

**APPLICATION FOR
DISTRICT COURT JUDGESHIP**

A. PERSONAL INFORMATION

1. Full name. **Michelle M. Sullivan**
2. Birthdate. [REDACTED]
3. Current home address. [REDACTED]
4. Email address. [REDACTED]
5. Preferred phone number. [REDACTED]
6. Judicial position you are applying for. **Thirteenth Judicial District Judge**
7. Date you became a U.S. citizen, if different than birthdate. **N/A**
8. Date you became a Montana resident.
I was born in Montana, and I have been a lifetime resident except for one year when I worked in Washington, D.C. after earning my undergraduate degree.

B. EDUCATIONAL BACKGROUND

9. List the names and location (city, state) of schools attended beginning with high school, and the date and type of degree you received.

**Forsyth High School
Forsyth, Montana**

High School Diploma - 1991

**MSU-Billings
Billings, Montana**

**Bachelor of Arts in Business Administration,
Accounting Option - 1995
Bachelor of Arts in Spanish - 1995**

**University of Montana School of Law
Missoula, Montana**

Juris Doctorate - 2000

10. List any significant academic and extracurricular activities, scholarships, awards, or other recognition you received from each college and law school you attended.

University of Montana School of Law:

Graduated with High Honors, ranking 1st out of 71
Order of Barristers for Participation in Moot Court
Client Counseling Team
John P. Archer Memorial Award
West Group's Award for Outstanding Scholastic Achievement
Boldt Scholarship for the 1999-2000 Academic Year

MSU-Billings:

Graduated *summa cum laude*
Passed Certified Public Accountant Exam
ASMSU-Billings Secretary-Treasurer
ASMSU-Billings Student Senate

C. LEGAL AND PROFESSIONAL EXPERIENCE

11. In chronological order (beginning with most recent), state each position you have held since your graduation from law school. Include the dates, names and addresses of law firms, businesses, or governmental agencies with which you have been affiliated, and your position. Include the dates of any periods of self-employment and the name and address of your office.

Partner **March 2017 - Present**
Sullivan Miller Law PLLC
1555 Campus Way, Suite 201
Billings, Montana 59102
and
180 N. 9th Avenue
Forsyth, Montana 59327

City Attorney **January 2023 - Present**
City of Colstrip
12 Cherry Street
Colstrip, Montana 59323

Associate **August 2000 – October 2004**
Of Counsel **April 2006 – February 2017**
Holland & Hart, LLP
401 N. 31st Street, Suite 1500
Billings, Montana 59101

12. In chronological order (beginning with most recent), list your admissions to state and federal courts, state bar associations, and administrative bodies having special admission requirements and the date of admission. If any of your admissions have terminated, indicate the date and reason for termination.

U.S. Court of Appeals for the Ninth Circuit	08/27/2002
U.S. Court of Appeals for the Fifth Circuit	08/27/2001
U.S. District Court for the District of Montana	10/18/2000
State of Montana	09/26/2000

13. Describe your typical legal areas of concentration during the past ten years and the approximate percentage each constitutes of your total practice (i.e., real estate, water rights, civil litigation, criminal litigation, family law, trusts and estates, contract drafting, corporate law, employment law, alternative dispute resolution, etc.).

- 40%** **Civil Litigation, including contract and tort claims; shareholder litigation; professional negligence; wrongful discharge, discrimination, and retaliation; breach of fiduciary duty; breach of promissory notes and foreclosure of security interests; quiet title actions; easement disputes; partition actions; condemnation; trespass and nuisance claims; ERISA litigation; landlord/tenant disputes; construction disputes; and insurance coverage disputes.**
- 20%** **Family Law, including petitions for dissolution of marriage; legal separations; interim and final parenting plans; motions to amend parenting plans; calculation of child support and representation of clients before the Child Support Services Division; establishment of paternity; review of prenuptial agreements; and petitions to void marriage.**
- 20%** **Probate and Trust Proceedings, including petitions for formal and informal probate of wills; intestacy proceedings; estate and trust administration; service as successor personal representative; will contests; submission of creditor's claims; and ancillary probates.**
- 5%** **Guardianship and Conservatorship Matters, including representation of petitioners; representation of protected persons; and representation of interested persons.**
- 5%** **Employment Law, including representation of clients before the Unemployment Insurance Division of the Department of Labor and Industry; review and negotiation of employment contracts; and review and negotiation of severance agreements.**
- 10%** **Other Areas, including contract drafting and review; tax deeds; name change petitions; responding to third-party subpoenas; representation of creditors in bankruptcy proceedings; workers compensation; small estate affidavits; city attorney work; OPD contract work; and family law mediations.**

14. Describe any unique aspects of your law practice, such as teaching, lobbying, serving as a mediator or arbitrator, etc. (exclude bar activities or public office).

Over the past year, I have served as a mediator in several family law mediations. I meet with the attorneys and both parties in a dissolution and/or parenting matter and work with them in an effort to resolve the matter before going to trial.

15. Describe the extent that your legal practice during the past ten years has included participation and appearances in state and federal court proceedings, administrative proceedings, and arbitration proceedings.

The bulk of my practice involves disputed matters, and I have been fortunate to appear before several different tribunals.

I have had matters before each of the sitting judges in the Thirteenth Judicial District Court, which is generally where I practice. In the past ten years, my practice has also included cases in Montana's Fifth, Sixth, Seventh, Ninth, Eleventh, Fourteenth, Sixteenth, Eighteenth, Twentieth, and Twenty-Second Judicial Districts. I have also appeared before the Montana Workers Compensation Court. I have had cases in the Justice Courts of Carbon and Yellowstone Counties, as well as Municipal Court in Billings.

I have appeared before most of Montana's federal court judges over the past decade, and I have tried cases in federal court in Helena and Great Falls. I appeared *pro hac vice* in a commercial dispute in federal court in North Dakota, and I have submitted briefs to the Eighth and Ninth Circuit Courts of Appeals.

I have also participated in contested case hearings before the Child Support Services Division and Unemployment Insurance Division.

Finally, my law partner and I participated in an arbitration proceeding involving a shareholder dispute.

16. If you have appeared before the Montana Supreme Court within the last ten years (including submission of amicus briefs), state the citation for a reported case and the case number and caption for any unreported cases.

Reported Cases:

***Ballou v. Walker*, 2017 MT 197, 388 Mont. 283, 400 P.3d 234**

***Montana Pub. Employees' Ass'n v. City of Bozeman*, 2015 MT 69, 378 Mont. 337, 343 P.3d 1233**

***Cavanaugh v. Citimortgage, Inc.*, 2013 MT 349, 372 Mont. 541, 313 P.3d 212**

Unreported Cases:

Ballou v. Walker, DA 18-0431, 2019 MT 170N

Wells Fargo Bank, Nat'l Ass'n for Pooling & Servicing Agreement Dated as of July 1, 2006 Securitized Asset Backed Receivables LLC Tr. 2006-FR3 Mortg. Pass-Through Certificates, Series 2006-FR3 v. Rehm, DA 16-0443, 2017 MT 96N

Britton v. Brown, DA 15-0488, 2016 MT 155N

Philip J. Slagter v. Citibank, N.A., DA 14-0051, 2014 MT 276N

17. Describe three of the most important, challenging, or complex legal issues you have dealt with or legal proceedings in which you have participated during your practice.

1. **In 2014, I took on the representation of an individual who had been sued by his sister in a matter involving a family limited partnership that owned a Montana ranch. The partnership was originally created by the siblings' mother as a mechanism to leave the ranch to her five children. My client and his sister had bought out their other three siblings' interest in the partnership, and the two of them intended to manage the partnership and operate the ranch.**

The lawsuit involved allegations that my client had engaged in self-dealing and included a claim to expel my client from the partnership and purchase his majority interest for \$1.00 based on a provision in the partnership agreement. We filed a counterclaim for judicial dissolution of the partnership, seeking liquidation of the partnership assets and distribution of the proceeds to the partners in accordance with their *pro rata* shares of the partnership.

The most pressing issue at the start of the case was how the partners should split the proceeds from the hay each of them had put up during 2014. An evidentiary hearing was conducted by the District Court in November 2014, resulting in the partners splitting the proceeds of the hay (as well as the cost to spray for weevils) between themselves and the partnership.

The Court then bifurcated the remaining proceedings, and set a trial date for February 2015. After a day-long bench trial, the Court issued its 37-page Findings of Fact and Conclusions of Law. The Court removed my client as a general partner in the partnership, declared that he remained a majority owner but as a limited partner, and declared the \$1.00 buyout provision in the partnership agreement unconscionable. The Court set a trial date in December 2015 for my client's claim of judicial dissolution.

After a two-day hearing, the Court entered its Findings and Conclusions and declared that the Partnership be dissolved. That decision was appealed to the Montana Supreme Court. The Court issued its opinion in 2017, holding that the partnership should not be dissolved, but rather my client's interest in the partnership must be bought out.

The matter was remanded back to the District Court to determine the value of my client's interest in the partnership.

Back at the District Court level, each party identified experts in the valuation of partnership shares. We presented evidence to the Court for the fourth time in June 2017 (this time with a different judge, as the former judge had retired). Findings and Conclusions were issued, and my client was directed to sell his shares to his sister at the fair value primarily established by my client's expert (with some modifications made by the Court). The opposition appealed to the Supreme Court again. The Court affirmed the District Court's determination of the value to be paid to my client in a 2019 opinion.

Collection of the judgment proved difficult, and resulted in additional proceedings in the District Court. The matter ultimately concluded three years later, in 2022, in bankruptcy court. As part of that proceeding, part of the ranch was sold and the proceeds used to pay my client in full, nearly eight years after his sister originally sued to exclude him from the partnership in exchange for the payment of \$1.00.

2. I represented a client in a matter where he was an employee of and minority shareholder in a statutory close corporation. He and the majority shareholder were at odds, and my client's employment ended abruptly. I brought claims on his behalf for shareholder relief under the Montana Close Corporation Act (including the purchase of my client's shares for a price established under a shareholder agreement), for wrongful discharge, and a claim to declare void the non-compete provisions in the parties' employment agreements and shareholders agreements, among other claims. (I also brought a claim in Justice Court for the return of a mounted elk – my client's first elk – which had previously been hanging in my client's office. It was returned.)

The parties engaged in extensive written discovery. The four corporate shareholders were deposed, as was the corporate entity. The case was challenging because the valuation of my client's shares in the business depended on the accurate reporting of the business's net income over the past several years. My accounting background helped me understand the financial statements and general ledgers that were produced in discovery. Each party identified local CPAs as experts. Significant bookkeeping errors were discovered that impacted the business's bottom line and made my client concerned that there could be more errors. We prevailed on our claim for an accounting, and a thorough review of the corporate books and records was conducted by an out-of-state forensic accountant.

The parties briefed and argued summary judgment motions and narrowed the issues for trial. Briefing on whether my client had a constitutional right to a jury on the statutory claims under the Montana Close Corporation Act was submitted, and that issue was also argued to the Court. Motions *in limine* were briefed and argued. A trial date was set. The matter was ultimately resolved during a mediation conducted by another District Court judge just a month before trial.

3. Sometimes a client requests help in a matter that is not particularly challenging or complex, but the issue is just as important to that client as those involved in more

complicated cases. One such case involved my representation of a 91-year-old woman in a proceeding to change her last name. My client had been married to her first husband for more than fifty years, and had raised her children with him. After he died, she remarried and took her second husband's last name. Unfortunately, she discovered upon her second husband's death that he and a caregiver had stolen a large amount of money from her. She wanted to be restored to her former name – the name she shared with her husband of more than fifty years and her children – and did not want to die with the last name of her second husband after learning what he had taken from her.

This matter was not legally complicated, but there were procedural and statutory requirements involved that would have been difficult for my client to fulfill without counsel. A legal name change necessarily involves filing a petition with the court. This case highlights the deeply personal and important matters that attorneys and the courts help to resolve each day.

18. If you have authored and published any legal books or articles, provide the name of the article or book, and a citation or publication information.

I wrote several articles for the Montana Employment Law Letter when I worked at Holland & Hart. Jeanne Bender and Jason Ritchie were then the editors of the Employment Law Letter. I do not have citation or publication information.

I co-authored with Chuck Hingle the article “Montana’s High Court Sends HAMP-Based Tort Claims to the Jury.” The article appeared on Holland & Hart's Banking and Financial Institutions blog in May 2014, and can be found at: <https://www.hollandhart.com/montanas-high-court-sends-hamp-based-tort-claims-to-the-jury> .

19. If you have taught on legal issues at postsecondary educational institutions or continuing legal education seminars during the past ten years, provide the title of the presentation, date, and group to which you spoke.

**October 2, 2015 Resisting Rambo or Rambette and Other State Bar of Montana -
Random Thoughts on the Rules of Women’s Law Section CLE
Civility in Litigation**

**October 7, 2016 Resisting Rambo – Random Thoughts on State Bar of Montana –
the Rules of Civility in Litigation Eastern Montana CLE
*Moderator of judicial panel with
Hon. Katherine Bidegaray &
Hon. Nickolas Murnion***

20. Describe your pro bono services and the number of pro bono hours of service you have reported to the Montana Bar Association for each of the past five years.

I reported the following *pro bono* hours of service to the Montana Bar Association over the past five years:

Year	Hours Provided Without Expectation of Fee	Hours Provided at a Substantially Reduced Fee
2022	75	20
2021	60	-
2019	30	45
2018	128	15

The State Bar has no record of my report of *pro bono* service for 2020. My firm's time records reflect that I logged 40+ hours for a *pro bono* family law case that year, which included representing my client at mediation and a hearing.

Over the past five years, my *pro bono* service has been primarily in family law. I have represented individuals of limited means to secure maintenance payments from a former spouse, to petition for parenting plans and child support, and to work through motions to amend parenting plans brought either by my client or the other parent. I have also provided counsel to a *pro bono* client with respect to issues of paternity and informal parenting plans.

In addition, I worked on an estate matter *pro bono* representing the child of a deceased parent to get their parent's estate closed and assets distributed.

Finally, I represented a client *pro bono* in a matter involving the death of her common-law spouse so that she could remain in the home that they had made. I later represented her *pro bono* in a landlord/tenant dispute in Justice Court.

21. Describe dates and titles of any offices, committee membership, or other positions of responsibility you have had in the Montana State Bar, other state bars, or other legal professional societies of which you have been a member and the dates of your involvement. These activities are limited to matters related to the legal profession.

Yellowstone Area Bar Association CLE Committee, 2014 – July 2020.

The CLE Committee planned, found speakers for, advertised, and submitted for approval a three-hour CLE for five months out of each calendar year.

22. Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, and type of discharge received.

I have not served in the military.

23. If you have had prior judicial or quasi-judicial experience, describe the position, dates, and approximate number and nature of cases you have handled.

Several years ago, I was invited to serve as a Justice of the Peace *pro tempore* in Yellowstone County. I did so on three or four occasions.

24. Describe any additional business, agricultural, occupational, or professional experience (other than legal) that could assist you in serving as a judge.

After graduating from MSU-Billings with my degree in accounting and CPA license, I worked as an auditor for KPMG in Washington, D.C. There, I specialized in governmental and non-profit audits. My assignments included the audits of Prince George's County, Maryland, the National Geographic Society, and the American Petroleum Institute. After a year in D.C., I returned home to Montana. I continued working as an auditor for KPMG in the Billings office. Here, my clients included small-town banks and businesses and non-profits throughout the region.

My business degree and work as an auditor has benefited me tremendously in my law practice. I have a solid understanding of financial information, internal accounting controls, tax issues, and corporate governance. That same background will allow me to understand complex business and financial issues that are brought before the courts in matters involving financial crimes, estate, trust, and conservatorship accountings, and business disputes.

For the past six years, my law partner and I have owned our own firm. This experience has helped me gain a practical understanding of corporate formalities, day-to-day bookkeeping, taxes, and office administration that all small business owners encounter on a regular basis.

My experiences working first at a large, regional firm and then at my own, smaller firm has also taught me the importance of professionalism, collaboration, and respect for colleagues. I think my professional experience would benefit me as a one of eight district court judges in Yellowstone County.

D. COMMUNITY AND PUBLIC SERVICE

25. List any civic, charitable, or professional organizations, other than bar associations and legal professional societies, of which you have been a member, officer, or director during the last ten years. State the title and date of any office that you have held in each organization and briefly describe your activities in the organization and include any honors, awards or recognition you have received.

Member

~2013 – November 2020

United Way Finance Committee

- *Review and approval of annual financial statements*
- *Review and recommendation of annual budget to Board of Directors*
- *Review of annual audit and 990*
- *Work with investment advisors*

Member

September 2019 – January 2021

MSU-Billings Foundation Governance Committee

- *Draft and recommend new Board policies*
- *Identify candidates for board officers*
- *Update Board's statement of roles and responsibilities*

26. List chronologically (beginning with the most recent) any public offices you have held, including the terms of service and whether such positions were elected or appointed. Also state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

I have neither held nor run for public office.

E. PROFESSIONAL CONDUCT AND ETHICS

27. 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.

28. Have you ever been found guilty of contempt of court or sanctioned by any court for any reason? If so, provide the details.

No.

29. 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.

30. Have you ever been found liable in any civil proceedings for damages or other legal or equitable relief, other than marriage dissolution proceedings? If so, provide the citation of a reported case or court and case number for any unreported case and the year the proceeding was initiated (if not included in the case number).

No.

31. Is there any circumstance or event in your personal or professional life that, if brought to the attention of the Governor or Montana Supreme Court, would 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

32. Are you currently an owner, officer, director, or otherwise engaged in the management of any business other than a law practice? If so, please provide the name and locations of the business and the nature of your affiliation, and state whether you intend to continue the affiliation if you are appointed as a judge.

No.

33. Have you timely filed appropriate tax returns and paid taxes reported thereon as required by federal, state, local and other government authorities? If not, please explain.

Yes.

34. Have you, your spouse, or any corporation or business entity of which you owned more than 25% ever filed under title 11 of the U.S. Bankruptcy Code? If so, give details.

No.

G. JUDICIAL PHILOSOPHY

35. State the reasons why you are seeking office as a district court judge.

Being a district court judge is often a very public job, especially when the judge is assigned to a high-profile criminal case or a matter challenging the constitutionality of controversial legislation. Other times, the job involves very private and highly sensitive matters for individuals, including those involving the parenting of minor children, the imposition of guardianships or conservatorship, the distribution of an estate after death, or the resolution of a civil matter.

The reasons that I want to be a judge encompasses both the public and private aspects of the job. From a public perspective, the citizens of Yellowstone County and the State of Montana deserve a judiciary that administers justice fairly and impartially in accordance with the rule of law. Maintaining the public's trust in the judicial system is critical. If I am selected for this position, I will hold myself to the highest standards of judicial conduct and ethics. I want to be a judge so that I can help build and preserve the integrity of the court system.

On a more private and individual level, district court judges make decisions every day that impact the people before them in deeply personal and life-changing ways. Judges make decisions about whether one parent should spend more time with their child than the other parent, who is best suited to be the guardian for a person with diminished capacity, whether a deceased person was unduly influenced in executing their last will and testament, and how best to protect children from abuse. Judges oversee trials that determine who was at fault in an accident, whether an employee was discriminated against, or if a contract is valid and enforceable. These are the sort of situations that everyday citizens find themselves in, and the only way out is by going through the courts. I want to be a judge so that I can help everyday people get through some of the most difficult times in their lives and move forward.

36. What three qualities do you believe to be most important in a good district court judge?

A good district court judge should have the right judicial temperament, which is a concise way of saying that a judge should be open-minded and impartial, patient and yet firm. Judges should be able to work equally well with prosecutors, defense counsel, civil litigators, family law lawyers, and *pro se* litigants. They should treat chambers and courtroom staff with the utmost respect and require other participants in the judicial system to do the same. Judges must be able to handle the scrutiny of their decisions not only by higher courts but also by the general public.

Efficiency and decisiveness are also key qualities for a district court judge. Statewide, district court judges have busy dockets, and this is particularly true in the Thirteenth Judicial District. For this reason, it is key that judges keep all of their cases moving toward a resolution. I have been impressed with the quality and caliber of the district court judges here, and their ability to manage their caseloads and make timely decisions on matters so that the parties can move forward.

Finally, a judge should appreciate and adhere to the role of the courts in our constitutional framework. A district court applies the laws that have been passed by the legislature, regardless of the judge's personal feelings about the necessity or wisdom of any given law. Confidence in the judiciary erodes when judges step outside their role in our finely balanced system of separation of powers between and among the legislative, executive, and judicial branches.

37. What is your philosophy regarding the interpretation and application of statutes and the Constitution?

My philosophy starts with the Montana Constitution. Article III, Section 1 divides our state government into the legislative, executive, and judicial branches, and provides: "No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others." Montana Code Annotated § 1-2-101 further defines the role of the judge in construing statutes, which is

“simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.”

When the Montana Constitution is clear, it should be applied as written using the plain language of the words selected by the constitutional convention delegates and voted on by the people of Montana. Only when the intent of the delegates cannot be discerned from the language of the Constitution itself should a Court look to the transcripts of the 1972 Constitutional Convention to determine the framers’ intent. In interpreting the U.S. Constitution, lower courts should follow the guidance of the U.S. Supreme Court, which is the ultimate arbiter of such issues.

The same is true with the interpretation and application of statutes. Section 1-2-101, quoted above, prohibits courts from adding to or taking away from statutory language. The intent must be determined by the plain language of the statute. Only when that is impossible should the Court look to the legislative history of a given law.

H. MISCELLANEOUS

38. Attach a writing sample authored entirely by you, not to exceed 20 pages. Acceptable samples include briefs, legal memoranda, legal opinions, and journal articles addressing legal topics.

See attached.

39. Please provide the names and contact information for three attorneys and/or judges (or a combination thereof) who are in a position to comment upon your abilities.

**Hon. Ashley Harada
217 N. 27th Street
Billings, MT 59101
(406) 869-8012**

**Adrian A. Miller
Sullivan Miller Law PLLC
2812 1st Ave N
Billings, MT 59101
(406) 403-7066**

**Greg Murphy
5533 Gene Sarazen Drive
Billings, MT 59106
(406) 672-3827**

CERTIFICATE OF APPLICANT

I hereby state that to the best of my knowledge the answers to all questions contained in my application are true. By submitting this application I am consenting to investigation and verification of any information listed in my application and I authorize a state bar association or any of its committees, any professional disciplinary office or committee, educational institutions I have attended, any references furnished by me, employers, business and professional associates, law enforcement agencies, all governmental agencies and instrumentalities and all other public or private agencies or persons maintaining records pertaining to my citizenship, residency, age, credit, taxes, education, employment, civil litigation, criminal litigation, law enforcement investigation, admission to the practice of law, service in the U. S. Armed Forces, or disciplinary history to release to the Office of the Governor of Montana or its agent(s) any information, files, records, or reports requested in connection with any consideration of me as a possible nominee for appointment to judicial office.

I further understand that the submission of this application expresses my willingness to accept appointment as District Court Judge if tendered by the Governor, and my willingness to abide by the Montana Code of Judicial Conduct and other applicable Montana laws (including the financial disclosure requirements of MCA § 2-2-106).

March 17, 2023

(Date)



(Signature of Applicant)

A signed original **and** an electronic copy of your application and writing sample must be submitted by
5:00 p.m. on Wednesday, April, 2023

Mail the signed original to:

Hannah Slusser
Governor's Office
P.O. Box 200801
Helena, MT 59620-0801

Send the electronic copy to: hannah.slusser@mt.gov

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*ATTORNEYS FOR PLAINTIFFS AND
 COUNTERCLAIM DEFENDANTS*

FILED

MAR 20 2019

SANDRA M. FOX, CLERK

MONTANA TWENTY-SECOND JUDICIAL DISTRICT COURT
 STILLWATER COUNTY

SCOTT L. LEHNER, an individual)
 SHEILA K. LEHNER, an individual, and)
 LOU Ranch LLC, a Montana limited)
 liability company,)

Plaintiffs,)

v.)

LAURETTA DEAN YANTIS and)
 SHERRY WINN,)

Defendants.)

LAURETTA DEAN YANTIS and)
 SHERRY WINN)

Counterclaimants,)

v.)

SCOTT L. LEHNER and)
 SHEILA K. LEHNER,)

Counterclaim Defendants.)

Cause No. DV 18-51

Judge Matthew Wald

**BRIEF IN SUPPORT
 OF MOTION FOR
 ORDER TO SHOW CAUSE,
 TEMPORARY
 RESTRAINING ORDER,
 AND PRELIMINARY
 INJUNCTIVE RELIEF**

Plaintiffs and Counterclaim Defendants Scott L. Lehner and Sheila K. Lehner

("Lehners") and Plaintiff LOU Ranch LLC ("LOU Ranch"), by and through their

COPY

counsel of record and pursuant to Mont. Code Ann. §§ 27-19-201 and 27-19-314, hereby submit this Brief in Support of their Motion for an Order to Show Cause, for a Temporary Restraining Order, and for Preliminary Injunctive Relief. Lehnners ask the Court to temporarily restrain Defendants and Counterclaimants Laretta Dean Yantis (“Yantis”) and Sherry Winn (“Winn”) from interfering with the Lehnners’ use of easement roads across Yantis’s property to access LOU Ranch’s property pending the outcome of this litigation. Specifically, Yantis and Winn should be enjoined from closing any gates on or across the easement roads that have been left open by Lehnners, or from constructing any other gates or encumbrances on or across the easement roads.

BACKGROUND

In 2006, the land involved in this dispute was owned by Sarah Yoder and Leona Roque. *See* Affidavit of Scott L. Lehner (hereafter, “Aff.”), attached hereto as Exhibit 1, at ¶ 1. At that time, Sarah and Leona owned almost 400 acres of land on Fishtail Creek in Stillwater County. *Id.* In late 2006, Sarah and Leona had a Certificate of Survey prepared, which carved out a 20.005-acre parcel from their 400 acres. *See* Certificate of Survey No. 329616, attached hereto as Exhibit 2. The newly-created 20.005-acre parcel – identified as Tract A1-A on the Certificate of Survey – included Sarah and Leona’s residence (hereafter, “Tract A1-A”).

On March 20, 2007, Sarah and Leona sold all of their property except Tract A1-A to Lehnners. *See* Contract for Deed, attached hereto as Exhibit 3. The property purchased by Lehnners (hereafter referred to as the “Ranch Property”) is described as follows:

Township 5 South, Range 17 East, Montana Prime Meridian

Section 8: Tract in NE $\frac{1}{4}$ SW $\frac{1}{4}$ described as Tract A1 on C/S No. 305830 excepting therefrom Tract A1-A on Certificate of Survey No. 329616

Section 8: SE $\frac{1}{4}$ SW $\frac{1}{4}$, excepting therefrom Tract A1-A on Certificate of Survey No. 329616

Section 8: S $\frac{1}{2}$ SE $\frac{1}{4}$

Section 17: E $\frac{1}{2}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$

With the Contract for Deed, Sarah and Leona also granted several non-exclusive permanent easements across Tract A1-A to allow access to the Ranch Property (hereafter, the “Easements”). *See* Ex. 3, pp. 1-2. Generally speaking, as depicted on the attached demonstrative Exhibit 4 (underlying photo accessed through the Montana Cadastral website), the Easements allow access from the highway in the northwest corner of Exhibit 4 along the existing road to the “B Gate” located at the bridge over Fishtail Creek, continuing along the existing road through Tract A1-A to the “Y Gate”, and then along both of the existing roads after the fork just beyond the “Y Gate.” *See* Ex. 3 and Aff. at ¶ 4. In late 2018, Lehnern transferred their ownership interest in the Ranch Property, along with the Easements, to LOU Ranch LLC. Aff. at ¶ 3. The members of LOU Ranch LLC are Scott and Sheila Lehner. *Id.*

Sarah died in 2012, and Leona died in 2013. Aff. at ¶ 5. Tract A1-A remained vacant for about two years following Leona’s death. *Id.* at ¶ 6. In 2015, Defendants Yantis and Winn expressed an interest in purchasing Tract A1-A. Their realtor arranged for Yantis and Winn to meet the Lehnern before the purchase. *Id.* at ¶ 7. Scott Lehner recalls telling Yantis and Winn about the easements, the lack of a boundary fence

between the properties, and other issues concerning Tract A1-A and the Ranch Property during that meeting *Id.* at ¶ 7.

Based on public records, Yantis purchased Tract A1-A on or about May 5, 2015. Lehnern understand that Yantis and Winn have resided in the residence located on Tract A1-A since that time. *Aff.* at ¶ 8.

Since purchasing the Ranch Property in 2007, Lehnern have consistently utilized the Easements for ingress and egress to move heavy construction and farming equipment to and from the Ranch Property, to move and ship cattle, to transport hay, to perform work on their place, and for recreational purposes such as hunting and snowmobiling. *Aff.* at ¶ 9. The Easements are utilized to access the Ranch Property year-round, with the most extensive use occurring during the spring through late summer months, consistent with Lehnern's farming and ranching operations. *Id.*

During the time that Sarah and Leona owned Tract A1-A, neither they nor Lehnern fully fenced off Tract A1-A from the Ranch Property. *Aff.* at ¶ 11. In the late summer or early fall of 2017, Yantis and Winn indicated to Lehnern that they wanted to construct a fence around Tract A1-A. *Aff.* at ¶ 12. Lehnern assisted Yantis and Winn in locating the property lines at that time, and Yantis and Winn constructed a fence along the properties' boundary, which included gates across two of the roads included in the Easements. *Id.* Those gates are identified as the "S1 Gate" and "S2 Gate" on Exhibit 4, and the forked roads leading to those gates will be referred to as the "S1 Road" and "S2 Road" for purposes of this Motion.

Around that same time, Yantis and Winn also erected a fence running through an interior portion of Tract A1-A. *Aff.* at ¶ 13. This fence included a gate across one of the

easement roads, just before the road forked into the S1 Road and S2 Road. *Id.* That gate is identified as the “Y Gate” on Exhibit 4. *Id.*

The Y Gate creates a hazard for Lehnerns. The S1 Road runs down a steep grade, as depicted in this aerial view of the S1 Road pulled from Google Earth. The Google Earth photo was taken before the installation of the boundary fence, S1 Gate, or Y Gate:



The Y Gate is located near the bottom of the hill. Aff. at ¶ 14. If the Y Gate is closed and Lehnerns are leaving the Ranch property via the S1 Road, they must stop their vehicles or equipment on an incline in order to open the Y Gate, which is quite difficult to do with a heavy load. Aff. at ¶ 15. The following photos, taken by Lehnerns’ daughter during the summer of 2018 as she followed Scott Lehner down the S1 Road, reveal what it looks like for Lehnerns to transport a large load of hay from their property down the S1 Road. During this particular trip, the Y Gate had been left open by the Lehnerns earlier in the day, and it was still open when they came down the hill.



Pickup and fully-loaded trailer passing through the S1 Gate and traveling down the S1 Road from Lehnners' Property



Nearing the curve in the S1 Road



Turning the corner on the S1 Road just before the Y Gate



Passing through the Y Gate

Last summer (the first summer the Y Gate existed), Lehnern would leave the Y Gate open to allow them safe passage through the gate on their way back down from their property. Aff. at ¶ 16. Yantis and Winn, however, would repeatedly close the Y Gate, even when Lehnern were in the middle of taking multiple loads off their property during the day. Aff. at ¶ 17. Yantis and Winn would close the Y Gate even though there was no livestock on their property (again, the Y Gate is located on the interior of Yantis's property), and thus no genuine reason to close the gate except to cause problems for the Lehnern. Aff. at ¶ 18.

Indeed, Yantis and Winn's antics did cause problems. On one day in particular, August 15, 2018, Scott Lehner was coming down the S1 Road with his pickup and trailer fully loaded with hay. Aff. at ¶ 19. Scott had left the Y Gate open on his way up to his property. *Id.* The Y Gate is not visible from the S1 Road until the driver turns the corner just before the gate. *Id.* at ¶ 20. Yantis and Winn had closed the Y Gate on Scott, which he did not realize until he turned the corner just before the gate. Scott was unable to get his truck and trailer stopped in time, and he ended up driving partway through the Y Gate. *Id.* at ¶ 21. Scott called the Stillwater County Sheriff's Department to make a report of the incident. *Id.* His pickup sustained \$1,468.25 in damages. *Id.*

The location of the Y Gate creates a hazard during bad weather, as well. As the gate is situated on an incline, it makes it difficult and dangerous to walk to and from the gate on the snow and ice to open and close it. Aff. at ¶ 22. Scott Lehner has fallen on the ice several times this past winter trying to open the Y Gate, and a hunting companion of his also fell on the ice this past January trying to maneuver the Y Gate. *Id.* at ¶ 22.

Vehicles of any size – not just heavy loads – traveling downhill on the S1 road have difficulty stopping on time in the mud or on the ice. *Id.* at ¶ 23.

Lehners acknowledge that the S1 Gate and S2 Gate, both of which are located on the boundary fence, are important to keep Lehners' cattle on the Ranch Property. *Aff.* at ¶ 24. Lehners keep those two gates closed when they have cattle on their place. *Id.* However, when there is no livestock present to contain, Lehners typically leave the S1 and S2 Gates open to allow for more convenient passage along the Easements. *Id.* at ¶ 25. Yantis and Winn – for no legitimate reason – will ride their four-wheelers up the hill just to close those gates. *Id.*

Prior to late 2017, the S1, S2, and Y Gates did not exist. When Lehners have no livestock on their place, the S1 and S2 Gates should remain open. The Y Gate is inherently dangerous to vehicle traffic and for individuals attempting to open the gate in bad weather; it should be removed.

It is almost the time of year when the Easements will once again enjoy peak use. Unfortunately, trial in this matter is not scheduled until December 2019. Accordingly, Lehners and LOU Ranch have filed the instant Motion requesting the Court to issue a Temporary Restraining Order and a Preliminary Injunction prohibiting Yantis and Winn from interfering with the use of the Easements.

ARGUMENT

I. THE COURT SHOULD ENTER A TEMPORARY RESTRAINING ORDER PENDING A HEARING ON THE APPLICATION FOR A PRELIMINARY INJUNCTION.

Lehners and LOU Ranch ask this Court to enter a temporary restraining order enjoining Yantis and Winn from closing any of the gates on the Easements that have

been left open by Lehnern, and from constructing any other gates or encumbrances on or across the Easements. Such an order will alleviate the hazards presented by the Y Gate in particular, and will prevent the further deterioration of the relationship between these neighbors if their interim rights are addressed by this Court. Lehnern and LOU Ranch are entitled to a temporary restraining order, pursuant to Mont. Code Ann. § 27-19-314, which provides as follows:

Where an application for an injunction is made upon notice or an order to show cause, either before or after answer, the court or judge may enjoin the adverse party, until the hearing and decision of the application, by an order which is called a temporary restraining order.

Under Montana law, an order to show cause combined with a temporary restraining order is the appropriate procedural vehicle to prevent further injury to the parties while they await a hearing on a motion for a preliminary injunction. “Before granting an injunction order, the court or judge shall make an order requiring cause to be shown, at a specified time and place, why the injunction should not be granted, and the adverse party may in the meantime be restrained as provided in 27-19-314.” Mont. Code Ann. § 27-19-301(2). A temporary restraining order is appropriate here. A proposed order has been provided to the Court as a courtesy.

II. A PRELIMINARY INJUNCTION SHOULD BE ISSUED PURSUANT TO THE PROVISIONS OF MONT. CODE ANN. § 27-19-201.

A preliminary injunction is appropriately granted in the following cases:

(1) when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;

(2) when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant;

(3) when it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual;

(4) when it appears that the adverse party, during the pendency of the action, threatens or is about to remove or to dispose of the adverse party's property with intent to defraud the applicant, an injunction order may be granted to restrain the removal or disposition;

(5) when it appears that the applicant has applied for an order under the provisions of 40-4-121 or an order of protection under Title 40, chapter 15.

Mont. Code Ann. § 27-19-201. The subsections of the statute are disjunctive; only one subsection needs to be met for an injunction to issue. *Sandrock v. DeTienne*, 2010 MT 237, ¶ 16, 358 Mont. 175, 180, 243 P.3d 1123, 1128. Here, Lehnars and LOU Ranch are entitled to a preliminary injunction under subsections (1) and (2).

A party is entitled to a preliminary injunction upon a showing that it has a legitimate cause of action, that it is likely to succeed on the merits of that claim, and that an injunction is an appropriate remedy. *Mack v. Anderson*, 2016 MT 204, ¶ 15, 384 Mont. 368, 372–73, 380 P.3d 730, 733–34, reh'g denied (Sept. 28, 2016). “[A]n applicant for a preliminary injunction must establish a prima facie case, or show that it is at least doubtful whether or not he will suffer irreparable injury before his rights can be fully litigated.” *Id.*, citing *Sandrock v. DeTienne*, 2010 MT 237, ¶ 16, 358 Mont. 175, 243 P.3d 1123 (citation omitted). “Upon the requisite showing, a preliminary injunction is issued to maintain the status quo pending trial, which has been defined as ‘the last actual, peaceable, noncontested condition which preceded the pending controversy.’” *Id.*

Here, the “status quo” will be restored by prohibiting Yantis and Winn from closing any gate on the Easements that have been left open by the Lehnrs. That will reflect the “last actual, peaceable, noncontested condition” which preceded the pending controversy, before Yantis and Winn began interfering with the Easement rights.

A. Subsection (1) of § 27-19-201 Entitles Lehnrs and LOU Ranch to a Preliminary Injunction.

Lehnrs and LOU Ranch are entitled to a preliminary injunction if it “appears that [they are] entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.” Mont. Code Ann. § 27-19-201(1). Here, an injunction prohibiting Yantis and Winn from interfering with the Easements, and more specifically, an order prohibiting Yantis and Winn from closing any gates across the easements left open by Lehnrs, is appropriate.

As reflected above, Yantis and Winn were expressly advised by Scott Lehner of the existence and use of the Easements over Tract A1-A before Yantis purchased her property, and thus had actual notice of the Easements. Aff. at ¶ 7. Moreover, those easements are a matter of public record. Even if Lehnrs had not expressly informed them about the easements, Yantis and Winn would nevertheless be charged with having constructive knowledge of any easements burdening Yantis’ property. *Earl v. Pavex, Corp.*, 2013 MT 343, ¶ 36, 372 Mont. 476, 492, 313 P.3d 154, 166 (“consistent with §§ 70–21–301 and –302(1), MCA, we hold that a prospective purchaser is on constructive notice of recorded servitudes and encumbrances granted by the existing and prior owners of the parcel in question during the respective periods when each owner held title to the parcel.”). Indeed, the existence of the Easements were likely factored into

the price paid by Yantis for Tract A1-A. *See City of Missoula v. Mix*, 123 Mont. 365, 372, 214 P.2d 212, 216 (1950) (“plaintiff knew of the limitations imposed on this property at the time it [was] purchased, so it is assumed the [plaintiff] received what it paid for. If it desires the full unrestricted fee another conveyance is called for.”). Yantis and Winn cannot now claim the burden of the Easements is too great or seek to limit use of the Easements.

Montana law has long held that the owner of an easement is entitled to “full use” of the easement, while the owner of the servient tenement “may make use of the land in any lawful manner that he chooses, which use is not inconsistent with and does not interfere with the use and right reserved to the dominant tenement or estate.” *Flynn v. Siren*, 219 Mont. 359, 361, 711 P.2d 1371, 1372 (1986) (*quoting Mix*, 123 Mont. at 372, 214 P.2d at 216). The Montana Supreme Court has more recently held that the “balancing of rights suggested by these general rules incorporates a standard of reasonableness: whether the servient owner’s use *unreasonably* interferes with the easement rights.” *Musselshell Ranch Co. v. Seidel-Joukova*, 2011 MT 217, ¶ 19, 362 Mont. 1, 8, 261 P.3d 570, 575 (emphasis in original).

The *Musselshell Ranch* Court expressly noted that the “servient owner’s actions cannot make the easement more ‘inconvenient, costly, or hazardous to use.’” *Id.* at ¶ 20, (*citing* Korngold, *Private Land Use Arrangements: Easements, Real Covenants, and Equitable Servitudes* at § 4.06 (a); *Hatfield v. Ark. Western Gas Co.*, 5 Ark. App. 26, 632 S.W.2d 238, 241 (1982) (“[t]he owner of the servient estate can do nothing tending to diminish its use or make it more inconvenient or create hazardous conditions”); *and Beiser v. Hensic*, 655 S.W.2d 660, 663 (Mo.App. E.D.1983)). The Court in *Musselshell*

Ranch also relied on a case where a gate was held to unreasonably interfere with the dominant owner's easement rights where the gate – despite having never been locked and rarely closed – nevertheless cut off the dominant owner's historical access to her property. *Id.* at ¶ 21 (citing *Stamm v. Kehrer*, 222 Mont. 167, 720 P.2d 1194 (1986)). Similarly, a gate that could not be opened without assistance and which interfered with snow removal and road maintenance was held to “plainly inconvenience[] the dominant owners.” *Id.* (citing *Strahan v. Bush*, 237 Mont. 265, 773 P.2d 718 (1989)). The Court also cited to *Flynn*, a case involving a gate that created a traffic hazard over an easement, wherein the Court held the easement owners were “entitled to an ungated, unbarricaded, unchained, free and unobstructed use of the right-of-way.” *Id.* at ¶ 20, (citing *Flynn*, 219 Mont. at 362, 711 P.2d at 1373). The Court also advised that “[f]orcing the dominant owner to defend an easement right in court also may constitute unreasonable interference with the right.” *Musselshell Ranch* at ¶ 23. Yet forcing the Lehnrs and LOU Ranch to defend their easement right in this Court is exactly what Yantis and Winn have done.

Opening and closing the Y Gate, S1 Gate, and S2 Gate multiple times a day – especially when those gates serve no function but to harass and endanger the dominant easement owners – is plainly inconvenient and results in lost time each day. The hazards are already apparent: Scott Lehner has driven through the gate once and has fallen on the ice multiple times trying to open the gate. Yantis and Winn's interference with Lehnrs' easement rights – for no legitimate reason – is patently unreasonable.

Lehnrs and LOU Ranch are entitled to the relief demanded in their Complaint, and part of that relief consists in restraining Yantis and Winn from interfering with the

Easements through the use of unnecessary gates. Lehnern and LOU Ranch are entitled to a preliminary injunction under subsection (1) of § 27-19-201.

B. Subsection (2) of § 27-19-201 Entitles Lehnern and LOU Ranch to a Preliminary Injunction.

Lehnern and LOU Ranch are also entitled to a preliminary injunction because allowing Yantis and Winn to continue closing the gates could “produce a great or irreparable injury”. Mont. Code Ann. § 27-19-201(2). Driving a fully-loaded trailer or other heavy equipment down the S1 Road and maneuvering the corner is, by itself, difficult. Keeping the equipment upright and on the road is paramount to everyone’s safety. If the Y Gate is closed, the risk is multiplied, not only to the equipment but to the safety of the driver, passengers, and anyone who may be assisting on the ground.

During bad weather, even passenger vehicles have difficulty stopping on the mud and the ice. Maneuvering the gate creates additional personal safety issues. Both Scott and a guest have fallen on the ice. Adding insult to injury is the fact that the Y Gate does not need to be there; it fences nothing in or out of Tract A1-A because the gate and adjacent fence are on the interior of Tract A1-A. The sole purpose of the Y Gate and Yantis and Winn’s insistence on continuously closing it behind Lehnern is to harass, inconvenience, and endanger their neighbors.

Allowing the Y Gate to remain and requiring the S1 and S2 Gates to be closed when no livestock is present carry the possibility of great harm and irreparable injury to Lehnern. As this Court knows, winter in Montana is not predictable, and spring snowstorms can happen as late as May. The parties have been lucky thus far that injuries, both to people and property, have been minor. But the parties cannot rely

solely on luck to prevent a greater, irreparable injury. Lehnerns are entitled to a preliminary injunction pursuant to subsection (2) of § 27-19-201.

CONCLUSION

The facts identified in this Brief establish a prima facie case in favor of Lehnerns and LOU Ranch and against Yantis and Winn. Under the circumstances described herein, a temporary restraining order prohibiting Yantis and Winn from closing gates left open by Lehnerns is necessary until the Court conducts a hearing on the need for a preliminary injunction. A preliminary injunction should be issued because Lehnerns and LOU Ranch are entitled to the relief demanded in their amended complaint and because without a preliminary injunction, Lehnerns and LOU Ranch may suffer great and irreparable injury. Accordingly, Lehnerns and LOU Ranch hereby request that the Court issue a temporary restraining order and set a show cause hearing on a preliminary injunction. Following the hearing, Lehnerns and LOU Ranch ask that this Court enter a preliminary injunction that will prohibit Yantis and Winn from closing any gates on or across the Easements that have been left open by Lehnerns, or from constructing any other gates or encumbrances on or across the easement roads.

DATED this 19th day of March, 2019.



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