SUPREME COURT OF THE STATE OF MONTANA

CASE NO. DA 24-0422

STEVEN CORRY STEPHENSON,

Plaintiff, Counter-Defendant, and Appellant

vs.

LONE PEAK PRESERVE, LLC,

Defendant, Counter-Plaintiff, and Appellee.

On Appeal from the Montana 18th Judicial District, Gallatin County
Cause No. DV 21-1297
Before Hon. John C. Brown

APPELLANT'S REPLY BRIEF

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PREFATORY NOTE

At p. 7 of its 'Statement of Facts,' Appellee Lone Peak Preserve LLC's Response Brief (the "Response Brief") mischaracterizes testimony provided by Appellant Steven Corry Stephenson ("Stephenson") at the preliminary injunction hearing in this matter held October 10, 2023 (the "Hearing"). Prior to addressing the arguments set forth in the Response Brief, Stephenson wishes to clarify this mischaracterization. Lone Peak's Response Brief states that at the Hearing, Stephenson "admitted the existence of the 30-Foot Easement"—an access easement purportedly conveyed by Lone Peak's deed and one of the two easements at issue in this matter. Response Brief, 7. Stephenson did not admit to the existence of the 30-Foot Easement as defined by Lone Peak; rather, he testified that Lone Peak holds a different easement created in 2013 by way of an easement agreement referred to elsewhere in the Response Brief as the "2013 Agreement." Lone Peak's mistake here may be readily understood because both the 2013 easement which Stephenson acknowledged and the alleged easement claimed by Lone Peak are 30-foot-wide access easements benefitting Lone Peak, and each is purportedly conveyed by a document incorporating an exhibit A. But the easement created in 2013 is conveyed by a different instrument and at a different time than the 30-Foot Easement claimed by Lone Peak. Seen against this background, Stephenson's testimony cited by Lone Peak clearly indicates that the easements he is acknowledging are those created by

the 2013 easement agreement, and *are not* the alleged easements claimed by Lone Peak which are at issue in this appeal:

> Q [by counsel Kelsey Bunkers]. Okay. What easements do you claim Lone Peak has across your property?
> A [by Stephenson]. Lone Peak has a 30-foot-wide access easement, as described on this Exhibit A. It also has an access easement, the best way I can do it is to – so there's this access easement, this utility easement. There is this additional access easement to allow access to this easement and my driveway. There's also this access easement that was created to give access from this point back around.
> Q. Okay. And those are all of the easements that you claim?
> A. Yes.
> Q. Okay. And **those are the easements that are depicted in the 2013 access easement** or that are addressed in the 2013 access easement, right?
> A. Yes.

Appellant's Exhibit B, 84:10-25, 85:1 (emphasis added)

Additionally, Lone Peak's Response Brief states that the single issue before this Court is whether the District Court "manifestly abuse its discretion in granting preliminary injunctive relief?" The parties agree that this issue is before this Court here. However, Stephenson has further asked this Court to consider whether the District Court "erred in concluding that [Lone Peak] met the evidentiary burden required of a party seeking a preliminary injunction." Stephenson Op. Br. 6.

INTRODUCTION

Stephenson appeals from the District Court's Findings of Fact, Conclusions of Law, and Order for Preliminary Injunction entered July 11, 2024. (Doc. 99, Findings of Fact, Conclusions of Law, and Order for Preliminary Injunction. (Hereafter the "District Court's Order")). The District Court's Order grants a preliminary injunction (the "Injunction") covering two alleged easements Appellee Lone Peak Preserve, LLC ("Lone Peak") claims across Stephenson's property: an alleged 30-foot-wide access easement purportedly created by the 2005 Warranty Deed granting Lone Peak title to its property (hereafter the "Alleged 30-Foot Easement") and an alleged easement covering a cul-de-sac partially located on Stephenson's property, as allegedly conveyed by a 1993 Affidavit of Dedication (hereafter the "Alleged Cul-de-sac Easement").

As Stephenson explained in his opening brief, Lone Peak constructed a gravel driveway crossing Stephenson's property when it began constructing a residence on its property near Big Sky in 2020. Stephenson Op. Br. 7 *passim*. Although part of this driveway runs across Stephenson's property outside any easement claimed by Lone Peak, Lone Peak used the driveway with Stephenson's consent between fall 2020 and December 2021 when Stephenson filed suit in this matter. *Id.* And Lone Peak's use of the driveway represents the last actual, peaceable, noncontested condition between the parties as to Lone Peak's use of Stephenson's property. *Id.*

Despite this, when Lone Peak sought a preliminary injunction from the District Court, it asked that the injunction cover the full area of both the Alleged 30-Foot Easement and the Alleged Cul-de-sac Easement. Granting the Injunction as requested by Lone Peak, the District Court went far beyond preserving Lone Peak's use of its existing driveway, enjoining Stephenson from installing improvements anywhere within Lone Peak's two alleged easements and, additionally, requiring him "to remove all improvements, structures, or obstacles… [and] any other interferences or impediments" from those alleged easements. Stephenson Op. Br. 15, 36-37.

Stephenson's Opening Brief argued that the District Court erred in granting the Injunction because the Injunction fails to preserve the status quo. Stephenson Op. Br. 18-20, 36-37. In its Response Brief, Lone Peak contends that the status quo in this case is not Lone Peak's use of its currently-existing driveway but rather its possession of the two alleged easements identified in its counterclaim. But this claim is not supported by the record. Rather, Lone Peak itself has represented to the District Court that its existing driveway traverses Stephenson's property outside its alleged easements; that it used this driveway with Stephenson's permission between fall of 2020 and December of 2021; and that it continued to use this driveway, rather than its alleged easements, after Stephenson filed suit "in order to maintain the status quo." Stephenson Op. Br. 30; and *see* Doc. 51, Lone Peak Preserve, LLC's Response

to Plaintiff's Motion for Summary Judgment, at 5. Accordingly, the status quo condition relevant to the Injunction is that Lone Peak enjoys access to its property by way of its existing driveway, while Stephenson enjoys the lawful use of his property so long as that use does not interfere with Lone Peak's use of the driveway. The Injunction issued by the District Court fails to preserve this condition, and the District Court's grant of the Injunction therefore represents clear error.

Stephenson's Opening Brief further argued that Lone Peak failed to carry the evidentiary burden required of a party seeking a preliminary injunction. Stephenson Op. Br. 8-10, 23-35. In response, Lone Peak asserts that the District Court properly found Lone Peak to have met its evidentiary burden under §27-19-201, and that nothing further was required of Lone Peak because the Injunction at issue in this case is not a mandatory injunction as defined by this Court in *Mercer v. Montana Department of Public Health and Human Services*, 2025 MT 9. Lone Peak misrepresents this Court's decision in *Mercer*, however. There, the Court defines a mandatory injunction as one that "'orders a responsible party to take action' as opposed to 'simply maintaining the status quo.'" *Mercer*, ¶ 14. The Injunction at issue here clearly qualifies under this definition and should properly be issued only upon the applicant's meeting a more demanding standard than that set forth in §27-19-201. As such, the District Court's Order cannot be upheld.

Finally, Lone Peak contends that findings of the District Court unchallenged by Stephenson are sufficient to support its grant of the injunction. This distorts the record in this case, however. The findings of the District Court which Lone Peak characterizes as unchallenged are either based on evidence which the District Court ought not have considered or do not support an injunction that preserves the status quo.

ARGUMENT

I. THE PRELIMINARY INJUNCTION AT ISSUE FAILS TO PRESERVE THE STATUS QUO ESTABLISHED BY LONE PEAK'S USE OF ITS EXISTING DRIVEWAY OUTSIDE THE BOUNDARIES OF ITS ALLEGED EASEMENTS.

A preliminary injunction "is an extraordinary remedy never awarded as of right." *Montanans Against Irresponsible Densification, LLC v. State*, 2024 MT 200, ¶ 10, 418 Mont. 78, 84, 555 P. 3d 759, 764, citing *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24, 129 S. Ct. 365, 376, 172 L.Ed.2d 249 (2008) Montana's preliminary injunction statute requires an applicant seeking an injunction to establish four factors:

> (a) the applicant is likely to succeed on the merits;
> (b) the applicant is likely to suffer irreparable harm in the absence of preliminary relief;
> (c) the balance of equities tips in the applicant's favor;
> (d) the order is in the public interest

Montanans Against Irresponsible Densification, ¶ 10; Mont. Code Ann. §27-19-201. Further, in considering whether to issue a preliminary injunction, a court "must exercise its discretion only in furtherance of the limited purpose of preliminary injunctions to preserve the status quo and minimize the harm to all parties." *Davis v. Westphal*, 2017 MT 276, ¶ 24, 389 Mont. 251, 264-65, 405 P.3d 73, 85; and see *Stensvad v. Newman Ayers Ranch, Inc.*, 2024 Mt 246, ¶ 28, 418 Mont. 378, 392, 557 P.3d 1240, 1247. The status quo is defined as "the last actual, peaceable, noncontested condition which preceded the pending

controversy." *Flying T Ranch, LLC v. Catlin Ranch, LP*, 2022 MT 162, ¶ 28, 409 Mont. 478, 515 P.3d 806.

As Stephenson's Opening Brief showed, the status quo here was established by Lone Peak's use of a gravel driveway it constructed in 2020 upon commencing construction of its residence (the "Driveway"). Testimony provided by Lone Peak's member Eric Schertel established that Lone Peak began using this Driveway to access its property prior to the onset of this litigation and continues to use the same Driveway today. Stephenson Op. Br. 14, 28-29. This testimony echoed Lone Peak's prior representations to the District Court that it began using the Driveway in 2020 and continued to use the driveway after Stephenson filed suit in December of 2021 "in order to preserve the status quo." Stephenson Op. Br. 30; (Doc. 51 at 5).

Despite this evidence, Lone Peak denies that its use of the Driveway represents the status quo. Instead, it contends that here "the status quo is Lone Peak's ability to use the entire width of the [Alleged] 30-Foot Easement and all of the [Alleged] Cul-de-sac Easement." Lone Peak Resp. Br. 40. This conveniently incorporates the relief Lone Peak seeks in its counterclaim into the status quo (and does so by ignoring the fact that neither of the two alleged easements claimed by Lone Peak is a valid servitude). More importantly,

however, Lone Peak's preferred definition of the status quo misrepresents the undisputed facts of this case.

It is undisputed that Lone Peak began using its currently-existing Driveway in 2020, more than a year before Stephenson filed suit in this matter, and continues to use it today. Stephenson Op. Br. 13-14, 28-29, Exhibit A 44:9-14; 45:5-16. It is likewise undisputed that this Driveway traverses Stephenson's property partially outside the alleged easements claimed by Lone Peak: A portion of the driveway lies within the Alleged Cul-de-sac Easement and another portion lies within the Alleged 30-Foot Easement, but a third portion of the Driveway lies outside both easements. (Doc. 51, Affidavit of Eric Schertel ¶ 11) Thus, Lone Peak's use of the Driveway represents a clear deviation from reliance on its alleged easement rights. Third, it is undisputed that Stephenson permitted Lone Peak to use the Driveway, including that portion outside the two alleged easements, between 2020 and the onset of litigation in December, 2021. *Id.* As Lone Peak has stated in a prior filing to the District Court:

> Upon commencing construction of the residential home on the Lone Peak Property, Lone Peak and its contractors began driving across the Stephenson Property on [the Driveway], a small portion of which was outside Lone Peak's easements on the Stephenson Property, which Stephenson approved and allowed.

Id. Finally, it is undisputed that both parties recognized Lone Peak's use of the Driveway as an alternative to an access conforming to Lone Peak's alleged

easement rights. Lone Peak stated as much in the above-referenced filing, noting that the parties agreed on Lone Peak's use of the Driveway because it "caused less disruption and disturbance to the Stephenson Property than utilizing a different access fully within Lone Peak's [alleged] easements." *Id.*

Lone Peak's own statements thus demonstrate that Lone Peak's use of the Driveway, and *not* its rights under its two alleged easements, represent the last actual, peaceable, uncontested condition preceding the controversy between Stephenson and Lone Peak. Indeed, if there were any doubt on this point, Lone Peak has clarified the issue by asserting its right to continue using the Driveway—*rather than* rely on its two alleged easements for access—"in order to maintain the status quo." (Doc. 51 at 5, Schertel Aff. ¶ 13)

Despite its own admission that the parties' agreement allowing Lone Peak access by way of the Driveway represented the status quo here, Lone Peak argues that the District Court properly disregarded that agreement. In support of this claim, Lone Peak cites this Court's holding in *Flying T Ranch* that the period immediately preceding litigation is not the status quo to be preserved if that period is disputed rather than peaceable. Lone Peak Op. Br. 22, and see *Flying T Ranch* ¶¶ 28-30. Here, however, Lone Peak's access was peaceable, and not disputed, during the period of Lone Peak's use of the Driveway prior to litigation—and Lone Peak presents no evidence to show otherwise. Similarly,

Lone Peak notes that this Court held in *Flora v. Clearman* that the status quo regarding the plaintiffs' use of the road at issue in that case was established in 2009 even though the plaintiffs did not initiate litigation until 2011 and did not seek an injunction until 2014. *Flora v. Clearman*, 2016 MT 290, ¶23, 385 Mont. 341, 348, 384 P.3d 448, 453. As in *Flying T Ranch*, however, the *Flora* Court noted that the dispute between the parties began in 2009, describing conditions that were manifestly not 'peaceable.' See *Flora*, ¶¶ 7-8.

Finally, Lone Peak argues that Lone Peak's use of the Driveway between Fall 2020 and December 2021 cannot establish the status quo because the status quo is properly understood as "the legally relevant relationship between the parties before the controversy arose" *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1061 (9th Cir. 2014). This is not the standard in Montana. More to the point, however, Lone Peak's use of the Driveway rather than an access wholly within its alleged easements *is* a legally relevant relationship between the parties insofar as it allowed Lone Peak to rely on Stephenson's permission to cross his property without trespass for over a year.

The record is clear that the status quo regarding Lone Peak's use of Stephenson's property was established by Lone Peak's consensual use of the Driveway, as an alternative to reliance on its claimed rights under its two alleged easements, between the fall of 2020 and December, 2021. Further, as detailed in

Stephenson's Opening Brief, the evidence before the District Court clearly established that Lone Peak continues to use the Driveway, and that Stephenson has never installed any improvements or structures obstructing it. Since a court may properly issue a preliminary injunction only for the limited purpose of preserving the status quo, several important consequences follow:

First, Lone Peak's assumption that the status quo incorporates and protects its claimed rights to use the full extent of both the Alleged 30-Foot Easement and the Alleged Cul-de-sac Easement is revealed as a misunderstanding. Consequently, Lone Peak's contention that the Injunction entered by the District Court preserved the status quo fails, as do its claims that Stephenson's improvements to his property self-evidently constitute interferences with Lone Peak's access. *See* Lone Peak Resp. Br. 18, 20, 23. Second, the injunction sought by Lone Peak is precluded because it would disrupt the status quo. The District Court's Order granting the Injunction is therefore necessarily revealed to constitute clear error. And third, any injunctive relief Lone Peak might properly be granted would be limited to preserving the status quo access it currently enjoys. Since Lone Peak's own testimony makes it clear that Stephenson has never installed any improvements or structures obstructing that access, the District Court's Findings of Fact could not support such an injunction.

II. THE PRELIMINARY INJUNCTION AT ISSUE IS A MANDATORY INJUNCTION, AND LONE PEAK HAS NOT MET THE HEIGHTENED STANDARD NECESSARY FOR SUCH AN INJUNCTION

Montana law requires a party seeking a preliminary injunction to show:

> (a) the applicant is likely to succeed on the merits;
> (b) the applicant is likely to suffer irreparable harm in the absence of preliminary relief;
> (c) the balance of equities tips in the applicant's favor;
> (d) the order is in the public interest

Mont. Code Ann. §27-19-201. A party seeking an injunction "must satisfy all four parts of the standard" *Stensvad*, ¶ 10. Montana courts also recognize a distinction between prohibitory injunctions and mandatory injunctions. *Mercer* ¶ 14, citing *N. D. v. Reykdal*, 102 F. 4th 982, 992 (9th Cir. 2024). A preliminary injunction which "'orders a responsible party to take action' as opposed to 'simply maintaining the status quo'…is accurately characterized as mandatory," and mandatory injunctions are "subject to a more demanding standard" than are prohibitory injunctions. *Id.*

In his Opening Brief, Stephenson explained that the District Court erred in entering the Injunction because Lone Peak did not establish any of the four elements required under the preliminary injunction statute. Stephenson Op. Br. 23-36. Additionally, however, the Injunction is improper because it is a mandatory injunction and Lone Peak likewise did not meet the more demanding evidentiary standard this Court has set for mandatory injunctions.

a. The Injunction is properly reviewed under the heightened standard for mandatory injunctions set forth in *Mercer*.

In *Mercer*, which was decided during the pendency of this appeal, this Court held that mandatory injunctions are subject to a higher standard of review than are preliminary injunctions which maintain the status quo. In particular, *Mercer* held that with regard to the first factor in the four-part test set forth in §27-19-201, a party seeking a mandatory injunction "must establish that the law and facts *clearly favor* her position, not simply that she is likely to succeed" *Mercer*, ¶ 14. Likewise, with regard to the second factor set forth in §27-19-201, *Mercer* held that mandatory injunctions "are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages." *Mercer*, ¶ 23 A party seeking a mandatory injunction must therefore show considerably more than a likelihood of irreparable harm.

Lone Peak argues that the Injunction at issue here is not a mandatory injunction, and that this Court therefore need not apply the heightened standard adopted in *Mercer*. Lone Peak Resp. Br. 24-25. Its claim is that the Injunction is not mandatory because "the status quo is not the source of Lone Peak's injury." Lone Peak Op. Br. 25. This misconstrues the distinction between a mandatory injunction and a prohibitory injunction, however. *Mercer* does not hold that an injunction should be considered mandatory only if the status quo is the source of

the applicant's injury. The Court's opinion does note that the status quo is the source of the applicant's injury in that specific case, and it further states that mandatory injunctions are "likely to be appropriate" in such circumstances. *Mercer*, ¶ 15 This, though, must be read as continuing the Court's explicit effort to limit the use of preliminary injunctions to order parties to take action; Lone Peak's suggestion that this should instead limit the applicability of the heightened mandatory injunction standard by insisting that a large class of injunctions ordering parties to take action do not properly qualify as 'ordering a responsible party to take action' thus turns the logic of the *Mercer* decision on its head.

Properly understood, *Mercer* defines a mandatory injunction straightforwardly as an injunction that "'orders a responsible party to take action' as opposed to 'simply maintaining the status quo'" *Mercer*, ¶ 14, citing *N. D. v Reykdahl*, 102 F.4th at 992. Equally straightforwardly, the Injunction at issue here orders Stephenson to take action rather than to maintain the status quo: the District Court's Order requires him "to remove all improvements, structures, or obstacles placed within" the two alleged easements, "and to remove any other interferences or impediments to" the easements. Accordingly, it clearly qualifies as a mandatory injunction under *Mercer*, and applying the heightened standard of review for mandatory injunctions is therefore appropriate.

b. Lone Peak has not met the heightened standard necessary for a party seeking a mandatory injunction.

As noted above, under *Mercer* a mandatory injunction is properly granted only where the applicant has demonstrated both "that the law and the facts *clearly favor* [its] position" and that "extreme or very serious injury will result." *Mercer*, ¶¶ 14, 23 (emphasis in original). Lone Peak has not established either of these heightened factors.

The District Court's Order was entered before *Mercer* was decided, and so does not specifically address the heightened standard for a mandatory injunction adopted there. Considering the record before the District Court, however, it is clear that Lone Peak has not demonstrated that the law and the facts clearly favor its position, because neither of its two alleged easements is valid. Neither has it demonstrated that extreme or very serious injury will result in the absence of injunctive relief, since the only irreparable harms that an injunction preserving the status quo could protect Lone Peak from are irreparable harms it will not suffer anyway.

As explained in Stephenson's Opening Brief, the Alleged 30-Foot Easement is invalid because at the time Stephenson purchased his property in 2010, the Easement was recorded only in the chain of title for Lone Peak's property, and not in the chain of title for Stephenson's property—and an easement recorded in this way was not a valid servitude under Montana law at that time. Stephenson Op. Br. 24-26. Lone Peak does not dispute that the

Easement was not in the chain of title for Stephenson's property in 2010. Rather, Lone Peak appears to contend that the Easement became enforceable against Stephenson in 2013 when this Court decided *Earl v. Pavex*, overruling *Nelson v. Barlow* and rejecting the "narrow chain-of-title" doctrine it had adopted. See *Earl v. Pavex Corp.*, 2013 MT 343, 372 Mont. 476, 313 P.3d 154; *Nelson v. Barlow*, 2008 MT 68, 342 Mont. 93, 179 P.3d 529. This is not how real estate law works in Montana. While it is true that Montana has adhered to a "wide chain-of-title" doctrine since 2013, this does not mean that property purchased before the switch to a wide chain-of-title approach became retroactively burdened by previously-unknown encumbrances. A prospective buyer of property is on notice of, and so is bound by, the encumbrances that are in a parcel's chain of title *at the time he or she takes title*. Accordingly, Stephenson is bound by those easements that were recorded in his property's chain of title in 2010—and the Alleged 30-Foot Easement was not so recorded.

Turning to the Alleged Cul-de-sac Easement, Stephenson's Opening Brief explained that this Easement is not valid because the easement as alleged by Lone Peak is a misdescription of a road easement benefitting the members of an HOA, and not the access easement specifically appurtenant to Lone Peak's lot, as it claims. Stephenson Op. Br. 26-27. Lone Peak responds that the District Court properly understood the Alleged Cul-de-sac Easement as an easement created by

Stephenson's deed through its reference to Certificate of Survey 1754A. Under this Court's easement by reference doctrine, "an explicit reference in the deed to a plat or certificate of survey on which an easement is clearly depicted and adequately described" is sufficient to establish the easement. *Blazer v. Wall*, 2008 MT 145, ¶ 41, 343 Mont. 173, 190, 183 P.3d 84, 97-98. Further, such an easement is adequately described only if the identities of the dominant and servient tenements are "ascertainable with reasonable certainty from the referenced plat or certificate of survey" *Blazer*, ¶ 54. Here, though, Certificate of Survey 1754A provides no information identifying Lone Peak's property as the dominant tenement. And the covenants for Skywood Preserve, to which Certificate of Survey 1754A refer, likewise give no indication that Lone Peak's property is the dominant tenement.

In the same vein, Lone Peak cannot demonstrate that extreme or very serious injury will result absent an injunction. As Stephenson's Opening Brief explained, the potential harm at issue here is an inability to access its property, but Lone Peak already enjoys all of the access that an injunction could provide to it consistent with the status quo. Thus Lone Peak is already protected against any harms that could be addressed by an injunction. Lone Peak responds by reasserting its contention that the status quo "is Lone Peak's ability to use the entire width of the [Alleged] 30-Foot Easement and all of the [Alleged] Cul-de-

sac Easement].” Lone Peak Op. Br. 40. Were this true, then Stephenson’s improvements could be understood as interferences with Lone Peak’s access. Even granting *ad arguendo* Lone Peak’s claim that its alleged rights to use the full area of both its alleged easements should be protected, it would be farcical to contend that improvements placed on undeveloped portions of Lone Peak’s alleged easements will cause it “extreme or very serious damage” even as it continues to enjoy the same unobstructed access it has employed since it began construction of its residence.

In sum, Lone Peak has not demonstrated that the law and the facts clearly favor its position with respect to either of the alleged easements it claims. It likewise has not demonstrated that it will suffer extreme or very serious damage in the absence of an injunction. Indeed, the District Court erred in concluding that Lone Peak had established these two factors under the standard set forth in Montana’s preliminary injunction statute. Having failed to properly meet that more permissive standard, Lone Peak necessarily fails to meet the more demanding standard for a mandatory injunction.

III. THE INJUNCTION IS NOT PROPERLY GRANTED ON THE BASIS OF THE DISTRICT COURT'S UNCHALLENGED FINDINGS BECAUSE THOSE FINDINGS RELY ON IMPROPERLY ADMITTED EVIDENCE TO WHICH STEPHENSON DID NOT HAVE AN OPPORTUNITY TO RESPOND.

Lone Peak argues, finally, that this Court should affirm the District Court's entry of the Injunction because "Findings of Fact and Conclusions of Law that Stephenson does not challenge are sufficient—by themselves—to support the preliminary injunction." Lone Peak Resp. Br. 27. This contention should be disregarded, as it relies on a blinkered view of the record before the Court as well as on Lone Peak's self-serving conception of the status quo dismantled above.

Lone Peak identifies seven purported facts found by the District Court which it claims "solidly support" the District Court's decision to grant the Injunction. Lone Peak Resp. Br. 28. Three of these purported facts recount evidence provided in affidavits at the hearing to which Stephenson was never given an opportunity to respond. Further, as Lone Peak certainly knows, Stephenson objected to admission of these affidavits at the Hearing, and subsequently filed written objections to the same—and the District Court has not ruled on Stephenson's objections. (*See* Doc. 82, Stephenson's Objections to Affidavits Submitted at Preliminary Injunction Hearing.) Although a District Court may consider new evidence at a preliminary injunction hearing, it is an abuse of discretion to consider such evidence if the opposing party is not afforded

an opportunity to respond. *Flathead-Lolo-Bitterroot Citizen Task Force v. Montana*, 98 F.4th 1180, 1188-89 (9th Cir. 2024) Consequently, rather than providing an unchallenged basis for affirming the District Court's entry of the Injunction, these facts further illuminate that court's abuse of discretion.

The other four facts highlighted by Lone Peak concern Stephenson's alleged interference with undeveloped areas of Lone Peak's alleged easements outside the boundaries of the Driveway, and thus cannot be addressed by an injunction that preserves Lone Peak's status quo access. Two of these facts address Lone Peak's use of the "full width" of the Alleged 30-Foot Easement, and two other concern his alleged interference with Lone Peak's "full use" of the Cul-de-sac Easement. Lone Peak Resp. Br. 28. As such, these facts have no bearing on an injunction which serves the limited purpose of preserving the status quo.

CONCLUSION

Lone Peak's own statements to the District Court demonstrate that the status quo in this matter was established by Lone Peak's consensual use of its currently-existing Driveway, rather than reliance on its alleged rights under the two alleged easements at issue here. Despite this, the District Court issued a mandatory injunction preventing Stephenson from installing improvements or structures anywhere on Lone Peak's two alleged easements, and further ordering Stephenson to remove existing improvements and structures from those alleged easements. The District Court thus erred in entering a preliminary injunction that does not serve the limited purpose of preserving the status quo. Further, the Injunction at issue is a mandatory injunction under this Court's holding in *Mercer*, and the District Court's Order is therefore subject to review under the heightened standard appropriate to mandatory injunctions. Finally, the District Court erred in relying on improperly admitted evidence to which Stephenson was not given an opportunity to respond for its Findings of Fact in support of the Injunction.

For the reasons stated above, the District Court's Order entering the Injunction should be reversed, and this case should be remanded to that Court for further proceedings consistent with that result.

Dated: February 18, 2025 Respectfully submitted,

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Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is not more than 5,000 words, excluding certificate of service, certificate of compliance, table of contents, and table of authorities.

Dated this 18th day of February, 2025

Michael L. Rabb

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CERTIFICATE OF SERVICE

I, Michael Lloyd Rabb, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 02-18-2025:

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