

APPLICATION FOR

**DISTRICT COURT JUDGESHIP
Sixteenth Judicial District**

A. PERSONAL INFORMATION

1. Full Name: Kevin Ray Peterson
 - a. What name do you commonly go by? Kevin
2. Birthdate: [REDACTED] Are you a U.S. citizen? Yes
3. Home Address: [REDACTED]
Phone: [REDACTED]
4. Office Address: 1625 11th Ave, DNRC 3rd Floor, Helena, Montana 59620
Phone: 406-444-5785
5. Length of residence in Montana: 26 years
6. Place of residence for the last five years:

<u>Dates</u>	<u>City</u>	<u>State</u>
June, 2008 to present	Helena	Montana

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>
Warren High School	Warren, Minnesota	1979	Diploma
University of Minnesota,	Crookston, Minnesota	1981	Assoc. App. Sci.

North Dakota State Univ.	Fargo, North Dakota	1984	B.S. Agriculture
North Dakota State Univ.	Fargo, North Dakota	1984	B.S. Sci. & Math
South Dakota State Univ.	Brookings, South Dakota	1989	M.S. Animal & Range Science
University of Montana	Missoula, Montana	1993	Juris Doctorate

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

Graduated with Honors: University of Minnesota, Crookston; South Dakota State University.

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.

Yes. 1990-1993. Co-Editor Public Land Law Review 1992-93, University of Montana
"The Development and Application of the 'Extraordinary Case' Exception within the ESA: Private and National Interests in Conflict." Public Land Law Review, Volume 14, pp 262-82.

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>
State Bar of Montana	1993
Federal Court, District of Montana	1993
Ninth Circuit Court of Appeals	1994
Minnesota Supreme Court	2006
United State Patent and Trademark Office	2006
United States Supreme Court	2014

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

Special Assistant Attorney General, State of Montana, Department of Natural Resources and Conservation, June 2008 to present.

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>
Standke, Green & Greenstein, Ltd. Minnetonka, MN (now dissolved)	Associate Attorney	2007-2008
Esquire Group Inc., Minneapolis, MN	Discovery Document Analyst	2006
Watts and Associates Inc., Billings, MT	Corporate Counsel Range Project Coordinator	2004-2006
Yellowstone County, Billings, MT	Deputy County Attorney	2000-2004
Yellowstone County, Billings, MT	Deputy Public Defender	1998-2000
Great Plains Law Firm, Billings, MT	Sole Practitioner	1996-1998
Simonton, Howe & Schneider, P.C Glendive, MT (now dissolved)	Associate Attorney	1993-1996

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

February 2006-July 2006 studied and sat for the United States Patent and Trademark Office (USPTO) Exam and acquired Minnesota bar admission credentials and relocated to Minnesota.

March 2008-June 2008 managed my father's estate in Glendive, Montana and relocated to Montana after accepting a position with DNRC in early May, 2008.

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.

State of Montana, Department of Natural Resources and Conservation (DNRC) is an Executive Branch agency. My current legal practice for the Office of the Director involves water law (20-40%) depending on time of year. This includes litigation principally in relation to enforcement of the Montana Water Use Act, administrative matters concerning new appropriation permits, appropriation right changes, or

other matters that may come before the Department hearings unit. In 2013, I devoted a significant amount of time to discovery work and trial preparation as a member of the Attorney General trial team for a U.S. Supreme Court original jurisdiction case (*Montana v. Wyoming*) involving the Yellowstone River Compact and specifically the Tongue River water allocations among participant states. This case had over 20 days of trial and in preparation I defended or took approximately 50 depositions and managed and prepared an extensive list of witnesses residing along the Tongue River for trial.

A large portion of time annually is committed to guidance and problem resolution for the central Water Resources Division (WRD) office in Helena and all regional offices across the state. I provide training for WRD on many issues concerning real estate property interests in water rights and training in compliance with the Montana Water Use Act.

Aside from water related law, I review and provide guidance on contracts covering millions of dollars in state grants to grantees ranging from rural water district projects to small private grant and loan projects. These grants include conservation districts and a host of other state, county or other units of local government. I review and advise on informational technology contracting (OIT dept.) for DNRC. I litigate matters for DNRC-forestry when called upon to manage cases of various types. Occasionally I handle intellectual property issues, commercial leasing issues, draft and review proposed administrative rules. I have conducted a lengthy audit of a grant program and provided the DNRC Director with the results and report of my findings. I met with federal agency personnel and investigators from USDI-Bureau of Reclamation (Billings) and the Office of the Inspector General (Denver) in gather, sharing and explaining information related to the internal audit. I spend 40-60% of my time on DNRC matters not specifically related to WRD issues. The balance of my time is assigned as matters arise with DNRC.

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

Agricultural law including farm program or other government program compliance.

Real estate law including farm and ranch leasing, conveyancing, common interest community development and management (covenants, restrictions, management and foreclosure of unpaid assessments), title insurance defense, easements, subdivision platting, and many other real estate related issues in residential, commercial or agricultural settings.

Criminal law both as a public defender and prosecutor and all facets of charging, trial preparation, jury trials, sentencing, revocation of probationary sentences, post-conviction relief and appellate matters including daily court appearances in both capacities.

Local Government and administration as a Deputy County Attorney in the Yellowstone County Attorney Civil Division

Employment law including for agency HR departments and for private businesses.

Federal contracting under the Federal Acquisition Regulations.

Personal injury, medical malpractice and other tort litigation including product liability.

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

- Criminal law
- Water law
- Real Estate
- Administrative law
- Intellectual Property

17. Do you regularly appear in court? Not at this time. My previous experience with Yellowstone County as listed above from 1998-2004 provided me with the opportunity to appear in court nearly 100% of the time in law and motion, evidentiary hearings and trial practice.

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

Federal court	< 5%
State or local courts of record	< 5%
Administrative bodies	10%
Other	0 %

See also my response to Question 14.

18. During the last five years, what percentage of your practice has been trial practice? 10%

19. How frequently have you appeared in court? Less than 1 times per month on average currently. Previous practice in Yellowstone County was every day the courts were open in 5 district court divisions.

20. How frequently have you appeared at administrative hearings?

Less than 1 times per month on average. DNRC generally is not a party to administrative proceedings with some exceptions. DNRC may appear for the limited purposes of defending agency decisions that are before a district court on a Petition for Judicial Review. I advise decision makers within the Department charged with issuing final agency decisions. As an attorney with a Montana state government executive agency charged with many regulatory and permitting obligations, I have a thorough working knowledge of the Montana Administrative Procedures Act and its application to agency rulemaking and decision making roles. I am a DNRC administrative rules reviewer for one program in DNRC. I also review proposed agency decisions under MAPA and non-MAPA administrative proceedings and defend agency decisions in district court.

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

Civil	25%
Criminal	65%
Other	10%

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.

Hohenlohe v. State of Montana, Department of Natural Resources and Conservation, 2010 MT 203, 357 Mont. 438, 240 P.3d 628.

John E. Bloomquist
Abigail St. Lawrence
3355 Colton Drive, Suite A
Helena, MT 59602
406-502-1244

See *Clark Fork Coalition et al. v. John E. Tubbs and The Montana Department of Natural Resources and Conservation* (response to Question 25). This case is pending appeal in the Montana Supreme Court and is just past the Notice of Appeal stage.

23. State the number of jury trials that you have tried to conclusion in the last ten years. None. See my response to Questions 14 and 17 above and 57 below.
24. State the number of non-jury trials that you have tried in the last ten years. None. Typically all my cases were resolved on summary judgment or settlement.
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.

State of Montana v. State of Wyoming, No. 137 Original, United States Supreme Court, 135 S. Ct. 1479, 193 L.Ed 2d 17, status on October 5, 2015, motion granted to delay consideration of the Special Master's Second Interim Report on liability issues resulting from trial in Billings, Montana October-December 2013. Decision pending.

James C. Kaste
Chris Brown
Sr. Assistants AG, Wyoming
123 Capitol Building
Cheyenne, WY 82002
307-777-3535

Andrew J. Kuhlman
Assistant AG, Wyoming
123 Capitol Building
Cheyenne, WY 82002
307-777-3535

The Clark Fork Coalition, Katrin Chandler, Betty J. Lannen, Joseph Miller v. John E. Tubbs and The Montana Department of Natural Resources and Conservation, BDV-2010-874, First Judicial District Court, Hon. Jeffrey M. Sherlock presiding. 406-447-8205. Petition for Judicial Review.

Mathew K. Bishop
Laura King
Western Environmental Law Center
103 Reeders Alley
Helena, Montana 59601
406-324-8011

Ryan K. Mattick
MOORE O'CONNELL & REFLING
P.O. Box 1288
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Stephen R. Brown
Garlington, Lohn & Robinson PLLP
Box 7909
Missoula, MT 59807-7909
406-523-2500

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

None. As counsel for an agency, the role of the attorney is usually to advise the board or commission. I have advised the DNRC Director in issuing opinions on appeal to the Director in administrative proceedings. See my response to Question 20 above summarizing my experience and knowledge working extensively in administrative legal matters.

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.

Presenter and materials, 12th Annual Montana Water Law Conference, 2012, Helena, MT.

Civil Law Updates given to county civil attorneys, December, 2002

Article published in the Montana Lawyer (1999) regarding the state of the ethical rules on the duty of client loyalty and duty of disclosure, with practice tips to avoid unethical traps.

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.

Montana State Bar
First Montana Judicial District State Bar

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.

Pioneer Park Estates Homeowners Association, Director and VP 2009-2014. This organization is a non-profit common interest community governance board charged with common interest duties under covenants, restrictions and CIC governance documents filed with the Montana Secretary of State.

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.

Community involvement both as a professional and member of a community are important parts in balancing life activities. Involvement does not require an organization or identified cause to be of benefit to the community. Assisting people with basic questions about legal issues or procedures that fall within my areas of knowledge or helping neighbors or organizations by giving time is an essential part of the community fabric. I have assisted people with questions on legal matters throughout my career. I have given time to my subdivision as a board member and officer for the homeowner's association where I reside.

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.

Yes. I operated a registered Suffolk sheep stud ram operation with my father for many years. That enterprise was sold in 2002.

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 not currently engaged in any of the capacities listed above.

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.

43. Do you have any liens or claims outstanding against you by the Internal Revenue Service (IRS)?

No.

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 have been engaged in researching and writing briefs for administrative, district court and appellate court consideration. A significant portion of my position duties have been associated with legal writing of legal documents. Briefing in the Department is handled by the responsible attorney.

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.

I have authored numerous internal agency memorandums and guidance documents for program administration. I have reviewed and edited many of the grant/loan program contracts as needed or procurement contracts for specific procurement needs. I have worked extensively with building spreadsheet databases for information tracking or audits and provided reports with analytical results based on data gathering and analysis.

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?
20-25 %

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

Yes, both platforms.

H. MISCELLANEOUS

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

I spend a great deal of time on lakes and reservoirs fishing and camping in Montana and Minnesota. I also hunt deer, hike trails and take ATV rides on established trails. I have been interested in photography for decades. I enjoy travel and I have had the opportunity to visit world-class museums and attended numerous fine arts performances in Eastern Europe. Other interests involve home improvement projects and trying to grow fruit trees and berries, woodworking and welding. I also enjoy golfing, mountain biking on trails or hiking trails and generally exploring what Montana has to offer.

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

- Farming and livestock work on the family farm and working in high school for local farmers in Minnesota and relatives located near Beach North Dakota through college years.
- Running a research project at Ordway Prairie in South Dakota for SDSU.
- Working on a range condition and trend survey for the USFS in Perkins County, South Dakota for SDSU; also was the project leader for a 350,000 acre+ range condition and trend survey on the Rosebud Sioux Reservation near Mission, South Dakota for United Sioux Tribes Development Corp.
- Feedlot management and farming on a ranch located at Ismay, Montana.
- Research Associate for Montana State University supervising range research and winter beef cattle nutritional studies at Fort Keogh Livestock and Range Research Station, Miles City, Montana.
- Legal practice as noted in paragraphs 11-14 above.

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

I have not handled cases on a pro bono basis. I have informally provided guidance, advice or reviewed documents for neighbors or co-workers, or other people who have asked for assistance with legal matters.

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

My experience as a Yellowstone County Deputy Public Defender was the most eye opening and significant position in the legal profession that I have held. The position was county funded and not a function of the State of Montana at the time I was a public defender. The interaction with indigent

people on a daily basis by representing people charged with felony crimes was a showcase of social differences and backgrounds. The case load was enormous, the pace was unrelenting and public defenders spent as much time in the county jail as some of their clients. The work was challenging but often rewarding in ways only each individual public defender can comprehend. The two years I spent working as a public defender are now invaluable to me in seeking an appointment to the Sixteenth Judicial District. Working directly with people facing serious consequences that depended on straightforward, candid, factual and experienced advice from me as legal counsel was an extensive education in human nature. My central philosophy in all my work then and presently has been to advise people on what each person needs to know about their respective situation and not merely to tell any person what they want to hear. This philosophy was particularly useful in delivering the best services I could give to be effective and provide representation that met or exceeded Montana and U.S. Constitutional expectations in representing indigent people charged with serious offenses.

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

A good district court judge should have a wide array of practice experience in many areas of law including civil and criminal. A judge should be very analytical but also decisive in rendering decisions from the bench or in written opinions. A judge should make the change from advocate to neutral fact finder but also develop case records that are complete. A judge should issue written opinions within reasonable time frames and provide well-reasoned and documented analysis both for the interested parties and for appellate purposes. A judge should maintain decorum and control in the courtroom over counsel, staff, parties and those attending in observance of court proceedings. A judge should project a demeanor towards those in the courtroom that is respectful, professional, businesslike and courteous. A judge should be mindful that not everyone is used to being in a courtroom and for prospective jurors, defendants, plaintiffs, witnesses or other persons coming before the court, some procedural discussion may be necessary or advisable in reducing stress or feelings of intimidation. *Pro se* litigants have increased in numbers and a judge must be tolerant and accepting of people representing themselves and work to help guide these self-represented people through the system as this may be the only access to the courts that a *pro se* litigant may have. A judge should project a presence of fairness in the courtroom and in chambers and maintain the public's trust in judicial impartiality. A judge should have a working understanding and knowledge of the people and places in the district and an understanding of the region as a whole.

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.

There is a definite need to maintain well-settled law so that confusion among practitioners and the public may be kept to a minimum. Law is an evolving body of literature in many ways however it is important to be able to rely on decisions from the past with regard to similar matters in order to practitioners to advise clients and for the public to have reasonable expectations of what the law is. Consistency across judicial districts in application of the same law to similar facts is also important in terms of judicial fairness to the public at large. The adoption by states of uniform laws for many subject areas has helped Montana in reaching consistency and reliability in well-established bodies of law.

Montana is a state with relatively low population and as a consequence, there is not always case law for practitioners or the courts to rely on across all subject matters. It is useful to consider out of state case law if the similar law may be applied to similar facts. Whether or not there are cases reported in Montana that address the application of a particular law, the variables that may be ever changing are the facts and circumstances. The role of a judge is to craft a means of resolution or a remedy that is appropriate to fit the facts and circumstances in applying law that may not have the breadth or scope to provide specific remedies or procedures. Water law is such an example where relatively old legal principals are now applied to modern day technology and advances in beneficial use practices. Synthesizing remedies and procedures from reliance on other states or through reasoned analysis of existing law, a law's intent or objectives, or from equitable principals, judicial decisions cannot avoid impacting the scope of a body of law in filling in voids in reaching decisions on some cases. Law is not static but often lags well behind social, scientific or other influences in society as a whole and a judge must be able to balance changes with the need for consistency and reliability.

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

I am seeking appointment to the Sixteenth Judicial District because I have accumulated a great deal of experience across many areas of law and I can use this accumulated knowledge to serve the District well. I have lived and worked in Miles City prior to becoming an attorney. I have lived and worked in Ismay, a small community located in the District. I have lived in Glendive and practiced in the Seventh Judicial District and Sixteenth Judicial District. I understand agriculture, small town living, rural communities and I identify with people of Eastern Montana.

My experience has accumulated since 1993 in two states. I have litigated many cases of a criminal nature in the busiest district court system in Montana in Yellowstone County. The concentration of accumulated experience as a public defender and as a deputy county attorney appearing in court daily for hours in law and motion, trial work or in hearings before five judges from 1998-2004 has prepared me well. My experience in civil law has evolved over 22 years of practice both in government and private settings. My scope of subject matters is very broad and include but is not limited to torts intellectual property, real estate, agricultural law, contracting and water law to name a few examples.

I believe I have the experience, analytical skills and abilities, temperament, self-motivation, administrative knowledge, organization and writing skills to serve the people of the Sixteenth Judicial District well for years to come.

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

In my career, I have had cases or participated in cases before the Montana Supreme Court that had significant impact on areas of law. One such case was *State v. Elison*, 2000 MT 288, 302 Mont. 228, 14 P.3d. 456, a case that significantly impacted the necessity of law enforcement in obtaining telephonic warrants for searches of motor vehicles and not relying on exigent circumstances as a basis for a search. In *State v. Logan*, 2002 Mont.206, 311 Mont. 239, 53 P.3d 1285 (Mark Hilario appellant counsel), I challenged the search of her purse on a traffic stop in district court along with probable cause to bring in a drug sniffing dog. This case was reversed directly based on *Elison*. Other cases from my past that impacted the body of criminal law were *State v. Freshment*, 2002 MT 61, 309 Mont. 154, 43 p.3d 968, a case I tried before a jury that went up on appeal (Gary Wilcox contracted to the YCPD as appellate

counsel) resulting in constraining prospective juror rehabilitation by district court judges. In *State v. Ommundson*, 1999 MT 16, 293 Mont. 133, 974 P.2d 620 (subsequently overruled as to the standard of review), conditions imposed on sentences were required to be reasonably related to rehabilitation of the defendant. In *Wessell v. State of Montana, Motor Vehicles Division*, (1996), 277 Mont. 234, 921 P.2d 264 (en banc), refusal to take a breath test was overturned based on a valid fear of needles and an inoperable breathalyzer and law enforcement refusal to accept a urine test as an alternative.

I have particular knowledge and skills in use of computers and databases. Part of my duties with the Yellowstone County Attorney's Office was to research and procure a case management and database software for the office and to assist in training and development for the software. I also developed the technology rotation for acquisition and replacement of computers in the office. My information is that both the software is in use (and reviewed or used by other CA offices in the state) and the technology rotation are still in use.

At DNRC, one of the focal points for my selection from the pool of candidates for open attorney positions was past work in the criminal justice system. One of my duties assigned by DNRC was to initiate enforcement of Montana Water Use Act violations under §85-2-114, MCA and §85-2-122, MCA. I have written enforcement guidance for WRD offices and litigated several cases to conclusion in district courts enforcing the Act. These include *Montana Department of Natural Resources and Conservation v. Catlin Ranch, LP*, DV-08-30, Montana Fourteenth Judicial District, Meagher County, settled days before trial; *Montana Department of Natural Resources and Conservation v. Neal Bouma et al.*, CDV-10-1043, Eighth Judicial District, Cascade County, summary judgment granted to plaintiff and first ever penalties assessed and collected by the Department under -122; *Montana Department of Natural Resources and Conservation v. Bar C, Inc.*, DV-29-11-73, Fifth Judicial District Court, Madison County, settled by entry of consent decree on injunctive relief.

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

The content of my application constitutes full disclosure to the best of my knowledge.

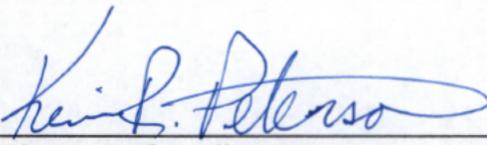
59. Is there any comment that you would like to make that might differentiate you from other applicants or that is unique to you that would make you the best district court judge applicant?

Most applicants for appointment appear to practice within the judicial district that the applicant seeks appointment to the bench, and the application itself appears to have that expectation. I presently reside in Helena but my work is state-wide. If I am the successful applicant, I will not have a practice to close and I will not have a roster of conflicts within the Sixteenth Judicial District to resolve through reassignment. My previous experiences living and working in Eastern Montana are far enough back to eliminate potential conflicts yet I retain work and residential experience in the Sixteenth Judicial District.

CERTIFICATE OF APPLICANT

I understand that the submission of this application expresses my willingness to accept appointment as District Court Judge for the 16th 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.

November 13, 2015
(Date)


(Signature of Applicant)

A signed original **and** an electronic copy of your application and writing sample must be submitted by
5:00 p.m. on Wednesday, December 2, 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

The basis for DNRC's Motion in Limine is that the conclusions and opinions Ohlson presents going to the issue of salvage water, are based on science and methodology without credibility to support the use of the NRCS models. Therefore, DNRC is requesting that the Court hold a "Daubert" hearing to render a pre-trial decision on whether to exclude the testimony of Otto Ohlson for failure to meet Rule 702, M. Rules of Evid. requirements and the admissibility of scientific methodology evidence under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, (1993), 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469. The hearing would serve judicial economy by disposing of a key evidentiary issue prior to trial. DNRC is filing a second Motion in Limine under separate cover concerning waiver and discovery abuses by CRLP over the same material now disclosed mere weeks before trial.

MEMORANDUM

In *Daubert*, the U.S. Supreme Court "contemplates a hearing to determine the admissibility of expert testimony which deals with questionable science in order that the court may make " a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of where that reasoning or methodology properly can be applied to the facts in issue." *Hunt v. K-Mart Corporation*, 1999 MT 125, ¶11, 294 Mont. 444, ¶11, 981 P.2d 275, 279 citing *Daubert* at 509 U.S. 579, 592-93. "The usual and customary procedure for obtaining such a hearing is the filing of a motion in limine." *Hunt*, ¶11.

In the *Hunt* case, K-Mart was unsuccessful in excluding testimony of hedonic damages principally because of an untimely objection at trial rather than objecting in a motion in limine or in the pre-trial order. *Hunt*, ¶12. In the case at bar, CRLP disclosed for the first time this new theory of salvage water based on computations of a computer model called the Farm Irrigation Rating Index (FIRI) represented by Ohlson as: computing the water savings from the conversion from flood irrigation to the 450 acre center pivot where "savings" equal the legal salvage water by definition. Exhibit R at 1, Second Supplemental Affidavit of Otto Ohlson marked Exhibit A to CRLP's Reply Brief. DNRC's objection and request for a *Daubert* hearing is timely and warranted. The request challenges the methodology of Otto Ohlson in applying a mathematical model with variable inputs based on data designed to estimate efficiency differences between irrigation systems to reach a conclusion regarding water salvage.

FIRI was not designed to quantify salvage water and this limitation is expressly stated in the operations manual and technical notes for the program. DNRC Exhibit A, Affidavit of Russel Levens and attachments A.1 and A.2. Ohlson's testimony is based on improper application of the FIRI computer model; therefore his methodology is improper, as are his ultimate conclusions which hinge on the errant methodology.

The evidence of this is his application of a model designed to function for one purpose, and then representing a different purpose in affidavit and sworn testimony at his deposition, stating that the results of the program represent salvaged water--directly in contravention of the NRCS warning not to use the program for that function. Water savings in comparison between two irrigation systems has no relationship to salvage water derived from a water saving method for computing historic consumptive and non-consumptive uses from specific water sources. Ohlson's methodology applied in his analysis wholly ignores the limitations of the model, and his analysis is improper because his methods are improper.

Judges are the "gatekeepers" that not only determine relevance of evidence, but admissibility of scientific evidence. *Lust v. Merrell Dow Pharm.*, 89 F.3d 594, 597 (9th Cir. 1996). In assessing the methodologies of experts to determine if testimony is reliable, Montana Courts have applied the *Daubert* analysis to novel scientific evidence. The Montana Supreme Court has ruled that *Daubert* applies to science-based expert testimony in Montana by stating:

¶ 46 In *Daubert*, the U.S. Supreme Court established the following non-exclusive factors to be considered when assessing the reliability of proffered scientific expert testimony: (1) whether the theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error in using a particular scientific technique and the existence and maintenance of standards controlling the technique's operation; and (4) whether the theory or technique has been generally accepted or rejected in the particular scientific field. *Daubert*, 509 U.S. at 583, 113 S.Ct. at 2796-97.

¶ 47 In 1994, this Court adopted the *Daubert* factors, concluding they were consistent with our holding in *Barmeyer v. Montana Power Co.*, 202 Mont. 185, 657 P.2d 594 (1983), overruled on other grounds by *Martel v. Montana Power Co.*, 231 Mont. 96, 752 P.2d 140 (1988), concerning the admission of novel scientific evidence. *Moore*, 268 Mont. at 42, 885 P.2d at 470-71. While Bieber argues otherwise, this Court has consistently held since *Moore* that the *Daubert* factors apply exclusively to novel scientific evidence. *State v. Cline*, 275 Mont. 46, 55, 909 P.2d 1171, 1177 (1996); *Hulse v. State, Dept. of Justice*, 1998 MT 108, ¶¶ 55-69, 289 Mont. 1, ¶¶ 55-69, 961 P.2d 75, ¶¶ 55-69; *State v. Southern*, 1999 MT 94, ¶ 59, 294 Mont. 225, ¶ 59, 980 P.2d 3, ¶ 59; *Gilkey v. Schweitzer*, 1999 MT 188, ¶¶ 18-20, 295 Mont. 345, ¶ ¶ 18-20, 983 P.2d 869, ¶¶ 18-20; *State v. Hocevar*, 2000 MT 157, ¶ 56, 300 Mont. 167, ¶ 56, 7 P.3d 329, ¶ 56; *State v. Ayers*, 2003 MT 114, ¶ 37, 315 Mont. 395, ¶ 37, 68 P.3d 768, ¶ 37.

State v. Bieber, 207 MT 262, 339 Mont. 309, 170 P.3d 444.

Unlike the *Bieber* case where the Montana Supreme Court opined the conclusions were attacked rather than methodology, in the case at bar the improper use of the FIRI program by Ohlson for an analysis FIRI was not designed to perform is a flawed methodology, leading to improper conclusions.

In *Cummins v. Lyle Industries, Inc.*, 93 F.3d 362, the federal court explained the application of *Daubert* in juxtaposition with Rule 702 in analyzing the proposed testimony of an expert by stating:

We begin with the first of the two inquiries mandated by *Daubert*-that the proposed testimony pertain to “scientific knowledge.” The Supreme Court in *Daubert*, noted that Rule 702 “clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify.” *Daubert*, 509 U.S. at 589, 113 S.Ct. at 2795. In carrying out this mandate, the Supreme Court held, the district court must ensure that “any and all scientific testimony or evidence admitted is not only relevant, but reliable.” *Daubert*, 509 U.S. at 589, 113 S.Ct. at 2795. An expert scientific opinion must be grounded in the “methods and procedures of science,” and must consist of more than simply “subjective belief or unsupported speculation.” *Id.* The Court explained:

[A]n inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation-i.e., “good grounds,” based on what is known. In short, the requirement that an expert’s testimony pertain to “scientific knowledge” establishes a standard of evidentiary reliability. *Id.*

As another panel of this court put it, “a district court asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist.” *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 318 (7th Cir.1996).

As our cases applying *Daubert* have recognized, the Supreme Court has articulated several nonexclusive guideposts to assist the district courts in determining whether expert testimony fairly can be characterized as a scientific opinion: (1) whether the proffered conclusion lends itself to verification by the scientific method through testing; (2) whether it has been subjected to peer review; (3) whether it has been evaluated in light of the potential rate of error of the scientific technique; and (4) whether it is consistent with the generally accepted method for gathering the relevant scientific evidence. *Deimer*, 58 F.3d at 344; see *Gruca v. Alpha Therapeutic Corp.*, 51 F.3d 638, 643 (7th Cir.1995); *Porter*, 9 F.3d at 615. The inquiry is a flexible one; the focus must be solely on principles and methodology, not on the conclusions they generate. *Daubert*, 509 U.S. at 595, 113 S.Ct. at 2797.

Cummins at 368.

Cummins has not been followed by all Circuit Courts because it has been criticized for being too restrictive in its analysis regarding application of *Daubert*. E.g. *Tassin v. Sears, Roebuck and Co.*, 946 F.Supp. 1241, (7th Cir. 1996). Some federal courts tend to be more liberal in *Daubert*’s application. *Id.* The Montana Supreme Court has constrained *Daubert* and hearings regarding pre-trial expert testimony admissibility determinations under Rule 702 M.R.Evid. to novel scientific analysis and has focused the analysis on methodology rather than the conclusions. *State v. Bieber*, 207 MT 262. It appears Montana leans toward the more restrictive application of *Daubert* in *Cummins* than the more liberalized application in other Circuits that have not necessarily followed *Cummins*.

Expert testimony based on subjective and errant use of a computer model has been excluded prior to trial by application of *Daubert*. In a case involving the subjective input of an expert on a trial and error basis until he reached the conclusion he apparently desired, the Court in *Perez-Hernandez v. Mitsubishi Motors*

Corporation, 2005 WL 6032881 (N.D.Ga), *aff'd* by *Perez-Hernandez v. Mitsubishi Motors Corporation* 2006 WL 3717902 (C.A.11 (Ga.))¹ excluded Plaintiff's expert testimony and stated:

Applying these criteria to the evidence presented to the Court, including Allen's testimony at the Hearing, the Court finds Plaintiffs have failed, significantly, to meet their burden to show the VDANL model produces reliable results. In fact, the Court concludes the roll gradient factor is subjectively unreliable. For example, Allen testified at length about the computer runs that were created as he developed the roll gradient number. Most of the computer runs are admittedly unreliable because the model was run using tires different than those actually on the car when the accident occurred. What the printout shows is that the model is run using varying inputs, such as the direction in which the steering wheel was turned by the driver, the intensity of the turn, and the speed of the car. As these inputs are varied subjectively by Allen, different results are produced until the model produces a result that Allen believes is consistent with the facts of the accident. For example, in running the model Allen varied the speed of the car from sixty-one to fifty-four miles per hour. Each change produced a different result. When a final set of parameters that Allen believes is consistent with the evidence was achieved, Allen accepted the value produced by the model for roll gradient and used that value to reach his design-defect opinion .

Plaintiffs failed to make a sufficient showing that the model has been generally accepted in the scientific community, particularly for the purpose for which Allen used the model in this case. Allen was not able to meet Plaintiffs' burden to show that the model has been peer reviewed, and he did not present sufficient information to evaluate the model's error rate or that it has been tested against objective standards or controls. In seeking to show that the model is credible and should be allowed, Allen identified people he claimed had validated it. He admitted on cross-examination, however, that one of the three individuals he mentioned as having validated the model, has testified in litigation that the model is misused by Allen when he applies it in the manner in which he applied it in this case. (Tr. at 134-35.) Evaluating the testimony of Allen at the Hearing in its entirety, along with the parties' submissions in this case, the Court concludes with respect to Allen's opinion based on the five characteristics for vehicle stability, that Plaintiffs have failed to prove by a preponderance of the evidence the reliability of the method used to calculate the four factors and/or the VDANL model method used to determine the roll gradient characteristic.

Having found Allen's calculation of the characteristics unreliable, his opinion based on them is precluded.

Perez-Hernandez at 6.

That the model has been or is used in vehicle evaluation and review, even by responsible persons, is not a substitute for a *Daubert* analysis. While use may be some evidence of acceptance within the scientific community, it is not necessarily evidence that the computer model is properly and reliably used in the application Allen wants to make of it here. In fact, Allen stated that the model was produced for a purpose different than the application he makes of it here. It is Plaintiffs' burden to show by a preponderance of the evidence that the model is reliable, including for the application to

¹ U.S.Ct. of App. 11th Cir. Rule 36-2, 28 U.S.C.A. An opinion shall be unpublished unless a majority of the panel decides to publish it. Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority. If the text of an unpublished opinion is not available on the internet, a copy of the unpublished opinion must be attached to or incorporated within the brief, petition, motion or response in which such citation is made.

which it was put in the Allen analysis. Plaintiffs fell far short of meeting their burden to allow use of the model in this case.

Perez-Hernandez at 6, FN 15.

Ohlson cannot independently verify any of the results he purports to represent as salvage water volume irrespective of whether it is deep percolation or runoff. The NRCS FIRI model itself is not the issue because the program does have legitimate application as a management decision tool. The issue is Ohlson's misapplication of the FIRI model to compute, and represent as factual, a defined quantity of water as salvage water to this Court. The other fiction represented by Ohlson is that the water rights listed on his report and associated flow rates represent the water available. These claims are all irrelevant to the analysis because the model requires an input of how much water the crop needs. There is no relationship between any of the claims listed as water sources and the results proffered by Ohlson although the inference is plainly there that the sources supply the water.² Ohlson's conclusions are baseless because the model he used cannot perform the function he used it for; therefore, his opinion is beyond unreliable.

Ohlson has no credentials as a hydrogeologist or hydrologist. Ohlson Deposition at _____. His role in computing salvage water with the FIRI program was to manipulate the best set of variables available within the program, none of which are linked specifically to the Catlin Springs claims (Affidavit of Russ Levens), to maximize the estimated runoff and deep percolation values the model generated (Affidavit of Russ Levens). Ohlson has **no** data concerning Catlin Springs tied to the use of the FIRI model (Affidavit of Russ Levens). Ohlson has no verification of any sort relative to any actual claimed water right. His methodology cannot meet Rule 702 M.R.Evid. reliability requirements and cannot satisfy a *Daubert* inquiry. CRLP has the burden to establish that the novel method reflected in Ohlson's testimony is relevant and reliable, and satisfies the *Daubert* requirements pertaining to novel scientific evidence intended to be presented from the methodology applied in his analysis.

It should also be pointed out that salvage water quantification is not a rough estimation procedure. If the 238 new acres receive water, under the previous decision in this case, it must be salvage water, and it must be so every year the acreage is irrigated. September 10, 2009 Order, Docket # 29. There can be no supplementation or substitution of Catlin Springs water for the required salvaged water. Order, Docket #29.

² The Court has already identified and excluded any source of water other than Catlin Springs as a claim that may be used to evaluate salvage water from as a source of savings. Order, Docket #104. Ohlson apparently was unaware of the Court's finding in this case regarding Cottonwood Creek and Ford Creek claims. Another slight of hand in Ohlson's testimony and affidavits is the reference to flow rate claims in excess of 85 cfs for Cottonwood Creek as true and correct representations of water volume when actual measurements were taken in 2008 and 2010 showing flow rates far below the claimed flow rates. CRLP continually represented the flow rate and volume associated with their measurements as accurate in Ohlson's affidavits and CRLP's briefing claiming Cottonwood Creek as a source of salvage water.

Therefore, Ohlson must affix a very reliable baseline quantity of bona-fide salvage water that is reasonably determined to exist annually, and critically, in drier years to ensure no expansion of Catlin Springs irrigation claims will occur as substituted water on new acreage with no water right associated with it. The 238 new acres must be 100% salvage water every year, and proof must be made of its availability no matter what the climatic conditions may be. Ohlson's analysis does not even address the specific burdens of proof identified by the Court, and furthermore the analysis embarks on an errant methodology rendering his conclusions unreliable by his own program's documentation.

Adverse affect must be eliminated by the Court for other appropriators by ensuring that salvage water is *always* available, or condition any future Order requiring the pivot to be shut down when climatic conditions do not support salvage water and determine a means to administer the condition. The quantity of salvage water and the reliability of its existence must be ensured by CRLP as part of its burden to ensure it irrigates only with qualified salvage water on the new 238 acres not in dispute. Failure to prove up 212 acres of historic irrigation requires an injunction and a return of CRLP to the Department for a permit since all 450 acres would be viewed as "new."

In CRLP's recent Reply Brief, CRLP represented to the Court that "Mr. Ohlson describes ditch losses from the historical flood irrigation system that occurred from ditch seepage between the point of diversion and where the ditch entered the field. These losses were estimated by using "NRCS approved engineering software." This statement is disingenuous at best. The software used is not approved for the purpose Ohlson and CRLP are representing -- quantifying a reliable and fixed baseline quantity of salvage water. NRCS is clear in its own program documentation that the use Ohlson made of the FIRI model is not acceptable and should not be considered reliable. DNRC Exhibit A, Affidavit of Russ Levens and A.1 and A.2-- FIRI documentation bearing the admonitions.

Ohlson, given his experience with the FIRI program, knew this but misrepresented the facts despite what the FIRI documentation states.³ Ohlson's analysis would be valid only if the inquiry were determining estimations for comparing seasonal irrigation on a tract of land or between methods of irrigation. The FIRI model has no nexus to actual historic consumptive or non-consumptive values tied to on-the-ground application of a particular claim-based water right. In short, the use of the FIRI model in Ohlson's methodology does not comply with the Court's evidentiary requirements outlined in its Order. Docket # 104 at 16.

³ Alternatively, if Ohlson had no knowledge or understanding of his misrepresentations based on his misuse of the model, his credibility, competence and qualifications as an Expert in using the model certainly are called into question.

The basis for the impropriety in methodology lies in the assumptions the FIRI program uses concerning water availability. The program has no inputs for actual historic consumptive or non-consumptive inputs that would be associated with a particular claim or water right nor does it deal with the fate of return flows, whether surface based or subsurface based. DNRC Exhibit A, Affidavit of Russell Levens. FIRI is designed to provide insight into whether a manager may change methods of irrigation, and is not designed to analyze relevant factors and variables in assessing salvage water under this Court's Order Denying Summary Judgment (Docket #104 at 16). DNRC Exhibit A, Affidavit of Russell Levens and attachments. The model provides relative values in comparisons of management options between irrigation methods or management changes over a season on a single parcel, It is a convenient tool to quickly run "what if" comparative models for the operator with theoretical constraints such as water availability.

The Department has recognized Ohlson's previous misuse of the FIRI model in a prior proceeding. In APPLICATION TO CHANGE A WATER RIGHT NO. 40A 30047511 BY SWANZ RANCH, LP (Preliminary Determination to Grant Change) DNRC Exhibit B, Ohlson estimated historic diverted volume with the FIRI model. *Swanz*, ¶27. The Department determined that the FIRI model "does not constitute substantial, credible information⁴ for diverted volume since it does not consider source water availability, or lack thereof, or actual historic diversions." Ohlson certainly knew of the limitations of the NRCS FIRI model yet has persisted in misusing the FIRI model in his consulting work here-- misrepresenting both the capabilities of the FIRI model and characterizations of volumes of water in the FIRI model program outputs. In short, FIRI has been disregarded as reliable as used by Ohlson in quantification of volumes of water when attempting to slide novel, mischaracterized methodology past a trier of fact as "NRCS approved methodology." The use Ohlson employed FIRI for in *Swanz* was in direct contravention of NRCS program documentation--just as he is now attempting to do in the instant proceedings for CRLP. See attachments to DNRC Exhibit A.

A hearing should be held before trial where Catlin Ranch, LP must demonstrate the following factors:

- (1) whether the theory or technique can be and has been tested;
- (2) whether the theory or technique has been subjected to peer review and publication;
- (3) the known or potential rate of error in using a particular scientific technique and the existence and maintenance of standards controlling the technique's operation; and

⁴ This is a lesser standard to meet in administrative proceedings than required by the M.R.Evid.

(4) whether the theory or technique has been generally accepted or rejected in the particular scientific field.

If any factor fails, the need for trial on the issue of salvage water no longer exists. Ohlson's analysis is the sum total of the evidence of salvage water CRLP indicated it will bring to trial. The FIRI model documentation itself rejects the methodology as used by Ohlson, and as such, the conclusions reached therein are unreliable because the methods applied to theoretical facts render them unreliable.

Other issues such as assessing the claimed historic irrigation of the anchoring 212 acres; abandonment of Cottonwood Creek and Ford Creek water rights; damages, if any, may proceed independently to trial. The exclusion of Ohlson's testimony regarding quantification of salvage water is attached to the 238 acres of new irrigation land. Failure of CRLP to prove 212 historically irrigated acres as the first element of the definition of "associated with" from the date of priority forward should result in all 450 acres being enjoined from irrigation under the present interpretation of §85-2-419, MCA.⁵

Attached to this Motion is the Affidavit of Russ Levens which highlights the appropriate use of FIRI and points out the most significant problems with how Ohlson used the FIRI program. Attached to the Affidavit are relevant warnings and instructional materials that plainly state the FIRI model is not to be used for the purpose Ohlson has used it for in this case. The Affidavit and FIRI warnings and lay bare the misrepresentations by CRLP in its Reply Brief and in Ohlson's attached Affidavit, marked as "Exhibit A" to the Reply Brief that its use was NRCS approved for deriving the representations Ohlson made of the results. NRCS does not sanction the use of FIRI for what CRLP Ranch has represented as a recognized proper use of FIRI. Therefore, the Court should conduct a hearing and assess CRLP's Expert's testimony to determine if Ohlson's testimony should be excluded based on Rule 702 M.R.Evid's reliability factors and failure of Ohlson's methodology to meet the requirements of *Daubert*. CRLP has the burden to qualify the expert and his testimony at a *Daubert* hearing regarding each and every aspect of the analysis and opinion in relation to all of the *Daubert* factors.

⁵ The Court's Order Denying Summary Judgment misstates the Department's position on the status of the 212 acres as not disputing the facts of historic irrigation of 212 claimed acres. When the Court interpreted the definition of "associated with," to mean "adjacent to," a new element of proof came into being in this District Court proceeding. "Associated with" has the anchoring, historically irrigated component that must first be proven to exist before the Court may move on the issue of salvage water and assessing the quantity that may be proven to irrigate the new adjacent land as the second component. DNRC has not relinquished, nor will it for purposes of this trial, its right to put CRLP to its burden of proof under the Montana Rules of Evidence that the historically irrigated land has been irrigated since the time stated on its claim(s) and to cross-examine and to present rebuttal evidence and testimony. There is most certainly a dispute about the historic irrigation of the claimed 212 acres. Any confusion may have arisen from accounting for 450 acres as claimed historic irrigation and undisputed new acreage of 238 acres being used as accounting for 450 acres in 2 categories -- claimed and new acreage. A "claim" of irrigation is proof of nothing in these proceedings and CRLP has the burden to prove its claim is real with evidence.

Respectfully submitted this 30th day of March, 2012.

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