

1978

# John P. Condas et al v. George J. Condas et al : Brief of Plaintiffs-Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN P. CONDAS, GEORGE P. )  
CONDAS, HARRY P. CONDAS, )  
MARGARITA CREGLOW ELLIS )  
and TESSIE MADSEN, )

Plaintiffs and Respondents, )

vs. )

GEORGE J. CONDAS, MARY )  
CONDAS LEHMER, CHRIS J. )  
CONDAS, NICK J. CONDAS, )  
ELLEN CONDAS BAYAS, )  
ALEXANDRA CONDAS OCKEY and )  
J. CONDAS CORPORATION, a )  
Utah corporation, )

Defendants and Appellants. )

#15669

BRIEF OF PLAINTIFFS-RESPONDENTS

AN APPEAL FROM THE DECREE OF THE FOURTH  
DISTRICT COURT IN AND FOR SUMMIT COUNTY,  
HONORABLE GEORGE E. BALLIF, JUDGE

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Clerk, Supreme Court, Utah

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ALEXANDRIA CONDAS OCKEY and )  
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corporation, )

Civil No. 15669

Defendants and Appellants. )

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BRIEF OF RESPONDENTS

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NATURE OF THE CASE

Respondents, who were the plaintiffs below, brought this action in the district court for Summit County after the appellants, defendants below, barred access to respondents' property in White Pine Canyon. Appellants had erected two

iron gates across the existing roadway in the canyon where the roadway crosses appellants' property which lies just above and below respondents' property in the canyon. The district court, Judge George E. Ballif, sitting without a jury, held that the roadway in the canyon is and has been, since before the turn of the century, a public road and enjoined appellants from further interference with the use of the roadway by respondents and the public.

#### QUESTIONS PRESENTED

The appellants are the successors in interest, as the grantees, of their father John Condas who, in an earlier lawsuit in 1928, was successful in establishing that the roadway in White Pine Canyon is a public road. The questions presented by the appeal are the following:

1. Whether it was error to receive in evidence the testimony of deceased witnesses who testified for John Condas in the earlier case as to the public character of the roadway, where the transcript of the testimony in the earlier case has been lost and the only record of the testimony of the deceased witnesses is found in the Abstract on Appeal and in the brief of John Condas which were filed in this court in the earlier case?

2. Whether the pleadings of John Condas in the earlier case, in which he alleged the public character of the roadway, were admissible in this case?

3. Whether appellants are judicially estopped, by the position of John Condas in the earlier case, from arguing that the roadway is a private road?

4. Whether appellants are collaterally estopped, by the findings in the earlier case, from litigating in this case the public or private character of the roadway?

5. Whether the evidence establishes that appellants' property, while part of the public domain, was subject to a public road which has not been vacated?

#### STATUTES INVOLVED

The following statutes are involved in this proceeding:  
Revised statutes of the United States, § 2477 (43 U.C.A. § 932):

"The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

Utah Code Annotated, § 27-12-89:

"A highway shall be deemed to have been dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of 10 years."

Utah Code Annotated, § 27-12-90:

"All public highways once established shall continue to be highways until abandoned or vacated by order of the highway authorities having jurisdiction over any such highway, or by other competent authority."

## STATEMENT OF FACTS

### A. Background Of This Lawsuit.

White Pine Canyon is situated about three miles northwest of Park City. The mouth of the canyon is at the end of a paved road known as Trottmann Lane which turns off to the west from the highway to Park City south of Kimball's Junction. At the end of the lane is a dirt roadway which continues south across the properties of both parties to the top of the canyon.

In 1924 John Condas, the appellants' father and his brother Pete Condas, the respondents' father, travelled to White Pine Canyon to talk to one Delbert Redden about his property which was situated near the mouth of the canyon. John Condas purchased the Redden property and then he and Pete and another brother homesteaded other lands farther up the canyon. (R. 500.)

In 1927, John Condas was sued by his immediate neighbor, Patrick Sullivan, who owned the property just below John Condas at the mouth of the canyon. Sullivan charged John Condas with trespass as he drove his sheep along the roadway where it crossed the Sullivan property. The outcome of the lawsuit, about which more will be said later, was in favor of John Condas. Sullivan v. Condas, 76 U. 585, 290 Pac. 954 (1928).

The property homesteaded by Pete Condas lies just above the former Redden property and just below another parcel of land which John Condas later acquired. One cannot reach the respondents'

property from the bottom or from the top of the canyon without crossing the property acquired by John Condas and later conveyed to appellants. (R. 402-404, 504-525, 575-579; Pl. Ex. 1.)

For many years and while John Condas was alive, Pete Condas and his family used the roadway in the canyon for access to their property. Then, in 1970, after John Condas had died and after Pete Condas turned down the appellants' proposal that Pete give them power to sell his property in conjunction with their property, appellants erected the two iron gates across the roadway with the result that respondents could not reach their property. (R. 517-521.)

Appellants also asked the Summit County Commission to vacate a part of the "public road" which crossed their land, the former Redden property. (R. 977-983.) Acting on appellants' representation that no one else used the roadway (R. 983.), the Commission, without prior public notice, adopted an ordinance purporting to vacate part of the "public road" where it crosses the former Redden property, as appellants had requested. After learning of respondents' interest in the roadway and following consultation with the County Attorney, the Commission concluded that its action in vacating the road was in error and a nullity. (R. 1002-1007, 1009-1010.)

B. Respondents' Position At The Trial.

Respondents took the position that (1) the roadway became a public road by federal grant and public user long before John

and Pete Condas came to White Pine Canyon, (2) the Summit County ordinance purporting to vacate a part of the public road was a nullity for lack of notice and (3) if the roadway was not a public road, nevertheless they had a prescriptive right to use the roadway.

On the creation of the public road in the early days respondents offered in evidence the pleadings of John Condas, the testimony of his witnesses and the findings of fact in the earlier Sullivan lawsuit. (R. 405, 422-435.) Respondents also offered in evidence the testimony of several men who were still alive who were able to testify as to early public use of the roadway before and after John Condas acquired the Redden property in 1924. The testimony of these men covered the years from 1903 to 1931. They testified that the public used the canyon for hunting, logging and trailing livestock and that public travel in the canyon was on foot and by horseback, by teams of horses pulling bobsleighs loaded with logs and by trucks and cars. (R. 478-497.)

Appellants have not discussed in their brief respondents' evidence which was obtained from the Sullivan case. That evidence is summarized as follows:

1. The pleadings of John Condas. In his answer and counterclaim John Condas plead that the roadway in White Pine Canyon was "\* \* \* a public highway and has been used \* \* \* by the public generally \* \* \* for more than sixty years past. \* \* \*" Paragraph 5 of John Condas counterclaim reads in full, as follows (Ex.2-P, pp. 17):

The defendant [John Condas] alleges that he is the owner, entitled to the possession and in possession of certain lands in White Pine Canyon, Summit County, State of Utah, and that various other persons are the owners of other tracts of land in said canyon, both above, below, and adjoining the said lands owned by the defendant. That there is now and has been for more than sixty years past a well traveled road up said White Pine Canyon, branching from the main State Highway and running through and beyond the said lands of the defendant and through the lands owned in said canyon by said other persons. That said road is a public highway and has been used continuously by the defendant by his predecessors in interest and by the aforesaid owners of land in said White Pine Canyon and vicinity and by the public generally, and especially by the residents of Park City and of Summit County, State of Utah, for more than sixty years past. That the defendant does claim the right to use said road for ingress to and egress from his said land in White Pine Canyon. \* \* \* (Emphasis supplied.)

2. The testimony of John Condas' witnesses. Five persons who are no longer living testified for John Condas in the Sullivan case as to the public's use of the roadway. One of the witnesses was Mr. Redden from whom John Condas purchased the property appellants now occupy. Pertinent portions of that testimony, as set forth in the abstract prepared by Patrick Sullivan's lawyer in his appeal to this Court (Ex. 2-P), are set forth in the Appendix A to this brief. In every respect the accuracy of the abstracted testimony is verified by the verbatim quotations of that testimony which are contained in John Condas' brief which was filed in this Court. (Ex. 3-P, p. 8.)

3. Findings of fact. The findings of fact in the Sullivan case, as to the nature and extent of the public's use of the roadway are in Finding No. 8, which reads as follows

8. The Court finds that more than fifty years ago the inhabitants of Park City, Snyderville and surrounding territory, and the public generally constructed and used a roadway up White Pine Canyon, through over and across Lot 8, Township 2 South Range 3 East, which lands now belong to the plaintiffs, [Sullivan property] and said roadway, as so constructed, was and has been, for more than fifty years last past, used by the public generally as a public highway, for the general purposes of traffic, including the hauling and transportation of logs, fire wood, lumber, mining timber, supplies for mining operations, and for the trailing of livestock, including cattle, sheep and horses, and for all purposes for which public highways, under similar conditions, are generally used.

C. Appellants' Position At The Trial.

Appellants confined their case to the testimony of themselves and others as to the physical condition of the roadway after the turn of the century and the efforts of John Condas to restrict traffic on the roadway by means of wooden gates which, from time to time, he placed across the roadway where it crosses the former Redden property.

Appellants never attempted at any time to offer in evidence anything from the record of the Sullivan case. They never attempted to show that the position taken by John Condas, his witnesses and the district court in the Sullivan case was in error so far as the public character of the roadway is concerned. In short, as to the public character of the roadway prior to 1924, appellants offered nothing at all. It was as though, from appellants' point of view, the early history of the canyon had no significance.

D. The Trial Court's Decision In This Case.

The trial court's findings of fact and its conclusions of law are found at page 211 in the record on appeal and are set

forth in the Appendix B to this brief. In summary, the trial court found as follows:

(1) The roadway in White Pine Canyon had been used by the public for more than 50 years prior to 1928. (Fdgs. 3-4.)

(2) John Condas took the position in the Sullivan case, that the roadway across his property was a public road. (Fdg. 6.)

(3) The district court in Sullivan found the public's use of the roadway since 1873 to have been "openly, notoriously, continuously, uninterruptedly, adversely and under claim of right as a public road", and appellants in this case offered no evidence to the contrary. (Fdg. 7.8.)

(4) John Condas, by gates and signs, sought to prevent the public's use of the roadway after 1925 (Fdgs. 9-12) but the public continued to use the roadway until 1971 (Fdg. 5).

(5) Respondents did not establish a prescriptive right of passage over the roadway. (Fdg. 14.)

(6) Respondents are denied access to their property and the public is denied use of the roadway by reason of iron gates put up by appellants in 1971. (Fdg. 15.)

(7) When appellants asked the County Commission to vacate a portion of the roadway on their land as a public road they represented to the Commission that no one but themselves used the roadway. (Fdg. 17 )

(8) Notice of the vacation was not given to respondents or to the public. (Fdg. 18.)

The trial court concluded as a matter of law that the roadway as it passes through and beyond appellants' property in the canyon is a public road and that the Summit County ordinance purporting to vacate part of the road was null and void. (R. 215.)

The trial court decreed that the roadway is a public road and enjoined appellants from interfering with the use of the road by respondents and the public. (R. 216-217.) The decree is reproduced as Appendix C to this brief.

#### ARGUMENT

##### I

#### THE FORMER TESTIMONY OF WITNESSES IN THE SULLIVAN CASE IS ADMISSIBLE IN THIS CASE

The trial court received in evidence the former testimony of persons who were witnesses for John Condas in Sullivan v. Condas and had testified in that case on the public's use of the roadway in White Pine Canyon.

The rule of evidence involved is Rule 63(3), Utah Rules of Evidence, which admits former testimony as an exception to the hearsay rule, on certain conditions. The rule reads in pertinent part as follows:

(3) Depositions and Prior Testimony. Subject to the same limitations and objections as though the

declarant were testifying in person\* \* \*: (b) if the judge finds that the declarant is unavailable as a witness at the hearing, testimony given as a witness in another action \* \* \*, when (i) the testimony is offered against a party who offered it in his own behalf on the former occasion, or against the successor in interest of such party, \* \* \*.

In this case the former testimony was offered on counsel's representation to the court that the former witnesses were no longer living. (R. 417.) Appellants did not object to the representation that the former witnesses were unavailable. The former testimony was offered against the appellants as the successors in interest as grantees, of the party, John Condas, who offered the testimony in his own behalf on the former occasion. The requirements of the rule were complied with in every detail.

The rule does not require "reprocity" or "mutuality" in the sense that the party who offers the former testimony must also have been a party in the prior proceeding. It is only necessary that the testimony be offered against a party who offered it before or his successors in interest. Placing substance over form, the Utah rule recognizes "that it is only the party against whom the former testimony is now offered, whose presence as a party in the previous suit is significant." McCormick On Evidence, 2d ed., § 256 at p. 618.

Although subpart (b)(i) of the rule does not require the identity of issues for which appellants argue (Br. 19), certainly the issue in both cases are not only substantially but precisely the same, namely the existence of a public road in White Pine Canyon.

Because the reporter's transcript of the testimony in the Sullivan case has been lost (R. 419), only the abstract of the record on appeal (Ex. 2-P) and the brief of John Condas (Ex. 3-P) which are on file in this Court were available to respondents to prove the former testimony. Both the abstract and the brief contain references to the pages of the lost transcript from which they were prepared.

The circumstances under which the abstract and the brief were prepared argue forcefully for their accuracy in reporting the former testimony. Both documents were prepared in an appeal in this Court where any misstatements by either lawyer would have been challenged. The documents were prepared with the lost transcript in hand and they were prepared by the persons who asked the former questions and heard the former answers given. Finally, when the verbatim quotations of the testimony in the brief of John Condas are compared with the abstract prepared by Patrick Sullivan's lawyer, it can be seen that the two documents agree in every material respect.

For the foregoing reasons it is submitted that the former testimony was properly received in evidence.

## II

THE STATEMENT OF JOHN CONDAS, IN  
HIS PLEADINGS IN THE SULLIVAN CASE,  
THAT THE ROADWAY ACROSS HIS PROPERTY  
IS A PUBLIC ROAD IS ADMISSIBLE AS A

DECLARATION AGAINST INTEREST AND AS  
A JUDICIAL ADMISSION

The trial court received in evidence the statement in the answer and counterclaim of John Condas in the Sullivan case (Ex. 2-P), that the roadway across his property is a public road.

The statement when made was clearly a declaration against the proprietary interest of John Condas for it acknowledged that his property was burdened with a public road. The statement also has the standing of a judicial admission.

Rule 63(10) of the Utah Rules of Evidence provides for the admission of declarations against interest as follows

(10) Declarations Against Interest. Subject to the limitations of exception (6), a statement which the judge finds was made by a declarant who is unavailable as a witness and which was at the time of the assertion so far contrary to the declarant's pecuniary or proprietary interest \* \* \* that the declarant under the circumstances would not have made the statement unless he believed it to be true;

Appellants appear to concede that the declaration of a third person may be used against a party whenever privity of estate exists, as this Court stated in Lyman Grazing Association v. Smith, 24 U 2d 443, 473 P. 2d 905 (1970), and that such a statement by John Condas himself would be admissible in this case because of the privity of estate that exists between him and the appellants, his grantees. (Br. 15-16.)

Appellants apparently object to the admission of the statement, as a declaration against interest, only because the statement

was made in pleadings prepared not by John Condas but by his lawyer. The objection is not well founded. "[P]leadings shown to have been prepared or filed by counsel employed by a party, are prima facie regarded as authorized by him and entitled to be received as his admission." McCormick, Hand Book of the Law of Evidence, 1954, § 242, at p. 513. Wigmore notes that a party in litigation "speaks always through his pleadings", as well as through the testimony of his witnesses, and states that "the basis upon which may be predicated a discrediting inconsistency on his part includes the whole range of facts asserted in his pleadings and in the testimony relied upon by him." Wigmore On Evidence, 1904 ed., § 1048, at p. 1217. "That the statements of the pleading are not those of the party himself must be immaterial since they are those of his authorized attorney. \* \* \* That the pleadings in prior causes, then, can be treated as the parties' admissions, usable as evidence in later causes, must be conceded. \* \* \*" Wigmore, supra, § 1066, at pp. 1245, 1246.

Appellants have not challenged the accuracy of the statements in the pleadings concerning the public road, nor do they even suggest that the statement in question was anything less than an authorized statement of John Condas' position as to the existence of a public road across his property.

Appellants take issue (Br. 14-15) with the trial court's language in referring to the statements in John Condas' pleadings as "admissions against interest" (R. 190). It is clear from the trial court's decision what the court meant to say. The trial court should not be made "an offender for a word." The appellants discussion (Br. 13-15) of vicarious admissions is beside the point. What is important here is that John Condas made a statement, through his lawyer in the Sullivan case, which was a declaration against his interest at the time it was made. Such a statement may properly be used against his grantees, the appellants, in this case.

The statement of John Condas in his pleadings that the roadway over his property is a public road is also admissible as a judicial admission under Rule 63(7) Utah Rules of Evidence, which provides as follows:

(7) Admissions by parties. As against himself a statement by a person who is a party to the action in his individual \* \* \* capacity \* \* \*.

"Judicial admissions are not evidence at all, but are formal admissions in the pleadings in the case \* \* \* by a party or his counsel which have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. McCormick On Evidence, 2d ed., 1972, § 262, at p. 630. Such admissions are in the same category as a response to a request to admit under the rules of civil procedure. Ibid, footnote 11. The same authority notes, at page 636 of the cited text, "the

sensible view that pleadings shown to have been prepared or filed by counsel employed by the party, are prima facie regarded as authorized by him and are entitled to be received as his admissions. \* \* \*

To the same effect are "the statements of a grantor of realty, made while title was \* \* \* still in him"; such statements "are receiveable as admissions against any grantee claiming under him. \* \* \* It is sufficient to note that the principle is today fully and universally conceded. \* \* \*" Wigmore on Evidence, 1972, vol. IV, § 1082, at p. 210. An admission of course, is sufficient to support a finding of fact. Peterson v. Richards, 73 U. 59, 272 Pac. 229 (1928) The note to Rule 63(7) contemplates "the admissibility of admissions \* \* \* by those by whose statements" a party "is bound."

### III

APPELLANTS ARE ESTOPPED  
FROM CHALLENGING THE  
PUBLIC CHARACTER OF THE  
ROADWAY IN WHITE PINE CANYON

There are several grounds for estoppel against the appellants in this case. Each will be presented separately.

A. Appellants are judicially estopped by the position taken by John Condas in the Sullivan case:--In his counterclaim in the Sullivan case John Condas took the position that a "public highway" runs "through and beyond the said lands of the defendant".

his own property, and "has been used continuously by the \* \* \* public generally \* \* \* for more than sixty years". (Ex. 2-P, at p. 17.)

If John Condas were alive today and the defendant in this lawsuit, he would be prevented by the doctrine of judicial estoppel from taking a position different from the one he took in the Sullivan case. John Condas received a benefit in the first trial and would be estopped from changing his position to receive another benefit now--from playing "fast-and-loose with the court". Mecham v. City of Glendale, 489 P. 2d 65, 67 (Ariz. 1971).

It was the rule of many courts for quite some time that a judicial estoppel could not operate where the partners were not the same in both cases. This position was based upon the view that mutuality of parties was essential to the operation of any estoppel. See this Court's opinion in Tracy Loan and Trust Co. v. Openshaw Inv. Company, 102 U. 509, 132 P. 2d 388 (1942).

The requirement of mutuality has since fallen in disfavor. For example, in the application of the related doctrine of "collateral estoppel", this Court has said that it is not necessary that the parties be the same in both cases. Richards v. Hodson, 26 U. 2d 113, 485 P. 2d 1044, 1046 (1971). And in California, the requirement of mutuality of estoppel, as a limit to the scope of collateral estoppel, has been rejected. Teitelbaum Furs, Inc. v. Dominion Insurance Company, 375 P. 2d 439 (Cal.

1962); cert den. 372 U.S. 966. In Mecham v. City of Glendale, supra, the Supreme Court of Arizona applied the doctrine of judicial estoppel where mutuality of parties did not exist.

Although appellants mention Mecham v. City of Glendale, supra, in their brief (p. 24), they do not appear to take issue with the Arizona court's holding that judicial estoppel does not require a mutuality of parties. Appellants offer no reason why they should not be held to the position taken by their grantor as to the public road across his property.

B. Appellants are collaterally estopped from relitigating the issue of a public road in White Pine Canyon:--A branch of the doctrine of res judicata is the principle of collateral estoppel which prevents the relitigating of material facts or issues which are essential to and were established or determined in a former action, Richards v. Hodson, 26 U.2d 113, 485 P.2d 1044, 1046 (1971); Knight v. Flat Top Mining Co., 6 U.2d 51, 305 P.2d 503, 506 (1957). It is not necessary that all parties be the same in the two actions. Richards, supra, at p. 1046.

The facts found and issues determined in the Sullivan case which are pertinent here are those which have to do with the public use of the road over the defendants' lands. The findings of fact of the trial court in the Sullivan case which are pertinent here are No. 8 and 9 (Ex. 2-P, at pp. 41-43) which in summary, states that the use made of the road by the public was "openly, notoriously, continuously, uninterruptedly, adversely

and under claim of right for more than fifty years" (Fdg. No. 9) "up White Pine Canyon" for "the general purposes of traffic \* \* \* for all purposes for which public highways, under similar conditions are generally used" (Fdg. No. 8).

It begs the point to say that the findings in the Sullivan case refer primarily to the Sullivan property. Of course they do, since this is where the trespass was charged and the public's use of the Condas property had been admitted. But to avoid the charge of trespass, John Condas had to prove the public character of the road over the Sullivan property and to do that he had to prove that the public used the road over the Sullivan property and on up the canyon "through and beyond" his own lands as well. (See paragraph 14 of his answer (Ex. 2-P at pp. 17-18)). If John Condas had been the only person to use the road the use would have been "private" rather than "public". Without the public's use further up the canyon, there would have been no occasion for the public to use the road over the Sullivan property. The findings of fact as to the public's use of the road were material to the outcome of that lawsuit and, therefore, establish the public character of that use in this lawsuit.

That the findings of fact were for rather than against John Condas is a distinction without a difference--it does not relieve his successors from the effect of the finding. The facts were material facts in a lawsuit in which their successor was a party.

IV

THE EVIDENCE ESTABLISHES  
THE EXISTENCE OF A PUBLIC  
ROAD ON APPELLANTS'  
PROPERTY WHILE IT WAS  
PART OF THE PUBLIC DOMAIN

The evidence in this case on the public's use of the roadway in White Pine Canyon in the early days is of necessity one sided since appellants chose to confine their evidence to the physical condition of the roadway and its use after the turn of the century. Respondents' evidence consists of the testimony of persons who used the roadway before and after the turn of the century.

The persons who testified as to the earliest public use of the roadway were the witnesses of John Condas in the Sullivan case. Portions of the abstracted former testimony of these persons are reproduced in the Appendix A to this brief. The testimony in the Sullivan case was reviewed by this Court, on Mr. Sullivan's appeal, in the following language (76 U. 290 Pac. at 957):

\* \* \* There is ample and satisfactory evidence to show that as early as 1873 the roadway extended up and down the canyon over the lands now owned by the plaintiffs [Sullivan] and the defendant [John Condas] and others, while such lands were a part of the public domain, and was traveled and used by the public generally as occasion required in going up and down the canyon. \* \* \*

Before leaving this discussion of the former testimony from the Sullivan case, it should be stated that at no time during the trial did appellants proffer any evidence from the Sullivan case. The trial of this case commenced on March 21, 1977, and concluded ten days later on March 21, 1977. Thereafter counsel for both parties appeared before the trial court in oral argument on April 13, 1977 and again on October 28, 1977, after the trial court's decision, in argument on the findings of fact, conclusions of law and decree. Counsel for appellants never asked the trial court at any time to consider anything from the Sullivan case which was not already before it.

Respondents offered additional evidence on the public road from other persons, still living, who were in the canyon in their early years. James Archibald, in his deposition, told of his travel in the canyon in 1898 with his father and a logging crew who brought logs out of the canyon with teams of horses as often as three times a day every day when it wasn't storming. Mr. Archibald also told of his travel in the canyon in 1903 and from 1905 to 1907. (R. 479; deposition, pp. 5-6, 8, 10.) Douglas Archibald, Earl Johnson, Gilbert Kimball and Spencer Young testified of their travel in the canyon in the years between 1905 to 1924. (R. 475; Earl Johnson deposition, pp. 3, 7-8; 437, 443-447; 454, 457, 459, 461, 463, 467, 470.)

Testimony of the public's use of the roadway while John Condas was alive was given by Fred Browning who worked

for John Condas off and on from 1925 to 1930 and lived on the property for six months in 1926. Mr. Browning testified in his deposition that he observed people going up and down the road on horses and in wagons, pickup trucks and cars. He also testified that John Condas had said to him that people could not be stopped from using the road because it had been a public road for too many years. (R. 483, 486, 489-495.)

In the opinion of the trial court, respondents "produced additional credible evidence during the trial to corroborate the evidence contained in the transcripts of Sullivan, and further substantiate the findings of the trial judge in Sullivan." (R. 189,191.)

Appellants, on the other hand, offered no evidence on the existence or nonexistence of the roadway while their property was a part of the public domain. No attempt was made by them to disprove the former testimony or this Court's conclusion, based on that and additional testimony, of the existence of the public road before John Condas came to White Pine Canyon. It would not be an overstatement to say, paraphrasing this Court's opinion in the Sullivan case, that there is ample, satisfactory and unchallenged evidence that a public road existed over the appellants' property while it was part of the public domain.

V

APPELLANT'S PROPERTY IS SUBJECT  
TO THE PUBLIC ROAD IN WHITE PINE  
CANYON

Pursuant to federal law the public is granted a right of way over the public domain. The grant is contained in § 2477 of the Revised Statutes of the United States and is quoted, supra, at page 3. This Court had occasion to review the federal grant and the related state statute, U.C.A. § 27-12-89, supra, at p. 3, in its opinion in the Sullivan case where it was held that when federal land patents are issued for lands on which public roads have been established, the patents are issued subject to such roads and the persons who accept the patents take the lands subject to the public's rights in those lands. Sullivan v. Condas, 76 U. 585, 290 Pac. at 957 (1928). In the language of the Sullivan opinion,

\* \* \* The patent to the land issued to the predecessors in interest of the plaintiffs [Sullivan] in 1906 about the thirty-three years \* \* \* [after the roadway came into existence]. Plaintiffs acquired their interest in the lands in 1922 or 1924. The right of way having been established over public lands by public user, the predecessors of the plaintiffs when the patent was issued to them, and the plaintiffs when they acquired their interest in and to the lands, took them subject to the easement in favor of the public, unless it was thereafter extinguished by operation of the state law, which was not done. \* \* \*

The trial court in this case determined that the action of the Summit County commissioners in attempting to vacate the public road was null and void for lack of notice. Appellants do not challenge that determination. This Court said in Sullivan that a public road (290 Pac. at 957):

"when once established must continue to be a highway until abandoned by order of the board of county commissioners in the county in which it is located or by a judgment of a court of competent jurisdiction."

Section 27-12-90 of the Utah Code, which is now in effect, quoted, supra, page 3, is clear.

All public highways once established shall continue to be highways until abandoned or vacated \* \* \* by \* \* \* competent authority

Appellants have offered no legal reason why the trial court should not have applied the law of the Sullivan case and U.C.A. § 27-12-90 to this case. When the law of Sullivan and the statute are applied to this case, the result is that the White Pine Canyon Road was a public road before appellants came to the canyon and has remained a public road since that time.

## VI

### APPELLANTS' HISTORY OF THE ROADWAY IN WHITE PINE CANYON AFTER THE TURN OF THE CENTURY IS IRRELEVANT AND INCOMPLETE

Respondents are reluctant to go into a lengthy discussion of the evidence, theirs and appellants', as to the public's use of the roadway after it had become established as a public road for the reason that to do so might be taken as a concession that such evidence is relevant. No such concession is intended. But respondents do wish to refer briefly

to a number of inconsistencies and omissions in the rather lengthy but one-sided discussion of the history of the canyon after the turn of the century.

A. The former testimony of deceased witnesses has been ignored:--The discussion of respondents' evidence (Br. 28-30) omits any mention of the five witnesses who testified to the earliest public use of the road in the Sullivan trial. One of those witnesses was appellants' predecessor in interest, Delbert Redden, who testified, "To my personal knowledge, a wagon road extended above the Condas house up White Pine Canyon clear to the top. It was always there \* \* \* while I lived there." (Ex. 2-P, pp. 100-101 quoted in Appendix A.) To say that "plaintiff's own evidence" is contrary to the findings of fact (Br. 30) is a total misstatement.

B. The documents have been misused:--Appellants refer to maps, survey notes and homestead papers (Br. 30-32) as establishing a "very clear inference" (Br. 31) that a "trail" rather than a road existed in the canyon. One has to bear in mind that when appellants speak of a road or a trail they do not have "use" in mind. They are talking about "width" and to them anything less than eight or ten feet in width is a trail (R. 309-910, 388.) Eight or ten feet, of course, is ample width for the horses and later the wagons, cars and trucks which were to travel in the canyon. (Fdg. 5, Appendix C, infra.) Chris Condas, one of the appellants, testified that

the old wagons were only five feet wide. (R. 810.) The earliest government map, prepared in 1901, shows a "trail". (Ex. 31-D.) Someone must have been using the canyon before that time.

No evidence was offered to show what was intended by the statements on the homestead documents. (Br. 31-32.) Certainly they were not intended to mean that no road existed in the canyon since not only Pete Condas but also John Condas and Delbert Redden made such statements (Br. 32; Exs. 33-D, 34-D, and 35-D) and both John Condas, by his pleadings, and Delbert Redden, by his testimony, took the position in the Sullivan case that a public road existed over their property. Moreover the homestead papers for Pete Condas and also his brother Gust were prepared by John Condas. (R. 553-554.)

C. The issue is not whether a public road was established across private property by public user:--Appellants discussion of the physical condition of the road and its use in later years (Br. 32-40) is intended to support the argument that the public did not acquire an interest in appellants' property by public user (Br. 40). This is a "smokescreen" to attempt to obscure the real point in issue which is public user before the property was acquired from the public domain. Appellants have ignored the fifty years of public use before John Condas purchased the Redden place.

There is a conflict in the testimony as to physical condition of the road at various times from the 1920's on.

Physical condition varies with intensity of use. It does not establish the absence of prior public rights. Without going into great detail, we would mention one part of the evidence on the physical condition of the road which appellants have ignored. Mr. David Street was the driver who took a caterpillar tractor up the road before appellants claim they made a "passable road" (Br. 33-34, R. 692.) Mr. Street therefore, saw the condition of the road before appellants claimed to have made it. Judge Ballif saw the road afterwards at the commencement of the trial. A film was taken of the road about the time Judge Ballif saw the road and that film was shown during the trial so that both Judge Ballif and Mr. Street could see it. Mr. Street then testified that the road he saw in the film was substantially the same road he had travelled, that he recalled very point along the road and that he did not have to use his blade when he drove a caterpillar up the road. (R. 1065, 1068-1069.) Mr. Street further explained that he knew, from his experience, that the road he travelled had not been made by a caterpillar because of "these little jigs" in the road. "There would be more straight stretches. \* \* \* Because there wouldn't be no object in dodging around the little points like this to get anywhere." (R. 1065.)

D. Gates and signs do not destroy a public road;--

To be sure, after winning his lawsuit with Patrick Sullivan,

John Condas put up fences and signs to obstruct public use. Appellants argument that such action "is incompatible with the requisite intentions of John G. Condas or his successors (themselves] to abandon the roadway to the public use" is again beside the point. (Br. 41.) Patrick Sullivan had also put up gates and he too made a point of it in his appeal. This Court responded to Mr. Sullivan as follows (290 Pac. at 957):

A further point is made that gates were put up by the plaintiffs and their predecessors in interest, thereby indicating that the character of the roadway was a private roadway and interrupted the use of it. But there is ample evidence to show that whatever gates or fences were put up were erected after the roadway had for many years been established and used as a public highway by the public generally and by those who had occasion to use it and was so continued to be used after as before whatever gates or fences were erected.

The teaching of Sullivan is that private parties cannot destroy public rights in an already established public road by gates and signs. No contrary authority has been cited by appellants.

There is no "irreconcilable" conflict in the trial courts' findings, as appellants argue. (Br. 42.) The existence of gates and private interference with public travel after 1924 do not a private road make out of a public road that came into existence in 1873. Appellants cite no authority for the proposition that private interference with public travel can achieve such a result. Actually, as the evidence showed, the

wooden gates were not an obstruction to public travel. The trial court found that "the public continued to use the roadway until it was closed by the defendants in 1971" (Fdg. 4) when "defendants placed iron gates across the roadway" as a result of which the public including appellants was "denied free travel along said road" (Fdg. 15).

The point of all of this is that no amount of wrongful conduct--in total disregard of the rights of others and of the law--can destroy the public road. Whatever John Condas and the appellants have done over the years to obstruct public travel over the road was no more lawful than the actions of Patrick Sullivan years before. Appellants cannot prevail on such conduct.

#### CONCLUSION

For the foregoing reasons the judgment of the district court should be affirmed.

Respectfully submitted,

---

Claron C. Spencer  
Attorney for appellants

#### CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief was mailed to the counsel for appellants this 7th day of September, 1978.

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Claron C. Spencer

## APPENDIX A

Selected portions of the abstract of the testimony of persons who testified on behalf of John Condas in Sullivan v. Condas relating to the public's use of the roadway in White Pine Canyon are set out below. The page references are to the Abstract in Sullivan v. Condas which is plaintiffs' Exhibit 2-P in this case:

MR. WILLIAM ARCHIBALD:

Page 70:

\* \* \* I have known White Pine and Red Pine Canyons since about 1870. I know the Sullivan ranch and the Condas ranch. They are both situated in the mouth of White Pine Canyon. Sullivan's ranch is down north of Condas' ranch. Land north belongs to me. I join the Sullivan ranch on the north with 99.3 acres.

\* \* \*

There is a roadway leading from the Park City highway up to plaintiffs', that is up to Sullivan's and Condas' ranches. It starts down what we call the Trotman residence and parallels the section line until it gets within about 20 rods of the township corner, where it turns southwest into Sullivan's place and crosses the corner of my land. It then

runs along pretty close to the foot of the bench, up past what is now the Sullivan house and runs on up there to the Condas ranch. It goes right up White Pine Canyon into the basin.

Pages 71-72 :

Q. How long have you known, to your own knowledge has there been a roadway leading up along in a general way the present course of the road which we saw yesterday?

(Objection)

Since 1873. For hauling lumber, for driving livestock up in the hills, and for hauling wood and general building material for the settlement in shape of timber. This road has been used generally by the public for those purposes during that entire period. The road has run in the direction of the present road. \* \* \* While I hve known this road it has been well defined and a well traveled road. Thereis no means of ingress and egress to White Pine canyon other than along the course of this road. \* \* \*

Pages 74-75:

On cross examination the witness Archibald testified as follows:

\* \* \* There is no possibility of automobile travel beyond the Condas place. There was a good road above the Condas place when we were logging. In 1903. The road there was used for logging clear

the Salt Lake County line. The logging ceased in 1903-1906. The logs were cut up by the sawmill right on this flat, just in front of that little hollow that runs up this side of Mr. Sullivan's house, and on the Sullivan tract. At that time the purpose of the road was for hauling wood and lumber, and driving cattle up into White Pine basin and McDonald basins and over to Dutch basins. We could drive our cattle over any part of the country most practicable. There were no fences. They done that. Swif's sawmill was in Robinson hollow about a mile above the Condas house.\* \* \* During the time the upper mill was operating there was quite a little trafic up and down the canyon, hauling lumber.

Page 76:

\* \* \*I know of lots of sheep driven back and forth for eight or ten years. In the early days cattle and some sheep driven, some horses. \* \* \*

Page 79:

This road that runs up to the Sullivan's ranch and thence up into Condas ranch was the main traveled road. The old trail was merely a little trail.

The farmers generally furnished wood to the mills for roasting ores until close to 1900.

This White Pine road passes up thru my land, not very much maybe 50, 75 or 100 feet. No interference with the use of this road or any obstruction until Mr. Sullivan got up there. The White Pine Canyon road is well defined. If people had any business in there that is the road they took.

White Pine canyon is 3 miles in length, White Pine canyon is not precipitious or steep. A good many mining claims located in that section.\* \* \*

\* \* \*

THOMAS L. POWERS, a witness for defendant, being sworn, on direct examination testified as follows:

Page 81:

\* \* \* I have know White Pine canyon for 35 years. I have dealt some in livestock, not very largely. I know the White Pine canyon road. I drove cattle in there 33 years ago. Anybody who wanted to go up there used the road. Since I have known the road it has been used just to haul some timbers out and to drive livestock back and forth, to haul logs and fence poles. It has been used by the public since I've know it, continuously.

Page 83:

\* \* \* It was a beaten road for a wagon. There was no occasion for people to travel it except to get out logs and fence posts. I haven't driven cattle in

the canyon since Redden homesteaded. Eleven or thirteen years. I started driving cattle there about 1896. I drove the last about 1912 or 1914. During that time no timber, but some logs were hauled down to Snyderville, some to Park City. The road went as far up as Iron Meadow and White Pine meadow, later in 1912.\* \* \*

Pages 84-85:

DAVE SNYDER, being sworn, testified for defendant as follows:

On direct examination:

I live at Snyderville and farm as a business. I have lived there 61 years. Also in the livestock business. I am 61 years old. I have known Red Pine and White Pine canyons practically all my life. There is a road leading up White Pine canyon. It has been there ever since I can remember. It has been used by the public since I have known it for hauling wood, driving stock, hauling logs and mining timbers and cordwood.\* \* \*

Page 87:

\* \* \* Twenty-five years ago I hauled wood and logs over the road above the Condas land. All of the land was then under the government.

Pages 88-89:

R.J. BAILEY, a witness for defendant, on direct examination, testified as follows:

I am 64 years old. I reside at Mill Creek. Have resided there 64 years. I am a sheep raiser. I have known White Pine canyon 26 or 27 years. When I first became acquainted with it there was a fair trail, fair road for a wagon up that canyon. I don't know the Lake and Redden places. They didn't own it when I went through there. About 24 years ago I first took sheep through there. We went up Trotman's Lane, turned to the left, then during that period we went up that canyon in June of each year, and out in the fall. Went up and down the canyon frequently with a cart--the front wheels of a wagon--for supplies and hay for the sheep. For eight or nine years. Quite a while ago. Along about 18 or 19 years ago. My last trip in there was in 1919.

\* \* \*

"Q.--And was there a well defined road during that period you went up with your sheep? A.--Yes, I could get along." The road was 2 to 3 rods wide. We were never interfered with. I know other sheep men that trailed sheep up that canyon. Others trailed their sheep up that road.\* \* \*

Page 90:

\* \* \* In 1919 I come down on horseback. "Q.--Now, the Sullivan place was taken up before that?" A.--

I just rode by. I didn't inquire who owned it. The boy took the sheep up there. I took my cart right up to the Western Monitor mine, the head of Iron canyon.

About five miles. It was a public highway. Its destination--the Western Monitor mine in Iron canyon at the head. You can go up that road if you want to. In 1919 you could go up with a cart, not a car. We could have done the same in 1914, 1915, 1916, and 1917. I cannot recall when we last went up there with a wagon as described.

Page 94:

DELBERT H. REDDEN, for defendant, testified, on direct examination, as follows:

I live at Park City, I have lived there about 30 years. I have been acquainted with White Pine Canyon since about 1900. Since then there has always been a road leading up White Pine Canyon.

\* \* \*

Since my acquaintance with it, this highway, it has been used for hauling logs, timbers and poles, and by stockmen and sheepmen, myself included.

Pages 97-98:

\* \* \* In 1921 I got \$500 worth of timber in the right hand fork of White Pine, and hauled them to the Daly Judge mine. \* \* \* Above the ranch White Pine canyon

is used generally for cattle and sheep grazing; mostly sheep and White Pine canyon road is the only way, the only access. (This last over objection and exception). Since I have been up there that canyon has been used by the public and private persons for grazing livestock. (This over objection and exception). In my grazing of the White Pine territory the livestock was trailed up and down the bottom of the canyon. (This over objection and exception). With reference to the bottom of the canyon the road runs right through the Sullivan and Condas places and down Trotman Lane to the county road.\* \* \*

Page 99:

\* \* \*At that time there was a traveled wagon road up White Pine canyon above my homestead, the present Condas place.\* \* \*

Pages 100-101:

Above 1918 or '19 I should say there was a wagon road on the right hand side of the canyon about half a mile above Condas house and also an old road in the canyon. "Q.--You mean in the bottom, above the Condas house? A.--All the way up the canyon. Q.--So, if I understand it, you say in 1918 there was a wagon road extending above the Condas house, White Pine Canyon, about half a mile? A.--Above the house."

The old road continued up the bottom. To my personal knowledge, a wagon road extended above the Condas house up White Pine Canyon clear to the top. It was always there. The old road from the Condas house to the top of White Pine Canyon. It was always there while I lived there. I don't know if it is there now. It extended about five miles above the Condas ranch to the Western Monitor mine. It did when I was last there in 1923.

Pages 102-103:

\* \* \* I know of no factories or settlements up there. Hunters and fishers, sheepmen and cattlemen came direct to my place and they go to the tops of the mountains, sometimes with their fishing tackle, guns, cattle and sheep, I would call the canyon to the tops of mountains public highways. \* \* \* I suppose there was a public thoroughfare from White Pine Canyon over to Brighton; it was used. I want the record to show that there was a public thoroughfare from White Pine canyon to Brighton.

\* \* \*

Archibald, Powers, Johnson, all of my neighbors hauled wood, posts, poles out and drove cattle up and down White Pine canyon during 1898 to 1908, while I lived in Snyderville.

APPENDIX B  
FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial before the court, sitting without a jury, upon the complaint of the plaintiffs, Claron C. Spencer, and Richard G. Allen of Senior and Senior appeared for the plaintiffs. Joseph Novak appeared for the defendants. Evidence was introduced by the respective parties and considered by the court, and the court being fully advised in the premises and having found the issues in favor of the plaintiffs and against the defendants, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiffs are the owners of the following described lands in the White Pine Canyon area of Summit County, Utah:

Township 2 South, Range 3 East, SLM

Section 12:	Lot 4, W1/2SE1/4, SW1/4
Section 13:	W1/2NW1/4
Section 14:	NE1/4NE1/4, W1/2NE1/4, NW1/4

2. The defendants are the owners of the following described lands in the White Pine Canyon area of Summit County, Utah:

Township 2 South, Range 3 East, SLM

Section 1:	Lots 9, 10, 13, 14, W1/2SE1/4
Section 12:	Lots 1, 2, 3, W1/2NE1/4
Section 13:	Lot 1

3. There is a roadway, passing up White Pine Canyon through and beyond the above-described lands of the defendants and the plaintiffs to the public domain. Said roadway is a public road and has been used by the plaintiffs and the defendants and their predecessors in interest and by the public generally since 1873.

4. The public's use of said roadway for more than fifty years prior to 1928 was for the general purpose of traffic including the hauling and transportation of logs, firewood, lumber, mining timber, supplies for mining operations, for the trailing of livestock including cattle, sheep and horses, and for all purposes for which public highways under similar conditions were then used. The public continued to use the roadway until it was closed by the defendants in 1971.

5. The uses made by said roadway were on foot, by horseback, in hore drawn wagons and in trucks and cars.

6. In the case of Sullivan v. Condas, which was filled in the Third Judicial Court in and for Summit County, Civil No. 42140, and decided in 1928, defendants' grantor, John G. Condas, alleged in his Amended Answer that there was and had been for sixty years a well traveled road up White Pine Canyon through and beyond the defendants' lands and that the road had been used as a public road by the public generally for more than 60 years.

7. The district court in Sullivan v. Condas case found that the roadway up White Pine Canyon was a public road and had been used by the public openly, notoriously, continuously, uninterruptedly, adversely and under claim of right as a public road since 1873. The court also found that said roadway immediately north of defendants' property was 3 rods in width "and that said width has been and is necessary in the enjoyment of said roadway for the purposes for which it has been used and is now being used by the public generally and by the 'defendants' 'grantor' and his predecessors in interest". The width of said roadway, through the defendants' lands, is a minimum sufficient to accommodate a motor vehicle of the size of a three-quarter ton pickup truck and a maximum of two rods.

8. Defendants offered no evidence to show that the road up White Pine Canyon through the lands now owned by them was not a public road from 1873 to 1924 as alleged by their grantor and as found to be fact in the case of Sullivan v. Condas.

9. During the years 1925 to 1928, John G. Condas, predecessor in interest of defendants, constructed a series of fences and gates within the northerly portion of his property dividing the same into several pastures and corral areas which included a wooden gate across the roadway entering his property on the north line thereof and a series of division fences and wire gates along the roadway through his pasture and corral

areas and a wooden gate of only sufficient width to permit passage of a person riding horseback across the roadway near the southerly end of his pasture area.

10. The wooden gate and its replacements constructed across the roadway on the north line of the John G. Condas property was usually maintained in a closed and locked condition, whenever John G. Condas and his successors were away from the property, generally since the construction thereof until the present time and was generally maintained in a closed but unlocked condition when they were present on the property and said gates were generally posted with "keep out" or "no trespassing" signs since the construction thereof until the present time.

11. During the period of 1926 to 1932, inclusive, entry upon and use of the roadway up White Pine Canyon across defendants' property by plaintiffs' predecessor in interest was with the permission and consent of defendants' predecessor in interest who provided a key to the locked gate to plaintiff's predecessor in interest.

12. During the period from 1933 to 1970, inclusive, plaintiffs and/or their predecessor in interest, leased their land to defendants' predecessor in interest and/or defendants or the lands of both parties were jointly leased to third persons and all during said period the entry upon and use of the roadway up White Pine Canyon across defendants' property by plaintiffs and their predecessor in interest was with the consent and permission of defendants and/or their predecessor in interest.

13. Notwithstanding the foregoing findings 9, 10, 11 and 12, the use of the roadway by plaintiffs and their predecessors in interest, and within the times limited in said Findings, was under a claim of right and not in recognition of defendants' claimed right to grant or deny permission to use same.

14. The evidence is insufficient to support a finding that the use of the roadway up White Pine Canyon across defendants' property by plaintiffs and their predecessor in interest was continuous, open and adverse under a claim of riht for a period of 20 years or that plaintiffs or their predecessor in interest established a prescriptive right of passage over the roadway up White Pine Canyon across defendants' property.

15. In 1971, he defendants placed iron gates across the roadway up White Pine Canyon and have maintained the gates so that the plaintiffs are barred from entrance to their lands either from the north or south along said roadway. The public generally is denied free travel along said road.

16. In 1972, defendants petitioned the Board of County Commissioners of Summit County to vacate a portion of the roadway as a public road where it passes through defendants' lands in Section 1.

17. Pursuant to defendants' petition and upon representations by the defendants that no one but he defendants used the road, the Board of County Commissioners enacted Ordin-

ance No. 63 on September 6, 1972, as corrected by amended Ordinance No. 67, which purported to vacate the public roadway through a portion of defendants' land.

18. The Board of County Commissioners for Summit County did not give notice of the vacation to the plaintiffs in this action, nor did they publish notice of the vacation prior to enacting the vacating ordinance.

#### CONCLUSIONS OF LAW

1. The roadway which passes up White Pine Canyon through and beyond the lands of the defendants and the plaintiffs is a public road.

2. The defendants are estopped from denying that said roadway is a public road.

3. The said roadway may be maintained by the plaintiffs and the public generally through the defendants' lands to a minimum width sufficient to accommodate a motor vehicle the size of a three-quarter ton pickup truck and to a maximum width of two rods as may be necessary to provide for the convenient and safe use of the public in the light of present and future modes of transportation.

4. Said public road has not been abandoned or vacated by competent public authority. The action of the Summit County Commission in 1972 in attempting to vacate a porition of said public road was anullity and Summit County Ordinance No. 63,

dated September 6, 1972, as corrected by Amended Ordinance No. 67, insofar as it purports to vacate a portion of the public road through defendants' property is null and void.

5. That plaintiffs have failed to establish the existence of a prescriptive easement over the defendants' property as alleged in their pleadings. The plaintiffs are entitled to their costs in this proceeding.

## APPENDIX C

### DECREE

The court being fully advised in the premises, having found the issues in favor of the plaintiffs and against the defendants, and having made findings of fact and conclusions of law herein;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. That the existing roadway up White Pine Canyon in Summit County, Utah, as it passes through and beyond the following described lands of the defendants:

Township 2 South, Range 3 East, SLM

Section 1:	Lots 9, 10, 13 14, W1/2SE1/4
Section 12:	Lots 1, 2, 3, W1/2NW1/4
Section 13:	Lot 1

is a public road.

2. That the plaintiffs, their agents, representatives, employees and successors in interest and the public generally have the right to use said roadway as a public road free of interference from the defendants, their agents, employees and successors in interest.

3. That the defendants shall forthwith remove the gates which they have erected across said roadway.

4. That the plaintiffs and the public generally may maintain said roadway through defendants' lands to minimum width

sufficient to accommodate a motor vehicle the size of a three-quarter ton pickup and to a maximum width of two rods, as may be necessary to provide for the convenient and safe use of the public in the light of present and future modes of transportation.

5. That the defendants and each of them, their agents, representatives, employees and successors in interest are premanently enjoined from interfering with or in any manner obstructing, either directly or indirectly, the use, occupancy and enjoyment of said roadway by the plaintiffs, their agents, representatives, employees and successors in interest and by the public generally through the said lands of the defendants.

6. That the plaintiffs recover their costs of this action.