

APPLICATION FOR

**DISTRICT COURT JUDGESHIP  
4th Judicial District**

**A. PERSONAL INFORMATION**

1. Full Name: Thomas Charles Orr
- a. What name do you commonly go by? Tom or Thomas

2. Birthdate: [REDACTED] Are you a U.S. citizen? Yes

3. Home Address: [REDACTED]

Phone: [REDACTED]

4. Office Address: P.O. Box 8096, Missoula, MT 59807

523 South Orange, Missoula, MT

Phone: (406)543-0999

5. Length of residence in Montana: 54 years.

6. List your place of residence for the last five years:

<u>Dates</u>	<u>City</u>	<u>State</u>
1/1/2010--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>
Bozeman Senior High	Bozeman, MT	6/78	Diploma
Montana State University	Bozeman, MT	6/86	BS Sociology
Univ. of Mont. School of Law	Missoula, MT	6/90	JD

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

I Graduated with honors from Montana State University

9. Were you a member of the Law Review? If so, please state 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>
State Bar of Montana	10/90
U.S. District Court, State of Montana	2000

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

Thomas C. Orr Law Offices, P.C. I am a solo practitioner. 1/1/2013--present

12. State the name, dates and addresses of all law firms with which you have been associated in practice, all 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>
Thomas C. Orr Law Offices, P.C.	Principal/Owner	1/1/2013-present
P. Mars Scott Law Offices, Missoula, MT	Associate Attorney	1/1/2010-12/31/2013
Orr Law Offices, P.C.	Principal/Owner	1/1/2000-12/31/ 2009
Office of the Missoula City Attorney, Missoula, MT	Deputy City Attorney	10/1/1991-12/31/1999
MT 1 <sup>st</sup> Judicial District Court, Helena, MT	Law Clerk	9/1/1990-9/30/1991

13. If you have not been employed continuously since the 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.

I have a general practice serving a diverse clientele in a wide variety of practice areas. I would say it is primarily litigation based. I have a number of family law cases involving dissolution, child custody, child support, and adoption. I would estimate that this constitutes approximately 30% of my practice. I do a fair amount real estate work, representing property managers, as well as buyers and sellers of real property. I estimate that this amounts to 30% of my practice. The remainder of approximately 40% percent would be best characterized as "other." I write wills, I advise businesses and individuals who have contract disputes. I work with businesses that have personnel and human resource issues. I am the Superior Town Attorney where I act as the town prosecutor and I provide municipal legal advice to the town council.

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

My solo practice has kept me very busy. I have also taught at a number of continuing education courses over the years.

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

Family law; property management; land use and subdivision.

17. Do you regularly appear in court? Yes, frequently.

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

Federal court	0%
State or local courts of record	65%
Administrative bodies	5%
Other	30% <sup>1</sup>

18. During the last five years, what percentage of your practice has been trial practice? 80% +/-

19. How frequently have you appeared in court? Ten times per month on average.

20. How frequently have you appeared at administrative hearings?

Less than one time per month on average.

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

Civil	80%
Criminal	5% <sup>2</sup>
Other	15%

<sup>1</sup> Justice Courts in Missoula, Butte and Helena

<sup>2</sup> As a town prosecutor

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

*Wohl, et. al. v. City of Missoula*, 2013 MT 46. Martin S. King, Worden Thane, P. O. Box 4747, Missoula, MT 59807. (406) 721-3400

*Wohl, et. al. v. City of Missoula*, 2014 MT 310. Martin S. King, Worden Thane, P. O. Box 4747, Missoula, MT 59807. (406) 721-3400

23. State the number of jury trials that you have tried to conclusion in the last ten years. 2

24. State the number of non-jury trials that you have tried in the last ten years. 50+

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

Quentin Rhoades, 430 N. Ryman, 2nd Floor, Missoula, Montana 59802, Telephone: (406) 721-9700  
June 6, 2014, *Arcadia of Montana v. Wayne T. Kelley and Beth A. Werner*, 21<sup>st</sup> Judicial Dist., DV-11-668.  
Judge James A. Haynes, (406) 375-6780

Kevin Vaino, 27 West Park Street #4, Butte, MT 59701, (406) 782-3357, October 22, 2014, *Legion Oasis v. Terri Cherne*, 2nd Judicial Dist., DV-14-383, Judge Brad Newman, (406) 497-6420.

Amy Hall, 616 Helena Avenue, St. 100, Helena, MT 59601, (406)442-9830 x 114, November 13, 2014, *The Dwelling Place, Inc. v. Tim Herman*, 4<sup>th</sup> Judicial Dist., DV-14-1089, Judge John W. Larson, (406) 258-4773.

I have been involved in many other cases that both went to trial or which were concluded at settlement conference. Attorneys with whom I have litigated these cases include, but are not limited to the following:

Cynthia Thiel, Boone Karlberg, P.O. Box 9199, Missoula, MT 59807, (406)543-6646

Tal Goldin, Evonne Smith Wells and Jamie McKittrick, Wells and McKittrick, 222 East Pine Street, Missoula, MT 59802, (406)728-7177

Ryan Phelan, P. Mars Scott Law Offices, P.O. Box 5988, Missoula, MT 59806, (406)327-0600

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

I have represented clients in adversarial proceedings involving child support, unemployment, and disciplinary proceedings involving property managers.

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

No.

#### **D. PROFESSIONAL AND PUBLIC SERVICE**

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

I have been a member of the Montana Bar Association since 1990.

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

I served on the Board of the Missoula Housing Authority from 2000-2005. I was Chairman of the Board for 2 years.

I was appointed to the Board of Trustees of the Missoula County Public School District in 2003. I later won election to the Board and served until 2007.

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

I ran for and was elected as a Trustee for Missoula County Public Schools in 2004.

#### **E. PROFESSIONAL CONDUCT AND ETHICS**

31. 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, give the particulars.

No.

32. Have you ever been found guilty of contempt of court or sanctioned by any court for any reason? If so, please explain.

No.

33. Have you ever been arrested or convicted of a violation of any federal law, state law, county or municipal law, regulation or ordinance? If so, please give details. Do not include traffic violations unless they also included a jail sentence.

Yes. I was arrested and later plead guilty to driving under the influence in 1984. This occurred in Bozeman while I was in college. I paid my fine of \$300.00, served a day in jail, and completed all other sentencing requirements. Pursuant to the law at the time, the record of this conviction was expunged from my record. A humiliating experience that gave me a powerful insight into the criminal justice system.

34. 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, please give details.

No.

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

No.

#### **F. BUSINESS AND FINANCIAL INFORMATION**

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

No.

37. If you are an officer, director, or otherwise engaged in the management of any business, please state 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.

N/A

38. 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, please identify the source and the approximate percentage of your total income it constituted over the last five years

No.

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

No.

40. Have you filed appropriate tax returns as required by federal, state, local and other government authorities? Yes

If not, please explain.

N/A.

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

No

If yes, please explain.

N/A

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

No.

43. Please explain your philosophy of public involvement and practice of giving your time to community service.

My first experience in public service began when I joined the United States Navy at age 18. I served in the Navy for four years prior to entering college. After law school, I served as Judge Jeffery Sherlock's law clerk. After my clerkship, I worked as a deputy city attorney for the City of Missoula. After leaving the City Attorney's Office, I served as a volunteer Board member on the Missoula Housing Authority and as an elected Trustee for the Missoula County Public School Board. I provide pro bono legal services to many individuals in Missoula as well as by serving as the attorney for Missoula Habitat for Humanity.

I believe everyone has an obligation to provide public service in areas of their expertise or interest.

### G. WRITING SKILLS

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

I have researched legal issues and drafted legal briefs extensively throughout my career. As a solo practitioner, I have primarily performed my own research and writing.

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

I have drafted numerous marital property settlement agreements, leases, contracts, releases, and settlement agreements.

46. Please 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. This is a portion of the Appellee's Brief in *Wohl, et. al. v. City of Missoula*, 2013 MT 46.

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

I would rather not guess. I can say that I spend a significant amount of time performing these duties.

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

Yes. I use Lexis in my practice. In my former employment, I used Westlaw.

#### H. MISCELLANEOUS

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

I enjoy whitewater rafting, scuba diving, hunting and cooking.

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

My first job was as a paperboy for the Bozeman Daily Chronical and Great Falls Tribune newspapers. During high school, I worked in a variety of restaurants as a dishwasher and cook. After high school, I was a sailor in the United States Navy where I worked as a radar operator on an aircraft carrier and a destroyer. After my service in the Navy, during college I worked as a cook, construction laborer and in other part-time jobs. After graduation from law school, I was a law clerk for Judge Sherlock in Helena. I then became a deputy city attorney for the City Missoula. Since 2000, I have been working in private practice.

51. Please identify the nature and extent of any pro bono work that you have personally performed during the last five years.

I regularly perform over a hundred hours of pro bono service every year. I serve as a pro bono mediator and attorney, primarily in the area of family law. I also provide pro bono legal services to the Missoula Habitat for Humanity.

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

As explained above, my first brush with the law was an unpleasant one. Nevertheless, it set me on the path towards my present career. I saw how someone's first experience with the legal system could be positive and direct the person towards improving himself or herself. I have also seen how it can have a negative effect. This experience was carried forth for me during my employment as a law clerk where I observed countless trials and legal appearances. Since my time working for Judge Sherlock, someone I view as a great example, it has been my goal to become a district court judge.

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

The most important qualities are patience and kindness. Without these attributes, a district judge cannot ever gain the depth of understanding necessary to make a judgment. Aside from these qualities, I think a good District Court Judge should have a wide range of public and private work experience, which allows them to understand what litigants and their attorneys are going through during litigation. A strong work ethic, innate curiosity, and good sense of humor are also important qualities.

54. 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.

Precedent provides the framework and beginning point for judicial decision-making. However, the controversies that come before the court are rarely black and white. As society changes, so too must law. I believe that law must have flexibility to take into account changes and developments in our society and culture.

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

Since my experience as a law clerk, I have wanted to be a district court judge. I believe I have the combination of life experience and personal qualities that will allow me to carry out the duties of judge in a thoughtful and compassionate manner. I have seen what happens to people's lives because of their experience in the judicial system. I want to have the opportunity to be a positive force in my community and for my profession.

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

I pride myself on my willingness to stand up and fight for the rights of my clients. I know that my efforts as a family law lawyer have resulted in better lives for many children and their parents. I am also proud of the results I achieved for my clients in the recent *Wohl* decisions, where, after 10 years of hard fought litigation, my clients prevailed against their city government who was found to have illegally taken their private property.

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

I have nothing to add to the information set forth above.

58. 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 candidate?

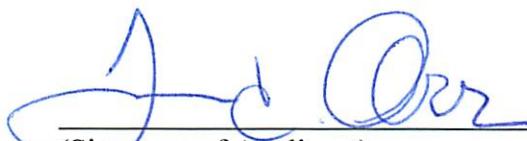
I am a veteran and I have the combination of public and private legal service experience that has been absent from the Missoula County bench for many years. I think it is time to have a judge who understands both the sides of the practice.

## I. CERTIFICATE OF APPLICANT

I understand that the submission of this application expresses my willingness to accept appointment as District Court Judge for the 4th 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 Canons of Judicial Ethics, if appointed.

2/15/2015

(Date)



(Signature of Applicant)

damages to the Plaintiffs under 42 USC § 1983 for the City's violation of their Federal Constitutional rights. The Plaintiffs are also entitled to damages for the violation of their rights which are protected by the Montana Constitution.

### **ARGUMENT**

**I. The District Court correctly determined that the City's right-of-way along South Avenue was limited to 60 feet.**

**A. The width of public roads is determined by the distances set forth in the dedication plats and by state law.**

The City's first claim of error is that the "District Court failed to consider the survey monuments on the ground." The City does not specify whether this claim of error is a challenge to the District Court's findings of fact or its conclusions of law and therefore this claim boils down to nothing more than arguments in favor of different findings. The standard of review, however, is not whether evidence supports different findings; it is whether the findings actually made are supported by substantial evidence. *Steed v. Solso*, 2010 MT 264, ¶ 27, 358 Mont. 356, 246 P. 3d 697 (citing Rule 52(a) M. R. Civ. P.). The claim is also not true. In fact, the District Court did consider the relevant survey monuments on the ground. The court found that South Avenue itself was a "record" monument, a fact upon which both parties' expert witnesses agreed. *Dkt. 124, 43: 11-14*. Likewise, the court accepted as fact, the testimony of the City's own consultant, who testified that no original survey monuments along South Avenue's right-of-

way have been located by any surveyor. *Id.* See also, testimony of Thomas McCarthy. *Tr. 153:1-2.*

There were no South Avenue monuments to consider with the exception of the section corner and quarter corner common to Section 29 and 32. See, McCarthy Aff., ¶42.<sup>6</sup> These monuments locate South Avenue's section line for the 60-foot road right-of-way that was dedicated by the R.M. Cobban Orchard Homes plat. See, *Exhibit P-17.*<sup>7</sup>

In making its finding and conclusions that, the South Avenue right of way was 60 feet wide, the District Court correctly considered the plats themselves and Montana law to determine the width of South Avenue. The standard width of a public road in Montana, since at least 1895, is, unless otherwise specifically noted, 60 feet. Montana law in effect in 1905 provided:

The width of all public highways, except bridges, alleys and lanes **must** be sixty feet **unless** a greater or less width is ordered by the Board of County Commissioners on petition of the persons interested. The width of all private highways and by-roads, except bridges, must be at least twenty feet. Nothing in this Act must be so construed as to increase or diminish the width of either kind of highway already established or used as such.

Chapter XLIV, Article I, § 3, 1903 Mont. Laws, 67 (emphasis added). (App. 14).

The legislature retained this language when it renumbered the statute as Rev. Code

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<sup>6</sup> Thomas McCarthy's Affidavit is included in Section 7 of the Appendix of the City's Principal Brief.  
<sup>7</sup> See, *Exhibit "A"* of Thomas McCarthy's Affidavit. (Section 7 of Appendix to the City's Principal Brief.)

Mont. § 1339 (1907) through its present iteration as Mont. Code Ann. § 7-14-2112(1). (App. 15).

Thus, as a matter of law, the standard legal road width for all public highways including South Avenue at the time of its dedication and through today, is 60 feet unless the County Commissioners ordered a greater width upon the petition of persons interested. The City of Missoula never submitted any evidence establishing that the Missoula County Commissioners ever ordered a greater width or that anyone petitioned them to do so. On this basis alone, this Court should affirm the District Court's conclusion that South Avenue is a 60-foot wide public right-of-way.

Montana case law also supports the District Court's conclusions. *See, Olson v. Jude*, 2003 MT 186, 316 Mont. 438, 73 P.3d 809. The primary issues in *Olson* involved the determination of the proper boundaries for tracts of land, which had been erroneously surveyed, resurveyed, and subdivided. Addressing these issues, the *Olson* Court explained that “[w]hen surveyors use corner sections and lines to base measurements and plot tracts, it is essential that they properly identify and authenticate the original monument.” *Olson* at ¶ 39 (citing *Helehan v. Ueland*, 223 Mont. 228, 231, 725 P.2d 1192, 1194, (1986)). The *Olson* Court went on to note that:

[o]riginal corners, as established by the government surveyors, if they can be found, or the places where they were originally established, if

they can be definitely determined, are conclusive on all persons owning or holding with reference thereto, without regard to whether they were located correctly or not, and must remain the true corners or monuments by which to determine the boundaries.

*Olson, supra (citing Vaught v. McClymond, 116 Mont. 542, 557, 155 P.2d 612, 619 (1945)) [citation omitted].*

Next, the *Olson* Court held that:

[w]hen lands are granted according to an official plat of a survey, the plat itself, with all its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and controls so far as limits are concerned, as if such descriptive features were written out on the face of the deed or grant itself.

*Olson, supra, at ¶ 46 (citing Vaught, 116 Mont. at 548-49, 155 P.2d at 616).*

Applying these rules here, we see that the City's claim of error has no merit. Other than South Avenue itself, there were no monuments on the ground along South Avenue for the City's surveyor or the District Court to consider except for the section corner and quarter corner common to Section 29 and 32. In the absence of South Avenue monuments on the ground, the court correctly considered the statutes in effect at the time of South Avenue's creation,<sup>8</sup> the original subdivision plats together with their associated Certificates of Dedication,<sup>9</sup> and other documents,<sup>10</sup> all of which support its conclusion that the South Avenue right-of-way, east of Clark Street, is 60 feet wide and symmetrical to the section line. *Dkt.*

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<sup>8</sup> *Dkt. 124, 50: 10-18*

<sup>9</sup> *Dkt. 124, 52: 4-9*

<sup>10</sup> *Dkt. 124, 52, 6-9.*

*124, 52:4-9; Exhibits P-18--21, (App. 10-13); Exhibits P-13 and P-17.*

Not only was the District Court's decision on this issue correct because it conforms with the law and the facts, it certainly did not rise to the level of "clear error" as would be required for the City to prevail on this argument. As such, this Court should affirm the court's judgment.

**B. The WGM retracement survey did not change the width of South Avenue.**

The City's second claim of error is that the District Court "completely failed to address the legal ramifications of the retracement survey." It is unclear what to make of the City's blanket indictment of the court's judgment because its unsupported claim does not address the standard of review applicable to either the court's findings of fact or conclusions of law. The City complains:

If the orders and judgment entered in this case are affirmed, it will essentially kill the use of retracement surveys by Citys, [sic] other governmental entities, and private parties as a means to locate rights of way and other property boundaries that, like here, are thrown into confusion by subsequent land divisions and the passage of time.

*City's Brief at 26.* Regardless of the alleged pitfalls that will occur if this Court affirms the District Court's judgment, COS 5007 provides no shelter for the City.

The basic premise of COS 5007, as explained by the City's expert who created it, is that the grantors and County Commissioners "extinguished" the 60-foot wide South Avenue right-of-way dedicated by the R.M. Cobban Orchard

Homes Subdivision with the dedication of the Car Line Addition Plats. *Tr. 38: 11-16*. The City's expert claims South Avenue has a "variable width" right-of-way of 91.44 feet at the centerline of Clark Street and 78.61 feet at the quarter corner. *See, McCarthy Aff. ¶47a.*<sup>11</sup> As with their other claims, this theory does not comply with Montana law that has been in effect for over a century.

Rev. Code Mont. § 1338 (1907)<sup>12</sup> (Act approved March 2, 1903) provided:

All public highways, once established, must continue to be public highways until abandoned by order of the board of commissioners of the county in which they are situated, or by operation of law, or judgment of a court of competent jurisdiction.

Similarly, Rev. Code Mont. § 1340 (1907) (Act approved March 2, 1903)<sup>13</sup> provided in part that:

A highway laid out and worked and used as provided in this Act must not be vacated or cease to be a highway until so ordered by the Board of County Commissioners of the county in which said road may be located...

The City never produced or entered any evidence into the record that the County ever abandoned or vacated the 60-foot wide public right of way originally dedicated in the R. M. Cobban Subdivision.<sup>14</sup> No statute in effect at the time of South Avenue's creation or today recognizes the concept of "extinguishment" of a

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<sup>11</sup> App. 7 of City's Brief.

<sup>12</sup> App. 15

<sup>13</sup> App. 15

<sup>14</sup> Thomas McCarthy attested to this fact during his cross-examination. *See, Tr. 1047:5-12*

public road. Indeed, the statutes clearly prohibit changes in public roads without specific actions by the Board of County Commissioners. Thus, the City's theory that part or all of the original South Avenue created by the R. M. Cobban Orchard Homes Subdivision was "extinguished" in favor of an indefinite "variable road right of way" fails as a matter of law.

Aside from the legal shortcomings of the City's arguments, the City's surveyor<sup>15</sup> did not prepare resurvey COS 5007 in conformance with Mont. Code Ann. § 76-3-614 (1999) when he filed it in 1999. That statute provides:

**When a recorded plat does not definitely show the location or size of lots or blocks or the location or width of any street or alley, the governing body may at its own expense cause a new and correct survey and plat to be made and recorded in the office of the county clerk and recorder. The corrected plat must, to the extent possible, follow the plan of the original survey and plat. The surveyor making the resurvey shall endorse the corrected plat referring to the original plat and noting the defect existing therein and the corrections made.**

(Emphasis added).

Mr. McCarthy claims COS 5007 is a "retracement" survey that follows the footsteps of James H. Bonner. *See, Affidavit of Thomas P. McCarthy, Page 4, ¶22.*<sup>16</sup> The facts belie this claim. First, the surveyor did not follow the plan of the original survey and plat.<sup>17</sup> Likewise, the surveyor did not endorse the corrected

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<sup>15</sup> Thomas McCarthy, and W.G.M. Group.

<sup>16</sup> App. 7 of City's Brief.

<sup>17</sup> R. M. Cobban Orchard Homes.

plat by referring to the original plat (i.e. R. M. Cobban Orchard Homes) nor did he note the defects existing and corrections made. Finally, the legend of COS 5007 does not show a single found James H. Bonner monument. *See, City's Trial Exhibit "O."*<sup>18</sup> Even if the City could establish that its surveyor had complied with the law when he produced COS 5007, the result is the same.<sup>19</sup> Nothing in the law allowing for resurveys extends any authority to the surveyor or the City to redefine property rights by way of a "resurvey."

**C. The "rule of blunder" does not supersede State law.**

The City's third specification of error is that the "District Court failed to properly consider and analyze 'the rule of blunder' and treatment of excess land." *City's Brief at 27.* This argument fails for two reasons. First, it does not address an appropriate standard of review. Second, it is not true.

After the trial, the District Court requested post trial briefs on the issue of the effect of "surveyor blunder." *Tr. 1121, 4-10.* The Parties submitted *Post Trial Briefs*, specifically addressing the issue of alleged blunder and the remedies available. *Dkt. 97*<sup>20</sup> *and Dkt. 98.*<sup>21</sup> (App. 17-18).

Next, the court requested additional post-trial briefing on the following

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<sup>18</sup>App. 6, City's Principal Brief.

<sup>19</sup> In addition, on May 29, 2009 on the eve of the trial, Thomas McCarthy, the surveyor of record for COS 5007, and the City recorded Affidavit #200912776, apparently in an effort to legitimize the errors made in 1999. The City did not notify the Plaintiffs or Court at trial that its primary exhibit had been amended in an attempt to comply with Mont. Code Ann. § 76-3-614. *See, Dkt. 116: 11-13* (App. 16).

<sup>20</sup>July 1, 2009 Defendant's Post Trial Brief on Issue of Blunder. (App. 17).

<sup>21</sup> July 1, 2009 Plaintiffs' Post Trial Brief. (App. 18).

issue:

The question that the Court is having difficulty with is assuming that the retracement survey of Tom McCarthy, registered surveyor, on behalf of WGN [sic] for the City of Missoula is, is accurate and correct in that the lots identified along South Ave. have a distance of more than 30 feet from edge of the lot to the center of South Ave.-- who owns the property in excess of 30 feet from the centerline of South Ave to the edge of the lot?

*Dkt. 110 1-2.* The Parties responded with additional *Post Trial Memorandums* and responses. *Dkt. 111*<sup>22</sup>, *Dkt. 112*<sup>23</sup>, *Dkt. 115*<sup>24</sup> and *Dkt. 116*<sup>25</sup>. (App. 19-22).

Although the City disagrees with the court's conclusions on these issues, the record clearly establishes that the District Court considered them—at length. The City's amorphous argument fails to address its obligation to demonstrate that any District Court finding of fact was “clearly erroneous” or that it made an incorrect conclusion of law.

Next, the City alleges “the effect of the District Court's judgment holding that the City's right-of-way is limited to 60 feet, is to allocate this “excess land” to each of Plaintiffs' properties.” *City's Brief at 27.* As above, even if this allegation were relevant, or even true, it has utterly failed to demonstrate how the allegation addresses the standard of review.

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<sup>22</sup> August 31, 2010 *Plaintiffs' Post Trial Memorandum.*

<sup>23</sup> August 31, 2010 *Defendant's Brief...*

<sup>24</sup> September 21, 2010 *Defendant's Reply Brief ...*

<sup>25</sup> September 21, 2010 *Plaintiffs' Reply...*

Under Montana law, there is no “excess land.” This is because each Plaintiff owns the property in front of their lot to the center of South Avenue. *Herreid v. Hauck*, 254 Mont. 496, 499, 839 P.2d 571, 573 (1992); Mont. Code Ann. §§ 70-16-202, 70-20-307. The City’s argument regarding “surveyor blunder” is similarly deficient. That is because neither the Montana Legislature, nor this Court has ever determined that a “rule of blunder” exists, let alone that such a “rule,” if adopted, would authorize the taking of private property in violation of the Montana Constitution, the U.S. Constitution or Montana law. For these reasons, the Montana Supreme Court should affirm the District Court.

**D. The District Court’s orders and judgment concerning the width of South Avenue conform to Montana law.**

The City’s fourth specification of error is that “the District Court’s orders and judgment are illogical and unworkable.” *City’s Brief at 28*. While it may be inconvenient for the City’s surveyors to review original plats and for their attorneys to consider established Montana law defining public road width before taking private property, these arguments do not demonstrate clear error in fact-finding or an incorrect legal conclusion by the District Court.

**II. The District Court did not abuse its discretion by awarding the Plaintiffs damages under an “inverse condemnation ”theory.**

As above, the City’s arguments ignore the standard of review, which