

2008

Haynes Land & Livestock Company, a partnership v. Jacob Family Chalk Creek, LLC, a limited liability company; et al. : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Jonathan O. Hafen; Bryan S. Johansen; Parr, Brown, Gee & Loveless; Attorneys for Appellees.
Ray G. Martineau; Anthony R. Martineau; Bret D. Cragun; Leslie W. Slaugh; Howard, Lewis & Petersen; Attorneys for Appellant.

Recommended Citation

Brief of Appellant, *Haynes Land & Livestock v. Jacob Family Chalk Creek*, No. 20080858 (Utah Court of Appeals, 2008).
https://digitalcommons.law.byu.edu/byu_ca3/1231

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE COURT OF APPEALS
OF THE STATE OF UTAH

HAYNES LAND & LIVESTOCK
COMPANY, a partnership,

Plaintiff-Appellant,

vs.

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

Defendants-Appellees.

Case No. 20080858-CA

OPENING BRIEF OF APPELLANTS (HAYNES PARTIES)

APPEAL FROM THE FINAL DECREE
OF THE FOURTH JUDICIAL DISTRICT COURT OF SUMMIT COUNTY,
THE HONORABLE BRUCE C. LUBECK, DISTRICT JUDGE

Jonathan O. Hafen
Bryan S. Johansen
PARR BROWN GEE & LOVELESS
185 South State Street STE 800
Salt Lake City, UT 84111

Attorneys for Jacob Family Chalk Creek,
LLC; Catherine B. Christensen, L.L.C.;
and Brian Garff

Brent A. Bohman
PO Box 120
Morgan, UT 84050

Attorney for Gerald Boyer, Gregory
Boyer, Fern Boyer, J.S. Hansen, and
Alfred C. Blonquist

Ray G. Martineau (2105)
Anthony R. Martineau (5859)
Brett D. Cragun (8683)
3098 Highland Drive STE 450
Salt Lake City, UT 84106
Telephone: (801) 486-0200
Email: rmartineau@martineaulaw.net

Leslie W. Slaugh (3752), for:
HOWARD, LEWIS & PETERSEN, P.C.
120 East 300 North Street
P.O. Box 1248
Provo, Utah 84603
Telephone: (801) 373-6345
Email: SlaughL@ProvoLawyers.com

Attorneys for Haynes Land & Livestock
Company and Triple H. Ranch, LC

FILED
UTAH APPELLATE COURTS

JUN - 1 2009

IN THE COURT OF APPEALS
OF THE STATE OF UTAH

HAYNES LAND & LIVESTOCK
COMPANY, a partnership,

Plaintiff-Appellant,

vs.

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

Defendants-Appellees.

Case No. 20080858-CA

OPENING BRIEF OF APPELLANTS (HAYNES PARTIES)

APPEAL FROM THE FINAL DECREE
OF THE FOURTH JUDICIAL DISTRICT COURT OF SUMMIT COUNTY,
THE HONORABLE BRUCE C. LUBECK, DISTRICT JUDGE

Jonathan O. Hafen
Bryan S. Johansen
PARR BROWN GEE & LOVELESS
185 South State Street STE 800
Salt Lake City, UT 84111

Attorneys for Jacob Family Chalk Creek,
LLC; Catherine B. Christensen, L.L.C.;
and Brian Garff

Brent A. Bohman
PO Box 120
Morgan, UT 84050

Attorney for Gerald Boyer, Gregory
Boyer, Fern Boyer, J.S. Hansen, and
Alfred C. Blonquist

Ray G. Martineau (2105)
Anthony R. Martineau (5859)
Brett D. Cragun (8683)
3098 Highland Drive STE 450
Salt Lake City, UT 84106
Telephone: (801) 486-0200
Email: rmartineau@martineaulaw.net

Leslie W. Slaugh (3752), for:
HOWARD, LEWIS & PETERSEN, P.C.
120 East 300 North Street
P.O. Box 1248
Provo, Utah 84603
Telephone: (801) 373-6345
Email: SlaughL@ProvoLawyers.com

Attorneys for Haynes Land & Livestock
Company and Triple H. Ranch, LC

LIST OF PARTIES

Parties asserting the roads are private:

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. Slauch, of Howard, Lewis & Petersen, P.C.:

HAYNES LAND & LIVESTOCK COMPANY, a partnership

TRIPLE H RANCH, LC., a limited liability company

CHALK CREEK-HOYSTVILLE WATER USERS CORPORATION, a corporation

Represented before the trial court by Stephen G. Swendimen and Julie I. Valdes, Assistant Attorneys General:

STATE OF UTAH, by and through the DEPARTMENT OF NATURAL RESOURCES,
DIVISION OF FIRE, FORESTRY AND STATE LANDS

Parties asserting the roads are public:

Represented before the trial court by Clark Waddoups, Jonathan O. Hafen, and Tobi Potestio, of Parr Waddoups Brown Gee & Loveless:

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 Brent A. Bohman (these parties were originally represented by George S. Young and Michael S. Johnson, of Pruitt, Gushee & Bachtell):

FERN J. BOYER

GERALD G. BOYER

GREGORY J. BOYER

J.S. HANSEN

ALFRED C. BLONQUIST

Represented before the trial court by David L. Thomas and Jami R. Brackin:

SUMMIT COUNTY, a political subdivision of the State of Utah

Other persons named in the pleadings but who did not appear at trial:

DAVID B. WILLIAMS

KAREL J. SNYDER

J.S. HANSEN

HELEN W. BLONQUIST

BARBARA HALL and KEVIN HALL

TABLE OF CONTENTS

LIST OF PARTIES	i
TABLE OF AUTHORITIES	v
JURISDICTIONAL STATEMENT	1
ISSUES PRESENTED FOR REVIEW	2
DETERMINATIVE PROVISIONS OF LAW	5
STATEMENT OF THE CASE	6
A. <u>Nature of the Case</u>	6
B. <u>Course of the Proceedings and Disposition Below</u>	6
C. <u>Statement of Facts</u>	10
SUMMARY OF ARGUMENT	14
ARGUMENT	16
I: ANY INCREASE IN WIDTH OF A ROAD DEDICATED TO THE PUBLIC BY USE MUST BE DETERMINED BY THE COURT; THE COUNTY CANNOT TAKE A WIDER PATH THAN THAT ABANDONED BY THE LANDOWNER.	16
A. Utah Cases Uniformly Hold That Where a Road Is Dedicated to the Public by Use, the Court Determines the Width of the Road; No Case Holds Width Is Determined by the County.	16
B. Determinating the Width of a Road Dedicated by Use Is a Core Judicial Function That Cannot Be Delegated to the County.	22
C. This Court Should Remand with Instructions to Fix the Road Width at 18 Feet in Accordance with the Trial Court’s Findings. ...	26
II: HAYNES WAS ENTITLED TO A DECREE QUIETING TITLE AGAINST ALL UNRECORDED ACCESS CLAIMS BEYOND THOSE EXPRESSLY FOUND BY THE TRIAL COURT.	27

III:	THE TRIAL COURT ON REMAND SHOULD DETERMINE THE ROAD WIDTH BASED ON THE WIDTH AND NATURE OF USE FROM 1880 TO 1896.	29
IV:	THE HISTORICAL RECORDS DID NOT PROVIDE CLEAR AND CONVINCING EVIDENCE OF TEN YEARS PUBLIC USE OF THE ROADS.	32
A.	The Controlling Evidence Was Documentary and Not Disputed; this Court Should Therefore Make Its Own Determination as to the Legal Effect of the Evidence.	32
B.	Private Property Rights Are Constitutionally Protected and Can Be Overcome Only by Clear and Convincing Evidence.	37
C.	Occasional Limited Use by Homesteaders, Hunters, and Other Such Persons Does Not Create a Public Road.	39
D.	The Evidence Did Not Establish Continuous Public Use of the East Fork Road.	42
E.	Use of Wild, Uncultivated, and Unenclosed Land Is Presumed Permissive.	44
F.	The Evidence Did Not Establish Ten Years Continuous Public Use of the Bench Road.	47
CONCLUSION		49

APPENDIX

- A. Memorandum Decision, March 21, 2008, R-Haynes 1393-1477
- B. Ruling and Order, August 29, 2008, R-Haynes 1678-1692
- C. Order and Final Judgment, September 16, 2008, R-Haynes 1693-1700
- D. Map of properties, Exhibit 117

TABLE OF AUTHORITIES

Cases Cited

<i>Armed Forces Ins. Exch. v. Harrison</i> , 2003 UT 14, 70 P.3d 35	29
<i>Baxter v. Utah Dep't of Transp.</i> , 783 P.2d 1045 (Utah Ct. App. 1989)	28
<i>Bench v. Bechtel Civil & Minerals, Inc.</i> , 758 P.2d 460 (Utah Ct. App. 1988)	33
<i>Blonquist v. Blonquist</i> , 30 Utah 2d 234, 516 P.2d 343 (1973)	17
<i>Boyer v. Clark</i> , 7 Utah 2d 395, 326 P.2d 107 (1958)	18, 25
<i>Brown & Root Indus. Serv. v. Industrial Comm'n</i> , 947 P.2d 671 (Utah 1997)	21
<i>Burrows v. Guest</i> , 5 Utah 91, 12 P. 847 (1887)	18
<i>Butler, Crockett & Walsh Dev. Corp. v. Pinecrest Pipeline Operating Corp.</i> , 909 P.2d 225 (Utah 1995)	17, 18
<i>Christensen v. Industrial Comm'n</i> , 642 P.2d 755 (Utah 1982)	21
<i>Clark v. Erekson</i> , 9 Utah 2d 212, 341 P.2d 424 (1959)	17
<i>Corruthers v. King</i> , 363 S.W.2d 413 (Ark. 1963).	45
<i>Deseret Livestock Co. v. Sharp</i> , 123 Utah 353, 259 P.2d 607 (1953)	18
<i>Draper City v. Estate of Bernardo</i> , 888 P.2d 1097 (Utah 1995)	17, 38, 39, 47, 48
<i>Gatrell v. Salt Lake County</i> , 106 Utah 409, 149 P.2d 827 (1944)	28
<i>Gaw v. State</i> , 798 P.2d 1130 (Utah Ct. App. 1990)	4, 5
<i>Hamerly v. Denton</i> , 359 P.2d 121 (Alaska 1961)	41
<i>Hunsaker v. State</i> , 29 Utah 2d 322, 509 P.2d 352 (1973)	17
<i>Jennings Investment, LC v. Dixie Riding Club, Inc.</i> , 2009 UT App 119	18

<i>Jeremy v. Bertagnole</i> , 101 Utah 1, 116 P.2d 420 (1941)	18, 26, 31
<i>Jones v. Johnson</i> , 761 P.2d 37 (Utah Ct. App. 1988)	33
<i>Kirk v. Schultz</i> , 63 Idaho 278, 119 P.2d 266 (1941)	41
<i>Kohler v. Martin</i> , 916 P.2d 910 (Utah Ct. App. 1996)	18, 24, 25
<i>Koller v. Godfrey</i> , 1999 UT App 346	39, 40, 48
<i>Lee v. Masner</i> , 45 P.3d 794 (Colo. Ct. App. 2001).	39, 40
<i>Leo M. Bertagnole, Inc. v. Pine Meadow Ranches</i> , 639 P.2d 211 (Utah 1981)	17, 38
<i>Lindsay Land & Live Stock Co. v. Churnos</i> , 75 Utah 384, 285 P. 646 (1929). ..	18, 40, 41
<i>Luchetti v. Bandler</i> , 108 N.M. 682 (N.M. Ct. App. 1989)	41
<i>Luevano v. Maestas</i> , 874 P.2d 788 (N.M. Ct. App. 1994)	47
<i>Lyons v. Baptist Sch. of Christian Training</i> , 804 A.2d 364 (Me. 2002).	45
<i>Marchant v. Park City</i> , 771 P.2d 677 (Utah Ct. App. 1989), <i>aff'd</i> , 788 P.2d 520 (Utah 1990)	28
<i>Memmott v. Anderson</i> , 642 P.2d 750 (Utah 1982)	17, 31
<i>Morris v. Blunt</i> , 49 Utah 243, 161 P. 1127 (1916)	46
<i>Moulton v. Irish</i> , 218 P. 1053 (Mont. 1923)	41
<i>Oregon S. L. R.R. v. Murray City</i> , 2 Utah 2d 427, 277 P.2d 798 (1954).	40
<i>Petersen v. Combe</i> , 20 Utah 2d 376, 438 P.2d 545 (1968)	38
<i>ProMax Dev. Corp. v. Mattson</i> , 943 P.2d 247 (Utah Ct. App. 1997)	5
<i>Reese v. Tingey Constr.</i> , 2008 UT 7, 177 P.3d 605	2
<i>Rio Grande Western Railway Co. v. Telluride Power Transmission Co.</i> , 23 Utah 22, 63 P. 995 (1900).	39

<i>Salt Lake City v. Ohms</i> , 881 P.2d 844 (Utah 1994)	22, 23
<i>Schaer v. State</i> , 657 P.2d 1337 (Utah 1983)	17, 24
<i>Sierra Club v. Hodel</i> , 848 F.2d 1068 (10 th Cir. 1988)	31
<i>Southern Utah Wilderness Alliance v. BLM</i> , 425 F.3d 735 (10 th Cir. 2005)	31, 38, 39
<i>Thomson v. Condas</i> , 27 Utah 2d 129, 493 P.2d 639 (1972)	40
<i>Thurnwald v. A.E.</i> , 2007 UT 38, 163 P.3d 623	30
<i>Utah County v. Butler</i> , 2008 UT 12, 179 P.3d 775	45, 47
<i>Uzelac v. Thurgood (In re Estate of S.T.T.)</i> , 2006 UT 46, 144 P.3d 1083	30
<i>Vaughn v. Williams</i> , 345 So. 2d 1195 (La. Ct. App. 1977)	30
<i>Wasatch County v. Okelberry</i> , 2008 UT 10, 179 P.3d 768	4, 38, 41
<i>Weihl v. Wagner</i> , 569 N.E.2d 297 (Ill Ct. App. 1991)	45
<i>Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co.</i> , 744 P.2d 1376 (Utah 1987)	3, 17
<i>Whitesides v. Green</i> , 13 Utah 341, 44 P. 1032 (1896)	18
<i>Wilson v. Hull</i> , 7 Utah 90, 92, 24 P. 799 (Utah 1890).	45

Constitutional provisions, statutes, and rules cited:

1917 Utah Laws, ch. 74 § 2	17, 19, 20, 22
1963 Utah Laws, ch. 39, § 93 (codified at Utah Code § 27-12-93)	20
Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253, codified at 43 U.S.C. § 932, repealed by Federal Land Policy Management Act of 1976 (FLPMA), Pub.L. No. 94-579 § 706(a), 90 Stat. 2743 (commonly called R.S. 2477)	41, 44
Revised Ordinances of Salt Lake City § 42-7-5 (1975)	24

U.S. Const. amend. V	30, 37
Utah Code Ann. § 27-12-89	24
Utah Code Ann. § 36-1-4 (1943)	20
Utah Code Ann. § 72-5-104(3) (2001)	21
Utah Code Ann. § 72-5-108 (2001), enacted by Utah Laws 1998, ch. 270, § 136 ...	2, 5, 14, 16-23
Utah Code § 72-5-104	16, 21, 22, 30
Utah Code § 72-5-104(1) (2006)	5, 6, 30
Utah Const. art I, § 22	30, 37
Utah Const. art VIII, § 1	22
Utah R. Civ. P. 54(b)	2
Utah Rev. Stat. § 25-1-1117 (1898)	20, 22

IN THE COURT OF APPEALS
OF THE STATE OF UTAH

HAYNES LAND & LIVESTOCK
COMPANY, a partnership,

Plaintiff-Appellant,

vs.

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

Defendants-Appellees.

Case No. 20080858-CA

OPENING BRIEF OF APPELLANTS (HAYNES PARTIES)

JURISDICTIONAL STATEMENT¹

The Order and Final Judgment was entered September 16, 2008.² The Notice of Appeal was timely filed on October 14, 2008;³ an Amended Notice of Appeal (eliminating Chalk Creek-Hoytsville Water Users Corporation as an appellant) was filed October 16, 2008.⁴

¹The trial court record consists of papers from two cases that were ultimately consolidated, but the papers in each case were indexed separately for appeal. Papers from *Haynes Land & Livestock Co. v. Jacob Family Chalk Creek*, trial court case no. 980600244, will be cited as “R-Haynes.” Papers from *Triple H Ranch, LC v. Boyer*, trial court case no. 000600299, will be cited as “R-TripleH.”

²R-Haynes 1693-1700.

³R-Haynes 1701-1705.

⁴R-Haynes 1711-1715.

The Order and Final Judgment contained a certification of finality under Rule 54(b) of the Utah Rules of Civil Procedure.⁵ A claim for partition by Triple H Ranch, LC against Fern Boyer, Gerald Boyer, Gregory Boyer, J.S. Hansen, and Alfred C. Blonquist remains pending before the trial court.

ISSUES PRESENTED FOR REVIEW

1. Where a court determines that a road has been dedicated to the public by use for ten years, may the court then delegate to a county the determination of the road's width?

Standard of review: The trial court determined that Utah Code § 72-5-108 directs that the width of highways, including highways dedicated by user, be determined by the highway authority of that particular jurisdiction. The appeal of this decision presents a question of statutory construction that is reviewed for correctness.⁶

Preservation below: The Haynes parties requested that the trial court determine width in Plaintiffs' Trial Brief.⁷ This issue was also raised in Haynes' Motion for Reconsideration of Road Width.⁸

2. Where a party has sued to quiet title, asserting that defendant had no rights of travel over plaintiff's property other than rights already of record, and the defendant did not

⁵R-Haynes 1697.

⁶*Reese v. Tingey Constr.*, 2008 UT 7, ¶ 6, 177 P.3d 605, 607.

⁷R-Haynes 1271-1273. The trial court's statement that the width issue "was not mentioned in pre-trial briefs," R-Haynes 1470, is incorrect.

⁸R-Haynes 1500-1503.

dispute plaintiff's legal title but claimed and proved only a particular public road across plaintiff's property, was plaintiff entitled to a decree that defendant had no other rights of travel across plaintiff's property?

Standard of review: This issue does not challenge the trial court's findings but disputes the conclusions of law. "While findings of fact will not be set aside unless they are clearly erroneous, conclusions of law are simply reviewed for correctness without any special deference."⁹

Preservation below: The Haynes parties raised this issue below in Haynes' Objection to Jacob-Christensen's Proposed Form of Order.¹⁰

3. Where an owner abandons a road to the public by permitting limited use, may the court fix the width of the road based on contemplated future uses that are significantly more burdensome than the uses permitted by the landowner?

Standard of review: This presents issues of constitutional and statutory construction that are reviewed for correctness.

Preservation below: This was raised in the pretrial¹¹ and post-trial¹² memoranda filed by Haynes.

⁹*Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co.*, 744 P.2d 1376, 1377-1378 (Utah 1987).

¹⁰R-Haynes 1526, 1633-34.

¹¹R-Haynes 1271-1273.

¹²R-Haynes 1374-1376.

4. Should occasional travel over wild, uncultivated, and unenclosed land be considered permissive?

Standard of review: “An appellate court reviews a trial court’s legal interpretation of the Dedication Statute for correctness and its factual findings for clear error.”¹³ Where the court exercises its discretion based on a misunderstanding of the law, however, that constitutes an abuse of discretion.¹⁴

Preservation below: This was argued in the post-trial memorandum of Haynes.¹⁵

5. Where a survey map showed a road existed, did comments in journals and other historic documents showing sporadic activities in a particular area, without mentioning travel over the roads or specifying a path of travel, constitute clear and convincing evidence of continuous public, non-permissive use of the entire length of the road?

Standard of review: “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, an appellate court reviews a trial court’s decision regarding whether a public highway has been established under the Dedication Statute for correctness but grants the court significant discretion in its

¹³*Wasatch County v. Okelberry*, 2008 UT 10, ¶ 8, 179 P.3d 768.

¹⁴*Gaw v. State*, 798 P.2d 1130, 1134 (Utah Ct. App. 1990).

¹⁵R-Haynes 1367-1368.

application of the facts to the statute.”¹⁶ Where the court exercises its discretion based on a misunderstanding of the law, however, that constitutes an abuse of discretion.¹⁷

Preservation below: A challenge to the sufficiency of the evidence need not be “preserved” by raising it before the trial court.¹⁸ Haynes did, however, argue that the evidence of public use was not clear and convincing.¹⁹

DETERMINATIVE PROVISIONS OF LAW

Utah Code § 72-5-104(1) (2006): “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 § 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 their respective jurisdiction.”

¹⁶*Wasatch County v. Okelberry*, 2008 UT 10, ¶ 8, 179 P.3d 768.

¹⁷*Gaw v. State*, 798 P.2d 1130, 1134 (Utah Ct. App. 1990).

¹⁸*ProMax Dev. Corp. v. Mattson*, 943 P.2d 247, 256 (Ct. App. 1997), *cert. denied*, 953 P.2d 449 (Utah 1997).

¹⁹R-Haynes 1364-1366.

STATEMENT OF THE CASE

A. Nature of the Case

This is a civil case seeking a declaration that certain roads were private. Other parties asserted that the roads became public under Utah Code § 72-5-104(1) (2006) or that other easements existed.

B. Course of the Proceedings and Disposition Below

Haynes Land & Livestock Company (“Haynes”) sued its adjoining landowners, Jacob Family Chalk Creek, Limited,²⁰ Catherine B. Christensen, L.L.C., and Brian Garff (jointly referred to in this brief as “Jacobs”), seeking a determination that Jacobs had no rights of travel over the Haynes property beyond existing recorded easements.²¹ Haynes also sought to enjoin Garff from constructing a sizeable building on the Jacobs property.²² Summit County was initially named as a defendant²³ but was later dismissed.²⁴ Jacobs counterclaimed to establish that the roads over the Haynes property were public or subject to easements in favor of Jacobs.²⁵

²⁰Jacob Family Chalk Creek, LLC, later acquired the title and was substituted as a party. R-Haynes 1162-1164.

²¹R-Haynes 1-9.

²²R-Haynes 5-6.

²³R-Haynes 6-7.

²⁴R-Haynes 54-55.

²⁵R-Haynes 65-79.

Triple H Ranch, LC, a limited liability company with the same principals as Haynes Land & Livestock Company, also commenced a suit for partition by sale against certain members of the Boyer families and others that owned interests in property surrounding Boyer Lake.²⁶ Among other allegations, the partition complaint asserted that the defendants had no lawful access to the properties. The Boyer defendants²⁷ counterclaimed, seeking among other claims a determination that a road leading to the lake was a public county road.²⁸ The defendants other than the Boyer defendants either disclaimed any interest in the property²⁹ or were dismissed from the action.³⁰ The Boyer defendants later filed an amended counterclaim and third-party complaint naming additional parties and asserting among other claims that the roads were public or that the Boyer defendants had prescriptive easements.³¹

The two lawsuits were consolidated for purposes of both discovery and trial.³² After consolidation of the cases, Jacobs filed an amended answer and counterclaim against all

²⁶R-TripleH 1-6.

²⁷Fern J. Boyer, Gerald G. Boyer, Gregory J. Boyer, J.S. Hansen, and Alfred C. Blonquist. R-TripleH 19-29.

²⁸R-TripleH 25-26.

²⁹R-TripleH 38-39 (disclaimer by Barbara Hall and Kevin Hall); R-TripleH 51 (disclaimer by Karel Snyder).

³⁰R-TripleH 40-41 (dismissing Helen W. Blonquist and Helen W. Blonquist, Trustee.)

³¹R-TripleH 81-94.

³²R-Haynes 107-110.

parties in both actions.³³ A certificate of default was entered against Stillman Seven, Barbara Hall, Kevin Hall, Helen W. Blonquist, and Karel J. Snyder.³⁴ B.A. Bingham and Sons, LLC, answered the counterclaim³⁵ but elected to not appear at trial.³⁶ David B. Williams likewise answered³⁷ but elected to not appear at trial.³⁸

Summit County was named as a defendant in the initial complaint filed by Haynes, but was later dismissed.³⁹ Summit County was subsequently brought back into the lawsuit as a defendant to the counterclaim filed by Jacobs.⁴⁰

Prior to trial, the parties stipulated and the trial court ordered that trial of the partition claims be bifurcated from the road and easement claims.⁴¹

³³R-Haynes 189-209.

³⁴R-Haynes 518-521.

³⁵R-Haynes 222-227.

³⁶Transcript vol. I, 8; R-Haynes 1316-1318.

³⁷R-Haynes 297-311.

³⁸R-Haynes 1312-1315.

³⁹R-Haynes 1-9, 54-55.

⁴⁰R-Haynes 189-209.

⁴¹R-Haynes 1155-1161, 1165-1170.

Following discovery, Jacobs moved for summary judgment on its claim for public road determination.⁴² Boyers joined in the motion.⁴³ The trial court denied the motion.⁴⁴

On October 3, 2007, the trial court, counsel, and parties participated in a day-long journey to the property at issue, crossing the Haynes and Jacob properties while counsel and others pointed out various sites.⁴⁵

A bench trial was held March 4-7, with oral arguments on March 11, 2008.⁴⁶ At the beginning of trial, Haynes stipulated that Jacobs had a prescriptive easement over the Bench Road consistent with historical use.⁴⁷ The trial court issued a memorandum decision on March 21, 2008, finding essentially that the Bench Road was public, the Middle Fork Road was public to a point just short of Boyer Lake, and that the East Fork Road was public to the middle of section 8. The court stated that it would fix the width of the road at 18 feet if called upon to make a width decision, but held that the width should instead be determined by Summit County.⁴⁸

⁴²R-Haynes 536-540.

⁴³R-Haynes 907-909.

⁴⁴R-Haynes 912-962.

⁴⁵R-Haynes 1036-1037, 1401-1402.

⁴⁶R-Haynes 1319-1327, 1339-1340.

⁴⁷Transcript vol. I, 13-14.

⁴⁸R-Haynes 1393-1477.

All parties raised various objections to the trial court's ruling. Haynes primarily sought reconsideration of the delegation of the width determination to Summit County⁴⁹ and objected to the form of order presented by Jacobs.⁵⁰ Jacobs moved to reopen to present evidence on width.⁵¹ Boyers moved to reconsider the grant to the Water Users of an easement over the Boyer property.⁵² The trial court made minor modifications to the form of order but otherwise denied the post-trial motions.⁵³ Haynes appealed⁵⁴ the trial court's decision, and Jacobs and Boyers cross-appealed.⁵⁵

C. Statement of Facts

The Chalk Creek Road, State Road 133, travels generally easterly from Coalville (in Summit County), through Upton, and eventually to Wyoming. The road at issue in this case departs to the south off the highway about seven miles east of Upton, along the East Fork of Chalk Creek.⁵⁶ A map of the properties and roads is in the appendix for the convenience of the Court.

⁴⁹R-Haynes 1500-1503, 1504-1521.

⁵⁰R-Haynes 1522-1520, 1530-1544.

⁵¹R-Haynes 1478-1481, 1482-1492.

⁵²R-Haynes 1606-1608, 1609-1618.

⁵³R-Haynes 1678-1692.

⁵⁴R-Haynes 1711-1715.

⁵⁵R-Haynes 1716-1720, 1721-1725.

⁵⁶R-Haynes 1405.

Haynes own approximately 10,000 acres of property in this area, with the northern portion of the Haynes property adjacent to Highway 133. Jacobs also own approximately 10,000 acres in the same area; their property is generally south and west of the Haynes property. The primary access to the Jacobs property is over the Haynes property.⁵⁷ Various paths of travel have existed over the properties, including particularly a rough road that loops through the properties. The road begins at Highway 133 and travels generally south over the Haynes property to the Jacobs property (Bench Road), then south and east over the Jacobs property (Middle Fork Road) to a reservoir (Boyer Lake) on property owned by the Chalk Creek-Hoytsville Water Users Corporation. The Boyer parties have an undivided interest (together with Triple H Ranch) in approximately 37 acres of property in five non-contiguous parcels surrounding Boyer Lake. From the Boyer Lake the road travels generally south and west across the Haynes property (East Fork Road) to join the Bench Road south of Highway 133.⁵⁸

The roads at issue were narrow, two-track roads ranging from 8 feet 10 feet in width.⁵⁹ The initial two miles of the Bench Road on the Haynes property was recently improved and now has an average width of 18 feet, but historically it was also 8 to 10 feet wide.⁶⁰ The

⁵⁷Exhibit 117; R-Haynes 1403-1404.

⁵⁸R-Haynes 1406-1409; Exhibit 117.

⁵⁹Transcript vol. I, 149-150; vol. II, 331-332; vol. III, 611, 620; vol. IV, 712, 797, 818.

⁶⁰*Id.*; Transcript vol. IV, 821.

entire loop is on private property and bounded by extensive private properties on both sides of the road – there are no public destinations for which the road affords access.⁶¹

Howard Haynes, a sheep rancher and father of the original principals of Haynes Land & Livestock Co., purchased the northern part of the Haynes property in 1932.⁶² He leased the remainder of what is now the Haynes property and purchased it in 1940 and 1941.⁶³ From the time of his purchase in 1932 he maintained a policy of locking the gates for 24 hours at least once each year, and also restricted access during the hunting seasons and at other times.⁶⁴

Irv Jacobs and A.E. Christensen, the predecessors of the current defendants (jointly referred to in this brief as “Jacobs”), purchased their property in 1938.⁶⁵ Jacobs have maintained a locked gate at the entrance to their property for as long as anyone can remember, and prior to this lawsuit the Jacobs believed their road was private.⁶⁶

Evidentially because the parties did not then believe a public road existed, in 1939 the predecessor to the Haynes interest conveyed to Jacobs’s predecessor an express easement over the Bench Road allowing the owners of the Jacobs property to cross the Haynes property

⁶¹See R-Haynes 1466.

⁶²Transcript vol. III, 608-609.

⁶³Exhibit 48; Transcript vol. III, 609, 645.

⁶⁴Transcript vol. III, 612, 613-617, 676-677, 709, 722, 771.

⁶⁵Transcript vol. II, 262.

⁶⁶Transcript vol. I, 166, 199, 243, 335.

for limited agricultural purposes.⁶⁷ Haynes stipulated at trial that Jacobs have also acquired a prescriptive easement over the Bench Road for recreational and other purposes relating to the existing and historical uses of the property.⁶⁸ A 1975 map of Class D roads (unimproved county roads) in Summit County shows the entire loop of the road as a public road.⁶⁹ Summit County stipulated, however, that there was no evidence the map had ever been officially adopted or approved by the Summit County commission.⁷⁰

Jacobs constructed three “cabins” on their property without objection from the Haynes.⁷¹ When Brian Garff began building a large fourth cabin, however, and Jacobs sought to expand their use beyond the scope of the historical deeded easement,⁷² Haynes filed this action to quiet title to the Haynes property and to restrict access to the historical uses.

The trial court found that the Bench Road, most of the Middle Fork Road, and a short section of the East Fork Road became public based on use from 1880 to 1896.⁷³ At that time, the even numbered sections were owned by the railroad, and the odd numbered sections were

⁶⁷Exhibits 7-9.

⁶⁸Transcript vol. I, 13-14.

⁶⁹Exhibit 114.

⁷⁰Transcript vol. IV, 876.

⁷¹Transcript vol. I, 121, 186; vol. II, 273-274; vol. III, 625.

⁷²Transcript vol. II, p. 405.

⁷³R-Haynes 1459.

federal land.⁷⁴ Historical documents show that during that period a few homesteaders staked claims on the property and a few sawmills were operated in the area.⁷⁵ There are also reports of individuals hunting and fishing in the area.⁷⁶ Additional detail concerning this evidence is presented in the argument section below.

SUMMARY OF ARGUMENT

Where a court declares that a road has been abandoned and dedicated to the public by public use, the court may either leave the road at its existing width or declare the width necessary to accommodate the historic uses. The court may not, however, delegate the determination of width to a county, especially where that county is a party to the lawsuit. Fixing the width of a road that has become public by use is a judicial function that cannot be delegated. Utah cases uniformly hold that it is the court that determines width; no case authorizes delegating that decision to a county. Utah Code § 72-5-108 authorizes a county to set minimum road standards, but does not give a county authority to “find” the width of a road dedicated to the public by use.

This Court should fix the width of the road at 18 feet, in accordance with express findings made by the trial court. In the event this Court determines to remand for additional proceedings, however, this Court should clarify that the width of the road is only that currently necessary to support the historical (1880-1896) uses. Current uses or contemplated

⁷⁴Exhibit 127; transcript vol. I, 87.

⁷⁵*E.g.*, Exhibits 137, 142.

⁷⁶*E.g.*, Exhibits 139, 161.

future uses should not be considered. Any other standard would unconstitutionally allow the public to take more than the landowner abandoned, without paying just compensation.

Haynes was entitled to a decree quieting title against all roads except those proved by the defendants. Haynes proved record title to the property. The burden of proof to establish any exceptions to that title rested on defendants. Defendants proved some roads. Haynes was entitled to a decree that no other roads existed.

No evidence was presented of ten years continuous public use of the East Fork Road. Similarly, the evidence regarding use of the Bench Road was not clear and convincing that members of the public used the road for ten continuous years. Occasional use by individuals looking for a homestead site is too sporadic to qualify as continuous public use; use by the homesteaders themselves is not use by the public. Sawmill operators had permission to build their sawmills; use of the road by their customers was similarly permissive. Most importantly, all this land was wild, unenclosed land, and this Court should hold that public use of such lands is presumed permissive.

ARGUMENT

I: ANY INCREASE IN WIDTH OF A ROAD DEDICATED TO THE PUBLIC BY USE MUST BE DETERMINED BY THE COURT; THE COUNTY CANNOT TAKE A WIDER PATH THAN THAT ABANDONED BY THE LANDOWNER.

- A. *Utah Cases Uniformly Hold That Where a Road Is Dedicated to the Public by Use, the Court Determines the Width of the Road; No Case Holds Width Is Determined by the County.*

The Order and Final Judgment entered by the trial court declared that certain roads have become public under the road dedication statute,⁷⁷ and then decreed: “The width of the portions of the Road that have been declared a public way shall be determined by Summit County, Utah according to that which is reasonable and necessary to ensure safe travel based on the facts and circumstances.”⁷⁸ The trial court made this delegation to Summit County based on the court’s interpretation of Utah Code § 72-5-108, which states: “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.”

The discussion below shows that delegating the road width determination was improper. Section 72-5-108 merely authorizes a highway authority to set road standards that must be satisfied by, for example, new roads or roads serving new developments. The statute does not and could not authorize a highway authority to take without just compensation

⁷⁷Utah Code § 72-5-104.

⁷⁸R-Haynes 1697, ¶ 12.

whatever additional property is necessary to enable an existing road to meet those standards. A court adjudicating a road dedication case can either find road width based on the evidence, or if inadequate evidence was presented the court can make no width determination and leave the road at its existing width. But, a court cannot delegate to a county or other highway authority the factual determination of how much width the landowner dedicated and abandoned to the public.

Section 72-5-108 or a predecessor statute has been in effect in Utah since at least 1917.⁷⁹ During this time of nearly 100 years, and in fact extending prior to the statute's enactment back to at least 1887, numerous decisions of the Utah appellate courts have directly or by implication confirmed that the width of a road abandoned to the public under the road dedication statute is determined by the court.⁸⁰

⁷⁹1917 Utah Laws ch. 74 § 1117.

⁸⁰*E.g. Butler, Crockett & Walsh Dev. Corp. v. Pinecrest Pipeline Operating Corp.*, 909 P.2d 225, 232 (Utah 1995) (It is “proper and necessary for the court in defining the road to determine its width[.]”); *Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1101 (Utah 1995) (“[Determination of road width] depends upon the full adjudication of the relevant facts that will be unearthed at trial.”); *Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co.*, 744 P.2d 1376, 1377 (Utah 1987) (trial court fixed width at ten feet); *Schaer v. State*, 657 P.2d 1337, 1342 (Utah 1983) (“width of the highway presents a question of fact”); *Memmott v. Anderson*, 642 P.2d 750, 754 (Utah 1982) (case remanded for further findings on the issue of width); *Leo M. Bertagnole, Inc. v. Pine Meadow Ranches*, 639 P.2d 211, 213 (Utah 1981) (trial court set the width at 30 feet); *Blonquist v. Blonquist*, 30 Utah 2d 234, 236, 516 P.2d 343, 344 (1973) (“brought before the court to determine the width of the roadway”); *Hunsaker v. State*, 29 Utah 2d 322, 325-326, 509 P.2d 352, 355 (1973) (“Even without the statutory presumption as to the width of the highway, the evidence in the instant case concerning the location of fences and the usual width of the highway in the vicinity is sufficient to sustain the determination of the trial court.”); *Clark v. Erekson*, 9 Utah 2d 212, 214, 341 P.2d 424, 426 (1959) (“There is also no merit to appellants’ contention that there is insufficient evidence to support the court’s finding as to the width of

There is no reported Utah decision delegating that decision to a county or other legislative body. In at least one decision, the trial court elected to make no decision as to road width, and the Utah Supreme Court affirmed the trial court's right to make no decision "when that issue was not the focus of the litigation."⁸¹ But, making no decision is not the same as specifically delegating the decision to a county. If the trial court makes no decision, the parties are left with the road in its existing condition. At that point, section 72-5-108 would not authorize a county to declare a width wider than the existing width without making just compensation,⁸² any more than that county would have authority to widen any other road without making just compensation.

the road."); *Boyer v. Clark*, 7 Utah 2d 395, 398, 326 P.2d 107, 109 (1958) (the trial court on remand must determine "the width of the highway, which must be determined in accordance with what is reasonable and necessary for the uses to which the road has been put"); *Deseret Livestock Co. v. Sharp*, 123 Utah 353, 357, 259 P.2d 607, 610 (1953) (trial court determined road width was 100 feet); *Jeremy v. Bertagnole*, 101 Utah 1, 9, 116 P.2d 420, 424 (1941) ("A particular use having been established, such width should be decreed by the court as will make such use convenient and safe."); *Lindsay Land & Live Stock Co. v. Churnos*, 75 Utah 384, 392, 285 P. 646, 649 (1929) ("We further approve the findings and conclusion of the court as to the width of the road."); *Whitesides v. Green*, 13 Utah 341, 349-350, 44 P. 1032, 1033 (1896) ("width must be determined from a consideration of the facts and circumstances peculiar to the case"); *Burrows v. Guest*, 5 Utah 91, 99, 12 P. 847, 851 (1887) (width "is a question of fact for the jury"); *Kohler v. Martin*, 916 P.2d 910, 914 (Utah Ct. App. 1996) ("Because the trial court failed to make this determination [concerning road width], we remand for this limited purpose."); *Jennings Investment, LC v. Dixie Riding Club, Inc.*, 2009 UT App 119, ¶ 34 (width determination reversed because not supported by adequate findings; cause remanded to trial court to determine the reasonable and necessary width of the road).

⁸¹*Butler, Crockett & Walsh Dev. Corp. v. Pinecrest Pipeline Operating Corp.*, 909 P.2d 225, 232 (Utah 1995).

⁸²See constitutional arguments at page 30 below.

Under the trial court's interpretation of section 72-5-108, a county could, without any judicial process whatsoever, simply decide that a historically two-track road eight feet wide was now going to be 36 feet wide, or 66 feet wide, or more, all without paying any compensation to the owner of the property affected. The same logic would permit a county to increase the width of any other public road, without incurring an obligation to pay just compensation to the affected landowner. Such a taking would obviously violate the constitutional protections of private property.⁸³

Notably, neither Jacobs nor the trial court identified any decision which approved delegating the road width determination to a county or other legislative entity.

Section 72-5-108 and its predecessor statutes have been reenacted or modified several times over the last century, but the essential provisions of the statutes have remained constant. Comp. Laws 1917, § 1117,⁸⁴ enacted in 1917, provided:

The width of rights of way for State roads shall be such as will meet with the approval of the State Road Commission, and *the widths of rights of way to be used for county roads, alleys, lanes, trails, private highways, and by-roads shall be such as may be deemed necessary by the Board of County Commissioners*; provided, that nothing in this Act shall be so construed as to increase or diminish the width of either kind of highways already established or used as such; provided, further, that nothing in this Act contained shall prevent cities from laying out, establishing, opening or accepting the dedication of

⁸³See arguments at page 30 below.

⁸⁴Enacted by 1917 Utah Laws ch. 74 § 2.

streets, avenues, boulevards and alleys of any width the council of such cities shall deem proper.⁸⁵

In the 1943 codification of the Utah Code, the section appeared as follows:

The width of rights of way for state roads shall be such as the state road commission may determine, and the width of rights of way to be used for county highways shall be such as may be deemed necessary by the board of county commissioners; *provided*, that nothing in this title shall prevent cities or towns from laying out, establishing or opening, or accepting the dedication of, streets and alleys of any width the governing body thereof shall deem proper.⁸⁶

In 1963 the provision was reenacted as follows:

The width of rights-of-way for public highways shall be such as the highway authorities of the state, counties, cities or towns may determine for such highways under their respective jurisdiction.⁸⁷

The statute was amended to its present form in 1998:

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.⁸⁸

⁸⁵Comp. Laws Utah § 1117 (1907) (italics added). The predecessor to this section was Utah Rev. Stat. § 25-1-1117 (1898), which stated: “The width of all public highways, except bridges, alleys, lanes, and trails, shall be at least sixty-six feet. The width of all private highways and by-roads, except bridges, shall be at least twenty feet; *provided*, that nothing in this title shall be so construed as to increase or diminish the width of either kind of highway already established or used as such.”

⁸⁶Utah Code Ann. § 36-1-4 (1943).

⁸⁷1963 Utah Laws, ch. 39, § 93 (codified at Utah Code Ann. § 27-12-93).

⁸⁸Utah Code Ann. § 72-5-108 (2001) (enacted by 1998 Utah Laws, ch. 270, § 136).

“A well-established canon of statutory construction provides that where a legislature amends a portion of a statute but leaves other portions unamended, or re-enacts them without change, the legislature is presumed to have been satisfied with prior judicial constructions of the unchanged portions of the statute and to have adopted them as consistent with its own intent.”⁸⁹ This Court should, therefore, hold that the meaning of section 72-5-108 is consistent with the long line of court decisions holding that the width of a road dedicated by use is to be determined by a court, not by a legislative body.

This is confirmed by recent changes to the road dedication statute. After the commencement of this case, section 72-5-104 was amended to clarify that “[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.”⁹⁰ This provision is substantive, and therefore cannot apply to this action.⁹¹ This provision illustrates, however, that section 72-2-108 does not apply to road dedication cases. If determination of road width were already governed by section 72-2-108, there would have been no reason to enact a separate provision in section 72-5-104 stating the factors to be considered in determining road width. Also, if the Legislature disagreed with the numerous cases holding that width is set by the court and intended that road width be

⁸⁹*Christensen v. Industrial Comm’n*, 642 P.2d 755, 756 (Utah 1982).

⁹⁰Utah Code Ann. § 72-5-104(3) (2001).

⁹¹“A ‘substantive’ change, or one that affects substantive rights, may not be applied retroactively.” *Brown & Root Indus. Serv. v. Industrial Comm’n*, 947 P.2d 671, 675 (Utah 1997). As a practical matter, however, subsection (3) essentially restated existing case law as to the width of the road.

determined by a county rather than the court, the Legislature would have been expected to state that explicitly in section 72-5-104.

The initial enactment of this provision also confirms that its purpose was to set standards, not to allow the highway authority to take additional land. Comp. Laws 1917, § 1117,⁹² enacted in 1917, provided: “nothing in this Act shall be so construed as to increase or diminish the width of either kind of highways already established or used as such[.]”⁹³

This Court should hold that section 72-5-108 does not authorize a county or highway authority to fix the initial width of a road dedicated by public use. That statute permits a county to set minimum standards for certain types of roads, but does not permit the county to take additional property to meet those standards. The trial court’s decision to delegate the determination of width to the County should be reversed.

B. Determinating the Width of a Road Dedicated by Use Is a Core Judicial Function That Cannot Be Delegated to the County.

“Article VIII, section 1 of the Utah Constitution . . . provides that the judicial power of the state shall be vested in the courts.”⁹⁴ The trial court delegated to Summit County the authority to conclude this litigation by determining the width of the road that had been dedicated to the public. Such a delegation of a core judicial function violates the separation of powers doctrine inherent in the Utah Constitution.

⁹²Enacted by 1917 Utah Laws ch. 74 § 2.

⁹³Comp. Laws Utah § 1117 (1907) (italics added). The predecessor to this section, Utah Rev. Stat. § 25-1-1117 (1898), contained a similar provision.

⁹⁴*Salt Lake City v. Ohms*, 881 P.2d 844, 848 (Utah 1994).

“The term ‘judicial power of courts’ is generally understood to be the power to hear and determine controversies between adverse parties and questions in litigation.”⁹⁵ The authorities cited in subpoint I.A. above show that determination of road width is an integral part of a road dedication case. Determining width is part of determining the controversy between the adverse parties. The “legislature is not free to authorize by statute other persons” to perform such core judicial functions.⁹⁶ It follows that section 72-5-108 cannot constitutionally permit a trial court to delegate the determination of road width to a county legislative body.

There is an inherent difference between determining road width in a case involving road dedication by use, and the decision a public road authority makes in fixing standards applicable to a county road to be used for development or other county-approved purposes. In a road dedication case, the road width determines the amount of private property dedicated by the private landowner. Fixing that width (finding what the landowner voluntarily gave to the public) is an inherently factual determination. The decision of a legislative body, in contrast, is based on policy considerations concerning aesthetics, ease of maintenance, and potential future expansion, among other factors. A county is an institutionally poor forum for finding facts—the trial court gave no explanation of how the County is to receive evidence,

⁹⁵*Id.* at 848 (citations and quotation marks omitted).

⁹⁶*Id.* at 856-57 (Howe, J., concurring) (because Justice Howe’s concurring opinion was joined by Justice Stewart and Justice Russon, it represents the view of the majority of the court).

or even if the County is required to consider evidence from the parties.⁹⁷ A county is not a proper forum to resolve the inherently factual issues of what width was abandoned to the public.

The principle that a court, not the county, must determine road width is confirmed in several cases. In *Schaer v. Utah Dept. of Transportation*,⁹⁸ the trial court fixed the width of a road based on city ordinances. The Utah Supreme Court rejected that approach:

In granting the plaintiff's motion, the trial court apparently relied on the Revised Ordinances of Salt Lake City § 42-7-5 (1975), as establishing the width of the dugway road at fifty feet as a matter of law. This reliance was misplaced. That ordinance merely sets forth the minimum standards and requirements regarding the widths of streets in a proposed *subdivision plan*. It does not address the reasonable and necessary width of a highway dedicated to the public under U.C.A., 1953, § 27-12-89. However, even though that ordinance does not establish the width of the dugway road as a matter of law, it may be offered as evidence of what is considered reasonable and necessary under the circumstances.⁹⁹

If it is improper to rely solely on municipal ordinances to establish width, it follows it would be even more improper to just turn the matter over to the municipality. In *Kohler v. Martin*,¹⁰⁰ this Court reversed because “the trial court erred in failing to assess the reasonable

⁹⁷ Although the trial court expressly assumed the County would “conduct hearings and consider input,” R-Haynes 1687, in fact on December 17, 2008, the County by resolution fixed the road width at 36 feet without holding any hearing or allowing any input whatsoever.

⁹⁸ 657 P.2d 1337 (Utah 1983).

⁹⁹ *Id.* at 1342 (italics added).

¹⁰⁰ 916 P.2d 910 (Utah Ct. App. 1996).

and necessary width of the roadway.”¹⁰¹ Similarly, the supreme court in *Boyer v. Clark*¹⁰² directed that the trial court determine the width of the road on remand.¹⁰³

The impropriety of allowing the County to determine the width of the road is further supported by analogy to a road acquired by condemnation. If a county were to condemn a right of way for a county road, the width of that road would be specifically determined. No one would claim the county could then go back and determine that a greater width was necessary, and take that greater width without a further condemnation proceeding and appropriate payment. Yet, that is exactly the authority the trial court purported to give the County here. The trial court found portions of the roads at issue were dedicated to the public. The width thus dedicated to the public is whatever it is, and it is not subject to further expansion based on what the County might think is necessary.

It must be remembered that Summit County is a party to this action, not an independent adjudicative body. Delegating the width determination to the County in essence says to the County, “You won. Now take as much property as you want – feel free to choose how wide you want the road to be.” Such a delegation of adjudicative authority to a party cannot be permitted.

Determination of the road width must be based on factual findings concerning the historical use of the road and what is currently reasonable and necessary to support the

¹⁰¹*Id.* at 914.

¹⁰²7 Utah 2d 395, 326 P.2d 107 (1958).

¹⁰³*Id.* at 398, 326 P.2d at 109.

historical use.¹⁰⁴ Evidence on all of this was before the trial court. In fact, the trial court expressly stated its finding, for use in the event the delegation to the County were reversed: “If the court is responsible to declare a width the court believes the evidence and law allow the court to declare the road should be 18 feet in width.”¹⁰⁵ “The court defers to the county but if the court is wrong, rather than return to court, the above conclusions are the court’s view on the matter.”¹⁰⁶

This Court should hold that the trial court was wrong in deputizing the County to determine the width of the road abandoned and dedicated to the public. Such factual findings are judicial functions, and not properly delegated to a county legislative body. This Court should reverse the order delegating the road width determination to Summit County.

C. This Court Should Remand with Instructions to Fix the Road Width at 18 Feet in Accordance with the Trial Court’s Findings.

The trial court recognized that its decision to delegate the road width determination to Summit County might be reversed, and made express findings to be used in that event.

The trial court stated:

58. . . . Again, the cases seem to say it is the court’s responsibility but to this court the statute seems to say otherwise. If the court is responsible to declare a width the court believes the evidence and law allow the court to declare the road should be 18 feet in width. . . .

¹⁰⁴*Jeremy v. Bertagnole*, 101 Utah 1, 9, 116 P.2d 420, 424 (1941).

¹⁰⁵R-Haynes 1473.

¹⁰⁶R-Haynes 1474.

59. . . . The court defers to the county but if the court is wrong, rather than return to court, the above conclusions are the court's view on the matter.¹⁰⁷

As explained above, this Court should hold that it was the trial court's responsibility to declare the width of the road. Consistent with the trial court's express finding, this Court should remand to the trial court for entry of judgment fixing the width at 18 feet.

II: HAYNES WAS ENTITLED TO A DECREE QUIETING TITLE AGAINST ALL UNRECORDED ACCESS CLAIMS BEYOND THOSE EXPRESSLY FOUND BY THE TRIAL COURT.

Paragraph 16 and other paragraphs of Haynes's Verified Complaint sought to quiet title in Haynes against all claims of access by Jacobs. The trial court denied that claim as to the Bench Road and part of the East Fork Road, but refused to expressly decree that Jacobs had no other rights over the Haynes property. One road at issue is the road to Red Hole. Some witnesses testified to using the road, but the trial court did not find any public or prescriptive rights over that road. The trial court described the road, which it labeled as the West Fork Road, as one "about which there seems little dispute."¹⁰⁸ The trial court did not, however, determine that any party had obtained prescriptive or other rights to use that road.

Where Haynes proved title to its property, Haynes was entitled to a decree quieting title in Haynes subject only to easements of record and the specific roads the trial court found to exist.

Haynes sought the following relief:

¹⁰⁷R-Haynes 1473-1474.

¹⁰⁸R-Haynes 1408.

B. A declaratory judgment under Count II hereof adjudging that plaintiff is the owner and holder of the legal, equitable and record title to all of the Haynes Property free and clear of any and all right, title and interest of Garff and/or Jacob therein and thereto, except as expressly provided by the Agreement, Exhibit “D” attached hereto.

C. A declaratory judgment under Count III hereof adjudging (a) that all of the roadways located upon the Haynes Property and the Jacob/Christensen property including the portions thereof which the County has heretofore erroneously designated as public and/or county roads, are in fact private and have never been and are not now public and/or county roads . .

. .¹⁰⁹

Jacobs stipulated that Haynes had record title to the property.¹¹⁰ “[O]nce [a] quiet title plaintiff makes a prima facie showing of ownership, defendant has the burden of going forward with proof of his challenge to plaintiff’s title.”¹¹¹ Therefore, Jacobs had the burden of proof to establish any unrecorded easements that it claimed may exist over the Haynes property.

The trial court found a public road existed over the Bench Road and some portions of the East Fork Road, but did not find any other public roads over the Haynes property. Haynes acknowledged a prescriptive easement over the Bench Road; Jacobs did not prove any other prescriptive easements. Haynes was therefore entitled to a quiet title decree

¹⁰⁹R-Haynes 8. *See also* Verified Complaint ¶¶16, 20 (R-Haynes 4, 5).

¹¹⁰Transcript v. I, 9-10.

¹¹¹*Baxter v. Utah Dep’t of Transp.*, 783 P.2d 1045, 1055 (Utah Ct. App. 1989), *citing Gatrell v. Salt Lake County*, 106 Utah 409, 411, 149 P.2d 827, 827 (1944). *See also Marchant v. Park City*, 771 P.2d 677, 682 (Utah Ct. App. 1989), *aff’d*, 788 P.2d 520, 524 (Utah 1990).

determining that Jacobs do not have any rights of access over the Haynes property other than those already of record or specifically found by the trial court. The case should be remanded with directions to enter a decree in favor of Haynes determining that the parties to this action have no rights over or on the Haynes property other than rights of record and those specifically found by the trial court.

**III: THE TRIAL COURT ON REMAND SHOULD DETERMINE
THE ROAD WIDTH BASED ON THE WIDTH AND NATURE
OF USE FROM 1880 TO 1896.**

Haynes argues above in point I.C. that this Court should remand with directions to declare the road width is 18 feet. If, however, this Court determines to remand this case for findings as to road width, the Court should give guidance to the trial court by clarifying that the width of the roads must be determined in light of the use at the time of dedication, not contemplated future uses. The trial court found the roads were dedicated to the public by public use from 1880 to 1896,¹¹² so the width should be such as would accommodate the uses made of the road from 1880 to 1896. Determining road width based on historical uses is required by Utah decisions and is compelled by constitutional considerations. The law relating to road width was disputed before the trial court,¹¹³ so clarification of the law for the benefit of the trial court on remand will promote judicial efficiency.¹¹⁴

¹¹²R-Haynes 1459, ¶ 42.

¹¹³See, e.g., R-Haynes 1469 ¶ 54.

¹¹⁴*Armed Forces Ins. Exch. v. Harrison*, 2003 UT 14, ¶ 38, 70 P.3d 35, 46.

Utah Code section 72-5-104(1) provides that a road can become “dedicated and abandoned” to the public by ten years continuous public use. That law must be interpreted, however, to avoid conflict with the private property rights guaranteed by both the Utah and United States constitutions.¹¹⁵ Section 22 of Article I of the Utah Constitution declares: “Private property shall not be taken or damaged for public use without just compensation.” The Fifth Amendment to the United States Constitution similarly states: “nor shall private property be taken for public use without just compensation.” The only interpretation of section 72-5-104(1) consistent with these constitutional protections is that a landowner may, through inaction, dedicate or abandon his or her property, but the public cannot take that property without compensation. A Louisiana court recognized this distinction, holding that the public authority could not take a road unless the landowner’s knowing acquiescence in public use and maintenance “amounts to a tacit dedication by the landowner – a giving by the landowner rather than a taking by the public authority.”¹¹⁶ The dedication statute is really only a rule of evidence that defines what constitutes abandonment or dedication to the public – it cannot give the public a right to take property without compensation.

Consistent with the concept that a landowner can abandon but the public cannot take, the scope and width of the easement must be limited to that which the landowner abandoned. While a landowner might voice no objection to public use of a narrow path and thereby

¹¹⁵*Thurnwald v. A.E.*, 2007 UT 38, ¶ 4, 163 P.3d 623, 625; *Uzelac v. Thurgood (In re Estate of S.T.T.)*, 2006 UT 46, ¶ 26, 144 P.3d 1083, 1091.

¹¹⁶*Vaughn v. Williams*, 345 So. 2d 1195, 1199 (La. Ct. App. 1977).

dedicate that path to the public, the landowner might have made strenuous objection to use of a wider path. The public cannot take a wider path than the landowner abandoned.

Utah cases are generally consistent with this principle. The law was summarized by the United States Court of Appeals for the Tenth Circuit as follows:

A right of way is not tantamount to fee simple ownership of a defined parcel of territory. Rather, it is an entitlement to use certain land in a particular way. To convert a two-track jeep trail into a graded dirt road, or a graded road into a paved one, alters the use, affects the servient estate, and may go beyond the scope of the right of way. See [*Sierra Club v.*] *Hodel*, 848 F.2d [1068] at 1083 [(10th Cir. 1988)] (“surely no Utah case would hold that a road which had always been two-lane with marked and established fence lines, could be widened to accommodate eight lanes of traffic”); *Jeremy v. Bertagnole*, 101 Utah 1, 116 P.2d 420, 424 (Utah 1941) (“the use to which the way has been put measures the extent of the right to use”; “[a] bridle path abandoned to the public may not be expanded, by court decree, into a boulevard”). This does not mean that no changes can ever be made, but that any improvements must be made in light of the traditional uses to which the right of way had been put, fixed as of October 21, 1976. *Hodel*, 848 F.2d at 1084.¹¹⁷

While “the width of a public road is determined according to what is reasonable and necessary under all the facts and circumstances,”¹¹⁸ that width can only be the width necessary to accommodate the historical use. Any more expansive width would result in an unconstitutional taking of private land without compensation.

The roads at issue are narrow, two-track paths. With the exception of the first two miles on the Haynes property which was recently improved and widened, the testimony at

¹¹⁷*S. Utah Wilderness Alliance v. BLM*, 425 F.3d 735, 747-748 (10th Cir. 2005).

¹¹⁸*Memcott v. Anderson*, 642 P.2d 750, 754 (Utah 1982) (citations omitted).

trial established the roads were 8 to 10 feet wide. The historical use has been primarily limited to agricultural purposes. The roads are already of adequate width for their historical purposes, and no widening of the roads would be justified. Jacobs were able to use the roads in the current condition for large cement trucks, dump trucks, satellite transmission semi truck and trailer, and other large vehicles.¹¹⁹ There was no testimony showing that any greater width (than the current 8-10 feet) was needed.

Jacob argued below, however, that the width should meet current development standards for a subdivision.¹²⁰ This Court should clarify that the width of the road is limited to that necessary to accommodate historical use from 1880 to 1896.

IV: THE HISTORICAL RECORDS DID NOT PROVIDE CLEAR AND CONVINCING EVIDENCE OF TEN YEARS PUBLIC USE OF THE ROADS.

A. *The Controlling Evidence Was Documentary and Not Disputed; this Court Should Therefore Make Its Own Determination as to the Legal Effect of the Evidence.*

The trial court found a public road was created by use of the roads from 1880 to 1896.¹²¹ Obviously, there were no witnesses who could testify from personal knowledge about that period, and the proof was thus primarily from documents.¹²² This Court is in as

¹¹⁹E.g., transcript vol. I, 188-220.

¹²⁰E.g., R-Haynes 1485-1487.

¹²¹R-Haynes 1459.

¹²²R-Haynes 1441.

good a position as the trial court to interpret those documents, and may review the facts de novo.¹²³

This is consistent with the observation of the trial court: “It does not appear as if the facts are in great dispute, but the legal consequences of those facts is where this dispute is centered.”¹²⁴

The evidence regarding use of the Bench Road is marshaled as follows; the following subpoints show this evidence did not constitute clear and convincing evidence of continuous public use for ten years:

Evidence that roads and physical signs of use existed.

1875: The road appeared on maps and is described in survey notes beginning in 1875. Exhibits 101-105, 108-109; Transcript vol. I, 59-68. The road is in substantially the same location as at present. Exhibit 296.

1893: A vacant cabin is reflected in the survey notes from October 1893. The cabin is located at point K.¹²⁵ Transcript vol. I, 61.

¹²³*Jones v. Johnson*, 761 P.2d 37, 38 (Utah Ct. App. 1988); *Bench v. Bechtel Civil & Minerals, Inc.*, 758 P.2d 460, 461 (Utah Ct. App. 1988).

¹²⁴R-Haynes 1403. *See also* R-Haynes 1440: “The court finds and concludes in this case there are very, very few credibility determinations at issue of any importance. Almost all the witnesses are found to be honest and credible and they saw events as they believed them to be from their perspective. Almost none of the court’s decisions are governed by credibility determinations.”

¹²⁵All references to a physical point and letter refer to the Exhibit 117 map, a copy of which appears in the appendix to this brief.

Exhibit 105, the field notes of an 1893 survey, notes a corral at point D. Transcript vol. I, 61. The survey notes also indicate a wagon road and old sawmill site at point A. Transcript vol. I, 64.

1894: The 1894 maps show the Bench Road existed, the Middle Fork Road existed to the point where it enters section 33 near Boyer Lake, and the East Fork Road existed from the fork on the Bench Road to the middle of section 8. Exhibits 110-112; transcript vol. I, 67-70.

A cabin existed at point K. Exhibit 111; transcript vol. I, 69.

An old sawmill existed at point A, and a corral existed at point D. Exhibit 112; transcript vol. I, 70.

The Randall cabin existed at point F. Exhibit 112, transcript vol. I, 71.

A meadow or irrigated field existed at point G. Exhibit 112, transcript vol. I, 71.

An old sawmill existed at point I. Exhibit 112, transcript vol. I, 71.

Evidence of use.

1863: L. L. Randall owned and operated a sawmill “about two miles up from Pine Cliff, in the East Fork of Calk [*sic*] Creek.” Exhibit 137, control number JC 2366; transcript vol. I, 93. Merrett T. Staley also operated a sawmill. *Id.* The Randall sawmill was built in 1863, and the “lumber was used extensively in the construction and enlarging of Fort Bridger, and homes in Coalville.” Exhibit 142; transcript vol. I, 96-97. The sawmill was operated for many years. Exhibit 158, control number JC 2587.

1865: Exhibit 131 reflects that on September 4, 1865, the county court granted a petition of L.L. Randall, Jacob Huffman, and others “to control saw timber on Chalk creek kanyon [sic],” and that “[t]he citizens shall have the privilege to haul logs to said mill and have them sawed on shares of one half.” Transcript vol. I, 90-91.

1883-1901: William Staley settled on a homestead at point E in July 1883 and resided there until at least 1901 when a patent was issued. Exhibit 119; transcript vol. I, 77-78.

1883-1903: Leonard Randall settled on a homestead at point F in July 1882 and resided there until at least 1903 when a patent was issued. Exhibit 120; transcript vol. I, 80-82.

1884: Exhibit 129 shows that water was being put to beneficial use in 1884, with a point of diversion near the Red Hole area. Transcript vol. I, 89.

1893: George Huff diverted water for a ditch in 1893. Exhibit 130; Transcript vol. I, 90.

1894-1898: John Clark maintained a dipping corral at point H; the dipping corral existed in 1894. Exhibits 105, 112; transcript vol. I, 63, 71-72. A newspaper article on August 8, 1895 stated that 40,000 sheep had been dipped at the dipping corral and that Clark expected to dip 100,000 sheep. Exhibit 150; transcript vol. I, 102. A newspaper article October 13, 1896, stated about over 100,000 sheep had been dipped that season. Exhibit 151; transcript vol. I, 102-103. A newspaper article dated June 22, 1898, stated that dipping would commence at Clark’s dipping corral on or about the first of July. Exhibit 152; transcript vol. I, 103.

1895-1901: George Huff settled on a homestead at point B in December 1893, and resided there until at least 1901 when a patent was issued. Exhibit 121; Transcript vol. I, 83.

1896-1903: Charles Saxton settled on a homestead at point C in July 1896 and resided there until at least October 1903 when a patent was issued. Exhibit 122; Transcript vol. I, 84.

1913: The Summit County commission authorized the expenditure of county funds for improvement of the Sage Brush Flat road in Chalk Creek, which the trial court found to be the Bench Road as described in this litigation. Exhibit 244; transcript vol. III, 561; R-Haynes 1419 ¶ 41.

Testimony not specific as to date

Sam Banner hunted bear and other animals in the Red Hole area. Exhibit 139; transcript vol. I, 94-96.

Sheep men and sawmill people would attend functions at the Upton ward. Exhibit 142, control number JC 2443; transcript vol. I, 97.

Mrytle Rigby, born December 3, 1888, homesteaded in the Chalk Creek area in 1916. A history written in 1983 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 to the white-top surrey, and everyone was off to Blue Lake or Bear River to fish." Exhibit 160 at JC 1649; transcript vol. I, 109.

The minutes of the Summit County commissioners for September 2, 1947, state that the fish and game warden “asked that an investigation be made as to the status of the Road through Howard Haynes Property, and leading to Blue Lake, as Mr. Haynes had closed the road to the public and the same had been used generally by the public for a long time.” Exhibit 133; transcript vol. I, 92. The minutes state the matter will be taken up with the county attorney, but there is no indication an investigation occurred or what the result might have been of any investigation. *Id.*

B. Private Property Rights Are Constitutionally Protected and Can Be Overcome Only by Clear and Convincing Evidence.

The trial court here stated, “This case is a very, very difficult case for the court and it is not a clear cut case at all.”¹²⁶ For the reasons expressed below, Haynes respectfully submit that the evidence in this case was not clear and convincing, and did not establish continuous public use for the required ten years.

Private property rights have constitutional protection. As stated above, Section 22 of Article I of the Utah Constitution declares: “Private property shall not be taken or damaged for public use without just compensation.” The Fifth Amendment to the United States Constitution similarly states: “nor shall private property be taken for public use without just compensation.”

Consistent with the constitutional prohibition of taking private property without just compensation, “a party seeking to establish dedication and abandonment under this statute

¹²⁶R-Haynes 1439.

[Utah Code § 72-5-104] bears the burden of doing so by clear and convincing evidence.”¹²⁷

Additionally, the trial court is required to view the evidence in these cases in light of the “presumption” that exists “in favor of the property owner.”¹²⁸

The reason for requiring this higher standard of proof in public road cases is clear. As explained by the Utah Supreme Court, “[t]he law does not lightly allow the transfer of property from private to public use. . . . This higher standard of proof is demanded since the ownership of property should be granted a high degree of sanctity and respect.”¹²⁹ In an earlier public roads case, the Utah Supreme Court similarly stressed that “[w]here individual property rights are at stake, we must not treat such rights lightly.”¹³⁰

Haynes respectfully submit that claims based on conjecture and inference from ancient records cannot meet the standard of clear and convincing evidence. A journal entry indicating, for example, that a person ended up at Blue Lake does not clearly and convincingly establish that the person followed a particular primitive, rough road to get there. This is particularly true if the individual was likely riding a horse or hiking such that travel across open meadows off the road could have occurred. The court in *Southern Utah*

¹²⁷*Wasatch County v. Okelberry*, 2008 UT 10, ¶ 9, 179 P.3d 768, 773 (citations omitted).

¹²⁸*Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1099 (Utah 1995) (quoting *Leo M. Bertagnole, Inc. v. Pine Meadow Ranches*, 639 P.2d 211, 213 (Utah 1981)).

¹²⁹*Draper City*, 888 P.2d at 1099.

¹³⁰*Petersen v. Combe*, 20 Utah 2d 376, 438 P.2d 545, 546 (1968).

*Wilderness Alliance v. BLM*¹³¹ noted that “litigants are driven to the historical archives for documentation of matters no one had reason to document at the time.”¹³² These records simply do not have the level of detail on each element of a dedication claim that is constitutionally required to justify impairing private property rights.

C. *Occasional Limited Use by Homesteaders, Hunters, and Other Such Persons Does Not Create a Public Road.*

Relying on the Colorado case of *Lee v. Masner*,¹³³ the trial court held that use of the road by even one homesteader is sufficient to make the road public. *Lee*, however, is inconsistent with Utah case authority.

Utah “case law has distinguished between use of a road by owners of adjoining property and by the general public.”¹³⁴ Homestead squatters, while not yet full owners of property, nonetheless have possessory rights that distinguish them from the general public. “[A] party settling upon unsurveyed government land who in good faith complies with the statutory requirements, is entitled, as against subsequent settlers to pre-empt the land[.]”¹³⁵ A memorandum decision of this Court confirms that use by a homesteader does not create a public road:

¹³¹425 F.3d 735 (10th Cir. 2005).

¹³²*Id.* at 742.

¹³³45 P.3d 794 (Colo. Ct. App. 2001).

¹³⁴*Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1099 (Utah 1995).

¹³⁵*Rio Grande Western Railway Co. v. Telluride Power Transmission Co.*, 23 Utah 22, 27, 63 P. 995, 1000 (1900).

Although the section twelve road was used by a family that homesteaded the property long ago, and the section eighteen road appeared on various maps, this evidence does not meet the burden required for creating a public highway, whether as a “county road” or otherwise.¹³⁶

Lee also varies from Utah law in its claim that use by one person is sufficient to create a public road.¹³⁷ For example, the Utah Supreme Court affirmed that use by “occasional squirrel hunters, fishermen, and the like” and “intermittent private use of the quarry leases and their employers, and by an occasional hunter or fisherman” was not sufficient to create a public road.¹³⁸ Similarly, faced with evidence that a way of travel had been used by a nursery company and its customers, the court held: “While we do not attempt to here define what evidence is necessary to establish a highway by virtue of an acceptance from the public domain or by dedication from the owner, we agree with the trial court that the evidence of such limited use for such a small section is not sufficient.”¹³⁹ In contrast, the court affirmed a public road where “the road was unquestionably used very extensively by the general public for general purposes,” and was used for trailing sheep “not by a few persons, but by many persons, and it involved more than the mere driving of animals on the road.”¹⁴⁰ The court

¹³⁶*Koller v. Godfrey*, 1999 UT App 346, ¶ 6.

¹³⁷45 P.2d at 795.

¹³⁸*Thomson v. Condas*, 27 Utah 2d 129, 132, 493 P.2d 639, 641 (1972).

¹³⁹*Oregon S. L. R.R. v. Murray City*, 2 Utah 2d 427, 435, 277 P.2d 798, 803 (1954).

¹⁴⁰*Lindsay Land & Live Stock Co. v. Churnos*, 75 Utah 384, 391, 285 P. 646, 648 (1929).

further commented that “[i]f the claim rested alone upon the use of the road for sawmill purposes, or for mining purposes, or for the trailing of sheep, the question would be more difficult,”¹⁴¹ thus indicating those uses alone would likely not be sufficient.

Other states similarly require that the use be significant. “Nevertheless, the public use necessary to constitute acceptance of the offer to dedicate under [R.S. 2477] cannot be a use that is merely occasional and not substantial.”¹⁴² Casual and desultory use is not sufficient.¹⁴³ Likewise inadequate is evidence of infrequent and sporadic use by sightseers, hunters, and trappers of a dead-end road running into wild, unenclosed, or uncultivated land.¹⁴⁴ The mere fact that a road or trail existed and was traveled by an individual “perhaps once a year, twice a year, three times, not over that; maybe some years not at all” will not create a public road.¹⁴⁵

It is therefore clear under Utah law that while the public need not consist of “a great many persons,”¹⁴⁶ the use does need to be by significantly more than one and needs to be more than infrequent use. The infrequent, occasional use described in this case does not meet the requirement of continuous public use.

¹⁴¹*Id.*

¹⁴²*Luchetti v. Bandler*, 108 N.M. 682, 684 (N.M. Ct. App. 1989).

¹⁴³*Kirk v. Schultz*, 63 Idaho 278, 284, 119 P.2d 266, 268 (1941).

¹⁴⁴*Hamerly v. Denton*, 359 P.2d 121, 125 (Alaska 1961).

¹⁴⁵*Moulton v. Irish*, 218 P. 1053, 1054 (Mont. 1923).

¹⁴⁶*Wasatch County v. Okelberry*, 2008 UT 10, ¶ 10, 179 P.3d 768, 773.

D. The Evidence Did Not Establish Continuous Public Use of the East Fork Road.

While Haynes do not agree with the trial court's decision about the Bench Road, Haynes must acknowledge there is some evidence that members of the public used that road. The sufficiency of that evidence is addressed below. With respect to the East Fork Road, however, there is really no competent evidence, let alone clear and convincing evidence, of public use for the requisite ten continuous years, prior to 1896 or at any time thereafter.

The evidence of use on the East Fork Road is marshaled as follows:

Exhibit 105, the field notes of an 1893 survey, notes a corral at point D.¹⁴⁷ The survey notes also indicate a wagon road and old sawmill site at point A.¹⁴⁸

Exhibit 112, an 1894 map, has a reference to an old sawmill at point A, and a corral at point D.¹⁴⁹ The map also shows a road that forks off the Bench Road and continues to almost the middle of section 8.

Exhibit 121 is a homestead application filed by George Huff in 1895. The homestead is at point B.¹⁵⁰ The application states Huff built a house in December 1893, and established residence in November 1894. The affidavit accompanying the application states Huff resided

¹⁴⁷Transcript vol. I, 61.

¹⁴⁸Transcript vol. I, 64.

¹⁴⁹Transcript vol. I, 70.

¹⁵⁰Transcript vol. I, 83.

there continuously until at least January 12, 1901 except for a four month absence in 1987.¹⁵¹

A patent was issued in June 1901.¹⁵²

Exhibit 122 is the homestead application filed by Charles Saxton. The homestead is at point C.¹⁵³ The application states Saxton settled on the homestead in July 1896 and resided there with only a few absences until January 1903,¹⁵⁴ and a patent was issued in October 1903.¹⁵⁵

Exhibit 130 is a record of a claim of water diversion, showing George Huff diverted water for a ditch in 1893.¹⁵⁶

The minutes of the Summit County commissioners for September 2, 1947, state that the fish and game warden “asked that an investigation be made as to the status of the Road through Howard Haynes Property, and leading to Blue Lake, as Mr. Haynes had closed the road to the public and the same had been used generally by the public for a long time.”¹⁵⁷ The minutes state the matter will be taken up with the county attorney, but there is no indication an investigation occurred or what the result might have been of any

¹⁵¹Exhibit 121, control number JC 2347.

¹⁵²*Id.*, control number JC 2351.

¹⁵³Transcript vol. I, 84.

¹⁵⁴Exhibit 122, control number JC 2327.

¹⁵⁵*Id.* control number JC 2333.

¹⁵⁶Transcript vol. I, 90.

¹⁵⁷Exhibit 133; transcript vol. I, 92.

investigation.¹⁵⁸ More critically, there is no evidence that the road at issue was the East Fork Road – the trial court here found that there was no public portion of the road leading to Blue Lake.¹⁵⁹

This evidence, at best, shows there was once a sawmill, but gives no indication of the years of use or even who used it. It also shows homesteaders present, but they were not members of the public as explained above. There was a corral, but no evidence of when or by whom it was used. There was a road, but no evidence of who used it or when. The evidence was not clear and convincing of continuous use by the public for any ten year period. This Court should reverse the trial court's decision that a portion of the East Fork Road is a public road.

E. Use of Wild, Uncultivated, and Unenclosed Land Is Presumed Permissive.

Haynes acknowledges there is some evidence that members of the public traveled over the Bench Road and across the Jacobs property en route to Boyer Lake (known then as one of the Blue Lakes), but assert that such use should be considered permissive and not of the character that results in a permanent right for all members of the public to use the road. In the late 1800's time period addressed by much of the evidence, half of the land at issue (all odd-numbered sections) was owned by the railroad and not subject to the RS 2477¹⁶⁰

¹⁵⁸*Id.*

¹⁵⁹R-Haynes 1451-1452 ¶ 29.

¹⁶⁰Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253 codified).at 43 U.S.C. § 932, repealed by Federal Land Policy Management Act of 1976 (FLPMA), Pub.L. No. 94-579 § 706(a), 90 Stat. 2743 (commonly called R.S. 2477).

statutory invitation to create a public road. For such land, permissive use of the land would not create a public road.¹⁶¹ Cases from several jurisdictions establish that “there is no presumption of adversity where the land over which an easement is sought is wild, uncultivated or unenclosed because of the theory of neighborly accommodation and problems of notice.”¹⁶²

A recent Maine decision acknowledged a general rule that open and continuous use of a way is presumed to be adverse, but then stated: “However, application of such a presumption to a public, prescriptive easement claim for recreational uses is inappropriate when that claim applies to open fields or woodlands and the ways traversing them.”¹⁶³

Utah law is consistent with this principle. In an early decision the court stated:

But if the land of which that covered by the road is a part is uninclosed, and not appropriated to any special use by the owner, the fact that the public travels over it occasionally, as the custom may be to cross vacant and unoccupied lands without objection from the owner, does not authorize any inference of an intention to dedicate.¹⁶⁴

¹⁶¹*Utah County v. Butler*, 2008 UT 12, ¶ 19, 179 P.3d 775, 782.

¹⁶²7 Thompson on Real Property § 60.03(b)(6)(viii) at p. 519 (2nd Thomas ed. 2006). *Accord Wehl v. Wagner*, 569 N.E.2d 297, 299 (Ill Ct. App. 1991); *Corruthers v. King*, 363 S.W.2d 413, 414 (Ark. 1963).

¹⁶³*Lyons v. Baptist Sch. of Christian Training*, 804 A.2d 364, 370 (Me. 2002).

¹⁶⁴*Wilson v. Hull*, 7 Utah 90, 92, 24 P. 799, 800 (Utah 1890).

Another early case, although addressing an easement by necessity, recognized that the rules applicable to open land must be different than those governing established communities:

This community, as disclosed by the evidence, during the years involved, was in process of settlement, and the whole country was but recently largely open, and the traveler free to follow almost any course that promised to bring him most easily to his journey's end. Here we find wheel tracks in almost any direction without system, and without regard to section lines or property rights. When, in a community so situated, the time arrives for the fencing of fields and the establishing of permanent roads and rights of way, the strict application of this rule would, in many cases, produce fantastic results quite inconsistent with justice.¹⁶⁵

This is consistent with the testimony presented in this case. For example, Fern Boyer, born in 1928 and 80 years old at the time of trial,¹⁶⁶ testified: "It was just like wide open country. There were no gates, no fences. Everyone seemed to enjoy everyone else and do whatever they wanted."¹⁶⁷ The evidence showed a general attitude that the open lands could be freely traversed without seeking permission. Under these circumstances, it would be improper to apply any presumption that the use was adverse. If there were any such presumption, this Court should hold the presumption was rebutted by Boyers' own evidence that "everyone" freely traversed over property of others without ever seeking permission.

¹⁶⁵*Morris v. Blunt*, 49 Utah 243, 257, 161 P. 1127, 1133 (1916).

¹⁶⁶Transcript vol. II, 415.

¹⁶⁷Transcript vol. II, 431.

Because the use was all permissive and not adverse, by permitted the use the owner (the railroad) did not thereby abandon the road to the public.¹⁶⁸

F. The Evidence Did Not Establish Ten Years Continuous Public Use of the Bench Road.

The trial court found there was continuous public use from 1880 to 1896. There was no specific evidence of use in 1880; the first date after that was 1883, when William Staley and Leonard Randall settled their homesteads. George Huff settled his homestead in 1895, and Charles Saxton in 1896. The last of these four to receive a patent was Charles Saxton, in 1903, twenty years after the first of the group to settle. But, as set forth above, homesteaders are not members of the public. And, the initial visit by each homesteader to locate his homestead site is the type of casual, sporadic use that cannot ripen into a public right of way for all time.

There is evidence that one sawmill operated on the Bench Road, but no evidence of how long it operated – only a claim that it operated “for many years.” The sawmill was apparently constructed by permission of the county court, so the use was by permission. Use of the road by the business invitees of the sawmill is likewise permissive and does not count as use by members of the public.¹⁶⁹ More importantly, evidence that a sawmill existed at one point on the road is not clear and convincing evidence that the entire road was used – it only might show use up to the point of the sawmill.

¹⁶⁸*Utah County v. Butler*, 2008 UT 12, ¶ 19, 179 P.3d 775, 782.

¹⁶⁹*See Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1099 (Utah 1995); *Luevano v. Maestas*, 874 P.2d 788, 793 (N.M. Ct. App. 1994).

As with sawmills, evidence that John Clark maintained a dipping corral is not evidence of public use of the roads. There is no evidence that the sheep were driven along the roads, and even if they were, the use by a business invitee is not use by the public.

There is evidence that sheepmen occasionally went to Upton or to Peter's Park, and evidence that townspeople occasionally went to the Blue Lakes. There is no evidence, however, as to exactly when or how often any of this happened. This is not clear and convincing evidence of continuous public use.

Haynes acknowledged that roads existed on the property. The mere existence of roads, however, does not give rise to an inference that the roads were used by members of the public.¹⁷⁰ The travelers that created the roads could have been adjoining landowners or others with documentary or prescriptive rights.¹⁷¹

In addition, as argued above, this Court should hold that all use of the road in this wild, unenclosed area was presumed permissive. Such a presumption is consistent with the evidence that everyone freely went wherever they wanted. The law should not presume that such wanderings create public roads.

This Court should hold that the evidence was not clear and convincing that the railroad (the owner of half the sections of land during the 1880 to 1896 time frame) abandoned the road to the public. There was no clear and convincing evidence of continuous

¹⁷⁰*Koller v. Godfrey*, 1999 UT App 346, ¶ 6 (evidence that a road appeared on various maps “does not meet the burden required for creating a public highway”).

¹⁷¹*See Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1099 (Utah 1995).

public use for any ten year period. This Court should hold that the Bench Road was not a public road.

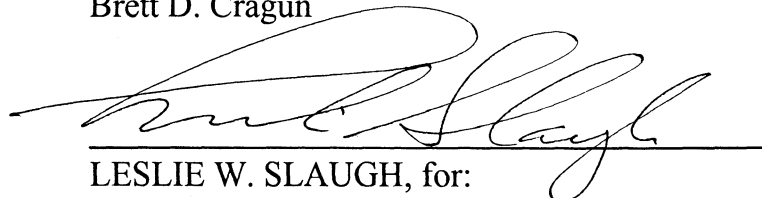
CONCLUSION

This Court should hold there was no clear and convincing evidence of ten years continuous public use of the East Fork Road, and hold that no portion of the East Fork Road is public. The Court should hold that because the Bench Road was in wide, unenclosed territory, the use of the road by members of the public was presumed permissive and that use did not effect a dedication and abandonment of the road to the public.

With respect to any segment of the road ultimately determined to be public, the Court should hold that the width of the road must be determined by a court; this Court should reverse the delegation of that decision to the County. The Court should direct the entry of judgment determining the road width is 18 feet in accordance with the trial court's findings. Alternatively, if the matter is remanded for further findings, this Court should clarify that the width should be such as will accommodate the use at the time the road became public and not for contemplated future uses beyond the historic use.

DATED this 3rd day of June, 2009.

Ray G. Martineau
Anthony R. Martineau
Brett D. Cragun

A handwritten signature in black ink, appearing to read "Leslie W. Slaugh", is written over a horizontal line.

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

MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing were mailed to each of the following, postage prepaid, this 24th day of June, 2009.

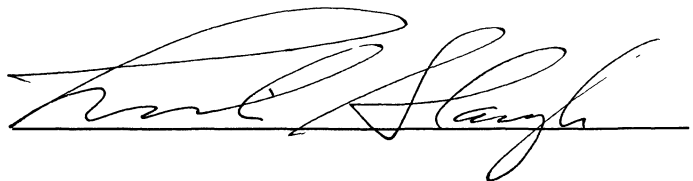
Jonathan O. Hafen
Bryan S. Johansen
PARR BROWN GEE & LOVELESS
185 South State Street STE 800
Salt Lake City, UT 84111

Brent A. Bohman
PO Box 120
Morgan, UT 84050

Ray G. Martineau
3098 Highland Drive STE 450
Salt Lake City, UT 84106

Stephen G. Swendimen
Julie I. Valdes
Norman K. Johnson
Assistant Attorneys General
1594 West North Temple STE 300
Salt Lake City, UT 84116

David L. Thomas
Jami R. Brackin
60 North Main Street
PO Box 128
Coalville, UT 84017

A handwritten signature in black ink, appearing to read "Karl H. Hough", written over a horizontal line.

APPENDIX A

Memorandum Decision, March 21, 2008, R-Haynes 1393-1477

001389

HAYNES LAND & LIVESTOCK
COMPANY, et al.,
Counterclaim Defendants.

TRIPLE H. RANCH, LC,
Plaintiff,

vs.

FERN J. BOYER et al.,
Defendants and
Third-Party Plaintiffs,

vs.

HAYNES LAND & LIVESTOCK
COMPANY, et al.
Third-Party Defendants.

I hereby certify that a true and correct copy of the **POST-TRIAL BRIEF OF JACOB FAMILY CHALK CREEK, LLC, CATHERINE B. CHRISTENSEN, L.L.C. AND BRIAN**

GARFF was served via hand-delivery on the 11th day of March 2008, to the following:

Ray G. Martineau, Esq.
Anthony R. Martineau, Esq.
Brett D. Cragun, Esq.
3098 Highland Drive, Suite 450
Salt Lake City, UT 84106
*Attorneys for Haynes Land & Livestock
Company, Triple H Ranch, LC, Chalk
Creek-Hoytsville Water Users*

Brent A. Bohman, Esq.
157 North Commercial Street, Suite 3
P.O. Box 120
Morgan, UT 84050
*Attorney for Fern J. Boyer, Gerald G.
Boyer, Gregory J. Boyer, J. S. Hansen, and
Alfred C. Blonquist*

David L. Thomas, Esq.
Jami R. Brackin, Esq.
60 North Main
P.O. Box 128
Coalville, UT 84017
Attorneys for Summit County

Stephen G. Schwendiman, Esq.
Norman K. Johnson, Esq.
Julie I. Valdes, Esq.
Assistant Attorneys General
1594 West North Temple, Suite 300
Salt Lake City, UT 84116
Attorneys for the State of Utah

Leslie W. Slauch, Esq.
HOWARD LEWIS & PETERSEN
120 East 300 North
Provo, UT 84606
*Attorney for Haynes Land & Livestock
Company, Triple H Ranch, LC, Chalk
Creek-Hoytsville Water Users*

and was served via first class, U.S. Mail, postage prepaid, on the 12th day of March 2008, to the following:

Timothy W. Blackburn, Esq.
Mara A. Brown, Esq.
VANCOTT, BAGLEY, CORNWALL & MCCARTHY
2404 Washington Boulevard
Ogden, UT 84401
Attorneys for B.A. Bingham & Sons, LLC

Paul R. Poulsen, Esq.
TESCH LAW OFFICES, PC
314 Main Street, No. 200
P.O. Box 3390
Park City, UT 84060
Attorney for David B. Williams

DATED this 12th day of March 2008.

PARR WADDOUPS BROWN GEE & LOVELESS

By: Tobi D. Potestio
Tobi D. Potestio

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

HAYNES LAND & LIVESTOCK
COMPANY,

Plaintiff,

vs.

JACOB FAMILY CHALK CREEK,
LIMITED, et.al.

Defendant.

JACOB FAMILY CHALK CREEK,
LIMITED, et.al.

Counterclaim Plaintiffs,

vs.

HAYNES LAND & LIVESTOCK
COMPANY,

Counterclaim Defendants

TRIPLE H RANCH LC,

Plaintiff,

vs.

FERN BOYER, et.al.

Defendants and Third Party
Plaintiffs

vs.

HAYNES LAND & LIVESTOCK
COMPANY,

Third Party Defendants.

MEMORANDUM DECISION

Case No. 980600244

Judge BRUCE C. LUBECK

DATE: March 21, 2008

The above matter came before the court for a bench trial on March 4, 5, 6, 7, and 11, 2008.

Haynes, Triple H, and Chalk Creek-Hoytsville Water Users were present with and through Ray G. Martineau and Leslie Slaugh; Jacob-Christensen and Garff (Jacob) were present through Clark Waddoups, Tobi D. Potestio and Jonathan O. Hafen; the Boyer parties (Fern Boyer, Gerald Boyer, Gregory Boyer and Alfred Blonquist, Trustee) were present with and through Brent Bohman; Summit County was present through Jami R. Brackin; and the State of Utah was present through Steven G. Schwendiman. Paul R. Poulsen for David B. Williams gave notice on March 3, 2008, that Williams would not appear at or participate in the trial. Timothy W. Blackburn for Bingham and Sons also filed a notice of non-appearance on March 4, 2008.

A default certificate was entered April 18, 2006, against Stillman, the Halls, Helen Blonquist and Karel Snyder, who had written she has no property in Utah.

BACKGROUND

Haynes filed a complaint September 8, 1998. It sought declaratory judgment quieting title in plaintiff to property and sought an adjudication of the rights and duties between Haynes

and Jacob. The original complaint originally named as defendants Catherine Christensen, LLC and Brian Garff and Summit County. It also sought to enjoin defendants from interfering with plaintiff's property rights.

In briefest summary, it alleged Haynes and Jacob owned adjoining properties in an area of Summit County known as Chalk Creek, Jacob's property being west and south of plaintiff's property. Historically there has been a limited right of way across plaintiff's land to Jacob's land solely for agricultural and livestock purposes. In May 1984 the parties entered an agreement which resolved the nature of Jacob's rights concerning the easement and plaintiff's right to cross Jacob's property to maintain an irrigation ditch to convey water from Jacob's property to Haynes' property. As to Garff, Haynes asserted Garff had no right to passage over the Haynes property to reach a cabin or other improvements, nor did Jacob, as such passage was beyond the quit claim deed and agreement of 1984. As to Summit County, plaintiff asserts the county improperly designated a private roadway on Haynes' property as a public road.

Plaintiff seeks a declaration that Haynes owns its property, has an easement over Jacob's property to service the irrigation ditch, that the roadway across Haynes' property is not public and is solely for agricultural purposes and uses by Jacob, and the court should enjoin Summit County from issuing building permits

pending the outcome of the case.

On September 28, 1998, Summit County was dismissed by Haynes.

For reasons not shown by the file no action was taken until service of process much later and Jacob filed an answer and counterclaim on May 15, 2003. It denied the essential allegations and alleges Garff owns a cabin on the Jacob property and Garff and Jacob have the right to use a road crossing the Haynes property. The road crosses Haynes property from SR 133, the Chalk Creek Road, and extends southward to Jacob's property and has been designated since 1978 as a Class D County road. It is the only feasible means of access to the Jacob property and has been in use since at least the mid- to late 1800s.

Jacob first seeks a declaration that the road is a Class D County Road and is a public road and Haynes may not deny or restrict Jacob's use. Jacob also seeks a declaration that the road has been in existence since the 1800s, is commonly known as an RS 2477 road, in reference to an 1866 federal statute, repealed in 1976. The road was part of the public domain and the right of use may not be extinguished without proper state procedures for abandonment of a public road.

Jacob secondly seeks the alternate declaration the road is a public right of way.

Third, Jacob seeks a declaration of easement by necessity.

Jacob alleges that before 1938, the Haynes and Jacob properties were owned jointly by the Wright Brothers, and that Jacob bought the property in 1938 and an easement was not expressly reserved to cross Haynes property. There is therefore an implied grant of easement by necessity for access to the Jacob property.

Fourth, Jacob seeks a declaration that an easement was granted. This was granted February 3, 1939, and recorded, and it is subject to reasonable expansion when livestock grazing is not frequent and Jacob is entitled to enjoy the land for grazing, hunting, camping, and recreation, including construction of cabins to facilitate recreational use.

Fifth Jacob alternatively seeks a declaration of prescriptive easement, that Jacob uses the road to access its property, that has occurred for more than 20 years, the use has been open and visible and without permission of Haynes.

Sixth, Jacob alleges trespass, that Haynes has threatened to restrict Jacob's use and has locked gates. In 1997 Garff obtained a building permit to build a cabin on the Jacob property. Haynes then sought to restrict further approvals. Damages have followed because of plaintiff's conduct.

Seventh, Jacob alleges the complaint of plaintiff is in bad faith.

On June 4, 2003, Haynes replied to the counterclaim.

On August 27, 2003, Haynes moved to consolidate docket number 000600299 into this case. That case was entitled Triple H Ranch LC v Fern J. Boyer, Gerald G. Boyer, Gregory J. Boyer, Karel J. Snyder, H.S. Hansen, Helen Blonquist, Alfred C. Blonquist, Barbara Hall and Kevin Hall, defendants and third party plaintiffs vs. Haynes Land & Livestock, Lydia O. Stillman dba Stillman Seven, Jacob Family Chalk Creek, Limited, Catherine B. Christensen, LLC, B.A. Bingham & Sons LLC, Chalk Creek Hoytsville Water Users Corp, Summit County, and State of Utah Department of Fire, Forestry and State Lands, third party defendants. The court issued a ruling and order September 23, 2003, consolidating the cases as the motion was unopposed. The court asked that an order be prepared but it was not provided until April 11, 2005, when it was signed by the court. Based on stipulation in June 2005 a scheduling order was entered.

That complaint, now consolidated into this case, alleges Triple H has an undivided 11/36 interest in property between the Haynes and Jacob properties, Fern Boyer has 3/40, Gerald Boyer 3/40, Gregory Boyer 1/10, Karel Snyder 1/36, J.S. Hansen 1/6, Helen Blonquist has a claimed interest in the property, Helen Blonquist as trustee has a 1/6 interest, Alfred Blonquist has an undivided 1/12 interest, and defendants Barbara and Kevin Hall may claim an interest in property in this Chalk Creek area in the west half of the Northeast quarter and the northeast quarter of

the Northwest quarter of Section 34 Township 2 North Range 8 East, SL Base and Meridian, with exceptions. The complaint was under Title 78 Chapter 39 and seeks partition by sale for the common benefit of all parties who own that property. It further alleges the property involved consists of 5 non-contiguous parcels, no party has any easements, partition without sale is impossible, and plaintiff asks for a decree determining the respective rights of the parties to the property, that it be sold subject to exceptions, and that the proceeds be applied to costs and attorney fees and then distributed according to the interests of the parties in the property.

An amended answer and counterclaim was filed in July 2005 pursuant to stipulation. The amended answer and counterclaim adds as another counterclaim the named defendants in what was formerly docket no. 000600299. It contains the same basic causes of action but alleges against all defendants and seeks declaratory judgment (1) against all counterclaim defendants that the road is a public road from the 1800s and Class D county road since 1978 (2) that the road is an RS 2477 road as against all counterclaim defendants, (3) that Jacob has a prescriptive easement against all defendants except Summit County for purposes of, among other things, livestock grazing, hunting, fishing, camping, snowmobiling, picnicking, recreational enjoyment, and the construction and use of cabins, (4) that Jacob has an

easement by necessity against Haynes and the State because when the property was sold by Wright in about 1938 Jacob was given no express easement and Jacob has no other access and Jacob is landlocked without the easement. A conservation easement was granted to the State in 1999 on part of Haynes property and that easement was taken by the State subject to Jacob's right to use the road, (5) as against Haynes and the State that Jacob has been granted an express but restricted easement in 1939 to use the road for moving livestock and related equipment and the express easement is subject to reasonable expansion to accommodate reasonable use and enjoyment of the benefitted land as noted in the third cause of action above, and (6) trespass as against Haynes in that Jacob owns an interest in the land and Haynes is threatening and attempting to block access and is thus trespassing and Jacob and Garff have been damaged in an amount to be proven, and (7) Haynes is acting in bad faith by bringing its complaint and Jacob has had to defend against a frivolous suit.

On August 1, 2005, Bingham, one of the consolidated third party defendants filed an answer.

On August 4, 2005, Summit County filed an answer to the counterclaim.

Williams filed an answer August 15, 2005, as well as a cross claim. Jacob answered November 9, 2005.

The State filed an answer August 30, 2005, and Chalk Creek-Hoytsville Water Users filed an answer on September 15, 2005.

Other defendants filed various answers, some indicating no interest in the lawsuit. Hall filed a disclaimer April 6, 2006.

Jacob filed a motion for partial summary judgment on September 8, 2006, as the next pleading. The court heard arguments on that matter on March 19, 2007, after extensions were granted for delayed briefing, and issued a Ruling and Order denying the motion on the public road issue on March 29, 2007.

Since that time various discovery disputes have arisen and this trial date was scheduled.

On October 3, 2007, the undersigned judge and court staff accompanied counsel and various others on a day-long journey to the property at issue, crossing the Haynes and Jacob properties while counsel and others pointed out various sites. That "field trip" was not on the record though the court's clerk was present and made some minutes which are part of the file. The court, for

its own information and memory, took some photographs which it retains as an aid to recollection of the area. Those are not part of the record though numerous photographs taken by the parties were introduced and received at trial.

On January 15, 2008, the parties stipulated that the trial would proceed on the issues dealing with the parties' rights to use of the roadways, and to defer trial of any other issues dealing with partition of the Boyer property until after this trial.

On January 25, 2008, the court signed an order based on stipulation of the parties that Jacob Family Chalk Creek LLC be substituted as defendant, counterclaim plaintiff, and third party defendant in place of the previously named limited partnership.

The court on January 30, 2008, denied the request of Haynes and the State to postpone the trial awaiting Utah Supreme Court rulings. In fact the Utah Supreme Court issued the anticipated rulings dealing with public roads on February 12, 2008.

The court heard evidence, received exhibits, heard argument

of counsel, received pre-trial briefs, visited the site, received post-trial briefs, and is fully advised. The court took the matter under advisement.

It does not appear as if the facts are in great dispute, but the legal consequences of those facts is where this dispute is centered.

The court finds as follows:

FINDINGS OF FACT

1. The nature of the parties appears, without serious dispute, to be as follows.

2. Plaintiffs are Haynes Land and Livestock, Triple H Ranch LC, and Chalk Creek-Hoytsville Water Users. Haynes is a general partnership and owns property in Summit County. All property at issue is located in T1N R8E, T2N R8E, T2N R7E and T3N R7E, as described in Exhibit AA attached to Haynes Trial Brief. The Haynes property comprises just under 10,000 acres.

Triple H is a limited liability company and it owns an undivided one third interest in the Boyer-Triple H property (Boyer property) in T2 R8 Section 34. Water Users is a corporation and it owns property also in Section 34.

Jacob Family Chalk Creek LLC is a limited liability company

and Catherine B. Christensen LLC is as well, and each owns an undivided one half interest in the approximately 10,000 acres as fully described in Exhibit DD to plaintiffs' trial brief, land mostly to the west and south of the Haynes property. Throughout this decision the court will normally call the Jacot-Christensen entities "Jacob." That is not done to imply Jacob is more important than Christensen, but is simply shorter than writing Jacob-Christensen so frequently. On occasion, such as describing cabins, the court will use the Jacob cabin, or the Christensen cabin and so forth. Whenever "Jacob" is used, unless the context shows otherwise, the court is referring to the Jacob-Christensen entities and families.

Garff is a family member of the Jacob entities who has attempted to build a cabin on the Jacob property.

Bingham & Sons owns property between SR 133 and the Haynes property. Stillman owns property nearby. Fern Boyer, Gerald Boyer, Gregory Boyer, J.S. Hansen, and Alfred Blonquist own an undivided 2/3 interest in combination with Triple H of what is called the Boyer property in Section 34 T2 R8.

Summit Count claims an interest in the Class D road and the State of Utah claims a grantee's right in the conservation easements involved or to be involved.

3. This dispute concerns historic routes to travel across property owned by Haynes and whether that travel is over a public

road, whether that travel is permissible and governed by some form of easement, or whether access across Haynes' property is more limited. Other subsidiary issues abound concerning use by others as well.

4. All references are to the Salt Lake Base and Meridian, and this land involves three townships, T1N, T2N or T3N, and Ranges 7E or 8E. Throughout, these will be short handed to T1, T2, or T3, R7 or R8 together with the appropriate section number.

From Coalville, Utah, the county seat of Summit County, heading basically eastward is SR 133, commonly called the Chalk Creek Road. That road travels easterly and eventually leads, over unimproved roads east of the area of concern in this case, to Wyoming and other areas of Utah. Leaving SR 133 approximately 18 miles east of Coalville in a south easterly direction, Haynes and Jacob each own substantial property (approximately 10,000 acres each). The chain of titles will be discussed but in essence Haynes bought property closest to SR 133 in the 1930s and 1940s. Further removed from SR 133 Jacob also owns substantial property, and the Boyer parties own property consisting of substantially smaller acreage in a Section bounded by the Haynes property and the Jacob property. To get to their property Jacob has to cross the Haynes property, as do the Boyers to get to their property. Now disputes have arisen about the nature of that use and whether the routes traveled to gain access is a public road or whether

Haynes ownership of the property is subject to certain types of easements in favor of Jacob or Boyer. Up to the day of trial there evidently was an issue as to whether any access was allowed by Boyer and it is Haynes position still at trial Boyer has no easement to gain access to the Boyer property.

5. From SR 133 a road crosses property owned by Bingham. That road goes for approximately one quarter mile and then leads onto the Haynes property as shown on X117 on T3 R7 Sec. 35. Interestingly, all involved including Haynes have used this road and Bingham, the owner, evidently has never attempted to stop such use from SR 133 and Bingham did not participate in this trial. All involved have evidently treated this first quarter mile or so as always being open to the public. The road shown on that map X117 shows where the current course of that road in orange. The road at that point is commonly called the Bench Road or historically Sage Brush Flats, and it travels onto Haynes property in T3 R7 Section 35. There is now a locked gate and fence with several signs basically stating No Trespassing or Private Property. That gate is in Section 35 as above. The particulars of the beginnings of those signs and gate are in some dispute. The road at issue then travels further onto and through Haynes property easterly onto T3 R7 Section 36, then turns southerly onto T2 R8 Section 1. It splits in T2 R8 Section 7, and the "main" or Bench Road at issue goes southerly still across

Haynes property through T2 R8 Sections 7 and 18 until the Jacob property begins at T2 R8 Section 19 immediately south of Section 18. At that point the road has commonly (and will be herein) called the Middle Fork Road. The land becomes more mountainous and less level. Thus, at T2 R8 the property line between Haynes and Jacob is the section line between Sections 18 and 19. The Middle Fork Road continues south easterly on Jacob's property through T2 R8 Sections 19, 20, 29, 32, 33 and into T1 R8 Section 4, which is toward the south end of the Jacob property. At approximately that area Jacob and Christensen have built some cabins to be discussed below. The road then travels north easterly back through T2 R8 Section 33 and onto T2 R8 Section 34 where lakes are located as discussed in the next paragraph. The Boyer property at issue is all within T2 R8 Section 34, bounded on the north, south and west by Jacob property and on the north and east by the Haynes property.

6. At the split in T2 R8 Section 7 back to the north what is called the East Fork Road (or East Fork Loop) travels easterly and somewhat southerly, across T2 R8 Sections 8, 9, and 15 and then turns south and crosses T2 R8 Sections 22, 23, 26 and 27, all still on Haynes property, where it veers a bit west onto the Jacob property at T2 R8 Section 27, just north of and near what are called Joyce Lake and Boyer Lake or Boyer Reservoir located within T2 R8 Section 34. The road from the East Fork then

continues southerly across the Boyer property in T2 R8 Section 34, crosses the reservoir and travels south westerly onto the Jacob property. Thus, considering the Middle Fork Road until it reaches the Boyer property, and the East Fork Road until it reaches the Boyer property, the named aspects of this road "meet" and a loop is formed. The entire road has in the past been called the East Fork of Chalk Creek, as it is in the East Fork Chalk Creek drainage, but the terminology used in this paragraph will be used throughout this Memorandum Decision to mean the Bench Road on the Haynes property from the northern beginning point in T3 R7 Section 35 until the property line between Haynes and Jacob at T2 R8 Sections 18 and 19. Thereafter the road will be called the Middle Fork from T2 R8 Section 19 all through the Jacob property until it reaches the Boyer property on T2 R8 Section 34. On the Boyer property the road will be called the Boyer road. Continuing from there at the north end of the Boyer property in Section 34 T2 R8 on the Haynes property the road will be called the East Fork Road until it "rejoins" the Bench Road in T2 R8 Section 7.

7. There is another road, which the court will call the West Fork Road, about which there seems little dispute. It leaves the Bench Road on Haynes property in T2 R8 Section 18 and branches off to the west and mostly south, onto Jacob property at T2 R8 Section 19 and then remains on the Jacob property to the southern

border of Jacob's property at T1 R7 Section 12.

8. The issues in this case concern the entire loop. Jacob and Boyers and Summit County contend the entire loop is a public road, including the Bench Road, Middle Fork Road, Boyer Road, and East Fork Road. Haynes and the State of Utah assert none of it is a public road but there is a prescriptive easement in favor of Jacob but none in favor of Boyer.

9. At the beginning of trial plaintiffs conceded for the first time in an oral stipulation that Jacob could have an agricultural and recreational easement over Haynes' property along the Bench Road and East Fork Road consistent with the historical use including oil and gas exploration but that use does not include use for the fourth, or Garff, cabin erected on the Jacob property, to be discussed below. Jacob accepted the stipulation but of course urged it does not go far enough and Jacob has additional rights of use and Jacob claims the entire road is public.

10. Most of this land was once owned by the Wright Brothers who conveyed various portions at various times to both Haynes and the predecessors of Jacob. In the mid 1930s various parcels were conveyed as shown on X300. The portions conveyed to Wasatch^{*} Livestock later basically became the Jacob property.

11. In 1932 Haynes, through Howard Hayes Sr, acquired the northern half of Section 36, T3 R7, as well as T2 R8 Sections 9,

15, 22, 23, 26, 35 as well as the eastern half of Section 27, some of Section 34 except the Boyer property, and the eastern half of Section 3 T1 R8. Thus, Haynes bought in 1932 what is the northern portion of its current property, approximately 6200 acres more or less. Thus, the Bench Road crossed Haynes property only on Section 36 of T3 R7. The remainder of the Bench Road, Section 35 of T3 R7, T2 R7 Section 1, T2 R8 Sections 7 and 18, went across land owned by others, not Haynes, until Haynes bought those portions, along with the southern half of Section 8 T2 R8 in about 1941. Specifically, as shown on X204, Haynes bought the south half of Section 36 T3 R7 and T2 R7 Section 1 in 1940 and Sections 7, 17, and 18 and most of Section 8 T2 R8 in 1941.

12. Triple H and the Boyers own undivided interests in Section 34 T2 R8. The land surrounds the Boyer Reservoir in Section 34 T2 R8. X116 shows the non-contiguous nature of the Boyer property within Section 34 T2 R8. The property basically surrounds the Boyer Reservoir owned and operated by the Chalk Creek-Hoytsville Water Users. The Boyers owned the land on which the Boyer Reservoir sits in Section 34 T2 R8, and it was formerly the Boyer Lake, one of three lakes comprising the Blue Lakes. The Boyers in 1903 filed a notice of appropriation for storage of water in a reservoir. The Boyer family received patent in 1914 to the Boyer property at issue and conveyed some of it to the Chalk Creek Reservoir Company for purposes of the reservoir. That

entity conveyed approximately 83 acres to the Chalk Creek-Hoytsville Water Users. A right of way was acquired in 1934 from the Wright Brothers. X6. After conveying the reservoir land to what is now known as the Chalk Creek-Hoytsville Water Users, Boyers retained the land around the Boyer Reservoir as shown on X116. Triple H was formed in 2000 to purchase some of that land and now owns an approximate 1/3 undivided interest in what is called herein the Boyer property in Section 34.

13. Haynes thus owns the land over which the Bench Road and the East Fork Road travel, and Haynes claims there are only three exceptions to Haynes record title: (1) the stipulated prescriptive easement in favor of Jacob, (2) the easement created by the deeds, X6-X9, for limited livestock usage, and (3) an easement for the Chalk Creek-Hoytsville Water Users (Water Users) to construct and maintain the reservoir, Boyer Reservoir.

14. Jacob bought its property, which again is to the south and west of Haynes property, from Wasatch Livestock, which was run by Irv Jacob. The Jacob property is again owned by the LLC and the Christensen LLC as equal undivided interest owners. It was purchased in the name of Jacob and Christensen in October 1938.

15. Once acquired the properties were basically run and managed by the parents of the current disputants. Howard Haynes Sr ran the Haynes property and his son and sibling Shirley

MacFarlane now basically operate the Haynes Land and Livestock LLC. Joe Jacob, the son of Irv Jacob, basically ran and operated, along with his siblings, the Jacob property during the time Howard Haynes, Sr, operated the Haynes property. Howard Haynes Sr. died in 1979. The testimony did not show when Joe Jacob died. The issues have arisen, as is always the case, in more recent times now that the "original" owners are not involved.

16. For the basically 40 years Haynes Sr operated the ranch sheep and cattle grazed the area, some belonging to Haynes, some under lease, and various wildlife operations were allowed to use the property under contract as well. Beginning in about 1978 Haynes allowed his property to be used as what was called a Posted Hunting Units. Various "outfitters" or companies would lease the land and charge customers to buy permits to hunt for a fee. Those people who hunted under the PHU, which later became Cooperative Wildlife Management Units, or CWMUs, were allowed on the property since 1978 until the present, on the Haynes property, to hunt deer, elk and other wildlife. Those lessees guarded the gates and checked during hunting season (basically August through October), as best they could, to determine that those on the Haynes land had permits. Some people, those who drew public permits, were guided. During that time frame perhaps 100 people a year counting guests used the property of Haynes. There were permits for on average 40-50 animals per year, and two could

go in the hunting party and others could stay in the campgrounds. They could bring RVs, ATVs, tents, campers, horses, and so forth. Most of the property is not fences though some is. Haynes has several "cross fences" on its property and some gates protected by "cattle guards." There is a fence between some of the Haynes and Jacob property at Sections 18-19 as discussed herein.

17. Jacob has also leased its lands, or portions thereof, for various others to run sheep and other livestock, as well as their own sheep and livestock in the past. Jacob has built cabins on their property as well. These uses will be discussed further below.

18. The court intends to find facts chronologically to explain its conclusions. To begin much before this litigation before statehood in 1896 all of these lands belonged to the United States and were part of the public domain. The "land use policy" of the United States was that the lands could be used by about anyone for about any purposes without permits, permission, or concern for the finite nature of resources. People could timber and hunt and graze livestock without regard to about anything. The even numbered sections were public land and the odd sections were public land until 1869 when they were acquired by the railroads. According to the title examination, X35, title to almost all of these relevant sections in this area vested in the State of Utah upon achieving statehood in 1896, and various

patents were granted to railroads as well and some lots were selected by Utah for various purposes such as a reform school, a permanent reservoir, and other purposes. There was no evidence that the railroad ever did anything with any of the sections involved in this area and the ownership of the railroads ceased just after 1900.

19. Jacob claims the historical evidence shows the entire road, the entire loop involved is a public road under law and Haynes asserts it is not. Many historical documents, all hearsay but admissible under varying exceptions, were received and have been reviewed.

20. Many historical documents were received, plaintiffs having stipulated they were admissible as far as being authentic and being exceptions to the hearsay rule. Plaintiffs objected as they were not relevant given that they could not produce sufficient proof by the necessary quantum of proof that this road was a public road. The court allowed admission of the documents and will briefly summarize as part of its findings those most heavily relied on by Jacob.

21. A probate court entry from March of 1862 shows someone requested permission to take timber out of "East Canyon" and to make a road. The court finds this is not convincing that this was in the drainage area of the East Fork of Chalk Creek but it does show that the public was, at that time, enabled to obtain

timber at will from the public lands.

22. In 1865 a probate court docket minute entry shows approval was given for persons to take timber from Chalk Creek and have a saw mill. Again that does not demonstrate to this court by clear and convincing evidence this road at issue was involved as Chalk Creek could be any of the many miles now called Chalk Creek. It again shows some evidence, however, that the public was using the public lands. That court entry showed L.L. Randall and Jacob Huffman wanted a saw mill and those names will be found later herein. A 1947 historical text, X137, shows at page 139 that L.L. Randall had one of the first saw mills two miles from Pine Cliff, and that is in this area. Pine Cliff is along SR 133 just east and north of where this Bench Road leaves SR 133. Randall's homestead, discussed later, was along Bench Road in T2 R8 Section 18. X158 confirms Huffman operated a saw mill on the East Fork.

23. Court minute entries from December 1866 and 1867 show two other requests in "Echo Canyon" and Cache Cove for a "herd ground." This is not convincing to the court as being in this immediate area though it again shows the public nature of the public lands and general area.

24. Official government surveys from the time are convincing to the court. X109 shows quite clearly the area of T3 R7 Section 35, where the current Bench Road leaves SR 133 going southward.

Other maps and notes from this 1874 survey (the survey was in 1873 and the resulting map from 1874, so those dates are largely interchangeable), combined with the stipulated expert report of Matthew Liapis, X296, show that there was a road in 1874 along what is now called the Bench Road and Middle Fork Road.

25. In summary, that expert report shows Liapis attempted to determine if the 1873 and 1893 surveys described herein correspond to the current road at issue. He used the survey maps from 1874 and 1894. He consulted other experts, he toured the area and used other filed survey notes. He concluded the maps from the 1800s show the road then was substantially similar to the current Bench Road and Middle Fork Road with some fairly minor variations. He noted the surveyors in that time often did not venture into the interior of a section but only noted the roads along the section boundaries and basically "filled in" the area where the road probably went in the interior of a section.

26. The survey notes from 1873 (the 1874 survey map) show a saw mill along the East Fork, T2 R8 Section 7, shown on X117 at Point A.

27. A probate court minute entry of 1869 shows U.S. Surveyors were in Chalk Creek and the court asked a group of men to assist. X242.

28. A territorial map from 1874 and 1875 shows a "saw mill" in this rough vicinity of these properties but it is impossible

to tell from that map precisely where the noted saw mill was located. X163, X164.

29. In a court minute entry of 1879 L.L. Randall and others sought permission to divert water in Chalk Creek. X. 234.

30. L.W. Randall applied for a homestead in 1896, indicating he had been living there since 1885, and he had improved the property and was he given a patent in 1903. X. 120. That is shown on Point F in X117 in Section 18 near the Bench Road.

31 . In 1895 W.H. Staley applied for a homestead in Section 18 T2 R8, indicating he had resided there since 1883, and he made improvements and irrigated and built corrals and such and he was given a patent in 1901.¹ That is shown as being near the Bench Road on X117 at Point E in Section 18 T2 R8.

32. A U.S. Survey Sectional and Mineral map of 1875 shows a cabin where Point K on X117 is shown, near the current Middle Fork Road on the southern end of the Jacob property.

33. In 1895 George Huff applied for a homestead, indicating

¹While these accounts of this time and place fascinate most and may cause many to wish for those "good old days" when a person could begin living in an area and create a homestead there obviously was a down side. A newspaper article from July 1886 demonstrates that perhaps those days, while they had their glory and glamor, were not all so good. William Staley, according to the report, in the course of 10 days lost two sons and a daughter to "that dreadful disease diphtheria." The article states "The unfortunate family a short time ago had a new home burnt to the ground. Their lot seems more than human nature can bear." William Staley's brother, M.H. Staley a few days later lost two children, ages 3 and 5, to the disease. All 5 deaths were within the space of two weeks.

he had been living there since 1894, and he was granted a patent in 1901. X. 121. That was in Section 8 T2 R8, at Point B on X117.

34. A court minute entry of 1894 indicated the prosecuting attorney should prosecute anyone who has been blocking public highways in any of the canyons in Summit County which have been used for 7 years. This does not directly relate to this area but again shows the public nature of the canyons to some extent.

35. A Coalville Times newspaper article from August 1895 indicated that about 40,000 sheep had been "dipped" and about 100,000 were expected at Clark's corral. These numbers were to some extent corroborated by X401-405, which showed at Coalville (the county seat) the tax records for 1893 show some 200,000 sheep were taxed as having been brought into Summit County for summer grazing. This is some corroboration that a large number of sheep were in the area but does not show the number of sheep specifically in Chalk Creek. Another article from the next year, 1896, also indicated 100,000 sheep were dipped at Clark's. Clark's dipping corral was in T2 R8 Section 19, now on the Jacob property, very near the Middle Fork Road shown on X117 at J. Dipping of sheep occurred by having the sheep in essence "bathed" in a chemical, creosote, to keep the flies off them.

36. Charles Saxton applied for a homestead in Section 8 Ts R8 indicating he had moved there in 1896. He was later given a patent. X. 122. That is in Section 8 T2 R8 south of the current

East Fork Road.

38. Various news articles from the late 1890s show various people had killed bear in the East Fork of Chalk Creek (this entire area) but none show the specific use of any particular roads. Those articles show use by persons in the area on public lands but are not convincing that any particular road was used.

39. A USGS survey map of 1903 shows the Bench Road and the Middle Fork Road to an area which appears to the court to be T1 R8 Section 4 and possibly into T2 R8 Section 33, north and west of the Boyer Reservoir. It also shows the East Fork Road terminating in the middle of Section 8 of T2 R8. The roads as shown on that map are reflected in X296, Attachment H. The court finds that map particularly compelling.

40. In 1902 William Boyer, according to a public record (X123) applied to divert water from what appears to be the current dam at Boyer Reservoir, then called Boyer Lake, in the north east quarter of the north west quarter of Section 34 T2 R8, the site of the Boyer property and current Boyer Reservoir.

41. In 1913 a record from the Summit County Commission shows that on November 5, 1913, the commission authorized the expenditure of county funds for improvement of the Sage Brush Flat road in Chalk Creek. Again, as found, Sage Brush Flats was the name of part of the area the court now calls Bench Road. The court finds this evidence refers to the Bench Road area. X244.

43. A Summit County map from the county surveyor in 1918, without a legend, seems to show a dotted line on, as best the court can determine, the rough area of Bench Road and the Middle Fork Road, again appearing to terminate at the south end of the Jacob property in Section 4 of T1 R8. The East Fork Road appears also to be depicted, again terminating in about the middle of Section 8 T2 R8. X. 166.

44. In a Utah Historical Society paper written in 1983 on the life of Lady Homesteader Myrtle Rigby it was described how she settled in the Chalk Creek area and in the summers frequent city visitors arrived, teams and horses prepared, and everyone was off to Blue Lake or Bear River to fish. This is again not specific as to any particular route or road but it does show use of the public of this area on public land. X160

45. A 1925 U.S. Forest Service map, X167, is claimed by Jacob to show the road. The court cannot decipher the map provided and cannot find the road referenced.

46. X168, a U.S. Forest Service map of 1929 appears to show a trail, depicted on the legend as lower than a good or poor motor road and lower than a "Road Not Passable by Motor" roughly in the area of what appears to the court to be the Bench Road and the Middle Fork Road. It appears to show the entire loop, but it shows no lakes and does not appear to the court to be the same as the other maps showing the East Fork Road. A map from 1931, X169,

appears to show the same thing. A 1935 Forest Service map appears to show the same thing. X170. In 1942 a similar map shows the same loop road but it is on the legend as a "poor" motor vehicle road. X171.

47. In a Summit County Commission meeting of September 1947 (X 133) a Fish and Game Warden named Ira Page appeared and made a statement that Haynes had closed the road to Blue Lake and that road had been used by the public for a long time and the matter was referred to the County Attorney.

48. At various times earlier various news articles and journal entries showed people were in this vicinity engaged in various activities. The court will not identify each date involved but in summary they showed as follows. Sheep herders from the hills came to dances at Upton, on SR 133 a few miles from the entry point to the Bench Road off SR 133, but there is no indication as to how those people traveled to get to Upton or precisely where they came from, but the court finds there is some inference they went on a road rather than through the deep forest or over cliffs or across creeks or streams. Sawmills were clearly present in the area in 1881. A man was lost in 1890 in the East Fork drainage area and a search posse was sent for him, but there is no indication of precisely where nor what routes were used. In 1881 a news paper article showed a person from Upton was killed in a wagon accident 13 miles south east of Upton, which would be

in this area, after visiting a saw mill in the area. This shows persons from Upton visited this East Fork area. X145.

49. Numerous people testified at trial about their comings and goings after these parties acquired their properties in the 1930s and early 1940s. While the court was aware of the objection of Haynes the court allowed the testimony over the relevance objection of Haynes, indicating it would hear the evidence and determine if it was relevant. It was necessary for the court to hear the evidence as a whole before the court could determine if it was persuasive. The testimony was all relevant as it tended to prove an issue in the case, namely, who had used this road and under what conditions.

50. William L. Christensen is the a grandson of A.E. Christensen, the grantee from Wasatch Livestock of what is now the Jacob property. He began going to this area and the Jacob property in the late 1930s as a young man, having been born in 1932. He went with his father. After leaving the county road, SR 133, Chalk Creek Road, they would take a road and travel it until they came to the Jacob property. The court finds that was along the Bench Road. He saw no gates, locked or unlocked after leaving the highway. He did recall seeing a sawmill on the Jacob property about 1940. After his father died in 1945 he did not go to the property until the 1960s, after serving in the military and after being married and having children. A cabin had been

built by the Jacob family, as distinguished from the Christensen family, in about 1948 and he went regularly to use that cabin and enjoy the property. He began to see gates on the Haynes property in the 1960s. There were signs put up by Joe Jacob on the Haynes-Jacob property line (between Sections 18-19 of T2 R8) and he recalls them in the 1960s. He participated in the planning of what is called the Christensen cabin in the early 1970s and there were no restrictions on travel or construction equipment along the Bench Road or Middle Fork Road. He is familiar with Jacob having commissioned an oil and gas exploration and the big trucks that used the area and the Bench Road and Middle Fork Road for that purpose without difficulty. He participated in a meeting in 1984 when Haynes, through Howard Haynes Jr., began to be upset about usage of the road. From that X255 was created, an agreement about use of the road, the so-called 1984 Agreement. The cabins built by Jacob and later the Christensens are located at approximately Point K on X117 in Section 4 T1 R8. He saw signs periodically in various places concerning trespassing and such but paid them no mind as he and his family always believed they had full access to the Bench Road and Middle Fork Road. On one occasion in the 1960s Howard Haynes Sr was stationed by the fence then existing off SR 133 and he allowed Christensen to pass after Christensen presented a note from Joe Jacob explaining who he, William Christensen, was. The 1960s is also the first time he

recalls seeing a fence between the Haynes-Jacob properties on sections 18-19 T2 R8. He recalls the road being narrow from the 1930s and early 1940s, with ruts if the weather was bad, and that was so until perhaps the 1970s. He felt there was no limitation on the use of the road and that it was always a public road. At some point there was a gate and locks and Joe Jacob gave Christensen either a key or a combination to enter onto the Haynes property off SR 133. He assumed it was a public road until the 1960s when it became private. He never kept the Boyers off the Jacob property.

51. William E. Christensen, son of William L. Christensen, testified the family wants to be free to develop the property as the Summit County zoning ordinances will allow, but the Christensens do not plan on having a big development but want to build other family cabins on their land. He has often hunted, fished, and otherwise recreated, at various times, and has taken many guests and others have been along, including television media trucks to film hunts and fishing activities on the Jacob property. No gates were locked before 1984. The road was often graded. He has had as many as 400 guests on the Jacob property and he nor those guests were never stopped. The Christensen family wants a conservation easement and full access may be more attractive economically if they are compensated for it. Travel was by the East Fork Road and Bench Road to the cabin areas.

52. Gary and Greg Boyer, brothers, own an interest in the Boyer property, and Gary Boyer has studied the road issue by examining historic documents for several hundreds of hours. He is the son of Fay and Fern Boyer. The Boyers first bought land in the area in 1905 and received patent in about 1913. Gary has been going to the area since he was a young man in the late 1950s, and since then he has been hundreds of times. The Boyers usually went on the East Fork Road, and Howard Haynes Sr. had left a key under a rock so they could have access. There was another gate on the East Fork Road, just east of the split in the loop, on Haynes property in Section 7 T2 R8. Until the 1980s the main gate off SR 133 was not locked. There was a gate but it was open. The East Fork Road gate was first locked in the mid 1970s. Gary has never been turned away, and he has taken groups of people and none has ever been stopped from using the East Fork Road. Gary Boyer felt Haynes was attempting to block entry so he began a study of the area. He has believed the Middle Fork Road was always public. The Boyers would also like to build a cabin on their property. Many, many photographs were received, X269-293, X307, portions of X51, and others, each consisting of multiple photos of various areas and portions of the road and signs from the early 1970s until the present. They show many of the beauties of the area, as well as portions of the road. As noted herein there are several photos from much earlier.

53. In the late 1940s the Jacob family built a cabin, in the area in Section 4 T1 R8, near the south end of their property, west and south of Boyer Lake. They built a second cabin in the mid 1950s in the same area. Zoning ordinances then were not what they are now and almost no approval was needed and no inspections occurred by county officials. The Christensen family completed a much larger cabin in the same vicinity in about 1974. Sometime in the mid 1990s Garff began to build a cabin, what is called the fourth or Garff cabin. Garff evidently married a daughter of Joe Jacob, though the court may be incorrect, but in any event Garff is now a member of the Jacob family. He obtained building permits from Summit County and began building a large, 4500 square foot retreat/residence on the Jacob property not far from the older Jacob cabins. That event was evidently the impetus for this lawsuit which was filed in 1998. That Garff cabin evidently remains unfinished and little or no evidence was presented respecting this building. The court did observe it from a distance on the October 2007 field trip but paid little attention to its level of completion and the court is unaware as to the status of the interior of the facility.

53. Charles Horman married into the Christensen family. He first went to the Jacob property in 1965, and he drove the roads in a passenger vehicle. He has been there often and frequently uses the property. He was basically in charge of building the

Christensen cabin, near point K on X117, in the early 1970s. It is approximately 5000 square feet, with 6 bedrooms and many, many bunk beds, and it is designed as a family retreat. It was built in the Summer months of 1972-1974, by using a crew of 5. It involved the normal construction equipment, including a large crane, cement trucks, 10 wheel dump trucks, front end loaders and heavy excavation equipment. He does not recall ever being asked to leave nor did the work crews ever experience any event wherein Haynes asked them to leave. Horman has used the property often and has often had large numbers of guests for church and youth gatherings at this cabin, and none were ever asked to leave the Haynes property or were they turned away. All material for the Christensen cabin was hauled to the site over the Haynes property on the Bench Road and Middle Fork Road and there was never any issue raised about usage of that road. Horman is aware of the 1984 agreement and after that he found the main gate off SR 133 locked which closed the road leading from SR 133 to Haynes property, and he removed the gate by force on two occasions, believing the 1984 agreement allowed access. He further developed two retaining and fishing ponds on Section 31 of T2 R8, and accessed those by what is called the West Fork Road, crossing Haynes property with large equipment and a crew and those too had free access across Haynes property along the Bench Road. Those have been stocked with fish regularly, at least every other year,

and private suppliers have been hired and have come to the Jacob property to plant the fish across the Bench Road onto the West Fork Road. Jacob, through Joe Jacob, put up signs on the gate leading from Haynes Bench Road to the Middle Fork Road on Jacob property, indicating private property and no trespassing. There is also a gate on the property line between the Boyer property by Boyer Lake and the Jacob property, and that is to keep the water users from the Jacob property. He never saw a gate locked between 1965 and 1975 onto the Haynes property. He graded the entire road, the entire loop, often during the 1970s. During the 1980s and into the early 1990s Alfred Blonquist, working at the time for Geary Construction, was hired to grade the road and he did it yearly along the entire loop. Blonquist was hired by Jacob and by the Hoytsville water users to do that work.

54. The Jacobs have had a presence on their property also. They too went often to the property and were never stopped, never asked to leave. They have brought large groups of people also, church and youth groups, and have not been blocked from using the Bench Road and Middle Fork Road. They have invited various others, such as pond inspectors when they built fishing ponds on their property. The Jacobs also testify there was never a locked gate at entrance off SR 133 before 1984. There was one sign, X51-32, on Middle Fork Road heading north off Jacob property to the Haynes property. It states "limited access road next 5.15 miles.

No Hunting, No Trespassing. Haynes Land & Livestock Co." That sign has been in place for some time. That sign is seen one leaves the Jacob property, off the Middle Fork Road, onto the Haynes property, the Bench Road. There was no testimony but the court finds, based on its travel to the site with counsel, that the distance between SR 133 and the boundary line between Sections 18-19 is approximately 5 miles.

55. The 1984 Agreement, X255, is between Haynes and Jacob. It, in summary, indicated Jacob had certain claims, Haynes recognized the 1939 deed granting access, and stated Jacob could have a right of way as described in the 1939 deed but Jacob claimed further rights; Haynes was allowed to keep a gate but would provide either 100 keys to Jacob or a combination allowing access. Jacob agreed to allow Haynes a perpetual easement and right of access for irrigation purposes in sections 20 and 21. Both parties reserved any rights they claim.

56. Robert Powell, not associated with either party, is a 79 year old man who grew up in the Coalville area on a small farm and he often went to the East Fork drainage area. He went to the area often with his father in their 1934 truck, and the road was not blocked nor was the gate locked. They usually went to what are called the Blue Lakes, which consist of what is now Boyer Reservoir, Joyce Lake, and Blue Lake, which is east of Boyer Reservoir in T2 R8 Section 35. An incident he recalled in the

1940s happened where some man, not identified, said the road was private and Powell's father said it was not, it was open to all and that he had used it for years. In 1965 Powell recalled the gate being unlocked but locked in the 1980s. He as never stopped in his journeys. He did not describe the route of travel.

57. Kay Crittendon, not associated with any parties, is an 85 year old man and life long resident of Coalville. He often fished at the Blue Lakes before 1935 and there were no gates or fences and no signs, and that was true until 1941. After 1935 his father did all the road work and helped build the Boyer Reservoir. He produced photographs from 1938 showing the East Fork Road at section 8 ended there. (X52-1 through 52-4, originals returned to Crittendon and copies substituted in the court record). His father cut the road east and south from the middle of section 8 where the East Fork Road ended and helped build what is now the current East Fork Road in 1938-1941. Crittendon fished at those lakes after World War II and when more people, sometimes called the "city savages," began to frequent the area Howard Haynes Sr began to try to stop the invasion by halting people at SR 133. Crittendon saw the dipping corrals in Section 19 T2 R8 and observed them just off the road Middle Fork Road.

58. Alfred Blonquist, one of the owners of the Boyer parcel, was given a copy of a map before he bought the property. That

map, X205, shows the entire loop at issue was declared a Class D county road in 1978. That map's origin is unknown but it was created and filed with the Utah Department of Transportation in 1978 pursuant to statute, now UCA 72-3-105. There was no county commission resolution or approval and no records appear to be extant which shed any light on how that Class D map came into being, it just exists and is on file with UDOT. It is also kept available for the public with the Summit County Recorder. It shows the entire loop is a Class D road since 1978. A Class D road is one that involves no maintenance by the county.

59. The deposition of Gwennola Blonquist, now deceased, was received on behalf of Haynes. She was born 1912, lived in the Coalville area until 1933, left, and returned in about 1940. As a youth she and others went to the Blue Lakes without permission and lots of people used the roads and those lakes. They usually went via East Fork Road but the deposition did not, to the court, clearly identify the precise route. She saw Jimmy's saw mill and corrals which were along the Bench and Middle Fork Road, saw no signs or fences or gates, and all was open. Her family got lumber from the area without permission though that route was not noted as to how they got wherever they went. Small boats were on the lakes and were used by various people.

60. The deposition of Lamont Staley, born in 1927, was received, as he now lives elsewhere. He lived in the area and

also went with his father in the mid 1930s to the area. They found what they believed was the crumbled cabin of his grandfather William by Red Hole Section 18, which is accessed by the Bench Road. He went on scout trips in about 1935 to Blue Lake without permission. He did not recall any gates and thinks it was all open. His route was not well identified.

61. In March 2006 Haynes has petitioned, as shown in X134, the Summit County Board of Commissioners (SCBC) to vacate the Class D road which has been on file with UDOT. In an April 2006 hearing the SCBC deferred action. X135. In September 2006 a petition for reconsideration was filed by Haynes, and a hearing was held February 14, 2007. X302, 260. The county has deferred action until this litigation is resolved. After this court issued its ruling denying Jacob's motion for summary judgment in March 2007 Haynes again wrote the SCBC in April 2007 asking for another public hearing in May 2007. X303. That was evidently denied. Another letter was sent by Haynes in July 2007 asking for a public hearing. Another formal request was filed by Haynes in August 2007 on behalf of Chalk Creek-Hoytsville Water Users, joined by Haynes and Triple H. X304.

62. Haynes has placed some of their property in a Conservation Easement in 1999. Haynes granted the easement to the State of Utah who may monitor compliance and is to preserve the Conservation Values of the property. Haynes reserved the right

to build structures on Section 18 T2 R8, Section 1 T2 R7, including as many as 6 cabins of up to 2500 square feet, along with out buildings. A Ranch Headquarters was allowed on Section 1 T2 R7 or Section 36 T3 R7, each such section being in the northern portions of the Haynes property accessed by the Bench Road.

63. There was ample contrary testimony from witnesses called by Haynes to contradict the recent use of the road at issue, the entire loop.

64. One of the current partners in Haynes, Howard Haynes, Jr. MD, a man of 87, first went with his father to the property in about 1934 after the northern portions were purchased in 1932. He helped with the sheep and other chores, trailed (or drove) the sheep from Tooele to this land for Summer grazing, and did many tasks over the years. He testified at that time he believed the intervening land (Sections 7, 8, 16, 17, and 18, T2 R8, not owned by Haynes until about 1941), were crossed to get to the north portion of the Haynes property under the assumption that there was some sort of permission from the owners at the time. The East Fork Road ended at Section 8. The reservoir company furthered the road to get to the reservoir, Boyer Reservoir. His father kept the gate locked as much as possible with the intent to keep people, the public, out. He now runs the ranch with his sister Shirley MacFarlane. The property was heavily guarded in

hunting season, basically the Fall of each year, and the gate was locked as much as possible. Haynes has built one cabin on the property but the evidence did not reveal its location and the court does not recall seeing it. The court does recall seeing a small cabin off to the west of the Bench Road possibly in Section 18 or Section 7 T2 R8 and that may be the cabin referenced by the testimony.. When problems began to arise in about 1981 he entered into the 1984 agreement, X255. Historically he recalls a saw mill, called Jimmy's, near the Haynes-Jacob border by Sections 18-19, and the Bench Road was well defined when the property was first purchased when he first went there.

65. Haynes partner and sister Shirley MacFarlane, born in 1935, went often to the property and it was always gated, there were signs, and it was guarded in hunting season.

66. That agreement, X255, basically gives Jacob the right to use the Bench Road for the purposes in the deeds (agricultural) and a key or combination system was put in place so Jacob could use the road. Jacob gave Haynes an irrigation easement on Section 20 and 21 to install a head gate. Each party reserved any rights and claims it had.

67. A deposition of Leroy Meadows, age 85, was received and considered. He was a local man and visited often in the area. He recalled a gate in about 1928, and always got permission from Howard Haynes, Sr, to use the land, or from the Wright Brothers,

the previous owners. The East Fork Road was not a road and was very primitive. By reputation in the area the road, the entire loop, was private and controlled by Haynes.

68. The Clyde Collard deposition was also received. He was a man of age 86 when deposed in 2006 and he was familiar with the area. He ran sheep on the Jacob property by lease after World War II. He recalled the gate being locked most of the time and Jacob also had a locked gate leading to Jacob's property. The East Fork Road was hardly ever traveled.

69. Many others, including Thomas Moore, a part-time fire marshal, were in the area since the 1970s and stated the gate off SR 133 was locked and Haynes tried to keep people off the road. Many others on behalf of Haynes testified concerning the road recent years, since the 1960s or so. They have been on the property and the main gate off SR 133 was usually locked and Haynes attempted to keep people off the road.

70. In September 1998 the deputy county attorney for Summit County wrote counsel for Haynes and stated the county took no official position on whether the road at issue, the entire loop, was or was not a public thoroughfare by operation of State statute. That contrasts with the current Summit County position which is that this entire loop road is a Class D county road and a public road.

71. The road across the Boyer Reservoir, a portion of the

Boyer Road, is only 12 feet wide. It goes across the top of the dam, which is inspected by state Department of Natural Resources personnel. It is classified as a high hazard dam should it fail. Outlet issues have arisen and the State officials have indicated the measuring devices need greater protection. They discourage any traffic across the top of the dam. If the road remains those dam officials recommend a 20-24 foot wide road at the top, which would require substantial cost of approximately \$900,000 to change the Boyer Reservoir system.

72. The Water Users initiated litigation in 1939 to condemn the land for what is called the Boyer Reservoir, though it was a natural reservoir before, as well as seek the roadway on the East Fork Road. The jury awarded damages for that taking in 1942.

73. After all the conflicts in that testimony concerning the use of the properties, the gates and locks and signs, the court finds that after Howard Haynes Sr bought the final portion of the Haynes property in 1941 the gates were locked most of the time and it was the intent of Haynes to keep people off the property. Further, after Joe Jacob bought the property from about the same time frame in 1938 he locked the gate from Haynes property to the Jacob property at Sections 18-19 T2 R8 and it was Jacob's intent to keep the public off the property. Factually since 1941 the Bench Road and the Middle Fork Road and the East Fork Road have been private roads and have not become public roads through usage

by the public since that time.

74. The court finds this road at issue is basically a "summer" road. There was no direct testimony as to the amount of snowfall at any given time but the court does not exist in a vacuum and can take judicial notice, even without being requested to do so in a civil matter under URE, Rule 201, of facts generally known. The court is not taking judicial notice that the road at issue is or is not passable at any given time, nor of precisely how much snow there is at any particular time, but there is a lot of snow this season and the court believes at this elevation this road is not visible or accessible by motor vehicle a good part of the year. Further, the court went on the "field trip" on October 3, 2007, and had off-the-record discussions with counsel. From all of the descriptions of the use of this road, it is clear that the "road" is not used when there is substantial snow on the ground. Snowmobiles have been alluded to in the trial and on the field trip and clearly the snow fall in this area prohibits use by motor vehicle when there is substantial snow. A snowmobile may ride "over" the road but not along it. When the court went on the field trip there were patches of snow on the north side of trees and hills and that was October 3, 2007. The court was advised that the Jacob cabins are located at approximately 9100 feet above sea level and at times they have been completely covered by snow. During trial, in a recess off

the record, the court indicated somewhat jokingly to counsel it would like to go back to the property, being aware there was still substantial snow in the area. The court was advised by someone there was probably still approximately 10 feet of snow by the Jacob cabins. From all this, the court finds that whatever use is and has been made of the road, that use by vehicles is seasonal and basically non-existent when there is substantial snowfall. The lowest of the Haynes property is approximately 7500 feet above sea level.

Based on the above findings and discussion, the court makes the following:

CONCLUSIONS OF LAW

1. The court will discuss the law it is relying not in an attempt to educate the parties or anyone else but itself. The parties have filed helpful memoranda, but in an effort to demonstrate why the court is concluding as it is the court recites its understanding of the governing law.

2. Jacob's first alternative relief is for the court to declare this entire loop is a public road under law. As noted in the court's previous ruling in March 2007, the relative

simplicity of what is called the Dedication Statute, UCA 72-5-104, belies the difficulty of this case. This case is a very, very difficult case for the court and it is not a clear cut case at all. The court is attempting to follow the law and do equity as the relief sought, declaration of a public road, is an equitable remedy. *Bertagnole v. Pine Meadow Ranches*, 639 P.2d 211, 213 (UT 1981). The court is also trying to solve an ongoing problem between the parties and is trying not to create additional litigation.

3. The case, by its nature, is very difficult. As has been recognized in such "public road cases," a trial court is given a fair degree of discretion in determining the legal consequences of the facts as found by the court because the legal requirements are highly fact dependent and somewhat amorphous. *Heber City Corp v. Simpson*, 942 P. 2d 307, 311 (UT. 1997). These cases by their nature, especially this one because Jacob has asked the court to make a determination from a time beginning almost 150 years ago, involve "reconstruction of historical facts concerning timing, nature, and the extent of public usage. . . [W]itnesses are required to dredge the recesses of their minds for aged memories. . . . Trial courts should be permitted some rein to grapple with the multitude of fact patterns that may constitute . . . " [a public road]. *Kohler v. Martin*, 916 P.2d 910, 912-913 (UT. App. 1996). Whether the facts show a public road is a question of fact

and law which involves complex facts, evidentiary resolutions and credibility determinations. The court finds and concludes in this case there are very, very few credibility determinations at issue of any importance. Almost all the witnesses are found to be honest and credible and they saw events as they believed them to be from their perspective. Almost none of the court's decisions are governed by credibility determinations.

4. This case is again made very difficult by the history involved. As found and discussed herein, the "original" owners back in the early 1940s were Howard Haynes Sr and Joe Jacob, along with of course the Christensen family and other siblings of those two principal operators of the land. Now a few generations have passed and the offspring of those men are at odds. The problem has been discussed in many cases, such as *Southern Utah Wilderness Alliance v. BLM*, 425 F.3d 735 (10th Cir. 2005). While that case was in a differing context, the problem is now that what was once used as part of the public lands is now in the hands of private individuals. The owners whose land is crossed (Haynes) do not want their land disturbed, ruined, full of strangers and "city savages" who may destroy the beauty and peace of the area and interfere with a livestock business. Indeed, Shirley MacFarlane indicated that the Jacob property users were using the Bench Road as a speed way and she feared for the safety of the Haynes families. The Jacobs on the other hand want to

enjoy their property in the same fashion and be free to allow their families, now growing larger just as the Haynes families are growing, to fully use and enjoy their land and not be stuck with only the ability, figuratively, to herd sheep down the road. The Jacobs and Christensens have built a few cabins and want to build a few more. The Haynes fear the Jacobs will build a veritable city and those residents will have to cross the Haynes land to get to that "city." The Jacobs believe they have the right to enjoy their property as they have done in the past and that now means building some additional cabins for their increasing family and does not mean having to use only the two small cabins (one is about 700 square feet and one 2500 square feet) to attempt to house and provide a refuge and retreat for a large family. Each party clearly has a very profound sense of right and entitlement and the court's determination will affect these parties greatly, as well as several generations of their families yet to come.

8. The case is again made more difficult because of the nature of the claim of Jacobs, particularly its timing-that this entire loop was and is a public road from over 100 years ago, beginning perhaps as early as 1865, but certainly in the period 1880 to 1896. That obviously entails proof of facts mostly from documents rather than live witnesses. No witnesses appeared, nor could any be expected to, who were alive before 1896. Further,

Haynes argued correctly that it could not possibly prove a negative from that time frame. Proving a negative is at best difficult and from this time frame may well be impossible. As noted by the court in the summary judgment determination, it would be highly unlikely to find a government record or newspaper article from, for example, 1892, indicating that no one used the East Fork loop this season. It is, of course, not the burden of Haynes to disprove public use but it is the burden of Jacob to prove public use and all that those elements entail.

9. This case is also somewhat unique in that it is from a time when the lands at issue were in the public domain. As found, prior to statehood in 1896, all of these sections and lands at issue, all of them, were in the public domain. The even numbered sections belonged to the United States and in 1869 the odd numbered sections belonged to the railroads through a grant from the United States. From that time (1869) until about statehood in 1896, the odd numbered sections belonged to the railroads. The only odd numbered sections involved as far as public use in this case has been principally Section 7. Most of the cases the courts have considered involved a private party seeking to have a road that passes over the private property of another declared public. This case differs in that most important regard.

10. This case is also complicated for the court in that the

parties, respectfully, all seemed to concentrate on the entirety of the road, the entire loop, without any emphasis on any particular portion of the road. The court believes the evidence was such that the parties probably could have and should have focused on a more discrete portion of the road. The court does not fault the parties for so arguing, but the court does not believe that the entire road merits factually or legally the same result.

11. All of this apologetic aside, this is a close and difficult case for the court.

12. The statute, the Dedication Statute, under which Jacob seeks a declaration by the court that this entire loop is a public road, states:

- (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.

Utah Code Ann. § 75-5-104 (2000).

13. As the Utah Supreme Court has noted in *Lindsay Land & Livestock v. Churnos*, 285 P. 646, the federal legislation from 1866 allowing SR 2477 roads could be viewed as an offer from the United States of a free right of way over the public domain. The

enactment of Utah statutes, as well as the common law, is the Utah answer of how that offer has been accepted.

14. It is clear that one who claims a public road exists must prove the road is public and has been abandoned and dedicated to the public by clear and convincing evidence. *Heber v. Simpson*, at 310. Additionally "the burden of establishing public use for the required period of time is on those claiming it". *Bertagnole v. Pine Meadow Ranches*, 639 P.2d 211, 213 (Utah 1981). These principles guided the court in its denial of summary judgment for Jacob wherein the court stated Jacob had an "uphill" battle but would have to prove a public road at trial.

15. Defendants are required to show by clear and convincing evidence that this is a public road and they claim it became such in the time frame of 1880-1896. That burden of proof requires defendants to produce evidence that causes the court to have a firm belief this is a public road. The evidence must reach the point where there remains no substantial doubt that this is a public road. That is the standard the court is using to determine if defendant has shown by clear and convincing evidence that there has been a public road created in the time frame alleged. Whatever definition of "clear and convincing" is used, that burden of proof is less than beyond a reasonable doubt. The court is entitled, as the finder of fact, to draw reasonable inferences from the facts proven and found. It is clear that one

witness can establish proof beyond a reasonable doubt and one witness can establish a fact by clear and convincing evidence as well. *Bonner v. Sudbury*, 417 P.2d 646 (UT. 1966).

16. Recently the Utah Supreme Court decided a trilogy of cases in February 2008 which discuss the Dedication Statute and apply to this case to some extent, though not entirely. Those cases are, of course, *Utah County v. Butler*, 2008 UT 12; *Wasatch County v. Okelberry*, 2008 UT 10; and *Town of Leeds v. Prisbey*, 2008 UT 11.

17. For purposes of this case only a few of the important holdings have an effect. In discussing the elements required for a public road to be found the Court made it clear, again, that the burden is on the claimant of a public road to prove it by clear and convincing evidence. In *Okelberry* the Court focused on what qualifies as a sufficient interruption to restart the running of the 10 year period and stated a bright line rule:

An overt act that is intended by a property owner to interrupt the use of a road as a public thoroughfare, and is reasonably calculated to do so, constitutes an interruption sufficient to restart the running of the required ten-year period under the Dedication Statute. 2008 UT 14,15.

Thus, the burden remains on Jacob to prove the road has been

dedicated to the public continuously. Evidence of an interruption in that 10 year period simply precludes a finding of continuous use.

18. From this bright-line rule it is clear to the court and the court finds and concludes Jacob and Boyer have failed to show this road, the entire loop, was a public road since 1941. Haynes and all their witnesses absolutely preclude the court from finding by clear and convincing evidence that the gate off SR 133 was not locked at least once for a period of 10 years. There was a good deal of conflict in the testimony and the court need not and did not find which "side" is correct, but the court has absolutely no difficulty in determining that the court is not convinced by Jacob that since Haynes owned the Haynes property finally in 1941 that the road was continuously used by the public. Indeed, Jacob in essence concedes as much. Haynes, through Howard Haynes Sr and others clearly locked gates and put up signs telling people, in essence, to keep out. Jacob did the same on its property line, and locked a gate. Since these parties have owned the property, at least since 1941, this has not been dedicated as a public road.

19. Before 1941, of course, is when the Jacob parties claim this road became public under law. There is no genuine dispute about any ten year period at that time as there was virtually no compelling evidence that there were gates or fences or signs or

anything else before that time. There was some evidence produced by Haynes that gates were up as early as 1932, and one witness through deposition thought a gate was in place in 1928, when Haynes bought the east and north portions of his property, but the court will not focus on that time period between 1932 and 1941 in any event. The court will do as asked by Jacob and examine and discuss the evidence as to use by the public, continuously, before 1932. After that time no public road was created by public use under the Dedication Statute.

20. Turning to whether this road has been used by the public before 1932 continuously for an uninterrupted period of ten years requires an examination of what the "public" is. This case becomes more complex and somewhat unguided by past cases because of, again, the time frame and the public nature of the land before 1896, before statehood.

21. The recent *Butler* case is helpful but not fully determinative of an issue in this case. The public must use the road and it must be a public thoroughfare before a road can be determined to be a public road under the Dedication Statute. *Butler* makes clear that those with a private right to use a road, such as adjoining property owners or those with permission or some prescriptive right, are not members of the public. "People as a whole" are considered the public, and that class includes all trespassers, those with no right to be on the road at all.

22. If the public used this road, meaning the entire loop, it must be for 10 years without interruption as *Okelberry* makes clear. Under *Butler*, the ten year period need not be specified, the period must simply be at least 10 years. Here, based on the evidence, the court concludes that people (the court will discuss whether those people amount to the "public" using a "public thoroughfare" later) certainly used portions of this road (to be discussed later) for at least 10 years, from perhaps 1865 to 1932, and certainly up to the time of statehood in 1896. The court finds that evidence overwhelming in fact, despite its previous doubts expressed in the court's denial of the summary judgment motion brought by Jacob. The court has now had the advantage of hearing much additional evidence, more carefully considering the documents and relating them to the property actually viewed by the court, and having more full argument. As found, many, many people before 1932 used portions of this road. There were several sawmills along various portions of the road. There were many, many sheep that were "dipped," at corrals in the area requiring the presence of many people. Many people hunted, fished, and went to the lakes by some route or another. While the court has found the use seasonal because of the heavy snowfall, the court concludes that the use of portions of the road was continuous. The use of the road need not be great and comparatively few people can use a road to make it public, but

when the need to use a road arises and the road is used, that use is continuous. *Boyer v. Clark*, 326 P.2d 107, 1008-109 (UT 1958). Natural occurrences, such as flood or snow, which inhibit usage of the road do not halt continuous use under the law. *Butler*, at 13. If the road is used as often as needed or convenient or necessary, even though the use is not constant, it is continuous use under the law and mere intermissions by naturally occurring events, other than an intentional act of interruption, will not halt the continuous nature of the use. Here, pre-1932 and certainly pre-1896 the evidence is again overwhelming that a large number of persons used some portion of the road for many, many purposes on a regular and ongoing basis.

23. Those purposes are sufficient to establish a road by whatever name. In *Boyer* the Court described the use as being use by persons hauling coal, crossing the open range, driving cattle and sheep, and people hunting or visiting others. The travel was by wagon or other vehicles or horse. The court found that sufficient to establish a public road. Interestingly, that case arose in Chalk Creek in Summit County as well in an area not far from this East Fork drainage area. The Court did not comment or discuss the public nature of the domain at the time. Trial was in 1956 and the trial court found facts dating back 50 years, to presumably about 1900, at or shortly after statehood.

24. In *Lindsay Livestock v. Churnos*, 285 P. 646 (UT. 1929)

the court dealt with a claim under the predecessor dedication statute. There the Court dealt with a time period from 1876 and involved findings that the land was patented in about 1900. There the lands were similar to these, described as unenclosed, uninhabited mountain lands, suitable only for grazing. *Lindsay* involved sheep grazing in the summers, sawmills in 1876, as well as a mining camp. Persons used the road at issue in that case to get lumber and work at and visit the mining camp, houses were built at the camp, and the use was extensive from 1876, though the mining camp lasted only about 5 years. Since 1900 the use was basically only sheep herders moving sheep, supplying sheep camps, and fishermen and hunters. No public money was expended on the road. The road found to be public in that case was found not to be the identical road at the time of trial as was the previous use but it was located in substantially the same place. The Court upheld the finding of a public road, again without much comment about the public nature of the land involved.

25. The Court upheld the finding of a public road in *Jeremy v. Bertagnole*, 116 P.2d 420 (UT 1941). Important to this case is the characterization of the early road, from about 1869, as a "trail" or roadway. The road was found to have been used for trailing herds of cattle, sheep, and horses. The Court did note that all patents issued were subject to the easements and rights of way of the public to use all such roads as may have been

established according to law.

26. Thus, whatever persons used this road, and the court calls it a road, they did so continuously for over 10 years before statehood while the lands were all in the public domain.

27. The next issue the court must discuss is just what portion of this road was used. The parties, again respectfully, focused on the entire loop. The court in its findings has basically divided the road into four parts for its discussion: The Bench Road across Haynes property, the Middle Fork across the Jacob property, the Boyer road across the Boyer property, and the East Fork Road across Haynes property going east then south from the Bench Road. The court does not believe the evidence merits treating the entire road, the entire loop, identically.

28. Without yet addressing whether the use was public, the court has found and concludes that the Bench Road and Middle Fork, to a somewhat imprecise ending, as well as a portion of the East Fork road to a somewhat imprecise ending, have been used by persons continuously for over 10 years. The East Fork beyond the middle of Section 8 T2 R8 and the Boyer Road have not been shown by clear and convincing evidence to have been used by persons, whether the public or not, continuously for ten years.

29. The court has found, as discussed, that the East Fork road, based on testimony of Howard Haynes Jr, Kay Crittendon, and the early map of 1903 (X134) demonstrate beyond doubt that Jacob

has not shown by clear and convincing evidence that a particular route was used along the East Fork after leaving the middle of Section 8. That area was described as terrible passage, a rock pile, and other terms showing it was not heavily or as regularly used as the Bench and Middle Fork Roads. Jacob has shown that the route along the Bench Road and Middle Fork Roads was used by persons regularly and continuously. The East Fork road was described as ending in the middle of Section 8 and the early maps show that, particularly X134 as reflected in Tab H of X296. The road was constructed from the middle of Section 8 for the reservoir in about 1940, clearly not 10 years before Haynes blocked access. Thus, while there is some evidence people went to the blue Lakes regularly, and some evidence that they went via East Fork Road, the evidence is not compelling that such use was continuous as required at least beyond the middle of Section 8. Had it been, the East Fork Road beyond the middle of Section 8 would have shown up on early maps and it does not.

30. Contrariwise, the demonstrable depiction of the Bench Road and Middle Fork Roads, to some point within Section 4 T2 R8, shows a road was created and use. It is only logical that these two portions were used by someone or there would not be a road shown. A passage is created by use, where timber or vegetation is removed for ease of access. Continuous use allows the passage way (road) to remain and be depicted on a map. Similarly as to the

East Fork Road to the middle of Section 8. A visible road in 1875, 1893, and on all maps thereafter, together with all the other evidence of vast usage, shows it was from early times in at least 1875 until statehood, used heavily by persons and that is what made the road visible to the surveyor and that use is what made the road visible on maps. The court's comments in its March 2007 ruling to the contrary notwithstanding, the court now having viewed the area, the court finds and concludes that persons traveling to the blue Lake area would certainly, at least by very strong inference, use a road rather than cut through heavy timber, up and over cliffs and other steep terrain. Persons obtaining timber, for example, whether from a mill or on their own from the woods somewhere, would use a wagon to haul the timber and that wagon would go on this road, rather than through the wild and over steep terrain or over fallen timber. While hunters may have strayed off the beaten path to find game, they sensibly would travel the road to get to an area to hunt rather than take off immediately through the wild terrain, even if on horseback. That at least is the reasonable inference the court draws from viewing this area and considering normal and reasonable human conduct. An inference of reasonable conduct by persons can amount to clear and convincing evidence in this court's view, when that inference is based on facts proven sufficiently. The presence of sawmills, corrals, and homesteads

along Bench Road and Middle Fork and along the portion of the East Fork Road to the middle of Section 8 show many persons were regularly using this road as far back as 1875.

31. The expert report of Liapis shows that the Bench Road and Middle Fork Road and the East Fork Road to the middle of Section 8 are substantially the same now as when first plotted in 1875, and are certainly the same as the 1903 USGS map, X134.

32. That leads the court to the most difficult question involved, and that is whether those persons using these Bench Roads and Middle Fork Roads and East Fork Roads to the middle of Section 8 and those people who "created" these roads by usage were members of the public and whether it was a public thoroughfare.

33. The difficult issue in this case is framed by the fact that when these lands were used by people, the Bench Road and the Middle Fork Road and the East Fork Road to the middle of Section 8, whoever these people were, the lands they crossed were all public lands because they were even numbered sections, except a small portion of Section 35 T3 R7, Section 1 T2 R7 Section 7 T2 R8, and a very small portion of T2 R8 Sections 19 and 33. Thus, ANYONE who used those sections, for any purpose, appears to the court to be a member of the public. Timber could be taken, livestock grazed, hunting could occur, and homesteads could be established, all without prior public approval or oversight on

the public lands. The bulk of the Bench Road and Middle Fork Road was on public lands as being in even numbered sections. Only a portion of the East Fork Road is in Section 8 and most of it is in Section 7. None of these roads crossed private land to create a situation where another landowner now seeks to take something away from a previous private landowner as is the case with most of the previous court cases. The cases where the public road was created during the time before statehood do not discuss this aspect of the facts in any detail but it seems of utmost importance to this court. The law is not developed concerning this issue. It seems almost tautological or definitional that any use of a road (or ^{trial}~~trial~~, or passage way) on public land is a public road. Who else did it belong to if not the public? It was not private and no one is seeking to now make something public that was private previously. Jacob in essence is claiming what was public should remain public.

34. As to the odd number railroad sections there is no indication in the record that the railroad ever seriously sought to use this land, nor that any railroad ever attempted to interfere with its use by the public on these odd numbered sections. Thus, while technically perhaps private land as belonging to the railroad, the odd numbered sections were really public as well. It is certainly clear from the record before the court that there is no evidence the railroad ever sought to

exercise its rights as a landowner, during the tenure of ownership, concerning the odd numbered sections at issue in this case.

35. Haynes argues that use is presumed permissive but the court believes that is particularly true when the use is by prescription. This use is not by prescription as the use of the road was use of a public road before Haynes owned the property over which the road passes.

36. Even discounting that concept, however, the court finds and concludes, based on all the evidence, that these Bench Road and Middle Fork Road and East Fork Road to the middle of Section 8 portions were used by the public continuously for over 10 years as a public thoroughfare.

37. The court believes Jacob's reliance on *Lee v. Masner*, 45 P.3d 794 (CO. App. 2001) as to when homesteaders become owners is a reasonable interpretation of the law in Utah. The court agrees with Haynes that *Kohler v. Martin*, 916 P.2d 910, and now *Butler* and other cases make clear that property owners and invitees are not members of the public. However, the court does not believe that the case relied on by Haynes, *Rio Grande Western Railway Co. v. Telluride*, 63 P. 995 (UT. 1900), stands for what Haynes claims it stands for.² While these homesteaders Staley, Randall, Huff,

²The court also does not believe a case cited by Haynes in its pre-trial memo, *Thurnwald v. A.E.*, 2007 UT 38, states at all

and Saxton detailed in the findings above had a right to preempt others perhaps as against their use of the property, nothing in Utah law the court can find indicates these homesteaders are land "owners" until at least they apply for homestead rights. Thus, the court concludes, those homesteaders were members of the public and it follows their guests and invitees were as well. Moreover, the court is not basing its conclusion solely on these homesteaders. They are merely some members of the public who used these portions of the roads as indicated.

38. The court concludes that many members of the public, trespassers or whatever they be called before 1896, (and they were trespassers after 1896 and after others owned the property,) and all kinds of people used these sections of the Bench and Middle Fork and East Bench Roads. Getting lumber, game, and recreating over the years seems never to have stopped and was continuous for at least 10 years. Again, a "lag" in usage, unless the result of an intentional act of interruption, is not a basis to conclude the road was not continuously used by the public. Thousands and thousands of sheep came to the area and used the Bench Road and some of the Middle Fork Road to get to the corrals, and those thousands and thousands of sheep did not appear only episodically. Those thousand and thousands of sheep

what Haynes claims for it, though it is not an issue given the court's resolution. There can be no "taking" as the public road is found to exist before Haynes owned the property.

did not get to the corrals or to grazing lands by themselves under the direction of a sheep dog. The testimony did not show such, but again the court may rely on the common sense notion that thousands and thousands of sheep require more than one person to herd those sheep. Indeed, Howard Haynes Jr described how he helped his father and others with trailing their sheep in the 1930s from Tooele. From such facts the court is not amiss in inferring many sheep herders and others were responsible for many sheep getting to this area. Haynes argues these facts as shown are not evidence of continuous use. The court has discussed that and use is continuous if use is as needed and desired and is not interrupted by an intentional act of the owner. Here, the owner of the land at the time, 1880-1896, was the public or the railroad, and no objection was ever lodged by the railroad. There is no evidence the railroad ever did any act amounting to an act of interruption. The use was open and the court believes the use of the land was use of public lands on all sections.

39. Further, while neither this factor nor any one factor is determinative, Summit County funds were expended on this road on the Bench Road, referred to in X244 as Sage Brush Flats. That was in 1913, after these sections were in private ownership but before Haynes owned the land. That too adds evidence that at least this portion of the road was public.

40. In addition as another factor, while again not

determinative as noted in *Heber City v. Simpson*, at 311 n.8, the fact is that Summit County in 1978 determined this was a Class D county road. The court is fully aware that this map seems to have been created almost immaculately as there is no evidence as to its etiology. However, the map exists and is kept in the County Recorder's Office and is on file with UDOT pursuant to statute.

41. Even if not used as a public road for years as a public road since these parties have owned the land, at least since 1941 and possibly since 1932, the public nature of the road does not "disappear" when the land over which the public road crosses comes into private hands. The purchaser, Haynes and before Haynes other owners, and Jacob and before Jacob others, all took the property subject to the public's right to use the roads. *Sullivan*, at 957.

42. It is the totality of the evidence that convinces the court by clear and convincing evidence these portions of the road were used by the public continuously for at least 10 years, from at least 1880 to 1896.

43. The burden of the usage on Haynes is not as great as if Haynes had owned the land when this road was made public by public use. Haynes frequently argued a taking of land is occurring. As noted, this court does believe that this land was public and the road over that public land was dedicated to the

public for such use before Haynes or Jacob purchased the land. These owners took the land subject to the right of the public to use the road. Thus, it is not as if Haynes owned land, the public then crossed it and used it, and thus Haynes is being deprived of something he had but now has lost. Haynes never "had" this road, it has been public since long before he purchased the land surrounding the public road.

44. If a road becomes public under the Dedication Statute clearly if Haynes or Jacob anyone erects gates and posts signs those actions do not extinguish the public nature of the road. *Sullivan v. Condas*, 290 P. 954, 957 (UT. 1930). This court may not vacate a public road and the vacation of a public road may only be done according to law. An adjoining owner of public land may not obstruct the public right. *Schettler v. Lynch*, 64 P. 955 (UT 1901).

45. As to the East Fork Road east of the middle of Section 8 the court concludes as well that there has been no public access at least since 1941. Prior to that time the road went to the middle of section 8 T2 R8 as shown on the early maps, the same as show the Bench and Middle Fork Roads. From the middle of Section 8 going east then south the court does not believe that portion of the road ever became public because of its much more limited use. The court was not and is not convinced by clear and convincing evidence that after the usage of the road to the saw

mills in the middle of Section 8 and the "bungalows" in that area the use was anything other than sporadic and the route was and is unknown. While there were some references to going that way to the blue Lakes, the use beyond the saw mills by hunters and fishermen and others was far more limited and not conclusive by clear and convincing evidence that that portion of the East Fork Road was ever abandoned and dedicated to the public. Certainly until about 1940 when the present iteration of the road was constructed by the Water Users the descriptions of the area included phrases such as rocky, a wagon trail, a terrible route, almost unpassable, and so forth. While such can still be a road, the court is not convinced by clear and convincing evidence that any particular route was traveled beyond the middle of Section 8. To the extent it was traveled, its use was not continuous and was at best episodic by far less members of the public than traversed the Bench Road or Middle Fork Road or the East Fork Road to the middle of Section 8. The more heavy usage to Peter's Park, so called, was before the split of the road. The two homesteads that were in the area were at the middle of Section 8 and were accessed by the East Fork Road as it ended at the middle of Section 8. The one saw mill just east of the split of the road in Section 7 is certainly similar in character as the same features of usage on the Bench and Middle Fork Roads. However, the court finds the evidence of usage simply not as convincing beyond the

mapped ending of the East Fork Road at the middle of Section 8.

46. Thus, the court concludes that the only public road from the early days of 1880 to 1896 and beyond until about 1932 was what the court is calling the Bench Road, the Middle Fork Road, and the East Fork Road to the middle of Section 8.

47. As to the remainder of what is now the East Fork Road, however, the Jacob-Christensen entities have been given by stipulation a prescriptive easement to use that road for traditional purposes for which Jacob has used it in the past. That is, for recreation and moving livestock as read into the record at the beginning of trial. The Jacob-Christensen family may continue to use that East Fork Road simply for access as agreed by Haynes but it may not be used for other purposes if Jacob desires to in fact build additional cabins, for example. That has not been the traditional use of that portion of the road. The public road may be used for those reasons beyond the stipulated prescriptive easement but the East Fork Road east of the middle of Section 8 may be used only for pure access for the traditional purposes. It will also allow ingress and egress in case of some type of emergency. Of course, in an emergency easements are not governing in any event. Simply, the East Fork Road east of the middle of Section 8 is not now and has not ever been a public road under the Dedication Statute.

47. The court is aware that does not solve the Boyer's

problem as to the East Fork Road. The court does not believe that the Boyer's have established a prescriptive easement over the East Fork Road for at least 20 years before ownership by Haynes. Before statehood use by Boyers was not shown. After ownership of property in about 1905 the travel demonstrated by Boyers was for purposes of going to the lakes and nothing more. That court concludes that is not sufficient to demonstrate a prescriptive easement for the Boyers over the entirety of East Fork Road. If they desire to build a cabin, as they testified, the route to be used would have to be along the public road of the Bench Road and Middle Fork Road. Any access the Boyers have to their property has to be over the public road and then by permission by Jacob.

48. That leaves the Boyer Road at issue. The court is not attempting to resolve any reservoir disputes, but the court has seen no convincing evidence that at any point in time, except recently, that the road across the Boyer Reservoir was used by anyone. Of all the travel to the blue Lakes for varying purposes by the public or by the Boyers or even the Jacobs, the evidence is not convincing that the road used went across the Boyer Reservoir. The court concludes that the Boyer Road is then not the subject of being a public road nor has anyone shown a prescriptive easement right to use the Boyer Road. The Boyer Road on the Boyer property is for their use and for the use of

those they allow to use that road. With the availability of the public road along the Bench Road and the Middle Fork road to a point to be discussed further below both the Jacob and Boyer entities may use that road to the point where the public road ends in Section 4. Beyond that, and onto the Boyer property, the Boyer's will have to obtain access by permission of Jacob to go from that point to the Boyer property where the current iteration of the road leaves the Jacob property onto the Boyer property in Section 34 T2 R8.

49. The court concludes, based on the testimony and again relying heavily on X134 and X296, that the public used the Bench and Middle Fork Roads as shown on X134 to the eastern most point on the Jacob property where the road crosses from T1 R8 Section 4 into T2 R8 Section 33. At that point the public road established by the testimony from 1880 and beyond has not been shown to have been established. Thus, any use of the road beyond that point by anyone will have to be permissive. The travel routes shown on X134 and the historic usage described leads the court to find and conclude that is the approximate point where the public gained access to the lakes. Beyond that lies the Boyer property line in Section 34 from the Jacob property and the evidence does not convince the court that any particular route was used to gain access to the blue lakes area, and certainly there was insufficient evidence (if any) that the public went across the

Boyer property and across the Boyer Reservoir.

50. Thus, the court concludes the road as it currently exists, what the court is calling the Middle Fork Road, ends as a public road where it crosses at the eastern most point from T1 R8 Section 4 onto T2 R8 Section 33 as now shown on X117.

Thereafter, through the Jacob property and across the Boyer property on what the court is calling the Boyer Road, the road is a private road and may be blocked and permission may be given or obtained for the use of the road or any existing easement may allow access. The Boyer Road is private except as to any easement in favor of the Water Users, who also enjoy a prescriptive easement along the East Fork Road to the Boyer property and to the Boyer Reservoir.

51. Thus, to summarize, the court, from the evidence, concludes that the East Fork Road is a public road from the point in Section 7 T2 R8 where it splits from the Bench Road to the middle of Section 8. From that point the East Fork Road is private. Jacob enjoys a historic easement along that road from the middle of Section 8 only for access as historically used. The Boyers do not enjoy a similar prescriptive easement for the same purposes. The Water Users enjoy a prescriptive easement along that road as well as Jacob but only as necessary for its purposes. Where that East Fork Road joins onto the Boyer property at the tri-junction of the Haynes, Jacob and Boyer

properties, at the junction of T2 R8 Sections 34 and Section 27, the road remains private through the Boyer property in Section 34 and it remains private until, going southerly, it enters the Jacob property at the eastern most portion of the division of Sections 33 T2 R8 and Section 4 T1 R8. The Water Users enjoy a prescriptive easement on the Boyer Road and any other use by others is permissive. The road is then public back to SR 133 from the Jacob property going along the Middle Fork and Bench Roads. Boyer does not enjoy a prescriptive easement from its property to the point the public road begins and any access will have to be by permission of Jacob.

In an attempt to again clarify, BASICALLY as shown on X117, the court is concluding, with the slight adjustments noted above, that as shown on X117, Section A so labeled is public, Section C is private, and Section D is private subject to the easements described. Section B is public.

52. One of the arguments Haynes has made against any portion of the road being declared public is that it goes "nowhere," there is no destination, it does not lead to a public place or even a particular site. That has indeed caused the court some concern throughout this litigation. In fact the court is aware of a few cases cited by the parties that deal with a "dead end" as a public road. In *Renfro v McCowan*, 2006 Dist. LEXIS 84439, the road found to be public went to a "view" area as described by the

court. In *Bertagnole v. Pine Meadow Ranches*, 639 P. 2d 211, (UT. 1981), the road seems to go to many, many cabins, but it does not lead to some other public area and when a member of the public gets to the "end" the same route, with lots of possible branches and loops, must be taken to return to I-80. Thus, the road in that case seems to be similar to the public aspects of this road, it leads to a "dead end" with some more loops in the *Bertagnole* road up Tolgate Canyon. The court concludes that such a "nowhere" road may still be a public road. The public may drive this road from SR 133 on either branch, along the East Fork Road to the middle of section 8, or along the Bench and Middle Fork Roads to Section 4, view the surroundings and turn around and travel back the same route as they took to SR 133. That is the nature of public roads under these Dedication Statutes based on older federal law which allowed creation of such roads. The fact that the public aspect of this road leads to a "dead end" as far as an actual destination does not defeat the public nature of its creation.

53. As to the width and scope of the public road it has been noted, in *Bertagnole* at 213, that the width of a dedicated highway is not limited to the beaten path. The width of a public road is to be determined as a question of fact. *Butler et.al. v. The Pinecrest Water Company*, 909 P.2d 225 (UT 1995). In the case cited for that proposition, *Blonquist v. Blonquist*, 516 P.2d 343

(UT. 1973), the court upheld a finding, without much discussion, of a width of 44 feet as being necessary and reasonable under the circumstances based upon the uses made of the road. The width which is reasonably safe and convenient for which the road was put is the width to be declared. In *Memmott v. Anderson*, 642 750 (UT. 1982), the trial court declared a public road a certain width and the Supreme Court found it was unable to determine what basis was used to determine the declared width. *Bertagnole* categorized, at 213-214, some past cases involving mountain canyons, and discussed findings of 44 feet, 60 and 82.5 feet in varying parts, 49.5 feet and 100 feet. The court in *Jeremy v. Bertagnole*, 116 P.2d 420 (UT 1941) discussed a public road created similarly to this case. That case made clear the width of the road is not to be measured by the width of the beaten track. It was necessary for the court to determine, according to what was reasonable and necessary, under all the facts and circumstances, the proper width and "where the public have acquired the right to a public highway by user, they are [not] limited to such width as has actually been used by them." That court noted that generally the greater portion of travel on a county road is confined to the tracks made by vehicles, but there must be room enough for travelers to pass each other. The road must be kept in such condition that the public will be safe and their rights protected. That court was citing *Lindsay Land* which

had indicated that the declared 100 foot width was justified by the evidence which showed more than that had probably been used. That case also stated, however, that the court must fix a width according to what was reasonable and necessary, under all the facts and circumstances, "for the uses which were made of the road." The court in *Jeremy* went on to say the court could not turn a bridle path abandoned to the public into a boulevard. "On the other hand, the implied dedication of a roadway to automobile traffic is the dedication of a roadway of sufficient width for safe and convenient use thereof by such traffic."

54. These cases do not clearly answer the question for the court for a number of reasons. First, the cases seem to refer, on one hand, to what "was" the use. On the other hand, especially in *Jeremy*, the courts discuss what "is" necessary now that the road is declared public for the safety of those "now" using the road. The Court has pointed out, in *Butler v Pinecrest, id*, that it was not error for the court to fail to determine width when that was not the focus of the litigation. Secondly, none of the cases refer to any statutes which state public policy.

55. In this case the court in its own defense must comment on how this issue was raised. During the trial there was precious little by way of evidence presented concerning the width of any portion of this road. The only direct evidence was from

Grant MacFarlane, who testified that at the lower, or northern-most portions of the Bench Road, that the road was perhaps an average of 20 feet wide there. There was evidence from Haynes that the road was in places only 8 feet wide and vegetation had to be cut in the Spring as it had grown over the space of the road when Haynes was a young man. The testimony did not reveal any specific places where that occurred or how wide the road was at any particular place nor how wide on average the road was. Jacob, to the court's recollection, did not present any evidence directly as to the road width at any point along the entire loop. There was some evidence that the road across the Boyer Reservoir was 12 feet. The court, as noted, traveled the entire loop in October 2007 with counsel. The court was unaware the issue of width may arise specifically, and in fact it was hardly mentioned during trial except in closing argument and in one post-trial brief. It was not mentioned in pre-trial briefs. It was first mentioned in the trial in Jacob's closing argument, then Haynes responded and Haynes responded in its post-trial brief. During the field trip the court did not pay particular attention to the width of the road. However, from that field trip alone the court would simply find and conclude that the width of the road seemed to vary greatly from the court's observations from one point to the next. It indeed seemed as narrow as 8 feet in places and it seemed wider than 20 feet in others. At the very base in the

northern most portions of the Bench Road testimony showed the oil and gas companies expanded the road in the 1980s but the exact beginning and ending of that widening was not revealed. Thus, respectfully, the court is operating under somewhat of a disadvantage. No party referred to any statutes whatever.

55. Most recently, in fact on March 18, 2008, the Utah Supreme Court decided *Pearson v. Pearson*, 2008 UT 24. In her dissenting opinion Chief Justice Durham noted that the courts are to examine statutory public policy before turning to common law. In this instance a statute and the case law seem to conflict to this court's thinking, though again no party briefed the specific issues.

56. UCA 72-5-108 seems to provide a stated legislative police that the "width" of rights of way for public highways shall be set as the highway authority of the State or county may determine for highways under their respective jurisdiction. This has been declared by Summit County in 1978 a Class D county road and it has now been declared, as described herein, a public road by this court. It would thus seem under that statute that the county, Summit County, determines the width. The "scope" of the right of way is that which is reasonable and necessary to ensure safe travel according to the facts and circumstances. UCA 72-5-104. Thus, to this court these statutes indicate, despite the cases to the contrary, that the court need not declare a width as

the court defers to the county authority to determine width. The cases that upheld the trial court's determination of width did not refer to UCA 72-5-108 or its predecessors, UCA 27-12-93, which have seemingly been in effect since 1963. The court, based on that statute, believes that the determination of width is NOT for the court but for county authorities. The determination of the width appears to be the responsibility of the county if this remains a Class D road.

57. From these thoughts and recitation of the law the court is of the belief that it ought not to declare a width. However, if the court's reading of the above statute is wrong, the court offers these thoughts and conclusions so that the parties need not return to court in the event the county either vacates this road or does not believe it is the responsibility of the county to declare the width of such a road or highway.

58. The court believes that it is attempting to solve a problem, not merely "find" the law though that is its principle task. The evidence showed that Jacob had a crane, cement trucks, front end loaders, caterpillars, road graders, pipe hauling trucks, 10 wheel dump trucks, media broadcast trucks, and other large vehicles on the Bench and Middle Fork Roads. Those vehicles seemed to have made it to what the court has concluded is the end of the public road without altering the road in its public portions. Evidently all construction equipment went along

the Bench and Middle Fork roads and not on the East Fork Road. The historic use by wagon and foot and horse indeed would require much less width in a road normally. The court has not in any way focused on the "trailing right" easements contained in X7 and X8 for example, whereby a 100 foot easement along the road was given for trailing and moving sheep. The court believes the language of the cases does not restrict the court to the historic uses only, but the court may and does consider what will now be safe for the public who may use that road if in fact it is the court's responsibility to declare a width. Again, the cases seem to say it is the court's responsibility but to this court the statute seems to say otherwise. If the court is responsible to declare a width the court believes the evidence and law allow the court to declare the road should be 18 feet in width. That is a far cry from that requested by Jacob but given that they have built 3 cabins and at least part of a fourth cabin at the southern end of this now-public road, and given that there may well be greater vehicle traffic now that the public may visit the area, and given the safety concerns involved in vehicles passing each other, it seems to the court a modest change will be required but this will still allow what the court concludes is reasonable and necessary and convenient for what uses are likely to be made of this public road. This will allow two vehicles to pass each other.

59. Again, the court's view is that the common law of Utah

allows the court to declare a width, but the statutory law reflecting public policy requires the county to declare the width. The court defers to the county but if the court is wrong, rather than return to court, the above conclusions are the court's view on the matter.

60. 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.

61. As to the width of the East Fork Road, the court believes no evidence justifies any conclusion other than that the width should remain just as it is presently on the non-public portion. The public portion is subject to the above comments. That historical use on the private road amounted to less use than the public portion, it is used less in the modern time, and is a private road with limited prescriptive use by only the Jacob and the Water User entities. Boyer can, of course, fully access their property via the public road and so there is no need nor justification for any other determination as to the East Fork Road east of the middle of Section 8. That is also true of the

Boyer Road.

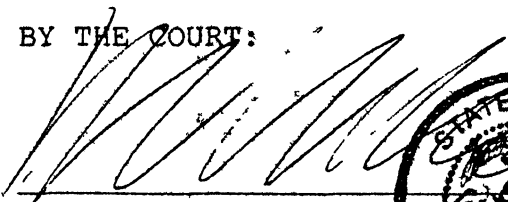
62. The court does not believe the litigation initiated by Haynes was in bad faith. It is a most difficult case for the court and the court sees no bad faith on behalf of any party though the court does wonder why the concessions given by Haynes were not announced 10 years ago. It appears true Haynes has not really attempted to stop the Jacob entities from use of the loop road, but Haynes for some reason believes Boyer has no access. Haynes is wrong, but not in bad faith for so believing.

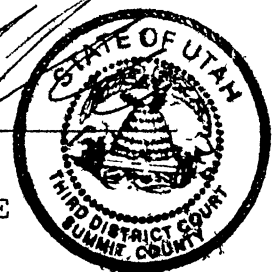
63. Similarly, the court concludes there are no damages for any trespass Haynes has caused by interfering with right of access. No evidence was presented on any such damages in any event.

Defendant is to prepare an order in compliance with URCP, Rule 7(f) setting forth this ruling. THIS MEMORANDUM DECISION IS INCORPORATED INTO ANY PREPARED ORDER AND THIS DECISION IS CONSIDERED AS PART OF THE COURT'S FINAL ORDER.

DATED this 21 day of Mar, 2008.

BY THE COURT:


BRUCE C. LUBECK
DISTRICT COURT JUDGE



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 980600244 by the method and on the date specified.

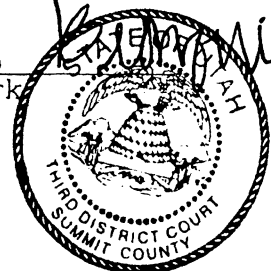
METHOD	NAME
Mail	TIMOTHY W BLACKBURN Attorney DEF 2404 WASHINGTON BLVD STE 900 OGDEN, UT 84401
Mail	BRENT A BOHMAN Attorney DEF 157 N COMMERCIAL ST STE 3 POB 120 MORGAN UT 84050
Mail	JAMI R BRACKIN Attorney DEF POB 128 COALVILLE UT 84017
Mail	MARA A BROWN Attorney DEF 2404 WASHINGTON BLVD STE 900 OGDEN UT 84401
Mail	BRETT D CRAGUN Attorney PLA 3098 HIGHLAND DR STE 450 SALT LAKE CITY UT 84106
Mail	JONATHAN O HAFEN Attorney DEF 185 S STATE ST STE 1300 SALT LAKE CITY UT 84111
Mail	DANIEL A JENSEN Attorney DEF 185 S STATE ST STE 1300 SALT LAKE CITY UT 84111
Mail	ANTHONY R MARTINEAU Attorney PLA 3098 HIGHLAND DR STE 450 SALT LAKE CITY UT 84106
Mail	RAY G MARTINEAU Attorney PLA 3098 HIGHLAND DR STE 450 SALT LAKE CITY UT 84106
Mail	TOBI D POTESIO Attorney DEF 185 S STATE ST STE 1300

Case No: 980600244
Date: Mar 24, 2008

Mail SALT LAKE CITY UT 84111
PAUL R POULSEN
Attorney DEF
POB 3390
PARK CITY UT 84060
Mail STEPHEN G SCHWENDIMAN
Attorney
1594 W NORTH TEMPLE STE 300
SALT LAKE CITY UT 84116
Mail LESLIE W SLAUGH
Attorney PLA
120 E 300 N
PROVO UT 84606
Mail DAVID L THOMAS
Attorney DEF
CIVIL DIVISION
60 N MAIN POB 128
COALVILLE UT 84017
Mail JULIE I VALDES
Attorney
1594 W N TEMPLE STE 300
POB 140855
SALT LAKE CITY UT
84114-0855
Mail CLARK WADDOUPS
Attorney DEF
185 S STATE ST STE 1300
SALT LAKE CITY UT 84111

Dated this 24th day of March, 2008.

B. Wilde
Deputy Court Clerk



APPENDIX B

Ruling and Order, August 29, 2008, R-Haynes 1678-1692

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

HAYNES LAND & LIVESTOCK
COMPANY,

Plaintiff,

vs.

JACOB FAMILY CHALK CREEK, LLC,
et al.,

Defendant.

JACOB FAMILY CHALK CREEK, LLC,
et al.,

Counterclaim
Plaintiffs,

vs.

HAYNES LAND & LIVESTOCK
COMPANY, et al.,

Counterclaim
Defendants.

TRIPLE H. RANCH, LC,

Plaintiff,

vs.

FERN J. BOYER et al.,

Defendants and
Third Party
Plaintiffs,

vs.

HAYNES LAND & LIVESTOCK
COMPANY, et al.,

Third-Party
Defendants.

RULING and ORDER

Case No. 980600244

[Consolidating Case Nos.
00600299 and 980600244]

Judge BRUCE C. LUBECK

DATE: August 29, 2008

001678

The above matter came before the court on August 26, 2008 for oral argument on various motions and requests.

Haynes was present through Ray G. Martineau and Leslie W. Slaugh; Jacob was present through Clark Waddoups, Jonathan O. Hafen, and Tobi D. Potestio; Boyer was present through Brent A. Bohman; Summit County was present through Jami R. Brackin, and the State of Utah was present through Steven G. Schwendiman.

Discussion was held on the following: Jacob Family Chalk Creek, LLC, Catherine B. Christensen, LLC, and Brian Garff's (Jacob) Motion for Entry of Proposed Form of the Order and in the alternative to Reopen Evidence for Limited Purpose; Haynes Land & Livestock Company, Triple H. Ranch, LC, and Chalk Creek-Hoytsville Water Users Cbrporation's (Haynes) Motion for Reconsideration of Road Width; and Fern Boyer, Gerald G. Boyer, Gregory J. Boyer, and J.S. Hansen's (Boyer) Motion for Reconsideration, or in the Alternative, for Clarification.

Jacob filed their motion on May 15, 2008. Haynes filed an opposition memorandum on May 21, 2008. Jacob filed a reply memorandum on June 9, 2008. Haynes filed their motion for reconsideration on May 21, 2008. Jacob filed an opposition memorandum on June 9, 2008. A request to submit was filed by Jacob on June 17, 2008. Based thereon oral argument was scheduled. That was postponed as Boyer filed their motion for reconsideration on July 30, 2008. Haynes filed a memorandum in opposition and Boyer filed a reply and request to submit for decision the same day. The court scheduled argument on all motions for August 26, 2008.

Oral argument was held and the court took the issues under advisement. Before the hearing the court carefully considered the memoranda and other materials submitted by the parties. Since taking the issues under advisement, the court has further considered the law and facts relating to the issues. The court has further reviewed the trial proceedings and relevant exhibits. Now being fully advised, the court renders the following Ruling and Order.

BACKGROUND

The background for this case was set forth in the Court's prior memorandum decision of March 21, 2008.

ARGUMENTS

Jacob moves for entry of their proposed form of order and final judgment and alternatively to reopen evidence for the limited purpose of addressing the issue of the road's width. A newer version of a proposed order was provided at argument. Jacob's proposed order differs from the decision of the court in some respects. First, they request the order be modified to show they do not have a prescriptive easement on the East Fork road. Second, they requested but withdrew at oral argument that the order be modified to state the road is 36 feet wide for "safety and maintenance" purposes instead of the court's 18 foot determination.

Jacob, after reviewing the tape of the trial record, suggests that Haynes only stipulated that Jacob had a prescriptive easement across the Bench road.

Jacob agrees that Summit County should determine the width of the road.

Haynes argues in their opposition memorandum that the road should not be expanded beyond the 18 foot declaration and that the court should not reopen evidence on the issue of road width. Haynes claims that testimony set the traveled surface of the road at only eight feet. Eighteen feet would be more than twice that width. Haynes says the court found the existing road sufficient for travel by large trucks and equipment. Further, Haynes denies that the Summit County Development Code, upon which Jacob relies, is controlling and that the recommendation contained therein pertains to subdivisions only. Haynes argues that the "Rights-of-way Across Federal Lands Act" upon which Jacob relies is not applicable because it was not enacted until after this lawsuit commenced.

Haynes cites *Western Kane County Special Service District No. 1 v. Jackson Cattle Co.*, 744 P.2d 1376, 1377 (Utah 1987) which upheld the determination that a road should be 10 feet wide while noting it was of such width during its public use. Haynes argues that there is no evidence that the road in its present condition is not safe.

Haynes contends that to reopen evidence now on the issue of road width would cause them prejudice, be unfair, and would

unnecessarily delay proceedings.

In reply Jacob again asserts that Utah Code Ann. § 72-5-108 supports a statutorily prescribed road width to be determined by Summit County. Summit County joins that position.

Jacob cites *Hunsaker v. State*, 509 P.2d 352, 354 (Utah 1973) to show the Utah Supreme Court in determining the width of a road started with a statutory presumption and then looked to potentially rebutting evidence. Jacob asserts, quoting *Jeremy v. Bertagnole*, 116 P.2d 420, 424 (Utah 1941), that any established use should be continually possible in a safe and convenient manner.

Haynes objects to certain portions of the proposed order submitted by Jacob. Haynes points to Rule 7(f)(3), URCP, to support its assertion that the order should not include a reference to incorporating the court's memorandum decision.

Haynes agrees with Jacob that the order should reflect that Jacob has a right to use the Bench road, but not the East Fork road.

Haynes contends the boundary between the Haynes and Boyer

properties is at the boundary of sections 27 and 34, not "in" section 34 itself.

Haynes objects to making the road 36 feet wide and insists it should remain at 18 feet as originally determined by the court. Haynes argues Summit County should not determine the width of the road but the court must do so.

Haynes assert the Boyer Defendants' easement denial was a denial of all types of easement, not just prescriptive.

Haynes asserts the order should state that all other claims of access by Jacob are denied.

Finally, Haynes asserts that the order should say the Jacob claim for easement is denied instead of not reached.

Jacob objects to the proposed order of Haynes.

Jacob asserts there is a significant difference in denying its claim and not reaching it and the language of the order should be the claim was not reached. This would enable an appellate court to remand with Jacob retaining access to its property. If the claim was denied and the appellate court reversed the decision that the road is public, Jacob is denied access to its property.

Boyer argues that the Court has decided without elaboration that they do not have a prescriptive right to use the East Fork road to access their property and that Water Users have a prescriptive easement across their property. Boyer argues the court misapprehended their argument as to when the prescriptive easement was acquired. Haynes did not even know Boyer had an interest in the Boyer property until long after the twenty-year period was over. Evidence that a key was given to the gate does not mean the use was permissive.

Boyer recites from the courts memorandum decision that Gary and Greg Boyer have used the road for more than the 20-year prescriptive easement period. They assert their use was not permissive and there was never any interruption of the use.

Boyer argues the Water Users never asserted a claim for a prescriptive right of way across the Boyer property and never presented any evidence to that effect. Boyer therefore claim there is no legal basis for granting such a right of way.

In opposition Haynes asserts no road existed during the time Boyer claims prescriptive use. Haynes maintains that the key

given by Howard Haynes, Sr. granted permission to use the road and thus the use could not be adverse. By locking the gate, Haynes interrupted the statutory period for a prescriptive easement.

Haynes also asserts that the Water Users claims were tried by consent. Since there was no objection to the evidence on the matter, it would be a waste of resources to try the issue again separately.

Boyer in reply again maintains its use of the road was adverse, that provision of a key to the gate does not rebut the presumption of adversity, that the *Okelberry* case does not apply, that their use of the road was not under the claim of Jacob-Christensen, and that Water Users have not presented any evidence to support a prescriptive easement.

DISCUSSION

The court has fully considered the positions of the parties and again reviewed the relevant portions of the file and exhibits and reviewed the necessary parts of the file.

1. Road width

The court believes its memorandum decision was correct. Under UCA 72-5-108 the relevant highway authority considers the factors set forth by statute in that chapter 5 of Title 72. The court's comments as to its "feelings" were in essence dicta and thoughts as the court ruled and reaffirms that the decision as to the width of a public road belongs to Summit County. This court is not "delegating" the decision to a governmental entity as the legislature has done that. The court believes not only does the statute make that clear but policy does as well. Summit County is certainly able to conduct hearings and consider input and exercise its expertise in a more meaningful manner than is the court on such issues as what is reasonable and necessary for safety of the public.

Haynes arguments as to the "taking" 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. Further, there has been no taking at this point in any event.

The court DENIES Haynes motion for reconsideration. Thus,

the court will sign an order in the language of paragraph 12 of the order provided to the court August 26, 2008.

2. Boyer's motion to reconsider or clarify.

The court will not change or modify its final conclusion about Boyer's not having any type of easement along the East Fork road. The court does not believe any further findings are necessary as the court found any use was permissive. The only reasonable explanation for having a locked gate and advising someone of where a key can be found to open that gate is that the use was permissive. Thus, the court will clarify to the extent needed that the court found and concludes that any use by the Boyers since ownership by Haynes has been permissive and thus there can be no prescriptive easement.

The court does not determine that the bright-line principles of *Okelberry* govern in this situation but the court does conclude the reasoning of that case applies as well to a prescriptive easement situation. Where a gate is erected, whether over a public road or otherwise, that is a clear interruption of the allowed use, whether it be a public road or use under a prescriptive easement. Haynes intent is clear here since

ownership and the gate along the East Fork was intended to keep people out. Again, use by the Boyers was permissive and thus the court's conclusion that they have no right of prescriptive easement use remains the court's ruling.

The court believes its conclusion as to the easement of the Water Users is also justified by the court's findings as well and no modification of that ruling or clarification is granted.

Boyer's motion to reconsider is DENIED.

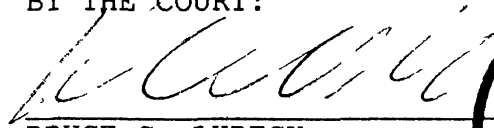
The court has carefully examined the proposed order given to the court August 26, 2008, and has considered the comments and arguments of the parties as to that order. The court directs Jacob-Christensen to prepare a final order in that same form and content but adding paragraph 21 from Haynes's proposed order dealing with the private nature of the Water User's road. The court will then sign that final order which is again to incorporate fully the court March 21, 2008, memorandum decision as well as this brief clarification to the court's denial of Boyer's claim of prescriptive easement over the East Fork Road.

The court believes its memorandum decision of March 21,

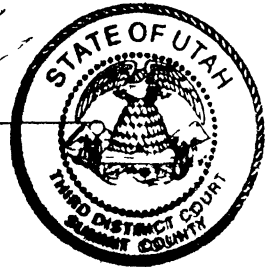
2008, was correct and reaffirms it in all aspects other than as indicated in the order the court will sign.

DATED this 29 day of Aug, 2008.

BY THE COURT:



BRUCE C. LUBECK
DISTRICT COURT JUDGE



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 980600244 by the method and on the date specified.

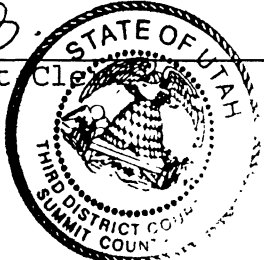
METHOD	NAME
Mail	TIMOTHY W BLACKBURN Attorney DEF 372 24TH STREET STE 400 OGDEN, UT 84401
Mail	BRENT A BOHMAN Attorney DEF 157 N COMMERCIAL ST STE 3 POB 120 MORGAN UT 84050
Mail	JAMI R BRACKIN Attorney DEF POB 128 COALVILLE UT 84017
Mail	MARA A BROWN Attorney DEF 2404 WASHINGTON BLVD STE 900 OGDEN UT 84401
Mail	BRETT D CRAGUN Attorney PLA 3098 HIGHLAND DR STE 450 SALT LAKE CITY UT 84106
Mail	JONATHAN O HAFEN Attorney DEF 185 S STATE ST STE 1300 SALT LAKE CITY UT 84111
Mail	DANIEL A JENSEN Attorney DEF 185 S STATE ST STE 1300 SALT LAKE CITY UT 84111
Mail	ANTHONY R MARTINEAU Attorney PLA 3098 HIGHLAND DR STE 450 SALT LAKE CITY UT 84106
Mail	RAY G MARTINEAU Attorney PLA 3098 HIGHLAND DR STE 450 SALT LAKE CITY UT 84106
Mail	TOBI D POTESIO Attorney DEF 185 S STATE ST STE 1300

Case No: 980600244
Date: Aug 29, 2008

Mail SALT LAKE CITY UT 84111
PAUL R POULSEN
Attorney DEF
POB 3390
PARK CITY UT 84060
Mail STEPHEN G SCHWENDIMAN
Attorney
1594 W NORTH TEMPLE STE 300
SALT LAKE CITY UT 84116
Mail LESLIE W SLAUGH
Attorney PLA
120 E 300 N
PROVO UT 84606
Mail DAVID L THOMAS
Attorney DEF
CIVIL DIVISION
60 N MAIN POB 128
COALVILLE UT 84017
Mail JULIE I VALDES
Attorney
1594 W N TEMPLE STE 300
POB 140855
SALT LAKE CITY UT
84114-0855
Mail CLARK WADDOUPS
Attorney DEF
185 S STATE ST STE 1300
SALT LAKE CITY UT 84111

Dated this 29th day of August, 2008.

B. B.
Deputy Court Clerk



APPENDIX C

Order and Final Judgment, September 16, 2008, R-Haynes 1693-1700

Clark Waddoups (3975)
Jonathan O. Hafen (6096)
Tobi D. Potestio (9557)
PARR WADDOUPS BROWN GEE & LOVELESS
185 South State Street, Suite 1300
Salt Lake City, Utah 84111

Telephone: (801) 532-7840
Facsimile: (801) 532-7750

Attorneys for Jacob Family Chalk Creek,
LLC; Catherine B. Christensen, L.L.C.;
and Brian Garff

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

HAYNES LAND & LIVESTOCK
COMPANY,

Plaintiff,

vs.

JACOB FAMILY CHALK CREEK, LLC,
et al.,

Defendants.

JACOB FAMILY CHALK CREEK, LLC,
et al.,

Counterclaim Plaintiffs,

vs.

ORDER AND FINAL JUDGMENT

Civil No. 980600244

[Consolidating Case Nos. 00600299
and 980600244]

Judge: Bruce C. Lubeck

001693

HAYNES LAND & LIVESTOCK)
COMPANY, et al.,)
)
Counterclaim Defendants.)
)
_____)
TRIPLE H. RANCH, LC,)
)
Plaintiff,)
)
vs.)
)
FERN J. BOYER et al.,)
)
Defendants and)
Third-Party Plaintiffs,)
)
vs.)
)
HAYNES LAND & LIVESTOCK)
COMPANY, et al.)
)
Third-Party Defendants.)
)

The above-captioned matter came on for trial before the Honorable Bruce C. Lubeck on March 4, 5, 6, 7, and 11, 2008. The Court took the matter under advisement at the conclusion of the trial and on March 21, 2008 issued a Memorandum Decision in which the Court set forth its Findings of Fact and Conclusions of Law pursuant to Rule 52 of the *Utah Rules of Civil Procedure*. On August 26, 2008, the Court heard oral argument on various motions and requests pertaining to the Memorandum Decision. After taking the additional matters under advisement, the Court issued a

Ruling and Order on August 29, 2008. For the reasons set forth in the Memorandum Decision, the Ruling and Order, and for good cause appearing, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. The Memorandum Decision of the Court, dated March 21, 2008, and the Ruling and Order of the Court, dated August 29, 2008, are incorporated into this Order and are considered as part of the Court's Final Order.

2. Jacob Family Chalk Creek, LLC, Catherine B. Christensen, LLC, and Brian Garff's (collectively, "Jacob-Christensen") declaratory action seeking judgment that the road at issue in this dispute (the "Road") is a public right of way is GRANTED in part and DENIED in part as follows:

- A. Pursuant to "R.S. 2477," Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253, *codified at* 43 U.S.C. § 932, *repealed by* Federal Land Policy Management Act of 1976, Pub. L. No. 94-579 § 706(a), 90 Stat. 2743, the Road is a public way as it traverses through every even numbered section specified in Paragraphs 3 through 5 below.
- B. Pursuant to Utah Code Ann. § 72-5-104 (2007), the Road is a public way as it traverses through every odd numbered section specified in Paragraphs 3 through 5 below.
- C. The Road is a private way as it traverses through the sections or portions of sections specified in Paragraphs 6, 7, 8, and 9 below.

3. From where the Road forks off of State Road 133 approximately eighteen miles east of Coalville, Summit County, Utah and travels in a southeasterly direction along the East Fork of Chalk Creek through Sections 35 and 36 of Township 3 North, Range 7 East; Section 1 of Township 2 North, Range 7 East; and Sections 6, 7, and 18 of Township 2 North, Range 8 East the Road is a public way ("Bench Road").

4. From where the Bench Road ends and the Road travels through Sections 19, 20, 29, 32, and 33 of Township 2 North, Range 8 East; and Section 4 of Township 1 North, Range 8 East the Road is a public way until the eastern most point where the Road crosses back from Township 1 North, Range 8 East, Section 4 into Township 2, Range 8 East, Section 33.

5. From where the Road forks off of the Bench Road in Section 7 of Township 2 North, Range 8 East and travels in an easterly direction through Sections 7 and 8 of Township 2 North, Range 8 East, the Road is a public way through the west half of Section 8 in the township until it reaches the center line.

6. The portion of the Road beginning at the center line of Section 8, Township 2 North, Range 8 East and traveling through the east half of Section 8 and Sections 9, 15, 16, 22, 23, 26, and 27 (to the boundary between Sections 27 and 34) of Township 2 North, Range 8 East is not a public road.

7. The portion of the Road described in Paragraphs 5 and 6 above is collectively referred to as the "East Fork Road." The East Fork Road ends in Section 34, Township 2 North, Range 8

East where the property of Fern Boyer, Gerald Boyer, Gregory Boyer, Alfred Blonquist as Trustee (collectively "Boyer Defendants"), and Triple H Ranch LC begins at its north boundary line.

8. The portion of Road that traverses the property of the Boyer Defendants and Triple H Ranch LC in Section 34 of Township 2 North, Range 8 East is a private way and shall be referred to herein as the "Boyer Road."

9. The portion of the Road beginning at the eastern most point where it crosses between Township 1 North, Range 8 East, Section 4 and Township 2 North, Range 8 East, Section 33 until it reaches the Boyer Road is a private way.

10. The portion of the Road described in Paragraphs 4 and 9 above is collectively referred to as the "Middle Fork Road."

11. The course of the Road stated in Paragraphs 3 through 10 above is depicted on the map introduced as trial Exhibit 117, which is attached hereto as Exhibit A and incorporated herein by this reference.

12. The width of the portions of the Road that have been declared a public way shall be determined by Summit County, Utah according to that which is reasonable and necessary to ensure safe travel based on the facts and circumstances.

13. The Chalk-Creek Hoytsville Water Users Corporation have a prescriptive easement for ingress and egress over the Boyer Road only for purposes of operating and maintaining Joyce Lake and Boyer Lake reservoirs.


14. The Boyer Defendants' claim for an easement over the East Fork Road is DENIED.
15. Haynes Land & Livestock Company's ("Haynes") claim that a taking has occurred is DENIED.
16. Haynes' claims to quiet title in the Road as against the Jacob-Christensens individually and collectively are DENIED for the portions of the Bench, East Fork, and Middle Fork Roads that are public as described above.
17. Haynes' claims to quiet title in the Road as against the Jacob-Christensens individually and collectively are GRANTED for the portion of the East Fork Road that is not a public way, as described above, based on a stipulation between Haynes and Jacob-Christensen after the Memorandum Decision issued whereby the parties agreed Jacob-Christensen does not have a prescriptive easement across the private portion of the East Fork Road.
18. Jacob-Christensen's claim for damages due to trespass by Haynes is DENIED.
19. Jacob-Christensen's claim for easement by grant, easement by necessity, and prescriptive easement on the Bench Road are not reached based on the Court's ruling that the Bench Road is a public way.
20. Default judgment is hereby entered against B.A. Bingham & Sons, LLC, a limited liability company; David B. Williams, an individual; Stillman Seven, a partnership; Karel J. Snyder, an individual, Helen W. Blonquist, an individual, Barbara Hall, an individual, and Kevin Hall, an individual.

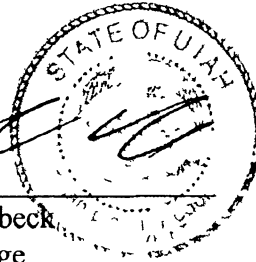
21. That portion of the road over the property of Chalk Creek-Hoytsville Water Users Corporation in Section 34, Township 2 North, Range 8 East is a private road and no party has established any easement or other right of access for the use of that road.

IT IS FURTHER ORDERED that, there being no just reason for delay, pursuant to Rule 54(b) of the *Utah Rules of Civil Procedure*, this judgment is entered as a final judgment and immediate execution may be had and issued on this final judgment.

ORDER AND JUDGMENT ENTERED this 15 day of September, 2008.

BY THE COURT:


Honorable Bruce C. Lubeck
Utah District Court Judge



CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of September, 2008, I caused a true and correct copy of the foregoing **ORDER AND FINAL JUDGMENT** to be served via first class, U.S. Mail, postage prepaid upon the following:

Ray G. Martineau, Esq.
Anthony R. Martineau, Esq.
Brett D. Cragun, Esq.
MARTINEAU LAW
3098 Highland Drive, Suite 450
Salt Lake City, UT 84106

Leslie W. Slauch, Esq.
HOWARD LEWIS & PETERSEN
120 East 300 North
Provo, UT 84606

Stephen G. Schwendiman, Esq.
Norman K. Johnson, Esq.
Julie I. Valdes, Esq.
ASSISTANT ATTORNEYS GENERAL
1594 West North Temple, Suite 300
Salt Lake City, UT 84116

Brent A. Bohman, Esq.
157 North Commercial Street, Suite 3
P.O. Box 120
Morgan, UT 84050

David L. Thomas, Esq.
Jami R. Brackin, Esq.
SUMMIT COUNTY ATTORNEY'S OFFICE
60 North Main
P.O. Box 128
Coalville, UT 84017

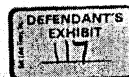
Timothy W. Blackburn, Esq.
VAN COTT BAGLEY CORNWALL & MCCARTHY
2404 Washington Boulevard
Ogden, UT 84401

Paul R. Poulsen, Esq.
TESCH LAW OFFICES, PC
314 Main Street, Suite 200
P.O. Box 3390
Park City, UT 84060





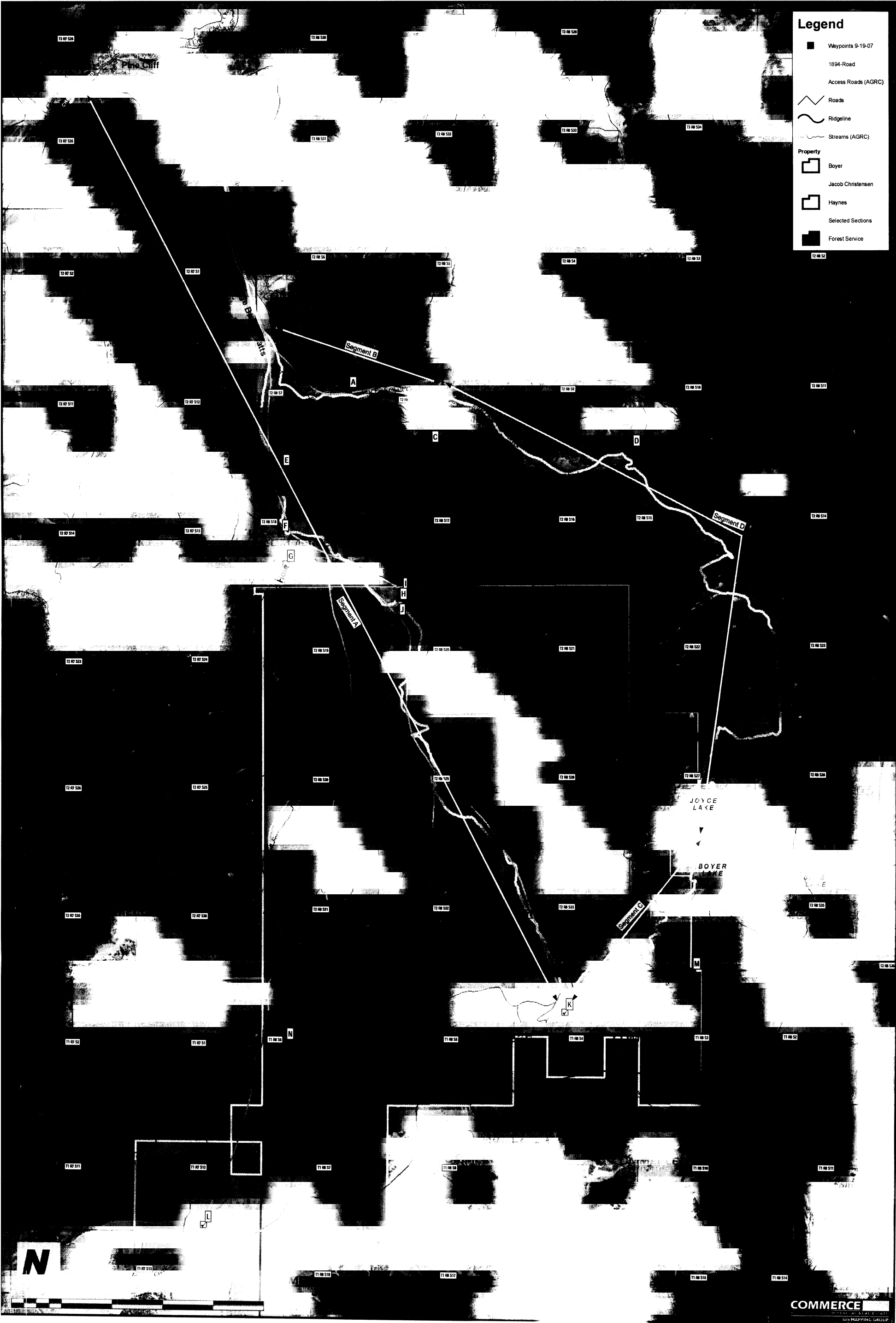
Summit County



COMMERCE

APPENDIX D

Map of properties, Exhibit 117



Summit County

2006

COMMERCE
FULL SERVICE COMMERCIAL REAL ESTATE

175 East 400 South, Suite 700
Salt Lake City, Utah 84111
Phone: 801-322-2000
FAX: 801-322-2040

10/10/2007 7:31:20 PM
F:\Projects\10 Evelyn\Tobin\Road-D.mxd
© Copyright 2007.
CommerceCRG. All rights reserved.
Aerial Photography, 2006
The above information while not guaranteed has
been secured from sources deemed reliable.
An independently owned and
operated member of the
CUSHMAN & WAKEFIELD