerns and tears.

That was the first exchange. More personal items were located later. Those deliveries were much more emotional. These were such that the agents were checking on my emotional well being along with the family's. The actual love and concern that developed between the agents and family with me as the middle man more than once caused me to leave the scene with tears in my eyes.

The process ended with an afternoon in my office where we all came together just to say goodbye. The family provided books of their story for the agents. The agents asked for autographs. Both sides left with a new feeling of trust. I was privileged to be in the middle of this wonderful experience, which I honestly do not feel would have ever ended as it did without my involvement. I would love to share all the details but that would not be appropriate in a public writing. All I can say is that I had a renewed faith and trust in the agents and a renewed awareness of the kindness that exists with the family.

What other events? I am very proud of two supreme court cases where the system had failed pro bono clients, but I and the supreme court did not.

57. State any pertinent information reflecting positively or adversely on you that you believe should be disclosed to the Judicial Nomination Commission.

I am dyslectic, however I will be drafting my own decisions. My law clerk will assist me with requested research. I will utilize my law clerk and judicial assistant for final proofing of my decisions. This also creates a situation where I will ask attorneys to prepare decisions if I can rule from the bench and I honestly intend to do that as much as possible.

I also would like to note that I am a named defendant in two suits filed by a pro se in federal court. I am honored to be in the company of Flathead County, Flathead County Attorney, a District

Court Judge, Flathead County Sheriff's Department, Flathead County Animal Control, two more local attorneys, Kalispell Regional Hospital and members of its staff including the CEO, Kalispell Regional Healthcare, Silvertip Emergency Physicians, Clinical Pathology Associates, Credit Systems, the Montana Medical Malpractice Panel, a number of law enforcement officials and almost anyone else this person can think of. I do not believe the case(s) is/are detrimental to me taking office, but the committee should be aware of the actions.

58. Is there any comment that you would like to make that might differentiate you from other applicants or that is unique to you that would make you the best district court judge candidate?

I have not reviewed any other applications. I simply believe my broad experience in trying cases is important. I believe that someone who looks at the problems and is willing to discuss solutions is important. I believe that whoever is chosen needs to be hard working and has an understanding of procedural and substantive law. I have those attributes.

CERTIFICATE OF APPLICANT

I understand that the submission of this application expresses my willingness to accept appointment as District Court Judge for the 11th Judicial District, if tendered by the Governor, and further, my willingness to abide by the rules of the Judicial Nomination Commission with respect to my application and the Montana Code of Judicial Conduct, if appointed.

(Date)

(Signature of Applicant)

August 7, 2015



A signed original **and** an electronic copy of your application and writing sample must be submitted by
5:00 p.m. on Wednesday, August 12, 2015.

Mail the signed original to:

**Lois Menzies
Office of Court Administrator
P.O. Box 203005
Helena, MT 59620-3005**

Send the electronic copy to: mtsupremecourt@mt.gov

Application form approved 7/10/93
Revised 9/15/2009

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 07 0669

Excerpts from Appellants' Opening Brief in Supreme Court Cause No. DA 07 0669

EMIL FERKOVICH and SHARON K.
FERKOVICH,
Plaintiffs / Appellants,

v.

FLATHEAD COUNTY, MONTANA; THE BOARD
OF ADJUSTMENT OF FLATHEAD COUNTY
THE FLATHEAD REGIONAL DEVELOPMENT
OFFICE, et al.,
Defendants/ Appellees.

STATEMENT OF FACTS

Ferkovich currently owns lots 9 and 10 in the West Glacier Golf Sites Subdivision in Flathead County. (Ferkovich Dep. at 8, 11, and 21).¹ This subdivision forbids all non-residential use of the lots and restricts the use to single family dwellings. (Application for Variance, first page of attachment. Appendix Item 4). The subdivision's lots are located on River Bend Drive, a county road. (Ferkovich Dep. at 8, 11, and 21). The Ferkovich lots are entirely within the 100-year flood plain of the Middle Fork of the Flathead River. (Jentz Dep. at 13).

At the time Ferkovich purchased lot 9, the property was not identified as being in any flood plain and the Master Plan for the area anticipated residential development. (Ferkovich Dep. at 8). Of the eleven houses built the subdivision, all but one was built before the adoption of the Flathead County Flood Plain and Flood Way Management Regulations in 1984. (Ferkovich Dep. at 22-25). The one house that was built after the enactment of the flood plain regulations was built without a permit. (Ferkovich Dep. at 24).

Ferkovich attempted to build a two-bedroom house on Lot 9 in 1984. (Ferkovich Dep. at 14-15). Flathead County rejected the Ferkovich application to build a septic system because it was too close to the Middle Fork of the Flathead River. (Ferkovich Dep. at 14).

In 1996, Mr. Ferkovich reached an agreement with the owner of the adjacent golf course to allow easements for septic systems to be placed on the golf course at \$5,000.00 a lot thus solving the septic issue. (Ferkovich Dep. at 16 -17). On June 19, 1996, Ferkovich applied for flood plain development permit. (Application). The Application was reviewed by Flathead Regional Development Office ("FRDO"). (Jentz Dep. at 9-14). FRDO granted the Ferkovich's request for a flood plain development permit with certain conditions. In granting the conditional flood plain permit, FRDO found that River Bend Drive is inaccessible to emergency vehicles during floods. FRDO required the Ferkovich to raise the county road, River Bend Drive, to the base flood elevation as a condition to building on their property. (Condition 5 of Approval). The raised portion

¹In the years intervening between the briefing of this case and the ruling, they ceased to own Lot 12.

of the road was to run from Lot 1 of the adjoining subdivision to Lot 9 of this subdivision. (Ferkovich Dep. at 58)².

That condition is as follows:

“River Bend Drive between the subject properties and Lot 1, River Bend Tract No. 1 be raised to the base flood elevation. The new road shall be constructed and paved to meet County specifications for subdivision roads, except that the applicant shall only be responsible for resurfacing the road to the existing width and not the minimum 20 foot standard. The applicant shall be required to obtain all permits necessary to complete said work including but not limited to County Encroachment Permit and Flood Plain Development Permits. This work shall be completed prior to occupancy of Lots 9, 10, or 12, West Glacier Golf Sites, Flathead County, Montana.”

On April 28, 1998, Ferkovich appealed to the Flathead County Board of Adjustment. The Board denied the variance.

In March of 1999, the cost to raise the county road was \$106,716.62. (Affidavit attached to “Reply in Support of Ferkoviches’ Motion...”).

ARGUMENT

...

ISSUE 5. WERE THE EQUAL PROTECTION CLAIMS AND SUBSTANTIVE DUE PROCESS CLAIMS VALID UNDER MONTANA LAW?

A. EQUAL PROTECTION:

If in order to build a home, Ferkovich was singled out to bare the cost of the road, that will,

²Please see Appendix Item 5, which is a map of the subdivision and related properties taken from the Deposition of Mr. Ferkovich.

contrary to the Court's determination, be a violation of equal protection. No one else will have to do the same. The road will be built. Ferkovich will not be reimbursed for the cost of correcting a long standing public problem which exists with or without them building a home. Land use regulations may be invalidated if they are discriminatory in their conception, application, or operation if they cause or continue a denial of equal protection. *Alden v. Board of County Commissioners* (1974) 165 Mont 364, 528 P2d 1320.

¶32 *Even assuming that Yurczyks were not treated differently than similarly situated groups, the zoning ordinance did not have "a substantial bearing upon the public health, safety, morals or general welfare of the community." Accordingly, we hold that the District Court did not err in concluding that the regulation violated the Yurczyks' equal protection rights.*

Yurczyk v. Yellowstone County (2004) 2004 MT 3, 319 Mont. 169.

The "substantial bearing" test has not been met. By operation, this requirement if conceded to by Ferkovich can only be applied to him. No one else would have to do the County's job.

B. SUBSTANTIVE DUE PROCESS:

On the federal level, in *Owens v City of Independence* (1980) 445 US 622, the Supreme Court held that constitutional violations whether procedural or substantive could give rise to damages. In general, a land use action which is in compliance with the authority of the legislative body, which is rationally related to its objective, which is consistent with the legislative intent and which does not destroy all economic viability of the property, will be sustained. *Penn Central Transportation Co. v. New York City* 438 U.S. at 124, 98 S.Ct. at 2659.

If a regulation "goes too far" it violates due process and may be a taking. *Pennsylvania Coal Co. v. Mahon*, (1922) 260 U.S. 393, 415. In Montana, *State v. Egdorf* (2003) 2003 MT 264, 317 Mont. 436, a non - land use case, explains substantive due process:

¶19 *Both the Fourteenth Amendment to the United States Constitution and Article II, section 17 of the Montana Constitution provide that no person shall be deprived of life, liberty, or property without due process of law. . . . Substantive due process bars arbitrary governmental actions regardless of the procedures used to implement them and serves as a check on*

oppressive governmental action. Englin v. Bd. of County Com'rs, 2002 MT 115, ¶ 14, 310 Mont. 1, ¶ 14, 48 P.3d 39, ¶ 14.

The theory underlying substantive due process reaffirms the fundamental concept that the due process clause contains a substantive component which bars arbitrary governmental actions regardless of the procedures used to implement them, and serves as a check on oppressive governmental action. ... Substantive due process primarily examines underlying substantive rights and remedies to determine whether restrictions are unreasonable or arbitrary when balanced against the purpose of the legislature in enacting the statute.

A substantive due process analysis requires a test of reasonableness of a statute in relation to the State's power to enact such legislation. 'The essence of substantive due process is that the State cannot use its police power to take unreasonable, arbitrary or capricious action against an individual.' ... In order to satisfy substantive due process guarantees, a statute enacted under a state's police power must be reasonably related to a permissible legislative objective.

Here, the regulation only required that there be: "The safety of access to property in times of flooding for ordinary and emergency services." The property had to be accessible. There is neither a requirement that accessibility be by road, nor is there any authority to require the rebuilding of off site, county roads. Similarly, nothing in 76-5-101 through 406, MCA authorizes requiring off site work on public property. Here, the action applying the regulation was not authorized by the enabling legislation or the local regulation's own language. Substantive due process was denied.

ISSUE 6. IN LIGHT OF LINGLE, HOW SHOULD MONTANA APPROACH LAND USE DECISIONS ?

Although, Ferkovich should prevail based on the existing law, this Court should now address how under Montana law, it will address regulatory action with respect to private property. As *Lingle* pointed out the issue is not just a taking issue but a determination of whether the land use action was itself legal. Legal actions can be takings. Likewise, illegal actions may only be illegal if there is no compensation.

As with the federal system, Montana is not consistent in its approach. Clearly, the evaluation should be multi-phased. First, the validity of the regulation should be evaluated. Then, one should

address the taking issue. Traditionally, the voiding of a regulation was enough, but as *Lingle* now points out, a valid regulation may still constitute a taking.

A. WHAT IS THE PROPER STANDARD FOR AN INVASION OF AN INALIENABLE RIGHT?

The 1972 Montana Constitution provides in part in Article II, § 3: “Inalienable rights. All persons are born free and have certain inalienable rights. They include ..., acquiring, possessing and protecting property....” A similar provision appeared in Article III, § 3 of the 1889 Constitution³. That provision lead to the need to evaluate actions relating to property rights and the police power with the test discussed earlier in this brief. This Court has created greater constitutional protection for fundamental rights and rephrased the standard of review.

The interests in property encumbered by land use regulations are fundamental and natural rights. Private and individual ownership of property is a natural and fundamental right. *Montana Talc Co. v. Cyprus Mines Corp.* (1987 Dissent) 229 Mont. 491, 505, 748 P.2d 444, 453. To sustain this action would mean that there would be no limit to which the County “might go in depriving persons of the use of private property under the guise of the police power....In short, all recognized principles of property rights would thus be destroyed....The paternal theory of government is odious, and we should not treat lightly or disregard the sacred rights of property recognized and guaranteed by the Government.” *Gas Products Co. v. Rankin, Atty. Gen., et Al.* (1922) 63 Mont. 372, 207 P. 993, [dealing with restraint of the use of underground gas.] Land use regulations are imposed on constitutionally protected property interests. “Any law or regulation which imposes unjust limitations upon the full use and enjoyment of property, or destroys property value or use, deprives the owner of property rights.” *Freeman v. Board of Adjustment of City of Great Falls* (1934) 97 Mont. 342, 34

³Sec. 3. All persons are born equally free, and have certain natural, essential, and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties, of acquiring, possessing, and protecting property, and of seeking and obtaining their safety and happiness in all lawful ways.”

P.2d 534 , 538 citing *State v. Gateway Mortuaries, Inc.*, 87 Mont. 225, 287 P. 156, 68 A. L. R. 1512; *Betty v. City of Sidney*, 79 Mont. 314, 257 P. 1007, 56 A. L. R. 872. In *Herlihy v. Donohue* et al., 52 Mont. 601, 607, 161 P. 164, 165, this court said: “The right of a person to acquire, hold, and protect property ... is, as among English-speaking people, as old as the common law itself. Its origin antedates by many years the guaranty contained in Magna Charta. The right itself was the inheritance of our people who inhabited the territory acquired from Great Britain at the close of the Revolution, and was adopted by the people of the territory of Montana by its first legislative assembly, and was continued in force thereafter. It is now embodied in the Bill of Rights (article 3 of our state Constitution).”

Additionally, the terms used in the current and 1989 Constitutions assuring the protection of the acquisition, possession and protection of property also lead to the conclusion that land use regulations must be viewed in relation to the constitutionally protected right which they are invading. “Possession is self-defining, and the term “seisin” means possession. *Northern Pacific R. Co. v. Cannon* (1891), 46 F. 224, 234. “Seisin” means a claim of title accompanied with possession. *Webb v. Wheeler* (1908), 80 Neb. 438, 114 N.W. 636.” *Clayton by Murphy v. Atlantic Richfield Co.* (1986) 221 Mont. 166, 171, 717 P.2d 558, 561. “Seisin in a legal sense means possession of land coupled with the right to possess it and a freehold estate therein; it is practically the same thing as ownership.” *Stephens v. Hurly* (1977) 172 Mont. 269, 274-275, 563 P.2d 546,549 - 550, citing authorities with approval. “Seisin” is defined by this Court as “perfect and complete title.” *Stephens* , 172 at 274, 563 P.2d at 549-50. Thus, the inalienable and fundamental rights of “acquiring, possessing and protecting property” relate to the seizin or possession of land. Land use controls directly affect seizin and thus directly affect the inalienable and fundamental rights.

Historically the standard for viewing these invasions of the inalienable property rights required a police power regulation to be reasonably adapted to its purpose and that it injure or impair property rights only to the extent reasonably necessary to preserve the public welfare. *Garden Spot Market, Inc. v. Byrne* (1963), 141 Mont. 382, 378 P.2d 220; *Freeman v. Board of Adjustment* (1934), 97 Mont. 342, 34 P.2d 534. The standard of reasonableness was the constitutional measure of the proper exercise

of the police power. *Betty v. City of Sidney* (1927), 79 Mont. 314, 257 P. 1007; *Leischner v. City of Billings* (1959), 135 Mont. 109, 337 P.2d 359.

Under the old constitution, this Court recognized the operation of the police power as necessarily an infringement of private rights, but held the exercise of such power may injure or impair property and individual rights only to the extent reasonably necessary to preserve the public welfare. *Garden Spot Market, Inc. v. Byrne* (1963) 141 Mont. 382, 396, 378 P.2d 220, 227 - 228. The old first step in the three standards of review was the requirement the action be substantially related to a legitimate state interest. Under the 1972 Constitution, this Court has provided a more grueling test to determine if fundamental rights have been injured or impaired.

A fundamental right may only be infringed if the government is able to show a “compelling state interest” for its action. *Butte Community Union v. Lewis* (1986), 219 Mont. 426, 430, 712 P.2d 1309, 1311. This increases the standard. The rights listed in Article II, Section 3 are fundamental and inalienable. “The most stringent standard, strict scrutiny, is imposed when the action complained of interferes with the exercise of a fundamental right” *Wadsworth v. State* (1996), 275 Mont. 287, 302, 911 P.2d 1165, 1174.

“Strict scrutiny of a legislative act requires the government to show a compelling state interest for its action. . . . When the government intrudes upon a fundamental right, any compelling state interest for doing so must be closely tailored to effectuate only that compelling state interest. . . . In addition to the necessity that the State show a compelling state interest for invasion of a fundamental right, the State, to sustain the validity of such invasion, must also show that the choice of legislative action is the least onerous path that can be taken to achieve the state objective.” [citations omitted] *Wadsworth*, 275 Mont. at 302, 911 P.2d at 1174.

The standard that should now be applied to state action implicating these fundamental rights is that an action which implicates such a right must be strictly scrutinized. The action can only survive scrutiny if the State first establishes a compelling state interest and then that its action is closely tailored to effectuate that interest through the least onerous path which can be taken to achieve the State's objective. *Montana Environmental Information Center v. Department of Environmental*

Quality (1999) 296 Mont. 207, 223-225, 988 P.2d 1236,1244 - 1246. When the old standard and the new are applied to land use discussions, the standard to review the validity of state action imposing conditions on the fundamental property right should be structured as follows:

1. The objective of the state action must be must related to a compelling state interest;
2. The state action must be closely tailored to effectuate that compelling interest while utilizing the least restrictive means (or least onerous path that can be taken) necessary to achieve the end; and
3. The state action must not deny the owner economically viable use of his or her land.

The forgoing standard determines the legitimacy of the state action under the police power. If the action does not satisfy the test, the action is not a proper exercise of the police power and thus, the action as such an exercise must be voided, unless the state desires to properly acquire the “Property.” The preceding discussion does not reach the takings test.

B. WHAT SHOULD BE THE TAKINGS TEST?

Lingle correctly brought the focus on the taking itself and not the means of getting there. Other than one addition, which is unique to Montana Law, we should begin by accepting *Lingle’s* guidelines.

First, there are the per se takings. If the government requires an owner to suffer a permanent physical property invasion —however minor—, it must provide just compensation. If state action completely deprives an owner of “all economically beneficial us[e]” of his or her property, compensation must be paid. *Lingle*, 544 U.S. at 538. In these situations, whether there was a proper exercise of the police power or not, compensation is due.

Most other regulatory takings cases should be resolved by balancing the public and private interests at stake, with three primary factors weighing in the balance: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action. *Penn Central*, supra, at 124, 98 S.Ct. 2646; *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002) 535 U.S. at 315. As alluded to earlier, there is no need to have the value of the property brought to zero. Rather,

there must be an interference with an investment backed expectation of a significant impact to the land owner, where the government action forces “some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. at 49.

C. LET US NOT FORGET “OR DAMAGE.”

It is simply wrong for a court to ignore the distinction between requiring damages for just the “taking” of property and the requirement that there be compensation of the “taking or damaging” of property. To carry the *Lingle* tests into Montana, there must be a modification. Per se takings or damaging require:

1. If the government requires an owner to suffer a permanent physical property invasion —however minor—, it must provide just compensation.
2. If state action deprives an owner of “economically beneficial us[e]” of his or her property, compensation must be paid.

Should neither of the per se situations exist, the court should balance as in *Lingle*:

(1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action. In each application, the Court must look also to the damage to the fundamental property right and not just the extinguishment of the right.

D. IF THE FORGOING IS APPLIED HOW SHOULD A COURT RESPOND?

Upon the finding of a taking or damaging of property or upon a finding that a regulation is not a proper exercise of the police power, rather than awarding damages, a Court should give proper respect to the administrative or legislative bodies. The Court should be required to submit its conclusion to those bodies. Should the state then choose to keep its regulation or action in affect, the Court should determine the amount of compensation due the land owner. Should the state determine that it does not

want to pay compensation, then the state action or regulations should simply be stricken. Thus, we will afford local government the option to care for a perceived public need, even if the same, much as the creation of a highway, results in the need for compensation.

E. THE PROPOSED STANDARD APPLIED HERE PROVIDES THE SAME RESULT, FERKOVICH SHOULD PREVAIL.

If the forgoing is applied to the situation here, Ferkovich should be entitled to compensation or the removal of condition 5 based upon the analysis applied earlier in this brief.