APPLICATION FOR

MONTANA CHIEF WATER COURT JUDGESHIP

A. PERSONAL INFORMATION

1. Full Name: Jeremiah Daniel Weiner

   a. What do you commonly go by? Jay Weiner

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

3. Home Address: [redacted]

   [redacted] Phone: [redacted]

4. Office Address: 215 N. Sanders St., P.O. Box 201401, Helena, Montana 59620-1401

   Phone: (406) 444-2026

5. Length of residence in Montana: 13.5 years (the last nine consecutively)

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

Dates	City	State
April 2004-present	Helena	Montana

B. EDUCATIONAL BACKGROUND

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

Name	Location	Date of Degree	Degree
Newton North High School	Newton, MA	June, 1988	Diploma
University of Pennsylvania	Philadelphia, PA	May, 1992	B.A.
Boalt Hall School of Law (Univ. of Cal. At Berkeley)	Berkeley, CA	May, 1997	J.D.

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

Cum Laude graduate – University of Pennsylvania, May, 1992

Lynn Case Prize for Best Thesis in European History – University of Pennsylvania, May, 1992

AmJur Award for Top Grade in Civil Procedure Class– Boalt Hall, December, 1994

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

Yes – *California Law Review* (May 1995-May 1996); no publications
Also Senior Articles Editor, *Asian Law Journal*, May 1996-May 1997; no publications

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.

Court or Administrative Body	Date of Admission
State of Montana	December 15, 1998
Federal District Court for the District of Montana	May 14, 1999
State of California (presently inactive)	September 8, 2003
Federal District Court for the Eastern District of California	December 22, 2003
U.S. Ninth Circuit Court of Appeals.	December 1, 2008
U.S. Tenth Circuit Court of Appeals	July 20, 2009

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

Assistant Attorney General, Montana Department of Justice, Helena, MT
Staff Attorney, Montana Reserved Water Rights Compact Commission, Helena, MT
Of Counsel, Rosette & Associates, P.C., Chandler, AZ (Rob Rosette, principal)

12. State the name, dates and addresses of all law firms with which you have been associated in practice, and of 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:

Employer's Name[1]	Position	Dates
Montana Attorney General's Office 215 N. Sanders St. Helena, MT 59620	Assistant Attorney General	April 2008-Present
Rosette & Associates 565 W. Chandler Blvd., Suite 212 Chandler, AZ 85225	Of Counsel	August 2005-Present
Montana Reserved Water Rights Compact Commission 1625 Ninth Ave. Helena, MT 59620	Staff Attorney	April 2004-Present
Monteau & Peebles 1001 2nd St. Sacramento, CA 95814	Associate	March 2003-March 2004
Supreme Court of the Republic of Palau P.O. Box 248 Koror, Palau 96940	Court Counsel	October 2001-October 2002
Kanji & Katzen 303 Detroit Street, Suite 400 Ann Arbor, MI 48104	Contract Attorney	August-September 2001
Chambers of the Honorable Charles C. Lovell Federal District Court for the District of Montana 301 South Park Ave. Helena, MT 59601	Law Clerk	August 1998-August 2001
Self-Employed Performed worked for: Pat Smith Smith & Daugherty 405 S. 1st St. West Missoula, MT 59801	Contract Attorney	October 1997-July 1998

[1] I have supplied firm names and addresses that were current during my periods of employment (with two exceptions where I was unable to locate the former addresses – for Pat Smith and Robert Terrazas). Some of the addresses have subsequently changed and some of the firms no longer exist in their configuration at the time I worked for them. I will be happy to provide updated contact information (if available) if that would be helpful.

Robert Terrazas
Terrazas Law Offices
1923 South Higgins Ave.
Missoula, MT 59801

John Morrison
Morrison & Meloy
80 S. Warren
Helena, MT 59601

California Indian Legal Services 510 16th Street, Fourth Floor Oakland, CA 94612	Law Clerk	January-August 1997
Heller, Ehrman, White & McAuliffe 1 Embarcadero Center San Francisco, CA 94111	Summer Associate	June-August 1996
Berkeley Community Law Center 3130 Shattuck Ave Berkeley, CA 94705	Law Clerk	August-December 1995
Regional Center of the East Bay 7677 Oakport St #300 Oakland, CA 94621	Law Clerk	June-August 1995

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

For four months between the end of my employment with the Supreme Court of the Republic of Palau (a small country in the Pacific Ocean halfway between Guam and the Philippines) and the start of my employment with Monteau & Peebles, I lived in Palau while studying to take the California bar exam. During the period between college and law school, I spent 11 months backpacking around the northern hemisphere and a year waiting tables.

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

My present practice for the Montana Attorney General's Office includes representing the State in Water Court cases to which the Attorney General is joined pursuant to §85-2-248, MCA, to resolve issue remarks giving rise to questions of non-perfection or abandonment. I am also responsible for Water Court cases concerning the approval of water rights compacts entered into by the State and those Indian tribes and federal agencies claiming federal reserved water rights in Montana. In addition, I represent the State in the ongoing litigation in federal district court in Portland, Oregon, and before the Ninth Circuit Court of Appeals over the adequacy under the Endangered Species Act of the federal National Marine Fishery Service's Biological Opinions issued for the operation of the Federal Columbia River

Power System, the network of federally owned dams stretching from Hungry Horse and Libby in Montana to the Pacific coast. I serve as the Attorney General's representative on the Water Court's Water Adjudication Advisory Committee, as an alternate on the Legal Committee of the Western States Water Council, and as an alternate on the Sovereign Review Team for the Columbia River Treaty review process currently being undertaken by the United States and Canada. I also review State-Tribal Cooperative Agreements for the approval of the Attorney General pursuant to the State-Tribal Cooperative Agreements Act, §18-11-101, MCA, *et seq.* This practice occupies roughly 35-40 percent of my time.

In my capacity as staff attorney for the Montana Reserved Water Rights Compact Commission, I represent the Commission in its negotiations with Indian tribes and federal agencies claiming federal reserved water rights in Montana. I serve as lead attorney in the Commission's negotiations with the Blackfeet Tribe, the Confederated Salish and Kootenai Tribes, the Crow Tribe, the Ft. Belknap Indian Community, and the U.S. Fish and Wildlife Service's Bowdoin National Wildlife Refuge and National Bison Range. My responsibilities include working closely with attorneys and technical staff from the negotiating parties as well as with key stakeholders and members of the public to arrive at practical solutions to the complicated problem of quantifying these federal reserved water rights in a way that balances the legal entitlements of the reserved right holders alongside the protection of existing water users. To be effective in this work, I have driven tens of thousands of miles all across Montana to attend hundreds of meetings and other gatherings, developing relationships with farmers, ranchers and other water users, tribal members, local governmental officials, environmental groups, and others. I draft compacts, state and federal bill drafts, memoranda of agreement, and other settlement-related documents. I coordinate among staff at various state agencies, including the Department of Natural Resources and Conservation, the Department of Fish, Wildlife and Parks, the Department of Justice, the Governor's office and the Compact Commission, regarding water policy decisions for these negotiations. I testify in Montana and congressional legislative hearings concerning settlements, and liaise with members of our congressional delegation, congressional staff and personnel at federal executive agencies to advance federal approval of negotiated water right settlements. I lead public meetings and make other presentations to inform people and solicit input and comment about ongoing negotiations and settlements. I also work with the Blackfeet and Fort Belknap Tribes and the Montana Department of Natural Resources and Conservation on issues related to the 1909 Boundary Waters Treaty between the United States and Canada that have potential implications for the Blackfeet and Fort Belknap water rights settlements. This practice occupies at least 60 percent of my time.

I have not performed any work in my Of Counsel capacity for Rosette & Associates since January of 2012. At that time, I was representing the Havasupai Tribe of Arizona in their efforts to quantify their federal reserved water rights.

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

I have practiced in the areas of Water Law, Indian Law, Gaming Law, Contract Law and Construction Law. I taught an undergraduate class in Constitutional Law at Carroll College in Helena, and a Criminal Justice class at Palau Community College in Koror, Palau.

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

Water and Indian Law.

17. Do you regularly appear in court? Yes.

What percentage of your appearance in the past five years were in:

Federal Court	5 %
State or local courts of record	95%
Administrative bodies	0 %
Other	0 %

18. During the past five years, what percentage of your practice has been trial practice? 30%

19. How frequently have you appeared in court? Less than one time per month on average.

20. How frequently have you appeared at administrative hearings?

I have not appeared at any administrative hearings.

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

Civil	100 %
Criminal	0 %
Other	0 %

22. Have you appeared before the Montana Supreme Court within the past 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.

I have my first appeal presently pending before the Montana Supreme Court in the matter of *Loren Heavirland, Sue Heavirland and Lyle Weist v. State of Montana (Attorney General)*, Supreme Court No. DA 12-0759. Opposing counsel is Justin B. Lee of Burk, Lee & Bieler, 216 Main Ave. North, Choteau, Montana 59422, (406) 466-5755.

23. State the number of jury trials you have tried to conclusion in the past ten years. 0

24. State the number of non-jury trials you have tried in the past ten years. 4

25. State the names, addresses and telephone numbers of adversary counsel against whom you have litigated your primary cases over the last two years. 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.

Litigation:

Thomas J. Sheehy
P.O. Box 511
Big Sandy, MT 59520
(406) 378-2103

Case: Water Court Case No. 41O-238
Claimant: John Mues
Objector: State of Montana
Trial: March 6, 2012
Presiding: Senior Water Master Doug Ritter
(406) 586-4364

Peter G. Scott
Gough Shanahan Johnson & Waterman
P.O. Box 1715
Helena, MT 59624
(406) 442-8560

Case: Water Court Case No.s 41O-352 and -353
Claimant: Charles Fellows
Objector: State of Montana
Trial: January 11, 2012
Presiding: Senior Water Master Doug Ritter
(406) 586-4364

W. John Tietz
Browning Kaleczyc Berry & Hoven
P.O. Box 1697
Helena, MT 59624

Case: Water Court Case No. 42KJ-54
Claimant: BNSF Railway Co.
Objector: State of Montana
Resolved on Summary Judgment
Presiding: Water Master Jay Porteen
(406) 586-4364

Justin B. Lee
Burk, Lee & Bieler
216 Main Ave. North
Choteau, MT 59422
(406) 466-5755

Case: Montana Supreme Court No. DA 12-0759
Loren Heavirland, Sue Heavirland and Lyle Weist v. State of Montana (Attorney General)
Trial: December 10, 2009 (presently on appeal)
Presiding: Senior Water Master Doug Ritter
(406) 586-4364

Indian Water Rights Negotiations:

Confederated Salish & Kootenai Tribes negotiations:
John Carter
Rhonda Swaney
Confederated Salish & Kootenai Tribes Legal Department
P.O. Box 278
Pablo, MT 59855
(406) 675-2700 x.1160

Duane Mecham
US Department of the Interior
Office of the Regional Solicitor
805 SW Broadway, Suite 600
Portland, OR 97205
(503) 231-6299

David Harder
US Department of Justice
Environment and Natural Resources Division
999 18th Street, South Terrace, Suite 370
Denver, CO 80202
(303) 844-1372

Blackfeet Tribe negotiations:
Jeanne S. Whiteing (counsel for the Blackfeet Tribe)
1628 5th Street
Boulder, CO 80302
(303) 444-2549

John C. Chaffin
US Department of the Interior
Office of the Solicitor
P.O. Box 31394
Billings, MT 59107

John E. Bloomquist (counsel for the Pondera County Canal and Reservoir Company)
Doney, Crowley, Payne, Bloomquist
44 W. 6th Ave #200
Helena, MT 59601
(406) 443-2211

Crow Tribe negotiations:
Donald R. Pongrace (counsel for the Crow Tribe)
Katie Morgan
Akin Gump Strauss Hauer & Field
1333 New Hampshire Ave. NW
Washington, DC 20036
(202) 887-4000

David Harder
US Department of Justice
Environment and Natural Resources Division
999 18th Street, South Terrace, Suite 370
Denver, CO 80202
(303) 844-1372

John C. Chaffin
US Department of the Interior
Office of the Solicitor
P.O. Box 31394
Billings, MT 59107

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

None.

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.

April 9, 2012 - Guest Lecturer, Environmental Negotiation and Mediation Class, University of Montana
Topic: Cross Cultural Negotiations

I have spoken at three of the last four biennial Indian Water Rights Symposia put on by the Western States Water Council and the Native American Rights Fund:
August 23, 2011, Billings, Montana – The Role of Technicians in Negotiations
August 27, 2007, Albuquerque, New Mexico – Deploying Technical Data in Water Rights Negotiations
September 14, 2005, Moscow Idaho – Post-Settlement Management Issues.

November 19, 2010, Missoula, Montana – The Seminar Group's Hydropower in Montana CLE
Topic: Legislation and Litigation Update

September 30, 2005, Helena, Montana – Montana History Conference
Topic: Winters, Federal Reserved Water Rights and the Montana Adjudication Process

D. PROFESSIONAL AND PUBLIC SERVICE

28. List all the bar associations and legal professional societies of which you are a member and give the titles and dates of any office 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 am a member of the Montana Bar Association and an inactive member of the California Bar Association. In addition, I am a member of the First Judicial District Bar Association, and was president of that association from September 2010 to August 2011. I am also an ex officio member of the Montana Water Court's Water Adjudication Advisory Committee and an alternate on the Western States Water Council's Legal Committee.

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

I am a member of the Helena Vigilante Runners Club.

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

No.

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.

No.

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, that 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.

In the fall semester of 1999, I taught a Constitutional Law class at Carroll College in Helena. In the fall of 2001, I wrote an article about a disastrous camping trip in the Cloud Peak Wilderness in Wyoming for the *Los Angeles Times* travel section. In the spring semester of 2002, I taught a Criminal Justice class at Palau Community College in Koror, Palau.

37. If you are an officer, director, or otherwise engaged in the management of any business, please state the name of such business, its nature, and the nature of your duties. State whether you intend to resign such position immediately upon your appointment as Chief Judge of the Water Court.

No business interests.

38. State whether during the past 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 past five years.

None.

39. Do you have any personal relationships, financial interests, investments or retainers which 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?

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 (5) years? If so, please give details.

No.

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

The strong sense of community is one of the things I value most about living in Montana. I believe it is vitally important to give back to one's community. I have taken great pleasure in volunteering to coach youth sports teams at our local YMCA, at activities in my son's elementary school and with the Helena Public Montessori Parents association. I have spoken with students at multiple Law Day programs at Capital High School in Helena, and participated in events for the University of Montana's Mansfield Center's summer program for undergraduates from Southeast Asia. I served as a discussion leader at a table at the 2010 Helena Education Foundation's Great Conversations fundraiser. As noted above, I was also privileged to serve as the president of the First Judicial District Bar Association from September 2010 to August of 2011. In addition, my work on behalf of the Compact Commission involves extensive public outreach and education about the water rights settlements the Commission negotiates.

G. WRITING SKILLS

44. In the last five years, explain the extent 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 and drafted multiple briefs and other pleadings for my Water Court cases. I have also conducted extensive legal research for issues related to the Indian and federal water rights negotiations on which I work, and have drafted memoranda and other documents based on that research. I do all 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 you have done.

In conjunction with my Indian water rights work, I have written settlement documents and supporting materials, including water compacts, an ordinance to govern the administration and enforcement of all water use on the Flathead Indian Reservation, and proposed state and federal legislation. I have also drafted written testimony for legislative and congressional hearings, memoranda of understanding, extensive e-mails and other correspondence, and public information materials. Legal and other writing is a significant component of my work.

46. Please attach a writing sample of no more than ten pages which you have written yourself. A portion of a brief or memorandum is acceptable.

Please see attachment, which is an excerpt from a memorandum I wrote on behalf of a client I represented in my private capacity. In addition, I have identified with brackets modifications from the original made to protect client confidentiality.

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

75 %

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

Yes.

H. MISCELLANEOUS

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

I love being outdoors with my family. We hike, camp, kayak and backpack. It was an exciting day when I took my then-three year old son out for his first paddle in our double kayak. He is nine now, and has requested his own single kayak. My work makes sharing our connection with Montana's rivers, lakes, and streams especially meaningful. I also play basketball, ski, read, write, cook, travel and watch pro football. I became serious about running a few years ago, trained with the Helena Vigilante Runners Club and completed three marathons. But now I more enjoy stretching my legs on one of Helena's many trails instead of competing.

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

Along with the various legal jobs listed above, I had a long career in the food service industry starting with my first formal (i.e., non-babysitting, non-snow shoveling) job working in a bakery in high school and continuing through law school, where I worked at a brew pub in downtown Berkeley, with stops in between waiting tables at various restaurants in Boston and Philadelphia. I also spent three month in 1993 with a non-governmental organization in Kathmandu, Nepal, striving to provide education and healthcare opportunities for children working in Nepali carpet factories.

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

In 2009 and 2010, I took on a case pro bono to defend a woman from theft charges filed against her in Jefferson County. After attending a pre-trial hearing and conducting witness interviews, I reached an agreement with the prosecutor that resulted in the dismissal of the charges.

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

The three years I spent clerking for Judge Charles C. Lovell have shaped my view of our system of justice more than any other experience in my life. During that time, I had the opportunity to observe and work with Judge Lovell in court on a regular basis. I was consistently impressed by the way he treated everyone who came before him with courtesy, civility and a deep sense of decency, but also with an expectation of professionalism – that lawyers would be prepared to try their cases efficiently and without gamesmanship, that litigants would recognize the seriousness and significance of appearing in court, that jurors were to be commended and appreciated for their public service but also needed to remain constantly aware that they held people's fates in their hands.

Judge Lovell could sometimes appear stern to people who he believed were not living up to these standards. But at the same time his judicial philosophy was tempered by tremendous humility. That is, his work was always informed by the recognition that the problems and difficulties that led to people appearing before him could not always (or necessarily often) be resolved as part of the judicial process, but that nevertheless the courts had a consistently important role to play. That role lies in an evenhanded application of the law to the facts of a particular case in order to reach the most just result possible. But it also lies in ensuring that the process of getting to that result is conducted with respect and integrity, so that the operation of our justice system can be seen even by dissatisfied litigants as having afforded them their opportunity to be heard fairly.

Over time, I came to believe that this approach is vital to the success and to the legitimacy of our system of justice. It is tempting sometimes to feel cynical about our justice system, about the advantages that people with more money and power can have over those with less, about the way laws can sometimes seem to favor one position over another for less than noble reasons. Even if those factors were not in play, no one will be happy with the outcome of every case: laws are not always perfectly drafted; rights and wrongs are not always starkly black and white; even the best jurists make mistakes sometimes; and some cases are just hard, meaning that even the best resolution is an unsatisfying one. But by approaching each case with a strong commitment to impartiality, with a deep respect for the law and the litigants, and by setting an example that elicits that same respect from others, a judge helps

foster respect for our legal system, for our courts and for the rule of law that is vital to the functioning of a healthy justice system in a pluralistic and often fractured democracy.

53. In the space provided, explain the qualities which you believe to be most important in a good Chief Water Court Judge.

Strong senses of responsibility and of accountability are the two most important qualities in a good Chief Water Court Judge. By responsibility, I mean that the Chief Water Court Judge must always bear in mind that he or she has multiple duties, all of which must be diligently executed. The Judge is responsible for overseeing the Montana General Stream Adjudication, which must be brought to a successful conclusion as swiftly as possible to allow for the predictability and certainty in the administration and enforcement of water rights that Montana needs. Water rights are hugely valuable commodities that are essential for the maintenance and evolution of our way of life. The cloud that hangs over these rights while the Adjudication remains unfinished significantly complicates Montana's ability to adapt to the changes brought about by our growing population, the water demands in our neighboring states and in Canada, and by challenges to the availability of our historic water supply posed by these social factors and by climatic variability. The Judge must therefore be aware of his or her enormous responsibility to bring about a prompt and accurate determination of the pending claims.

The Judge is also responsible for the smooth operation of the Water Court, and for utilizing its resources, including its highly dedicated staff, in the most efficient and cost-effective manner possible. The Judge further has a responsibility to engage with stakeholders to ensure that the Water Court's operation is as transparent as possible, that its decisions are readily accessible and understandable, and that the Water Court plays an important role in Montana's ongoing water law and policy debates. An ability to work efficiently to carry out these various responsibilities is thus critical.

By accountability, I mean that the Judge must remember that there are multiple constituencies deeply invested in the Water Court's work, and that the Judge should feel an obligation to ensure that the concerns and needs of these groups are considered and respected. First and foremost, the Judge should be accountable to the litigants before the Water Court. This of course does not mean that the Judge should be inclined to rule in any particular way or to favor claimants over objectors as a class or vice versa. Rather, the Judge's ability to treat every litigant with decency and respect is a critical part of this accountability, particularly given the large number of claimants who proceed before the Court *pro se*. The prompt issuance of rulings is another facet of accountability, because such promptness is of great importance to the individual litigants and to the water bar overall, which is a small bar in Montana and its members often have multiple cases before the Court involving similar or overlapping issues. A timely ruling in one case may therefore greatly facilitate the resolution of many others.

The Judge is also accountable to the Legislature, which appropriates the Court's funding, and which recognized the vital importance of having Montana's water rights finally decreed by creating the Adjudication in the first place. And, of course, the Judge is accountable to the citizens of Montana, both now and into the future, as, in the course of adjudicating the water rights claims before it, the Water Court is also constructing and developing the body of water law that will guide Montana for generations to come.

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 and flexibility are not opposite poles where the existence of one precludes the application of the other. It is certainly the responsibility of a judge to apply precedent because the ability to reasonably predict the outcome of a given case from the cases that have been decided before is one of the touchstones of fairness in our system of justice. A judicial system cannot operate in an environment of legal chaos in which litigants and their lawyers cannot reasonably assess the state of the law and make informed assessments of how their particular facts and circumstances fit into that law.

At the same time, no two cases are exactly alike, and precedent should not be viewed as a straitjacket. Each precedent arose from a particular set of facts, and those facts – and the decisions to which they led – existed in a particular political, social and legal context. New cases could present unique factors or extenuating circumstances that call into question the continued validity or viability of a precedent, either in general or in the context of a particular case. Rather than just disregard a precedent that no longer seems apposite, however, a principled jurist should explicitly grapple in his or her opinion with both the existing precedent and the specific facts of the case at hand and clearly articulate why a more flexible application of the law is warranted in a given case. The clarity of this articulation is critical, both so that future litigants can understand the rationale behind the decision and so that any appellate court reviewing the decision can have the benefit of the judge's thinking as it fulfills its important role in providing oversight of the actions of the individual judge.

55. In the space provided, state the reasons why you are seeking office as the Chief Water Court Judge.

Montana is at a critical juncture in regard to its water law and resources. The end of the Adjudication is nearly in sight, but there remains significant work to be done to bring it to a successful conclusion, because of both the sheer number of cases left to resolve and the vital water law and policy questions that some of those cases present. The Water Court will therefore remain responsible for the foreseeable future in shaping the body of water law that will play such an important role in Montana's continued growth and development. I would very much like to participate in building that future, and believe that I am well qualified for that role.

Since I came to work for the State in 2004, I have had the opportunity to work on a wide array of Montana water law and policy issues as a result of my Water Court caseload and participation as an ex officio member of the Water Adjudication Advisory Committee, as well as my role in the Compact Commission's Indian and federal reserved water right negotiations. To perform these duties, I have spent significant time discussing, researching and thinking about Montana and western water law and policy, and have worked closely with – and been privileged to learn from – many gifted lawyers and other water experts.

Most recently, in the course of negotiating the proposed Confederated Salish and Kootenai Tribes water rights settlement, which is expected to come before the Legislature for approval during the current session, I had the occasion to work extensively on drafting what essentially amounts to a Water Use Act for the Flathead Reservation. This effort required me to ground myself deeply in the Montana Water Use Act and to work closely with the Department of Natural Resources and Conservation, as well as the Tribes, the United States and interested stakeholders, in order to draft a body of code that adapted existing Montana law to the unique circumstances of the Flathead Reservation. I have worked to shepherd Indian and federal reserved water rights settlements through the political process at both the state and federal level, and have participated in the proceedings before the Water Court to obtain final decrees of the rights recognized in these settlements. I have also become skilled at managing my time to ensure that I handle my caseload and multiple other responsibilities efficiently, produce high quality

work, and am responsive and accountable to the host of people and entities who are invested in the projects on which I work And I am continually energized by my passion for my work and what I believe is its importance to Montana. These various facets of my work have combined to make me uniquely qualified to serve as Montana's next Chief Water Court Judge.

The Compact Commission is due to sunset this June, which means that my Indian water rights duties will be coming to a close. While there is certainly much more work I feel I could usefully perform at the Attorney General's Office, the opportunity to serve as the Chief Water Court Judge is a tremendous personal and professional challenge that I am eager to embrace. More importantly, it is role in which I feel I could make a real difference and provide important service to Montana, my adopted home state. (I wasn't born here, but I got here as fast as I could.)

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

I am most proud of the work I have done on Indian water rights settlements, particularly the settlement with the Blackfeet Tribe that the Montana legislature ratified in 2009 and that is presently before Congress for approval. When I came to work for the State in 2004, I met with deep skepticism about whether a Blackfeet settlement was possible. The Tribe had broken off negotiations with the State entirely in the early 1990s. While negotiations subsequently resumed, they were slow going. But over the course of several years, by working extremely hard with Compact Commission staff and the Tribe's lawyer and technical consultants, and especially by driving thousands of miles across Montana through gorgeous scenery and in all kinds of weather (though I could have done without some of the black ice I encountered driving back home late one night in a February snow storm after a meeting in Valier), I was able to forge relationships with irrigators, stock growers, tribal members, city and county officials, Tribal Council members, local legislators, the Milk River Joint Board of Control, and stakeholder groups such as the St. Mary Rehabilitation Working Group. By showing up at meeting after meeting after meeting, I came to understand their concerns, not just about the Blackfeet water rights negotiations but about their reliance on water and their needs more broadly. This process helped form a base of trust from which the negotiations could build.

It was not a seamless process. Indeed, at times it was a highly contentious one, between the State and the Tribe, between the State and the water users we were striving to protect, and between the Tribe and its members. We had some very argumentative negotiating sessions. I was yelled at in gyms and in meeting rooms full of water users who felt that their livelihoods were being put at risk by some of the proposed terms of the settlement. The Tribe's lawyer was excoriated at several meetings held in Browning by tribal members who believed the Tribe was compromising too much. But we worked with the feedback we received, made changes to the settlement, took those changes back out to the public to discuss further, and worked some more. Although we could not satisfy each and every person (a negotiated settlement means no group gets everything it wants), we ultimately achieved strong support across a broad spectrum of individuals and groups when the Compact came before the 2009 session of the Montana legislature for approval. It passed out of committee unanimously and eventually was adopted by an 87 to 12 vote in the Montana House and a 48 to 2 vote in the Senate. It was a very gratifying day when the Governor signed the bill ratifying the Blackfeet Compact.

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

Much of my work presently involves bringing the water rights negotiations with the Confederated Salish and Kootenai Tribes (CSKT) to a successful conclusion. For a couple of reasons the CSKT negotiations are unique among the Indian water rights negotiations that the Compact Commission has conducted over the last 34 years. First, the CSKT are the only tribes in Montana that have language in their treaty with the United States that affords them a legal basis to assert claims for water rights (for instream flows) outside the boundaries of their Reservation. Second, as a consequence of a series of Montana Supreme Court decisions beginning in 1996, there is a regulatory vacuum on the Flathead Reservation, as the Montana Department of Natural Resources and Conservation has been divested of the authority to issue new water use permits on the Reservation. Consequently, the proposed CSKT water rights settlement deals with the resolution of CSKT water rights claims throughout western Montana, not just on the Flathead Reservation, and also proposes a joint State-Tribal regulatory approach that would create a single body to administer and enforce all water rights on the Flathead Reservation whether they are held by tribal members or non-members and whether they derive from state or federal law. As these are both new approaches in Montana, there has been much uncertainty and concern among members of the public about these and other aspects of the proposed settlement.

This is not an unusual dynamic in the settlement process. But there is an extraordinary level of acrimony presently surrounding the CSKT negotiations. The Compact Commission has engaged in a lengthy public outreach and comment process regarding the proposed settlement, and has worked hard to address the various concerns that have been raised and to ensure that existing water users are protected to the greatest extent possible. There are, however, some very organized and very vocal groups who are distributing a lot of information that is misleading at best and sometimes downright false. I have been actively engaged in efforts to rebut these false and misleading claims. In this back and forth, these opposition groups have taken to attacking me personally, including questioning my professional integrity. While I have thick skin and there is no validity to the allegations about me that these groups are making, I think it is best for the Judicial Nominating Commission to be aware of the situation since my application for the position of Chief Water Court Judge may draw the attention of some of these groups, and they may comment on my application.

58. Is there any comment you would like to make that might differentiate you from other applicants or that are unique to you that would make you the best Chief Water Court Judge candidate?

In addition to my extensive experience working with Montana water users and practicing water law, I also had a previous opportunity to work in a resource adjudication court. This was during my time working for the Supreme Court of the Republic of Palau. Palau was originally colonized by the British in the late 1700s, taken by the Spanish in the 1800s, sold to Germany in 1899, conquered by the Japanese during World War I and then by the United States during World War II. Each colonial power confiscated land from the indigenous clans for administrative and military purposes. In the run-up to independence in 1994, Palau implemented a set of "Return of Public Lands" laws, creating a process that ultimately included a dedicated Land Court for the repatriation of confiscated land to its former owners or their descendants. Approximately 30,000 claims were filed with the Land Court, which amounted to roughly three claims per Palauan. The Land Court has faced similar challenges as the Montana Water Court. Both have large dockets that must be processed promptly with finite resources, both deal with an intensely emotional subject and both are often trying to reconstruct long-ago events from less-than-perfect data. (It was not uncommon for the record in a Land Court case to consist exclusively of the testimony of one 80+ year old non-English-speaking sister against another, each asserting that the great uncle who was the clan headman gave to *her* upon *her* marriage the parcel that

ran from this certain limestone wall to that particular palm tree.) During my time in Palau, I worked with the Land Court directly in its hearing of these cases and also with the Palau Supreme Court resolving appeals from Land Court rulings. That experience gave me a particular appreciation for both the importance and the limitations of what a resource adjudication court can do, as well as the special challenges it faces. Each case comes with strong feelings and deep historical connections. Often the familial and communal issues underpinning a particular case cannot be resolved solely by a judicial determination. But the conclusion of each case can also facilitate the moving forward that needs to occur in the world outside the court. Each case requires and deserves a fair, courteous and efficient judge who ensures that the litigants have the opportunity to tell their stories and who issues prompt and evenhanded rulings. I believe I can be that kind of judge.

I. CERTIFICATE OF APPLICANT

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

2/8/13
(Date)

(Signature of Applicant)

A signed original **and** an electronic copy of your application must be submitted by
5 p.m. on Friday, February 8, 2013.

Mail the signed original to:
Lois Menzies
Office of Court Administrator
P.O. Box 203005
Helena, MT 59620-3005

Send the electronic copy to: lmenzies@mt.gov .

Application form approved 7/10/93
Revised 9/15/2009

I. Questions Presented

May state and/or local governments impose *ad valorem* taxes on lands owned in fee by Indian tribes or their members within the exterior boundaries of an Indian reservation?

II. Brief Answer

County of Yakima v. The Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251 (1992)("Yakima"), held that where a clear expression of congressional intent to remove restraints on alienation can be identified, states may impose *ad valorem* taxes on once-allotted lands owned in fee by an Indian tribe or its members. The Ninth Circuit, as articulated in the case Lummi v. Whatcom County, 5 F.3d 1355 (9th Cir.1993)(Lummi), has taken the Yakima analysis a step further and endorsed the equation "alienability equals taxability." In other words, according to Lummi, if a parcel is free from restraints on alienation, however those restraints came to be removed, it is taxable. Thus state and local governments are apparently free to impose *ad valorem* property taxes on any fee lands owned by Indian tribes or their members. The Lummi court drew no distinctions between lands allotted pursuant to treaty and lands allotted pursuant to acts of Congress.

Lummi, however, is a poorly reasoned decision whose persuasive force has been sharply undercut by the subsequent United States Supreme Court case Cass County v. Leech Lake Band of Chippewa Indians, 425 U.S. 103 (1998)("Leech Lake"), and the Sixth Circuit's ruling in Keweenaw Bay Indian Community v. Naftaly, 452 F.3d 514 (6th Cir.2006), *cert. denied* --- S.Ct. ----, 2006 WL 2783702, 75 USLW 3177 (U.S. Nov 27, 2006) (NO. 06-429). I believe strong arguments exist, which I will detail below, as to why Lummi should be overturned or limited to its facts. As it stands, however, it remains the law of the Circuit.

Despite Lummi, though, the Washington State Supreme Court's ruling in Snohomish County v. Seattle Disposal Co., 425 P.2d 22 (Wash.1967)("Snohomish County"), may be sufficient to preclude the imposition of *ad valorem* taxes on Indian lands located on the [client's reservation]. That case found that [a specific federal statute], which governs lease terms for Indian lands on [various reservations], constituted a restraint on alienation sufficient to divest the State of Washington of jurisdiction (including the power to tax) over Indian-owned lands on those reservation, specifically including fee parcels of former allotment lands acquired by a tribal government. Although Snohomish County involved [another tribe] I can see no reason why it is not fully applicable to the [client tribe] as well.

III. Analysis

1. Taxability of Indian-owned Fee Lands

State jurisdiction to tax Indian land and property has been a vexed question in this nation's jurisprudence. In 1832, the United States Supreme Court established the bright-line rule that the "several Indian nations [constitute] distinct political communities, having territorial boundaries, within which their authority is exclusive...." Worcester v. Georgia, 31 U.S. (Pet.)

515, 556-557 (1832). But Congress and the Court have spent the last 175 years blurring this clear divide between the authority of tribes and the authority of states. State taxing authority has, however, remained an area in which the Court in particular has generally opted for more categorical rules. *See, e.g.*, Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973); Montana v. Blackfeet Tribe, 471 U.S. 759 (1985); Yakima, 502 U.S. 251. The gist of these cases has been the development of the principle that "[s]tate and local governments may not tax Indian reservation land absent cession of jurisdiction or other federal statutes permitting it." Leech Lake, 425 U.S. at 110. Moreover, state authority to tax Indian lands exists only when Congress has made its intent to allow such taxation "unmistakably clear." Yakima, 502 U.S. at 258.

Despite this strong language, courts have not been shy about finding unmistakable congressional clarity sufficient to allow state taxation of Indian-owned fee lands. In Yakima, the United States Supreme Court addressed a claim brought by the Yakima Nation[1] seeking to prevent Yakima County from foreclosing on certain properties, including some owned in fee by the Nation and its members, for failure to pay *ad valorem* and excise taxes the county claimed were due and owing. The Court found that the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. §331, *et seq.* ("GAA"), represented Congress' unmistakable intent to allow lands allotted pursuant to the GAA's authority to be subject to state-authorized *ad valorem* taxation, Yakima, 502 U.S. at 258-59, and to be amenable to involuntary sale as a consequence of the non-payment of those taxes. Id. at 263-64. Thus the Court found the county entitled to impose its *ad valorem* taxes on the fee lands held by the Yakima Nation and its members. Id. at 267-68. Given the sweep of the GAA and the sheer scale of the lands allotted pursuant to its authority, this is a devastating holding for many efforts to shield once-allotted and subsequently re-acquired land from state taxation. Yakima did not, however, speak to the taxability of lands made alienable by mechanisms other than the GAA. *See* Leech Lake, 425 U.S. at 112 ("In Yakima, we considered whether *the GAA* manifested an unmistakably clear intent to allow state and local taxation of reservation lands allotted *under the GAA* and owned in fee by either the Yakima Indian Nation or individual Indians")(emphasis added).

The United States Supreme Court had occasion to analyze Yakima in its 1998 decision in Leech Lake. Leech Lake involved a challenge brought by a Minnesota tribe contesting the assessment of state law-based *ad valorem* taxes on fee parcels it owned. The tribe's lands had originally been allotted pursuant to the Nelson Act of 1889, 25 Stat. 642, §3 of which provided for the allotment of erstwhile tribal lands to individual Indians under the terms of the GAA, and §§ 5 and 6 of which provided for the sale of former tribal pine and "homestead" lands to non-Indians. In the 1970s, the tribe began an aggressive land re-acquisition program, buying up allotted lands in fee to expand the tribe's land base. After Yakima was handed down, Cass County began to assess *ad valorem* property taxes on the tribe's fee parcels. Under protest and to avoid foreclosure, the tribe paid the tax bills and then filed suit to contest the county's authority to levy the taxes. Leech Lake, 524 U.S. at 107-109.

[1]It is my understanding that the Nation's preferred spelling is "Yakama" rather than "Yakima." To avoid confusion, however, I will use the Supreme Court's spelling for purposes of this memo.

In reaching the conclusion that the tribe's re-acquired lands were taxable, the Leech Lake Court examined the structure of the Nelson Act, and the holdings in Yakima and Goudy v. Meath, 203 U.S. 146 (1906). 524 U.S. at 110-113. The Leech Lake Court found that Yakima and Goudy together stood "for the proposition that when *Congres*s makes reservation lands freely alienable, it is unmistakably clear that *Congress* intends that land to be taxable by state and local governments, unless a contrary intent is clearly manifested." 524 U.S. at 113 (internal quotations omitted)(emphasis added). Thus, as the Nelson Act provided for the free alienation of tribal lands, the Leech Lake Court concluded that the principles of Yakima and Goudy meant that when the Minnesota tribe re-acquired those lands in fee, it took them subject to *ad valorem* taxation by the county. 524 U.S. at 113. The Leech Lake Court also rejected the tribe's assertion that its re-acquisition of the lands revived their pre-allotment immunity from taxation, an immunity that had (in the tribe's view) merely lain dormant while the lands were out of tribal control. Instead, the Leech Lake Court found that only a clear statement of Congress could re-impose restraints on taxation that Congress had unmistakably removed. Id. at 113-114.

Despite the fact that both Yakima and Leech Lake ruled against tribal assertions of tax immunity, it merits mention that in both cases the Court found clear statements of *congressional* intent to remove restrictions on alienation, and that both cases found that the existence of such statements of congressional intent to be crucial to the inquiry into a state's ability to tax Indian lands. The Ninth Circuit, in its 1993 Lummi decision, was not so scrupulous.

In Lummi, the Ninth Circuit refused to find any legal significance in the fact that the Lummi Tribe's lands had been allotted pursuant to treaty rather than to the GAA or other act of Congress as it pertained to the question of state authority to tax tribally-owned fee land.[2] Rather, the Lummi court read Yakima (and Goudy) to make the *fact* of alienability – not the mechanism by which land became alienable (treaty, act of Congress, executive action, etc.) – to be the touchstone of the inquiry into a parcel's taxability. Lummi, 5 F.3d at 1357. That is, the Ninth Circuit reasoned, if Indian-owned fee land was alienable – irrespective of how it came to be so - it was taxable. The Lummi court recognized that this sweeping conclusion "may be hard to square with . . . [Yakima's] requirement . . . that Congress' intent to authorize state taxation of

[2]Judge Beezer dissented from the panel's decision on the ground that Yakima's articulation of the principle alienability equals taxability was predicated on the expression of congressional intent found in the GAA, while the Lummi land at issue in the case at bar had been allotted pursuant to the Treaty of Point Elliott. Lummi, 5 F.3d at 1360. As Judge Beezer put it:

> There is an appealing simplicity to the proposition that alienable land is taxable land. Unfortunately, federal Indian law does not have a simple history; no amount of wishing will give it a simple future. *Yakima Indian Nation* is a case of statutory interpretation which presents a detailed analysis of the language and structure of the GAA as it applies to allotments and patents issued under its particular provisions. Through its analysis, the Supreme Court found Congress' unmistakably clear intent to permit state taxation of reservation fee lands allotted under the Act. The same type of analysis must be applied to an allotment or assignment made under other statutory authority

Id. Judge Beezer would have remanded the case for a closer analysis of whether that Treaty and statutes pertaining to it (specifically 25 U.S.C. §372) evidenced the requisite congressional intent to authorize state taxation. Id.

Indians must be unmistakably clear." Id. at 1358. But the Lummi court found that Yakima compelled its conclusion nevertheless. Thus, in the Ninth Circuit at least, the law currently holds that any alienable lands owned in fee by Indian tribes or their members are taxable under applicable state law.

I believe, however, that Lummi is ripe for reconsideration. In the first place, its gloss on Yakima as standing for the principle that "alienability equals taxability" has been undercut by the Supreme Court's formulation in Leech Lake that Yakima was a case allowing the assessment of "*ad valorem* taxes on reservation land owned in fee by individual Indians or the tribe *and originally made alienable when patented in fee simple under the GAA*." Leech Lake, 524 U.S. at 109 (emphasis added). I find the italicized language important because it indicates that the Leech Lake Court found the *manner* in which tribal land had been allotted to be significant – in other words, that an expression of congressional intent is key. Moreover, though this point apparently escaped the Lummi panel, the Yakima Court itself recognized the possible significance of the *manner* of allotment, when it remanded the case for further consideration of both the Yakima Nation's factual assertion that some of the parcels in question had been allotted other than through the application of the GAA, "and the prior legal question whether it makes any difference." Yakima, 502 U.S. at 270.

This interpretation of the flaws of Lummi draws strong support in (and is, in part, taken from) the Sixth Circuit's recent decision in KBIC. KBIC involved a claim for tax immunity for fee lands owned by a tribe and its members brought by a Michigan tribe whose lands were originally allotted pursuant to treaty. The KBIC court surveyed Yakima and Leech Lake, and found them to stand squarely for the proposition that the crucial inquiry is whether there is a clear *congressional* expression of intent to allow state taxation of alienable lands. 452 F.3d at 530-31. KBIC therefore flatly disagreed with Lummi on the ground that Lummi simply got the standard wrong. 452 F.3d at 531 n.4. KBIC also found that a treaty itself cannot be grounds for finding state authority to tax because a treaty, standing alone (i.e., without subsequent congressional action related to it), is simply not an act of Congress. Id. at 530-531. Thus, after surveying the record and finding no subsequent congressional action pertaining to the 1854 Treaty or the allotted lands, and certainly none manifesting a "clear congressional intent" to allow state taxation of the allotted lands, the KBIC court found the tribe's and its members' fee lands to be exempt from state taxation. Id. at 533. KBIC was explicit in the basis for its decision:

> We realize that the case turns on the formality of whether land was allotted and made alienable through an act of Congress or through some other source, such as the President. Supreme Court jurisprudence makes clear, however, that only Congress has the power to authorize state taxation of American Indian reservation land. If land becomes alienable through the clear intent of Congress, as manifested by statute, such land is also taxable. If land becomes alienable through another source, Congress simply has not spoken as to whether that land should be taxable.

Id. I believe KBIC's approach is superior to Lummi's. It is much more rigorous, and better grounded in United States Supreme Court precedent.

In re Kaul, 4 P.3d 1170 (Kan.2002)("Kaul II"), is another case that stands in direct contrast to Lummi's analytic framework (though Kaul II does not name names). Where Lummi read Yakima to make alienability the alpha and omega of the taxability inquiry, the Kaul II court expressly found Yakima to mean that "alienability of land is *not* the sole test for the imposition of *ad valorem* taxes on property held by members of Indian tribes." 4 P.3d at 1175-76 (emphasis added). Rather, in Kaul II's formulation, Yakima mandates a two-step inquiry.

> First, Congressional intent to allow the imposition of *ad valorem* taxes upon the property must be found. Second, the taxing authority must examine the treaties and laws under which the tribal lands at issue were allotted to determine if the federal restrictions on alienation and taxation of tribal lands have been removed.

Id. at 1176. Although Kaul II formulates its test a bit differently from that of the KBIC court, I believe the underlying principle is the same – a recognition of the need for a particularized inquiry into the history of an allotted parcel. While the end result of this process ultimately may be the endorsement of state authority to tax (as it proved to be on the facts of Kaul II, id. at 1178), this approach is also much better attuned to the myriad complexities of federal Indian law and policy.

Goudy v. Meath, 203 U.S. 146, a case relied on by Yakima, Leech Lake, and Lummi, and discussed in KBIC, is not to the contrary. Indeed, it is a paradigmatic example of particularized inquiry. Goudy arose from an assertion of state tax immunity by a member of the Puyallup Tribe whose land was allotted pursuant to the 1854 Treaty of Point Elliott. As the Goudy Court explained, the Treaty of Point Elliott specifically provided for allotment of tribal lands, with restrictions on both the alienation and encumbrance of allotted parcels to remain in place unless and until: a) the land subject to the treaty was enclosed within the boundaries of a state; b) that state legislature acted to remove those restrictions; *and* c) Congress ratified the state action removing the restrictions. 203 U.S. at 146-47. The Goudy Court conducted a thorough assessment of the record and concluded that all of the necessary prerequisites had been satisfied to allow the free alienation, and thus taxation, of Mr. Goudy's allotted land. Specifically, the Goudy Court determined that: 1) in 1886, Mr. Goudy received a patent to a parcel of allotted land under the terms of the Treaty of Point Elliott; 2) in 1889, the new state of Washington enacted, in its first legislative session, a law providing for the removal of restraints on alienation and encumbrance of lands held by Indians "in severalty" within the state's boundaries; and 3) in1893, Congress enacted a law authorizing the creation of a commission to supervise the sale of lands allotted pursuant to the Puyallup's treaty, with the caveat that the Indian allottees holding patents to any of the land selected for sale by the commission shall not be entitled to alienate their lands for the 10 years after enactment of the law. Id. at 146-148. Consequently, the Goudy

Court held that Mr. Goudy's land was properly taxable under Washington law. Id. at 150.[3]

The particular factual findings concerning subsequent congressional action explain why Goudy allowed taxation while KBIC prohibited it where both of the subject reservations were allotted pursuant to treaty. Moreover, a close reading of Goudy indicates that the Lummi court's reliance on it for the proposition that "even though [an Indian] receives his property by treaty, [he must] accept the burdens as well as the benefits of land ownership[,]" 5 F.3d at 1358, is simply misplaced.[4] Lummi reads Goudy to the effect that it was the GAA upon which Goudy relied in finding congressional consent to alienation. Lummi, 5 F.3d at 1357-58 (the GAA theoretically imposing both these burdens and benefits). This point is important because if the GAA itself was the congressional act authorizing alienability (and thus taxation) in Goudy, then the fact of allotment by treaty is indeed irrelevant. But I believe the Lummi court's reading is incorrect. A better reading is that Goudy referenced the GAA to show that, pursuant to that Act, Mr. Goudy was *personally* subject to Washington state laws unless he or his property were otherwise exempted. As the Goudy Court articulated:

> Among the laws to which the plaintiff as a citizen became subject [by operation of the GAA] were those in respect to taxation. His property, *unless exempt*, became subject to taxation in the same manner as property belonging to other citizens, and the rule of exemption for him must be the same as for other citizens, that is, that no exemption exists by implication, but must be clearly manifested.

203 U.S. at 149 (emphasis added). Reviewing the procedural history discussed above, the Goudy Court concluded that the implementation of Congress' 1893 act pertaining to allotted Puyallup lands represented the removal of Mr. Goudy's exemption from taxation, leaving him (due to the otherwise applicable provisions of the GAA) susceptible to taxation on the same terms as other Washingtonians. Id. at 149-150. Thus, despite the assertion in Lummi, it is the 1893 Act, not the GAA, that Goudy finds to be the final necessary component allowing for taxability. *See also* Goudy v. Meath, 80 P. 295 (Wash.1905)(the case below, which makes *absolutely no mention whatsoever* of the GAA).

To be fair to the Lummi court, I believe the Yakima Court's analysis of Goudy commits the same error. *See* Yakima, 502 U.S. at 263 (reading Goudy to hold that §5 of the GAA is the basis for the alienability of Mr. Goudy's land).[5] Nevertheless, the consequences of this error are

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[3]The Goudy Court also found probative the fact that that the Secretary of the Interior, in 1903, specifically found that all of the conditions of the Puyallup's treaty had been satisfied and that upon the (then-impending) expiration of the 10 year waiting period imposed by the 1893 Act, "the Puyallup Indian allottees will have power to lease, encumber, grant, and alien [sic] the same in like manner and like effect as any other person may do under the laws of the United States, and of the state of Washington." Id. at 148 (internal quotations omitted).

[4]This fact may help explain why the Lummi court found that proposition "hard to square with the requirement, recently approved by the [Yakima] Court, that Congress' intent to authorize state taxation of Indians must be unmistakably clear." 5 F.3d at 1358.

[5]It is also worth noting in this context that while Leech Lake also invokes Goudy in support of its ruling on taxability, it nowhere construes Goudy as a case turning on the GAA. *See* Leech Lake, 524 U.S. at 111-114.

much more serious in Lummi than in Yakima. Yakima involved lands indisputably allotted pursuant to the GAA. Thus even if Goudy does not say what Yakima says it says, the underlying principle of Yakima's analysis (congressional consent to alienability leads to taxability) is not fatally wounded. In Lummi, however, the tribe's lands were on exactly the same footing as the Puyallup lands at issue in Goudy. The Goudy Court carefully considered the terms of the Treaty of Point Elliott in reaching its conclusion (that *Congress* had authorized the removal of restraints on the alienation of allotted Puyallup land). But Lummi's reading of Goudy allowed the Lummi court to *avoid* engaging with the actual language of the Lummi's treaty. Thus a misapprehension of the logic of Goudy - logic specifically invoked by the Lummi court (*see* 5 F.3d at 1358) – calls into the question the gravamen of the Lummi opinion (that the manner of allotment is irrelevant and alienability is all).

This weakness is of extreme importance to [the client], whose lands – like the Puyallup's and the Lummi's - were allotted pursuant to the Treaty of Point Elliott. A brief discussion of that treaty is warranted here. Article 7 of that treaty authorized the President of the United States, at his discretion, to allot the lands of the reservations created by the treaty "on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable." Article 6 of the 1854 Treaty with the Omahas set forth various technical regulations pertaining to lands to be allotted, and also specified that all lands allotted under its authority "shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force, until a State constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions." Article 6 concluded with the proviso that "[n]o State legislature shall remove the restrictions herein provided for, without the consent of Congress." Clearly, therefore, and as the Goudy Court recognized, the Treaty of Point Elliott contained an express exemption from state taxation for allotted lands. To remove the exemption, not only must a state act to lift those exemptions – which Washington did in its first legislature – but Congress must then ratify the state action.

Goudy, as discussed above, found such ratification, as it pertained to Puyallup lands, in the 1893 Act.[6] That 1893 Act, however, did not pertain to [the client] (or the Lummi, for that matter). Nor have I been able to find any other authority to suggest that Congress *ever* ratified Washington's 1889 Indian jurisdiction law as it pertains to the lands of [the client's reservation]. In light of the absence of such congressional action, I believe the allotted lands of [the client] are in same restricted status as those of the Keweenaw Bay Indian Community in KBIC, and that Yakima and Leech Lake actually compel the conclusion that allotted lands [on the client's reservation], owned in fee by either [the client] or its members, should in fact be exempt from state taxation as a matter of federal law. As it stands, however, Lummi nevertheless requires a contrary conclusion as a matter of Circuit law (if not logic).

Even if Lummi's simple "alienability equals taxability" formulation remains the law of the Circuit, however, I believe there are two additional, interrelated arguments that [the client] may be able to advance to defeat state taxation of the fee lands of [the client] or its members.

[6] Lummi obviously held such ratification to be irrelevant to the status of Lummi lands.

The linchpin of these arguments may be found at [a particular federal statute]. That statute reads:

> [n]otwithstanding any other provision of law, any Indian lands on [certain reservations] in the State of Washington, may be leased by the Indians with the approval of the Secretary of the Interior, and upon such terms and conditions as he may prescribe, for a term not exceeding twenty-five years: *Provided, however*, That such leases may provide for renewal for an additional term not exceeding twenty-five years, and the Secretary of the Interior is hereby authorized to prescribe such rules and regulations as may be necessary to carry out the provisions of this section.

(Emphasis in original.) The Washington Supreme Court has construed this provision to be a federally-imposed restraint on the alienation of Indian-owned land on [another reservation]. Snohomish County, 425 P.2d at 26. As the statute specifically references [the client's reservation] as well, [the client] seems well-positioned to assert that, as a matter of *federal* law, this provision renders lands owned in fee by [the client] not freely alienable. As such, Lummi's holding that alienability is the key to taxability would actually seem to cut in [the client's] favor.

Moreover, the Washington Supreme Court's Snohomish County decision found that, as a matter of *state* law, and pursuant to the terms of R.C.W. §37.12.060, [the relevant federal statute] constituted a restraint on alienation sufficient to deprive the county of jurisdiction to tax a parcel of fee land [another tribe] had purchased in a tax sale in 1963. 425 P.2d at 26. To reach this conclusion, the Snohomish County court examined the state of the law defining Washington's jurisdiction over Indian lands and people within its borders. First, the court rejected the county's assertion that the GAA itself provided authority for the imposition of state-based property taxes. Finding that [the other tribe's reservation] had been allotted pursuant to the Treaty of Point Elliott rather than the GAA, the court found the county's invocation of the GAA flatly inapposite. 425 P.2d at 25. Next, the court considered R.C.W. §37.12.060, the statute enacted by the State of Washington to accept the jurisdiction conferred on the state by P.L. 280. R.C.W. §37.12.060 specifically disclaims state jurisdiction - including the power to alienate, encumber or tax - over "any real or personal property, including water rights and tidelands, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States *or* is subject to a restriction against alienation imposed by the United States...." (Emphasis added.) That statute also disclaims any right of the state "to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein...." In other words, if a parcel belonging to an Indian tribe or individual is subject to a federal restraint on alienation, Washington law expressly precludes the state from taxing it (and, *a fortiori*, from foreclosing on it). Looking to the plain text of [the relevant federal statute], the Snohomish County court found precisely such a restraint. Consequently, it held that R.C.W. §37.12.060 divested the state of jurisdiction to, *inter alia*, tax any Indian-owned lands on [the other tribe's reservation]. 425 P.2d at 26. Crucially, Snohomish County specifically held that the mere fact of acquisition by the

tribe was sufficient to reinstate the restraint of [the relevant federal statute], even though the parcel in question was completely unencumbered when [the other tribe] purchased it. Id.

The logic of Snohomish County seems to apply directly to once-allotted fee lands owned by [the client] as well. It is important to note, though, that this theory is not likely to support the shielding from taxation of fee land held by tribal *members*. While R.C.W. §13.12.060 disclaims jurisdiction over the restricted lands of both tribes and individuals, the essential restraint under the Snohomish County approach is found in [the relevant federal statute], which speaks of imposing a leasing restriction on the "Indian lands" of, *inter alia*, [the client's reservation]. [The relevant federal statute], however, does not itself define the term "Indian lands." I have found no authority speaking to the question of what, for this purpose, is the best of the varying definitions of Indian lands found in federal statutes, but I believe the definition contained in 25 U.S.C. §81 is the most likely candidate. I reach this conclusion by comparing the secretarial approval provisions of [the relevant federal statute] and §81, and the implementing regulations codified at 25 C.F.R. §162, *et seq*., which cite to both §81 and [the relevant federal statute], among others, as their source of statutory authority. 25 U.S.C. §81's definition of "Indian lands" includes both trust lands and also those lands "the title to which is held *by an Indian tribe* subject to a restriction by the United States against alienation." (Emphasis added.) I recognize that there is something of a circularity problem presented by trying to use a definition *predicated* on the existence of a restraint (§81) to prove the applicability of that restraint (via [the relevant federal statute] to lands owned in fee by [the client]), but the clarity of the restraint imposed by [the relevant federal statute], and the fact that Congress did not specifically limit it to "lands held in trust" where Congress clearly knew how to do so (*see, e.g.*, §81 itself) seem to counsel in favor of the reading I suggest.

Thus if the restraint found in [the relevant federal statute] is construed in light of 25 U.S.C. §81's definition to apply only to fee lands held by a *tribe*, then lands owned in fee by individual tribal members are not shielded by the restraint in [the relevant federal statute], and thus are outside the sweep of the ruling in Snohomish County. A more expansive definition of "Indian lands" is found at 25 U.S.C. §4302 (dealing with tribal business development), which includes within its ambit all lands encompassed by the definition of "Indian country" in 18 U.S.C. §1151. But even this definition is not a panacea. 18 U.S.C. §1151, which defines "Indian country" to include "all land within the limits of any Indian reservation *under the jurisdiction of the United States Government*" (emphasis added), poses an even larger circularity problem than the one identified above in that it is exactly the question of the jurisdiction of the United States (as opposed to that of a state) that is at issue here. Moreover, because of the general reluctance currently displayed by both courts and the executive branch of the United States to construe federal responsibilities to tribes expansively, it seems extremely unlikely that a court would interpret [the relevant federal statute] in light of 25 U.S.C. §4302 rather than 25 U.S.C. §81.

In any event, it is also true that Snohomish County is not the world's most closely-reasoned or citation-rich opinion.[7] Moreover, the persuasiveness of its reliance on the mere fact

[7]It does, however, accurately cite to LaMotte v. U.S., 254 U.S. 570, 577 (1921), for the proposition that a secretarial

of tribal re-acquisition (in fee) is diminished by subsequent court pronouncements. *See, e.g.*, Sherrill v. Oneida Indian Nation, 544 U.S. 197, 214 (2005); Leech Lake, 524 U.S. at 114; Lummi, 5 F.3d at 1359.[8] It is also true that Snohomish County is ultimately a case about a state's jurisdiction to *zone* rather than its jurisdiction to *tax* – a difference that both the United States Supreme Court and the Ninth Circuit have found significant, particularly in light of the more narrow focus of Yakima.[9] But Snohomish County nevertheless currently remains good law in the state of Washington,[10] and appears to be squarely on point (at least for the crucial question of the existence of a restraint on alienation) for lands owned in fee by [the client].

IV. Conclusion

The law of the Ninth Circuit is less favorable than that of the United States Supreme Court when it comes to shielding fee lands owned by Indians and tribes from state *ad valorem* taxation and foreclosure. To the extent that freedom from state taxation and/or consolidation of a tribe's land base is of paramount concern, the most direct remedy for this situation is to seek to have all tribally-owned fee parcels taken into trust under the authority of 25 U.S.C. §465 as quickly as possible. This land-into-trust process, of course, is both a slow and a costly one. In the interim, and as detailed above, there are some colorable arguments that can be made to avoid liability for *ad valorem* property taxes. In light of existing Ninth Circuit precedent, however, the chance of success of any of these arguments is entirely unclear. Unfortunately, therefore, the most likely conclusion is that fee lands will be held to be subject to state-based *ad valorem* taxation.

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approval provision regarding leasing is indeed a restraint on alienation (albeit a comparatively small one).

[8]Credit is due Lummi for anticipating the Leech Lake Court's identification of the land-into-trust provisions of 25 U.S.C. §465 as being probative on the question of the effect (or, more accurately, lack thereof) on taxability of mere Indian re-acquisition in fee of allotted lands, absent those lands being taken back into trust or made subject to some other particular indicator of federal intent to preclude state taxation. As it pertains particularly to [the client's reservation's] lands, however, I would contend that [the relevant federal statute] a represents exactly such a particular indicator, taking [the client's] lands outside the more generalized analytic framework of Lummi and Leech Lake.

[9]It bears repeating, though, that in reaching its conclusion about zoning, the Snohomish County court also specifically declared that "the state is without authority to encumber or tax" the Tribes' after-acquired fee parcel. 425 P.2d at 26.

[10]The Washington Supreme Court's decision in Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 929 P.2d 379 (Wash.1996)("A&M Lumber"), is not to the contrary. A&M Lumber considered the non-Indian plaintiff's efforts to vindicate through a partition action its partial interest in a parcel of fee land that had originally been allotted under the provisions of the GAA. After the institution of the suit, the Quinault Indian Nation acceded to several of the partial interests in the parcel. The Washington Supreme Court, citing Lummi, held that the Nation's re-acquisition of the parcel did not operate to re-impose restraints on alienation sufficient to bar the partition action, 929 P.2d at 383, and found that, under Yakima, it retained *in rem* jurisdiction over the parcel sufficient to adjudicate the controversy over the parcel. Id. at 384. These conclusions are reasonable in light of Yakima and the identification by the A&M Lumber court of the GAA as the source of allotment authority. But Snohomish County, as discussed above, turned on the applicability of a specific federal statute not relevant to A&M Lumber. In addition, the Snohomish County court specifically found the GAA irrelevant to its analysis. Consequently, the two cases are quite distinguishable.