

APPLICATION FOR

**DISTRICT COURT JUDGESHIP
Fifth Judicial District**

A. PERSONAL INFORMATION

1. Full Name: **ALICE SUZANNE NELLEN**
a. What name do you commonly go by? **A. SUZANNE NELLEN**
2. Birthdate: [REDACTED] Are you a U.S. citizen? **YES**
3. Home Address: [REDACTED]
Phone: [REDACTED]
4. Office Address: **A. SUZANNE NELLEN, ATTORNEY AT LAW, PLLC
1800 W. KOCH STE. 5, BOZEMAN MT 59715**
Phone: **406-587-4427**
Office #2 Address: **MADISON COUNTY, JUSTICE COURT
PO Box 277, VIRGINIA CITY MT 59755**
Phone: **406-843-5308**
5. Length of residence in Montana: **44 YEARS**
6. Place of residence for the last five years: **SHERIDAN, MT**

| <u>Dates</u> | <u>City</u> | <u>State</u> |
|---------------------|-----------------|--------------|
| 1987-2014 | BELGRADE | MT |
| 2014-PRESENT | SHERIDAN | 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> |
|--------------------------|-----------------|-----------------------|---|
| E. DEPERE HIGH SCHOOL | DEPERE, WI | 1971 | H.S. DIPLOMA |
| MT STATE UNIVERSITY | BOZEMAN, MT | 1976 | B.S. AG SCIENCE |
| MT STATE UNIVERSITY | BOZEMAN, MT | 1977 | B.S. AG PRODUCTION |
| UNIVERSITY OF WISCONSIN | MADISON, WI | 1979 | STUDIED AG BUS & ECONOMICS IN PREPARATION FOR MBA PROGRAM. NO DEGREE. |
| GONZAGA U, SCHOOL OF LAW | SPOKANE, WA | 1982 | JD |

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

DEAN'S LIST 1974-1977 – 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.

NO

C. PROFESSIONAL BACKGROUND AND EXPERIENCE

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

| <u>Court or Administrative Body</u> | <u>Date of Admission</u> |
|-------------------------------------|--------------------------|
| WASHINGTON STATE BAR ASSOCIATION | 1982 (INACTIVE) |
| MONTANA STATE BAR ASSOCIATION | 1983 |
| FEDERAL DISTRICT COURT OF MONTANA | 1984 |

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

A. SUZANNE NELLEN, ATTORNEY AT LAW, PLLC (SOLO PRACTICE)

MADISON COUNTY, JUSTICE OF THE PEACE

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> |
|---|------------------------------|---------------------|
| MONTANA WATER COURT | WATER MASTER | 1983-1985 |
| NELLEN & BARTLETT LAW OFFICE | ATTY (OFFICE SHARING) | 1985-1986 |
| DRYSDALE, MCLEAN & NELLEN, PC | ATTY & PARTNER | 1986-2001 |
| NELLEN & SWIMLEY, PLLP | ATTY & PARTNER | 2002-2006 |
| A. SUZANNE NELLEN, ATTY AT LAW, PLLC | SOLO PRACTITIONER | 2006-PRESENT |
| MADISON COUNTY | JUSTICE OF PEACE | 2014-PRESENT |

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

N/A

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

WATER LAW – 30%
CRIMINAL – 25%
REAL PROPERTY – 20%
ESTATE PLANNING AND PROBATE – 15%
BUSINESS ENTITY- 10%

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

I HANDLED THE MAJORITY OF THE CIVIL AND CRIMINAL LITIGATION AT MY PREVIOUS FIRMS, WHICH INCLUDED THE AREAS OF LAW DESCRIBED IN #14 AS WELL AS BANKING, DIVORCES, GUARDIAN AD LITEM, AVIATION AND APPELLATE WORK.

I HAVE BEEN A SPEAKER FOR MONTANA STATE UNIVERSITY CLASSES AND EQUINE ORGANIZATIONS ADDRESSING TOPICS OF LIABILITY AND CONTRACT ISSUES INVOLVING AGRICULTURE AND WATER RIGHTS. I HAVE BEEN A SPEAKER AT NUMEROUS ESTATE AND PROBATE SEMINARS.

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

IN MY CURRENT PRACTICE THERE IS AN EMPHASIS ADDRESSING WATER ADJUDICATION ISSUES, CRIMINAL DEFENSE, REAL PROPERTY MATTERS, PROBATE AND ESTATE PLANNING MATTERS.

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

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

| | |
|---------------------------------|------------|
| Federal court | 5% |
| State or local courts of record | 85% |
| Administrative bodies | 10% |
| Other | 0% |

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

40% IN PRIVATE PRACTICE AND 100% AS JUSTICE OF PEACE

19. How frequently have you appeared in court?

8 TIMES PER MONTH ON AVERAGE IN MY PRIVATE PRACTICE AND 3 DAYS/WEEK AS JOP.

20. How frequently have you appeared at administrative hearings?

3 TIMES PER YEAR.

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

| | |
|----------|------------|
| Civil | 50% |
| Criminal | 50% |
| 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.

No

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

IN MY PRIVATE PRACTICE, 7. AS JUSTICE OF THE PEACE, 5.

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

IN MY PRIVATE PRACTICE, 5. AS JUSTICE OF THE PEACE, 10.

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

A. **ADVERSARY COUNSEL: KYLA MURRAY, BOZEMAN CITY ATTORNEY
ADDRESS: 121 N. ROUSE AVE., BOZEMAN, MT 59715
PHONE: (406) 582-2314**

**STATE OF MONTANA V. ANN ELIZABETH SINNOTT; CAUSE No.: TK-16-443
DATE OF TRIAL: SETTLED
PRESIDING JUDGE: KARL P. SEEL, 615 SOUTH 16TH AVE, BOZEMAN, MT 59715
PHONE: (406) 582-2040**

B. **ADVERSARY COUNSEL: KYLA MURRAY, BOZEMAN CITY ATTORNEY
ADDRESS: 121 N. ROUSE AVE., BOZEMAN, MT 59715
PHONE: (406) 582-2314**

**STATE OF MONTANA V. LONNIE; CAUSE No.: TK-16-1995
DATE OF TRIAL: SETTLED
PRESIDING JUDGE: KARL P. SEEL, 615 SOUTH 16TH AVE, BOZEMAN, MT 59715
PHONE: (406) 582-2040**

- C. **ADVERSARY COUNSEL: KYLA MURRAY, BOZEMAN CITY ATTORNEY**
ADDRESS: 121 N. ROUSE AVE., BOZEMAN, MT 59715
PHONE: (406) 582-2314

STATE OF MONTANA V. PATTISON; CAUSE No.: TK-15-4404

DATE OF TRIAL: SETTLED

PRESIDING JUDGE: KARL P. SEEL, 615 SOUTH 16TH AVE, BOZEMAN, MT 59715

PHONE: (406) 582-2040

- D. **ADVERSARY COUNSEL: MICHAEL J. GEE, BEAVERHEAD COUNTY ATTORNEY**
ADDRESS: 2 S. PACIFIC ST, DILLON, MT 59725
PHONE: (406) 683-3730

STATE OF MONTANA V. THOMAS; CAUSE No.: TK-16-335

DATE OF TRIAL: SETTLED

PRESIDING JUDGE: CANDY L. HOERNING, 2 S. PACIFIC #16, DILLON, MT 59725

PHONE: (406) 683-3755

- E. **ADVERSARY COUNSEL: JORDEN S. RAMLER, BELGRADE CITY ATTORNEY**
ADDRESS: 202 W. MADISON AVE, BELGRADE, MT 59714
PHONE: (406) 388-0150

STATE OF MONTANA V. THOMAS; CAUSE No.: TK-16-357

DATE OF TRIAL: SETTLED

PRESIDING JUDGE: ANDREW BREUNER, 91 E. CENTRAL, BELGRADE, MT 59714

PHONE: (406) 388-3774

- F. **ADVERSARY COUNSEL: BERT J. CERTAIN, DEPUTY GALLATIN COUNTY ATTORNEY**
ADDRESS: 1709 W. COLLEGE ST., BOZEMAN, MT 59715
PHONE: (406) 582-3745

STATE OF MONTANA V. WIRTH; CAUSE No.: TK-16-1381

DATE OF TRIAL: SETTLED

**PRESIDING JUDGE: RICK WEST, GALLATIN COUNTY JUSTICE COURT, 615 S. 16TH,
BOZEMAN, MT 59715**

PHONE: (406) 582-2191

- G. **ADVERSARY COUNSEL: JIM LIPPERT, CITY ATTORNEY**
ADDRESS: 301 WEST 1ST ST, STE. B., BIG TIMBER, MT 59011
PHONE: (406) 932-5410

BUFFALO JUMP RANCH V. BAUR, CAUSE No.: TK-16-1381

DATE OF TRIAL: OCTOBER 2, 2015 – SUMMARY JUDGMENT GRANTED

**PRESIDING JUDGE: BRENDA R. GILBERT, DISTRICT JUDGE, 200 WEST 1ST, BIG TIMBER, MT
59011**

PHONE: (406) 932-5154

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

I HAVE APPEARED BEFORE THE DNRC REGARDING CHANGE APPLICATIONS AND PERMITTING MATTERS INVOLVING WATER RIGHTS.

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.

N/A

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.

WASHINGTON BAR ASSOCIATION – 1982 - 2015

MONTANA STATE BAR ASSOCIATION – 1983 - PRESENT

GALLATIN COUNTY BAR ASSOCIATION – 1983 - PRESENT

MONTANA TRIAL LAWYERS ASSOCIATION ---1985 - 2010

MONTANA FIFTH JUDICIAL DISTRICT BAR ASSOCIATION – 2006 - PRESENT

MONTANA ASSOCIATION OF CRIMINAL DEFENSE ATTORNEYS ---2008 - 2013

NATIONAL COLLEGE OF DUI DEFENSE, INC. – 2010 - 2014

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.

MONTANA CUTTING HORSE ASSOCIATION: MEMBER, DIRECTOR 2010 - 2011

AIRCRAFT OWNERS PILOT ASSOCIATION: MEMBER

GREATER RUBY VALLEY CHAMBER OF COMMERCE & AGRICULTURE: MEMBER

AMERICAN QUARTER HORSE ASSOCIATION: MEMBER

AMERICAN ANGUS ASSOCIATION: MEMBER

MONTANA STOCK GROWER’S ASSOCIATION: MEMBER

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

CURRENTLY I AM THE JUSTICE OF THE PEACE FOR MADISON COUNTY. I ORIGINALLY WAS APPOINTED AND THEN ELECTED IN 2014.

IN 2012 I APPLIED FOR THE APPOINTMENT FOR THE MT ASSOCIATE WATER COURT JUDGESHIP.

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

MY PHILOSOPHY OF PUBLIC SERVICE AND THE PRACTICE OF GIVING MY TIME TO COMMUNITY SERVICE IS AN INTEGRAL PART OF MY LIFE. AS WINSTON CHURCHILL SAID “WE MAKE A LIVING AT WHAT WE DO, BUT WE MAKE A LIFE BY WHAT WE GIVE.” COMMUNITY SERVICE PROVIDES A STRONG QUALITY OF LIFE, NOT ONLY FOR THE RECIPIENT BUT FOR THE PERSON WHO PROVIDES THE

SERVICE. IT IS MY OPINION THAT IF ONE HELPS ANOTHER, IT IS NEVER A WASTED ACT. I WAS RAISED TO BELIEVE THAT I HAD A RESPONSIBILITY TO HELP OTHERS AND GIVE BACK TO SOCIETY.

I HAVE STRESSED PUBLIC INVOLVEMENT TO ALL MEMBERS OF MY STAFF. I PERSONALLY HAVE VOLUNTEERED MY TIME ASSISTING WITH HIGH SCHOOL DEBATES, SPEAKING TO AGRICULTURE GROUPS, PARTICIPATION WITH LOCAL 4-H AND FFA PROGRAMS, INVOLVEMENT WITH SENIOR CITIZENS GROUPS AND THEIR NEEDS, INVOLVEMENT WITH COLLEGIATE RODEO PROGRAMS, MENTORING YOUNGER INDIVIDUALS AND ATTORNEYS AND PROVIDING HOLIDAY MEALS TO INDIVIDUALS UNABLE TO PROVIDE FOR THEMSELVES. I HAVE VOLUNTEERED MY TIME TO ASSIST NONPROFIT ORGANIZATIONS WITH BUSINESS DOCUMENTS AND COUNSELING REGARDING LEGAL ISSUES, AND HAVE PARTICIPATED IN THE GALLATIN COUNTY PRO BONO PROJECT.

FINALLY, I ADDRESS WITH ALL MY CLIENTS THEIR ABILITY TO PAY AND ADJUST FEES ACCORDINGLY TO THE INDIVIDUAL CLIENTS AND ISSUES.

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.

JUSTICE OF THE PEACE, MADISON COUNTY- 2014 TO PRESENT.

NELLEN REAL ESTATE, LLC - 2001 TO PRESENT. I AM THE SOLE MEMBER OF THIS COMMERCIAL REAL ESTATE HOLDING ENTITY WHICH LEASES OFFICE SPACE TO A. SUZANNE NELLEN, ATTORNEY AT LAW, PLLC.

GLENCOE, LLC - 2003 TO PRESENT. I AM THE SOLE MEMBER OF THIS REAL ESTATE HOLDING ENTITY WHICH LEASES PROPERTY TO TWIN SUGARS, LLC.

TWIN SUGARS, LLC – 2003 TO PRESENT. I AM THE SOLE MEMBER OF THIS OPERATING ENTITY INVOLVED IN COW/CALF AND HORSE BREEDING OPERATIONS IN SHERIDAN, MONTANA.

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.

JUSTICE OF THE PEACE, MADISON COUNTY. IF APPOINTED, I WOULD RESIGN IMMEDIATELY.

NELLEN REAL ESTATE, LLC – HOLDING ENTITY FOR MY LAW OFFICE CONDOMINIUM. I AM THE SOLE MEMBER AND MANAGER. UPON MY APPOINTMENT AS DISTRICT COURT JUDGE, I WOULD LEASE OR SELL SAID REAL ESTATE HOLDINGS BUT CONTINUE THE LLC FOR LIABILITY PROTECTION.

GLENCOE, LLC – HOLDING ENTITY FOR THE RANCH REAL ESTATE LOCATED IN SHERIDAN, MONTANA. I AM THE SOLE MEMBER AND MANAGER. UPON APPOINTMENT AS DISTRICT COURT JUDGE, I WOULD CONTINUE TO HOLD SAID REAL ESTATE AS A SINGLE MEMBER LLC FOR LIABILITY PROTECTION.

TWIN SUGARS, LLC – COW/CALF AND HORSE OPERATING ENTITY. I AM THE SOLE MEMBER AND MANAGER. UPON APPOINTMENT AS DISTRICT JUDGE, I WOULD CONTINUE TO OPERATE THE RANCH AS A SINGLE MEMBER LLC FOR LIABILITY PROTECTION.

A. SUZANNE NELLEN, ATTORNEY AT LAW, PLLC – I WOULD DISSOLVE THIS PROFESSIONAL LIMITED LIABILITY COMPANY UPON MY APPOINTMENT AS DISTRICT COURT JUDGE.

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.

NELLEN REAL ESTATE , LLC - 15%

TWIN SUGARS, LLC. - LESS THAN 5%

JUSTICE OF THE PEACE, MADISON COUNTY – 30%

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

NO

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

YES

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

If not, please explain.

43. Do you have any liens or claims outstanding against you by the Internal Revenue Service (IRS)?
 YES **NO**

If yes, please explain.

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.

SINCE I HAVE BEEN A SOLE PRACTITIONER, I HAVE PERFORMED ALL OF MY OWN RESEARCH REGARDING LEGAL ISSUES AND DRAFTING BRIEFS. IT IS NOTED THAT MY STAFF DOES ASSIST ME WITH PROOFREADING, DATA COLLECTION, TRANSCRIPTION AND FORMATTING.

AS A JUSTICE OF THE PEACE, I HAVE DONE ALL MY OWN RESEARCH AND DRAFTING OF FINDINGS OF FACTS AND CONCLUSIONS OF LAW AS WELL AS MINUTES, SENTENCING ORDERS, JUDGMENTS, DECISIONS, WRITS, TEMPORARY AND PERMANENT ORDERS OF PROTECTIONS.

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 DRAFTED NUMEROUS DEEDS, ESTATE PLANNING AND PROBATE DOCUMENTS, WATER TRANSFER DOCUMENTS, PURCHASE AND SALE DOCUMENTS, EASEMENTS, BUSINESS ENTITY DOCUMENTS, AN ASSORTMENT OF CONTRACTS, BANKRUPTCY NOTICES AND PROOFS OF CLAIM AND A VARIETY OF BUSINESS TRANSACTION DOCUMENTS. I HAVE PRODUCED ALL DOCUMENTS THAT HAVE BEEN TRANSMITTED FROM MY OFFICE.

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.

SEE ATTACHED.

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

60%

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

YES – IN BOTH AND FAST CASE

H. MISCELLANEOUS

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

I OWN AND OPERATE A SMALL RANCH EMPHASIZING THE BREEDING AND SALE OF PERFORMANCE HORSES AND ANGUS COMMERCIAL CATTLE. THE MAJORITY OF MY FREE TIME IS DEDICATED TO RANCHING. I PERIODICALLY SHOW PERFORMANCE HORSES AS PART OF MY RANCHING DUTIES. I ALSO TRAVEL, SKI, READ, AND HUNT BIRDS. I AM INVOLVED IN LOCAL NONPROFITS AND THE MENTORING PROGRAMS IN GALLATIN COUNTY.

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

BEFORE GRADUATING FROM LAW SCHOOL, MY PRIMARY JOBS WERE ASSOCIATED WITH AGRICULTURE, I.E. MONTANA DEPARTMENT OF AGRICULTURE, THE WISCONSIN DEPARTMENT OF AGRICULTURE, USDA, AND MY FAMILY'S FARM. I ALSO WORKED FOR THE LAW FIRM OF SOUTH WELL AND O'ROURKE, P.S. IN SPOKANE, WASHINGTON DURING LAW SCHOOL. DURING COLLEGE, I WAS A BARTENDER, A WAITRESS AND A RIDING INSTRUCTOR. SINCE GRADUATING FROM LAW SCHOOL, MY CAREER HAS BEEN THE PRACTICE OF LAW.

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

I PERFORM APPROXIMATELY 60 TO 100 HOURS PER YEAR OF PRO BONO WORK. THE NATURE OF THE WORK IS ASSISTING INDIGENT CLIENTS, MENTORING INEXPERIENCED ATTORNEYS, AND PARTICIPATING IN THE GALLATIN COUNTY PRO BONO PROJECT, PROVIDING LEGAL DOCUMENTS AND COUNSELING TO NONPROFIT ENTITIES.

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

SPECIFICALLY WITH REGARD TO LAW, IT IS THE LATE CHIEF WATER JUDGE LESSLEY WHO INFLUENCED MY CAREER AND THE WAY I VIEW OUR SYSTEM OF JUSTICE. I WORKED WITH JUDGE LESSLEY AS A WATER MASTER FROM 1983 THROUGH 1985. I KNEW JUDGE LESSLEY PRIOR TO WORKING WITH HIM. HE ENCOURAGED ME TO RETURN TO MONTANA AFTER LAW SCHOOL AND GET INVOLVED WITH THE ADJUDICATION PROCESS AND WATER LAW. AS A RESULT OF JUDGE LESSLEY'S INFLUENCE AND MY EXPERIENCE AS A WATER MASTER, I HAVE CONTINUED TO EMPHASIZE WATER ADJUDICATION MATTERS IN MY PRIVATE PRACTICE.

WITH REGARD TO MY VIEW OF OUR SYSTEM OF JUSTICE, JUDGE LESSLEY INCREASED MY LEVEL OF OBJECTIVITY AS WELL AS COUNSELED ME ON AVOIDING THE APPEARANCE OF IMPROPRIETY. THE LATE JUDGE ALSO PROVIDED GUIDANCE ON HOW TO REMAIN NEUTRAL IN OUR ADVERSARIAL SYSTEM OF JUSTICE WHILE BEING FAIR AS A FACT FINDER.

THE EVENT THAT HAS INFLUENCED THE WAY I VIEW OUR SYSTEM OF JUSTICE IS MY CURRENT POSITION AS JUSTICE OF THE PEACE FOR MADISON COUNTY. I HAVE BEEN A JUDGE FOR 2 AND ½ YEARS AND EXPERIENCED THE BEST AND THE WORST IN PEOPLE. THE PARTIES WHO APPEAR BEFORE ME REQUIRE MY TIME AND ARE ENTITLED TO MY ATTENTION, IMPARTIALITY, LEGAL KNOWLEDGE AND RESPECT. I AM CONSTANTLY COGNIZANT THAT THE COURTROOM CAN BE A VERY INTIMIDATING VENUE.

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

I BELIEVE THAT FAIRNESS, COMMON SENSE, WORK ETHIC, WISDOM, AND ETHICS ARE ALL IMPORTANT. ALL MONTANA DISTRICT COURTS ARE BUSY, BUT A GOOD DISTRICT COURT JUDGE MUST BE ABLE TO GIVE ADEQUATE TIME AND RESPECT AND LISTEN TO ALL LITIGANTS TO BE ABLE TO PROVIDE A TIMELY, KNOWLEDGEABLE DECISION.

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.

FOLLOWING PRECEDENT IS NECESSARY FOR CONTINUITY AND PREDICTABILITY. IT IS INDISPENSABLE FOR CONSISTENT GROWTH OF LEGAL PRINCIPLES. HOWEVER, THERE MUST BE FLEXIBILITY FOR PRACTICAL WORKABILITY. PRECEDENT CAN BECOME AN ABANDONED DOCTRINE AS A RESULT OF CHANGED FACTS AND SOCIETY EVOLVING. THE NECESSARY FLEXIBILITY IN THE LAW ALLOWS ISSUES TO BE DECIDED CORRECTLY BY THE BALANCE OF BOTH.

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

I HAVE PRACTICED LAW MORE THAN 34 YEARS AND HAVE A WIDE ASSORTMENT OF EXPERIENCE IN CRIMINAL AND CIVIL MATTERS. I HAVE TRIED NUMEROUS JURY TRIALS AND JUDGE TRIALS WHICH INCLUDE PRETRIAL MOTIONS. THE LEGAL PROFESSION HAS BEEN VERY GOOD TO ME AND IT IS TIME IN MY LIFE TO GIVE BACK TO THE COMMUNITY. SINCE BEING A JUDGE, I HAVE REALIZED THE DEMANDS OF THE POSITION. I HAVE FULLY ENJOYED THE POSITION AND I BELIEVE I HAVE BEEN A GOOD JUDGE FOR MADISON COUNTY. I INTEND TO CONTINUE TO BE A GOOD DISTRICT COURT JUDGE FOR THE FIFTH JUDICIAL DISTRICT.

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

WHAT I AM MOST PROUD OF IS MY 34 YEARS OF LEGAL PRACTICE, AND THE FACT THAT I STILL MAINTAIN A PASSION FOR THE LEGAL PROCESS. THE LEGAL PROFESSION HAS LOST RESPECT AND TRUST. I BELIEVE THE CLIENTS I HAVE REPRESENTED AND THE PEOPLE I HAVE MET IN MY CAREER HAVE A MORE POSITIVE OPINION OF THE PROFESSION. IT IS NOT HOW MANY TIMES I HAVE PREVAILED IN COURT, MONETARY SUCCESS OR THE NOTORIETY, BUT THAT THE PEOPLE THAT I HAVE COME INTO CONTACT WITH HAVE CHANGED THEIR FEELINGS OF MISTRUST AND RESENTMENT TOWARDS THE PROFESSION AS A RESULT OF MY WORK. AS A JUDGE, I AM MOST PROUD OF SERVING MADISON COUNTY AND PROVIDING A FAIR, COMPETENT, AND PASSIONATE JUDGE.

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

THERE IS NO QUESTION THAT I AM A COWGIRL/RANCHER AND THUS I AM DIRECT, CONFIDENT AND INDEPENDENT. THESE QUALITIES HAVE ASSISTED ME AS A CURRENT JUDGE AND LAWYER, AND I BELIEVE THEY ARE POSITIVE TRAITS FOR A JUDGE. I DO WANT TO NOTE THAT I AM NOT A GOOD TYPIST AND RELY ON DICTATION WHEN POSSIBLE.

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 CURRENTLY A JUDGE FOR MADISON COUNTY. MY LAST 2.5 YEARS HAVE GIVEN ME AN

OPPORTUNITY TO CONFIRM THAT IT IS A POSITION THAT I HAVE ENJOYED IMMENSELY, AND I FEEL THAT I HAVE DEMONSTRATED THE NECESSARY SKILLS. I HAVE MADE TOUGH DECISIONS, MAINTAINED CONTROL OF MY COURTROOM WHEN PARTIES AND/OR LITIGANTS GET OUT OF LINE, RESPECTED THE LITIGANTS, PARTIES, AND STAFF – BUT MOST OF ALL, I HAVE TRIED TO BE FAIR AND PASSIONATE OF THE LAW IN MY DECISION-MAKING.

CERTIFICATE OF APPLICANT

I understand that the submission of this application expresses my willingness to accept appointment as District Court Judge for the 5th 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.

Oct 31, 2016
(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 Monday, October 31, 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

While the Montana Supreme Court has not had the opportunity to address the requirement of expert testimony in a ditch design, construction or maintenance case, it has upheld the requirement of an expert to set forth the standard of care in a wide variety of cases involving professional duties which are not obvious to a lay person. For example, in *Dubiel v. Mont. Dept. of Transp.*, 2012 MT 35, 364 Mont. 175, 272 P.3d 66, the wife of a man who was killed when a tree fell on his vehicle while stopped on a highway awaiting road clearance during a windstorm brought a negligence and wrongful death action against the Department of Transportation. *Dubiel*, ¶1. The wife failed to retain an expert to establish the Department's standard of care with regard to highway safety under the circumstances involving her husband's death. *Dubiel*, ¶4. The Montana Supreme Court affirmed summary judgment for the Department, stating that there were "numerous interrelated factors that must be considered by the Department in making a decision to close the road, many of which are not readily apparent to a layman." *Dubiel*, ¶18.

Likewise, the Montana Supreme Court affirmed the district court's decision requiring expert testimony on firefighting techniques in a negligence case against the City of Billings after a resident's home was destroyed by fire. In *Albert v. City of Billings*, 2012 MT 159, ¶24, 365 Mont. 454, 282 P.3d 704, the district court determined that firefighting techniques were beyond the trier of fact based on firemen's testimony that various tactics are employed depending on the type of

fire, the source of the fire, the condition of the structure, and the material fueling the fire. The court recognized that firefighting is based on specialized, technical knowledge in holding, “[t]he district court did not err in granting summary judgment to the City on the grounds that Albert failed to present expert witness testimony to substantiate his negligent firefighting claim.” *Albert*, ¶24.

Again, in *Dayberry v. City of East Helena*, 2003 MT 321, ¶17, 318 Mont. 301, 80 P.3d 1218, a diver was required to present expert testimony on the issue of the applicable standard of care for the operator of the City’s pool, to determine the reasonableness of the pool’s design and whether the depth of the swimming pool was unreasonably dangerous for the length of the diving board. Affirming summary judgment for the City, the *Dayberry* court agreed that unless Dayberry could produce expert testimony regarding the standard of care applicable to pool operators or the allegedly dangerous condition of the pool, a *prima facie* case of negligence or strict liability could not be established. Noting that pool operators have a general statutory duty to keep pools safe, in order to establish the standard of conduct to which the City must conform, Dayberry must have presented expert testimony as to both the pool design issue and the standard of care applicable to operators, which are not matters within the common knowledge of trial jurors.

Other Montana cases requiring expert testimony to establish the standard of care for various professions are listed in *Dulaney v. State Farm Fire & Cas. Ins.*

Co., 2014 MT 127, ¶12, 375 Mont. 117, 324 P.3d 1211, a case which held that expert testimony is required to identify the standard of care for an insurance agent in procuring a policy with adequate coverage for the insured. *Dulaney* stresses the wide variety of professional duties which require expert testimony to establish the standard of care in Montana including lawyers in legal malpractice cases, *Carlson v. Morton*, 229 Mont. at 241, 745 P.2d at 1138 (1987); doctors in medical malpractice cases, *Deaconess Hosp. v. Gratton*, 169 Mont. 186, 189-90, 545 P.2d 670, 672-73 (1976); real estate brokers, *May v. ERA Landmark Real Estate*, 2000 MT 299, ¶70, 302 Mont. 326, 15 P.3d 1179; and title insurers, *Dobie v. Lincoln Co. Title Co.*, 215 Mont. 1, 5, 692 P.2d 1267, 1270 (1985).

Here, there has been no expert disclosure by the Plaintiff for establishing the standard of care for ditch design, construction, cleaning, repair, or maintenance and the deadline for disclosing any proposed expert has passed. Therefore, there is no evidence in the record for Plaintiff's negligence claim to survive summary judgment. Without an expert, the Ranch resorts to conclusory statements and speculative assertions. Silverstein admits that his conclusion that Huyser Ditch caused injuries to his cows is speculation (see **Exhibit A**, Silverstein Dep. p. 33, ll. 19-25 – p. 34, ll. 1-10). The Ranch has utterly failed to establish the applicable standard of care for the design, construction, cleaning, repair, and/or maintenance

of ditches which constitutes the easement owners' statutory rights under §70-17-112(1), MCA.

There are culverts on the Ditch which allow crossing by livestock without entering the Ditch. (Statement of Uncontroverted Facts No. 14). Further, Defendant Baur employed the "best in the business" (Stenberg Construction) to clean and maintain the Ditch at the recommendation of co-easement owner Cooney and tenant rancher, Kevin Dawe (Statement of Uncontroverted Facts No. 11). Baur submits that the design, construction, cleaning, repair and maintenance of ditches require expert testimony as to the applicable standard of care because such a procedure is beyond the common knowledge of the ordinary person. This case is no different in that respect from pool safety, highway safety or firefighting techniques employed to save a structure. The Ranch's failure to provide such expert testimony for standards relating to ditch design or maintenance mandates summary judgment be granted to the Defendant for failure to present a *prima facie* case of negligence.

B. There Is an Absolute Failure of Evidence On Defendant's Alleged Breach of Any Applicable Standard of Care

Actionable negligence arises only from the breach of a legal duty, and thus, there must first be a duty imposed on the defendant, along with allegations which,

if proven, would support a finding of a breach of that duty. *Peterson v. Eichhorn*, 2008 MT 250, ¶24, 344 Mont. 540, 189 P.3d 615.

Defendant Baur has more than met all his legal duties pertaining to the cleaning and maintenance of the Huyser Ditch. He has the legal right to enter the property of Buffalo Jump Ranch for inspection, repair, and maintenance of the Ditch under §70-17-112(1), MCA (see also: *Kephart v. Portmann*, 259 Mont. 855 P.2d 120 (1993)). Owners of the ditch easement also maintain a necessary secondary easement to reasonably enter, inspect, repair, and maintain the ditch.

For purposes of safety, Baur has a general duty to keep the Huyser Ditch in “good general repair and condition,” and specifically has no statutory duty to “prevent access to the Ditch by persons or animals” under Section 85-7-2211, MCA.

Baur was not personally involved in the procedure or decision-making process as to how the Ditch was cleaned (Statement of Uncontroverted Facts No. 11). The protocol for the process was left to Stenberg Construction. Silverstein agrees that Stenberg Construction is a good operator for ditch maintenance (see **Exhibit A**-Silverstein Dep. 39, ll. 18-24). At the recommendation of easement co-owners Cooney’s and Baur’s tenant, Kevin Dawe, Baur simply agreed to pay his *pro rata* share of the cost of hiring the best ditch maintenance company possible for the purpose of keeping the Huyser Ditch in good general condition (Statement

of Uncontroverted Facts No. 11). Clearly, there is no evidence of a breach of any relevant standard of care by Defendant Todd Baur.

This Court should take into account the Pre-Discovery Disclosure Statement of the Defendant providing two expert opinions: that of Ditch Rider Bill Hibnes and Lyle Stenberg of Stenberg Construction, who actually cleaned the Ditch. This Court should also consider the expert opinion of Kevin Dawe, identified in Defendant's Answer to Ranch's Discovery Requests, who will testify as to the excellent condition of the Huyser Ditch following the 2013 maintenance project and his opinion that cattle have been able to continue to safely cross the Ditch. Rule 56(c)(3), M.R.Civ.P., specifically provides for the Court to look at "disclosure" materials on file as well as discovery, pleadings, and affidavits in deciding a summary judgment motion.

Defendant's experts will testify that the Ditch is well-maintained and safe for crossing livestock (Statement of Uncontroverted Facts No. 19). Plaintiff's "proof" is merely the admitted speculative opinion of Ranch Manager, Mark Silverstein (Statement of Uncontroverted Facts No. 16, 17, and 18). Silverstein's conclusory statements and assertions do not constitute facts that are "material and of a substantial nature" that would prevent summary judgment (see *Tin Cup County Water and/or Sewer Dist. v. Garden City Plumbing & Heating, Inc.*, 2008 MT 434, ¶54, 347 Mont. 468, 200 P.3d 60). In fact, all other witness' testimony is

to the contrary. Cows have been observed on both sides of the Ditch without any apparent injury (See **Exhibit E**, Affidavit of Lauri Cooney, ¶¶ 5-6).

Plaintiff Ranch has failed to show by any evidence that Todd Baur breached any duty in the cleaning, repair or maintenance of Huyser Ditch.

C. Plaintiff Ranch Has Admitted That It Has No Proof That The 2013 Maintenance of the Huyser Ditch Caused Injury to Its Cows

Regarding the causation element, a plaintiff cannot survive summary judgment even with expert testimony, where the expert could only opine that a defendant's negligent acts "could have" caused the harm at issue (see *Hinkle ex rel. Hinkle v. Shepherd Sch. Dist. #7*, 2004 MT 175, ¶¶ 35-38, 322 Mont. 80, 93 P.3d 1239; *Butler v. Domin*, 2000 MT 312, ¶ 22, 302 Mont. 452, 15 P.3d 1189).

In his deposition, Mark Silverstein, Ranch Manager for Buffalo Jump Ranch, expressly admitted that he had no proof that the two cows who had late abortions and/or the three who had stifling were caused by any condition of the Huyser Ditch. There is no evidence as to the cause of the alleged injuries. Silverstein has admitted several times that he only suspected the Ditch was the cause of these alleged injuries (Statement of Uncontroverted Facts No. 18). In fact, none of the cows alleged to be injured were found in the Ditch and he has admitted that gopher holes or a kick from another animal, among other things, can cause stifling (Statement of Uncontroverted Facts No. 16, 17, 18).

In this case, the only experts involved are those disclosed by Todd Baur, whose opinions are that the Ditch is safe for the crossing of livestock. Silverstein admits that he can only say that the Ditch “possibly” caused the injuries (Statement of Uncontroverted Facts No. 18). Lauri Cooney, who is able to view the Ditch on a daily basis, has never observed injured cattle and has seen them on both sides of the Ditch (See **Exhibit E**, Affidavit, ¶¶ 5-6).

Out of a herd of 180 pastured cows, it is just as likely that other causes brought on the two abortions and three stifling problems. Even construing the facts in a light most favorable to the Plaintiff, the only thing established is that the cleaning of the Ditch merely preceded the problems with those few cows in 2014/2015, not that it most likely caused the injury. This is precisely the type of case that warrants summary judgment.

II. THE BAURS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR COUNTERCLAIM BECAUSE THE RANCH MANAGER HAS ADMITTED INTERFERENCE WITH THEIR DITCH EASEMENT IN VIOLATION OF § 70-17-112, MCA

Thomas and Stephanie Baur own numerous water rights in the Huyser Ditch (Statement of Uncontroverted Facts Nos. 6 and 7) by virtue of which they possess a secondary easement to reasonably access, inspect, repair, and maintain the Ditch by statute. Section 70-17-112, MCA, states in relevant part:

Interference with canal or ditch easements prohibited.

(1) A person with a canal or ditch easement has a secondary easement to enter, inspect, repair, and maintain a canal or ditch.

(2) No person may encroach upon or otherwise impair any easement for a canal or ditch used for irrigation or any other lawful domestic or commercial purpose, including carrying return water.

Unquestionably, Buffalo Jump Ranch Manager, Mark Silverstein, intentionally violated statutory rights bestowed upon the Baur's. By his own admission, Silverstein interfered with those rights by locking access gates "when they tried to sneak in to work on the Ditch, which is my right to do..." (see **Exhibit A**, Silverstein Dep. p. 36, ll. 15-19). Mr. Silverstein's mistake regarding his "rights" versus the Baur's rights under the law does not validate his actions. The statute is clear. Silverstein deliberately denied the Baur's reasonable access to their Ditch in violation of the law. Summary judgment is appropriate in favor of the Counterclaimants.

CONCLUSION

Mark Silverstein filed this lawsuit on behalf of the Ranch because he was offended that he was not notified of the Ditch maintenance in 2013, and because Defendant Todd Baur refused to sign an agreement allowing him to fill in and restrict the Ditch to carry only 100 miner's inches of water, when the collective water rights of the Baur's and Lauri Cooney far exceed that amount.

The negligence claim is completely without merit because the evidence verifies that the Ditch has been properly and well-maintained. Further, the only

expert testimony as to the condition and safety of the Ditch is that produced by Todd Baur.

Even if this Court finds that expert testimony is not necessarily required for ditch design, construction, and maintenance, this negligence case fails because Plaintiff's "evidence" consists of mere suspicion and speculation that Ranch cows might have been harmed as a result of measures taken to keep the Ditch clean and in proper condition. Therefore, based on a total lack of evidence to support the requisite elements of a negligence case and the admitted statutory violation of Baur's secondary easement rights, it is respectfully requested that summary judgment be granted in favor of the Baur's, and further, that costs and fees be granted to them as the prevailing party pursuant to §70-17-112(5), MCA. See also: *Kephart v. Portmann*, 259 Mont. 232, 238-39, 855 P.2d 120 (1993).

RESPECTFULLY SUBMITTED this ___ day of August, 2015.

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