

2007

Wasatch County, a body of politic of the State of Utah v. E. Ray Okelberry, Brian Okelberry, Eric Okelberry, West Daniels Land Association, Utah Division of Wildlife Resources : Reply Brief

Utah Court of Appeals

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Thomas Low; Scott H. Sweat; Wasatch County Attorney's Office; Attorneys for Respondent.

Don R. Petersen; Leslie W. Slaugh; Howard, Lewis, & Petersen; Attorneys for Petitioners.

THOMAS LOW, and SCOTT H. SWEAT, for: WASATCH COUNTY ATTORNEY'S OFFICE 805 West 100 South Heber City, UT 84032 Telephone: 435-654-2909 Facsimile: 435-654-2947

ATTORNEYS FOR RESPONDENT

DON R. PETERSEN and LESLIE W. SLAUGH for: HOWARD, LEWIS & PETERSEN, P.C. 120 East 300 North P.O. Box 1248 Provo, UT 84603 Telephone: 801-373-6345 Facsimile: 801-377-4991
ATTORNEYS FOR PETITIONERS

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IN THE UTAH SUPREME COURT

WASATCH COUNTY, a body politic of
the State of Utah,

Respondent,

vs.

E. RAY OKELBERRY, BRIAN
OKELBERRY, ERIC OKELBERRY,
WEST DANIELS LAND
ASSOCIATION, UTAH DIVISION OF
WILDLIFE RESOURCES,

Petitioners.

Case No. 20070011-SC

REPLY BRIEF OF PETITIONERS

ON WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS IN
WASATCH COUNTY v. OKELBERRY, 2006 UT App 473

DON R. PETERSEN and
LESLIE W. SLAUGH for:
HOWARD, LEWIS & PETERSEN, P.C.
120 East 300 North
P.O. Box 1248
Provo, UT 84603
Telephone: 801-373-6345
Facsimile: 801-377-4991
ATTORNEYS FOR PETITIONERS

THOMAS LOW, and
SCOTT H. SWEAT, for:
WASATCH COUNTY ATTORNEY'S OFFICE
805 West 100 South
Heber City, UT 84032
Telephone: 435-654-2909
Facsimile: 435-654-2947
ATTORNEYS FOR RESPONDENT

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UTAH APPELLATE COURTS
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WASATCH COUNTY ATTORNEY'S OFFICE
805 West 100 South
Heber City, UT 84032
Telephone: 435-654-2909
Facsimile: 435-654-2947
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ARGUMENT

I: THE PUBLIC HAS NO “RIGHT” TO USE PRIVATE ROADS.

Amicus Utah Association of Counties (UAC) asserts that it acts “on behalf of its member counties who maintain thousands of miles of rural county public roads like the one at issue in the present case.” UAC further asserts that “[c]ounties in Utah are vitally interested in maintaining the public nature of the roads which comprise the inventory of each county's public transportation system.”¹ Two responses are appropriate. First, the trial court specifically found that “the County has never maintained the roads” at issue in this case.² The roads in this case are in remote areas that are not even accessible during the winter months and have generally had little maintenance, if any.³

Second, and more importantly, it must be remembered that counties already have the power of eminent domain to gain access to any private road deemed important to the county's “public transportation system.” UAC has not identified any statute or case authority that gives the public any right to trespass over private land. The only real issue here is whether the counties will be required to pay for the land.

Wasatch County argues that the balancing test of the court of appeals is an appropriate way to resolve the “tension embedded in the nature of these road-dedication cases.”⁴ The

¹UAC brief, p. 1.

² R. 419 ¶ 4; *see also* R. 489 ¶ 1.

³*Id.* 4-5.

⁴Wasatch County brief, p. 27.

supposed tension evaporates, however, if one recognizes that a landowner may abandon or dedicate his or her roads to the public, but the public cannot take those roads without paying just compensation.⁵ The focus should not be on whether the public has managed to trespass with a certain frequency, but rather whether the landowner has acted so as to clearly communicate an intent to retain the private character of the property.

Wasatch County claims the bright line standard is unworkable, because the public could be prevented from taking the property by a single instance of a person being unable to use the road.⁶ Past history belies this claim, because several cases reflect situations where the statute worked – where a landowner dedicated his or her land to the public by failing to make any effort to restrict public travel.⁷ More importantly, however, allowing an individual to retain ownership is what the state and federal constitutions require. It should offend no one that an individual is able to retain his or her private property by a single instance of interrupting the ten-year statutory period.

⁵*Vaughn v. Williams*, 345 So. 2d 1195, 1199 (La. Ct. App. 1977).

⁶ Wasatch County brief, p. 29.

⁷*E.g., Richards v. Pines Ranch, Inc.*, 559 P.2d 948, 949 (Utah 1977) (“defendants were unable to show that the use over the years prior to recent times was by permission of the then owners.”); *Boyer v. Clark*, 7 Utah 2d 395, 396-97, 326 P.2d 107, 108 (1958) (“No one testified that prior to the time respondent acquired the property in question permission was asked or obtained from any owner to traverse the trail.”); *Lindsay Land & Live Stock Co. v. Churnos*, 75 Utah 384, 386, 285 P. 646, 647 (1929) (“substantially uncontradicted” evidence established public use “without interference or objection on the part of the owners of the land.”)

II: HIGHLIGHTING THE CONSTITUTIONAL BOUNDARIES OF POSSIBLE INTERPRETATIONS OF THE STATUTE DID NOT RAISE A NEW ISSUE ON APPEAL.

Wasatch County asserts that this Court should not consider Okelberrys' constitutional arguments because they were raised for the first time on appeal. Okelberrys have not, however, raised a new constitutional issue.

The first context in which Okelberrys referred to constitutional principles was to argue that the statute must be interpreted in a way that avoids constitutional conflicts.⁸ Okelberrys do not claim that the road dedication statute is unconstitutional if interpreted correctly. Okelberrys had argued before the court of appeals that any interruption of use was enough to preserve the private character of property.⁹ Okelberrys make that same argument to this Court, and in addition argue that any other conclusion would violate the constitutional protections of private property. This is not raising a new issue, but only making additional arguments in support of a prior claim.

Okelberrys also referred to constitutional principles to explain the presumptions in favor of preserving private property. The court of appeals recognized these strong presumptions.¹⁰ This was not a new issue.

⁸Okelberrys' opening brief, p. 18.

⁹*Wasatch County v. Okelberry*, 2006 UT App 473, 153 P.3d 745, ¶ 14.

¹⁰*Okelberry*, ¶ 16.

It should be expected that arguments presented to this Court will not be exact repetitions of arguments made below. This Court has previously approved going beyond the arguments made to the trial court so long as a new issue is not raised.¹¹

This Court should consider Okelberrys' constitutional arguments as additional reasons to adopt the arguments Okelberrys made to the court of appeals.

III: THE LOWER COURTS ASSUMED THE ROADS HAD BEEN PERIODICALLY BLOCKED BUT ERRONEOUSLY HELD IT DID NOT MATTER.

Okelberrys argued in their opening brief that the trial court assumed the truth of Okelberrys' evidence. Wasatch County asserts that "[t]his representation of the findings is only partially correct, and to the extent the court of appeals assumed that this was the trial court's finding or conclusion, it was mistaken."¹² Wasatch County asserts that the trial court "assuming the truth" statement in paragraph 4 of its Conclusions of Law referred only to the evidence described in paragraph 3 of the initial findings of fact.¹³ Wasatch County further asserts that the statements by the trial court were only an acknowledgment that "even if certain Okelberry claims were true, the evidence would still require a conclusion that the four roads were dedicated to the public."¹⁴

¹¹*Progressive Casualty Ins. Co. v. Dalglish*, 2002 UT 59, ¶ 14 n. 5, 52 P.3d 1142.

¹²Wasatch County brief, p. 8.

¹³Wasatch County brief, p. 9.

¹⁴*Id.*

In one sense, the County is correct. Paragraphs 3 and 4 of the trial court's initial conclusions of law reveal the trial court's conclusion that because a substantial number of people used the roads as often as they found it convenient or necessary, it did not matter that the use of some people was blocked, that gates were locked for several days at a time, and that no trespassing signs were posted on the property. In other words, the trial court rejected Okelberrys claim that “any interruption of public access during the relevant period is enough to prevent use from being continuous.”¹⁵

But, there is nothing in the wording of paragraph 4 of the initial conclusions of law to limit its assumption of Okelberrys' evidence as true to only the statements in the preceding paragraph 3. And, the court of appeals did not treat the trial court's assumption as being so limited. Before commenting that the trial court assumed the truth of Okelberrys factual assertions, the court of appeals described at least one factual element not included in paragraph 3 of the trial court's conclusions of law: “employees of the Okelberrys testified that they had, at times, asked people trespassing on the property or the roads to leave.”¹⁶ This testimony is reflected in paragraph 16 of the trial court's findings of fact,¹⁷ not in paragraph 3 of the conclusions of law.

¹⁵*Id.* ¶ 3.

¹⁶*Okelberry* ¶ 5.

¹⁷R. 417.

Because this Court on certiorari reviews the decision of the court of appeals and not the trial court,¹⁸ this Court should also assume the truth of Okelberrys evidence. This Court should thus conclude that this appeal does not present a factual dispute, but a legal one: is “any interruption of public access” sufficient, or must there be two interruptions, or three, or many?

In answering this legal question, this Court should treat the following facts as true, consistent with the assumptions of the court of appeals and the trial court:

- “There were also multiple wire gates along the Four Roads such that persons traveling on the Four Roads generally had to open the gates before proceeding within the boundaries of the Okelberrys property.”¹⁹ Okelberrys demonstrated on pages 35-38 of their opening brief that gates alone, even without locks, constitute an interruption sufficient to defeat abandonment to the public.
- The gates were “generally kept closed” and “periodically locked for several days at a time.”²⁰ Contrary to the statements of Wasatch County on pages 4 and 11 of its brief, this periodic locking was prior to 1990. The trial court stated that Okelberrys locked the gates “[a]t various times in the past.” The trial court then explained that the pattern changed in the 1990s, when Okelberrys began locking

¹⁸*State v. Duran*, 2007 UT 23, ¶ 5, 156 P.3d 795.

¹⁹*Okelberry*, ¶ 2.

²⁰*Id.* ¶ 5 (internal quotation marks omitted); R. 415 ¶ 3.

the gates “on a more permanent basis.”²¹ For the locking to be on a “more” permanent basis in the 1990s, there must have been some locking of the gates before then. The trial court expressly found that this locking occurred “at various times in the past.”²²

- The gates were kept closed for the purpose of restricting travel on the roads.²³
- “No Trespassing-Private Property” signs were posted on the gates and on the property.²⁴
- Employees of Okelberrys had, at times, asked people trespassing on the roads to leave.²⁵

As explained in Okelberrys’ opening brief and above in this brief, the trial court in essence held that because many people ignored the no-trespassing signs and used the property without interruption, it did not matter that Okelberrys did periodically prevent public use of their private property. This holding was in error and contrary to established decisions of this Court.

²¹R. 488 ¶ 5.

²²*Id.*

²³R. 416 ¶ 17.

²⁴*Okelberry* ¶ 5; R. 415 ¶¶ 3-4; R. 488 ¶ 6.

²⁵*Okelberry* ¶ 5; R. 417 ¶ 16.

IV: ANY INTERRUPTION THAT EVIDENCES AN INTENT TO EXERCISE CONTROL OVER PRIVATE PROPERTY SHOULD BE ADEQUATE TO RETAIN PRIVATE OWNERSHIP.

The starting point in any statutory construction case is the language of the statute. The statute here provides that a “highway” becomes public when it has been “continuously used as a public thoroughfare” for 10 years.²⁶ This Court has interpreted “continuously” to be synonymous with “without interruption.”²⁷ As interpreted by the court of appeals and as advocated by the counties, the test becomes instead whether interruptions were frequent and extensive.

Quoting *Boyer v. Clark*,²⁸ Wasatch County argues that continuous use exists whenever the public used the road “as often as they found it convenient or necessary.”²⁹ In *Boyer*, however, there was no claim that anyone tried to restrict use in any manner prior to 12 years before the case was commenced, and there was testimony of over 50 years unrestricted use before that.³⁰ The quoted language in *Boyer* was only to establish that “continuous” use does not require constant use. *Boyer* therefore does not support the proposition argued by Wasatch County, and adopted by the trial court, that a road becomes public if many members of the public use the road without restriction. In the later case of *Draper City v. Estate of*

²⁶ Utah Code Ann. § 72-5-104(1) (2006).

²⁷See *Richards v. Pines Ranch, Inc.*, 559 P.2d 948, 949 (Utah 1977). Accord *AWINC Corp. v. Simonsen*, 2005 UT App 168, ¶ 11, 112 P.3d 1228, 1230-31, and cases cited therein.

²⁸7 Utah 2d 395, 397, 326 P.2d 107, 109 (1958).

²⁹Wasatch County brief, p. 7.

³⁰7 Utah 2d at 396-97, 326 P.2d at 108.

Bernardo,³¹ there was evidence that members of the general public had made “continual” use of the road for “hiking, camping, horseback riding, and riding motorized vehicles.”³² This Court there held that testimony that “some of them” were stopped and asked to leave could defeat the public road claim. *Id.*

Wasatch County and UAC also argue that *Thurman v. Byram*³³ establishes that an occasional interruption does not prevent a road from becoming public. In contrast to the instant case, however, the trial court in *Thurman* specifically found there had been no interruption of public use. In the instant case the trial court made no such finding, but held that evidence of interruption did not matter because there was extensive public use. The only undisputed “interruption” in *Thurman* was a periodic closing of gates to facilitate the movement of sheep.³⁴ There was no finding that the landowner had made any attempt to preclude use of the road by members of the public. *Thurman* therefore does not support the conclusion that interruptions of public use must be frequent or extensive.

Wasatch County asserts that gates alone should not constitute an interruption of use, and argues that gates are no more interruptive than a fallen tree, an animal, or rain or snow.³⁵ The difference, of course, is that a gate communicates that the property is private. Given that

³¹888 P.2d 1097 (Utah 1995).

³²*Id.* at 1100.

³³626 P.2d 447 (Utah 1981).

³⁴*Id.* at 449.

³⁵Wasatch County brief, p. 24.

the only constitutional justification for the statute is voluntary abandonment or dedication, actions showing an intent to retain control of the property should be sufficient to prevent a finding of continuous use.³⁶

Wasatch County argues that the purpose of the gates was to control the sheep.³⁷ The trial court, however, acknowledged that the testimony showed the gates were kept closed for the purpose of restricting travel on the roads, as well as for livestock control.³⁸ Also, the testimony was that the gates were locked while moving the sheep, not merely closed.³⁹ Because a closed gate would have been as effective at keeping sheep in as a locked gate, it is apparent the purpose of the locks was to keep people out. Closing or locking a gate to keep people out while moving sheep is much different than closing a gate to keep sheep in.

UAC argues that the evidence supporting the existence of gates prior to 1990 is “sparse and stinting as best.”⁴⁰ An examination of the evidence, however, highlights the policy reasons why a single interruption should preserve private property. UAC notes that one witness testified the gate of Circle Springs Road always had a chain and lock, but that every

³⁶See Okelberrys’ opening brief, pp. 17-18.

³⁷Wasatch County brief, p. 25.

³⁸ R. 416 ¶ 7.

³⁹Ray Okelberry testified that he had made a habit of locking at least some of the gates every year while the sheep were being moved. Trial Transcript, June 30 at 138-39. This was supported by Mel Price. Mel Price began accessing the property in approximately 1972, Trial Transcript, June 29 at 154, and testified that the gates had “always been locked” as far back as he could remember. Trial Transcript, June 29 at 160, 170.

⁴⁰UAC brief, p. 13.

week the gate was put up, it was ripped out the next day.⁴¹ UAC further admits that Lee Okelberry testified that a gate could not be kept on that road,⁴² that he further testified that the gates themselves were disappearing⁴³ and that Ray Okelberry testified that locks were removed.⁴⁴ If this Court were to hold that a gate is insufficient to preserve private property and that trespassers gain rights by destroying gates, landowners will be forced to resort to more drastic and potentially deadly measures to prevent public access. Particularly with remote mountain roads, landowners should not be expected to create an impenetrable barrier along miles of property boundaries.

Wasatch County characterizes Okelberrys as “trying to paint a picture of the evidence presented at trial as showing limited use by a few individuals.”⁴⁵ Okelberrys do not make that claim, but argue that the volume of use is irrelevant. Whether the roads are used by 61,000 persons per day on BYU campus, or by only an occasional deer hunter on a remote mountain road, the principles for preserving private property should be the same. It is the fact of interruption (acts showing an intent to retain private control) that is important.

The dictionary defines “continuous” as “marked by uninterrupted extension in space, time, or sequence.”⁴⁶ If use is interrupted, it is not continuous. Wasatch County and UAC

⁴¹*Id.*

⁴²*Id.*

⁴³*Id.* p. 16

⁴⁴*Id.* p. 17-18

⁴⁵Wasatch County brief, p. 12.

⁴⁶*Merriam-Webster's Collegiate Dictionary* 251 (10th ed. 1993).

have cited no case holding to the contrary. The new rule of the court of appeals, requiring proof of interruption that outweighs the use, finds no support in the statute or opinions of this Court.

Similarly lacking statutory or case support is the argument of Wasatch County and UAC that interruption of use on a rural road must be more extensive than interruption on BYU campus. Neither Wasatch County nor UAC seems to dispute that BYU maintains its private ownership by closing roads once a year on the day (Christmas) when the closure is least likely to actually interrupt anyone's planned use.⁴⁷ Paradoxically, Wasatch County and UAC argue that closure of rural roads must occur at a time and for a duration that actually significantly interferes with use, yet operation of the balancing test posited by the court of appeals would dictate the opposite result. The real lesson is that the balancing test is unsound.

This Court should reject the balancing test of the court of appeals and hold that the private nature of property may be preserved by interrupting public use once during the ten-year statutory period.⁴⁸

⁴⁷BYU brief, p. 4, states that closures are timed to "allow as much public access as possible." UAC's argument (UAC brief, p. 28) that BYU interferes with 61,000 drivers by closing its roads on Christmas Day has no support in fact or logic.

⁴⁸Of course, if the factfinder determines the landowner's evidence is not credible and that use was not interrupted even once, then the road would become public.

V: TO PRESERVE PRIVATE PROPERTY RIGHTS, THIS COURT SHOULD LIMIT THE DISCRETION GIVEN TO TRIAL COURTS; THIS IS NOT A NEW ISSUE.

Okelberrys' opening brief in this Court asserted that the discretion given to the trial court on a mixed question of fact and law should be significantly limited where constitutional issues are involved.⁴⁹ Wasatch County opposes this argument as being raised for the first time. But, the title of first point of Okelberrys' opening brief in the court of appeals was "In Reviewing the Merits of this Appeal, This Court's Deference to the Trial Court is Limited by the Trial Courts' Own Independent Obligations to Protect the Rights of Property Owners in Public Roads Cases."⁵⁰ The rights of property owners are protected by the constitutional provisions cited in Okelberrys' opening brief in this Court. Although those constitutional provisions were not cited to the court of appeals, the principles were argued. This is sufficient to preserve the issue.⁵¹

This Court in *State v. Pena*⁵² recognized that the discretion granted to a trial court should be limited where constitutional issues are involved. The Court also noted that it is occasionally appropriate to "contract the size of the pasture in response to things we learn over time."⁵³ This is such a case. The highly deferential balancing test created by the court

⁴⁹Okelberrys' opening brief, p. 8.

⁵⁰A copy of the brief is attached.

⁵¹*See State v. Garcia*, 2007 UT App 228, ¶ 10.

⁵²869 P.2d 932, 939 (Utah 1994).

⁵³*Id.* at 938.

of appeals violates constitutional private property rights. This Court should hold that clear and convincing evidence of continuous public use does not exist where there is credible, un rebutted evidence of interruption.

The court of appeals expressed the concern that the public road statute would be eviscerated if a public road claim could be defeated by a property owner's "self-serving testimony that at some point she interrupted use of a road."⁵⁴ Of course, if the trial court finds the "self-serving testimony" lacks credibility, the trial court need give it no weight. If, however, the trial court finds that use was interrupted (as the trial court assumed here), then the trial court should not be given discretion to weigh the quality of that interruption against the volume of public use. To do so violates the statutory requirement of continuous (uninterrupted) use and takes private property without just compensation.

VI: WASATCH COUNTY DID NOT CROSS-PETITION FOR CERTIORARI REVIEW, AND MAY NOT DISPUTE THAT OKELBERRYS REPRESENTED THE INTERESTS OF WEST DANIELS LAND ASSOCIATION.

Wasatch County asserts in its statement of the case that a default was entered against West Daniels Land Association.⁵⁵ The court of appeals specifically held, however, that Okelberrys represented the interest of the Association and that the rights to the Association's property were adjudicated at trial, rather than by default.⁵⁶ Wasatch County did not file a

⁵⁴Okelberry, ¶ 17.

⁵⁵Wasatch County brief, p. 2.

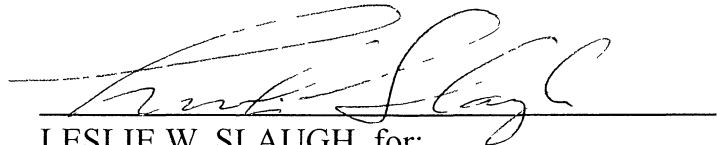
⁵⁶Okelberry, ¶ 2 n. 1.

cross-petition on this issue and is bound by the ruling of the court of appeals.⁵⁷ Any ruling of this Court regarding the land of Okelberrys should apply equally to the land of West Daniels Land Association.

CONCLUSION

The balancing test created by the court of appeals violates private property rights and is not supported by the statutory language. Public use is not “continuous” if it is interrupted even once. This Court should reverse the decision of the court of appeals and remand to the trial court for further proceedings.

DATED this 13th day of August, 2007.



LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN, P.C.
Attorneys for Petitioners

⁵⁷See *In re Affidavit of Bias*, 947 P.2d 1152, 1156 (Utah 1997).

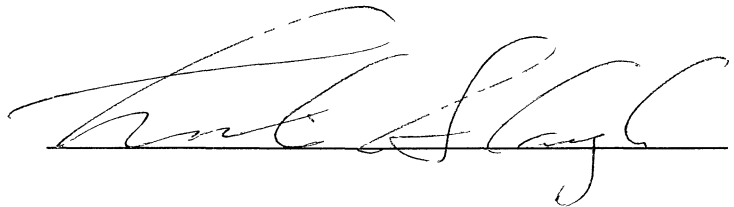
MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing were mailed to each of the following, postage prepaid, this ^{14~~th~~}~~15th~~ day of August, 2007.

Thomas Low
Scott H. Sweat
Wasatch County Attorney's Office
805 West 100 South
Heber City, Utah 84032

Michael R. Orme
Steve Sandberg
Brigham Young University
A-350 ASB
Provo, UT 84602

J. Mark Ward
Utah Association of Counties
5397 South Vine Street
Murray, UT 84107

A handwritten signature in cursive script, appearing to read "Scott H. Sweat", written over a horizontal line.

IN THE UTAH COURT OF APPEALS

WASATCH COUNTY,

Appellant/Cross-Appellee,

vs.

E. RAY OKELBERRY, BRIAN
OKELBERRY, ERIC OKELBERRY, UTAH
DIVISION OF WILDLIFE RESOURCES,
WEST DANIELS LAND ASSOCIATION,

Appellees/Cross-Appellants.

Case No. 20050389-CA

APPELLEES/CROSS-APPELLANTS' OPENING BRIEF

APPEAL FROM THE RULING OF THE FOURTH DISTRICT COURT, WASATCH
COUNTY, HONORABLE DONALD J. EYRE

RYAN D. TENNEY, for:
HOWARD, LEWIS & PETERSEN, P.C.
120 East 300 North
Provo, UT 84606
Telephone: 801-373-6345
Facsimile: 801-377-4991
ATTORNEYS FOR
APPELLEES/CROSS-APPELLANTS

THOMAS L. LOW
SCOTT H. SWEAT
WASATCH COUNTY ATTORNEYS' OFFICE
805 West 100 South
Heber City, UT 84032
Telephone: 435-654-2909
Facsimile: 435-654-2947
ATTORNEYS FOR
APPELLANT/CROSS-APPELLEE

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Utah Code Annotated § 78-2a-3(j) (2004).

ISSUES PRESENTED & STANDARDS OF REVIEW

1. Whether a county can obtain control over privately owned roads under Utah Code Annotated § 72-5-104 (2005), where the private landowner has routinely expelled persons who were found using those roads without permission, and where the landowner has also maintained and locked gates controlling access to those roads during the pendency of his ownership.

This issue was tried in a bench trial from June 28-30, 2004. The trial transcript can be found in the appellate record.¹ This is a mixed question of law and fact. As such, the appellate court reviews the trial court's factual findings under the clearly erroneous standard, but reviews the ultimate determination for correctness. See AWINC Corp. v. Simonsen, 2005 UT App 168, ¶¶7-8, 112 P.3d 1228.

2. Whether the trial court was correct in estopping the government from exerting control over a road system, where the government has sat idly collecting taxes on the roads while the property owners maintained and used these roads for a period of decades.

This issue presents a question of law that is reviewed for correctness. Ledfors v. Emery County Sch. Dist., 849 P.2d 1162, 1162-63 (Utah 1993).

¹Though the trial transcript has been included in the appellate record, the volumes have not been paginated for purposes of the record. As such, all references to the transcript shall be in the following format: Trial Transcript, June (date) at (page number).

DETERMINATIVE PROVISIONS

The determinative provision with respect to the road issue is Utah Code Annotated § 72-5-104. The determinative provisions with respect to the estoppel issue are set forth in Wasatch County's opening brief.

STATEMENT OF THE CASE

Wasatch County filed suit on August 24, 2001. R. at 10. In its Complaint, the County asked for a declaration that five roads that cross over the Appellees' private property have been abandoned to the public under Utah Code Annotated § 72-5-104. R. at 8-10. Specifically, the County sought dedication of the roads referred to as Ridge Line Road, Parker Canyon Road, Thornton Hollow Road, Circle Springs Road, and Maple Canyon Road. R. at 9. The matter was tried in a bench trial from June 28-30, 2004, and the trial court issued its Findings of Fact and Conclusion of Law on October 22, 2004. R. at 407. In that decision, the court determined that the County had met its § 72-5-104 burden with respect to Ridge Line, Parker Canyon, Thornton Hollow, and Circle Springs, but that it had not met its burden with respect to Maple Canyon. R. at 413, ¶8. The trial court then estopped the County from exercising control over the four dedicated roads. R. at 411, ¶13.

The County filed a Motion to Alter or Amend Judgment on October 28, 2004, arguing that the estoppel ruling was improper. R. at 431. After further briefing and argument, the trial court issued its Supplemental Findings of Fact and Ruling on Motion to Amend Judgment (the Supplemental Findings) on February 23, 2005. R. at 489. In the

Supplemental Findings, the trial court did amend some of its earlier factual findings, but still denied the County's challenge to the estoppel ruling. An Order to that effect was signed by the trial court on April 8, 2005. R. at 492. On April 22, 2005, the County filed a Notice of Appeal, challenging the trial court's conclusion that it is estopped from claiming control over the four contested roads. R. at 495. The County did not include a challenge to any of the trial court's factual findings, nor did it challenge the trial court's conclusion that Maple Canyon is still a private road. On April 28, 2005, the Okelberrys filed a Notice of Cross-Appeal, challenging the trial court's conclusion that the requirements of § 72-5-104 had been met with respect to any of the roads in this case. R. at 509.²

²A note regarding the involvement of West Daniels Land Association is required here. The Court will note from the attached map that portions of Ridge Line Road and the entirety of Parker Canyon Road are actually located on property owned by the West Daniels Land Association (West Daniels). As recounted in Okelberry v. West Daniels Land Ass'n., 2005 UT App 327, 120 P.3d 34, West Daniels was a land association that was formed in 1952 to purchase and manage grazing land for its members. *Id.* at ¶2. The land that West Daniels purchased and managed is immediately adjacent to the Okelberrys' private ground. As set forth in the Okelberry opinion, the Okelberrys were members of West Daniels, and used the West Daniels land in conjunction with their own lands as part of their grazing operations. *Id.* at ¶¶2-9. After the West Daniels board began limiting the Okelberrys' ability to graze on association lands, however, the Okelberrys filed a lawsuit against the association. While that lawsuit was pending, this action was filed by the County regarding these roads. These two lawsuits have proceeded concurrently with one another.

For reasons that are not fully explained in this record, the attorney representing West Daniels withdrew from this litigation early on, and no successor counsel was appointed. R. at 419, ¶7. Less than two months before trial, the County asked the trial court for entry of a default summary judgment against West Daniels. R. at 279. The Okelberrys objected to that motion, arguing that (1) as owners of over one-third of the shares in West Daniels, they had the right to assert its interests in this trial, and (2) indicating that they would be presenting evidence regarding the West Daniels roads at that upcoming trial. R. at 284-85. The County responded by asserting that the Okelberrys lacked standing to represent West Daniels' interests with respect to the road litigation. R. at 311-12.

There is no evidence that the trial court actually entered any ruling on the County's motion. See Record Index to appellate file. As a result, the West Daniels roads were litigated at trial. Specifically, the County presented evidence of public use, and the Okelberrys presented evidence showing restriction on those West Daniels roads. In its Findings of Fact and Conclusion of Law, the trial court addressed the motion for default summary judgment for the first time. The court first mistakenly asserted that default had actually been entered against West Daniels. The trial court then noted, however, that the parties had litigated these roads at trial. R. at 419, ¶7. By allowing presentation of evidence regarding this road, the trial court therefore appears to have at least implicitly concluded (1) that its "default judgment" (which, again, had never actually been announced or entered) had been de facto overruled, and (2) that the Okelberrys' request as minority shareholders for leave to represent West Daniels' interests regarding these roads had been granted. As such, the trial court's ruling adjudicated these issues with respect to the West Daniels roads as well. The County filed a motion to amend judgment following the issuance of the court's ruling. Throughout the consideration of that motion, neither the County nor the trial court objected to the decision to allow the Okelberrys to present evidence and argue the merits of the West Daniels roads. Further, in filing both its notice of appeal and its opening brief in this matter, the County has still not objected to the trial court's decision to allow the Okelberrys to represent West Daniels' interests in this matter. For example, the County's opening brief specifically references the evidence with respect to Parker Canyon, and makes no mention of there being anything improper about the Okelberrys continuing to defend the private nature of that road. As such, to the extent that the County may have had an argument relating to the Okelberrys' ability as minority shareholders to assert West Daniels' interests either at trial or on appeal, that argument has been waived. See, e.g., Utah Ass'n of Counties v. Tax Comm'n of State, 895 P.2d 825, 827 (Utah 1995) (allowing appellate participation by a potential non-party where that potential non-party had actively participated at trial and had therefore been implicitly allowed to intervene).

It is additionally worth noting that all of the shares of stock in West Daniels were purchased by a single buyer during the summer of 2005—i.e., after the conclusion of the trial and the filings of the respective Notices of Appeal. That buyer supports the position taken by the Okelberrys with respect to this appeal, and has also specifically consented to the Okelberrys' continued representation of West Daniels' interests with respect to these roads.

For these reasons, this brief will address the merits of all of the roads still in dispute without regard to any ownership issues that may have existed between the Okelberrys and West Daniels. For simplicity's sake, no effort will be made to distinguish between the Okelberry and West Daniels properties except where specifically necessary.

STATEMENT OF FACTS

The roads in question run across several thousand acres of rural, undeveloped property that is owned by the Okelberrys in Wasatch County. Ray Okelberry, his brother Lee Okelberry, and their father first purchased this property in 1957. Trial Transcript, June 30 at 61-62. The Okelberrys ran a sheep business, and bought the mountainous property in order to relocate their herds to a higher, cooler elevation. Trial Transcript, June 30 at 61. Ray and Lee Okelberry ultimately bought out their father's interest in the land, and, after Lee decided to retire from the business, Ray's sons Eric and Brian Okelberry then bought out Lee's interest. Trial Transcript, June 30 at 62. At the present time, Ray, Eric, and Brian Okelberry own the land in question and continue to use it in their own livestock operations.

The Okelberrys' property is crisscrossed by a series of unimproved dirt roads. A color-coded map of the properties in question was attached as an exhibit during the pretrial proceedings, R. at 371, and, for convenience, is reproduced and attached as an exhibit to this brief. Evidence was presented at trial indicating that the County has not done any work to improve the physical condition of the roads. Findings of Fact, R. at 419, ¶4; Supplemental Findings, R. at 489, ¶2; Trial Transcript, June 28 at 25-26; Trial Transcript, June 29 at 57; Trial Transcript, June 30 at 80. The evidence presented at trial also indicated that, due to weather, the roads are only open for travel from Mid-May or June through November of each year. Findings of Fact, R. at 419, ¶5; Trial Transcript, June 28 at 61. To the extent that these roads can actually be referred to as "roads," the

evidence showed that they are rough, steep, rocky, and often obstructed by naturally falling trees. See, e.g., Trial Transcript, June 28 at 285 (testimony of County witness Ed Sabey, describing recurrence of falling trees); Trial Transcript, June 29 at 97 (testimony of County witness Benny Gardner, describing the roads as “rough” and “steep”); Trial Transcript, June 29 at 238-39 (testimony of Shane Ford, describing roads as “rocky” and “rough”); Trial Transcript, June 30 at 26 (testimony of Brian Okelberry, describing need for yearly tree removal).³

As indicated at trial, there are four ways in which the landowners have controlled access to the roads since 1957: (1) by granting permission to some people to use the roads, and then by expelling persons who were found on the roads without permission; (2)

³There was a minor dispute at trial regarding just how rough and rocky particular portions of the roads were. The testimony regarding Ridge Line road is instructive on this point. Gerald Thompson, testifying for the County, testified that he was able to take a 1955 Ford “car” up Ridge Line. Trial Transcript, June 28 at 247. By contrast, Mark Butters, also testifying for the County, testified that that same road is “very narrow,” “very steep,” “awful rocky,” and that a vehicle’s sides are scraped by the trees and shrubbery as it drives through. Trial Transcript, June 29 at 116-18. Finally, in their case in chief, the Okelberrys presented testimony that Ridge Line is inaccessible to a non-4 wheel drive vehicle even in the summer months. Trial Transcript, June 29 at 140 (testimony of Jeff Jefferson); Trial Transcript, June 29 at 157 (testimony of Mel Price); Trial Transcript, June 29 at 211 (testimony of Glen Shepherd).

As will be set forth in the Argument section of this brief, the ultimate resolution of this appeal does not hinge on a decision regarding what type of vehicle would be needed to traverse the particular roads during particular seasons. The questions before this Court are instead focused on the nature and extent of the man-made obstacles to public use. As a general matter, however, it is worth noting as background that even the County’s evidence tended to show that these roads are narrow, rocky, unpaved roads that are only passable by vehicles for a period of approximately 6 months of the year.

by maintaining a series of closed gates that cross each of the roads; (3) by periodically locking those gates; and (4) by posting no-trespassing signs along the roads.

Permission and Expulsion⁴

From the time that the Okelberrys purchased the property, they treated it and the roads that crossed it as private ground that was subject to their control. One of the chief ways in which the Okelberrys protected their private property rights was by granting permission to friends or neighbors to use the roads, and by expelling persons who they found using the roads without permission. At trial, Ray Okelberry specifically testified that as far back as 1957, he, Lee, and their father were granting permission—both orally and in writing—to friends and neighbors to use the roads. Trial Transcript, June 30 at 81. Ray Okelberry supported this testimony by presenting copies of permission slips that he had given to persons that he knew. One such slip, admitted as Defense Exhibit 28, read as follows: “I, Ray Okelberry, give permission to Brian Gardner and his folks to go through or around my locked gates, and **permission to use my roads** to access my property in Wasatch County.” Trial Transcript, June 30 at 83-84 (emphasis added). Ray Okelberry also presented a copy of a note that he had left on a car that was found on his property, informing the owner that he or she was trespassing. Trial Transcript, June 30 at 82. Brian Okelberry offered similar testimony regarding the Okelberrys’ attempt to limit access to these roads by granting or withdrawing permission. See Trial Transcript, June

⁴The evidence relating to this factor presented at trial appears to have been exclusive to the Okelberry roads, and does not apply to the West Daniels roads.

30 at 35-36. Specifically, Brian testified that he and his family would routinely grant permission to people they knew to come up and “use the roads and to hunt” on their property, and that the Okelberrys in later years even made a practice of charging persons for this road usage and hunting right. Trial Transcript, June 30 at 35.

At trial, several witnesses supported the assertion that the Okelberrys had been controlling access to the roads by granting permission and then expelling non-permissive users. Bruce Huvard, a longtime friend of the Okelberrys, testified that he has been using the roads with their specific permission since 1966. Trial Transcript, June 29 at 252, 261. Mr. Huvard also affirmatively testified that, between 1966 and 1990, he was asked by the Okelberrys to “kick people off” the property if he came upon them and learned that they did not have permission to be there. Trial Transcript, June 29 at 266. During one exchange at trial, Mr. Huvard testified about his role as follows:

Q: During this period of time from 1966 to 1990 do you know if other people obtained permission to use those roads?

A: They did.

Q: Do you know if other people used those roads that did not have permission?

A: Yes.

Q: Do you know if they were asked to leave?

A: When I was personally hunting there I would ask them to leave if they didn't have permission.

Trial Transcript, June 29 at 256.

Mel Price similarly testified. He stated that he has been using the roads since 1974. Trial Transcript, June 29 at 153. He also specifically stated that he has asked for permission to use the roads during every year since then, and then authenticated a permission slip that he had received from Ray Okelberry granting him permission to “access all of my private roads on my private land.” Trial Transcript, June 29 at 163-65. He further testified that his uncles and nephew have also received permission to use the roads from the Okelberrys, and that he had always understood that “a person needed permission to use the roads.” Trial Transcript, June 29 at 166.

Jeff Jefferson testified regarding the permission/expulsion protocols as well. Mr. Jefferson started working for the Okelberrys on their property in 1977, and has worked there every summer since then. Trial Transcript, June 29 at 130, 143. Mr. Jefferson stated that the Okelberrys had a policy that when one of their employees saw someone on the property, the employee was to approach the person, ask if they had permission, and then ask them to leave if they didn’t have permission. Trial Transcript, June 29 at 141. In fact, Mr. Jefferson specifically testified that he had had to ask one of the County’s witnesses, Mark Butters, to leave the property on two different occasions. Trial Transcript, June 29 at 141. As to the question of whether the expulsion policy was for the Okelberry roads and property, or whether it just applied to the Okelberry property itself, Mr. Jefferson was unequivocal that it applied to the property *and* the roads. On cross-examination, the following exchange occurred:

Q: You indicated that any time you saw people on the property you'd ask them to leave; is that correct?

A: That's correct.

Q: Is that any time you saw people driving on the roads?

A: Well, I'd ask if they, they had permission to be on there, 'cause I was informed that **it wasn't a public access**, you know, for people to be on there. So if they didn't have permission I would ask them to leave.

Q: When you say on there, do you mean on the roads or on the property?

A: Well, most of the time when people came on there they wouldn't stay on the road.

Q: So people you talked to were people that were off the road on property, is that what you're saying?

A: No—I'd run into people like that **and on the road**. And I'd ask them if they're supposed to be on there.

Q: Would you chase them down with your horse—

A: No.

Q: —or how would you talk to them?

A: Just as I was coming **up the road** I'd run into them. Try to do it nice, polite.

Trial Transcript, June 29 at 148-49 (emphasis added).

In further support of this assertion, Glen Shepherd testified that he has specifically asked for and received written permission from the Okelberrys to use their roads. Trial Transcript, June 29 at 212, 220. Similarly, Shane Ford testified that he and his extended

family have routinely used the roads and the property, with specific permission from the Okelberrys for both. Trial Transcript, June 29 at 230-31.

Fences and Gates

At the time that the Okelberrys purchased the property in 1957, the Okelberrys' property was bordered by fences. See, e.g., Trial Transcript, June 28 at 147 (testimony of James Bessendorfer); Trial Transcript, June 29 at 174 (testimony of Lee Okelberry); Trial Transcript, June 30 at 62 (testimony of Ray Okelberry). These border fences have remained in place throughout the Okelberrys' period of ownership. It appears to be undisputed that there have also been wire gates across the contested roads since at least 1957. See, e.g., Trial Transcript, June 28 at 39, 43, 48, 62, 64 (testimony of Dee Sabey that there have "always" been gates); Trial Transcript, June 29 at 174 (testimony of Lee Okelberry); Trial Transcript, June 30 at 24 (testimony of Brian Okelberry indicating that there are both internal "pasture gates" and external gates "at each place that [the roads] goes on and off West Daniels" land); Trial Transcript, June 30 at 62, 137 (testimony of Ray Okelberry).⁵

As indicated by the Okelberrys, the purpose of these gates was twofold. First, the *gates were used as a means of controlling the movement of the sheep and cattle within the*

⁵As per common practice, these gates are designed to be "let down" in the winter to avoid being knocked out of position by the snowfall. Though there was some testimony that some members of the public had ridden snowmobiles across these roads during the winter, the trial court did not rely on this particular form of use as part of its ruling and this usage is accordingly not addressed herein.

Okelberry property. See Trial Transcript, June 30 at 25 (testimony of Brian Okelberry); Trial Transcript, June 30 at 138 (testimony of Ray Okelberry). Second, the gates were also kept closed by the Okelberrys and their employees as a means of controlling vehicular and pedestrian traffic. In a pretrial affidavit that was filed with the Court, for example, Lee Okelberry testified that the family had attempted to control access to the roads through “fences and gates.” R. at 192, ¶5. At trial, Brian Okelberry also specifically testified that “one of the purpose[s] of the gates” was “to control vehicles from going up and down the roads,” Trial Transcript, June 30 at 25, and then later expressed his belief that the gates had been a sufficient means of asserting private control over the roads:

Q: Based upon your recollection and experience up there, do you have an opinion whether those roads have been open to the public and have been used continually during these summer months?

A: Not–Not–In my time we haven’t opened them. We closed the gates and tried to put a little control on it.

Trial Transcript, June 30 at 43. This assertion that there was a dual purpose for the gates was also backed up by Glen Shepherd, who at the time of trial had used the roads for 35 years and has been a neighbor of the Okelberrys for the past 14 years. See Trial Transcript, June 29 at 208. At trial, Mr. Shepherd testified that the gates have been kept closed “as far back as [he could] remember” and that his understanding was that the gates were kept closed, in part, to restrict the flow of persons. Trial Transcript, June 29 at 219. This assertion was also backed up by Jeff Jefferson, who worked as a rancher for the

Okelberrys every summer from 1977 through 2003. Trial Transcript, June 29 at 130, 143. According to Mr. Jefferson, the purpose of the gates was to control both the livestock and the public. Trial Transcript, June 29 at 135.

As for the West Daniels roads, the above testimony has obvious applicability to those roads with respect to the points at which Ridge Line runs onto and off of the West Daniels property. Additionally, testimony at trial also indicated that there were gates across Parker Canyon as well. See Trial Transcript, June 28 at 46-47 (testimony of Dee Sabey that there were gates on Parker Canyon); Trial Transcript, June 28 at 278 (testimony of Ed Sabey that there were gates across Parker Canyon).

Locks on the Gates

The Okelberrys presented testimony that they have been locking the gates on a periodic basis. Admittedly, there was some question at trial regarding the frequency and scope with which those gates have been locked. Ray Okelberry affirmatively testified, for example, that he had begun locking the exterior gates as early as 1958 or 1959, and that the interior gates within his property have been locked for approximately the past 20 years. Trial Transcript, June 30 at 135-37. More importantly, Ray Okelberry testified that he had made a habit of locking at least some of the gates every year while the sheep were being moved. Trial Transcript, June 30 at 138-39. This was supported by Mel Price. Mel Price began accessing the property in approximately 1972, Trial Transcript,

June 29 at 154, and testified that the gates had “always been locked” as far back as he could remember. Trial Transcript, June 29 at 160, 170.

Conversely, Brian Okelberry testified that, at least according to his memory, the exterior gates had only been locked since the 1980s, Trial Transcript, June 30 at 54, while Lee Okelberry could not remember ever having personally locked the gates himself. Trial Transcript, June 29 at 196. Additionally, the County presented testimony from several persons who indicated that they had never encountered a locked gate. See, e.g., Trial Transcript, June 28 at 35, 40, 43, 48 (Dee Sabey); Trial Transcript, June 28 at 112, 119, 125 (James Bessendorfer).

After considering the evidence, the trial court accepted Ray Okelberry’s contention that the gates were periodically locked while the sheep were being moved. The court thus found that the Okelberrys have “locked those gates for periods of time” prior to “completely controll[ing] access” through constant locking in 1989. Supplemental Findings, R. at 486. That finding has not been challenged on appeal by the County.

Signs

Finally, the evidence also indicates that the Okelberrys placed no trespassing signs along their roads as a means of informing the public that use was restricted. Ray Okelberry testified that he had started putting these signs up almost immediately upon purchasing the property in the late 1950s. Trial Transcript, June 30 at 137. Other witnesses confirmed the existence of these signs throughout the relevant period. Bruce Huvard, for example, specifically remembered seeing the no trespassing signs up as of

1966. Trial Transcript, June 29 at 257-58, 268-69. Mel Price, who has been using the roads since the early 1970s, stated that there had been no trespassing signs posted along the roads as far back as he could remember. Trial Transcript, June 29 at 160. Brian Okelberry similarly testified that there are signs on each of the boundary gates. Trial Transcript, June 30 at 25. Jeff Jefferson also testified that “all entrances” were marked with a sign stating “no trespassing or keep out.” Trial Transcript, June 29 at 135. Evidence also indicated that the West Daniels roads were marked with no trespassing signs as well. See Trial Transcript, June 29 at 161; Trial Transcript, June 29 at 212.

Following trial, the trial court concluded that the County had met its § 72-5-104 burden with respect to the contested roads. Specifically, the trial court concluded that there had been uninterrupted public use of the roads from 1960 until 1989. R. at 413, ¶8.⁶

⁶Though the trial court did specifically determine that there had been “no public use of the various roads in the 1940s or before and also that no evidence of vehicular use prior to the 1950s existed,” Findings of Fact, R. at 417, ¶10, the Court was somewhat ambiguous regarding the exact years for which the court believed § 72-5-104 had been satisfied. For example, in its discussion of the continuous use factor, the court determined that individuals had begun “using the roads beginning in the late 1950s until the late 1980s or early 1990s.” R. at 415, ¶4. In its discussion of the public thoroughfare requirement, the court was less specific, indicating simply that, “prior to the locking of the gates in the early 1990s, the roads were used as public thoroughfares.” R. at 414, ¶6. Finally, with respect to the ten year public use requirement, the court determined that the roads had been used “starting in 1960 until the early 1990's.” R. at 413, ¶7.

In its conclusory paragraph, however, the Court shortened the period somewhat with respect to the cutting off date. Specifically, the court determined that the roads had been used continuously “for a period of well over ten years prior to 1989 when the Okelberrys began locking the gates.” R. at 413, ¶8. Thus, the court specifically concluded that “the public has been effectively cut off from use of these public roads since 1989.” R. at 413, ¶8.

As discussed below, there is a presumption in favor of the property owner in cases brought under § 72-5-104. This brief will accordingly assume that the narrowest dates prevail and that the trial court’s ruling was that the roads had been continuously used from 1960 until

Those findings are the subject of the cross-appeal in this case, and will be discussed below in section II of the Argument. Additionally, on its own initiative, the trial court also determined that the principle of estoppel should be invoked to prevent the County from asserting control over these roads. That issue will be discussed in section III.

SUMMARY OF THE ARGUMENT

The trial court erred in concluding that these roads had been abandoned to the public under Utah Code Ann. § 72-5-104. The trial court first erred by ignoring uncontroverted evidence indicating that the Okelberrys had routinely expelled non-permissive users from their roads. Second, the trial court erred by also ignoring uncontroverted evidence indicating that there were gates across all of the roads in question, and that those gates were routinely closed. Third, the evidence showed that the gates had been locked and that there had been no trespassing signs alongside all of the roads. Given this evidence, the trial court's ultimate determination that there had been ten years of uninterrupted use by the public was simply incorrect and should be overturned.

In the alternative, this Court should affirm the trial court's decision to invoke the estoppel principle in this case. Specifically, the trial court correctly recognized that a governmental agency is not allowed to sit idly by while a landowner maintains his or her

1989. As will be set forth below in the Argument section, however, the slight difference that may exist between 1957, 1958, 1959, or 1960 as a starting point, and 1989, 1990, or 1991 as an ending point will become meaningless given the years ultimately covered by the Okelberrys' evidence.

roads for a period of decades, only to then arbitrarily claim ownership at a time of the government's choosing. As such, the estoppel ruling was correct.

ARGUMENT

I. IN REVIEWING THE MERITS OF THIS APPEAL, THIS COURT'S DEFERENCE TO THE TRIAL COURT IS LIMITED BY THE TRIAL COURTS' OWN INDEPENDENT OBLIGATIONS TO PROTECT THE RIGHTS OF PROPERTY OWNERS IN PUBLIC ROADS CASES.

As a threshold matter, the standard of appellate review that is applied to public roads cases warrants some discussion. Under Utah Code Annotated § 72-5-104, a privately owned highway is deemed to have been “dedicated and abandoned to the use of the public when it has been (1) continuously used (2) as a public thoroughfare (3) for a period of ten years.” (Numbering added). In enforcing the terms of § 72-5-104, the courts have determined that appeals from § 72-5-104 rulings present mixed questions of law and fact; as such, the trial court's factual findings are reviewed under the clearly erroneous standard, while the “ultimate determination” as to § 72-5-104's applicability is considered to be a question of law that is reviewed for correctness. Heber City Corp. v. Simpson, 942 P.2d 307, 309-10 (Utah 1997); see also AWINC Corp. v. Simonsen, 2005 UT App 168, ¶¶7-8, 112 P.3d 1228.

While this mixed question standard of review is well accepted in the relevant decisions, there is also a certain tension in those decisions regarding the actual degree of deference that should be granted to the trial court's resolution of the second question—i.e., the ultimate determination as to whether the § 72-5-104 criteria have been met. In Heber

City, the Utah Supreme Court indicated that although the ultimate determination is ostensibly reviewed for correctness, the appellate courts still recognize that the determination is “highly fact dependent and somewhat amorphous.” Heber City, 942 P.2d at 310. For this reason, the appellate courts have “historically . . . given trial courts a fair degree of latitude in determining the legal consequences under section [72-5-104] of facts found by the court.”⁷ Id. at 309-10; see also Campbell v. Box Elder County, 962 P.2d 806, 808 (Utah Ct. App. 1998).

Though subsequent decisions have reaffirmed the idea that this is a deference-laden correctness review, the decisions have repeatedly noted that the appellate review also takes into account the specific evidentiary requirements that are placed upon the trial court in § 72-5-104 cases. Specifically, it is well accepted that a public road dedication under § 72-5-104 is only proper where the trial court finds that clear and convincing evidence supports the government’s position. See Heber City, 942 P.2d at 310; AWINC Corp., 2005 UT App 168 at ¶7; Campbell, 962 P.2d at 808. Additionally, the trial court is required to view the evidence in these cases in light of the “presumption” that exists “in favor of the property owner.” Draper City v. Estate of Bernardo, 888 P.2d 1097, 1099 (Utah 1995) (quoting Bertagnole, Inc. v. Pine Meadow Ranches, 639 P.2d 211, 213 (Utah 1981)).

⁷Prior to 1998, the public dedication statute in question was designated as § 27-12-89. The above quotation from Heber City referred to the statute under its prior designation

For purposes of review, then, the central question is what is exactly required in order to meet the “clear and convincing” evidentiary standard. Black’s Law Dictionary states that the standard requires a showing that “the thing to be proved is highly probable or reasonably certain.” Black’s Law Dictionary, Evidence (8th ed. 2004). Similarly, Corpus Juris Secundum states that “[e]vidence is clear and convincing if it places in the fact finder an abiding conviction that the truth of the factual contentions is highly probable,” and that “clear and convincing evidence is that which leaves no reasonable doubt in the mind of the trier of fact as to the truth of the proposition in question.” 32A C.J.S. Evidence § 1306 (2005); accord 29 Am.Jur.2d Evidence § 157 (2005). The standard requires “clear, explicit, and unequivocal evidence” that is “sufficiently strong to command the unhesitating assent of every reasonable mind.” 9A Am.Jur. Pl. & Pr. Forms Evidence § 140 (2005).

The reason for requiring this higher standard of proof in public road cases is clear. As explained by the Utah Supreme Court, “[t]he law does not lightly allow the transfer of property from private to public use. . . . This higher standard of proof is demanded since the ownership of property should be granted a high degree of sanctity and respect.” Draper City, 888 P.2d at 1099. In an earlier public roads case, the Utah Supreme Court similarly stressed that “[w]here individual property rights are at stake, we must not treat such rights lightly.” Petersen v. Combe, 438 P.2d 545, 546 (Utah 1968).

Thus, while the trial court’s judgment is given a certain degree of deference on appellate review, it is nevertheless also clear that this appellate deference is simply not

absolute. Instead, in order to protect the important private property rights that are at stake in these cases, the appellate court's review is only deferential to the extent that the appellate court first concludes that the trial court has properly applied the clear and convincing evidence standard to its own determination. To hold otherwise would be to render the clear and convincing evidence standard meaningless, while at the same time weakening the protections that are afforded to private property owners in these cases.

For these reasons, if the evidence in favor of dedication in this case is not "clear, explicit, and unequivocal" such that there is "no reasonable doubt" regarding the government's position, then the trial court's decision to publicly dedicate what had been privately owned roads should be overturned by this Court.

II. THE TRIAL COURT ERRED WHEN IT DETERMINED THAT THERE WAS CLEAR AND CONVINCING EVIDENCE THAT THE ROADS HAVE BEEN ABANDONED TO THE PUBLIC.

As for the substantive requirements of § 72-5-104, the statute itself requires three separate criteria to be established for a public dedication to occur: first, that the road was used "continuously"; second, that the road was used as "a public thoroughfare"; and third, that the road was continuously used as a public thoroughfare for at least a period of "ten years."

The bulk of the analysis in the cases has focused on the first requirement, that of "continuous use" by the public. It is well accepted that though the continuous use requirement does not require the road to have been used on a day-to-day basis, see Campbell, 962 P.2d at 809 (stating that continuous use may be "continuous though not

constant”), the public’s ability to access the road still needs to have been unfettered and unimpeded on *any occasion* on which members of the public tried entering. The County must therefore show that “the public made a continuous and uninterrupted use of” the contested road “as often as they found it convenient or necessary.” AWINC Corp., 2005 UT App 168 at ¶11; accord Heber City, 942 P.2d at 310 (stating that the use must be “without interruption”). Thus, it must be shown that members of the public used the roads “*as often as the claimant had occasion or chose to pass*,” and that those same members were able to use the roads “**whenever** they found it necessary or convenient.” Campbell, 962 P.2d at 809 (*first emphasis* in original; **second emphasis** added).

The reported cases are illustrative. In Draper City, the Utah Supreme Court considered a case in which the city had brought suit against a rural landowner under § 72-5-104's predecessor statute. See generally 888 P.2d at 1098-99. The trial court had granted summary judgment on behalf of the city; the Supreme Court reversed. Id. at 1101. In holding that the evidence did not support the public road determination, the Supreme Court emphasized the fact that there had been intermittent interruptions in the public’s right to use the roads. Specifically, the evidence had shown that: (1) the landowners had, on occasion, stopped persons who were using the roads and asked them to leave; (2) the owners had posted “no trespassing” signs at the entrance to the roads; (3) the owners had blocked the roads by digging trenches, stacking concrete blocks, and creating obstructive piles of dirt and rocks; and (4) the owners had erected a gate at the entrance to the roads. Id. at 1100. All of these acts were identified as interruptive acts by

the Supreme Court. Particularly instructive for purposes of this appeal is the emphasis that the Draper City Court placed on the fact that the owners had asked “some” persons to leave the roads. Id. What is noteworthy about this is that the Supreme Court did not require a showing that the owners had asked “all” trespassers to leave the roads. Instead, the Supreme Court accepted as proof of interruption the mere assertion that “some” persons had been asked to leave. Also significant is the Court’s reliance on signs and gates as evidence of interruption.

In Campbell, this court similarly affirmed a decision of a lower court holding that a public road had not been established. See generally 962 P.2d at 807-08. In so doing, this Court determined that the continuous use requirement had not been satisfied because of evidence showing (1) that the owners had placed a gate across the road in question, and (2) that the gate had been locked during certain (but not all) months of the year. Id. at 808-09. As in Draper City, the court thus concluded that an interruption of public access, however brief, is still sufficient to break off the ten year period of continuous public use, thereby preserving the landowner’s private property rights.

In contrast, the cases in which the Utah appellate courts have concluded that § 72-5-104 has been satisfied have been those in which the uncontroverted evidence showed that there had been absolutely no interruption of the public’s right to use the roads during the requisite period. In Heber City, for example, the Supreme Court affirmed a continuous use determination because of the fact that the “**uncontradicted** evidence demonstrates that the public made a continuous and uninterrupted use” of the contested

roads. 942 P.2d at 311 (emphasis added). Similarly, in Kohler v. Martin, 916 P.2d 910 (Utah Ct. App. 1996), this Court affirmed a public road dedication where there was “abundant, un rebutted evidence in support” showing continuous use. Id. at 913. Specifically, the court emphasized the fact that the landowners had “not fence[d] off the roadway,” had “not post[ed] any signs, and in general [had] made no attempts to limit the passage of the public.” Id.

In short, though the continuous use requirement remains a “fact-intensive” inquiry, Heber City, 942 P.2d at 310, the controlling legal test is well-established. In order to ensure that § 72-5-104 is not used to arbitrarily and unfairly deprive a landowner of his or her property rights, the courts have insisted that the continuous use requirement is only satisfied when the evidence showing uninterrupted use is un rebutted and uncontradicted. If there has been competent or credible evidence of interruption, the continuous use requirement has simply not been satisfied, and § 72-5-104 is inoperative.

As to the other § 72-5-104 factors, the second requirement is that there be a showing that the contested road was used as a public thoroughfare. By definition, this requirement is closely related to the continuous use requirement.⁸ Under the public thoroughfare analysis, the question is whether the public had “a general right of passage”

⁸Though each of the three § 72-5-104 elements “embodies a logically distinct requirement that must be satisfied, the elements are so intertwined that they are not readily susceptible to separate discussion. For example, it is difficult to analyze whether the ‘use’ has been continuous without determining at the same time whether that ‘use’ has been as a public thoroughfare.” Heber City, 942 P.2d at 310 n.6. For this reason, a discussion of the three elements necessarily involves a degree of “overlap.” Id.

on the road in question. Heber City, 942 P.2d at 311. In making such a determination, the road's designation (or lack thereof) on a map is not dispositive. Id. at 311 n. 8.⁹ Evidence showing that the road was used by either neighbors or by permissive users is also not relevant. See AWINC Corp., 2005 UT App 168 at ¶¶16-17; Campbell, 962 P.2d at 809. Instead, the public thoroughfare requirement requires the County to show that the road was regularly used by non-neighbor, non-permissive members of the general public. See AWINC Corp., 2005 UT App 168 at ¶¶16-17. Finally, the County must show that the public used the roads as a public thoroughfare without interruption for a period of ten continuous years. Under Heber City, the rule is that the County can prevail on this factor by showing that the other two requirements have been met with respect to any ten year period in the road's history. See generally 942 P.2d at 313 n.12.

A. **The evidence supporting trial court's conclusion.**

Pursuant to Rule 24(a)(9) of the Utah Rules of Appellate Procedure, the following is the evidence that supports the trial court's conclusion that the roads were continuously used as a public thoroughfare for a period of ten years.

⁹Given that the public thoroughfare requirement focuses on the question of whether the particular persons using the roads were doing so with or without permission, it makes sense that designations on a map are not deemed relevant to the analysis. Indeed, the non-controlling nature of such evidence was acknowledged at trial by Don Wood, a County employee who testified on behalf of the County. Trial Transcript, June 28 at 25-26.

In spite of this, it is worth noting that some evidence was presented at this trial showing that these roads had been charted on some government maps. The trial court did not reference or rely on these map designations in either its original or supplemental rulings, however, and, given the lack of legal relevance of these designations, this brief accordingly does not marshal or discuss this evidence in the analysis.

1. Marshaled evidence supporting the trial court's conclusion regarding Ridge Line.

Evidence regarding frequency of use: Dee Sabey testified that he had used the road “lots of times in the summer” for weekend camping, and that he used the road “several times” “every fall” during the deer hunt. Trial Transcript, June 28 at 38. James Bessendorfer testified that he used the road “many times” every year until the gates were locked. Trial Transcript, June 28 at 111-12. Martin Wall testified that he had used the road “many times.” Trial Transcript, June 28 at 191. Gerald Thompson testified that he used the road “several times” per year during the hunting season, that he used it 1-2 additional times per year for picnics, and that his total usage amounted to approximately 5 times per year. Trial Transcript, June 28 at 233, 257. Ed Sabey “guessed” that he used the road “several times a month.” Trial Transcript, June 28 at 270.¹⁰ Dick Baum testified that he used the road once a year for a biking trip. Trial Transcript, June 28 at 314. Benny Gardner testified that he used the road 7-8 times per year. Trial Transcript, June 29 at 69. Brandon Richins testified that he has used it “quite frequently” since he

¹⁰It is unclear whether Ed Sabey meant that he used the road several times a month in the hunting season, several times a month in the summer months, or whether he was somehow asserting that he used the road several times a month during the winter months as well.

received his driver's license. Trial Transcript, June 29 at 10.¹¹ Mark Butters testified that he used the road twenty times per summer. Trial Transcript, June 29 at 103.¹²

Evidence regarding permission: The following individuals testified that they had never been asked to leave the road: Dee Sabey, Trial Transcript, June 28 at 40; Martin Wall, Trial Transcript, June 28 at 197; Ed Sabey, Trial Transcript, June 28 at 271.

Evidence regarding gates: The following individuals testified that the gates hadn't been locked during the relevant period: Dee Sabey, Trial Transcript, June 28 at 40; James Bessendorfer, Trial Transcript, June 28 at 112; Martin Wall, Trial Transcript, June 28 at 192; Gerald Thompson, June 28 at 232; Ed Sabey, Trial Transcript, June 28 at 271; Mark Butters, June 29 at 103.

¹¹Brandon Richins was born in 1973, Trial Transcript, June 29 at 6, and testified that he received his license in the summer of 1990. Trial Transcript, June 29 at 10. As indicated above, this was the same time period in which the roads were permanently locked.

¹²Some of these witnesses also testified as to seeing unnamed other persons on the roads as well. See, e.g., Trial Transcript, Dick Baum, June 28 at 319 (indicating that he would sometimes see "someone" else up on the roads). In Draper City, the Supreme Court addressed the question of whether such testimony has any probative value in a § 72-5-104 case. See 888 P.2d at 1100. The Court concluded that such testimony does not have any weight in a public roads case, noting that these other "users are not identified," and that there would be no way to determine whether such users "had permission to use the road." Id.

In addition to the permission aspect identified in Draper City, there would also be an open question as to whether any or all of these unnamed users had subsequently been asked to leave, whether they had been obstructed by a locked gate, or whether they regarded the no trespassing signs as evidence that they were in fact trespassing. As such, though it is acknowledged that many of the County's witnesses described having seen other persons on these roads, this testimony regarding unnamed users has no substantive value at all to this case and is therefore not marshaled or discussed further in this brief.

Evidence regarding signs: The following individuals testified that they had not seen any signs during the relevant period: Dee Sabey, Trial Transcript, June 28 at 39; James Bessendorfer, June 28 at 112; Martin Wall, June 28 at 192, 197; Gerald Thompson, June 28 at 232; Dick Baum, June 28 at 314; Mark Butters, June 29 at 103.

2. Marshaled evidence supporting the trial court's conclusion regarding Circle Springs.

Evidence regarding the frequency of use: Dee Sabey testified that he used the road 2-3 times per summer and then for the deer hunt “practically every fall.” Trial Transcript, June 28 at 33. James Bessendorfer testified that he used the road two to three times per year during the 60s, 70s, and 80s. Trial Transcript, June 28 at 100. Martin Wall testified that he didn’t use the road every year, but that when he did, he would use it two to three times in the year during the fall hunt. Trial Transcript, June 28 at 187. Gerald Thompson indicated that he has walked the road one time. Trial Transcript, June 28 at 228. Ed Sabey testified that he used the road “maybe twice a year, three times” a year during the relevant period. Trial Transcript, June 28 at 266-67. Brandon Richins testified that he had used the road sometime during his teenage years, while would have been post-1986. Trial Transcript, June 29 at 8.¹³ Benny Gardner testified that he used the road “several times” during the period from 1964 through 1999. Trial Transcript, June 29 at 66. Mark

¹³Later in his testimony, however, Mr. Richie recanted and indicated that he has no clear memory regarding Circle Springs. Trial Transcript, June 29 at 21-22.

Butters testified that he used the road approximately 20 times per summer. Trial Transcript, June 29 at 102.

Evidence regarding permission: The following individuals testified that they had never been asked to leave the road or had seen anyone else be asked to leave the road: Dee Sabey, Trial Transcript, June 28 at 35; James Bessendorfer, Trial Transcript, June 28 at 104; Martin Wall, Trial Transcript, June 28 at 190; Brandon Richins, Trial Transcript, June 29 at 10.

Evidence regarding gates: The following individuals testified that the gates hadn't been locked during the relevant period: Dee Sabey, Trial Transcript, June 28 at 35; James Bessendorfer, Trial Transcript, June 28 at 104; Martin Wall, Trial Transcript, June 28 at 187-88; Ed Sabey, Trial Transcript, June 28 at 268; Brandon Richins, Trial Transcript, June 29 at 10; Benny Gardner, Trial Transcript, June 29 at 63 (testifying that there were no locked gates in the 1960s).

Evidence regarding signs. The following individuals testified that they had not seen any no trespassing signs during the relevant period: Dee Sabey, Trial Transcript, June 28 at 34; Ed Sabey, Trial Transcript, June 28 at 288; Brandon Richins, Trial Transcript, June 29 at 9; Benny Gardner, Trial Transcript, June 29 at 63.

3. Marshaled evidence supporting the trial court's conclusion regarding Thornton Hollow.

Evidence regarding frequency of use: Dee Sabey testified that he had used the road "off and on" from the 1960s to 1980s. Trial Transcript, June 28 at 42-43. James

Bessendorfer testified that he had used the road approximately six times per year. Trial Transcript, June 28 at 117. Martin Wall testified that he had used the road for hunting. Trial Transcript, June 28 at 193. Gerald Thompson testified that he had used the road in the 1960s and 1970s. Trial Transcript, June 28 at 235. Ed Sabey testified that he had used the road once or twice a month during the summer. Trial Transcript, June 28 at 272. Brandon Richins testified that he used the road when he was younger. Trial Transcript, June 29 at 15.¹⁴ Benny Gardner testified that he had used the road 6-7 times per year since the 1980s. Trial Transcript, June 29 at 70. Mark Butters testified that he had used the road between 1967 and 1994. Trial Transcript, June 29 at 105.

Evidence regarding permission: The following individuals testified that they had never been asked to leave the road or had seen anyone else be asked to leave the road: Dee Sabey, Trial Transcript, June 28 at 44; James Bessendorfer, Trial Transcript, June 28 at 120; Benny Gardner, Trial Transcript, June 28 at 70;

Evidence regarding gates: The following individuals testified that the gates hadn't been locked during the relevant period: Dee Sabey, Trial Transcript, June 28 at 43; James Bessendorfer, Trial Transcript, June 28 at 118; Mark Butters, Trial Transcript, June 29 at 105.

Evidence regarding signs: The following individuals testified that they had not seen any no trespassing signs during the relevant period: Dee Sabey, Trial Transcript,

¹⁴Later in his testimony, however, Mr. Richie recanted and indicated that he has no clear memory regarding Thornton Hollow. Trial Transcript, June 29 at 21-22.

June 28 at 43; Gerald Thompson, June 28 at 236; Benny Gardner, Trial Transcript, June 29 at 72 (testifying that he had seen the signs, but that he thought they were only for the property).

4. Marshaled evidence supporting the trial court's conclusion regarding Parker Canyon.

Evidence regarding frequency of use: Dee Sabey testified that he used the road “several times” per year during the hunting season. Trial Transcript, June 28 at 46. Gerald Thompson testified that he used the road for hunting. Trial Transcript, June 28 at 238. Brandon Richie, who was born in 1973, testified that he used it “all his life.” Trial Transcript, June 29 at 16.¹⁵ Benny Gardner testified that he has used it 4-5 times per year. Trial Transcript, June 29 at 76. Mark Butters testified that he has used the road approximately fifty times since 1960. Trial Transcript, June 29 at 106.¹⁶

Evidence regarding permission: The following individuals testified that they had never been asked to leave the road or had seen anyone else be asked to leave the road: Dee Sabey, Trial Transcript, June 28 at 47; Mark Butters, Trial Transcript, June 29 at 106.

Evidence regarding gates: The following individuals testified that the gates hadn't been locked during the relevant period: Dee Sabey, Trial Transcript, June 28 at 48; James

¹⁵Later in his testimony, however, Mr. Richie recanted and indicated that he has no clear memory regarding this road. Trial Transcript, June 29 at 31.

¹⁶James Bessendorfer also testified to use, but, as a member of West Daniels, his use was permissive. Trial Transcript, June 28 at 121.

Bessendorfer, Trial Transcript, June 28 at 125; Ed Sabey, Trial Transcript, June 28 at 278; Wayne Robertson, Trial Transcript, June 30 at 15.

Evidence regarding signs: The following individuals testified that they had not seen any no trespassing signs during the relevant period: Dee Sabey, Trial Transcript, June 28 at 47; James Bessendorfer, June 28 at 125; Ed Sabey, Trial Transcript, June 28 at 278; Mark Butters, Trial Transcript at 107.

B. **In spite of the above-listed evidence, the trial court's ultimate determination that the roads were continuously used by the public for a period of ten years is incorrect.**

As discussed above, the trial court could only conclude that the roads were abandoned to the public under § 72-5-104 if it properly determined that there was clear and convincing evidence that the public had used the roads without interruption from 1960 through 1989. Though the County did present this evidence tending to show that certain members of the public were able to repeatedly trespass on these privately owned roads, that evidence is nevertheless fatally flawed for three different reasons. First, the County has failed to rebut the Okelberrys' supported assertions that they and their agents routinely ejected persons from the roads who did not have permission to be there. Second, the County has also failed to rebut the Okelberrys' supported assertions that there were gates across each of the roads that were kept closed. Third, though there is some dispute about the time periods in which the gates were locked and in which the no trespassing signs were posted, the evidence presented by the Okelberrys regarding the

existence of these two interruptive obstacles was sufficient to defeat any claim of clear and convincing evidence showing abandonment.

1. The Okelberrys presented un rebutted evidence showing that they had expelled persons who did not have permission to use the roads.

First, the County's case was reliant upon the testimony of a series of witnesses who were by their own assertions only part- time, intermittent users of the roads. With slight variations in frequency, the testimony was generally that the roads were used by these witnesses on a limited number of occasions during the summer, and then again during the 2-3 week long hunting season in the fall.

In terms of claimed usage, the notable high point in the County's case was Mark Butters. In spite of the fact that virtually all of the evidence supported the notion that these roads are rough and very difficult to traverse, as well as the fact that the County's other witnesses generally claimed usage rates of no more than 5-6 times during a given summer, Mark Butters nevertheless testified that he uses the Ridge Line and Circle Springs roads approximately 20 times per summer. Assuming *arguendo* that this particular statement was true, and that by the term "summer" Mr. Butters was referring to the months of June, July, and August, it is worth noting that Mr. Butters was still only asserting that he used these roads at a rate of somewhere close to 1½ times per week. The other witnesses, of course, were claiming usage at rates much lower than that.

Given the intermittent nature of these witnesses' claimed usage, it is therefore clear that even the County's most persistent witnesses were by their own terms simply not

in a position to rebut the Okelberrys' insistence that uninvited persons had been asked to leave the roads ever since the Okelberrys purchased the property. Thus, when Ray Okelberry testified that he and his father were granting permission to users as far back as 1957, there was no contrary evidence that could disprove this assertion. When Brian Okelberry testified that he and his family had routinely limited access to the roads by granting or withdrawing permission, there was no contrary evidence that could disprove this assertion. When Bruce Huvard testified that, at the Okelberrys' request, he had been exercising his authority since 1966 to kick people off the roads if he came upon them, there was no contrary evidence that could disprove this assertion. When Jeff Jefferson testified that, at least since 1977, he and the other Okelberry employees had been instructed to approach non-permissive users and ask them to leave, there was no contrary evidence that could disprove this assertion. When Mel Price, Glenn Shepherd, and Shane Ford all testified that they and other persons they knew had sought for and received permission to use these roads, this testimony wholly comported with the testimony of the Okelberrys and their agents, and there was no contrary evidence that could disprove the contention that this was part of a repeated pattern of conduct since 1957.

Because § 72-5-104 requires clear and convincing evidence of uninterrupted use, the testimony of these witnesses regarding the repeated expulsions of non-permissive users should have been deemed conclusive as to the roads that were under the Okelberrys' control. Other than showing that this particular collection of admittedly intermittent, admittedly spasmodic users had each managed to use these rural roads on occasion

without being stopped, the County simply presented no other evidence that contradicted the claim that other persons were in fact being expelled from the property, or that instead showed that the Okelberrys and their witnesses were lying when they testified otherwise. Given the importance placed upon this very same type of behavior in Draper City, the trial court in this case therefore should have concluded that the evidence of uninterrupted use was not clear and convincing on this basis alone. On the basis of this factor alone, the trial court can and should be overturned.

2. The Okelberrys presented un rebutted evidence showing that they had controlled access to the roads through gates.

Second, the County's own witnesses repeatedly acknowledged that there have always been gates across these roads during the relevant period.¹⁷ This question of whether a closed gate must be locked in order to qualify as an interruptive act for purposes of § 72-5-104 has not been definitively addressed by a Utah appellate court.¹⁸ In this case, the trial court specifically noted that the gates were often closed, but then concluded that a closed yet unlocked gate was not interruptive for purposes of § 72-5-104. See Trial Transcript, June 30 at 154-55; R. at 415, ¶¶3-4. That conclusion should be rejected as a matter of law.

¹⁷There was also evidence in this case indicating that those gates were periodically locked. The legal significance of those locks will be discussed in the next section.

¹⁸This issue appears to have been raised in Chapman v. Uintah County, 2003 UT App 383, 81 P.3d 761, but was not ultimately reached by the panel. See id. at ¶¶24-26.

As discussed above, the question under the continuous use requirement is whether the public's right to use the road was interrupted or "limited." Heber City, 942 P.2d at 311 n.9. Though some cases have considered the impact of locked gates on the continuous use inquiry, see, e.g., Campbell, 962 P.2d at 809, it is significant that a number of the cases have also considered the presence of gates as an interruptive force without deeming it necessary to even note whether those gates were locked. See, e.g., Draper City, 888 P.2d at 1100; AWINC Corp., 2005 UT App 168 at ¶3, 11-12; Kohler, 916 P.2d at 913.

There are strong policy reasons for allowing a gate to act as an interruptive force, even in the absence of any evidence showing that that gate was locked. As indicated above, the Utah courts have long sought to achieve a balance between the competing interests that are at work in the § 72-5-104 cases. On the one hand, the government clearly has an interest in preserving the public's right to use roads that have been left to the public for a lengthy period of time. It is instructive in this regard that the statute itself only calls for public dedication where the landowners have "abandoned" the road. See Utah Code Ann. § 72-5-104(1). In a very real sense, the prevailing logic here is one of reliance. If an owner has completely "abandoned" a particular road for such a lengthy period of time, it stands to reason that the public will have developed collective patterns of travel, commerce, and development during that time that would track and be reliant upon the existence of this "public thoroughfare." This is exactly what happened, for example, in the Heber City case. In that case, the road in question had continuously been

used by the public from 1947 until 1989. 942 P.2d at 313. Not only did a “number of businesses” spring up alongside the road, but the road also became a primary means of reaching the airport. Id. at 312. In such circumstances, it would indeed be unjust to allow a long absent landowner to suddenly emerge, claim ownership, and restrict the public’s right to use a road that had never before been treated as anything but public.

On the other hand, where the landowner has taken some recognizable steps to assert some control over the roads, the public will be under no such illusions. For example, in a case involving rural roads that are crossed by unlocked gates, a member of the public who wished to use the roads would still have to physically stop their car, get out, open the gate, drive through the gate, and then get out again to close the gate before proceeding onward. This is precisely what happened here, for example, with many of the County’s own witnesses testifying that the gates were always kept closed as a means of keeping the Okelberrys’ livestock within the property. See, e.g., Trial Transcript, June 28 at 40 (testimony of Dee Sabey); Trial Transcript, June 28 at 314 (testimony of Dick Baum); Trial Transcript, June 29 at 119, 123 (testimony of Mark Butters). As such, the members of the public who used these roads were always presented with a reminder upon both ingress and egress that these roads belonged to some other party, and that use of these roads was solely at the pleasure of that owner.

As indicated above, the law does not lightly allow the public takeover of a private property owner’s land. The statute at issue in this case does not require a landowner to come up with an expensive, elaborate, or foolproof system for keeping out all trespassers.

Instead, the statute allows the property owner to preserve his or her rights by simply creating some interruptive obstacle that limits the public's access to the private roads. Given the large number of rural ranches and farms in this state that are separated from the highways by nothing more than a wire fence or gate, this Court should reject the trial court's decision to read into the statute a heretofore non-existent requirement that all of those gates and fences actually be locked. Instead, this Court should affirm the obvious, common-sense reading of the statute, thereby holding that a landowner who has preserved and maintained a gate or fence across his or her road cannot be said to have "abandoned" that road under § 72-5-104. For this reason, this Court can and should conclude that there was not clear and convincing evidence showing that the roads involved in this appeal were ever abandoned to the public.

3. The quantum of evidence regarding locks and signs contradicts the trial court's finding of clear and convincing evidence.

Third, the Okelberrys presented a sufficient quantum of evidence at trial to establish that there had been no trespassing signs alongside the roads. As discussed above, many of the witnesses discussed the presence of signs alongside this road system in general terms. See Trial Transcript, June 30 at 137 (testimony of Ray Okelberry); Trial Transcript, June 29 at 257-58, 268-69 (testimony of Bruce Huvard); Trial Transcript, June 29 at 160 (testimony of Mel Price); Trial Transcript, June 30 at 25 (testimony of Brian Okelberry); Trial Transcript, June 29 at 135 (testimony of Jeff Jefferson). Other witnesses were more specific as to the particular signs they saw upon particular roads.

With respect to Parker Canyon, both Mel Price and Glen Shepher testified that they had in fact seen no trespassing signs on that road. See Trial Transcript, June 29 at 161; Trial Transcript, June 29 at 212. With respect to Thornton Hollow, Mark Butters, testifying for the County, testified that he had seen no trespassing signs as well. Trial Transcript, June 29 at 106. Similar testimony was elicited with respect to Circle Springs. Trial Transcript, June 29 at 161 (testimony of Mel Price).

It is true that the County presented a number of witnesses who denied having seen such signs. In an ordinary circumstance, the presentation of such conflicting testimony would allow the trial court to make a determination that would be granted deference by the appellate court. In this circumstance, however, the inquiry is whether the trial court's conclusion that the evidence regarding the signs had not been posted was "clear and convincing." In light of the conflicting evidence regarding this issue, this Court should accordingly conclude that the evidence was sufficient to establish the existence of these no trespassing signs, and that those signs then showed there to have been an interruption in the public's right to continuously use the roads as a public thoroughfare.

As for the question of whether the gates were locked, the evidence that was presented at trial indicated that the Okelberrys had in fact locked the gates that controlled access to their roads. Ray Okelberry, for example, specifically testified that he had begun locking the exterior gates since the late 1950s, and that he had also made a habit of locking the gates every year while moving his own sheep. Trial Transcript, June 30 at

138-39. His assertion that the gates were at least periodically locked was also supported by Mel Price. Trial Transcript, June 29 at 160, 170.

It is true that many of the County's witnesses testified that they had not encountered locks on the gates until the late 1980s. This discrepancy is, however, explainable on at least two levels. First, the testimony at trial was that the gates and the locks were repeatedly torn down through the years by trespassers and hunters. For example, Jeff Jefferson, the longtime Okelberry employee, testified that one wire gate had ultimately been replaced by an iron gate "because every week—you could put up the gate and the next day it would be ripped out." Trial Transcript, June 29 at 134; accord Trial Transcript, June 29 at 186-87, 197-98 (testimony of Lee Okelberry); Trial Transcript, June 30 at 137-39 (testimony of Ray Okelberry). Second, as discussed above, none of the witnesses who testified on behalf of the County were anything but sporadic users of the roads. According to his testimony, Ray Okelberry testified that he was at the very least locking the gates for a short period every summer while he moved his sheep. Depending on the vagaries of chance and timing, such short term, periodic locking would not necessarily have impacted the County's collection of admittedly intermittent witnesses.

Regardless, the trial court ultimately concluded that the Okelberrys had been locking the gates at least on a periodic basis prior to 1989. See Supplemental Findings, R. at 488, ¶5 ("At various times in the past, the Okelberrys and their employees have locked these gates. Beginning in the 1990s, the Okelberrys began locking these gates on a more permanent basis"). This finding has not been challenged on appeal by the County,

and must therefore be accepted as true by this Court. As such, the only way that the trial court's ultimate determination is sustainable is if this Court determines that periodic locking of gates is not sufficient to cut off § 72-5-104's continuous use requirement. Such a conclusion, however, would clearly contradict both the statute and the cases.

In short, a determination that a landowner has abandoned his or her road to the public is only permissible where there is clear and convincing evidence that *any* member of the public was able to use the road whenever that member so desired. All that the County was able to show in this case, however, was that *certain* members of the public had been able to use the roads during their own periodic forays into the area. That is not enough.

The trial court erred because it failed to properly recognize the legal impact of the Okelberry's evidence. Specifically, the un rebutted evidence showing that the Okelberrys had expelled non-permissive users of the roads was enough to defeat the County's claim of abandonment. The un rebutted evidence showing that the public had had to cross through the gates when crossing onto these roads was likewise enough to defeat the claim of abandonment. Finally, the evidence showing both a periodic locking of the gates and the presence of no trespassing signs should at the very least have prevented the trial court from concluding that there was clear and convincing evidence of non-interruption.

For these reasons, the trial court's ultimate determination that these roads have been abandoned to the public should therefore be overturned.

III. THE TRIAL COURT DID NOT ERR WHEN IT DETERMINED THAT THE COUNTY SHOULD BE ESTOPPED FROM ASSERTING CONTROL OVER THE ROADS IN QUESTION.

Although the trial court initially concluded that the roads in question were continuously used as a public thoroughfare for a period of ten years, the trial court also determined that the County should be prevented from asserting control over the roads under principles of estoppel. By definition, the court's estoppel ruling was only necessary because of the initial determination that § 72-5-104 had been satisfied. Because that determination was in error, this Court should simply reverse that ruling and resolve this appeal on that issue alone. Should this Court determine that a ruling on the estoppel issue is necessary, however, Appellants suggest that that ruling be upheld.

In general, an estoppel determination is appropriate where there is

(1) a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; (2) reasonable action or inaction by the other party taken on the basis of the first party's statement, admission, act, or failure to act; and (3) injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act.

Eldredge v. Utah State Ret. Bd., 795 P.2d 671, 676 (Utah Ct. App. 1990).

As a threshold matter, it is worth noting that this case does indeed satisfy the three prongs of the general estoppel rule. First, assuming that the trial court's determination regarding the roads' abandonment in 1970 is correct,¹⁹ the County has wholly failed to act

¹⁹As discussed above, the trial court appears to have ruled that the uninterrupted public use began in 1960, and that it continued for a period of at least ten years thereafter. As such, under the terms of § 72-5-104, the roads would have become public as of 1970.

in a manner consistent with its current assertions of ownership. Specifically: (1) the County has never maintained the roads, instead leaving that difficult task to the Okelberrys and their employees (see Supplemental Findings at ¶¶2-3; Trial Transcript, June 29 at 177); (2) the County has allowed the Okelberrys to put up no trespassing signs alongside the roads (discussed *infra*); (3) the County has allowed the Okelberrys to maintain and periodically lock the gates are placed across these roads (discussed *infra*); (4) the County has allowed the Okelberrys to require uninvited persons to leave the roads upon demand (discussed *infra*); (5) the County has allowed the Okelberrys to sell trespass permits for use of the roads (discussed *infra*); and (6) the County has allowed the Okelberrys to enter into private contracts with private hunting units, whereby the Okelberrys have purported to sell the rights to restrict use of these roads (see Supplemental Findings at ¶¶9-10). Each of these acts are acts that are manifestly impermissible on any public road by any private party. Taken either individually or collectively, the County's current position is therefore inconsistent with its prior conduct.

Second, the private owners of these roads have acted in reliance upon their belief that these roads are privately owned. The evidence presented at trial both explicitly and implicitly indicated that the Okelberrys have spent over 50 years developing a successful grazing operation on these lands. These efforts have included, of course, the efforts that have been expended in maintaining the gates and locks and the work that obviously goes into keeping such roads clear of trees and debris. See, e.g., Trial Transcript, June 29 at 218; Trial Transcript, June 30 at 26; Trial Transcript, June 30 at 126-29. The evidence

also indicated that, in spite of their significant efforts, the Okelberrys have been unable to keep the trespassers and private hunters off of their land. See Trial Transcript, June 29 at 215 (testimony of Glen Shepherd); Trial Transcript, June 29 at 261 (testimony of Bruce Huvard); Trial Transcript, June 39 at 137 (testimony of Ray Okelberry). Further, testimony was presented at trial showing that the trespassers upon the roads very often left the roads and then trespassed upon the Okelberry property itself. See Trial Transcript, June 29 at 26 (Brandon Richins admitting that he'd often drive onto the private property to get around fallen trees); Trial Transcript, June 29 at 149 (Jeff Jefferson testifying that "most of the time when people came on there they wouldn't stay on the road"); Trial Transcript, June 29 at 190-194 (testimony of Lee Okelberry describing how he often caught trespassers gathering wood or hunting on the Okelberrys' private ground). Given the obvious harm that such unfettered use could do to the Okelberrys' operations, it seems clear that the Okelberrys would not have developed this operation in this location if the County had asserted its control over these roads sooner.

Third, the evidence that was presented at trial did indicate that the Okelberrys would suffer injury if the roads were opened to the public. This injury would occur on two levels. First, Ray Okelberry testified that the opening these roads would result in an increase in pedestrian traffic on his property. See generally Trial Transcript, June 30 at 138-41. Given the sensitive nature of his livestock operation, Ray Okelberry testified that he would in fact be put out of business by such a decision. Id. Second, it was well established at trial that the Okelberrys have financially benefitted from the presence of

controlled, private hunting units on their property. Shane Ford, who currently runs the unit on the Okelberry property, specifically testified that his unit is benefitted by having exclusive access. For example, when asked whether his own interests would be served by keeping the roads private, Mr Ford indicated that “I shouldn’t have any competition on my CWMU.” Trial Transcript, June 29 at 246. He then indicated that though he currently has a “ten year lease with Mr. Okelberry right now, but there’s, you know, there’s some other things involved with that.” Trial Transcript, June 29 at 249. The trial court apparently interpreted this last comment to mean that Mr. Ford would get out of his lease with the Okelberrys if the roads were opened to the public. In light of the specific nature of the CWMU, such a finding is supportable.

In its opening brief, the County has nevertheless argued that estoppel is inappropriate against the government. As a general matter, it is true that the courts ordinarily disfavor attempts to invoke estoppel against the government. The fact that estoppel is usually disfavored as against the government, however, obviously does not preclude a court from determining that a particular situation warrants application of the principle. In Eldredge, for example, this Court specifically held that estoppel can be applied against the government “in unusual circumstances where it is plain that the interests of justice so require.” 795 P.2d at 675. This Court then held that estoppel was appropriate in that case because “the failure to apply the doctrine could allow the whim of an administrative body to bankrupt [the private party], which had acted in good faith in reliance upon a solemn written commitment.” Id. at 676. This Court also emphasized the

fact that estoppel can be invoked against the government in certain circumstances in order to ensure that the government is “scrupulously just in dealing with its citizens.” Id. In Anderson v. Public Service Commission, 839 P.2d 822 (Utah 1992), the Utah Supreme Court again emphasized that estoppel should be invoked against the government sparingly. In so holding, however, the court reaffirmed the rule that estoppel can be invoked against the government in “unusual circumstances where it is plain that the interests of justice so require” it. Id. at 827.

It is true that, as in Eldredge, the Anderson Court’s review of the applicable law stressed the fact that the governmental estoppel cases ordinarily involve “very specific written representations by authorized government entities.” Id. It is also true that there are no such written representations in the record regarding this particular case. Anderson is distinguishable, however, on two levels. First, Anderson did not actually require a written representation as a precondition for governmental estoppel. Instead, it simply indicated that the prior cases had ordinarily “involved” such representations. See id. at 827-28. Though subtle, there is a marked difference between a court indicating that “the few cases in which Utah courts have permitted estoppel against the government have *involved*” written representations, as was the case in Anderson, and the different situation in which a court instead indicates that such a written representations are “*required*”—a rule that has never been enforced or even specifically contemplated by any Utah appellate court.

Second, the unique nature of public roads cases indicates that the insistence that there be written representations from the government prior to the private party's reliance is a requirement that should be simply deemed inapplicable in the § 72-5-104 cases. Unlike other situations where estoppel has been invoked against the government, the erstwhile defendants in these public road cases are rarely, if ever, in formal discussions with the government agency prior to the filing of suit—thus rendering this requirement practically useless in this particular area of law.

A look at the situations where written representations have been invoked is instructive. For example, in Eldredge, the issue was whether the state could be estopped from denying the appellant's claim that he was entitled to be credited with a certain number of years for purposes of his retirement. See generally 795 P.2d at 672-75. At issue in the estoppel claim was the fact that, in deciding whether to retire in the first instance, the claimant had first discussed the matter in conversation and writing with various state agents. See id. Such conversations would obviously be expected of persons contemplating retirement, thus lending support to the rule's applicability in those cases. Similarly, Celebrity Club Inc. v. Utah Liquor Control Comm'n, 602 P.2d 689 (Utah 1979), involved a business owner who had received written assurances that his business was zoning compliant, and who then had spent several hundred thousand dollars on his business in reliance on those assurances. After the licensing agency changed its mind, the owner invoked estoppel as a means of preventing the government from declaring him to be in violation. See generally id. at 689-95. As with the situation in Eldredge, the

decision to undertake expensive improvements obviously presents the classic scenario in which the citizen's action would ordinarily be preceded by official communications—thus lending itself to a writing-specific rule for estoppel.

By contrast, the defendants who are sued in these public road cases very often seem to have no idea that the government even had the ability to assert a claim to their roads until the suit had actually been filed. In this case, for example, not only was there no evidence that the County had ever spent any money improving the roads in question, but there was also no evidence that the County had ever even *discussed* these roads with any of the owners. Instead, the County allowed these owners to proceed along with their businesses for a period of decades, completely unaware that the County was choosing to bide its time until it felt like actually claiming control over these “abandoned” roads. Without some provocation of some sort by the County, it is difficult to imagine why these or any other rural property owners would ever even think it necessary to demand assurances from the government that they in fact own their own roads, particularly given that these owners had already spent money purchasing these roads, and had then spent several decades paying property taxes on them. See Supplemental Findings at 484 (noting that “The County has itself treated the roads as the Okelberrys’ private property by collecting property taxes on the land.”).

It is thus significant that when the Utah Supreme Court considered the issue of estoppel against the government in a recent public roads case, the Court did not invoke the written representation requirement. See Western Kane County Special Serv. Dist. No.

1 v. Jackson Cattle Co., 744 P.2d 1376, 1378 (Utah 1987). Though the Court did indicate that it was still “extremely reluctant to apply the doctrine of estoppel against the assertion of rights in a public highway by a government entity,” id., the Court simply did not require anything beyond the usual showing of reliance and detriment that is ordinarily required in estoppel cases. See id. This holding comports with the prior precedent from the Utah Supreme Court and from other jurisdictions supporting the conclusion that estoppel can be invoked in public roads cases. See, e.g., Premium Oil v. Cedar City, 187 P.2d 199, 203 (Utah 1947) (holding that estoppel was appropriate against the government in a public road case where the government had allowed the private party to maintain a fence across the road and enact other improvements); Wall v. Salt Lake City, 168 P. 766, 768-69 (Utah 1917); 39 Am.Jur. 2d Highways, Streets & Bridges § 179 (2005) (concluding that a government agency may be estopped to “open or use a street theretofore created” under some “exceptional circumstances”).

In preemptive response to this position, the County has asserted that even if a written representation isn’t required, the estoppel claim fails in this case because there was not even a direct statement, verbal or written, upon which the landowners could rely. The problem with this position, of course, is that the law of estoppel has never required there to be a direct statement at all. Instead, the law has traditionally allowed for estoppel to be invoked where one party has relied on another party’s *inaction*. These road cases provide a clear example of how this principle can and should operate. As indicated above, the County in this case has allowed the land owners to engage in a number of

activities that are wholly incompatible with private use, such as fencing and control over use. It is the County's inaction in the face of such private control that forms the basis for the estoppel claim.

To illustrate this principle, suppose for a moment that we're not dealing with the rural roads in question here, but that we were instead dealing with a newly constructed subdivision for which a county has constructed the internal roads. In spite of the county's efforts in building the roads, suppose that the developer was then allowed to construct a gate across the roads leading into the subdivision, periodically lock those gates, routinely charge persons fees for entrance and for use of the internal roads, and then expel persons found to be using the roads without permission. Suppose that the developer was also allowed to engage in these behaviors without governmental opposition or even comment for a period of decades, and that the developer was then allowed to enter into other contractual arrangements that were clearly based upon the developer's continued control of these roads. If a subsequent lawsuit arose regarding the roads, surely the government's longstanding inaction in the face of the developer's blatant assertions of control could and would be regarded as an affirmative representation indicating governmental non-ownership. That is exactly the principle that ought to be invoked here.

The County next argues that a policy allowing private citizens to invoke estoppel against the government in these cases would be unworkable insofar as the "there is simply too much land owned by the government for it to adequately protect the public's interest if, simply by its inaction, it could lose the public's rights." Appellants' Brief at *8. The

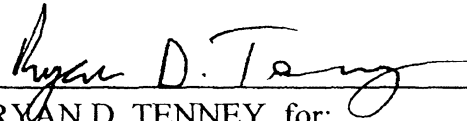
problem with this argument is that it has the actors exactly backwards. By its terms, § 72-5-104 does not provide private citizens with a mechanism for taking property from the government at all. Instead, the sole design and function of the statute is to allow the government to take property away from private citizens. Thus, the only instances in which this rule would be applicable would be in cases like this one in which the government is trying to obtain control over roads that have long since been in the exclusive control of a private landowner. There would be no impact at all on the government's own holdings.

Thus, this case presents this Court with the opportunity to recognize that, for purposes of governmental estoppel, public road cases are different than other types of cases. Simply put, the government should not be allowed to sit idly by while landowners fashion lives and businesses around roads that they have purchased and maintained, only to then turn around and claim ownership of the roads after decades of non-involvement. By the same token, the government also should not be allowed to accept property tax payments on roads, only to then declare that those roads had been abandoned all along. For these reasons, the estoppel ruling was appropriate and should be affirmed.

CONCLUSION

This Court should hold that the trial court erred in concluding that the roads in this case had been abandoned to public use. In the alternative, this Court should hold that the estoppel ruling was correct.

DATED this 7 day of March, 2006.



RYAN D. TENNEY, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Appellees/Cross-Appellants

MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing were mailed to the following, postage prepaid, this 7 day of March, 2006.

Ryan D. Terry