

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 22-0274

RONALD R. OBERLANDER,

Third-Party Plaintiff, Third-Party Counterdefendant and Appellant,

v.

JAQUES HENNEQUIN, CARLI HENNEQUIN, KENT J. WATKISS, TAWANA
RAE WATKISS, JEFFREY S. MCDONALD, NATALIE M. MCDONALD,
CHRISTOPHER M. ROEMER, JOHN R. ZAUHER, KELLI D. GOLDSBURY,
JOHN J. GOLDSBURY, SUSAN DORAN CARTER, STEFANY J. FRAY,
PATRICK OFFEN, SAM STOVER, AUDREY J. STOVER, KATHIE L.
STANISLAW, WALTER W. RICHARDS, III, SUSAN L. RICHARDS, LOUIS
LEVINSON, CAROLYN M. LEVINSON, JOHN D. RANDALL, SUSAN K.
RANDALL, VICTOR C. BIELBY, TRUSTEE, JOHN S. STIEGLER, MELISSA
STIEGLER, DAVID FRANZMAN, LINDA FRANZMAN, JAMES K.
VANBLARICOM, AND KRISTIN L. LEAVENS.

Third-Party Defendants, Third-Party Counterclaimants and Appellees.

ANSWER BRIEF OF APPELLEES

On Appeal from the Twenty-First Judicial District Court
Ravalli Cause No. DV-21-317, Honorable Shane A. Vannatta

Joseph D. Houston
Kevin S. Jones
Jones & Associates, PLLC
2625 Dearborn Avenue, Ste 102A
Missoula, MT 59804
Phone (406) 541-3333
joe@jonesmtlaw.com
kevin@jonesmtlaw.com
Attorneys for Appellees

Jeffrey R. Kuchel
Gregory G. Schultz
Crowley Fleck, PLLP
P.O. Box 7099
Missoula, MT 59807-7099
Phone (406) 523-3600
jkuchel@crowleyfleck.com
gschultz@crowleyfleck.com
Attorneys for Appellant

TABLE OF CONTENTS

TABLES OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iv
STATEMENT OF THE ISSUES.....	1
I. Whether the District Court's Order entered April 11, 2022, dismissing Oberlander's prescriptive easement claims is subject to review under this appeal. If such Order is subject to this appeal, whether the District Court correctly dismissed Oberlander's prescriptive easement claims for lack of standing.	
II. Whether the District Court manifestly abused its discretion in granting the Preliminary Injunction against Oberlander and waiving the undertaking.	
III. Whether the District Court was correct in ordering Oberlander to release the Lis Pendens he filed on Appellees' properties.	
STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS.....	5
STANDARD OF REVIEW.....	12
SUMMARY OF ARGUMENT.....	13
ARGUMENT.....	17
I. The District Court's Order entered April 11, 2022, dismissing Oberlander's prescriptive easement claims is not subject to review under this appeal.....	17
A. Alternatively, the District Court correctly dismissed Oberlander's prescriptive easement claims for lack	

of standing.....	19
II. The District Court did not manifestly abuse its discretion in granting the Preliminary Injunction.....	25
A. Sufficient evidence exists to support the District Court's finding that it appears Appellees are entitled to their demanded relief.....	25
B. Sufficient evidence exists to support the District Court's finding that it appears during the litigation Oberlander will engage in some act in violation of Appellees' property rights, tending to render a final judgment ineffectual.....	32
C. The District Court did not manifestly abuse its discretion in waiving the statutory undertaking in the interest of justice.....	34
D. The District Court did not abuse its broad discretion in limiting the time allowed to present evidence at the show cause hearing.....	36
III. The District Court was correct in ordering Oberlander to release the Lis Pendens he filed on Appellees' properties.....	38
CONCLUSION.....	39
CERTIFICATE OF COMPLIANCE.....	41
CERTIFICATE OF SERVICE.....	42

TABLE OF AUTHORITIES

Cases:

<i>Baxter Homeowners Ass'n v. Angel</i> , 2013 MT 83, 369 Mont. 398, 298 P.3d 1145.....	19
<i>Big Sky Hidden Village Owners Ass'n, Inc. v. Hidden Village Inc.</i> 276 Mont. 268, 915 P.2d 845.....	18
<i>Blazer v. Wall</i> , 2008 MT 145, 343 Mont. 173, 183 P.3d 84.....	21
<i>Brimstone Mining, Inc. v. Glaus</i> , 2003 MT 236, 317 Mont. 236, 77 P.3d 175.....	13
<i>Davis v. Westphal</i> , 2017 MT 276, 389 Mont. 251, 405 P.3d 73.....	18, 25, 26, 31
<i>Fink v. Williams</i> , 2012 MT 304, 367 Mont. 431, 291 P.3d 1140.....	37
<i>Flora v. Clearman</i> , 2016 MT 290, 385 Mont. 341, 384 P.3d 448.....	12
<i>Fox Farm Estates Landowners Ass'n v. Kreisch</i> , 285 Mont. 264, 947 P.2d 79 (1997).....	30
<i>Hennen v. Omega Enterprises, Inc.</i> , 264 Mont. 505, 872 P.2d 797 (1994).....	18
<i>In re Estate of Snyder</i> , 2007 MT 146, 337 Mont. 449, 162 P.3d 87.....	18
<i>Larson v. State</i> , 2019 MT 28, 394 Mont. 167, 434 P.3d 241.....	21
<i>Leichtfuss v. Dabney</i> , 2005 MT 271, 329 Mont. 129, 122 P.3d 1220.....	22, 23
<i>Miller v. State Farm Mut. Auto. Ins.</i> , 2007 MT 85, 337 Mont. 67, 155 P.3d 1278.....	19
<i>Porter v. K & S Partnership</i> , 192 Mont. 175, 181, 627 P.2d 836, 839 (1981).....	31

<i>Rasmussen v. Fowler</i> , 245 Mont. 308, 800 P.2d 1053 (1990).....	23, 24
<i>Shammel v. Canyon Resources Corp.</i> , 2003 MT 372, 319 Mont. 132, 82 P.3d 912.....	12
<i>Shors v. Branch</i> , 221 Mont. 390, 720 P.2d 239 (1986).....	13
<i>Slauson v. Marozzo Plumbing & Heating</i> , 2009 MT 333, 353 Mont. 75, 219 P.3d 509.....	21, 22, 23
<i>State v. Pound</i> , 2014 MT 143, 375 Mont. 241, 326 P.3d 422.....	12, 13
<i>Tomlin Enterprises, Inc. v. Althoff</i> , 2004 MT 383, 325 Mont. 99, 103 P.3d 1069.....	12, 13
<i>Weems v. State</i> , 2019 MT 98, 395 Mont. 350, 440 P.3d 4.....	30-31
<i>West v. Club at Spanish Peaks, LLC</i> , 2008 MT 183, 343 Mont. 434, 186 P.3d 1228.....	39
Statutes:	
Mont. Code Ann. § 1-3-212.....	28
Mont. Code Ann. § 27-19-201.....	14, 15, 25, 26, 32, 34
Mont. Code Ann. § 27-19-306.....	16, 34
Mont. Code Ann. § 70-16-202.....	29
Mont. Code Ann. § 70-17-103.....	22
Mont. Code Ann. § 70-19-102.....	16, 39
Mont. Code Ann. § 70-20-101.....	30

Rules 4, M.R.App.P.17

Rule 6, M.R.App.P.17, 19

Rule 16, M.R.Civ.P.37

Other Authorities:

Thompson on Real Property vol. 7, § 60.02(f)(1)
(David A. Thomas ed., 2d Thomas ed., 2006).....21-22

STATEMENT OF THE ISSUES

I. Whether the District Court's Order entered April 11, 2022, dismissing Oberlander's prescriptive easement claims is subject to review under this appeal. If such Order is subject to this appeal, whether the District Court correctly dismissed Oberlander's prescriptive easement claims for lack of standing.

II. Whether the District Court manifestly abused its discretion in granting the Preliminary Injunction against Oberlander and waiving the undertaking.

III. Whether the District Court erred in ordering Oberlander to release the Lis Pendens he filed on Appellees' properties.

STATEMENT OF THE CASE

This case involves Appellant Ronald Oberlander, a property owner and member of Hidden Valley Ranches Homeowners Association, using the private road easements within the Hidden Valley Ranches subdivision, namely Hidden Valley Road South and Fescue Slope Road, to access land located outside the subdivision that Oberlander leases from the State of Montana for a commercial agricultural operation. The Hidden Valley Ranches Homeowners Association (“HOA”) commenced this action against Oberlander, in part, to enjoin Oberlander

and his agents from using the Hidden Valley Ranches private road easements to access the state land (Dkt. 1).

Oberlander filed an *Amended Third-Party Complaint* claiming appurtenant prescriptive easements against each property owner along the portions of private road easements that Oberlander uses to access the state land (Dkt. 8). In connection with his prescriptive easement claims, Oberlander filed a Lis Pendens on the separate properties. (Dkt. 4). For their *Answers to the Amended Third-Party Complaint and Counterclaim*, the Appellee Third-Party Defendant property owners (“Property Owners”) denied the existence of an easement over their properties to access the state land. They also asserted claims for trespass and requested an order enjoining Oberlander and his agents from entering upon their properties to access the state land (Dkt. 18, 25, 28, 31). The owner of the state land does not claim any access easements over the Hidden Valley Ranches properties. By Order dated April 11, 2022, the District Court dismissed Oberlander’s prescriptive easement claims for lack of standing (Dkt. 115). Oberlander did not seek certification of that Order for appeal. No other easement claim has been alleged by Oberlander in this action.

On April 15, 2022, the Property Owners filed an *Application for Preliminary Injunction and Temporary Restraining Order With Notice* (Dkt. 117) to enjoin Oberlander and his agents during the pendency of this action from entering upon their properties, including the Hidden Valley Ranches private road easements, for the purpose of accessing the state land leased by Oberlander. The *Application for Preliminary Injunction* requested a waiver of the undertaking in the interest of justice. The Property Owners also requested an order requiring Oberlander to immediately remove or release the Lis Pendens he filed on their properties in connection with his dismissed easement claims.

On April 19, 2022, the Court issued a *Temporary Restraining Order* (Dkt. 118) immediately enjoining Oberlander, his agents, guests, and invitees from entering upon the Property Owners' properties, including Hidden Valley Road South and Fescue Slope Road, for the purpose of accessing the state land. Oberlander subsequently filed a *Motion to Dissolve the Temporary Restraining Order* (Dkt. 119), which Motion was denied (Dkt. 124).

In the *Temporary Restraining Order* (Dkt. 118), the Court originally set a Show Cause Hearing on May 25, 2022. Through counsel, Oberlander objected to the delay in the hearing. Subsequently, the Court issued an *Order & Rationale*

(Dkt. 124) resetting the hearing for Friday, May 6, 2022, at 2:00 PM.

Testifying at the Show Cause Hearing for the Property Owners were Katherine Scholl, the HOA President, and Property Owners Stefany Fray, Kent Watkiss, and Louis Levinson. Oberlander also testified. Property Owner John Zauher provided an Affidavit that was filed on May 6, 2022, prior to the hearing (Dkt. 127). Counsel for Oberlander submitted a *Point Brief RE Status Quo*, which the District Court also considered.

At the hearing, the Court advised counsel that time would be equally split. *Findings of Fact and Conclusions of Law and Order Granting Preliminary Injunction*, p. 9 (Dkt. 131). During counsel for Oberlander's lengthy cross-examination of HOA President Katie Scholl, the Court reminded Oberlander's counsel that he was burning through his time on matters not germane to the preliminary injunction hearing. *Transcript*, pp. 56, 72. Oberlander's counsel continued with his cross-examination, squandering his hearing time on irrelevant questions. As a result, he ran out of time for direct examination of his own client, Ronald Oberlander. The Court denied Mr. Oberlander the opportunity to provide additional statements because his counsel had run out of time. *Transcript*, pp. 142, 144-145. The District Court allowed Oberlander's counsel to provide an offer of

proof. The hearing concluded at approximately 5:14 PM. Dkt. 131, pp. 9-10.

On May 16, 2022, the District Court issued its *Finding of Fact and Conclusions of Law and Order Granting Preliminary Injunction* (Dkt. 131). The District Court waived the undertaking in the interest of justice. Oberlander appealed the *Finding of Fact and Conclusions of Law and Order Granting Preliminary Injunction* (Dkt 131).

STATEMENT OF FACTS

The following facts are from the District Court's findings in its *Finding of Fact and Conclusions of Law and Order Granting Preliminary Injunction* (Dkt. 131) and from the Show Cause Hearing transcript and exhibits (*Transcript*).

1. Hidden Valley Ranches is a Ravalli County subdivision of land created by Certificate of Survey No. 1316, recorded with the Ravalli County Clerk and Recorder on July 6, 1977. Dkt. 131, pp. 2-3; *Transcript*, p. 8 (Ex. 1).

2. The property in Hidden Valley Ranches, as depicted on COS 1316, is subject to a Declaration of Covenants recorded with the Ravalli County Clerk and Recorder on November 2, 1977, at Deeds Book 145, beginning at Page 126. Dkt. 131, p. 3; *Transcript*, p. 9 (Ex. 2).

3. Many of the tracts depicted in COS 1316 have been further

subdivided since its recording. Hidden Valley Ranches currently consists of 326 separate lots. Dkt. 131, p. 3; *Transcript*, pp. 8-9.

4. COS 1316 identifies and creates a “60’ Private Roadway & Utility Easement” that provides access to the separate tracts. The roadway easements depicted on COS 1316 are located on the individual lots over which they run. Dkt. 131, p. 3; *Transcript*, pp. 10-11 (Ex. 1).

5. The roads currently known as Hidden Valley Road South and Fescue Slope Road are two of roadways depicted on COS 1316. They remain private roadway easements. Hidden Valley Road South currently is a paved road. Fescue Slope Road currently is a gravel road. Dkt. 131, p. 3; *Transcript*, p. 12 (Ex. 1).

6. Pursuant to the Declaration of Covenants, the Hidden Valley Ranches HOA handles maintenance of the non-dedicated, private road easements depicted in COS 1316, which include Hidden Valley Road South and Fescue Slope Road. The HOA collects road maintenance assessments from the property owners in Hidden Valley Ranches to pay for the cost of road maintenance and repairs. Dkt. 131, p. 3; *Transcript*, pp. 11-12 (Ex. 2, Art. VI Sec. 5).

7. Oberlander owns Tract 25a of COS 1316, which also is known as 610 Fescue Slope Road. Immediately adjacent to Tract 25a is land owned by the State

of Montana. Oberlander leases the land from the State of Montana. Dkt. 131, p. 4; *Transcript*, pp. 12-13 (Ex. 1), 15-16, 118-119 (Ex. 3), 124-126 (Ex. 16, 17); Dkt. 8, p. 8 (*Oberlander's Amended Third-Party Complaint*, ¶ 5).

8. Oberlander's current Lease of the state land consists of 327.7 grazing acres and 352.3 agricultural acres. Oberlander uses the state land to produce various crops and hay. The produced crops and hay are sold to third parties. Livestock graze on the state land. Oberlander uses the state land to produce income. Dkt. 131, p. 4; *Transcript*, pp. 119-120 (Ex. 3).

9. The state land leased by Oberlander is not part of Hidden Valley Ranches or COS 1316. The HOA does not assess road maintenance dues to the State of Montana and no contribution to the road maintenance costs has been paid on behalf of the state landowner or lessee. Dkt. 131, p.4; *Transcript*, p. 13.

10. No easement exists in favor of the state land over the properties or roadways in Hidden Valley Ranches (COS 1316). Oberlander's leases for the state land do not reference any easement or right to access the state land through Hidden Valley Ranches. Dkt. 131, p. 4; *Transcript*, pp. 13-14, 144 (Ex. 3, 16, 17). The state land enjoys separate access to a public road. Oberlander testified that the separate public road access (via Dry Gulch Road) does not provide feasible access

to a portion of the state land by large semi-trucks and trailers. Oberlander also testified that the State of Montana does not permit the creation of additional roadways on the state land. Oberlander admitted that he did not research the state land easements prior to leasing the land. Dkt. 131, pp. 4-5; *Transcript*, pp. 13-14, 127, 130, 131-133, 144-145.

11. Oberlander, his family members, guests and invitees use Hidden Valley Road South and Fescue Slope Road as the main route for access to the state land through Oberlander's Tract 25a. Oberlander did not obtain or seek permission from the individual property owners to travel over their properties to access the state land. Dkt. 131, p. 5; *Transcript*, pp. 88, 99, 108, 121; Dkt. 127 (*Affidavit of John Zauher*, ¶ 4).

12. In his written discovery responses, a copy of which were admitted into evidence as Exhibit 4, Oberlander described his use of Hidden Valley Road South and Fescue Slope Road to access the state land as follows:

Since 2001, Oberlander has used the Pathway to access the State Land for full agricultural usage, including the following: livestock and equine grazing, hay production, spring and winter wheat production, oat and barley production, specialty ancient grain production, grass seed production, grain and hay storage, agricultural equipment storage... semi-trucks, with trailers for hauling livestock, grain, and equipment (the following are specific types of trailers used: hopper bottom grain trailer, flatbed trailer, RNG trailer, van trailer,

cattle trailer), pick up trucks and cars, pickup with 16' stock trailer, and deliveries of fertilizer, bulk fuel, and parts... per year, Oberlander uses a semi-truck to haul grain 7 times, 10 times with the flatbed trailer, 7 times with the RGN trailer, 10 times with van trailer, 2 times with cattle trailer, 4 times with pick up and stock trailer, with delivers of fertilizer 5 times, bulk fuel delivered 2 times, and parts delivery 30 times per year. On average, there are approximately 77 trips per year, which averages to approximately 6.5 round trips per month. This does not include the additional trips made by pickup and automobiles.

Dkt. 131, p. 5; *Transcript*, pp. 18-19 (Ex. 4, *Answer to Interrogatory No. 4*, pp. 10-11).

13. The HOA President and the Property Owners who testified at the hearing disputed the historical road use described by Oberlander. They did not notice the described vehicle traffic prior to 2021. The HOA President and the testifying Property Owners did not learn that Oberlander was using the Hidden Valley Ranches private road easement to access the state land until 2021. Dkt. 131, p. 6; *Transcript*, pp. 19-20, 89-90, 100-102, 109-110; Dkt. 127 (*Affidavit of John Zauher*, ¶¶ 7-8).

14. The witnesses testified to the relatively recent increase in traffic, noise, and dust created by large equipment using the private roads to and from Oberlander's property on Tract 25a. All of the witnesses testified to being bothered by the increased traffic, noise (from jake brakes) and dust. The witnesses

testified that the increased traffic, noise and dust was disturbing the peaceful enjoyment of their properties and, in the case of one witness, was creating a safety risk for her young children. Dkt. 131, p. 6; *Transcript*, pp. 20-21, 24, 90-92, 95, 103, 110-112, 151; Dkt. 127 (*Affidavit of John Zauher*, ¶¶ 8-9).

15. By letter dated March 11, 2021, counsel for the HOA contested Oberlander's right to use the Hidden Valley Ranches private road easements to access the state land and demanded that he immediately cease doing so. Oberlander did not comply with the demand. Dkt. 131, p. 6; *Transcript*, pp. 22-23 (Ex. 5).

16. The road maintenance company hired by the HOA generally performs road maintenance and repairs on the Hidden Valley Ranches private road easements one time per year. In 2021, the road maintenance company had to return a second time to perform road grading and maintenance on the roads used by Oberlander and his agents. The HOA President and the testifying Property Owners attributed the need for additional grading and maintenance in 2021 to Oberlander's heavy use of the roads to access the state land. Dkt. 131, pp. 6-7; *Transcript*, pp. 24-25, 92-93.

17. Oberlander believes that, as the owner of 610 Fescue Slope Road

(Tract 25a), he has a right to use the private road easements Hidden Valley Road South and Fescue Slope Road to access the state land. Dkt. 131, p. 7; *Transcript*, p. 121.

18. The Declaration of Covenants for Hidden Valley Ranches do not give the HOA authority, nor does the HOA possess authority, to consent to or grant an easement over the individual HOA members' properties for the benefit of the state land. The Property Owners, as owners of the properties subject to private roads Hidden Valley Road South and Fescue Slope Road, did not consent to an easement over their properties to access the state land, nor did they give the HOA authority to consent to any such easement on their behalf. Dkt. 131, p. 7; *Transcript*, pp. 17-18 (Ex. 2), 88, 99-100, 108-109; Dkt. 127 (*Affidavit of John Zauher*, ¶ 4).

19. On the request for a waiver of the undertaking in the interest of justice, the Property Owners who testified at the hearing each stated why they believed an undertaking would not be fair under the circumstances. Their reasons included Oberlander's lack of a right or claim to enter their properties to access the state land and the fact that the Property Owners already bear the burden of Oberlander's use of the roads through road maintenance dues assessed by the HOA. The Property Owners believe they should not have to pay an undertaking to

prohibit activity Oberlander has no right to engage in on their respective properties. *Transcript*, pp. 96, 104, 113. Oberlander did not offer any testimony or argument at the hearing in favor of an undertaking. Dkt. 131, pp. 8-9.

20. Oberlander testified that, absent a court order, he intends to continue using Hidden Valley Road South and Fescue Slope Road to access the state land. Dkt. 131, p. 26; *Transcript*, p. 123.

STANDARD OF REVIEW

The standard of review for a district court's grant of a preliminary injunction is manifest abuse of discretion. *Flora v. Clearman*, 2016 MT 290, ¶ 13, 385 Mont. 341, 384 P.3d 448. "A 'manifest' abuse of discretion is one that is obvious, evident, or unmistakable." *Id.* (quoting *Shammel v. Canyon Resources Corp.*, 2003 MT 372, ¶ 12, 319 Mont. 132, 82 P.3d 912. A district court's conclusions of law are reviewed to determine whether they are correct. *Flora*, ¶ 13.

The District Court is in the best position to observe and determine the credibility of witnesses and the Supreme Court does not second guess the District Court's determination regarding the strength and weight of conflicting testimony. *State v. Pound*, 2014 MT 143, ¶ 19, 375 Mont. 241, 326 P.3d 422; *Tomlin Enterprises, Inc. v. Althoff*, 2004 MT 383, ¶ 22, 325 Mont. 99, 103 P.3d 1069;

Shors v. Branch, 221 Mont. 390, 399, 720 P.2d 239, 245 (1986). “On appeal the district court’s findings of fact are construed in favor of the prevailing party, and the district court’s findings will be upheld even if the evidence could have supported different findings.” *Pound*, ¶ 19 (citing *Tomlin*, ¶ 22; *Brimstone Mining, Inc. v. Glaus*, 2003 MT 236, ¶ 20, 317 Mont. 236, 77 P.3d 175).

SUMMARY OF ARGUMENT

The District Court’s Order entered April 11, 2022, dismissing Oberlander’s prescriptive easement claim is not subject to review under this appeal. That Order is interlocutory and requires certification by the District Court prior to appeal.

Oberlander did not seek certification, nor did the District Court certify the Order for appeal. In addition, no appeal was made within 30 days of entry of the Order.

Alternatively, if the April 11, 2022, Order is subject to review under this appeal, the District Court correctly dismissed Oberlander’s prescriptive easement claims for lack of standing. Standing is a prerequisite to the exercise of subject matter jurisdiction and is subject to contest at any time by a party or *sua sponte* by the Court. Oberlander’s *Amended Third Party Complaint* claims an appurtenant prescriptive easement to access the state land over the private roads located on parcels owned by the Property Owners. Oberlander does not own the state land

and the State of Montana (DNRC) does not claim a prescriptive easement for the use of the Hidden Valley Ranches private road easements to access the state land.

An easement appurtenant benefits and attaches to a particular parcel of land. The State, as the owner of the purported dominant tenement, is the proper party to assert an appurtenant prescriptive easement claim. The State, by Oberlander's own admission and acknowledgment, makes no such claim. Therefore, Oberlander, a mere leaseholder, lacks personal standing to assert the prescriptive easement claims in his *Amended Third-Party Complaint*.

The District Court did not manifestly abuse its discretion in granting the Application for Preliminary Injunction. A preliminary injunction order may be granted "when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually." Mont. Code Ann. § 27-19-201(1). The Property Owners are entitled to possession of their properties, to the exclusion of others who have no legal right to enter thereon. The Property Owners neither consented to nor authorized Oberlander's use of their properties to access the state land. Oberlander failed to show a legal right to enter the properties to access the state land. Based upon the evidence

presented, any abuse of discretion by the District Court in issuing the Preliminary Injunction under Mont. Code Ann. § 27-19-201(1) cannot be said to have been “obvious, evident, or unmistakable.”

A preliminary injunction order also may be granted “when it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant’s rights, respecting the subject of the action, and tending to render the judgment ineffectual.” Mont. Code Ann. § 27-19-201(3). The Property Owners’ right to possession of their properties is violated both by the unauthorized entry by Oberlander to access the state land, and also by his subsequent failure to cease or abet his intrusion. The violation of property rights extends beyond the scope of monetary damages. Any future judgment regarding Oberlander’s violation of the property rights of the Property Owners would be rendered ineffectual, at least in part, by Oberlander’s continual, unauthorized entry over their properties during this case. Based upon the evidence presented, any abuse of discretion by the District Court in issuing the Preliminary Injunction under Mont. Code Ann. § 27-19-201(3) cannot be said to have been “obvious, evident, or unmistakable.”

The written undertaking required in connection with a preliminary injunction may be waived in the interest of justice, pursuant to Mont. Code Ann. § 27-19-306(1)(b)(ii). The Property Owners presented testimony as to why a waiver under the circumstances was in the interest of justice. Oberlander failed to offer any testimony or argument at the hearing in favor of an undertaking. Based upon the evidence presented, any abuse of discretion by the District Court in waiving the undertaking cannot be said to have been “obvious, evident, or unmistakable.”

The District Court did not abuse its broad discretion in limiting the time allowed to present evidence at the Show Cause hearing. The District Court has broad discretion in determining the reasonable limit on the time allowed by the parties to present evidence. At the hearing, the Court advised that time would be equally split and even reminded Oberlander’s counsel of the time limit during his lengthy cross-examination of the Property Owners’ first witness.

The District Court was correct in ordering Oberlander to release the Lis Pendens he filed on the properties. A Lis Pendens is permitted in an action affecting the title or right of possession of real property. Mont. Code Ann. § 70-19-102(1). No claim by Oberlander currently exists in the present case that affects the title to or right of possession of the Property Owners’ properties.

ARGUMENT

I. The District Court's Order entered April 11, 2022, dismissing Oberlander's prescriptive easement claims is not subject to review under this appeal.

Much of Oberlander's Opening Brief argues for the reversal of the District Court's Order entered April 11, 2022, dismissing Oberlander's prescriptive easement claims for lack of standing (Dkt. 115). This case involves multiple parties and multiple claims for relief. The Order dismissing Oberlander's prescriptive easement claims is an adjudication of fewer than all claims to all parties and leaves matters in the litigation undetermined. Pursuant to Rule 6(5), (6), M.R.App.P., the Order entered on April 11, 2022, is appealable only upon a certification by the District Court directing the entry of final judgment as to an otherwise interlocutory order. The District Court did not provide any such certification, nor did Oberlander seek or move for such a certification. Otherwise, a notice of appeal must be filed within 30 days from the date of entry of the order from which the appeal is taken. Rule 4(5)(a)(i), M.R.App.P. Oberlander did not file a notice of appeal within 30 days of the Order dismissing his prescriptive easement claims.

The cases cited by Oberlander do not support review of the Order entered on April 11, 2022, as part of this appeal. In *Hennen v. Omega Enterprises, Inc.*, 264 Mont. 505, 872 P.2d 797 (1994), the plaintiff filed a motion for partial summary judgment that involved both declaratory judgment and injunction issues. The motion was denied. The defendant appealed the refusal to grant an injunction. Since the declaratory judgment issue was part of the same motion, and material to the injunction issue, the Supreme Court allowed for review of both issues in the appeal. *Id.* at 507-08, 799. In *Big Sky Hidden Village Owners Ass'n, Inc. v. Hidden Village Inc.*, 276 Mont. 268, 915 P.2d 845 (1996), the Supreme Court reviewed a grant of summary judgment. That case did not involve the review of an injunction. In *In re Estate of Snyder*, 2007 MT 146, 337 Mont. 449, 162 P.3d 87, the appeal involved the judicial interpretation and construction of a will. That case also did not involve the review of an injunction. In *Davis v. Westphal*, 2017 MT 276, 389 Mont. 251, 405 P.3d 73, the plaintiffs filed a motion for summary judgment that also included a request for immediate ejection and permanent injunction. The district court granted summary judgment but denied the request for injunction.

In the present case, the April 11, 2022, Order dismissing Oberlander's prescriptive easement claims did not grant or deny any injunctive relief. The motion giving rise to that Order did not include any request for injunctive relief. The *Application for Preliminary Injunction* was not filed until after the April 11, 2022, Order. More than 30 days elapsed between the Order dismissing Oberlander's prescriptive easement claims and the grant of the Preliminary Injunction, without Oberlander seeking an appeal or requesting certification of the April 11, 2022, Order, pursuant to Rule 6(5), (6), M.R.App.P.

A. Alternatively, the District Court correctly dismissed Oberlander's prescriptive easement claims for lack of standing.

Alternatively, if the April 11, 2022, Order is subject to review under this appeal, the District Court correctly dismissed Oberlander's prescriptive easement claims. Standing is a prerequisite to the exercise of subject matter jurisdiction and is subject to contest at any time by a party or *sua sponte*. *Baxter Homeowners Ass'n v. Angel*, 2013 MT 83, ¶ 14, 369 Mont. 398, 298 P.3d 1145; *Miller v. State Farm Mut. Auto. Ins. Co.*, 2007 MT 85, ¶¶ 7-8, 337 Mont. 67, 155 P.3d 1278. The April 11, 2022, Order dismisses Oberlander's prescriptive easement claims for lack of standing. It is immaterial whether the dismissal was requested by motion or raised by the District Court *sua sponte*.

Oberlander leases certain state land. Oberlander's *Amended Third Party Complaint* claims, as an appurtenance to his state land leasehold, a prescriptive easement over the Hidden Valley Ranches private road easements located upon the parcels owned by the Property Owners (Dkt. 8, ¶ 6). Oberlander argues that, in his capacity as a leaseholder, he "stands in the shoes of the State for purposes of establishing a prescriptive easement benefitting the State land." Dkt. 8, ¶ 45. The Property Owners' *Answers to the Amended Third-Party Complaint* include affirmative defenses requesting dismissal of Oberlander's prescriptive easement claims because he is not the real party in interest. Oberlander is not the owner of the alleged dominant tenement. Dkt. 18, ¶ 2. The Property Owners also requested dismissal of Oberlander's easement claims for failure to join the State of Montana as an indispensable party. Dkt. 18, ¶ 3.

The Property Owners subsequently filed *Third-Party Defendants' Motion for Order Requiring Joinder of the State of Montana as an Additional Third-Party Plaintiff* (Dkt. 19). In his Response in opposition to the motion, Oberlander both acknowledged and provided evidence that the State of Montana (DNRC) does not claim a prescriptive easement for the use of the Hidden Valley Ranches private

road easements, including Hidden Valley Road South or Fescue Slope Road (Dkt. 20, Ex. A).

The District Court denied the Property Owners' motion, but dismissed Oberlander's prescriptive easement claims for lack of standing (Dkt. 115).

“Standing narrowly focuses on whether, at the time of assertion of a claim, a particular claimant is a proper party to assert the claim regardless of whether the claim is otherwise cognizable or justiciable.” *Larson v. State*, 2019 MT 28, ¶ 45, 394 Mont. 167, 434 P.3d 241 (citations omitted). As noted by the District Court, while the parties argued whether the owner of the leasehold interest or the owner of the land is the owner of the dominant tenement of the appurtenant easement, the parties did agree that the claim is for an appurtenant easement rather than in gross (Dkt. 115, p. 7).

“An easement appurtenant is one that benefits a particular *parcel* of land, i.e., it serves the *owner* of that land and *passes with title to that land.*” *Slauson v. Marozzo Plumbing & Heating*, 2009 MT 333, ¶ 16, 353 Mont. 75, 219 P.3d 509 (citing *Blazer v. Wall*, 2008 MT 145, ¶ 24, 343 Mont. 173, 183 P.3d 84, 93) (emphasis added). “An easement appurtenant must have both a dominant tenement and a servient tenement.” *Blazer*, ¶ 24 (citing *Thompson on Real Property* vol. 7, §

60.02(f)(1), at 469 (David A. Thomas ed., 2d Thomas ed., 2006)). “The *land* upon which the burden or servitude is held is called the servient tenement.” Mont. Code Ann. § 70-17-103 (emphasis added). The foregoing authority was cited by the District Court in its Order (Dkt. 115, p. 8).

In *Slauson*, a lessee’s use of an adjoining tract established the existence of a prescriptive easement that attached to the land and passed with title. *Id.*, ¶¶ 3-9. The owner of the servient estate argued that, since the easement was created through the lessee’s use, it did not attach to the land and instead terminated with the lease. *Id.*, ¶ 10. This argument was rejected by the District Court, which reasoned that the property owner of the dominant parcel was “in privity” with the lessee and that the easement over the servient parcel passed with owner of the dominant parcel. *Id.* In affirming the District Court’s decision, the Supreme Court reaffirmed the definition of an easement appurtenant as “one that benefits a particular *parcel* of land, i.e., it serves the *owner* of that land and *passes with title to that land.*” *Id.*, ¶ 16 (emphasis added).

Like Oberlander in the present case, the owner of the servient estate in *Slausen* cited the Supreme Court’s prior ruling in *Leichtfuss v. Dabney*, 2005 MT 271, 329 Mont. 129, 122 P.3d 1220, to support his rejected argument that a

prescriptive easement obtained by the use of a lessee only attaches to the leasehold interest and does not run with the land. In *Leichtfuss*, the Supreme Court concluded that a prescriptive easement in favor of a life estate holder survived the extinguishment of the life estate and passed to a subsequent purchaser of the land. *Id.* While the Supreme Court in *Leichtfuss* considered secondary authorities related to the principle that a life tenant or a lessee generally cannot impose upon his land a burden that passes to the remainderman or the reversioner, the Supreme Court ultimately rejected application of this principle in the context of an easement's dominant tenement. *Id.*, ¶¶ 37-39. "Having considered the foregoing authorities in the context of the facts of the case at hand, we conclude that rigid application of a rule that prevents the *benefit* of an easement from running to a remainderman or reversioner is unsound." *Id.*, ¶ 41.

The *Slauson* decision cited by Oberlander also noted the Supreme Court's prior observations in *Rasmussen v. Fowler*, 245 Mont. 308, 800 P.2d 1053 (1990), which are directly dispositive of Oberlander's position. Similar to Oberlander in the present case, in *Rasmussen*, an agricultural lessee of state land claimed, in part, the existence of an easement appurtenant to his agricultural leasehold. While the Court recognized the existence of an easement, the Supreme Court clarified that

the lessee could not be granted an easement appurtenant to the state land, since that right existed only in favor of the State, as the owner of the land.

As for an easement appurtenant, Fowler maintains that the state land is the dominant tenement, and that Rasmussen, as a mere lessee, cannot be granted a prescriptive right. We agree that Rasmussen cannot be granted an easement appurtenant to that state land, but hold that the lower court rightly determined that there is such a right recognized in favor of the State as the owner through long historical use, and that Rasmussen, in his standing, as lessee, has the right of use of that easement for agricultural purposes.

Id., at 313, 1056.

Based upon the forgoing authority, the District Court in the present case correctly noted in its April 11, 2022, Order, “The requested relief declaring a prescriptive appurtenant easement attaches to the State land, it does not attach to the leasehold.” Dkt. 115, p.8. As the leaseholder, Oberlander would have a right to use any prescriptive appurtenant easement benefitting the leased land, if such easement existed. However, the State, as the owner of the dominant tenement, is the proper party to assert an appurtenant prescriptive easement claim and the State, by Oberlander’s own admission and acknowledgment, makes no such claim. Therefore, Oberlander, a leaseholder, lacks personal standing to assert the prescriptive easement claims in his *Amended Third-Party Complaint*. “Indeed, in the

subject Agricultural & Grazing Lease of State Lands Documents, the State makes no representation or grant as to access Oberlander may use to access the leased property.” Dkt. 115, p.9.

To the extent that the District Court’s April 11, 2022, Order dismissing Oberlander’s prescriptive easement claims is subject to review under this appeal, it was correctly decided by the District Court and should be affirmed. Oberlander lacks standing to assert his prescriptive easement claim where the owner of the purported dominant land makes no such claim. The District Court also was correct to address the standing issue *sua sponte*, even if not specifically raised by motion.

II. The District Court did not manifestly abuse its discretion in granting the Preliminary Injunction.

A. Sufficient evidence exists to support the District Court’s finding that it appears Appellees are entitled to their demanded relief.

“District Courts have broad discretion to grant preliminary injunctive relief on any of the five grounds enumerated in § 27-19-201, MCA.” *Davis*, ¶ 24. A preliminary injunction order may be granted “when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a

limited period or perpetually.” Mont. Code Ann. § 27-19-201(1). In their pleadings, the Property Owners denied the existence of an easement over their properties to access the state land, asserted claims for trespass, and requested an order enjoining Oberlander and his agents from entering upon their properties to access the state land (Dkts. 18, 25, 28, 31). Through their *Application for Preliminary Injunction*, the Property Owners requested that Oberlander and his agents be enjoined during the pendency of the action from entering upon their properties, including the Hidden Valley Ranches private roads easements, for the purpose of accessing the leased state land. (Dkt. 117).

“The essential elements of a modern common law trespass claim are: (1) an intentional entry or holdover, (2) by the defendant or a thing, (3) without consent or legal right.” *Davis*, ¶ 15. Actionable trespass may occur regardless of whether the trespass causes damages or harm beyond the mere interference with another’s right to exclusive possession of the property. *Id.* Contrary to Oberlander’s argument, the fact that other owners of property within Hidden Valley Ranches have easement rights over the private roads does not mean that an action for trespass cannot exist for entry onto their properties by one having no easement right. The Property Owners’ right to exclusive possession means possession to the

exclusion of others who have no legal right to enter their properties. “A civil trespass encompasses both the initial unauthorized entry upon the property of another *and* the subsequent failure to cease or abet the intrusion.” *Id.*

The evidence presented did not show the existence of an easement in favor of the state land over the Property Owners’ properties. Oberlander’s leases for the state land do not reference any easement or right to access the State land through Hidden Valley Ranches. *Transcript*, pp. 13-14, 144 (Ex. 3, 16, 17). In addition, Oberlander previously acknowledged and produced evidence in this case that the State of Montana (DNRC) does not claim a prescriptive easement for the use of Hidden Valley Road South or Fescue Slope Road. *Response Opposing Motion to Join State of Montana* (Dkt. 20, Ex. A).

There is no evidence of an easement over Third-Party Defendants’ properties in favor of the state land. Oberlander’s easement claim in this case was dismissed. He is unable to identify any legal claim or right to enter upon the Third-Party Defendants’ properties to access the state land. Oberlander acknowledged that he neither sought nor obtained permission or consent from the Third-Party Defendants to travel over their properties to access the state land.

Order Granting Preliminary Injunction, pp. 11-12 (Dkt. 131).

The state land enjoys separate access to a public road. *Transcript*, pp. 13-14. Oberlander argued that the separate public road access does not allow for sufficient

access to a portion of the State land by large semi-trucks and trailers. He also testified that the State does not permit the creation of additional roadways on the state land. Oberlander admitted that he did not research the state land easements prior to leasing the land. *Transcript*, pp. 127, 130, 131-133, 144-145. On this issue, the District Court noted:

Although Mr. Oberlander needs to use the subject private roads to access portions of the state land with large and heavy equipment for the efficient use of the leased land, he has no apparent legal right to do so, and does not have the right to overburden the real property of the subdivision landowners. It is not the fault of the subdivision landowners that Oberlander's legal access to the state lands is inadequate for his needs. When leasing the state lands, he accepted the benefits and the burdens of that property. Mont. Code Ann. § 1-3-212 ("A person who takes the benefit shall bear the burden.").

Order Granting Preliminary Injunction, p. 14 (Dkt. 131).

The Property Owners did not consent to Oberlander's entry upon their properties to access the state land. The Property Owners also did not authorize the HOA to consent to an easement over their properties. *Transcript*, pp. 17-18, 88, 99-100, 108-109. Oberlander admitted at the hearing that he was using Hidden Valley Road South and Fescue Slope Road as the main route for access to the State land. Oberlander also admitted that he did not obtain or seek permission from the

individual property owners to travel over their properties to access the State land.

Transcript, pp. 88, 99, 108, 121. According to the District Court:

The evidence presented, including Oberlander's own admissions, shows that Oberlander and his agents have intentionally entered Third-Party Defendants' properties for the purpose of accessing the state land without their consent or legal right. Such actions interfere with Third-Party Defendants' property rights. In the context of this case, the rights preserved are the individual property owners' rights in the private roads of Hidden Valley Road South and Fescue Slope Road.

The private roads were created by COS 1316 to serve the residents of the Hidden Valley Ranches subdivision. The individual property owners own the real property burdened by the subject private road easements. "An owner of land bounded by a road or street is presumed to own to the center thereof, but the contrary may be shown." Mont. Code Ann. § 70-16-202. The last actual, peaceable, noncontested condition that preceded the pending controversy is the time before Oberlander impermissibly entered Third-Party Defendants' properties to access the state land.

Order Granting Preliminary Injunction, p. 13 (Dkt. 131).

Oberlander argued that the prior HOA Board knew of and consented or acquiesced to his access to the state land over the Hidden Valley Ranches private roads. However, the authority to consent to an easement over the Property Owners' properties for access to the state land belongs to the individual Property Owners, not to the HOA. The District Court stated:

Oberlander argued at the hearing that the prior HOA Board knew of Oberlander's access to the state land over the private roads easements and consented or acquiesced to such use. Contrary to this argument, Ms. Scholl, the current HOA President, testified that Oberlander's prior communication and issues with the HOA Board involved the use of his Tract 25a, and not access to the state land.

The HOA does not possess any authority to consent to an easement over Third-Party Defendants' properties to access the state land. The authority to consent to or grant an easement for the benefit of the state land belongs to the individual property owners, not the HOA. Additionally, no creation of any easement may be created merely by oral consent or acquiescence. Mont. Code Ann. § 70-20-101 ("An estate or interest in real property, other than an estate at will or for a term not exceeding 1 year, may not be created, granted, assigned, surrendered, or declared otherwise than by operation of law or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring it or by the party's lawful agent authorized by writing.").

Order Granting Preliminary Injunction, p. 12 (Dkt. 131).

In determining whether an applicant seeking a preliminary injunction has established a prima facie case, "the court should decide merely whether a sufficient case has been made out to warrant the preservation of the property or rights in status quo until trial, without expressing a final opinion as to such rights." *Fox Farm Estates Landowners Ass'n v. Kreisch*, 285 Mont. 264, 268, 947 P.2d 79, 82 (1997). "Status quo means 'the last actual, peaceable, noncontested condition which preceded the pending controversy.'" *Weems v. State*, 2019 MT 98, ¶ 26,

395 Mont. 350, 440 P.3d 4 (quoting *Porter v. K & S Partnership*, 192 Mont. 175, 181, 627 P.2d 836, 839 (1981); see also *Davis*, ¶ 24). Oberlander's claimed use of the Property Owners' properties to access the state land does not represent the status quo.

Given that no easement exists in favor of the state land over the subject properties, and given that the Property Owners did not authorize or consent to Oberlander's use of their properties to access the state land, the District Court did not manifestly abuse its discretion by concluding that the last actual, peaceable, noncontested condition that preceded the pending controversy was the time before Oberlander impermissibly entered the subject properties to access the State land. Testimony also was presented that Oberlander's described use of the private roads to access the state land did not occur until recently. The HOA President and the Property Owners who testified stated that they did not notice the described vehicle traffic prior to 2021. *Transcript*, pp. 19-20, 89-90, 100-102, 109-110; Dkt. 127. Upon learning of the access, Oberlander was sent a letter dated March 11, 2021, from the HOA's counsel contesting use of the roads to access the state land and demanding that Oberlander immediately cease doing so. He did not comply with the demand. *Transcript*, pp. 22-23 (Ex. 5). During the Summer of 2021, the road

maintenance company hired by the HOA had to return a second time to perform road grading and maintenance on the sections of the roads used by Oberlander and his agents. *Transcript*, pp. 24-25, 92-93. This court action commenced soon thereafter. The District Court was presented with sufficient evidence to support its finding that Oberlander's described use of the private roads to access the State land is not the status quo.

Based upon the evidence presented, any abuse of discretion by the District Court in issuing the Preliminary Injunction under Mont. Code Ann. § 27-19-201(1) cannot be said to have been "obvious, evident, or unmistakable." As such, no manifest abuse of discretion exists and the Preliminary Injunction should be affirmed.

B. Sufficient evidence exists to support the District Court's finding that it appears during the litigation Oberlander will engage in some act in violation of Appellees' property rights, tending to render a final judgment ineffectual.

A preliminary injunction order also may be granted "when it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual." Mont. Code Ann. § 27-19-201(3). As stated above, the Property

Owners have a right to possession of their properties. *Davis*, ¶ 15. That right is violated both by the unauthorized entry by another, but also their subsequent failure to cease or abet the intrusion. *Id.*

The evidence presented, including Oberlander's own admissions, showed that Oberlander and his agents have intentionally entered the Property Owners' properties for the purpose of accessing the state land without their consent or legal right. *Transcript*, pp. 88, 99, 108, 121; Dkt. 127. In addition, the HOA was not given authority by the Property Owners to consent or acquiesce to Oberlander's entry upon their properties to access the state land. *Transcript*, pp. 17-18, 88, 99-100, 108-109; Dkt. 127. Oberlander continued his unauthorized use of the private roads over the subject properties to access the state land, even after receiving a letter from counsel demanding that he cease doing so. At the Show Cause hearing, Oberlander testified that, absent a court order, he intends to continue using the private road easements to access the state land. *Transcript*, p. 123.

Oberlander's prior unauthorized entries, and his express intention to continue such entry onto the Property Owners' properties for the purpose of accessing the state land, appears to violate the Property Owners' right to possession of their properties. The District Court was presented with sufficient

evidence to support its finding that Oberlander does not have authority to enter the subject properties to access the state land. It is not unreasonable to conclude that Oberlander is doing or threatens or is about to do an act in violation of the Property Owners' rights. The violation of property rights is beyond the scope of any damages that could be awarded. Thus, any future judgment regarding Oberlander's violation of the Property Owners' rights would be rendered ineffectual, at least in part, by Oberlander's continual, unauthorized entry over their properties during the pendency of this case.

Based upon the evidence presented, any abuse of discretion by the District Court in issuing the Preliminary Injunction under Mont. Code Ann. § 27-19-201(3) cannot be said to have been "obvious, evident, or unmistakable." As such, no manifest abuse of discretion exists and the Preliminary Injunction should be affirmed.

C. The District Court did not manifestly abuse its discretion in waiving the statutory undertaking in the interest of justice.

Pursuant to Mont. Code Ann. § 27-19-306(1)(b)(ii), the written undertaking required in connection with a preliminary injunction may be waived in the interest of justice. The Property Owners requested a waiver of the undertaking. The Property Owners who testified at the hearing each stated why they believed an

undertaking would not be fair under the circumstances. Conversely, Oberlander failed to offer any testimony or argument at the hearing in favor of an undertaking.

The evidence presented showed that the Property Owners already pay assessments to the HOA for maintenance and repairs of the Hidden Valley Ranches private road easements, without payment or contribution for access to the state land. *Transcript*, pp. 11-13.

No right or claim exists for Oberlander or his agents to enter Third-Party Defendants' properties to access the state land. Third-Party Defendants pay road maintenance assessments to the HOA for maintenance and repairs to Hidden Valley Road South and Fescue Slope Road without contribution or behalf of the state land.

Order Granting Preliminary Injunction, pp. 15-16 (Dkt. 131).

In addition to the added maintenance costs already borne by the Property Owners and the HOA, Oberlander's use of the private roads to access to the state land also burdens the Property Owners through increased traffic, noise and dust that disturb the peaceful enjoyment of their properties. *Transcript*, pp. 20-21, 24, 90-92, 95, 103, 110-112, 151; Dkt. 127. Further burdening the Property Owners with an undertaking would be inconsistent with the interests of justice. It is Oberlander who voluntarily entered into leases for the state land that do not reference any easement right to access the state land through Hidden Valley

Ranches. Oberlander admitted that he did not research the state land easements prior to leasing that land. *Transcript*, pp. 144-145.

When addressing the equities and Oberlander's argument that he is unable to farm a portion of the State land without access over the subject properties, the District Court appropriately stated:

But it also is a buyer beware type of issue when Mr. Oberlander obtained the leases in the first place. And it was up to him to make sure that he had the access that he needed. And, so, when -- again, balancing the equities, I am not certain -- again, I don't want to deny Mr. Oberlander the benefit of being able to use those lands, and to access the agricultural part, and it's lamentable that the State doesn't provide additional access routes across the State land and allow him to build a road, but I'm not sure that's the individual property owner's in the Hidden Valley Ranches' burden.

Transcript, p. 158.

Based upon the evidence presented, any abuse of discretion by the District Court in waiving the undertaking associated with the Preliminary Injunction cannot be said to have been "obvious, evident, or unmistakable." As such no manifest abuse of discretion exists and the waiver of the undertaking should be affirmed.

D. The District Court did not abuse its broad discretion in limiting the time allowed to present evidence at the Show Cause hearing.

The Show Cause hearing was set for May 6, 2022, beginning 2:00 pm. Dkt. 124. Counsel was advised by the District Court that the time to present evidence at

the hearing would be split equally. Dkt. 131, p. 9. “The District Court has broad discretion in determining issues related to trial administration.” *Fink v. Williams*, 2012 MT 304, ¶ 18, 367 Mont. 431, 291 P.3d 1140. One of those issues is “a reasonable time limit on the time allowed to present evidence.” *Id.*, quoting M.R.Civ.P. 16(c)(2)(O).

During counsel for Oberlander’s lengthy cross examination of HOA President, Katie Scholl, counsel for Appellees made an objection that the line of questioning was irrelevant to the scope of hearing. In response to the objection, the Court made the following statement to counsel:

THE COURT: So, Mr. Houston, I’ll let Mr. Kuchel burn through his half of the time as he sees fit. And if he wants to spend most of his time talking about board notice and stuff like that, that’s certainly -- I presume there is something he’s getting at, so I’ll let him go ahead and use that.

Mr. Kuchel, you can continue.

Transcript, p. 56. Counsel for Oberlander then proceeded to continue his cross-examination of Katie Scholl for several more minutes. On this matter, the District Court correctly stated the following in its Order:

At the hearing, the Court advised counsel that time would be equally split. Indeed, during counsel for Oberlander’s lengthy cross-examination of HOA President Katie Scholl, the Court reminded Oberlander’s counsel that he was burning through his time on matters not germane to the preliminary injunction hearing. Oberlander’s

counsel continued his cross-examination, squandering his hearing time on irrelevant questions; he ran out of time for direct examination of his own client, Ronald Oberlander. The Court denied Mr. Oberlander to provide additional statements because counsel had run out of time. The Court allowed Oberlander's counsel to provide an offer of proof. The court concluded the hearing at approximately 5:14 PM.

Order Granting Preliminary Injunction, pp. 9-10 (Dkt. 131).

Equally splitting the time at the hearing, such that each side had ninety minutes to present evidence, was not unreasonable. It cannot be said that the District Court abused its broad discretion. Counsel for Oberlander was made aware of the time limit and has only himself to blame for any inefficient use of the time he was allotted.

III. The District Court did not err in ordering Oberlander to release the Lis Pendens he filed on the properties.

In connection with the easement claims in his *Amended Third-Party Complaint*, Oberlander also recorded a Lis Pendens on each of the Property Owners' properties (Dkt. 4). In their *Answers to the Amended Third-Party Complaint*, the Property Owners requested an order requiring Oberlander to release and remove his Lis Pendens upon their properties. The request for release and removal of the Lis Pendens also was made in the *Application for Preliminary Injunction* and again by the Property Owners who testified at the hearing.

“In an action affecting title or right of possession of real property . . . , the plaintiff, at the time of filing the complaint, and the defendant, at the time of filing the answer, when affirmative relief is claimed in the answer, or at any time afterward may file in the office of the clerk and recorder of the county in which the property was situated a notice of the pendency of the action containing the names of the parties and the object of the action or defense and a description of the property in that county affected by the action or defense.” Mont. Code Ann. § 70-19-102(1). A lis pendens “casts a ‘cloud on title’ which impairs the ability to sell the property to others.” *West v. Club at Spanish Peaks, L.L.C.*, 2008 MT 183, ¶ 59, 343 Mont. 434, 186 P.3d 1228.

With the dismissal of Oberlander’s prescriptive easement claims against the Property Owners, no claim exists affecting title to or possession of the Property Owners’ properties. As such, the District Court correctly determined that the Property Owners were entitled to the removal and release of the Lis Pendens filed by Oberlander that clouded title to their properties.

CONCLUSION

The District Court did not manifestly abuse its discretion in granting the Preliminary Injunction and waiving the undertaking. Based upon the evidence

presented, any abuse of discretion by the District Court in its findings cannot be said to have been obvious, evident, or unmistakable. It appears that the Property Owners are entitled to the relief demanded in their Third-Party Counterclaims, which relief consists in enjoining Oberlander and his agents from entering upon the Property Owners' properties to access the leased state land. It also appears that Oberlander, during the pendency of this case, intends to continue entering the Property Owners' properties to access the state land, absent an order from the Court. Such continuing violation of the Property Owners' individual property rights would render a final judgment in this case ineffectual, at least in part. The Appellee Property Owners respectfully request that the Supreme Court affirm the District Court's *Findings of Fact, Conclusions of Law and Order Granting Preliminary Injunction*.

DATED this 11th day of November, 2022.

JONES & ASSOCIATES, PLLC

By: /s/ Joseph D. Houston
Joseph D. Houston
Attorney for Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to M. R. App. P. 11, I certify that this Brief is printed with proportionately-spaced Times New Roman text of 14 points; is double spaced; and the word count calculated by Microsoft Word does not exceed 10,000 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, and appendices.

/s/ Joseph D. Houston
Joseph D. Houston
Attorney for Appellees

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 11th day of November, 2022, the foregoing Answer Brief of Appellees was served by eService and by First Class Mail, postage prepaid, at Missoula, Montana, to the following:

Gregory G. Schultz
Jeffrey R. Kuchel
Crowley Fleck PLLP
P.O. Box 7099
Missoula, MT 59807-7099

/s/ Joseph D. Houston

CERTIFICATE OF SERVICE

I, Joseph David Houston, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 11-11-2022:

Kevin Scott Jones (Attorney)
2625 Dearborn Ave., Ste. 102A
Missoula MT 59804

Representing: Victor C Bielby, Susan Doran Carter, Stefany J Fray, John Goldsbury, Kelli Goldsbury, Carlie Hennequin, Jacques Hennequin, Carolyn M Levinson, Louis Levinson, Jeffrey S McDonald, Natalie M McDonald, Patrick Offen, John D Randall, Susan K Randall, Walter W Richards, III, Susan L Richards, Christopher Roemer, Kathie L Stanislaw, John S Stiegler, Melissa Stiegler, Audrey J Stover, Sam Stover, Kent J Watkiss, Tawana Rae Watkiss, John Zauher
Service Method: eService

Jeffrey R. Kuchel (Attorney)
Crowley Fleck PLLP
305 South 4th Street East
Suite 100
Missoula MT 59801
Representing: Ronald R Oberlander
Service Method: eService

Gregory G. Schultz (Attorney)
305 S. 4th St. E., Ste. 100
Missoula MT 59801
Representing: Ronald R Oberlander
Service Method: eService

Electronically Signed By: Joseph David Houston
Dated: 11-11-2022