

2008

Wasatch County v. Okelberry : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS
OF THE STATE OF UTAH

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.

Case No. 20080988-CA

OPENING BRIEF OF APPELLANTS

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

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FILED
UTAH APPELLATE COURTS

APR 07 2009

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LIST OF PARTIES

All parties are listed on the case caption.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv
LIST OF PARTIES	i
JURISDICTIONAL STATEMENT	1
ISSUES PRESENTED FOR REVIEW	2
DETERMINATIVE PROVISIONS OF LAW	4
STATEMENT OF THE CASE	4
A. <u>Nature of the Case & Course of the Proceedings Below</u>	4
B. <u>Statement of Facts</u>	6
Permission and Expulsion	7
Fences and Gates	11
Locks on the Gates	13
Signs	15
SUMMARY OF ARGUMENT	17
ARGUMENT	18
I: THE UTAH SUPREME COURT HELD THE LOCKING OF GATES WAS AN INTERRUPTION AS A MATTER OF LAW, REGARDLESS OF INTENT OR IMPACT.	18
II: LEE OKELBERRY AND OTHERS INTERRUPTED USE OF THE ROAD AS A PUBLIC THOROUGHFARE BY STOPPING PERSONS TO JUDGE WHETHER THEIR PURPOSE IN USING THE ROADS WAS ACCEPTABLE.	22

III:	BECAUSE INTENT WAS NOT RELEVANT AT THE TIME OF THE FIRST TRIAL, OKELBERRY WAS ENTITLED TO A NEW TRIAL TO PRESENT EVIDENCE OF INTENT ADDRESSING THE NEW TEST ADOPTED BY THE SUPREME COURT.	26
IV:	MAINTENANCE OF UNLOCKED GATES CONSTITUTED AN INTERRUPTION.	29
CONCLUSION		34

APPENDIX

- A. *Wasatch County v. Okelberry*, 2008 UT 10, 179 P.3d 768.
- B. Ruling, August 27, 2004, R. 407-397.
- C. Findings of Fact and Conclusions of Law, October 22, 2004, R. 420-409.
- D. Order, October 22, 2004, R. 428-421.
- E. Supplemental Findings of Fact and Ruling on Motion to Amend Judgment, February 23, 2005, R. 489-481
- F. Order, April 8, 2005, R. 492-490.
- 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.
- H. Map of properties, R. 371.

TABLE OF AUTHORITIES

Cases Cited

<i>A.K. & R. Whipple Plumbing & Heating v. Aspen Constr.</i> , 1999 UT App 87, 977 P.2d 518	27
<i>Amax Magnesium Corp. v. Utah State Tax Comm'n</i> , 874 P.2d 840 (Utah 1994)	2
<i>AWINC Corp. v. Simonsen</i> , 2005 UT App 168, 112 P.3d 1228	31
<i>Berger v. Berger</i> , 88 N.W.2d 98 (N.D. 1968)	30
<i>Campbell v. Box Elder County</i> , 962 P.2d 806 (Utah Ct. App. 1998)	20, 26, 30
<i>Draper City v. Estate of Bernardo</i> , 888 P.2d 1097 (Utah 1995)	29, 31
<i>Gaw v. State</i> , 798 P.2d 1130 (Utah Ct. App. 1990)	3
<i>Guisti v. Sterling Wentworth Corp.</i> , 2009 UT 2, 201 P.3d 966	1
<i>Heber City Corp. v. Simpson</i> , 942 P.2d 307 (Utah 1997)	25, 30
<i>Kohler v. Martin</i> , 916 P.2d 910 (Utah Ct. App. 1996)	31
<i>Lewis v. Porter</i> , 556 P.2d 496 (Utah 1976)	27
<i>McIntyre v. Board of County Commissioners</i> , 86 P.3d 402 (Colo. 2004)	30
<i>Morris v. Blunt</i> , 49 Utah 243, 161 P. 1127 (Utah 1916)	25
<i>Pozzolan Portland Cement Co. v. Gardner</i> , 668 P.2d 569 (Utah 1983)	3
<i>Thurnwald v. A.E.</i> , 2007 UT 38, 163 P.3d 623	19
<i>Town of Leeds v. Prisbrey</i> , 2008 UT 11, 179 P.3d 757	20, 21, 24
<i>Uzelac v. Thurgood (In re Estate of S.T.T.)</i> , 2006 UT 46, 144 P.3d 1083	19
<i>Vaughn v. Williams</i> , 345 So. 2d 1195 (La. Ct. App. 1977)	20, 33

<i>Wasatch County v. Okelberry</i> , 2006 UT App 473, 153 P.3d 745, <i>rev'd</i> , 2008 UT 10, 179 P.3d 768	4, 5
<i>Wasatch County v. Okelberry</i> , 2008 UT 10, 179 P.3d 768	3, 4, 18, 19, 21, 25, 27, 29
<i>Williams v. Prather</i> , 196 So. 118 (Ala. 1940)	30

Constitutional provisions, statutes, and rules cited:

U.S. Const. amend. V	19
Utah Code § 72-7-104(4)	33
Utah Code § 72-5-104(1) (2006)	4, 19, 25, 31, 32
Utah Code § 78A-3-102(3)(j)	1
Utah Code § 78A-4-103(2)(j)	1
Utah Const. art. I, § 22	19
Utah R. Civ P. 7	2

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OPENING BRIEF OF APPELLANTS

JURISDICTIONAL STATEMENT

The trial court issued its ruling on October 23, 2008.¹ Okelberrys timely filed their notice of appeal on November 20, 2008.² The supreme court had jurisdiction under Utah Code § 78A-3-102(3)(j). This Court has pour-over jurisdiction under Utah Code § 78A-4-103(2)(j).

Although the appeal is timely with respect to the October 23, 2008, ruling, that ruling may not have been a final order. Based on the case of *Guisti v. Sterling Wentworth Corp.*,³

¹R. 676-668.

²R. 680-679.

³2009 UT 2, 201 P.3d 966.

decided after Okelberrys' appeal, it is arguable that Rule 7 of the Utah Rules of Civil Procedure required Wasatch County to submit an order implementing the trial court's ruling. Okelberrys is filing a separate motion addressing this potential jurisdictional issue.

ISSUES PRESENTED FOR REVIEW

1. Where the trial court found gates had been locked, did the court act contrary to the Utah Supreme Court's direction in finding the locked gates did not interrupt public use?

a. Standard of appellate review: Whether a trial court on remand correctly interpreted the appellate court's decision is a question of law. The appellate court applies a correction of error standard.⁴

b. Preservation below: Okelberrys argued below that a "locked gate is clearly an interruption" and that "it is the act of blocking, not the result, that is important."⁵

2. Did the trial court rule based on a misunderstanding of the law and thus abuse its discretion in holding that Okelberrys did not interrupt use by stopping persons who were using their private roads?

a. Standard of review: "An appellate court reviews a trial court's legal interpretation of the Dedication Statute for correctness and its factual findings for clear error. 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

⁴*Amax Magnesium Corp. v. Utah State Tax Comm'n*, 874 P.2d 840, 842 (Utah 1994).

⁵R. 630.

credibility determinations. Thus, an appellate court reviews a trial court's decision regarding whether a public highway has been established under the Dedication Statute for correctness but grants the court significant discretion in its application of the facts to the statute.”⁶ Where the court exercises its discretion based on a misunderstanding of the law, however, that constitutes an abuse of discretion.⁷

b. Preservation below: The issue was raised in Okelberrys’ Memorandum Opposing Plaintiff’s Motion for Entry of Findings of Fact and Conclusions of Law.⁸

3. Did the trial court abuse its discretion in denying Okelberrys’ motion to allow presentation of additional evidence addressing intent and other factors made relevant by the Utah Supreme Court’s decision?

a. Standard of appellate review: “Like the motion for a new trial on the ground of newly discovered evidence, a motion to reopen the case to take additional testimony is normally addressed to the discretion of the trial court, and its discretionary denial or grant of the motion will be interfered with by an appellant court only for abuse.”⁹

b. Preservation below: Okelberrys sought this relief in their motion for new trial for presentation of additional evidence.¹⁰

⁶*Wasatch County v. Okelberry*, 2008 UT 10, ¶ 8, 179 P.3d 768.

⁷*Gaw v. State*, 798 P.2d 1130, 1134 (Utah Ct. App. 1990).

⁸R. 621.

⁹*Pozzolan Portland Cement Co. v. Gardner*, 668 P.2d 569, 570 (Utah 1983) (citation omitted).

¹⁰R. 616-614.

4. Did the trial court err in concluding that the maintenance of unlocked gates did not interrupt use of the road as a public thoroughfare?

a. Standard of review: Because the testimony concerning the maintenance of gates was essentially undisputed, the only issue for decision is a question of law. Review is for correctness.

b. Preservation below: This issue was raised in Okelberrys' Memorandum Opposing Plaintiff's Motion for Entry of Findings of Fact and Conclusions of Law.¹¹

DETERMINATIVE PROVISIONS OF LAW

Utah Code § 72-5-104(1) (2006) is determinative of this appeal: "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

A. Nature of the Case & Course of the Proceedings Below

This is a civil case seeking a declaration that certain privately owned roads have become public under Utah Code § 72-5-104(1) (2006).

This is an appeal from the trial court's decision on remand. Wasatch County appealed and Okelberry cross-appealed from the original trial court decision in this case. The Court of Appeals decision on that appeal is reported at 2006 UT App 743, 153 P.3d 745, and the Utah Supreme Court opinion is reported at 2008 UT 10, 179 P.3d 768. A copy of the supreme court opinion is attached in the Appendix to this brief.

¹¹R. 627-622.

Wasatch County filed suit on August 24, 2001.¹² The case was tried in a bench trial from June 28-30, 2004.¹³ The trial court ultimately entered an order determining that the roads had become public¹⁴ but that the county was estopped from asserting an ownership interest in the roads.¹⁵ Wasatch County appealed, and Okelberrys cross-appealed. The Court of Appeals issued its opinion November 30, 2006, sustaining Wasatch County's appeal and rejecting the Okelberrys' cross-appeal.¹⁶ On Okelberrys' petition for writ of certiorari, the Utah Supreme Court reversed the court of appeals and remanded for further proceedings.

On remand, Wasatch County filed a motion for further findings.¹⁷ Okelberrys responded¹⁸ and filed a cross-motion for further findings.¹⁹ Okelberrys' motion included a motion for new trial or for leave to present additional evidence addressing the new test adopted by the supreme court.²⁰ The trial court held oral arguments on the motion on

¹²R. 10.

¹³R. 357-353.

¹⁴R. 424.

¹⁵R. 482.

¹⁶*Wasatch County v. Okelberry*, 2006 UT App 473, 153 P.3d 745, *rev'd*, 2008 UT 10, 179 P.3d 768.

¹⁷R. 605-597.

¹⁸R. 636-617.

¹⁹R. 616-611.

²⁰*Id.*

September 26, 2008.²¹ The court did not expressly rule on Okelberrys' motion for new trial or to present additional evidence, but issued a ruling on October 23, 2008, finding the issues in favor of Wasatch County.²²

B. Statement of Facts

The roads in question run across several thousand acres of rural, undeveloped property that is owned by the Okelberrys in Wasatch County. Ray Okelberry, his brother Lee Okelberry, and their father first purchased this property in 1957.²³ The Okelberrys ran a sheep business and bought the mountainous property in order to relocate their herds to a higher, cooler elevation.²⁴ Ray and Lee Okelberry ultimately bought out their father's interest in the land, and, after Lee decided to retire from the business, Ray's sons Eric and Brian Okelberry then bought out Lee's interest.²⁵ At the present time, Ray, Eric, and Brian Okelberry own the land in question and continue to use it in their own livestock operations.

The Okelberrys' property is crisscrossed by a series of unimproved dirt roads. A color-coded map of the properties in question was attached as an exhibit during the pretrial proceedings,²⁶ and, for convenience, is reproduced and attached as an exhibit to this brief.

²¹R. 667; Transcript of Oral Argument September 26, 2008.

²²R. 676-668.

²³Trial Transcript, June 30 at 61-62.

²⁴Trial Transcript, June 30 at 61.

²⁵Trial Transcript, June 30 at 62.

²⁶R. at 371.

Evidence was presented at trial indicating that the County has not done any work to improve the physical condition of the roads.²⁷ The evidence presented at trial also indicated that, due to weather, the roads are only open for travel from Mid-May or June through November of each year.²⁸ To the extent that these roads can actually be referred to as “roads,” the evidence showed that they are rough, steep, rocky, and often obstructed by naturally falling trees.²⁹

As indicated at trial, there are four ways in which the landowners have controlled access to the roads since 1957: (1) by granting permission to some people to use the roads, and then by expelling persons who were found on the roads without permission; (2) by maintaining a series of closed gates that cross each of the roads; (3) by periodically locking those gates; and (4) by posting no-trespassing signs along the roads.

Permission and Expulsion³⁰

From the time that the Okelberrys purchased the property, they treated it and the roads that crossed it as private ground that was subject to their control. One of the chief ways in

²⁷Findings of Fact, R. at 419, ¶4; Supplemental Findings, R. at 489, ¶2; Trial Transcript, June 28 at 25-26; Trial Transcript, June 29 at 57; Trial Transcript, June 30 at 80.

²⁸Findings of Fact, R. at 419, ¶5; Trial Transcript, June 28 at 61.

²⁹*See, e.g.*, Trial Transcript, June 28 at 285 (testimony of County witness Ed Sabey, describing recurrence of falling trees); Trial Transcript, June 29 at 97 (testimony of County witness Benny Gardner, describing the roads as “rough” and “steep”); Trial Transcript, June 29 at 238-39 (testimony of Shane Ford, describing roads as “rocky” and “rough”); Trial Transcript, June 30 at 26 (testimony of Brian Okelberry, describing need for yearly tree removal).

³⁰The evidence relating to this factor presented at trial appears to have been exclusive to the Okelberry roads, and does not apply to the West Daniels roads.

which the Okelberrys protected their private property rights was by granting permission to friends or neighbors to use the roads, and by expelling persons whom they found using the roads without permission. Ray Okelberry testified that as far back as 1957, he, Lee, and their father were granting permission—both orally and in writing—to friends and neighbors to use the roads.³¹ Brian Okelberry offered similar testimony regarding the Okelberrys’ attempt to limit access to these roads by granting or withdrawing permission.³² Brian testified that he and his family would routinely grant permission to people they knew to come up and “use the roads and to hunt” on their property.³³

Several witnesses supported the assertion that the Okelberrys had been controlling access to the roads by granting permission and then expelling non-permissive users. Bruce Huvard, a longtime friend of the Okelberrys, testified that he has been using the roads with their specific permission since 1966.³⁴ Mr. Huvard also affirmatively testified that, between 1966 and 1990, he was asked by the Okelberrys to “kick people off” the property if he came upon them and learned that they did not have permission to be there.³⁵ During one exchange at trial, Mr. Huvard testified about his role as follows:

Q: During this period of time from 1966 to 1990 do you know if other people obtained permission to use those roads?

³¹Trial Transcript, June 30 at 81.

³²See Trial Transcript, June 30 at 35-36.

³³Trial Transcript, June 30 at 35.

³⁴Trial Transcript, June 29 at 252, 261.

³⁵Trial Transcript, June 29 at 266.

A: They did.

Q: Do you know if other people used those roads that did not have permission?

A: Yes.

Q: Do you know if they were asked to leave?

A: When I was personally hunting there I would ask them to leave if they didn't have permission.³⁶

Mel Price similarly testified. He stated that he has been using the roads since 1974.³⁷ He also specifically stated that he has asked for permission to use the roads during every year since then, and then authenticated a permission slip that he had received from Ray Okelberry granting him permission to "access all of my private roads on my private land."³⁸ He further testified that his uncles and nephew have also received permission to use the roads from the Okelberrys, and that he had always understood that "a person needed permission to use the roads."³⁹

Jeff Jefferson testified regarding the permission/expulsion protocols as well. Mr. Jefferson started working for the Okelberrys on their property in 1977, and has worked there every summer since then.⁴⁰ Mr. Jefferson stated that the Okelberrys had a policy that when

³⁶Trial Transcript, June 29 at 256.

³⁷Trial Transcript, June 29 at 153.

³⁸Trial Transcript, June 29 at 163-65.

³⁹Trial Transcript, June 29 at 166.

⁴⁰Trial Transcript, June 29 at 130, 143.

one of their employees saw someone on the property, the employee was to approach the person, ask if they had permission, and then ask them to leave if they didn't have permission.⁴¹ In fact, Mr. Jefferson specifically testified that he had had to ask one of the County's witnesses, Mark Butters, to leave the property on two different occasions.⁴² As to the question of whether the expulsion policy was for the Okelberry roads and property, or whether it just applied to the Okelberry property itself, Mr. Jefferson was unequivocal that it applied to the property *and* the roads. On cross-examination, the following exchange occurred:

Q: You indicated that any time you saw people on the property you'd ask them to leave; is that correct?

A: That's correct.

Q: Is that any time you saw people driving on the roads?

A: Well, I'd ask if they, they had permission to be on there, 'cause I was informed that **it wasn't a public access**, you know, for people to be on there. So if they didn't have permission I would ask them to leave.

Q: When you say on there, do you mean on the roads or on the property?

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?

⁴¹Trial Transcript, June 29 at 141.

⁴²Trial Transcript, June 29 at 141.

A: No—I’d run into people like that **and on the road**. And I’d ask them if they’re supposed to be on there.

Q: Would you chase them down with your horse—

A: No.

Q: —or how would you talk to them?

A: Just as I was coming **up the road** I’d run into them. Try to do it nice, polite.⁴³

In further support of this assertion, Glen Shepherd testified that he has specifically asked for and received written permission from the Okelberrys to use their roads.⁴⁴ Similarly, Shane Ford testified that he and his extended family have routinely used the roads and the property, with specific permission from the Okelberrys for both.⁴⁵

Fences and Gates

At the time that the Okelberrys purchased the property in 1957, it was bordered by fences.⁴⁶ These border fences have remained in place throughout the Okelberrys’ period of ownership. It was undisputed that there have also been wire gates across the contested roads since at least 1957.⁴⁷

⁴³Trial Transcript, June 29 at 148-49 (emphasis added).

⁴⁴Trial Transcript, June 29 at 212, 220.

⁴⁵Trial Transcript, June 29 at 230-31.

⁴⁶*See, e.g.*, Trial Transcript, June 28 at 147 (testimony of James Bessendorfer); Trial Transcript, June 29 at 174 (testimony of Lee Okelberry); Trial Transcript, June 30 at 62 (testimony of Ray Okelberry).

⁴⁷R. 672 ¶ 20 (“The Court finds that there were gates at the entrances to each of the roads from 1957 to 2004.”) See also, e.g., Trial Transcript, June 28 at 39, 43, 48, 62, 64

As indicated by the Okelberrys, the purpose of these gates was twofold. First, the gates were used as a means of controlling the movement of the sheep and cattle within the Okelberry property.⁴⁸ Second, the gates were also kept closed by the Okelberrys and their employees as a means of controlling vehicular and pedestrian traffic. In a pretrial affidavit that was filed with the Court, for example, Lee Okelberry testified that the family had attempted to control access to the roads through “fences and gates.”⁴⁹ At trial, Brian Okelberry also specifically testified that “one of the purpose[s] of the gates” was “to control vehicles from going up and down the roads,”⁵⁰ and then later expressed his belief that the gates had been a sufficient means of asserting private control over the roads:

Q: Based upon your recollection and experience up there, do you have an opinion whether those roads have been open to the public and have been used continually during these summer months?

A: Not–Not–In my time we haven’t opened them. We closed the gates and tried to put a little control on it.⁵¹

(testimony of Dee Sabey that there have “always” been gates); Trial Transcript, June 29 at 174 (testimony of Lee Okelberry); Trial Transcript, June 30 at 24 (testimony of Brian Okelberry indicating that there are both internal “pasture gates” and external gates “at each place that [the roads] goes on and off West Daniels” land); Trial Transcript, June 30 at 62, 137 (testimony of Ray Okelberry).

⁴⁸See Trial Transcript, June 30 at 25 (testimony of Brian Okelberry); Trial Transcript, June 30 at 138 (testimony of Ray Okelberry).

⁴⁹R. at 192, ¶5.

⁵⁰Trial Transcript, June 30 at 25.

⁵¹Trial Transcript, June 30 at 43.

This assertion that there was a dual purpose for the gates was also backed up by Glen Shepherd, who at the time of trial had used the roads for 35 years and has been a neighbor of the Okelberrys for the past 14 years.⁵² At trial, Mr. Shepherd testified that the gates have been kept closed “as far back as [he could] remember” and that his understanding was that the gates were kept closed, in part, to restrict the flow of persons.⁵³ This assertion was also backed up by Jeff Jefferson, who worked as a rancher for the Okelberrys every summer from 1977 through 2003.⁵⁴ He testified the purpose of the gates was to control both the livestock and the public.⁵⁵

As for the West Daniels roads, the above testimony has obvious applicability to those roads with respect to the points at which Ridge Line runs onto and off of the West Daniels property. Additionally, testimony at trial also indicated that there were gates across Parker Canyon as well.⁵⁶

Locks on the Gates

The Okelberrys presented testimony that they have been locking the gates on a periodic basis. Admittedly, there was some question at trial regarding the frequency and

⁵²See Trial Transcript, June 29 at 208.

⁵³Trial Transcript, June 29 at 219.

⁵⁴Trial Transcript, June 29 at 130, 143.

⁵⁵Trial Transcript, June 29 at 135.

⁵⁶See Trial Transcript, June 28 at 46-47 (testimony of Dee Sabey that there were gates on Parker Canyon); Trial Transcript, June 28 at 278 (testimony of Ed Sabey that there were gates across Parker Canyon).

scope with which those gates have been locked. Ray Okelberry affirmatively testified, for example, that he had begun locking the exterior gates as early as 1958 or 1959, and that the interior gates within his property have been locked for approximately the past 20 years.⁵⁷ More importantly, Ray Okelberry testified that he had made a habit of locking at least some of the gates every year while the sheep were being moved.⁵⁸ This was supported by Mel Price. Mel Price began accessing the property in approximately 1972, Trial Transcript, June 29 at 154, and testified that the gates had “always been locked” as far back as he could remember.⁵⁹

Conversely, Brian Okelberry testified that, at least according to his memory, the exterior gates had only been locked since the 1980s,⁶⁰ while Lee Okelberry could not remember ever having personally locked the gates himself.⁶¹ Additionally, the County presented testimony from several persons who indicated that they had never encountered a locked gate.⁶²

In the initial set of findings, the trial court accepted Ray Okelberry’s contention that the gates were periodically locked while the sheep were being moved. The court thus found

⁵⁷Trial Transcript, June 30 at 135-37.

⁵⁸Trial Transcript, June 30 at 138-39.

⁵⁹Trial Transcript, June 29 at 160, 170.

⁶⁰Trial Transcript, June 30 at 54.

⁶¹Trial Transcript, June 29 at 196.

⁶²See, e.g., Trial Transcript, June 28 at 35, 40, 43, 48 (Dee Sabey); Trial Transcript, June 28 at 112, 119, 125 (James Bessendorfer).

that the Okelberrys have “locked those gates for periods of time” prior to “completely controll[ing] access” through constant locking in 1989.⁶³ On remand, the trial court reiterated the position, finding that Okelberrys had “locked some of the gates at some points between the 1950s and 1990.”⁶⁴

Signs

Finally, the evidence also indicates that the Okelberrys placed no trespassing signs along their roads as a means of informing the public that use was restricted. Ray Okelberry testified that he had started putting these signs up almost immediately upon purchasing the property in the late 1950s.⁶⁵ Other witnesses confirmed the existence of these signs throughout the relevant period. Bruce Huvard, for example, specifically remembered seeing the no trespassing signs up as of 1966.⁶⁶ Mel Price, who has been using the roads since the early 1970s, stated that there had been no trespassing signs posted along the roads as far back as he could remember.⁶⁷ Brian Okelberry similarly testified that there are signs on each of the boundary gates.⁶⁸ Jeff Jefferson also testified that “all entrances” were marked with a

⁶³Supplemental Findings, R. at 486.

⁶⁴R. 672 ¶ 24. The trial court concluded that this didn’t restrict travel on the roads. *Id.*

⁶⁵Trial Transcript, June 30 at 137.

⁶⁶Trial Transcript, June 29 at 257-58, 268-69.

⁶⁷Trial Transcript, June 29 at 160.

⁶⁸Trial Transcript, June 30 at 25.

sign stating “no trespassing or keep out.”⁶⁹ Evidence also indicated that the West Daniels roads were marked with no trespassing signs as well.⁷⁰

Following trial, the trial court concluded that the County had met its § 72-5-104 burden with respect to the contested roads. Specifically, the trial court concluded that there had been uninterrupted public use of the roads from 1960 until 1989. R. at 413, ¶8.⁷¹

⁶⁹Trial Transcript, June 29 at 135.

⁷⁰See Trial Transcript, June 29 at 161; Trial Transcript, June 29 at 212.

⁷¹Although the trial court did specifically determine that there had been “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,” Findings of Fact, R. at 417, ¶10, the Court was somewhat ambiguous regarding the exact years for which the court believed § 72-5-104 had been satisfied. For example, in its discussion of the continuous use factor, the court determined that individuals had begun “using the roads beginning in the late 1950s until the late 1980s or early 1990s.” R. at 415, ¶4. In its discussion of the public thoroughfare requirement, the court was less specific, indicating simply that, “prior to the locking of the gates in the early 1990s, the roads were used as public thoroughfares.” R. at 414, ¶6. Finally, with respect to the ten year public use requirement, the court determined that the roads had been used “starting in 1960 until the early 1990’s.” R. at 413, ¶7.

In its conclusory paragraph, however, the Court shortened the period somewhat with respect to the cutting off date. Specifically, the court determined that the roads had been used continuously “for a period of well over ten years prior to 1989 when the Okelberrys began locking the gates.” R. at 413, ¶8. Thus, the court specifically concluded that “the public has been effectively cut off from use of these public roads since 1989.” R. at 413, ¶8.

As discussed below, there is a presumption in favor of the property owner in cases brought under § 72-5-104. This brief will accordingly assume that the narrowest dates prevail and that the trial court’s ruling was that the roads had been continuously used from 1960 until 1989. As will be set forth below in the Argument section, however, the slight difference that may exist between 1957, 1958, 1959, or 1960 as a starting point, and 1989, 1990, or 1991 as an ending point will become meaningless given the years ultimately covered by the Okelberrys’ evidence.

SUMMARY OF ARGUMENT

The Utah Supreme Court remanded this case for a determination in accordance with a new bright-line test, under which a single interruptive act is sufficient to prevent a private road from becoming public. This is true even if there exists extensive uninterrupted use. Although the fact of even frequent uninterrupted public use is thus irrelevant to determining whether use was interrupted on one occasion, the trial court's decision focuses on the occasions of public use. The trial court found gates were locked or shut and users stopped, but "found" these were not interruptive acts because there was no evidence of a general or regular policy of stopping users. The trial court misapplied the law established by the Utah Supreme Court. Because the trial court's own findings establish interruptions, the case should be remanded with instructions to enter judgment for Okelberrys.

Also, the trial court abused its discretion in denying Okelberrys' motion to reopen to present evidence addressing the a new test established by the Utah Supreme Court. The new test focused on the intent of the landowner, whereas prior cases had held intent was irrelevant. The trial court ruled against Okelberrys because they had failed to present evidence of their intent in placing signs and locking gates. Because intent was not relevant at the time of the first trial, fairness demands that the evidence be reopened to allow Okelberrys to present testimony on this issue.

ARGUMENT

I: THE UTAH SUPREME COURT HELD THE LOCKING OF GATES WAS AN INTERRUPTION AS A MATTER OF LAW, REGARDLESS OF INTENT OR IMPACT.

The trial court stated: “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.”⁷² In making this conclusion, the trial court misinterpreted the supreme court’s mandate. The supreme court clearly held that if gates were locked at all, that constituted an overt act sufficient to enter a public use; there was no additional requirement that the locking be “reasonably calculated to interrupt public use.”

The court established a bright line test based primarily on intent:

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.⁷³

With respect to the locking of gates, however, the court held such an act per se establishes the required intent. If the gates were locked during the relevant time periods, the supreme court held that was a sufficient interruption: “The locking of gates for several days at a time constitutes an overt act intended to interrupt public use and reasonably calculated

⁷²R. 670.

⁷³*Wasatch County v. Okelberry*, 2008 UT 10, ¶ 15, 179 P.3d 768, 774.

to do so.”⁷⁴ The only issue for the trial court to decide, therefore, was whether the gates were locked; the trial court was not asked to decide Okelberry’s intent in locking the gates nor whether the locked gates constituted an interruption of public use.

The trial court found that there were occasions in which Mr. Okelberry locked the gates in the 1950s, 1960s, 1970s. It follows that the use of the road as a public thoroughfare was interrupted. The trial court’s conclusion that the roads were dedicated to the public must be reversed with instructions to enter judgment that the roads remain private.

Even if the intent and impact of the locked gates had been an issue to be decided by the trial court, its decision demonstrates a misunderstanding concerning what a landowner must establish to retain the private character of his or her land. It is important to remember the context in which this issue arises. While Utah Code section 72-5-104(1) provides that a road can become “dedicated and abandoned” to the public by ten years continuous public use, that law must be interpreted to avoid conflict with the private property rights guaranteed by both the Utah and United States constitutions.⁷⁵ Section 22 of Article I of the Utah Constitution declares: “Private property shall not be taken or damaged for public use without just compensation.” The Fifth Amendment to the United States Constitution similarly states: “nor shall private property be taken for public use without just compensation.” The only interpretation of section 72-5-104(1) consistent with these constitutional protections is that

⁷⁴*Id.* ¶ 19.

⁷⁵*Thurnwald v. A.E.*, 2007 UT 38, ¶ 4, 163 P.3d 623; *Uzelac v. Thurgood (In re Estate of S.T.T.)*, 2006 UT 46, ¶ 26, 144 P.3d 1083, 1091.

a landowner may, through inaction, dedicate or abandon his or her property, but the public cannot take that property without compensation if the owner takes reasonable measures to retain its private character. The public authority can not “take” a road unless the landowner’s knowing acquiescence in public use and maintenance “amounts to a tacit dedication by the landowner – a giving by the landowner rather than a taking by the public authority.”⁷⁶

Prior to the supreme court decision in this case, several cases held that the intent of the landowner was not relevant.⁷⁷ The supreme court in this case, however, implicitly overruled these prior cases and held that intent is the determining factor. The court established a bright line test, quoted above, based primarily on intent.

The importance of intent rather than the impact is illustrated in *Town of Leeds v. Prisbrey*,⁷⁸ decided by the supreme court as a companion case to the instant matter. Joanne George, Prisbrey’s predecessor in title, had erected barricades across the claimed road once every seven years, but the evidence showed that the barricades did not actually interrupt the use of the road by anyone. “Mrs. George testified that she never encountered anyone attempting to travel on West Center Street during her roadblocks and knows of no one who was actually prevented from using the road because of her blockades.”⁷⁹ The supreme court

⁷⁶*Vaughn v. Williams*, 345 So. 2d 1195, 1199 (La. Ct. App. 1977).

⁷⁷“[R]ecent cases have definitively stated that owner intent is now irrelevant to determining whether a road has been dedicated and abandoned to public use.” *Campbell v. Box Elder County*, 962 P.2d 806, 808 n. 3 (Utah Ct. App. 1998).

⁷⁸2008 UT 11, 179 P.3d 757.

⁷⁹*Id.* ¶ 3.

held that this evidence was nonetheless sufficient to interrupt use of the road as a public thoroughfare: “Although she did not block the public's *actual* use of the road because her roadblocks occurred during intermissions in the road's use, Mrs. George's intent and conduct were nevertheless sufficient to interrupt West Center Street's continuous use as a public thoroughfare for purposes of the Dedication Statute.”⁸⁰

In the instant case, the supreme court also emphasized that actual impact was unimportant:

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.⁸¹

Therefore, the trial court here erred by focusing on the impact of the locked gates. The trial court found there were “occasions in which Mr. Okelberry locked the gates,” but discounted this because “these were few and far between” and did not restrict public access.⁸² But, as in *Prisbrey*, Mr. Okelberry was not required to show that he actually restricted any access. If Ray Okelberry locked the gates at all in the early years, as the trial court found,

⁸⁰*Id.* ¶ 7 (italics by the court).

⁸¹*Okelberry*, ¶ 17.

⁸²R. 670.

that by definition constituted an interruption of public use regardless of whether any person's actual use was interrupted.

Finally, the trial court's finding that the locked gates were not intended to restrict public access is not supported by the evidence. The trial court noted that Brian Okelberry testified "that one of the purposes of the gates was to control vehicles 'from going up and down the roads.'"⁸³ Okelberrys acknowledge, as noted by the trial court, that there were witnesses who testified that they had not locked the gates and other witnesses who testified they had never seen any locked gates during the early years.⁸⁴ But this testimony goes only to whether the gates were locked in all, not to Okelberrys' intent in locking the gates. If the gates were locked, there was no other purpose for locking the gates but to restrict public use of the roads. Locking the gates is not necessary for controlled livestock; sheep are restrained as effectively by a gate that is wired shut. The only possible purpose for locks was to keep people out. The trial court's finding that the locks were not intended to restrict public access must be reversed.

II: LEE OKELBERRY AND OTHERS INTERRUPTED USE OF THE ROAD AS A PUBLIC THOROUGHFARE BY STOPPING PERSONS TO JUDGE WHETHER THEIR PURPOSE IN USING THE ROADS WAS ACCEPTABLE.

Lee Okelberry testified they maintained gates at each entrance to their private property, and stopped and questioned anyone who used to roads, to determine if they had

⁸³R. 674.

⁸⁴*Id.*

what Lee believed was a legitimate reason for using the roads. He testified he stopped individuals on the roads to inquire about their reason for using the roads, and let them continue if he approved of the business.⁸⁵ Lee Okelberry testified he made such stops starting in 1957 when Okelberrys purchased the property.⁸⁶

As the trial court acknowledged, other witnesses testified to stopping people using the roads.⁸⁷ Bruce Huvard testified he used the roads by permission beginning in 1966, but also, at the request of Okelberrys, would ask people to leave if they had not obtained permission.⁸⁸ Jeff Jefferson, who started working for the Okelberrys in 1977, also testified he asked people to leave the roads if they did not have permission.⁸⁹

This evidence is corroborated by the many individuals who testified they recognized the property as private and asked permission to use it. Mel Price testified he obtained permission to use the roads.⁹⁰ Lee Okelberry testified he gave permission to the Taylors,

⁸⁵Transcript June 29, 2004, at page 209; transcript June 30, 2004, pages 180, 185.

⁸⁶Transcript June 29, 2004, pages 183-85.

⁸⁷R. 672-671.

⁸⁸Transcript June 29, 2004, pages 254-56.

⁸⁹Transcript June 29, 2004, pages 140-41, 149.

⁹⁰Transcript June 29, 2004, page 163; Exhibit 20.

Thompsons, Youngs, and others.⁹¹ Shane Ford testified his mother, whose family had previously owned the property, would ask permission.⁹²

Okelberrys acknowledge that there were many people who were not stopped. Mark Butters testified that he used the Ridgeline road twenty times per summer.⁹³ Several individuals testified they had never been asked to leave the road.⁹⁴ Similar testimony was given concerning the other roads.

The trial court noted the evidence that individuals had been stopped when using the roads, but held that such actions did not constitute interruptions of public use because they did not interrupt public use of the roads “generally,” nor show there was a “regular” policy of requiring permission or approval to traverse the roads.⁹⁵ The trial court’s holding demonstrates a misunderstanding of the evidence necessary to prove an interruption of use. There is no requirement that the overt act interrupt use of the roads “generally” or that there be any “regular” policy of interrupting use or requiring permission. In fact, just the opposite was true in the *Prisbrey*⁹⁶ case. There the interruptive acts occurred only once every seven years, and never actually interrupted any use whatsoever. Factually, public use was

⁹¹Transcript June 29, 2004, page 202.

⁹²Transcript June 29, 2004, page 231.

⁹³Trial Transcript, June 29 at 103.

⁹⁴Dee Sabey, Trial Transcript, June 28 at 40; Martin Wall, Trial Transcript, June 28 at 197; Ed Sabey, Trial Transcript, June 28 at 271.

⁹⁵*Id.*

⁹⁶*Town of Leeds v. Prisbrey*, 2008 UT 11, 179 P.3d 757.

unrestricted. But, the Utah Supreme Court nonetheless held that these actions were legally sufficient to interrupt use of the road “as a public thoroughfare.”

The meaning of using a road “as a public thoroughfare” was explained by the Utah Supreme Court in *Morris v. Blunt*⁹⁷ as follows:

A "thoroughfare" is a place or way through which there is passing or travel. It becomes a "public thoroughfare" when the public have a general right of passage. Under [the identically worded predecessor statute to section 72-5-104(1),] the highway, even though it be over privately owned ground, will be deemed dedicated or abandoned to the public use when the public has continuously used it as a thoroughfare for a period of 10 years, but such use must be by the public. Use under private right is not sufficient. If the thoroughfare is laid out or used as a private way, its use, however long, as a private way, does not make it a public way; and the mere fact that the public also make use of it, without objection from the owner of the land, will not make it a public way. Before it becomes public in character the owner of the land must consent to the change.⁹⁸

In *Heber City Corp. v. Simpson*,⁹⁹ the Utah Supreme Court stated that the last requirement, that “the owner of the land must consent to the change” from private to public character, had been abandoned.¹⁰⁰ But, given the clear language of *Okelberry* focusing on the intent of the landowner, this Court must conclude that consent of the landowner is still

⁹⁷49 Utah 243, 161 P. 1127 (Utah 1916).

⁹⁸*Id.* at 251, 161 P. at 1131, as quoted in *Heber City Corp. v. Simpson*, 942 P.2d 307, 311 (Utah 1997), but with an updated reference to the current statute.

⁹⁹942 P.2d 307 (Utah 1997).

¹⁰⁰*Id.* at 311.

a requirement. Indeed, any other rule would be unconstitutional for the reasons set forth in Point I above.

The act of stopping a traveler to judge whether the traveler's business is legitimate is an overt act consistent only with asserting control over the roads. Such acts show the landowner still regards the roads as private and has not consented to any change to a public character. Thus, Lee Okelberry's overall testimony is very consistent with that of Ray Okelberry: the roads were private and the Okelberrys took overt actions to interrupt use as a public thoroughfare on several occasions. This is sufficient to defeat the claimed dedication to the public. The trial court erred in holding they were required to "generally" or "regularly" restrict access. This Court should hold that the actions of the Okelberrys and their employees in stopping people who were using the roads constituted an overt act which was intended to and did interrupt use of the roads as a public thoroughfare.

III: BECAUSE INTENT WAS NOT RELEVANT AT THE TIME OF THE FIRST TRIAL, OKELBERRY WAS ENTITLED TO A NEW TRIAL TO PRESENT EVIDENCE OF INTENT ADDRESSING THE NEW TEST ADOPTED BY THE SUPREME COURT.

Prior to the supreme court decision in this case, several cases held that the intent of the landowner was not relevant. In 1998, this Court commented that "recent cases have definitively stated that owner intent is now irrelevant to determining whether a road has been dedicated and abandoned to public use."¹⁰¹ The supreme court in this case, however, implicitly overruled these prior cases and held that intent is the determining factor. The court

¹⁰¹*Campbell v. Box Elder County*, 962 P.2d 806, 808 n. 3 (Utah Ct. App. 1998).

established a bright line test that focuses on the intent of the property owner.¹⁰² In remanding this case, the court again focused on intent: “it remains a factual question whether the Okelberrys intended the signs to interrupt public use of the roads.”¹⁰³

In light of the new test adopted by the supreme court, Okelberrys moved for a new trial or for leave to present additional evidence addressing the new standard. The trial court did not rule or comment on the motion, but impliedly denied it by entering a final ruling without allowing additional evidence.

The Utah Supreme Court has directed “[a] court should consider a motion to reopen to take additional testimony in light of all the circumstances and grant or deny it in the interest of fairness and substantial justice.”¹⁰⁴ In contrast to a motion for new trial, “a motion to reopen does not require that the evidence be newly discovered or that it could not have been discovered during the pendency of the trial by a party acting with due diligence.”¹⁰⁵

The case law controlling at the time of trial held intent was not relevant. Okelberrys accordingly did not present evidence of intent. Where the case was remanded for decision under a new standard, fairness demanded that Okelberrys be permitted to supplement the

¹⁰²*Okelberry*, ¶ 15.

¹⁰³*Id.* ¶ 18.

¹⁰⁴*Lewis v. Porter*, 556 P.2d 496, 497 (Utah 1976). *Accord A.K. & R. Whipple Plumbing & Heating v. Aspen Constr.*, 1999 UT App 87, ¶ 23, 977 P.2d 518.

¹⁰⁵12-59 Moore's Federal Practice - Civil § 59.13. The Utah Supreme Court cited approvingly to the predecessor of this section in *Lewis v. Porter*, 556 P.2d 496, 497 (Utah 1976).

record to add the missing evidence of intent. The trial court denied that opportunity, but in its decision repeatedly faulted Okelberrys for failing to present evidence of intent regarding the no trespassing signs on the property. The trial court stated: “Yet none of Defendants’ witnesses at trial specified their intent when putting up the signs in the years prior to the 1980s and 1990s.”¹⁰⁶ The court concluded: “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.”¹⁰⁷

The trial court also claimed a lack of evidence of intent regarding 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.”¹⁰⁸ (Of course, there would be no other possible reason to lock gates than excluding the public from the property.)

Wasatch County acknowledged and the trial court concurred¹⁰⁹ that the test adopted by the Utah Supreme Court was a new test. The Utah Supreme Court remanded “for further

¹⁰⁶R. 671.

¹⁰⁷*Id.*

¹⁰⁸R. 673 ¶ 24.

¹⁰⁹*Id.* 672, 669.

proceedings consistent with this opinion.”¹¹⁰ There was no restriction against taking additional evidence relevant to the new standard. Denying the request to present additional evidence resulted in Okelberrys being judged against a standard that did not exist at the time of trial. The unfairness is obvious. This Court should hold the trial court abused its discretion in denying Okelberrys’ motion for leave to present additional evidence.

IV: MAINTENANCE OF UNLOCKED GATES CONSTITUTED AN INTERRUPTION.

The trial court held that “the simple existence of gates clearly does not constitute an overt act,” noting the gates were there before Okelberrys took control of the property.¹¹¹ This ignores the undisputed evidence that Okelberrys maintained and frequently replaced the gates.

It was undisputed that there have always been unlocked gates across these roads during the time considered by the Court.¹¹² Although individuals were able to open the gates and still use the roads, the presence of those gates created a presumption that the use was permissive and therefore interrupted use of the road “as a public thoroughfare.” Use by permission does not count as “public use” under the dedication statute.¹¹³

¹¹⁰*Okelberry*, ¶ 20.

¹¹¹R. 672.

¹¹²Transcript June 29, 2004, page 158.

¹¹³*Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1099 (Utah 1995).

Other states have ruled that an unlocked gate creates a presumption that any use was permissive. As stated by one court, “where a landowner places gates across a road through his land, it is notice to the public that they thereafter are passing through the land by permission and not by right, so that no prescriptive right to the use of the road can be acquired.”¹¹⁴ Another court similarly held, in a case dealing with unlocked gates: “The erection of a gate across a road tends to evidence an intention on the part of the owner to assume and assert ownership and possession of the land over which the road runs.”¹¹⁵ The court said such obstruction “is a strong indication that the use by others is permissive only.”¹¹⁶ Another court holds that unlocked gates “conveys the clear message that any public use of that road is with the landowner's permission only,” although that presumption is not conclusive.¹¹⁷

This presumption of permissive use is consistent with Utah cases. The question under the continuous use requirement is whether the public's right to use the road was interrupted or “limited.”¹¹⁸ Although some cases have considered the impact of locked gates on the continuous use inquiry,¹¹⁹ it is significant that a number of the cases have also considered the

¹¹⁴*Berger v. Berger*, 88 N.W.2d 98, 103 (N.D. 1968).

¹¹⁵*Williams v. Prather*, 196 So. 118, 120 (Ala. 1940).

¹¹⁶*Id.*

¹¹⁷*McIntyre v. Board of County Commissioners*, 86 P.3d 402, 412 (Colo. 2004).

¹¹⁸*Heber City*, 942 P.2d at 311 n. 9.

¹¹⁹*See, e.g., Campbell*, 962 P.2d at 809.

presence of gates as an interruptive force without deeming it necessary to even note whether those gates were locked.¹²⁰

There are strong policy reasons for allowing a gate to act as an interruptive force, even in the absence of any evidence showing that that gate was locked. As indicated above, the Utah courts have long sought to achieve a balance between the competing interests that are at work in the § 72-5-104 cases. On the one hand, the government clearly has an interest in preserving the public's right to use roads that have been left to the public for a lengthy period of time. But, it is instructive that the statute itself only calls for public dedication where the landowners have “abandoned” the road.¹²¹

Where the landowner has taken some recognizable steps to assert some control over the roads, the public will be under no illusion that the roads are public. For example, in a case involving rural roads that are crossed by unlocked gates, a member of the public who wished to use the roads would still have to physically stop their car, get out, open the gate, drive through the gate, and then get out again to close the gate before proceeding onward. This is precisely what happened here, for example, with many of the County's own witnesses testifying that the gates were always kept closed as a means of keeping the Okelberrys'

¹²⁰See, e.g., *Draper City*, 888 P.2d at 1100; *AWINC Corp. v. Simonsen*, 2005 UTApp 168, ¶3, 112 P.3d 1228, 1229 (“fence wire drop gate”); *Kohler v. Martin*, 916 P.2d 910, 913 (Utah Ct. App. 1996).

¹²¹See Utah Code Ann. § 72-5-104(1).

livestock within the property.¹²² As such, the members of the public who used these roads were always presented with a reminder upon both ingress and egress that these roads belonged to some other party, and that use of these roads was solely at the pleasure of that owner.

As indicated above, the law does not lightly allow the public takeover of a private property owner's land. The statute at issue in this case does not require a landowner to come up with an expensive, elaborate, or foolproof system for keeping out all trespassers. Instead, the statute allows the property owner to preserve his or her rights by simply creating some interruptive obstacle that limits the public's access to the private roads "as a public thoroughfare." Given the large number of rural ranches and farms in this state that are separated from the highways by nothing more than a wire fence or gate, this Court should reject the trial court's decision to read into the statute a heretofore non-existent requirement that all of those gates and fences actually be locked. Instead, this Court should affirm the obvious, common-sense reading of the statute, thereby holding that a landowner who has preserved and maintained a gate or fence across his or her road cannot be said to have "abandoned" that road under § 72-5-104. For this reason, this Court can and should conclude that there was not clear and convincing evidence showing that the roads involved in this appeal were ever abandoned to the public.

¹²²*See. e.g.*, Trial Transcript, June 28 at 40 (testimony of Dee Sabey); Trial Transcript, June 28 at 314 (testimony of Dick Baum); Trial Transcript, June 29 at 119, 123 (testimony of Mark Butters).

The presumption of permissive use is also mandated by constitutional considerations. A landowner may, through inaction, dedicate or abandon his or her property, but the public cannot take that property without compensation if the owner takes reasonable measures to retain its private character. A public authority can not take a road unless the landowner's knowing acquiescence in public use and maintenance "amounts to a tacit dedication by the landowner — a giving by the landowner rather than a taking by the public authority."¹²³ A gate, even an unlocked gate, clearly communicates to the public that the property is private. The public constitutionally cannot take the property where the landowner takes reasonable measures to communicate and retain its private character.

And, if the rule is that closed but unlocked gates do not interrupt use as a public thoroughfare, the result is that the public is taking more than the landowner gave—a violation of the constitutional prohibition against taking private property without compensation. If the road is public, presumably the public authority can prohibit the maintenance of gates.¹²⁴ Where the use Okelberrys supposedly permitted or abandoned to the public was a use that was always restricted by gates, it would be unconstitutional for the public to take more, without compensation. Indeed, a holding that the road is public and cannot be restricted by gates impacts the whole of the property – without gates, Okelberrys cannot use the property

¹²³*Vaughn v. Williams*, 345 So. 2d 1195, 1199 (La. Ct. App. 1977).

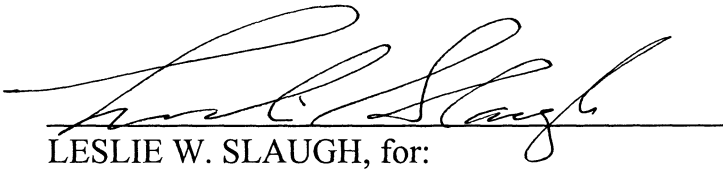
¹²⁴Utah Code § 72-7-104(4) provides that "the highway authority having jurisdiction over the right-of-way may" remove from the right-of-way of any highway any structure installed by any person or "give written notice to the person . . . to remove the installation from the right-of-way." *Utah County v. Butler*, 2008 UT 12, ¶ 24, 179 P.3d 775, 784.

for livestock as they have always done. It follows that the constitutional protections of private property require that either unlocked gates be considered an interruption, or that the gates be permitted to remain even if the road is public.

CONCLUSION

The trial court erred in again requiring proof that Okelberrys “generally” or “regularly” excluded members of the public from the roads. One intentional act every ten years is sufficient to preserve private property, regardless of whether anyone’s access was actually restricted. Because there was un rebutted evidence of purposeful blocking by Okelberrys, their roads were not “continuously used as a public thoroughfare for a period of ten years.” The decision of the trial court should be reversed with instructions to enter judgment for Okelberrys.

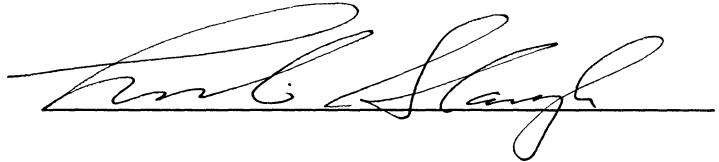
DATED this 7th day of April, 2009.


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

MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing were mailed to each of the following, postage prepaid, this 7th day of April, 2009.

Thomas Low
Scott H. Sweat
Wasatch County Attorney's Office
805 West 100 South
Heber City, Utah 84032

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

APPENDIX A

Wasatch County v. Okelberry, 2008 UT 10, 179 P.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,
Defendants and Petitioners.

F I L E D

February 12, 2008

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

On Certiorari to the Utah Court of Appeals

DURRANT, Justice:

INTRODUCTION

¶1 In this case and two companion cases that we also decide today,¹ 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

¹ Town of Leeds v. Prisbrey, 2008 UT 11, ___P.3d ___; Utah County v. Butler, 2008 UT 12, ___P.3d ___.

period of ten years.”² 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”).³ 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,⁴ and West Daniels Land Association,⁵ seeking to have the Four Roads declared dedicated

² Utah Code Ann. § 72-5-104(1) (2001).

³ 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.

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

⁵ Portions of Ridge Line Road and Parker Canyon Road
(continued...)

and abandoned to the use of the public pursuant to Utah Code section 72-5-104.⁶ 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

⁵ (...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.

⁶ 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.⁷ 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."⁸ "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."⁹ An appellate court reviews a trial court's legal interpretation of the Dedication Statute for correctness and its factual findings for clear error.¹⁰ 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.¹¹ 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

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

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

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

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

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

significant discretion in its application of the facts to the statute."¹²

ANALYSIS

¶9 Both the United States and Utah Constitutions prohibit uncompensated takings of private property.¹³ 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."¹⁴ 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.¹⁵

¶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."¹⁶ 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."¹⁷

¹² Id. at 310.

¹³ 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.").

¹⁴ Utah Code Ann. § 72-5-104(1) (2001).

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

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

¹⁷ 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."¹⁸ 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.¹⁹

¹⁷ (...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)).

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

¹⁹ 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.²⁰ We do so by first evaluating "the 'best evidence' of legislative intent, namely, 'the plain language of the statute itself.'"²¹ 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."²²

¶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

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

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

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

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

interruption."²³ 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.²⁴ 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

²³ 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).

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

it "convenient or necessary,"²⁵ 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

²⁵ 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.

¶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

2

2004

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

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 15th.

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, can 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.

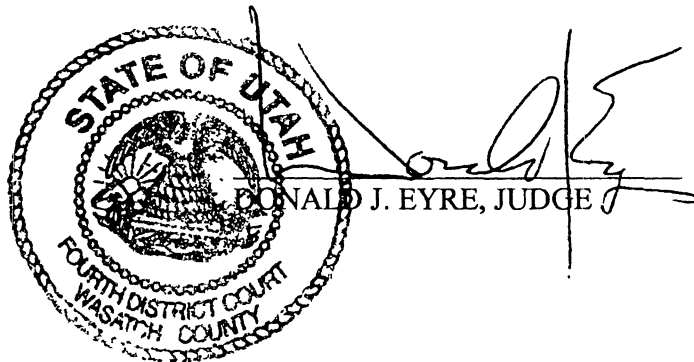
As further stated in *Premium Oil*, "in many cases where cities attempt to open dedicated street for the benefit of the public, the courts have estopped the city from enforcing a dedication because the city authorities and the public itself has taken no action over a period of years, to prevent the erection 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 for review and to the Court for final approval.

DATED this 27th 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

2.11

APPENDIX C

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

168

DON R. PETERSEN (2576), for:
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120 East 300 North Street
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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>Plaintiff,</p> <p>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>Defendants.</p>	<p>FINDINGS OF FACT AND CONCLUSIONS OF LAW</p> <p>Case No. 010500388 Judge Donald J. Eyre</p>
--	--

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.

21

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 15th

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.

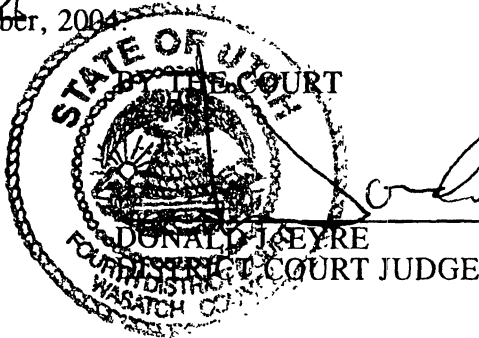
11. In Premium Oil v. Cedar City, 187 P.2d 199 (Utah 1947), the supreme court held that a strip of land once dedicated as a public road had been used in a manner directly in conflict with the land's dedication as a public road. The court stated that "the manner in which the city used the strip was openly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

APPENDIX D

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

10/1

DON R. PETERSEN (2576), for:
HOWARD, LEWIS & PETERSEN, P.C.
ATTORNEYS AND COUNSELORS AT LAW
120 East 300 North Street
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Our File No. 25774

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;">ORDER</p> <p>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 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

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).

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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

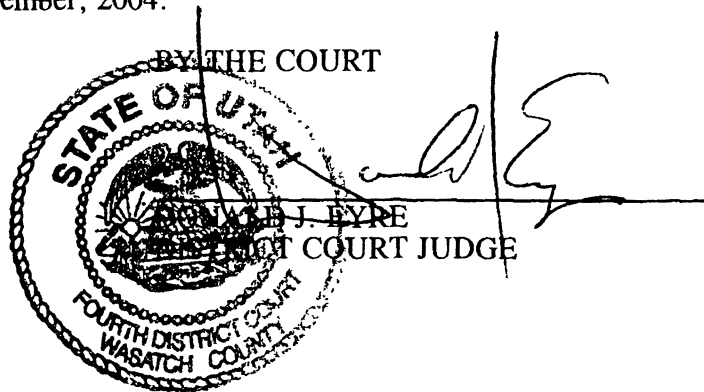
the city used the strip was openly hostile to the public use as a street and should have been notice to all that any dedication, if previously intended, has been abandoned. Under the facts of the case, the court held that the Plaintiff would be estopped to claim an improper abandonment or vacation. this 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 22nd 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.

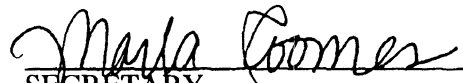


DON R. PETERSEN, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Defendants Okelberry

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**

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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.

45

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 be 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.¹

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

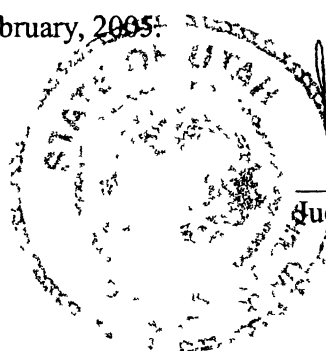
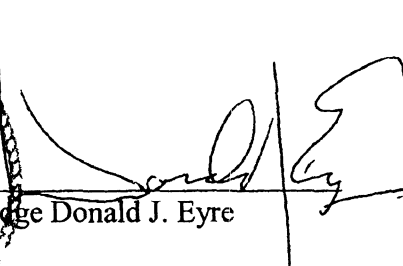
¹ This view is well-supported by the commentators. One respected commentator has thus noted that though “the application of estoppel doctrines against municipal corporations is not favored,” a municipal corporation is “[n]onetheless . . . subject to the rules of estoppel in those cases where equity and 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 18th 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
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Mail DON R PETERSEN
ATTORNEY DEF
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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

FILE

DON R. PETERSEN (2576), and
RYAN D. TENNEY (9866), for:
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Our File No 27754

Attorneys for Defendants

IN THE FOURTH JUDICIAL DISTRICT COURT OF WASATCH COUNTY

STATE OF UTAH

WASATCH COUNTY, Plaintiff, vs. E. RAY OKELBERRY, et. al., Defendants.	ORDER 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 8th 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

495

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
08 06 2008 10:12:19

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 Buttars 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 23rd 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.

