

2005

Wasatch County a body politic of the State of Utah  
v. E. Ray Okelberry, Brian Okelberry, Eric  
Okelberry, Utah Division of Wildlife Resources,  
West Daniels Land Association, and John Does  
1-25 : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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| <p>WASATCH COUNTY, a body<br/>politic of the State of Utah</p> <p>PLAINTIFF/APPELLANT/CROSS-<br/>APPELLEE</p> <p>vs.</p> <p>E. RAY OKELBERRY, BRIAN<br/>OKELBERRY, ERIC OKELBERRY<br/>UTAH DIVISION OF WILDLIFE<br/>RESOURCES, WEST DANIELS LAND<br/>ASSOCIATION, and John Does 1-25</p> <p>DEFENDANTS/APPELLEES/CROSS-<br/>APPELLANTS</p> | <p>APPELLANT'S OPENING BRIEF</p> <p>Case No. 20050389-CA</p> |
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This is an appeal from an order entered after a bench trial in the Fourth District Court for Wasatch County, State of Utah, the Honorable Donald J. Eyre, Judge, presiding.

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APPELLEE

vs.

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DEFENDANTS/APPELLEES/CROSS-  
APPELLANTS

APPELLANT'S OPENING BRIEF

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## JURISDICTION OF THE COURT

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

## ISSUES PRESENTED

- A. **Issue:** May the public lose the right to use a road if the provisions of Utah Code Section 72-3-108 are not met?

**Determinative Law:** Utah Code Section 72-3-108; *Western Kane County Special Service District No. 1 v. Jackson Cattle Company*, 744 P.2d 1376, (Utah 1987).

**Standard of Review:** A trial court's interpretation of the law is reviewed for correctness. *Ledfors v. Emery County Sch. Dist.*, 849 P.2d 1162, 1162-63 (Utah 1993).

**Issue Raised:** This issue was raised in Plaintiff's proposed findings of fact and conclusions of law. (R. at 374)

- B. **Issue:** Can equitable estoppel be asserted against a government entity absent affirmative action on the part of the government entity?

**Determinative Law:** *Anderson v. Public Service Comm'n of Utah*, 839 P.2d 822 (Utah 1992) and *Wall v. Salt Lake City*, 168 p. 766 (Utah 1917).

**Standard of Review:** A trial court's interpretation of the law is reviewed for correctness. *Ledfors v. Emery County Sch. Dist.*, 849 P.2d 1162, 1162-63 (Utah 1993).

**Issue Raised:** This issue was raised in Plaintiffs motion to alter or amend judgment. (R. at 438)

- C. **Issue:** Was there sufficient evidence for the Court to find valuable improvements to the property undertaken in reliance on county's actions to allow equitable estoppel to be asserted against a government entity?

**Determinative Law:** *Western Kane County Special Service District No. 1 v. Jackson Cattle Company*, 744 P.2d 1376, (Utah 1987).

**Standard of Review:** To support an insufficiency of the evidence claim on appeal, the one challenging the verdict must marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict. So long as some evidence and reasonable inferences support the jury's findings, the Court will not disturb them. *Hatch v. Davis* 102 P.3d 774, 778-779 (Utah App. 2004).

**Issue Raised:** This issue was raised in Plaintiff's motion to alter or amend judgment. (R. at 435)

- D. **Issue:** Did the trial court properly apply the doctrine of equitable estoppel to the facts of the case?

**Determinative Law:** *Western Kane County Special Service District No. 1 v. Jackson Cattle Company*, 744 P.2d 1376, (Utah 1987)

**Standard of Review:** A trial court's interpretation of the law is reviewed for correctness. *Ledfors v. Emery County Sch. Dist.*, 849 P.2d 1162, 1162-63 (Utah 1993).

**Issue Raised:** This issue was raised in Plaintiff's motion to alter or amend judgment. (R. at 451)

### DETERMINATIVE STATUTES AND RULES

U.C. A. §72-3-108 -- County roads -- Vacation and narrowing.

(1) A county may, by ordinance, vacate, narrow, or change the name of a county road without petition or after petition by a property owner.

(2) A county may not vacate a county road unless notice of the hearing is:

(a) published in a newspaper of general circulation in the county once a week for four consecutive weeks prior to the hearing; or

(b) posted in three public places for four consecutive weeks prior to the hearing; and

(c) mailed to the department and all owners of property abutting the county road.

(3) The right-of-way and easements, if any, of a property owner and the franchise rights of any public utility may not be impaired by vacating or narrowing a county road.

(4) Except as provided in Section 72-5-305, if a county vacates a county road, the state's right-of-way interest in the county road is also vacated.

U.C.A. §72-5-105 (1) -- Highways, streets, or roads once established continue until abandoned.

(1) All public highways, streets, or roads once established shall continue to be highways, streets, or roads until abandoned or vacated by order of the highway authorities having jurisdiction or by other competent authority.

shall vest in the record owner, with the remainder of the highway, street, or road vested as otherwise provided in this

## STATEMENT OF THE CASE

### I. Nature of the Proceedings

Plaintiff Wasatch County appeals that part of the Order dated October 22, 2004, in which the court, after finding that Thorton Road, Ridge Line Road, Parker Canyon Road, and Circle Springs Road had been abandoned and dedicated to the public, found that the public was prevented from using those roads based on the doctrine of equitable estoppel.

### II. Course of Proceedings & Disposition in the Trial Court

On August 24, 2001 Wasatch County filed a complaint in the Fourth District Court alleging that certain roads located on Property owned by the Okelberrys, West Daniels Land Association and the Utah Department of Wildlife Resources had become public by operation of law.(R. at 10) Wasatch County reached a settlement with the Utah Department of Wildlife Resources on.(R. at 247) West Daniels Land Association defaulted on a motion for Summary Judgment.(R. at 419) On June 28, 29, and 30, 2003 trial was held between the Okelberry Defendants and Wasatch County. (R. at 357)

The trial court found that of the five roads located on the Okelberry Property, four had been abandoned to the public pursuant to Utah Code Annotated §78-3-108 . (R. at 425) The Court further found that because the County had waited for 12 years to initiate a lawsuit to open the roads, under the doctrine of equitable estoppel the public was estopped from using the roads. (R. at 423) Plaintiff filed a motion to alter or amend judgment or amend findings of fact and conclusions of law. (R. at 421) The trial court

amended its findings of fact (R. at 489) but denied Plaintiff's motion to alter or amend judgment. (R. at 492)

### III. Statement of Relevant Facts

Defendants are owners of real property located in Wasatch County. (R. at 419) The property is of mountainous terrain. (R. at 419) The property is traversed by several interconnecting dirt roads, some of which provide access to United States Forest land. (R. at 419-419) The public used these roads at will for approximately 30 years. (R. at 413) In 2001, the County filed an action in District Court to enforce the public's rights to use the roads. (R. at 10) The District Court, after a bench trial, found the evidence sufficient to conclude that the roads had become dedicated and abandoned to the public pursuant to state law. (R. at 413) However, after concluding that the roads had become dedicated and abandoned to the public, the District Court then applied the doctrine of equitable estoppel to prevent the public's use of the roads. (R. at 412) The District Court based this application on its factual finding that Defendants began denying the public the use of the roads by locking gates and posting signs starting in around 1989 and Wasatch County had not brought an action to open the roads until 2001. (R. at 413)

### **SUMMARY OF ARGUMENTS**

This Court should overturn the District Court's finding that Wasatch County is estopped from defending the public's right to use the roads found to be dedicated to the public. Utah case law has shown a clear pattern to limit the vacation of public roads to a strict following of the provisions in Utah Code § 78-3-108. The Utah Supreme Court

has explicitly stated that it is reluctant to apply the doctrine of equitable estoppel to bypass the legislative provisions with regard to vacation of a public road, and has exhibited that reluctance in many cases. In stating such reluctance, the courts have not completely foreclosed the possibility that other means exist to vacate a public road. However, Plaintiff submits that is a valid extension if not reading of the law to limit any vacation to compliance with the statute. It is undisputed that the requirements of § 78-3-108 were not met in this case.

If, in fact, the doctrine of equitable estoppel with respect to a road vacation survives and may be applied against the government, the evidence presented by the Okelberrys at trial does not satisfy the elements required for estoppel against a government entity. To meet the requirements of equitable estoppel against the government, a party must prove that an authorized government authority made specific written representations, or at least very clear and well-substantiated affirmative acts or representations for a party to rely on. Second, a party must show that it reasonably relied on that representation by either placing extensive, valuable improvement on the road, or making a substantial investment in the land, thereby changing the nature of the use of the land from a road to something completely different. Finally, the party asserting estoppel must demonstrate how it will suffer a grave injury, or manifest in justice based on the fact that either the improvements or the investments made would be completely destroyed if the land were to revert back to a public road.

In the case at bar the trial court found that the County had made no affirmative statements or representations to the Okelberrys. Without such an affirmative representations by the government, equitable estoppel simply cannot be found against the County.

Further, the Okelberrys have presented absolutely no evidence that they relied on anything that the County did or did not do. They have shown no evidence of how they changed their position or made any decisions based on what the county did or did not do.

Finally there was insufficient evidence that the Okelberrys had made valuable improvements on the land constituting the roads or how they would be substantially injured if the roads were reopened to the public. Even under the most liberal definition of “improvement,” the Okelberrys’ actions fall far short of the type of improvements required by the courts. In fact virtually all the alleged improvements made to the roads actually enhanced their use as roads rather than changing the use of the land to something different.

The District Court mainly cited the case of *Premium Oil v. Cedar City*, 187 P.2d 199 (Utah 1947) as the basis for its decision. The County submits that even this case does not support a finding of equitable estoppel. A careful reading of this case supports the above listed elements of estoppel against the government to vacate a County road. However, even if *Premium Oil* does create a separate standard by which such cases may be judged, the Okelberrys have failed to meet that standard as well. *Premium Oil* merely, in dicta, gives the impression that it may be possible to apply estoppel in this type of case

based on inaction by the government, rather than an affirmative representation. While this may or may not be true, *Premium Oil* still requires extensive and valuable improvements that change the nature of the use of the land, and a grave injury that would be suffered when those improvements are destroyed. The Okelberrys have failed to show either.

The idea that inaction by the government may suffice in a claim to vacate a public road, without substantial improvements to the land, has far reaching public policy implications. The Utah legislature has made it very clear that a private citizen may not assert an adverse possession claim against the government. There is simply too much land owned by the government for it to adequately protect the public's interest if, simply by its inaction, it could lose the public's rights. If private citizens are able to rely merely on inaction by the government and their own assumptions, rather than a clear affirmative representation by the government line between valid estoppel case and a common adverse possession claim will be blurred beyond the point of distinction.



## ARGUMENT

- I. THE ONLY METHOD TO ADANDON A PUBLIC ROAD IS BY SATISFYING THE CLEAR AND SPECIFIC PROVISIONS IN UTAH CODE § 72-3-108.

Utah case law shows a clear trend to limit the loss of the public's right to use a public road to strict compliance with the road vacation statute contained in the Utah Code. This statute is found in Utah Code Ann. § 72-3-108 (West 2005) and provides, in pertinent part:

- (1) A county may, by ordinance, vacate, narrow, or change the name of a county road without petition or after petition by a property owner.
- (2) A county may not vacate a county road unless notice of the hearing is:
  - (a) published in a newspaper of general circulation in the county once a week for four consecutive weeks prior to the hearing; or
  - (b) posted in three public places for four consecutive weeks prior to the hearing; and
  - (c) mailed to the department and all owners of property abutting the county road.

This trend was shown in the case of *Clark v. Erekson*, 341 P.2d 424, 425 (Utah 1959). In *Clark*, the Utah Supreme Court held that a road previously abandoned to the public could only be vacated or abandoned upon an order by the county commissioners, or some other agency of competent authority. In *Clark*, like the case at bar, the road had become a public road by use pursuant to state statute. After it had become a public road, the claimed owner of the road had encroached on the road for thirty (30) years by placing a fence, trees, shrubbery, and garage on the land. *Id.* The court ordered the obstructions removed based on the fact that, once abandoned to public use, a road could only be

vacated as allowed by statute, and that the former owner's attempts to convert the land to his own by modifying its use did not change the legal status of the public road. *Id.* This is supported by the legislature's action in passing Utah Code Ann. § 72-5-105 (West 2005) which states, in pertinent part, "[a]ll public highways, streets, or roads once established shall continue to be highways, streets, or roads until abandoned or vacated by order of the highway authorities having jurisdiction or by other competent authority."

Likewise in the case of *Ercanbrack v. Judd*, 524 P.2d 595, 597 (Utah 1974), the Court held that even after the County Commission voted to vacate the road upon a petition by the former owner, a road that had been abandoned to the public remained public because the county had not complied with the explicit statutory requirements to vacate a county road. In that case, the claimed owner had lost the road through continuous use by the public for a period of more than ten (10) years, and later had placed a locked gate on the road. *Id.* at 595. Seven years after placing a locked gate on the road, the claimed owner formally petitioned the county to vacate the road. *Id.* The county denied the petition. Eight years later, the claimed owner once again asked the county to vacate the road, which petition was formally granted by the county. *Id.* Nevertheless, the supreme court held that, despite the county's clear intent to vacate the road, the statute governing such vacation explicitly required notice before such an act could be taken, and hence the land in question was still a public road. *Id.* at 597.

In 1987, in the case of *Western Kane County Special Service Dist. No. 1 v. Jackson Cattle Co.*, 744 P.2d 1376, 1378 (Utah 1987) the Supreme Court explicitly stated that it

was “extremely reluctant to apply the doctrine of equitable estoppel against the assertion of rights in a public highway by a government entity,” and that such reluctance was “in harmony with the expressed will of the legislature, which requires that a strict statutory procedure be followed for the vacation of a public road.”

This trend was more recently affirmed in the case of *AWINC v. Simonson*, 112 P.3d 1228, 1231 (Utah App. 2005). At trial in the *AWINC* case, Simonsen presented evidence that he had placed a locked metal gate across the road to block traffic as far back as 1996 or 1997, and had placed no trespassing signs along the road. *Id.* at 1229. The court found that, despite the fact that Simonsen had prevented traffic on the road, it had been abandoned to the public long before his acts to prevent travel, and had not reverted back to his ownership, but rather remained a public road. *Id.* at 1231-32.

In the present case, there was no evidence presented by the Defendants that the County had intended to vacate the roads in question, nor did they demonstrate that the County followed the steps required by U.C.A. § 72-3-108 in order to vacate the roads. In fact, rather than argue that the road had somehow reverted back to their ownership through vacation, the Okelberrys only argument at trial was that the road had never been abandoned to public use. As has been noted above, even with an explicit statement of intent by a County, and a resolution to vacate a county road, such a decision is null if the County has not strictly complied with the entire statute. A review language of the Utah Code and the application of that language by Utah courts shows a clear intent by the legislature to limit the vacation of public roads to certain instances in which the

provisions of the statute are satisfied. Consequently, it is entirely appropriate, indeed a proper extension if not application of the law, for this Court to hold that the only way a public road may be vacated is through strict compliance with § 72-3-108 of the Utah Code, and that Wasatch County in this case had no intention of vacating the roads in question, nor did they satisfy the statutory requirements necessary to do so.

II. IF THE DOCTRINE OF EQUITABLE ESTOPPEL HAS SURVIVED THE STRICT DEMANDS OF THE UTAH CODE, IT IS ONLY PROPERLY APPLIED AGAINST A GOVERNMENT ENTITY WHEN THERE HAS BEEN A CLEAR WRITTEN REPRESENTATION MADE BY A GOVERNMENT ENTITY.

An estoppel claim generally consists of three elements: 1) a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; 2) a reasonable action or inaction by the other party taken or not taken on the basis of the first party's statement, admission, act, or failure to act; and 3) injury to the second party that would result from allowing the first party to contradict or repudiate such a statement, admission, act, or failure to act. *Nunly v. Westates Casing Services, Inc.*, 989 P.2d 1077 (Utah 1999).

It is also a general rule that estoppel may not be asserted against the government.

*Anderson v. Public Service Comm'n of Utah*, 839 P.2d 822, 827 (Utah 1992) (citing *Utah State Univ. v. Sutro & Co.*, 646 P.2d 715, 718 (Utah 1981); *Weese v. Davis County Comm'n*, 834 P.2d 1 (Utah App. 1992)); However, Utah courts have left open a very narrow exception to that rule for the most extreme cases in which it is necessary to prevent "manifest injustice." *Wall v. Salt Lake City*, 168 P. 766, 770 (Utah 1917) (quoting *City of Los Angeles v. Cohn*, 35 P. 1002 (Cal. 1894); *Holland v. Career Services Review*

*Board*, 856 P.2d 678, 682 (Utah App. 1993). Under this narrow exception, when estoppel is asserted against the government a different standard for some of the elements is required. The first prong (Representation Prong) of the test is satisfied only by clear, written representations by an authorized government entity. *Anderson*, 839 P.2d at 827 (Utah 1992); *Celebrity Club, Inc. v. Utah Liquor Control Comm’n*, 602 P.2d 689, 691 (Utah 1979); *Eldredge v State Retirement Bd.*, 795 P.2d 671, 672-73 (Utah Ct. App. 1990). The third prong (Injury Prong) is satisfied only when the resulting harm can be shown with “such certainty,” and to be of “sufficient gravity” to justify the application of this narrow exception. *Anderson*, 839 P.2d at 827 (quoting *Utah State Univ. v. Sutro & Co.*, 646 P.2d 715, 720 (Utah 1982)). This section discusses the Representation Prong of the test. The Reliance and Injury Prongs will be discussed below.

A. Utah Case law requires a clear, written representation by an authorized government authority, upon which the adverse party has relied before the doctrine of equitable estoppel may be argued against a government entity.

The Utah Supreme Court has held that the doctrine of equitable estoppel, when argued against a government entity, can only be applied in cases where the government has made a clear written representation to another party, upon which that party has reasonably relied to its detriment. *Anderson*, 839 P.2d at 827. See *Wall*, 168 P.2d at 766. In 1992, the supreme court stated that the exception to the rule barring estoppel against the government should only be applied if “the facts may be found with such certainty, and the injustice suffered is of sufficient gravity . . .” to demand its application. *Anderson*, 839 P.2d at 827 (quoting *Utah State Univ. v. Sutro & Co.*, 646 P.2d 715, 720 (Utah 1982)).

The Court went on to point out that there are only a few cases in which the Utah courts have allowed the use of estoppel against a government entity, and those cases have “involved very specific *written* representations by authorized government entities.” *Anderson*, 839 P.2d at 827 (emphasis added).

The *Anderson* case gives a clear indication of the continued reluctance by Utah courts to allow the assertion of estoppel against a government entity. Mr. Anderson, a common carrier of passengers for hire, was stripped of his operating license after failing to pay a fine that resulted from his failure to keep valid proof of insurance on record with the appropriate state authority. *Id.* at 823. Anderson argued that the assistant attorney general had made certain representations to him during settlement negotiations that would have resulted in him keeping his license. *Id.* at 827. The court held that, regardless of whether any oral representations were made to Anderson, because there was no specific written representation upon which Anderson relied in failing to pay his fine by the required date, he could not assert estoppel against the commission for revoking his license. *Id.*

In reaching its decision, the court referred to two earlier cases in which the doctrine of estoppel was allowed against the government. *Id.* First, the court referred to *Celebrity Club, Inc v. Utah Liquor Control Commission*, in which a man expended approximately \$200,000.00 to complete a club in reliance on the Liquor Control Commission’s written representation that his proposed location did satisfy certain requirements of the Utah Code. 692 P.2d at 691. Later, the same commission denied his

license for failing to satisfy the very same regulations it assured him had been met. *Id.* In that case, the supreme court held that the commission was estopped from denying him a license based on the fact that it had made a specific, written representation to him, upon which he had relied to great personal detriment. *Id.* Second, the *Anderson* opinion referred to *Eldredge v. Utah State Retirement Board*, in which the state was prevented from denying Mr. Eldredge retirement credit for several years of employment after Eldredge had voluntarily participated in an early retirement program based on the state's oral *and written* assurance that he would be credited for the years. 795 P.2d at 672-73.

The Utah Court of Appeals again followed the supreme court's clearly established precedent in *Anderson* a year later in *Holland*. 856 P.2d at 682-83. The *Holland* court noted that estoppel is only assertible against a government institution in unusual situations involving "manifest injustice," and that, "as noted by our Supreme Court . . . 'the few cases in which Utah courts have permitted estoppel against the government have involved *very specific written* representations by authorized government entities.'" *Id.* at 682 (emphasis original) (quoting *Anderson*, 839 P.2d at 827). Mr. Holland argued that he was entitled to be reappointed to a government job at a higher pay. *Id.* at 680. The court, however, stated that Holland's case failed because he had never received any actual written representation that he was entitled to be reinstated at the higher pay level. *Id.*

Based on the foregoing cases, the current law in the state of Utah is that estoppel against the government may only be asserted when the government has made some sort

of specific written representation that is contrary to its subsequent position. While the *Anderson* opinion does not explicitly state that there can *never* be a case in which estoppel may be applied without specific written representations, it is clear from the holding that the court was not interested in even pursuing whether any oral representations were made to Mr. Anderson regarding a settlement. *Anderson*, 839 P.2d at 827.

B. If the Court finds that an actual written representation is not necessary, there must be at least a “very clear” and “well-substantiated” affirmative representation of some sort by the government before estoppel may be asserted.

As mentioned above, the *Anderson* court did not explicitly state that it would never consider an estoppel case in which there was not a clear written representation by the government. If the court finds there is still a hypothetical situation in which equitable estoppel may be asserted against the government absent a specific written representation by the government, at most it is a very narrow exception requiring some other “very clear, well-substantiated” representation. *Anderson*, 839 P.2d at 828. The *Anderson* court based its decision on the absence of a written representation. *Id.* It then supported its decision by referring to two prior cases, *Celebrity Club* and *Eldredge*, that the Court stated both involved “very clear, well-substantiated representations by government entities.” *Id.* at 828. This language should be read as an indication that, if there ever was a case in which estoppel may be proper against the government without a written representation, it must still involve “very clear” and “well-substantiated” representations upon which an adverse party had relied. This is also supported by the Court’s language in *Jackson Cattle*, noted above, in which the court expressly stated its reluctance to apply equitable estoppel



against the government, specifically with regard to vacation of public roads, and that such was the intent of the legislature in setting forth specific requirements by which a county may vacate a public road. 744 P.2d at 1378.

There is only one case known to the Plaintiffs in which a Utah appellate court has actually applied the doctrine of equitable estoppel *against the government* to vacate the public's interest in a road, and it is directly in line with the test outlined by the Supreme Court in *Anderson*.

In *Wall*, the Supreme Court considered a case in which the City of Salt Lake attempted to expand a street to its originally intended width of 132 feet, to the detriment of adjacent landowners who claimed the land. 168 P. at 765. Despite a prior resolution that the street's official width was to be 132 feet, the city only created a street with a width of sixty-six (66) feet and never made any use of the remaining thirty-six (36) feet. *Id.* at 767. Based on the city's actual use of the land, the adjacent property owners claimed an interest in the land and petitioned the city to approve a subdivision plan that contained the unused portion of the street. *Id.* at 768. The map displayed the land in question, not as a public highway, but as having been enclosed by fence and under a "state of cultivation" by the adjacent landowners. *Id.* Understanding that it was giving up the city's interest in the extra street width, the city council nevertheless authorized the city engineer to approve the map. *Id.* A year later, and after a new city council had been elected, the matter was referred to the city attorney to determine if the city had any rights in the land. *Id.* The city attorney opined that the council had no authority to set aside its

prior action. *Id.* In reliance upon such official actions, the owners gave a mortgage on the land of \$3,000.00 (value in 1917), and continued to develop the land, which was eventually sold. *Id.* Twenty-one (21) years later, the city claimed the land. *Id.* at 769.

While the Court in *Wall*, which was decided seventy-five (75) years before *Anderson*, did not explicitly discuss specific written representations by the city, it can readily be inferred that the acts of the city which induced reliance by the landowner were well-documented matters of public record. The city council had received a detailed map with plat designations and had voted on the matter. *Id.* at 768. Thereafter, a subsequent city counsel had sought and received an official legal opinion on the matter from the city attorney. *Id.*

The *Wall* decision is directly in line with the supreme court's later decisions regarding the use of estoppel against the government. In fact, through resolutions of the city council and documented legal opinions by the city attorney, the process in *Wall* creates a far stronger and readily substantiated representation by the government than would be a letter or other type of personal communication. Even though the court in *Wall*, like *Anderson*, did not specifically require a written document, they did note that the difference in *Wall*, as compared to other cases cited by the city, was that "[n]one of them present a case like this, where the municipality, by its own affirmative acts, declarations, and conduct, misled the party, or induced him to believe that he had the right to rely upon the assurances which the municipality, after a long period of time, sought to repudiate to his injury." *Id.* at 769.

In the present case it is undisputed that Wasatch County made no specific written representations to the Okelberrys or anyone else that it intended to relinquish or abandon its rights to the roads in question. (R. at 487). Further, there is nothing to indicate that the county made the type of “very clear, well-substantiated,” *Anderson*, 839 P.2d at 828, “affirmative acts,” *Wall*, 168 P. at 769, manifesting an intent to vacate the roads in question that would satisfy the minimum threshold established by the supreme court. In fact, to the contrary, the trial court’s own finding was that there was no evidence at trial to suggest that the county had made *any affirmative representation* to anyone that it intended to abandon the roads. (R. at 487). Therefore, the Defendants’ case fails on the first prong of the test for estoppel asserted against a government entity.

III. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE FINDING THAT THE OKELBERRYS RELIED ON A REPRESENTATION BY THE COUNTY TO THEIR DETRIMENT, MADE VALUABLE IMPROVEMENTS TO THE LAND, AND WOULD SUFFER A SUBSTANTIAL INJURY IF THE ROADS ARE REOPENED TO THE PUBLIC.

The Reliance and Injury Prongs of an estoppel case against the government are satisfied when a party relies on a representation by an authorized government entity, and the resulting harm can be shown with “such certainty,” and to be of “sufficient gravity” to justify the application of this narrow exception. *Anderson*, 839 P.2d at 827 (quoting *Utah State Univ. v. Sutro & Co.*, 646 P.2d 715, 720 (Utah 1982)). Specifically with regard to claims of estoppel against the government in order to vacate a public road, such reliance must include that party making “extensive and valuable improvements to the land,”

*Premium Oil v. Cedar City*, 187 P.2d 199, 203 (Utah 1947), or equally valuable investment in developing the land, *Wall*, 168 P. at 770, which would, in effect, be destroyed if the land was to revert back to use as a public road.

A. There is no evidence that any actions taken by the Okelberrys were in reliance upon any action or inaction of the Wasatch County or that such reliance resulted in “extensive and valuable improvements” to the land.

1. The Defendants presented no evidence at trial to indicate that any actions they took were in reliance on a representation by the County.

As noted above, the Utah Supreme Court has determined that the doctrine of estoppel should only be applied against the government when the government induces reliance of an adverse party through specific written representations contrary to its subsequent position. *Anderson*, 839 P.2d at 827.

A careful review of the trial transcript reveals that the Okelberrys did not present any evidence whatsoever to indicate that their efforts to prevent access to the roads and lease their land to the CWMU were made in reliance upon anything represented by the County, either through action or non-action. As will be discussed below in part (B) of this section, much of the work performed on the roads by the Okelberrys actually predated the road's abandonment to the public, and therefore couldn't possibly have been in reliance upon anything the County did, or did not do, in relation to the status of the roads. Further, Lee Okelberry specifically testified that they decided to prevent access to the roads and lease the hunting rights to the property because they were “having some

bad times,” meaning financially, and said nothing of reliance on anything done by the County. (Trial, June 29, 2004 at 206.)<sup>1</sup>

Indeed, the only statement in evidence regarding any action or non-action by the County is the statement that the County did not intend to maintain the roads in question. (Trial, June 30, 2004 at 80); (Trial, June 29, 2004 at 52-53); (Trial, June 28, 2004 at 26). However, this statement was not presented to show that the Okelberrys made any sort of investment or improvement on the land in reliance upon the County’s refusal to maintain the roads, but rather in an effort to show that the roads had never been abandoned to the public in the first place. Never did any of the Okelberrys testify that because of the County’s refusal to maintain the roads, they were induced to believe that the County was abandoning or declining to protect the right of the public to access those roads. The court stated in *Wall* that a representation by the government, followed by a position to the contrary, must be so egregious as to “amount to fraud” if allowed to go unchecked. 168 P. at 772. The County’s current action to protect the right of the public to use the roads can not be seen as perpetrating a fraud on the Okelberrys merely because it had, in the past, refused to maintain what can only be described as unimproved mountain roads.

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<sup>1</sup> We note that this is an improper method by which to cite to the portion of the record that is the trial transcript. However, the transcripts were not stamped with a record page number or nor were they included in the record index. We have therefore referenced the date of the transcript and the page number.

Therefore, even if this Court were to find that Wasatch County's inaction for a period of time constitutes some sort of representation, the Defendants' claim fails the reliance prong of the test for estoppel against the government because they failed to show first that they made any valuable improvements to the land, and second that they did so in reliance upon the County's representation.

2. Any reliance by the Defendants falls short of the required "extensive and valuable improvements" required in order to justify the use of estoppel against the government to vacate a public road.

The supreme court has stated that the acts by the government relied upon by an adverse party must be of such a nature as to induce that party to believe that there is *no longer a road*, and *amount to fraud* if the government were permitted to later contradict those acts. *Wall*, 168 P. 772 (quoting 3 Dillon, Mun. Corps. § 1194 (5th Ed.)) (emphasis added). More specifically, in cases involving public roads, such reliance must include making substantial improvements to the land in question that are openly contrary to the rights of the general public to use the road. See *Wall*, 168 P. at 771-72; *Premium Oil*, 187 P.2d at 203.

Even if this Court were to find that the Okelberrys did, in fact, rely on some act or failure to act by the County, such action does not amount to "extensive and valuable improvements" on the land. *Premium Oil*, 187 P.2d at 203. In the two only cases to be found in which the Court has applied the doctrine of equitable estoppel to vacate the public's right to a road, the court has relied heavily on the presence of extensive and valuable improvements to the land made in reliance upon some act by the adverse party.

*Wall*, 168 P. at 768; *Premium Oil*, 187 P.2d at 203. In *Wall*, the court notes the following improvements: cultivation of the land, grading of the land, a detailed plan for subdivision and sale of land, sale of plats that included the land in dispute, and a mortgage given on the land in the amount of \$3,000.00 (valued in 1917) to purchase the land. 168 P. at 768. As stated above, the improvements in *Wall* were made in reliance upon an express resolution by the city council to allow the development of the land. *Id.*

In *Premium Oil*, the court notes the following improvements to the land: a fence to prevent traffic over the land in question, the relocation of a pioneer cabin to that strip of land, and the construction of a public swimming pool on the land at the expense of \$36,000.00 (valued in 1947). 187 P.2d at 203. The city in *Premium Oil* made all of these improvements at the request of the public, including, the woman who owned the land prior to the plaintiff in the case. *Id.* Therefore, in both *Wall* and *Premium Oil* the Court based its decision on the fact that one party's actions included extensive and valuable improvements to the land in question made in reliance upon an express representation by the other party.

Further, in both *Wall* and *Premium Oil*, the fact that substantial improvements had been made to the land in question was only part of the issue that gave rise to those suits. More than merely improving the road, the improvements to the land changed the way that the land could be used from a road to something different, and did so in a manner that was a blatant affront to the rights of the claiming parties.

In *Wall*, the land in question could no longer be used as a road because it had been subdivided and sold as private property. *Id.* The actions of the property owners in that case made it clear that the land in question would never be used as a public road. *Id.* In *Premium Oil*, the land could no longer be used as a road, if it ever had been, because it had become part of a public swimming pool complex. 187 P.2d at 203. The court found that the adjacent property owner had watched for twenty-five (25) years as the city developed the land, first into a park and then into a public pool, in a manner that was “openly hostile to the public use as a street and should have been notice to all that any dedication, if previously intended, had been abandoned.” *Id.* at 203.

In the present case, there is no evidence in the record that would support a finding by the court that the Okelberrys made extensive valuable improvements to the land in question or that any improvements to the land changed its use from that of a road to something else. A careful review of the trial transcript reveals that the Okelberrys did expend some effort with regard to the roads, but that such their efforts fall far short of those necessary to support an assertion of equitable estoppel.

To completely marshal the trial evidence, Plaintiff has taken the most liberal interpretation of the term “improvement,” and submits that the evidence at trial included the following:

Testimony of Lee Okelberry:



- Lee Okelberry testified to having graded Thorton Hallow Road, for the purpose of taking care of fences, and “made a reservoir down there.” (Trial, June 29, 2004 at 177-79).
- Lee Okelberry testified that he put a cattle guard on the fence in Thorton Hallow and in two other places along the roads. (Trial, June 29, 2004 at 179); (Trial, June 29, 2004 at 193).
- Lee Okelberry testified that he graded part of Circle Springs Road so they could salt sheep. (Trial, June 29, 2004 at 180).
- Lee Okelberry has done some grading on Maple Canyon Road with a Caterpillar. Maple Canyon Road had also been graded prior to his purchase of the property. (Trial, June 29, 2004 at 181-82).  
  
(Note: Maple Canyon Road is not at issue in this appeal).
- Exhibit 7 shows a gate with a lock and tire affixed to it, which Lee Okelberry testified was placed sometime within six or seven years prior to the litigation. (Trial, June 29, 2004 at 200-01).
- A wire gate was replaced with a metal gate approximately twenty (20) years ago at the entrance to Maple Canyon Road. (Trial, June 29, 2004 at 218).  
  
(Note: Maple Canyon Road is not at issue in this appeal).
- Lee Okelberry testified that the land was leased to Shane Ford in 2002. (Trial, June 29, 2004 at 237).

Testimony of Bruce Huvard:

- Bruce Huvard testified that he first leased the land from the Okelberrys for hunting in 1994 or 1995, later testified that the unit lasted from 1995-2001. (Trial, June 29, 2004 at 250, 257).
- Mr. Huvard testified that he cleared trees off of some roads when it was necessary, and helped to maintain some of the gates. (Trial, June 29, 2004 at 258-59).

Testimony of Brian Okelberry:

- Brian Okelberry testified to having cleared trees from the roads when it was necessary. (Trial, June 30, 2004 at 26).
- Brian Okelberry testified that there is a big rut on Maple Canyon Road that they have “spent a lot of money on . . . .” (Trial, June 30, 2004 at 35).

Note that Maple Canyon Road is not at issue in this appeal.

- Brian Okelberry testified that they leased the land to United Sportsman to sell hunting permits in 1990. (Trial, June 30, 2004 at 39).
- Brian Okelberry testified that he personally sold hunting permits to people in 1991 or 1992. (Trial, June 30, 2004 at 45).
- United Sportsman posted signs, such as no trespassing signs on the property in 1990, but left after one year. (Trial, June 30, 2004 at 46).

It is not clear whether these signs were actually affixed to the gates and roads, or were merely on the adjacent Okelberry property.

- Brian Okelberry testified that after United Sportsman left he began to take more of a role in posting signs. (Trial, June 30, 2004 at 46).  
(Note: It is not clear where these signs were located.)
- Brian Okelberry testified that he fixed an interior gate on Ridge Line Road. (Trial, June 30, 2004 at 47)
- Brian Okelberry testified that he bought Lee's land 1991. (Trial, June 30, 2004 at 48, 62).
- Brian Okelberry testified that the first locks were placed on the gates in the 1980s. (Trial, June 30, 2004 at 54).

Testimony of Ray Okelberry:

- Ray Okelberry testified that he worked on Parker Canyon Road in 1957 with a Caterpillar. (Trial, June 30, 2004 at 73).
- Ray Okelberry built a corral area in Bear Wallow. (Trial, June 30, 2004 at 75).  
Note: this is not an improvement on the land constituting the roads, merely on another part of the Okelberry's property.
- Ray Okelberry testified that he graded other roads and made improvements thereon in 1957. (Trial, June 30, 2004 at 77).
- Ray Okelberry testified that he did work with a Caterpillar about four times on Maple Canyon Road in 1983. (Trial, June 30, 2004 at 79-80).

- A metal gate replaced a wire gate on. A picture, marked as Exhibit 8 and dated November 6, 2001 displaying the gate was entered into evidence. (Trial, June 30, 2004 at 91-92).
- A sign is displayed on the gate at Circle Springs Road in a Exhibit 46 dated November 6, 2001. (Trial, June 30, 2004 at 107-08).
- Exhibit 46, a picture taken just before the trial show a gate barricaded with big rocks where the fish and game property meets the Okelberry's land. (Trial, June 30, 2004 at 118-19). (Note this gate was probably built by Utah Department of Wildlife Resources)
- Exhibit 56 is a picture dated October 3, 2001 which shows a lock on the gate on Thorton Hallow Road. (Trial, June 30, 2004 at 128).
- A metal gate was put in place to replace a wire fence in 2002 or 2003 at Thorton Hallow. (Trial, June 30, 2004 at 126-29).
- Ray Okelberry testified that he removed trees that had fallen over the roads as necessary. (Trial, June 30, 2004 at 73-74).
- Exhibits 6, 15, 45, 54, 55, 57, and 58 are photos which show some gates across the roads and no trespassing signs on and around said gates.
- Exhibits 36 and 40 are photos which show no trespassing signs on trees.
- Exhibit 47 is a photo which shows a lock on a gate.

Plaintiff submits that much of the evidence presented above does not really even apply to the roads at in issue in this case let alone qualify as “extensive and valuable improvements” to the land as required. *Premium Oil*, 187 P.2d at 203.

First, several of the above mentioned improvements occurred long before the roads were abandoned to the public. The Okelberrys testified that, after purchasing the property in 1957, they graded several of the roads in question in order to gain better access to their fences and make them more passable for their livestock operations. (Trial, June 29, 2004 at 177-79); (Trial, June 29, 2004 at 180); (Trial, June 30, 2004 at 73); (Trial, June 30, 2004 at 77). The Court found that the roads had become public between 1960 and 1990. (R. at 413 ) This means that the bulk of the grading work could in no way be construed as having been made in reliance upon a representation by the County that the roads were to be vacated by the public, as the public had not yet acquired a right to such roads. Therefore, because the doctrine of equitable estoppel is only concerned with improvements made to roads in reliance upon some representation that those roads are no longer public, testimony of improvements made in or around 1957 is irrelevant.

Second, several of the above mentioned improvements deal with Maple Canyon Road, which the lower court has found *not* to have been abandoned to the public, and is not at issue in this appeal. (R. at 413). It is important to note that the grading work testified to have been done in the 1980’s appears to have been on Maple Canyon Road. Taken in conjunction with the first point, this indicates that the vast majority of the

grading work done to the roads was actually done long before the roads would have been abandoned by the public.

Third, some of the improvements, such as the reservoir and corral area, were not made to the actual road. In both the *Wall* and *Premium Oil* cases, the Court found that several improvements had been made to the road itself, not just the land surrounding the road. The Court in *Premium Oil* made specific reference to the fact that the land that the adjacent property owner claimed was a road had now been fenced, turned into a park, and then made into part of a public swimming pool complex. 187 P.2d at 203. In *Wall*, the Court noted that the land that the city was trying to claim as part of the public road had first been fenced and cultivated, and later subdivided, graded, and sold as a new community by the name of Fremont Heights. 168 P. at 768.

In the present case, after one subtracts the evidence regarding changes made to Maple Canyon Road, the changes made to land that is not part of the road, and the changes made in or around 1957 are removed from the above list, we are left with the following:

- Removal of trees that had fallen across the road.
- Barricading certain gates to increase effectiveness.
- Replacement of at least two wire gates with metal gates.
- Placement of signs on gates and property.
- Installation of cattle guards in as many as three locations on the roads in question.
- Placement of locks on some or all of the gates at some point.

- Personal sale of hunting permits, and multiple lease agreements with various hunting units.
- The purchase of Lee Okelberry's portion of the land and his sheep herd by Ray Okelberry.

The flaw in this evidence, even if the Court were to consider the evidence Plaintiff has shown is irrelevant, is that it simply falls far short, in both quantity and quality, of the type of improvements required in both *Wall* and *Premium Oil*. Even if the above actions may be considered improvements to the roads for the purpose of this action, they certainly do not rise to the level of “extreme and valuable improvements,” *Premium Oil*, 187 P.2d at 203, such that a “manifest injustice,” *Wall*, 168 P. at 770, would occur if the roads were re-opened to the public. Further, the “improvements” listed above did not actually change the nature of the land in question from a road to something entirely different in a manner that would give adequate notice to the public that its rights were being substantially eroded.

In this case, the large bulk of the alleged improvements, such as clearing trees, maintaining gates and fences, installing cattle guards, and placing locks and signs on the gates, either enhance use of the land as a road, or exclude only the public’s use of the land as a road. Neither of these changes satisfies the type of “improvements” made in *Wall* and *Premium Oil*. The District Court in this case made particular mention of the fact that the Okelberrys had “constructed and maintained gates” and had “spent time and energy improving and maintaining the roads.” (R. at 485-86). While it is true that the

Okelberrys *maintained* gates at various places along the roads in question, it is also clear from the testimony of Ray Okelberry that there were already gates on all of the roads when they purchased the property in 1957. (Trial, June 29, 2004 at 174); (Trial, June 30, 2004 at 24). Further, the type of time and energy invested by the Okelberrys was merely that which was necessary for them to carry out their sheep and livestock business, such as tree removal and minimal grading. This is unremarkable, as several witnesses from the general public testified to having made similar “improvements” to the roads to suit their own needs, namely tree removal. (Trial, June 28, 2004 at 78, 91, 139-40, 182, 285); (Trial, June 29, 2004 at 26, 86-88). Therefore, it could reasonably be concluded that all who used the roads felt compelled to make “improvements” to the land in question to the extent that it became necessary for them to carry out their desired use of the roads.

With regard to the sale of trespass or hunting permits and the lease of the land to various hunting units, the Okelberrys have not indicated how this can be considered a valuable improvement to the roads. In fact, simply leasing one’s land to a third party or charging certain people for the right to enter one’s property to hunt does nothing to improve the physical condition of the roads, or place impediments thereon. Neither does a lease of one’s property indicate a change in the use, or demonstrate to the public some other intended use of the land. Further, as will be discussed below, the Okelberrys did not present any evidence to show that they made some sort of investment in the land by entering into these lease agreements that would be lost if the roads were to remain open to the public. Therefore, the Defendants have failed to provide any evidence that they



made the sort of extreme and valuable improvements to the land that are required in an estoppel case against the government regarding the vacation of a public road.

While the Okelberrys may argue that Ray's purchase of Lee's land and sheep could conceivably be considered an investment and, therefore, that it satisfies *Wall*, there is so evidence to support such a finding. It is also notable that this fact is not mentioned in the District Court's Supplemental Findings of Fact and Conclusions of Law. Not only did plaintiff in *Wall* produce evidence to support a specific dollar amount which would be lost, but the court found that the entire purpose of the investment would be destroyed if the land in that question was determined to be a public road. In the present case, the Okelberrys did not produce any evidence regarding the amount of Ray's "investment," nor did they explain how the purpose of the investment would be completely destroyed, or even hurt, if the roads in question were re-opened to the public.

Further, as has been discussed above, the investment made by the plaintiffs in *Wall* changed the possible use of the land in question to something entirely different. In this case, the investment made by Ray to purchase Lee's portion of the land does not change the use of the land in question from that of a road to something else. In fact, since Ray also purchased Lee's sheep, it is clear that Ray merely intended, and in fact has, continued to use the land as before, to run livestock operations and lease it for hunting purposes. Rather than establish some sort of investment material to the issue in this case, the statement seems to be nothing more than a comment made to help establish a timeline of events.

The fatal flaw in the evidence presented above, under the most liberal definition of an “improvement” to the roads, is that it neither satisfies the extent and value of the types of improvements required by *Wall* and *Premium Oil* nor demonstrates the type of improvements that change the very use of the roads to a purpose that would be destroyed by re-opening the roads to the public. Because the Okelberrys simply did not present evidence sufficient to establish estoppel, the finding of estoppel against the County and the public must fail.

B. The Okelberrys have failed to show how they will be injured as a result of any reliance on the County’s affirmative act or omission and subsequent contrary position.

In addition to demonstrating reliance upon a representation by a government authority, a party asserting estoppel must demonstrate that such reliance will result in substantial injury if the government is later allowed to take a position contrary to its earlier representations. *Anderson*, 839 P.2d at 827-28; *Celebrity Club, Inc.*, 602 P.2d at 691. Black’s Law Dictionary defines detrimental reliance as, “[r]eliance by one party on the acts or representations of another, causing a *worsening of the first party’s position.*” BLACK’S LAW DICTIONARY 1316 (8th ed. 2004) (emphasis added). This type of reliance is clearly present in the cases cited by the Supreme Court in *Anderson*. In *Celebrity Club, Inc.*, for example, a club owner expended approximately \$200,000.00 in reliance upon the written representation from the Liquor Control Commission that his club satisfied certain zoning requirement. 602 P.2d at 691. In *Eldredge*, a man voluntarily participated in an early retirement program upon written assurance from the state retirement board that he

would receive retirement credit for certain years of employment. 795 P.2d at 672-73. In both cases, the parties took action that immediately put them at some sort of disadvantage. If, for example, Mr. Eldredge had somehow incurred some windfall or benefit, rather than a loss, by participating in the retirement program, the Court would simply have found that he had sustained no injury due to his reliance, but rather had benefited.

Further, as we see from the opinion on *Wall*, when equitable estoppel is asserted against the government to vacate a public road, the injury resulting from detrimental reliance must include lost investments, either in the form of costly buildings or money expended to purchase and develop land in reliance upon a representation by the government that a road no longer exists. *Wall*, 168 P. at 770; *Premium Oil*, 187 P.2d at 203. In this case, the District Court cites two ways in which the Okelberrys would be injured if the roads remain open to the public. First, the court states that “opening the roads to the public would in effect destroy the Okelberrys’ sheep and cattle operation.” (R. at 485). Second, the court states that “[t]he most significant injury would be the loss of income due to the expected departure of the [Cooperative Wildlife Management Unit, or CWMU].” *Id.*

With regard to the first point, the Okelberrys’ livestock operations, there is but one statement that can be found in the record that supports the conclusion that they will somehow be injured if the roads in question remain open to the public. Ray Okelberry testified that if the roads were open to the public, it would “put [him] out of business.”

(Trial, June 30, 2004 at 140). However, this statement is not supported by any offering of proof. Rather, it is an off-hand, unsubstantiated, and clearly self-serving comment. To the contrary, the facts entered into evidence demonstrate that the very sheep and cattle operations that Ray Okelberry claims will be destroyed have existed in harmony with public use of the roads for over thirty (30) years. In fact, at trial, members of the public testified that when they encountered a closed gate, they would pass through and then re-close the gate. Mr. Buttars specifically testified that the reason he did that was that he knew there were cattle and sheep in the area. (Trial, June 29, 2004 at 122-23).

Although Lee Okelberry testified that there were times when a gate would be left down or open, he also noted that, for the most part, people were mindful to close gates that had been closed when they encountered them. (Trial, June 29, 2004 at 197-98). To say that the livestock operations will be destroyed by preserving what has been the *status quo* for several decades is completely unsupported by any facts in evidence. Not only did the Defendants fail to show how re-opening the roads will affect the livestock operations, they utterly failed to demonstrate that public use has had some detrimental effect on those operations in the past.

In support of the its second point, the alleged injury that will be suffered by the loss of the CWMU contract, the court states that Shane Ford, the current operator of the CWMU, testified that he would cease to use the Okelberry property if the roads were open to the public. (R. at 485, 487). A thorough reading of Shane Ford's testimony, as well as the rest of the trial transcript, produces no such statement by either Ford or any

other witness. Such a discrepancy by the court is difficult to imagine, and so it may be possible that the trial transcript is somehow incomplete and does not contain the statement by Mr. Ford. However, even if such a statement were made, it would be completely unsupported by any offering of evidence. In fact, Mr. Ford testified that he was operating under a ten year lease with the Okelberrys, beginning in 2002, so it is difficult to see how the CWMU lease would have been immediately impacted by re-opening the roads. (Trial, June 29, 2004 at 249).

Further, even if it could be shown, which it was not, that the lease was somehow contingent upon the roads remaining closed to the public, the Okelberrys still have a long way to go to meet the burden of proving that substantial damages and manifest injustice would occur if the roads were re-opened to the public. There was no evidence presented at trial that the current Hunting Unit could not be replaced if Mr. Ford decided to cease operations on the Okelberry property. Even if that were the case, there is no evidence that such an outcome would be a “manifest injustice” of the magnitude that would require the application of estoppel. *Wall*, 168 P. at 770 (quoting *City of Los Angeles v. Cohn*, 35 P. 1002 (Cal. 1894); *Holland*, 856 P.2d at 682. In fact, the record indicates that this is at least the third agreement that the Okelberrys have been involved with for hunting rights on their land. (Trial, June 29, 2004 at 237, 250, 257); (Trial, June 30, 2004 at 39). The Okelberrys have been selling permits for people to hunt on their land since 1990, but the agreement with Mr. Ford did not take effect until approximately 2002. (Trial, June 29, 2004 at 237). If anything can be inferred from the evidence in the

record, it is that Mr. Ford's CWMU is not the only entity with which the Okelberrys can do business. If Mr. Ford were to terminate his relationship with the Okelberrys, there is nothing in the record to indicate that an agreement with another entity would be impossible.

Further, the court made the conclusion that the Okelberrys' "business investments" on the land were significant, and that, in developing a business relationship with the current CWMU the Okelberrys had "potentially pass[ed] on other business or land development opportunities that may have existed in the interim." (R. at 482, 484). While this may or may not be true, there is absolutely no evidence in the record to indicate that the Okelberrys made a single investment or passed up a single opportunity because of the lease agreement with Mr. Ford and the CWMU. In fact, merely leasing one's land generally does not require any investment on the part of the lessor. Again, a careful reading of the trial transcript produces absolutely no evidence upon which the court can rely to make such a statement.

It is true that the Supreme Court in *Wall* left the test open to include both buildings erected on a road and substantial investments made regarding a road in reliance upon government representations that such a road no longer exists. *Wall*, 168 P at 769. Indeed, the *Wall* Court stated that it was, "unable to see any difference in principle between a person who, under the circumstances, spends his money in the erection of a building and one who expends his money upon the same assurance for the purchase of

land . . . .” The present case, however, does not involve either circumstance. *Wall*, 168 P. 770.

The lease agreement with Shane Ford to run a hunting unit on the property simply does not fall under the rubric of either “valuable improvements” or the type of detrimental reliance in the form of investments discussed by the court in *Wall*. In *Wall*, the court pointed to the fact that the land owners had encumbered the property with a mortgage based on the resolution by the city council to allow the subdivision and sale of the land. *Id.* The *Wall* Court found that the loss of at least a \$3,000.00 investment (valued in 1917) in the land was no smaller injury than the loss of a building placed on the land of the same value. *Id.*

Essentially, the court in *Wall* found that regardless of what buildings may have actually been placed on the portion of the land that constituted the road, the investment in developing, subdividing, and selling the land alone was of equal value to a building, and that the investment would be completely lost if the land reverted back to public use. *Id.* Again, it is important to note that detrimental reliance exists only when a person acts upon the representations of another and *worsens* his or her position. In this case, the Okelberrys have failed to demonstrate how they will be placed in a position worse than where they were before the alleged reliance on the County’s inaction. To the contrary, the Okelberrys merely acted in a way to *better* their position by leasing their land. The term investment implies an expenditure made in anticipation of a return greater than the amount paid. While in *Wall*, there was a true investment made, the Okelberrys have not

produced any evidence to show what money was expended in anticipation of a future gain. Rather, the district court erroneously equated profits made from leasing the property to the CWMU to some sort of investment that would be lost if the roads were re-opened.

There is no reason why the Okelberrys can not continue to lease their land to entities that will sell the right for people to hunt on their land even if the roads that traverse that land are open to the public. Even assuming that the Okelberrys may lose part of a source of income from the CWMU, it is income that came at no apparent expense to them and only as a result of unlawful blocking of public roads. Their position is akin to a hypothetical man who begins to sell permits to the public to enter land that is designated a city park. Surely, the man will be injured if the city enforces the public's right to enter the park without paying him, but the man has made no investment in reliance upon any act by the city. To take the analogy one step further, suppose that the city, unaware of the man's actions, fails to stop him for a period of many years. It would be unreasonable to think that such failure to act validates the man's claim to sell passes to the park, and that the man could conceivably claim detrimental reliance in order to recover his lost profits from the city.

Loss of increased income does not necessarily amount to an actionable injury in a case such as this. In fact, the Supreme Court has been absolutely clear that the doctrine of equitable estoppel is one that should only be applied against the government in extreme circumstances, when "the facts may be found with such certainty, and the



injustice suffered is of sufficient gravity, to invoke the exception.” *Anderson*, 839 P.2d at 827 (quoting *Utah State Univ. v. Sutro & Co.*, 646 P.2d 715, 720 (Utah 1982)). Indeed, if the Okelberrys have made decisions that will turn out to be to their detriment if the roads remain open to the public, they have presented absolutely no evidence of that at trial. Certainly, they have not presented facts with “such certainty” that the injury they will suffer is of “sufficient gravity” to justify assertion of this narrow exception. *Id.* In fact, the supreme court in *Jackson Cattle* clearly held that when one has not substantially “altered his position to his detriment in reliance on the asserted nonuse of the roadway by the public, estoppel should not be available to circumvent the statutory process.” 744 P.2d at 1378. It is the responsibility of the party asserting estoppel to demonstrate that a substantial injury will result if the government is allowed to take a position that is contrary to its prior representations. This is a burden that the Okelberrys did not meet.

#### IV. THE PREMIUM OIL CASE DOES NOT SUPPORT A FINDING OF ESTOPPEL IN THE CASE AT BAR.

##### A. A close reading of *Premium Oil* supports the *Anderson* and *Wall* requirements for estoppel against a government entity.

Even though estoppel was asserted *by*, and not *against*, the government in *Premium Oil*, a careful reading of the case actually reveals that it satisfies all of the minimum requirements established for an estoppel case against the government to vacate a public road. 187 P.2d 199. First, while the Court noted that the land in question had always belonged to the city, and had never actually been abandoned to use as a road, it also found that the government had relied upon affirmative representations of members of the

public, including the adjacent landowner<sup>2</sup> that they wished the park to be built on the land. *Id.* at 202-03. Second, in reliance, the city invested a great deal of money and public resources to construct a public park and swimming pool on the land in question. Finally, to change the land from the current use as a public park and pool to that of a public road would be impossible “without destroying costly and permanent improvements being used by the public.” *Id.* at 204.

While it is true that the *Premium Oil* court did not explicitly state that an affirmative representation is required, it is also true that *Premium Oil* never drew the conclusion that such an affirmative representation was *not* necessary or that mere inaction would suffice. What the court was thinking in *Premium* can be shown from the language quoting the Illinois Supreme Court as saying that equitable estoppel may be applied when private parties have been induced by the government to believe that streets have been abandoned by the public, and have “placed themselves, by making structures or improvements *in the streets*, in a situation where they must suffer great pecuniary loss if those representing the public be allowed afterwards to allege that the street was not

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<sup>2</sup> A subsequent purchaser was the plaintiff in *Premium Oil*, arguing that the land he had purchased contained a road that had been created through public use. 187 P.2d at 203. Therefore, while it was not the actual plaintiff in the case that had requested that the park be built, it was the person who, at the time, would have stood “in the shoes” of the plaintiff pertaining to decisions made with regard to the land because a later purchaser can only acquire what rights remain in the land. *Id.* Further, the Court noted that the Plaintiff had purchased the land with full notice and knowledge of the changed use of the alleged road and the developments thereon. *Id.* This case is unique as the Court struggles to determine if the Plaintiff has standing to bring suit as a private party arguing he is entitled to an easement over public land or if he is a member of the public asserting a right in a public road.

abandoned . . . .” *Id.* (quoting *Village of Itasca et al. v. Schroeder*, 55 N.E. 50, 58 (Ill. 1899) (emphasis added)).

More importantly, while the Court does make several references to the fact that the previous landowner had stood by and watched, without protesting, for well over twenty (20) years while the city made improvements to and changed the use of the land, the Court never says that this is the deciding factor. *Id.* at 202-03. Rather, the Court specifically notes on more than at least three occasions that the previous landowner made affirmative representations to the city and actually *requested* that the changes be made to the land. *Id.*

B. If, in fact, the *Premium Oil* case creates a separate test for equitable estoppel when asserted to vacate a public road, the test is still not met in the case at bar because defendants have failed to show that they made extensive and valuable improvements to the land that change the use of the land from a public road to something else that would be destroyed if the land is re-opened to the public.

If, in fact, *Premium Oil* creates separate test for cases estoppel cases involving the vacation of a public road, it must necessarily include: 1) “extensive and valuable improvements” erected on or made to the land, 2) in reliance upon action or inaction, 3) that changes the use of the land from that of a public road and, 4) would have to be destroyed to change the land’s use back to that of a public road. *Id.* at 202-04.

As discussed above, any work or actions taken by the Defendants do not qualify as “extensive and valuable improvements” to the land. Merely clearing trees in order to travel on the roads, placing signs informing others to keep out, and blocking traffic on the roads does not improve the land in the way that is required under *Premium Oil*. At best,

these improvements indicate effort expended in order to use the roads oneself, and profit by creating exclusive use on the roads. In fact, it is clear from the trial transcript that other members of the public expended the same efforts in clearing the roads in order to use them for their own purposes.

In applying the last two principles of the *Premium Oil* case, it becomes clear that, regardless of the issue of representation or reliance, the Okelberrys did not make improvements that changed the nature of the use of the land, and which would have to be destroyed at substantial cost to them if the roads are re-opened to the public. In fact, the alleged improvements made by the Defendants were either to enhance their use of the land as a road (i.e. by clearing trees or grading the roads), or merely to limit the use of the land as roads by preventing the general public to travel on them without permission. Nothing in the record indicates that the Defendants have made such “costly and permanent” improvements to the roads that change the very nature of the possible use of the land. *Id.* at 204.

Further, because no such improvements have been made, there are no such improvements that would have to be destroyed in order to change the use of the land back to that of a road. Certainly, locks would have to be removed from gates, but that is the extent of the work that would need to be done in order to re-open the roads to the public. The gates maintained by the Defendants have been in place since long before the roads became public. Further, the Defendants would still be able to enjoy the use of those gates (unlocked) as well as the benefit of any other work done to clear or enhance the

road. As an added benefit, the Defendants would also benefit from the continued additional clearing done by those members of the public who traverse the roads.

- C. To Affirm the District Court's decision would be to blur the line between a common adverse possession claim and the proper application of a very narrow exception to a clearly defined statutory provision and expand a doctrine that the Supreme Court and the Utah legislature have been steadily narrowing over the years.

As a policy matter, affirming the finding of the District Court would greatly expand the exception to the general rule that the Supreme Court has been applying to an increasingly narrow spectrum of cases over the past decade. The language of the Court has shown an increasing reluctance to apply the doctrine of equitable estoppel against the government, except in the most extreme cases. *Anderson*, 839 P.2d at 827; *Jackson Cattle*, 744 P.2d at 1378. In the general sense, the Court clearly looks for a specific, perhaps even written representation by the government before the doctrine may be considered. *Anderson*, 839 P.2d at 827. Specifically in the context of vacation of public roads, the Court seems to be increasingly willing to give deference to the intent of the legislature regarding the process required for a County to vacate a public road. *Jackson Cattle*, 744 P.2d at 1378 (“We are extremely reluctant to apply the doctrine of estoppel against the assertion of rights in a public highway by a government entity . . . . This reluctance is in harmony with the expressed will of the legislature, which requires that a strict statutory procedure be followed for the vacation of a public road.”); *Ercanbrack*, 524 P.2d at 596-97 (even when there had been an express, written statement by the County of its intent to

vacate a certain public highway, the Court nullified the resolution because it did not completely satisfy certain aspects of the statute for vacation of a public road).

Without reasonable reliance on an affirmative representation that results in substantial investment in, or improvements on land formerly used as a road, the courts would open the door to using equitable estoppel to claim private rights in roads based merely on nonuse. This not only clearly contravenes the will of the legislature and the trend of the Supreme Court with regard to vacation of public roads, but it essentially contravenes U.C.A. § 78-12-13, which expressly prohibits any person from acquiring a right in a public road by adverse possession. If the Okelberrys' claim, based essentially only on nonuse, is upheld they will essentially be given a right in a public road based on a claim indistinguishable from common adverse possession. Further, and perhaps for this very reason, the Supreme Court specifically held in *Jackson Cattle* that mere nonuse is not enough to support an equitable estoppel claim. 744 P.2d at 1378; *See also Clark*, 341 P.2d at 425.

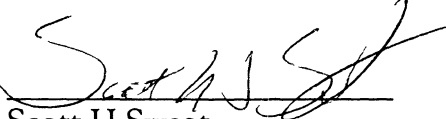
The *Clark* opinion supports this position with regard to nonuse of a public road, particularly when nonuse is created by the would-be owner of the property denying the public access. *Clark*, despite the fact that the Court does not explicitly discuss estoppel, is notable in that the road in question was first attained by the public through use as a thoroughfare. *Clark*, 341 P.2d at 425. In facts similar to the present case, Clark expended time, money and effort to fence the land, build a building, and plant shrubberies and trees on the property. *Id.* The Court found that, despite Clark's

encroachment on, and the public's nonuse of the land for thirty (30) years, the road was not vacated by the County. *Id.* The Court ordered Clark to remove the encroachments, because they had been constructed after the road had been abandoned to the public. *Id.*

### CONCLUSION

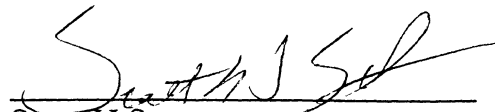
Wasatch County did not vacate the roads pursuant to the provisions outlined in Utah Code Ann. § 72-3-108. Further Wasatch County did not make any affirmative act, let alone a writing, upon which the Okelberrys could rely in believing the roads in question were private. Moreover, the Okelberrys did not produce sufficient evidence to support an estoppel claim against the County, this Court should reverse the District Court's finding that the County is estopped from asserting the public's right to use those roads.

Dated this 30<sup>th</sup> day of December, 2005.

  
Scott H Sweat

I hereby certify that I mailed a true and correct copy of the forgoing Appellant's Opening Brief, first class postage prepaid, this 30<sup>th</sup> day of December 2005 to the following:

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## ADDEDNDUM

Findings of Fact and Conclusions of Law

Order

Supplemental Findings of Fact and Conclusions of Law

Order

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Our File No.

Attorneys for Defendants Okelberry

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

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| <p>WASATCH COUNTY, a body public of<br/>the State of Utah,</p> <p>Plaintiff,</p> <p>vs.</p> <p>E. RAY OKELBERRY, BRIAN<br/>OKELBERRY, ERIC OKELBERRY,<br/>UTAH DIVISION OF WILDLIFE<br/>RESOURCES, WEST DANIELS LAND<br/>ASSOCIATION, and JOHN DOES 1-25,</p> <p>Defendants.</p> | <p><b>FINDINGS OF FACT AND<br/>CONCLUSIONS OF LAW</b></p> <p>Case No. 010500388<br/>Judge Donald J. Eyre</p> |
|--|--|

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

**FINDINGS OF FACT**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### CONCLUSIONS OF LAW

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

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



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

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

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

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

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

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

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

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

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

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

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

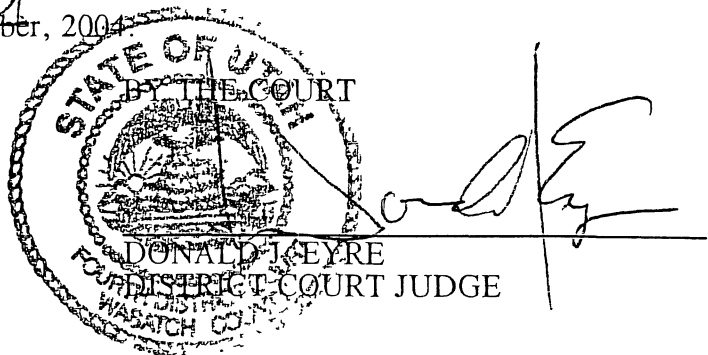
11. In Premium Oil v. Cedar City, 187 P.2d 199 (Utah 1947), the supreme court held that a strip of land once dedicated as a public road had been used in a manner directly in conflict with the land's dedication as a public road. The court stated that "the manner in which the city used the strip was openly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

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

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

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

DATED this 22 day of Oct September, 2004



APPROVED AS TO FORM:

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

**NOTICE TO PLAINTIFF'S ATTORNEY**

TO: SCOTT H. SWEAT, ESQ.

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

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



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

MAILING CERTIFICATE

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

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

  
\_\_\_\_\_  
SECRETARY

G \DRP\OKELBERY FOF

ORDER



PJB

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

Our File No. 25774

Attorneys for Defendants Okelberry

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

|  |   |
|--|---|
| <p>WASATCH COUNTY, a body public of<br/>the State of Utah,</p> <p>Plaintiff,</p> <p>vs.</p> <p>E. RAY OKELBERRY, BRIAN<br/>OKELBERRY, ERIC OKELBERRY,<br/>UTAH DIVISION OF WILDLIFE<br/>RESOURCES, WEST DANIELS LAND<br/>ASSOCIATION, and JOHN DOES 1-25,</p> <p>Defendants.</p> | <p>ORDER</p> <p>Case No. 010500388<br/>Judge Donald J. Eyre</p> |
|--|---|

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

## ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

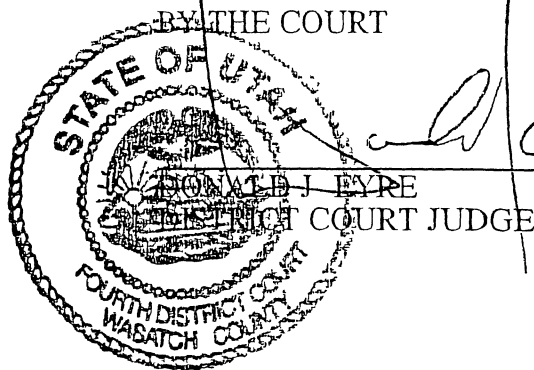
the city used the strip was openly hostile to the public use as a street and should have been notice to all that any dedication, if previously intended, has been abandoned. Under the facts of the case, the court held that the Plaintiff would be estopped to claim an improper abandonment or vacation. this Court finds that while the roads at issue were properly abandoned to public use by compliance with the statutory requirements, the Defendants for a period of twelve years exerted control and used the roads in an openly hostile manner to the public use of the streets. Applied to the present case, the County having failed to bring an action for twelve years must now be estopped from doing so.

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

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

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

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



APPROVED AS TO FORM:

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

## SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW



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

FILED FEB 23 2005 9:10 AM  
CLG

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

Plaintiff,

v.

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

Defendants.

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

Case No. 010500388

Judge Donald J. Eyre

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

**FINDINGS OF FACT**

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

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

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

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

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

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

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

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

prevent the Okelberrys from selling these trespass permits.

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

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

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

### **RULING**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

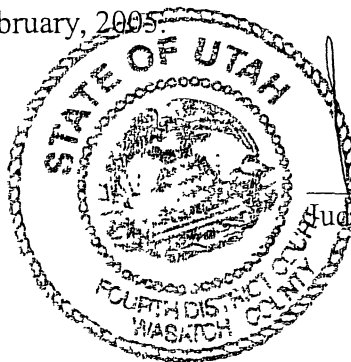
reliance on the asserted nonuse of the roadway by the public.” *Id.* at 1378. In *Western Kane* the Utah Supreme Court refused to apply equitable estoppel against the government because the “landowner had not substantially altered his position to his detriment in reliance on the asserted nonuse of the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

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

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

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

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



Judge Donald J. Eyre



ORDER

2005 MAR 25 11:33

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

Attorneys for Defendants

IN THE FOURTH JUDICIAL DISTRICT COURT OF WASATCH COUNTY

STATE OF UTAH

WASATCH COUNTY,

Plaintiff,

vs.

E. RAY OKELBERRY, et. al.,

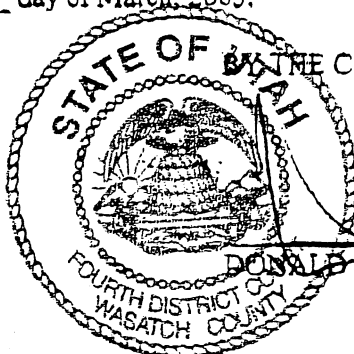
Defendants.

**ORDER**

Case No. 010500388  
Judge Donald J. Eyre

This Court hereby (I) supplements its findings of fact as was set forth in the  
Supplemental Findings of Fact and Ruling that were signed on February 18th, 2005, and (II)  
denies Plaintiff's Motion to Alter or Amend Judgment.

DATED this 28 day of March, 2005.



BY THE COURT:

DONALD J. EYRE, JUDGE