

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

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**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 AND THROUGH ITS COMMISSION,  
SCOTT JACKSON, LYNN JACKSON, DEBRA WILLIAMS,  
LISA ANDERSON, BERT WILLIAMS & CONNIE HIX,**

**Defendants.**

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**CATLIN RANCH, LP, a Montana Limited Liability Company**

**Cross-Claimant and Appellant,**

**v.**

**DEBRA WILLIAMS, LISA ANDERSON, BERT  
WILLIAMS and CONNIE HIX,**

**Crossclaim Defendants and Appellees.**

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**APPELLEE, FLYING T RANCH, LLC'S ANSWER BRIEF**

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

**Appearances: (next page)**

Brian Gallik  
Gallik, Bremer & Molloy, P.C.  
777 East Main Street, Suite 203  
Bozeman, MT 59771-0070  
Phone: (406) 404-1728  
Email: [brian@galliklawfirm.com](mailto:brian@galliklawfirm.com)  
*Attorney for Plaintiff and Appellee, Flying T Ranch, LLC*

Vuko J. Voyich/Kelly Voyich  
104 E. Callender, Suites 2 & 3  
PO Box 1409  
Livingston, MT 50047  
Phone: (406) 222-9626  
Email: [office@andersonandvoyich.com](mailto:office@andersonandvoyich.com)  
*Attorneys for Defendant and Appellant, Catlin Ranch, LP*

Jim Lippert  
Jim Lippert Attorney at Law, P.C.  
PO Box 1636  
Big Timber, MT 59011-1636  
Phone: (406) 932-5410  
Email: [jimlippertlaw@itstriangle.com](mailto:jimlippertlaw@itstriangle.com)

Hanna Warhank  
Rachel A. Taylor  
Church Harris Johnson & Williams, P.C.  
PO Box 1645  
Great Falls, MT 59403  
Phone: (406) 761-3000  
Email: [hwarhank@chjw.com](mailto:hwarhank@chjw.com)  
Email: [rtaylor@chjw.com](mailto:rtaylor@chjw.com)  
*Attorneys for Defendants Scott and Lynne Jackson*

Matthew W. Williams  
777 East Main Street, Suite 205  
Bozeman, MT 59715  
Phone: (406) 551-6169  
Email: [mattheww53@aol.com](mailto:mattheww53@aol.com)  
*Attorney for Defendants, Crossclaim Defendants, and Appellees, Williams, Anderson and Hix*

Susan B. Swimley  
1807 W. Dickerson St. STE B  
Bozeman, MT 59715  
Phone: (406) 586-5544  
Email: [swimley@swimleylaw.com](mailto:swimley@swimleylaw.com)  
*Attorney for Defendant, Meagher County*

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## STATEMENT OF ISSUE

Was the district court's preliminary injunction Order, which followed nearly four (4) days of testimony, after a year of discovery, including depositions and expert disclosures, which provided the parties access over Moss Agate Road while allowing Catlin to lock the gate, provided all parties had a key, clearly erroneous and/or an abuse of discretion?

## STATEMENT OF CASE

In April, 2014, Appellee Flying T ("FT") purchased Section 25, T8N, R7E from Defendants/Appellees Bert and Debbie Williams, Lisa Anderson and Connie Hix ("Williams"). It started construction of a cabin.

To access Section 25, FT exited Highway 89 in Section 15 near the historic Moss Agate stage station. It crossed the South Fork of the Smith River and drove over "Moss Agate Road" or "Moss Agate Spur" ("MAR"). MAR, established by Meagher County in 1892, crosses lands owned by Defendant/Appellant Catlin Ranch, ("Catlin") in Sections 15, 14 and 11, crosses land owned by Defendants/Appellees Scott and Lynn Jackson ("Jackson") in Section 2, until the road forks in the north ½ of Section 2. Appendix, Ex. A. The easterly fork is not part of MAR, but a private easement that traverses Jackson-owned sections and continues over an easement across state land in Section 36 ending at Section 25. The westerly fork, is not at issue. *Id.* FT, Williams and Jackson understood MAR

was either a county road or a road over which landowner access was reserved by the County in 1969.

In June 2014, Catlin's Ben Galt, and assistant, Terry Taylor, saw a concrete truck traveling over MAR. They locked the gate and called the Sheriff. That office obtained county road records dated 1969 from the title company. A deputy provided those documents to Catlin, which removed the lock. In reliance, FT finished construction of its cabin, made improvements to MAR and used its property for three years without interference.

In September 2017, FT unexpectedly found the gate at Moss Agate locked. FT's Todd Timbrook, cut the lock, drove to his cabin over MAR, and called Galt, without success. He spoke with Taylor and understood she would provide him a key, which never arrived. Later that month, Timbrook returned to hunt and meet a contractor. Both accessed Section 25 over MAR.

The next month, Timbrook learned County Attorney, Kimberly Deschene, informed the Sheriff that FT's access over MAR required judicial resolution. Catlin locked the gate.

FT tendered the dispute to its insurance company. In the interim, FT accessed its cabin over a "path" through Williams, by permission.

By letter dated January 9, 2018 Catlin's attorneys asserted FT did not have access over MAR, as it crossed Catlin in Section 15, but access existed over "Road

19,” a county road it asserted was abandoned in 1969, with access reserved to landowners. There is no remnant of any road with the course and direction asserted for Road 19 that exists today, having been obliterated years before by farming, with no means of crossing the river. In recognition of these facts and FT’s need to winterize its cabin and the challenging permissive route through Williams, Catlin offered FT access over MAR, one time, as that was the only access that could accommodate a propane truck.

After efforts to resolve the dispute failed, FT filed a Complaint in May 2019. Case Register Report (“CRR”) 1. It claimed access over MAR: (1) county road; (2) successor to landowner to whom access was reserved by the county in 1969; and/or (3) estoppel, implication, prescription.

On July 3, 2019, FT filed a motion for preliminary injunctive relief. CRR 4, 5. Catlin disqualified the judge. CRR 3. On July 17, 2019, Catlin requested a stay pending resolution of FT’s action against its title company. CRR 8. The court granted the motion. CRR 25. FT appealed. CRR 26, 38. This Court reversed holding the title insurance case would not determine the status of Moss Agate. *Flying T Ranch v. Catlin Ranch, LP*, 2020 MT 99, ¶ 17, 400 Mont. 1, 462 P.3d 218.

Upon remand, the parties began discovery and the Court set a July hearing. CRR 44. On the eve of the hearing, Jacksons advised they objected to FT’s access over MAR as it crossed Section 2. Catlin filed an “emergency motion” to vacate,

asserting Jacksons, Williams and the County were necessary parties. CRR 48. The Court granted the motion. CRR 52. FT amended the Complaint. CRR 55. Defendants answered. CRR 57-59, 65. Catlin crossclaimed against Williams, CRR 67. They answered. CRR 83. The Court entered a new scheduling order and reset the hearing for January, 2021. CRR 64.

Between May 2020, and January 2021 the parties exchanged discovery. CRR 36, 45-47, 66, 69-70, 84, 90.

FT's application for preliminary injunction came on for hearing on January 13, 2021. CRR 86, 87. The hearing ended the next day due to COVID, *id.* at 87 and was continued to April. CR 88.

During the following three months, the parties exchanged additional discovery [CRR 90, 102, 107, 108, 120, 121, 126], served subpoenas [CRR 91, 92 106], expert reports [CRR 96, 97, 103, 122, 123] and took eight depositions [CRR 94, 95, 98-101, 104, 113-115].

The hearing resumed April 29, 2021 and concluded April 30. CRR 133, 134, 86, 87, 124, 132-136, 151. On August 2, 2021, the district court granted FT's motion for preliminary injunction. CRR 163. Catlin appealed. CRR 165.

## STATEMENT OF FACTS

### **A. The Parties.**

FT purchased Section 25 from Williams. Pl. Ex. 98. Williams had title as heirs of Dupeas. Pl. Ex. 85. Catlin owns Sections 13-15, 23 and 24. Answer, CRR 145, p. 3, ¶ 4. Jacksons own Section 2, T7N, R7E and the South 1/2 of Section 35, T8N, R7E. Answer, CRR 59, ¶ 4.

### **B. Moss Agate Road (“MAR”).**

FT’s claimed access over MAR starts at Highway 89 in Section 15. App, Exh. A; Pl. Ex. 38A; Tr. Test. 4/29/21 at pp. 132. It proceeds east across the South Fork of the Smith River, through “Moss Agate,” or the “Old Stage Station,” through the balance of Section 15 where it enters Section 14 (Catlin) and proceeds east and north to Section 11 (Catlin), and continues north across Section 2 (Jackson). App. A. Only that portion of MAR through Catlin and Jackson, as described and colored in yellow on the map in the Appendix, was at issue. The remainder of the road to Section 25 is provided by easement granted by Jacksons to Williams, Pl. Ex. 87, and the State’s confirmation of Williams’ right to cross its lands for a residence. Pl. Ex. 90. This stretch of road is colored in orange on the Map in the Appendix.

At the hearings, FT presented evidence MAR was created in 1892 by Meagher County upon petition filed in 1891 by landowners. To understand the 1891 petition, approved in 1892, it is necessary to understand the 1882 WSS to Livingston Road.

**C. 1882—County Adopts WSS to Livingston Road.**

In 1882, Meagher County declared “*WSS to Livingston Road*,” a county road. Pl. Ex. 1 (map); Pl. Ex. 3a (GLO map); Pl. Ex. 3b; Test. Lahren, 1/13/21, pp. 34-37. Thereafter, the *WSS to Livingston Road* was improved. Pl. Ex. 6, 8; Test. Lahren, pp. 36-37, 46-47. The route was used by stagecoaches, *id.*, p. 36:8-13 and a postal route. Pl. Ex. 4; Lahren Test., 1/13, pp. 38-40; P. Ex. 31, pp. 12-14.

**D. 1883 – Woolsey Builds a Stage Station in Section 15 along 1882 Road.**

In 1883, W.M. Woolsey built a stage station at Moss Agate, as part of the 1882 WSS to Livingston Road. Pl. Ex. 1; Lahren Test., 1/13/21, pp. 20-21:13-25, 55. The stage station was used to care for horses on the stagecoach route over the WSS to Livingston Road. Lahren Test., pp. 21, Ins 1-3; 55-57; Ex. 10, Ex. 117. Documents reflect the stage station was advertised and used as part of the road between WSS and Livingston, becoming a local landmark. Lahren Test., 1/13/21, pp. 49, 54-69.

**E. 1891-92 – County Alters portion of 1882 Road to Commence south of Catlin Spring & Intersect with 1882 Road “at or Near the Stage Station.”**

On December 11, 1891, residents petitioned Meagher County to appoint viewers to “[a]lter the [1882] White Sulphur Springs Road

Commencing at a point on said road ... 20 rods south of Catlin Spring, and to run ... in a southerly direction to Louis Madison’s Ranch, ...thence in a southerly direction to intersect ... the White Sulphur Springs and Livingston Road at or near the stage station, about two miles above what is known as the “Hill Ranch.”

Pl. Ex. 117.3 (emphasis added); Pl. Ex. 2b; Pl. Ex. 2b; Test. of Lahren, 1/13/21, pp. 24-28. Accompanying that Petition was Madison's sworn statement, that he posted notices on the front door of the Court House, advising the petition would be presented to the Commissioners, "[a]sking ...the [1882] White Sulphur Springs to Livingston Road be changed and altered "[t]o intersect the [1882] White Sulphur Springs and Livingstone [sic] road *at or near the stage station of said road.*"" Pl. Ex. 2a (emphasis added); Pl Ex. 31, p. 3. The Commissioners' Journal for December 11, 1891, confirms the foregoing. Pl. Ex. 2a, 2b; Pl. Exh. 31. Lahren Test. 1/13/21, pp. 25-34; Hallin Test. 4/30/21, pp. 51-52; *see also* Ex. 136C.

The Viewers recommended a route going south "to a point about a mile North of Fords Sheep Camp." Ex. 2b; Ex. 31, p. 3; Lahren Test.1/12/21 pp. 25-27, 72-74. The Commissioners' Journal, dated September 10, 1892, confirms receipt of the petition, notice of publication, and viewers' report, but rejected the Sheep Camp terminus of the Road, instead establishing the County Road at the location requested in the 1891 petition, to "intersect said White Sulphur Springs and Livingston Road, *at or near the stage station...*and said road as viewed was ... established as a county road per Report recorded in Road Record No. 1...." Road Record No. 1 provides:

## ROAD RECORD

<u>NAME OF ROAD</u>	<u>COMMENCING AT</u>	<u>PETITION FILED</u>	<u>ROAD VIEWERS</u>	<u>REPORT FILED</u>
W Sulphur Springs Livingston (change)	A point on said road about 20 rods South of Catlin Springs	Dec. 11 <sup>th</sup> 1891	Geo. Catlin Henry Durst E.C. Hill	Feb. 15 <sup>th</sup> 1892
<u>PETITION FOR BY</u>	<u>ENDING AT</u>	<u>DATE OF APPOINTMENT</u>	<u>ROAD ESTB.</u>	
Louis Madison Wm Luppold And others	<u>its intersection with White Sulphur Springs Road at or near the stage Station</u> about two miles above what is known as the "Hill Ranche"	Dec. 11 <sup>th</sup> 1892		Sept. 10 <sup>th</sup> 1892

Pl. Ex. 2b; Pl. Ex. 31, p. 3; Lahren Test., 1/13/21 at 25-30; Ex. 31 at 14-15, Tr. Trans., 4/29 at 11-20, 59-72.

### **F. The Stage Station's Location at Moss Agate in Section 15.**

An issue was the location of the "stage station" because the 1892 Road ends "at or near the stage station." 4/30/21 Test. pp. 32-34. FT established the stage station was at Moss Agate in Section 15. Pl. Ex. 31, pp. 3-4; Test. Lahren. 1/13/21; 4/29/21 at pp. 11- 18, 59-72; Pl. Ex. 136A, 117 & 136B. Test. Hallin, 4/30/21 at pp. 28-34, 51, 54-58, 66-67; Pl. Ex. 12A, B & C.

Ted Hebnes testified. CRR 132 [Pl. Ex. 84]. Ted was born in 1927 and lived with his parents in Section 1, T7N7E, in the late 1920's until 1941. *Id.* at pp. 8-16; 90-92. Hebnes visited Moss Agate and drove over MAR in 2020. He testified the primary access to their homestead was MAR through the "stage station," in Section 15, where they brought sheep and milk for delivery to the railroad station, located a short distance from the stage station. *Id.* at pp. 27-32; 5-61; 77; 80-82 & Depo. Ex 1, 2, 3A (map). They also drove over MAR in a Chevy sedan. *Id.* at pp. 30-31; 36.

Hebnes testified the road he traveled in 2020 – MAR -- was the same as that used growing up, and later when recreating following military service. *Id.* at pp. 27-33, 64-65, 67, 77-78.

They never asked permission to use MAR, and there were no gates or locks. *Id.*, pp. 31, 38, 70-72, 79. He testified landowners shared maintenance of MAR with a horse-drawn grader, like that pictured in Depo. Exhibit 8. *Id.* at pp. 38-40; Pl. Ex. 31, p. 4, ¶ 5; Lahren Test, 1/13/21, p. 158-159. Hebnes testified other homesteaders used MAR including the Ericksons, who operated a sawmill. *Id.* at pp. 42-48. Hebnes testified MAR accessed the “Moss Agate School,” in Section 11, as shown deposition Exhibit 7. *See also*, Pl. Ex. 31, ¶ 4; Pl. Ex. 23; Pl. Ex. 25 (census); Lahren Test. 1/13/21, pp. 21, 105-110, 172-173.

Hebnes testified about a large barn at Moss Agate. Pl. Ex. 84, Depo. at pp. 50-55, 126. He identified the barn in Deposition Exhibits 4 and 5. *Id.* He identified the Doigs and Ringers, who lived in “Moss Agate, Montana,” and shown in photos taken between 1925 and 1929. *Id.* at pp. 48-49 & Depo Ex. 5 & 6; Lahren Test., 1/13/21, pp. 164-165.

Bill and Ben Galt, members of Catlin, testified they visited Moss Agate in 1967. Tr. Trans., 4/30/21, pp. 111-112; 172:2-7. Bill testified there was a two-story horse barn at Moss Agate, and a cabin where ranch hands lived. *Id.* at p. 112:10-18; p. 113:18-25. Ben confirmed this testimony. *Id.*, p. 173:20-25. Bill testified the

history was the horse barn at Moss Agate “was used for a stage stop to switch horses for stagecoaches.” *Id.*, pp. 114:22-25; 115:1-8; 126: 2-7; 59:20-24 (“[f]rom ...old Rankin hands ...my understanding was ... they swapped horses there ....”) Ben understood a stage station was located at Moss Agate, “[b]y the Moss Agate corrals.” *Tr. Test.*, p. 172:2-7; p. 186:13-21; *Depo. Test.*, p. 13:18-20.

Jay Doig, 85 years old, was born and raised in WSS. *Depo.*, pp. 7:14; 19:4-15. He knew of MAR and the corrals located at Moss Agate, where he inspected cattle. *Id.* at pp. 19:4-15; 36:10-13; 47:1-25. He testified to a cabin and horse barn in Section 15, volunteering: “It was actually a stage stop at one time there.” *Id.* at pp. 24:23-24; 26:15-17. He used MAR in the 50’s and 60’s to hunt on the Rostad’s property, without permission. *Id.* at pp. 22:7-14; 23:1-16; 30:16-25; 40:17-24; 51:4-16; 52:11-15; 52:24-25; 53:1; 58:25; 59:1-11; 60:18-24; 61:4-7. He used MAR to feed cattle. *Id.* at pp. 31:16-25; 32:1-25; 56:2-14; 62:16-23. He drove over MAR in a jeep. *Id.*, p. 61:10-17. He recognized a picture of Berneta Doig, his aunt, *id.* p. 48:2-25, confirming she lived at Moss Agate. *Id.* at 49:4-25.

Phil Rostad, a retired rancher whose family has owned land near Moss Agate since the 1940’s and used MAR to access the property, testified the “old stage station” was located at Moss Agate and MAR was an old county road. He testified his uncle, Carl, was a County Commissioner when a petition was presented in 1969 to abandon MAR, while reserving access to landowners who owned land accessed

by that Road. Rostad Depo, pp. 9, 29-34, 41-44, 54, 57, 58:8-14, 61-64. He never asked permission to use MAR and was never denied access. *Id.* p. 64.

Dorothy Dupea Kincaid, whose family has extensive roots in the area, testified: “It is my understanding, based on interactions with my father, that the historic reputation in the area was that the barn at Moss Agate was used for a stage station . . . .” CRR 124, p. 2.

The location of the “stage station” at Moss Agate in Section 15 is confirmed on maps and photos. Pl. Exhs. 148, 149 (1951 USGS), 150 (1958 USGS), 151 (1965 USGS), 152 (1997 USFS), 24 (1950 State Water Resource), 153 (1936 Map); 154 (Map with “Old Stage Station”), 28 (USFS Map); Ex. 22, 33. Lahren Test., 1/13/21 at pp. 102-108, 156-158, 165-166; Hallin, 4/30/21 at pp. 30-32, 36-37; 41-43, 53-56. Catlin produced no maps to the contrary. Hallin, 4/30/21 at p. 55, 58-60, 64; Pl. Ex. 125, 125A, 125B; Tr. Test. 2/29/21 at pp. 153-154.

Testimony from surveyors Hallin and Henesh confirmed the USGS publishes maps at high levels of factual accuracy to meet National Accuracy Standards. USGS relies upon local sources for information regarding names of features and roads. Hallin Test. 4/30/21 at 36-46; Pl. Ex. 154, p. 1. “[U]SGS cartographers and editors check all maps thoroughly and ... attempt to keep factual errors to a minimum.” *Id.* USGS maps, meeting these standards state: “This map complies with National Map Accuracy Standards.” Ex. 154, p. 2, col. 2, ¶ 4. All USGS maps in this case contain

that statement. Hallin Test, 4/29/21 at pp. 35-40, 54; Test. of Henesh, 4/29/21 at pp. 123-126, 167-170,

The stage station's location in Section 15 was corroborated by Lahren, who summarized his opinions on the location of the stage station in Affidavits, Reports and testimony in January and April 2021. CRR 5, 86, 87, 103, Pl. Ex. 31; Pl. Ex. 117; Test., 1/13/21 *passim*, and 4/29/2021 at p. 61:21-24. Lahren researched newspapers, starting in the late 1800's and produced numerous articles discussing the stage station, and that evidence corroborated maps and testimony that the stage station, was located in Section 15. *Id.*

Catlin's expert admitted finding no evidence establishing the stage station other than Section 15. *Id.*, 4/30/21 Test at pp. 43-47, 50-53, 62.

#### **G. Construction of Highway 89.**

In 1931, Highway 89 was built. Hallin agreed that following construction of Highway 89, MAR was used to access Highway 89. 4/30/21 Test., p. 80.

#### **H. Evidence of Use of MAR**

MAR continued to be used by landowners and the public while the southern stretch of the 1882 WSS County Road (aka Road 19), from its intersection with MAR in Section 14, south through Sections 23 and 24, was used less, with testimony confirming Road 19 was obliterated in portions of Section 24 because the landowner tilled the land. Test. of Williams, pp. 75-95; D. Williams, pp. 113, 115-119;

Jackson, pp. 225-227; Hallin, 4/30/21 at 84-89. MAR was also used for leasing and timber harvest. Pl. Ex. 21; Lahren Test., 4/13/21 at pp. 99-101.

**I. 1969 Petition to Abandon While Reserving Landowner Access.**

In 1969, certain landowners sought to abandon a portion of MAR. Pl. Ex. 18. The Viewers recommended abandoning the Road “but right of entry be reserved to the following: [D]upea . . . Rostad, Manger... .” *Id.* Lahren test., 1/13/21 at 90-97. The petition did not seek to abandon that portion of MAR crossing Catlin’s property starting at Highway 89 in Section 15, where the stage station was located, continuing through § 14 where it intersected with Road 19 (aka 1882 WSS County Road). *Id.* At the time of the 1969 petition, Dupea, Rostad, and Manger owned land accessed by the 1882 WSS Road and MAR. FT’s land – Section 25 – was owned then by Manger Ranch. The Dupea and Manger parcels were later acquired by Williams, and Williams sold the Manger tract (§25) to FT. Williams Test., 4/29/21, pp. 74-75. Dupeas were the parents of Debbie Williams, Connie Hix, and Lisa Anderson. *Id.* Williams used MAR to access Section 25 without interference. 4/29/21 Tr. Trans. at pp. 75-76, 85.

Catlin claimed the 1969 petition sought to reserve landowner access over the southern portion of Road 19, with access to Highway 89 in Section 23, owned by Catlin. However, there was no evidence this route was used at the time of the petition. Rostad testified he never traveled the southerly stretch and did not know

a road existed there. Depo., p. 61:1-7. Kincaid testified in her Declaration: “I am not aware of any other road near Highway 89 that would get you to the Moss Agate area.” CRR 124. Doig testified he didn’t know of another road near Moss Agate to access the south side of the Castle Mountains besides MAR. Depo., p. 61:1-3, CRR 128, 136.

Exhibits 12a, 12b, and 12c, aerial photos, confirm MAR as the most defined route, leading to the inference that it was the road used by landowners, to whom access was either not abandoned or reserved in 1969. Lahren Test., 1/13/21, pp. 60-69.

Catlin’s expert, Hallin, testified the southern route was indistinguishable in stretches, due to cultivation and had not been used in many years. Tr. Test., April 30, p. 16:1-5; 60:23-35, 61:1. Physical access over Road 19 to Highway 89 was impossible since there are no bridges over or culverts in the Smith River. *Id.* Hallin testified that both areas were owned, historically, by the same owner. *Id.* Therefore, whether it was Rankin or Ringling, whoever cultivated over Road 19 did so while owning land burdened by MAR in Section 15. *Id.*, p. 80:22-25.

In light of this evidence, it was reasonably inferred that the access the 1969 petitioners intended to reserve, was the route used by landowners for decades -MAR- as the land to the south had been cultivated with no stream crossing available. *Cf.* MCA § 26-1-602 (4), (20), (28).

The Commissioners' Journals do not reflect any official action taken on the 1969 petition, but the legend states that "No Action" was taken with respect to MAR. Pl. Ex. 18. There is no decree, resolution, or order addressing abandonment of the WSS County Road, and a number of people who signed the petition were not freeholders, as required by law.

After the 1969 petition, property owners located north of Catlin's parcels and near the WSS County Road, continued to use the MAR. Defendant Jackson testified:

Q. [I] understood your testimony with respect to access over Moss Agate, ... you ...always thought ....you could use Moss Agate to get to your property.

A. (Jackson) Yes.

\* \* \*

Q. And you've had that understanding your whole life?

A. Up until . . .

Q. -- recently?

A. --recently.

Q. [I]t was your understanding you could use [MAR] as a matter of right . . . ?

A. [Y]es.

\* \* \*

Q. [W]ith respect to [Jacksons' easement to Williams] it states ... at Page 2 that the easement shall run from the Moss Agate road. ...?

A. Correct.

Q. [M]oss Agate ... is the road ...you thought landowners who access property through Moss Agate had a right to use ...?

A. Correct.

Q. Since Flying T purchased its property in 2014.. .. you knew there was a cabin up there, right?

A. Yes.

Q. You've not made any effort to interfere ...until this lawsuit . . . correct?

A. Correct.

Q. [T]hat's because you thought landowners who access property in the backcountry ... through Moss Agate had a right to use it...?

A. Correct.

Test. of Jackson, 4/30/21 at pp. 229-232; 4/29/21 Test. at pp. 88-89.

**J Williams Secure Easement from Jackson and Sell § 25 to FT.**

Bert Williams testified he and his wife, Debbie, decided to list Section 25 around 2008. Tr. Trans., 4/29/21 at 77:9-25. They approached Ben Galt for a “deeded easement” and were denied. *Id.*, p. 84:18-24; Tr. Trans. 4/29/21 at pp. 77-78, 84; Pl. Ex. 147. Bert requested a “deeded easement” because a realtor advised such written confirmation would be required to market the property. Tr. Trans. 4/29/21, pp. 78-79.

Bert discussed the issue with Ron Jackson, Defendant Scott Jackson's father. Ron told Bert he had access over MAR because it was reserved by the County to Dupea in 1969. Tr. Trans., 4/29/21, at p. 79:18-25, 89-92. Scott Jackson testified, he understood those landowners identified in the 1969 documents, and their successors, retained access to their properties over MAR. *Id.*, at 225-227. Phil Rostad, whose uncle was a commissioner in 1969, testified he had the same understanding. Rostad Depo. CRR, 128.

Williams met Angie Evans, First American Title. She found the 1969 Commission documents and her bosses confirmed access over MAR. Williams Test., 4/29/21 at pp. 79-81.

Thereafter, Williams secured an easement (Pl. Exh. 87), over the north half of Section 2 and the south half of Section 35 from Jacksons. Tr. Trans. 4/29/21 at pp. 89-92, 96-97, 106-108. Williams did not seek an easement over the south half of Section 2 because he understood he had the right to cross that road by the 1969 petition and Ron Jackson's statement. *Id.* The recorded easement from Jackson confirms that understanding: "The easement shall run from *Moss Agate Road* ... located in the N1/2 of Section 2 . . ." Pl. Ex. 87, p. 2. Scott Jackson testified this easement was drafted with the shared understanding that Williams and Jackson could access their properties over MAR, from its intersection with Highway 89 in Section 15. Tr. Trans. 4/30/21, 226:21-25.

Williams represented to buyers that access to Section 25 started off Highway 89 at Moss Agate, followed MAR through Catlin, into Jackson, where it forked in Section 2 with access through Sections 2 and 35 to land owned by the State. Tr. Trans., 4/29/2021, 1-8.

In 2013, FT managing member Timbrook looked to buy property. Timbrook Test., 1/14/21 at pp. 233-235. Timbrook testified FT's goal was to obtain land to recreate with family and hunt. Tr. Trans., 1/14/2021, at p. 251:4-24. Timbrook traveled to Meagher County and met with a realtor at the Moss Agate gate and accessed Section 25 over MAR and the Jackson easement. Tr. Trans. 1/14/21 at 235:18-22, 236-241; 245-248; Pl. Ex. 37, 39, 40, 41, 42, 43.

FT signed an agreement to purchase Section 25. Timbrook, Test. 1/14/21 at pp. 248-251. FT hired John Glover, a real estate attorney, to assist with due diligence. Glover opined "Flying T ha[d] legal access to Section 25 over ... Moss Agate Road, which [he] understood to be a county road...." Timbrook Test., 1/14/21 at p. 250, 251, 297-298, 301-303. Glover Declaration, CRR 76, ¶¶ 4, 5, 7. He realized FT needed to expand the scope of an existing easement over state land to include a residence. *Id.*, ¶ 8. Williams agreed to obtain the expanded easement. Pl. Ex. 110. Tr. Trans., 1/14/21 at 254-257, 298. In February 2014, the state expanded the easement. *Id.* at pp. 256-257. In April 2014, the parties closed. Pl. Ex. 85, 86, 87, 88; 1/14/21 Tr. Trans. 331-335.

**K. FT Builds a Cabin and Contractors Use MAR. Galt claims Trespass. Sheriff 's Office investigates and obtains 1969 County Records and Provides to Galt, who removes lock. FT finishes Construction and Uses MAR for 3 years without Interference.**

FT hired Phil Maurer to build a cabin. Tr. Trans, 1/13/21 at pp. 112-135; 1/14/21 at pp. 259-262. He and subcontractors used MAR “just about every weekday” of the summer of 2014 (Tr. Trans., 1/13/21 at 115:51 123:4-6) and finished the cabin the next summer (1/13/21; 130:19-21; 1/14/21 at 260-262). He testified concrete trucks, and supply trucks used MAR to access the site (1/13/21; 115:8-11). Subcontractors corroborated this use. Declarations of Hayes, Martyn, and Parks. CRR 76. Maurer testified he spoke with Ben Galt during construction and advised he was using MAR to access FT’s property. Tr. Trans. 1/13/21 at p. 127:4-9. Galt voiced no objection. *Id.* Tr. Trans., 1/14/21 at 269-270.

Maurer testified FT paid for improvements to MAR. He referenced Exhibit 43, a marshy area that almost impassable in the spring, but after FT paid for improvements, MAR was easier to use. Tr. Trans. 1/13/21 at p. 117: 4-25; Timbrook, 1/14/21 at pp. 242-245, Ex. 43-44. Maurer testified he never asked permission to use MAR nor was denied access. *Id.* at 125:5-19. Subcontractor Declarations confirm this testimony. CRR 76.

Ben Galt and assistant Taylor saw a concrete truck on MAR, called the Sheriff and locked the gate. Pl. Ex. 102, pp. 2-3; 102A; Tr. Trans. 1/13/21 at p. 142-143; 1/14/21 at 262-265; 4/30/21 at pp. 192-194. Deputy Rauser investigated. Tr. Trans.,

1/13/21 at pp. 135-148. He spoke to Angie Evans, with the title company, who provided records from 1969 that MAR was an abandoned county road with access reserved to landowners who used MAR to access their properties. *Id.* at pp. 137-138, 142-143. Rauser reported this to Galt, Taylor and Timbrook. Pl. Ex. 102, p. 3; Tr. Test., 1/13/21 at pp. 144-145, 147; 1/14/21 at 263-268; Pl. Ex. 104. Deputy Rauser never heard back from Galt. Tr. Trans., 1/13/21 at p. 147; 1/14/21 at 268-269. Taylor testified that after Rauser provided the 1969 documents, no objections were raised to use of MAR until 2017. Tr. Test. 4/30/21, p. 156:5-14; Tr. Test. 1/14/21 at p. 268-269. Galt agreed that because of documents provided by Rauser, he took the lock off the gate. Tr. Test. 4/30/21 at p. 190:21-25; Tr. Trans. 4/30/21, pp. 160, 195.

Galt admitted that after removing the lock, he did not contact a lawyer or expert to investigate MAR and did not file a lawsuit to decide its status, despite seeing construction vehicles traveling over MAR. Tr. Trans 4/20/21 at pp. 196-197. John Lesofski, a State Game Warden, testified he did not recall any reports of trespass over MAR while he was Game Warden. Tr. Trans. 4/30/21 at pp. 162:20-25, 163:1-10).

Timbrook testified that after Galt removed the lock in 2014, FT relied on that fact and Catlin's silence to continue investing in their property, by finishing the cabin and repairing parts of MAR. Tr. Trans., 1/14/21 at pp. 240-244, 247-248, 268:23-

25; 260:4-25, 261:1-3; 270-271, 273-279, 305; Ex. 43, 54, 56, 57, 60, 64. Timbrook estimates spending over \$500,000. Tr. Trans. 1/14/21 at pp. 276-277. Scott Jackson testified he saw FT's improvements and did nothing. Tr. Trans. 4/30/21 at pp. 220:21-25, 221:1-6, 242-243.

Timbrook testified FT's cabin was first used the fall of 2014. Tr. Trans. 1/14/21 at pp. 261:9-25; Pl. Ex. 44. For the next three years FT enjoyed its property, using MAR for access without interference. Tr. Trans. 1/14/21 at p. 271-273, 279-280, Pl. Ex. 60, 62, 63. Galt admitted during that time he had no issues with his cows or the corrals because of FT's use of MAR. Tr. Trans. 4/30/21, p.192:16-19; see also Tr. Trans., 1/14/21, p. 295:13-20.

**L. 2017. Galt Locks Gate. County Attorney Decides Judicial Resolution Required.**

In September 2017, Timbrook found the gate locked. Tr. Trans. 1/14/21 at 271-272, 281-284; Tr. Trans. 4/29/21 at pp. 76-77. Timbrook did not have cell service, so he cut the chain. *Id.* at p. 281. He called Taylor from his cabin to notify her of his understanding of his right of access and intention to replace the cut link with his own lock. *Id.* ; Tr. Trans. 4/30 at pp. 156-157. Taylor did not object. *Id.* at pp. 281-283. Taylor testified the return of the lock was a sudden decision by Catlin, in response to fires. Tr. Trans., 4/30/21, p. 160-161.

Timbrook attempted to talk to Galt, but his calls were never returned. Tr. Trans. 4/30/21 at p. 192-193. Bert Williams left Galt and Taylor messages, but his calls were never returned. Tr. Trans, 4/29/2, p. 95:5-9; pp. 282-283; 293; 4/30/29 at pp/ 192-193. Catlin did not remove the lock on the gate when FT protested and the Sheriff referred it to the County Attorney. She testified she looked at the records and because her understanding was “murky” the parties needed a judge to decide access. Deschene Depo., p. 39:20-25; 1/14/21 Tr. Trans. pp. 285-286.

**M. FT Refers Dispute to Title Company. Williams give FT Permission to Cross Their Land in the Interim.**

MAR became inaccessible to FT. Tr. Trans. 1/14/21 at pp. 285-286. 311. It tendered the matter to First American who hired counsel to try and resolve the issue without breaching the peace or litigation. Tr. Trans., 1/14/21 at pp. 285-286. Between 2017 and the district court’s order, Williams permitted FT to drive through their property over a “path” that was very rough, and the scope the easement across state land did not allow a residence. Tr. Trans. 1/14/21 at pp. 285- 294, 311-312; Pl. Ex. 77, 79, 80, 81.

Settlement efforts failed. FT filed this case and sought preliminary injunctive relief. At the hearings. Catlin placed great weight on alleged “other accesses” allegedly available to FT. Hallin, admitted that each of the alleged “other accesses” were either not practically feasible (obliterated with no access across a river) and/or lacked easement as a matter of right. *See*, Test. of Hallin, 4/30/21 at pp. 8-31, 65,

84-89; Tr. 4/29/21 at p. 263:3-7; *Cf.* Timbrook, Trans., 1/14/21, pp. 288-289, 313-316, 327-328, 330. Jackson offered similar testimony, Tr. Trans. 4/30/21, p. 213:17-21; Lyman Depo., CRR 128, 136 at p. 57:22-25; Tr. Trans. 4/29/21 (B. Williams) at pp. 85-87, 99-100, 109-110; D. Williams at pp. 114-116, 119; Henesh, Tr. Trans. 4/29/21 at pp. 133-143. Doig and Rostad didn't know of access on Road 19. Timbrook testified the cost of rebuilding Road 19, exceeded \$350,000. Tr. Trans. 1/14/2021 at pp. 313-315, 330. Tom Henesh, a professional engineer, described MAR as being obviously improved, with culverts, rock added to the roadbed, and ditches constructed along sides of the road. Tr. Trans. 4/29/21 at pp. 121-123; 136:7-16. In his professional opinion, by far the best access to FT's property is over MAR. *Id.* at pp. 143-146.

### **STANDARD OF REVIEW**

FT agrees with Catlin's Standard of Review, adding a manifest abuse of discretion is one that is "obvious, evident or unmistakable." *Sandrock v. Etienne*, 2010 MT 237, ¶ 13, 358 Mont. 175, 243 P.3d 1123.

### **ARGUMENT SUMMARY**

The Order is anchored in substantial evidence, correct conclusions of law, and minimized harm to all parties *BAM*.

FT established a prima facie case MAR is a county road, ending at the stage station, supported by priority of calls.

Monetary damages are irrelevant. *Flying TI* is law of the case.

FT established a prima facie easement by estoppel. FT relied upon Catlin's silence, after removing the lock, to invest in property accessed by MAR and used it for three years -- the last peaceable event before the lock's 2017 return.

The 1969 petition, if valid, did not terminate private interests in MAR.

Challenges to the Order, without record citations are contrary to appellate procedure rules and without factual support.

## ARGUMENT

### A. **The Order is Supported by Facts Developed After Discovery. The Conclusions of Law Are Correct.**

#### 1. **Introduction.**

MCA § 27-19-201 states an injunction may be granted:

(1) When it appears ... the applicant is *entitled to the relief demanded* and ... any part of the relief consists in restraining the commission or continuance of the act complained of . . .

(2) When it appears ...the ... *continuance of some act* during the litigation would produce a great or irreparable injury to the applicant;

(3) When it appears . . . *the adverse party is doing . . . some act in violation of the applicant's rights . . .*

*Id.* (emphasis added).

The circumstances when injunctive relief is available are disjunctive and a finding supporting one circumstance is sufficient for granting an injunction. *Sweet Grass Farms, Ltd. v. Bd. of Co. Commrs.*, 2000 MT 147, ¶27, 300 Mont. 66, 2 P.3d

825. A *prima facie* case is such as will prevail until contradicted and overcome by other evidence. *Black's Law Dictionary*, p. 1071 (5<sup>th</sup> Ed.); MCA § 26-01-102 (“Prima facie evidence defined) FT satisfied its burden.

This Court discussed these standards in *BAM Ventures, LLC v. Schifferman*, 2019 MT 67, 395 Mont. 160, 437 P.3d 142. There, the dispute concerned access to properties owned by BAM and Schifferman. *Id.* at ¶ 2. In 2003, before improvements were made to the properties, Schiffermans purchased their lot, which lacked physical access. *Id.* In 2004, the Department of Transportation added a paved apron extending from the highway toward the border of the properties and installed a gate nearby. *Id.*

From 2004, Schiffermans used these improvements to access their lot and improved the access. *Id.* In 2005, Schiffermans built a garage followed by a house in 2016. *Id.* They installed a cattle guard near the gate. Contractors used the apron and driveway to access the property. *Id.* Schiffermans believed their access was on their lot and received no objections about its use. *Id.*

In 2017, BAM purchased the adjacent lot and used its property to host recreational activities. *Id.* at ¶ 3. BAM's principal believed Schiffermans' driveway ran across part of BAM's property, so he fenced off the driveway and removed the cattle guard. *Id.* In response, Schiffermans removed part of BAM's fencing and began driving across an unimproved area to access their driveway. *Id.*

As of the injunction hearing, Schiffermans had attempted to improve this altered route but found it did not provide comparable access. *Id.* An expert testified it would take several days and \$7,000 to build comparable access. *Id.*

After hearing, the district court determined Schiffermans made a *prima facie* case of a prescriptive easement and granted a preliminary injunction pursuant to MCA § 27-19-201(1). *Id.* at ¶ 5. The district court held Schiffermans had not established irreparable harm, and money damages could not be considered irreparable harm, because "money damages may be recovered ...without resort to equity." *Id.* The court reasoned, however, that Schiffermans did not need to establish "irreparable harm" because that requirement was necessary for injunctive relief under subsection (2) of MCA § 27-19-201. *Id.*

On appeal, this Court addressed the standards in paragraphs 14-16, explaining "[t]he prevention of some degree of harm or injury is an overlapping concept ...implied within all of the subsections of the statute . . . This was the essential meaning of our ...statement in *Porter* ... that "[a]lthough no finding of injury or damage is required for a preliminary injunction under [subsection (1)], it is the court's duty to minimize the injury or damage to all parties to the controversy." *Id.*, at ¶ 16, (emphasis added) (citations omitted).

This Court affirmed the district court's preliminary injunction order, holding while Schiffermans did not prove "irreparable harm," they established a *prima facie*

case for relief and would suffer continuing harm by not being allowed to access their property by way of the access they had used for years before the start of the litigation. *Id.*, ¶ 18.

*BAM* applies. FT alleged an easement over MAR under several theories. In recognition of the substantial facts before the district court, following nearly four days of testimony, Catlin does not credibly contest FT failed to establish a *prima facie* case for relief. Instead, it asserts FT (1) can be “made whole” with damages from the title company; (2) failed to show harm and has other access; (3) failed to “establish” an easement by estoppel; and (4) the last peaceable event was in 2017 when Catlin locked the gate.

**2. FT Established a Prima Facie Case that MAR is a County Road that has not been abandoned and Used For Years Without Interference as Access to Section 25.**

The district court correctly found FT established a *prima facie* case that MAR is a county road created in 1892 that has not been abandoned. The standard for determining the existence of a public road is whether 'the record taken as a whole shows that a public road was created. *Letica Land Co. v. Anaconda-Deer Lodge Cty.*, 2015 MT 323, ¶ 15, 381 Mont. 389, 362 P.3d 614 (Mont. 2015). This standard reduces the burden of having to produce precise documentary evidence showing that a public road was validly created a century after the fact. *Reid v. Park Cty.*, 192 Mont. 231, 627 P.2d 1210, 1213 (Mont. 1981).

The 1891 petition, accepted and approved by the county in 1892, as reflected in County records, constitutes *prime facie* evidence of the creation of a county road over MAR. MCA § 26-1-605 (Entries in public or other official books or records made in the performance of the officer's duty by a public officer of this state or any other person in the performance of a duty specially enjoined by law are *prima facie* evidence of the facts stated in the book or record.); MCA 26-1-606 (Entry made by an officer or board of officers or under the direction and in the presence of either, in the course of official duty, is *prima facie* evidence of the facts stated in such entry).

The parties disputed the terminus of the 1892 change in the WWS Springs to Livingston Road "at or near the stage station." As summarized above, the district court received testimonial and documentary evidence on this issue. It turned to MCA § 70-20-201 which explains rules of construction in construing descriptions:

(1) Where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite, unknown, or false does not frustrate the conveyance, but it is to be construed by the first mentioned particulars.

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

\* \* \*

(6) When the description refers to a map and that reference is inconsistent with other particulars, it controls them if it appears

that the parties acted with reference to the map; otherwise, the map is subordinate to other definite and ascertained particulars.

*Id.* (emphasis added). Order, COL N, O & P; Tr. Test. 4/29/21 at pp. 147-150; Pl. Ex. 118, 120.

Catlin does not claim the district court erred in applying these rules governing the priority of calls, to the evidence before it when finding the stagecoach station location in Section 15, and not near a sheep camp miles away in Section 23. The statute is not even mentioned in Catlin's brief. Regardless, the district court applied these rules of construction and correctly found FT made a prima facie case that MAR ended at Moss Agate, "at or near the stage station," in Section 15 because the stagecoach station constituted a permanent and ascertainable monument the location of which takes priority over any inconsistency associated with the approximate distance of that monument from the Hill Ranch or the "sheep camp." *Larsen v. Richardson*, 2011 MT 195, ¶¶ 43-49, 361 Mont. 344, 260 P.3d 103 (discussing priority of calls)

Having established a prima facie case that MAR was a county road ending at the stage station in Section 15, the next issue was abandonment. A county road, once established, continues to be a county road until abandoned or vacated by (1) operation of law; (2) judgment of a court of competent jurisdiction; or (3) the order of the Board of County Commissioners. MCA § 7-14-2615; *Smith v. Russell*, 2003 MT 326, 318 Mont. 336, 80 P.3d 431, 435. Abandonment cannot be established by

mere implication. *McCauley v. Thompson-Nistler*, 2000 MT 215, 301 Mont. 81, 10 P.3d. 794. Instead, the “party claiming abandonment has the burden of proving that acts claimed to constitute abandonment demonstrated a “decisive and conclusive intent to abandon the road.” *Soup Creek LLC v. Gibson*, 2019 MT 58, 395 Mont. 105, 439 P.3d 369.

Here, the district court again evaluated the evidence developed over the course of a year, including road records and commissioners’ journals from Meagher County, and the testimony of landowners as summarized above and applied the law. It correctly concluded in COL R-U that there was insufficient evidence by Catlin to find at this stage of the proceedings, abandonment, and even if Catlin met its burden, the 1969 Petition reserved access to the Dupeas, and because FT is a successor to Dupeas, prima facie evidence of reserved access over MAR existed.

In sum, the court carefully weighed the evidence presented over nearly four (4) days of testimony and applied that evidence to the law. It correctly found FT established a prima facie case on the theory that MAR was and remains a county road starting in Section 15, proceeding through Sections 14 and 11 and across Section 2, until the road forks in the north ½ of Section 2. This is the route FT used for over three (3) years until Galt placed a lock on the gate, which interferes with FT’s enjoyment of the easement, and results in harm sufficient to support an injunction under subsections (1) and (3) of MCA § 27-19-201. *BAM*, 2019 MT 67,

¶ 14, 395 Mont. 160, 437 P.3d 142. Further, the court minimized the harm to all parties by limiting access over MAS to only the parties, and allowing Catlin to lock the gate, provided the parties received a key. The district court's decision is factually sound and legally correct.

**3. FT's case against the Title Insurance Company is Irrelevant and Rejected in *Flying T I*, which is the Law of the Case.**

Catlin argues at pages 11-12, that the court erred because FT seeks monetary damages against its title insurance company in a separate lawsuit, citing *Boyer v. Karagacin* (1978), 178 Mont. 26, 582 P.2d 1173. This argument finds no support in *Boyer*, the law of injunctions, and was considered and rejected by this Court in *Flying T Ranch v. Catlin Ranch, LP*, 2020 MT 99, 400 Mont. 1, 462 P.3d 218 ("*Flying T I*"), which is the law of the case. *State v. Gilder*, 2001 MT 121, ¶ 9, 305 Mont. 362, 28 P.3d 488.

FT's claims against its title insurance company for breach of contract and bad faith, does not furnish "all the relief to which [FT] is entitled..." *Boyer*, 178 Mont. 31, 582 P.2d at 1176. This Court held in *Flying T I*: "[T]he determination of the status of Moss Agate ... goes well beyond the claims Flying T has in its ... contract and bad faith claim against First American, and any relief Flying T may ... obtain from First American ... would do nothing to determine the status of Moss Agate...." 2020 MT 99, ¶ 17, 400 Mont. 1, 462 P.3d 218. That decision is the law of the case. "Under the doctrine of law of the case, a prior decision of this Court resolving a

particular issue between the same parties in the same case is binding and cannot be relitigated. This Court has applied the doctrines of law of the case ... to preclude an appellant from raising issues that were decided by this Court on a previous appeal.” *State v. Gilder*, 2001 MT 131, ¶ 9, 305 Mont. 362, 28 P3d 488 (citations omitted). Catlin’s argument is without merit.

**4. FT established a *prima facie* case for relief and proved harm by being denied its historic access.**

Catlin argues FT failed to show sufficient evidence of harm to justify the preliminary injunction, arguing FT has other access. *Id.* 13-18. Catlin conflates and then ignores the role of “harm” in MCA § 27-19-201, as analyzed in *BAM*, and then ignores the evidence of legal and practical difficulties associated with each of the other “accesses” it claims exists in this case.

As discussed, the court evaluated the substantial evidence, applied the priority of calls in the applicable statute and held FT established a *prima facie* case that MAR is a county road located in Section 15 that has not been abandoned. Catlin does not seriously dispute that finding or conclusion.

FT was not required to show “irreparable harm” as Catlin implies. *BAM* says the opposite and implies that harm is inherent in cases where the applicant makes a case o *prima facie* case of entitlement to relief under subsection (1) of the statute. In *BAM*, the Schiffermans attempted to improve the altered access route but found it did not provide comparable access to that enjoyed for years before the dispute. *Id.*

An expert testified it would take days and \$7,000 to build a comparable access. *Id.*

This Court held that while Schiffermans had alternative access, they “[e]stablished they would suffer continuing harm by not being able to access their property, while the litigation was pending, by way of the access route they had used for many years, and thus satisfied subsection (1).” 2019 MT at ¶ 18.

The same analysis and conclusion apply here. Catlin’s claim FT has other access and therefore was not “harmed” is the same as that rejected in *BAM* and is untrue. FT used MAR for over three (3) years, and improved that road, because, like the access in *BAM*, it is *the only feasible access* to its property, Second Timbrook Aff., CRR 2, 034 at ¶10, a fact recognized by Catlin when it offered FT use of MAR to haul propane, to winterize its cabin after Catlin locked the gate in 2017. Pl. Ex. 101.

At the hearings, FT showed that alleged access to the north and south no longer existed; that bridges over creek crossings were absent and legal impediments existed, including Jacksons’ denial of access over a portion of Section 2 (south of the “Y”) and the scope of the easement across state land to the north, from Williams’ permissive route, prohibits use for a residence. The roadbed to the south was obliterated in places, with no access across the Smith. Timbrook testified it would cost in excess of \$350,000 to construction a road of similar quality to that of MAR.

Trs. 1/14/21; Affidavit, CR 23, at ¶ 9. Engineer Tom Henesh confirmed the physical limitations of these other claimed accesses.

In short, as Catlin's expert Hallin admitted, Moss Agate is the **ONLY** access that permits Flying T to reasonably access its property and was the access used for over three years before Catlin locked the gate. As in *BAM*, FT made a *prima facie* case for relief and the locked gate subjects FT to harm because it cannot access its property over the route it used between 2014 and the fall of 2017.

Contrary to its argument at pages 18-20, Catlin offered no evidence of any harm it suffered when FT used MAR between 2014 and 2017. Galt admitted no complaints with FT's use of MAR after learning of the county road records in 2014. Game warden, Lesofski, acknowledged no complaints, as did the Sheriff. Catlin offered no evidence of future harm. The district court carefully limited potential harm to Catlin by limiting access to FT, Williams and Jackson and allowed Catlin to lock the gate if it provided all parties a key. Order, p. 26, III.

The district court's Order is factually sound, legally correct and consistent with *BAM*.

**5. FT Established a Prima Facie Case of Easement by Estoppel.**

The district court held FT established a *prima facie* case for an easement by estoppel. COL, V, W, X, Y, Z, AA. In *Kelly v. Wallace*, 1998 MT 307, 292 Mont. 129, 972 P.2d 1117, this Court recognized the theory, but found the evidence

insufficient following a trial. Since *Kelly*, the American Law Institute adopted the *Restatement (Third) of Property (Servitudes)*, which provides as follows:

If injustice can be avoided only by establishment of a servitude, the owner...of land is estopped to deny the existence of a servitude burdening the land when:

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

(2) The owner ...represented ... the land was burdened by a servitude under circumstances in which it was reasonable to foresee ... 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; COL, V. In nearly a dozen cases since *Kelly*, this Court has cited to the *Restatement (Third)* in easement cases. See, FT's Proposed Findings and Conclusions, CRR 150 at p. 45 (citing cases)

The district court observed that application of this theory 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.” *Restatement Third*, § 2.9 comment *d* and Illustration 5. COL X. It applied these concepts, finding FT made a prima facie case for relief.

FT purchased its property, understanding its access was over MAR. It retained contractors to construct a cabin and related improvements on its property

with access over MAR. Catlin saw a concrete truck on MAR going toward FT's property, locked the gate and called the Sheriff. That office investigated and presented Catlin with county records reflecting access. Catlin removed the lock.

Galt acknowledged he disputed that deputy's information but took no action, or advising FT, orally or in writing, he disagreed. Knowing FT was investing in its property in reliance upon MAR, Catlin had a duty to speak if it disagreed with the information provided by the sheriff regardless if it believes the information was incorrect. *See, id.*, § 2.10 at p. 146 ("Failure to object to an investment ... in improvements to land by another may give rise to an estoppel against the owner ... of the land, if the owner ... knows or reasonably should know ... the investment is being made on the basis of a mistaken belief ... the investor has a nonrevocable right to use the land.").

Catlin argues it is being penalized by "neighborly acts of courtesy" yet failed to present evidence of such claimed acts with respect to FT, because no such evidence exists. If that evidence is removing the lock, it did so without advising FT it was doing so without waiver of protest or claims to the contrary.

Catlin's assertion that § 2.10 of the *Restatement* precludes application of estoppel, when a monetary award is available reflects a misunderstanding of the *Restatement* and ignores *Flying T I*. Catlin appears to refer to comment d, which states a court should consider whether injustice can be avoided by an award of

monetary compensation for the servitude. That consideration does not apply as this Court previously ruled that money damages will not resolve FT's access issue.

In sum, the court correctly ruled, based upon the facts to date, that FT reasonably relied upon Catlin's silence and inaction, by resuming investment in its property and improving MAR after Catlin removed the lock from the gate in 2014 over MAR. Under *Kelly*, or the *Restatement* a prima facie case of easement by estoppel was established.

The district court also held, FT presented a prima facie case that even if the 1969 petition to abandon was valid, that the petition expressly reserved to FT, as a successor to the Dupeas, a right of access over MAR, which the record reflects "no action [was] taken" with respect to that road. COL BB-FF. Catlin and Jacksons do not challenge this conclusion.

"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 private easements that were appurtenant to the dominant estates, served by a county road may be implied. Public policy disfavors the construction of instruments resulting in the "landlocking" of land.) *Restatement (Third) of Property (Servitudes)* § 4.1, comment f.

Before the district court, Catlin failed to offer evidence of a "decisive and conclusive" character, or evidence, to establish to establish a prima facie case of

abandonment as required by *Soup Creek*. Even if such evidence existed the county's abandonment of its interests in MAR did not support a finding that the County could, or did, abandon *private interests* in the road. *Restatement (Third) of Property (Servitudes)* § 7.4 (Am. Law Inst. 2000), Reporter's Note, p. 357 ("Abandonment ... only effective to terminate a servitude if all benefitted parties abandon their interests. Abandonment of a public road does not extinguish existing private rights of way in the road.").

The district court correctly held, and Catlin does not challenge, that a prima facie case exists that in the alternative, in 1969, the County reserved a right of entry over MAR to Dupea and the access should not be construed as personal to Dupea, but instead runs with the land, to the benefit of FT as successor to Dupea.

**6. The Last Actual, Peaceable Uncontested Event Was September, 2017, Before Catlin Locked the Gate.**

Catlin next claims the district court erred finding the last actual, peaceable, uncontested event was FT's use of MAR for the approximately three years before the litigation commenced. Order, MM. Nonsense. "The last actual, peaceable, non contested condition which preceded the pending controversy," *BAM*, ¶ 18, was FT's unmolested use of MAR for three years after the deputy's meeting with Galt and Taylor in 2014 followed by Catlin's removal of the lock on the gate. While Catlin now claims it silently objected, it did not contest FT's use of MAR to improve or enjoy its property.

Further, when Catlin returned the lock to the gate, it was not because of FT, but a wildfire across the highway. When confronted by the lock, FT cut the lock and called Catlin, whose agent promised a key that never arrived. Thereafter, the County Attorney reviewed the issue and concluded the issue required judicial resolution. After that the parties debated access and when that failed, FT filed a complaint.

The court correctly ruled the last actual, peaceable, uncontested event was FT's uncontested use of MAR after the removal of the lock in 2014 until its return in September, 2017 followed by the County Attorney's opinion that a court would need to decide the issue.

**7. The District Court Correctly Enjoined Catlin from Interfering with the Access of Williams and Jacksons Across MAR**

This argument is directed to Williams and Jacksons. However, the Order is consistent with *BAM*, ¶ 16, which directs a court to minimize the harm to all parties.

**8. The Order Was Based Upon Findings FT Made a Prima Facie Case for Relief**

Catlin and Jackson take liberties with the Order asserting it decided ultimate issues of fact and law, which it did not, and in making this argument ignore the unique procedural posture of this case, brought about by their own procedural maneuverings which only served to delay the outcome the evidence and law supports, and at the end of the day backfired.

The court's Order repeatedly states only that FT established a "prima facie case for relief," nothing more. *See*, Order at O, P, U, V, Y, AA, BB, MM, NN. Unlike many preliminary injunction Orders, which are made upon affidavits and before discovery, the court's Findings and Conclusions are the product of nearly four days of testimony, following one year of discovery, including expert reports, depositions, declarations and exhaustively researched county records. The court's Order is the natural result of that extensive process, which remains open upon remand and trial if additional evidence is discovered, of which Catlin identifies as depositions of County Commissioners, the probative value and admissibility of which is questioned.

In sum, when Catlin and Jackson failed to get the result they sought, they attempt to bring to this Court everything they can imagine prompting reversal of the court's order, in what appears to be another procedural play – disqualification of the judge on remand, and seek another bite at the same apple, with the same evidence.

**B THE DISTRICT COURT'S FINDINGS AND CONCLUSIONS ARE SUPPORTED BY FACTS AND ROOTED IN THE LAW.**

Finally, Catlin attacks the district court's Order citing to alleged errors in Finding and Conclusions yet offers no evidence or citations to the record asserting errors that are "obvious, evident or unmistakable" or a manifest abuse of discretion.

The court's Findings of Fact are supported by substantial evidence. Contrary to Catlin's assertions at pages 34-36, the locations of MAR, the stage station and the

sheep camp were supported by the testimony of Dr. Lahren, Henesh, Ben and Bill Galt, Jackson, Doig, Rostad, Deschene, a deputy Sheriff, the cross-examination of Catlin's expert, Hallin, County Road and Commission Records, federal and state maps and aerial photographs,

The lack of abandonment was supported by the testimony of Lahren, Hallin, Henesh, Rostad, Williams, a deputy Sheriff, and documentary evidence from the County and Sheriff.

As it concerns damages, the Court simply advised, in the context of a preliminary injunction and this Court's decision in *BAM*, that FT had presented prima facie evidence of harm resulting from Catlin's actions and inactions. The inability to use MAR after Catlin locked the gate in 2017 is not in reasonable dispute and *BAM* supports a finding of harm.

With respect to alternative access to Section 25, the district court's Order reflects what the evidence showed through the testimony of Bert and Debbie Williams, Timbrook, Hallin, Henesh, Galt, Jackson and the depositions of Doig and Rostad.

The Court understood Jacksons own all of Section 2, and any scrivener error is harmless and no prejudice was demonstrated by Catlin.

## **CONCLUSION**

The district court's Order is properly affirmed.

RESPECTFULLY SUBMITTED this 22nd day of April, 2022.

GALLIK, BREMER & MOLLOY, P.C.



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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 Brief is printed with proportionately-spaced Times New Roman typeface of 14 points; is double spaced except for lengthy quotations or footnotes, contains 10,098 words by Order granted by Court to file overlength brief, excluding the Table of Contents, the Table of Authorities, Certificate of Service and Certificate of Compliance, as calculated by Microsoft Word software.

Dated this 22nd day of April, 2022.

GALLIK, BREMER & MOLLOY, P.C.



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By: Brian K. Gallik

## CERTIFICATE OF SERVICE

I hereby certify that I have served a true and accurate copy of the foregoing on April 22 2022 by email upon the following:

Hanna Warhank  
Rachel A. Taylor  
PO Box 1645  
Great Falls, MT 59403  
hwarhank@chjw.com  
rtaylor@chjw.com

Matt Williams  
777 East Main Street, STE 205  
Bozeman, MT 59715  
Ph: (406) 551-6169  
mattheww53@aol.com

Vuko J. Voyich  
Kelly Voyich  
104 E. Callender, Suite s 2 & 3  
PO Box 1409  
Livingston, MT 50047  
office@andersonandvoyich.com

Susan Swimley  
1807 W. Dickerson St. STE B  
Bozeman, MT 59715  
swimley@swimleylaw.com

Jim Lippert  
PO Box 1636  
Big Timber, MT 59011  
jimlippertlaw@itstriangle.com

Nancy McCracken



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Brian Gallik

## CERTIFICATE OF SERVICE

I, Brian K. Gallik, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 04-22-2022:

Matthew W. Williams (Attorney)  
506 e. babcock  
bozeman MT 59715  
Representing: Lisa Anderson, Connie Hix, Bert Williams, Debra Williams  
Service Method: eService

Hanna Warhank (Attorney)  
P.O. Box 1645  
Great Falls MT 59403  
Representing: Lynn Jackson, Scott Jackson  
Service Method: eService

Rachel Ann Taylor (Attorney)  
6017 Vigilante Lane  
Great Falls MT 59404  
Representing: Lynn Jackson, Scott Jackson  
Service Method: eService

Susan Brooks Swimley (Attorney)  
1807 W. Dickerson, Suite B  
Bozeman MT 59715  
Representing: Meagher County Commission  
Service Method: eService

Vuko J. Voyich (Attorney)  
PO Box 1409  
Livingston MT 59047  
Representing: Catlin Ranch, LP  
Service Method: eService

James B. Lippert (Attorney)  
P.O. Box 1636  
Big Timber MT 59011  
Representing: Catlin Ranch, LP  
Service Method: eService

Electronically signed by Corrie Larson on behalf of Brian K. Gallik  
Dated: 04-22-2022