

2008

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

Utah Court of Appeals

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IN THE COURT OF APPEALS
OF THE STATE OF UTAH

HAYNES LAND & LIVESTOCK
COMPANY, a partnership,

Plaintiff - Appellant,

v.

JACOB FAMILY CHALK CREEK, LLC,

a limited liability company; et. al.,
an individual

Case No. 20080858-CA

BRIEF OF APPELLEE SUMMIT COUNTY

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LIST OF PARTIES

PLAINTIFFS, COUNTERCLAIM DEFENDANTS and THIRD-PARTY DEFENDANTS:

Referred to in this Brief as Appellants or the “Haynes parties”

HAYNES LAND & LIVESTOCK COMPANY, a partnership
TRIPLE H RANCH LC., a limited liability company
Represented before the trial court by Ray G Martineau, Anthony R Martineau, and Brett D Cragun, Law Offices of Ray G Martineau, and by Leslie W Slaugh, of Howard, Lewis and Peterson, P C

DEFENDANTS, COUNTERCLAIM PLAINTIFFS and THIRD PARTY DEFENDANTS:

Referred to in this Brief as the “Jacob parties” or the “Jacob-Christensen parties”

JACOB FAMILY CHALK CREEK, LLC, a limited liability company
CATHERINE B. CHRISTENSEN, L.L.C., a limited liability company
BRIAN GARFF, an individual
Represented before the trial court by Clark Waddoups, Jonathan O Hafen and Tobi Potestio of Parr Waddoups Brown Gee & Loveless

COUNTERCLAIM DEFENDANTS and THIRD PARTY DEFENDANTS:

STATE OF UTAH by and through the DEPARTMENT OF NATURAL RESOURCES,
DIVISION OF FIRE, FORESTRY AND STATE LANDS
Represented before the trial court by Stephen G Schwendiman and Julie I Valdes, Assistant Attorneys General

CHALK CREEK- HOYTSVILLE WATER USERS CORPORATION, a corporation
Represented before the trial court by Ray G Martineau, Anthony R Martineau, and Brett D Cragun, Law Offices of Ray G Martineau, and by Leslie W Slaugh, of Howard, Lewis and Peterson, P C

SUMMIT COUNTY, a political subdivision of the State of Utah
Represented before the trial court by Jami R Brackin and David L Thomas, Summit County Attorney’s Office

B.A. BINGHAM & SONS, LLC, a limited liability company	<i>Did not appear at trial</i>
STILLMAN SEVEN, a partnership	<i>Did not appear at trial</i>

DEFENDANTS, COUNTERCLAIM DEFENDANTS and THIRD PARTY PLAINTIFFS:

Referred to in this Brief as the “Boyer parties”

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GERALD G. BOYER an individual
GREGORY J. BOYER an individual
J.S. HANSEN an individual
HELEN W. BLONQUIST, Trustee
ALFRED C. BLONQUIST, Trustee
Represented before the trial court by Brent A. Bohman

DEFENDANTS, COUNTERCLAIM DEFENDANTS and THIRD PARTY PLAINTIFFS
(cont.)

KAREL J. SNYDER an individual *Did not appear at trial*
BARBARA HALL an individual *Did not appear at trial*
KEVIN HALL an individual *Did not appear at trial*

COUNTERCLAIM DEFENDANT

DAVID B. WILLIAMS *Did not appear at trial*

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STATEMENT OF ISSUES¹ & STANDARD OF REVIEW

1. Did the trial court err by finding a public road existed under the Dedication Statutes?

“We review the trial court’s legal interpretation of the Dedication Statute for correctness and its factual findings for clear error. But whether the facts of a case satisfy the requirements of the Dedication Statute is a mixed question of fact and law that involves various and complex facts, evidentiary resolutions, and credibility determinations. Thus, we review the trial court’s decision regarding whether a public highway has been established under [the Dedication Statute] ... for correctness but grant the court significant discretion in its application of the facts to that statute.”

Jennings Investment, LC, v. Dixie Riding Club, Inc., 2009 UT App. 119, ¶5 (*quoting Town of Leeds v. Prisbey*, 2008 UT 11 ¶ 5, 179 P.3d 757).

2. Did the trial court err by allowing Summit County to establish the width of the class D public road under the express statutory authority granted to counties?

Questions of statutory construction are questions of law reviewed by the appellate courts under a “correction of error” standard.

Brown & Root Industrial Service v. Industrial Commission of Utah, 947 P.2d 671, 675 (Utah 1997) citing State v. Harmon, 910 P.2d 1196, 1199 (Utah 1995); Zissi v. State Tax Comm’n, 842 P.2d 848, 852 (Utah 1992).

3. Did the trial court err by rejecting the Appellants takings arguments?

Legal determinations ... are defined as those which are not of fact but are essentially of rules or principles uniformly applied to persons of similar qualities and status in similar circumstances ...

... [A]ppellate review of a trial court's determination of the law is usually characterized by the term “correctness.” Controlling Utah case law teaches that “correctness” means the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of law. [citations omitted]

State v. Pena, 869 P.2d 932, 935-36 (Utah 1994).

¹Appellee Summit County has not responded in this Brief to all issues and arguments made by the Appellant Haynes Parties as they were not specifically issues with which the County was involved. However, Summit County joins the Jacob-Christensen parties and the Boyer parties in their Briefs regarding all issues contained in those Briefs.

CONSTITUTIONAL OR STATUTORY PROVISIONS

UNITED STATES CONSTITUTION

Amendment - Trial and Punishment, Compensation for Takings. Ratified 12/15/1791.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UTAH CONSTITUTION

Article I, Section 22. [Private property for public use.]

Private property shall not be taken or damaged for public use without just compensation.

UTAH STATUTORY PROVISIONS

17-50-305. County powers to acquire, construct, and control roads and other facilities -- Retainage.

(1) A county may:

(a) contract for, purchase, or otherwise acquire, when necessary, rights of way for county roads over private property, and may institute proceedings for acquiring such rights of way as provided by law;

(b) lay out, construct, maintain, control, and manage county roads, sidewalks, ferries and bridges within the county, outside of cities and towns;

(c) designate the county roads to be maintained by the county within or extending through any city or town, which may not be more than three in the same direction;

(d) abolish or abandon county roads that are unnecessary for the use of the public, in the manner provided by law; and

(e) lay out, construct, maintain, control, and manage landing fields and hangars for the use of airplanes or other vehicles for aerial travel.

(2) If any payment on a contract with a private contractor to construct county roads, sidewalks, ferries, and bridges under this section is retained or withheld, it shall be retained or withheld and released as provided in Section 13-8-5.

17-50-309. Regulation of use of roads.

A county may enact ordinances and make regulations not in conflict with law for the control, construction, alteration, repair, and use of all public roads and highways in the county outside of cities and towns.

72-3-103. County roads -- Class B roads -- Construction and maintenance by counties.

- (1) County roads comprise all public highways, roads, and streets within the state that:
 - (a) are situated outside of incorporated municipalities and not designated as state highways;
 - (b) have been designated as county roads; or
 - (c) are located on property under the control of a federal agency and constructed or maintained by the county under agreement with the appropriate federal agency.
- (2) County roads are class B roads.
- (3) The state and county have joint undivided interest in the title to all rights-of-way for all county roads.
- (4) The county governing body exercises sole jurisdiction and control of county roads within the county.
- (5) The county shall construct and maintain each county road using funds made available for that purpose.
- (6) The county legislative body may expend funds allocated to each county from the Transportation Fund under rules made by the department.
- (7) A county legislative body may use any portion of the class B road funds provided by this chapter for the construction and maintenance of class A state roads by cooperative agreement with the department.
- (8) A county may enter into agreements with the appropriate federal agency for the use of federal funds, county road funds, and donations to county road funds to construct, improve, or maintain county roads within or partly within national forests.

72-3-105. Class D roads -- Maps to be prepared by county -- Indication of roads.

- (1) As used in this section, "class D road" means any road, way, or other land surface route that has been or is established by use or constructed and has been maintained to provide for usage by the public for vehicles with four or more wheels that is not a class A, class B, or class C road under this title.
- (2) Each class D road is part of the highway and road system within the state with the same force and effect as if the class D road had been included within this system upon its being first established or constructed.
- (3) The state and county have joint undivided interest in the title to all rights-of-way for class D roads.
- (4) The county governing body exercises sole jurisdiction and control of class D roads within the county.
- (5) Each county shall prepare maps showing to the best of its ability the class D roads within its boundaries which were in existence as of October 21, 1976. Preparation of these maps may be done by the county itself or through any multi-county planning district in which the county participates.
- (6) Any class D road which is established or constructed after October 21, 1976, shall be reflected on maps prepared as provided in Subsection (5).
- (7) The county shall provide a copy of any map under Subsection (5) or (6) upon completion to the department.
- (8) The department shall scribe each road shown on its own county map series. The department is not responsible for the validity of any class D road and is not responsible for its being inventoried. The department shall also keep on file an historical map record of the roads as provided by the counties.

72-5-104. Public use constituting dedication -- Scope.

- (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, 72-3-105, 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.

72-5-107. United States patents -- Patentee and county to assert claims to roads crossing land.

- (1) (a) If any person acquires title from the United States to any land in this state over which any public highway extends that has not been duly platted, and that has not been continuously used as a public highway for a period of ten years, the person shall within three months after receipt of the person's patent assert the person's claim for damages in writing to the county executive of the county in which the land is situated.
- (b) The county legislative body shall have an additional period of three months in which to begin proceedings to condemn the land according to law.
- (2) (a) The highway shall continue open as a public highway during the periods described under Subsection (1).
- (b) If no action is begun by the county executive within the period described under Subsection (1)(b), the highway shall be considered to be abandoned by the public.
- (3) In case of a failure by the person so acquiring title to public lands to assert his claim for damage during the three months from the time the person received a patent to the lands, the person shall thereafter be barred from asserting or recovering any damages by reason of the public highway, and the public highway shall remain open.

72-5-108 Width of rights-of-way for public highways. 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 their respective jurisdiction.

72-5-302 Rights-of-way across federal lands -- Title -- Presumption -- Scope.

- (1) This part applies to all R.S. 2477 rights-of-way.
- (2) The state and its political subdivisions have title to the R.S. 2477 rights-of-ways in accordance with Sections 72-3-102, 72-3-103, 72-3-104, 72-3-105, and 72-5-103.
- (3) (a) Acceptance of a right-of-way for the construction of a highway over public lands, not reserved for public uses, is presumed if the state or a political subdivision of the state makes a finding that the highway was constructed and the right-of-way was accepted prior to October 21, 1976.
- (b) The existence of a highway in a condition suitable for public use establishes a presumption that the highway has continued in use in its present location since the land over which it is built was public land not reserved for public use.
- (4) (a) Unless specifically determined prior to the cut-off date provided in Section 72-5-301 by the state or a political subdivision of the state with authority over the R.S. 2477 right-of-way, the scope of the R.S. 2477 right-of-way is that which is reasonable and necessary for all highway

uses as of the cut-off date determined according to the facts and circumstances, including:

- (i) highway drainage facilities;
- (ii) shoulders adjacent to the right-of-way; and
- (iii) maintenance activities defined in Section 72-5-301 that are reasonable and necessary.

(b) Unless specifically determined by the state or political subdivision of the state with the authority over the R.S. 2477 right-of-way, an R.S. 2477 right-of-way is presumed to be at least 66 feet wide if that is the usual width of highway rights-of-way in the area.

(c) The scope of the R.S. 2477 right-of-way includes the right to widen the highway as necessary to accommodate the increased travel associated with those uses, up to, where applicable, improving a highway to two lanes so travelers can safely pass each other.

(5) The safety standards established by the Department of Transportation in accordance with Section 72-6-102 apply to all determinations of safety on R.S. 2477 rights-of-way used for vehicular travel.

STATEMENT OF FACTS

Summit County does not dispute² the Findings of Fact adopted by the trial court in its Memorandum Decision dated March 14, 2008 and incorporates them herein as a thorough and correct statement of the facts in this case.³

SUMMARY OF ARGUMENT

The road at issue in this case was established during the territorial days of Utah, when the land on which the road was located and surrounding the road was in the public domain. The road has existed in its present location since at least 1875 and continued uninterrupted until 1932 when the Appellants or their ancestors first took an ownership interest in the land abutting the road.

Whether under the provisions of the R.S. 2477 laws⁴, or under the provision of Utah's statutory scheme showing uninterrupted public use for 10 years⁵, the evidence was clear, convincing and sufficient to support the trial court's finding that the road had been established as a public highway or right-of-way during the period when the land was in the public domain and prior to the Appellants taking any ownership interest in the land. Because the Appellants took

²It should be noted that there is a typographical error in the Memorandum Decision at ¶35, page 26 referencing County tax records dated 1993. The correct date is 1893. (R: 1418, trial exhibits 401-404)

³R:1403-1438

⁴43 U.S.C. §932 (now repealed) and UTAH CODE ANN. §72-5-302. For a discussion on the history and intent of the R.S. 2477 laws, *see Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735, 740-741 (10th Cir. 2005)

⁵UTAH CODE ANN. §72-5-104

their interest subject to the established public right-of-way there can be no constitutional or compensable taking of the land either by the finding of a public road by dedication, or by establishing the width of the road existing prior to any property interest being held by the Appellant.⁶

The Utah legislature has designated counties as the highway authorities over the class B and class D road within the counties' respective jurisdictions.⁷ With that grant of authority is the ability of counties to regulate, maintain, construct, acquire and control,⁸ the roads as the highway authority. Further, the State has granted to the counties the ability to establish the width of the rights-of-way or public highways within their jurisdiction,⁹ and has granted to counties the "sole jurisdiction and control of class D roads within the county."¹⁰ Finally, the State of Utah has determined that roads created or accepted under the R.S. 2477 laws are "presumed to be at least 66 feet wide."¹¹

With the presumptive width of the road being established by the State, the broad grant of authority to the counties to regulate roads, and the express statutory language granting to the counties, the ability to establish the width of the public highway, the trial court did not err by

⁶Danforth v. U.S., 308 U.S. 271, 284, 60 S.Ct. 331, 236, 84 L.Ed 240 (1939); 11A McQuillin Mun. Corp. § 32.132 (3d ed., Supp 2006).

⁷UTAH CODE ANN. §72-3-103 and §72-3-105

⁸UTAH CODE ANN. §17-50-305 and §17-50-309

⁹UTAH CODE ANN. §72-5-108

¹⁰UTAH CODE ANN. §72-3-105(4)

¹¹UTAH CODE ANN.. §72-5-302(4)(b)

having Summit County establish the width of the public road dedicated to the public by use before the Appellants had any ownership interest in the land.

ARGUMENT

1. THE TRIAL COURT DID NO ERR BY FINDING A PUBLIC ROAD EXISTED UNDER THE DEDICATION STATUTES.¹²

This issue is presented by the Appellants as one challenging the Findings of Fact of the trial court by alleging that they do not rise to the level of clear and convincing evidence as required, as well as a general challenge to the sufficiency of the evidence.

After several hearings, four days of trial and another day of argument, the trial court meticulously sorted through the mountains of exhibits and evidence presented, to issue its carefully and thoughtfully crafted Memorandum Decision dated March 14, 2008. Within that decision are the trial court's findings of fact which include a thorough recitation of the facts and evidence presented and the weight given to each. Despite this careful recitation, however, the Appellants now seek to have the Appellate Court conduct a *de novo* review of the evidence and find as a matter of law, that the evidence was insufficient and could not support the trial court's finding of a road under the Dedication Statutes.

In Utah County v. Butler 2008 UT 12 ¶ 11, 179 P.3d 775, a case dealing with the road Dedication Statutes, the Utah Supreme Court declared:

We require parties challenging factual findings of a lower court to 'first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally

¹²The statutes referred to throughout this brief as the "Dedication States" are UTAH CODE ANN. §72-5-104 and/or §72-5-302.

insufficient to support the finding even when viewing it in a light most favorable to the court below' *Id.* (quoting *Wilson Supply, Inc. v. Fradan Mfg. Corp.*, 2002 UT 94 ¶ 21, 54 P.3d 1177).

In their opening brief, Appellants have attempted to marshal evidence in support of the trial courts findings, but have failed to show how, when viewed in a light most favorable to the trial court, the evidence fails to support the findings of the trial court. Rather, Appellants argue that the Appellate Court should conduct a *de novo* review of the documentary evidence that was admitted as exhibits, asserting that the Court of Appeals can review the documentary evidence as well as the trial court, to reach a result preferred by the Appellants. This invitation is not supported by Utah law.

“We review the trial court’s legal interpretation of the Dedication Statute for correctness and its factual findings for clear error. But whether the facts of a case satisfy the requirements of the Dedication Statute is a mixed question of fact and law that involves various and complex facts, evidentiary resolutions, and credibility determinations. Thus, we review the trial court’s decision regarding whether a public highway has been established under [the Dedication Statute] ... for correctness **but grant the court significant discretion in its application of the facts to that statute.**”

Jennings Investment, LC, v. Dixie Riding Club, Inc., 2009 UT App. 119, ¶5 (quoting *Town of Leeds v. Prisbey*, 2008 UT 11 ¶ 5, 179 P.3d 757) [emphasis added].

Summit County has long been the situs of road litigation and many of the cases involving the Dedication Statutes and cited by the Appellants for other reasons, are of Summit County origin. A review these cases, support the findings of the trial court in this case as the evidence is similar if not identical to the evidence presented in this matter.

As an example, in *Jeremy v. Bertagnole*, 101 Utah 1, 116 P.2d 420 (1941), the road at issue in Summit County was one which followed East Canyon Creek through what is now the Jeremy Ranch area northward into Morgan County. The Utah Supreme Court upheld the finding

of a public way between the years 1876 and 1894 by the trial court, based upon evidence that the road had existing since 1869 and had been used for “vehicular and other traffic between 1877 and 1900”. Id. at 423.

In Boyer v. Clark, 326 P.2d 107 (Utah 1958), which dealt with a road intersecting SR 133 (Chalk Creek Road) in Eastern Summit County near Upton, Utah, and known as Middle Canyon, the Utah Supreme Court determined that trailing cattle and sheep, and using the road for “courting” was sufficient as a matter of law. “The use of the road was not great because comparatively few people had need to travel over it, but those of the public who had such need, did so” for a period exceeding 50 years. Id. at 108-109

In Blonquist v. Blonquist, 30 Utah 2d 234, 516 P.2d 343 (1973) which dealt with another road intersecting SR 133 (Chalk Creek Road) near Upton, known as Southfork, the Utah Supreme Court determined that evidence of sheep and cattle trailing, and vehicular travel by the public, although not daily or weekly use, but “whenever it was necessary or convenient” was sufficient to support the finding of a public road by dedication. Id. at 344.

In Leo M. Bertagnole, Inc., v. Pine Meadow Ranches, 639 P.3d 211 (Utah 1981) another Summit County case involving what is known as Tollgate Road located off the interchange from Interstate 80 on the north side of Silver Creek Canyon between Kimball Junction and Wanship, the Utah Supreme Court stated that “the trial court’s findings on this issue will not be overturned unless the evidence clearly preponderates against them.” Id. at 213. The Court then proceeded to uphold the trial court’s finding of a public way based upon evidence of trailing sheep and transporting sheep camps, use by hunters, fishermen, campers picnickers, church groups and “more lovers ... than you can imagine” Id. at 212.

After reviewing the case law and the facts of this case used by the trial court to support its decision, Appellants have not and cannot show how the evidence is insufficient as a matter of law to warrant a reversal of the trial courts Findings of Fact establishing the public road.

“On appeal, ‘the findings and judgment should not be disturbed unless this court can say affirmatively and with some degree of assurance that there is no reasonable basis in the evidence that could fairly and rationally support the requisite degree of proof, i.e. by clear and convincing evidence.’”

Armed Forces Insurance Exchange v. Harrison, 2003 UT 14 ¶26, 70 P.3d 35, 43, (*quoting Lamb v. Bangart*, 525 P.2d 602, 609 (Utah 1974)).

We reverse a trial court’s findings of fact only if they are ‘against the clear weight of the evidence,’ thus making them ‘clearly erroneous.’ In re Estate of Bartell, 776 P.2d 885, 886 (Utah 1989) (*quoting State v. Walker*, 743 P.2d 191, 193 (Utah 1987)). In making such a determination, we consider the evidence in a light most favorable to the trial court’s findings, and we recite the facts in accordance with that standard.

Butler, Crockett and Walsh Development Corp., v. Pinecrest Pipeline Operating Co., 909 P.2d 225, 228 (Utah 1996).

In reviewing the evidence presented at trial and that relied upon by the trial court, it cannot be said that either the findings were erroneous, nor that they were not supported by clear and convincing evidence. The evidence in the instant case showed the roads existence on several historical maps, from 1874¹³ until the present date, including the existence of the road on the County’s class D road map from 1976¹⁴ to the present date. To establish the public use of the road there was evidence of several saw mills, sheep dipping corrals that accommodated hundreds of thousands of sheep in the area, several homesteads and residential cabins, hunting, fishing, camping, picnicking and some dancing and dating as often as the public wanted or had need to

¹³Trial exhibits 163-174

¹⁴Trial exhibit 205

go. There was also evidence of the use of water from the stream along the road and at various points, County maintenance of portions of the road and county records showing an interest in keeping the roads open.¹⁵

The trial courts careful articulation of the evidence on which the findings were based was more than sufficient to meet the clear and convincing evidence standard and Appellants have failed to show how this evidence taken in the light most favorable to the trial courts' findings, rises to the level of clear error.

Notwithstanding the abundance of evidence, as additional support for the claim of error, Appellants assert that prior to their acquiring any ownership interest in the land, the use of the road and the land was permissive and thus no dedication could occur. However, there is no evidence in the record that between the period of 1875 and 1896 the use of the land or the road was permissive such that it granted to each person or member of the public using the road, a private right of use. To the contrary, the trial court found that the Boyer parties who have owned their property interest longer than any other party, had no permissive, prescriptive or other rights across the road other than the public right-of-way.¹⁶

Appellants also seem to argue that there needs to be an "intent" of the underlying property owner to have the road dedicated to public use before a public right-of-way can be found under the Dedication Statutes and cites a Louisiana case in support.¹⁷ This assertion is contrary to Utah law.

¹⁵R:1403-1438

¹⁶R:1685-1689

¹⁷Appellants Opening Brief at p. 30, footnote 116

‘The determination that a roadway has been continuously used by members of the general public for at least 10 years is the sole requirement for it to become a public road. It is not necessary to prove the owner’s intent to offer the road to the public as contended by defendants. [The Dedication Statutes] deems a dedication to the public as a matter of law when the required public use is established.’

Leo M. Bertagnole, Inc., v. Pine Meadow Ranches, 639 P.3d 211, 213 (Utah 1981) (*quoting* Thurman v. Byram, 626 P.2d 447, 449 (Utah 1981)).

Additionally, as stated above, the road was established long before the Haynes parties took an interest in the land abutting the road. At the time, the road was located on property in the public domain, being owned by the United States Government and later the State of Utah. That government through the 1866 adoption of 43 U.S.C.A. §932 or the R.S.2477 laws, gave clear intention of having the public create and use rights of way on federal land not reserved for public use.¹⁸

A road or right-of-way established on public land, not reserved for public use establishes a presumption of a public “highway” or road. UTAH CODE ANN. § 72-5-302(3)(b). Additionally, 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.” UTAH CODE ANN. § 72-5-104.

The evidence of the existence of the East Fork roads (including the Bench portion, the Middle Fork portion and the East Loop portion) from as early as 1875 is undisputed. Their use by the public for myriad purposes from 1865 through 1932 is also undisputed. It is only the effect this evidence has or the weight to be given the evidence that is disputed by the Appellants. Thus, the creation of these roads while on public land and their use for more than 50 years before the Haynes parties acquired an interest in the land, more than satisfies the legislative

¹⁸Southern Utah Wilderness Alliance v. Bureau of Land Management, 425 F.3d, 735, 740-41 (10th Cir. 2005).

requirements for dedication to the public.¹⁹

By 1932, when the Appellants first took an interest in the land surrounding the road in question, they took their ownership interest subject to the public highway. In another very similar Summit County case, the Utah Supreme Court in Sullivan v. Condas, 76 Utah 585, 290 P.954, 957 (Utah 1930) declared,

“ . . . and the Appellants 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.”

In the Sullivan case, there was a dispute over a road being used for grazing sheep and cattle. The trial court found, and the Supreme Court upheld that there was “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 Appellant and the defendant and others, while such lands were a part of the public domain, and was traveled and used by the public generally as occasion require in going up and down the canyon.” Id.

The court went on further to say that by the time the Appellants in that case acquired their interest in the land in 1922 or 1924, they took subject to that public easement. Id. The Court then went on to state:

Under the laws of the territory of Utah (Laws 1880, chap. 29; Laws 1886, chap. 12, Comp. Laws 1888, § 2066, Rev. St. 1898 § 1115, and carried into Comp. Laws Utah 1917, § 2802), a highway is deemed and taken as dedicated and abandoned to the use of the public when it has been continuously and interruptedly used as a public thoroughfare for a period of ten years, and when once established must continue to be a highway until abandoned by

¹⁹Memmot v. Anderson, 642 P.2d 750, 753 (Utah 1982).

order of the board of county commissioners of the county in which it is located or by a judgment of a court of competent jurisdiction.
Id.

Thus, the law in 1932 when the Appellant's first took their interest in the land on which the road is sited, created a roadway by use which was superior in interest to the rights acquired by the Appellant Haynes parties. The law also required that a formal action be taken to abandon the public interest in the road and it is undisputed that to date, the County has not vacated the road.

The Appellants in the trial of this matter took great care to present evidence which showed that from 1932 until the present date, the Haynes parties attempted to interrupt the public's use of the road by placing gates or locks across the roadways and by requiring a condemnation of the road in 1939 for the Chalk Creek Hoystville Water Users. Even if all the Appellant's evidence was taken as true, as a matter of law, it is irrelevant. Under Utah law, the road had been established and dedicated to the public by use long before they acquired their interest and the only way to vacate a public road is to follow the statutory scheme now found in UTAH CODE ANN. §72-3-108 (1953 as amended), which is the same requirement that existed in 1932.

The trial courts finding of fact are supported by clear and convincing evidence of the existence and use of the roads found to be dedicated to the public and there was no error in the trial courts findings which would warrant a reversal of this matter.

2. THE TRIAL COURT DID NOT ERR BY ALLOWING SUMMIT COUNTY TO DETERMIN THE WIDTH OF THE ROAD UNDER THE EXPRESS STATUTORY AUTHORITY GRANTED TO COUNTIES.

“Questions of statutory construction are questions of law reviewed by the appellate courts under a ‘correction of error’ standard.” Brown & Root Industrial Service v. Industrial Commission of Utah, 947 P.2d 671, 675 (Utah 1997) citing State v. Harmon, 910 P.2d 1196, 1199 (Utah 1995); Zissi v. State Tax Comm’n, 842 P.2d 848, 852 (Utah 1992).

In interpreting a statute, our goal is to ascertain the Legislature’s intent. We do so by first evaluating ‘the best evidence’ of legislative intent, namely, ‘the plain language of the statute itself.’ We give words of a statute their ‘plain and ordinary meaning, in the absence of any statutory or well established technical meaning, unless it is plain from the statute that a different meaning is intended.’ Wasatch County v. Okelberry, 2008 UT 10, ¶ 13, 179 P.3d 768 (*quoting State v. Martinez*, 2002 UT 80, ¶ 8, 52 P.3d 1276 and State v. Navaro, 83 Utah 6, 26 P.2d 955, 956 (1933)).

A. *Authority of Summit County to establish the width*

The Utah legislature has designated counties as the highway authorities over the class B and class D road within the counties’ respective jurisdictions.²⁰ Class B road are those on which there is on-going maintenance by the county and for which the counties receive state funding. Class D roads, are all other roads within unincorporated areas of the county which are not designated as state roads. The road at issue in this case is a class D road.

With the statutory designation as the highway authority, is within the authority granted to Summit County to regulate, maintain, construct, acquire and control,²¹ the class D roads

²⁰UTAH CODE ANN. §72-3-103 and §72-3-105

²¹UTAH CODE ANN. §17-50-305 and §17-50-309

including the road at issue. This authority is further expanded by the express grant of authority to the counties to establish the width of the rights-of-way or public highways within their jurisdiction,²² and by the grant to counties, the “sole jurisdiction and control of class D roads within the county.”²³

While the Haynes parties do not dispute that once found to be a public highway, the appropriate highway authority for the road would be Summit County, they do allege that it was reversible error for the trial court to follow the express statutory language of UTAH CODE ANN. §72-5-108 which grants to counties the authority to set the width of public highways as well as the dictates of UTAH CODE ANN. §72-3-105(4) which grants to counties the “sole jurisdiction and control of class D roads within the county.”

In support of their position, the Appellant Haynes parties cite several Utah cases in which the width of roads dedicated to the public have been discussed and decided by the courts. They argue that because the courts determine the width in the cited case, it is a core judicial function which only the courts can perform. However, none of the cases cited by the Appellants²⁴ address the application of UTAH CODE ANN. §72-5-108 in cases involving the Dedication Statute nor do any of the cases stand for the proposition that **only** the courts can decide the width of the road in those case, or that it was reversible error for the Court to rely on the County to establish what is “reasonable and necessary to ensure safe travel” under the Dedication Statutes.²⁵ the effect of the

²²UTAH CODE ANN. §72-5-108

²³UTAH CODE ANN. §72-3-105(4)

²⁴See Appellants Opening Brief, at p. 17, footnote 80.

²⁵ UTAH CODE ANN. § 72-5-104.

express and plain statutory language of UTAH CODE ANN. §72-5-108 in cases involving the Dedication Statutes appears to be one of first impression before the Utah Appellate Courts. The cases cited by the Appellant address various width issues in different manners, but none address the statutory provisions. The Appellant's argument that a width determination is solely within the court's powers, or that court cannot or should not delegate to the county or other highway the responsibility of determining a width, misstates the issue, is not supported by any cited law and is contrary to the plain language of the statutes. This same argument was made before the trial court and was properly rejected by the trial court.²⁶

There is no dispute in the record that prior to the Haynes parties acquiring their first interest in the land, the roads in question existed and were used by the public for myriad purposes including recreating at the lakes and in meadows along the road, trailing sheep or livestock, hunting, gathering and milling lumber and establishing homesteads to name a few. While the Appellants do dispute the sufficiency of this evidence, the evidence itself is undisputed. It is also recognized and undisputed by the Appellants that during the period between 1869 and 1896 when this road was in use and dedicated to the public by use, the odd numbered sections of land over which the road crossed were public lands.²⁷

The dedication of the road by use while on public lands not reserved for public use during this time period classifies this road as an R.S. 2477 road under the provisions of UTAH CODE ANN. 72-5-302 and 43 U.S.C. §932 (now repealed). As an R.S. 2477 road, the width of the road has

²⁶R: 1467-1474, 1687

²⁷R: 1413

been presumptively predetermined by the State of Utah as being 66 feet in width.²⁸ Under the Dedication Statute “[t]he scope of the right-of-way is that which is reasonable and necessary to ensure safe travel according to the facts and circumstances,”²⁹ and the state Legislature has determined that for R.S. 2477 roads, the reasonable and necessary width is 66 feet.

In light of the presumptive width of 66 feet set by the State, if the width is established by the County at something less than 66 feet it cannot be deemed unreasonable. Further, with the broad grant of authority given to the counties, and the express and plain statutory language granting to the counties, the ability to establish the width of the public highways, the trial court did not err by having Summit County establish the width of the public road dedicated to the public by use before the Appellants had any ownership interest in the land.

B. Reasonable and necessary width is greater than 8-10 feet.

Appellants insist that the roads in question are limited to 8-10 feet in width,³⁰ as the traveled path of the road, and further insist that despite the specific statutory provisions regarding the scope of the right-of-way being that which is “reasonable an necessary”³¹ to ensure safe travel, the only consideration which can be had is the historical use of the road rather than that which is necessary to ensure safe travel. This argument was also rejected by the trial court.³²

²⁸ UTAH CODE ANN. §72-3-105(4)(b)

²⁹ UTAH CODE ANN. §72-5-104(3)

³⁰ Appellants Opening Brief at pp. 11, 19

³¹ UTAH CODE ANN. §72-3-104(3).

³² R:1473.

In making the alternative claims that 1) the width is limited to 8-10 feet; or 2) the width should be limited to 18 feet; or 3) the width should be limited to some historical use, Appellants ignore the trial courts findings regarding the myriad uses of the road which exceeded the 8-10 foot width as well the trial courts own admonishment that his “feelings” regarding the 18 foot width was dicta.³³ Appellants also ignore other evidence, including the affidavit of Gerald Boyer³⁴ and Steve Jacob³⁵ which measures the existing traveled road width as between 16 feet and 45 feet and ignores the statutory provisions of the dedication statutes which set forth that the “scope of the right-of-way is that which is reasonable and necessary to ensure safe travel according to the facts and circumstances.”³⁶ It ignores too, the affidavit of Derrick Radke, Summit County Engineer which articulates that the minimum width necessary to ensure the safe travel of two vehicles in opposite directions with sufficient emergency pull out and maintenance, is 36 feet.³⁷

Appellants do not put forth that their 8-10 foot width is one which is either reasonable or safe for travel, but rather argue that the issue of width should be remanded back to the trial court, with this Court directing the trial court to determine width only in light of the use at the time of dedication and to allow only the width of the beaten track.³⁸ This invitation is contrary to the

³³R: 1687

³⁴R: 1567-1571

³⁵R: 1563-1566

³⁶UTAH CODE ANN. §72-5-104(3).

³⁷R: 1493-1496

³⁸Appellant Opening Brief at p. 29.

statutory language of UTAH CODE ANN. §72-5-104(3) regarding the scope of the right-of-way, and the long line of cases supporting the statutory language which sets the scope of the right-of-way as that which is reasonably necessary to achieve safe travel under the circumstances.

The case law interpreting that statutory provision supports a determination that the width of the road is not 8-10 feet as suggested by Appellants or even 18 feet as alternatively argued, but that which is reasonable and necessary for safe travel. “The width [is] not limited to the beaten path, but that which was reasonably safe and convenient for the use to which the road was put.”

Blonquist v. Blonquist, *supra* at 344. This theme has been consistent in Utah law.

In the landmark case of Jeremy v. Bertagnole, *supra* at 423 (*quoting Whitesides v. Green*, 13 Utah 341, 44 P. 1032, 1033 (1896)) the Utah Supreme Court stated:

‘Counsel for the appellant appear to insist that the public have only a right to travel on the beaten path, and must be confined to one rod [16.5 feet] in width. We cannot agree with counsel that, when the public have acquired the right to a public highway by user, they are limited to such width as has actually been used by them. Generally, the greater part of the travel on a county highway is doubtless confined to the track made by vehicles, but there must be room enough for travelers with wagons, carriages, or implements to pass each other, and for necessary improvements and repairs to be made so as to keep it in a suitable condition. ... [W]here the public have acquired the easement the land subject to it has passed under the jurisdiction of the public authorities, for the purpose of keeping the same in proper condition for the enjoyment thereof by the public. Such authorities are bound to keep the road open and in suitable repair, and, if obstructions be placed thereon, it is their duty to remove the same, and care for the rights of the public.’

In the case of Hunsaker v. State, 29 Utah 2d 322, 326, 509 P.2d 352, 354 (1973), the Utah Supreme Court stated:

This court has reiterated that where the public has acquired the right to a public highway by user, they are not limited to such width as has been actually used. The use carries with it such use as is reasonably necessary for the public easement of travel. Jeremy v. Bertagnole, 101 Utah 1, 116 P.2d 420 (1941), Whitesides v. Green, 13 Utah 341, 44 P.1032 (1896). In Meservey v. Guilliford 14 Idaho 113, 93 P. 780 (1908), the court observed that a statute which establishes the width of a highway should be considered as

a declaration of the width that is reasonably necessary for the convenience of the public generally.

In Butler, Crockett and Walsh Development Corp., v. Pinecrest Pipeline Operating Co., supra at 228 the Utah Supreme Court held:

“[W]here the evidence establishes dedication of a roadway...the width of such roadway is not to be ... measured by the boundaries of the beaten track.” Jeremy v. Bertagnole, 101 Utah 1, 8, 116 P.2d 420, 423 (1941). Instead, it is “ ‘ proper and necessary for the court in defining the road to determine its width, and to fix the same according to what was reasonable and necessary, under all the facts and circumstances, for the uses which were made of the road.’ ” Id. (quoting Lindsay Land & Live Stock Co. v. Churnos, 75 Utah 384, 392, 285 P. 646, 649 (1929)); *see also* Memmott v. Anderson, 642 P.2d 750, 754 (Utah 1982).

Notwithstanding the litany of cases which affirm that the width and scope is that which is reasonable and necessary for safe travel and that the scope is not limited to the beaten path as suggested by Appellants, if this Court were to look only at the fact that the road in question was an R.S. 2477 road, then under the provisions of UTAH CODE ANN. §72-5-302 there is a presumption that the scope or width of the right-of-way is 66 feet, and that the declaration of the width establishes the scope of the right-of-way as that which is reasonable and necessary for safe travel. Hunsaker, supra at 354.

In discussing the R.S. 2477 status of a Summit County road in Boyer v. Clark supra at 109, the Utah Supreme Court declared:

“In Lindsay Land & Livestock Co. v. Churnos, 75 Utah 384, 285 P. 646, 648, this Court pointed out that congress in 1866 enacted Section 2477, Revised Statutes of the United States (43 U.S.C.A. § 932) wherein it granted the right of way for public highways over public lands not reserved for public uses, and that an acceptance of such grant could be made ‘by public use without formal action by public authorities, and that continued use of the road by the public for such length of time and under such circumstances as to clearly indicate an intention on the part of the public to accept the grant is sufficient.’ We further pointed out that under our territorial laws a continuous and uninterrupted use of a road by the public for a period of 10 years was sufficient to create a public highway by use, and

where the evidence showed that ‘while the lands traversed by the road were public lands of the United States the road was used as a public thoroughfare’ for a period exceed that required by our statutes for creating a public highway by use, such evidence ‘is sufficient in law to amount to an acceptance of the congressional grant of the right of way over the public lands, and thus would constitute and create the road in question a public highway by dedication.’ *See also Jeremy v. Bertagnole*, 101 Utah 1, 116 P.2d 420, 423.

Under the provisions of the Utah Code as well as these decisions, the road in question is undoubtedly an R.S. 2477 road and Appellant’s arguments are in direct contravention of the statutory presumption of 66 feet.

The end result is that there was no error on the part of the trial court in giving the appropriate highway authority the responsibility of fixing the width of the road. The plain language of the statute grants to counties the ability to determine the width of class D roads. There is also a presumption in the statutes that the width of the road is 66 feet and a determination of anything less which still meets the statutory scope requirement of a width which “reasonable and necessary to ensure safe travel according to the facts and circumstances” does not rise to the level of reversible or clear error.

3. THE APPELLANTS HAVE NO STANDING TO ASSERT A TAKINGS CLAIM UNDER THE UTAH OR U.S. CONSTITUTIONS.

Throughout Haynes’ Brief are arguments, references, suggestions, and innuendo that by finding that the road in question was dedicated to the public by use, Summit County (or the court) has effected a “taking” under Article I, §22 of the Utah Constitution and the 5th amendment of the United States Constitution. Haynes further alleges that if either the court or Summit County determines that the width of the road is greater than the 8-10 feet asserted by

Haynes, that too would be a taking under the Utah and U.S. constitutions.

These same arguments were made before the trial court and were twice rejected. In its Memorandum Decision of March 21, 2008 the trial court stated:

“Haynes’ contention that this “road widening” could amount to a taking is rejected. Again, this public road was actually created long before Haynes purchased the property and Haynes took the property subject to the public’s right of usage. The court is now merely determining, if it must, what that usage is as far as being reasonably necessary and convenient to the public today. A width such that two vehicles can pass each other is deemed by the court to be reasonable and proper.”³⁹

After hearing argument on a motion to reconsider the trial court again confirmed its decision in the Ruling and Order dated August 28, 2008, wherein it stated:

“Haynes arguments as to the ‘takings’ are again rejected. The court determined previously and reaffirms that Haynes never had something to take. This road was public before Haynes bought the property and Haynes accepted and took the property subject to that public right.”⁴⁰

The trial court’s rulings were correct as a matter of law. Takings claims are personal in nature and property owners that acquire land after the road (including the scope or width of the road) has been established under the Dedication Statutes, take that land subject to the public’s interest in the road and cannot thereafter make a claim of a constitutional taking. Danforth v. U.S., 308 U.S. 271, 284, 60 S.Ct. 331, 236, 84 L.Ed 240 (1939) (*takings claims are personal to the property owner and do not run with the land*); Sullivan v. Condas, 76 Utah 585, 290 P.954, 957 (Utah 1930); 11A McQuillin Mun. Corp. § 32.132 (3d ed., Supp 2006). Because the Haynes Appellants took their land subject to the established road, they do not have any standing

³⁹R: 1474

⁴⁰R: 1687

to make a takings challenge and the arguments and suggestions to the contrary in their brief are without merit.

Even assuming that the Haynes parties had a compensable takings claim, a road created while the land was in the public domain prior to U.S. patents has a statutory requirement for those seeking a takings claims which can be found in UTAH CODE ANN. §72-5-107. There is no evidence that this was followed by the Haynes parties. Failure to follow the required procedure, assuming that there is standing to make a claim, creates a fatal flaw in any allegation of a taking. Without following the proper procedures, a takings claim is not ripe for decision and cannot be made. Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194, 105 S.Ct 1308, 87 Led.2d 126 (1985), Patterson v. American Fork City, 2003 UT 7 ¶35, 67 P.3d 466, 476-77. Both the federal and Utah laws require that the administrative processes of the County be exhausted before a takings claim can be had under either constitution. Id., Gardner v. Board of Commissioners of Wasatch County, 2008 UT 6, ¶¶26-29, 178 P.3d 893,901-902. It is undisputed that no administrative process has been requested or taken place.

CONCLUSION

A road established by the public during the territorial days of Utah, when the land on which the road was located was in the public domain is a public highway and the trial court did not err in finding it had been dedicated to the public by use. The road has existed in its present location since at least 1875 and continued uninterrupted, being used by the public as often as necessary, until 1932 when the Appellants first took an ownership interest in the land abutting the road.

Whether under the provisions of the R.S. 2477 laws, or under the provision of Utah's

statutory scheme showing uninterrupted public use for 10 years, the evidence was sufficient and supports the trial court's finding by clear and convincing evidence that the road had long been established as a public right-of-way or public road during the period when the land was in the public domain and prior to the Appellant's taking any ownership interest in the land.

The Utah legislature has designated counties as the highway authorities over the class B and class D road within the counties' respective jurisdictions. With that grant of authority is the ability of counties to regulate, maintain, construct, acquire and control, the roads as the highway authority. Further, the State has granted to the counties the ability to establish the width of the rights-of-way or public highways within their jurisdiction, and has granted to counties the "sole jurisdiction and control of class D roads within the county." Therefore, the trial court did not err when deferring to the express and plain statutory language granting counties the authority to establish the width of the class D road.

Inasmuch as the State of Utah has determined that roads created or accepted under the R.S. 2477 laws are "presumed to be at least 66 feet wide," a determination that the scope of the right-of-way established by use is anything less than 66 feet is reasonable and does not rise to the level of clear error warranting a reversal.

Appellant first took their interest in the land subject to the public's existing right-of-way and as a result, Appellants have no standing to assert any sort of takings claim under the Utah or U.S. constitutions. As a result, the trial court did not err in twice rejecting the Appellants takings arguments and claims for lack of standing. There can also be no constitutional or compensable taking of the land by establishing the width of a road existing prior to any property interest being held by the Appellant.

Notwithstanding the efforts Appellants to interrupt the public use of the road, the efforts were insufficient as a matter of law, to abandon the public's interest once established. As such, the road in question is and continues to be a public highway classified as a class D county road and the order of the trial court should be affirmed in its entirety.

RESPECTFULLY SUBMITTED and DATED this 4th of August, 2009.

SUMMIT COUNTY ATTORNEY

By: 

Jami R. Brackin, Deputy

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of August, 2009, I hand delivered a true and correct copy of the foregoing *Appellee's Brief* to the following:

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A handwritten signature in cursive script, appearing to read "Christopher A. Forts", is written over a horizontal line.