

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court No. DA 21-0426

FLYING T RANCH, LLC, a Montana limited liability company,

Plaintiff and Appellee,

v.

CATLIN RANCH, LP, a Montana limited partnership,

Defendant and Appellant,

MEAGHER COUNTY BY & THROUGH ITS COMMISSION,
SCOTT JACKSON, LYNN JACKSON, DEBRA WILLIAMS,
LISA ANDERSON, BERT WILLIAMS & CONNIE HIX,

Defendants.

CATLIN RANCH, LP, a Montana limited partnership,

Cross-Claimant and Appellant,

v.

DEBRA WILLIAMS, LISA ANDERSON,
BERT WILLIAMS & CONNIE HIX,

Cross-claim Defendants and Appellees.

APPENDIX TO
APPELLANT, CATLIN RANCH, LP'S, OPENING BRIEF

On Appeal from the Fourteenth Judicial District Court, Meagher County
District Court Cause No. DV-19-5
Honorable Brenda R. Gilbert, Presiding

APPEARANCES:

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INDEX OF EXHIBITS

Exhibit 1 Findings of Fact, Conclusions of Law, and Order Regarding
Preliminary Injunction, August 2, 2021

1 Hon. Brenda R. Gilbert
2 Presiding District Judge
3 414 East Callender
4 Livingston, Montana 59047
5 Telephone: (406) 222-4130

Number DV-19-5
Filed and
Day of August, 20 21
Candi Richardson
Clerk of District Court

7 **MONTANA FOURTEENTH JUDICIAL DISTRICT, MEAGHER COUNTY**

8 *****

9 FLYING T RANCH, LLC, a Montana limited)
10 liability company,)

11 Plaintiff,)

12 vs.)

13 CATLIN RANCH, LP, a Montana limited)
14 partnership, MEAGHER COUNTY BY &)
15 THROUGH ITS COMMISSION, SCOTT)
16 JACKSON, LYNN JACKSON, DEBRA)
17 WILLIAMS, LISA ANDERSON, BERT,)
18 WILLIAMS & CONNIE HIX,)

19 Defendants.)

20 CATLIN RANCH, LP, a Montana limited)
21 partnership,)

22 Cross-Claimant,)

23 vs.)

24 DEBRA WILLIAMS, LISA ANDERSON,)
25 BERT WILLIAMS, and CONNIE HIX,)

26 Cross-claim Defendants.)

Cause No. DV-19-5

Hon. Brenda Gilbert

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER REGARDING
PRELIMINARY INJUNCTION**

#163

1
2 This case came before the Court on January 13 and 14, 2021 and April 29 and 30,
3 2021 for a hearing on Plaintiff Flying T Ranch, LLCs ("Flying T") Motion for TRO and
4 Preliminary Injunction seeking an order barring Defendant Catlin Ranch LP ("Defendant
5 Catlin") and Defendants Lynn and Scott Jackson ("Defendant Jacksons") from interfering
6 with Flying T's access to and from Flying T's property located in Section 25, Township 8
7 North, Range 7 East, P.M.M., Meagher County via the Moss Agate Spur, Moss Agate, and
8 Road 19.
9

10 Flying T was represented by Brian K. Gallik; Defendant Catlin Ranch, LP (Catlin) was
11 represented by Vuko J. Voyich and Jim Lippert. Defendant Meagher County was represented
12 by Susan B. Swimley; Defendants Scott and Lynn Jackson were represented by Rachel A.
13 Taylor; Defendants Bert and Debra Williams, Connie Hix, and Lisa Anderson were
14 represented by Matthew W. Williams.
15

16 The Court heard testimony from the parties and from their expert and lay witnesses.
17 The Court admitted into evidence numerous exhibits, including documents from the Meagher
18 County Clerk and Recorder's Office and the Meagher County Clerk of Court.
19

20 Having considered the testimony and evidence presented, the Court now makes the
21 following:
22

23 FINDINGS OF FACT

- 24 1. The action before the Court concerns a temporary restraining order/preliminary
25 injunction request by Flying T, seeking unrestricted access through gates and across a
26 road, which lies on Catlin's property in Sections 11, 14 and 15, Township 7 North,
27 Range 7 East, Meagher County, Montana and more specifically an approximate 1.1
28

1 mile stretch beginning in Section 15, known as the "Moss Agate Spur". Flying T's
2 request includes access through the South half of Section 2, Township 7 North, Range
3 7 East, Meagher County, Montana, which is owned by Defendants Scott and Lynn
4 Jackson, (Jacksons).
5

6 2. Flying T Ranch, LLC owns the real property located in Section 25, Township 8 North,
7 Range 7 East, P.M.M., Meagher County, Montana ("Flying T Property"). Flying T
8 purchased the Flying T Property from Bert Williams, Lisa Anderson and Connic Hix.
9

10 3. Catlin Ranch, LP ("Catlin") owns Sections 11, 13, 14 and 15, Township 7 North,
11 Range 7 East, P.M.M., Meagher County, Montana.

12 4. Scott and Lynn Jackson ("Jacksons") own the North half of Section 2, Township 7
13 North, Range 7 East and the South half of Section 35, Township 8 North, Range 7
14 East, Meagher County Montana.
15

16 5. Bert and Debra Williams first discussed selling Section 25 in the early 2000's. At that
17 time, a realtor recommended that Williams acquire deeded access over the Moss Agate
18 Road. Before talking about selling with the person that then owned the property now
19 owned by Catlin, the Williams decided not to sell Section 25 at that time.
20

21 6. Williams decided to list Section 25 for sale around 2008. They asked Ben Galt for a
22 deeded easement and were denied.

23 7. Bert Williams had discussed obtaining deeded access through Jacksons' property in
24 the North half of Section 2 with Scott Jackson's father, Ron Jackson. However, Ron
25 Jackson told Bert Williams that all the neighboring landowners had legal access over
26 the Moss Agate Road, because it was reserved to them by the County Commissioners
27 in 1969.
28

- 1 8. Bert Williams took the information he learned from Ron Jackson to Angie Evans at
2 First American Title. Angie Evans found the 1969 County Commission documents,
3 had her superiors review the records, and thereafter, Ms. Evans told Bert Williams that
4 Williams had legal access on the Moss Agate Road.
5
- 6 9. The Williams secured a deeded easement from Jackson over the North half of Section
7 2 and the South half of Section 35, Township 7 North, Range 7 East, to ensure deeded
8 access from the Moss Agate Road to their property in Section 25. Bert Williams
9 testified that he did not seek an easement over the South half of Section 2 from
10 Jacksons because he understood he had the right to cross that road by virtue of the
11 1969 documents.
12
- 13 10. Scott Jackson testified that the easement granted to Williams was drafted with the
14 understanding that Williams and Jackson could access their properties through Moss
15 Agate, from its intersection with Highway 89 in Section 15.
16
- 17 11. After receiving confirmation from the title company regarding access on Moss Agate
18 Road and obtaining the Jackson Easement, the Williams represented access to
19 potential buyers of Section 25 via the Moss Agate Road.
20
- 21 12. In 2013, Todd Timbrook, Managing Member of Flying T, was looking for recreational
22 property in Montana for Flying T to acquire. He and realtors met at the Moss Agate
23 gate and accessed Section 25 over the Moss Agate Road on four wheelers.
24
- 25 13. Flying T made an offer to purchase Section 25 from Williams, and hired attorney John
26 Glover in Bozeman to represent it in the transaction. John Glover signed a Declaration
27 that has been filed with the Court. In his Declaration, Mr. Glover states that, as a
28 result of his review of the Preliminary Title Commitment, the Jackson easement, the

1 Montana Cadastral Maps, and a Water Resources Survey Map, he concluded that
2 Flying T has legal access to Section 25 over what has been commonly called Moss
3 Agate Road, which he understood to be a county road.
4

5 14. Mr. Glover recognized the need for the then existing easement over Section 36 owned
6 by the State of Montana, to be expanded to allow for construction of a single-family
7 residence. This was a contingency in the contract between Williams and Flying T.
8 The Williams satisfied this contingency and obtained the expanded easement from the
9 State of Montana.
10

11 15. Flying T purchased the Flying T Property in 2014.

12 16. After its purchase, Flying T began work on building a cabin and associated structures
13 on Section 25 during the summer of 2014. Flying T's general contractor, Phil Mauer,
14 testified at the hearing. He testified that he and his subcontractors used the Moss
15 Agate Road to access Section 25 just about every weekday during the summer of
16 2014. The final work on the cabin was completed during the summer of 2015.
17

18 17. Mr. Maurer testified that he took a forklift and multiple pickup trucks to the worksite.
19 He testified that there were also operators of concrete trucks, an excavator, and supply
20 trucks that all used the Moss Agate Road to get to the worksite. Mr. Maurer also
21 testified regarding some road work that was done on the Moss Agate Road to improve
22 a marshy area in one spot and to generally make the Road easier to use.
23

24 18. Mr. Maurer testified that he introduced himself to Ben Galt during the construction of
25 the cabin. He testified that he had gone to the Ringling Bar for dinner, and someone
26 pointed Ben Galt out to him. Mr. Maurer than went over and introduced himself to
27
28

1 Mr. Galt and told him that he was doing the construction of the cabin and would be
2 going through the corrals that summer. Mr. Galt voiced no objection.

3
4 19. Mr. Maurer testified that he never asked permission to use the Moss Agate Road, nor
5 was he denied access. He was not aware of any of the subcontractors asking
6 permission to use the Road or being denied access.

7
8 20. Mr. Maurer testified that, on one occasion during the summer of 2014, the gate was
9 locked going into Moss Agate, but they were given the combination and continued
10 access through it. The gate was locked by Ben Galt, who reported the matter of
11 concrete trucks going up the road to the Sheriff's office as a trespass. Mr. Galt spoke
12 with Deputy Rauser who testified at the hearing.

13
14 21. Deputy Rauser spoke to Angie Evans at the title company who told the Deputy that the
15 Moss Agate Road is an abandoned county road and that the easement over the road
16 was reserved to the landowners that used Moss Agate to access their properties.
17 Deputy Rauser reported this information to Ben Galt. Deputy Rauser provided the
18 documents he received from Angie Evans to Catlin employee Terry Taylor. Ben Galt
19 testified that after his interaction with Deputy Rauser, he took the lock off the gate at
20 Moss Agate. Thereafter, there were no objections voiced to Flying T by Catlin's
21 employees or agents regarding Flying T's contractors going through Moss Agate until
22 the fires of 2017.

23
24 22. John Glover stated in his Declaration, that he also received the documents from Angie
25 Evans in June of 2014, specifically the Meagher County Commission minutes on the
26 1969 Petition, and a copy of the Warranty Deed from Manger to Dupeas for Section
27 25.
28

1 23. After the incident in 2014, Mr. Galt did not contact any lawyers or experts to further
2 investigate the status of the Moss Agate Road; he did not file a lawsuit to address
3 Flying T's use of the road. The construction of Flying T's cabin continued unfettered.
4 Mr. Timbrook testified that he tried to call and talk to Mr. Galt to introduce himself
5 and understand why he had locked the gate, but his calls and messages were not
6 returned.
7

8 24. Mr. Timbrook testified that after gaining access again, Flying T relied upon the silence
9 of Ben Galt, continued to construct the cabin, and made improvements to the road.
10 For the next three years, the members of Flying T and their families, continued to use
11 the cabin during hunting season, to fish in the spring and for summer vacations.
12

13 25. From the purchase in 2014 until early fall of 2017, Flying T accessed the Flying T
14 Property via the Highway 89, thence through the Moss Agate Spur, thence via Moss
15 Agate/ Road 19/White Sulphur Springs Road through Jacksons' land and thence into
16 Section 25.
17

18 26. In September of 2017, Catlin again locked the gate. Flying T communicated with the
19 Meagher County Sheriff, who in turn consulted with the then Meagher County
20 Attorney Kimberly Deschene Durham. Flying T cut the Catlin lock off of the gate
21 and placed a Flying T lock on the gate.
22

23 27. Ms. Durham later opined in her deposition testimony that the legal status of the road
24 was "murky" and something that would have to be sorted out by the Court.
25

26 28. The cutting of the Catlin lock and placing of the Flying T lock were communicated by
27 Flying T to Terry Taylor, Catlin Ranch manager, as soon as possible once cellular
28

1 service was established. Terry Taylor testified that locking the gate in 2017 was a
2 sudden decision on the part of Catlin in response to fires across the road.

3
4 29. Mr. Timbrook attempted to talk to Mr. Galt about the access situation, but his calls
5 were never returned. Bert Williams testified that he also left Ben Galt and Catlin
6 employee Terry Taylor four or five messages, asking to discuss the situation, but his
7 calls were also not returned.

8 30. Flying T filed suit to have the Court determine access to Flying T Property.

9
10 31. Oral and written notice of Flying T's seeking a temporary restraining order and
11 preliminary injunction was given and acknowledged by Defendant Catlin and
12 Defendant Jacksons.

13 32. The White Sulphur Springs to Livingston Road Petition was filed on December 11,
14 1891, the road was viewed on January 4, 1892, and the road was established on
15 September 10, 1892. The road commenced 20 rods south of Catlin Spring and
16 proceeded south to intersect with the White Sulphur Springs to Livingston Road at or
17 near the stage station. The Commission adopted the route that included the public
18 road ending at or near the stage station.
19

20
21 33. The location of the "stage station" was the subject of considerable testimony and
22 evidence in this matter. The Court finds persuasive the testimony of Ted Hebnes, Jay
23 Doig, Phil Rostad, and Dorothy Dupea Kincaid regarding the location of the "stage
24 station" also referred to as Moss Agate, being in Section 15. The location of the
25 "stage station or "Moss Agate" in Section 15 is also confirmed on various USGS,
26 State, and Forest Service maps. (Plaintiff's Exhibits 149, 150, 151, 152, 153, 154.)
27
28 Bill Galt acknowledged in his testimony that previously, there was a horse barn at

1 Moss Agate that was historically used to switch horses for stagecoaches. Ben Galt,
2 Bill's brother, also testified that he understood a stage station was located at Moss
3 Agate by the Moss Agate corrals.
4

5 34. The existence of the stage station on Catlin's property in Section 15 is also
6 corroborated by historical research done by Dr. Larry Lahren, who summarized his
7 opinions on the location of the stage station in Section 15 in his Affidavits, Reports,
8 and during the course of his testimony at the hearing.
9

10 35. Defendant Catlin refers to the records from January 4, 1892, that establish this route
11 as County Road No. 19, the route of which was modified in 1939. Defendant Catlin
12 does not recognize the language "ending at or near the stage station." Defendant
13 Catlin's expert Barney Hallin, further clarified that the route from Highway 89 to
14 Flying T Property, depicted on Exhibit 38A, starts at Highway 89 and extends into
15 Section 24 and heads into Sections 11 and 2 up to the Jacksons. (Cross Examination
16 April 30, 2021, Hallin's Affidavit, Ex. C19.)
17

18 36. Defendant Catlin Ranch's expert, Barney Hallin, testified on April 29, 2021, that the
19 route that Defendant Catlin Ranch refers to as County Road No. 19 has not been
20 abandoned as a public road and generally traverses north to south across Catlin Ranch.
21

22 37. County Road No. 19, established in 1914, travels the north-south route substantially
23 similar to the 1892 White Sulphur Springs to Livingston Road but does not call out an
24 extension to a stage station or Moss Agate Station.
25

26 38. County Road No. 19 was petitioned to be abandoned prior to May of 1969. The Court
27 makes no finding as to the adequacy of the petition. The Viewers made their
28 recommendation to abandon County Road No. 19 upon granting right of entry to the

1 surrounding landowners. The Commission never acted upon this Petition; thus the
2 road was not abandoned. No right of entry to the adjacent landowners was recorded in
3 the public record.
4

5 39. Catlin claims the 1969 petition sought to reserve access over the southern portion of
6 the Road, with access to US Highway 89 in Section 23, owned by Catlin. However,
7 there is no evidence that this route has been used for decades or could be used now.
8 Instead, the evidence demonstrates that the access that was intended to be reserved by
9 the Petition, if granted, was over the Moss Agate Road. This is supported by the
10 deposition testimony of Phil Rostad and Jay Doig, as well as the declaration of
11 Dorothy Dupea Kincaid.
12

13 40. Subsequent to the 1969 abandonment petition, the property owners located north of the
14 Catlin parcels and near the WSS County Road, continued to use the 1892 WSS County
15 Road and the Moss Agate Spur, as a matter of right and without permission of Catlin
16 or its predecessor in interest. Flying T, its attorney, John Glover, the Williams, Mr.
17 Rostad, and the Jacksons all understood that there was a right of access through Moss
18 Agate.
19

20
21 41. The Moss Agate Spur commences in Section 15, T7N, R7E, Meagher County
22 Montana and is the road from Highway 89 through the location of the former Moss
23 Agate Stage Station and extends to the northerly – southerly route of the Moss Agate/
24 Road 19/ White Sulphur Springs Road to Livingston Road. The USGS maps for
25 1947, 1950s series (Exhibit 148), 1951 USGS quad (Exhibit 149), 1958 USGS
26 (Exhibit 150), 1965 USGS (Exhibit 151), and 1993 all show remnants of the Moss
27 Agate Stage Station in Section 15.
28

1 42. The Court heard testimony and evidence relative to the issue of whether Flying T
2 suffers harm in the absence of the requested injunctive relief or whether Flying T's
3 members have a useable alternate means of access.
4

5 43. Testimony was presented regarding access through the Williams property and past
6 their home and outbuildings. (The Williams route). This access as testified by Bert
7 Williams, Debbie Williams and Tom Hcnesh is not available for adequate access. By
8 the video presented and the testimony presented, the Williams route is not available
9 during many times of the year, including spring, summer and fall due to the side slope,
10 mud and snow drifting of the possible route.
11

12 44. The Williams route is not improved to allow a full-size vehicle, let alone a pickup and
13 horse trailer, to travel the route at any time. Further, the Williams route is completely
14 unavailable for legal access to the Flying T cabin. The Williams route necessitates
15 crossing Forest Service property that does not allow for access for residential use.
16

17 45. The Jackson route, also referred to in testimony as the Cottonwood route, from the
18 north has never been legally available. Flying T does not have access from Highway
19 89 North across Catlin's land and then onto the public extension of WWS/ Road 19.
20

21 46. The testimony demonstrated that Flying T does not have other workable, reasonable
22 access to its property.

23 Based upon the foregoing Findings of Fact, the Court now draws the following

24 Conclusions of Law:

25 **CONCLUSIONS OF LAW**

26 A. Any findings of fact set forth herein are incorporated within the Court's Findings
27 of Fact set forth above.
28

1 B. This Court has jurisdiction over this action pursuant to § 3-5-302, MCA.

2 C. Venue is proper in Meagher County.

3 D. Preliminary injunctive relief “seeks to prevent threatened wrong, further injury,
4 and irreparable harm until the rights of the parties are adjusted.” *Boyer v. Karagacin*, 178
5 Mont. 26, 34, 582 P.2d 1173, 1178 (1978) (emphasis added), *citing* 43 C.J.S. Injunctions § 5;
6 *Montana Power Co. v. Environmental Protection Agency*, 429 F. Supp. 683, 702 (D. Mont.
7 1977); *Sheridan County Electric Co-Op v. Ferguson*, 124 Mont. 543, 554, 227 P.2d 597, 603
8 (1951); *Hansen v. Galiger*, 123 Mont. 101, 113, 208 P.2d 1049, 1056 (1949). *See also*, MCA
9 § 27-19-201.
10
11

12 E. The circumstances upon which injunctive relief are available are thus disjunctive
13 and a finding supporting one of the circumstances is sufficient for granting an injunction.
14 *Sweet Grass Farms, Ltd. v. Bd. of Co. Commrs. of Sweet Grass Co.*, 2000 MT 147, ¶27, 300
15 Mont. 66, 2 P.3d 825. Accordingly, an applicant need only show threatened wrong, further
16 injury or a *prima facie* case for relief. *Id.* MCA § 27-19-201.
17

18 F. A *prima facie* case, like *prima facie* evidence, is such as will prevail until
19 contradicted and overcome by other evidence. *Black’s Law Dictionary*, p. 1071 (5th Ed.); *see*
20 *also*, MCA § 26-01-102 (“*Prima facie* evidence is that which proves a particular fact until
21 contradicted and overcome with other evidence.”) Where a party has established a *prima*
22 *facie* case entitling it to a preliminary injunction, the district court “must ‘make an order
23 requiring cause to be shown, at a specified time and place, why the injunction should not be
24 granted.’” *City of Great Falls v. Forbes*, 2011 MT 12, ¶ 12, 359 Mont. 140, 247 P.3d 1086
25 (quoting MCA § 27-19-301(2) (emphasis added)).
26
27

28 G. The Supreme Court affirmed the foregoing standards governing preliminary

1 injunctions in a case similar to that before this Court. *See BAM Ventures, LLC v. Schifferman,*
2 2019 MT 67, 395 Mont. 160, 437 P.3d 142. There, the dispute concerned access to one of
3 two pieces of adjacent property located in Wise River, owned respectively by BAM and
4 Schifferman. *Id.* at ¶ 2. In 2003, before improvements were made to the properties, the
5 Schiffermans purchased their lot, which then lacked physical access. *Id.* In 2004, the
6 Montana Department of Transportation (MDOT) completed an improvement project for
7 Montana Highway 43, which ran along the southern border of the properties. *Id.* During the
8 project, MDOT added a paved apron extending from the highway toward the border of the
9 properties and installed a "green gate" nearby. *Id.*

12 H. From 2004, Schiffermans used these improvements to access their lot, and further
13 improved the access by installing an elevated driveway with culverts. *Id.* In 2005,
14 Schiffermans built a 1200 square foot garage on their lot and constructed a house there in
15 2016. *Id.* They also had a cattle guard installed near the gate. Construction contractors and
16 suppliers used the apron and driveway to access the property. *Id.* Schiffermans believed
17 their access was on their lot, and received no objections about its use. *Id.*

19 I. In 2017, BAM purchased the lot adjacent to the Schiffermans' lot and used its
20 property to host disabled veterans for recreational activities. *Id.* at ¶ 3. BAM's principal
21 believed Schiffermans' driveway ran across the corner of BAM's property, so it fenced off the
22 driveway with temporary fencing and removed Schiffermans' cattle guard. *Id.* In response,
23 Schiffermans removed part of BAM's fencing and began driving across an unimproved grass
24 and dirt area to access their driveway. *Id.* As of the preliminary injunction hearing,
25 Schiffermans had attempted to improve this altered route, but found it did not provide
26 comparable access. *Id.* An expert testified it would take approximately two days and \$7,000
27
28

1 to build a comparable access across the new route to the existing driveway. *Id.*

2 J. After a hearing, the district court determined Schiffermans had made a *prima facie*
3 showing of their prescriptive easement claim and granted them a preliminary injunction
4 pursuant to MCA § 27-19-201(1). *Id.* at ¶ 5. The district court agreed with BAM that
5 Schiffermans had not established irreparable harm, and that money damages could not be
6 considered irreparable harm, because "money damages may be recovered in an action at law
7 without resort to equity," citing *Caldwell v. Sabo*, 2013 MT 240, ¶ 29, 371 Mont. 328, 308
8 P.3d 81. The Court reasoned, however, that Schiffermans did not need to establish
9 "irreparable harm" because that requirement was necessary only for preliminary injunctive
10 relief under subsection (2), not subsection (1), of MCA § 27-19-201. *Id.*

11
12
13 K. On appeal, the Supreme Court affirmed the order granting preliminary
14 injunctive relief. The Court first addressed the applicable standards:

15
16 Montana courts have managed over the years to address equitable preliminary
17 injunctive relief under the standards of § 27-19-201, MCA, but it has not
always been an easy task. . . .

18 ¶ 14 However, as we have often recognized, the subsections of § 27-19-201,
19 MCA, are written disjunctively. *Demonstration of one, and not all, of the*
20 *subsections suffices to authorize a court to grant equitable, preliminary*
21 *injunctive relief, when its discretion is so moved.* As we stated in *Sweet Grass*
Farms, "only one subsection need be met for an injunction to issue." [Citations
omitted].

22 ¶ 15 Regarding what is commonly referred to as "irreparable harm," only
23 subsection (2) explicitly references the issue, and its precise language is often
24 overlooked. Specifically, subsection (2) authorizes relief when it appears that
25 commission or continuation of an act during the litigation would produce "a
great or irreparable injury"—that is, an injury so significant it could not later be
26 repaired even by means of the litigation.

27 ¶ 16 However, while only mentioned explicitly by subsection (2) in terms of a
28 great or irreparable injury, *the prevention of some degree of harm or injury is*
an overlapping concept that is implied within all of the subsections of the
statute. Under subsection (1), when it appears an applicant has established

1 entitlement to relief under a legal claim that consists of "restraining the
2 commission or continuance of [an] act," injunctive relief is authorized to stop
3 the continuing illegal act, as well as the harm that is implicitly being done
4 thereby. Under subsection (3), when a continuing or threatened act would
5 violate "the applicant's rights" and tend to render "the judgment ineffectual,"
6 injunctive relief is authorized to prevent the act and the implied harm that
7 would result from such circumstances. Subsection (4) authorizes relief to
8 prevent the threatened removal or disposal of "the adverse party's property with
9 intent to defraud" and the obvious harm such actions would cause. Likewise,
10 without mentioning "harm" or "injury," subsection (5) nonetheless protects
11 against threatened harm by authorizing relief to protect applicants from
12 economic loss and from physical abuse or intimidation in domestic and order
13 of protection proceedings. While our cases have not always used precise
14 language, collectively they correctly stand for the principle that all requests for
15 preliminary injunctive relief require some demonstration of threatened harm or
16 injury, whether under the "great or irreparable injury" standard of subsection
17 (2), or the lesser degree of harm implied within the other subsections of § 27-
18 19-201, MCA. This was the essential meaning of our dichotomous statement in
19 Porter, 192 Mont. at 182, 627 P.2d at 840, upon which we heavily relied for
20 our recent holding in Davis, ¶ 24, that "[a]lthough no finding of injury or
21 damage is required for a preliminary injunction under [subsection (1)], it is the
22 court's duty to minimize the injury or damage to all parties to the controversy."
23 Porter, 192 Mont. at 182, 627 P.2d at 840.

24 *Id.* at ¶¶ 13-16 (emphasis added) (multiple citations omitted).

25 L. Applying these standards, this Court affirmed the district court's grant of
26 preliminary injunctive relief, holding that while Schiffermans did not prove "irreparable
27 harm," they did establish a *prima facie* case for relief and they would suffer continuing harm
28 by not being allowed to access the property by way of the access they had used for several
years before the start of the litigation:

29 In the case at bar, the District Court concluded the Schiffermans did not
30 establish, under subsection (2), that they would apparently suffer an injury so
31 great or irreparable it could not be addressed and compensated within the
32 litigation. Nonetheless, upon making a *prima facie* showing of prescriptive
33 easement, which is not contested on appeal, Schiffermans established they
34 would suffer continuing harm by not being able to access their property, while
35 the litigation was pending, by way of the access route they had used for many
36 years, and thus satisfied subsection (1). Consequently, the purpose of equitable
37 injunctive relief was here fulfilled, that is, to "preserve the status quo and

1 minimize the harm to all parties pending final resolution on the merits." *Davis*,
2 ¶ 24 (emphasis omitted). The "status quo" is "the last actual, peaceable,
3 noncontested condition which preceded the pending controversy." *Benefis*, ¶
4 14. The noncontested condition preceding the current controversy was the
5 Schiffermans' use of the access created by the Department of Transportation
6 and improved by them. We conclude the District Court did not abuse its
7 discretion by entering the preliminary injunction permitting Schiffermans to
8 continue to use the access pending the outcome of the litigation.

9 *Id.*, ¶ 18 (emphasis added).

10 M. The standard for determining the existence of a public road is not proof of
11 strict adherence to these statutory procedures; rather, it is whether 'the record taken as a whole
12 shows that a public road was created.' *Letica Land Co. v. Anaconda-Deer Lodge Cty.*, 2015
13 MT 323, 381 Mont. 389, 362 P.3d 614, 618 (Mont. 2015) (quoting *Reid v. Park Cty.*, 192
14 Mont. 231, 627 P.2d 1210, 1213 (Mont. 1981)). The "record taken as a whole" standard
15 reduces the burden of having to produce precise documentary evidence showing that a public
16 road was validly created a century after the fact. *Reid*, 627 P.2d at 1213; *Danreuther*
17 *Ranches v. Farmers Coop. Canal Co.*, 2017 MT 241, 389 Mont. 15, 403 P.3d 332, 337 (Mont.
18 2017). Thus, the issue here is whether Flying T has established a prima facie case that a
19 county road was validly established in 1892. Therefore, the "record as a whole standard"
20 governs. *Croy v. Ravalli County* 472 F. Supp. 3d 877, 888 (D. Mont. 2020); *Soup Creek LLC*
21 *v. Gibson*, 2019 MT 58, 395 Mont. 105, 439 P.3d 369.

22 N. To this end, where, as here, the parties dispute the location of a road, public or
23 private, MCA § 70-20-201 sets forth Rules for construing the description provided:
24

25 The following are the rules for construing the descriptive part of a conveyance
26 of real property when the construction is doubtful and there are no other
27 sufficient circumstances to determine it:

- 28 (1) Where there are certain definite and ascertained particulars in the
description, the addition of others which are indefinite, unknown, or

1 false does not frustrate the conveyance, but it is to be construed by the
2 first mentioned particulars.

3 (2) When permanent and visible or ascertained boundaries or
4 monuments are inconsistent with the measurement, either of lines,
5 angles, or surfaces, the boundaries or monuments are paramount.

6 (3) Between different measurements which are inconsistent with each
7 other, that of angles is paramount to that of surfaces and that of lines
8 paramount to both.

9 (4) When a road or stream of water not navigable is the boundary, the
10 rights of the grantor to the middle of the road or the thread of the stream
11 are included in the conveyance, except where the road or thread of the
12 stream is held under another title.

13 (5) When a navigable lake, where there is no tide, is the boundary, the
14 rights of the grantor to low watermark are included in the conveyance.

15 (6) When the description refers to a map and that reference is
16 inconsistent with other particulars, it controls them if it appears that the
17 parties acted with reference to the map; otherwise, the map is
18 subordinate to other definite and ascertained particulars

19 (Emphasis added).

20 O. Applying these standards, Flying T established a prima facie case for
21 preliminary injunctive relief under several subsections of MCA § 27-19-201, which
22 are written disjunctively. *Bam Ventures, LLC, supra*, at ¶ 14.

23 P. First, the 1892 Petition, accepted and approved by the Meagher County
24 Commission, following public notice and the appointment of viewers, as reflected in the
25 County records, constitutes prime facie evidence of the creation of a county road. *See*, MCA
26 § 26-1-605 (Entries in public or other official books or records made in the performance of the
27 officer's duty by a public officer of this state or any other person in the performance of a duty
28 specially enjoined by law are prima facie evidence of the facts stated in the book or record.);
MCA 26-1-606 (An entry made by an officer or board of officers or under the direction and in

1 the presence of either, in the course of official duty, is *prima facie* evidence of the facts stated
2 in such entry).

3
4 Q. Second, with respect to the location of the road, ending “at or near the stage
5 station,” the evidence is uncontroverted that the stage station was location in Section 15,
6 appurtenant to US Highway 89, on Catlin’s property. As to Catlin’s assertion that the stage
7 station, in Section 15, is less than 2 miles from the Hill Ranch, as described in the records, the
8 Court must apply the Rules in MCA § 70-20-201(2), governing the priority of calls, which
9 results in a finding and conclusion that the Moss Agate Road, created by the County in 1892,
10 is located in Section 15, because the stage coach station constituted a permanent and
11 ascertainable monument, the location of which takes priority over any inconsistency
12 associated with the approximate distance of that monument from the Hill Ranch. *See also,*
13 *Larsen v. Richardson*, 2011 MT 195, ¶¶ 43-49, 361 Mont. 344, 260 P.3d 103.

14
15
16 R. A county road, once established, must continue to be a county road until
17 abandoned or vacated by (1) operation of law; (2) judgment of a court of competent
18 jurisdiction; or (3) the order of the Board of County Commissioners. MCA § 7-14-2615;
19 *Smith v. Russell*, 2003 MT 326, 318 Mont. 336, 80 P.3d 431, 435.

20
21 S. Abandonment cannot be established by mere implication. *McCauley v.*
22 *Thompson-Nistler*, 2000 MT 215, 301 Mont. 81, 10 P.3d. 794. Instead, as the Court held in
23 *Soup Creek LLC v. Gibson*, 2019 MT 58, 395 Mont. 105, 439 P.3d 369, the “party claiming
24 abandonment has the burden of proving that acts claimed to constitute abandonment
25 demonstrated a decisive and conclusive intent to abandon the road”:

26
27 One of the elements necessary to prove abandonment of any easement,
28 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

1 character so decisive and conclusive as to indicate a clear intent to
2 abandon. The conduct must be some affirmative official act, and not mere
3 implication. Mere nonuse, even for extended periods of time, is generally
4 insufficient, by itself, to indicate an intent to abandon. *Id.*, *McCauley*, ¶ 30
5 (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.

6 *Id.* (emphasis added) (citation omitted). Refusal to adopt a public highway as a county road
7 does not equate to abandoning that public highway; in light of the other evidence, it
8 establishes no more than an "implication" of abandonment. *Id.* at ¶ 27, citing *McCauley*, ¶ 30.

9
10 T. Finally, to the extent that Catlin claims the Moss Agate Road was abandoned,
11 it failed to produce evidence of any act demonstrating a "decisive and conclusive intent" to
12 abandon Moss Agate as a county road and there is no evidence of an Order of the Board to
13 that end. Proceedings regarding the 1969 Petition are not sufficient to allow for a conclusion
14 of abandonment. No action was taken by the Commission with respect to Moss Agate. Even
15 if the record were capable of being construed to allow for a conclusion of abandonment, and
16 the predecessor to Flying T, the Dupeas, and others were expressly reserved the right of
17 access over the abandoned Road, as well as Moss Agate.

18
19 U. Accordingly, Flying T has established a prima facie case for relief on the
20 theory that Moss Agate was and remains a county road.

21
22 V. Flying T also set forth a prima facie case for an easement by estoppel. In *Kelly*
23 *v. Wallace*, 1998 MT 307, 292 Mont. 129, 972 P.2d 1117, the Court recognized the theory,
24 but found the evidence insufficient following a trial. Subsequent to the *Kelly* decision, the
25 American Law Institute adopted the *Restatement (Third) of Property (Servitudes)*, which
26 provides as follows:
27
28

1 If injustice can be avoided only by establishment of a servitude, the owner or
2 occupier of land is estopped to deny the existence of a servitude burdening the
3 land when:

4 (1) The owner or occupier permitted another to use that land under
5 circumstances in which it was reasonable to foresee that the user would
6 substantially change position believing that the permission would not be
7 revoked and the user did substantially change position in reasonable reliance
8 on that belief; or

9 (2) The owner or occupier represented that the land was burdened by a
10 servitude under circumstances in which it was reasonable to foresee that the
11 person to whom the representation was made would substantially change
12 position on the basis of that representation, and the person did substantially
13 change position in reliance on that representation

14 *Id.*, § 2.10.

15 W. Cases decided by the Supreme Court since *Kelly*, make clear the Court's
16 substantial reliance on the *Restatement (Third)* in easement cases.

17 X. Application of this theory of relief is not reserved for "extreme circumstances,"
18 but instead "[i]s flexible, in its application depending on the foreseeability and reasonableness
19 of the reliance on the representation, and the justice of the situation. The reasonableness of the
20 user's reliance should be determined by the same criteria as those applied in determining
21 whether an oral servitude should be given effect. See Comment *d* to § 2.9. Illustration 5 to the
22 *Restatement*, while not exactly the facts before this Court, provides guidance:

23 O, the owner of Blackacre, knew that Whiteacre, an adjacent unimproved
24 property, was landlocked, and that A, its owner, had been using an old road
25 across Blackacre for occasional access to Whiteacre. When A built a house on
26 Whiteacre, using the old road to bring in construction materials, and then
27 graded and paved the road to provide a driveway to the house, O said nothing
28 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

1 the road across Blackacre shifted the burden to O to notify A that his
2 permission to use the road was revocable.

3 Y. The facts set forth above establish a prima facie case for relief in Flying T's
4 favor under the doctrine of easement by estoppel. Flying T purchased its property, with the
5 understanding it had unfettered access to and from that land, from a county road. Thereafter,
6 it retained contractors and others to improve Moss Agate to its land and construct residential
7 improvements on that property. Catlin placed a lock on the gate. Flying T protested and
8 Catlin removed it, following a conversation with the Deputy Sheriff. Mr. Galt acknowledged
9 he disputed that information, but took no action in the form of contacting experts, a lawyer, or
10 filing a lawsuit to determine the status of Moss Agate as access to Section 25. Flying T relied
11 upon Catlin's silence and inaction, by continuing to invest substantial sums of money in its
12 property and additional money to modestly improve the road and its members and guests
13 continued to use the Road as there is no other feasible or legal access to that property.

14 Z. Catlin did not seek access to the Court for an injunction, or other relief, claiming its
15 rights were somehow violated by Flying T. Instead, it sat, watched and waited, while Flying
16 T improved the road (which benefitted Catlin) and invested substantial funds in permanent
17 improvements to its property, including a home, a well, and a wastewater disposal system.
18 Catlin knew Flying T was making these substantial investments and waited for three (3) years
19 to take any action.

20 AA. Flying T's actions, in light of the real property record and the extended time
21 over which they worked, was reasonable, particularly in light of the absence of any objection
22 or lawsuit from Catlin. Under either *Kelly*, or the *Restatement (Third)* a prima facie case of
23 easement by estoppel has been presented.

1 BB. Flying T also presented a prima facie case that even if the 1969 Petition to
2 abandon was valid, that the actions of the County expressly reserved to Flying T, as a
3 successor in interest to the Dupeas, a right of access over Moss Agate. The records reflect
4 that “no action [was] taken” with respect to that road.
5

6 CC. “Courts are willing to graft an easement onto a land transaction in order to do
7 justice in a particular case.” Bruce and Ely, *The Law of Easements and Licenses in Land*, §
8 4:1 at 4-2 (2019 Ed). Reservation of the private easements that were appurtenant to the
9 dominant estates, served by that public or county easement may be implied. Public policy
10 disfavors the construction of instruments resulting in the “landlocking” of land. *Restatement*
11 *(Third) of Property (Servitudes)* § 4.1, comment f.
12

13 DD. In the proceedings before the Court, Catlin failed to offer evidence of a
14 “decisive and conclusive” character to establish abandonment as required by *Soup Creek LLC*
15 *v. Gibson, supra*. Even if such evidence existed, and none has been produced, the County’s
16 abandonment of its interests in the Road does not, and cannot, support a finding that the
17 County could, or did, abandon *the private interests* in the road. *See Restatement (Third) of*
18 *Property (Servitudes)* § 7.4 (Am. Law Inst. 2000), Reporter’s Note, p. 357 (“Abandonment is
19 only effective to terminate a servitude if all benefitted parties abandon their interests.
20 *Abandonment of a public road does not extinguish existing private rights of way in the road.*”)
21 (emphasis added); *Zywiciel v. Historic Westside Vill. Partners, LLC*, 721 S.E.2d 617, 621 (Ga.
22 App. 2011) (same).
23
24

25 EE. As stated, in 1969, the Meagher County Commissioners reserved an
26 unrestricted right of entry to: “Tobe Dupea, Carl Rostad, Manger Ranch Co., Montana Power
27
28

1 Co., Mountain States Tel. & Tel. Co.” Reservation of a right of access was not, and should
2 not, be construed as personal to an individual landowner, but instead runs with the land.

3
4 FF. Catlin’s claims that Flying T has other access, while factually and legally in
5 dispute, is not persuasive with respect to the request for injunctive relief pending trial. The
6 Court in *BAM*, affirmed the district court’s grant of preliminary injunctive relief, holding that
7 while Schiffermans did not prove “irreparable harm,” they did establish a prima facie case for
8 relief, and they would suffer continuing harm by not being allowed to access the property by
9 way of the access they had used for several years before the start of the litigation:

10
11 In the case at bar, the District Court concluded the Schiffermans did not
12 establish, under *subsection (2)*, that they would apparently suffer an injury so
13 great or irreparable it could not be addressed and compensated within the
14 litigation. Nonetheless, upon making a *prima facie* showing of prescriptive
15 easement, which is not contested on appeal, Schiffermans established they
16 would suffer continuing harm by not being able to access their property, while
17 the litigation was pending, by way of the access route they had used for many
18 years, and thus satisfied *subsection (1)*. Consequently, the purpose of equitable
19 injunctive relief was here fulfilled, that is, to “preserve the status quo and
20 minimize the harm to all parties pending final resolution on the merits.” *Davis*,
21 ¶ 24 (emphasis omitted). The “status quo” is “the last actual, peaceable,
22 noncontested condition which preceded the pending controversy.” *Benefis*, ¶
23 14. The noncontested condition preceding the current controversy was the
24 Schiffermans’ use of the access created by the Department of Transportation
25 and improved by them. We conclude the District Court did not abuse its
26 discretion by entering the preliminary injunction permitting Schiffermans to
27 continue to use the access pending the outcome of the litigation.

28 *Id.*, ¶ 18 (emphasis added).

GG. At the preliminary injunction hearing in *BAM*, the Schiffermans had attempted
to improve the altered access route but found it did not provide comparable access to the
access they enjoyed for several years before the dispute arose. *Id.* An expert testified it
would take approximately two days and \$7,000 to build a comparable access across the new
route to the existing driveway. *Id.*

1 HH. Flying T used Moss Agate because, like the access in *BAM Ventures*, it is the
2 only feasible access to its property, (Second Timbrook Aff., at ¶10) This conclusion is
3 supported by the Court's prior Order providing that Flying T could use Moss Agate to
4 transport propane to its residence, to prevent damage to that home.
5

6 II. Flying T showed that former access roads to the north and south no longer
7 exist, and a bridge over a creek crossing is absent. As explained in Mr. Timbrook's Second
8 Affidavit, CR 23 at ¶ 9, it would cost in excess of \$350,000 to construct a road of similar
9 quality to that of Moss Agate:
10

11 The North route, like the South route, is over the old White Sulphur
12 Springs/Livingston road (also known as County Road 19) which required a
13 newly negotiated easement by First American from a neighboring landowner
14 due to the fact the original road is absent in areas. This North route is longer
15 (approximately 3.5 miles total) and less direct adding several miles more of
16 travel. Approximately 16 miles of Road 19 does not exist today and would
17 need to be reconstructed in the original location. In four areas, the fences of
18 neighboring property owners cross the old road path. Due to the lack of
19 maintenance, what road does still exist floods often and is impassable in wet
20 weather. Overall, the road quality is far inferior and requires significant road
21 improvements in excess of \$350,000 to be passable and even close to the
22 quality of the Moss Agate Road.
23

24 JJ. Moss Agate is the only access today that permits Flying T to reasonably access
25 its property and the investments it made to that property. As in *BAM Ventures*, here, Flying T
26 made a prima facie case for relief, under several theories, and was (and is) subject to present
27 and ongoing harm by Catlin's actions because it cannot access its property over the route it
28 has used since it purchased the property in 2014.

 KK. In contrast, when considering hardship, Catlin offered no evidence of harm it
allegedly suffered when Flying T used Moss Agate, without interruption between 2014 and

1 2017. Nor did it offer any evidence that it would suffer future harm as a result of Flying T's
2 continued use of Moss Agate, pending a trial on the merits.

3
4 LL. In sum, the evidence is that Flying T lacks comparable access, both factually
5 and legally, and that construction of comparable access to Section 25 would cost several
6 hundred thousand dollars, involve the construction of a bridge or installation of culverts and
7 government permits to accomplish that, as well as construction of a road in areas that are
8 difficult to navigate. On at least one of the other routes, lawful access as not available, as the
9 scope of the easement did not include a residence. Even the Williams access, allowed by
10 permission, does not permit a propane truck to reach the cabin, a fact recognized by Catlin in
11 its letter to Flying T. Thus, as in *BAM*, Flying T lacks access comparable to that it enjoyed
12 for years before this dispute arose.

13
14 MM. In deciding whether an applicant has established a prima facie case, a court
15 should determine whether a sufficient case has been made out to warrant the preservation of
16 the property or rights in status quo until trial, without expressing a final opinion as to such
17 rights. See *Fox Farm Estates Landowners Ass'n v. Kreisch* (1997), 285 Mont. 264, 268, 947
18 P.2d 79, 82. "Status quo" has been defined as "the last actual, peaceable, noncontested
19 condition which preceded the pending controversy." *Porter*, 192 Mont. at 181, 627 P.2d at
20 839. *Sweet Grass Farms*, ¶ 28. The Court views the status quo as having been established by
21 Flying T's use of the access for approximately three years before this litigation commenced.
22 The purpose of a preliminary injunction is to preserve the status quo and to minimize the harm
23 to the parties pending trial. *City of Whitefish*, 2008 MT 436 ¶ 18, 347 Mont. 490, 199 P.3d
24 201.

1 NN. Flying T has thus set forth a prima facie case for relief under several theories,
2 that it enjoys a right to utilize the 1892 WSS to Livingston County Road, including the Moss
3 Agate Road and that right has not been abandoned, extinguished or terminated.
4

5 OO. Flying T also established injury and damage during the pendency of this
6 litigation. The Court does not address, at this juncture, the issue of injury that could arise out
7 of an ultimate decision of "no access". Flying T purchased its property and constructed a
8 cabin for recreational use for its members and their families. Catlin's locking the gate and
9 refusing access for the years this litigation has consumed has harmed Flying T's members,
10 and their families by precluding or limiting the use of that property and has caused financial
11 damage.
12

13 Based upon the foregoing Findings of Fact and Conclusions of Law, the Court now
14 enters the following Order:
15

16 **ORDER**

17 **I.**

18 The Application for a Temporary Restraining Order is moot.
19

20 **II.**

21 The Court hereby enters a preliminary injunction enjoying Catlin, Jackson, and any
22 others acting in concert with them, from inhibiting Flying T's access from U.S.
23 Highway 89 via Moss Agate Spur Road and the Moss Agate/WSS/Road 19 during
24 the pendency of this proceeding.
25

26 **III.**

27 Catlin shall be permitted to "lock" the gate at Moss Agate, on the condition that
28

1 Flying T, Williams and Jacksons have a key or the combination to pass through the
2 gate and travel over the road, as needed.

3 SO ORDERED this 29th day of July, 2021.
4

5
6 
7 Brenda R. Gilbert
8 Presiding District Court Judge

9 CC: Brian Gallik
10 Vuko J. Voyich
11 Jim Lippert
12 Susan B. Swimley
13 Hanna Warhank/Rachel A. Taylor
14 Matthew W. Williams
15 Judge Gilbert
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