

2008

Haynes Land and Livestock Company v. Jacob Family Chalk Creek : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

HAYNES LAND & LIVESTOCK
COMPANY, a partnership, and Triple H.
Ranch, LC, a limited liability company

Plaintiff-Appellants,

vs.

JACOB FAMILY CHALK CREEK, LLC, a
limited liability company; et. al.,

Defendants-Appellees

**BRIEF OF APPELLEES AND CROSS
APPELLANTS FERN J BOYER,
GERALD G. BOYER, GREGORY
BOYER, L.S. HANSEN AND ALFRED
C. BLONQUIST**

Appeal No. 20080858

[District Court Case No. 980600244]

Appeal from the Third Judicial District Court, Summit County, State of Utah
The Honorable Bruce C. Lubeck, District Court Judge

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TRIPLE H RANCH, LC, a limited liability company

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STATEMENT OF JURISDICTION

The Order and Final Judgment was entered September 16, 2008. The Notice of Appeal was timely filed on October, 14, 2008. The Jacobs and Boyers Notice of Cross Appeal was timely filed October 17, 2008.

The Order and Final Judgment contained a certification of finality under Rule 54(b) of the Utah Rules of Civil Procedure. A claim of partition by Triple H Ranch against Fern Boyer, Gerald Boyer, J.S. Hansen, and Alfred C. Blonquist remains pending before the trial court.

STATEMENT OF ISSUES

The Boyers join in Jacob's Statement of the Issues and arguments thereon and do not separately set forth or address the same herein. This Brief of Appellee and Cross Appellant is limited to the issues raised by way of Boyers' Cross Appeal, which are as follows:

1. Did the trial court error in not declaring the Middle Fork Road a public all the way to the Boyer Property?

Standard of Review: The appellate court reviews the decision of the lower court for correctness and its factual findings for clear error, but grants to the trial court significant discretion in the application of the facts to the statute. *Town of Leeds v. Prisbrey*, 179 P.3d 757 (Utah 2008).

Preservation Below: In the Amended Answer and Counterclaims and Third Party Claims, Boyer asserted the subject road, including the entire loop, was a public road. R-
Triple H 85-88.

2. Did the trial court error in not declaring the East Fork Road a public road all the way to the Boyer Property?

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Preservation Below: In the Amended Answer and Counterclaims and Third Party Claims, Boyer asserted the subject road, including the entire loop, was a public road. R-Triple H 85-88.

3. Did the trial court error in granting the Water Users a prescriptive easement in the road across the Boyer Property?

Standard of Review: Whether an easement exists is a conclusion of law. Such a finding is highly fact dependent which accords the trial court a broad measure of discretion when apply the correct legal standard to the facts. An appellate court, therefore, overturns the conclusion of the trial court only if it finds it exceeded the broad discretion granted. *Valcarce v. Fitzgerald*, 961 P.2d 305, 311 (Utah 1998).

Preservation Below: Boyers objected to the trial court granting the Water Users a prescriptive easement in their Memorandum in Support of Motion for Reconsideration, or in the Alternative, For Clarification. R-Haynes 1616.

STATUTORY AUTHORITIES

Utah Code Ann. § 72-5-104:

- (1) A highway is dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years.
- (2) The dedication and abandonment creates a right-of-way held by the state in accordance with Sections 72-3-102, 72-3-104, 72-5-1-5, and 72-5-103.
- (3) The scope of the right-of-way is that which is reasonable and necessary to ensure safe travel according to the facts and circumstances.

Utah Code Ann. § 72-5-108:

The width of rights-of-way for public highways shall be set as the highway authorities of the state, counties, or municipalities may determine for the highways under the respective jurisdiction.

STATEMENT OF THE CASE

A. Nature of the Case. This is a consolidated civil case wherein all of the parties are seeking a determination as to whether the road at issue is a public road by virtue of R.S. 2477 and/or Utah Code § 72-5-104(1)(2006), or in the alternative, whether any easements exist.

B. Course of Proceedings and Disposition Below. More than 100 years ago, Gerald Boyer, Gregory Boyer, Fern Boyer, J.S. Hansen and Alfred C. Blonquist (the “Boyers”) predecessors in interest purchased a parcel of land (the “Boyer Property”) for the purpose of constructing an irrigation reservoir and, until the current dispute arose, have had uninterrupted access to their land. Trial Transcript, Vol. II, 352, 367. In 2000, the principles of Haynes Land and Livestock Company (“Haynes”) created Triple H Ranch, L.C. (“Triple H Ranch”) for the purpose of acquiring a one-third undivided interest in the Boyer Property. After acquiring that interest, Triple H Ranch filed this lawsuit against the Boyers alleging that the Boyers have no legal right of ingress or egress to their

property and, therefore, the Boyer property should be partitioned by sale. R-Triple H 1-6. Ultimately, Haynes has admitted it is their intent to eliminate the Boyers as a landowners in the East Fork of Chalk Creek and to acquire their property interests. Trial Transcript, Vol III, 739. In response, the Boyers asserted that the road was a public road, or in the alternative, they had a prescriptive right to use the road. R-Triple H, 85-89.

Prior to the initiation of this lawsuit, Haynes took issue with other landowners, Jacob Family Chalk Creek, LLC and Catherine B. Christensen, LLC (referred to herein together as “Jacob”), who were constructing a fourth cabin on their 10,000 acre ranch. In an effort to control the Jacob’s use of their property, in 1998 Haynes sued the Jacobs asserting that they only had a right of ingress and egress for agricultural purposes. R-Haynes, 1-8. In response, the Jacobs also asserted the road at issue is a public highway. R-Haynes, 65-79.

Because of the common issues in both lawsuits; namely, whether the subject road is a public highway, by stipulation of the parties the two actions were consolidated. R-Triple H, 116-119. By further stipulation of the parties, Haynes’ claim against the Boyers for partition by sale was bifurcated from the underlying road dispute and reserved for a later determination.

During the trial of the road issues, Boyers, Jacobs and Summit County introduced evidence showing that between 1865 and 1947 the subject road was used by many members of the public for a variety of different purposes, including accessing the area known as The Blue Lakes which includes the Boyer Property on which Boyer Lake is located. Trial Transcript, Vols. I – IV, 1-892. In the Memorandum Decision, the trial

court found that there was overwhelming evidence the Bench Road and the Middle Fork Road to a point just shy of the Boyer Property had been used continuously by many members of the public from 1865 until 1941, and declared that portion of the road to be a public road. R-Haynes, 1393-1475. Although that determination was based in part on the trial court's finding that many people used the public portion of the road to access The Blue Lakes, it nevertheless failed to connect the road to the Boyer Property. R-Haynes 1393-1475. Likewise, the trial court found the East Fork Road was a public road only to the middle of section 8 of Township 2 North Range 8 East and, therefore, did not connect the public portion of that road to the Boyer Property either. R-Haynes, 1451–1452. In other words, the trial court failed to recognize that the Boyers, who have owned and accessed their property for over 100 years, have any independent right of their own to get to their property.¹

The trial court did, however, grant the Chalk Creek-Hoytsville Water Users Corporation (the “Water Users”) a prescriptive easement across the road on the Boyer Property despite the fact it never asserted or introduced evidence in support of such claim. R-Haynes, 1466.

¹ The failure of the trial court to connect the public road to the Boyer Parcel creates a dilemma for the Boyers. Should Haynes again seek to petition Summit County to vacate the public's interest in the road, the Boyer's would not be entitled to written notice of the hearing because under Utah Code §72-3-108(2)(c) written notice is only required to be provided to “owners of property abutting the county road.” Even more troubling, because Boyers are not abutting landowners to the public portion of the road, were Summit County to vacate the road they would not retain a right of way in the road because they would not be abutting landowners to the vacated public road. See, e.g., *Mason v. State*, 656, P.2d 465, 468-470 (Utah 1982)

Following the denial of the Boyers and other parties post trial motions, the trial court issued its Order and Final Judgment declaring the Bench Road was public, the East Fork Road public to the middle section 8, and the Middle Fork public to a point just short of the Boyer Property, denying the Boyers a prescriptive easement from the public portion of the East Fork Road to their property, granting the Water User's a prescriptive easement over the Boyer Property and delegating to Summit County the responsibility to determine the width of the public portions of the roads. R-Haynes, 1678-1692.

STATEMENT OF FACTS

1. Orientation of the Properties and the Road.

Haynes owns approximately 9,574 acres of real property along or close to the East Fork of Chalk Creek in Summit County. R-Haynes 2, ¶ 6 (referencing Exhibit A) (the "Haynes Property"). Jacob also owns approximately 9,346 acres of real property along or close to the East Fork of Chalk Creek in Summit County. R-Haynes 2. 6 (referencing Exhibit B) (the "Jacob Property"). The Jacob- Property adjoins the Haynes Property both on the south and west borders of the Haynes Property as illustrated by Trial Exhibit 117. Boyers own a two-thirds undivided interest in approximately thirty seven acres of land surrounding Boyer Lake as illustrated by Exhibit 117; Trial Ex. 116.

The Road at issue in this Lawsuit consists of a loop providing Jacob and Boyer the sole means of access to their respective properties over the land owned by the Haynes. This loop is represented in Trial Exhibit 117. The trial court broke down the Road into different segments. R-Haynes 1406. The first segment of the road departs from Highway 133 ("Chalk Creek Canyon Road") and travels in a southerly direction until it reaches the

Jacob Christensen's property (the "Bench Road"). *Id.*, *see also* Trial Ex. 117. The first quarter mile of the Bench Road crosses over land owned by the Bingham and the remainder, over land owned by the Haynes. *Id.* Once it reaches the Jacobs property, it travels in a southern and easterly direction across their property until it reaches the Boyer property (the "Middle Fork Road"). R-Haynes 1406-1407; *see also*, Trial Ex. 117. There is a fork in the Bench Road located on the Haynes property at the Northwest corner of Section 7, Range 8, Township 2 which travels in an easterly and somewhat southerly direction. R-Haynes 1407. Trial Ex. 117. (Segments B & D)]. The Road then turns south over Haynes' property through Sections 15, 22, 23, 25, and portions of Section 27 of Range 8, Township 2 until it reaches the Jacob Christensen property due north of Joyce Lake. R-Haynes 1407. Trial Ex. 117. The Road then travels the east side of Joyce Lake on Jacob Christensen's property until it reaches the Boyer Property at the north end of Section 34, Range 8, Township 2. *Id.*; Trial Exhibit 117. The Road then crosses the Boyer Property (the "Boyer Road"), travels across the reservoir until then travels to Jacob Christensen's property once more, completing the loop in the center of Section 34 of Range 8, Township 2, near the southern end of the Boyer Reservoir. R-Haynes 1407-1408.

In total, the Road is approximately twenty-four miles in length and travels through four separate townships, with the majority of the Road traveling through Township 2 North, Range 8 East, SLM. Trial Ex. 117.

2. Existence of the Road.

According to official government documents, The Bench Road, Middle Fork Road, and the East Fork Road (to approximately the center of Township 2, Range 8, Section 8) portions of the Road have existed for over 100 years. Trial Ex. 108 (“Survey Plat 1”); Trial Ex. 109 (Survey Plat 2”); Trial Ex. 111 (“Survey Plat 3”); Trial Ex. 112 (“Survey Plat 4”). In 1875, the United States surveyed the lands over which the first two miles of the Bench Road are located. Trial Ex. 101 (“Government Survey 1”). This survey shows the road described as “road to sawmill” leaving highway 133 and extending to the south of section 1 of township 2N Range 7 East. Trial Ex. 101, p. 36. The remaining lands in which the Bench Road, Middle Fork Road, and the first portion of the East Fork Road are located were surveyed in 1893. Trial Ex. 103 (“Government Survey 3”); Trial Ex. 111. The surveys show that by 1893 the entire Bench Road had been established and the Middle Fork Road extended south all the way to Section 4 of Township 1 North, Range 8 East. *See* Trial Ex. 103; 104; 105, pp. 400, 419, 425, 428–29, 432–33, 438–40, 443; 111 and 112.

By 1900, the Middle Fork Road circled around towards the northeast and extended to the midpoint of the south line of Section 34, Township 2 North Range 8 East. Trial Ex. 113; See also Trial Ex. 166, 168 and 169.

The last portion of the Middle Fork Road, however, no longer follows that route. Compare Trial Ex. 113 with 174. Rather, the Middle Fork Road now takes a more direct path from Section 4 to Boyer Reservoir. Trial Ex. 174. It is this alignment that is reflected on the Summit County Class “D” Road map. Trial Ex. 205.

3. Use of the Road.

A. Presence of Sawmills and Timbering Activity Along the Road.

In addition to the U.S. Geological Surveys showing the physical existence of the Road as far back as 1875, there is evidence of sawmill and timbering activity along the first couple miles of the Bench Road as early as 1865. Specifically, in 1865 the probate court granted the petition of L.L. Randall, Jacob Huffman (and two others) to saw timber on Chalk Creek Canyon, and further provided that “[t]he citizens shall have the privilege to haul logs to said mill and have them sawed” Trial Ex. 131. Historical records establish that the referenced sawmill was located approximately two miles up the east fork of Chalk Creek. Trial Ex. 137 p. 139 (“The men who first owned these mills were as follows: L.L. Randall owning a saw mill about two miles up from Pine Cliff, in the East Fork of Calk [sic] Creek.”); Trial Ex. 158, p. 9; Trial Ex. 101, p. 36; 108 (stating in the 1875 U.S. Geological Survey that the Road went to the sawmill). Further, a 1874 map of the Territory of Utah (Trial Ex.163), a 1875 Mineral Map of Utah (Trial Ex.164) and a 1878 Mineral Map of Utah (Trial Ex. 165) also show the existence of a saw mill in this vicinity. This mill was operated for many years and supplied timber to the local communities. Trial Ex. 158, p. 9.

In addition, the record shows another sawmill, owned by Merritt Staley, was located “way up the East Fork where the ledges are.” Trial Ex. 159, p. 3. This sawmill was in existence at least by 1886 because a newspaper reported diptheria spread through Merritt Staley’s family in 1886 while the family was living at Staley’s “saw mill in the mountains.” Trial Ex. 146; Trial Ex. 147 (reporting that M.T. Staley’s family lost two

children to diphtheria). It operated for at least four years as at least one record shows it was still operating in 1890. Trial Ex. 159, pp. 2–3 (noting that a boy who was born in 1880 went to visit Mr. Staley at the sawmill when the boy was 10).

In 1893, a United States surveyor reported seeing two old sawmills located along or close to the Road. Trial Ex. 105, p. at 431, 440. One of the sawmills was located close to the Road in Section 20, Township 2 North, Range 8 East and the other was located along the Road in Section 7 of the same Township. *Id.*; Trial Ex. 117.

Further, although these records and accounts do not reveal the total number and duration of the mills, the 1893 field notes of the U.S.S. Geological surveyor revealed that most of the usable pine trees had already been cut down, thereby establishing the widespread and long standing timbering activities in the area adjacent to the Road. Trial Ex. 105, p. 447.

In addition to the larger scale timbering activities occurring at the sawmills, the trial record also shows individual members of the public also cut down and hauled away timber from the land adjacent to the Road. See., e.g. Trial Transcript, Vol. II, 422.

B. Grazing and Trailing of Livestock Along the Road.

Besides timbering and sawmill operations, sheep herds constituted another source of commerce in the Chalk Creek area. According to several homestead records, individuals settled along the Road for purposes of farming and grazing. See e.g., Trial Ex. 120, pp. JC 1546–47; Trial Ex. 119, pp. JC 1572–73.

The Boyer Property, a good portion of the Jacob property and part of the Haynes Property are enclaves within the boundaries of the forest where the sheep were grazed

and trailed into other forest land or parts of Wyoming. Trial Ex. 117 (showing boundaries of forest and location of the parties' property within the forest); Trial Ex. 149, p. 8 (noting sheep herds were "making their way up Chalk Creek and to other ranges"); Trial Ex. 157, p. 7, *in* App. II, Tab 28 (noting sheep herds were moved through the Chalk Creek area and to other ranges each Spring, with some traveling as far as 200 miles); Deposition of Lloyd ("Collard Depo."), p. 18, admitted at Trial Tr. Vol. IV, p. 874 (stating "the East Fork Road" was used to trail sheep up through adjoining property "and over to the head of the Weber").

The number of sheep moved specifically along the East Fork of Chalk Creek can be partially measured by information about shearing and dipping corrals in the area. The "Clark Brothers . . . built the first shearing corral, which served thousands of sheep for many years." Trial Ex. 137, p. at 143. In 1890, the Deseret News reported that a sheep herder who was herding "Church sheep, and was camped near Bishop Clark's shearing corral on Mill Fork of Chalk Creek, is lost." Trial Ex. 148, p. 494. Mill Fork of Chalk Creek connects to the Road in Section 20, Township 2 North, Range 8 East, Trial Ex. 117, and is shown as extending into and stopping at a corral in Section 12, Township 1 North, Range 7 East. Trial Ex. 117, Point L; Trial Ex. 110.

In 1893, a United States surveyor reported that John Clark had a dipping corral located along Segment A of the Road. Trial Ex. 117; Trial Ex. 105, p. 431. His notes state: "John Clark has a sheep dipping correll [sic] and cabin in the N.W.1/4 of Sec. 20. His improvements are worth about \$200.00." Trial Ex. 105, p. 447. The northwest quarter of Section 20 is the head of Mill Fork. Trial Ex. 117.

In 1895, an article in the Coalville Times reported that 40,000 sheep had been dipped already at Clark's corral that season, and that by the end of the season they expected to dip 100,000 sheep. Trial Ex. 150, p. 1. A year later, another article reported that over 100,000 sheep had been dipped at Clark's corral in 1896. Trial Ex. 151, p. 1. A third article reported Clark's dipping corral was opening for another season in July 1898. Trial Ex. 152, p. 1. Thus, Clark's dipping corral continued operations at least through 1898.

C. Homes and Farms.

Along with these business activities, by approximately 1882 people began building homes, corrals, ditches, and fences along or close to the Road. Trial Ex. 119, pp. JC 1570–72; Trial Ex. 120, pp. JC 1542, 1544–46.

In 1883, William H. Staley ("W. Staley") began occupying part of Section 18, Township 2 North, Range 8 East. Trial Ex. 117; Trial Ex. 119, pp. JC 1570–72. He built a house, corrals, and a stable, and used the property for grazing and farming. Trial Ex. 119, pp. JC 1570–72.

W. Staley did not file his homestead entry, however, until 1895. Trial Ex. 119, pp. JC 1559, 1562. Thus, for more than ten years he used and occupied the land without license or permission from the federal government. A homestead patent was issued to W. Staley in 1901 for the 160-acre parcel. Trial Ex. 119, p. JC 1576.

Leonard W. Randall ("L.W. Randall") began occupying land in Section 18 of Township 2 North Range 8 East in 1882. Trial Ex. 117; Trial Ex. 112; Trial Ex. 120, pp. JC 1542, 1544–46. He built a house, corrals, ditches, and fences, and used the property

for grazing and farming. Trial Ex. 120, pp. 1542, 1544-46. A survey plat map also noted the location of an irrigated field in the area. Trial Ex. 117; Trial Ex. 112 (showing the location of the irrigated field related to the Randall cabin; *see also* Trial Ex. 129 (showing L.W. Randall ditch diverted water from Red Hole Creek as early as 1884).

In 1896, L.W. Randall first filed his homestead entry, again more than ten years after he began to use and occupy the land without license or permission. Trial Ex. 120, pp. JC 1537, 1540. A homestead patent was issued to L.W. Randall in 1903 for the 160-acre parcel. Trial Ex. 120, p. JC 1558.

Between 1893 and 1896, two other individuals began occupying land in Section 8, Township 2 North, Range 8 East, along Segment B of the Road, for purposes of establishing a homestead. Trial Ex. 121, pp. JC 2347-48; Trial Ex. 122, pp. JC 2327-28; Trial Ex. 117.

George Huff settled on land in Section 8, Township 2 North, Range 8 East, in December 1893, and established his actual residence a year later. Trial Ex. 117; Trial Ex. 121, pp. JC 2337, 2347. In addition to building a home, he built a stable, corrals, and fencing. Trial Ex. 121, pp. 2345-47. He also cleared and cultivated part of the land. Trial Ex. 121, pp. 2345-47; *see also* Trial Ex. 130 (showing Geo. Huff's ditch diverted water from the East Fork of Chalk Creek as early as 1893).

Similar to W. Staley and L.W. Randall, Huff did not immediately file his homestead entry, but waited two years, filing in December 1895. Trial Ex. 121, p. JC 2337. A homestead patent was issued to Huff in 1901 for the 160-acre parcel. Trial Ex. 121, p. 2351.

In 1896, Charles Saxton also filed his homestead entry in Section 8, Township 2 North, Range 8 East. Trial Ex., 122, p. JC 2314; Trial Ex. 117. He built a house, corrals, fencing, and ditches. Trial Ex. 122, pp. JC 2325–27. He cultivated some of the land, and indicated it was good for grazing. Trial Ex. 122, pp. JC 2325–27. A homestead patent was issued to Saxton in 1903 for the 160-acre parcel. Trial Ex. 122, p. JC 2333.

Survey Plat 4, which was done in 1893, reflects further use of the Road by noting that another corral was located in Section 10, Township 2 North, Range 8 East, about one mile from the Huff and Saxton homesteads. Trial Ex. 112; Trial Ex. 117.

A fifth cabin was located in Section 20, Township 2 North, Range 8 East, close to the Road. Trial Ex. 112; Trial Ex. 117. This is the same section in which Clark’s dipping corral and an old sawmill were located, which section remained in federal ownership until 1899. Trial Ex. 112. No documents show grant of title, license, or permission by the federal government for any person or entity to build or use a cabin, dipping corral, or sawmill on the property either before or during the relevant time period of 1880 to 1896. Trial Ex. 107 (hereinafter “BLM Conveyances 1”) (detailing when each portion of Section 20 was conveyed by the United States).

According to Government Survey 4, the Middle Fork Road ended in Section 4, Township 1 North, Range 8 East, about 23 chains south of the section’s north border. Trial Ex. 117; Trial Ex. 105, p. 221 (discussing cabin that was visible in an adjoining township. No documents show grant of title, license, or permission by the federal government for any person or entity to build and use the cabin on the property either

before or during the relevant time period of 1880 to 1896. *See* Trial Ex. 106 (detailing when each portion of Section 4 was conveyed by the United States.

D. Reservoirs and Water Diversion

By 1902, growth in the area was sufficient that farmers in Upton were contemplating building at least three reservoirs at the head of the East Fork because there were some lakes there and places to build a reservoir. *See* Trial Ex. 155.

In January 1903, a Notice of Appropriation of Water was filed by William Boyer and others for the dual purpose of establishing a reservoir in Section 34, Township 2 North, Range 8 East, and diverting the water to Upton and Coalville. Trial 123. The water was needed in Upton and Coalville for “irrigation purposes, domes[tic] purposes, and other useful purposes.” Trial Ex. 123.

E. Hunting and Fishing

The Road also provided access for recreational activities in and around the East Fork of Chalk Creek, such as hunting and fishing. Trial Ex. 139, pp. 10–11 (discussing hunting and fishing throughout the Chalk Creek area); Trial Transcript Vol. II, 428; 10-22; - Fern Testimony (testifying her Uncle Sam Banner used to hunt around Red Hole and fish around Blue Lake). “Early accounts by pioneers, stockman and explorers make clear that bear roamed the forested land of Utah.” Trial Ex. 143, p. 249. In 1899, the Coalville Times reported that people were hunting and killing bear in the vicinity of “East Fork Creek.” Trial Ex. 154, p. 1; *see also* Trial Ex. 153, p. 1 (reporting Clarks found bear tracks near the “dipper,” and the Staleys killed bear near East Fork canyon). Indeed, Red Hole, “was a natural haunt for bear and a very popular hunting ground.” Trial Ex. 139, p.

26; Trial Ex. 117 (showing location of Red Hole); *see also* Trial Transcript Vol. II., pp 425-428).

Another witness, Gwennola Blonquist, born in 1912, testified she went to the Blue Lakes using the Middle Fork Road twice in 1933 with her husband and several other “yahoos” to hike and recreate. Gwennola Blonquist Depo., pp. 10:24-11:8, admitted at Trial Tr. Vol. III, p. 556; *see also*, Trial Ex. 262 (a photograph of Ms. Blonquist and a friend in boats on the Boyer Reservoir).

During the trial, C. Kay Crittenden, born 1923, testified that he had gone up to the Blue Lakes and fished and camped on numerous occasions prior to 1935 and never saw any gates, signs, or any other obstruction preventing the public at large from traveling along the Road. Trial Tr. Vol. III, p. 502:5-504:18.

During the trial, Fern Boyer, born in 1928, testified that her father (and others) used to go to Blue Lake to fish “all the time.” Trial Tr. Vol. II, pp. 433:14-435:9.. A photograph taken in 1920’s was admitted showing in one photograph her mother and father holding up a string of fish and in the other her uncle Leslie and his wife doing the same. Trial Ex. 261. In the 1930s Ms. Boyer testified she would go up to the Blue Lakes annually for two weeks at a time with her grandparents to camp, fish and cut timber. Trial Tr. Vol. II, pp. 422:17-424:18.

A former resident of Upton, Robert Powell, born in 1929, testified on one occasion that he and his cousin drove part way up the Middle Fork Road, parked and walked to the Blue Lakes. In fact, on the way down, he testified they encountered the local fish warden who was patrolling the area. Trial Tr. Vol III, pp. 485:22-486:20.

Lamont Staley testified that in 1939 at the age of 12 his scoutmaster took him and his scout troop camping to the Blue Lakes for four or five days. Deposition of Lamont Staley, p. 17:12-21, admitted at Trial Tr. Vol. III, p. 554.

Finally, the biography of Myrtle Rigby, a lady homesteader, states:

Sundays were especially fun and exciting at Chalk Creek Ranch in the Summer. More frequently than not there were city visitors. A bountiful lunch was prepared, favorite horses were saddled, a team harnessed --- and everyone was off to Blue Lake or Bear River to fish.

Trial Ex. 160, p. 6.

F. Socials and Dances

Social events like dances also occurred in the area. “When a dance was scheduled [in Upton during the late 1800s], the word traveled far. The men and women at the sawmills high in the hills heard of it and even those herding sheep around and above the sawmills” came. Trial Ex. 142, p. at 31. By 1891, an amusement hall was built in Upton. Trial Ex. 137, p. 143; Trial Ex. 139, p. 7; Trial Tr. Vol., II, p. 435:10-17.

G. Federal Ownership of the Land in Dispute

The United States retained ownership of every even-numbered section through which Segments A and B of the Road traverse until approximately 1896. *See, e.g.*, Trial Ex. 119, p. JC 1559 (stating that homestead entry for section 18 was filed December 26, 1895); Trial Ex. 120, p. JC 1537 (stating that homestead entry for section 18 was filed February 17, 1896); Trial Ex. 121, p. JC 2338 (stating that homestead entry for section 8 was filed December 14, 1895); Trial Ex. 122, p. JC 2314 (stating that homestead entry for section 8 was filed May 20, 1896).

Subsequently, the sections passed from federal ownership into state or private ownership on various dates, but the United States continued to own some of the land along the Road as late as 1909. With respect to the odd-numbered sections, the Union Pacific Railroad (the “Railroad”) filed its map of definite location on January 8, 1869 showing the location of its tracks from Omaha, Nebraska to Promontory Summit, Utah. Trial Ex. 132, p. 516. Odd sections of land along Segments A and B of the Road transferred to the Railroad on that date. *See, e.g., id.*; Trial Ex. 127; 12 Stat. 489, § 3. A table attached hereto as Appendix “F” details when each section along Segments A and B of the Road passed from federal ownership.

H. Public Acknowledgments of Road Status.

The importance of canyon roads, such as the Road at issue in this Lawsuit, to the local communities they served is shown by the 1894 minutes of the probate court. These minutes reflect that the “[p]rosecuting attorney was instructed to forbid any person or persons from closing any of the canyon roads in Summit County that have been used as public highways for seven years and to prosecute any person violating the instructions herein given.” Trial Ex. S.C. 243. Further, the minutes of the Summit County Commission show that in 1913 the county expended monies for road construction on Sage Brush Flats which constitutes part of the Bench Road. Trial Ex. S.C. 244. In 1918, the road is set forth on the Summit County [?] and in 1975 the entirety of the road including the loop was designated as a Class D road on Summit County’s general highway map. Trial Ex. 114.

Further, Gwennola Blonquist, born in 1912, testified that when they used the Road to travel to the Blue Lakes they believed that the roads were public and knew of many people that used the Road. G. Blonquist Depo., p. 12:8-11. Fern Boyer testified that the community was shocked with Howard Haynes, Sr. blocked off access via the Road in about 1947 given that it hadn't been closed off prior and anyone was free to travel upon it. Trial Tr. Vol. II, pp. 440:17-445:21. Similarly, Robert Powell testified that prior to 1950, it was his belief that the community viewed it as a public road. Trial Tr. Vol. III, p. 498:9-499:15. C. Kay Crittenton, born in 1923, also testified that there were no restrictions on access along the Road until the Late 1940s or early 1950s and the public was free to traverse across it. Trial Tr. Vol. III, pp. 507:22-509:12.

SUMMARY OF ARGUMENT

The trial court erred in not extending the public portion of the Middle Fork Road to the Boyer Property. In the Memorandum Decision the trial court found that many members of the public used the Middle Fork Road to access The Blue Lakes. Given that Boyer Lake is located within the Boyer Property, and is one of the three lakes making up The Blue Lakes, the only reasonable inference is that the public used the Middle Fork Road to access the Boyer Property. By failing to declare the Middle Fork Road a public road all the way to the Boyer Property, it has deprived the Boyers of the rights associated with being abutting landowners to a public road and left them without any independent legal right of their own to access property they have owned for over one hundred years.

In addition, the trial court erred in not extending the public portion of the East Fork Road to the Boyer Property. Every witness who testified including Howard Haynes

Jr., acknowledged that a trail or other way extended from the middle of section 8 up to The Blue Lakes and/or the Boyer Property. The fact that this trail or way was not depicted on the early maps does not justify finding the public's use was not continuous when the undisputed testimony and other facts of record evidence the public could and did use that way whenever they choose to do so.

Finally, the trial court erred in granting the Water User's a prescriptive easement across the Boyer Property. The Water Users did not plead such a claim, and did not introduce into evidence any testimony or records in support of such a claim.

ARGUMENT

I. THE TRIAL COURT ERRED BY FAILING TO DECLARE THE MIDDLE FORK ROAD A PUBLIC ROAD ALL THE WAY TO THE BOYER PROPERTY.

Based in part on the trial court's finding that the public used the Middle Fork Road to access The Blue Lakes (R-Haynes, 1443, 1464), it concluded the Middle Fork Road was public extending into Section 4 of Township 1 North, Range 8 East.² R-Haynes, 1464. Moreover, the trial court expressly states that it is "from that approximate point where the public gained access to the lakes." R-Haynes, 1464. Despite these findings,

² In finding that the public portion of the Middle Fork Road only extended into Section 4 of Township 1 North Range 8 East, the trial court relied upon what it refers to as exhibit 134, a 1903 U.S.G.S. map. Exhibit 134, however, is a petition to vacate and none of the parties introduced into evidence a 1903 U.S.G.S. map. The Boyers did, however, introduce into evidence a 1900 U.S.G.S. map, which is exhibit 113. It is undoubtedly this 1900 map that the court is referring to as it is the only U.S.S.G. map in evidence during that early time period. Contrary to the trial court's findings and conclusions, the 1900 U.S.G.S. map shows the Middle Fork Road curving around in a northeast direction until it reaches the southline of Section 34 of Township 2 North Range 8 East, which is just one-half mile due south of the Boyer Property. See also the 1918 Summit County map, 1929 and 1931 Wasatch National Forrest maps evidencing the same. Exhibits 166, 168 and 169 respectively.

however, the trial court concluded the public portion of Middle Fork Road does not extend to the Boyer Property for two reasons. First, the trial court states “the evidence does not convince the court that any particular route was used to gain access to The Blue Lakes area.” R-Haynes, 1464. Second, the trial court states, “there was insufficient evidence (if any) that the public went across the Boyer Property” R-Haynes, 1464-1465.

A. *Based On The Evidence Of Record, And The Trial Court’s Own Findings, The Only Reasonable Inference Is That Members Of The Public Used The Middle Fork Road To Access The Boyer Property.*

During the pertinent time period, The Blue Lakes consisted of three natural bodies of water, one of which was Boyer Lake. See Exhibits 117 and 166. These lakes are located in a basin at the top of the East Fork of Chalk Creek Canyon into which the trial court found the public portion of the Middle Fork Road extended. Exhibit 117, R-Haynes, 1464. Until Boyer Reservoir was constructed in the 1930’s, Boyer Lake was located entirely within and encompassed by the Boyer Property. See Exhibits 116 and 117. Thus, access to Boyer Lake could only be accomplished by crossing over the Boyer Property. Furthermore, Joyce Lake is located directly north of and next to Boyer Lake. See Exhibits 117, 173 and 174. Thus, from where the 1903 U.S.G.S. map shows the Middle Fork road extending, the most direct route to access Joyce Lake would have been to cut across the Boyer Property.

Given the trial court’s finding that many people used the Middle Fork Road to gain access to The Blue Lakes, given that Boyer Lake is one of three lakes constituting the area known as The Blue Lakes, given that access to Boyer Lake could not be

accomplished without crossing the Boyer Property, and given that the most direct route to Joyce Lake from the Middle Fork is across the Boyer Property, the only reasonable inference that can be drawn from the facts of record is that the public used the Middle Fork Road to access the Boyer Property. The trial court's finding to the contrary, therefore, is clearly erroneous.

B. *The Absence Of a Map Depicting The Exact Path The Public Used To Cross The Last One-half Mile to the Boyer Property Does Not Preclude The Finding of a Public Road.*

The second basis on which the trial court concluded the Middle Fork Road is not a public road was the lack of any evidence as to the exact path the last one-half mile of the road traveled. R-Haynes, 1464. Although Boyer concedes that the record below does not show any specific course or route used by the public over this short one-half mile stretch, contrary to the conclusion of the trial court this lack of evidence is not fatal to their claim.

By way of this action, Boyers are seeking a right of ingress to and egress from property they have owned for over 100 years – not some undefined right to travel across Haynes' property as they please. As discussed in Part I.A. above, the 1900 U.S.G.S. map and other evidence introduced at trial was for the purpose of showing that the Middle Fork Road was being used by the public to access The Blue Lakes, including the Boyer Property on which Boyer Lake is located. The Boyer were not seeking during the trial to have the trial court impose a road across the Haynes from the end of the road as depicted on the 1903 U.S.G.S. map over to the Boyer property. The simple fact is that the portion of the road depicted in the 1900 U.S.G.S. Map from its southernmost point in Section 4 to the midpoint of the south section line of Section 34 no longer exists. See Exhibit 174.

As evidenced by the 1998 United States Department of Agriculture, Slader Basin Quadrangle Map, the Middle Fork Road currently traverses on a more direct course to and across the Boyer Parcel from section 4 of Township 1 North Range 8 East and no longer curves around into Section 3 thereof. See Exhibit 174. In other words, the last segment of the Middle Fork Road has been relocated.

There is no evidence that Summit County, or for that matter, the Jacobs, have ever objected to or complained about the relocation. In fact, like the Boyers, it is the current alignment of the road that both the Jacobs and Summit County contended during the trial of this action should be declared to be a public road. See Exhibit 205.

It is well settled under Utah law that the relocation of a road that does not substantially affect the general course of a highway does not alter its public status. See, e.g., Memmott v. Anderson, 642 P.2d 750, 752 (Utah 1982) (wherein the Utah Supreme Court held that the relocation of a segment of a road 1,800 feet to the north did not affect the claimant's rights as an allotting landowner to a public road); Lindsay Land & Livestock Co. v. Churnos, 285 P.646, 649 (Utah 1929) (wherein the Utah Supreme Court held that deviations or alterations of a road that do not substantially alter its course do not defeat the public status thereof).

It follows therefrom that the trial court should have declared the Middle Fork Road a public road all the way to the Boyer Property.

II. THE TRIAL COURT ERRED BY NOT DECLARING THE EAST FORK ROAD A PUBLIC ROAD ALL THE WAY TO THE BOYER PROPERTY.

Although the trial court acknowledged “some” evidence the public used the East Fork Road to gain access to The Blue Lakes (R-Haynes 1452), it concluded that the evidence failed to clearly establish the East Fork Road is public from the middle of section 8 to the Boyer Property because:

1. the evidence did not show “that a particular route was used along the East Fork after leaving the middle of section 8” (R-Haynes, 1461); and
2. the “area was described as a terrible passage, a rock pile, and other terms showing it was not heavily used or as regularly used as the Bench and Middle Fork Roads (R-Haynes, 1452).”

A. Contrary To The Trial Court’s Finding, Every Single Witness Who Testified Concerning The East Fork Road Testified As To The Existence Of Established Trail Or Way.

By whatever their description, every single witness who testified regarding the East Fork Road beyond the middle of section 8 acknowledged the existence of a trail or other way, including the witnesses the trial court stated its finding was based upon:

Howard Haynes Jr.: After having testified that the East Fork Road ended in the middle of section 8, on cross examination he testified as follows:

Q. If I understand your testimony correctly earlier, you testified that, at the time your father purchased the property, the road that we call the East Fork loop that comes off the bench road in an easterly direction terminated at some point in Section 8; is that correct?

A. That’s correct.

Q. And didn’t continue any further. Is that your testimony?

A. That’s right.

Q. Okay. And you further testified that a road from that terminus point did not exist until when the reservoir built it in approximately 1940, correct?

A. Well, I think it would be passable with horses and maybe some wagons, but it wasn't much of a road.

Trial Transcript, Vol. III., 670.

Kay Crittenden: Likewise, after testifying that the "road" ended in the middle of section 8, he further testified as follows:

Q. You discussed that the road terminated around Section 8 and that your father went in and constructed the road right?

A. Right.

Q. Was there a trail that led over the reservoir, though, where the road stopped that you considered to be a trail?

A. That used to be what they call a pack trail.

Q. Why is it a pack trail? Would you describe what a pack trail is?

A. Well, a pack trail, Boyers would maybe have used that. I don't know which way the Boyers got up to build that first reservoir that was there.

Q. Okay.

A. And there was just a trail where they'd trail their horses and pack horses.

Q. So you would be able to take a horse in there with packs or go from where the road ended in Section 8 over to the reservoir.

A. Yes.

Trial Transcript, Vol. III, 523-524.

LeRoy Meadows: In his deposition, LeRoy Meadows testified that prior to 1932³ his brother and two cousins traveled by horse and buggy to The Blue Lakes three different years using the East Fork Road:

Q. What was the road like as you traveled up to the lake?

A. Well, it was just – a wagon road is all I can say.

Q. Was it more of a road or a trail?

A. Well, to the forks, there was a creek there, the two streams. It was a wagon road. It was a road. But from there on, why, there was very little road.

Q. What did you use to travel it?

³ Initially, he testified this occurred in the early 1930's but later acknowledged it was prior to 1932. Deposition of LeRoy Meadow, 10-11; 28.

A. Well, we took a buggy. We had two old horses, one from each family that we hooked together, and hooked them on the buggy. It was a two-seated buggy. And we went from there right on up to Blue Lake.

Deposition of LeRoy Meadows, 13-14.

Fern Boyer: Ms. Boyer testified that in the 1930's, starting at a very early age, she, her parents, her grandparents and others went to The Blue Lakes on many occasions to camp, fish, and cut timber. Although she described the road as a "very rocky" and stated her grandfather Sam Banner referred to it as that "rocky pile", she also testified they went up the East Fork Road traveling by team and wagon or in her father's model T Ford. Trial Transcript, Vol. II, 420-434.

In light of this undisputed testimony, including that of Haynes, the fact that this road does not appear on the 1900 U.S.G.S. map is not indicative of the absence of a trail or way. The foregoing testimony clearly evidences that an established trail or way existed from section 8 to The Blue Lakes, whatever the description used by the witness. Conversely, no evidence of record exists denying the existence of such a trail or other way. The trial court's conclusion that the evidence failed to show a particular route was traveled, therefore, is contrary to the undisputed evidence of record and is clearly erroneous.

B. *The Fact That The East Fork May Not Have Been Used As Frequently Or As Heavily As The Middle Fork Road Does Not Preclude It From Being A Public Road.*

In the Memorandum Decision, the trial court did not find that the public did not use the East Fork Road beyond the middle of Section 8. To the contrary, the trial court expressly acknowledged that there was evidence that people used that road to go to the

Blue Lakes. R-Haynes, 1452. Nevertheless, the trial court stated it “does not believe that portion [beyond section 8] of the road ever became public because of its much more limited use.” R-Haynes, 1460. By applying a quantitative rather than qualitative analysis, however, the trial court applied the incorrect legal standard. See *Okelberry v. Wasatch County*, 179 P.3d 768 (Utah 2008).

Under Utah Code §72-5-104(1), a road is deemed to have been dedicated to the public “when it has been continuously used as a public thoroughfare for a period of ten years.” To constitute “continuous use,” a claimant need only establish that the public “use[d] the road whenever they found it necessary or convenient.” *Campbell v. Box Elder County*, 962 P.2d 806, 809 (Utah App. 1998); see also *Boyer v. Clark*, 326 P.2d 107, 109 (Utah 1958) (concluding that continuous use requires use by the public “as often as they found it convenient or necessary”). This does not mean, however, that use had to be frequent. Specifically, the Utah Court of Appeals concluded that under Utah law “[e]ven infrequent use can result in dedication of a road as a public thoroughfare.” *Campbell*, 962 P.2d at 809. To determine whether the East Fork Road is or is not a public road, therefore, the proper inquiry is not how many people used the road but, rather, whether the public was free to and in fact used the road whenever they had the occasion to do so.

It is clear from the evidence that the public was free to use the East Fork Road beyond section 8 at their convenience. Prior to 1941 when the trial court determined Haynes commenced interrupting the public’s use of the Bench Road, Kay Crittenden (Trial Transcript, Vol. III, 508-509) and Fern Boyer (Trial Transcript, Vol. III, 499) both

testified that during that time period people were free to go wherever they wanted.

Moreover, there is no evidence whatsoever that once a person traveled to the middle of Section 8 on what the trial court determined is a public road that there was anything to prevent that person from continuing up the road.

It is also clear from the evidence that the public actually used the road to travel to the Blue Lakes for in excess of ten years. For three years prior to 1932⁴, LeRoy Meadows testified in his deposition that he, his brother and two cousins traveled to The Blue Lakes by horse and buggy across the East Fork Road. Deposition of LeRoy Meadows, 10-11. Although Mr. Meadows, who is a member of the board of directors of the Water User's, self-servingly claimed his father obtained permission from Elmer Wright, during this time period the lands over which the East Fork Road traverses were owned by Joseph Livingston and his wife. See Exhibit 1. Thus, his use of the East Fork Road was as a member of the public.

Between 1932 and 1938, Fern Boyer testified that during the summers she, her parents and her grandparents traveled by team and wagon and/or a Model T Ford up the East Fork Road to camp, fish and cut timber. In addition, Exhibit 261 was introduced through her showing her parents and her uncle Leslie and his wife holding up a string of fish, which photographs she testified were taken in the 1920's. Trial Transcript, Vol. II, 420-436.

⁴ Initially, Mr. Meadows testified this occurred in the early 1930's but later acknowledged it was prior to 1932. Deposition of LeRoy Meadows, 28.

Yet another witness, LaMont Staley, who was born in 1927 testified that when he was twelve years old his scout master took him and his boy scout troop camping at The Blue Lakes using the East Fork Road. Deposition of LaMont Staley, 17. Although he testified he did not remember which route they took to get to The Blue Lakes, later in his deposition he stated they crossed a creek and went past the bungalows, thereby establishing he went up the East Fork Road. Deposition of LaMont Staley, 29.

Based on the foregoing, it is clear not only that the public was free to use the road at their convenience but also that the public actually did so. Such being the case, the trial court erred in not declaring the East Fork Road public all the way to The Blue Lakes.

III. THE TRIAL COURT ERRED IN GRANTING THE WATER USERS A PRESCRIPTIVE EASEMENT ACROSS THE BOYER PROPERTY.

The Water Users were brought into this litigation as third party defendants and did not assert any claim to a right to use the road across the Boyer Property. During the trial no witnesses testified that the Water Users have ever used the road across the Boyer property, let alone continuously under some claim of right. Moreover, the trial court did not make a single factual finding addressing any use by the Water Users of the road across Boyer property.

While Rule 15(b) of the Utah Rules of Civil Procedure provides that “[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings”, this rule pre-supposes that the issue actually have been addressed at trial. Here, the Water Users

neither plead a prescriptive easement across the Boyer Property, nor did it present any evidence pertaining to such a claim.

The trial court's decision, therefore, to grant the Water Users an easement sua sponte across the Boyer Property was clearly erroneous.

CONCLUSION

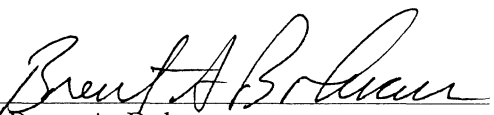
The trial court's conclusion that the public portion of the Middle Fork Road does not extend to the Boyer Property is clearly erroneous. Given the trial court's finding that many members of the public used the Middle Fork Road to access The Blue Lakes, the only reasonable inference that can be drawn therefrom is that the public used the road to access the Boyer Property. This court, therefore, should declare the Middle Fork Road, as currently aligned, a public road all the way to the Boyer Property.

In addition, the evidence clearly shows that the public was free to use the East Fork Road whenever they choose to do so and that the public did in fact use the East Fork Road for a period in excess of ten years. This court, therefore, should declare the East Fork Road public all the way to the Boyer Property.

Finally, there is no evidence of record to support the trial court granting the Water User's an easement across the Boyer Property. This court, therefore, should declare that no such easement exists.

DATED this 6th day of August, 2009.

By: _____


Brent A. Bohman

Attorney for Gregory Boyer, Gerald
Boyer, Fern Boyer and Eugene
Hansen

CERTIFICATE OF SERVICE

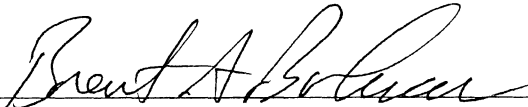
I hereby certify that on the 6th day of August, 2009, a true and correct copy of the foregoing **BRIEF OF APPELLEES AND CROSS APPELLANTS FERN J BOYER, GERALD G. BOYER, GREGORY BOYER, L.S. HANSEN AND ALFRED C. BLONQUIST** was served via first class U.S. mail, postage prepaid, upon:

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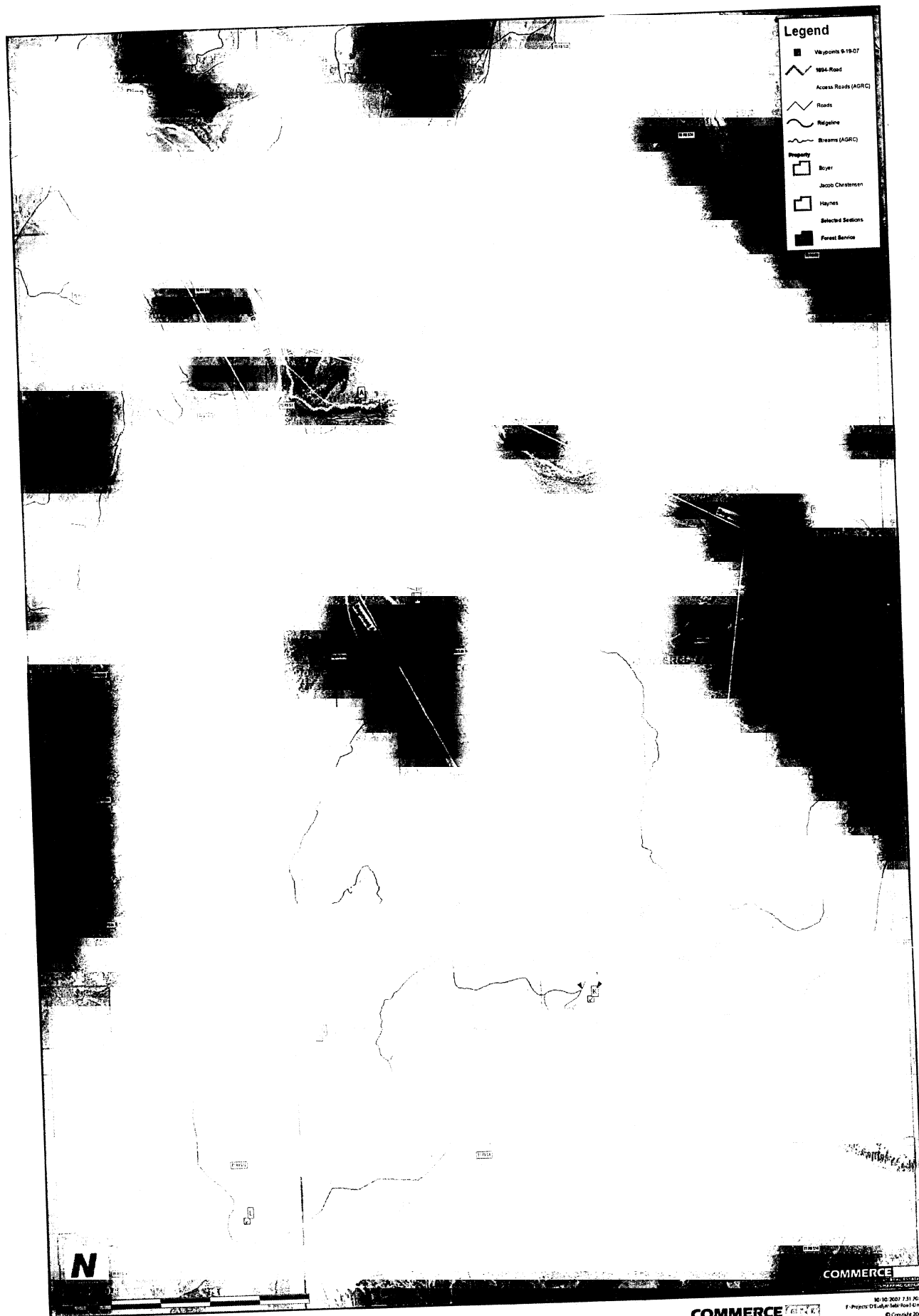
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APPENDIX



Summit County

COMMERCIAL REAL ESTATE
FULL SERVICE COMMERCIAL REAL ESTATE

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