

**UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY**

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

1. **Name:** State full name (include any former names used).

William Walter Mercer

2. **Position:** State the position for which you have been nominated.

United States District Judge for the District of Montana

3. **Address:** List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

401 North 31st Street, Suite 1200
Billings, Montana 59101

4. **Birthplace:** State year and place of birth.

1964; Billings, Montana

5. **Education:** List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

1989 – 1993, George Mason University School of Law; J.D., 1993

1986 – 1988, Harvard University; M.P.A., 1988

1982 – 1986, University of Montana; B.A., 1986

6. **Employment Record:** List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or description.

2010 – Present

Holland & Hart LLP

401 North 31st Street

Billings, Montana 59101

Partner (2014 – present)

Of Counsel (2010 – 2013)

2001 – 2009

United States Attorney's Office, District of Montana

2929 Third Avenue North, 4th Floor

Billings, Montana 59101

United States Attorney

2005 – 2007

United States Department of Justice

950 Pennsylvania Avenue, NW

Washington, D.C. 20530

Acting Associate Attorney General (2006 – 2007)

Principal Associate Deputy Attorney General (2005 – 2006)

1997 – 2001

United States Attorney's Office, District of Montana

201 East Broadway Street, 1st Floor and 105 E. Pine Street, 2nd Floor

Missoula, Montana 59801

Assistant United States Attorney

1997 – 1999

University of Montana

Davidson Honors College

32 Campus Drive

Missoula, Montana 59812

Adjunct Faculty

1994 – 1997

United States Attorney's Office, District of Montana

2929 Third Avenue North, 4th Floor

Billings, Montana 59101

Assistant United States Attorney

1996

Montana State University – Billings

Department of Sociology, Political Science, and Native American Studies

1500 University Drive

Billings, Montana 59101

Adjunct Faculty

1989 – 1994

United States Department of Justice
Office of Policy Development
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
Attorney Advisor (1994)
Policy Analyst (1990 – 1994)
Presidential Management Intern (1989 – 1990)

1988 – 1989

United States Department of the Treasury
Office of Tax Policy
Office of Tax Analysis
Revenue Estimating Division
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220
Presidential Management Intern (1988 – 1989)

Summer 1987

The Brooklyn Union Gas Company
195 Montague Street
Brooklyn, New York 11201
Government Relations Intern

Spring – Summer 1986

University of Montana Foundation
950 Arthur Avenue
Missoula, Montana 59812
Capital Campaign Assistant

Other Affiliations (uncompensated):

2010 – 2018

Big Sky Senior Services
935 Lake Elmo Drive, Suite B
Billings, Montana 59105
Member, Board of Directors (Uncompensated)

2013 – 2018

University of Montana Foundation
950 Arthur Avenue
Missoula, Montana 59812
Member, Board of Trustees (Uncompensated)

2011 – 2018

Billings Symphony Society
2820 Second Avenue North
Billings, Montana 59101
Member, Board of Directors (Uncompensated)

2010 – 2017

Boulder – Arrowhead Little League
P.O. Box 21401
Billings, Montana 59104
Member, Board of Directors (Uncompensated)

1997 – 2001

Truman Scholars Association
5511 Sunset Lane
Indianapolis, Indiana 46228
Member, Board of Directors (Uncompensated)

1997 – 2001

University of Montana Alumni Association
32 Campus Drive
Missoula, Montana 59812
Member, Board of Directors (Uncompensated)
Vice-President, 2000-2001

7. **Military Service and Draft Status:** Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

I have not served in the military. I registered for selective service.

8. **Honors and Awards:** List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

Chambers USA, Montana Natural Resources & Environment and Commercial Litigation, 2016 – 2025 (Band 1 in Natural Resources & Environment and Band 2 in Commercial Litigation)

Mountain States Super Lawyers®, Environmental Litigation (Montana), 2022 – 2025

The Best Lawyers in America®, Natural Resources Law (Montana), 2019 – 2025; Commercial Litigation (Montana), 2021 – 2025

Distinguished Alumni Award, Davidson Honors College, University of Montana, 2022

Highest State Legislative Effective Score for the Montana House of Representatives in its 67th and 68th Sessions per the Center for Effective Lawmaking, a collaboration between the University of Virginia and Vanderbilt University, 2021 – 2024

Community Service Award (Billings Awardee), University of Montana, 2018

Distinguished Alumni Award, George Mason University School of Law, 2002

Harry S. Truman Scholarship Foundation Judge Joseph E. Stevens, Jr. Award (2000)

Harry S. Truman Scholarship Foundation Elmer B. Staats Award (1996)

Presidential Management Intern, 1988 – 1990

Truman Scholar, Harry S. Truman Scholarship Foundation (1984)

9. **Bar Associations:** List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

Montana Bar Association (1993 – Present)

American Bar Association (A subset of the last thirty-two years, but not presently)

Yellowstone Area Bar Association (1994 – 1997; 2001 – Present)

Advisory Committee on Rules of Practice and Internal Operating Procedures, United States Court of Appeals for the Ninth Circuit (2001 – 2007)

Western Montana Bar Association (1997 – 2001)

10. **Bar and Court Admission:**

a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

Montana, 1993.

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

Supreme Court of the United States, 2019

United States Court of Appeals for the D.C. Circuit, 2013

United States Court of Appeals for the Ninth Circuit, approximately 1995

United States District Court for the District of Montana, 1994

Montana State Courts, 1993.

There have been no lapses in membership.

11. **Memberships:**

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Kiwanis Club of Missoula, 1997 – 2001

Federalist Society, Membership has been sporadic since 1993

Truman Scholars Association, 1992 – Present

National Association of Former U.S. Attorneys, 2011 – Present

Elks Lodge # 394, Billings, Montana, 2015 – 2022

University of Montana Alumni Association, 1986 – Present

b. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

I do not believe any of these organizations discriminate based upon race, sex, religion or national origin.

12. **Published Writings and Public Statements:**

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply copies of all published material to the Committee.

With assistance, I have sought to locate all responsive items. Despite our efforts, there may be other materials that we have been unable to identify. Copies of responsive items are included in Appendix 12a.

b. Supply copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a

report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

With assistance, I have sought to locate all responsive items. Despite our efforts, there may be other materials that we have been unable to identify. However, the following report is responsive to the request:

Federal Law Enforcement Priorities in Montana and Characteristics of the Federal Criminal Justice System, 2001 – 2008

c. Supply copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

With assistance, I have sought to locate all responsive items. Despite our efforts, there may be other materials that we have been unable to identify. Copies of responsive items are included in Appendix 12c.

d. Supply copies, transcripts or recordings of all speeches or talks delivered by you including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

With assistance, I have sought to locate all responsive items. Despite our efforts, there may be other materials that we have been unable to identify. Copies of responsive items are included in Appendix 12d.

e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and copies of the clips or transcripts of these interviews where they are available to you.

With assistance, I have sought to locate all responsive items. Despite our efforts, there may be other materials that we have been unable to identify. Copies of responsive items are included in Appendix 12e.

13. **Judicial Office:** State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I have not held judicial office.

a. Approximately how many cases have you presided over that have gone to verdict or judgment? _____

i. Of these cases, approximately what percent were:

jury trials: _____ %
bench trials: _____ %

ii. Of these cases, approximately what percent were:

civil proceedings: _____ %
criminal proceedings: _____ %

b. Provide citations for all opinions you have written, including concurrences and dissents.

c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature of the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (4) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.

e. Provide a list of all cases in which certiorari was requested or granted.

f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

h. Provide citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, provide copies of the opinions.

i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

I have not held judicial office.

- a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;
- b. a brief description of the asserted conflict of interest or other ground for recusal;
- c. the procedure you followed in determining whether or not to recuse yourself;
- d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

15. **Public Office, Political Activities and Affiliations:**

- a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

Member (January 2019 – Present), Montana House of Representatives, elected in November 2018; re-elected in November 2020, November 2022, and November 2024

Nominee (2006 – 2007), Associate Attorney General of the United States (I withdrew from consideration when it appeared that the United States Senate would not confirm me for the position)

Member (2001 – 2004), Montana Board of Crime Control (Board Chairman, 2003 – 2004). Governor Martz appointed me to these positions.

United States Attorney, District of Montana (2001 – 2009). President George W. Bush nominated me for the position, and the United States Senate confirmed me for it.

- b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign,

including the candidate, dates of the campaign, your title and responsibilities.

Member, Rules Committee, Montana Republican Party (2022 – Present)

16. **Legal Career:** Answer each part separately.

a. Describe chronologically your law practice and legal experience after graduation from law school including:

- i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

I did not serve as a law clerk.

- ii. whether you practiced alone, and if so, the addresses and dates;

I have not practiced law alone.

- iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each;

1994

United States Department of Justice
Office of Policy Development
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
Attorney Advisor

1994 – 1997

United States Attorney's Office, District of Montana
2929 Third Avenue North, 4th Floor
Billings, Montana 59101
Assistant United States Attorney

1997 – 2001

United States Attorney's Office, District of Montana
201 East Broadway Street, 1st Floor and 105 E. Pine Street, 2nd Floor
Missoula, Montana 59801
Assistant United States Attorney (1997 – 2001)

2001 – 2009

United States Attorney's Office, District of Montana
2929 Third Avenue North, 4th Floor
Billings, Montana 59101
United States Attorney

2005 – 2006

Office of the Deputy Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
Principal Associate Deputy Attorney General

2006 – 2007

Office of the Associate Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
Acting Associate Attorney General

2010 – Present

Holland & Hart LLP
401 North 31st Street
Billings, Montana 59101
Of Counsel (2010 – 2013)
Partner (2014 – present)

- iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I served as a mediator once in 2016. The case involved allegations of campaign finance violations against a former state legislator brought by Montana's Commissioner of Political Practices.

- b. Describe:

- i. the general character of your law practice and indicate by date when its character has changed over the years.

I worked for the U.S. Department of Justice ("DOJ") as an attorney for sixteen years. For less than a year of that time, I worked as a lawyer in the Department's policy office in Main Justice. After leaving Washington, D.C., I worked in the United States Attorney's Office in the District of Montana as an Assistant U.S. Attorney for seven years. Beginning in 2001, I served as the United States Attorney for the District of Montana until the end of 2009. From 2005 to 2007, I also served as Principal Associate Deputy Attorney General ("PADAG") and then as Acting Associate Attorney General in Washington, D.C.

My practice as an Assistant U.S. Attorney consisted of defending the government in civil litigation, litigating civil cases brought on behalf of the United States, prosecuting federal criminal cases, and representing the government in the appeals that resulted from the cases. As United States Attorney, I managed the operations and strategic plan of the office and worked closely with law enforcement partners, and I continued to have primary responsibility for a small number of cases. As PADAG, I focused on management of the operations of DOJ, development of DOJ initiatives, and participation in interagency efforts involving the Domestic Policy Council, the National Security Council, and the National Economic Council. As Acting Associate Attorney General, I served as the third-ranking official in DOJ and provided oversight to five litigating divisions (Antitrust, Civil, Civil Rights, Environment and Natural Resources and Tax) with criminal and civil cases, in addition to the grant-making functions of DOJ and interagency working groups.

In 2010, I joined Holland & Hart LLP in its Billings Office and remain with the firm to this day. In fifteen years in private practice, I have focused on civil litigation, interactions with regulators, and a small number of criminal cases.

- ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

While at DOJ, the United States was my sole client. In the United States Attorney's Office, I focused on prosecution of white collar crimes, appellate cases, False Claims Act litigation, and defending the United States in tort claims litigated under the Federal Tort Claims Act and challenges brought pursuant to the Administrative Procedure Act pertaining to permits issued by the Forest Service and BLM. I served as lead counsel in many appeals litigated in the Ninth Circuit over my sixteen years in the United States Attorney's Office. I presented fifteen oral arguments as the government's sole counsel. I developed an expertise in appellate practice and on the U.S. Sentencing Guidelines.

During my years at Holland & Hart, I have represented corporations and trade associations. I have represented a small number of individuals. I represent clients in government investigations and environmental law disputes, including both litigation and other interactions with governmental entities. I have also engaged in other types of commercial litigation outside the judicial branch before regulatory agencies.

- c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

With the exception of interactions with regulators on permitting issues and government investigations, the remainder of my practice involves litigation. As an Assistant U.S. Attorney, I estimate that I maintained an average of thirty to forty active criminal and civil cases. I had an average of five active cases per year during my nine years as United States Attorney, but did not maintain a caseload while serving at DOJ headquarters.

In private practice, I have been an active litigator, but I have spent less time in court in private practice than I did as an Assistant U.S. Attorney. My cases in private practice have been in state court more than federal court.

i. Indicate the percentage of your practice in:

- | | | |
|----|--------------------------|-----|
| 1. | federal courts: | 65% |
| 2. | state courts of record: | 30% |
| 3. | other courts: | 0% |
| 4. | administrative agencies: | 5% |

ii. Indicate the percentage of your practice in:

- | | | |
|----|-----------------------|-----|
| 1. | civil proceedings: | 75% |
| 2. | criminal proceedings: | 25% |

d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I have been in trial nine times. I tried three felony criminal cases before juries. I was sole counsel in two trials and an associate counsel in one. I tried six civil cases. None of these involved a jury. I was sole counsel in two of the trials and lead counsel in the other four.

i. What percentage of these trials were:

- | | | |
|----|-----------|-----|
| 1. | jury: | 33% |
| 2. | non-jury: | 67% |

e. Describe your practice, if any, before the Supreme Court of the United States. Supply copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice.

I have been counsel of record in two cases before the United States Supreme Court:

Espinoza v. Mont. Dep't Revenue, 591 U.S. 464 (2020) (No. 18-1195) (merit-stage brief of petitioners, 2019 U.S. S. Ct. Briefs Lexis 4361; merit-stage reply brief, 2019 U.S. S. Ct. Briefs Lexis 7240).

Atlantic Richfield Co. v. Christian, 590 U.S. 1 (2020) (No. 17-1498) (cert. amicus, 2018 U.S. S. Ct. Briefs Lexis 2138; brief of amici, 2019 U.S. S. Ct. Briefs Lexis 3790).

17. **Litigation:** Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- a. the date of representation;
- b. the name of the court and the name of the judge or judges before whom the case was litigated; and
- c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. *United States v. Rivas-Gonzalez*, 365 F.3d 806 (9th Cir. 2004), reh'g denied, 384 F.3d 1034 (9th Cir. 2004) (representation from 2002 to 2004)

Rivas was sentenced in state court in Washington in 1993 for a drug offense and was deported the same year after serving his sentence. Soon after deportation, he reentered the country, married a citizen, became a father, and lived in the United States until his arrest in 2002. The parties agreed that the appropriate range under the Sentencing Guidelines was 27 to 33 months. Rivas sought a twelve-month sentence through a downward departure due to his cultural assimilation and family ties. The District Court concluded that the case was "outside the heartland" of the Sentencing Guidelines. The Court downward departed nine levels under the Guidelines, which was three levels more than Rivas sought, and imposed a six-month prison sentence.

I conferred with colleagues on the sentencing issues in District Court. I worked with the Appellate Section of the Criminal Division in DOJ and the Office of the Solicitor General to obtain authorization for the appeal, worked on the brief, and presented oral argument before the panel of Ninth Circuit judges. The Ninth Circuit reversed and remanded the case to the District Court because the guideline reduction based upon cultural assimilation was unfounded on the facts of this case.

Judge Donald W. Molloy imposed the sentence. Judges Andrew J. Kleinfeld, Richard C. Tallman, and Ronald M. Gould heard the case on appeal in the Ninth Circuit.

Counsel for Defendant:

Melissa Harrison
Former Assistant Federal Defender
Current Contact Information Unknown

2. *United States v. Edwards*, 158 F. App'x. 930 (9th Cir. 2005); 390 F. App'x. 627 (9th Cir. 2007); 595 F.3d 1004 (9th Cir. 2010) (representation from 2003 to 2009)

I prosecuted Edwards for bankruptcy fraud and making a false statement to a bank. He failed to disclose stock options and other assets in his bankruptcy filing. The intended loss associated with his concealments exceeded \$ 500,000, and he committed the crimes while on probation for a prior bank fraud conviction in which the loss exceeded \$ 3 million. The District Court imposed a sentence of seven months of house arrest and probation for five years, which was below the Sentencing Guidelines range of 27 to 33 months of imprisonment. I sought authorization from the Solicitor General to appeal the sentence, which he granted. The U.S. Court of Appeals for the Ninth Circuit remanded the case for resentencing given intervening changes in federal sentencing caselaw, although one judge agreed that the sentence was not reasonable. On remand, the District Court reimposed the same sentence. I sought authorization from the Solicitor General to appeal the sentence as unreasonable. The U.S. Court of Appeals for the Ninth Circuit remanded the case for resentencing on a full record, concluding that the judge determined he would have imposed the same sentence had he known the Sentencing Guidelines were not mandatory, but not whether the sentence was reasonable under 18 U.S.C. § 3553(a). On remand, the District Court imposed the same sentence in addition to a restitution order of \$ 102,696. I sought authorization from the Solicitor General to appeal the sentence as unreasonable, which he granted. The Ninth Circuit affirmed the judgment over the dissenting opinion of Judge Bea, who would have reversed the sentence as substantively unreasonable.

Judge Donald W. Molloy imposed the sentences. Ninth Circuit Judges Mary Schroeder, Andrew Kleinfeld, Arthur Alarcon heard the first appeal. Ninth Circuit Judges Robert Beezer, Richard Paez, and Susan Graber heard the second appeal. Ninth Circuit Judges Harry Pregerson, Carlos Bea, Milan Smith heard the final appeal.

Counsel for Defendant:

John P. Rhodes
Assistant Federal Defender
125 Bank Street, Suite 710
Missoula, MT 59802
(406) 721-6749

3. *Montana Environmental Information Center v. U.S. Bureau of Land Management and American Petroleum Institute*, 2013 U.S. Dist. Lexis 86560 (D. Mont.), 615 F. App'x. 431 (9th Cir. 2015) (representation from 2011 to 2016)

Plaintiffs asserted that the Bureau of Land Management ("BLM") violated the National Environmental Policy Act in conjunction with a decision to lease federal land for oil and gas development. On behalf of trade associations, our firm defended BLM's leasing decision by asserting that Plaintiffs lacked standing and that the agency's decision was neither arbitrary nor capricious. Following oral argument on cross-motions for summary judgment, the District Court

held that the Plaintiffs lacked standing and dismissed the case. The Ninth Circuit reversed the District Court's judgment and remanded the case for further proceedings on whether the Plaintiffs could establish standing by associated harms to the surface connected to the leases. BLM and Plaintiffs entered into a settlement agreement over the objection of Intervenor which resolved the case.

I served as lead counsel in the U.S. District Court for the District of Montana and the U.S. Court of Appeals for the Ninth Circuit for the trade associations.

District Judge Sam E. Haddon entered judgment. Judges Diarmuid O'Scannlain, A. Wallace Tashima, and Margaret McKeown heard the case on appeal in the Ninth Circuit

Counsel for Plaintiffs:

Shiloh Hernandez
313 East Main Street
Bozeman, MT 59715
(406) 586-9699

Counsel for the Government:

Ruth Ann Storey
Current Contact Information Unknown

4. *Treasure State Resource Industry Association v. Environmental Protection Agency*, 805 F.3d 300 (D.C. Cir. 2015) (representation from 2013 to 2015)

Our firm represented the Treasure State Resources Industry Association ("TSRIA") in a Petition for Review challenging the Environmental Protection Agency's ("EPA") designation of a portion of Yellowstone County, Montana as non-attainment under the 2010 National Ambient Air Quality Standard ("NAAQS") for sulfur dioxide and denial of its requests of reconsideration by EPA. EPA's promulgation of a new NAAQS in 2010 led to its designation of Yellowstone County as non-attainment in 2013 in addition to 28 other communities nationwide. In addition to Wayne County, Michigan, TSRIA asked the D.C. Circuit to vacate the rule for multiple reasons, including concerns with the data utilized by EPA. The D.C. Circuit affirmed the rule. I served as lead counsel and participated in oral argument in the U.S. Court of Appeals for the D.C. Circuit.

D.C. Circuit Judges Stephen Williams, Patricia Millett, and Thomas Griffith heard the appeal.

Co-Counsel:

Marie Bradshaw Durrant
Pacifcorp
1407 West North Temple, Suite 320
Salt Lake City, UT 84116

(801) 220-2154

Counsel for the Government:

Amanda Shafer Berman
Crowell & Moring LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 688-3451

5. *City of Missoula v. Mountain Water Company and Carlyle Infrastructure Partners, LP*, 378 P.3d 1113 (Mont. 2016)(1st Appeal); 417 P.3d 321 (Mont. 2018)(2nd Appeal); 419 P.3d 685 (Mont. 2018)(3rd Appeal); 427 P.3d 1018 (Mont. 2018)(4th Appeal); and 487 P.3d 15 (Mont. 2021)(5th Appeal) (representation 2014 to 2021)

The City of Missoula brought a lawsuit in May 2014 to condemn through eminent domain the city's water utility owned by a private entity. We represented Carlyle Infrastructure Partners, LP ("Carlyle"), and its entity, Western Water Holdings, the upstream owner of Mountain Water. Our firm represented Carlyle in opposing the City's attempt to condemn the water system and associated water rights, the trial to determine the valuation of the assets, and other related legal issues. Discovery included a massive amount of electronic data and depositions of over fifty witnesses.

The City prevailed after a twelve-day trial on whether public ownership was a more necessary use and, therefore, it was legally entitled to take the assets. The Montana Supreme Court affirmed the judgment of the District Court. After a separate six-day trial on valuation of the assets, the three commissioners awarded \$ 88,600,000 to Defendants, which exceeded the City's final offer before condemnation by \$ 38.6 million. Because the commissioners' award exceeded the final offer made by the City before initiating the condemnation case, Mountain Water and Carlyle were entitled to their costs and attorneys' fees under Montana law. The amounts of the attorneys' fees and costs to which Defendants were entitled were also litigated. The parties litigated an appeal and cross-appeal of the costs and fees awarded in the Montana Supreme Court. The parties also litigated Defendants' entitlement to interest in the District Court and the Montana Supreme Court. Finally, after the Supreme Court reversed the District Court's Order on summary judgment on Defendants' constitutional challenge to the statutory cap on the reimbursement rate for costs and attorneys' fees and remanded the case to the District Court for further proceedings, the District Court denied Defendants' motion for substitution of judge. On appeal of that issue, the Supreme Court reversed the District Court's denial of the reassignment of the case to a different judge.

I served as lead counsel for Carlyle throughout the litigation in the District Court and the Montana Supreme Court. Karen Townsend presided as the District Court Judge. Montana Supreme Court Justices Patricia Cotter, Michael Wheat, Jim Rice, Beth Baker, Dirk Sandefur, James Shea, Laurie McKinnon, Ingrid Gustafson and Chief Justice McGrath heard one or more of the five appeals.

Co-Counsel:

Adrian A. Miller
Sullivan Miller Law PLLC
2812 First Avenue North, Suite 225
Billings, MT 59101
(406) 403-7066

Kyle A. Gray
Holland & Hart LLP
401 North 31st Street, Suite 1200
Billings, MT 59101
(406) 252-2166

Counsel for the City of Missoula:

Natasha Prinzing Jones
Boone Karlberg P.C.
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6. *Upper Missouri Waterkeeper v. Montana Department of Environmental Quality and the City of Billings*, 438 P.3d 792 (Mont. 2019) (representation from 2016 to 2019)

Our firm represented the City of Billings as an Intervenor in a lawsuit brought in Gallatin County by an environmental advocacy group challenging a general permit for stormwater discharges issued by the Montana Department of Environmental Quality (“DEQ”) through the Montana Pollutant Discharge Elimination System program and legality of the Environmental Protection Agency’s authority on permitting for municipal separate storm sewer systems (MS4s). Plaintiff

alleged that DEQ failed to comply with applicable legal requirements in issuing the statewide MS4 permit.

The City and DEQ prevailed in the District Court and on an appeal to the Montana Supreme Court on the issues presented, including (1) the adequacy of public participation in advance of the issuance of the MS4 permit and (2) that it was neither arbitrary nor capricious for the DEQ to include construction and post-construction controls, Total Maximum Daily Loads, and pollution monitoring requirements in the General Permit.

I served as lead counsel for the City and participated in oral argument in the District Court and on the briefing in both the District Court and the Montana Supreme Court.

Rienne H. McElyea presided as the District Court Judge. Montana Supreme Court Justices Beth Baker, Dirk Sandefur, James Shea, Laurie McKinnon, and Ingrid Gustafson heard the appeal.

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7. *Espinoza, et al. v. Montana Department of Revenue*, 435 P.3d 603 (Mont. 2018); 591 U.S. 464 (2020) (representation from 2016 to 2019)

I represented Plaintiffs in the District Court and the Montana Supreme Court as local counsel in collaboration with Institute for Justice attorneys.

Montana enacted a tax credit mechanism in 2013 that provided tax credits to those who donate to organizations that award scholarships for private school tuition. The Montana Department of Revenue promulgated a rule that precluded families who received scholarships from using them at religious schools. Plaintiffs' Complaint and request for injunctive relief alleged that the rule discriminated against them based upon their religious beliefs and the fact that instruction at Stillwater Christian School, the school that their children attended, is religion-based.

The District Court enjoined enforcement of the rule following a hearing on the request for injunctive relief. After briefing and oral argument on the merits, the District Court granted summary judgment for Plaintiffs and permanently enjoined the rule. The State appealed the final judgment to the Montana Supreme Court.

After briefing and oral argument in the Montana Supreme Court, the Court reversed the District Court's judgment and concluded that the statutory mechanism that authorizes the scholarship program violated Article X, Section 6 of the Montana Constitution's prohibition on utilizing public funds or making a direct or indirect appropriation for any sectarian purpose.

The United States Supreme Court granted Plaintiffs' petition for writ of certiorari. The Court reversed the Montana Supreme Court finding that the rule violated Plaintiffs' rights under the Free Exercise Clause.

I presented the portion of the oral argument before the Montana Supreme Court focusing on tax credits not constituting direct or indirect appropriations or payments from public funds. I participated in the briefing in the District Court, the Montana Supreme Court, and the U.S. Supreme Court.

Judges David Ortley and Heidi J. Ulbricht presided in the District Court. Justices Jim Rice, Beth Baker, Dirk Sandefur, James Shea, Laurie McKinnon, Ingrid Gustafson and Chief Justice Mike McGrath heard the appeal in the Montana Supreme Court; United States Supreme Court Justices Gorsuch, Alito, Thomas, Kavanaugh, Ginsburg, Kagan, Breyer, Sotomayor, and Chief Justice Roberts heard the appeal from the Montana Supreme Court.

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8. *Montana Trout Unlimited, et al. v. Montana Department of Environmental Quality and Tintina Montana, Inc.*, 544 P.3d 163 (Mont. 2024) (representation from 2015 to 2024)

Our firm represented Tintina in its efforts to seek and defend the permits for a copper mine. The mine is the first copper mine proposed in Montana in the last 30 years. We started working with Tintina in 2015 to help obtain all necessary permits for the proposed mine and advise on a wide range of environmental law and permitting issues. Permitting for the project took nearly 5 years to complete, but the Montana Department of Environmental Quality (DEQ) issued a final environmental impact statement, a mine operating permit, and a Montana Pollutant Discharge Elimination System (MPDES) permit to Tintina in 2020.

Plaintiffs sued DEQ on multiple decisions it made and the analysis it used in conjunction with issuing the mine operating permit. The litigation involved complex issues of water quality and tailings facility construction and operations. The District Court ruled in favor of the environmental groups. Tintina and DEQ appealed this ruling to the Montana Supreme Court. After briefing and oral argument, the Court reversed the District Court and reinstated the company's mine operating permit.

Our firm served as lead counsel for the company in the permitting process and the litigation in District Court. I led our team throughout that process and participated at oral argument in the District Court in the hearing on the dispositive motions. We also appeared in the appeal.

Judge Katherine M. Bidegaray presided in District Court. Justices Jim Rice, Beth Baker, Dirk Sandefur, James Shea, Laurie McKinnon, and Ingrid Gustafson and Chief Justice Mike McGrath heard the appeal.

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9. *Montanore Minerals Corp., v. Montana DEQ; Ksanka Elders Advisory Committee, et al. v. Dorrington*, ADV-2018-363 (1st Judicial District); DDV-2021-1126 (1st Judicial District).

Our firm represented Hecla, a company with more than 100 years of mining experience, and its subsidiaries, which held exploration and operating permits in Montana, in an enforcement action brought by the Montana Department of Environmental Quality (DEQ) in District Court. In the initial case, DEQ alleged that Hecla (and, by extension, its subsidiaries) should be precluded from mining in Montana under the State's bad actor statutes because Phillips Baker, Hecla's CEO, was formerly employed as a principal or controlling member of a mining company that went bankrupt and caused Montana to incur costs for reclamation. DEQ pursued the action following a letter from EarthJustice in 2017, which asserted that Hecla and its subsidiaries should be precluded from being a permittee in Montana. The parties actively litigated the case from 2018 until the last quarter of 2021, when DEQ moved to dismiss it, which the court granted.

The Intervenors, now as Plaintiffs, then initiated a mandamus action in District Court in 2022 seeking a judicial order compelling DEQ to enforce the bad actor provisions of the Metal Mines Reclamation Act and a declaratory judgment. We also represented the Hecla subsidiaries as an intervenor in the second case and succeeded in getting the mandamus action dismissed. Following the retirement of the CEO, and with summary judgment motions pending, Plaintiffs voluntarily dismissed the balance of their case.

I served as lead counsel on these matters since the outset of the bad actor allegations and drafted briefing and participated in oral arguments in motions hearings before all three judges.

The dates of our representation were 2018 – 2024. Judges Mike Menahan (ADV-2018-363) and Christopher D. Abbott (DDV-2021-1126) presided in the District Court.

Counsel for Mr. Baker:

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10. *United States ex. rel. Reginald Williams v. Robyn Williams, et al.*, CV 15-54-RJS-DBP (representation from 2021 to 2024)

Williams brought a False Claims Act (“FCA”) lawsuit against Utah pursuant to the qui tam provisions of the FCA. He alleged that Utah made false claims between 2009 and 2014 with respect to grant funding from the DOJ made available through the American Recovery and Reinvestment Act of 2009 (“ARRA”). The United States Attorney for the District of Utah intervened in the litigation and further alleged that state employees made multiple false claims leading to awards to Utah state agencies that would not have generated payments from DOJ if accurate statements had been made. The United States Attorney also asserted that the false claims led to violations of DOJ’s non-supplanting requirements.

Utah issued a request for proposals to evaluate potential outside counsel and retained our firm to defend it from allegations made by the Relator. I served as lead counsel. Our work included assessment of various DOJ grant programs at issue and the applicable program rules, including

(1) whether ARRA required state agency grantees to supplement, not supplant, pre-existing state expenditures; and (2) whether a State can be liable under the FCA even though a state is not a person under the FCA given *Vermont Agency of Natural Resources v. United States ex rel. Chandler*, 529 U.S. 765 (2000). The case settled after mediation with U.S. Magistrate Judge Oberg.

Chief U.S. District Judge Robert J. Shelby presided.

Co-Counsel:

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18. **Legal Activities:** Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

In private practice, I have represented clients under investigation by states and the United States in matters that did not result in a case against the entity being investigated. The clients engaged our firm early in the matter, typically after the government has served a civil investigative demand or grand jury subpoena. I work with clients on all aspects of the response to the government's demand and related fact gathering. I also advocate on behalf of clients with investigative agencies and the attorneys deciding how the government will proceed, if at all.

I have not engaged in lobbying.

19. **Teaching:** What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide copies to the committee.

I taught Advocacy and Analysis in Public Policy to undergraduate students in the University of Montana's Davidson Honors College. I taught the class twice between August 1997 and May 1999, but I do not recall which semesters I taught the class. The class focused on domestic public policy topics and the analysis, development, and implementation of public policy.

I taught Introduction to Public Policy to undergraduate students at Montana State University-Billings in the fall semester of 1996. The class focused on domestic public policy topics and the analysis, development, and implementation of public policy.

I developed and utilized syllabi for these classes, but I no longer have them.

20. **Deferred Income/ Future Benefits:** List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

See attached Financial Disclosure Report.

21. **Outside Commitments During Court Service:** Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

I have no such plans, commitments, or agreements.

22. **Sources of Income:** List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, licensing fees, honoraria, and other items exceeding \$500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

See attached Financial Disclosure Report.

23. **Statement of Net Worth:** Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached Net Worth Statement.

24. **Potential Conflicts of Interest:**

a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

If confirmed, I would recuse myself from any matter where I have ever played a role. If I am confirmed, the most likely conflicts of interest would relate to assets owned by my family and entities related to the ownership of the assets (e.g., Eagle Bend Yacht Harbor Boat Slip Owners Association). Although more remote, potential conflicts of interest could also be present based upon my children's employment. For a period of time, I also anticipate recusing in all cases in which my law firm is a party or represents a party. I will evaluate any other real or potential conflict of interest, or relationship that could give rise to the appearance of a conflict of interest, on a case-by-case basis and determine appropriate action, including recusal, with the input of parties and consultation of applicable canons of judicial ethics.

b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

If confirmed, I would comply with 28 U.S.C. § 455. I would recuse myself in any litigation in which I have played a role. I would evaluate potential conflicts on a case-by-case basis based upon 28 U.S.C. § 455, the Code of Conduct for United States Judges, and other ethical guidelines, rules, and principles and determine whether recusal is necessary.

25. **Pro Bono Work:** An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

My pro bono legal work is a subset of overall pro bono efforts. The *Espinoza* case, described in the response to Question 17 above, involved over 300 hours of *pro bono* work in the District Court, the Montana Supreme Court, and the U.S. Supreme Court. More recently, I represented a board member for a local water and sewer district who had been wrongfully divested of her board position and successfully sued the district to be reinstated. I also represented a board member for a defunct non-profit organization who was subjected to a demand from the Montana Department of Revenue to pay the non-profit's unpaid trust tax liability for employment taxes for former employees of the non-profit. These additional pro bono cases took approximately 200 hours of my time.

While in private practice, I have also served as a Director on the Boards of the University of Montana Foundation, Big Sky Senior Services, the Billings Symphony Society, and Boulder-Arrowhead Little League.

26. **Selection Process:**

a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

I contacted Senator Daines on November 22, 2024 to express my interest in being considered for the district court judge position held by Judge Dana Christensen. On December 18, 2024, Senator Daines and a member of his staff met with me on a video conference to discuss my professional experience and background and my interest in serving as a federal judge in Montana. On January 10, 2025, I spoke with a member of Senator Daines's staff again and he requested that I fill out some paperwork and return it to him. In March 2025, I met with staff members employed by Senator Daines and a staff member from Senator Sheehy's office via videoconference.

On April 12, 2025, I spoke with Senator Sheehy about my interest in the judgeship. On April 16, 2025, Senator Daines called to let me know that he and Senator Sheehy had forwarded my name to the White House for its consideration for the vacancy. On April 21, 2025, I interviewed with the White House Counsel's Office in Washington, D.C. Since then, I have been in contact with officials from the White House Counsel's Office and the Justice Department's Office of Legal Policy regarding the nomination.

b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.

AFFIDAVIT

I, William Walter Mercer, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

June 24, 2025
(DATE)

W Mercer
(NAME)

Paul Patrick Melcher
(NOTARY)

