

APPLICATION FOR
MONTANA ASSOCIATE WATER JUDGE

A. PERSONAL INFORMATION

1. Full Name: Stephen R. Brown
 - a. What name do you commonly go by? Steve
2. Birthdate: [REDACTED] Are you a U.S. citizen? Yes
3. Home Address: [REDACTED]
Phone: [REDACTED]
4. Office Address: P.O. Box 1389, Bozeman, MT 59718
Phone: (406) 577-7743
5. Length of residence in Montana: 25 years
6. Place of residence for the last five years:

<u>Dates</u>	<u>City</u>	<u>State</u>
1994 to present	Missoula	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>
Wilson High School	Tacoma, WA	1978	High school diploma
Whitworth College	Spokane, WA	1983	B.S. - Geology
Lewis & Clark Law School	Portland, OR	1989	J.D.

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

- Graduated from law school *cum laude*;
- Cornelius Honor Society (selected by the law faculty based on distinguished scholarship, leadership, and contribution to the law community);
- Bernard F. O'Rourke Award Recipient (presented to a graduating law student to recognize outstanding written scholarship in the environmental and natural resources field during law school);
- Certificate in Environmental and Natural Resource Law.

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

Yes. I was the Articles Editor for the law review Environmental Law. I published the following articles:

- "Breathing Life Back into a Drowned Resource: Mitigating Wildlife Losses in the Columbia Basin Under the Northwest Power Act," 18 ENVTL. L. 571 (1989) – the article analyzes legal mechanisms to provide mitigation for wildlife affected by development of hydropower projects in the Pacific Northwest.
- "Pluralism and the Environment: The Role of Comment Agencies in NEPA Litigation," 14 HARV. ENVTL. L. REV. 277 (1990) (co-author with Professor Michael C. Blumm) – the article is a comprehensive survey of cases involving administrative agency comments on environmental impact statements and environmental assessments under the National Environmental Policy Act and how those comments may influence the outcome of cases.

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>
Oregon State Bar (inactive)	1989
Montana State Bar (judicial)	1995
Federal District of Montana	1994
Confederated Salish & Kootenai Tribal Court	2005
Ninth Circuit Court of Appeals	2017

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

Montana Water Court – Associate Water Judge

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>
Garlington, Lohn & Robinson, PLLP	Associate / Partner	1994 to 2019
Alexander Blewett III School of Law at the University of Montana	Adjunct Professor	1998 to 2019
Stoel Rives LLP – Portland, OR	Intern / Associate	1988 to 1994
Washington Department of Natural Resources	Intern	Summer 1987

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

I have been employed continuously since graduating from law school.

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 am the Associate Water Judge at the Water Court. Most of my work involves hearing, evaluating and deciding water rights adjudication cases. I also address petitions for judicial review of decisions of the

Department of Natural Resources and Conservation that are filed in the Water Court. Additionally, I assist with the preparation of material and information for the Water Policy Interim Committee.

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

While in private practice, I focused my practice on environmental (25%); water law (50%); oil and gas and other energy (15%); general business and litigation (10%). My practice involved both litigation and non-litigation matters. Non-litigation work included advising entities and individuals on regulatory and transaction matters. I also mediated and served as an arbitrator in several water cases.

I have been an adjunct professor at the Alexander Blewett III Law School at the University of Montana since 1998. I have taught Oil and Gas Law, and Natural Resources and Energy Law in alternate semesters or alternate years.

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

As an attorney I focused most of my law practice on environmental, natural resource (including water law) and energy law. As a judge, my work is exclusively related to water law.

17. Do you regularly appear in court? Yes

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

Since February 2019, my work has been exclusively in Water Court. Prior to that time, my work generally was allocated as follows:

Federal court	5%
State or local courts of record	35%
Administrative bodies	10%
Other (Water Court)	50%

18. During the last five years, what percentage of your practice has been trial practice? 50%

19. How frequently have you appeared in court? About one time each month on average. Currently I regularly conduct court conferences and hearings.

20. How frequently have you appeared at administrative hearings? Periodically each year.

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

Civil (including Water Court)	89%
Criminal	1 %
Other (administrative)	10%

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

Yes, between 2016 and 2019, I was involved in six cases before the Montana Supreme Court. The five most recent cases were:

<u>Case Caption</u>	<u>Citation</u>	<u>Opposing Counsel</u>
Nelson v. Davis	2018 MT 113	<p>Greg Schultz Crowley Fleck, PLLP 305 S 4th St E Missoula, MT 59801 (406) 523-3600</p> <p>Patrick Beddow Michael F. McGuinness Patten, Peterman, Bekkedahl & Green, PLLC 2817 2nd Ave. North Billings, MT 59101 (406) 252-8500</p>
Danreuther Ranches v. Farmers Coop. Canal Co.	2017 MT 241	<p>John Bloomquist Bloomquist Law Firm, P.C. 3355 Colton Dr Suite A, Helena, MT 59602 (406) 502-1244</p>
Clark Fork Coalition v. Tubbs (for intervenor Mountain Water Company) (argued)	2016 MT 229	<p>Abigail J. St. Lawrence St. Lawrence Law Office 36 S Last Chance Gulch, #L3, Helena, MT 59601 (406) 442-1560</p> <p>Ryan K. Mattick Cusick, Mattick & Refling, P.C. 517 S. 22nd Ave, Suite 5 Bozeman, MT 59718 (406) 587-5511</p> <p>Numerous amicus curiae</p>

Kelly v. Teton Prairie LLC 2016 MT 179 David T. Markette
Markette & Chouinard PC
601 South 1st Street
Hamilton, Montana, 59840
(406) 363-1110

Eldorado Coop Canal Co. v. Hoge 2016 MT 145 John Bloomquist
Bloomquist Law Firm, P.C.
3355 Colton Dr Suite A,
Helena, MT 59602
(406) 502-1244

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

Three.

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

As a judge I have presided over one full evidentiary hearing and have several evidentiary hearings scheduled in 2020. As an attorney, I tried approximately 20 cases, including trials in federal court, state district court, and water court evidentiary hearings.

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.

Some of the cases I have presided over at the Water Court that now are concluded include:

In re Climbing Arrow Ranch Inc., Case 41F-A19, 2019 Mont. Water LEXIS 1 (Mar. 6, 2019) (order denying objection to master's report).

Counsel: Cindy Younkin, 2066 Stadium Dr., Ste. 101, Bozeman, MT 59715, (406) 582-0027.

In re Dome Mt. Ranch, Claim 43B 211133-00 et al., 2019 Mont. Water LEXIS 2 (Mar. 12, 2019).

Counsel: Dana Elias Pepper/Bina R. Peters, Dana Elias Pepper, River and Range Law, PLLC, PO Box 477, Bozeman, MT 59771, (406) 599-7424.

Peters v. United States, Case 41A-79 (July 23, 2019), (Closing Order Following Supreme Court Remand) (Supreme Court cite: 2019 MT 9N, 395 Mont. 519, 432 P.3d 716).

Counsel: Kirsten Madsen, Agency Legal Services Bureau, PO Box 201440, Helena MT 59620-1440, (406) 444-5850; Joseph H. Kim, United States Department of Justice, P.O. Box 7611, Washington, D.C. 20044-7611, (202) 305-0207; Roger D. Peters (pro se).

In re Betty J. Yaeger, Case 40EJ-33, 2019 Mont. Water LEXIS 230 (Aug. 29, 2019).

Counsel: Hertha L. Lund/Christopher T. Scoones, Lund Law PLLC, 662 Ferguson Ave., Unit 2, Bozeman, MT 59718, (406) 586-6254; Oliver J. Urick, Hubble Law Firm, PLLP, PO Box 556, Stanford, MT 59479, (406) 566-2500.

In re Guenther, Case 41H-S5, 2019 Mont. Water LEXIS 106 (Nov. 19, 2019).

Counsel: W. John Tietz, Browning, Browning, Kaleczyc, Berry & Hoven, PC P.O. Box 1697, Helena, MT 59624, (406) 443-6820; Jesse Guenther and Tracey Guenther (pro se).

In re Dennis and In re Bloom, Case 76GJ-R97 (Order Denying Objections and Adopting Master's Report in Part) (Sept. 26, 2019); Claim 76GJ-6046, 2019 Mont. Water LEXIS 127 (Nov. 22, 2019); Case 76GJ-172, 2020 WL 871414 (Feb. 11, 2020).

Counsel: Holly J. Franz, P.O. Box 1155, Helena, MT 59624-1155, 406-442-0005, hollyjo@franzdriscoll.com; Ross Keogh, Parsons Behle & Latimer, 110 East Broadway, Suite 206, Missoula, MT 59802, (406) 333-0520; Calli J. Michaels, Bloomquist Law Firm, P.O. Box 1418, Dillon, MT 59725-1418, (406) 683-8795.

Debuff v. Mont. Dep't of Natural Res. & Conservation, Case WC-MAPA-2019001, 2019 Mont. Water LEXIS 114 (Nov. 21, 2019) (currently on appeal to Montana Supreme Court).

Counsel: John Bloomquist, Bloomquist Law Firm, 3355 Colton Drive, Suite A, Helena, MT 59602, (406) 502-1244; Barbara Chilcott, Department of Natural Resources and Conservation, PO Box 201601, Helena, MT 59620-1601, (406) 444-9758.

In re Dyer, Case 41L-53 (July 16, 2019).

Counsel: Jeanne S. Whiteing, 1628 5th St., Boulder, CO 80302, (303) 444-2549; Derek E. Kline, Blackfeet Legal Department, P.O. Box 849, Browning, MT 59417, (406) 338-7777; Rebecca M. Ross, US Dept. of Justice - Indian Resources Section, P.O. Box 7611, Ben Franklin Station, Washington, D.C. 20044, (202) 616-3148; Holly J. Franz; Margaret A. Dyer and Ray R. Dyer (pro se).

In re Connolly, Case 41L-22, 2019 Mont. Water LEXIS 133 (Nov. 27, 2019).

Counsel: Jeanne S. Whiteing; Derek E. Kline; Rebecca M. Ross; Phyllis H. Connolly (pro se).

In re Flying S Ranch, Inc., Case 41J-185, 2019 Mont. Water LEXIS 158 (Dec. 10, 2019).

Counsel: Ryan Mattick, Jeremy A. Michael, Cusick, Farve, Mattick & Refling, P.C., PO Box 1288, Bozeman, MT 59771-1288, (406) 587-551; John Bloomquist; Kirsten Madsen.

In re Circle S Ranch, Inc. Case 41P-108, 2019 Mont. Water LEXIS 8 (May 16, 2019) (Order on Motion to Modify); 2019 Mont. Water LEXIS 228 (Dec. 31, 2019) (Order Granting Motion to Modify)

Counsel: Abigail R. Brown, ARB Law Group, 7 West 6th Avenue, Suite 512, Helena, MT 59601, (406) 457-5494.

In re Lee Martinell Co., Case 41A-35, 2020 Mont. Water LEXIS 49 (Jan. 23, 2020).

Counsel: Abigail Brown; Walter E. Congdon, 445 Brooks, Missoula, MT 59801-4013, (406) 925-1351; James J. DuBois, US Department of Justice, Environmental & Natural Resources Division, 999 18th Street, South Terrace Suite 370, Denver, CO 80202, (303), (303) 844-1375.

In re Betty J. Yaeger, Case 40EJ-32 (Feb. 7, 2020).

Counsel: Hertha L. Lund/Christopher T. Scoones; Abigail Brown

Before leaving private practice, I was counsel for defendant-intervenor Optima, Inc. in the case *Mines Management, Inc. v. Fus*, Cause No. DV 07-248, Montana Nineteenth Judicial District, Lincoln County, before Judge Matthew J. Cuffe, (406) 293-8120. The defendant was represented by Amy N. Guth, 408 Main Avenue, Libby, MT 59923, (406) 293-2322. Opposing counsel was Mark L. Stermitz and Matthew A. Baldassin, Crowley Fleck, PLLP, 305 S 4th St E, Missoula, MT 59801, (406) 523-3600. The case was tried to a jury in October 2018. The case later was reversed by the Montana Supreme Court. The case was subject to prior decisions in the Montana Supreme Court (*Mines Mgmt. v. Fus*, 2014 MT 256) and the Ninth Circuit (*Montanore Minerals Corp. v. Bakie*, 867 F.3d 1160 (9th Cir. 2017)).

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

In private practice I tried or otherwise was involved in contested case hearings before the Montana Public Service Commission, the Montana Department of Natural Resources and Conservation, and the Montana Board of Environmental Review. Cases in the last five years include:

- *In the Matter of Change Application No. 41K-30111184 by Broken O Land & Livestock LLC*, Montana DNRC Final Order, July 31, 2018, rev'd, *Broken O Land & Livestock, LLC v. Mont. Dep't of Natural Res. & Conservation*, 2019 Mont. Water LEXIS 11.
- *In re Lyft, Inc. Application for Class E Transportation Network Carrier Certificate of Compliance*, Montana Public Service Commission Docket No. T-17.9.COC (Final Order, Sept. 5, 2017).

I also have served several times as a panel member on Montana Medical Legal Panel proceedings, and a board member on attorney fee arbitration panel proceedings.

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.

Authorships:

- 2012 Survey on Oil and Gas (Montana chapter), 18 TEX. WESLEYAN L. REV. 541 (2012);
- 2013 Survey on Oil and Gas (Montana chapter), 19 TEX. WESLEYAN L. REV. 407 (2013);
- 2014 Survey on Oil and Gas (Montana chapter), 1 TEX. A&M L. REV. (SURV. ON OIL & GAS) 167 (2014);
- 2018 Survey on Oil and Gas (Montana chapter), 5 TEX. A&M J. PROP. L. 57 (2019);
- 2019 Survey on Oil and Gas (Montana chapter), TEX. A&M L. REV. (in publication);
- “Implementing Institutional Controls at Brownfields and Other Contaminated Sites,” (Am. Bar. Ass’n, Amy L. Edwards ed., 2012) – author of chapter 41;
- Montana Water Law Treatise, Rocky Mtn. Min. L. Found (currently with the publisher for editing).

Seminar Presentations:

- “Wetlands Mitigation: Are There Rules and Do They Reflect Good Science?” American Bar Association 34th Conference on Environmental Law, Keystone, CO (Mar. 2005);
- “Montana Water Rights Sales and Transfers,” Lorman Education Services (Dec. 2009);
- “Oil and Gas Development in Montana,” The Seminar Group, (Billings, MT, Oct. 2013) – presentation on due diligence and risk reduction in oil and gas development;
- “Montana Water Law Seminar,” The Seminar Group (Helena, MT, Sep. 2013) – topic: “Water Court Litigation – Evidentiary Issues”;
- “Surface Owner – Mineral Owner Disputes” presented at Oil and Gas Rights in Montana (Billings, MT, July 2014);
- “Natural Resources & the Law,” The Seminar Group (Missoula, MT, Nov. 2014) – presentation on natural resource issues involving ranches;
- “Montana Water Law Seminar,” The Seminar Group (Helena, MT, Oct. 2014) – presentation on conflicts of interest and ethical issues in water rights cases;
- “Montana Water Law Seminar,” The Seminar Group (Helena, MT, Oct. 2015) – presentation on Water Court litigation case assessment;
- “Montana Water Law Seminar,” The Seminar Group (Helena, MT, Oct. 2016) – presentation on strategies for objectors in Water Court litigation;
- “Montana Water Law Seminar,” The Seminar Group (Helena, MT, Oct. 2018) – outline on water rights transactions (no presentation due to conflict with ongoing trial);
- “Montana Water Law Seminar,” The Seminar Group (Helena, MT, Oct. 2019) – Water Court update.

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.

- State Bar of Montana;
- Oregon State Bar;
- American College of Environmental Lawyers – fellow (2008 to present);
- Martindale-Hubbell Rating – AV Preeminent;
- Best Lawyers in America (since 1995);
- Chambers & Partners – Natural Resources & Environment Band 1 (highest);
- Rocky Mountain Super Lawyers – top environmental attorneys;
- American Bar Association Section on Environmental, Energy and Resources (1994 to present) – Vice-chair Water Quality and Wetlands Subcommittee (2004 to 2005); national chair of Water Quality and Wetlands Subcommittee (2006).

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.

- Garlington, Lohn & Robinson, PLLP – Executive Committee (2007-2014); Managing Partner (2015-2019);
- Run Wild Missoula – Board of Directors (2013-2019);
- Missoula Strikers Soccer Association – Board of Directors and President (2002-2005);
- Missoula Economic Partnership – Board member (2018-2019).

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

I was appointed as the Associate Water Judge in January 2019 and began service in February 2019. I have not otherwise run for public office or sought a judicial appointment.

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

Public involvement and community service provide a richer perspective of where we live and work. Involving ourselves in our communities connects us to others we might not normally reach in our professional lives. It enhances emotional and ethical awareness. It builds stronger communities.

During my entire time in Montana, I have looked for opportunities to volunteer time to community and public service projects. I volunteer at local events such as trail building and maintenance on public lands, and working aid stations at running events. I have served on committees of several nonprofit organizations. I have been a soccer coach and referee for the local youth soccer program. I served on the program's board of directors and was appointed club president for a term. While in practice, I

worked with our firm to implement group volunteer events such as spending a day each year working at local community gardens and service centers, and providing financial assistance to many local organizations. I enjoy being part of the local community by being a good neighbor, spending time with friends, voting at my neighborhood polling place in elections, shopping at local farmer's markets, and supporting music and art events.

I also try to stay active volunteering for various activities at the law school beyond teaching. I have judged negotiation competitions and practice rounds of moot court competition teams, participated in panel presentations and guest lectures, mentored law students about career opportunities, supervised a clinical intern student, and worked with the environmental and natural resource faculty on curriculum development and event planning. I believe the law school plays a very important role in the strength of Montana's legal community and volunteer time is time well spent.

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.

In August 2009 I was cited and convicted for operating a motor vehicle while under the influence of alcohol. The citation occurred while driving home from a social event. I completed all driver improvement requirements and learned a very valuable lesson.

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 or Montana Supreme Court, affect adversely your qualifications to serve on the court for which you have applied? If so, provide the details.

No.

F. BUSINESS AND FINANCIAL INFORMATION

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

No.

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 an associate water judge, state whether you intend to resign such position immediately upon your appointment.

I am not involved in any business.

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 was paid an adjunct faculty stipend to teach at the law school. Until February 2019, I was a member of a limited liability company that owns a commercial building in Missoula, from which I received an annual pro rata distribution. Because the company leases part of the building to the law firm, I liquidated my interest when I left the firm. These income streams have been less than 10 percent of my total income.

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 Chief Justice, 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? X Yes No

If not, please explain.

N/A.

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

If yes, please explain.

N/A.

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 draft many orders each month that include rulings on motions and other case management orders, and orders to resolve issues and objections to water rights. I do my own legal research for the orders and opinions I write.

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

In private practice I drafted many contracts and other documents for various types of transactions, mostly involving water and other natural resources. I also wrote letters to clients providing advice on legal matters, and prepared formal legal opinions. I create PowerPoint presentations for law school classes and presentations, and for most seminars. I have written and graded many law school examinations and research papers. I also have written and edited a number of legal publications.

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. The writing sample should be as recent as possible.

Attached is a copy of an Order on Pending Motions issued on February 11, 2020 in Water Court Case 76GJ-R172. The order also is reported at 2020 WL 871414.

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

75%

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

Yes, I primarily use Lexis, but also am very comfortable with Westlaw. I have used both services throughout my entire career.

H. MISCELLANEOUS

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

I enjoy running and hiking, especially on trails in the Montana's mountains. I have completed several marathons and ultramarathons. Each of the past seven years I have organized a group trail run across the Bob Marshall Wilderness, with plans hopefully to do so again later this summer.

I also enjoy many other activities including hiking, camping, climbing, biking, skiing, floating, fishing, reading, and photography. I most enjoy spending time with my family and friends.

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

Before law school I was a professional ski patrol at Schweitzer Mountain Resort in Sandpoint, Idaho. For that work I was licensed as an emergency medical technician and also performed avalanche control work. During the summers between college and law school I worked at various seasonal jobs in Yellowstone National Park, including a management position at the full-service gas station at Canyon. I filled seasonal gaps by working in a hospital as a surgical technician and at various construction and restaurant positions.

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

In addition to serving on the boards of several nonprofit entities and on various committees for community groups, while in practice I assisted several low-income individuals with litigation and non-litigation matters on a pro bono basis. I have not performed pro bono legal work since becoming a judge, but I continue to volunteer to present at seminars, conferences and law school events.

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

Montana's state district court judges strongly influence how I view our system of justice. They are selflessly dedicated to providing justice across Montana. Each day these judges address an enormous range of complicated legal and social issues. Some travel hundreds of miles each month to serve various counties. Others manage an enormous caseload that seems crushing. They do so with grace, empathy, good humor, and steadfast dedication to providing fair and even-handed justice. All are advocates for their staffs and they support each other. They easily could follow other successful legal careers, but have made the choice to dedicate their time to maintaining the high standards of Montana's judiciary.

I always have been impressed and influenced by Montana's judiciary, but that admiration has grown significantly during the short time I have observed their critical work from perspective of a water judge. They influence me by being a model of hard work, integrity, intelligence and fairness. Our system of justice depends on them and they are wonderful role models.

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

After being the associate water judge for just over a year, I only am beginning to learn the qualities it takes to be a good water judge. A good judge looks at each case thoughtfully and objectively, and drafts decisions based on a careful analysis of the facts and application of existing law and applicable procedural rules. Clear, precise orders are important not only to resolve the immediate dispute, but also to allow parties to make predictable future decisions about water use in reliance on the Court's orders. A good judge also tries to continually learn something from each case and incorporate that knowledge into the next decision to make it better than those that preceded it.

Being a good Water Court judge requires being cognizant of the rich history of Montana's water law and its evolution from early pure common law cases through the various statutory changes leading to the enactment of the Water Use Act, and the body of law – both procedural and substantive – that followed the creation of the Water Court. Every water right the Water Court addresses is a small, but important piece of Montana history. Each decision will help to guide the allocation and use of a scarce resource for the foreseeable future. Additionally, because Montana is undergoing a McCarren Amendment adjudication, it is critical to remain mindful of applicable aspects of federal law and Indian law.

Like every judge, a Water Court judge should also strive to earn the respect of the parties, the practicing bar, other judges, the Court's water masters and staff, and the public. Respect never is a given. Earning respect as a judge requires good judgment, courtesy, discipline, humility, integrity, fairness, and sometimes a bit of creativity.

A good Water Court judge must love what they do and bring a passion to work. Much of the day-to-day can get lost in the detail of individual cases and their technical aspects, but keeping sight of how fortunate Montana is to have a court to evaluate and determine water rights and disputes is critical to be a good judge.

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.

Respect for precedent is important to create a predictable body of law that will guide the outcome of future disputes, and allow parties to make decisions with a measure of certainty and reduced risk. Our system of fair and even-handed justice depends on a consistent body of law.

Adhering to precedent does not mean that law must be inflexible and not evolve over time. One example is the law applied to the interrelationship between surface water and groundwater. Not many decades ago, Montana and most other western states considered groundwater and surface water to be separate hydrologic systems and bifurcated them legally. Over time, as knowledge of geohydrology matured, Montana's courts and legislature had the foresight to recognize an interconnected hydrologic system.

Had the law remained static and inflexible, the legal regimes for resolving water disputes would be artificial and much more difficult, as witnessed by the recent experience some other states.

Ultimately balance is struck by approaching each case with a thorough and careful evaluation of the factual record and deciding cases narrowly in light of those facts. It also is important to follow procedural rules and, where statutes are involved, apply accepted canons of statutory construction. This allows precedent to be appropriately malleable based upon the incremental responses to different sets of facts, including advances in knowledge of hydrology and other factors. By deciding cases narrowly based on the salient facts, the public can rely on a predictable, precedent-based system, but a system with sufficient flexibility to accommodate advances in both technical knowledge and different factual scenarios.

56. In the space provided, state the reasons why you are seeking office as an associate water judge.

I seek reappointment because I thoroughly enjoy serving the people of Montana as a judge. I love every day I come to work. I initially applied for this position because water law was my favorite area of practice. My fascination with water law and its importance to Montana only has grown. The water masters and staff at the Court are dedicated, supportive and a joy to be around. It is a privilege to be a colleague of Judge McElyea and to learn from his mentorship. I admire Montana's water bar and their tremendous talent and professionalism. I learn something new every day and relish the challenge of resolving each case without losing sight of the overall goals of the adjudication process.

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

I am proud to have been part of Montana's legal system for the past 26 years. I arrived Montana in 1994 not knowing anyone very well, and with little experience. Over time and with the assistance of some very good mentors, I developed an environmental and natural resource practice. I was fortunate to assist with some thorny issues Montana has faced as it rapidly evolves and also addresses its historical resource development and use legacies. Looking back, I am proud to have been involved in work that has ranged from the cleanup and rehabilitation of contaminated sites to assisting farmers and ranchers in securing the water rights necessary to preserve the viability of their family operations. Through this work, I have had the good fortune to work for and alongside many amazing people and to learn a great deal about the fabric of Montana.

I am of course very proud and honored to serve Montana as the Associate Water Judge. It is a privilege that I try never to take for granted. Already I have helped to resolve some complicated cases, with many more in process and on the horizon. I am proud of decisions that give parties a measure of certainty as to their water rights, and help move the adjudication process toward its ultimate conclusion.

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

Other than the information disclosed in this application, I am not aware of other information.

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 associate water judge applicant?

Even though I have much more to learn about the art of being a judge, I think the experience I have gained the past year differentiates me from others. Judge McElyea is a very patient mentor and I have learned a great deal from him and everyone at the Water Court. I have developed, and am eager to continue to develop, a breadth and depth of experience that I believe makes me well-suited to be reappointed as the Associate Water Judge.

CERTIFICATE OF APPLICANT

I understand that the submission of this application expresses my willingness to accept appointment as Associate Water Judge for the State of Montana, if tendered by the Chief Justice, 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.

April 7, 2020
(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, May 4, 2020.

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

Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
(406) 586-4364
1-800-624-3270
Fax: (406) 522-4131
watercourt@mt.gov

IN THE WATER COURT OF THE STATE OF MONTANA
CLARK FORK DIVISION
FLINT CREEK BASIN (76GJ)
PRELIMINARY DECREE

CLAIMANT: Clare E. Bloom
PROPOSED INTERVENOR: Dennis Ranch, LLC
INTERESTED PARTY: Munis Family Limited Partnership

CASE: 76GJ-R172
76GJ 6046-00

ORDER ON PENDING MOTIONS

BACKGROUND

On December 17, 2019, Dennis Ranch, LLC (“Dennis”) filed a Motion to Intervene or in the Alternative Motion for Rule 54(c) Certification. The motions relate to water right claim 76GJ 6046-00, which is owned by Clare E. Bloom. Bloom and Munis Family Limited Partnership (“Munis”) ¹ oppose the motion.

Claim 76GJ 6046-00 is included in the Preliminary Decree for the Flint Creek Basin (Basin 76GJ) as a claim to divert water from Flint Creek for irrigation use with an April 30, 1888 priority date. The Preliminary Decree abstract for claim 76GJ 6046-00 included an issue remark stating that the claim and another claim were filed on the same decreed right and the combined flow rates of the two claims exceeded what was decreed in the 1906 case *Mont. Elec. Power and Min. Co. v. Mary Schuh, et al.* (Case No. 655,

¹ Munis did not formally request to participate as a party. However, Munis submitted responses to both motions filed by Dennis relating to claim 76GJ 6046-00 without objection from Dennis. Accordingly, the Court added Munis as an interested party pursuant to M.R.Civ.P. Rule 19(a)(2).

Ninth Cir. Ct., Dist. of Mont.) (the “Schuh Decree”). Neither Dennis nor anyone else objected to claim 76GJ 6046-00 based on this remark or for any other reason.²

The Water Court addressed the decree exceeded remark in a Closing Order signed by the Chief Water Judge on January 31, 2019. The Closing Order found that the two claims referenced in the remark actually stem from two different water rights, both of which were decreed to John D. Kennedy in the Schuh Decree. One was an “April 1888” right for 60 miners inches, and the second an “1888” right for 53 miner’s inches.³ The Closing Order concluded Bloom owns the 60 inch right and the 53 inch right is owned by Munis as claim 76GJ 214138-00.⁴ Pursuant to its authority under § 85-2-248(3), MCA, the Court ordered the remark removed from claim 76GJ 6046-00 and closed the proceedings related to the claim.

Dennis does not have a recognized ownership interest in claim 76GJ 6046-00, but does have other water right claims in Basin 76GJ, including claim 76GJ 98883-00. Claim 76GJ 98883-00 was included in the Basin 76GJ Preliminary Decree as a claim to divert water from Flint Creek for irrigation use with a claimed priority date of December 31, 1885. Several other parties also claim water rights with the same priority date based a water right decreed to Mary Schuh in the Schuh Decree. These other parties include Munis and George McClain (“McClain”). Collectively, the flow rates of the December 31, 1885, water right claims of Dennis, Munis and McClain exceed what was decreed to Mary Schuh in the Schuh Decree, which generated issue remarks. The Water Court consolidated the claims into Case 76GJ-R10 to resolve the issues.

² Claim 76GJ 6046-00 also was decreed with a notice remark stating that the ditch name had been modified and providing notice that the remark would be removed if no one objected, which no one did.

³ Most of the documents discussed in Dennis’ filings use miner’s inches as the flow rate units, consistent with historical practice in Montana. The Water Use Act specifies that cfs is the legal unit, and provides the factors for converting miner’s inches. Section 85-2-103, MCA.

⁴ On March 19, 2019, the senior water master filed a Master’s Report in Case 76GJ-R15 reaching a parallel conclusion for claim 76GJ 214138-00. The Court adopted the Master’s Report on April 8, 2019.

On August 9, 2019, Dennis moved the Court to create implied claims in Case 76GJ-R10. The motion asks the Court to parse Dennis' claim 76GJ 98883-00 into three claims. Dennis requests that the flow rate for claim 76GJ 98883-00 be reduced to resolve the decree exceeded issues in Case 76GJ-R10. Dennis also requests that the reduction be reallocated to two new implied claims, one for 1.50 cfs (60 miner's inches) with an 1888 priority date, which apparently is based on the same decreed right that forms the basis of Bloom's claim 76GJ 6046-00. Munis Br. at 4-5. If Dennis' proposed implied claim is recognized, a new decree exceeded issue may arise as to claim 76GJ 6046-00 if both it and the new implied claim are based on the same decreed right. However, whether Dennis' motion has merit is a matter before the senior water master in Case 76GJ-R10, which currently is stayed.

On October 3, 2019 (after it filed its motion for an implied claim in Case 76GJ-R10), Dennis moved to set aside the Closing Order on the basis that the Closing Order contains errors that may be remedied under M.R.Civ.P. Rule 60(a) or (b). The Water Court denied this motion. *In re Bloom*, 2019 Mont. Water LEXIS 127 (Nov. 22, 2010).

In the present motion, Dennis again seeks leave to challenge the Closing Order by either intervening in proceedings involving claim 76GJ 6046-00, or alternatively to obtain a Rule 54(a) "certificate deeming final the closing order and all other underlying orders in this claim relating to Claim 76GJ 6046-00." Munis and Bloom both oppose the motion.

DISCUSSION

A. Intervention.

Dennis seeks to intervene as a matter of right pursuant to the intervention rule, which states in relevant part:

On timely motion, the court must permit anyone to intervene who:
(2) claims an interest relating to the property or transaction which is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless the existing parties adequately represent that interest.

M.R.Civ.P. Rule 24(a).

Rule 24(a) is one of the Montana Rules of Civil Procedure. The Water Court's adjudication rules state that the rules apply unless the context of the adjudication rules provide otherwise. W.R.Adj.R. 2(b). Neither Bloom nor Munis argue that Rule 24(a) does not apply in Water Court proceedings. Rather they argue that Dennis does not meet the intervention test.

A motion to intervene as a matter of right must (1) be timely; (2) show an interest in the subject matter of the action; (3) show that the protection of the interest may be impaired by the disposition of the action; and (4) show that the interest is not adequately represented by an existing party. *Estate of Schwenke v. Bechtold*, 252 Mont. 127, 131, 827 P.2d 808, 811 (1992). If any of these factors do not exist, the motion should be denied. *Id.* In addition to these four factors, the Supreme Court has noted that "a determining factor in a motion to intervene is whether the motion seeks to relitigate or reopen issues already decided." *Connell v. State Dep't of Soc. & Rehab. Servs.*, 2003 MT 361, ¶ 20, 319 Mont. 69, 81 P.3d 1279.

Timeliness is the threshold element of a motion to intervene. An untimely motion must be denied regardless of the other factors. *Connell*, ¶ 23; *Estate of Schwenke*, 252 Mont. at 133. Neither the rule nor case law set a hard and fast objective time period to determine timeliness. However, several factors guide the Court's discretion in determining timeliness. The factors include (1) the length of time the proposed intervenor knew or should have known of an interest in the case before moving to intervene; (2) if intervention is granted, prejudice to the original parties resulting from the proposed intervenor's delay in applying to intervene; (3) prejudice to the proposed intervenor if the motion is denied; and (4) any unusual circumstances mitigating for or against a determination that the application is timely. *In re C.C.L.B.*, 2001 MT 66, ¶ 24, 305 Mont. 22, 30, 22 P.3d 646 (2001); *In re Erb*, Order Regarding Dismissal of Notice of Intent to Appear Party and Order Remanding Matter to Water Master, Case 41B-208, 2016 Mont. Water LEXIS 2, *14.

In evaluating timeliness, Dennis' motion also must be viewed against the backdrop of the statutory objection process applicable to Water Court adjudication proceedings and

the various opportunities Dennis and its predecessors had to voice any concerns. When the Water Court issues temporary preliminary and preliminary decrees for various hydrologic basins, the statute requires the Court to allow parties to file objections to claims that appear in preliminary and temporary preliminary decrees. Section 85-2-233(2), MCA. Objections are subject to specific timing requirements that apply to all basins. The typical objection period is 180 days after entry of a decree, although for good cause the objection period may be extended for up to two 90-day periods. *Id.* The statute mandates that objections “must be filed” prior to the expiration of the objection period. *Id.* The statute does not authorize late objections.

Basin 76GJ is a two decree basin, meaning the Water Court has issued both a temporary preliminary decree and a preliminary decree. Bloom’s predecessors, Victor and Cecil Johnson filed the statement of claim for claim 76GJ 6046-00 on October 23, 1980. The Water Court issued the temporary preliminary decree in March 1984, and provided the opportunity to object to claims. Dennis’ predecessors did not object to claim 76GJ 6046-00, but the Johnsons did. Their objection was resolved in a Master’s Report issued on March 24, 1989. The Master’s Report was adopted by the Court in an order dated July 7, 1989.

The claims in Basin 76GJ were reexamined by the Department of Natural Resources and Conservation (“DNRC”). Based on reexamination, new abstracts were generated and included in the Preliminary Decree. The Court set November 15, 2016 as the deadline to file objections. This Court later extended the deadline to February 13, 2017. A counterobjection period followed.

On June 9, 2017, following the close of the objection and counterobjection periods, the Water Court published an “objection list” identifying each claim in Basin 76GJ that received an objection or counterobjection, and the elements of the claims objected to. Bloom’s claim 76GJ 6046-00 appeared on the objection list as a result of the issue remarks on the claim. The release of the objection list opened the notice of intent to appear period that allowed persons until August 8, 2017 to seek to appear for purposes of resolving issues to a claim.

In addition to the time delay of this motion, allowing Dennis to now intervene potentially prejudices third parties. For example, Bloom cannot counterobject to any of Dennis' claims, including those at issue in Case 76GJ-R10 because the counterobjection period in Basin 76GJ closed on May 2, 2017. There is no statutory mechanism to reopen the counterobjection period. Likewise, if Dennis had objected, other parties might have decided it was necessary to appear to ensure that the claims were resolved in an historically accurate manner, and in a way that did not unravel the resolution of other claims originating from the Schuh Decree. Because Dennis did not object to claim 76GJ 6046-00, no third party was put on notice of any issue Dennis might have with the claim or how the objection might affect other claims.

The objection process the Legislature set forth in the adjudication provisions of the Water Use Act heightens the risk of prejudice to Bloom and other third parties if the Court allows Dennis to intervene. While the objection process does not expressly supplant Rule 24(a) intervention, the risk of prejudice dictates that the Court give heightened scrutiny to Dennis' reasons for not availing itself of the objection process that exists for every decree the Water Court issues.

Dennis does not cite any case where the Water Court has allowed a party to intervene in a case after not objecting during the objection period. Instead, Dennis relies on *Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, ¶ 35, 356 Mont. 41, 230 P.3d 808, where the Supreme Court found a post-judgment motion to intervene timely when filed during pendency of appeal period. However, in *Aspen Trails*, the Supreme Court only allowed intervention after evaluating potential prejudice to the existing party and finding none. *Aspen Trails* did not involve a situation similar to Water Court proceedings where a party seeks to intervene after missing the deadlines for party status afforded by the objection process.

The Court recognizes that finding lack of timeliness may be perceived as conflicting with the Court's policy to address the merits of water rights. *See, e.g., In re Horvath*, Case 76G-548, 2006 Mont. Water LEXIS 4, *6 (Master's Report, May 22, 2006). However, that policy has limits to avoid allowing parties to use Rule 24

intervention as an elixir to cure the failure to object within the statutory objection period. Thus, even though Dennis has provided some justification for not submitting a timely objection, in light of the length of time Dennis had to raise its concerns, the potential prejudice to third parties, and the risk of undercutting the statutory objection process with its mandatory deadlines, Dennis' motion to intervene must be denied as untimely.

B. Rule 54(b)

Dennis also requests that the Court certify the Closing Order as final pursuant to M.R.Civ.P. 54(b) for purposes of a potential appeal. Rule 54(b) states:

(1) When an action presents more than one claim for relief — whether as a claim, counterclaim, crossclaim, or third-party claim — or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

Subpart (2) of the rule requires that any Rule 54(b) order or decision “comply with the certification of judgment requirements of Montana Rule of Appellate Procedure 6(6).” M.R.Civ.P. 54(b)(2). Appellate Rule 6(6) sets forth the requirements for the Court to sufficiently document its findings. M.R.App.P. 6(6).

Rule 54(b) applies to certain Water Court proceedings. *In re Adjudication of Sage Creek Drainage Area*, 234 Mont. 243, 763 P.2d 644 (1988). In *Sage Creek*, the Montana Supreme Court held that Water Court proceedings involving decisions on temporary preliminary decrees and preliminary decrees are interlocutory and, under the Water Court appeal statute (§ 85-2-235, MCA), typically require Rule 54(b) certification before they can be appealed to the Montana Supreme Court.

After the Supreme Court decided *Sage Creek*, the Legislature modified the statute regarding appeals from Water Court and authorized appeals from “an interlocutory ruling by the water judge upon a question of law ... by any party who is affected by the decision

and who participated in the matter in which the ruling was issued.” Ch. 421, L. 1995, now codified as § 85-2-235(3), MCA. Following the change to the statute, the Supreme Court often hears appeals from Water Court decisions prior to final decrees, even when the appeal includes fact issues. *E.g. Weinheimer Ranch, Inc. v. Pospisil*, 2013 MT 87, 369 Mont. 419, 299 P.3d 327.

Dennis does not argue that it has a right to appeal an interlocutory ruling under revised § 85-2-235(3), MCA, presumably because it did not file an objection and achieve party status to participate in the claim 76GJ 6046-00 proceedings. Instead, Dennis argues that because it someday will have a right to appeal the Basin 76GJ final decree, Rule 54(b) provides it with a gateway to appeal any interlocutory rulings that precede the final decree, including the Water Court’s January 31, 2019 Closing Order.

Dennis’ argument does not hold up under scrutiny. By not meeting the statutory prerequisites to file an interlocutory appeal under § 85-2-235(3), MCA, Dennis must prove that it meets the standard elements reviewed under Rule 54(b). As Munis notes in its response, Dennis bears the burden of applying various factors and convincing the Court that this is a sufficiently “harsh case meriting a favorable exercise of discretion” to certify it for appeal. Munis Resp. at 10, *citing, Roy v. Neibauer*, 188 Mont. 81, 86, 610 P.2d 1185, 1188 (1980). These factors include: (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the court; (3) the possibility that the court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in a setoff against the judgment sought to be made final; and (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, triviality of computing claims, expense, and the like. *Roy*, 188 Mont. at 87. Additionally, when deciding whether to grant certification, the court must follow three “guiding principles”: (1) the party seeking certification bears the burden of convincing the court that this is an “infrequent harsh case” meriting a favorable exercise of discretion; (2) the court must balance the competing factors present in the case to determine if it is in the interest of sound judicial

