

2015

Stichting Mayflower Mountain Fonds & Stichting Mayflower Recreation Fonds vs. United Park City Mines Company, Empire Pass Master Owners Association, Inc., Red Cloud Homeowners Association, : Brief of Appellees'

Utah Supreme Court

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IN THE UTAH SUPREME COURT

STICHTING MAYFLOWER
MOUNTAIN FONDS & STICHTING
MAYFLOWER RECREATION
FONDS,

Plaintiffs/Appellant,

vs.

UNITED PARK CITY MINES
COMPANY, EMPIRE PASS MASTER
OWNERS ASSOCIATION, INC., RED
CLOUD HOMEOWNERS
ASSOCIATION,

Defendants/Appellees.

BRIEF OF APPELLEES

Appellate Case No. 20150047-SC

District Court No. 050500430
(Consolidated with 050500500)

Appeal from the Third Judicial District Court, Summit County, Judge Ryan M. Harris

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UTAH APPELLATE COURTS

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78A-3-102(3)(j).

INTRODUCTION

The Stichtings' opening brief attempts to raise numerous issues never preserved below, discusses legal theories that are not in the operative pleadings, and recites alleged facts that were not included in the moving papers at issue. Despite the drawn out procedural history of this case, the remaining legal issues before the court are straightforward and the lack of evidence to support them a decade later is dispositive. It is time to put this case to rest.

The Stichtings pursued only two specific legal theories below—a public road claim under RS 2477 and a common-law prescriptive easement claim. For the public road claim, there is no question that the Stichtings had to prove that the public continuously used the Claimed Roads for at least five years—if not twenty years—before October 13, 1881. The district court properly entered summary judgment after finding that the Stichtings failed to provide any evidence of public use that could possibly satisfy their burden of proof, but alternatively the court could have entered summary judgment on any of the requisite elements of the public road claim. There is no evidence that the Claimed Roads even existed prior to 1901; and if there were, there is no evidence that any particular person used the roads; and if there were, there is no evidence that such person was acting as a member of the public; and if there were, there is no evidence the use was continuous instead of interrupted; and if there were, there is no evidence the use

took place for the requisite time period prior to October 13, 1881. In short, there is no evidence to support any of the elements of the Stichtings' public road claim under RS 2477, and they cite to none in their brief. The district court did not err in entering summary judgment.

As for the prescriptive easement claim, the Stichtings did not raise below any of the facts, arguments, and authorities they now raise in their brief. In opposing summary judgment, they "did not include any additional evidence, but instead, referenced evidence submitted by United Park." (R2563.) The evidence they now cite to as creating a disputed issue of fact as to adverse use was actually attached to documents filed later in the lawsuit, not to their opposition to the motion for summary judgment. On that ground alone, this court should affirm the entry of summary judgment.

The remaining sections of the opening brief take issue with the district court's refusal to allow them to add a claim for an appurtenant easement nine years after they filed their original complaint and two years after the court, instead of dismissing their amended complaint as incoherent, provided them a final opportunity to raise any claim they wanted. There is nothing unusual or improper—let alone an abuse of discretion—in declining to allow an entirely new theory under these circumstances, especially after the close of discovery. This court should therefore affirm all of the orders of the district court now raised by the Stichtings on appeal.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Stichtings have not challenged any of the district court's Statement of Undisputed Facts in its Memorandum Decision and Order, dated October 1, 2014

(R5965), which are set forth in relevant part as follows:

Background. The Stichtings have come to own certain parcels of land near the top of Flagstaff Mountain south of Park City, which parcels straddle the Summit-Wasatch county line. (R5965.) These parcels were formerly old mining claims that were located and patented by prospectors in the latter decades of the 19th Century. (R5965.) United Park City Mines Company¹ owns similar property in the same area. (R5965.)

The Stichtings claim that a network of public roads exists across United Park's land that would link the Stichtings' property with SR-224, the main road that leads from Park City over Empire Pass and from there to Midway or Guardsman Pass.² (R5965.) While the Stichtings' property is not "landlocked," they seek to establish public roads from SR-224 to provide easier and more convenient access to their property. (R5965)

United Park has developed portions of its property over which the Stichtings claim a road exists. Some of this development already exists. (R5965.)

The Stichtings filed their original complaint in October 2005 (in case number 050500500), alleging rights to a road over United Park's property. The complaint was terse, six pages long, and formally sought only a declaration of a prescriptive easement.

¹ The term "United Park" is used to refer collectively to all defendants/appellees because their positions are consistent for purposes of this appeal.

² The parties gave names to some segments of the roads. The "Primary Access Road" veers off, eastward, from SR-224 in the lower-right-hand corner of the map attached as Exhibit A to the district court's order. The "Flagstaff Loop Road" loops off of the Primary Access Road and around the former Flagstaff Mine. The Primary Access Road has two parts: the Lower Primary Access Road, and the Upper Primary Access Road, the upper portion of which stretches eastward beyond the Flagstaff Loop Road.

The court used the phrase "Claimed Roads" to refer to all of the roads claimed by the Stichtings, including the Flagstaff Loop Road and the Primary Access Road. (R5965.)

(R5966.) The case languished for the first few years, with two orders to show cause due to inactivity. In what Judge Harris later described as moments of mercy, Judge Lubeck elected not to dismiss the Stichtings' case, eventually granting the Stichtings' motion to consolidate its case into another related case, Case No. 050500430. (R5966.)

Motion for Judgment on Pleadings. After consolidation, the parties retained expert witnesses and conducted discovery. In December 2011, the Stichtings filed an amended complaint, which was not much longer or more detailed than the original complaint. (R5966.) United Park moved for judgment on the pleadings, arguing that the allegations were inscrutable. The court (Judge Kelly) ruled that the claims were indeed "somewhat cryptic in nature and do not put [United Park] on adequate notice regarding what is claimed." (R1696.) As a consequence, on March 8, 2012 ("March 2012 Order") Judge Kelly ordered that Plaintiffs "make full and complete disclosures of their claims and evidence in this case" in writing, and that failure to do so "shall result in [the Stichtings] being unable to use the individual, document, or evidence in further proceedings." (R1696.) Instead of dismissing the complaint, Judge Kelly ordered the Stichtings to "provide the specific statute or case law they allege supports their claim to a public or private road," and that failure to do so "shall result in [Plaintiffs] being unable to proceed with their claim." (R1696-97.) The Stichtings subsequently submitted a more detailed recitation of their claims, including (i) a common-law prescriptive easement claim, and (ii) a public road claim under an old post-Civil War statute known as "RS 2477." (R1854-59.)

Summary Judgment on Prescriptive Easement. In May 2012, after pre-trial disclosures, United Park moved for summary judgment. (R2563.) In their response, the Stichtings failed to comply with Rule 7 and did not specifically controvert United Park's statement of facts. (R2350.) Nor did the Stichtings provide any evidence to create a disputed issue of material fact. (R2350.) Instead, they included numbered paragraphs that corresponded to United Park's statement of facts, and declared the facts to be "False" or "Irrelevant." (R2350.) In arguing that the Stichtings' use of the road was adverse, the Stichtings said only that the "[f]ailure to block the use is not consent." (R2352.)

In reply, United Park pointed out that the Stichtings had not disputed testimony from their own witness that United Park had provided them permission to access "whatever road you want." (R.2390.) Noting that the "Stichtings did not include any additional evidence, but instead, referenced evidence submitted by United Park" in their opposition, the district court entered summary judgment on the prescriptive easement claim because "there is no disputed fact that Stichtings' access to the subject property was permissive." (R2563.) At that point, the only remaining claim in the lawsuit was the Stichtings' public road claim under RS 2477.

Motion to Add a New Claim for Appurtenant Easement. In February 2014, the Stichtings retained new counsel who filed a motion seeking to add a claim for "appurtenant easement." (R2783.) The court denied the motion on two grounds. (R4837.) First, the court held that the Stichtings had failed to include a claim for an appurtenant easement in their pre-trial disclosures filed pursuant to the March 2012 Order. The claim was therefore barred by the terms of that order. (R4838.) Second, apart from the March

2012 order, the court stated that it was exercising its “discretion” to refuse to allow the belated second amendment. (R4838.) The court found the motion to be untimely because the “case has been pending for nine years.” (R4838.) The court found no justification for the delay and refused to force the parties to incur additional expense by moving discovery deadlines and re-opening discovery. (R4838.)

Summary Judgment on the Public Road Claim. In February 2014, United Park moved for summary judgment on the Stichtings’ sole remaining claim under RS 2477. (R5963.) The court granted that motion, based upon the lack of evidence.

The Flagstaff Mine - Prior to 1871, the land near the summit of Flagstaff Mountain was part of the unsurveyed public domain of the United States. (R5968.) Sometime in 1871, a group of prospectors “located”³ a mining claim on Flagstaff Mountain that became the site known as “the Flagstaff Mine.” (R5969.)

The first of only two shipments of ore came from the Flagstaff Mine in July 1871. (R5969.) In field notes filed in 1872, the Flagstaff mining claimants asserted that they had made “two miles of road.” (R5968.) Importantly, there is no indication of where this road was located, which two-mile stretch of road they were referring to, or who used it. (R5969.) Counsel for the Stichtings admitted at the hearing on the motion for summary judgment that they did not know the location of the roads in 1880. (R6098:96.) In fact,

³ The “location” of a mining claim “is the initial step taken by the locator to indicate the place and extent of the surface which he desires to acquire. It is a means of giving notice. That which is located is called [in statute] and elsewhere a ‘claim’ or a ‘mining claim.’ Indeed, the words ‘claim’ and ‘location’ are used interchangeably.” *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.*, 171 U.S. 55, 74 (1898). (R5968.)

the only direct evidence of those roads does not locate them where they presently lie. The Flagstaff mining claim was surveyed on December 11, 1872, and a very rough map sketch was included with that survey. (R5969.) Although a small unattached stretch of “road” is shown on that map sketch, it is not connected to any other road, and is in a completely different orientation from any of the roads at issue here. (R5969, 4034.)

In 1873, the Flagstaff Mine claimants published notice of their application for a “patent”⁴ on the Flagstaff mining claim, and that patent was approved and issued by federal mining officials in 1876.⁵ (R5969.) At some point before 1874, several mining structures (including a log house and an ore house) were constructed at the Flagstaff Mine site. (R5969.) By 1875, the original ore strike at the Flagstaff Mine had been depleted, and a second shaft was sunk, which was rich enough to result in periodic ore shipments as late as 1881, but not rich enough to keep a mill in business. (R5969.)

Other Mining Activity in the Area - Many other mining claims were located in the vicinity during the 1870s and 1880s, including many owned by the Stichtings (including the Overlooked Fraction, Uncle Charles, Black Rock, and Blue Ledge), and many owned by United Park (including the Lucky Bill, Home Station, and Peeler). (R5970.)

⁴ “A mining claim always starts out as unpatented. The owner must continue mining or exploration activities or it becomes null. A patented claim is one for which the federal government has issued a patent (deed). To obtain a patent, the owner must prove that the claim contains locatable minerals that can be extracted at a profit. A patented claim can be used for any purpose, like any other real estate. *See, e.g., United States v. Locke*, 471 U.S. 84, 86 (1985).

⁵ This patented mining claim is now owned by the Stichtings. (R5969.)

None of the field notes associated with any of the surrounding mining claims mentions work on the construction of any road. (R5970.) Indeed, the relevant field notes are silent with regard to how the claimants on these later-filed claims traveled to their claims. The furthest that any of the field notes goes is to include general language to the effect that prospectors traveled "southerly from Park City by wagon road." (R5970.)

The roads at issue here cross the Lucky Bill, Home Station, and Peeler mining claims, all currently owned by United Park. (R5970.) These three claims were located between 1881 and 1883. (R5970.) The first of these claims to be officially located was the Home Station claim, which was located on October 13, 1881. (R5970.) The Lucky Bill claim was next, and was located on January 1, 1883. (R5970.) Finally, the Peeler claim was located on December 17, 1883. (R5970.)

Use By People Other Than Prospectors - The record contains no direct evidence that anyone who was not a prospector, prior to 1900, used whatever roads were around Flagstaff Mountain. There were no homesteads on Flagstaff Mountain before 1912. (R5970.) There is no evidence that the public used the roads prior to 1900 for timber harvesting, livestock grazing, hunting, fishing, recreation, or any other purpose. (R5970.)

Surveys and Maps - There are no maps or surveys issued prior to 1897 describing any roads that could possibly be the roads at issue here. (R5971.) In 1897, the Government Land Office ("GLO") conducted a survey of the lands in the vicinity of the Flagstaff Mine. (R5971.) The survey shows no road leading to the Flagstaff Mine, or any other road that could be any of the roads at issue here. (R5971, 4035.)

A couple of years later, the U.S. Geological Survey (“USGS”) surveyed the entire Park City district, including Flagstaff Mountain, and issued a topographical map in 1901. (R5971.) This map is the first map to depict a road leading east off of SR-224 near the top of Flagstaff Mountain and headed in the general direction of the Flagstaff Mine. But even that map does not indicate a road leading all the way to the Flagstaff Mine. (R5971, 4037.) It does indicate, however, a possible alternative route to access the Lucky Bill or Flagstaff Mines without passing over most of the roads at issue here, a fact that undermines the Stichtings’ public road claim based upon these maps. (R5971.)

In 1950, the National Agricultural Imagery Program of the U.S. Department of Agriculture took aerial photographs of the area, including Flagstaff Mountain. (R5972.) Those photos are the first that depict the roads at issue here. (R5972.) In 1955 and 1998, the USGS prepared updated topographical maps, and those depict the roads. (R5972.)

SUMMARY OF THE ARGUMENT

The district court properly entered summary judgment in favor of United Park on the Stichtings’ claims for a public road and prescriptive easement and refused to allow the Stichtings to add a claim for appurtenant easement nine years into this litigation.

First, the district court correctly granted summary judgment in favor of Defendants on the Stichtings’ public road claim. This was not even a “close call.” *See* R6079. The court correctly concluded that the Stichtings could not prove by clear and convincing evidence (or even by a preponderance of the evidence) any “public use” of the Claimed Roads over United Park’s land during the relevant time period. “There is not a shred of evidence of any kind that any such use occurred on these roads during the 1870s and

1880s.” (R5988.)

Additionally, numerous alternative grounds exist for the court’s ruling because the Stichtings failed to prove even a single element of their public road claim, including duration, frequency, continuity, and intensity of use during the relevant time. In fact, the Stichtings conceded that they do not even know the location of the Claimed Roads in 1880. (R6098:96.) The first map showing some of the Claimed Roads did not appear until 1901—a full 25 years after the Stichtings had to prove continuous public use of the Claimed Roads. There is no evidence that the Claimed Roads even existed during the relevant time period. There is no evidence that anyone ever used the Claimed Roads and did so continuously, intensively, and without interruption whether for five years or 20. The Stichtings’ public road claim rests entirely on sheer speculation, which is fatal to their claim.

Second, the district court correctly granted summary judgment in favor of United Park on the Stichtings’ prescriptive easement claim after finding that there was no evidence of any adverse use of the Claimed Roads. The undisputed facts demonstrate that any use of the Claimed Roads was permissive and therefore no prescriptive easement could arise as a matter of law. Although the Stichtings cite to additional evidence in their brief that they contend demonstrates adverse use, they failed to present any of that evidence below in opposing summary judgment and cannot do so now on appeal. The Stichtings also did not seek reconsideration of this dismissal in their Rule 59 motion following dismissal of the public road claim.

Third, the district court correctly denied the Stichtings’ motion to file a second

amended complaint to add a claim for an appurtenant easement after nine years of litigation, and the close of all discovery, and just 11 days before the deadline for filing dispositive motions. The court properly denied the motion as untimely, unjustified, and prejudicial. The court also correctly denied the motion after finding that the Stichtings failed to include an appurtenant easement claim in their Pre-Trial Disclosures, which the court had ordered them to file in an attempt to remedy their defective amended complaint. In that order, the court unequivocally declared that the Stichtings would be barred from raising any claims not expressly disclosed in those Pre-Trial Disclosures.

This Court should therefore affirm the orders of the district court challenged by the Stichtings on appeal and uphold the grant of summary judgment in favor of United Park on all claims.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF UNITED PARK ON THE PUBLIC ROAD CLAIM.

The Stichtings' public road claim arises under a federal statute commonly called "RS 2477." Enacted in 1886, RS 2477 was a congressional, open-ended grant of "the right of way for the construction of highways over public lands, not reserved for public uses." *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 761 (10th Cir. 2005) (hereinafter "*SUWA*") (quoting 43 U.S.C. § 932). RS 2477 remained in effect for over a century until repealed in 1976 under the Federal Land Policy Management Act (FLPMA). After repeal "any 'valid' RS 2477 rights of way 'existing on the date of approval'" of FLPMA—October 21, 1976—would "continue in effect." *Id.* at 741.

As noted by the district court, the “starting point for trial courts as they determine how to navigate a case arising under RS 2477” is the case of *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735 (10th Cir. 2005) (hereinafter “*SUWA*”) (R5974.) There is no question that “federal law governs the interpretation of RS 2477.” *Id.* (quoting *SUWA*, 425 F.3d at 768). However, “in determining what is required for acceptance of a right of way under the statute, federal law “borrows” from long-established principles of state law, to the extent that the state law provides convenient and appropriate principles for effectuating congressional intent.” *Id.* (emphasis added)). When determining whether an RS 2477 highway has been accepted in Utah, courts must look “to Utah law in force at the time the right of way was claimed to have been accepted.” *Id.* (quoting *SUWA*, 425 F.3d at 771 (emphasis added)).

Here, the land over which the Claimed Roads pass was removed from the public domain on October 13, 1881, when the Home Station mining claim was officially located. (R5877.) So, the Stichtings must prove acceptance of the Claimed Roads by 1881. To do so, the Stichtings bear the burden of proving “(1) continuous use (2) by the public (3) for the requisite period of time.” (R5979.)

A. The Requisite Time Period was Twenty Years in 1881.

In 1881, there was no Utah statute establishing the requisite time period for proving dedication of a road by public use. In the absence of a governing statute, the requisite time period is determined by looking to Utah common law. *See Vogler v. Anderson*, 89 P. 551, 552 (Wash. 1907); *Burrows v. Guest*, 12 P. 847, 847 (Utah 1886).

In *Harkness v. Woodmansee*, 26 P. 291 (Utah 1891), the Utah Supreme Court plainly declared that “right to a public road” by “dedication” arises only after “twenty years” of “uninterrupted adverse enjoyment.” *Id.* at 292.⁶ This 20-year period had been the law in Utah since the nineteenth century. *Funk v. Anderson*, 61 P. 1006, 1007-08 (Utah 1900). The Stichtings were therefore required to prove use of the Claimed Roads for 20 years by 1881. As a matter of law, the Stichtings cannot prove 20 years of use during a nine-year period. This court can affirm on that ground alone.

Rather than looking to Utah common law for the requisite time period, the district court instead improperly applied a five-year time period set forth in an 1880 statute that is entirely inapplicable to public road claims arising through dedication by public use. That statute provides as follows:

Sec. 2. Highways are roads, streets or alleys and bridges, laid out or erected by the public, or if laid out or erected by others, dedicated or abandoned to the use of the public.

Sec. 3. Roads laid out and recorded as highways by order of the County Court, and all roads used as such for a period of five years, are highways.

1880 Laws of Utah, ch. XXIX (emphasis added). Although Section 2 expressly claims to public roads dedicated through public use, the district court instead applied Section 3 and the five-year period set forth in Section 3 of the statute and effectively imported it into Section 2. Yet, Section 3 does not apply to roads created through dedication by public

⁶ Although the issue before the Court in the *Harkness* case was a claim for a private prescriptive easement, rather than a public road by dedication, the Court unambiguously stated that the 20-year requirement applied to claims of a public road by dedication through use. *Id.*

use at all. Rather, as the Idaho Supreme Court noted when interpreting Idaho's enactment of the same statute, Section 3 is better read as creating an additional means of establishing a public highway if the road is both (i) erected by the public or expressly dedicated to the public, and (ii) is recorded by the county court and used by the public for five years. *Galli v. Idaho County*, 191 P.3d 233, 239 (Idaho 2008). As another court explained, "[t]o qualify as a highway under Idaho's road creation statutes during the relevant period of time, Eagle Creek Road must have been designated as such by the Shoshone County Board of Commissioners and regularly used by the public for five years." *County of Shoshone v. United States*, 912 F. Supp. 2d 912, 928-29 (D. Idaho 2012), (emphasis added). Here, the roads were not recorded by the county court, so the five-year option set forth in Section 3 simply does not apply.

The Idaho courts' interpretation of this identical statute gives literal effect to all provisions in the statute. In contrast, the Stichtings' interpretation ignores the plain language of the statute, improperly conflates Sections 2 and 3 of the statute, renders the second clause of Section 3 superfluous, and is contrary to the rules of statutory interpretation. Because Section 3 of the 1880 statute is inapplicable, the court erred in applying the five-year time period to this case.

Instead, the 20-year common law period must be applied to the Stichtings' public road claim. Because there is no evidence of continuous public use of the roads beginning in 1861—twenty years before the Home Station mining claim was located—the Stichtings' public road claim fails as a matter of law. This court can affirm on that ground alone.

But even if the five-year period applied, the result is the same. Under Section 3 of the 1880 statute, the Stichtings had to prove that the claimed roads existed between 1976 and 1881, and were used continuously, by the public, during that five-year period. (R5982.) As demonstrated below, they cannot meet their burden to satisfy any of those elements.

B. The Stichtings' Burden of Proof Was Clear and Convincing Evidence.

The district court correctly held that the Stichtings' burden of proof was clear and convincing evidence but that they could not meet their burden of proof even if it were only preponderance of the evidence.

There is no dispute that, in October 1881, the burden of proof for RS 2477 claimants in Utah was clear and convincing evidence. Instead, the Stichtings argue that, over 120 years later, the Utah Legislature lowered the burden of proof for RS 2477 cases from clear and convincing evidence to preponderance of the evidence when it enacted the 2003 Utah Rights-of-Way Across Federal Lands Act, Utah Code Ann. § 72-5-301 *et seq.* (“Act”), which provides in relevant part as follows:

The proponent of the R.S. 2477 status of the highway bears the burden of proving acceptance of the grant by a preponderance of the evidence for all decisions that are not subject to Subsection (6)(a).

Id. § 72-5-310(6)(b).

The district court properly rejected the Stichtings' argument. First, the court noted that the Utah federal district court faced a virtually identical argument and “declined to apply the provisions of the Act—at least not provisions that impacted the burden of

proof—to modern RS 2477 adjudications.” (R6077) (citing *San Juan County v. United States*, 2011 U.S. Dist. LEXIS 58460, *17-18 n.9 (D. Utah May 27, 2011), *aff’d* 754 F.3d 787 (10th Cir. 2014) (hereinafter “*Salt Creek District Court Case*”). Noting that “[w]hether the R.S. 2477 grant has been accepted is a question of compliance with the then-existing laws of the state where the right-of-way was established,” the *Salt Creek* court observed that the Legislature had not enacted the Act until 2003—“many years after the opportunity to accept the R.S. 2477 grant had been terminated by Congress.” *Id.* Accordingly, the *Salt Creek* court held that the Act was a “*post-hoc*” attempt to “alter the burden of proof concerning the acceptance of R.S. 2477 rights-of-way” and refused to apply the burden-of-proof provisions of the Act to RS 2477 claims. *Id.* Here, the district court likewise held that the burden-of-proof provisions of that Act could not be applied to alter the Stichtings’ burden of proof under RS 2477 a century later. *Id.*

The Stichtings attempt to distinguish the *Salt Creek District Court Case* by arguing that a different provision of the Act was at issue in that case. Because both provisions would alter the burden of proof if applied to RS 2477 cases, the district court rightly found no basis for distinguishing the *Salt Creek District Court Case* and instead found “the analysis of the federal court instructive here, certainly as to provisions of the Act that might “attempt[] to alter the burden of proof” that would have applied to establishment of RS 2477 claims on or before October 21, 1976. (R6078); accord *San Juan County*, 754 F.3d at 799 (refusing to apply Utah law to RS 2477 cases to the extent it would “retroactively broaden the public’s eligibility for R.S. 2477 rights-of-way beyond what Congress could have intended to preserve.”)

Second, the district court correctly found that Subsection (6)(b) of the Act has absolutely no relevance to the facts of this case regardless. (R6078.) By its terms, Subsection (6)(b) applies “merely to specific proceedings challenging ‘the correctness of any acknowledgment of acceptance’ that may be created or recorded by the State of Utah notifying interested parties that the State of Utah considers ‘title of the right-of-way’ as having ‘vested[ed] in the State of Utah.’” *Id.* (quoting Utah Code Ann. § 72-5-309(1), - 310(2)(a)). As the court noted, the relevant subsection appears in a statute concerning the State of Utah’s acknowledgment of acceptance of a right of way under RS 2477, something that did not happen here.”

If this statutory Subsection were a stand-alone provision, its context may look different. But when this provision appears as just another Subsection of a lengthy statutory provision describing a specific and discrete type of adjudicatory proceeding, in the Court’s view this Subsection applies not to RS 2477 lawsuits generally but, rather, only to the specific actions described in Section 310 of the Act (e.g., petitions filed to challenge the correctness of one of the State of Utah’s notices of acknowledgment).

(R6079) (emphasis added). Where a notice of acknowledgement has not been issued, as here, section 72-5-310 simply does not apply.

Confirming this, section 72-5-310(6)(b) applies only to “decisions that are not subject to Subsection (6)(a).” The relevant section reads in its entirety:

(6)(a) In accordance with Section 72-5-302, a rebuttable presumption that the R.S. 2477 grant has been accepted is created when: (i) a highway existed on public lands not reserved for public uses as of the cut-off date under Section 72-5-301; and(ii) the highway currently exists in a condition suitable for public use.

(b) The proponent of the R.S. 2477 status of the highway bears the burden of proving acceptance of the grant by a preponderance of the evidence for all decisions that are not subject to Subsection (6)(a).

Utah Code Ann. § 72-5-310. The presumption in (6)(a) applies only where the highway existed on public lands as of 1976. But if the claimed right of way does not involve a highway on public lands as of 1976, the proponent must prove acceptance of the grant in the face of a challenge to the “notice of acknowledgement” sent by the governor. The preponderance of the evidence standard in (6)(b) has no application here because no “notice of acknowledgment” has been issued.⁷

Finally, regardless of the burden of proof, the district court correctly held that the Stichtings failed to meet that burden.

Even if the burden of proof to be applied in this case were preponderance of the evidence, the result would not be any different. Plaintiffs would still bear this burden of proof—something that can in and of itself, be ‘decisive’ in RS 2477 cases—and, on the evidence presented Plaintiffs would not be able to surmount even this lessened burden.

(R6079-80) (emphasis added). This court could therefore choose to clarify this issue or hold, as the Tenth Circuit has done, that “[b]ecause the judge correctly concluded the evidence of the existence of a public thoroughfare failed to satisfy either the more lenient ‘preponderance of the evidence’ standard or the more stringent ‘clear and convincing

⁷ If the Stichtings were correct about the applicability of the Act, then the time period is ten years, not five. Utah Code Ann. § 72-5-301(1)(b) (requiring “use by the public for a period in excess of 10 years.”)

evidence' standard, we need not resolve the dispute over the proper standard." *San Juan County*, 754 F.3d at 801. Either way, this court should affirm.

C. The District Court Correctly Concluded that the Stichtings Failed to Prove "Public Use."

The district court canvassed 60 years of state and federal case law in rightly determining that a single purpose use of a claimed road was insufficient as a matter of law to constitute public use for purposes of RS 2477. (R5985-87.) In *Lindsay Land & Livestock Co. v. Churnos*, 285 P. 646 (Utah 1929), the Utah Supreme Court first raised the issue of whether a single purpose use of a claimed road could constitute "general public use of the road" sufficient to establish a public thoroughfare. (R5986.) The Court noted that the claimed road had been used by a wide cross-section of the public, including sheepherders, people visiting a sawmill in the vicinity, members of the "general public" who traveled the road "extensively . . . in going to and from [a nearby] mining camp," and "hunters, fisherman, and others who had occasion to travel over it." *See id.* (quoting *Churnos*, 285 P. at 647). The *Churnos* Court ultimately found that there was a public road due to such extensive public use but specifically cautioned that "[i]f the claim rested alone upon the use of the road for sawmill purposes, or for mining purposes, or for the trailing of sheep, the question would be more difficult." *Id.* (emphasis added).

The Stichtings erroneously construe this language in *Churnos* as having conclusively "established that a single purpose R.S. § 2477 road could be deemed to be a public road through continuous use." (Br. at 18.) Yet, as the district court rightly observed, the issue of whether a single purpose use could qualify as a public use was "left

open in *Churnos*” because the road at issue there was extensively used by a wide variety of people for a wide variety of purposes. (R5987.)

The issue was again flagged in the *SUWA* case. Quoting the above language from *Churnos*, the court pointedly declared that “[w]e think it significant that the Utah Supreme Court stated that if the claim rested ‘alone upon the use of the road for sawmill purposes, or for mining purposes, or for the trailing of sheep, the question would be more difficult.’ *SUWA*, 425 F.3d at 773 (emphasis added). The court then noted that “old mining and logging roads constructed for a particular purpose and used for a limited period of time” are not the same as roads used “by the general public.” *Id.* at 771 (emphasis added). The *SUWA* court further observed that “[l]arge parts of southern Utah are crisscrossed by old mining and logging roads constructed for a particular purpose and used for a limited period of time, but not by the general public.” *Id.* at 781-82 (emphasis added).

Then, in the *Salt Creek District Court Case*, the Utah federal district court cited *SUWA* and concluded that a road used only by cattlemen did not constitute a “public use” as required for dedication of an RS 2477 road. (R5990-91.) The Stichtings attempt to distinguish this case by claiming that it was the “minimal use” of the road that dictated the result, not the limited purpose of the use. (Br. at 20.) The evidence in the case however, was that three different cattle operations had used the road for over 60 years. That is not minimal use.

Moreover, citing to *Churnos*, *Cassity v. Castagno*, 347 P.2d 834, 835 (Utah 1959), *Jeremy v. Bertagnole*, 116 P.2d 420 (Utah 1941), and *Boyer v. Clark*, 326 P.2d 107 (Utah

1958), the *Salt Creek* court noted that “in each of those cases, the RS 2477 grant was found to have been accepted by continuous public use of the claimed road for more than ten years by various persons and for varying purposes.” *Salt Creek District Court Case*, 2011 U.S. Dist. LEXIS 58460, *34-35 (emphasis added). Further, on appeal, the Tenth Circuit Court of Appeals upheld the decision and declared that, as *Churnos* demonstrated, “frequency and variety of use were critical common-law inquiries into the acceptance of an R.S. 2477 right-of-way.” *San Juan County*, 754 F.3d at 799 (emphasis added). The Stichtings’ contention that none of these cases turned on the lack of variety of use is baseless.

Tellingly, the Stichtings have not cited to even one state or federal case where any court found that a single purpose use of a claimed road was found to constitute “public use” sufficient to create an RS 2477 road. To the contrary, the plethora of state and federal cases cited by the district court clearly supports and even dictates the court’s conclusion in this case that use of a road for a single purpose does not constitute “public use” as required dedication of an RS 2477 road. The district court therefore rightly concluded that the question of whether a single purpose use qualifies as public use “has been definitively answered in the negative by the Utah Supreme Court, both in the cases following *Churnos*, and by the Utah federal district court in the *Salt Creek District Court Case*.” (R5989.)

The district court also correctly concluded that use by mining prospectors and claimants does not constitute “public use” under RS 2477. The Stichtings do not dispute that locators, patentees, and claimants had proprietary rights in their mining claims and

that their use of any roads to reach those claims would not constitute public use under RS 2477. (Br. at 20-21.) The Stichtings also concede in their brief that use of roads by “invitees” or other permissive users does not constitute “public use” for purposes of RS 2477. *See* Br. at 19-20. Prospectors were nothing more than invitees of the federal government. As noted by the Stichtings in their brief, “the Mining Law of 1872 effectively granted to all citizens and prospective citizens of the United States . . . a right of entry onto public land. *See* Br. at 23 (citing 1872 Mining Law § 1, R.S. § 2319, 30 U.S.C. § 22) (emphasis added). It “allowed any citizen of the United States to become a prospector” over federal public land. (Br. at 24.) Therefore, all prospecting done on Flagstaff Mountain while it was in the federal public domain was done with the express authorization of the federal government and was therefore a permissive use.

Utah courts have repeatedly found that permissive use does not qualify as “public use.” In *Heber City Corp. v. Simpson*, 942 P.2d 307, 311 (Utah 1997), the Utah Supreme Court declared that “use by permission does not constitute use as a public thoroughfare.” *Id.* In *San Juan County*, the Tenth Circuit Court of Appeals quoted *Heber City* and declared that “[t]o demonstrate the existence of a public thoroughfare, a claimant must show: ‘(i) passing or travel, (ii) by the public, and (iii) without permission.’” *San Juan County*, 754 F.3d at 797 (emphasis added). Because prospecting upon federal public land during the time period at issue was expressly contemplated and authorized by federal law, any such use would clearly be a permissive use and would not qualify as a public use under RS 2477 as a matter of law.

Even if use by prospectors could constitute public use, there is no evidence of such use. The only evidence of any use of any road during the relevant time frame is a reference to two ore shipments from the Flagstaff Mine in 1871 and 1872 by the Flagstaff Mine claimants by an unknown route. There is no evidence that those two shipments used a road at issue here, and even if there were, that use would not constitute public use. As the district court recognized, “[t]here is no direct evidence that anyone else ever used these roads, prior to 1881, for homesteading purposes, for timber-gathering purposes, for livestock grazing, for hunting or fishing, or for recreational pursuits.” (R5988.) More emphatically, there is not “a shred of evidence of any kind that any such use occurred on these roads during the 1870s and 1880s.” (R5988.)

The Stichtings contend that the court drew improper inferences against them regarding the “success of the prospectors roaming the mountains around Park City in the late 19th century and the number of users of the Flagstaff Road.” (Br. at 24.) But the district court did not draw such an inference. It ruled that whether the individuals using the roads “were prospectors, locators, claimants, or patentees makes no difference” because they were all engaged in the activity of “mining.” (R6082.)

Regardless, there is no evidence that prospectors used the roads at issue here. To assert the contrary, the Stichtings point to a master’s thesis from 1971 for the proposition that there were “more than 500 men prospecting in the hills around Park City *as early as* 1872.” (Br. at 25 (emphasis added).) From this, the Stichtings infer that those prospectors used the roads at issue here. But the larger quote from the thesis reveals that it does not provide a sufficient basis for that inference:

By 1872 there were *probably* 500 or more men prospecting and working in the hills above Parley's Park. An *area of six square miles* contained the Walker and Webster, the Pinyon, the Ontario, the McHenry, the Red, White & Blue, the Pioneer, and the Flagstaff Mines. At the Ontario and the McHenry, sleeping quarters had been erected by the companies to house the men they employed.

(R.629-30.)

Of all of the mines mentioned, only the Flagstaff Mine has any relevance here.

(R5303.) And given that the area in question was "six square miles" and contained at least seven other mines—two of which had sleeping quarters erected—no reasonable inference could be drawn as to how many of the alleged prospectors were located in the vicinity of the Flagstaff Mine, much less what roads they used.

Even if such an inference reasonably could be drawn, the result is the same.

Again, the thesis claims only that alleged prospectors were in the hills *by* 1872—it says nothing about the years following, which are the critical years here. As described in detail above, there is no possible evidence of any actual use of any road to the mine after 1872. Based on the undisputed evidence in the record, it is simply not reasonable to infer from a single, speculative and unsubstantiated sentence in some thesis anything about actual use of the Claimed Roads during the relevant time period. It is impossible to extrapolate from a general reference to prospectors in the area "by 1872" how many prospectors, if any, were on Flagstaff Mountain from 1872-1881, much less whether any of those prospectors ever actually used the Claimed Roads or to what extent, or even whether the Claimed Roads actually existed at the time the alleged prospectors were presumably wandering somewhere above the hills of Park City

In short, there is no evidence of prospectors using the roads at issue, let alone evidence of prospectors who did not become locators, claimants, or patentees, as the Stichtings admit they must show to prevail. Moreover, any such inference would be “insufficient to constitute clear and convincing evidence of public use.” *Id.* “The heightened pleading standard has to mean something, and if it could be satisfied with this sort of unsupported inference, it would be rendered utterly meaningless.” *Id.* Even under a lesser preponderance of the evidence standard, the Stichtings could not prove public use given the utter lack of evidence regarding public use. (R6079-80.) Therefore, based on the undisputed facts in the record and all reasonable inferences to be drawn therefrom, the district court correctly concluded that the Stichtings could not meet their burden of proving public use of the Claimed Roads during the relevant time period and properly granted summary judgment to Defendants.

D. The District Court’s Grant of Summary Judgment in Favor of Defendants is Sustainable on Multiple Alternative Grounds.

Although the district court ruled that the Stichtings failed to prove public use, there are multiple alternative grounds on which this Court can easily sustain the district court’s grant of summary judgment in favor of Defendants, as the court observed in its decision. (R005987 n.7; R5992 n.9.)

“It is well settled that an appellate court may affirm the judgment appealed from if it is sustainable on any legal ground or theory apparent on the record.” *Peak Alarm Co. v. Salt Lake City Corp.*, 2010 UT 22, ¶ 76, 243 P.3d 1221. On this record, the Stichtings failed to provide evidence of any of the requisite elements of their public road claim.

No Evidence the Roads Existed - First, there is no evidence that the Claimed Roads even existed between 1876 and 1881, only speculation. Under Utah law, “speculation is insufficient to create a genuine issue of material fact for purposes of a summary judgment motion.” *Glover By & Through Dyson v. Boy Scouts of Am.*, 923 P.2d 1383, 1388 (Utah 1996); *Gildea v. Guardian Title Co.*, 970 P.2d 1265, 1270 (Utah 1998) (“Such speculation falls short of creating a genuine issue of material fact sufficient to survive summary judgment.”).

The Stichtings cite three facts in their brief as support for their claim that the roads existed during the relevant time periods, none of which actually support that claim. First, the Stichtings point to a non-specific reference to “two miles of road” in the 1872 Flagstaff field notes, but fail to cite any evidence that the referenced road was located where they now contend the Claimed Roads were located. (Br. at 33.) The Stichtings’ failure in that respect is unsurprising, as the map accompanying the reference to “two miles of road” does not depict any of the roads at issue here, but does depict a road in a different location. (R5969, ¶ 20; 4034.) In fact, there are no maps showing the location of the “two miles of road” between 1876 and 1881, let alone showing that it shares the location of the current roads.

Second, the Stichtings point to the field notes for other claims that make no mention of a road. (Br. at 33.) It is difficult to understand how this absence of evidence supports their claim, especially where the only map in 1872 depicts a different road. (R5972, ¶ 32.)

Third, the Stichtings contend that the “historical records show that the location of the Flagstaff Road has not changed in more than one hundred years.” (Br. at 33.) But that hardly matters. Even a hundred years does not reach back to 1901, when a map for the first time depicts *some* of the roads at issue here. (R5972, ¶¶ 31-32.) No previous map depicts any of the roads. Moreover, the 1901 map “depicts a possible alternative route, leading off of SR 224 at a much lower point that would have allowed prospectors to access the Lucky Bill of Flagstaff Mines without passing over most of the Claimed Roads.” (R5304.) There is simply no way of determining which, if either, of these routes might have been the road to the Flagstaff Mine in 1871. Because there is no evidence to establish what roads were actually used by the prospectors in the 1870s, a factfinder could not find for the Stichtings on this point without resorting to impermissible speculation.⁸ Without evidence that the Claimed Roads even existed during the relevant period, the Stichtings cannot prove their public road claim.⁹

⁸ A factfinder could not draw an inference in favor of the Stichtings based on the circumstantial evidence of possible road use in the 1870s. A reasonable inferences cannot be drawn from circumstantial evidence if that “evidence is as consistent with the fact sought to be proved as with its opposite.” *Dept. of Econ. Dev. v. Arthur Andersen & Co.*, 924 F. Supp. 449, 474 (S.D.N.Y. 1996); *see also Koer v. Mayfair Mkts.*, 431 P.2d 566, 569-70 (Utah 1967) (affirming JNOV in favor of store owner where inference drawn by jury from circumstantial evidence that store owner caused dangerous condition was not reasonable) (“[T]here was testimony at trial that others were shopping in the aisle. It is quite possible that one of them dropped the grape on the floor after the manager passed by.”).

⁹ On appeal, the Stichtings continue to argue that they can satisfy their burden with the absence of evidence, asserting that for the district court to have entered summary judgment, it had to find “that the public did not use the Flagstaff Road between 1872 and 1880.” (Br. at 35.) The Stichtings have to prove their claim. Neither United Park nor the court has to disprove their claim.

No Evidence of Actual Use - Second, the Stichtings cannot show that anyone used the Claimed Roads, even assuming those roads existed in 1871. The only evidence of use consists of one shipment of ore from the Flagstaff Mine in 1871 and another in 1872. Yet even those shipments are unhelpful because there is no evidence the shipments traveled any of the Claimed Roads instead of alternative roads depicted on the same maps on which the Stichtings rely.

Otherwise, the Stichtings' evidence consists only of their speculation that there must have been prospectors who used the roads. Specifically, the Stichtings cite to a number of other mining claims on Flagstaff Mountain and speculate that prospectors must have used the roads at issue to reach these claims. (Br. at 33.) Yet of the seven mining claims cited by the Stichtings, only one had been located by 1881, so their speculation is beside the point. (R5294-97,5970.) Further, there are no production records or mining logs for any of those mining claims in the record and no evidence that any ore was ever transported. In short, there is no evidence of use of any roads by anyone to access any of those mining claims or any others prior to 1880.

No Evidence of Continuous Use - Third, the Stichtings cannot show continuous use. 'Continuous' in this context means 'without interruption.'" *San Juan County*, 754 F.3d at 797. There is no evidence of any actual use prior to 1880, much less evidence of continuous, uninterrupted use. As in the *Salt Creek District Court Case*, "there is no specific evidence of recurring monthly use by anyone." *Salt Creek District Court Case*, 2011 U.S. Dist. LEXIS 58460, at *124 n.90 (emphasis in original).

The Stichtings have provided no evidence for any element of their public road claim. They have no evidence the roads existed. They have no evidence that anyone used the roads. And they have no evidence that anyone who did use the roads used them continuously. Thus, even assuming that the five-year—instead of the twenty-year—time period applies, the Stichtings’ claim fails as a matter of law. The district court therefore properly granted summary judgment in favor of United Park.¹⁰

II. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO UNITED PARK ON THE PRESCRIPTIVE EASEMENT CLAIM.

The Stichtings also challenge the district court’s 2012 order granting summary judgment in favor of United Park on the Stichtings’ prescriptive easement claim. The Stichting’s arguments fail for several reasons.

¹⁰ The Stichtings’ arguments regarding alternative access to their property are irrelevant on appeal because the district court never reached that issue below. The question of whether the Stichtings had alternative access to their property arose solely in the context of their claim to a private access easement over the Claimed Roads, which required them to prove that the Claimed Roads were public roads under RS 2477. Because the district court found that they could not so prove, it never reached the issue of whether the Stichtings retained a private access easement in any alleged abandoned public road over Defendants’ land.

To claim a private access easement, the Stichtings would in any event have had to prove that it was “necessary for ingress and egress to and from property” and that any “alternative access imposed measurable hardship that was unreasonable under the circumstances.” *Mason v. State*, 656 P.2d 465, 469 (Utah 1982). It is undisputed that “Plaintiffs’ property is not ‘landlocked’; that is, there is another way to reach Plaintiffs’ property from another direction.” (R5965.) The Stichtings never challenged this fact.

The issue of alternative access was not a “new theory,” as the Stichtings now contend. (Br. at 36.) Rather, Defendants submitted proof of alternative access to negate one of the elements the Stichtings were required to prove under their private access easement theory.

First, the Stichtings simply did not preserve the issues they now raise in their brief. Utah appellate courts will not consider an argument raised on appeal unless it was “presented to the trial court in such a way that the trial court has an opportunity to rule on it.” *In re A.T.*, 2015 UT 41, ¶ 9 (quotation omitted). To present the district court with an opportunity to rule, “(1) the issue must be raised in a timely fashion; (2) the issue must be specifically raised; and (3) a party must introduce supporting evidence or relevant legal authority.” *Brookside Mobile Home Park, Ltd. v. Peebles*, 2002 UT 48, ¶ 14, 48 P.3d 969.

The Stichtings did none of this. As noted in the August 16, 2012 Order, “[i]n their opposition to the motion for summary judgment, Stichtings did not include any additional evidence,” and, with respect to the prescriptive easement claim, did not even reference any of the evidence submitted by United Park. (R2563). In fact, the Stichtings did not cite to a single piece of evidence or a single disputed or undisputed fact in opposing summary judgment on their prescriptive easement claim. Yet, under Rule 56(e), they were required to “set forth specific facts showing that there is a genuine issue for trial.” Utah R. Civ. P. 56(e); *Cowen & Co. v. Atlas Stock Transfer Co.*, 695 P.2d 109, 113-14 (Utah 1994) (concluding that Rule 56(e) foreclosed appellant from raising new issues and facts in opposition to summary judgment on appeal).

None of the evidence that the Stichtings now cite in their appellate brief was ever mentioned in any of the summary judgment memoranda. The majority of the record cites now appearing in the Stichtings’ appellate brief are to exhibits that were attached to a summary judgment motion filed *two years after the court’s order dismissing the*

prescriptive claim. That motion had nothing whatsoever to do with any prescriptive easement claim because it had been dismissed two years earlier. For example, nowhere in the summary judgment proceedings did the Stichtings' ever claim, as they do now, that Mr. Theobald "beg[a]n the prescriptive period by accessing the property without permission." Nowhere did the Stichtings claim there were no gates or fences or cable denying access to the Stichtings' property when Mr. Theobald began visiting the property. Nowhere did the Stichtings claim that they continued to access their property after the cable was installed or that they never sought the combination from United Park.

Even the claim that Mr. Theobald obtained the combination from Deer Valley, United Park's lessee, and not directly from United Park, is newly raised. Although testimony to that effect was included in exhibits that were attached to the summary judgment motion, neither party referenced that testimony in their summary judgment briefs, so it was never brought to the attention of the district court. All of this evidence is being raised for the first time on appeal.

The Stichtings also failed to raise any of the legal arguments or authority they now raise on appeal with respect to adverse use. In their opposition to United Park's motion for summary judgment, the Stichtings included only three sentences in defense of their prescriptive easement claim:

The gist of "adversity is that the use was maintained under claim of right. *Heber City v. Simpson*, 942 P.2d 307, 311 (Utah 1997); *Morris v. Blunt*, 161 Pac. 1127, 1131 (Utah 1916). Failure to block the use is not consent. Certainly, where the use is previously established by the public, or by prior private owners, failure to block the use is irrelevant.

(R2342.) At best, this spare passage preserved for appeal the issue of whether United Park had an affirmative duty to block Mr. Theobald's access in order to foreclose the Stichtings' prescriptive easement claim, which they have abandoned on appeal.

Even if this court were to consider the new issues raised in the opening brief, it should affirm. To establish a prescriptive easement under Utah law, a claimant must establish that their use of another's land was "(1) open, (2) notorious, (3) adverse, and (4) continuous for at least 20 years." *Lunt v. Lance*, 2008 UT App 192, ¶18, 186 P.3d 978 (quotation omitted). Each of the above elements must be established by clear and convincing evidence. *Id.*

The district court ruled that the Stichtings cannot establish "adverse" use as a matter of law. Under Utah law, a use "cannot be adverse when it rests upon license or mere neighborly accommodation." *Green v. Stansfield*, 886 P.2d 117, 120 (Utah Ct. App. 1994) (quoting *Lunt v. Kitchens*, 260 P.2d 535, 537 (Utah 1953)). In addition, "where a person opens a way for the use of his own premises, and another person also uses it without causing damage, in the absence of evidence to the contrary, such use by the latter is permissive." *Buckley v. Cox*, 247 P.2d 277, 279 (Utah 1952) (listing cases).

Once permissive use is established under one of the above mechanisms, "[a] permissive use cannot become adverse without notice to the owner of a change in use." *Green*, 886 P.2d at 120. If a use is permissive at the outset, a claimant must make a "distinct assertion of a right hostile to the owner," bring that assertion "to the attention of the owner, and then continue the use "for the full prescriptive period." *Id.* (quotation omitted). In *Gashler v. Peay*, 2006 UT App 4, ¶ 2 (unpub.), the court affirmed summary

judgment on the basis that the claimant had “clearly not shown that their use ever became adverse.”

In the present case, Mr. Theobald testified that United Park initially took the Stichtings on a guided tour of the area and gave the Stichtings permission to “basically . . . use whatever road you want.” (R2121.) In opposing summary judgment, the Stichtings did not dispute that United Park permitted the Stichtings to use the roads. (R2387.)¹¹ It is also undisputed that the Stichtings only used the roads that had been opened on United Park’s property in the same way as United Park, and without causing damage. Accordingly, the Stichtings’ use was both actually and presumptively permissive under Utah law. The Stichtings did not present any evidence of a subsequent and timely “distinct assertion” of any change in that use. Under these circumstances, the Stichtings cannot establish adversity as a matter of law.

Further, the Stichtings’ assertion that this case “mirrors” *Crane v. Crane*, 683 P.2d 1062 (Utah 1984) is unfounded. (Br. at 51, 53-54.) Although the claimants in *Crane* were able to establish a prescriptive easement claim even though the landowners had provided them a key to access the road at issue, there are no other similarities between the present case and *Crane*. After the claimants in *Crane* had already used the road at issue for well more than the prescriptive period (1936 to 1953), the landowners installed a locked gate across the road and informed claimants that they intended to block future use. *Crane*, 683

¹¹ In their opposition, the Stichtings argued that United Park had no choice but to permit the Stichtings to use the roads because they were public roads. *Id.* They did not argue that their use was non-permissive.

P.2d at 1065. The claimants immediately informed the landowners that they had a right to use the road (presumably because they had already used the road for 30 years), and that they would break down the new gate. *Id.* The landowners subsequently provided the claimants a key. *Id.* Over the next 30 years, although the landowners continued to attempt to block the claimants' access, the claimants persisted in their use of the road, sometimes by cutting through the fence, sometimes by "saw[ing] the gate in two," and sometimes by using a key. *Id.* at 1066. This court affirmed the district court's grant of prescriptive easement, highlighting the testimony that the claimants asserted a right to use the road in the 1950s and "forced their way through the fence or gate when they did not have a key during the period from 1950 to 1980." *Id.*

Although *Crane* demonstrates that it is possible to establish a prescriptive easement when the landowner provides a key to a locked gated, it does not support the Stichtings' assertion that there is a genuine issue of material fact as to adversity in this case. Unlike *Crane*, there is no evidence that the Stichtings timely asserted a right to use the roads at issue under a claim of right after United Park installed a gate in the early 1990s. There is no evidence that the Stichtings used the roads at issue for a full prescriptive period prior to the installation of United Park's gate in 1990. And there is no evidence that the Stichtings forced their way through United Park's gate for a period of 30 years in order to access the roads at issue. This court should disregard the Stichtings' attempt to analogize their claim to *Crane*.

The Stichtings' contention that they are entitled to a presumption of adverse use under *Valcarce v. Fitzgerald*, 961 P.2d 305, 312 (Utah 1998) is also equally misguided.

(Br. at 51.) The presumption does not apply here for several reasons. First, the Stichtings' use was permissive at its inception because United Park "open[ed] the way" under *Buckley*, 247 P.2d at 279 and because the Stichtings' use rested upon a "neighborly accommodation" under *Green*, 886 P.2d at 120. Second, the *Valcarce* presumption only applies "once a claimant has shown an open and continuous use of the land under a claim of right for the twenty-year prescriptive period." *Valcarce*, 961 P.2d at 311-12.

The Stichtings cannot also establish "continuous" use for a twenty-year period as a matter of law. To be considered "continuous," a claimant must establish that their use was not "interrupted by the owner of the land across which the right is exercised." *Richards v. Pines Ranch, Inc.*, 559 P.2d 948, 949 (Utah 1977) (quotation omitted). Here, Mr. Theobald testified that he began using the roads as needed when the Stichtings acquired the property in "late '70s, early '80s," at which time "there were no gates or fences." (R3367-68.) United Park then installed posts and a cable lock across the road approximately ten years later in "1990 or something." (R3369.) Because this interruption and reassertion of ownership undisputedly occurred before the prescriptive period had run, the Stichtings cannot establish continuity as a matter of law by clear and convincing evidence.¹² This court should affirm the court's ruling on the prescriptive easement claim.

¹² This Stichtings' main case, *Crane v. Crane*, 683 P.2d 1062 (Utah 1984), is distinguishable on this point as well because the claimants in *Crane* had been using the road at issue for approximately thirty years prior to the landowner's installation of a locked gate across the road. *Id.* at 1065-66.

III. THE DISTRICT COURT PROPERLY DENIED THE STICHTINGS' MOTION TO AMEND THEIR COMPLAINT.

The district court properly exercised its broad discretion in denying the Stichtings' Motion for Leave to File a Second Amended Complaint in 2012 to add an appurtenant easement claim because the motion was untimely, unjustified, prejudicial and directly contrary to the prior orders of the court. The power to grant or deny leave to amend "lies within the court's discretion" and will not be disturbed "unless the court has exceeded its discretion and prejudice results." *Jones v. Salt Lake City Corp.*, 2003 UT App 355, ¶ 7, 78 P.3d 988.

A. The Stichtings' Attempt to Add an Appurtenant Easement Claim Was Untimely, Unjustified, and Prejudicial.

It is well established that motions to amend may be denied if they are "untimely, unjustified, and prejudicial." *Daniels v. Gamma West Brachytherapy, LLC*, 2009 UT 66, ¶ 58, 221 P.3d 256 (internal citations omitted). "Trial courts are not required to find all three factors to deny a motion to amend; a court's ruling on a motion to amend can be predicated on only one or two of the particular factors." *Id.*

First, the district court correctly found that the Stichtings' motion "does not meet the case law elements that would support a motion to amend at this juncture of the case" because the motion was untimely. (R4836.) "Untimely motions are those filed in the advanced procedural stages of the litigation process." *Daniels*, 2009 UT 66, ¶ 59 (internal citations omitted).

The Stichtings filed their Motion to Amend on February 10, 2014— nine years after litigation commenced, three months after the parties had exchanged expert reports,

and just 11 days before the deadline for filing dispositive motions. The fact discovery deadline had also closed for the second time five months earlier, so there would be “more time and expense required to address the claim” and “move discovery deadlines and reopen discovery to allow the defendants a chance to address the amended claims.” (R4836.)

The deadline to amend pleadings had also long since passed. In fact, a year before the Stichtings filed their most recent motion to amend, the court expressly stated in its March 26, 2013 Scheduling Order that amendments “will not be permitted” because the deadline to amend pleadings had already passed. (R2710.) The Stichtings’ motion was unquestionably filed in the advance procedural stages of the litigation process and was therefore untimely.

In their brief, the Stichtings do not challenge the court’s denial of their motion due to untimeliness. They argue only that there was no excessive delay or undue prejudice. (Br. at 49.) Because the court’s denial of the Stichtings’ motion can be predicated solely upon a finding of untimeliness, the district court’s denial of the Motion to Amend is sustainable on that basis alone.

Second, the motion was unjustified. The Stichtings provided no reason for their delay in seeking to amend their complaint, other than the fact that they had hired new counsel. But that hardly constitutes justification. In fact, far from explaining why they did not discover their claim until 2012, they incorrectly claim that it was in play all along. (Br. at 47-48.)

Third, the motion was prejudicial. Motions are prejudicial when the nonmoving party would have little time to prepare a response before trial.” *Daniels*, 2009 UT 66, ¶ 59. Ignoring this standard, the Stichtings argue merely that United Park would not have required additional discovery on the new claim. (Br. at 49.) They contend that the historical evidence already in the record was all that United Park would need to defend themselves against the new claim. Yet, the elements of an appurtenant easement claim are drastically different than those of an RS 2477 claim, requiring proof of “(i) unity of title followed by severance; (ii) an apparent, obvious, and visible servitude at the time of severance; (iii) that the easement is reasonably necessary to the enjoyment of severed property; and (iv) the easement must be continuous and self-acting.” *See Adamson v. Brockbank*, 185 P.2d 264, 272 (1947). Aside from the requirement of continuous use, none of the elements overlap the public road claim. Additional discovery would have been required for each. After nine years of litigation, United Park surely would have been prejudiced by allowing the Stichtings to essentially start the case over again.

In a similar case, *Daniels v. Gamma West Brachytherapy, LLC*, 2009 UT 66, ¶ 60, a plaintiff appealed denial of his motion to amend to add a new claim, which the trial court had denied as untimely and prejudicial because it would have required the reopening of discovery. Although acknowledging that “the trial date was distant and that United Park might have had sufficient time to prepare a response to the claim of fraudulent concealment,” the Utah Supreme Court nevertheless refused to reverse the denial of the motion to amend, holding that it must “defer to the trial court’s determination that the additional claim would have prejudiced the Defendants” because

the trial court “is best positioned to evaluate the motion to amend in the context of the scope and duration of the lawsuit.” *Id.* This Court must likewise give “considerable deference” to the district court’s determination in this case that granting the Stichtings’ motion would cause prejudice to United Park.

B. The Stichtings’ Attempt to Add an Appurtenant Easement Claim Was Contrary to the Prior Orders of the Court.

i. No Appurtenant Easement Claim in the Stichtings’ Pre-trial Disclosures

The district court also properly denied leave to amend because the Stichtings had failed to disclose a claim for appurtenant easement in their Pre-Trial Disclosures. On December 22, 2011, United Park filed a Motion for Partial Judgment on the Pleadings, seeking dismissal of the Stichtings’ public road claim under Rule 12(c). Although the Stichtings purportedly amended their complaint to add a public road claim, the only claim was for “Declaratory Relief – Prescriptive Easement” and no public road claim was alleged. (R1561-62.) The court agreed with United Park and expressly found that the Stichtings’ complaint was “somewhat cryptic in nature and [did] not put United Park on adequate notice regarding what is claimed.” (R1682.)

The court further noted that it was “concerned that United Park be afforded due process with respect to the allegations in the Stichtings’ First Amended Complaint,” but rather than dismissing the defective complaint, the court instead gave the Stichtings a second bite at the apple and ordered them to file Pre-Trial Disclosures in order to “ameliorate the effects of the form of the Amended Complaint.” *See id.* Specifically, the court ordered as follows:

Stichtings shall make full and complete disclosures of their claims and evidence Such disclosures shall be made notwithstanding any prior disclosures, shall be made in writing, and shall not incorporate other disclosures or materials by reference

For each roadway claimed, Stichtings shall provide the specific statute or case law they allege supports their claim to a public or private road. Failure to provide such information by the date set forth herein shall result in Stichtings being unable to proceed with their claim under Utah R. Civ. P. 37.

(R4837) (quoting March 8, 2012 Order). The Stichtings took full advantage of the court's further leeway and, without objection, filed their Pre-Trial Disclosures on March 23, 2012.

Nowhere in their Pre-Trial Disclosures did the Stichtings even mention the words "appurtenant easement," much less recite the elements or cite to any case law concerning appurtenant easements. (R1856-62.) The court therefore correctly determined that the Stichtings "did not include a claim for an appurtenant easement nor identify any case law or statute in support of such a claim" and consequently required them "to stick to what they have in the 2011 Amended Complaint as clarified by the March 23, 2012 Pre-Trial Disclosures." (R4838) (emphasis added).

The Stichtings now protest that their Pre-Trial Disclosures did include a "full and complete disclosure" of an appurtenant easement claim in compliance with the court's order. In a footnote, they quote references to a "private right of access to adjoining lands" and the like, and attempt to argue that these references are to an appurtenant easement. (Br. at 48 n.5.) In reality, those references pertain to a so-called "private access easement" over a public road, whereby a "landowner whose property abuts a

public road possesses, by operation of law, a private easement of access to that property across the public road.” *See Gillmor v. Wright*, 850 P.2d 431, 437 (Utah 1993). A private access easement over a public road is an entirely different legal theory and claim than an appurtenant easement, which becomes an issue when property is severed and does not exist merely by virtue of being adjacent to a public road.

ii. No Appurtenant Easement Claim in the Stichtings’ Amended Complaint

The Stichtings also contend that even if they did not adequately disclose an appurtenant easement theory in their Pre-Trial Disclosures, the court erred in denying their motion to further amend their complaint to add that claim because the appurtenant easement claim appears in their Amended Complaint. That argument is directly contrary to the district court’s findings in its March 8, 2012 Order, wherein the court expressly found that the complaint “did not put United Park on adequate notice regarding what is claimed.” (R1696.) The Stichtings have not appealed those findings and therefore cannot pursue that argument on appeal. Moreover, the Defendants had no idea that the Stichtings were claiming an appurtenant easement. Tellingly, nowhere in any of the multiple dispositive motions filed by the parties in this nine-year case did any party ever mention any appurtenant easement claim.

Furthermore, the Amended Complaint is irrelevant in light of the March 2012 order. In that Order, the Court expressly precluded the Stichtings from relying on “any prior disclosures” or even “incorporate[ing] other disclosures or materials by reference.” *See* R1696, ¶ 1. Instead, the Stichtings were required to affirmatively disclose all of their “claims and evidence” in their Pre-trial Disclosures to give the Landowners sufficient

notice of exactly what it was the Stichtings were claiming in their pleadings. *Id.* The entire purpose of that requirement was to prevent the Stichtings from doing exactly what they have now attempted to do—bootstrap new claims into the lawsuit at this last minute, whether by trying to point to vague or inapplicable allegations in the Stichtings' Amended Complaint, or otherwise.

iii. Pre-Trial Disclosure Requirement Within Court's Discretion

The Stichtings also attempt to evade the requirements of the district court's March 2012 Order by claiming for the first time that it was improper and exceeded the court's power and authority. The Stichtings never raised or preserved this issue below. On page five of their opening brief, the Stichtings claim they preserved this issue in their memoranda in support of their motion to amend and at the hearing on that motion, but the Stichtings did not challenge the court's authority to enter the March 2012 order anywhere in those pages. The Stichtings even filed an objection to the March 2012 Order but never questioned the Court's authority to issue the order or require clarifying disclosures. (R1828-32.) Nor did they challenge the court's authority to require the disclosures in response to the United Park's motion to strike the Stichtings' summary judgment motion or the United Park's opposition to their motion to amend the complaint, both of which were premised in significant part on the March 2012 Order. The Stichtings had numerous opportunities to raise this issue time and again, and instead said nothing. Having taken full advantage of the opportunity given them by the court to salvage their flawed Amended Complaint, they now turn on the court and challenge its authority

simply because their Pre-Trial Disclosures were as deficient as the amended complaint they were intended to cure.

In requiring Pre-Trial Disclosures, the district court acted within the broad discretion bestowed upon courts to manage their dockets. *Welsh v. Hosp. Corp. of Utah*, 2010 UT App 171, ¶ 9, 235 P.3d 791 (“Trial courts have broad discretion in managing the cases assigned to their courts.”) In its March 2012 Order, the court cited to Rules 16 and 26 of the Utah Rules of Civil Procedure as the basis for the order and specifically stated that it was “exercis[ing] its case management authority and prerogative under Utah R. Civ. P. 16(b).” (R1696.) Rule 16(b) allows courts to include in scheduling orders “any other matters appropriate in the circumstances of the case.” Utah R. Civ. P. 16(b) (pre-2011). In its Order, the district court described in detail the “circumstances of the case” that warranted the clarifying disclosures required therein, namely, that the amended complaint did not give adequate notice to Defendants of the claims asserted against them.

Furthermore, all of the information that the court required to be disclosed via its March 8 Order was information that the Stichtings were already required under the Rules to disclose, either in its amended complaint, its initial disclosures, or its pretrial disclosures. Rule 26 specifically requires identification of documents, exhibits, and witnesses. The Stichtings acknowledge that “while parts of the March 2012 Order were a valid exercise of the District Court’s authority under Rule 16(b), ordering Mayflower to disclose its legal theories, supporting facts, case law, and statutes, was not.” (Br. at 45.) Yet, this is the very information that the Stichtings were required to set forth in their amended complaint in order to put Defendants on notice of what was being claimed.

They consistently failed to do so. The district court acted within its power and discretion in ordering the Pre-Trial Disclosures.

The Stichtings also contend that the future sanction of exclusion set forth in the March 2012 Order for failure to comply was somehow improper. They argue that the sanction was “self-executing instead of requiring a hearing and showing of non-compliance.” (Br. at 45.) That simply is not true. The March 2012 Order specifically states that the imposition of the sanction would be conditioned on non-compliance with the Order; therefore, a showing of non-compliance was expressly required as a prerequisite to any exclusionary sanction. In fact, the only “enforcement” of the threatened sanction came after a hearing, where the parties presented arguments about the Stichtings’ failure to comply with the March 2012 Order. (R4837.) No sanction in the March 2012 Order was self-executing or was ever enforced in such a way.

iv. No Prejudice as a Result of the Pre-Trial Disclosure Requirement

The Stichtings suffered absolutely no prejudice as a result of the March 2012 Order. To the contrary, the court effectively saved the Stichtings’ defective amended complaint by giving the Stichtings the opportunity to ameliorate its defects through filing clarifying Pre-Trial Disclosures. The Stichtings embraced this opportunity with nary a whimper until the district court found that its Pre-Trial Disclosures were likewise deficient.

Furthermore, notwithstanding the fact that the March 2012 Order expressly warned the Stichtings that they would be precluded from using any witnesses and documents that they failed to disclose in their Pre-Trial Disclosures, such was not strictly

the case. As acknowledged by the Stichtings, the district court “tempered the restrictions” of the order and did not exclude a single witness or document that was not disclosed in the Pre-Trial Disclosures. (Br. at 46.) As for the appurtenant easement theory, the Order merely served as an alternative ground, and not the sole ground, for denying the Stichtings’ motion to add that claim at the last minute, as described above. Thus, the Stichtings cannot show any prejudice resulting from the March 2012 Order.

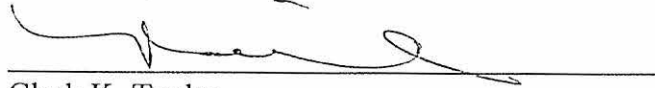
In contrast, if the Court were to refuse to enforce the March 2012 Order and allow the Stichtings to proceed with claims that were not included in its Pre-Trial Disclosures, United Park would be significantly prejudiced. They have fully relied on the Stichtings’ Pre-Trial Disclosures in conducting discovery, briefing dispositive motions, and defending against the Stichtings’ claims. United Park would be greatly prejudiced if the Stichtings were now allowed to proceed with a new appurtenant easement claim after relying on the district court’s assurances that only claims fully and completely disclosed in the Stichtings’ Pre-Trial Disclosures could proceed.

CONCLUSION

The district court correctly granted summary judgment in favor of United Park on the public road claim and prescriptive easement claim. The district court also acted within its broad discretion in refusing to allow the Stichtings to add an additional claim nine years into the litigation as untimely, prejudicial, and contrary to the prior orders of the court. This court should affirm.

DATED this 22nd day of July, 2015.

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Signed with Permission

CERTIFICATE OF COMPLIANCE WITH RULE 24(f)(1)

1. This brief complies with the type-volume limitation of Utah R. App. P.24(f)(1) because this brief contains 13,237 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B). Counsel relies on the word count of Microsoft Word.

2. This brief complies with the typeface requirements of Utah R. App. P.27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 97 in 13 point Times New Roman.

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Attorney's or Party's Name

Dated: July 22, 2015

CERTIFICATE OF SERVICE

I hereby certify that I caused two copies of the foregoing **BRIEF OF APPELLEES** to be mailed, postage prepaid, this 22nd day of July, 2015 to:

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Addendum A

ADDENDUM

DETERMINATIVE STATUTES AND RULES

Mining Act of 1866, § 8, R.S. § 2477, 43 U.S.C. § 932

“The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.”

General Mining Act of 1872, § 1, R.S. § 2319

“All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States

1880 Laws of Utah, ch. XXIX

Sec. 2. Highways are roads, streets or alleys and bridges, laid out or erected by the public, or if laid out or erected by others, dedicated or abandoned to the use of the public.

Sec. 3. Roads laid out and recorded as highways by order of the County Court, and all roads used as such for a period of five years, are highways.

Utah Code Ann. § 72-5-310

(6)(a) In accordance with Section 72-5-302, a rebuttable presumption that the R.S. 2477 grant has been accepted is created when: (i) a highway existed on public lands not reserved for public uses as of the cut-off date under Section 72-5-301; and(ii) the highway currently exists in a condition suitable for public use.

(b) The proponent of the R.S. 2477 status of the highway bears the burden of proving acceptance of the grant by a preponderance of the evidence for all decisions that are not subject to Subsection (6)(a).

