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STATE OF MONTANA
Case Number: DA 19-0504

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 19-0504

FLYING T. RANCH, LLC,

Appellant,

v.

CATLIN RANCH, LP,

Appellee.

APPELLANT, FLYING T'S REPLY BRIEF

On Appeal from the Montana Fourteenth Judicial District Court,
Meagher County, Montana, The Honorable Brenda Gilbert, Presiding.

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FLYING T RANCH, LLC ("Flying T"), respectfully submits the following Reply brief.

I. The District Court Erred by Granting Catlin's Motion to Stay Which Effectively Denied Flying T Pending Application for Temporary and Preliminary Injunctive Relief Without a Hearing.

A. Introduction.

Flying T filed a motion for a temporary restraining order and a preliminary injunction precluding Catlin from interfering with its access over Moss Agate Road as it crossed Catlin's property during the pendency of this litigation. CR 4. It supported those applications with the affidavits of its expert, Dr. Lahren and Todd Timbrook, a member of Flying T. *Id.*

Contrary to Catlin's suggestion, a *prima facie* case is not required for either a TRO or a hearing on an application for a preliminary injunction. *City of Great Falls v. Forbes*, 2011 MT 12, ¶¶ 12-15, 359 Mont. 140, 247 P.3d 1086; *Porter v. K & S Partnership*, 192 Mont. 175, 183, 627 P.2d 836, 840 (1981); MCA §§ 27-19-301-303. Regardless, Flying T's application established a prima facie case for relief under several theories, including (1) the existence of a petitioned county road from 1892 ("Moss Agate") that has not been abandoned, *see, e.g.*, *Soup Creek LLC v. Gibson*, 2019 MT 58, ¶ 25, 395 Mont. 105, 439 P.3d 369; (2) easement by estoppel; *Kelly v. Wallace*, 1998 MT 307, 292 Mont. 129, 972 P.2d 1117; *Restatement (Third) of Property (Servitudes), Id.*, § 2.10; and reserved easement by implication.

and/or (3) reserved easement by implication. *See* CR 1 (Complaint).

Catlin immediately moved to substitute the district judge and stay this case in favor of a separate breach of contract and damage case between Flying T and its title insurance companies. CR 8. The district court eventually ordered a conference to set the required hearing on Flying T's motion for injunctive relief. CR 13. Following that conference, the district court inexplicably granted the motion to stay, CR 25, and did not address the pending motions for temporary or preliminary injunctive relief, let alone hold the required hearing on the pending application for injunctive relief. *Id.*

The district court, however, recognized that the substantial improvements Flying T made to its property, in reliance upon access over Moss Agate (its only legal and practical access), could be harmed by its indefinite stay, and thus ordered that Flying T be allowed to transport propane to heat the home and other improvements it built on the property, thereby preventing damage to the same. CR 25, pp. 8-9.

As explained below, and in prior briefing, Catlin failed to make any case of hardship or inequity upon which the district court could plausibly grant the motion to stay. Similarly, Flying T was entitled, as a matter of law, to a hearing on its motion for preliminary injunctive relief. The district court's actions were plain error and an abuse of discretion. The district court's order is properly reversed with an Order (1)

lifting the stay; and (2) setting the matter for hearing on Flying T's application for preliminary injunctive relief.

B. There is No Hardship or Inequity, Let Alone a "Clear Case of Hardship or Inequity," Justifying the District Court's Order Staying This Easement Case In Favor of Flying T's Bad Faith/Breach of Contract Case Against Its Title Insurance Company.

The only Order before this Court is that granting Catlin's motion to stay this easement case pending resolution of a breach of contract case between Flying T and its insurance company. CR 25. To that end, Catlin correctly cites the standard that must be met to issue such an order, and, generally, the standard of review upon appeal. However, and most telling, it offers *no defense* of the sparse rationale for the district court's Order granting the stay. *Compare* Catlin's Brief at pp. 27-33 *with* Order, CR 25. Instead, it offers some of the same arguments set forth below, along with new justifications neither advanced below or relied upon by the district court. *Compare* Catlin's Appeal Brief, pp. 29-33 *with* Briefs in Support of Motion to Stay, CR 8 & 21.

Nowhere does the district court's Order explain how the contract/bad faith case resolves Flying T's claims of an access easement across Catlin's property. CR 25. Catlin fails to explain how the stay Order answers that question. Instead, Catlin couches its arguments in terms of both cases involving "same or similar damages." Appeal Brief at 29. Damages do not equate to a declaration of Flying T's property

rights over Moss Agate Road -- the purpose of this litigation. Nor is Flying T seeking damages from its insurance company, in the other lawsuit, for damages flowing from Catlin's conduct in this case. CR 1.

Catlin admits these fundamental facts in Paragraph 1 of its Answer to Flying T's Complaint:

> Flying T seeks a declaration, pursuant to the Montana Declaratory Judgments Act . . . regarding access to its real property located in Meagher Count. It also seeks an award of damages against Catlin as a legal and factual result of **its tortious acts towards Flying T, including its unlawful and unreasonable interference with Flying T's easement rights**. Finally it seeks preliminary and permanent injunctive relief against Catlin . . . barring Catlin, and its agents, and other acting in concert with it, as well as its successors and assigns from interfering with Flying T's access to and from its real property . . . .
>
> **ANSWER:** **Admit this is Plaintiff's stated claim for relief**. Deny all other aspects of paragraph A.1.

Answer, CR 7, p. 1 (emphasis added). This is the point. The separate case against the insurance companies does not seek this relief. Nor does the relief sought in the insurance case seek this relief. There is simply no overlap. Catlin admits it. The district court's order was plain error and an abuse of discretion.

Moreover, Catlin does not explain why, if the contract and easement cases are so similar to justify a stay of this (easement) case, that it (Catlin) would simply sit idly by and allow the contract/damage case to influence resolution of property rights over its property. If Flying T or the Title Company defendants made claims,

or asserted defenses implicating Catlin's property rights because of Moss Agate, they would have named Catlin as a party. *See, e.g.,* Mont. R. Civ. P. 19 (Required Joinder of Parties); 20 (Permissive Joinder of Parties).

To that same end, if Catlin truly believed the contract/bad faith case would have any potentially adverse impact on its property rights, by virtue of Flying T's claim of access (including the public's right of access) over Catlin's property, it (Catlin) would seek to intervene in that action as an indispensable party, and Judge Dayton would surely grant that motion. Mont. R. Civ. P. 24 (Intervention). No such motion has been filed.

Instead, Catlin avoids its Answer to the Complaint and takes it upon itself to characterize Flying T's claims in the motion to stay as limited to damages, while ignoring Flying T's absolute right to pursue its easement claim over Moss Agate -- an access it understood to be its access when it purchased the property; and an access it improved and used for over three (3) years with Catlin's knowledge and without its objection (to build substantial improvements and enjoy its property before it was shut down by the Sheriff, who reversed his prior position on access without notice to Flying T or an opportunity to be heard).

Before the district court, Catlin argued primarily that its hardship or inequity was limited to incurring legal expenses. CR 8 at pp. 4-5. It now asserts, in an argument not presented to the district court, that if the preliminary injunction had

been granted (which it was not) Catlin "becomes the servient estate to Flying T's unlimited use." Catlin Appeal Brief at p. 30. While this Court normally does not consider arguments raised for the first time on appeal, *Bugli v. Ravalli County*, 2019 MT 154, ¶ 34, 396 Mont. 271, 444 P.3d 399, Catlin's argument is spurious.[1]

First, Catlin conflates the Order staying the entire case with Flying T's request for preliminary injunctive relief which are legally and factually different. Even if the district court had, following hearing, denied some or all of the requested preliminary injunctive relief, Flying T would be entitled to go forward with discovery, serve interrogatories, requests for production, take depositions and take the case for a trial on the merits of its access rights across Catlin's property. As it stands now, it has no ability to prosecute its easement case while unrelated damage claims are prosecuted in a different action.

Second, as Todd Timbrook's second affidavit makes clear, CR 23, Flying T does not have legal or practical access to its property absent Moss Agate, a point

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[1] It is also incomprehensible. The rights of the dominant and servient estate owners, with respect to easements, are well-established by law. MCA §§ 70-17-106, 107. Regardless, the scope of any order granting preliminary injunctive relief can be tailored to the facts of the case. For example, if Catlin is so concerned about third parties, other than Flying T, or the public using the road during the pendency of the litigation, the gate can be locked provided Flyting T has a key. Catlin's discussion of easements by necessity and implied negative easements, raised for the first time on appeal, and its application to this appeal is a mystery. *See* Catlin Appeal Brief at pp. 30-31.

acknowledged by Catlin when it offered to allow propane trucks over Moss Agate, CR 8, an offer accepted by the District Court's Order. CR 25, p. 9.

On the other hand, Catlin claimed only before the district court that it would be harmed because it would incur attorneys' fees. CR 8. It now offers reasons why it locks the Moss Agate gate (again conflating the standards for motions to stay with motions for preliminary injunctive relief) which again are issues not raised in its Answer or considered or adopted by the district court in its Order. Appeal Brief at pp. 31-32. While it complains about the negligence of a third party (not Flying T), *id.* at p. 31, it offered below no evidence that Flying T caused it any harm, let alone exceeded the scope of the easement, during the three plus years it used the easement (without interference from Catlin) to access, improve and enjoy its real property.

In sum, Catlin failed to establish any hardship or inequity, let alone a "clear case of hardship or inequity," which is required before a case may be stayed. The district court's order granting the stay, based upon these speculative, flimsy arguments, was an abuse of discretion and is properly reversed with instructions to set the matter for hearing on Flying T's Motion for Preliminary Injunction and allow discovery to proceed.

C. The District Court's Stay Order Effectively Denied Flying T's Motion for Preliminary Injunction Without a Hearing as Required By Law.

The district court did not expressly deny Flying T's motion for temporary or preliminary injunctive relief. CR 25. Instead, its written words granted only Catlin's motion for a stay. *Id.*, p. 8. It did not address Flying T's motion for injunctive relief pending trial, except for allowing propane to be delivered over Moss Agate to the improvements made upon that property. *Id.*, p. 9.

If this Court adopts Catlin's argument that the district court considered and denied Flying T's motion for injunctive relief pending trial on the merits, the district court did so without a hearing. Such a result is plain error as Flying T complied with the statutes and case law governing applications for preliminary injunctions which makes clear that a decision on the merits of an application for preliminary injunction can only be issued following a hearing on that application. MCA §§ 27-19-301-303; *City of Great Falls v. Forbes,* 2011 MT 12, ¶¶ 12-15, 359 Mont. 140, 247 P.3d 1086. As the district court did not conduct a hearing, even though it scheduled a conference to set the hearing, the decision at issue is properly reversed and remanded to the district court for a hearing.

In *City of Great Falls,* this Court explained the procedure governing applications for preliminary injunctions. It made clear that "[t]he court ***receiving an***

application for injunction **must make an order requiring cause to be shown at a specified time and place, why the injunction should not be granted."**

> Section 27-19-201(1), MCA, provides that a preliminary injunction may be granted 'when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually. Section 27-19-301(1), MCA provides that '[n]o preliminary injunction may be issued without reasonable notice to the adverse party of the time and place of the making of the application therefor.' **The court receiving an application for injunction must make an order requiring cause to be shown, at a specific time and place, why the inunction should not be granted.'** Section 27-19-301(2), MCA. ***A preliminary injunction may be granted upon affidavits or oral testimony at the hearing.*** **Section 27-19-303, MCA**.
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> * * *
>
> The City filed an application for injunctive relief pursuant to § 27-19-201, MCA. Forbes does not contend that the City failed to serve him with notice or that the court failed to provide him with a show cause hearing. Forbes cites no statute or case law that requires the City to file a complaint and serve summons in order to obtain a preliminary injunction. **We conclude that the City followed the proper procedure under §§ 27-19-301 and -303, MCA, by filing an application for an injunction, requesting that the District Court set a hearing date, and providing reasonable notice to Forbes.**

Id., ¶¶ 12, 15 (emphasis added).

In short, the procedure for preliminary injunctive relief is (1) the filing of an application with the district court of a motion for preliminary injunctive relief; (2) a request for a hearing on that motion; and (3) service of that

application and notice of the hearing date on the application upon the opposing party.[2] Upon the hearing, and determining whether to grant the motion,

> [c]ourts of equity should in no manner anticipate the ultimate determination of the questions of right involved. Rather, *the court should decide merely whether a sufficient case had been made out to warrant the preservation of the property or rights and status quo until trial*, without expressing a final opinion as to such rights. An applicant need not make out such a case as would entitle him to final judgment on the merits.

Porter v. K & S Partnership, 192 Mont. 175, 183, 627 P.2d 836, 840 (1981) (emphasis added). *See also BAM Ventures, LLC v. Schifferman,* 2019 MT 67, ¶¶14-16, 395 Mont. 160, 437 P.3d 142 (standards applicable to preliminary injunction).

Here, Flying T filed and served a complaint setting forth its easement claims against Catlin. CR 1, 6. It then filed a request for temporary and preliminary

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[2] Having studied again the statutes and case law on this issue, Flying T's statement at page 17 of its opening brief that a prima facie case is required before a court sets a hearing on the motion, was made in error. While that has been the undersigned' practice, particularly when seeking a TRO, the statutes, *Forbes* and *Porter* make clear that an applicant for a preliminary injunction need file only an application for a preliminary injunction, a request for hearing date and provide notice of the hearing date to the party sought to be enjoined. At the hearing, the applicant and the opposing party can submit affidavits or present testimony and other evidence. No order is properly issued, one way or another, until after that hearing and upon the hearing "[*t*]*he court should decide merely whether a sufficient case had been made out to warrant the preservation of the property or rights and status quo until trial.*" *Porter, supra.* It is only when there is a request for a TRO, without notice to the other side, that the applicant must establish by affidavit or verified complaint that <u>a delay</u> in considering the application for preliminary injunction would cause *immediate and irreparable injury ....*" before the required hearing. MCA § 27-19-315(1) (emphasis added).

injunctive relief. CR 7. The motion was supported by the affidavits of its expert, Dr. Lahren and Todd Timbrook, one of the members of the LLC, in support of the easement claims. CR 5 & 23. Those affidavits and supporting evidence set forth a *prima facie* case for relief. Flying T's briefs made clear that it would be submitting additional evidence at the time of the hearing, in support of its request.

The district court, recognizing that Flying T had established a claim for relief (and Catlin did not file a motion dismissing the case for failure to state a claim upon which relief could be granted), ordered the parties to attend a conference to set the date for the hearing on Flying T's motion for preliminary injunctive relief. CR 13. The parties participated in that conference. Catlin served its opposition papers, including its expert affidavit who, not surprisingly, disagreed with some of Flying T's expert's opinions. CR 11. While waiting for the hearing date, the district court inexplicably granted the stay, effectively denying the pending application for injunctive relief, pending trial without a hearing. CR 25.

D. County Road Theory.

Dr. Lahren's affidavit summarized the facts associated with the existence of a county road and why, in his opinion, the claimed 1969 abandonment was ineffective. CR 5. Maps depicting the County Road as it crosses Section 14, owned by Catlin, are set forth as Lahren _1 and Lahren_19 to CR 5. Flying T's property is depicted in orange on Lahren_19. With respect to Mr. Hallin's opinions, set forth in his

Affidavit of July 8, 2019, his statement that *"the abandoned road did not go through the Moss Agate corrals in Section 15, T.7N R.7E"* contradicts the 1892 approved road to the Moss Agate Stage Station (corrals) - and contradicts the anticipated testimony of ten former road users interviewed by Dr. Lahran, one of whom used the road beginning in 1929. *Id.*

Second, in reference to *Meagher County Road Number 19* [created by Meagher County in 1914) Mr. Hallin claimed *this road was petitioned to be abandoned, and, according to county records, was abandoned."* Mr. Hallin attaches maps of the proposed abandonment route from the June 3, 1969 petition, Book 11, Page 412 which do not correlate to the descriptions of the 1892 approved road to the Stage Station, or all of the 1914 County Road Number 19 survey stations. *Compare* with Exhibits Lahren_1, _19, attached to Aff. of Lahren, CR 5.

Moreover, he did not provide any evidence from the Commissioner's Journals or Minutes corroborating his statement that "according to county records" a formal abandonment action by the governing body of the 1892 road or the 1914 County Road Number 19 in 1969 was accomplished. There is no evidence in the Commissioner's Journals or other records to verify that the 1969 petition to *abandon or close County Road Number 19* or the *White Sulphur Springs to the Moss Agate Stage Station Road* of 1892, was approved by the Meagher county commissioners.

In *Soup Creek LLC v. Gibson*, 2019 MT 58, 395 Mont. 105, 439 P.3d 369, this Court explained:

> One of the elements necessary to prove abandonment of any easement, including public property by governmental entities, is a showing of a clear intent to abandon. The conduct claimed to demonstrate this intent must be of character so decisive and conclusive as to indicate a clear intent to abandon. The conduct must be some affirmative official act, and not mere implication. Mere nonuse, even for extended periods of time, is generally insufficient, by itself, to indicate an intent to abandon. *Id.*, *McCauley*, ¶ 30 (internal citations omitted). *Further, the party claiming abandonment has the burden of proving that acts claimed to constitute abandonment demonstrate a decisive and conclusive intent to abandon the road. State v. Fisher*, 2003 MT 207, ¶ 9, 317 Mont. 49, 75 P.3d 338(finding no abandonment by government entity).

Id., ¶ 25 (emphasis added). Catlin has offered no such evidence.

E. Estoppel.

Flying T also set forth a prima facie case for an easement by estoppel. As counsel for the Kellys, in *Kelly v. Wallace*, 1998 MT 307, 292 Mont. 129, 972 P.2d 1117, the undersigned is well versed in what the courts did and did not do in that case. There, the Court recognized the theory, but found the evidence insufficient following a trial. This is a new case with new facts and Catlin did not move to dismiss this theory for failure to state a claim upon which relief could be granted.

Subsequent to *Kelly*, the American Law Institute adopted the *Restatement (Third) of Property (Servitudes),* which provides in relevant part as follows:

> If injustice can be avoided only by establishment of a servitude, the owner or occupier of land is estopped to deny the existence of a servitude burdening the land when:
>
> (1) The owner or occupier permitted another to use that land under circumstances in which it was reasonable to foresee that the user would substantially change position believing that the permission would not be revoked and the user did substantially change position in reasonable reliance on that belief; or
>
> (2) The owner or occupier represented that the land was burdened by a servitude under circumstances in which it was reasonable to foresee that the person to whom the representation was made would substantially change position on the basis of that representation, and the person did substantially change position in reliance on that representation

Id., § 2.10.

Catlin "questions if this a valid theory, " ignoring this Court's substantial reliance on the *Restatement (Third)* in easement cases, as evidenced by its recent decision, in *O'Keefe v. Mustang Ranches HOA*, 2019 MT 179, ¶¶ 16-20, 29, 30, 32, 35, 396 Mont. 454, 446 P.3d 509 (citing *Restatement (Third) of Property (Servitudes)* (2000), §§ 1.7, 2.1, 2.1, cmt. c, 2.7, cmt. f, 2.2, cmt. d, 2.13, cmt. a, 4.1, cmt. d, 4.9, 4.10, cmt.e). *See also Scott v. Lee and Donna Metcalf* 2015 MT 265, ¶¶ 13 & 2, 381 Mont. 64, 358 P. 3d 879, (citing *Restatement (Third) of Property (Servitudes)* §§ 4.4, 4.7 & 5.8); *Burcalow Family, LLC v. Corral Bar, Inc.*, 2013 MT 345, ¶18, 372 Mont. 498, 313 P.3d 182 (citing *Restatement (Third) of Property (Servitudes)* § 2.17 cmt. e; *Mattson v. Mont. Power Co.*, 2009 MT 286, ¶¶ 37, 44, 45, 46, 47, 49, 50, 51, 52, 53, 368 Mont. 1, 291 P.3d 1209, (citing *Restatement*

(Third) of Property (Servitudes) § 2.15, cmt. a; §4.10 & comments, g & h; §4.1(a); § 4.1 cmt. b, §4,2, cmt. a; §4.1, cmt c; §4.10 cmt. a; §§4.3 – 4.13; 4.1 cmt. d.; § 1.2; 4.10, cmt. h;); *Yellowstone River, LLC v. Meriwether Land Fund I, LLC,* 2011 MT 263, ¶31, 362 Mont. 273, 264 P.3d 1065 (citing *Restatement (Third) of Property (Servitudes)* § 2.15 cmt. a); *Leichtfuss v. Dabney,* 2005 MT 271, ¶ 30, 329 Mont. 129, 122 P.3d 1220, (citing *Restatement (Third) of Property, (Servitudes)* § 4.10 illus. 15, at 599-600; § 4.3, cmt. e; § 2.5 cmt. a; § 2.5 illus. 3; § 4.1(1)); § 5.2, cmt. a; § 4.1(1) & cmt. a; *Cook v. Hartman*, 2003 MT 251, ¶¶ 26, 28, 317 Mont. 343, 77 P.3d 231 (citing *Restatement (Third) of Property (Servitudes)* § 2.16, cmt. *e* & § 2.17; § 2.17 cmt. i); *Mularoni v. Bing,* 2001 MT 215, ¶¶ 27-29, 306 Mont. 405, 34 P.3d 497, (citing *Restatement (Third) of Property (Servitudes)* § 5.7 & § 7.5; § 7.5 cmt. a.); *Quarter Circle JP Ranch, LLC v. Jerde*, 2018 MT 68, ¶ 13, 391 Mont. 104, 414 P.3d 1277 (citing *Restatement (Third) of Property (Servitudes),* § 4.1); Hudson v. Irwin, 2018 MT 8, ¶¶ 18-20, 390 Mont. 138, 408 P.3d 1283.

Contrary to Catlin's assertion, the application of this theory of relief is not reserved for "extreme circumstances," but instead "[i]s flexible in its application depending on the foreseeability and reasonableness of the reliance on the representation, and the justice of the situation. The reasonableness of the user's reliance should be determined by the same criteria as those applied in determining whether an oral servitude should be given effect." *See* Comment *d* to § 2.9.

Illustration 5 to the § 2.10 of the *Restatement (Third),* with facts similar to this case, provides guidance:

> O, the owner of Blackacre, knew that Whiteacre, an adjacent unimproved property, was landlocked, and that A, its owner, had been using an old road across Blackacre for occasional access to Whiteacre. When A built a house on Whiteacre, using the old road to bring in construction materials, and then graded and paved the road to provide a driveway to the house, O said nothing about his right to revoke A's permission to use the road, even though he discussed the progress of the construction with A on several occasions. *The conclusion would be justified that O is estopped from denying that A holds the benefit of a servitude for access to Whiteacre because it should have been apparent to O that A was relying on continued permission to use the road in making the investment to build the new house.* The fact that the parties were neighbors, that O knew Whiteacre was landlocked and that A had been using the road across Blackacre shifted the burden to O to notify A that his permission to use the road was revocable.

(Emphasis added).

This case is a textbook example of injustice. As the Complaint and affidavit of Mr. Timbrook makes clear, Flying T purchased its property with the understanding it had unfettered access to and from that land, from a public highway. Thereafter, it hired contractors and others to improve Moss Agate and started using that road to construct residential improvements on its property.

Catlin then placed a lock on the gate, for the first time. Flying T protested. Caltin removed the lock, following instruction from the Sheriff. Thereafter, Flying T through its contractors, members and guests continued to use the roads at issue,

including use of the road to complete the improvements on its property accessed by Moss Agate.

On the other hand, Catlin did not seek redress from any court for an injunction, or other relief, claiming its rights were somehow violated by Flying T, that Moss Agate was not a county road, that even if a county road it had been abandoned, or any other theory of relief.

Instead, it sat, watched and waited, while Flying T improved the road (which benefitted Catlin) and invested substantial funds in permanent improvements to its property, including a home, a well, and a wastewater disposal system. Catlin knew Flying T was making these substantial investments and waited for three (3) years to take covert action.

Flying T relied upon Defendant's silence, and the lack of the filing of an action in district court for a declaration of rights or quiet title, to invest substantial money in the access road crossing Catlin's property and in improving its own property. Flying T's actions, in light of the real property record and the extended time over which they worked was reasonable, particularly in light of the absence of any objection or lawsuit from Catlin.

Under either *Kelly,* the *Restatement (Third)* or both, a prima facie case of easement by estoppel was presented to the district court before the required hearing. Catlin's assertion that Flying T must be held, at this stage of the litigation, to a

standard that applies at trial is not supported by the law applicable applications for injunctive relief.

F. Reserved Easement by Implication.

The theory here, which Catlin does not understand, is that a portion of the easement at issue provided access to and from the property owned by Flying T. Evidence exists of an effort to abandon the public or county's interest in that access, for which there is no proof of success. Even if evidence existed of the government's actual, and not implied, abandonment of the easement, such an action does not necessarily extinguish the private interests in the easement (i.e. the interests of the dominant estate, owned by a private person, served by the easement).

"Courts are willing to graft an easement onto a land transaction in order to do justice in a particular case." Bruce and Ely, *The Law of Easements and Licenses in Land*, § 4:1 at 4-2 (2019 Ed). Reservation of the private easements that were appurtenant to the dominant estates, served by that public or county easement, can be implied. Public policy disfavors the construction of instruments resulting in the "landlocking" of land. *Restatement (Third) of Property (Servitudes)* § 4.1, comment f.

In 1969, certain landowners along and near the WSS County Road petitioned the County Commissioners to abandon the WSS County Road, over its entire length. Complaint, CR 1, ¶ 25. Viewers were appointed who recommended abandonment,

but reserving a right of entry to: "Tobe Dupea, Carl Rostad, Manger Ranch Co. (owner of Section 25, now owned by Flying T), Montana Power Co., Mountain States Tel. & Tel. Co." *Id.,* ¶ 26. The County Commissioner's Journals do not reflect any official action taken by the Commissioners in response to the Peititon and property owners to the north of Catlin's land, and the public at large, continued to use the County Road and Moss Agate. *Id.*, ¶¶ 28-30.

Coupled with the absence of official action approving the abandonment by the County, Catlin believes the reservation to Flying T's predecessor in interest, was personal to Flying T's predecessor and did not run with the land. In light of overarching public policies, reservation of a right of access was not, and should not, be construed as personal to an individual landowner, but instead should run with the land, and issue to be further developed at trial.

In sum, and although not necessary for a hearing on its application for a preliminary injunction, Flying T set forth a *prima facie* case that it enjoys a right to access its property, pending trial, over the Moss Agate Road, and that absent preliminary injunctive relief it would be harmed. The district court's order, granting the motion to stay was effectively an unlawful Order denying the motion for injunctive relief, pending trial, without a hearing.

CONCLUSION

The district court's order staying this case was plain error and an abuse of discretion. Catlin failed to establish a clear case of hardship or inequity supporting its motion to stay this easement case in favor of a contract/damage case against the title insurance company. The District Court's Order likewise fails to meet the stringent standard supporting such an order staying a proceeding in favor of another, particularly where, as here, the cases seek different relief from different defendants.

Flying T's application for injunctive relief pending trial, satisfied the requirements necessary to have a hearing on that application. Moreover, the application set forth a *prima facie* case for relief under several theories. It established the existence of present, and continuing harm by Catlin's actions, which the district court recognized in part, by ordering delivery of propane to Flying T's improvements over Moss Agate. Flying T was entitled, as a matter of law, to a hearing on its application for preliminary injunctive relief and, at the end of that hearing, upon proof heard, to preliminary injunctive relief pending a trial on the merits.

DATED this 27th day of January 2020.

GALLIK, BREMER & MOLLOY, P.C.

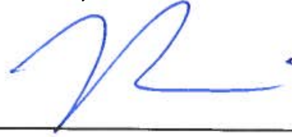
Brian K. Gallik
ATTORNEYS FOR Flying T

CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that this Appellant's Reply Brief is printed with proportionately-spaced Times New Roman typeface of 14 points; is double spaced except for lengthy quotations or footnotes, and does not exceed 5,000 words, excluding the Table of Contents, the Table of Authorities, Certificate of Service and Certificate of Compliance, as calculated by Microsoft Word software.

Dated this 27th day of January, 2020.

GALLIK, BREMER & MOLLOY, P.C.



By: Brian K. Gallik

CERTIFICATE OF SERVICE

I, Brian K. Gallik, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 01-27-2020:

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