

APPLICATION FOR  
**DISTRICT COURT JUDGESHIP**  
**Thirteenth Judicial District**

**A. PERSONAL INFORMATION**

1. Full Name: **Donald L. Harris**
  - a. What name do you commonly go by? **Don Harris**
2. Birthdate: [REDACTED] Are you a U.S. citizen? **Yes**
3. Home Address: [REDACTED]  
Phone: [REDACTED]
4. Office Address: **3936 Avenue B, Suite D, Billings, MT 59102**  
Phone: **406-294-2000**
5. Length of residence in Montana: **65 years.**
6. Place of residence for the last five years:

<u>Dates</u>	<u>City</u>	<u>State</u>
<b>1983 - present</b>	<b>Billings</b>	<b>Montana</b>

**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>
<b>Sentinel High School</b>	<b>Missoula</b>	<b>1970</b>	<b>Diploma</b>
<b>University of Montana</b>	<b>Missoula</b>	<b>1980</b>	<b>BA</b>
<b>University of Montana School of Law</b>	<b>Missoula</b>	<b>1983</b>	<b>JD</b>

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

**Graduated with High Honors, BA in philosophy in 1980**

**Graduated with High Honors, JD in 1983**

**American College of Trial Lawyers Medal for Excellence in Advocacy, 1983**

**National Moot Court Competition, 1983**

**Order of Barristers, 1983**

**Insurance Counsel Trial Academy Certificate International Association of Insurance Counsel, 1985**

**Distinguished Service Award State Bar of Montana, 1990**

**Master Advocates Program Diploma, National Institute for Trial Advocacy, 1996**

**Board Certified, Civil Trial Advocacy, National Board of Trial Advocacy, 1999**

**Courage Award, Civil Rights Protection and Advocacy System for the State of Montana, 2003**

**MTLA Trial Lawyer of the Year Award, 2013**

**AV Preeminent Rating, Martindale-Hubbell**

**Best Lawyers in America**

**Super Lawyers (Montana Region)**

9. Were you a member of the Law Review? If so, provide 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.

Court or Administrative Body

Date of  
Admission

**Montana Supreme Court**

**June 1983**

**United States District Court, Montana**

**June 1983**

**United States Court of Appeals for the Ninth Circuit**

**October 1990**

**United States Supreme Court**

**August 1991**

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

**Harris, Gannett & Varela, PLLC: Tucker P. Gannett, partner  
Elizabeth M. Varela, associate**

12. State the name, dates and addresses of law firms with which you have been associated in practice, 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>
<b>Crowley, Haughey, Hanson, Toole &amp; Dietrich</b>	<b>Associate</b>	<b>June 1983-December 1988</b>
<b>Crowley, Haughey, Hanson, Toole &amp; Dietrich</b>	<b>Partner</b>	<b>January 1989-November 2000</b>
<b>Cozzens, Warren &amp; Harris, PLLP</b>	<b>Partner</b>	<b>November 2000-December 2004</b>
<b>Cozzens, Warren, Harris &amp; Odegaard, PLLP</b>	<b>Partner</b>	<b>January 2005-March 2005</b>
<b>Cozzens, Harman, Warren, Harris &amp; Odegaard, PLLP</b>	<b>Partner</b>	<b>April 2005-December 2005</b>
<b>Cozzens, Harman, Warren &amp; Harris, PLLP</b>	<b>Partner</b>	<b>January 2006-March 2007</b>
<b>Harman, Warren &amp; Harris, PLLP</b>	<b>Partner</b>	<b>April 2007-December 2012</b>
<b>Harris &amp; Warren, PLLP</b>	<b>Partner</b>	<b>January 2013-December 2013</b>
<b>Harris &amp; Associates, PLLC</b>	<b>Member</b>	<b>January 2014-April 2016</b>
<b>Harris, Gannett &amp; Varela, PLLC</b>	<b>Partner</b>	<b>April 2016-Present</b>

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

N/A

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.

**General civil litigation – 100%: insurance coverage disputes for individuals and businesses; commercial litigation; personal injury cases; disability discrimination and employment-related claims; insurance bad faith claims; lender liability cases; construction defects; mediations**

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

**Family law, criminal law, civil rights, land use development, FELA, insurance defense, dealership protection, premises liability, oil and gas disputes, open range law, inverse condemnation, professional malpractice, dram shop liability**

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

**Civil litigation**

17. Do you regularly appear in court? **Yes**

What percentage of your appearance in the last five years was in:

Federal court	<b>15%</b>	
State or local courts of record	<b>85%</b>	
Administrative bodies	_____	%
Other	_____	%

18. During the last five years, what percentage of your practice has been trial practice?  
**100%**

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

20. How frequently have you appeared at administrative hearings?  
**0** times per month on average.

21. What percentage of your practice involving litigation has been: **Last 10 years**

Civil	<b>100%</b>	
Criminal	_____	%
Other	_____	%

22. Have you appeared before the Montana Supreme Court within the last five years? If so, 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.

- a. ***Draggin' Y Cattle Co. v. JCCS*, 2017 MT 125, 387 Mont. 430, 395 P.3d 497 (judicial disqualification)**

**Gary M. Zadick** 406-771-0007  
**Ugrin, Alexander, Zadick & Higgins, PC**  
**P.O. Box 1746**  
**Great Falls, MT 59401**

- b. ***Wicklund v. Sundheim* , 2016 MT 62, 383 Mont. 1, 367 P.3d 403 (oil and gas royalty dispute)**

**Albert R. Batterman** 406-778-3006  
**Batterman Law Offices, P.C.**  
**P.O. Box 985**  
**Baker, MT 59313**

- c. ***Draggin' Y Cattle Co. v. JCCS*, 2016 MT 98, 383 Mont. 243, 371 P.3d 970 (reasonableness of stipulated judgment)**

**Gary M. Zadick** 406-771-0007  
**Ugrin, Alexander, Zadick & Higgins, PC**  
**P.O. Box 1746**  
**Great Falls, MT 59401**

- d. ***Finn v. Dakota Fire Insurance*, 2015 MT 253, 380 Mont. 481, 356 P.3d 13 (insurance coverage dispute)**

**Kathleen L. DeSoto** 406-523-2500  
**Garlington, Lohn & Robinson, PLLP**  
**P. O. Box 7909**  
**Missoula, MT 59807**

- e. ***Scentry Biologicals v. Mid-Continent Casualty Co.*, 2014 MT 39, 374 Mont. 18, 319 P.3d 1260 (insurance coverage dispute)**

**Allan H. Baris** 406-587-5511  
**Moore, O'Connell & Refling, P.C.**  
**P. O. Box 1288**  
**Bozeman, MT 59771-1288**

**Levon G. Hovnatanian** 713-632-1700  
**Christopher W. Martin**  
**Ethan D. Carlyle**  
**Martin, Disiere, Jefferson & Wisdom, L.L.P.**  
**808 Travis, 20<sup>th</sup> Floor**  
**Houston, TX 77002**

**Gregory G. Murphy** 406-672-3827  
**5533 Gene Sarazen Drive**  
**Billings, MT 59106**

**Paul D. Odegaard** 406-259-2222  
**Odegaard Law Firm, PLLP**  
**2722 3<sup>rd</sup> Avenue North , Suite 315**  
**Billings, MT 59101**

f. *Meadow Brook v. First American Title Ins. Co.*, 2014 MT 190, 375 Mont. 509, 329 P.3d 608  
(insurance coverage dispute)

g. *Krutzfeldt Ranch v. Pinnacle Bank*, 2012 MT 15, 363 Mont. 366, 272 P.3d 635  
(disqualification of counsel)

23. State the number of jury trials that you have tried to conclusion in the last ten years. 5

24. State the number of non-jury trials that you have tried in the last ten years. 6

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

a. *Draggin' Y Cattle Co. v. JCCS v. G. Patrick HagEstad* 406-278-1455  
*New York Marine* Milodragovich, Dale, Steinbrenner, P.C.  
P.O. Box 4947  
Gallatin County - DV 11-87AX Missoula, MT 59806

Hon. George W. Huss (deceased) Gary M. Zadick 406-771-0007  
Hon. Amy P. Eddy - 406-758-5906 Ugrin, Alexander, Zadick & Higgins, PC  
P.O. Box 1746  
Great Falls, MT 59401

New trial date being scheduled on 8/11/17

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b. *New York Marine v. JCCS* Gary M. Zadick 406-771-0007  
Ugrin, Alexander, Zadick & Higgins, PC  
United States District Court P.O. Box 1746  
Great Falls Division - CV 14-00083 Great Falls, MT 59401

Hon. Brian Morris 406-454-7800 Michael C. Goodman 415-374-2300  
Michelle P. Alborzfar  
Brandon P. Rainey  
Hogan Lovells US LLP  
3 Embarcadero Center, 15<sup>th</sup> Floor  
San Francisco, CA 94111

Case currently stayed

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c. *Asphalt Plus v. Fisher Sand & Gravel* Jeffery A. Hunnes 406-245-3071  
Guthals, Hunnes & Reuss, P.C.  
Yellowstone County – DV 13-0408 P.O. Box 1977  
Billings, MT 59103-1977

Hon. Ingrid Gustafson - 406-256-2916 Trial: 2/22/16 (settled on 3<sup>rd</sup> day of trial)

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d. *Gateway Village v. Gallatin County* Jennifer L. Farve 406-587-5511  
Elizabeth W. Lund  
Gallatin County – DV 14-123A Abigail R. Brown  
Hon. George W. Huss Moore, O’Connell & Refling, P.C.  
P.O. Box 1288  
Bozeman, MT 59771

Trial: 9/21/15

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e. *Weaver, et al. v. Travelers Casualty, et al.* Guy W. Rogers 406-248-2611  
Brown Law Firm, P.C.  
United States District Court P.O. Drawer 849  
Billings Division Billings, MT 59103-0849

No trial date

Hon. Susan P. Watters – 406-247-2350  
Hon. Timothy J. Cavan – 406-247-7025

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**Harlan B. Krogh** 406-255-0400  
**Crist, Krogh & Nord, PLLC**  
2708 First Avenue North, Suite 300  
Billings, MT 59101  
(represented the City of Billings in all six cases)

**f. *Dieffenbacher v. City of Billings***  
Yellowstone County - DV 15-1104

**Trial Date: 8/22/17 (settled)**

**g. *Kucera v. City of Billings***  
Yellowstone County - DV 15-1061

**Trial Date: 4/17/17 (settled)**

**h. *Schmidt v. City of Billings***  
Yellowstone County - DV 15-1060

**Trial Date: 3/6/17 (settled)**

**i. *Stonerock v. City of Billings***  
Yellowstone County - DV 15-1063

**Trial Date: None set (settled)**

**j. *Tedlund v. City of Billings***  
Yellowstone County - DV 15-1081

**Trial Date: 6/26/17 (settled)**

**k. *Turcotte v. City of Billings***  
Yellowstone County - DV 15-1062

**Trial Date: 5/23/17 (settled)**

**Hon. Gregory R. Todd - 406-256-2901**

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**l. *Ellis v. Ventling Building & Development***  
Yellowstone County – DV 15-0475

**Gary L. Walton** 406-494-1385  
**Gary L. Walton, PLLC**  
P.O. Box 4248  
Butte, MT 59702

**Hon. Michael G. Moses - 406-256-2911**

**Trial: 9/25/17**

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**m. *Muir v. Billings Ventures, L.P.***  
Yellowstone County – DV 16-0402

**Isaac M. Kantor** 406-523-2500  
**Garlington, Lohn & Robinson, PLLP**  
P.O. Box 7909  
Missoula, MT 59807

**Hon. Gregory R. Todd - 406-256-2901**

**Trial: 7/10/17 (settled)**

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n. *Duecker v. Advanced Care Hospital of Montana* Brooke B. Murphy 406-252-2500  
Yellowstone County – DV 16-1761 Matovich, Keller & Murphy, P.C.  
P.O. Box 1098  
Billings, MT 59103  
Hon. Russell C. Fagg - 406-256-2906

Trial: 3/27/18

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o. *Sand-Smith v. Liberty Life Assurance Company of Boston*  
United States District Court  
Billings Division - CV 17-004-BLG

Mary E. Duncan 406-248-7646  
Felt, Martin, Frazier & Weldon, PC  
P.O. Box 2558  
Billings, MT 59103-2558

Hon. Susan P. Watters – 406-247-2350

Iwana Rademaekers 214-579-9319  
Law Offices of Iwana Rademaekers, P.C.  
14785 Preston Road, Suite 550  
Dallas, TX 75254

No trial date (submitted on briefs for decision)

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p. *Ferguson v. Café Regis, Inc.*  
Carbon County – DV 14-47

Kenneth S. Frazier 406-248-7646  
Felt, Martin, Frazier & Weldon P.C.  
P.O. Box 2558  
Billings, MT 59103

Hon. Blair Jones - 406-322-5406

Trial Date: 5/19/16 (settled)

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q. *Powell v. Frontier Chevrolet, et al.*  
Yellowstone County – DV 14-1789

Dan L. Spoon 406-541-2200  
Spoon Gordon Ballew  
P. O. Box 8869  
Missoula, MT 59807-8869

Hon. Russell C. Fagg - 406-256-2906

Settled before trial scheduled

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

**Served as a member of the Commission on Practice from July 2012 to July 2016**

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

**Articles:**

**The Moral Guidepost: Professional Satisfaction in Practicing Law, *Trial Trends*, Summer, page 18, 2004**

**All Beginnings are Hard, University of Montana School of Law, 2007**

**Seeing Injustice: The Aesthetics of Trial Practice, University of Montana School of Law and the Philosophy Forum, 2008**

**Seminars:**

**09/09/03 Professionalism in the Law: Reflections on the State of the Practice and the Role of the Law School – University of Montana Law School**

**01/16/04 Ethics & Professionalism – University of Montana/MTLA**

**09/22/06 Demonstrative Evidence – ABOTA, Missoula**

**02/07/07 Evidence Workshop – PESI, Billings**

**11/13/07 All Beginnings Are Hard, University of Montana Law School, Missoula**

**09/10/09**

**09/28/10**

**05/20/08 Ethics (U of M Advanced Trial Advocacy Program), Missoula**

**09/30/08 Seeing Injustice: The Aesthetics of Trial Practice, University of Montana, Missoula**

**10/29/08 Insurance Coverage Litigation, National Business Institute, Billings**

**03/25/11 Tips for Running Your Own Law Firm—The Important Stuff They Don't Teach You in Law School (YABA Panel Discussion), Billings**

**11/04/11 Pre-Trial Trouble: How to Spot and Avoid Minefields, MTLA, Missoula**

**04/12/13 Defeating the Reservation of Rights Ambush, MTLA, Missoula**

**08/03/17 Attorney's Fees – Ethical and Practical Issues, MTLA, Missoula**

## D. PROFESSIONAL AND PUBLIC SERVICE

28. List all bar associations and legal professional societies of which you are a member. Provide 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.

**Yellowstone County Bar Association, 1983-present**  
**Chairperson: Mentoring Committee**

**State Bar of Montana, 1983-present**  
**Chairperson, Legal Services to the Poor Committee, 1987-1991**

**Montana Trial Lawyers Association, 2001-present**  
**Board Member, 2011-2017**  
**Education Committee, 2002-2007**

**American Board of Trial Advocates**  
**President, 2013-2015**

**Former Director, Montana Legal Services Corporation**

**American Association for Justice**

**University of Montana School of Law Clinical Board of Visitors, 1995-1999**

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

**Board Member, C.O.R. Enterprises, Inc. (non-profit community corporation that provides training and employment opportunities for persons with disabilities)**

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

**No.**

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

**All citizens have a responsibility to improve their communities. I was a co-founder, board member, and officer of the Yellowstone Soccer Association whose mission has been to increase youth soccer participation and improve soccer facilities in Billings. I was a co-founder, board member, and officer of the Montana Youth Tennis Foundation. MYTF was formed to help junior tennis players throughout the state compete in state, regional, and national tournaments. I served as a board member**

**and officer for the Big Sky Little League and for the Billings Tennis Association. For many years, I served as a board member of C.O.R. Enterprises, Inc., a non-profit community organization whose mission is to provide training, resources, and employment opportunities for persons with disabilities. I organized and served as chairperson of the Yellowstone County Mentoring Committee. The Mentoring Committee works to provide new lawyers in Yellowstone County with mentors who are very experienced practicing attorneys to help the new lawyers become successful. In addition to those community activities, I have also served on State Bar, MTLA, ABOTA, and University of Montana Law School committees and boards to improve the legal profession.**

### **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, provide the details.

**No.**

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

**No.**

34. Have you ever been arrested or convicted of a violation of any federal law, state law, or county or municipal law, regulation or ordinance? If so, provide the 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, provide the details.

**No.**

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

**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, provide the details, including dates.

**No, other than my wife and I are members of an LLC that owns part of the building in which my law firm is located. The firm pays rent to the LLC.**

38. If you are an officer, director, or otherwise engaged in the management of any business, provide 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.

**I am a member of Hail Mary, LLC described above. I will 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, identify the source and the approximate percentage of your total income it constituted over the last five years.

**None.**

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

**No.**

41. If appointed by the Governor, are you prepared to disclose the information required under 2-2-106, MCA (i.e., the name, address and type of your business; any present or past employer from which you currently receive benefits; any business or professional entity or trust in which you hold an interest; any entity in which you are an officer or director; and any real property, other than a personal residence, in which you hold an interest)?

**Yes.**

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

If not, please explain.

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

If yes, please explain.

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44. Have you ever been found by the IRS to have willfully failed to disclose properly your income during the last five years? If so, provide the details.

No

### G. WRITING SKILLS

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

**I conduct legal research several times a week, sometimes daily. I draft, on average, two to four briefs a month.**

**I personally research the legal issues and draft the briefs on my cases. On cases in which I help the other attorneys in my office, I typically edit their briefs and may perform additional research.**

46. If you have engaged in any other types of legal writing in the last five years, such as drafting documents, etc., explain the type and extent of writing that you have done.

**In addition to briefs, I routinely draft pleadings, discovery and discovery responses, settlement brochures, demand letters, fee agreements, settlement agreements and releases, and correspondence to counsel and clients. I have also written three articles on legal topics which I have presented: one to the MTLA on professional satisfaction; one to the law school on practicing law; and one to a combined law school and philosophy forum on the relationship between laws, moral judgments, and justice. I have also served as Special Master in two cases in which I wrote decisions and recommendations on pending motions.**

47. Attach a writing sample of no more than ten pages that you have written yourself. A portion of a brief or memorandum is acceptable.

**Attached.**

48. What percentage of your practice for the last five years has involved research and legal writing?  
**50%**

49. Are you competent in the use of Westlaw and/or Lexis?

**Yes.**

## **H. MISCELLANEOUS**

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

**For many years I was active in organizing and coaching youth sports in Billings, primarily soccer, baseball, and tennis. I work out regularly in the hope I can keep up with my wife, sons (33 and 31), and daughter (27) when we go hiking and skiing. I continue to read, think about, and write on issues involving the philosophy of law, professionalism, and aesthetic judgment.**

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

**Janitor, tennis instructor, lumber mill worker, philosophy department teaching assistant, mobile home factory worker, administrative clerk, United States Army (1975-1979), legal intern, attorney**

52. Identify the nature and extent of any pro bono work that you have personally performed during the last five years.

**I typically represent three to five individuals a year on claims for health care and other insurance benefits; average one family law case per year; organized the ABOTA Teachers Law School Programs in Billings, Great Falls, and Kalispell; organized the ABOTA Masters in Trial Program; have given several presentations at the University of Montana School of Law; have given several presentations at MTLA CLE programs; organized and served on the Yellowstone County Bar Mentoring Committee**

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

**I have been very fortunate to have practiced with many great trial lawyers and to have appeared before many fine judges during my career. When skilled and experienced lawyers present a case to an impartial judge or jury, the facts and the law determine the result. Power, money, fame, influence, status, all forms of prejudice—none of this matters when our system of justice works. This is the great power of the rule of law and why rule of law is central to our democracy. In the courtroom, all people are equal before the law.**

**Unfortunately, our system of justice has its flaws. Often people can't afford to hire lawyers, cases take too long to decide, and sometimes lawyers, judges, or juries fail in their responsibilities. Then justice does not prevail.**

**I have tried many cases both to judges and juries. In our system of justice, the courtroom is a magnificent and noble place to be when lawyers, judges, and juries do their jobs. Our great challenge is making the courtroom accessible, improving lawyer skills and professionalism, providing adequate judicial resources, and educating the public about the critical role the jury plays as the fourth branch of government in our democracy.**

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

**Good district court judges must be smart, fair, and practical with very good legal research, reasoning, and writing skills. They must have an even temperament, patience, and be good listeners. They must be able to set their personal biases aside and judge cases impartially based upon admissible evidence and applicable law. They must care about the quality and timeliness of their work. They must treat all persons who appear before them with courtesy and respect.**

**Good district court judges are able to move cases along by setting and enforcing pretrial deadlines and trial dates. They provide clear and timely pretrial rulings. All good district court judges work hard.**

**Finally, good district court judges are sensitive to cultural differences. They must not bend to political pressure or popular prejudice. Good district court judges exercise compassion when making tough decisions.**

55. 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.

**Constitutional, statutory, administrative, and common law provide the legal parameters for deciding cases. Existing law, however, does not always address the new issues raised by scientific, technological, or cultural developments. Historically, the law often lags behind society. In these circumstances, judges are called upon to use existing law as guideposts for determining how the new issues should be decided based upon the evidence presented. A judge's decision should be firmly anchored in existing law and should carefully explain how the new issue requires an extension or modification of existing law to reach not only a fair decision, but a decision that comports with principles already established by existing law.**

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

**Public service. District court judges have the opportunity to help individuals, families, and their communities. Upholding the rule of law makes our communities safer and business more**



**efficient and predictable. Innovative alternatives to imprisonment like drug courts and veteran's treatment programs help people while reducing the burden on taxpayers.**

**I have practiced law for 34 years and have tried about 70 cases, including many family law cases. I know the rules of procedure, the rules of evidence, and how trials should be conducted. I think I can use my knowledge, skills, and experience to help people as a district court judge.**

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

**I am proud to have been recognized by my peers as a successful and ethical trial lawyer and having been chosen to serve on the Commission on Practice. Helping clients through difficult times has been the most rewarding aspect of my career.**

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

**For the first 17 years of my practice I worked primarily as a defense lawyer for insureds or insurers. For the last 17 years of my practice I have worked primarily representing claimants. Having practiced on both sides of the fence, I feel I have a balanced view of the law.**

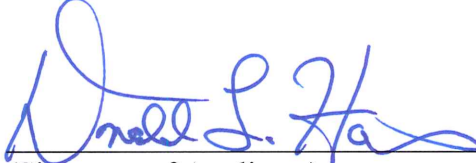
59. Is there any comment that you would like to make that might differentiate you from other applicants or that is unique to you that would make you the best district court judge applicant?

**I served in the U.S. Army for four years (1975-1979). I began as a private and finished as a sergeant. For three of the four years, I served in an armored cavalry squadron that patrolled the East German border. I worked with and learned about people from all parts of our country, from the most disparate backgrounds you might imagine. My military service has shaped who I am as a trial lawyer and may give me a unique ability to understand people of different backgrounds.**

**CERTIFICATE OF APPLICANT**

I understand that the submission of this application expresses my willingness to accept appointment as District Court Judge for the 13th 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.

August 8, 2017  
(Date)

  
(Signature of Applicant)

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A signed original **and** an electronic copy of your application and writing sample must be submitted by ***5:00 p.m. on Thursday, August 10, 2017.***

**Mail the signed original to:**

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

**Send the electronic copy to: [mtsupremecourt@mt.gov](mailto:mtsupremecourt@mt.gov)**

**IN THE SUPREME COURT OF THE STATE OF MONTANA**

Supreme Court Cause No. DA 15-0263

**Earle D. Wicklund, Claude L. Teisinger, and Edward J. Stevens, as  
Trustees of the Teisinger Stevens Wicklund Royalty Trust,**

Plaintiffs/Appellants,

vs.

**G'Nell Sundheim, Jerry Sundheim, Jimmy Sundheim, Sharon Sundheim,  
Judean Sundheim, Patricia Sundheim, Orion Sundheim, Elma Sundheim,  
Robert E. Sundheim, Delores Frison, Audrey Sundheim Estate, Jeff  
Sundheim, as Personal Representative of the Audrey Sundheim Estate,  
Nancy Marie Pawlowski, Laura Ann Pawlowski, Scott E. Sundheim, Jeffry  
J. Sundheim, Rhonda Cayko and Eric Sundheim, Individually, and all  
other heirs of Ole Sundheim and Iver Sundheim,**

Defendants/Appellees.

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**BRIEF OF APPELLANTS**

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On Appeal from the Seventh Judicial District Court- Richland County  
Cause No. DV 13-54 – Hon. David Cybulski

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Appearances:

MICHAEL E. ZIMMERMAN  
P. O. Box 6710  
Sheridan, WY 82801  
P: 307-672-9764/F: 307-673-2632  
[mike@mezimmerman.com](mailto:mike@mezimmerman.com)

DONALD L. HARRIS  
Harris & Associates, PLLC  
3936 Avenue B, Suite D  
Billings, MT 59102  
P: (406) 294-2000/F: (406) 294-2010  
[don@dlharrislaw.com](mailto:don@dlharrislaw.com)

Attorneys for Plaintiffs/Appellants

ALBERT R. BATTERMAN  
Batterman Law Offices, P.C.  
P. O. Box 985  
Baker, MT 59313  
P: 406-778-3006/F: 406-778-3007  
[rbatterman@midrivers.com](mailto:rbatterman@midrivers.com)

Attorneys for Defendants/Appellees

## STATEMENT OF THE ISSUES FOR REVIEW

1. Did the District Court err by construing the reservation of a royalty interest in a warranty deed in favor of the grantee instead of the grantor?
2. Did the District Court err by admitting the testimony of an English professor to interpret the royalty interest reserved in a warranty deed?
3. Did the District Court err by applying the doctrine of laches to deny the Teisinger claim to a royalty interest?

## STATEMENT OF THE CASE

This case arises out of a dispute between the Teisinger heirs/successors (hereafter Teisingers) and the Sundheim heirs/successors (hereafter Sundheims) over a royalty interest the Teisingers' predecessors reserved in a 1953 warranty deed that conveyed land to the Sundheims' predecessors. The Teisingers filed suit against the Sundheims to confirm the 3/5ths royalty interest reserved in the warranty deed. The case was tried to the District Court. The Teisingers now appeal the District Court's March 27, 2015 order denying their claim to the 3/5ths royalty interest.

## STATEMENT OF FACTS

### A. The 1953 Warranty Deed and Hill Lease.

In March 1953, Chester and Jennie Teisinger sold acreage in several sections of land in Richland County (hereafter the Property) to Ole and Iver Sundheim. *Pretrial Order, Agreed Facts*, ¶ 3. Ownership was conveyed by a warranty deed in which the Teisingers reserved to themselves two different

mineral interests: (1) “three-fifths (3/5ths) of Land owners oil, gas and mineral royalties” and (2) “three-fifths (3/5ths) of any and all delay rentals on present and existing oil and gas leases now of record against the lands herein described.” *Appendix, Tab 2, Exhibit 3-1, Admitted Trans., Day 1, pp. 4, 10.*<sup>1</sup> Landowner’s oil, gas, and mineral royalties are the “share of the product or profit paid to the owner of the property.” *Marias River Syndicate v. Big West Oil Co.*, 98 Mont. 254, 38 P.2d 599, 601 (1934); *Stokes v. Tutvet*, 134 Mont. 250, 257, 328 P.2d 1096, 1100 (1958). This royalty interest is a perpetual non-participating royalty, *Pretrial Order, Agreed Facts, ¶ 4*, meaning that the Teisingers were entitled to receive 3/5ths of the landowner’s royalty from any future oil and gas produced on the Property. *Stokes*, 328 P.2d at 1101.

In contrast, delay rentals are “Rent, usually on oil and gas leases, paid for additional time in which to utilize the land.” *Black’s Law Dictionary* 388 (5<sup>th</sup> ed., West 1979); *see, e.g., Berthelote v. Loy Oil Co.*, 95 Mont. 434, 441, 454, 28 P.2d 187, 188, 193 (1933). Delay rentals extend the time the lessee has to explore and produce oil and gas under an existing lease. The Teisingers’ reservation of a 3/5ths interest in delay rentals applied to an oil and gas lease that the Teisingers had previously granted to R. L. Hill in 1951. *Pretrial Order*,

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<sup>1</sup> All exhibits cited were admitted by stipulation of counsel. *See, Trans., Day 1, pp. 4, 10.*

*Agreed Facts*, ¶ 1. The Hill lease only covered a portion of the Property and was released in 1958. *Id.*, ¶¶ 1 and 6.

**B. Oil and Gas Exploration and Production.**

In July 1973, the Sundheims leased mineral rights that included Section 10 of the Property. *Id.*, ¶¶ 7 and 8. In April 1975, all of the parties who owned “royalty, overriding royalty, working interest, or operating rights under the oil and gas leases and lands subject to this agreement” executed a Communitization Agreement. *Exhibit 9-1*. Because of their 3/5ths royalty interest in Section 10, the Teisingers signed the Communitization Agreement. *Exhibit 9-5, 9-6*. The Sundheims also signed the Communitization Agreement as did the other interest owners. *Exhibit 9-5; see 9-4 through 9-11*. In August 1975, Superior Oil Company drilled a dry hole on the Section 10 land covered by the Communitization Agreement. *Pretrial Order, Agreed Facts*, ¶ 12.

In April 1976, the Sundheims leased oil and gas interests on another portion of the Property, Section 17. *Id.*, ¶¶ 15, 17. In 1981, a producing well, known as the Four Mile Creek 1-17 well, was developed on Section 17. *Id.*, ¶ 19. In a division order, Murphy Oil Corporation confirmed the Teisingers’ 3/5ths royalty interest and the Sundheims’ 2/5ths royalty interest in Section 17 and issued royalty payments to the parties based upon those fractional interests. *Id.*, ¶ 21; *Exhibit 23; Exhibits 24 and 25*. Neither the Teisingers nor the

Sundheims objected. Royalty payments continued for approximately two and a half years with 3/5ths being paid to the Teisingers and 2/5ths being paid to the Sundheims until production stopped. *Exhibit 25-8; Trans., Day 1, pp. 83-85.*

No further drilling or production occurred on the Property until 2011 when True Oil LLC, Brigham Oil & Gas, LLP, and Whiting Oil and Gas Corporation began exploration and drilling. *Pretrial Order, Agreed Facts, ¶¶ 27-33.* In August 2012, Whiting Oil and Gas obtained a drilling and division order title opinion from the Sadler Law Firm that recognized the Teisingers' 3/5ths royalty interest:

In Montana, a grant is to be interpreted in favor of the grantee, except that a reservation in any grant is to be interpreted in favor of the grantor. Mont. Code Ann. § 70-1-516 (2009). **Accordingly, the examining attorney has interpreted the reservation in the Teisinger Deed as containing a reservation of a fraction of lease royalties and a separate reservation of delay rentals, with the limiting provision of “present and existing oil and gas leases now of record” applying only to the reservation of delay rentals.** (emphasis supplied)

*Ex. 37-3.*

The examining attorney also noted, however, that “the reservation in the Teisinger Deed is arguably ambiguous.”:

The examining attorney notes that the reservation contained in the Teisinger Deed is arguably ambiguous, in that it can be construed so that the limiting language “present and existing oil and gas leases now of record” applies to both the reservation of delay rentals and the reservation of royalties. If the limiting language were to be applied to the reservation of royalties, then the royalty

reservation would terminate upon the termination of the oil and gas lease in effect at the time of execution of the Teisinger Deed and, the Teisinger's, and their heirs, would not be vested with a fraction of royalty interest due under any subsequently executed oil and gas lease covering all of Section 17 and the NE/4 and the NW/4SE/4 of Section 20.

*Id.* Because the reservation was “arguably ambiguous”, the attorney recommended that Whiting Oil and Gas obtain either a stipulation between all affected parties that the Teisingers own 3/5ths of the landowner royalty interest or obtain a judicial determination of the meaning and effect of the reservation.

*Exhibit 37-5.*

On December 17, 2012, Whiting notified the Teisingers that Whiting would suspend payments for the 3/5ths royalty interest until a quiet title judgment or stipulation as to each parties' royalty interest was obtained.

*Complaint, ¶ 8, Doc. 1.* Because the Sundheims contested the Teisingers' 3/5ths royalty interest, the Teisingers filed this quiet title action on May 17, 2013 to confirm their royalty interest. *Complaint, Doc. 1.*

### **C. The Dispute.**

The parties dispute the meaning of the following language in the 1953 warranty deed:

First parties reserve unto themselves three-fifths (3/5ths) of the Land owners oil, gas and mineral royalties and three-fifths (3/5ths) of any and all delay rentals on present and existing oil and gas leases now of record against the lands herein described....



It is unknown who drafted the 1953 warranty deed. *Pretrial Order, Agreed Facts*, ¶ 5.

The Teisingers contend that the reservation of 3/5ths of the landowner's oil, gas, and mineral royalties and the reservation of 3/5ths of the delay rentals on the existing Hill lease are two separate and distinct reservations that address different interests. The royalty reservation applied to the entire Property. The delay rental reservation applied to the Hill lease that covered only portions of the Property. While the Teisingers' right to delay rentals expired upon the termination of the Hill lease in 1958, the Teisingers' 3/5ths royalty interest in the entire Property continued as a perpetual non-participating royalty. In contrast, the Sundheims argue that both the Teisingers' royalty interest and their delay rental interest applied only to the Hill lease and that both interests expired in 1958.

**D. The District Court's Order.**

Following a two day bench trial, the District Court entered findings of fact, conclusions of law, and an order denying the Teisingers' claim for a 3/5ths royalty interest. *Appendix, Tab 1, Order*, ¶¶ 57-60. Relying on an oil and gas treatise instead of M.C.A. § 70-1-516, the District Court concluded that the royalty reservation was ambiguous and that "reservations should be 'construed in the light most favorably to the grantee.'" *Id., District Court Conclusions of*

*Law*, ¶¶ 38, 52. M.C.A. § 70-1-516, however, requires reservations in a deed “to be interpreted in favor of the grantor.” The District Court erred by interpreting the reservation in favor of the grantee Sundheims, instead of the grantor Teisingers.

As a back stop, the District Court also concluded that the Teisingers’ claim to a 3/5ths royalty interest was barred under the doctrine of laches because “their delay in bringing this action so prejudiced the defendants’ (Sundheims’) preparation of their case as to be inequitable.” *Id.*, ¶¶ 55, 56. The District Court erred, however, because the Teisingers promptly filed this action after learning that the Sundheims contested the Teisingers’ 3/5ths royalty interest.

### **STANDARDS OF REVIEW**

This Court reviews a district court’s conclusions of law to determine if they are correct. *Whary v. Plum Creek Timberlands, L.P.*, 2014 MT 71, ¶ 8, 374 Mont. 266, 268, 320 P.3d 973, 975. This Court reviews a district court’s findings of fact to determine if they are clearly erroneous. *Id.*, 2014 MT at ¶ 8. A district court’s evidentiary rulings are reviewed for an abuse of discretion. *Masters Group Intern., Inc. v. Comerica Bank*, 215 MT 192, ¶ 35, 380 Mont. 1, 11, 352 P.3d 1101, \_\_\_\_\_. With regard to laches, this Court reviews *de novo* if laches is a valid defense to a particular claim. A district court’s application of the laches factors is entitled to deference. *In re Parenting of Strash*, 2005 MT

143N, ¶ 23, 327 Mont. 537, 115 P.3d 221.

### **SUMMARY OF ARGUMENT**

M.C.A. § 70-1-516 provides that, “A grant is to be interpreted in favor of the grantee, except that a reservation ... is to be interpreted in favor of the grantor.” The District Court found that the royalty reservation in the 1953 warranty deed was ambiguous. The District Court also concluded that there was insufficient intrinsic evidence to determine the intent of the parties to the 1953 deed. The parties stipulated that there was no evidence as to who drafted the warranty deed.

Under these circumstances, M.C.A. § 70-1-516 required the District Court to interpret the ambiguous royalty reservation in favor of the Teisingers. *Van Hook v. Jennings*, 1999 MT 198, ¶ 12, 295 Mont. 409, 413, 983 P.2d 995, 997 (“Ambiguities in a reservation of rights in any grant of property are to be interpreted in favor of the grantor.”) Instead, the District Court erred by relying upon a treatise on oil and gas leases to rule that a reservation in a deed should be construed in favor of the grantee. The District Court’s ruling is contrary to Montana law.

The District Court also erred by admitting and adopting an English professor’s opinion about how to interpret the royalty reservation. Not only was the professor’s opinion based upon the mistaken assumption that both perpetual

non-participating royalties and delay rentals were dependent on existing oil and gas leases, the professor acknowledged that the rules of grammar could not resolve the ambiguity. In any event, the professor's opinion is irrelevant because the resolution of the ambiguity is governed by statute, M.C.A. § 70-1-516.

Finally, the District Court erred by invoking laches to bar the Teisingers' claim. The Teisingers consistently asserted their right to a 3/5ths royalty interest each time the property was explored for oil and gas. In fact, from 1982 to 1985, Murphy Oil paid the Teisingers a 3/5ths royalty interest and the Sundheims a 2/5ths royalty interest without any objection from the Sundheims. When the Sundheims contested the Teisingers' right to a 3/5ths royalty interest after new exploration began on the Property in late 2012, the Teisingers promptly filed this quiet title action. Teisingers diligently sought to protect and enforce their right to a 3/5ths royalty interest once the Sundheims challenged that interest. In contrast, the Sundheims waited over 30 years—from 1982 to 2012—to assert their right to a 3/5ths royalty interest.

## ARGUMENT

### **I. M.C.A. § 70-1-516 Required the District Court to Interpret the Royalty Reservation in Favor of the Teisingers.**

The District Court found that “the royalty reservation in the 1953 Deed is ambiguous.” *Appendix, Tab 1, District Court Conclusions of Law*, ¶ 38. The