

2008

Wasatch County v. E. Ray Okelberry, Brian  
Okelberry, Eric Okelberry, West Daniels Land  
Association, Utah Division of Wildlife Resources :  
Brief of Appellee

Utah Court of Appeals

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**THE UTAH COURT OF APPEALS**

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

Plaintiff-Appellee,

Case No. 20080988-CA

KELBERRY, BRIAN  
OKELBERRY, ERIC OKELBERRY,  
WEST DANIELS LAND  
ASSOCIATION, UTAH DIVISION OF  
WILDLIFE RESOURCES,

Defendants-Appellants.

**RESPONSE BRIEF OF APPELLEE WASATCH COUNTY**

**APPEAL FROM THE FINAL DECREE  
OF THE FOURTH JUDICIAL DISTRICT COURT OF WASATCH COUNTY,  
THE HONORABLE DONALD J. EYRE**

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IN THE UTAH COURT OF APPEALS

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

Plaintiff-Appellee,

vs.

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

Defendants-Appellants.

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## **LIST OF PARTIES**

All parties are listed on the case caption



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## **STATEMENT OF JURISDICTION**

The Utah Supreme Court had jurisdiction of this appeal pursuant to Utah Code Ann. § 78A-3-102(3)(j). It subsequently assigned the appeal to the Utah Court of Appeals, which has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(j).

## **DETERMINATIVE PROVISIONS OF LAW**

U.C.A. § 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.

## **STATEMENT OF THE CASE**

### Statement of Facts

Defendants are owners of vast tracts of real property located in Wasatch County. (R. 419). The property is mountainous terrain separating the Wallsburg valley from state and federal owned forested land. (R. 418-419). The property is traversed by several interconnecting dirt roads, some of which provide the only vehicle access to several parts of United States Forest Service land (“Forest land”). (R. 419-418). As found by the trial court, the public has used these roads at-will for at least thirty years, starting in the 1960s. (R. 413). Beginning in the late 1980s or early 1990s the Okelberrys began restricting access to the roads. (R. 488). In 2001, the County filed an action in the Fourth Judicial District Court to enforce the public’s rights to use the roads. (R.10).

At trial, nine witnesses—a representative sampling of community users—testified that beginning in the late 1950s they used the roads without impediment or limitation by the Okelberrys or anyone. The roads were used by the public to access several areas of

Forest land for recreational activities in which vehicles traveled the roads. (R. 682 pg. 102-103) For the areas of public land served by these roads, there is no other way for vehicle access. These witnesses testified that they never requested or received permission to use these roads, but used the roads whenever they wanted, regardless of the purpose (R. 400) There was some testimony of sometimes seeing the Okelberrys or their employees while using the roads prior to the 1990s (R. 683 pg. 122); however, none of these witnesses were ever approached or stopped by the Okelberrys or their employees (R. 473).

At trial, these witnesses also testified that throughout the Okelberry property there were wire livestock fences with wire gates across the roads. However, these gates were typically only closed when livestock were present on the Okelberry property. (R. 682 pg. 189). If the livestock were only in one area of the property, only the gates for that area would be closed and the rest of the gates would be open. (R. 683 pg. 232) During the winter months, not only were the gates open, but the wire fences themselves were usually let down and placed on the ground (R. 684 pg. 137-138)

These witnesses further testified that they never saw any no-trespassing signs or any other signs or markers until the late 1980s or early 1990s (R. 675) There was also evidence that when the first signs were erected, some signs were placed inside the Okelberry property along and parallel to the roads indicating that although a person could use the roads, travelers were not allowed to leave the roads and enter onto the surrounding Okelberry property (R. 683 pg. 71-72)

All of the witnesses called by the County testified that in all the years they used these roads they never encountered a locked gate until the 1990s. (R. 675). The witnesses testified that they were always able to use the roads; their collective uninterrupted use spanned over thirty years. (R. 413, 417).

In the early 1990s the Okleberrys started selling what they described as “trespass permits” to persons who wanted to hunt on their property. The Okelberrys charged individuals fifty dollars per person for permission to hunt on their land during the appropriate seasons. Brian Okelberry testified that the one time he encountered someone hunting on Okelberry property without a trespass permit, he did not kick him off, but instead sold him a permit. (R. 684 pg. 35-36). Ray Okelberry stated that when they started selling the trespass permits is when they started “this permission deal.” (R. 684 pg. 86).

After selling the trespass permits for a year or two, the Okelberrys leased the “hunting rights” on the property to United Sportsman, Inc, a hunting club, to be used by club members. It was during these few years of trespass permits and the United Sportsman lease that members of the public first started seeing no trespassing signs being posted and locks installed on the gates. (R. 683 pg. 64-65).

Finally, the property was placed into what is now called a “Cooperative Wildlife Management Unit” (“CWMU”). In a CWMU, the operator works in conjunction with the Department of Wildlife Resources (“DWR”) to manage the wildlife on the property. (R. 416). In exchange for allowing the DWR to have a say in the management of the land for



wildlife, the CWMU operator (and sometimes the landowner) is allowed to sell hunting permits to individuals. (R. 683 pg. 228-229).

After a three-day bench trial, the district court found, by clear and convincing evidence, that four of the roads at issue had become dedicated and abandoned to the public pursuant to state law. (R. 413).

### **SUMMARY OF ARGUMENT**

On remand from the Utah Supreme Court the trial court made further and more specific findings in order to apply the new test articulated in this case for what is required to interrupt public use under the dedication statute. After making those findings, the trial court held that the roads in question had been dedicated to the public.

The trial court specifically found that the gates across these roads were not locked prior to the late 1980s or early 1990s. It specifically found that the testimony from Ray Okelberry, that he locked the before the 1990s, was not credible. The trial court further found that any such locking that may have taken place was not intended to interrupt the public use of the road. The finding regarding no intent to close public access was correct since even those claims of locking gates was clearly intended for livestock control.

The trial court also properly held that the wire gates across these roads did not constitute an act of interruption. The gates were in place when the Okelberrys bought the property so they were not an overt act of the Okelberrys. Furthermore, the evidence showed that the intent in using the gates was for livestock control.

The Okelberrys claim that the presence of gates limits the scope of the public roads was not raised below and it should not be considered by the Court. Regardless, to

allow a road that meets the requirements for dedication to the public to be somehow limited in scope defeats the purpose of the statute and is unworkable.

The trial court found that persons were at times asked to leave the Okelberry property adjacent to the roads but were not stopped from using the roads. This finding is supported by the testimony of Lee Okelberry that people could use the roads through their property whether they requested permission or not and without any trouble at all.

The trial court's denial of the Okelberrys' motion for new trial or to present additional evidence was also correct. The intent of the Okelberrys regarding these roads was clear at trial and the court expressly found that persons were freely allowed to use the roads during the relevant time periods. This evidence was sufficient to support the trial court's holding on this motion.

The evidence in this case spans fifty years. It is clear that there was a change in the Okelberrys' dealings with these roads which went from making no effort to control the roads for thirty years to trying to completely cut off public access. However, as found by the trial court the roads had already become dedicated public roads.

## **ARGUMENT**

### **I. THE TRIAL COURT CORRECTLY APPLIED THE UTAH SUPREME COURT'S RECENT TEST ARTICULATED IN THIS CASE**

In its recent opinion in *Wasatch County v. Okelberry*, 2008 UT 10, ¶ 15, the Utah Supreme Court articulated a new test to apply when determining whether a public road was used continuously by the public for ten years or whether the use was interrupted by the property owner; thereby restarting the ten year requirement of continuous use for a

road dedication. In that opinion, the Court said, “[A]n 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.” *Id.*

As noted by the trial court in its *Further Specific Findings of Fact and Ruling on Defendants' Motion for Entry of Supplemental Findings and Conclusions; or Alternatively for New Trial or Presentation of Additional Evidence* (hereinafter, “Further Specific Findings”), the new test has three elements. First, the property owner must have performed an act. Second, the act must be intended to interrupt the use of the road. Third, the act must be reasonably calculated to interrupt the use of the road. (R. 672).

Fortunately, the Court did not pronounce a new test without providing direction. At the time the Court decided *Okelberry*, there were two other “companion cases” dealing with road dedication. These cases were *Town of Leeds v. Prisbrey*, 2008 UT 11 and *Utah County v. Butler*, 2008 UT 12. In both *Prisbrey* and *Butler*, the Utah Supreme Court applied the new test articulated in *Okelberry*. In fact, in *Butler*, the Court noted that Butler had failed to marshal the facts, as required when challenging the factual findings of a lower court, and as a result the Court would normally decline to review the issue. However, noting the new standard set forth in *Okelberry*, the Court elected “to exercise [its] discretion and review the merits of [Butler’s] arguments regarding continuous use in order to elucidate this standard by applying it to specific facts.” *Butler*, 2008 UT 12 at ¶ 12. A review of the holdings in *Butler* and *Prisbrey* will show that on remand the trial court correctly applied the new standard set forth in *Okelberry*.

A. Review of *Town of Leeds v. Prisbrey*

The *Prisbrey* decision is important because it shows that a single qualifying act is enough to restart the ten year continuous use requirement under the dedication statute. In *Prisbrey*, the trial court found that the public had used the road in question for thirty years. *Town of Leeds v. Prisbrey*, 2008 UT 11, ¶ 4. However, on six occasions within that time period the owner of the property, a Mrs. George, had physically blocked the road with sawhorses and manned the blocked road with either herself or her sons for twenty-four continuous hours. *Id.* ¶ 3. The trial court found that Mrs. George effected the blockade with the specific intent and for the specific reason of retaining private ownership of the road. *Id.* ¶ 7.

On review, the Court found that blocking the roadway for twenty-four continuous hours was a sufficient method of interrupting public use of the roadway. Further because the intent to interrupt continuous use existed, the roads had not become dedicated to the public.

B. Review of *Utah County v. Butler*

*Butler* is important to the case at bar because it shows that a landowner must have the necessary intent for an act to interrupt the public use of the road. Like the case at bar, *Butler* involved issues pertaining to the existence of gates, gates being locked at times, the placement of no trespassing signs, and allegations of people being asked to leave private property. *Butler*, 2008 UT 12, ¶5-6. Also, there were allegations of irrigation water and snow on the road at times making it impassable. *Id.* ¶ 5-6.

In *Butler*, the trial court found that the acts of locking gates, kicking persons off of the property, placement of signs, and using the road to deliver irrigation water did occur. *Id.* ¶ 6. However, the trial court also found that each of the claimed interruptions failed to disrupt continuous use, and specifically held that none of the acts which had occurred were intended to interrupt the use of the road by the public. *Id.* ¶ 16-17. In applying the standard established in *Okelberry*, the Court held that despite the fact that some actual interruptions were found by the trial court, the road was still dedicated to the public. *Id.* The Court held that the lack of the necessary intent when locking gates, placing signs, or delivering irrigation and the ejecting of persons from the property adjacent to the road rendered those acts insufficient to interrupt continuous use. *Id.*

In the case at bar, the Okelberrys presented evidence regarding some of the same facts found in the *Butler* case, namely the existence of gates, locking of gates, asking persons to leave the property, and the erection of no trespassing signs. (R. 672-673). However, this evidence was properly found by the trial court to either be unreliable or not credible, and lacking the necessary intent to interrupt the public use of the roads. Regardless, the Okelberrys' purported interruptive acts failed to satisfy the standard articulated in *Okelberry* and clarified in *Prisbrey* and *Butler*.

C. The Trial Court Did Not Find the Evidence of Locked Gates Prior to the Late 1980s or Early 1990s Credible

One of the issues argued in this case prior to remand was whether the trial court had made a finding that the gates across the roads at issue in this case had been locked prior to the late 1980s or early 1990's. After articulating the new standard of what would

constitute an interruptive act in this type of case, the Supreme Court noted that “factual questions remain as to whether and when such an event or events occurred.” *Okelberry*, 2008 UT 10, ¶19. This was clearly one of the factual issues to be determined on remand and as required the trial court resolved this issue.

In its Further Specific Findings the trial court clarified its earlier findings regarding locked gates by finding that there was no credible evidence of locked gates prior to the late 1980s or early 1990s. The trial court noted that the evidence of such an act as locking gates had to be credible in order to constitute an overt act. (R. 670). The trial court then made detailed findings of why the evidence of locked gates prior to the late 1980s or early 1990s was not credible. (R. 670). Those reasons included self interest of the witness and the fact that the evidence was contradicted by virtually all of the witnesses called by the Plaintiff or the Defendants. (R. 670). The trial court further clarified its findings by expressly holding that to the extent Ray Okelberry’s testimony contradicted the testimony of Lee Okelberry and Brian Okelberry on the issue of locking gates, the testimony of Ray Okelberry was not credible. (R. 670). Or stated differently, the trial court found that the gates were not locked prior to sometime in the late 1980s or 1990s, as testified to by Brian Okleberry and Lee Okelberry and supported by all of the testimony of Plaintiff’s witnesses. The trial court went even further and noted that any locking of gates that actually may have occurred lacked the requisite intent necessary to interrupt continuous use as articulated in *Okleberry* and clarified in *Butler*.

- D. For the Sake of Argument, Even if the Trial Court had Found Some Locking of Gates, Such Acts Lacked the Requisite Intent to Qualify as an Interruptive Act

Even if the trial court's Further Specific Findings could be construed to have found that the gates were locked at some time prior to the late 1980s, the trial court correctly held that such acts lacked the requisite intent to constitute an interruptive act. In the standard articulated by the Supreme Court in *Okelberry*, the first part of the test requires "[a]n overt act that is intended by a property owner to interrupt the use of a road as a public thoroughfare" *Okelberry*, 2008 UT 10, ¶ 15. Ostensibly, in order to intend to disrupt continuous use of road by the public, one must know that the road is being used by the public, know that the public use must be interrupted to stop the road from becoming public, and then act with intent to interrupt the public use.

The trial court specifically found that even if those acts claimed by the Okelberrys had taken place, they were not intended to interrupt the public use of the road. In fact, at trial one of the Okelberrys' arguments was that during the 1950s and 1960s and even into the 1970s there was not any use of the roads by the public. It would be impossible for them to intend to interrupt the use of the road by the public when they were not aware such use was even happening.

E. The Okelberrys' Sufficiency of Evidence Argument Must Fail

1. The Okelberrys Failed to Marshal the Evidence

Although not listed in their questions presented, the Okelberrys make a sufficiency of evidence argument in their brief with respect to the trial court's finding that they lacked the intent to lock the gates in order to interrupt the use of the road by the public. It is important to note that this argument presumes a finding by the trial court that the gates

were locked at some time at least every ten years. However, the trial court expressly found the evidence of locked gates as not credible. Nevertheless, for the sake of argument, even if the trial court had found from Ray Okelberry's testimony that he sometimes locked gates was credible, the Okelberrys' sufficiency of evidence argument must fail.

In *Chen v. Stewart*, 2005 UT 68, ¶ 53, the Supreme Court held, "In order to challenge a court's factual findings, an appellant must first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below." This requires the party to present, in "comprehensive and fastidious order, *every scrap* of competent evidence introduced at trial which supports the very findings the appellant resists." *Oneida/SLIC v. Oneida Cold Storage*, 872 P.2d 1051, 1052-53 (Utah App. 1994) (citation omitted) (emphasis added). Where evidence is inadequately marshaled, the court is to assume "that all findings are adequately supported by the evidence." *Chen v. Stewart*, 2004 UT 82, ¶ 19. In their sufficiency of evidence argument, the Okelberrys have failed to make any effort at marshalling. Therefore, this court should hold that the finding that the Okelberrys lacked the intent to lock the gates in order to interrupt the use of the road by the public is in fact supported by sufficient evidence on that basis.

2. There was Sufficient Evidence for the Trial Court's Holding on Intent

Even had the Okelberrys properly marshaled the evidence as required to argue that issue, the trial court was still correct in its finding that any such locking of gates lacked



the intent required under *Okelberry*. This can best be seen in the testimony of Ray Okelberry. At trial, the following testimony was given by Ray Okleberry:

A. The first gate, yes. That's the first gate I locked, Circle. I had the sheep ready to go and somebody left the gate opened and trespassed on the Forest Service. I brought them back and locked the gate.

Q. Now when you say the other gate, was that the gate that goes – The 1080 Gate, is that the one that goes onto the Ridge Line Road?

A. That's Right, and those big pines. I locked that. We had two bands of sheep, as I stated before. One was on the one side of that fence, the middle division fence, and one was on the other. It was my responsibility that, for the ranch and the Okelberrys, to get the sheep over there. I had had problems and I wasn't going to have any problems. I locked them.

(R.684 pg. 136). Ray Okelberry is stating that the reason he claimed to have locked some gates was so the sheep would not get out. It had nothing to do with interrupting the public's use of the road. The fact that such testimony of locking the gates is in direct contradiction to his earlier testimony that during those years he virtually never saw members of the public on these roads gives further basis for the trial court's finding that such evidence was not credible. (R. 684 pg 65-67). The lack of intent to close these roads to the public is further shown in the collective testimony of Ray Okelberry where he never states that he or his family was making an effort to keep the roads private. Even more telling is his statement that once they started selling trespass permits was the time they started "this permission deal," (R. 684 pg. 86).

## **II. THE EXISTENCE OF GATES DID NOT QUALIFY AS AN INTERRUPTIVE ACT**

After an extensive search, Wasatch County has found no Utah case law that has held that the presence of gates alone interrupts the continuous use of a road by the public

under the dedication statute. In Wasatch County's search, the significance of an unlocked gate alone as an interruptive force in the context of section 72-5-104 has not yet been addressed by any appellate court in Utah. Some cases have, as pointed out by the Okelberrys, addressed the presence of gates without indicating whether the gates were locked. However, the language of the opinions indicates that likely these gates were in fact locked. *See e.g., AWINC Corp.*, 2005 UT App 168, ¶ 3 (noting that "[t]he gates prevented use" of the road); *Kohler v. Martin*, 916 P.2d 910, 914 (Utah App. 1996) (finding the gate prevented use of the road). A gate that is unlocked hardly prevents the public's access to and use of any particular road.

There are good reasons why the trial court's holding that the presence of gates across these roads did not constitute an interruptive event is correct and should not be disturbed.

A. No Overt Act Was Performed by the Okelberrys

First, as noted by the trial court, there was no overt act of the Okelberrys to place gates across the roads. The evidence at trial was that the boundary gates were already present when the Okelberrys purchased the property. (R. 684 pg. 62-63). Because the gates were already present the Okelberrys did not perform an overt act, a necessary element of the standard set forth by the Supreme Court.

B. The Gates Were Not Intended to Interrupt the Public Use of the Road

Second, the Okelberrys' intent in using the gates was clear at trial. The evidence was that the gates were used to contain livestock. Brian Okelberry testified that the purpose of the gates was to keep the sheep together and on the Okelberry property. Only

after persistent, leading questioning by his own attorney did he agree that perhaps the gates were to control use of the road by the public. (R. 684 pg. 25). Keeping the sheep on the property was necessary because if the sheep were to wander off the property the Okelberrys would be fined by the Forest Service. (R. 683 pg. 135). Lee Okelberry testified that cattle guards were put in because the wire gates would sometimes get cut off or rolled back, indicating that the purpose of the gates was livestock control. (R. 683 pg. 198).

The fact that these gates were for livestock control is further shown by the evidence that the gates were only closed when there was livestock on the property. For instance, Martin Wall testified that “if there was no stock in there [the gates] would be down.” (R. 682 pg. 189). Ed Sabey similarly testified that the gates are not always up and that “once the sheep and cattle is gone [the gates] were hardly put up, ever . . . .” (R. 682 pg. 271, 292). Shane Ford, an Okelberry witness, testified that the gates would be open or closed, depending on which pasture the sheep were in. (R. 683 pg. 232). Lee Okelberry also testified that the gates were not up at all times during the summer. (R. 683 pg. 97). Ray Okelberry testified that the sheep would be on the property from May to June and would return at the end of September. (R. 684 pg. 69-70). Gerald Thompson testified that sometimes the gates were open and at other times they were closed. (R. 682 pg. 244). Brandon Richins similarly testified that sometimes the gates were up and sometimes they were not. (R. 683 pg. 12, 25). The evidence clearly supported the trial court’s holding that the gates were intended to control the livestock and that there was no intent to interrupt use of the road.

C. For the Sake Of Argument, Even if the Gates Had Been Intended to Interrupt Access, They were not Reasonably Calculated to do so.

The gates present during the relevant time periods do not convey or show intent to interrupt the public use of the roads. The gates used were wire fence gates. This type of gate does not send a message to “keep out.” There is a significant difference between a wire gate on a wire fence in rural sheep and cattle country and a wrought-iron gate on a fence around a person’s back yard. Each sends a completely different message. In this case the gates were clearly livestock gates on livestock fences.<sup>1</sup> The message sent by these gates is one of livestock control, not to keep out. Considering that the roads run through sheep country, it would be incongruous to allow wire livestock gates to serve as a reasonably calculated act of interruption. This is even more apparent when put in the proper context. In the thirty plus years that these roads have been used by the public many things have changed. Wasatch County was much more agriculturally based than it is currently. There were fewer people, more farms, and more livestock. People, especially in these outlying areas which are even now considered rural, were accustomed to seeing and using livestock gates. Cattle guards were much less prevalent than in today’s world. A gate simply did not have the same meaning it may have today. And it was in this environment that these roads were dedicated to the public, developing into well-used, continuous, and necessary access to Forest Service and other public lands.

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<sup>1</sup> It is true that in recent years, the Okleberrys did intend to interrupt public use by closing and locking their gates. They also replaced the wire gate with an iron gate on at least one road (the main road into the property), but this was long after the roads had become dedicated to the public under the statute. It does show that when the Okleberrys did intend to interrupt public use, they knew how to do it.

Further, even currently under Utah Code Ann. § 72-7-106, a county may authorize a person to keep unlocked gates on Class B and D public roads. For a member of the public accustomed to seeing gates across all types of roads, even public roads, the presence of a wire livestock gate across a road in rural livestock grazing areas did not and does not send a message that a person cannot use the road. Even had the Okelberrys intended for the gates to interrupt the public use, they would not have been reasonably calculated to do so.

The trial court properly found that the presence of gates across these roads did not interrupt the public use. They were not an overt act by the landowner, they were not intended to interrupt public use, and, even had they been an act of the Okelberrys intended to interrupt public use of the roads, they were not reasonably calculated to do so.

### **III. THE EXISTENCE OF GATES CANNOT LIMIT THE SCOPE OF WHAT IS DEDICATED TO THE PUBLIC**

The Okelberrys also argue that the existence of gates limits the scope of the public road dedication. Their argument is that a road dedication includes a tacit intention of the landowner to give the road to the public. They further argue that the presence of gates limits the amount or the scope of that gift leaving the public only with what was given. As support for this argument they cite the Louisiana case of *Vaughn v. Williams*, 345 So.2d 1195 (La. Ct. App. 1977).

#### **A. This Issue was Not Raised Below**

This argument was not raised or preserved below by the Okelberrys. Because they fail to make either of these showings, this issue should not be considered. *See. DeBry v.*

*Noble*, 889 P.2d 428, 444 (Utah 1995) (holding that arguments not raised below are not considered by the Court).

B. When a Road is Dedicated it Must Become a Complete Public Road.

In Utah, although the consent of the Landowner was at one time a necessary element for a road dedication, it no longer is. *Heber City v. Simpson*, 942 P.2d 307, 311 (Utah 1997). Rather, under Utah's dedication statute, a road is dedicated by the use of the public and inaction on the part of a landowner. This is supported by the Supreme Court's new standard for interruption of the continuous use element. Under that standard, a landowner cannot interrupt continuous use by merely showing that he did not intend to dedicate a public road. Instead he must show that he acted with the specific intent to not allow a dedication of the road.

If a landowner were allowed to use this "limited gift" argument to limit the scope of a road properly dedicated under the dedication statute, that same argument could and would be used regarding every aspect of roads so dedicated. For example, a landowner may argue that he tacitly gave only a dirt road and thus it can never be paved. Or a landowner may argue that he tacitly only allowed use when he was not using the roadway to deliver irrigation water and thus he can flood the public road with water when desired.<sup>2</sup> Further, a landowner may argue that he tacitly only allowed eight feet of the road to be used by the public and thus there is only an eight foot wide public road that can never be increased. Such a result would be absurd.

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<sup>2</sup> See *Utah County v. Butler*, 2008 UT 12, ¶ 6,

When a road is dedicated to the public, it must become a public road where the highway authority has the same ability and powers to govern and use it in the public's best interest as with any other public road.

**IV. THE TRIAL COURT'S FINDING THAT THE OKELBERRYS EJECTED PERSONS FOUND ON THE PROPERTY ADJACENT TO THE ROAD BUT NOT THE ROAD ITSELF IS CORRECT.**

The trial court found that the testimony at trial showed “that the Okelberrys and their employees have at various times asked persons to leave *the property surrounding the roads.*” (R. 488) (emphasis added). In its Further Specific Findings, the trial court did not modify that finding, rather it found that the Okelberrys allowed persons to freely use these roads. (R. 673). The evidence presented at trial supports the trial court's findings that the public's use of these roads was without permission, but freely allowed by the Okelberrys.

**A. The Public's Use of the Road Was Not by Permission.**

The Okelberrys argue that there was evidence that at times they granted permission to some people to use their land and on other occasions expelled some people found on the land. They argue that this evidence shows an effort to control access to the roads and should be considered to meet the standard for an act that interrupted public use. However, even a cursory review of that evidence shows why the trial court properly found that evidence to not constitute an interruption of continuous use.

First, virtually all the grants of permission given by the Okelberrys were to either allow hunting or camping or somehow use the Okelberry property, not merely to use the roads. There was no credible evidence during the relevant time period before the late

1980s or 1990s of anyone requesting permission to use only the roads, it was always to use the property through which the roads traverse.

Second, virtually all of the evidence of permission happened after the late 1980s or early 1990s, after everyone agreed that the Okelberrys started to restrict use of the roads and property. (*See, e.g.*, R. 684 pg. 83-84) (written permission slip allowing use of roads and land, dated 8/31/2000).

Conversely, all of the witnesses called by the County testified to using the roads for decades without any permission. (*E.g.*, R. 682 pg. 190) (testimony of Martin Wall, who first used the roads in the 1950's, stating that he never asked for nor received permission to use the roads); (*see also* R. 683 pg. 141) (testimony of Okelberrys' employee, Jeff Jefferson, who stated that the majority of people he approached on the Okelberry property were there without permission).

B. The Evidence of Requesting People to Leave Was About People Who Were Off of The Roads and On the Property Adjacent To The Roads

The credible testimony offered by the Okelberry witnesses regarding ejecting persons from their property were instances of persons found off of the road using the Okelberry property in ways the Okelberrys did not approve. The record has several detailed examples of occasions where persons found off of the road on the Okelberry property adjacent to the road were asked to leave. However, there was no testimony showing one specific instance where a non-permissive user of the roads had been expelled, simply for using the roads.

For instance, Ray Okelberry testified that he once left a note at a camp, sometime



within the last 20 years, advising the occupant that he or she was trespassing on private property. (R. 684 pg. 82). The camp, and its occupant, had been there for more than a week and were on the Okelberry property—not the road—and were in fact trespassing. *See* Defendant’s Exhibit 27.<sup>3</sup> (R. 683 pg. 122). Ray Okelberry did not testify to expelling anyone from the area other than the instance where he left the note at the camp, as discussed above. (R. 684 pg. 82). Brian Okelberry similarly testified that he could not recall asking anyone to leave the property—and thus presumably also the roads. (R. 684 pg. 41).

In their brief, the Okelberrys cite the testimony of Lee Okelberry to claim that he routinely questioned persons he found using the road. *Okelberry Brief* at 22-23. In fact, Lee Okelberry testified that he could not recall asking anyone to leave during the 1950s or 1960s. (R. 683 pg. 184-85). His only descriptions of asking anyone to leave concerned use of the property—not the roads. When asked whether he believed the roads were open for use by the public, he stated, “There was no consideration for the use of the public or nothing else with the Forest Service. Anybody that had any business in there could get through the road without any trouble at all.” (R. 683 pg. 204). When asked whether the public had to ask to use the roads, he stated, “If there was any that needed to go through there in any way, shape or form they could ask or they could go through there.” (R. 683 pg. 205) (emphasis added). Clearly, Lee Okelberry was not stopping

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<sup>3</sup> There was one instance where an employee, Jeff Jefferson, testified that he asked Mark Butters and his brother to leave the roads. But he admitted that this happened in 2002 or 2003 long after the relevant time period. Even the County admitted that the Okelberrys had begun blocking these roads by this time. (R. 683 pg. 150).

people and asking them their “business.” As he stated, there wasn’t any consideration needed for anyone to use the roads. If anyone did ask he had no problem, or if they just used the roads there was no “trouble at all.” During Lee Okelberry’s time, the roads were open for anyone to use. Lee Okelberry’s testimony that that he had never turned anyone away who had business on the public lands did not mean that he was monitoring the use of these roads. (R. 683 pg. 205).

There was also testimony from a friend of the Okelberrys and an employee of the Okelberrys regarding asking persons to leave the property. Bruce Huvard, an Okelberry friend, testified that the Okelberrys authorized him to ask non-permissive users to leave the property and roads. (R. 683 pg. 266). This friend, who only frequented Okelberry property during some hunting seasons, did not provide any examples or dates for his assertion that he had in fact asked anyone to leave the Okelberry roads, other than when he became involved in leasing the land in the mid-1990’s. (R. 683 pg. 255-56). Jeff Jefferson, an Okelberry employee, testified that per Okelberry policy if he saw someone on the property he would ask them to leave. (R. 683 pg. 141). The following discussion with Jefferson took place during cross-examination:

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

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

A: No - - Yeah, I’d run into people like that and on the road. And I’d ask them if they’re suppose to be on there.

(R. 683 pg. 149). However, none of the Okelberrys testified to the existence of any

policy regarding the expulsion of individuals either on the road or the property. Jeff Jefferson's testimony essentially was that he would ask people to leave the Okelberry property. It was only when pressed that he added the catchall "and on the road" statement. (R. 683 pg. 148-49).

The trial court found that the testimony at trial showed "that the Okelberrys and their employees have at various times asked persons to leave *the property surrounding the roads.*" ( R. 488). (emphasis added). In its further supplemental findings, the trial court did not modify those findings. The trial court was correct in its holding that ejection of trespassers from adjacent land does not interrupt the continuous use of the roads themselves. The evidence supports the trial court's finding that individuals were not ejected solely for using the roads, but that before the 1990s the Okelberrys freely intended to let others use the roads. (R. 673).

C. Even Had the Court Found that Persons Were Kicked Off the Roads Solely For Using the Roads, Any Such Acts Were Neither Intended to Disrupt the Use of the Road by the Public Nor Reasonably Calculated to Do So.

Even if the trial court had found that members of the public found simply using the roads were asked to leave by the Okelberrys or their employees, such actions would not have qualified as an interruptive act under the Court's new standard. The Okelberry witnesses who testified to performing such an act were Bruce Huvard, a friend of the Okelberrys, and Jeff Jefferson, an employee of the Okelberrys. As stated above, both of these witnesses claimed to have been asked by the Okelberrys to perform such acts. However, none of the Okelberrys, all of whom testified of acts when they expelled persons from the property, ever talked about expelling persons from the roads or about

creating a policy of expelling persons from the road. Even if Mr. Huvard and Mr. Jefferson ever ejected someone using only the road, such instances were gratuitous acts, not acts sanctioned by the Okelberrys for any specific purpose. Such acts would have lacked the necessary intent to interrupt the use of the roads by the public.

Finally, even if such acts had been found to have occurred with the intent to interrupt public use, the act of occasionally asking a person to leave the Okelberry property is not reasonably calculated to interrupt the use of the road. Though it may disrupt that person's use of the road, it does not send any message to the general public that the roads are private.

#### **V. THE COURT'S DENIAL OF THE MOTION FOR NEW TRIAL OR TO PRESENT ADDITIONAL EVIDENCE WAS CORRECT**

The Okelberrys also question the trial court's denial of their motion for a new trial or to reopen the case and allow additional evidence. The basis of their argument is that the new standard articulated by the Supreme Court resurrected the element of intent as a necessary element to determine road dedication, and that considering this new test or standard, they should be allowed to present evidence specifically focused on that test.

As noted by this Court in *A.K. & R. Whipple Plumbing and Heating v. Aspen Const.*, 977 P.2d 518, 524 (Utah App. 1999), the standard of review for a motion for a new trial is abuse of discretion. In *Aspen*, the Court stated, "It lies within the sound discretion of the trial court to grant a motion to reopen for the purpose of taking additional testimony after the case has been submitted but prior to entry of judgment." *Id.* (citing *Lewis v. Porter*, 556 P.2d 496, 497 (Utah 1976)). However, in an unpublished

case, this Court has also stated, “We review the trial court’s decision on a motion for a new trial for an abuse of discretion and we reverse only if there is no reasonable basis for the decision.” *Ranson v. DiPaolo*, 2008 UT App 65 (quoting and citing *Balderas v. Starks*, 2006 UT App 218, ¶ 13, *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 805 (Utah 1991)(internal punctuation omitted).

In the case at bar, there was certainly a reasonable basis for the trial court’s denial of the Okelberrys’ motion to reopen the case for additional evidence or for a new trial.

At the trial, the Okelberrys did their best to try and show that they intended to disrupt the use of these roads by the public. At trial and all along, the Okelberrys have argued that any interruption however caused and however brief should preclude a finding of continuous use. To support this argument the Okelberrys tried to introduce every piece of evidence that could to show they intended to control these roads. One very good example referenced above was when Okelberrys’ counsel asked owner and defendant, Brian Okelberry, twice in succession, whether one of the purposes of the gates was to keep people from using the roads. (R. 684 pg. 25). The fact that he had to ask such a pointed, leading question two times to his own client in order to get the response he wanted (even then, hesitantly), shows that the defense was very focused on trying to show an intent to interrupt public use of this road.<sup>4</sup> It is somewhat disingenuous for the Okelberrys to now say that, even though they took every opportunity to show any and every conceivable interruption of the use of these roads, including leading questions to

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<sup>4</sup> It also shows that the trial court was correct in not finding evidence garnered in such a way to be credible evidence.

illicit evidence of intent to close the roads to the public, had they only known intent was an issue they would have shown evidence of their intent to stop public use.

The trial court did not merely find a “silent” lack of intent on the part of the Okelberrys to close the roads due to insufficient evidence. To the contrary, the court specifically found just the opposite. The trial court found that prior to the 1990s the Okelberrys intended to freely let the public use the roads. (R. 673). This use was without restriction and whether or not any member of the public had permission.

The reality is that this new standard of what is necessary to interrupt continuous use does not change what evidence a party in Defendant’s position would try and in fact did try to present at trial. Rather, it only gives this court a slightly different measuring stick to measure that evidence. The trial court was well within its discretion in denying the Okelberrys’ motion for a new trial or to introduce additional evidence. In fact it was the correct decision. The test articulated by the Supreme Court should not change the finding of dedication. Nor is it a basis for granting a new trial or reopening the trial to take additional evidence.

For the sake of argument, even if further evidence were needed in this matter, it would be wrong to require a completely new trial. This trial took place approximately four years ago. Some of the witnesses brought by Wasatch County were elderly even then. Witnesses may have moved or otherwise be unavailable. If this Court were to believe it absolutely necessary to take additional evidence, the case should be reopened rather than having a completely new trial.

As a result, the trial court clearly did not abuse its discretion and based its decision on a reasonable basis.

## **VI. THE OKELBERRYS EFFECTIVELY CONCEDED THEIR CLAIM THAT SIGNS WERE AN INTERRUPTIVE ACT**

Although the issue regarding erection of no trespassing or keep out signs is discussed in the Okelberrys' brief in the statement of facts section, that issue is not listed in their statement of issues or included in the argument section of their brief. The Okelberrys appear to have conceded their argument that no trespassing or keep out signs were an interruptive act. This is instructive in that the evidence at trial was that signs appeared around the time that the gates began to be locked and people were ejected from the roads. (R. 673). The evidence from the witness brought by the County and the witness of the Okelberrys correspond directly regarding the timing of these events. During the early 1990s when the Okelberrys testified that they began the "whole permission deal" by selling trespass permits and placing the property into the hunting club and CWMU is exactly the same time that the witness brought by the County testified that they first saw any no trespassing signs or locked gates. (R. 413).

One of the aspects of this case which sometimes seems to be overlooked is that there is over fifty years of history regarding these roads. Often in the limitations of an appellate review it seems that the evidence is somewhat less clear than it was at trial. In this case, all parties agree that in the late 1980s or early 1990s the Okelberrys took affirmative acts which were intended to interrupt the use of the road. They began to lock the gates. They began to post no trespassing signs on the road and generally acted to

close the roads to the public. At trial, there was a lot of testimony from the Okelberrys and their witnesses of their intent and the steps they took to keep people off the roads and the land. There was testimony of locks torn off gates and gates torn off of fences. There was testimony regarding people being asked to leave the property and of people asking permission to use the property. There was testimony regarding the existence of no trespassing signs on the roads, even testimony of angry confrontations. However, almost all of that evidence, when pinned down, was to events that took place after 1990. Even the witness brought by Wasatch County agreed that those events happened after 1990.

Nevertheless, it was clear to the trial court as seen in its findings and ruling that those actions and the intent behind those actions came about in the late 1980s or early 1990s. At trial, it was clear to the court that this change in policy by the Okelberrys was as complete as it was dramatic. In light of this evidence and presentation, the trial court properly found that the Okelberrys' intent prior to the 1990s was to freely allow the use of the roads by the public.

It is this type of factual situation that has resulted in a standard of review for road dedication that allows a large degree of deference to the trial court's ruling in applying the facts to the law. This has not changed by the new standard of what interrupts public use under the dedication statute. As noted in *Wasatch County v. Okelberry*, 2008 UT 10.

¶ 8

An appellate court reviews a trial court's legal interpretation of the Dedication Statute for correctness and its factual findings for clear error. But whether the facts of a case satisfy the requirements of the Dedication Statute is a mixed question of fact and law that involves various and complex facts, evidentiary resolutions, and credibility determinations.



Thus, an appellate court reviews “a trial court’s decision regarding whether a public highway has been established under [the Dedication Statute] . . . for correctness but grant[s] the court significant discretion in its application of the facts to the statute.” (citations omitted).

### **CONCLUSION**

The trial court correctly found that there were no acts which interrupted the public use of the road under the Supreme Court’s new standard. For almost thirty years, the public was allowed to freely use these roads without permission or restriction. During that time the gates were not locked, people were not stopped from using the roads and the presence of gates was not intended nor reasonably calculated to interrupt the use of the roads by the public. The decision of the trial court should thus be affirmed.

Dated this 9<sup>th</sup> day of June, 2009.

A handwritten signature in black ink, appearing to read "Scott H. Sweat", is written over a horizontal line.

SCOTT H SWEAT  
WASATCH COUNTY ATTORNEYS OFFICE  
Attorneys for Wasatch County

I hereby certify that two true and correct copies of the foregoing were mailed to each of the following, postage prepaid, this 9<sup>th</sup> day of June, 2009.

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SCOTT H SWEAT

## APPENDIX A

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

*This opinion is subject to revision before final  
publication in the Pacific Reporter.*

IN THE SUPREME COURT OF THE STATE OF UTAH

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Wasatch County, a body politic  
of the State of Utah,  
Plaintiff and Respondent,

No. 20070011

v.

E. Ray Okelberry, Brian Okelberry,  
Eric Okelberry, West Daniels  
Land Association, Utah Division  
of Wildlife Resources, and John  
Does 1-25,

F I L E D

Defendants and Petitioners. February 12, 2008

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Fourth District, Heber Dep't  
The Honorable Donald J. Eyre, Jr.  
No. 010500388

Attorneys: Thomas L. Low, Scott H. Sweat, Heber City, for  
plaintiff  
Don R. Petersen, Leslie W. Slaugh, Provo, for  
defendants

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On Certiorari to the Utah Court of Appeals

DURRANT, Justice:

#### INTRODUCTION

¶1 In this case and two companion cases that we also decide today,<sup>1</sup> we consider the operation of Utah Code section 72-5-104(1) (the "Dedication Statute"), which provides as follows: "A highway is dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a

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<sup>1</sup> Town of Leeds v. Prisbrey, 2008 UT 11, \_\_\_P.3d \_\_\_; Utah County v. Butler, 2008 UT 12, \_\_\_P.3d \_\_\_.

period of ten years."<sup>2</sup> We granted certiorari in this case to consider whether the court of appeals erred in its application of the standard for ascertaining continuous use as a public thoroughfare under this statute. We conclude that it did so err. We reverse and remand for the entry of specific findings of fact relevant to the standard we announce today and for an application of that standard.

#### BACKGROUND

¶2 In 1957, Roy Okelberry and his sons, E. Ray and Lee, purchased a large tract of land (the "Property") in Wasatch County near Wallsburg, Utah. E. Ray and Lee later acquired their father's interest in the Property. Sometime thereafter, Lee sold his interest in the Property to E. Ray and E. Ray's sons, Brian and Eric. E. Ray, Brian, and Eric Okelberry (the "Okelberrys") currently own the Property and use it for their livestock operations.

¶3 Several unimproved mountain roads cross the Property, all of which begin and end (or connect with roads that begin and end) at points outside of it. Four of these roads are at issue in this case: Circle Springs Road, Thorton Hollow Road, Parker Canyon Road, and Ridge Line Road (collectively, the "Four Roads").<sup>3</sup> When Roy, E. Ray, and Lee Okelberry purchased the Property in 1957, fences on its east and south sides separated it from United States Forest Service property, and wire gates along these fences controlled access to the Four Roads, requiring persons entering or exiting the Property to open the gates before proceeding.

¶4 In 2001, Wasatch County filed a Complaint for Declaratory Judgment and Quiet Title against the Okelberrys, the Utah Division of Wildlife Resources,<sup>4</sup> and West Daniels Land Association,<sup>5</sup> seeking to have the Four Roads declared dedicated

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<sup>2</sup> Utah Code Ann. § 72-5-104(1) (2001).

<sup>3</sup> The underlying lawsuit also included Maple Canyon Road. The trial court found that this road had not been dedicated and abandoned to the public. Neither party appealed this decision, and we do not address it here.

<sup>4</sup> Wasatch County settled its dispute with the Utah Division of Wildlife Resources in 2003.

<sup>5</sup> Portions of Ridge Line Road and Parker Canyon Road  
(continued...)

and abandoned to the use of the public pursuant to Utah Code section 72-5-104.<sup>6</sup> During a three-day bench trial, Wasatch County presented several witnesses who testified that they had used the Four Roads without the Okelberrys' permission for recreational purposes during the 1960s, 1970s, and 1980s. These witnesses also testified that although there were gates on the roads, their use of the roads was unrestricted. The Okelberrys presented evidence and testimony that members of the public had not had unrestricted access to the roads, but that the gates on the roads had been locked, at least occasionally, as early as the late 1950s and that "No Trespassing," "Keep Out," or "Private" signs were posted. The Okelberrys testified that they had given permission to a large number of people in the community to use

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<sup>5</sup> (...continued)

traverse property owned by West Daniels Land Association (the "Association") immediately adjacent to the Property. The Okelberrys are members and shareholders in the Association and use the Association's land, together with their own, for grazing livestock. The Association initially made an appearance through counsel, but counsel later withdrew and no successor was appointed. Wasatch County thereafter sought default summary judgment against the Association. The Okelberrys opposed this motion, arguing that as members of the Association they had "a vested interest to see that no judgment is entered in this matter on behalf of the plaintiff" and that, at trial, they "will present evidence that there are no established roads across the property of [the] Association." For reasons that are unclear from the record, the trial court did not enter a ruling on Wasatch County's default judgment motion prior to trial. In its posttrial Findings of Fact and Conclusions of Law, the court noted that the Association's "default was entered," but that the Okelberrys had been allowed to submit "[e]vidence regarding the use of those portions of the roads at issue which are located in [the] Association's property" at trial. The trial court made its determinations regarding the Four Roads without distinguishing between the Okelberrys' property and the Association's property. We likewise do not distinguish between the properties and refer only to the interests of the Okelberrys because the parties have not appealed this issue.

<sup>6</sup> An earlier version of this statute was in effect at the time Wasatch County claims the Four Roads were dedicated and abandoned to the use of the public. See Utah Code Ann. § 27-12-89 (1995). A 1998 amendment to the earlier version renumbered this section but made no substantive changes to it. 1998 Utah Laws 861. We therefore refer to the current version of the statute throughout this opinion.

their roads and Property and had sold trespass and hunting permits. And witnesses testified that the Okelberrys, in the mid-1990s, placed their Property in a cooperative wildlife management unit for use as a private hunting unit. The Okelberrys and their employees testified that when they encountered persons on the Property or roads without express permission to be there, they asked them to leave.

¶5 At the conclusion of the bench trial, the trial court entered findings of fact and conclusions of law and, later, supplemental findings of fact. The trial court found "that there was no public use of the various roads in the 1940s or before and also that no evidence of vehicular use prior to the 1950s existed." The court recognized that there were gates on the roads that the Okelberrys or their employees locked "[a]t various times in the past," but found that they were locked "on a more permanent basis" beginning in the early 1990s. In addition, the court found that "[p]rior to the gates being locked, the existence of the gates did not interrupt the public's use of the roads."

¶6 In its Conclusions of Law, the trial court stated as follows:

Taking even the [Okelberrys'] factual assertions as true, it is clear that individuals using the roads beginning in the late 1950s until the late 1980s or early 1990s used the roads without interruption, they used the roads freely, and though not constantly, they used the roads continuously as they needed. Therefore, [the] Court finds that prior to the interrupting mechanisms being put in place the roads in question were subject to continuous use . . . .

The trial court also found that the majority of those using the roads were nonpermissive users and members of the general public. Thus, the court determined that "[p]rior to the locking of the gates in the early 1990s the roads were used as public thoroughfares." And the court found "that the continuous use as a public thoroughfare continued for at least ten years, if not much longer, or for multiple periods of ten years." The court therefore concluded that Wasatch County had established by clear and convincing evidence that the Four Roads had been abandoned and dedicated to the public. The court decided, however, that Wasatch County was equitably estopped from opening the roads to public use because the Okelberrys had, since 1989, asserted private control over the roads. The court stated that "[t]o

allow the County now to assert an ownership interest in these roads would cause the Okelberrys injury [and] would be unjust."

¶7 Wasatch County appealed the trial court's equitable estoppel determination, and the Okelberrys cross-appealed the court's decision that the Four Roads had been dedicated to the public. The court of appeals reversed the trial court's equitable estoppel decision and upheld its decisions regarding the public dedication of the Four Roads.<sup>7</sup> We granted certiorari to determine whether the court of appeals applied the correct standard for determining whether a road has been continuously used as a public thoroughfare pursuant to Utah Code section 72-5-104. The parties do not challenge, and we do not address, the equitable estoppel issue.

#### STANDARD OF REVIEW

¶8 "On certiorari, we review for correctness the decision of the court of appeals, not the decision of the district court."<sup>8</sup> "The correctness of the court of appeals' decision turns on whether that court correctly reviewed the trial court's decision under the appropriate standard of review."<sup>9</sup> An appellate court reviews a trial court's legal interpretation of the Dedication Statute for correctness and its factual findings for clear error.<sup>10</sup> 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.<sup>11</sup> 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 grant[s] the court

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<sup>7</sup> See Wasatch County v. Okelberry, 2006 UT App 473, ¶ 33, 153 P.3d 745.

<sup>8</sup> D.J. Inv. Group, L.L.C. v. DAE/Westbrook, L.L.C., 2006 UT 62, ¶ 10, 147 P.3d 414.

<sup>9</sup> State v. Dean, 2004 UT 63, ¶ 7, 95 P.3d 276.

<sup>10</sup> See State v. Levin, 2006 UT 50, ¶ 20, 144 P.3d 1096.

<sup>11</sup> Heber City Corp. v. Simpson, 942 P.2d 307, 309-10 (Utah 1997).



significant discretion in its application of the facts to the statute."<sup>12</sup>

### ANALYSIS

¶9 Both the United States and Utah Constitutions prohibit uncompensated takings of private property.<sup>13</sup> Yet, under certain circumstances, Utah statutory law allows property to be transferred from private to public use without compensation. The Dedication Statute at issue in this case allows for such a transfer. The statute provides that "[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."<sup>14</sup> In light of the constitutional protection accorded private property, we have held that a party seeking to establish dedication and abandonment under this statute bears the burden of doing so by clear and convincing evidence.<sup>15</sup>

¶10 In a number of our past cases, we have sought to interpret the phrase "continuously used as a public thoroughfare." We have explained that such use occurs when "the public, even though not consisting of a great many persons, [makes] a continuous and uninterrupted use" of a road "as often as they [find] it convenient or necessary."<sup>16</sup> The court of appeals, borrowing language from one of our cases dealing with the doctrine of right-of-way by prescription, has added to this definition as follows: "[U]se may be continuous though not constant[] . . . provided it occurred as often as the claimant had occasion or chose to pass. [. . .] Mere intermission is not interruption."<sup>17</sup>

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<sup>12</sup> Id. at 310.

<sup>13</sup> U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just compensation."); Utah Const. art. I, § 22 ("Private property shall not be taken or damaged for public use without just compensation").

<sup>14</sup> Utah Code Ann. § 72-5-104(1) (2001).

<sup>15</sup> See Draper City v. Estate of Bernardo, 888 P.2d 1097, 1099 (Utah 1995); Bonner v. Sudbury, 417 P.2d 646, 648 (Utah 1966).

<sup>16</sup> Boyer v. Clark, 326 P.2d 107, 109 (Utah 1958).

<sup>17</sup> Campbell v. Box Elder County, 962 P.2d 806, 809 (Utah Ct. (continued...))

¶11 Despite the best efforts of this court and the court of appeals, a workable interpretation of "continuous use" in the context of the Dedication Statute has remained elusive. We have described ourselves as "hard-pressed to establish a coherent and consistent statement of the law on a fact-intensive, case-by-case review of trial court rulings."<sup>13</sup> In reviewing the case now before us, the court of appeals thoughtfully sought to bring some coherency and consistency to this area of the law by articulating a balancing test:

In deciding whether a locked gate acted as an interruptive force sufficient to restart the running of the statutory ten-year period, the trial court should weigh the evidence regarding the duration and frequency that the gate was locked against the frequency and volume of public use to determine if there is clear and convincing evidence that public use of the road was continuous.<sup>19</sup>

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<sup>17</sup> (...continued)  
App. 1998) (quoting Richards v. Pines Ranch, Inc., 559 P.2d 948, 949 (Utah 1977)). The entire passage from which this quote was extracted reads as follows:

"A way may be established by prescription without direct evidence of its actual use during each year. A use may be continuous though not constant. A right of way means a right to pass over another's land, more or less frequently, according to the nature of the use to be made by the easement; and how frequently is immaterial, provided it occurred as often as the claimant had occasion or chose to pass. It must appear not to have been interrupted by the owner of the land across which the right is exercised, nor voluntarily abandoned by the claimant. Mere intermission is not interruption."

Richards, 559 P.2d at 949 (quoting 1 Thompson on Real Property § 464 (1924)).

<sup>18</sup> Heber City Corp. v. Simpson, 942 P.2d 307, 310 (Utah 1997).

<sup>19</sup> Wasatch County v. Okelberry, 2006 UT App 473, ¶ 18, 153 P.3d 745. The balancing test articulated by the court of appeals (continued...)

¶12 We find the court of appeals' approach problematic. The proposed test could be read to suggest that the elements of the Dedication Statute are met where the duration and frequency of continuous use as a public thoroughfare simply outweigh the duration and frequency of interruption during a ten-year period. Under this standard, it could be argued that even where there is a significant interruption in the use of a road, if the period of use is greater than the length of the interruption, the requirements of the Dedication Statute would be satisfied. We think it unlikely that this is what the Legislature intended when it required that a road be "continuously used." Indeed, to balance interruptions in use against frequency of use in order to determine whether a road was continuously used is inconsistent with the very notion of continuous use--any sufficient interruption in use necessarily makes use noncontinuous. Moreover, we think that this balancing test fails to remedy the lack of predictability from which this area of the law suffers. Thus, while we reject the court of appeals' interpretive approach, its careful review of our case law and attempt to bring coherence to that case law highlights for us the need for a clear, workable standard. We take this opportunity to articulate such a standard.

¶13 In interpreting a statute, our goal is to ascertain the Legislature's intent.<sup>20</sup> We do so by first evaluating "the 'best evidence' of legislative intent, namely, 'the plain language of the statute itself.'"<sup>21</sup> We give the words of a statute their "plain, natural, ordinary, and commonly understood meaning, in the absence of any statutory or well-established technical meaning, unless it is plain from the statute that a different meaning is intended."<sup>22</sup>

¶14 The word "continuously" is neither defined in the Dedication Statute nor imbued with technical meaning. Thus, we understand "continuously" to have its plain meaning of "without

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<sup>19</sup> (...continued)  
applies only to locked gates, but it could arguably apply to other types of interruptions, and we consider its potentially broad application here.

<sup>20</sup> See Duke v. Graham, 2007 UT 31, ¶ 16, 158 P.3d 540.

<sup>21</sup> Id. (quoting State v. Martinez, 2002 UT 80, ¶ 8, 52 P.3d 1276).

<sup>22</sup> State v. Navaro, 26 P.2d 955, 956 (Utah 1933).

interruption."<sup>23</sup> A party claiming dedication must therefore establish by clear and convincing evidence that a road has been used without interruption as a public thoroughfare for ten years in order for the road to become dedicated to public use.

¶15 The lack of clarity in this area of the law stems largely from the fact that we have never set forth a standard for determining what qualifies as a sufficient interruption to restart the running of the required ten-year period under the Dedication Statute. We do so now by setting forth a bright-line rule by which we intend to make application of the Dedication Statute more predictable:

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.

This rule does not change the burden of the party claiming dedication. For a highway to be deemed dedicated to the public, the party claiming dedication must establish by clear and convincing evidence that the road at issue was continuously used as a public thoroughfare for a period of ten years; credible evidence of the type of interruption defined above--an overt act intended to and reasonably calculated to interrupt use of a road as a public thoroughfare--simply precludes a finding of continuous use.

¶16 In order to elucidate this standard, we think it helpful to distinguish between an interruption in use and an intermission in use. The distinction lies in the intent and conduct of the property owner. As noted above, a road may be used continuously even if it is not used constantly or frequently.<sup>24</sup> For example, a road may be used by only one person once a month, but if this use is as frequent as the public finds

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<sup>23</sup> Merriam-Webster's Collegiate Dictionary defines "continuous" as "marked by uninterrupted extension in space, time, or sequence." Merriam-Webster's Collegiate Dictionary 270 (11th ed. 2003).

<sup>24</sup> See Campbell v. Box Elder County, 962 P.2d 806, 809 (Utah Ct. App. 1998).

it "convenient or necessary,"<sup>25</sup> and the landowner has taken no action intended and reasonably calculated to interrupt use, the use is continuous. The one-month period of time between usages is a mere intermission, not an interruption. Likewise, a road may be heavily traveled by the public during certain times of the year but impassable because of weather-related conditions at other times. Though the use is not constant, if it occurs as often as the public finds it convenient or necessary, and the landowner has taken no action intended and reasonably calculated to interrupt use, the use is continuous. The period of impassability due to weather is a mere intermission, not an interruption.

¶17 Continuous use may be established as to heavily or lightly used roads, as long as the use is as frequent as the public finds it convenient or necessary. We emphasize here, however, that the action necessary by the landowner to establish an interruption in public use does not vary depending on the level of public use. An overt act intended and reasonably calculated to interrupt public use restarts the statutory period, and the effectiveness of such act is not tied to the level of public use. In other words, an act by a landowner sufficient to interrupt public use of a road used on a daily basis by the public is also sufficient to interrupt public use of a road used on a monthly basis by the public.

¶18 We now apply our newly articulated test to the facts of the case at hand. The Okelberrys asserted at trial that there were signs on the roads indicating "No Trespassing," "Keep Out," or "Private," and that trespassers were at times asked to leave. Wasatch County conceded that such signs were posted, but argued that they referred only to property adjoining the roads and not the roads themselves. While the trial court assumed the Okelberrys' assertions to be true for purposes of its analysis, it made no actual findings as to when the signs were posted, what they appeared to reference, or whether trespassers were asked to leave. Thus, while it is clear that the posting of the signs constituted an overt act, it remains a factual question whether the Okelberrys intended the signs to interrupt public use of the roads and whether the posting of the signs was reasonably calculated to do so. Questions also remain as to when the signs were posted and whether trespassers were asked to leave, and if so, when and how many.

¶19 The Okelberrys also claimed at trial that the gates were periodically locked for several days at a time beginning in

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<sup>25</sup> Boyer v. Clark, 326 P.2d 107, 109 (Utah 1958).

the late 1950s. Here again, while the trial court assumed this claim to be true for purposes of its analysis, it did not make a factual finding on this issue. The locking of gates for several days at a time constitutes an overt act intended to interrupt public use and reasonably calculated to do so. But factual questions remain as to whether and when such an event or events occurred. We therefore remand this case for the trial court to make these factual determinations.

### CONCLUSION

¶20 Utah Code section 72-5-104(1) provides that "[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." We hold today that an overt act that is intended by the property owner to interrupt the use of a road as a public thoroughfare, and is reasonably calculated to do so, is an interruption in continuous use sufficient to restart the running of the ten-year period under this statute. If a party produces credible evidence of such an interruption, this evidence will preclude a finding of continuous use. Because the trial court did not make specific findings of fact regarding the Okelberrys' evidence of interruption in the use of the Four Roads as public thoroughfares, we reverse and remand for further proceedings consistent with this opinion.

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¶21 Chief Justice Durham, Associate Chief Justice Wilkins, Justice Parrish, and Justice Nehring concur in Justice Durrant's opinion.

## APPENDIX B

Ruling, August 27, 2004, R. 407-397

**IN THE FOURTH JUDICIAL DISTRICT COURT  
WASATCH COUNTY, STATE OF UTAH** <sup>20</sup>

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

Plaintiff,

v.

E. RAY OKELBERRY, BRIAN  
OKELBERRY, ERIC OKELBERRY,  
UTAH DIVISION OF WILDLIFE  
RESOURCES, WEST DANIELS LAND  
ASSOCIATION, and JOHN DOES 1-25,

Defendants.

**RULING**

Case No. 010500388  
Judge Donald J. Eyre

This matter was last heard by the Court during a trial on July 28, 29, and 30, 2004, where the parties were directed to prepare proposed findings of fact and conclusions of law. The Court has reviewed the file, considered the memoranda filed by the parties, heard oral arguments, and being fully advised in the premises issues the following ruling.

**FACTUAL SUMMARY**

1. The Plaintiff Wasatch County (hereinafter "County") is a political subdivision of the State of Utah.
2. The Defendants E. Ray Okelberry, Brian Okelberry, and Eric Okelberry (hereinafter "Okelberrys") are the owners of real property located east and north of the town of Wallsburg in Wasatch County, Utah.



3. Several roads or portions of roads cross through portions of this property. These roads have been designated as Maple Canyon Road, Circle Springs Road, Thorton Hollow Road, Parker Canyon Road, and Ridge Line Road.

7. All of these roads are mountain roads and, except for keeping the roadway clear, have had little maintenance, if any. Specifically, the County has never maintained the roads. These roads are typically accessed by pickup truck, snowmobiles, and all-terrain vehicles.

15. The property in question where the roads are located is generally not accessible until mid-May or later and is generally not accessible after November 15<sup>th</sup>.

4. All of these roads begin and end at points outside of the defendants' property or connect with other roads which begin and end at points outside of the Okelberry and West Daniels Land Association property.

5. West Daniels' Land Association is a record owner of certain parcels of real property located in Wasatch County over which the Ridge Line Road and the Parker Canyon road traverse. West Daniels Land Association property adjoins the Okelberry property. West Daniel's Land Association initially appeared through counsel who later withdrew.

No successor counsel was appointed. West Daniel's Land Association failed to respond to Plaintiff's motion for summary judgment and its default was entered. Evidence regarding the use of those portions of the roads at issue which are located in West Daniel's Land Association property was submitted at trial.

6. Circle Springs Road, Parker Canyon Road, and the portion of the Ridge Line Road from where it enters the Okelberry property on the southeast to where it connects with Parker Canyon Road are designated as Forest Service Roads on the map currently sold to the public by the Forest

Service. Circle Springs Road, Thorton Hollow Road, and Parker Canyon Road cross thorough into forest land some distance before they end.

8. Utah Division of Wildlife Resources is a record owner of a certain parcel of real property located in Wasatch County in Township 5 South, Range 5 East, Salt Lake Base and Meridian. Pursuant to a stipulation entered into between the Utah Division of Wildlife Resources and the property owners, certain portions of a road known as Ridge Line Road and Fish and Game Road were abandoned and dedicated to the use of the public subject to certain restrictions. As of the date of trial on June 28, 29 and 30, 2004, gates along said road were still locked and access was obstructed by barricades that had been placed there by the Utah Division of Wildlife Resources.

9. There are signs on the property of the Utah Division of Wildlife Resources stating that no motorized vehicles are allowed on the property. The evidence is such that in certain areas, it is extremely steep and rocky and only accessible by a 4-wheel-drive vehicle. Portions of the Ridge Line Road over property owned by the Utah Division of Wildlife Resources were built after 1957. The road, at best, cen be described as narrow, rocky and very difficult to traverse.

10. At the time of the purchase of the property by the Okelberry's in 1957, the property was bordered on the east and the south by fences separating the Okelberry property and the United States Forest public property. There were also multiple gates along the roads: two gates controlled access from the "Big Glade" area, one gate controlled access to the Circle Springs Road, and one gate controlled access to the Ridge Line Road. the gates were wire gates; whoever went through the gates had to open them and close them behind them.

11. At trial the Court specifically found that there was no public use of the various roads in the 1940s or before and also that no evidence of vehicular use prior to the 1950s existed.

12. At trial the County presented testimony of various individuals who allegedly used the roads for many more than ten years for recreational purposes. These individuals testified that even though there were no-trespassing markers they were able to freely use the roads. They also stated they were members of the general public without any private right to use the roads.

13. Plaintiff presented evidence that there were gates located on the roads, but they were not locked until the early 1990's. Prior to the gates being locked, the existence of the gates did not interrupt the public's use of the roads.

14. Plaintiff concedes that occasionally between the late 1950's and late 1980's the Okelberry's or their agents informed members of the general public who had left the subject roadways and were using the surrounding Okelberry property that they were trespassing, however, not until the 1990's did they impede traffic on the road themselves.

17. At trial the Okelberrys presented testimony of individuals that Ridge Line Road and Parker Canyon Road were never at any time open to public use.

18. The Okelberrys testified that there were large numbers of people in the community who asked for permission to use the roads or their property, thus indicating that the roads were not generally recognized as public.

19. At trial the Okelberrys presented testimony of various individuals, including employees who testified that there was not continuous use of the roads and that if they saw someone using the roads, they asked them to leave.

16. At trial the Okelberrys testified that improvements made to the roads were for the sole purpose of facilitating their sheep and cattle operation, that the gates were generally closed from the beginning of their ownership to control their sheep and cattle and to restrict travel on the

roads.

20. In the early 1990's the Okelberry's started selling trespass permits to persons wanting to use the Okelberry property for wood gathering, camping, or hunting.

21. In the mid 1990's the Okelberry's allowed their land to be placed into a Cooperative Wildlife Management Unit "CWMU" (a.k.a. a Private Hunting Unit "PHU"). Said property is currently still part of a CWMU.

### RULING

As provided by statute, a private road must meet a three part test to become dedicated and abandoned to a public highway. The three requirements are (1) continuous use, (2) as a public thoroughfare, (3) for a period of ten years. Ut. Code Ann. 72-5-104(1) (2003). The three elements must be proved by "clear and convincing evidence" by the party claiming the road has been abandoned to public use. *Thomas v. Condas*, 493 P.2d 639 (1972). Once established, a public road continues to be a public road until it is "abandoned or vacated by order of the highway authorities having jurisdiction or by other competent authority." Utah Code Ann. 72-5-105(1) (2004).

First, the road must have been subject to "continuous use." Utah Courts have interpreted "continuous use" in various instances to mean the public has used the roads "extensively," *Bertagnole v. Pine Meadow Ranches*, 639 P.2d 211 (Utah 1981), "frequently and freely," *Thurman v. Bryam*, 626 P.2d 447 (Utah 1981). However, continuous does not mean constant. The supreme court has stated that "use may be continuous though not constant . . . provided it occurred as often as the claimant had occasion or chose to pass. Mere intermission is not interruption." *Campbell v. Box Elder County*, 962 P.2d 806, 809 (Ut. Ct. App 1998) (quoting

*Richards v. Pines Ranch, Inc.*, 559 P.2d 948 (Utah 1977). Similarly, in *Boyer v. Clark*, 326 P.2d 107, 108 (Utah 1958), the supreme court found as a matter of law that a public highway existed even though “the use of the road was not great because comparatively few people had need to travel over it, but those of the public who had such need, did so.”

The Okelberrys have argued that use was not constant because at the time of purchase in 1957 there were gates in place, concededly though, they were not always locked and did not prevent travel. The Okelberrys claim that beginning in the 1960s the gates were periodically locked for several days at a time and that signs were also posted on the gates and property which stated “No Trespassing–Private Property.” Thus, they argue that *any* interruption of public access during the relevant periods is enough to prevent use from being continuous. Plaintiffs deny the Defendant’s factual assertions claiming that while there were gates on the roads, they were not locked until the 1990’s and that once signs were posted, they seemed to refer only to the property abutting the roads and not the roads themselves.

This Court finds the facts of the present case similar to the facts of *Boyer v. Clark* wherein at issue was Middle Canyon Road that had been used for wagon and horse traffic. As previously stated, the *Boyer* court noted that the public, “though not consisting of a great many persons, made a continuous and uninterrupted use of middle canyon road . . . as often as they found it convenient or necessary.” Taking even the Defendant’s factual assertions as true, it is clear that individuals using the roads beginning in the late 1950’s until the late 1980’s or early 1990’s used the roads without interruption, they used the roads freely, and though not constantly, they used the roads continuously as they needed. Therefore, that Court finds that prior to the interrupting mechanisms being put in place the roads in question were subject to continuous use

and Plaintiffs met their burden proving the first element of the statute.

Second, the continuous use must have been as a “public thoroughfare.” The Supreme Court of Utah has stated that a place becomes a public thoroughfare when the public has a “general right of passage.” *Heber City v. Simpson*, 942 P.2d 307 (Utah 1997). It is sufficient to show that the road was used freely by the general public. *Thurman v. Byram*, 626 P.2d 447, 449 (Utah 1981). The general public, however, does not include adjoining land owners or individuals with permission of adjoining land owners. *Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1099 (Utah 1995). “Use under a private right is not sufficient” to establish a public right. *Heber City v. Simpson*, 942 P.2d at 311. Also, as once was the case, it is no longer necessary to prove the land owner’s intent or consent to offer the road to the public. See *Thurman v. Byram*, 626 P.2d at 449.

In making the public thoroughfare determination, trial courts are “permitted some reign to grapple with the multitude of fact patterns that may constitute a public thoroughfare.” *Kohler v. Martin*, 916 P.2d 910, 913 (Ut. Ct. App. 1996). The defendants claim they gave permission to individuals to use the roads and unauthorized individuals were removed. Plaintiffs claim that while some individuals who have used the roads were permissive users, the majority were using the roads without permission from the land owners. None of the individuals who testified on behalf of the Plaintiff own property adjacent to or along the roads. The Court finds that the individuals who have used the roads have been members of the general public who used the roads as a thoroughfare to public lands and/or for recreation. Prior to the locking of the gates in the early 1990's the roads were used as public thoroughfares.

Third, and lastly, the continuous use as a public thoroughfare must have lasted for a

period of ten years. From the facts that have been presented, it is clear to the Court that the continuous use as a public thoroughfare continued for at least ten years, if not much longer, or for multiple periods of ten years. Starting in 1960 until the early 1990's when the Okelberry's began locking the gates and selling hunting permits the roads were accessible and used by the general public as they found necessary and convenient. It is clear that the third statutory element has been easily met.

The Court finds by clear and convincing evidence that the Plaintiff has not met their burden in regards to Maple Canyon Road. The Court finds that there was evidence that Maple Canyon Road had been locked at the Wallsburg end prior to the locking of the other roads, and that it has a history of washing out and therefore, there was no evidence of continuous use for ten years. The Court also finds that the Plaintiff has in fact met their burden as to Ridge Line Road, Circle Springs Road, Thorton Hollow Road, and Parker Canyon Road, that they were used continuously by the public as a public thoroughfare for a period of well over ten years prior to 1989 when the Okelberry's began locking the gates. Finding that there were abandoned to public roads, the Court finds the width of the roads to be two-track, approximately ten feet in width. The Court also finds that the public has been effectively cut off from use of these public roads since 1989.

After finding the roads to be public roads, the Court now turns to the issue of whether they continue as public roads after a twelve year period of nonuse and private control exerted by the defendants over the roads.

The court finds that while public roads once dedicated can be abandoned or vacated only "by order of the highway authorities having jurisdiction or by other competent authority." Ut.

Code Ann. 72-5-015 (2004). Prior to 1911 a public road could be vacated after a five-year period of nonuse. The statute has since been amended by deleting that provision. The Court held that the legislature clearly intended to limit the method of vacating public roads to the specific statutory requirements and no longer allow forfeiture through nonuse. *Henderson v. Osguthorpe*, 657 P.2d 1268, 1270-1271 (Utah 1982). However, this Court finds the principle of estoppel is dispositive in the present case.

In *Premium Oil v. Cedar City* 187 P.2d 199 (Utah 1947), the supreme court held that a strip of land once dedicated as a public road had been used in a manner directly in conflict with the land's dedication as a public road. The court stated that "the manner in which the city used the strip was openly hostile to the public use as a street and should have been notice to all that any dedication, if previously intended, has been abandoned. Under the facts of the case, the court held that the Plaintiff would be estopped to claim an improper abandonment or vacation. this Court finds that while the roads at issue were properly abandoned to public use by compliance with the statutory requirements, the Defendants for a period of twelve years exerted control and used the roads in an openly hostile manner to the public use of the streets. Applied to the present case, the County having failed to bring an action for twelve years must now be estopped from doing so.

As further stated in *Premium Oil*, "in many cases where cities attempt to open dedicated street for the benefit of the public, the courts have estopped the city from enforcing a dedication because the city authorities and the public itself has taken no action over a period of years, to prevent the erection of valuable improvements." 187 P.2d at 204. Allowing the County to open the roads as public roads now would ruin the Okelberry sheep and cattle operation as well as

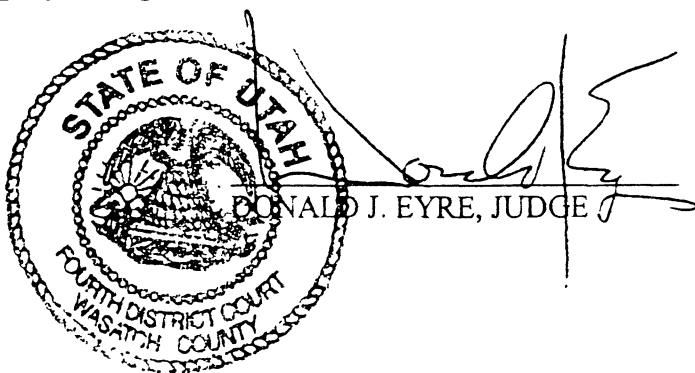


eliminate the hunting unit now being operated by Shane Ford. Admittedly little improvements have been made to the roads themselves, but doubtless large amounts of time and money has been expended on behalf of these business operations and the Defendants have relied on their private use of the road to sustain and build their businesses. It would be inequitable to now, after twelve years of clearly private use of the roads, to allow the County to open the roads to the Defendants' detriment.

### CONCLUSION

By clear and convincing evidence the Court finds that the roads in question were abandoned to public roads, but the County is now estopped from opening them to public use because of their failure to bring an action against the Okelberrys who asserted private control over the roads for twelve years in opposition to their public status. The Court directs counsel for the Defendants to prepare findings of fact, conclusions of law, and final order consistent with this ruling, and directs counsel to submit the order to opposing counsel to review and to the Court for final approval.

DATED this 27<sup>th</sup> day of August, 2004.



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 010500388 by the method and on the date specified.

METHOD	NAME
Mail	DON R. PETERSEN ATTORNEY DEF 120 EAST 300 NORTH P.O. BOX 1248 PROVO, UT 84603
Mail	SCOTT H SWEAT ATTORNEY PLA 114 SOUTH 200 WEST P.O. BOX 625 HEBER UT 84032

Dated this 27 day of August, 2004.

  
Deputy Court Clerk

## APPENDIX C

Findings of Fact and Conclusions of Law, October 22, 2004, R. 420-409

. 1A

DON R. PETERSEN (2576), for:  
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Our File No.

Attorneys for Defendants Okelberry

IN THE FOURTH JUDICIAL DISTRICT COURT OF WASATCH COUNTY  
STATE OF UTAH

<p>WASATCH COUNTY, a body public of the State of Utah,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>E. RAY OKELBERRY, BRIAN OKELBERRY, ERIC OKELBERRY, UTAH DIVISION OF WILDLIFE RESOURCES, WEST DANIELS LAND ASSOCIATION, and JOHN DOES 1-25,</p> <p style="text-align: center;">Defendants.</p>	<p style="text-align: center;"><b>FINDINGS OF FACT AND CONCLUSIONS OF LAW</b></p> <p style="text-align: center;">Case No. 010500388 Judge Donald J. Eyre</p>
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This matter came on for trial on July 28, 29 and 30, 2004. The Court heard the testimony of various witnesses and received various exhibits. Counsel was directed to prepare proposed Findings of Fact and Conclusions of Law. The Court has now reviewed the file, considered the memoranda filed by the parties, heard oral arguments and now, being fully advised in the premises, makes and enters the following:

**FINDINGS OF FACT**

1. The Plaintiff Wasatch County (hereinafter "County") is a political subdivision of the State of Utah.

2. The Defendants E. Ray Okelberry, Brian Okelberry, and Eric Okelberry (hereinafter "Okelberrys") are the owners of real property located east and north of the town of Wallsburg in Wasatch County, Utah.

3. Several roads or portions of roads cross through portions of this property. These roads have been designated as Maple Canyon Road, Circle Springs Road, Thorton Hollow Road, Parker Canyon Road, and Ridge Line Road.

4. All of these roads are mountain roads and, except for keeping the roadway clear, have had little maintenance, if any. Specifically, the County has never maintained the roads. These roads are typically accessed by pickup truck, snowmobiles, and all-terrain vehicles.

5. The property in question where the roads are located is generally not accessible until mid-May or later and is generally not accessible after November 15<sup>th</sup>.

6. All of these roads begin and end at points outside of the defendants' property or connect with other roads which begin and end at points outside of the Okelberry and West Daniels Land Association property.

7. West Daniels' Land Association is a record owner of certain parcels of real property located in Wasatch County over which the Ridge Line Road and the Parker Canyon road traverse. West Daniels Land Association property adjoins the Okelberry property. West Daniel's Land Association initially appeared through counsel who later withdrew. No successor counsel was appointed. West Daniel's Land Association failed to respond to Plaintiff's motion for summary judgment and its default was entered. Evidence regarding the use of those portions of the roads at issue which are located in West Daniel's Land Association property was submitted at trial.

6. Circle Springs Road, Parker Canyon Road, and the portion of the Ridge Line Road from where it enters the Okelberry property on the southeast to where it connects with Parker Canyon Road are designated as Forest Service Roads on the map currently sold to the public by the Forest Service. Circle Springs Road, Thorton Hollow Road, and Parker Canyon Road cross thorough into forest land some distance before they end.

7. Utah Division of Wildlife Resources is a record owner of a certain parcel of real property located in Wasatch County in Township 5 South, Range 5 East, Salt Lake Base and Meridian. Pursuant to a stipulation entered into between the Utah Division of Wildlife Resources and the property owners, certain portions of a road known as Ridge Line Road and Fish and Game Road were abandoned and dedicated to the use of the public subject to certain restrictions. As of the date of trial on June 28, 29 and 30, 2004, gates along said road were still locked and access was obstructed by barricades that had been placed there by the Utah Division of Wildlife Resources.

8. There are signs on the property of the Utah Division of Wildlife Resources stating that no motorized vehicles are allowed on the property. The evidence is such that in certain areas, it is extremely steep and rocky and only accessible by a 4-wheel-drive vehicle. Portions of the Ridge Line Road over property owned by the Utah Division of Wildlife Resources were built after 1957. The road, at best, can be described as narrow, rocky and very difficult to traverse.

9. At the time of the purchase of the property by the Okelberry's in 1957, the property was bordered on the east and the south by fences separating the Okelberry property and the United States Forest public property. There were also multiple gates along the roads: two gates controlled access from the "Big Glade" area, one gate controlled access to the Circle Springs

Road, and one gate controlled access to the Ridge Line Road. the gates were wire gates; whoever went through the gates had to open them and close them behind them.

10. At trial the Court specifically found that there was no public use of the various roads in the 1940s or before and also that no evidence of vehicular use prior to the 1950s existed.

11. At trial the County presented testimony of various individuals who allegedly used the roads for many more than ten years for recreational purposes. These individuals testified that even though there were no-trespassing markers they were able to freely use the roads. They also stated they were members of the general public without any private right to use the roads.

12. Plaintiff presented evidence that there were gates located on the roads, but they were not locked until the early 1990's. Prior to the gates being locked, the existence of the gates did not interrupt the public's use of the roads.

13. Plaintiff concedes that occasionally between the late 1950's and late 1980's the Okelberry's or their agents informed members of the general public who had left the subject roadways and were using the surrounding Okelberry property that they were trespassing, however, not until the 1990's did they impede traffic on the road themselves.

14. At trial the Okelberrys presented testimony of individuals that Ridge Line Road and Parker Canyon Road were never at any time open to public use.

15. The Okelberrys testified that there were large numbers of people in the community who asked for permission to use the roads or their property, thus indicating that the roads were not generally recognized as public.

16. At trial the Okelberrys presented testimony of various individuals, including employees who testified that there was not continuous use of the roads and that if they saw someone using the roads, they asked them to leave.

17. At trial the Okelberrys testified that improvements made to the roads were for the sole purpose of facilitating their sheep and cattle operation, that the gates were generally closed from the beginning of their ownership to control their sheep and cattle and to restrict travel on the roads.

18. In the early 1990s the Okelberrys started selling trespass permits to persons wanting to use the Okelberry property for wood gathering, camping, or hunting.

19. In the mid 1990s the Okelberrys allowed their land to be placed into a Cooperative Wildlife Management Unit "CWMU" (a.k.a. a Private Hunting Unit "PHU"). Said property is currently still part of a CWMU.

The Court having entered its Findings of Fact, now makes and enters the following:

### CONCLUSIONS OF LAW

1. As provided by statute, a private road must meet a three part test to become dedicated and abandoned to a public highway. The three requirements are (1) continuous use, (2) as a public thoroughfare, (3) for a period of ten years. Ut. Code Ann. 72-5-104(1) (2003). The three elements must be proved by "clear and convincing evidence" by the party claiming the road has been abandoned to public use. Thomas v. Condas, 493 P.2d 639 (1972). Once established, a public road continues to be a public road until it is "abandoned or vacated by order of the highway authorities having jurisdiction or by other competent authority." Utah Code Ann. 72-5-105(1) (2004).

2. First, the road must have been subject to "continuous use." Utah Courts have interpreted "continuous use" in various instances to mean the public has used the roads "extensively," Bertagnole v. Pine Meadow Ranches, 639 P.2d 211 (Utah 1981), "frequently and freely," Thurman v. Bryam, 626 P.2d 447 (Utah 1981). However, continuous does not mean



constant. The supreme court has stated that "use may be continuous though not constant ... provided it occurred as often as the claimant had occasion or chose to pass. Mere intermission is not interruption." Campbell v. Box Elder County, 962 P.2d 806, 809 (Ut. Ct. App. 1998) (quoting Richards v. Pines Ranch, Inc., 559 P.2d 948 (Utah 1977)). Similarly, in Boyer v. Clark, 326 P.2d 107, 108 (Utah 1958), the supreme court found as a matter of law that a public highway existed even though "the use of the road was not great because comparatively few people had need to travel over it, but those of the public who had such need, did so."

3. The Okelberrys have argued that use was not constant because at the time of purchase in 1957 there were gates in place, concededly though, they were not always locked and did not prevent travel. The Okelberrys claim that beginning in the 1960s the gates were periodically locked for several days at a time and that signs were also posted on the gates and property which stated "No Trespassing--Private Property." Thus, they argue that any interruption of public access during the relevant periods is enough to prevent use from being continuous. Plaintiffs deny the Defendant's factual assertions claiming that while there were gates on the roads, they were not locked until the 1990s and that once signs were posted, they seemed to refer only to the property abutting the roads and not the roads themselves.

4. This Court finds the facts of the present case similar to the facts of Boyer v. Clark wherein at issue was Middle Canyon Road that had been used for wagon and horse traffic. As previously stated, the Boyer court noted that the public, "though not consisting of a great many persons, made a continuous and uninterrupted use of middle canyon road . . . as often as they found it convenient or necessary." Taking even the Defendants' factual assertions as true, it is clear that individuals using the roads beginning in the late 1950s until the late 1980s or early 1990s used the roads without interruption, they used the roads freely, and though not constantly,

they used the roads continuously as they needed. Therefore, that Court finds that prior to the interrupting mechanisms being put in place the roads in question were subject to continuous use and Plaintiffs met their burden proving the first element of the statute.

5. Second, the continuous use must have been as a "public thoroughfare." The Supreme Court of Utah has stated that a place becomes a public thoroughfare when the public has a "general right of passage." Heber City v. Simpson, 942 P.2d 307 (Utah 1997). It is sufficient to show that the road was used freely by the general public. Thurman v. Byram, 626 P.2d 447, 449 (Utah 1981). The general public, however, does not include adjoining land owners or individuals with permission of adjoining land owners. Draper City v. Estate of Bernardo, 888 P.2d 1097, 1099 (Utah 1995). "Use under a private right is not sufficient" to establish a public right. Heber City v. Simpson, 942 P.2d at 311. Also, as once was the case, it is no longer necessary to prove the land owner's intent or consent to offer the road to the public. See Thurman v. Byram, 626 P.2d at 449.

6. In making the public thoroughfare determination, trial courts are "permitted some reign to grapple with the multitude of fact patterns that may constitute a public thoroughfare." Kohler v. Martin, 916 P.2d 910, 913 (Ut. Ct. App. 1996). The defendants claim they gave permission to individuals to use the roads and unauthorized individuals were removed. Plaintiffs claim that while some individuals who have used the roads were permissive users, the majority were using the roads without permission from the land owners. None of the individuals who testified on behalf of the Plaintiff own property adjacent to or along the roads. The Court finds that the individuals who have used the roads have been members of the general public who used the roads as a thoroughfare to public lands and/or for recreation. Prior to the locking of the gates in the early 1990s the roads were used as public thoroughfares.

7. Third, and lastly, the continuous use as a public thoroughfare must have lasted for a period of ten years. From the facts that have been presented, it is clear to the Court that the continuous use as a public thoroughfare continued for at least ten years, if not much longer, or for multiple periods of ten years. Starting in 1960 until the early 1990s when the Okelberrys began locking the gates and selling hunting permits the roads were accessible and used by the general public as they found necessary and convenient. It is clear that the third statutory element has been easily met.

8. The Court finds by clear and convincing evidence that the Plaintiff has not met their burden in regards to Maple Canyon Road. The Court finds that there was evidence that Maple Canyon Road had been locked at the Wallsburg end prior to the locking of the other roads, and that it has a history of washing out and therefore, there was no evidence of continuous use for ten years. The Court also finds that the Plaintiff has in fact met their burden as to Ridge Line Road, Circle Springs Road, Thorton Hollow Road, and Parker Canyon Road, that they were used continuously by the public as a public thoroughfare for a period of well over ten years prior to 1989 when the Okelberrys began locking the gates. Finding that there were abandoned to public roads, the Court finds the width of the roads to be two-track, approximately ten feet in width. The Court also finds that the public has been effectively cut off from use of these public roads since 1989.

9. After finding the roads to be public roads, the Court now turns to the issue of whether they continue as public roads after a twelve year period of nonuse and private control exerted by the defendants over the roads.

10. The Court finds that while public roads once dedicated can be abandoned or vacated only "by order of the highway authorities having jurisdiction or by other competent

authority." Ut. Code Ann. 72-5-015 (2004). Prior to 1911, a public road could be vacated after a five-year period of nonuse. The statute has since been amended by deleting that provision. The Court held that the legislature clearly intended to limit the method of vacating public roads to the specific statutory requirements and no longer allow forfeiture through nonuse. Henderson v. Osguthorpe, 657 P.2d 1268, 1270-1271 (Utah 1982). However, this Court finds the principle of estoppel is dispositive in the present case.

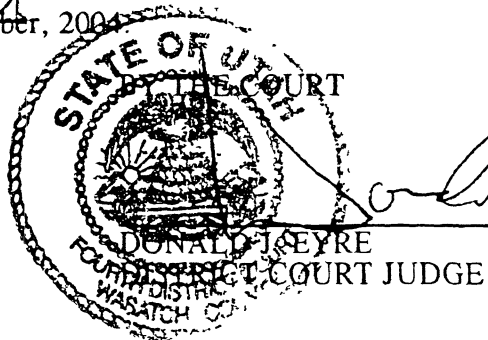
11. In Premium Oil v. Cedar City, 187 P.2d 199 (Utah 1947), the supreme court held that a strip of land once dedicated as a public road had been used in a manner directly in conflict with the land's dedication as a public road. The court stated that "the manner in which the city used the strip was openly hostile to the public use as a street and should have been notice to all that any dedication, if previously intended, has been abandoned. Under the facts of the case, the court held that the Plaintiff would be estopped to claim an improper abandonment or vacation. this Court finds that while the roads at issue were properly abandoned to public use by compliance with the statutory requirements, the Defendants for a period of twelve years exerted control and used the roads in an openly hostile manner to the public use of the streets. Applied to the present case, the County having failed to bring an action for twelve years must now be estopped from doing so.

12. As further stated in Premium Oil, "in many cases where cities attempt to open dedicated street for the benefit of the public, the courts have estopped the city from enforcing a dedication because the city authorities and the public itself has taken no action over a period of years, to prevent the erection of valuable improvements." 187 P.2d at 204. Allowing the County to open the roads as public roads now would ruin the Okelberry sheep and cattle operation as well as eliminate the hunting unit now being operated by Shane Ford. Admittedly little improvements

have been made to the roads themselves, but doubtless large amounts of time and money has been expended on behalf of these business operations and the Defendants have relied on their private use of the road to sustain and build their businesses. It would be inequitable to now, after twelve years of clearly private use of the roads, to allow the County to open the roads to the Defendants' detriment.

13. By clear and convincing evidence the Court finds that the roads in question were abandoned to public roads, but the County is now estopped from opening them to public use because of their failure to bring an action against the Okelberrys who asserted private control over the roads for twelve years in opposition to their public status.

DATED this 22<sup>nd</sup> day of Oct September, 2004



APPROVED AS TO FORM:

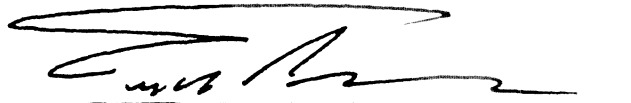
SCOTT H. SWEAT, ESQ.  
Deputy Wasatch County Attorney  
Attorney for Plaintiff

**NOTICE TO PLAINTIFF'S ATTORNEY**

TO: SCOTT H. SWEAT, ESQ.

You will please take notice that the undersigned, attorney for Defendants Okelberry, will submit the above and foregoing Findings of Fact and Conclusions of Law to the Court for signature upon the expiration of the time permitted for the filing of a written objection pursuant to Rule 7(f)(2) of the Utah Rules of Civil Procedure.

DATED this \_\_\_\_ day of September, 2004.



DON R. PETERSEN, for:  
HOWARD, LEWIS & PETERSEN  
Attorneys for Defendants Okelberry

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing document was mailed, postage prepaid, and also transmitted by facsimile to the fax number listed below this 14 day of September, 2004, to:

Scott H. Sweat  
Deputy Wasatch County Attorney  
114 South 200 West  
Heber City, UT 84032

  
\_\_\_\_\_  
SECRETARY

G \DR\OKELBERY FOF

## APPENDIX D

Order, October 22, 2004, R. 428-421



10/17

DON R. PETERSEN (2576), for:  
**HOWARD, LEWIS & PETERSEN, P.C.**  
ATTORNEYS AND COUNSELORS AT LAW  
120 East 300 North Street  
P.O. Box 1248  
Provo, Utah 84603  
Telephone: (801) 373-6345  
Facsimile: (801) 377-4991

Our File No 25774

Attorneys for Defendants Okelberry

IN THE FOURTH JUDICIAL DISTRICT COURT OF WASATCH COUNTY  
STATE OF UTAH

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

Plaintiff,

vs.

E. RAY OKELBERRY, BRIAN  
OKELBERRY, ERIC OKELBERRY,  
UTAH DIVISION OF WILDLIFE  
RESOURCES, WEST DANIELS LAND  
ASSOCIATION, and JOHN DOES 1-25,

Defendants.

ORDER

Case No. 010500388  
Judge Donald J. Eyre

This matter came on for trial on July 28, 29 and 30, 2004. The Court heard the testimony of various witnesses and received various exhibits. Counsel was directed to prepare proposed Findings of Fact and Conclusions of Law. The Court reviewed the file, considered the memoranda filed by the parties, heard oral arguments, and now having heretofore entered its Findings of Fact and Conclusions of Law and being fully advised in the premises, makes and enters the following:

4/1

## ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. As provided by statute, a private road must meet a three part test to become dedicated and abandoned to a public highway. The three requirements are (1) continuous use, (2) as a public thoroughfare, (3) for a period of ten years. Ut. Code Ann. 72-5-104(1) (2003). The three elements must be proved by "clear and convincing evidence" by the party claiming the road has been abandoned to public use. Thomas v. Condas, 493 P.2d 639 (1972). Once established, a public road continues to be a public road until it is "abandoned or vacated by order of the highway authorities having jurisdiction or by other competent authority." Utah Code Ann. 72-5-105(1) (2004).

2. First, the road must have been subject to "continuous use." Utah Courts have interpreted "continuous use" in various instances to mean the public has used the roads "extensively," Bertagnole v. Pine Meadow Ranches, 639 P.2d 211 (Utah 1981), "frequently and freely," Thurman v. Bryam, 626 P.2d 447 (Utah 1981). However, continuous does not mean constant. The supreme court has stated that "use may be continuous though not constant ... provided it occurred as often as the claimant had occasion or chose to pass. Mere intermission is not interruption." Campbell v. Box Elder County, 962 P.2d 806, 809 (Ut. Ct. App. 1998) (quoting Richards v. Pines Ranch, Inc., 559 P.2d 948 (Utah 1977)). Similarly, in Boyer v. Clark, 326 P.2d 107, 108 (Utah 1958), the supreme court found as a matter of law that a public highway existed even though "the use of the road was not great because comparatively few people had need to travel over it, but those of the public who had such need, did so."

3. The Okelberrys have argued that use was not constant because at the time of purchase in 1957 there were gates in place, concededly though, they were not always locked and

did not prevent travel. The Okelberrys claim that beginning in the 1960s the gates were periodically locked for several days at a time and that signs were also posted on the gates and property which stated "No Trespassing--Private Property." Thus, they argue that any interruption of public access during the relevant periods is enough to prevent use from being continuous. Plaintiffs deny the Defendant's factual assertions claiming that while there were gates on the roads, they were not locked until the 1990s and that once signs were posted, they seemed to refer only to the property abutting the roads and not the roads themselves.

4. This Court finds the facts of the present case similar to the facts of *Boyer v. Clark* wherein at issue was Middle Canyon Road that had been used for wagon and horse traffic. As previously stated, the Boyer court noted that the public, "though not consisting of a great many persons, made a continuous and uninterrupted use of middle canyon road . . . as often as they found it convenient or necessary." Taking even the Defendants' factual assertions as true, it is clear that individuals using the roads beginning in the late 1950s until the late 1980s or early 1990s used the roads without interruption, they used the roads freely, and though not constantly, they used the roads continuously as they needed. Therefore, that Court finds that prior to the interrupting mechanisms being put in place the roads in question were subject to continuous use and Plaintiffs met their burden proving the first element of the statute.

5. Second, the continuous use must have been as a "public thoroughfare." The Supreme Court of Utah has stated that a place becomes a public thoroughfare when the public has a "general right of passage." *Heber City v. Simpson*, 942 P.2d 307 (Utah 1997). It is sufficient to show that the road was used freely by the general public. *Thurman v. Byram*, 626 P.2d 447, 449 (Utah 1981). The general public, however, does not include adjoining land owners or individuals with permission of adjoining land owners. *Draper City v. Estate of Bernardo*, 888

P.2d 1097, 1099 (Utah 1995). "Use under a private right is not sufficient" to establish a public right. Heber City v. Simpson, 942 P.2d at 311. Also, as once was the case, it is no longer necessary to prove the land owner's intent or consent to offer the road to the public. See Thurman v. Byram, 626 P.2d at 449.

6. In making the public thoroughfare determination, trial courts are "permitted some reign to grapple with the multitude of fact patterns that may constitute a public thoroughfare." Kohler v. Martin, 916 P.2d 910, 913 (Ut. Ct. App. 1996). The defendants claim they gave permission to individuals to use the roads and unauthorized individuals were removed. Plaintiffs claim that while some individuals who have used the roads were permissive users, the majority were using the roads without permission from the land owners. None of the individuals who testified on behalf of the Plaintiff own property adjacent to or along the roads. The Court finds that the individuals who have used the roads have been members of the general public who used the roads as a thoroughfare to public lands and/or for recreation. Prior to the locking of the gates in the early 1990s the roads were used as public thoroughfares.

7. Third, and lastly, the continuous use as a public thoroughfare must have lasted for a period of ten years. From the facts that have been presented, it is clear to the Court that the continuous use as a public thoroughfare continued for at least ten years, if not much longer, or for multiple periods of ten years. Starting in 1960 until the early 1990s when the Okelberrys began locking the gates and selling hunting permits the roads were accessible and used by the general public as they found necessary and convenient. It is clear that the third statutory element has been easily met.

8. The Court finds by clear and convincing evidence that the Plaintiff has not met their burden in regards to Maple Canyon Road. The Court finds that there was evidence that

Maple Canyon Road had been locked at the Wallsburg end prior to the locking of the other roads, and that it has a history of washing out and therefore, there was no evidence of continuous use for ten years. The Court also finds that the Plaintiff has in fact met their burden as to Ridge Line Road, Circle Springs Road, Thorton Hollow Road, and Parker Canyon Road, that they were used continuously by the public as a public thoroughfare for a period of well over ten years prior to 1989 when the Okelberrys began locking the gates. Finding that there were abandoned to public roads, the Court finds the width of the roads to be two-track, approximately ten feet in width. The Court also finds that the public has been effectively cut off from use of these public roads since 1989.

9. After finding the roads to be public roads, the Court now turns to the issue of whether they continue as public roads after a twelve year period of nonuse and private control exerted by the defendants over the roads.

10. The Court finds that while public roads once dedicated can be abandoned or vacated only "by order of the highway authorities having jurisdiction or by other competent authority." Ut. Code Ann. 72-5-015 (2004). Prior to 1911, a public road could be vacated after a five-year period of nonuse. The statute has since been amended by deleting that provision. The Court held that the legislature clearly intended to limit the method of vacating public roads to the specific statutory requirements and no longer allow forfeiture through nonuse. Henderson v. Osguthorpe, 657 P.2d 1268, 1270-1271 (Utah 1982). However, this Court finds the principle of estoppel is dispositive in the present case.

11. In Premium Oil v. Cedar City, 187 P.2d 199 (Utah 1947), the supreme court held that a strip of land once dedicated as a public road had been used in a manner directly in conflict with the land's dedication as a public road. The court stated that "the manner in which

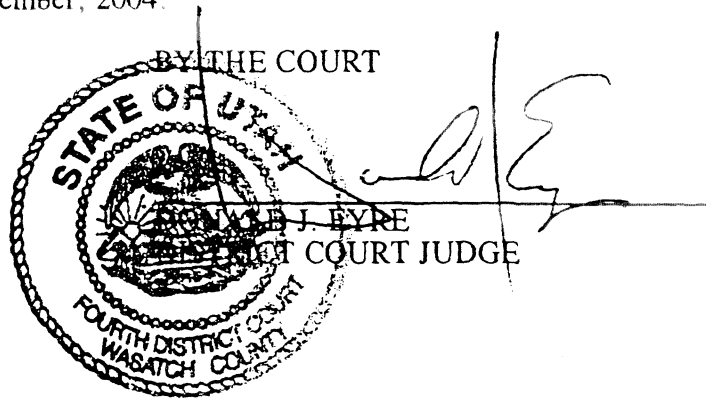
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12. As further stated in Premium Oil, "in many cases where cities attempt to open dedicated street for the benefit of the public, the courts have estopped the city from enforcing a dedication because the city authorities and the public itself has taken no action over a period of years, to prevent the erection of valuable improvements." 187 P.2d at 204. Allowing the County to open the roads as public roads now would ruin the Okelberry sheep and cattle operation as well as eliminate the hunting unit now being operated by Shane Ford. Admittedly little improvements have been made to the roads themselves, but doubtless large amounts of time and money has been expended on behalf of these business operations and the Defendants have relied on their private use of the road to sustain and build their businesses. It would be inequitable to now, after twelve years of clearly private use of the roads, to allow the County to open the roads to the Defendants' detriment.

13. By clear and convincing evidence the Court finds that the roads in question were abandoned to public roads, but the County is now estopped from opening them to public

use because of their failure to bring an action against the Okelberrys who asserted private control over the roads for twelve years in opposition to their public status.

DATED this 22<sup>nd</sup> day of Oct September, 2004.



APPROVED AS TO FORM:

\_\_\_\_\_  
SCOTT H. SWEAT, ESQ.  
Deputy Wasatch County Attorney  
Attorney for Plaintiff

**NOTICE TO PLAINTIFF'S ATTORNEY**

TO: SCOTT H. SWEAT, ESQ.

You will please take notice that the undersigned, attorney for Defendants Okelberry, will submit the above and foregoing Findings of Fact and Conclusions of Law to the Court for signature upon the expiration of the time permitted for the filing of a written objection pursuant to Rule 7(f)(2) of the Utah Rules of Civil Procedure.

DATED this 14 day of September, 2004.

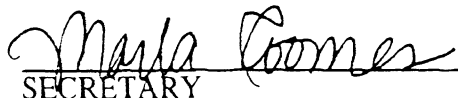


DON R. PETERSEN, for:  
HOWARD, LEWIS & PETERSEN  
Attorneys for Defendants Okelberry

**MAILING CERTIFICATE**

I hereby certify that a true and correct copy of the foregoing document was mailed, postage prepaid, and also transmitted by facsimile to the fax number listed below this 14 day of September, 2004, to:

Scott H. Sweat  
Deputy Wasatch County Attorney  
114 South 200 West  
Heber City, UT 84032

  
SECRETARY



## APPENDIX E

Supplemental Findings of Fact and Ruling on Motion to Amend Judgment,  
February 23, 2005, R.489-481

**IN THE FOURTH JUDICIAL DISTRICT COURT  
WASATCH COUNTY, STATE OF UTAH**

-Cg

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

Plaintiff,

v.

E. RAY OKELBERRY, BRIAN  
OKELBERRY, ERIC OKELBERRY,  
UTAH DIVISION OF WILDLIFE  
RESOURCES, WEST DANIELS LAND  
ASSOCIATION, and JOHN DOES 1-25,

Defendants.

**SUPPLEMENTAL FINDINGS OF  
FACT AND RULING ON MOTION  
TO AMEND JUDGMENT**

Case No. 010500388  
Judge Donald J. Eyre

This matter came before the Court on December 17, 2004, on Plaintiff's Motion To Alter Judgment or Amend Findings of Fact. Plaintiff was represented by Scott H. Sweat, Deputy Wasatch County Attorney. Defendants were represented by Don R. Petersen and Ryan D. Tenney. The Court has reviewed the file, considered the parties memoranda, heard oral arguments, and being fully advised on the premises issues the following supplement:

**FINDINGS OF FACT**

1. Testimony was presented at trial showing that though the roads at issue in this case are in many places rough and difficult to traverse, Wasatch County (the County) has not made any efforts in the past to pave, grade, or otherwise improve the condition of these roads.

2. Testimony was also presented at trial indicating that Wasatch County currently has no plans to improve these roads in the future.

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3. Due to the rough nature of these roads, the Okelberrys and their employees have at certain times in the past made efforts to improve the conditions of these roads. Specifically, they have used heavy equipment to grade and level certain sections of the roads and have spent considerable time and energy removing fallen trees.

4. The Okelberrys and their employees have constructed and maintained gates that are placed at various points along the contested roads. Due to problems with vandalism, the Okelberrys have found it necessary to repair and maintain some of these gates. Their repair efforts have included the use of concrete as a means of permanently securing the fence posts.

5. At various times in the past, the Okelberrys and their employees have locked these gates. Beginning in the 1990's, the Okelberrys began locking these gates on a more permanent basis. Prior to the filing of this suit, Wasatch County had taken no official action to prevent the Okelberrys from locking these gates.

6. The Okelberrys and their employees have posted "no trespassing" signs at various places along these roads. Prior to the filing of this suit, Wasatch County had taken no official action to prevent the Okelberrys from posting such signs.

7. Testimony was presented at trial indicating that the Okelberrys and their employees have at various times asked persons to leave the property surrounding the roads. Beginning in the 1990's, the Okelberrys began restricting access to the roads. Prior to the filing of this suit, Wasatch County had taken no official action to prevent the Okelberrys from restricting the access to these roads.

8. The Okelberrys and their employees have sold trespass permits to members of the public, thereby granting those members permission to use the Okelberry property and surrounding roads. Prior to the filing of this suit, Wasatch County had taken no official action to

prevent the Okelberrys from selling these trespass permits.

9 Beginning in the mid-1990's, the Okelberrys entered into a contractual relationship that allowed private hunters to access their land in return for a significant monetary payment. These hunting contracts were administered as part of a Cooperative Wildlife Management Unit (CWMU).

10. Shayne Ford is currently the operator of the CWMU that has access to the Okelberry property. At trial, Shayne Ford testified that his CWMU would no longer use the Okelberry property if the contested roads were made open to the public.

11. No evidence was provided at trial to suggest the Wasatch County had ever affirmatively represented to the Okelberrys or anyone that it intended to abandon the public roads at issue or to otherwise not enforce the public's right to access these roads.

### RULING

Under Utah law, in order to invoke the doctrine of equitable estoppel, a party must meet three elements: (1) a statement, admission, act, or *failure to act* by one party inconsistent with a claim later asserted; (2) reasonable action or inaction by the other party taken on the basis of the first party's statement, admission, act, or failure to act; and (3) injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act. *The View Condo. Owners Assn. v. MSICO, L.L.C.*, 2004 UT App 104, 33, 90 P.3d 1042 (quoting *Eldredge v. Utah State Ret. Bd.*, 795 P.2d 671, 675 (Utah Ct. App. 1990) (emphasis added)).

First, the Court finds that for at least ten years the County failed to act as if the roads were public and that failure to act is inconsistent with their present assertion that those roads are public. Though the County is claiming to have had an ownership interest in the roads, they failed

to act in any way as owners until the filing of this action. Specifically, the Okelberrys placed gates across these roads, locked those gates for periods of time, asked persons to leave, completely controlled access to the roads since 1989, and have even sold trespass permits to persons wishing to use these roads. Each of these activities are clearly hostile to any claim of ownership by any other entity. If a private citizen constructed a toll booth across a residential road, for example, it would clearly be expected that the municipality would take immediate steps to reassert control. Here, the Okelberrys have controlled access to these roads for over a decade and have in fact actually received money from persons who wished to gain access.

In further support, the Okelberrys have expended some effort in the past to maintain and improve these roads, while the County has not expended any efforts in this regard. See *Premium Oil v. Cedar City*, 187 P.2d 199, 203 (Utah 1947) (holding that it was “important” that “[n]o attempt was made by the city or the public to improve the property so as to indicate the presence of a street”); *Wall v. Salt Lake City*, 168 P. 766, 768 (Utah 1917) (noting that the private landowner had made certain “improvements” by “leveling and filling in low places” in partial reliance on the municipality’s own inaction). No witness at trial even suggested that the County had undertaken any specific action during the time periods to assert the public’ rights to those roads (such as forcibly removing gates or locks, or by taking any efforts at all to maintain or improve those roads), nor was there any suggestion that any previous action had been filed in any court to obtain a declaration that the roads were in fact public. Thus, the Court finds the first prong of the estoppel analysis has been met.

Second, the Court finds that the Okelberry’s have taken reasonable actions based on the County’s failure to assert any ownership interest in these roads. Specifically, the Okelberrys have constructed and maintained gates across the roads, have spent time and energy improving



and maintaining the roads (rather than calling on county personnel to do so), and have developed and maintained a livestock operation that incorporates and uses all of the roads in question (rather than purchasing and moving their livestock operations). Also, the Okelberrys have entered into a business relationship with the CWMU that is operated by Shayne Ford. This business relationship has continued for almost a decade, and is by Shayne Ford's testimony, expressly predicated on the Okelberrys' continued control over these roads. The Court concludes that the Okelberrys would not have undertaken these activities had the County asserted any ownership rights over these roads, thus satisfying the second prong of the estoppel analysis.

Third, the Court finds that the Okelberrys would suffer injury if the County were now allowed to assert ownership rights over these roads. The most significant injury would be the loss of income due to the expected departure of the CWMU. The Okelberrys also testified at trial that they would suffer certain injuries to their own ongoing livestock operation if these roads were opened to the public. Opening the roads to the public would in effect destroy the Okelberrys' sheep and cattle operation. These losses clearly satisfy the third estoppel factor.

The Plaintiff, County, asserts that estoppel may not be found against a government entity. The Supreme Court of Utah did state that the "*general* rule is that estoppel may not be asserted against a governmental entity." *Weese v. Davis County Comm'n*, 834 P.2d 1, 4 (Utah 1992) (emphasis added). However, the Supreme Court of Utah has applied the principle of estoppel in pais "to exceptional cases where the elements calling for its exercise appear to have been an abandonment to the public use for the prescriptive period, inclosure and expensive improvements, such as large and costly buildings, acts of the municipality inducing the abutter to believe that there is no longer any street, and the expenditure of money in reliance upon the acts of the municipality." The Court further stated that "the absolute bona fides of the abutter or

adverse possessor is a most important factor where estoppel in pais is claimed. The acts relied on must be of such character as to amount to a fraud, if the city were permitted to claim otherwise.” *Wall* 168 P. at 772. This Court finds the present case to be exceptional so as to invoke the exception.

The Court finds it significant that the roads in question are located on private property and the roads themselves were private property prior to their abandonment to public use by their constant use. Prior to the filing of this action, the County has never asserted any type of ownership control over the roads. The County has never made any improvements on the roads. The County has itself treated the roads as the Okelberrys’ private property by collecting property taxes on the land. The *Walls* court stated that the property in dispute in that case had been recognized by the county as private “not only by the plat, but *by assessing it and enriching its own coffers by tribute exacted in the form of taxes.*” *Wall* at 771 (emphasis added).

Relying on the “bona fides of the abutter,” the Court finds that the Okelberrys absolutely believed the roads in question were their private property and as such asserted their ownership control by erecting fences and issuing trespass permits onto the property and these actions were uninterrupted by the County for over a decade. Clearly the Okelberrys’ reasonably believed the roads were their property and acted consistent with that belief and the County did not challenge their belief for a substantial period of time. While erecting fences does not rise to the level of erecting “large and costly buildings,” the Court finds the Okelberrys’ improvements and more importantly their business investments on the land to be significant. Thus, this Court finds that estoppel may properly asserted against the County.

The County then asserts that the exception to applying estoppel to a governmental entity is limited to situations where allowing the government to disavow its own affirmative act would

cause grave injustice to the other party and where estoppel may result in the loss of a public road, the courts have also required substantial conflicting improvements on what has been the road by the relying land owner. It is true that some cases have indicated that an affirmative action is required in order to assert estoppel against a government entity. See *The View Condo. Assn.*, 2004 UT APP 104 at 34, n.2; See also *Wall v. Salt Lake City*, 168 P. 766, 769 (Utah 1917). However, this requirement does not appear to have been universally applied by the courts.<sup>1</sup>

In *Premium Oil v. Cedar City* 187 P.2d 1999 (Utah 1947), the Utah Supreme Court held that it is a “general rule” that a “municipality may be estopped to assert a dedication by acts and conduct which have been relied upon by others to their prejudice.” *Id.* at 203. The *Premium Oil Co.* court further held that “in many cases where cities attempt to open dedicated streets for the benefit of the public, the courts have estopped the city from enforcing a dedication because the city authorities and the public itself has taken no action over a period of years” to prevent the private landowner from acting in an otherwise hostile manner. *Id.* at 204. The *Premium Oil* court made no mention of an affirmative action requirement.

Similarly, the Utah Supreme Court held in *Western Kane County Special Service District No. 1 v. Jackson Cattle Co.*, 744 P.2d 1376 (Utah 1987), that estoppel against the government is appropriate where the landowner has “substantially altered his position to his detriment in

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<sup>1</sup> This view is well-supported by the commentators. One respected commentator has thus noted that though “the application of estoppel doctrines against municipal corporations is not favored,” a municipal corporation is “[n]onetheless . . . subject to the rules of estoppel in those cases where equity and justice require their application.” 28 Am. Jur. 2d *Estoppel and Waiver* Section 152. Further, “a municipality may be estopped to open or use a street theretofore created, still existing in point of law, and never opened, or, if once opened in use since fallen into disuse and seemingly abandoned.” 39 Am. Jur. 2d *Highway and Streets, and Bridges* Section 179; See Also 11A McQuillen *The Law of Municipal Corporations* Section 33.62 (“The municipality itself may be stopped to assert a dedication by acts and conduct which have been relied on by others to their prejudice.”).



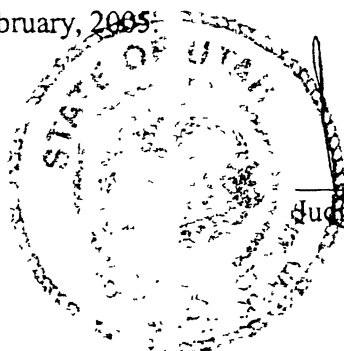
reliance on the asserted nonuse of the roadway by the public.” *Id.* at 1378. In *Western Kane* the Utah Supreme Court refused to apply equitable estoppel against the government because the “landowner had not substantially altered his position to his detriment in reliance on the asserted nonuse of the roadway by the public.” *Id.* The roads in *Western Kane* were located on the edges of the property and no more than ten feet wide. The Court did not discuss any evidence that the landowners had made any improvements, but the Court did mention that the County paid 75 percent of the cost of the land into the court.

Here, the Court finds that “equity and justice” do require the application of estoppel to the present case. The Okelberrys have acted as if they owned the roads in question for over a decade. In addition to the time and labor that they have personally spent on these roads, they have also developed a business relationship with a CWMU—thereby potentially passing on other business or land development opportunities that may have existed in the interim. To allow the County now to assert an ownership interest in these roads would cause the Okelberrys injury, would be unjust, and therefore cannot be sanctioned by this Court.

As such, the Court holds that the County is hereby estopped from asserting an ownership interest over these roads, and the County’s Motion to Amend Judgment is hereby DENIED.

Counsel for the Defendants shall prepare an order consistent with this ruling.

DATED this 18<sup>th</sup> day of February, 2005.



Judge Donald J. Eyre

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 010500388 by the method and on the date specified.

METHOD	NAME
Mail	MARTIN B BUSHMAN ATTORNEY DEF NATURAL RESOURCE DIVISION 1594 W N TEMPLE STE 300 SALT LAKE CITY, UT 84116
Mail	DON R PETERSEN ATTORNEY DEF POB 1248 PROVO UT 84603
Mail	RYAN D TENNEY ATTORNEY DEF 2342 N 750 W LEHI UT 84043

By Hand	THOMAS L LOW
By Hand	SCOTT H SWEAT

Dated this 23 day of February, 2007.

  
Deputy Court Clerk

## APPENDIX F

Order, April 8, 2005, R. 492-490

RUF

DON R. PETERSEN (2576), and  
RYAN D. TENNEY (9866), for  
**HOWARD, LEWIS & PETERSEN, P.C.**  
ATTORNEYS AND COUNSELORS AT LAW  
120 East 300 North Street  
P.O. Box 1248  
Provo, Utah 84603  
Telephone (801) 373-6345  
Facsimile (801) 377-4991

Our File No. 27754

Attorneys for Defendants

IN THE FOURTH JUDICIAL DISTRICT COURT OF WASATCH COUNTY

STATE OF UTAH

WASATCH COUNTY,  Plaintiff,  <b>vs.</b>  E. RAY OKELBERRY, et. al.,  Defendants	<b>ORDER</b>  Case No. 010500388 Judge Donald J. Eyre
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This Court hereby (I) supplements its findings of fact as was set forth in the Supplemental Findings of Fact and Ruling that were signed on February 18th, 2005, and (II) denies Plaintiff's Motion to Alter or Amend Judgment.

DATED this 21 day of March, 2005.

BY THE COURT

  
DONALD J. EYRE, JUDGE

Approved as to Form:

\_\_\_\_\_  
Scott H. Sweat  
Deputy Wasatch County Attorney

**MAILING CERTIFICATE**

I hereby certify that a true and correct copy of the foregoing was mailed to the following,  
postage prepaid, this 7 day of March, 2005.


Scott H. Sweat  
Wasatch County Attorney  
805 West 100 South  
Heber City, UT 84032

  
\_\_\_\_\_  
SECRETARY

NOTICE PURSUANT TO RULE 7 OF THE UTAH RULES OF CIVIL PROCEDURE OF THE  
STATE OF UTAH

Pursuant to Rule 7(f)(2) of the Utah Rules of Civil Procedure, notice is hereby given to Plaintiff, that this proposed order prepared by Defendants shall be the Order of the Court unless Petitioner files an objection in writing within five (5) days from the date of the service of this notice.

DATED this 7 day of March, 2005.

  
RYAN D. TENNEY  
Attorney for the Defendants

## APPENDIX G

Further Specific Findings of Fact and Ruling on Defendants' Motion for Entry of Supplemental Findings and Conclusions; or Alternatively for New Trial or Presentation of Additional Evidence, R. 676-668.

IN THE FOURTH JUDICIAL DISTRICT COURT  
WASATCH COUNTY, STATE OF UTAH

Wasatch  
0060 00 1112:19

WASATCH COUNTY,

Plaintiff,

v.

WEST DANIELS LAND ASSOCIATION et al,

Respondent.

**FURTHER SPECIFIC FINDINGS OF  
FACT AND RULING ON DEFENDANTS'  
MOTION FOR ENTRY OF  
SUPPLEMENTAL FINDINGS AND  
CONCLUSIONS; OR ALTERNATIVELY  
FOR NEW TRIAL OR PRESENTATION  
OF ADDITIONAL EVIDENCE**

Case No. 010500388 PR

Judge Donald Eyre, Jr.

This matter comes before the Court on remand from the Utah Supreme Court. In a ruling filed February 12, 2008 (*Wasatch County v. Okelberry*, 2008 UT 10), the Supreme Court instructed this Court to enter "specific findings of fact regarding the Okelberrys' evidence of interruption in the use of the Four Roads as public thoroughfares." 2008 UT 10 ¶ 20. The Court has reviewed the file, reviewed trial transcript, considered the memoranda of both parties, heard oral argument, and now issues the following findings of fact and ruling:

**SPECIFIC FINDINGS OF FACT**

1. Several of Plaintiff's witnesses testified at trial that they used some or all of the four roads (Circle Springs Road, Ridge Line Road, Thorton Hallow Road, Parker Canyon Road) at issue here during various periods between 1957 and 2004.

2. Deon Sabey testified that he used all four roads several times beginning in the 1950s. He testified that when using the roads he never saw "no trespassing" signs on any of the roads, but did see gates on the roads. He never saw or encountered locks on any of the gates. He saw no markers on the gates. He saw others using the roads at various times, and was never asked to leave the roads, nor did he get permission to use any of the roads.

3. Moroni Besendorfer testified that he used all four roads several times beginning in the 1960s. He testified that he saw others on the road every year from the 1960s through the 1980s. He testified that he saw others use the roads and camp on adjoining property with their vehicles. He did not see any "no trespassing" signs until 1999. He saw no locked gates until "a few years" prior to the trial. He was never kicked off the roads or asked to leave, and never obtained permission to use



the roads.

4. Martin Wall testified that he used Circle Springs Road and Ridge Line Road regularly beginning in the 1950s, for hunting and gathering firewood. He testified that he never saw "no trespassing" signs. He saw gates on the roads, but they were not locked. He never received permission to traverse the roads.

5. Jake Thompson testified that he has used Circle Springs Road and Ridge Line Road regularly since the 1950s, and Thorton Hallow Road since at least the 1970s. He testified that he never saw "no trespassing" signs on the roads. He saw gates, but they were not locked. He never received permission to travel the roads, and was never kicked off the roads.

6. Ed Sabey testified that he has used all of the roads regularly since about the 1960s. He testified that he never saw "no trespassing signs," nor signs on Parker Canyon Road saying "no motorized vehicles." He saw gates, which were not locked. He had seen others on the roads. He never got permission to use the roads. He testified that about "15 years ago" (which would have been 1989), people were stopped from using Ridge Line Road.

7. Richard Baum testified that he used Ridge Line Road for biking about "20 years ago" (1984). He was never kicked off the road, and never saw "no trespassing signs." He did see "orange painted wood signs" on the road.

8. Brandon Richins testified that he has used Circle Springs Road, Ridge Line Road, and Parker Canyon Road starting in the late 1980s. He testified that he first saw "no trespassing" signs about 15-16 years ago (1988-89) on Circle Springs Road. He saw locked gates on Ridge Line Road since 2001. He never saw locked gates on Parker Canyon road, but saw "no motorized vehicle" signs. He never had permission to use the roads, and saw others on them.

9. Benny Gardner testified that he started using Circle Springs Road, Thorton Hallow Road, and Parker Canyon Road in about 1966. He testified that he did not see "no trespassing" signs until the 1990s. He saw the gates on the roads, but testified that they were not locked until "more recently." He testified that he saw others on the roads, was never kicked off the roads, and never got permission to use the roads.

10. Mark Buttars testified that he used all the roads starting in the 1960s, except Parker Canyon Road, which he started using in 1972. He testified that he saw "partial trespassing" signs on Thorton Hallow Road and Circle Springs Road starting in about 1992. He saw no signs prior to 1992. He never received permission to use the roads, and saw others on the roads. While he saw gates on the roads, he testified that they were never locked.

11. Defendants called several witnesses who also testified regarding public access to the roads between 1957 and 2004.

12. Jeff Jefferson mainly testified regarding the condition of the roads. He testified that each of the roads was rocky and would require a 4-wheel drive vehicle to pass, but that sometimes gates

were left open. He testified that he asked Mark Butters to leave the roads twice sometime after 2000. He also testified that the sign on a tire at the start of Circle Springs Road was put up in about 1992.

13. Melvin Price also testified about the condition of the roads: that they were only passable by 4-wheel drive vehicles. He testified that there have been locked gates and "no trespassing" signs on Ridge Line Road for at least 20 years. He testified that there were signs and locked gates on the other roads at some point, but did not specify a time frame. He testified that he got permission from the Okelberrys each year he used the roads, and that there was not much traffic or many others on the roads.

14. Lee Okelberry testified that his father purchased property surrounding the roads in 1957. He testified that the roads had gates and fences. He testified that Thorton Hallow Road and other roads were "better than a trail," but that the public was not there much in the 1950s. He testified that he occasionally he stopped and talked to people on Parker Canyon Road in the 1950s. He stated that "as the years went by there was a little more traffic" on the roads. He testified that in 1957 there was no need for "no trespassing" signs because "[t]here was no, not that much trespass up there." He further stated that there were no locks on the gates in 1957, but instead "[w]e put fasteners on them and we wired them to a post." "We never did lock anybody out of there," he stated. He testified that he asked wood gatherers to get off private land on occasion. He also testified that he "never locked" the gates. He testified that a locked gate shown to him as an exhibit was "put there after I left." Finally, he testified that "I think we stood up for the public quite a bit. If there was any that needed to go through there in any way, shape or form they could ask or they could go through there. We never turned nobody down that had any business down in there."

15. Glen Shepherd testified that there are now signs on all of the roads. He said he had permission for years from the Okelberrys to use the roads, who are "pretty free" with giving permission. He stated that the roads are generally seen as private rather than public roads, and that there have always been gates of some sort on the roads.

16. Shane Ford testified that the condition of the roads is pretty similar now (in 2004) to their condition in 1994. He testified that gates are now locked during hunting season. He believed that the roads have not been open to the public for continuous use.

17. Bruce Huvard testified that the roads were "very rough." He testified that he first went to the property in 1966, and saw "keep out" and "private" signs on the property at that time. He testified that he obtained permission from the Okelberrys each year from 1966 to 1990 to use the roads. He testified that there were always gates upon entering the roads between 1966 and 1990. He testified that there were others who used the roads without permission, but that they were not very numerous. He kicked people off the Okelberry property who were not "supposed to be on there" between 1966 and 1990. He testified that "some" of the gates were locked between 1966 and 1990, but did not specify exact dates.

18. Brian Okelberry testified that he started working on the property around the roads in the early 1970s. He testified that there have always been gates on the road since he's been there, and that one of the purposes of the gates was to control vehicles "from going up and down the roads."

He has given people permission to use roads at times. He testified that there were "keep out" signs on some of the gates. He testified that some of the gates have been locked "over periods of time." He testified that he started taking an active role in preventing trespassing around the late 1980s, and began putting up signs then. He testified that the first boundary locks were placed on the gates in the 1980s.

19. Ray Okelberry testified that there were gates on the roads beginning in 1957, and that as time passed more people came. He has told people to leave the roads "on occasion." He gave permission to Brian Gardner and others to use the roads. He began charging people for "trespass permits" beginning in the 1990s. He testified that there were locks on the gates in the 1990s and 2000s. He testified that the sign on the tire at the entrance to the Circle Springs Road was there "about 20 years." He testified that they started locking the Circle Springs and "1080 gate" (going into the Ridge Line Road) either the first or second year he was there. He testified that people may have cut the locks from gates at some points. He testified that he began putting up signs in 1957-59, but that "they didn't stay up," and hypothesized that the "wind blew them away." He also testified: "I'm not saying the gate was opened or locked all summer, but when I was getting ready to get those sheep out of there I locked those gates. And I've always had trouble keeping locks there."

20. The Court finds that there were gates at the entrances to each of the roads from 1957 to 2004.

21. The Court also finds that there may have been signs at various locations reading "keep out" and "private" beginning in the 1960s. However, the evidence shows that these signs did not restrict travel on the roads themselves, and it is unclear whether they were intended to refer to keeping off the roads or the surrounding property. None of Defendants' witnesses clarified whether the signs were intended to refer to the roads or the property. Ray Okelberry testified that the signs he placed "didn't do any good" anyway. More signs were placed by Brian Okelberry and others beginning in the late 1980s and 1990s.

22. The Court finds that occasionally persons may have been told to leave the property beginning in the 1950s, but this did not restrict travel on the roads. Restrictions on use of the roads began in the 1980s at the earliest. There was no evidence presented that the Okelberrys regularly kicked people off the roads at any time before the 1980s; the evidence instead shows that they freely intended to let others use the roads.

23. The Court finds that while some people obtained permission to use the roads, getting specific permission was not enforced, and many used the roads from 1957 to the 1990s without permission.

24. The Court finds that though the Okelberrys may have locked some of the gates at some points between the 1950s and 1990s, this did not restrict travel on the roads. There was no credible evidence presented that the Okelberrys intended to or actually did restrict travel prior to the 1990s due to the locking of gates. While Ray Okelberry testified that he locked gates beginning either in 1957 or 1958, he did not testify that he intended to keep the public from accessing the roads at this time. Lee Okelberry and Brian Okelberry, both Defendants' witnesses, testified that the boundary

gates at the entrances of the roads were never locked until at least the 1980s. Several of Plaintiff's witnesses also testified to this effect.

### RULING

The issue before the Court here is a fairly narrow one, though it must be decided based on a large amount of testimony and evidence. The Utah Supreme Court, on February 12, 2008, issued a written decision ordering this Court to enter "specific findings of fact regarding the Okelberrys' evidence of interruption in the use of the Four Roads as public thoroughfares." *Wasatch County v. Okelberry*, 2008 UT 10 ¶ 20. This Court has reviewed the evidence and made those specific findings of fact above, and will presently apply those findings to the now-applicable law.

In its February 12 decision, the Supreme Court articulated a "bright-line rule" to determine whether a road is dedicated and abandoned for use to the public under Utah Code Annotated § 72-5-104. This rule is as follows:

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.

*Wasatch County v. Okelberry*, 2008 UT 10 ¶ 15.

The new rule thus contains three requirements: 1) there must be an overt act; 2) there must be a show of intention by a property owner to interrupt the public use of a road; 3) the overt act must be reasonably calculated to interrupt road use by the public. The Supreme Court explained that "credible evidence" which meets these three requirements "simply precludes a finding of continuous use." *Id.*

Defendants argue that they have presented evidence of "at least four types of acts" which would satisfy the above standard: "locked gates, unlocked gates, asking trespassers to leave, and posting signs." (Memorandum Opposing Plaintiff's Motion for Entry of Findings of Fact and Conclusions of Law ("Opp. Memo"), at 2.) The Court now addresses each of these.

The evidence at trial showed clearly that there were unlocked gates at the entrances to the roads (boundary gates) as well as some interior gates during all the years relevant to this issue. The question is whether unlocked gates would satisfy the requirements explained above. The Court holds that they do not. Defendants argue, using language from various cases in other states, that an unlocked gate creates a "presumption that any use was permissive." (Opp. Memo, at 11.) But the testimony at trial shows otherwise. Several witnesses testified of unlocked wire or metal gates which were used to control cattle, but none testified that this interrupted their use of the roads, or that they supposed that their use was permissive based on the presence of the gates. Perhaps most importantly, the simple existence of gates clearly does not constitute an overt act. The gates were apparently there even before Defendants took control of the property, and the requirement that travelers open and close such gates for the purpose of controlling livestock does not show intent to interrupt public use. The gates themselves "were not meant to restrict public travel on the Road[s]." *Utah County v. Butler*, 2008 UT 12 ¶ 16.

Defendants claim that "asking people to leave the roads" constitutes an overt act under the Supreme Court's standard. Indeed, multiple witnesses, including Bruce Huvard, Melvin Price, and Glen Shepherd testified that they obtained permission to use the roads. Some testimony was also presented at trial that, on occasion, the Okelberrys and others asked people to leave property

surrounding the roads. The evidence did not show, however, that this interrupted public use of the roads generally. Several of Plaintiff's witnesses testified that they used the roads freely during the 1960s, 1970s, and 1980s without any resistance. Lee Okelberry testified that the Okelberrys "never turned nobody down" who had legitimate business using the roads. None of Defendants' witnesses testified that there was a regular policy of requiring permission or approval to use the roads during that period, nor that asking persons to leave the property was intended to restrict public access to the roads themselves. As the Supreme Court stated in *Utah County v. Butler*, when individuals are not removed from the roads themselves, simply removing them from the adjoining property is not sufficient to constitute an overt act reasonably calculated to interrupt continuous use. *See* 2008 UT 12 ¶ 17. The evidence shows that it was not until the late 1980s and 1990s that the Okelberrys began requiring hunting permits and other permission to use the roads. As a result, the Court finds that these instances of asking persons to leave the property do not rise to the level of an overt act intended to interrupt public use of the roads prior to the 1990s.

Another possible interruptive act alleged by Defendants was the posting of "keep out" and "no trespassing" signs on the gates and the property surrounding the roads. The Utah Supreme Court has held that "it is clear that the posting of the signs constituted an overt act," but that less clear was whether posting the signs showed an intent to interrupt public use of the road and whether the act was reasonably calculated to do so. *Wasatch County v. Okelberry*, 2008 UT 10 ¶ 18. It appears that a majority of the "no trespassing" and "keep out" signs on the property at the time of trial were placed there in the late 1980s and 1990s. Ray Okelberry testified that he began putting up signs as early as 1957 or 1958, but that it "didn't do any good" to put the signs up. He also testified that the early signs "didn't stay up." Bruce Huvard testified that he saw signs as early as 1966 saying "keep out" and "private." Yet none of Defendants' witnesses at trial specified their intent when putting up the signs in the years prior to the 1980s and 1990s. Further, many of Plaintiff's witnesses testified that they never saw "no trespassing" signs until the late 1980s or 1990s, and that none of them were deterred in their travels along the roads by signs. The Utah Supreme Court held, in *Utah County v. Butler*, that "[s]igns posted against travel on property adjacent to the Road do not constitute an interruption of travel on the Road itself." 2008 UT 12 ¶ 17. Without credible evidence showing that the signs were meant to apply to the roads themselves, the Court cannot infer an intent to interrupt the use of the roads from the posting of signs in the 1950s, 1960s, or 1970s, nor can it conclude that the earlier signs were "reasonably calculated" to interrupt public road use prior to the late 1980s or 1990s.

Finally, Defendants submit that evidence of locked gates constitutes an overt act sufficient to satisfy the Supreme Court's standard. The Supreme Court held that "[t]he locking of gates for several days at a time constitutes an overt act intended to interrupt public use and reasonably calculated to do so." *Wasatch County v. Okelberry*, 2008 UT 10 ¶ 19. However, the Court also held that "factual questions remain as to whether and when such an event or events occurred." *Id.* Ray Okelberry testified that he started locking the Circle Springs and "1080 gate" (going into the Ridge Line Road) either the first or second year he was on his property. He testified that "when I was getting ready to get those sheep out of there I locked those gates." (Transcript of Bench Trial, June 30, 2004, at 138.) He also stated that "I've always had trouble keeping locks there," but that "I was there I might have been there a week or ten days that I had those gates locked." *Id.* at 138-39.

The Utah Supreme Court explained that evidence of an overt act must be "credible" to preclude a finding of continuous use under the dedication statute. *Wasatch County v. Okelberry*, 2008 UT 10 ¶ 15. That Court has previously held that a trial court has "the prerogative to judge the

credibility of the witnesses and to determine the facts.” *Casida v. Deland*, 866 P.2d 599, 602 (Utah 1993) (citing *Hanks v. Turner*, 508 P.2d 815, 816 (Utah 1973)). In making this determination, the Court is “not obliged to believe the self-serving testimony” of the witness. *Id.* Further, while a trial judge “should not arbitrarily reject competent, credible, uncontradicted testimony, nevertheless he is not compelled to believe evidence where there is anything about it which would reasonably justify refusal to accept it as the facts, and this includes the self-interest of the witness.” *Id.* (citing *Strong v. Turner*, 452 P.2d 323, 324 (Utah 1969)).

Though the Court properly takes into account Ray Okelberry's self-interest in assessing the credibility of his testimony, that alone is not dispositive. The main problem with Ray Okelberry's trial testimony regarding locked gates is that it contradicts not only the testimony of several of Plaintiffs' witnesses (specifically, Deon Sabey, Moroni Besendorfer, Martin Wall, Jake Thompson, Ed Sabey, Brandon Richins, Benny Gardner, and Mark Buttars), it also contradicts the testimony of Defendants' own witnesses, Brian and Lee Okelberry. Plaintiffs' witnesses who testified on the issue testified that they encountered no locked gates while using the roads until at least the late 1980s or 1990s, and some not until the 2000s.

Brian Okelberry testified that the first boundary locks were placed on gates in the 1980s. Lee Okelberry testified that “[w]e never did lock anybody out of there,” that he personally never locked any gates, and that any locks on gates shown to him as exhibits were put there “after I left,” which would have been in the 1990s, as he testified he stopped going to the area “about six years ago.” (Transcript of Bench Trial, June 29, 2004, at 198.) He specifically testified that locks were not put on the gates in 1957, but instead “[w]e put fasteners on them and we wired them to a post.” These statements by Brian and Lee Okelberry are especially significant because they are statements against interest. Brian Okelberry is a party to this case, and both were witnesses called by Defendants.


Plaintiff's witnesses also contradict Ray Okelberry's testimony. Defendants argue that Plaintiff's witnesses are “sporadic users” of the road and that their testimony regarding locked gates should not be given as much weight as a result. (Opp. Memo, at 9.) But the Supreme Court explained that “a road may be used continuously even if it is not used constantly or frequently.” *Wasatch County v. Okelberry*, 2008 UT 10 ¶ 16. “For example, a road may be used by only one person once a month, but if this use is as often as the public finds it ‘convenient or necessary,’ and the landowner has taken no action intended and reasonably calculated to interrupt use, the use is continuous. The one-month period of time between uses is a mere intermission, not an interruption.” *Id.*

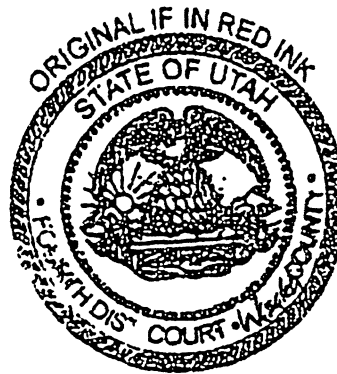
The Court finds that while there may have been occasions in which Mr. Okelberry locked the gates in the 1950s, 1960s, and 1970s, these were few and far between, were not intended to restrict public access, and were not reasonably calculated to interrupt public use of the roads. The Court finds that his testimony, to the extent it contradicts the testimony of Lee Okelberry, Brian Okelberry, and several of Plaintiff's witnesses (that the gates were not locked with that intent until at least the 1980s), is not credible evidence under the Supreme Court's standard. Defendants' other witnesses testifying about the existence of locked gates did not specify timeframes in which the gates were locked; therefore the testimony of the Okelberrys are Defendants' only evidence on this subject. As in *Utah County v. Butler*, the Court finds here that between the 1950s and at least the 1980s “the gates . . . were not erected or locked with the requisite intent and therefore did not interrupt the public's continuous use of the Road.” 2008 UT 12 ¶ 16.

## CONCLUSION

This Court ruled previously that "it is clear that individuals using the roads beginning in the late 1950s until the late 1980s or early 1990s used the roads without interruption, they used the roads freely, and though not constantly, they used the roads continuously as they needed." (Findings of Fact and Conclusions of Law, 22 September 2004, at 6-7.) Plaintiffs at trial made a showing by clear and convincing evidence that Circle Springs Road, Ridge Line Road, Thorton Hallow Road, and Parker Canyon Road were abandoned to the public. Defendants have offered no credible evidence of overt acts sufficient to change this determination under the Utah Supreme Court's newly created standard. Therefore the Court holds that under Utah Code Annotated § 72-5-104(1) each of the four roads was "dedicated and abandoned to the use of the public" by continuous use as a public thoroughfare for over 10 years.

Signed this 23 day of October, 2008.

  
DONALD J. EYRE  
District Court Judge



**CERTIFICATE OF SERVICE**

I hereby certify that, on the 23<sup>rd</sup> day of October, 2008, I caused a true and correct copy of the foregoing **FURTHER SPECIFIC FINDINGS OF FACT AND RULING ON DEFENDANTS' MOTION FOR ENTRY OF SUPPLEMENTAL FINDINGS AND CONCLUSIONS; OR ALTERNATIVELY FOR NEW TRIAL OR PRESENTATION OF ADDITIONAL EVIDENCE** to be delivered to the following parties:

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## APPENDIX H

Map of properties, R. 371.

