

APPLICATION FOR

**DISTRICT COURT JUDGESHIP**  
**Eighteenth Judicial District**

**A. PERSONAL INFORMATION**

1. Full Name: David Langdon Weaver
  - a. What name do you commonly go by? Dave Weaver.
2. Birthdate: [REDACTED] Are you a U.S. citizen? Yes.
3. Home Address: [REDACTED]  
Phone: [REDACTED]
4. Office Address: 1700 West Koch, Ste. 4, Bozeman, MT 59715.  
Phone: Office (406) 586-0246 [REDACTED]
5. Length of residence in Montana: Forty-Two (42) Years.
6. Place of residence for the last five years:

<u>Dates</u>	<u>City</u>	<u>State</u>
2011 to Present	Bozeman	MT

**B. EDUCATIONAL BACKGROUND**

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

<u>Name</u>	<u>Location</u>	<u>Date of Degree</u>	<u>Degree</u>
Bozeman Senior High	Bozeman, Montana	1981	High School Diploma
Montana State University	Bozeman, Montana	1987	Bachelor of Arts/ Political Science

Gonzaga U. Law School      Spokane, Washington      1991      Juris Doctorate

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

I was on the Dean's List during undergraduate school at Montana 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.

I was not a member of the Law Review.

### C. PROFESSIONAL BACKGROUND AND EXPERIENCE

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

<u>Court or Administrative Body</u>	<u>Date of Admission</u>
Montana State District Court	1991
Montana Supreme Court	1991
Federal District Court for the State of Montana	1991
United States Court of Appeals for the 9 <sup>th</sup> Circuit	1991

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

I am the remaining partner in the law firm of Nash, Zimmer & Weaver, PLLC. The other principal partner was Sarah Nash Zimmer who recently retired. Donald Nash, now deceased, was the founding partner in the firm.

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>
Morrow, Sedivy & Bennett	Associate/Partner	1991-1995
Morgan, Cameron & Weaver	Partner	1995-1999
Five Rivers, Inc.	Legal Counsel	1999-2001

Nash, Zimmer & Weaver

Partner

2001 - present

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

I have continuously been employed since completing law school. In 1999 I left the formal practice of law to serve as legal counsel and construction supervisor for an environmental consulting and construction firm. I resumed private practice in 2001 with my present firm.

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.

I have a diverse practice and have performed a wide variety of services for my clients over the years. My present practice is a general civil practice focusing in the following areas:

Real Estate: sales, easements, land use/planning, development, farm & ranch, litigation (30%).

Business: contracts, transactions, entity formation, employment, litigation (30%).

Estate/Probate: drafting wills and trusts, estate planning, probates, litigation (15%).

Construction: liens, contracts, litigation (10%).

Water: water right adjudication, water permits, canal company issues, ditch easements, litigation (15%).

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

I have performed a limited amount of lobbying for individual clients regarding election law legislation. I performed limited criminal law services for my clients including representation of criminal defendants regarding fish and wildlife citations. I have represented insurance companies as defense counsel in personal injury and property damage cases. I have represented Plaintiffs in personal injury cases. I have represented banks and other creditors in Federal Bankruptcy proceedings. I have represented clients in adoption and parental termination proceedings. I have served as court appointed counsel and guardian ad litem in guardian and conservator cases for minors and elder persons. I have served as conservator for minors in regard to pending litigation and distributions of litigation proceeds.

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

I have obtained specialized knowledge of Montana water law.

17. Do you regularly appear in court? Yes.

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

Federal court	0%
State or local courts of record	98%
Administrative bodies	2%
Other	0%

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

Twenty percent (20%).

19. How frequently have you appeared in court?

Three to four times per year on average.

20. How frequently have you appeared at administrative hearings?

Two to three times per year on average.

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

Civil	100%
Criminal	0%
Other	0%

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.

My last appearance before the Montana Supreme Court was in December, 2011. Please see attached amicus brief in the matter of Town of Manhattan v. DNRC (Case No. DA 11-0342). I represented the Association of Gallatin Agricultural Irrigators (AGAI) in this matter involving the issuance of a new water permit for the City of Manhattan. The names and contact information for counsel involved in this case are set forth in the attached brief on the page entitled "Appearances."

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

One (1).

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

Four (4).

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.

(See attached)

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

I have represented clients before the Bozeman City Commission and the Gallatin County Commission primarily in regard to real estate development and/or land use issues. I have represented clients before the Department of Natural Resources and Conservation.

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.

I have not published a legal book or article. I did lecture on the United States Supreme Court case regarding the payment of rent to the State of Montana from hydroelectric facilities located within navigable water ways in Montana at the annual Montana Water CLE in 2009. The purpose of this lecture was to provide an outline of the constitutional issues involved and the implications of this decision to Montana water users.

#### **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.

Member Montana State Bar Association beginning 1991.

Member Gallatin County Bar Association beginning 1991. (Past Chairman of the Pro Bono Committee, Past Secretary, Past Vice President and Past President in the late 1990's early 2000's)

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.

In the past five years I have been actively involved in the following:

Chairman of Friends of Law & Justice. (A ballot/initiative citizens group organized to advocate for the passage of the upcoming bond for the construction of new law enforcement and judicial buildings in Gallatin County) (March 2015 to present)

Member Board of Directors Alcohol and Drug Services of Gallatin County (ADSGC is a non-profit entity offering addiction treatment services for low to moderate income persons) (2014 to present).

Member Advisory Committee to Gallatin County Criminal Justice Coordinating Council (CJCC is organized to study the Gallatin County juvenile and adult criminal justice system and to identify deficiencies, raise public awareness, consolidate efforts and formulate policy, plans and programs to improve the system) (2006 to 2016).

Member/Chairman Board of Directors Gallatin County Capital Improvement Planning Committee. (The Gallatin County CIP principal mission is to identify deficiencies, raise public awareness and formulate

policy, plans and programs for recommending capital improvement projects to the Board of County Commissioners) (2004 to present).

Member Board of Directors for Bridger Bowl Ski Area (June 2016 to present).

Ex-Officio Board Member of Association of Gallatin Agricultural Irrigators (2004 to present).

Member National Eagle Scout Association (1978 to present).

Member Montana State University Alumni Association (1989 to present).

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

I have not run for, nor held public office.

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

I have had the good fortune of being able to work and raise my family in the greater Bozeman community and my family and I have benefited from all our community has to offer. Being able to serve my community is my way of “paying forward” my gratitude for what my community has provided me. I have a strong belief in public involvement and community service demonstrated by my activities listed above. My service philosophy is to engage in activities where I believe I can most effectively contribute, given my strengths and abilities. I also believe that as an attorney, I have certain skills acquired as a result of my education and training that should be utilized, not only in my business as an attorney, but also in service to my community. In addition to my sense of obligation for community service, I also have learned that some of the greatest satisfaction I have achieved as an attorney has been as a result of my community service.

#### **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.

In 1999 I had an opportunity to expand my work experience by serving as legal counsel and as a construction supervisor for a Bozeman based environmental consulting and construction firm. I primarily worked in the area of acquiring state and federal permitting for the development of streams, ponds and wildlife habitat. This work was performed in Montana, Wyoming, Colorado and New Mexico. I resumed private practice in 2001 with my present firm.

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 at this time an officer, director or otherwise engaged in the management of any other for profit business. As set forth above, I am presently serving as a member of the Board of Directors for Alcohol and Drug Services of Gallatin County, the Association of Gallatin Agricultural Irrigators and the Gallatin County Capital Improvements Planning Committee. If appointed to the position of District Court Judge, I will immediately resign my positions with all of these entities. Also as stated above, I am presently serving on the Board of Directors for Bridger Bowl ski area, a non-profit entity. If appointed to the position of District Court Judge I would likewise resign this position unless it can be clearly determined that holding such position does not violate judicial rules of ethics and in no way creates the appearance of impropriety.

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.

I have not received any fees of compensation in the past five years other than for legal services rendered by me.

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.

None.

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

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 have always performed my own research and writing other than in those cases where I was serving as co-counsel with attorneys from other law firms. In the past five years I have undertaken research projects regarding public and private easements, subdivisions law and regulations, construction lien law, insurance coverage for construction claims, real estate contract law, trust administration, and the fiduciary duties of trustees. Not all of these projects were undertaken for the purpose of drafting legal briefs filed with a Court. Most were undertaken for the purpose of providing clients detailed information on issues of potential or pending litigation.

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.

A significant portion of my practice is transactional in nature. Accordingly, I spend a great deal of time drafting real estate documents, contracts, business formation and operational documents and other agreements. I spend a significant portion of my time drafting wills, trusts and other estate planning documents as well as probate documents.

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.

(Please see attached writing sample. For purposes of Question 22, I have also attached a copy of the last brief I participated in writing for submission to the Montana Supreme Court. In addition to helping to write other portions of the brief, I individually wrote that portion of the brief contained in Arguments I and II.)

48. What percentage of your practice for the last five years has involved research and legal writing?  
Twenty percent (20%)
49. Are you competent in the use of Westlaw and/or Lexis?

I use Lexis in my office at this time and I believe I am competent in its use.

## H. MISCELLANEOUS

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

I am married with one son from a former marriage, Ean, age 23, and two step children, Whitney age 28 and Will, age 26. My wife Gina and I spend as much time as possible with our three children enjoying typical Montana activities such as skiing, camping, hiking and fishing. I take time for myself to enjoy golf, bird hunting, fishing and photography. I also enjoy reading historical biographies, particularly biographies of figures in United States history. Gina and I also have a large and varied group of friends

with whom we enjoy spending time.

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

In addition to my legal career set forth above, I worked at Columbia Paint Store in Bozeman and as the manager of a small ranch outside Bozeman while attending undergraduate school. My duties at the paint store included customer service and sales, servicing equipment, and assisting the store manager. While working on the ranch, I was responsible for taking care of a small herd of cattle and other general ranching duties. As set forth above, I left the formal practice of law in 1999 to serve as legal counsel and construction supervisor for a Bozeman based environmental consulting and construction firm. I primarily worked in the area of state and federal permitting for the development of streams, ponds and wildlife habitat. I also performed the duties of a construction supervisor for large environmental construction projects. This work was performed in Montana, Wyoming, Colorado and New Mexico.

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

I spent the past twelve years representing the Association of Gallatin Agricultural Irrigators. This work has primarily been in regard to the formation, organization and operation of this non-profit corporation organized to protect the interest of senior water right owners in the Gallatin Valley and to educate the community on water use issues. I have volunteered approximately 50 to 60 hours per year for the past twelve years to this organization. I have also advised numerous persons in the community who could not afford legal assistance in areas of real estate transaction, landlord tenant disputes, employment issues and estate planning.

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

The most recent event to influence my view of our system of justice has been the result of my work to organize and chair a local citizens group. Friends of Law & Justice advocates for the passage of the upcoming bond issue in Gallatin County for the construction of a new joint city/county law enforcement and judicial facility. Beginning with my service on the County Capital Improvement Planning Committee, I have been working on this project for the last ten years. This past year my work to organize the Friends of Law and Justice Committee (which has raised approximately one hundred thousand dollars to fund the advocacy and community education campaign) required that I spend significant time with members of the public discussing and promoting this project. My work in reaching out to the community for support has impressed on me the fundamental importance of the rule of law to our community and the necessity for adequate facilities to insure fair and effective justice. At the beginning of this project I was somewhat skeptical of whether the community would fully appreciate the need for adequate judicial facilities required for the safe and timely administration of justice. What has been most rewarding about this process is, in fact, the incredible support and understanding from the community of the need for such facilities. My work on this project and the support from our community for the project has influenced my view of our judicial system by showing me that in addition to good judges and adequate facilities, our system of justice also requires community understanding and support which I believe we presently have in Gallatin County.

I also believe the late Gallatin County District Court Judge Mark Guenther influenced the way I view our system of justice, specifically my opinion of what a District Court Judge should be. I have the privilege of working in the firm in which Judge Guenther practiced before serving on the bench. I also had the privilege of appearing in his Court and getting to know him after he was elected. Judge Guenther was a dedicated public servant with a tremendous sense of obligation to his community. He was compassionate and served our community with the strength of his convictions. He demonstrated tremendous personal courage. Judge Guenther influenced the way I view our system of justice by showing me that a District Court Judge must, in addition to many other things, be humane.

My ethics professor in law school, Jerry Hess, concluded his class at the end of a semester of instruction in legal and professional ethics by telling the class "If it is necessary for you to review or research the rules of professional conduct as an attorney to determine whether your actions are ethical, you have already gone too far." This statement has always guided me in my practice of law and served as a reminder to me that the professional and ethical conduct of attorneys and judges is crucial to the effectiveness of our justice system. Such behavior is necessary for the proper expectation of justice which our judicial system demands. I believe my professor was trying to tell me that although we have a specific set of ethical rules to follow as attorneys and judges, those rules are intended only to establish minimum standards of conduct. It is incumbent upon attorneys and judges to constantly strive for the highest standards of conduct in order to maintain and increase public confidence in our justice system. My instructor's parting wisdom, in retrospect, influenced my view of our system of justice by showing me that my ethical and professional conduct as an attorney is required not only for the preservation of our judicial system but more importantly it is required for my personal well-being.

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

This question, more than any other, has caused me to critically evaluate my decision to file this application. A District Court Judge must be someone who is regarded by the community as being fair, impartial, open minded, compassionate, intelligent, ethical, and moral. A District Court Judge must be respected for these qualities at all times. In addition, I think a District Court Judge should possess the ability to listen, work hard, learn, be decisive, and speak and write with conviction. I think a District Court Judge should possess the ability to separate or distinguish a person's behavior from the person when possible. In other words, a District Court Judge must be able to judge people and their actions without being judgmental. I believe a good District Court Judge must have a substantial personal and professional history with his or her community in order to be fully aware of community issues and values. Last but not least, I believe a District Court Judge should have the ability to apply common sense to any and all matters before the Court. I believe I have these qualities and would make a good District Court Judge for Gallatin County. I look forward to the opportunity to serve my community in this capacity.

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.

Let me first state that I agree with the premis of the question. A Court, in order to achieve justice, must often balance the rule of precedent with the necessary flexibility in the law to deal with specific facts and circumstances. I believe this balance is achieved in the following way. The Court must first

accurately and thoroughly determine the relevant facts of the matter. Second, the Court must determine the applicable law of the case. Third, the Court must apply the relevant facts to the applicable law to make a just decision. If application of the facts to the applicable law guides the Court to a clear and unambiguous determination of the matter, the rule of precedent must be followed regardless of the outcome. This is required for the fair and orderly function of our community. If and only if the facts and circumstances of a case before the Court present an issue which cannot be clearly resolved within the body of existing applicable law or if to yield to the rule of precedent would result in a grossly unjust or inequitable result, the Court may, in its sound discretion, apply contemporary standards of fairness and justice to accomplish a just resolution. In so doing, the Court must, in my opinion, rigorously apply community values and provide a detailed analysis to identify and clarify sufficient circumstances under which the rule of precedent should be suspended and contemporary standards of justice applied. In other words, in these situations, the Court must serve as the conscience of the community in order to fashion the appropriate remedy or relief demanded by such circumstances to satisfy the local community's expectation of justice.

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

I am seeking this appointment because I want to serve my community as a District Court Judge. I spoke with several active and retired District Court Judges before submitting this application. I asked all of them what they valued most about being a District Court Judge. Although their specific answers varied, the one answer they all had in common was the professional and personal satisfaction of serving their communities. The most satisfying aspect of practicing law to me is solving a problem for my clients. I believe that being a District Court Judge will fulfill my professional desire to help solve problems and perform community service at a higher level.

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

I am most proud of my representation of clients in a civil action against Park County, Montana involving my clients' right to vote in Montana. I, along with co-counsel, was able to secure a favorable decision from the District Court resulting in my clients being able to continue to exercise their election franchise in Park County, Montana. I am particularly proud of my work in this case because it was an extraordinarily complex legal and procedural issue and involved the protection of perhaps the most fundamental right afforded citizens in a democracy, the right to vote. My clients were thrilled with the outcome and the results of the litigation have positively affected the rights of other persons similarly situated to my clients but not directly involved in the litigation.

I am also very proud of the work I do for the Association of Gallatin Agricultural Irrigators. This organization was founded for the purpose of protecting historically decreed water rights in the Gallatin River system and to promote sound water conservation efforts in the Gallatin Valley. I represented this organization through its formation, drafting mission statements and developing policy. This organization is comprised of approximately 35 canal and ditch companies in the Gallatin Valley and represents more than a thousand water right holders in the Gallatin Valley.

I am very proud of my work described above in the formation and leadership of the Friends of Law and Justice and the work I have directed and accomplished to educate and advocate for the passage of the bond for the much needed new law enforcement and judicial facilities in Gallatin County.

As a general comment, I am proud of my professional reputation for applying a common sense problem solving approach to the practice of law.

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

Pertinent information reflecting positively on me is set forth in this application, in particular my community service work.

I also want to make certain the Committee is aware the County Attorney in Gallatin County, Marty Lambert, is my brother-in-law. Mr. Lambert is married to my sister. I have discussed the possibility of me becoming a District Court Judge in Gallatin County with Mr. Lambert and with the State Bar Association. With assistance from the State Bar Association, which they have offered, appropriate protocols can be drafted regarding this relationship. I have complete confidence that Mr. Lambert and I can perform our respective duties without interference or compromising our ethical responsibilities.

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 am viewed by my clients, colleagues, family and friends as well spoken, fair, trustworthy and open minded. I have the ability to examine any situation from differing points of view.

I have a strong sense of community. I grew up in Bozeman and have lived in Bozeman for the past forty-two years. As a result of my growing up in Bozeman and volunteering significant time to local agencies and organizations, I believe I have a strong appreciation for the needs and values of my community.

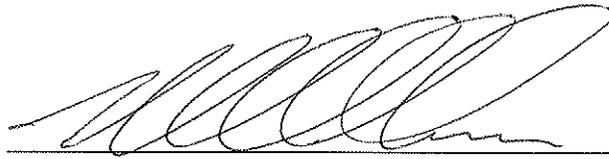
I have a strong sense of family. My wife and I have been married for 20 years and have three children from previous marriages. All of our children have or are receiving college educations. We are very proud of our efforts and success in blending our families and creating a strong family for the benefit of our children and ourselves. These successful efforts have given me a great deal of personal confidence and a tremendous understanding and appreciation for the importance of family.

### **CERTIFICATE OF APPLICANT**

I understand that the submission of this application expresses my willingness to accept appointment as District Court Judge for the 18th 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.

9/20/16

(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 Wednesday, September 21, 2016.*

**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)**

**APPLICATION  
DISTRICT COURT JUDGESHIP  
EIGHTEENTH JUDICIAL DISTRICT  
QUESTION NO. 25 / ADVERSE COUNSEL**

1. Philip S. Chiaviello  
P.O. Box 21  
Livingston, MT 59047  
(406) 224-1108

Construction Case.

M&W Homes, L.P. v. Amy Knoll d/b/a Absaroka Knoll Construction/Cause No. DV 16-97.

Matter settled prior to trial.

Presiding Judge: Hon. Brenda Gilbert (406) 222-4132.

2. Alanah Griffith  
108 N. 11<sup>th</sup>, Unit 1  
Bozeman, MT 59715  
(406) 624-3585

Peter Dayton

Worden & Thayne, PC

111 N. Higgins Ave., Ste. 600

Missoula, MT 59806-4747

(406) 721-3400

Margot B. Ogburn

777 East Main St., Ste. 203

Bozeman, MT 59771

(406) 219-1815

Easement Case.

Robert & Loretta Lindstrom et. al. v. Montana Mountain Riders, LLC et.al./

Cause No. DV15-713B.

Matter is pending and not yet set for trial.

Presiding Judge: Hon. Mike Salvagni (406) 582-2140.

3. Edward J. Guza  
25 Apex Dr., Ste. A  
Bozeman, MT 59718  
(406) 586-2228

Real Estate Ownership Case.

Suit has not yet been filed.

4. Will Brooke  
602 South Ferguson Ave., Ste. 6  
Bozeman, MT 59718  
(406) 585-8111

Entity/Member distribution dispute.

Robert Sumpter v. Hollow top Partners, LLC/ Cause No. DV-12-77A.

Matter resolved prior to trial.

Presiding Judge: Hon. Holly Brown (406) 582-2160.

5. Abigail R. Brown

Moore, O'Connell & Refling

P.O. Box 1288

Bozeman, MT 59771-1288

(406) 587-5511

Interference With Irrigation Canal Dispute.

Suite was not filed.

6. Mark D. Parker

401 N. 31<sup>st</sup> St., Ste. 805

P.O. Box 7212

Billings, MT 59103-7212

(406) 245-9991

Insurance Agent Contract Dispute. I represented interested unnamed party in regards to depositions and subpoenas for production of evidence.

Farmers Insurance Exchange v. David S. Goldan / Cause No. DV10-651A.

Presiding Judge: Hon. Holly Brown (406) 582-2160.

7. Rebecca H. Pape

Pape Law, PC

26 East Mendenhall

P.O. Box 1601

Bozeman, MT 59771-1601

(406) 522-0014 Ext. 1

Road Easement Dispute.

Suit was not filed.

**APPLICATION  
DISTRICT COURT JUDGESHIP  
EIGHTEENTH JUDICIAL DISTRICT  
QUESTION NO. 47 / WRITING SAMPLE**

1 David L. Weaver  
NASH, ZIMMER, WEAVER & GRIGSBY, PLLC  
2 1700 West Koch, Suite 4  
P.O. Box 1330  
3 Bozeman, MT 59718-1330  
Telephone: (406) 586-0246  
4 Fax: (406) 586-0021

5 Attorney for John D. Peebles &  
William S. Peebles

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7  
8  
9 MONTANA NINTH JUDICIAL DISTRICT COURT, TETON COUNTY

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12 MONTE GIESE, STEVEN KELLY,  
and WILLIAM REICHEL  
13 Petitioners,

14 vs.

15 LEONARD BLIXRUD, in his capacity  
as Water Commissioner for the Perry v.  
16 Beattie Decree, Cause No. 371, Mont. Ninth  
Judicial District Court, and JOHN DOES 1  
17 through 5,  
18 Respondent.

Cause No. DV-11-009

**POINT BRIEF FOR SHOW  
CAUSE HEARING**

19 \* \* \* \* \*

20 **COME NOW** John D. Peebles & William S. Peebles, by and through their undersigned  
21 counsel of record, and pursuant to this Court's March 14, 2011 Order Setting Show Cause  
22 Hearing, hereby submits the following point brief on the issues identified by the Court for  
23 hearing on April 19, 2011.

24 **INTRODUCTION**

25 John D. Peebles & William S. Peebles are the owners of water rights on the Teton River,  
26 which water rights were part of the Perry v. Beattie Decree, Case No. 371, Teton County, and  
27

1 which water rights are part of the Water Court adjudication of Basin 410. The Peebles are  
2 therefore interested water users for purposes of the above entitled action. Pebbles assert they, as  
3 junior water right holders under the Perry v. Beattie Decree, Case No. 371, will be required to  
4 discontinue their diversion of Teton River water significantly earlier than they have historically  
5 had to in the event the conveyance of senior water rights under the Perry v. Beattie Decree, Case  
6 No. 371, through the Bateman Ditch is prohibited, which distribution has occurred for more than  
7 fifty years.

8 Petitioner are the owners of water rights on the Teton River which are not part of the  
9 Perry v. Beattie Decree, Case No. 371, Teton County and which have not been fully adjudicated  
10 by the Montana Water Court.

11 Petitioners in the above-captioned matter filed a petition for a writ of prohibition  
12 commanding the water commissioner for the Perry v. Beattie decree, Case No. 371, Teton  
13 County, to “not divert water down the Bateman Ditch other than the 1500 miner’s inches (37.5  
14 cfs) that have been decreed to the predecessor of Patrick Saylor...” 1<sup>st</sup> Amend. Pet. for Writ of  
15 Prohibition 6 (Mar. 23, 2011). The Court in its Order dated March 14, 2011 identified four (4)  
16 preliminary issues for review at the hearing set for April 19, 2011 and invited objections,  
17 motions, and briefs from any interested water user.

18 The four (4) preliminary issues identified by the Court are:

- 19 1. Plaintiff’s standing to contest the method of distribution of that section of the  
20 Teton River being distributed pursuant to the Perry v. Beattie decree;
- 21 2. The applicability of the writ of prohibition statutes, section 27-27-101, MCA  
22 in the context of a water dispute along a decreed portion of the river where there is  
23 an appointed water commissioner;
- 24 3. Consolidation of this matter into the Perry v. Beattie, Case No. 371, and
- 25 4. Petitioners’ reasons, basis, and legal authority for initiating a lawsuit prior to  
26 issuance by the Montana Water Court of its final decree, with all objections

1 resolved.

2 As set forth below, the Petitioners' request for issuance of a writ of prohibition is not an  
3 appropriate remedy at this time because the act sought to be prohibited is within the water  
4 commissioners jurisdiction and because Petitioners have other remedies available to them.  
5 Furthermore, until such time as the Water Court issues its final decree in Basin 41O, the water  
6 rights at issue in this matter will not have been fully determined for purposes of resolving  
7 distribution disputes. Accordingly, the Peebles request the Court dismiss the Petitioner's claim  
8 for issuance of a writ of prohibition.

9  
10 **I. PLAINTIFFS STANDING UNDER MONT. CODE ANN. § 85-5-301**

11 Assuming the Petitioners own a valid water right claiming the Teton River as a source,  
12 Petitioners would have standing to pursue a dissatisfied water user action pursuant to Mont. Code  
13 Ann. § 85-5-301. Mont. Code Ann. § 85-5-301(1) entitled Complaint by Dissatisfied User states:

14 (1) A person owning or using any of the waters of the stream or ditch or  
15 extension of the ditch who is dissatisfied with the method of distribution of the  
16 waters of the stream or ditch by the water commissioner or water commissioners  
17 and who claims to be entitled to more water than the person is receiving or to a  
right prior to that allowed the person by the water commissioner or water  
commissioners may file a written complaint, duly verified, setting forth the facts  
of the claim. (emphasis provided)

18 Upon the Water Court determining the validity of Petitioners' water rights in the  
19 adjudication of Basin 41O, the clear and plain meaning of Mont. Code Ann. § 85-5-301(1) would  
20 afford Petitioners standing to bring a dissatisfied water user action seeking to enforce the relative  
21 priority of their water rights in the Teton River. This Court has previously held, "Nothing in  
22 section 85-5-301, MCA, requires that a water user hold a decreed water right. The statute allows  
23 a person 'owning or using' any of the water of a stream to bring an action." Order Regarding  
24 Dissatisfied Water User Complaint of Teton Coop. Reservoir Co. (Sept. 18, 2009), Perry v.  
25 Beattie, Cause No. 371. Assuming the Water Court determines the Petitioners in fact own  
26 enforceable water rights in the Teton River, they would have standing to bring a dissatisfied  
27

1 water user action pursuant to Mont. Code Ann. § 85-5-301. Peebles, although acknowledging  
2 Petitioners may have standing for such an action, in no way acknowledge Petitioners have a  
3 cause of action or would be entitled to relief under such action.  
4

## 5 II. APPLICABILITY OF WRIT OF PROHIBITION

6 Mont. Code Ann. § 7-27-101 entitled Definition and Function of Writ of Prohibition  
7 states:

8 The writ of prohibition is the counterpart of the writ of mandate. It arrests the  
9 proceedings of any tribunal, corporation, board, or person exercising judicial  
10 functions when such proceedings are without or in excess of the jurisdiction of  
11 such tribunal, corporation, board, or person. (*emphasis provided*)

12 Mont. Code Ann. § 7-27-102 entitled Issuance of Writ states:

13 A writ of prohibition may be issued by the supreme court or the district court or  
14 any district judge to any lower tribunal or to a corporation, board, or person in all  
15 cases in which there is not a plain, speedy, and adequate remedy in the ordinary  
16 course of law. The writ is issued upon an affidavit on the application of the person  
17 beneficially interested. (*emphasis provided*)

18 Before a writ of prohibition may be granted the parties seeking the writ must demonstrate the acts  
19 by public officials are clearly unlawful. Kimble Props., Inc. v. State, 231 Mont. 54, 56, 750 P.2d  
20 1095, 1096 (1988) Such a writ is disfavored by the courts, and is appropriate only where no  
21 other remedy is available. Kimble Props., Inc. v. State, 231 Mont. 54, 56, 750 P.2d 1095, 1096  
22 (1988). The decision to grant or deny a writ of prohibition is within the Court's discretion and  
23 will not be disturbed on appeal, even if conflicting evidence exists, so long as the record  
24 demonstrates substantial evidence in support of the Court's conclusion. State ex rel. Ellan v. 8<sup>th</sup>  
25 Jud. Dist. Ct., 97 Mont. 160, 33 P.2d 526, 529 (1934); *see also*, Christopherson v. State, 226  
26 Mont. 350, 354, 735 P.2d 524, 527 (1987) (upholding district court's decision on mandamus  
27 action where record was supported by substantial credible evidence); Goyen v. City of Troy, 276  
28 Mont. 213, 223, 915 P.2d 824, 830 (1996) (grant or denial of writs of mandamus and prohibition  
reviewed for correctness of law).

1           **A. The Water Commissioner Is Acting Within His Jurisdiction.**

2           Mont. Code Ann. § 85-5-101 entitled Appointment of Water Commissioners states:

3                     (1) Whenever the rights of persons to use the waters of any stream,  
4                     ditch or extension of ditch, watercourse, spring, lake, reservoir, or  
5                     other source of supply have been determined by a decree of a court  
6                     of competent jurisdiction, including temporary preliminary,  
7                     preliminary, and final decrees issued by a water judge, it is the duty  
8                     of the judge of the district court having jurisdiction of the subject  
9                     matter, upon the application of the owners of at least 15% of the  
10                    water rights affected by the decree, in the exercise of the judge's  
11                    discretion, to appoint one or more commissioners. The  
12                    commissioners have authority to admeasure and distribute to the  
13                    parties owning water rights in the source affected by the decree the  
14                    waters to which they are entitled, according to their rights as fixed  
15                    by the decree and by any certificates, permits, and changes in  
16                    appropriation right issued under chapter 2 of this title. When  
17                    petitioners make proper showing that they are not able to obtain the  
18                    application of the owners of at least 15% of the water rights  
19                    affected and they are unable to obtain the water to which they are  
20                    entitled, the judge of the district court having jurisdiction may  
21                    appoint a water commissioner. (*emphasis provided*)

22           Mont. Code Ann. § 85-5-101(1) grants water commissioners the authority to distribute  
23           decreed water rights. Accordingly, the water commissioner is acting in a lawful manner within  
24           his jurisdiction when he distributes water through the Bateman Ditch to senior water users under  
25           the Perry v. Beattie decree. Petitioners' application for a writ of prohibition should therefore be  
26           denied.

27           Furthermore, a writ of prohibition may not "restrain a ministerial, executive or  
28           administrative function, no matter how illegal the act thereunder may be so long as the tribunal  
29           sought to be restrained has jurisdiction of the subject matter in controversy." State v. Mont.  
30           Livestock Sanitary Bd., 135 Mont. 202, 209, 339 P.2d 487, 491 (1959). A mistake as to the  
31           body's jurisdiction does not justify a writ. *Id.* In order to obtain a writ of prohibition, the  
32           moving party must demonstrate a body's proceedings are clearly unlawful. Bitterroot River  
33           Protection Assn., Inc. v. Bitterroot Conserv. Dist., 2002 MT 66, ¶ 9, 309 Mont. 207, 45 P.3d 24  
34           (citations omitted). Thus, a writ of prohibition should be granted only where the body is acting  
35           clearly outside its authority. *Id.* Inconvenience alone is insufficient to invoke the extraordinary

1 remedy of a writ of prohibition. Malta Irrigation Dist. v. Mont. Bd. of Health and Env'tl. Scis.,  
2 224 Mont. 376, 382, 729 P.2d 1323, 1327 (1986).

3 Petitioners seek to prohibit the water commissioner from distributing water down the  
4 Bateman Ditch except for 1,500 miner's inches decreed to Patrick Saylor's predecessor-in-  
5 interest. As set forth above, water commissioners have the lawful authority to distribute to the  
6 parties owning water rights the water rights to which they are entitled. Therefore, the water  
7 commissioner's actions of distributing the water decreed under Perry v. Beattie through the  
8 Bateman Ditch to senior users is within the water commissioner's jurisdiction and may not be  
9 prohibited by issuance of a writ of prohibition. This is particularly true because the Perry v.  
10 Beattie decree does not set forth points of diversion nor limit the water commissioners ability to  
11 distribute such water. The Perry v. Beattie decree only sets forth flow rates, ownership, and  
12 priority dates. *See generally*, Perry v. Beattie, Cause No. 371, Teton County.

13  
14 **B. Other Remedies Are Available to Petitioners.**

15 Writs of prohibition are justified "only by extreme necessity, when the grievance cannot  
16 be redressed by ordinary proceedings at law, or in equity, or by appeal." State v. J. Ct., 192  
17 Mont. 95, 96, 626 P.2d 836, 837 (1981), *quoting* State v. Booher, 43 Mont. 569, 118 P. 271  
18 (1911); *see also*, Christopherson, 226 Mont. at 355, 735 P.2d at 527 (citation omitted). A writ  
19 should not be granted where specific statutory remedies are available. State v. 8<sup>th</sup> Jud. Dist. Ct.,  
20 139 Mont. 573, 576, 366 P.2d 435, 437 (1961). Furthermore, a right to judicial appeal will  
21 defeat a writ of prohibition unless the appeal's slowness is likely to produce immediate injury or  
22 mischief. Malta Irrigation Dist. v. Mont. Bd. of Health and Env'tl. Scis., 224 Mont. 376, 381, 729  
23 P.2d 1323, 1326 (1986) (citation omitted).

24 As set forth above, Petitioners may pursue any claims they have relative to the  
25 distribution of water by means of a dissatisfied water user action pursuant to Mont. Code Ann. §  
26 85-5-301. It is note worthy that Plaintiff Charles Fellows, in Case DV-11-01 filed in this Court,  
27

1 is seeking to have the use of the Bateman Ditch by the water commissioner to distribute senior  
2 water rights discontinued. In his Verified Complaint Mr. Fellows has asserted six (6) claims  
3 other than writ of prohibition, including dissatisfied water user action, declaratory judgment,  
4 injunctive relief, private nuisance, public nuisance, and negligence. Although these claims have  
5 not been asserted by Petitioners in this case, it appears remedies other than a writ of prohibition  
6 are available to Petitioners.

7 Additionally Petitioners have failed to demonstrate any extreme necessity required for the  
8 issuance of a writ of prohibition. Water commissioners have used the Bateman Ditch to distribute  
9 water other than Mr. Saylor's 1,500 miner's inches for more than fifty years without objection  
10 from Petitioners or their predecessors.

### 11 **III. CONSOLIDATION INTO CASE 371**

12 As set forth above, Petitioners' claim for issuance of a writ of prohibition should be  
13 denied by this Court. Assuming the Court agrees with Peebles that Petitioners' request for  
14 issuance of a writ of prohibition should be denied and because Petitioners have made no other  
15 claims for relief at this time, there is no case to be consolidated into Perry v. Beattie, Case No.  
16 371, Teton County.

### 17 **IV. LAWSUIT PRIOR TO FINAL DECREE FROM WATER COURT**

18 The Water Court has the sole jurisdiction to determine existing water rights. *See, In Re*  
19 Deadman's Basin Waters Users Assn., 2002 MT 15, ¶ 15, 308 Mont. 168, 40 P.3d 387. "District  
20 courts are granted the authority to supervise the distribution of water that has already been  
21 adjudicated and to enforce such water decrees." Baker Ditch Co. v. Dist. Ct., 251 Mont. 251,  
22 255, 824 P.2d 260, 262-63 (1992). As set forth above, the Peebles' water rights in the Teton  
23 River were adjudicated in the Perry v. Beattie decree, Case No. 371, Teton County. Petitioners'  
24 water rights have not been adjudicated by either a District Court or the Montana Water Court.  
25 Until the Water Court completes its adjudication of Petitioners' water rights it is not possible for  
26  
27

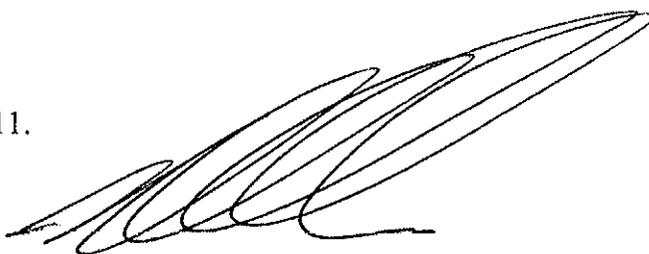
1 the District Court in this case to determine or enforce the relative priorities of Petitioners' water  
2 rights for purposes of overseeing the distribution of Teton River water. For the Court to afford  
3 Petitioners the relief they seek, the Court would in effect be usurping the Water Court's  
4 jurisdiction and authority to adjudicate the validity and/or priority of Petitioners' water rights.  
5

6 **CONCLUSION**

7 Petitioners are not entitled to the relief of the issuance of a writ of prohibition for the  
8 reason that the water commissioner is acting within his jurisdiction and authority to continue the  
9 historic practice of conveying senior water rights under the Perry v. Beattie Decree, Case No.  
10 371, through the Bateman Ditch. Additionally, as set forth above, Petitioners have other  
11 remedies available to them which preclude the Court from issuing a writ of prohibition in this  
12 case. For these reasons, Peebles respectfully request the Court deny Petitioner's request for  
13 issuance of a writ of prohibition.

14 Until such time as the Petitioner's water rights have been fully adjudicated by the  
15 Montana Water Court, the Peebles respectfully request the Court maintain the status quo of the  
16 historic use of the Bateman Ditch by the water commissioner to convey senior water rights other  
17 than Mr. Saylor's to senior water right owners under the Perry v. Beattie Decree, Case No. 371.  
18

19  
20 **DATED** this \_\_\_\_ day of April, 2011.



21  
22 DAVID L. WEAVER  
23  
24  
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26  
27  
28

IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 11-0342

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TOWN OF MANHATTAN,

Petitioner and Appellant,

v.

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

OF THE STATE OF MONTANA,

Respondent and Appellee.

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**TROUT UNLIMITED &  
ASSOCIATION OF GALLATIN AGRICULTURAL IRRIGATORS  
AMICUS CURIAE BRIEF**

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On Appeal from the Montana Eighteenth Judicial District Court

Cause No. DV-09-872C, Honorable John C. Brown

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