2004

Utah County and State of Utah v. Randy Butler : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

UTAH COUNTY and STATE OF UTAH, by and through its DEPARTMENT OF NATURAL RESOURCES, DIVISION OF WILDLIFE RESOURCES,

Plaintiffs/Appellees,

vs.

RANDY BUTLER, DONNA BUTLER, MARGARET CONDLEY, ELIZABETH CONDLEY, BLAINE EVANS, LINDA EVANS, and JOHN DOES 1-15,

Defendants/Appellants.

Case No. 20040809-CA

ORAL ARGUMENT NOT REQUESTED

PUBLISHED OPINION

BRIEF OF APPELLEE UTAH DIVISION OF WILDLIFE RESOURCES

Appeal from the Findings of Fact, Conclusions of Law, and Order signed by the Honorable James R. Taylor on August 16, 2004, and entered that same day in the Fourth Judicial District Court for Utah County, State of Utah

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BRIEF OF APPELLEE UTAH DIVISION OF WILDLIFE RESOURCES

JURISDICTION

This appeal is taken from the Findings of Fact, Conclusions of Law, and Order signed and entered by the Honorable James R. Taylor on August 16, 2004 in the Fourth Judicial District Court for Utah County, State of Utah. The Utah Supreme Court transferred the appeal to the Utah Court of Appeals pursuant to Utah Code Ann. § 78-2-2(4) (West 2004), and the Utah Court of Appeals assumes appellate jurisdiction over the appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) (West 2004).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Whether the trial court's factual findings on historical public use of the Bennie Creek Road are supported in the record. Specifically, whether some of the witnesses at trial used the road in violation of criminal trespass laws and whether the trial court improperly relied upon the testimony.

Standard of review: The trial court's ultimate determination of public dedication of a road under Utah statute is a mixed question of fact and law, and is therefore reviewed for correctness. Heber City Corp. v. Simpson, 942 P.2d 307, 309 (Utah 1997). However, the appellate court gives significant discretion to the trial court in its application of the facts to the governing dedication statute because of the "highly fact dependent" nature of the determination. Id. at 310.

2. Whether the trial court's factual findings on the public's continuous use of the Bennie Creek Road are clearly erroneous.

Standard of review: The trial court's ultimate determination of public dedication of a road under Utah statute is a mixed question of fact and law, and is therefore reviewed for correctness. Heber City Corp. v. Simpson, 942 P.2d 307, 309 (Utah 1997). However, the appellate court gives significant discretion to the trial court in its application of the facts to the governing dedication statute because of the "highly fact dependent" nature of the determination. Id. at 310.

3. Whether the trial court erred under § 72-5-104(1) in identifying a fifty-five year period over which the Bennie Creek Road was used continuously as a public thoroughfare, as opposed to identifying a precise ten-year period.

Standard of review: The determination of whether the trial court correctly interpreted Utah Code Ann. § 72-5-104(1) (West 2004) is a question of law and reviewed for correctness. AWINC Corp. v. Simonsen, 2005 UT App 168, ¶ 8, 112 P.3d 1228.

4. Whether the trial court committed reversible error in declining to issue a written decision specific to Appellants' untimely Objection to the proposed Findings of Fact, Conclusions of Law and Order, and in dispensing with their request for hearing on the matter.

Standard of review: The determination of whether the trial court erred in declining to grant a hearing and issue a written order with respect to Appellants' Objection to the proposed Findings of Fact and Conclusions of Law is an issue reviewed under an abuse of discretion standard. State v. All Real Property, 2001 UT App 361, ¶ 6, 37 P.3d 276, 278 (Utah Ct. App. 2001); *See also,* Merrill v. Bailey & Sons Co., 106 P.2d 255, 260 (Utah 1940).

DETERMINATIVE STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

The text of the determinative statute, Utah Code Ann. § 72-5-104(1), appears in Addendum A and in the body of this brief.

STATEMENT OF THE CASE

In the fall of 1996, Appellants Randy and Donna Butler installed a steel gate across the Bennie Creek Road. In October 2000, Appellees filed a complaint in the Fourth Judicial District Court for Utah County against Appellants Butler for illegally closing a public road previously abandoned and dedicated to public use pursuant to Utah Code Ann. § 72-5-104(1) (West 2004). (R. 12). Appellees subsequently amended the complaint on October 12, 2001 to include additional property owners adjoining the road, including Margaret Condley, Michael Condley, Elizabeth Condley, Blaine Evans and Linda Evans. (R. 199). Appellants all denied the allegations contained in the amended complaint. (R. 277). On October 1, 2003, the trial court signed an order dismissing Margaret, Michael, and Elizabeth Condley from the case pursuant to stipulation between the involved parties. (R. 1201-18).

The remaining parties participated in an eight day bench trial in June 2004. (R. 1442-55). On June 16, 2004, the trial court issued its Memorandum Decision holding the Bennie Creek Road dedicated and abandoned to public use pursuant to § 72-5-104. (R. 1473 and Addendum B). Appellees filed proposed Findings of Fact, Conclusions of Law, and Order on July 16, 2004. (R. 1507, 1526).

Appellants filed an Objection to the proposed Findings of Fact, Conclusions of Law, and Order on August 10, 2004. (R. 1486). On August 16, 2004, Appellees filed a Reply to Appellants' Objection together with a notice to submit

for decision. (R. 1503, 1506). The trial court judge approved and executed the proposed Findings of Fact, Conclusions of Law, and Order on August 16, 2004. (R. 1507-26 and Addendum C).

Appellants Donna and Randy Butler and Linda and Blaine Evans then filed a Notice of Appeal to the Utah Supreme Court on September 15, 2004. (R. 1620-23). Appellee Utah County subsequently filed a Notice of Cross-Appeal on September 27, 2004. (R. 1631). The Utah Supreme Court transferred the appeal and cross-appeal to the Utah Court of Appeals on September 23, 2004 pursuant to Utah Code Ann. § 78-2-2(4) (West 2004).

STATEMENT OF THE FACTS

In 1996, Appellants Randy and Donna Butler erected a large metal gate across the Bennie Creek Road near their home. (R. 1514 ¶31). They locked the gate closed and brought to an end a lengthy history of unrestricted public use of the road. (R. 1514 ¶31; R. 1513 ¶¶31-33).

The Bennie Creek Road commences in Birdseye, Utah at the junction of U.S. Highway 89 and continues westerly approximately 2.5 miles to the eastern edge of the Uinta National Forest. (R. 1523 ¶¶3-4). The road continues into the National Forest where it provides access to a number of camping areas, hiking trails, and the Nebo Loop Road. (R. 1522 ¶10; R. 1516 ¶24). Portions of the Bennie Creek Road cross Appellants' properties before reaching the National Forest. (R. 1524-25 ¶¶1-2).

Sixty-five witnesses testified at trial recalling facts and circumstances relative to the use and condition of the Bennie Creek Road from as early as 1927. (R. 1523 ¶5). Earl Gardner owned what is now Appellants Randy and Donna Butler's property from 1927 to 1963. (R. 1523 ¶8). During that period of time the public frequently traveled the road and the Gardners never attempted to restrict or regulate public use of the road. (R. 1523 ¶8). From 1927 until Appellant Randy Butler installed a gate in 1996 to restrict public use of the road, a wide variety of people traveled the road unimpeded into the National Forest for sundry activities such as hiking, sightseeing, fishing, hunting, camping, horseback riding, family outings, livestock operations, irrigation maintenance, law enforcement, and trail and road maintenance. (R. 1522 ¶10; R. 1519 ¶16; R. 1515 ¶26).

Although wire stock gates occasionally crossed the road at a couple locations, the overwhelming number of witnesses testified that none of the gates were ever locked closed or posted against trespassing prior to 1980. (R. 1522 ¶¶10-11; R. 1519 ¶16; R. 1517 ¶¶20-21; R. 1516 ¶¶22-23). The gates were employed to control livestock movement. (R. 1517 ¶¶20-21; R. 1516 ¶23). The public continuously used the road whenever necessary or convenient for a period in excess of ten years. (R. 1515 ¶28).

Travel on the road was impacted from time to time by weather, springs and a bog during wetter times of the year, and by irrigation practices in the summer. (R. 1522 ¶11; R. 1517 ¶18). Nevertheless, the public continuously traveled the

road by motor vehicle, wagon, horseback and foot despite these seasonal conditions. (R. 1522 ¶11; R. 1517 ¶18). Utah County and the United States Forest Service regularly graded and improved the road beginning in the 1950s and extending into the late 1990s. (R. 1516 ¶25). The road maintenance improved travel on the road. (R. 1516 ¶25).

A number of "No Trespassing" signs and yellow and orange paint markings were placed on trees and fence posts paralleling the length of the road crossing Appellants' properties. (R. 1518 ¶19). None of the signs or markings explicitly or implicitly identified the road as closed to public travel. (R. 1518 ¶19). The physical juxtaposition, frequency and content of the signs and paint markings clearly posted the property adjacent to the road against trespass as required in Utah Code Ann. § 23-20-14 (West 2004), but they did not prohibit public use of the road. (R. 1518 ¶19).

Although the road had been continuously used by the public as a thoroughfare for over seventy years, Appellants Randy and Donna Butler constructed a steel gate across the road in 1996 and locked it closed. (R. 1514 ¶31).

SUMMARY OF THE ARGUMENT

1. The trial court correctly concluded the Bennie Creek Road was abandoned and dedicated to public use pursuant to Utah Code Ann. § 72-5-104 (West 2004). Appellees established by clear and convincing evidence the road had been

continuously used as a public thoroughfare for a period of ten years. Appellants' claim the trial court erred in considering the testimony of alleged trespassers in its Findings is without merit.

First, Appellants waived the right to raise this claim on appeal when they failed to properly preserve it in the trial court. Closing argument is the only place in the trial record where Appellants reference trespass as a matter for the trial court's consideration. However, that discussion involved nothing more than a general summary of the criminal trespass statute in Utah Code Ann. § 23-20-14, and a vague discussion of an unidentified person who allegedly traveled the road in trespass. Appellants claim on appeal the trial court erroneously relied upon the testimony of persons traveling the road in violation of common law trespass principles. Common law trespass was never specifically mentioned or argued in closing argument or elsewhere in the record. The closing argument discussion was untimely, vague, inapposite and lacked sufficient specificity to enable the trial court an adequate opportunity to understand and rule on the issue. Therefore, Appellants waived the common law trespass claim and cannot raise it now for the first time on appeal.

Second, Appellants' trespass argument is, in reality, a challenge to the trial court's ultimate finding that the road had been used continuously as a public thoroughfare for a period of ten years. The trial court carefully weighed and considered the extensive testimony offered at trial on the presence and absence

of locked gates and "No Trespassing" signs. These are the indica of landowner intent to close a road to public use and are at the heart of the dedication statute analysis. They are also prerequisites for enforcing the State's criminal trespass statutes. The trial court concluded the overwhelming weight of evidence demonstrated the road was never posted against public travel or obstructed by locked gates from 1927 through 1980. Appellants are required to marshal all the evidence in the record supporting the trial court's Findings on these facts in order to challenge them. Inasmuch as Appellants have wholly failed to marshal any evidence supporting the trial court's Findings on trespass related issues, they are presumed substantiated in the record and should remain undisturbed.

Lastly, common law trespass is a necessary element for establishing a public dedication under § 72-5-104, and not a legal theory upon which to defeat it. To create a public thoroughfare by use, travel upon a road must be non-permissive. Permissive use of a road cannot itself establish a public dedication. Common law trespass, on the other hand, enjoins any type of non-permissive use of another's property. To suggest common law trespass invalidates uses otherwise qualified to establish a public thoroughfare is equivalent to stating non-permissive use can never create a public dedication. Such a legal interpretation eviscerates § 72-5-104 and leaves it without legal effect. Accordingly, it cannot serve as a basis to disturb the trial court's Findings and Conclusions.

2. Appellants challenge the trial court's ultimate finding that the Bennie Creek Road was used "continuously" as a public thoroughfare for ten years. While Appellants recognize a duty to marshal the evidence in support of the trial court's Findings on "continuous use," they maintain there is no evidence in support of the Finding. The record is replete with testimony from fifty of Appellees' witnesses who used the road as often as they found it convenient and necessary or observed such use by others. The testimony collectively established extensive public use of the road from the mid-1920s to 1996 when Appellant Butler obstructed travel with a locked gate. The road was used to access the National Forest during all seasons of the year for a variety of purposes, including hunting, fishing, camping, hiking, picnicking, horseback riding, sightseeing, and livestock operations. Although irrigation practices and naturally occurring springs created muddy conditions from time to time, public travel on the road nonetheless continued by vehicle, horseback, and foot. Appellants failed to marshal any of this evidence or the other evidence in the record supporting the trial court's Findings on continuous use. Therefore, the trial court's Findings should be upheld.

3. The trial court did not err in identifying a fifty-five year period over which the Bennie Creek Road was used continuously as a public thoroughfare, as opposed to pinpointing a precise ten-year period. The trial court found by clear and convincing evidence that the road was used continuously as a public

thoroughfare from 1927 to 1980. Once a public thoroughfare is created, it continues unless officially vacated by the county authority having jurisdiction over the road. *See* Utah Code Ann. § 72-5-105. No evidence was presented at trial suggesting that Utah County's interest in the road had ever been vacated. The dedication statute requires that continuous use be established for ten years. If ten years of use is the required minimum, fifty-five years of continuous use certainly satisfies the requirement, and a court is under no obligation to specifically identify a ten-year subset of the larger period. Appellants' argument is without merit and cannot serve as a basis to set aside the trial court's Findings and Conclusions.

4. Appellants' Objection to the proposed Findings of Fact, Conclusions of Law, and Order and their request for a hearing were both filed untimely and the trial court was under no obligation to issue a written decision specific to the Objection or to afford a hearing on the matter. Nevertheless, the trial court ruled on Appellants' Objection when it signed the proposed Findings of Fact, Conclusions of Law, and Order. Nothing in law or procedure requires a court to issue a written decision on objections to proposed findings and conclusions or to hear argument. The trial court did not abuse its discretion by signing the proposed Findings and Conclusions without first hearing Appellants and issuing a written decision.

ARGUMENT

I. THE TRIAL COURT WAS CORRECT IN DEEMING THE USERS OF THE BENNIE CREEK ROAD MEMBERS OF THE PUBLIC.

Utah Code Ann. § 72-5-104(1) reads: "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." Appellants assert trespassers are not members of the public for purposes of establishing a public thoroughfare by use, and that the trial court erred by not applying common law trespass principles to the dedication statute.

A. Appellants Failed to Properly Preserve the Issue of Common Law Trespass in the Lower Court and are Estopped from Raising it for the First Time on Appeal.

Appellants claim for the first time on appeal that trespassers do not constitute members of the public under § 72-5-104. Appellants maintain that the trespass argument was preserved in closing argument on the final day of trial. (*See* Appellants' Brief, Statement of Issues/Standards of Review, p. 6, ¶1). However, the cited pages of trial transcript provide nothing more than a general summary of the criminal trespass statute in Utah Code Ann. § 23-20-14, and a vague discussion of an unidentified person that allegedly traveled the Bennie Creek Road in trespass. (R. 1646: 1197-98). Appellants further neglected to explain to the trial court exactly what the law requires with respect to trespass and public dedications and how the two principles interplay, if at all.

To preserve an issue for appeal, it must be raised in a timely fashion at the trial level, it must be specific, and it must be supported by evidence or relevant legal authority. Hatch v. Davis, 2004 UT App 378, ¶ 56,102 P.3d 774. Issues that are not timely, specific or properly supported by evidence or legal authority are usually deemed waived. *See* Smith v. Hales & Warner Construction, Inc., 2005 UT App 38, 107 P.3d 701.

Appellants failed to raise the trespass claim in a timely manner. Appellants raise the trespass issue for the first time during closing arguments at trial. Although an issue can be preserved for appeal in limited circumstances by raising it for the first time in closing argument, it must be presented with sufficient specificity and clarity to enable the trial court to fully consider the matter. Chapman v. Uintah County, 2003 UT App 383, ¶¶ 25-26, 81 P.3d 761. The vague discussion of trespass in Appellants' closing argument lacked sufficient specificity and is, therefore, untimely.

Appellants' trespass argument was not specific and did not enable the trial court sufficient opportunity to thoroughly understand and consider the issue. Appellants' brief appears to focus on some undefined interplay between common law trespass and the public dedication statute. However, those portions of the record where Appellants assert to have preserved the trespass claim refer exclusively to criminal trespass. These two forms of trespass are not the same. Criminal trespass typically requires the subject's knowledge, via notice, that entry

upon the property is prohibited. *See* Utah Code Ann. §§ 23-20-14 and 76-6-206. Common law trespass, on the other hand, is presumed on intentional entry upon another's property, regardless of knowledge. *See* Walker Drug Co., Inc. v. La Sal Oil Co., 972 P.2d 1238, 1243 (Utah 1998); O'Neil v. San Pedro, L.A. & S.L.R. Co., 114 P. 127, 128 (Utah 1911); RESTATEMENT (SECOND) OF TORTS § 158 (1997). Neither Appellants' brief nor the record explain with any detail or provide legal authority on the role of trespass (common law or criminal) in applying public dedication principles under § 72-5-104. Appellants' general reference to criminal trespass in closing argument lacks sufficient specificity to preserve their common law trespass claim raised on appeal.

Lastly, Appellants did not provide the trial court legal authority supporting the trespass claim to properly preserve the issue for appeal. The fundamental role of trespass in determining whether a road has been abandoned and dedicated to public use is that of determining the historical efforts of the landowner to close the road to public use. However, this legal principle was never specifically articulated at trial and, in any event, focused on criminal trespass. The trial court did not consider common law trespass in its Findings and Conclusions because the issue was never raised during trial. It never had an opportunity to consider the issue.

Appellants' trespass discussion in closing argument was untimely, vague, inapposite, and lacked legal authority. Appellants cannot now raise for the first

time on appeal that the trial court erred by failing to consider common law trespass in its decision. The claim has been waived.

B. Alternatively, the Trial Court's Findings Should be Upheld Since Appellants Have Failed to Marshall the Evidence.

The trial court's Findings of Fact, Conclusions of Law, and Order plainly show that all evidence presented at trial regarding "No Trespassing" signs and gates along the Bennie Creek Road was carefully considered and weighed.[1] With respect to "No Trespassing" signs, the trial court concluded the signs along the road posted the adjacent property against trespass, not the road. (R. 1518 ¶19). As for gates across the road, the trial court concluded the overwhelming weight of evidence showed the wire gates were for livestock control, not locked shut, nor posted in a manner suggesting the road was closed to public use. (R. 1516-17 ¶¶20-23). Based on these findings and others, the trial court concluded the Bennie Creek Road had been abandoned and dedicated to public use prior to 1980. (R. 1510 ¶¶7-8).

Appellants attempt to veil their trespass claims as a question of law in order to avoid marshaling the voluminous evidence supporting the trial court's Findings of Fact. "To successfully challenge an ultimate finding of fact , an appellant must first marshal all the evidence in support of the finding and then demonstrate that

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[1] A brief summary of several witnesses' trial testimony concerning extensive use of the road and the absence of locked gates or signs posting the road closed to public use is provided in Point II. of Appellees' brief, *infra*.

the evidence is legally insufficient to support the finding even when viewing it in the light most favorable to the court below." Parduhn v. Bennett, 2005 UT 22, ¶ 25, 112 P.3d 495 (internal quotations omitted). Appellants must marshal ". . . in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists." AWINC Corp. v. Simonsen, 2005 UT App 168, ¶ 10, 112 P.3d 1228, quoting West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah Ct. App. 1991). Appellant has failed to marshal any evidence supporting the trial court's Findings with respect to trespass use of the Bennie Creek Road. Therefore, the trial court's findings should be upheld.

C. Alternatively, Common Law Trespass is an Essential Element in Establishing a Public Thoroughfare.

Several conditions must be met for a private road to become a public thoroughfare under § 72-5-104: 1) there must be passing or travel, 2) the use must be by the public, and 3) the use must not be permissive. Heber City Corp v. Simpson, 942 P.2d 307, 311 (Utah 1997). Appellants focus on the public use requirement by contending that trespassers are not members of the public. They assert a "substantial" number of Appellees' witnesses were trespassers. In support of this argument, Appellants cite to nine places in the record where seven of Appellees' witnesses claimed to have seen "No Trespassing" signs along the Bennie Creek Road. Appellants' argument, however, is flawed in two respects.

First, seven of Appellees' fifty witnesses hardly constitutes a "substantial number." Second, Appellants take these witnesses' testimonies out of context. While each of the seven witnesses indeed testified seeing "No Trespassing" signs along the Bennie Creek Road during their travels, each stated elsewhere in their testimony that the content and location of the signs on the side of the road led them to believe they posted the property adjacent to the road, and not the road itself. (R. 1639: 39: 13-15: R. 72: 10-14; R. 1640: 227: 20-24; R.1640: 287: 1-7; R. 1640: 349: 1-14; R. 1640: 379: 1-7: 1641: 507: 14-21; and R. 1642: 704: 1-8). One must seriously question any other interpretation of the signs. If the road was closed to public use, as Appellants contend, there would be no need to post "No Trespassing" signs along a couple miles of its stretch. The more reasoned approach taken by the trial court and nearly every witness who observed the signs was that they posted the property adjacent to the road and not the road itself.

Appellants suggest that common law trespassers do not qualify as the public for purposes of establishing a public thoroughfare, but they fail to cite any case law supporting this position. Appellants state that common law trespass is simply the wrongful (without permission) entry upon the property of another. Appellants' Brief, p. 21. Yet, Utah case law is clear that permissive use is insufficient to establish a public thoroughfare under § 72-5-104. Campbell v. Box Elder County, 962 P.2d 806, 809 (Utah Ct. App. 1998). Appellants' common law

trespass argument is irreconcilable with a fundamental premise of the dedication statute: use must be non-permissive. Dedication under § 72-5-104 is a form of prescriptive right. It is generally accepted that the type of use required to acquire a prescriptive right must be adverse and hostile to the landowner against whom the right is asserted. *See* 25 AM. JUR. 2D *Easements and Licenses* § 55 (2005). "Adverse" and "hostile" has been defined as being trespassory in nature, or use without license or permission. 25 AM. JUR. 2D *Easements and Licenses* § 56 (2005).

Appellants' common law trespass argument not only eviscerates the purpose of § 72-5-104 and leaves it without legal effect, it also flies in the face of centuries of prescriptive right jurisprudence. Accordingly, it cannot serve as a basis to disturb the trial court's Findings of Fact, Conclusions of Law and Order.

II. THE TRIAL COURT CORRECTLY INTERPRETED AND APPLIED THE LAW OF "CONTINUOUS USE" BY HOLDING THAT THE BENNIE CREEK ROAD HAD BEEN CONTINUOUSLY USED BY THE PUBLIC.

Section 72-5-104 requires that the public must use a road continuously in order to dedicate it to public use. Under the continuous use requirement, members of the public must have been able to use the road whenever they found it necessary or convenient. Campbell v. Box Elder County, 962 P.2d 806, 809 (Utah Ct. App. 1998). The trial court meticulously listed in its Findings of Fact, Conclusions of Law, and Order numerous examples of continuous public use of the road spanning over seventy years. It concluded there was clear and

convincing evidence showing the public continuously used the road for the requisite period of time. (R. 1515 ¶¶27-28).

Appellants argue, in spite of the trial court's detailed Findings, that the evidence was not convincing enough to establish continuous use.

A. The Trial Court Findings Should Be Upheld Since Appellants Failed to Properly Marshal the Evidence Supporting the Trial Court's Factual Findings.

Appellants challenge the trial court's Finding of Fact that the Bennie Creek Road was used "continuously" for a period of ten years. While they recognize a duty to marshal the evidence in support of the trial court's Finding of Fact supporting continuous use, they maintain "[t]here is no evidence to marshal in support of [the] finding." Appellants' Brief, p. 26. "If an appellant argues that no evidence supports a factual finding, the burden to marshal does not then shift to the appellee; rather, the appellee may prove that the appellant did not meet [its] marshaling burden by presenting a 'scintilla' of evidence in support of the ultimate finding." Parduhn, 2005 UT 22, ¶ 25 .

To successfully challenge an ultimate finding of fact, such as continuous use, Appellants must "marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in the light most favorable to the court below." Parduhn, 2005 UT 22, ¶ 25 *quoting* Chen v. Stewart, 2004 UT 82, ¶ 76, 100 P.3d 1177. Appellants must marshal "in comprehensive and fastidious order, every scrap of competent

evidence introduced at trial which supports the very findings the appellant resists." AWINC Corp., 2005 UT App 168, ¶ 10, *quoting* West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah Ct. App. 1991).

Appellants wholly fail to marshal any evidence in support of their contention that the trial court's continuous use findings are not supported in the record. However, the record is replete with evidence demonstrating the Bennie Creek Road was used continuously as a public thoroughfare for a period in excess of ten years. The trial court's Findings of Fact, Conclusions of Law, and Order meticulously recognizes this evidence. Although thoroughly summarizing the testimony of sixty-five witnesses over eight days of trial is legally unnecessary to provide a mere scintilla of evidence, a brief overview of a few key witnesses' testimonies supporting the trial courts Findings is in order.

Madge Truman's family owned what is now Appellant Butler's property. Her family owned the property when she was born in 1927 and continued to own it until approximately 1960. (R. 1639: 128: 13-14; R. 129: 6-14; R. 1639: 130: 10-17). During that period of time, Ms. Truman witnessed continuous public travel on the Bennie Creek Road and no attempts were made by her family or others to restrict or deny access to the road. (R. 1639: 134-137). Virginia Johnson, Madge Truman's sister, also witnessed continuous public travel on the road between 1940 and 1996 and no attempts were made through gates, signs or requiring permission to restrict public use of the road. (R. 1639: 145: 12-13; R. 1639: 150-

154). Steve Tipton testified to using the road a half a dozen times each year between 1948 and 1996 for purposes of hunting and fishing. (R. 1639: 160: 18-20; R. 1639: 162: 5-23). He traveled the road by pickup and never encountered locked gates or signs posting the road closed to public use. (R. 1639: 163: 6-18; R. 1639: 165: 19-25; R. 1639: 166: 1-3). He used the road to travel into the National Forest on many occasions. (R. 1639: 167: 25; R. 1639: 168: 1-4). Dale Gurley, a conservation officer for the Utah Division of Wildlife Resources, testified to patrolling the road in a pickup truck multiple times a week during summer and fall between 1968 and 1991. (R. 1640: 298: 12-19; R. 1640: 300: 1-5). He also traveled the road for personal use to access the National Forest beginning in 1958. (R. 1640: 300: 10-25; R. 1640: 301:1-7). During his travels, Mr. Gurley observed other people using the road for purposes of hunting and fishing primarily on the National Forest. (R. 1640: 307: 13-25; R. 1640: 308: 1-23). At no time did he encounter locked gates, signs posting the road closed to public use, or seek permission to use the road. (R. 1640: 301-306). Clyde Naylor is the Utah County Engineer, Surveyor, and Public Works Director. He testified that Utah County regularly maintained the entire length of the Bennie Creek Road into the National Forest from 1974 through 1996. (R. 1639: 83-127). Ronald Daley testified to traveling the road several times a year high into the canyon by motor vehicle between 1933 and 1996 to hunt, fish and picnic. (R. 1641: 485: 13-20; R. 1641: 486: 1-21; R. 1641: 487: 3-7; R. 1641: 491: 23-25; R. 1641: 492: 1-3). He

observed other people regularly using the road and never sought permission to use it himself, nor did he encounter any locked gates or signs posting the road closed. (R. 1641: 488: 6-25). Dewayne Newitt also traveled the road eight to twelve times a year between 1952 and 1996. (R. 1639: 19: 1-25; R. 1639: 21: 7-10). He observed other people using the road in motor vehicles on many occasions, and he never sought permission to use the road or encountered locked gates or signs posting the road closed. (R. 1639: 25: 3-20; R. 1639: 25-32).

Emil Mitchell, Jesse Mitchell, and Lloyd Jackson all testified at trial for Appellants. Emil Mitchell traveled the road from 1937 to 1949. (R. 1643: 788: 1-9). Jesse Mitchell traveled the road from 1947 to 2004. (R. 1643: 824-26). Lloyd Jackson traveled the road from 1944 to 2004. (R. 1643: 848: 14-19). Each of these witnesses periodically encountered a couple wire stock gates across the road, but they were never locked shut or posted with signs suggesting the road was closed to public use. (R. 1643: 788-90; R. 1643: 827-29; R. 1643: 836: 2-5; R. 1643: 838: 10-20; R. 1643: 840: 24-25; R. 1643: 841: 1-7; R. 1643: 869-872). They all recalled a spring and bog on the road near the Forest Service boundary which made travel difficult. However, they all testified being able to traverse the bog in tractors, trucks, or horse and wagon. (R. 1643: 778: 4-12; R: 1643: 830: 13-20; R. 1643: 841: 24-25; R. 1643: 842: 1; R. 1643: 874: 8-25; R. 1643: 875: 1-7; R. 1643: 884-85). Lloyd Jackson further testified that although he encountered

irrigation water on the road from time to time, the road was still passable by vehicle. (R. 1643: 872: 15-25; R. 1643: 873; 1-13).

Many more witnesses testified to traveling the Bennie Creek Road into the National Forest without landowner permission and unobstructed by natural or artificial conditions, locked gates or signs posting the road closed to public use.

Appellants suggest the trial court's "continuous use" Finding is flawed on account of irrigation practices and seasonal water conditions which a small number of witnesses testified made the road impassible at times. The trial court specifically recognized this testimony in its Findings of Fact, Conclusions of Law, and Order and concluded that a clear and convincing majority of witnesses testified to traveling the road by foot, horse, and vehicle unrestricted by such conditions. (R. 1518 ¶18; R. 1516 ¶25). Moreover, public use of a road may be "continuous" despite being limited from time to time by seasonal conditions, such as weather. AWINC Corp., 2005 UT App 168, ¶ 14.

Appellants further challenge the trial court's "continuous use" Finding claiming it failed to consider the evidence presented on "locked gates" and "No Trespassing" signs on the Bennie Creek Road. Contrary to Appellants' assertion, the trial court carefully considered and weighed the evidence presented on gates and signs. The trial court concluded the "No Trespassing" signs along the road posted the adjacent property against trespass, not the road. (R. 1518 ¶19). Similarly, the trial court concluded the overwhelming weight of evidence showed

the wire gates that periodically crossed the road were for livestock control, unlocked, and not posted in a manner suggesting the road was closed to public use. (R. 1516-17 ¶¶20-23). Based on these findings and others, the trial court concluded the Bennie Creek Road had been abandoned and dedicated to public use prior to 1980. (R. 1510 ¶¶7-8).

The trial court weighed and considered all the evidence presented at trial and concluded it demonstrated by clear and convincing evidence that the road had been used continuously for a period of ten years prior to 1980. Appellants, on the other hand, have failed to marshal any evidence supporting these Findings and Conclusions. Therefore, the trial court's Findings and Conclusions should be upheld.

III. THE TRIAL COURT CORRECTLY FOLLOWED THE DEDICATION STATUTE AND WAS NOT REQUIRED TO SPECIFICALLY IDENTIFY THE TEN-YEAR PERIOD OF CONTINUOUS USE.

To establish a public thoroughfare under § 72-5-104, the public must use a road continuously for a period of ten years. Appellants correctly recognize that use need not be constant to be continuous as long as passage is available as often as the claimant finds it convenient or necessary. Richards v. Pines Ranch, Inc., 559 P.2d 948, 949 (Utah 1977). "Mere intermission is not interruption." Id. Based on the evidence offered at trial, the trial court concluded the public continuously traveled the Bennie Creek Road without interruption from 1925 through 1980. (R. 1518 ¶ 18; R. 1516 ¶¶22, 25; R. 1515 ¶ 28; R. 1510 ¶7).

Appellants claim, without legal authority or support, the trial court erred by failing to identify the precise ten-year period when the dedication occurred.

Appellants boldly suggest the trial court was legally obliged to pinpoint one ten-year period among the fifty-five years it found the road continuously used as a public thoroughfare. Neither § 72-5-104 nor relevant case law requires a court to identify a specific ten-year subset of a larger period of time when the elements of dedication are satisfied.[2] It is difficult to conceive that where ten years of continuous use is the required minimum, fifty-five years is somehow legally deficient. This argument is without merit and should not serve as a basis to set aside the trial court's Findings of Fact, Conclusions of law and Order.

IV. THE TRIAL COURT WAS WITHIN ITS DISCRETION WHEN IT RULED ON APPELLANTS' OBJECTION TO THE PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER.

Appellants argue the trial court abused its discretion in declining to specifically respond to their Objection to the proposed Findings of Fact, Conclusions of Law and Order, and afford a hearing.

The trial court judge issued his Memorandum Decision in this case on June 16, 2004 wherein, among other things, he instructed Appellees to prepare findings of fact, conclusions of law, and an order consistent with the decision. (R.

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[2] Once a public thoroughfare is created, it continues as a public road until abandoned or vacated by the public authority having jurisdiction over it. *See* Utah Code Ann. § 72-5-105 (West 2004). Appellants have never claimed or asserted the public status of the Bennie Creek Road to have been abandoned or vacated by competent legal authority.

1437). Thereafter, Appellees mailed proposed Findings of Fact, Conclusions of Law, and Order to Appellants on July 16, 2004. (R. 1526, 1507). The proposed Findings and Conclusions were, in large part, substantively identical to the trial court's Memorandum Decision. Appellees subsequently agreed by written correspondence dated July 22, 2004 to allow Appellants until August 9, 2004 to file an objection to the proposed Findings and Conclusions. (R. 1479). Appellants filed their Objection to Appellees' Proposed Findings of Fact and Conclusions of Law and Request for Hearing on August 10, 2004. (R. 1486). The Objection largely contested the ultimate findings and conclusions in the trial court's Memorandum Decision. Appellees filed a Reply to Appellants' Objection together with a notice to submit for decision on August 16, 2004. (R. 1503, 1506). The trial court judge signed the proposed Findings of Fact, Conclusions of Law, and Order without substantive modification on August 16, 2004. (R. 1526, 1508).

First, Appellants' Objection to the proposed Findings of Fact and Conclusions of Law and their request for a hearing were filed untimely. Rule 7(f)(2) of the Utah Rules of Civil Procedure requires objections to any proposed order be filed within five days after service. Although Appellees agreed to allow Appellants until August 9, 2004 to file an objection, their Objection to the proposed Findings of Fact, Conclusions of Law, and Order was not filed until August 10, 2004. Appellants' Objection and request for hearing was filed

untimely, and the trial court was therefore under no obligation to respond to it in writing or to grant a hearing.

Moreover, all the relevant filings were in the trial court judge's possession and were presumably reviewed when he signed the Findings of Fact, Conclusions of Law and Order on August 16, 2004. The trial court judge heard all the evidence over eight days of trial and assessed the credibility of witnesses. Additionally, the proposed Findings and Conclusions were largely identical to the trial court's Memorandum Decision. Although the trial court judge did not grant a hearing or issue an order specific to Appellants' Objection, he nonetheless rejected Appellants' Objection and ruled on the matter by signing the Findings of Fact, Conclusions of Law and Order as proposed. Nothing in law or rule requires a judge to issue a written decision or grant a hearing[3] on objections to a proposed order. The Utah Supreme Court flatly rejected a claim similar to Appellants in Merrill v. Bailey & Sons Co., 106 P.2d 255 (Utah 1940). The Merrill appellants claimed the lower court erred in adopting proposed findings and conclusions

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[3] Rule 7(e) of the Utah Rules of Civil Procedure states; "A court *may* hold a hearing on any motion." (Emphasis added). Use of the word "may" grants the trial court discretion in determining when and if a hearing should be held. The subsection further adds; "The court shall grant a request for a hearing on a motion under rule 56 or a motion that would dispose of the action or any claim or defense in the action. . . ." Appellants' Objection to the proposed Findings of Fact Conclusions of Law, and Order did not involve a matter that would summarily dispose of the case or a claim or defense in the case. The fate of the case had already been decided in the trial court's Memorandum Decision issued after trial. Therefore, the trial court did not have a legal obligation to hold a hearing on Appellants' Objection.

without first affording the appellants an opportunity to be heard upon their objections to the proposed findings and conclusions. In concluding there was no merit to the contention, the Court held that although it is customary and acceptable to have the prevailing party submit proposed findings and conclusions, it is the ultimate responsibility of the trial court to make them.

> The court may make its findings and conclusions independent of either of the proposed findings and conclusions or the objections and amendments offered thereto. It is certainly not error, therefore, to fail to give the parties an opportunity to be heard on the matter.

Id. at 260.

The trial court's decision not to specifically respond to Appellants' Objection or grant a hearing on the matter was a proper exercise of discretion, and should not serve as a basis for setting aside the Findings of Fact, Conclusions of Law, and Order.

STATEMENT CONCERNING ORAL ARGUMENT AND PUBLISHED OPINION

Appellees do not request oral argument or a published opinion in this case.

(Continued on following page)

CONCLUSION

Based upon the record and the foregoing arguments, Appellees respectfully request this Court to affirm the trial court's August 16, 2005 Findings of Fact, Conclusions of Law, and Order declaring the Bennie Creek Road abandoned and dedicated to public use.

DATED this 13TH day of September, 2005.

MARK L. SHURTLEFF
Utah Attorney General

MARTIN B. BUSHMAN
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that on the 13TH day of September, 2005, I caused to be mailed, postage prepaid, two true and exact copies of BRIEF OF APPELLEE UTAH DIVISION OF WILDLIFE RESOURCES to:

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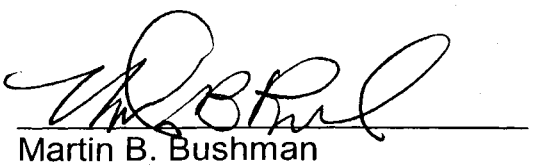

Martin B. Bushman

ADDENDA

ADDENDUM A

§ 72–5–104. Public use constituting dedication—Scope

(1) A highway is dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years.

(2) The dedication and abandonment creates a right-of-way held by the state in accordance with Sections 72–3–102, 72–3–104, 72–3–105, and 72–5–103.

(3) The scope of the right-of-way is that which is reasonable and necessary to ensure safe travel according to the facts and circumstances.

Laws 1963, c. 39, § 89; Laws 1998, c. 270, § 132, eff. March 21, 1998; Laws 2000, c. 324, § 7, eff. March 16, 2000.

Codifications C. 1953, § 27–12–89.

ADDENDUM B

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

State of Utah, et. al.,	:	
Plaintiffs	:	Memorandum Decision
vs.	:	Date: June 16, 2004
Randy Butler, et. al.,	:	Case Number: 000403327
Defendants	:	Division VII: Judge James R. Taylor

This matter came before the Court for trial on June 1, 2004. The case continued through 7 days of testimony concluding with closing arguments on June 15. The Court has taken the matter under advisement and now renders this Memorandum Decision.

The Plaintiffs have asked this Court to determine that a route described as the Benny Creek Road is a public highway under Utah Code Annotated section 72-5-104, 1953 as amended.[1] In addition, the Plaintiffs ask the Court to exercise its equitable powers to restrain the Defendants from blocking the road from public use and declare a right of way along the road for the public, although it seems that a declaration that the route is a public highway would render a further declaration of a public right of way to be superfluous. The Plaintiffs also ask for damages of $10.00 per day since July 29, 1997 when notice was provided to the Defendants that they were

[1]Formerly 27-12-89, renumbered in 1998. The statute has remained substantially unchanged since first enacted by the Territorial Legislature in 1886, Lindsay Land & Livestock Co. v. Churnos, 75 Utah 384, 285 P. 646 at 648 (Utah, 1929).

improperly blocking a public highway under Utah Code Annotated section 72-7-104 and an identical Utah County Ordinance (17-3-1-1).

In a case such as this the Court is required to consider "reconstruction of historical facts concerning timing, nature, and the extent of public usage. . . . [W]itnesses are required to dredge the recesses of their minds for aged memories," Kohler v. Martin, 916 P.2d 910 at 912 (Utah Ct. App. 1996). Over 60 witnesses have testified in this trial recalling facts and circumstances from as early as 1927. Nearly half provided the Court with memories preceding 1960. None of the witnesses, in the view of this Court, attempted to mis-lead or do anything other than give an honest and complete recitation of what they recall. Even so, when the testimony is compared to pictures, maps and other testimony some statements must be given greater credibility than others.

Public Highway

Three factors must be established by clear and convincing evidence in order for a route to be deemed a dedicated highway, abandoned to the use of the public under U.C.A. section 72-5-104: "there must be (i) continuous use, (ii) as a public thoroughfare, (iii) for a period of ten years. . . .Once the technical provisions of [the statute] have been satisfied, the road is a 'public highway.' The court has no discretion to ignore that fact." Campbell v. Box Elder County, 962 P.2d 806 at 808 (Utah Ct. App. 1998) citing Heber City Corp. v. Simpson, 942 P.2d 307 at 310 (Utah, 1997). There is no requirement of proof of the owner's intent to offer the road to the public. Bertagnole v. Pine Meadow Ranches, 639 P.2d 211 at 213 (Utah, 1981); see also Draper

City v. Estate of Bernardo, 888 P.2d 1097 at 1099 (Utah, 1995) and Thurman v. Byram, 626 P.2d 445 at 449 (Utah 1981).

Continuous Use

Continuous use is established where the public has "made a continuous and uninterrupted use of the road as often as they found it convenient or necessary," Campbell, 962 P.2d at 809. The "use may be continuous though not constant, . . . provided it occurred as often as the claimant had occasion to chose to pass. Mere intermission is not interruption." Id. at 809 (citing Richards v. Pines Ranch, Inc., 559 P.2d 948 (Utah 1977).

In this case the evidence was that a route of travel from U.S. Highway 89 near the "Birdseye Church" has extended west toward the Uintah National Forest since before the memory of any witness. An ariel photograph taken in 1949 clearly shows the road extending from the highway into the vicinity of the national forest. Madge Truman and Ginnie Johnson both testified that their family owned the property now owned by Defendant Randy Butler (herinafter "Gardner Property") from 1927 until 1963 and that they lived on the property along the road from 1925 or 1933 (depending upon which sister is considered) until 1949. During that time the road was traveled often and no attempts were made by the family to restrict or deny access to the road to any members of the public. One witness for the Defendants, Lloyd Jackson, testified that he trailed sheep across the Gardner property between 1947 and 1955. He also hunted in the area every year until 1965. He testified that his father "made arrangements" with

Mr. Gardner to move the sheep across the property on the way to the forest service property. The Defendant insists that this travel was, therefore, by permission. However, the witness did not participate in the discussion and both parties to the actual arrangements are deceased. It was apparent that the Gardners had cattle on their property. Care needed to be taken to not allow the sheep to get into the cattle–the herds needed to be kept apart. The conversations and arrangements were just as likely an effort to work out the details of the operation as to gain permission to travel a road. Contrasted with that testimony are the statements by Duane Newitt, Ron Davis, Reneae Swenson, Glen Roberts, Norris Dalton, Youd Barney, Hugh Tangren, Don Daley, Craig Ingram, and Glen Thatcher. All of these witnesses personally used the road for recreation including hunting, fishing, camping and sightseeing in the 1940's and 50's. None encountered locked gates or sought permission. None were ever prevented from traveling the road. Several, including Norris Dalton and Hugh Tangren, drove vehicles well into forest service property.

There was testimony that travel was impacted by the weather. Springs or bogs in the road were worse in wetter times of the year and occasionally restricted travel by vehicle. Winter snow was not plowed off of this mountain road. Nevertheless, the evidence is clear and convincing that for at least 10 years prior to 1958 the road was open and traveled by the public as often as necessary or convenient, interrupted only by naturally occurring conditions such as groundwater (spring water) in wet years and snow in the winter.

Mr. Butler and his parents (J. Lee Butler and Diane Butler) recalled family hunting trips between 1958 and 1962 when family members accompanied the family patriarch, Barney Newitt (Diane Butler's father, Randy Butler's grandfather) to a location in Sanpete County to obtain a key before traveling up the road to camp just below the bog on property now owned by Defendants Blaine and Linda Evans. Randy Butler has a particularly vivid memory from approximately 1962 when, at age 7, he saw his grandfather get out of the truck to unlock a gate and spotted a buck which he shot before opening the gate to allow continued travel on the road. Contrasted against this vivid and believable recollection, however, is other important evidence. Only the Poulson family has been identified as property owners who lived in Sanpete County. Barney Newitt and Grandmother Poulsen, to whom he would have spoken in 1958 to 1962 about a key are both deceased. Steve Poulson testified that to his knowledge the only locked gate on the Poulson property during that time was on a side road south off the Benny Creek road toward an old bunkhouse. Duane Newitt, the brother of Diane Butler, testified that he camped and hunted with the family during those years and does not recall any locked gates. Nineteen other witnesses testified that they traveled the road for a variety of purposes during that time and never encountered any locked gates. None of the other witnesses ever felt it necessary to obtain permission from property owners to travel the road.

Other witnesses testified for the Defendants that there were locked gates on the road. Virgil Neeves testified that between 1958 and 1980 there was a locked gate near the Gardner

home (the last home traveling west toward the forest service property, now occupied by Defendant Randy Butler) which was locked most of the time. He specifically recalled a "cock fight"[2] up the road in 1972 when only people who were supposed to participate were given keys to the gate. A cock fight, of course, is an illegal activity and the one time use of the gate to discourage discovery or participation by persons not known to the participants can hardly be considered to be a termination of general public access. Mr. Neeves' other access to the area was usually across country from the property he worked to the north (the Dixon Ranch) to work on water diversion works along Bennie Creek. He saw people stuck on the road and recalls a cable across the road to stop cars. His memories are simply confused and inconsistent with all of the other testimony about obstructions on the road in question. There is evidence of a cable across a side road belonging to the Poulson family.

Mike Condley testified that he lived in the area from 1970 until 1979. Although he does not recall any locks after 1979, he firmly recalled a locked gate near the Gardner (Butler) home. However, no other witness corroborates this point and descriptions of locked gates by the Butler

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[2]"Cockfights" are illegal contests between roosters bred and trained to fight typically involving wagering and serious threat of injury to the animals. Presently outlawed by U.C.A. section 76-9-301(1)(e), the practice has been illegal in this State since at least 1898. The Revised Statutes of the State of Utah, January 1, 1898 section 4454 provided that "any person who shall keep or use any . . . fowl, or bird, for the purpose of fighting . . . and any person who shall be a party to or be present as a spectator at any such fighting . . . shall be adjudged guilty of a misdemeanor."

family, Defendant Blaine Evans and others put the locked gates farther west, near the present cattle guard between the Butler home and forest service property.

Finally Elizabeth Condley testified that between 1967 and 1977 the gates were never locked in the summer but that they were locked late in every fall. However, her testimony was that she traveled the road on horseback during the summer. There was nothing given to explain how she could have known that the gate was locked in the fall.

The heaviest use of the property was clearly for hunting deer and elk in the fall season. Several dozen witness testified that they personally hunted the area between 1958 and 1980 and never encountered locked gates or were otherwise prevented from using the road. Division of Wildlife Resources officers Gurley and Briggs both patrolled the area to check hunters during that period. Dale Gurley, in particular, patrolled between 1968 and 1991 sometimes observing as many as 25 or 30 hunters in the forest service area who had traveled up the Benny Creek road to hunt. Officer Gurley never encountered locked gates and never needed permission to access the area to check on hunters and fishermen. Kent Cornaby, Forest Service supervisor, routinely traveled the road during the 60's and 70's. Entrance to the forest service during that time was marked by signs.

Shirlene Otteson testified that her family purchased the Gardner property in 1964 and owned it until 1981. During that time she was regularly on the property with her husband and children. The road was considered and treated by her family as a public road during that time.

No attempt was made to close the road during that time. There was testimony that one defense witness, John Mendenhall, was told by Ms. Otteson's father, Mr. Roach, to stop hunting and leave the property. However he testified that he was a teenager with three other teenagers and no adult. He was hunting well off the road on the Roach (Gardner/now Butler) property. Ordering teenagers to leave in such a circumstance hardly equates with restricting travel on the road.

There was testimony that the road is periodically used to deliver irrigation water to property along the road and that when that occurs, the road becomes impassable. However, neither the Gardner family nor the Otteson (Roach) families used that method of irrigation, covering a period from 1925 to 1981.

There was substantial testimony about signs along the road. The Defendants have insisted that there were many signs, perpendicular to the road, coupled with posts painted yellow and orange clearly designating the area as private property. Most of Plaintiffs' witnesses testified that they saw the signs but considered them warning against leaving the road but not a warning against traveling on the road. The evidence was that the signs were placed on various locations along the edge of the road west of the Gardner home and, in particular, around a wire gate in the vicinity of a present cattle guard.

Utah Code Annotated section 23-20-14 provides a mechanism for private property owners to restrict hunter access to their property by posting:

> "Properly posted" means that "No Trespassing" signs or a minimum of 100 square inches of bright yellow, bright orange, or flourescent paint are displayed at all

corners, fishing streams crossing property lines, roads, gates, and rights-of-way entering the land. If metal fence posts are used, the entire exterior side must be painted."

The plain and obvious intent of the statute is to require physical notation or warning at the entrance or on the edge of property. Members of the public encountering such signs would have to conclude, based upon the statute, that they were at a property line or on the edge of private property, meaning that where they are standing is not restricted. Signs and painted posts along a fence running parallel to a road, regardless of the physical juxtaposition of the sign, more clearly indicate the fence as a boundary than prohibiting travel along the road from which the signs can be seen. The signs and painted posts in this case clearly did what the plaintiffs' witnesses assumed–they prohibited travel off of the road, not on the road.

There was testimony regarding four gates on the Benny Creek road between U.S. Highway 89 and the Uintah National Forest. Traveling west from the highway, the first gate location is near the Gardner home (presently the Randy and Donna Butler home). All but one witness described the versions of this gate prior to 1996 as a drift wire gate that was never locked. All testified and assumed it was used to assist in livestock operations and not to restrict general travel on the road.

The second gate to the west was within 100 yards of a present cattle gate. Also a wire gate, most witnesses did not recall any locks and that the gate was only occasionally closed. These witnesses assumed that, again, the gate was for use with livestock operations and not

intended to restrict travel on the road. There was also testimony, however, that this gate was locked on occasion after 1980 and the implication was that this was the gate unlocked by Barney Newitt in the late 50's and early 60's. Remnants of the gate still exist, including a weathered piece of plywood which was brought into court. This evidence is simply too skimpy and too removed to conclude that the fence was locked and signed to disrupt public travel particularly in the face of all the witness who regularly traveled the road and recalled no locks or road restrictions.

There was testimony of a "white gate" constructed of lumber and located near an ancient bridge spanning one of the ditches or streams crossing the road. One witness testified that the gate had been locked on one occasion and one exhibit includes a picture of a yellow pole described as the remnants of the bridge. However, again, this minimal evidence is overwhelmed by the substantial testimony of persons who used and drove the road on all seasons between 1925 and 1980 without encountering any locked gate.

The fourth gate is at the entrance to the forest service property. There has been a sign indicating the entrance to the forest service for at least 35 years and the forest service property has clearly been fenced in the memory of all witnesses. A sign, still on the gate, asks users to "please close the gate."[3] The obstruction was obviously intended to restrict the travel of cattle

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[3]What was formerly a wire livestock gate has been replaced with a cattle guard. A metal gate nearby allows horses and livestock to move through the fence when required. The sign is presently on the metal gate.

and sheep, not people.

It is established, by clear and convincing evidence that the road was in continuous use by the public.

Public Thoroughfare

The term "thoroughfare" is not defined in any Utah statute. Competent legal authority defines the term as "a street or way opening at both ends into another street or public highway, so that one can go through and get out of it without returning. It differs from a cul de sac, which is open only at one end."[4] The Utah Supreme Court has stated that:

> [w]hile it is difficult to fix a standard by which the measure what is a public use or a public thoroughfare, it can be said here that the road was used by many and different persons for a variety of purposes; that it was open to all who desired to use it; that the use made of it was as general and extensive as the situation and surroundings would permit, had the road been formally laid out as a public highway by public authority."

Lindsay Land & Livestock Co. v. Churnos, 75 Utah 384, 285 P. 646 at 648 (Utah 1929).

The Court has also stated that 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." Gillmor v. Carter, 15 U.2d 280, 391 P.2d 426 at 428 (Utah 1964).

In another case evidence that the road was generally impassable, that the road failed to connect or lead to public property and that there had been only minimal maintenance were

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[4]Bouvier's Law Dictionary, Banks-Baldwin Law Publishing Company, Cleveland: 1946.

reasons to overturn a determination by summary judgment that a proposed road was a highway Draper City v. Estate of Bernardo, 888 P.2d 1097 at 1100-1101 (Utah 1995). Of course the Draper City case did not determine that the road known as the "Lower Corner Canyon Road" could not be determined to be a public highway in the face of such evidence, only that the issue could not be resolved via summary judgment. This case is in a substantially different posture.

This Court concludes, by clear and convincing evidence, the following facts about the Benny Creek road. The road or path connects U.S. Highway 89 and the Uintah National Forest. Paths and trails from the top or terminus of the road travel over the mountain and connect to the Nebo Loop Road. During certain seasons and at certain times between 1925 and 1980 there were springs or ditches which created bogs making travel through or around difficult or impossible. Nevertheless, there was regular maintenance performed on the road by Utah County, the United States Forest Service and landowners during that time. The road was graded as needed or following significant storms during the 1950's. The County has had a contract with the forest service requiring them to maintain the road from 1974 through the present time. There was no evidence that the County has not honored that contract. One witness for the Defense testified that he operated a grader for the County and only graded from the church to the Gardner home for several years. Others, however, testified that they graded the road from the termination of oiled road in Birdseye to the forest service property at least twice per year during the decades of the 60's and 70's. The testimony established a wide variety of uses including travel to the forest

service and adjoining private property for fishing, deer hunting, elk hunting, cougar hunting (during the winter), hiking, family outings, general sightseeing, labor on irrigation headwaters, movement of cattle and sheep, law enforcement related to wildlife regulations, and maintenance of forest trails and signs by forest service employees. Vehicles, horses, trailers, hikers, bikes and motorcycles were all driven at various times the entire length of the road ending on forest service property.

The Court concludes that the road was a public thoroughfare before 1980.

10 years

The statute specifies a 10 year period. This Court finds, by clear and convincing evidence that even if it is concluded (which this Court does not) that the road was gated and locked in the late 50's and early 60's as described by the Butlers, the road was used as necessary and convenient by the public for more than 10 years before that time and, again, 10 years after that time.

Reasonable and Necessary Width

Having determined that the Benny Creek road was a public highway before 1980 by clear and convincing evidence, this Court must also determine the reasonable and necessary width of the highway, Kohler v. Martin, 916 P.2d 910 at 914 (Utah Ct. App. 1996), U.C.A. Section 72-5-104(3). The only testimony on this point was that of Clyde Naylor, a qualified engineer and longtime director of public works for Utah County. Mr. Naylor testified that a width of 20 feet

plus a three foot shoulder on each side for a total width of 26 feet was reasonably necessary for anticipated travel. There being no evidence to the contrary the Court finds that the width of the roadway in this case should be 26 feet, including a 3 foot shoulder on each side.[5]

Injunction

As noted above, the issuance of an injunction may be mooted by the determination that the road is a public highway. Nevertheless, it is the order of this Court that the Defendants refrain from blocking, locking or otherwise interfering with public access to the Benny Creek road. It should be noted that the determination expressed in this decision takes into account the occasional use of the road for transportation of irrigation water. While there was little or no evidence that the road was actually used in lieu of an irrigation pipe or ditch before 1980, the testimony was not controverted that with the present, improved condition of the road, the occasional presence of irrigation water on the road will not substantially interfere with public use

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[5]The Court notes that a legal description of the centerline of the road generated from a survey of the road itself was introduced into evidence. The description was challenged by counsel for the Defendants since it appears to lie in a different township or range than the legal description of the Defendants' properties. Testimony was also presented that indicated that several years ago the adjoining property owners agreed to establish their respective boundaries as the center of the roadway and confirmed that agreement by recorded boundary line agreement. No expert testimony was presented to assist this Court to determine if there is a conflict in the two positions or how such a conflict, if it exists, should be resolved. The Court merely determines, today, that the road as it presently exists is a public highway, 20 feet wide with a three foot shoulder on each side.

of the road.

Fines

U.C.A. section 72-7-104 provides that any person who installs, places or maintains a structure within the right-of-way of a highway must remove the structure within ten days of notice. Upon failure to remove the structure "[a] highway authority may recover: . . . (b) $10 for each day the installation remained within the right-of-way after notice was complete." Notice to Mr. and Mrs. Butler was completed on July 29, 1997. Calculated from 10 days after service to the date of this decision, 2,561 days have passed.

Nevertheless, several factors must also be considered. There was testimony that a locked gate was constructed in 1996 by Mr. Butler. There was also substantial testimony that many people were unable to travel the road after that time without gaining permission or using a key provided by Mr. and Mrs. Butler. However, one exhibit shows a gate created by the County which allowed travel past the Butler gate, although admonishing travelers to close the gate and stay on the road until arriving at the forest service. As noted above there have historically been gates across the road for purposes unrelated to obstruction of traffic. An unlocked gate is consistent with this pattern and would not be considered to violate the right-of-way declared today. Consequently, for some of the time since construction of the metal Butler gate the road has been obstructed and for some of the time it has not. No evidence was presented to clarify how many of the intervening 2,561 days were days when the road was obstructed and how many

were not. The Plaintiffs, as the moving party in seeking to obtain the penalty, had the burden of providing specific evidence of the number of days the Defendants have been in violation. Merely showing initial service and testimony that persons were stopped from time to time during the last 6 or 7 years does not meet that burden. Inasmuch as the Court cannot determine with reasonable precision the number of days during which a violation of the State statute and County ordinances existed no penalty can be imposed.

Costs of Court

The Plaintiffs are, however, as the prevailing party entitled to recover reasonable costs of court to be established by affidavit.

Conclusion

In this decision the Court has avoided reference to facts and circumstances after 1980. The Court is convinced by what it considers to be clear and convincing evidence that a public highway was established on the Benny Creek Road decades before the Butler, Evans or even Condley families ever came into possession of the property abutting the road. As a member of the public of this county, state and nation this Court is ashamed that these Defendants have had to suffer abuse at the hands of the general public. Their cattle have been stolen and killed. Their property has been littered. Their lives have been threatened. The distance from "the valley" gives a certain solitude and quiet peace equally attractive to the people who have made Birdseye their home, people who wish to enjoy the natural beauty as visitors and people who wish to

escape rules of behavior. Bullet holes in signs and beer cans and used syringes littering the landscape are not proud symbols of Utah and America. That said, it is also clear that other good and responsible people have used and cherished the area. It was obviously a particularly special place for the Newitt family. Grandchildren have caught their first fish in Benny Creek and dozens and dozens of hunters have relished a yearly visit to Deer Hollow--which was not accidentally named.

It is the business of this Court, sitting in equity, to resolve the needs and desires of competing interests. The law properly demands great deference to private ownership and property rights. In this case, however, the evidence is clear and convincing that the road in question has been a public thoroughfare connecting a national forest and recreation area to a national highway for decades and generations.

Counsel for the Plaintiff is directed to prepare findings of fact, conclusions of law and an order consistent with this decision.

Dated this 16th day of June, 2004

Judge James R. Taylor
Fourth Judicial District Court

A certificate of mailing is on the following page.

State of Utah, et. al. v. Randy Butler, et. al. 000403372 Memorandum Decision 6/16/04

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Mailed this 16 day of June, 2004, postage pre-paid as noted above.

Court Clerk

ADDENDUM C

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IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, STATE OF UTAH

UTAH COUNTY and STATE OF UTAH, by and through its DEPARTMENT OF NATURAL RESOURCES, DIVISION OF WILDLIFE RESOURCES, Plaintiffs, vs. RANDY BUTLER, DONNA BUTLER, MARGARET CONDLEY, MICHAEL E. CONDLEY, ELIZABETH CONDLEY, BLAINE EVANS, LINDA EVANS and JOHN DOES 1 through 15, Defendants.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Civil No. 000403372 Division No. 7 Judge James R. Taylor

This matter came before the Court on a bench trial consisting of June 1st, 2nd, 7th, 8th, 9th, 10th, 14th, and 15th, 2004. Plaintiff Utah County was represented by M. Cort Griffin and Robert J. Moore, Deputy Utah County Attorneys. Plaintiff State of Utah, by and through its Department of Natural Resources, Division of Wildlife Resources, was represented by Martin B. Bushman, Assistant Utah Attorney General. Defendants Randy Butler, Donna Butler, Blaine Evans, and Donna Evans were represented by Mark E. Arnold and Scott Wiggins, of Arnold & Wiggins, P.C.

The Court has reviewed the file, heard evidence at trial, issued a Memorandum Decision dated June 16, 2004, and upon being advised in the premises, now makes the following:

FINDINGS OF FACT

The Court makes the following findings of fact based upon the clear and convincing evidence presented at trial, the admissions of Defendants, and the addition of the Butler Family Trust:

1. That Defendants Randy Butler and Donna Butler are individuals residing in Utah County, Utah, and are the trustees and/or successor trustees of the Butler Family Trust dated the April 11, 2002, which is the owner of record of certain real properties more particularly described as follows:

> COM N 89 DEG 58'01"E ALONG SEC LINE 2661.78 FT FR NW COR SEC 26, T10S, R3E, SLM; S 89 DEG 29'48"E 402.48 FT; S 12 DEG 07'30"W1083.73 FT; N 84 DEG 25'25"W 491.21 FT; N 86 DEG 46'28"W 114.33 FT; S 77 DEG 44'11"W 78.72 FT; S 59 DEG 32'05"W 73.23 FT; S 48 DEG 34'23"W 81.42 FT; S 66 DEG 14'50"W 60.21 FT; S 88 DEG 10'49"W 73.18 FT; N 79 DEG 55'36"W 86.59 FT; N 20 DEG 49"W 444.56 FT; N 13 DEG 12'01"W 265.17 FT; N 31 DEG 28'45"W 353.97 FT; N 61 DEG 03'58"W 244.51 FT; N 16 DEG 47'16"W 346.47 FT; N 12 DEG 28'38"W 368.34 FT; N 89 DEG 26'04"W 1047.86 FT; N 1 DEG 42'24"W 672.01 FT; S 8 DEG 50'11"E 1330.15 FT; S 1 DEG 47'12"E 1315.76 FT; N 89 DEG 58'01"E 1330.89 FT TO BEG. AREA 56.76 ACRES.

ALSO: COM SW COR SEC 23, T10S, R3E, SLM; N 1 DEG 42'24"W 671.48 FT; S 89 DEG 26'04"E 1047.86 FT; S 12 DEG 28'38"E 368.34 FT; S 16 DEG 47'16"E 346.47 FT; S 61 DEG 03'58"E 244.51 FT; S 31 DEG 28'45"E 353.97 FT; S 13 DEG 12'01"E 265.17 FT; S 20 DEG 00'49"E 444.56 FT; N 79 DEG 55'36"W 30.66 FT; N 81 DEG 57'45"W 80 FT; N 77 DEG 09'25"W 503.28 FT; S 83 DEG 57'05"W 131.47 FT; N 83 DEG 21'17"W 364.54 FT; N 65 DEG 44'39"W 278.69 FT; N 55 DEG 47'09"W 218.59 FT; N 63 DEG 31'54"W 325.32 FT; N 587.40 FT TO BEG. AREA 50.30 ACRES.

ALSO: COM. AT NE COR OF SEC 27, T 10 S, R 3 E, SLM; S 8.90 CHS; N 63 3/8 W 19.86 CHS; E 17.77 CHS TO BEG. AREA 7.81 ACRES.

ALSO: SE1/4 OF SE1/4 OF SEC 22, T 10 S, R 3 E, SLM. AREA 40 ACRES.

2. That Defendants Blaine Evans and Linda Evans are individuals residing in Utah County, State of Utah, and are the owners of record of certain real properties more particularly described as follows:

BEG. 10 CHS S OF NW COR OF SEC 26, T 10 S, R 3 E, SLM; S TO THE TOP OF THE "GARDNER KNOLL" 19 CHS M OR 1; N-NE ALONG EXISTING FENCE LINE TO A PT S 63 E 8.65 CHS TO EXISTING COR POST; N 63 W 8.65 CHS M OR 1 TO BEG. AREA 8.22 ACRES M OR 1.

ALSO: COM AT SW COR. SEC. 27, R10S, R3E, SLB&M.; N 0 DEG 10'6"W 2651.35 FT; N 0 DEG 10'6"W 2651.35 FT; S 89 DEG 58'10"E 2640.89 FT; S 89 DEG 58'10"E 1467.41 FT; S 63 DEG 23'0"E 1316.6 FT; S 0 DEG 21'14"E 2078.28 FT; S 0 DEG 21'14"E 1333.77 FT; N 89 DEG 42'26"W 1323.7 FT; S 0 DEG 18'27"E 1331.74 FT; N 89 DEG 37'13"W 1324.8 FT; N 89 DEG 37'13"W 2649.6 FT TO BEG. AREA 597.515 AC.

ALSO: S1/2 OF SW1/4 & SW1/4 OF SE1/4 OF SEC 22, T 10 S, R 3 E, SLM. AREA 120 ACRES.

ALSO: N1/2 OF SW1/4 & N1/2 OF SE 1/4 SEC 22, T 10 S, R 3 E, SLM. AREA 160 ACRES.

3. That the Bennie Creek Road (hereinafter referred to as "Road") commences at or near Birdseye, Utah at a junction with U.S. Highway 89, located in Section 25, Township 10 South, Range 3 East Salt Lake Base and Meridian.

4. That from the Road's junction with U.S. Highway 89, it continues approximately 2.5 miles in a westerly direction through Sections 25, 26, 27 and 22, Township 10 South, Range 3 East Salt Lake Base and Meridian until it reaches the western edge of the Uinta National Forest.

5. That over 60 witnesses testified at trial recalling facts and circumstances from as early as 1927. Nearly half provided the Court with memories preceding 1960. None of the witnesses, in view of the Court, attempted to mis-lead or do anything other than give an honest and complete recitation of what they recall. Even so, when the testimony is compared to pictures, maps and other testimony some statements must be given greater credibility than others.

6. That the Road follows a route of travel from U.S. Highway 89 near the "Birdseye Church" and has extended west toward the Uinta National Forest since before the memory of any witness.

7. That an ariel photo taken in 1946 clearly shows the Road extending from the highway into the vicinity of the national forest.

8. That Madge Truman and Ginnie Johnson both testified that their family owned the property now owned by Defendants Randy Butler and Donna Butler (hereinafter referred to as "Gardner Property") from 1927 until 1963 and that they lived on the property along the Road from 1925 or 1933 (depending upon which sister is considered) until 1949. During that time

the Road was traveled by the public often and no attempts were made by the family to restrict or deny access to the Road to any members of the public.

9. That Loyd Jackson, a defense witness, testified that he trailed sheep across the Gardner property between 1947 and 1955. He also hunted in the area every year until 1965. He testified that his father "made arrangements" with Mr. Gardner to move sheep across the Gardner's property on the way to the forest service property. Defendants insist that this travel was, therefore, by permission. However, Mr. Jackson did not participate in the discussions and both parties to the actual arrangements are deceased. It was apparent that the Gardners had cattle on their property. Care needed to be taken to not allow the sheep to get into the cattle, as the herds needed to be kept apart. The conversations and arrangements were just as likely an effort to work out the details of the operation as to gain permission to travel the Road.

10. That Duane Newitt, Ron Davis, Renae Swenson, Glen Roberts, Norris Dalton, Youd Barney, Hugh Tangren, Don Daley, Craig Ingram, and Glen Thatcher, all personally used the Road for recreation including hunting, fishing, camping, and sightseeing in the 1940's and 50's. None of them encountered locked gates on the Road or sought permission to use the Road. None of them were ever prevented from traveling the Road. Several, including Norris Dalton and Hugh Tangren, drove vehicles well into forest service property.

11. That travel on the Road was impacted by the weather. Springs or bogs in the Road were worse in the wetter times of the year and occasionally restricted travel by vehicle, but not by foot, horseback, or horse drawn wagon. Winter snow was not plowed off the Road.

Nevertheless, the evidence is clear and convincing that for at least 10 years prior to 1958 the road was open and traveled by the public as often as necessary or convenient, interrupted vehicular travel only by naturally occurring conditions such as groundwater (spring water) in wet years and snow in the winter. The springs and bogs in the Road were passable on foot, horseback or by wagon even when vehicle access was restricted.

12. That Defendant Randy Butler and his parents (J. Lee Butler and Diane Butler), defense witnesses, recalled family hunting trips between 1958 and 1962 when family members accompanied the family patriarch, Barney Newitt (Diane Butler's father, Randy Butler's grandfather) to a location in Sanpete County to obtain a key before traveling up the Road to camp just below the bog on the property now owned by Defendants Blaine and Linda Evans. Randy Butler has a particularly vivid memory from approximately 1952 when, at age 7, he saw his grandfather get out of the truck to unlock a gate and spotted a buck which he shot before opening the gate to allow continued travel on the road. Contrasted against this vivid and believable recollection, however, is other important evidence. Only the Poulson family has been identified as property owners who lived in Sanpete County. Barney Newitt and Grandmother Poulsen, to whom he would have spoken in 1958 to 1962 about a key are both deceased. Steve Poulson testified that to his knowledge the only locked gate on the Poulson property during that time was on a side road branching south off the Road toward an old bunkhouse. Duane Newitt, the brother of Diane Butler, testified that he camped and hunted with the family during those years and does not recall any locked gates. Nineteen other witnesses testified that they traveled the Road for a variety of purposes during that time and

never encountered any locked gates. None of the other witnesses ever felt it necessary to obtain permission from property owners to travel the Road.

13. That Virgil Neeves, a defense witness, testified that between 1958 and 1980 there was a cable gate across a cattle guard west of the Gardner home (the last home traveling west toward the forest service property, now occupied by Defendants Randy Butler and Donna Butler) which was locked most of the time. He specifically recalled a "cock fight" up the Road in 1972 when only people who were supposed to participate were given keys to the gate. A cock fight, of course, is an illegal activity and the one time use of the gate to discourage discovery or participation by persons not known to the participants can hardly be considered to be a termination of general public access. Mr. Neeves' other access to the area was usually across country from the property he worked to the north (the Dixon Ranch) to work on water diversion works along Bennie Creek. He saw people stuck on the Road and recalls a cable across a cattle guard on the Road to stop cars. His memories are simply confused and inconsistent with all of the other testimony about obstructions on the Road in question. Further, there is evidence of a cable across a side road belonging to the Poulson family, and a gate and cattle guard on the Road at the Forest Boundary.

14. That Mike Condley, a defense witness, testified that he lived in the area from 1970 until 1979. Although he does not recall any locks after 1979, he firmly recalled a locked gate near the Gardner (Butler) home. However, no other witness corroborates this point and descriptions of locked gates by the Butler family, Defendant Blaine Evans and others put

locked gates farther west, near the present cattle guard between the Butler home and forest service property.

15. That Elizabeth Condley, a defense witness, testified that between 1967 and 1977 the gates were never locked in the summer but that they were locked late in every fall. However, her testimony was that she traveled the Road on horseback during the summer. There was nothing given to explain how she could have known that the gate was locked in the fall.

16. That the heaviest use of the Road was clearly for hunting deer and elk in the fall season. Several dozen witness testified that they personally hunted the area between 1958 and 1980 and never encountered locked gates or were otherwise prevented from using the Road. Division of Wildlife Resources officer Gurley and Briggs patrolled the area to check hunters and fishermen from 1958 through 1996. Dale Gurley, in particular, patrolled between 1968 and 1991 sometimes observing as many as 25 or 30 hunters in the forest service area who had traveled up the Road to hunt. Officer Gurley never encountered locked gates and never needed permission to access the area to check on hunters and fishermen. Kent Cornaby, Forest Service supervisor, routinely traveled the Road during the 60's and 70's for personal and professional purposes. Entrance to the forest service during that time was marked by signs.

17. That Shirlene Otteson, a Plaintiffs witness, testified that her family purchased the Gardner property in 1964 and owned it until 1981. During that time she was regularly on the property with her husband and children. The Road was considered and treated by her family as a public road during that time. No attempt was made to close the Road during that time.

There was testimony that one defense witness, John Mendenhall, was told by Mrs. Otteson's father, Mr. Roach, to stop hunting and leave his property. However, Mr. Mendenhall testified that he was a teenager with three other teenagers and no adult. Mr. Mendenhall was hunting well off the Road on the Roach (Gardner/now Butler) property. Ordering teenagers to leave in such a circumstance hardly equates with restricting travel on the Road.

18. That there was testimony that the Road is periodically used to deliver irrigation water to property along the Road and that when that occurs, the Road becomes impassable. However, neither the Gardner family nor the Otteson (Roach) families used that method of irrigation, covering a period from 1925-1981. A clear and convincing majority of witnesses further traveled the Road unrestricted by irrigation practices.

19. That there was substantial testimony about signs along the Road. The Defendants have insisted that there were many signs, perpendicular to the Road, coupled with posts painted yellow and orange clearly designating the area as private property. Most of Plaintiffs' witnesses testified that they saw the signs but considered them warning against leaving the Road but not a warning against traveling on the Road. The evidence was that the signs were placed on various locations along the edge of the Road west of the Gardner home to the forest boundary and, in particular, around a wire gate in the vicinity of a present cattle guard. Members of the public encountering signs posting property as provided by Utah Code Ann. §23-20-14 would have to conclude, based upon Utah Code Ann. § 23-20-14, that they were at a property line or on the edge of private property, meaning that where they are standing

is not restricted. Signs and painted posts along a fence running parallel to a road, regardless of the physical juxtaposition of the sign, more clearly indicate the fence as a boundary than prohibiting travel along the road from which the signs can be seen. The signs and painted posts in this case clearly did what the Plaintiffs' witnesses assumed, they prohibited travel off of the Road, not on the Road. There was no testimony that any signs stated "Road Closed."

20. That there was testimony regarding four gates on the Road between U.S. Highway 89 and the Uinta National Forest. Traveling west from the highway, the first gate location is near the Gardner home (presently the Randy and Donna Butler home). All but one witness described the versions of this gate prior to 1996 as a drift wire gate that was never locked. All testified and believed it was used to assist in livestock operations and not to restrict general travel on the Road.

21. The second gate to the west was within 100 yards of a present cattle gate. Also a wire gate, most witnesses did not recall any locks and that the gate was only occasionally closed. These witnesses believed that, again, the gate was for use with livestock operations and not intended to restrict travel on the Road. There was also testimony, however, that this gate was locked on occasion after 1980 and the implication was that this was the gate unlocked by Barney Newitt in the late 50's and early 60's. Remnants of the gate sill exist, including a weathered piece of plywood which was brought into court. This evidence is simply too skimpy and too removed to conclude that the fence was locked and signed to disrupt public

travel particularly in the face of all the witness who regularly traveled the Road and recalled no locks or road restrictions.

22. That there was testimony of a "white gate" constructed of lumber and located near an ancient bridge spanning one of the ditches or streams crossing the Road. One witness testified that the gate had been locked on one occasion and one exhibit includes a picture of a yellow pole described as the remnants of a bridge. However, again, this minimal evidence is overwhelmed by the substantial testimony of persons who used and drove the Road in all seasons between 1925 and 1980 without encountering any locked gate.

23. The fourth gate is at the entrance to the forest service property, which was formerly a wire livestock gate, has been replaced with a cattle guard. A metal gate nearby allows horses and livestock to move through the fence when required. There has been a sign there indicating the entrance to the forest service for at least 35 years and the forest service property has clearly been fenced in the memory of all witnesses. A sign, still on the gate, asks users to "please close the gate." The sign is presently on the metal gate. The obstruction was obviously intended to restrict the travel of cattle and sheep, not people.

24. That the Road connects U.S. Highway 89 and the Uinta National Forest. Paths and trails from the top or terminus of the Road travel over the mountain and connect to the Nebo Loop Road.

25. That during certain seasons and at certain times between 1925 and 1980 there were springs or ditches which created bogs at times making vehicular or wagon travel through or around the bogs difficult or impossible. Nevertheless, travel by foot or horse was not restricted and

there was regular maintenance performed on the Road by Utah County, the United States Forest Service and landowners during that time. The Road was graded as needed or following significant storms during the 1950's. The County has had a contract with the forest service requiring them to maintain the Road from 1974 through the present time. There was no evidence that the County has not honored that contract. One witness for the Defense testified that he operated a grader for the County and only graded from the church to the Gardner home for several years. Others, however, testified that they graded the Road from the termination of oiled road in Birdseye to the forest service property at least twice per year during the decades of the 60's and 70's.

26. That the testimony established a wide variety of uses including travel to the forest service and adjoining private property for fishing, deer hunting, elk hunting, cougar hunting (during the winter), hiking, family outings, general sightseeing, labor on irrigation headwaters, movement of cattle and sheep, law enforcement related to wildlife regulations, and maintenance of forest trails and signs by forest service employees.

27. That vehicles, horses, trailers, hikers, bikes and motorcycles all at various times traveled the entire length of the Road ending on forest service property.

28. That the Court finds, by clear and convincing evidence that even if it is concluded (which this Court does not) that the Road was gated and locked in the late 50's and early 60's as described by the Butler's, the Road was used as necessary and convenient by the public for more than 10 years before that time and, again, 10 years after that time.

29. That the only testimony as to width of the Road was that of Clyde Naylor, a qualified engineer and longtime director of public works for Utah County. Mr. Naylor testified that a width of 20 feet plus a three foot shoulder on each side for a total width of 26 feet was reasonably necessary for anticipated travel. There being no evidence to the contrary the Court finds that the width of the roadway in this case should be 26 feet, including a 3 foot shoulder on each side.

30. The Court notes that a legal description of the centerline of the Road generated from a survey of the Road itself was introduced into evidence. The description was challenged by counsel for the Defendants since it appears to lie in a different township or range than the legal description of the Defendants' properties. Testimony was also presented that indicated that several years ago the adjoining property owners agreed to establish their respective boundaries as the center of the roadway and confirmed that agreement by recorded boundary line agreement. No expert testimony was presented to assist this Court to determine if there is a conflict in the two positions or how such a conflict, if it exists, should be resolved. The Court merely determines, today, that the Road as it presently exists is a public highway, 20 feet wide with a three foot shoulder on each side.

31. There was testimony that a locked gate was constructed in 1996 by Mr. Butler. There was also substantial testimony that many people were unable to travel the Road after that time without gaining permission or using a key provided by Mr. and Mrs. Butler. However, one exhibit shows a sign created by the County which allowed travel past the Butler gate, although admonishing travelers to close the gate and stay on the Road until arriving at the

forest service. As noted above there have historically been gates across the Road for purposes unrelated to obstruction of traffic. An unlocked gate is consistent with this pattern and would not be considered to violate the right-of-way declared today.

32. That for some of the time since construction of the metal Butler gate in 1997 it has been locked and the Road has been obstructed and for some of the time it has not. No evidence was presented to clarify how many of the intervening 2,561 days were days when the Road was obstructed and how many were not. The Plaintiffs, as the moving party in seeking to obtain the penalty, had the burden of providing specific evidence of the number of days the Defendants have been in violation. Merely showing initial service and testimony that persons were stopped from time to time during the last 6 or 7 years does not meet that burden. Inasmuch as the Court cannot determine with reasonable precision the number of days during which a violation of the State statute and County ordinances existed no penalty can be imposed.

33. The Road has been a public thoroughfare connecting a national forest and recreation area to a national roadway for decades and generations.

34. That Plaintiffs are the prevailing party and are therefore entitled to recover reasonable costs of court to be established by affidavit.

CONCLUSIONS OF LAW

The Court hereby makes the following Conclusions of Law relying in whole or in part upon the foregoing Findings of Fact:

1. That the Road has been dedicated and abandoned to the use of the public because it has been continuously used a public thoroughfare for a period of ten years, pursuant to Utah Code Ann. §72-5-104 (and its predecessor statute Utah Code Ann. § 27-12-89).

2. That three factors must be established by clear and convincing evidence in order for a route to be deemed a dedicated highway, abandoned to the use of the public under Utah Code Ann. § 72-5-104: "there must be (i) continuous use, (ii) as a public thoroughfare, (iii) for a period of ten years. ...Once the technical provision of [the statute] have been satisfied, the road is a 'public highway.' The court has no discretion to ignore that fact." Campbell v. Box Elder County, 962 P.2d 806 at 808 (Utah Ct. App. 1998) citing Hebert City Corp. v. Simpson, 942 P.2d 307 at 310 (Utah 1997). That Plaintiffs successfully proved each of the foregoing factors by clear and convincing evidence.

3. That there is no requirement of proof of the owner's intent to offer the road to the public. Bertagnole v. Pine Meadows Ranches, 639 P.2d 211 at 213 (Utah, 1981); see also Draper City v. Estate of Bernardo, 888 P.2d 1097 at 1099 (Utah, 1995) and Thurman v. Byram, 626 P.2d 445 at 449 (Utah 1981).

4. That continuous use is established where "the public has made a continuous and uninterrupted use of the road as often as they found it convenient or necessary," Campbell, 962 P.2d at 809. The "use may be continuous though not constant...provided it occurred as often as the claimant had occasion to choose to pass. Mere intermission is not interruption." Id. at 809 (citing Richards v. Pines Ranch, Inc., 559 P.2d 948 (Utah 1977).

5. That Utah Code Ann. § 23-20-14 provides a mechanism for private property owners to restrict sportsman access to their property by posting:

> "Properly posted" means that "No Trespassing" signs or a minimum of 100 square inches of bright yellow, bright orange, or flourescent paint are displayed at all corners, fishing streams crossing property lines, roads, gates, and rights-of-way entering the land. If metal fence posts are used, the entire exterior side must be painted."

The plain and obvious intent of the statute is to require physical notation or warning at the entrance or on the edge of property. Members of the public encountering such signs would have to conclude, based upon the statute, that they were at a property line or on the edge of private property, meaning that where they are standing is not restricted. Signs and painted posts along a fence running parallel to a road, regardless of the physical juxtaposition of the sign, more clearly indicate the fence as a boundary than prohibiting travel along the road from which the signs can be seen. The signs and painted posts in this case clearly did what the plaintiffs' witnesses assumed-they prohibited travel off of the road, not on the road.

6. That the term "thoroughfare" is not defined in any Utah statute. Competent legal authority defines the term as a "street or way opening at both ends into another street or public highway, so that one can go through and get out of it without returning. It differs from a cul de sac, which is open only at one end." Bouvier's Law Dictionary, Banks-Baldwin Law Publishing Company, Cleveland: 1946. The Utah Supreme Court has stated that:

> [w]hile it is difficult to fix a standard by which the measure what is a public use or a public thoroughfare, it can be said here that the road was used by many and different persons for a variety of purposes; that it was open to all who desired to use it; that the use made of it was as general and extensive as

> the situation and surroundings would permit, had the road been formally laid out as a pubic highway by public authority."

Lindsay Land & Livestock Co. v. Churnos, 75 Utah 384, 285 P. 646 at 648 (Utah 1929).

The court has also stated that 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." Gilmore v. Carter, 15 U.2d 280, 291 P.2d 426 at 428 (Utah 1964).

In another case evidence that the road was generally impassable, that the road failed to connect or lead to public property and that there had been only minimal maintenance were reasons to overturn a determination by summary judgment that a proposed road was a highway. Draper City v. Estate of Bernardo, 888 P.2d 1097 at 1100-1101 (Utah 1995). Of course the Draper City case did not determine that the road known as the "Lower Canyon Corner Road" could not be determined to be a public highway in the face of such evidence, only that the issue could not be resolved via summary judgment. This case is in a substantially different posture.

7. That the Road was a public thoroughfare before 1980.

8. That having determined that the Road was dedicated and abandoned to the public before 1980 by clear and convincing evidence, this Court must also determine the reasonable and necessary width of the Road. See Kohler v. Martin, 916 P.2d 910 and 914 (Utah Ct. App. 1996), Utah Code Ann. § 72-5-104(3).

9. That the reasonable and necessary width of the Road to ensure safe travel is 26 feet, including a 20 foot wide travel width and three (3) foot shoulders on each side.

10. That Utah Code Ann. § 72-7-104 provides that any person who installs, places or maintains a structure within the right-of-way of a highway must remove the structure within ten days upon notice. Upon failure to remove the structure "[a] highway authority may recover . . . (b) $10 for each day the installation remained within the right-of-way after notice was complete."

11. Plaintiffs are entitled to reasonable costs of court as the prevailing party to be established by affidavit.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ordered, adjudged, and decreed as follows:

1. That the Road from the gate at the Butler residence to the Uinta National Forest Boundary is hereby declared a public highway within the meaning of Utah Code Ann. §72-5-104 (and its predecessor statute Utah Code Ann. § 27-12-89).

2. That the location of Road is where it presently exists.

3. That the scope (or width) of the right-of-way of the Road west of the gate at the Butler Residence is 26 feet, including a 3 foot shoulder on each side and a 20 foot travel width, the centerline of which is the center of the exiting Bennie Creek Road.

4. That the Defendants and their successors and assigns shall not take any action that blocks, locks, or otherwise interferes with public access to the Road.

5. That the Defendants immediately remove any and all structures, blockages, gates, fences or anything that blocks, locks, or otherwise interferes with public access across the Road.

6. That Plaintiff Utah County's request for judgment, joint and several, against Defendants Randy Butler and Donna Butler at the rate of $10 per day from July 29, 1997 to the date of the order, plus interest at the legal rate from the date of judgment is hereby denied.

7. That Plaintiffs are awarded judgment, joint and several, against Defendants Randy Butler and Donna Butler, Blaine and Linda Evans for reasonable costs of courtdetermined by a verified bill of costs pursuant to URCP Rule 54 in the amount of $ _____ for Utah County and $ _____ for the State of Utah.

received

8. Plaintiff Utah County is ordered to record this Findings of Fact, Conclusions of Law, and Order in the records of the Utah County Recorder.

9. For interest on the Judgement at the legal rate from date of the entry of judgment.

DATED this 16 day of Aug., 2004

ORIGINAL IF IN COLORED INK
STATE OF UTAH
4TH DIST. COURT • UTAH COUNTY

JAMES R. TAYLOR, JUDGE

NOTICE OF OBJECTIONS

Notice of objections must be submitted to the Court and Counsel within five (5) days after service, pursuant to Rule 7 of the Utah Rules of Civil Procedure.

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**, postage prepaid, this 16th day of July, 2004, to the following:

MARK E. ARNOLD
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