

2005

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

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Ryan D. Tenney; Howard, Lewis and Peterson; counsel for appellants.

Thomas Low, Scott H. Sweat; counsel for appellee.

Recommended Citation

Reply Brief, *Wasatch County v. Okelberry*, No. 20050389 (Utah Court of Appeals, 2005).
https://digitalcommons.law.byu.edu/byu_ca2/5766

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

WASATCH COUNTY,

Appellant/Cross-Appellee,

vs.

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

Appellees/Cross-Appellants.

Case No. 20050389-CA

APPELLEES/CROSS-APPELLANTS' REPLY BRIEF

APPEAL FROM THE RULING OF THE FOURTH DISTRICT COURT, WASATCH
COUNTY, HONORABLE DONALD J. EYRE

RYAN D. TENNEY, for:
HOWARD, LEWIS & PETERSEN, P.C.
120 East 300 North
Provo, UT 84606
Telephone: 801-373-6345
Facsimile: 801-377-4991
ATTORNEYS FOR
APPELLEES/CROSS-APPELLANTS

THOMAS L. LOW
SCOTT H. SWEAT
WASATCH COUNTY ATTORNEYS' OFFICE
805 West 100 South
Heber City, UT 84032
Telephone: 435-654-2909
Facsimile: 435-654-2947
ATTORNEYS FOR
APPELLANT/CROSS-APPELLEE

FILED
UTAH APPELLATE COURTS
JUL 12 2006

IN THE UTAH COURT OF APPEALS

WASATCH COUNTY,

Appellant/Cross-Appellee,

vs.

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

Appellees/Cross-Appellants.

Case No. 20050389-CA

APPELLEES/CROSS-APPELLANTS' REPLY BRIEF

APPEAL FROM THE RULING OF THE FOURTH DISTRICT COURT, WASATCH
COUNTY, HONORABLE DONALD J. EYRE

RYAN D. TENNEY, for:
HOWARD, LEWIS & PETERSEN, P.C.
120 East 300 North
Provo, UT 84606
Telephone: 801-373-6345
Facsimile: 801-377-4991
ATTORNEYS FOR
APPELLEES/CROSS-APPELLANTS

THOMAS L. LOW
SCOTT H. SWEAT
WASATCH COUNTY ATTORNEYS' OFFICE
805 West 100 South
Heber City, UT 84032
Telephone: 435-654-2909
Facsimile: 435-654-2947
ATTORNEYS FOR
APPELLANT/CROSS-APPELLEE

TABLE OF CONTENTS

<u>TABLE OF CONTENTS</u>	i
<u>TABLE OF AUTHORITIES</u>	ii
<u>ARGUMENT</u>	1
I. THE OKELBERRYS' OPENING BRIEF PROPERLY COMPLIED WITH THE MARSHALING REQUIREMENT..	1
A. <u>The Okelberrys did not simply “reargue the weight” of their supportive evidence, but instead fully complied with the marshaling requirement.</u>	1
B. <u>The Okelberrys were not required to marshal any evidence relating to the lock issue because that issue presents a legal challenge.</u>	2
C. <u>The Okelberrys were not required to marshal evidence that was irrelevant to the trial court’s ultimate determination.</u>	6
II. THE OKELBERRYS WERE NOT REQUIRED TO PRODUCE TESTIMONY FROM PERSONS WHO WERE ACTUALLY STOPPED FROM USING THE ROADS.	8
III. THIS COURT SHOULD HOLD AS A MATTER OF LAW THAT UNLOCKED GATES ARE SUFFICIENT TO RETAIN PRIVATE CONTROL OVER ROADS.	11
A. <u>The presence of an unlocked gate is significant for purposes of § 72-5-104 because the gate interrupts the public’s ability to use the road in question.</u>	11
B. <u>The County’s ability to place gates across class B or D roads is not analogous to the present situation.</u>	15
IV. CONTRARY TO THE COUNTY’S ASSERTIONS, INTERMITTENT INTERRUPTIONS ARE SUFFICIENT TO PREVENT PUBLIC DEDICATION UNDER § 72-5-104.	18
<u>CONCLUSION</u>	23

TABLE OF AUTHORITIES

Cases

<u>AWINC Corp. v. Simonsen</u> , 2005 UT App 168, 112 P.3d 1228	12, 22
<u>Bear River Mutual Insurance Co. v. Wall</u> , 978 P.2d 460 (Utah 1999)	23
<u>Boyer v. Clark</u> , 326 P.2d 107 (Utah 1958)	12, 22
<u>Campbell v. Box Elder County</u> , 962 P.2d 806 (Utah Ct. App. 1998)	12, 19, 22
<u>Chapman v. Uintah County</u> , 2003 UT App 383, 81 P.3d 761	12, 22
<u>Draper City v. Estate of Bernardo</u> , 888 P.2d 1097 (Utah 1995)	14, 21-22
<u>Heber City Corporation v. Simpson</u> , 942 P.2d 307 (Utah 1997)	7, 10, 12, 22
<u>Mardanlou v. Ghaffarian</u> , 2006 UT App 165, –P.3d–	8
<u>Rappleye v. Rappleye</u> , 2004 UT App 290, 99 P.3d 348	7
<u>State v. Six Mile Ranch Co.</u> , 2006 UT App 104, 132 P.3d 687	10, 12, 19, 22
<u>Thurman v. Byram</u> , 626 P.2d 447 (Utah 1981)	21-22

Statutes

Utah Code Annotated § 72-3-103 (2005)	16
Utah Code Annotated § 72-3-105 (2005)	16
Utah Code Annotated § 72-5-104 (2005)	passim
Utah Code Annotated § 72-6-118 (2005)	17-18
Utah Code Annotated § 72-7-102 (2005)	18
Utah Code Annotated § 72-7-106 (2005)	15-18
Utah Code Annotated § 76-8-416 (2005)	18

Rules

Utah Rule of Appellate Procedure 24(a)(9) 2, 6-7

Other Authorities

Webster's Third New International Dictionary (1993) 12, 20

ARGUMENT

I. THE OKELBERRYS' OPENING BRIEF PROPERLY COMPLIED WITH THE MARSHALING REQUIREMENT.

Wasatch County (the County) argues that the Okelberrys failed to comply with the marshaling requirement in their opening brief. The County advances three principal arguments in support of this contention. Each should be rejected.

A. The Okelberrys did not simply “reargue the weight” of their supportive evidence, but instead fully complied with the marshaling requirement.

The County's first argument is a general one—namely, that the Okelberrys marshaled “none” of the contrary evidence regarding the interruptive acts in their brief, but instead “simply present[ed] the evidence supporting their position at trial and reargue[d] its weight.” County's Response/Reply Brief at 3. This assertion is incorrect. In their Opening Brief, the Okelberrys included a detailed marshaling section that was marked by three separate levels of subheadings: the first level designated the marshaling section generally; the second level organized the contrary evidence on a road-by-road basis; the third level then listed and classified the contrary evidence on a road-specific, interruptive act-specific basis. See Okelberrys' Opening Brief at 24-31. Taken together, this marshaling section spans a full 6½ pages of text. As such, the County's assertion that the Okelberrys have marshaled “none” of the contrary evidence is wrong and ought to be disregarded by this Court.

B. The Okelberrys were not required to marshal any evidence relating to the lock issue because that issue presents a legal challenge.

The County next complains of a failure to marshal Lee Okelberry's testimony that the gates were not locked. Though this testimony was specifically discussed in the Statement of Facts of the Okelberrys' Opening Brief at page 14, it was admittedly not then discussed again in the marshaling section. Thus, the County's complaint on this issue is not one of omission, but rather of placement. Regardless, Rule 24(a)(9) of the Utah Rules of Appellate Procedure states that a party must marshal all supportive evidence when "challenging a fact finding." The assertion that there was a marshaling failure on this point should be rejected simply because the Okelberrys are not challenging any factual finding relating to the lock issue.

Based on the nature of this argument, it appears that there may be some confusion regarding which of the Okelberrys' arguments on cross-appeal are and are not actually directed at fact findings. Given how organizationally complicated this appeal is, this confusion is understandable. After all, this Court is being asked to review the trial court's conclusion that a three-pronged statutory test was met with respect to four different roads over five different decades. This complexity is compounded by the fact that the trial court actually issued two separate rulings on the matter, and by the fact that the Okelberrys have cited to four separate interruptive acts as the basis for their cross-appeal.

For purposes of clarification, the following is a synopsis of the trial court's rulings with respect to each of the four interruptive acts, as well as the nature of the cross-appeal with respect to each:

(1) Permission and expulsion: In its original Findings of Fact, the trial court noted that the Okelberrys produced testimony indicating that they and their agents had asked non-permissive users to leave the roads. R. at 417, Findings of Fact at ¶16. The court also noted that the County believed that the Okelberrys and their agents were instead only asking persons to leave the surrounding property, but not the roads themselves. R. at 417, Findings of Fact at ¶13. The trial court did not settle this evidentiary dispute in its original ruling, however, but instead concluded that it didn't matter whether some persons were expelled from the roads. According to the trial court, the fact that the County's witnesses used the roads without permission was enough to establish that the roads were used as a public thoroughfare. See R. at 414, Conclusions of Law at ¶6.

In its Supplemental Findings of Fact, however, the trial court appears to have revisited the issue again in passing. In Supplemental Finding ¶7, the court noted that testimony had been presented below 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." R. at 488, Supplemental Findings at ¶7. Though it doesn't say so directly, this Supplemental Finding could theoretically be read as a conclusion that the granting and withdrawing of permission was only for the surrounding properties, and not for the roads themselves.

Given the lack of clarity regarding what the trial court did and did not find with respect to this interruptive act, the cross-appeal with respect to this issue takes one of two forms. First, if this Court concludes that the trial court never actually rejected the Okelberrys' testimony regarding expulsions from the roads, the challenge on appeal is that these expulsions rendered the public's use of the roads non-continuous, and that the ultimate determination of public abandonment (which is a legal determination) was therefore erroneous as a matter of law. Second, if this Court instead determines that Supplemental Finding ¶7 was an implicit Finding that the Okelberrys and their agents had only expelled persons from the properties, and not from the roads themselves, the Okelberrys are then challenging that finding directly on the basis that it is not supported by the evidence. As discussed in the Okelberrys' Opening Brief on pages 32-34, the basis for that challenge would be that the County did not produce any direct evidence contradicting the testimony of the four separate witnesses who testified that the expulsions occurred on the roads themselves, or of the three other witnesses who testified to having had to receive specific permission to use the roads. Given that this testimony was unrebutted, any contrary finding would not have been supported by the evidence and should be overturned

(2) The presence of closed gates on the roads: The trial court specifically found that there have been gates across the roads since 1957. R. at 418-17, Findings of Fact at ¶¶9, 12. This specific finding is not challenged by the Okelberrys, and it has not been

properly challenged by the County.¹ Instead, the Okelberrys' challenge on this point is purely legal—ie that the presence of gates across a road, whether locked or not, cuts off the public's ability to use the road continuously as a public thoroughfare. See Okelberrys' Opening Brief at 34-37; Section III of this Brief, supra at 11-18.²

(3) The locks on the gates: In its Supplemental Findings, the trial court specifically found that the Okelberrys had periodically locked the gates. According to the court, “[a]t 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.” R. at 488, Supplemental Findings at ¶5. The Okelberrys do not challenge this finding, and the County has not properly challenged it on appeal either. As such, the Okelberrys' challenge on this point is also purely legal—ie that the periodic locking of gates, even if only temporary, was enough to cut off the public's ability to use the roads continuously as a public thoroughfare. See Okelberrys' Opening Brief at 38-40; Section IV of this Brief, supra at 18-23.³

¹Though the County pointed to some contrary evidence on this point in its Reply Brief, see County's Response/Reply Brief at 11-12, the County has never appealed this specific Finding, nor has it marshaled the supporting evidence. As such, its assertions that the gates may have been “down” at some point is not before this Court.

²Given the purely legal nature of this challenge, no marshaling on this point was technically required. In spite of this, the evidence regarding these gates was marshaled out of an abundance of caution and as a courtesy to this Court.

³Given the purely legal nature of this challenge, no marshaling on this point was technically required either. In spite of this, the evidence regarding the locks was marshaled out of an abundance of caution and as a courtesy to this Court.

(4) The *no trespassing* signs: In the trial court's original Findings, it stated that there had been *no trespassing* signs across the roads, but the court then concluded that these signs only referred to the property, not the roads, and therefore did not impede the public's ability to use the roads. R. at 417, Findings of Fact at ¶11. The Okelberrys directly challenge this Finding to the extent that it holds that the signs referred to the property, not the roads. The Okelberrys also challenge the ultimate determination that these signs did not act as an obstacle to uninterrupted public use as a public thoroughfare. See Okelberrys' Opening Brief at 37-38.

C. The Okelberrys were not required to marshal evidence that was irrelevant to the trial court's ultimate determination.

Finally, the County complains of a failure to marshal (1) the evidence showing that the contested roads were identified on Forest Service maps and (2) Lee Okelberry's apparent testimony that the *no trespassing* signs had only been put up recently.

With respect to the identification of these roads on Forest Service maps, the Okelberrys did specifically discuss this evidence on page 24 of their Opening Brief. As such, the County's complaint is again not one of omission, but rather of placement—ie that this discussion was not located in the marshaling section itself. While this is admittedly true, this evidence did not need to be marshaled, however, because it was not relevant to the trial court's ultimate determination.

Rule 24(a)(9) does not require a party to marshal all evidence that was presented at trial, but instead only requires a marshaling of “all evidence that supports the challenged

finding.” This Court has also held that a party is only required to marshal the “relevant evidence.” Rappleve v. Rappleve, 2004 UT App 290, ¶27, 99 P.3d 348. As was noted on page 24 of the Okelberrys’ opening brief, the County’s map witness, Don Wood, specifically acknowledged at trial that the fact that a particular road is designated on a Forest Service map does not necessarily mean that the road is a public road. Trial Transcript, June 28 at 21. As such, testimony regarding map designations has been deemed irrelevant for purposes of a § 72-5-104 determination, see Heber City v. Simpson, 942 P.2d 307, 311 n.8 (Utah 1997), and the trial court did not rely on these map designations as support for the ultimate determination of abandonment in this case.

The irrelevancy of the map designations was discussed in the Okelberrys’ Opening Brief, yet the County still failed to either acknowledge the discussion, to refute the cited authority, or to even attempt to show how the maps were somehow relevant to the trial court’s ultimate determination. Given that Rule 24(a)(9) only requires a marshaling of all relevant evidence, this Court should hold that the failure to mention Mr. Wood’s testimony in the marshaling section was simply not a violation of the marshaling rule.

Regarding Lee Okelberry’s statement about the signs, further review indicates that this one statement was indeed overlooked while reviewing and cataloguing the 749 pages of trial testimony, and it therefore was not marshaled. The Okelberrys also note, however, that they did specifically cite to and marshal at least eighteen different statements made at trial that supported the County’s position with respect to the signs issue. See Okelberrys’ Opening Brief at 26-31. Given their otherwise abundant

compliance with the rule, the Okelberrys respectfully suggest that their marshaling was sufficient with respect to this issue. See, e.g., Mardanlou v. Ghaffarian, 2006 UT App 165, ¶12 n.1, –P.3d–. If this Court determines that some sanction is appropriate, the Okelberrys further suggest that the impact of this particular failure would be limited to the sign issue itself, and not to the other separate challenges raised on cross-appeal.⁴

II. THE OKELBERRYS WERE NOT REQUIRED TO PRODUCE TESTIMONY FROM PERSONS WHO WERE ACTUALLY STOPPED FROM USING THE ROADS.

The County next asserts that the Okelberrys' failure to produce testimony from persons who had actually been stopped from using the roads is somehow fatal to the Okelberrys' claim that these expulsions interrupted the public's ability to use the roads. This argument should be rejected.

While it may be true that the Okelberrys did not produce any witnesses who had actually been expelled from the roads, the Okelberrys did produce at least two witnesses who specifically testified to having actually *done the expelling*: Bruce Huvard, who has been asking persons to leave the roads since at least 1966, Trial Transcript, June 29 at 256, and Jeff Jefferson, who has been asking persons to leave the roads every summer since at least 1977. Trial Transcript, June 29 at 141, 148-49. This also comports with the

⁴The County also complains of a general failure to marshal testimony from "Glen Shepherd and Brian and Lee Okelberry." County's Response/Reply Brief at 3. The County does not then identify what testimony from these three witnesses it thinks ought to have been marshaled. In the absence of something more specific, the Okelberrys are powerless to respond, and this particular challenge ought to be rejected as being improperly briefed.

testimony of several other witnesses who affirmatively described having obtained permission to use not just the property, but the roads themselves. See Trial Transcript, June 29 at 163-65 (Mel Price); Trial Transcript, June 29 at 212, 220 (Glen Shepherd); Trial Transcript, June 29 at 230-31 (Shayne Ford).

This testimony regarding the permissions and expulsions was uncontroverted. The County did not, for example, impeach this testimony on cross-examination by eliciting an admission from any of these witnesses that the expulsions had never in fact occurred. Nor did the County call any witness from either the Okelberry family or the Okelberry operation who could testify that this expulsion policy didn't exist, or that it only applied to the surrounding property and not to the roads. All that the County has done is present testimony from nine witnesses, each of whom were unaffiliated with the Okelberry operation, and who had each managed to slip through the gaps that existed in the Okelberrys' efforts to expel non-permissive travelers from their roads. The County has then based its argument with respect to this issue on the suggestion that if these nine witnesses made it through, then the Okelberrys and their agents must all have been lying when they stated that they expelled other persons from the property.

Given the large geographic area at issue, given its rural nature, and given the fact that even the Okelberrys and their agents were only on the property during certain months of the year (and even then were usually off the roads in the back country with the livestock), it is not surprising or significant that these selected witnesses had each managed to make it through without being stopped. Given how emotionally charged this

case was,⁵ the Okelberrys' failure to obtain the testimony of witnesses who had been stopped and turned back is not surprising nor significant either. What is significant is that no witness testified that the Okelberrys were not telling the truth when they said that they had a policy of periodically expelling non-permissive users from these roads, nor did any witness testify that Bruce Huvard and Jeff Jefferson were lying when they said that they had acted as agents on the Okelberrys' behalf in expelling certain other members of the public. Thus, because this testimony was uncontroverted, it should have been accepted as true by the court. Once accepted as true, this interruptive act alone should have mandated a ruling that these roads were not used by the public continuously without interruption. The Okelberrys' failure to produce a person who had actually been expelled was immaterial.⁶

⁵For example, testimony at trial described several armed confrontations between the Okelberrys and members of the public who were demanding access to their roads. See, e.g., Trial Transcript, June 29 at 199-20 (Lee Okelberry); Trial Transcript, June 29 at 261 (Bruce Huvard). The testimony also described repeated instances in which the Okelberrys' gates and locks were simply torn down by would-be trespassers. Trial Transcript, June 29 at 186 (Lee Okelberry); Trial Transcript, June 30 at 137-38 (Ray Okelberry).

⁶In the Okelberrys' opening brief, the Okelberrys also asserted that the operative standard for § 72-5-104 cases was that there needed to have been "unrebutted" and "uncontradicted" testimony of non-interrupted use. Okelberrys' Opening Brief at 23. This assertion was founded upon a review of such cases as Heber City, wherein this type of evidentiary disparity seemed to be the norm. See Okelberrys' Opening Brief at 20-24. After that brief had been filed, however, this Court issued its opinion in State v. Six Mile Ranch Co., 2006 UT App 104, 132 P.3d 687, wherein it affirmed a decision by a trial court to publicly dedicate certain roads, even though there had been a dispute of evidence below. See id. at ¶28. To the extent that the Okelberrys' Opening Brief argued otherwise, that statement of the law is obviously rendered obsolete by the decision in Six Mile Ranch and is hereby withdrawn.

III. THIS COURT SHOULD HOLD AS A MATTER OF LAW THAT UNLOCKED GATES ARE SUFFICIENT TO RETAIN PRIVATE CONTROL OVER ROADS.

The County argues that the presence of unlocked gates alone is not sufficient to constitute an interruption under § 72-5-104 because such gates do not actually “prevent” use or travel. County’s Response/Reply Brief at 13. The County then maintains that because gates can sometimes be placed across Class B or D roads, such gates cannot constitute an interruption for purposes of § 72-5-104. Both arguments should be rejected.

A. The presence of an unlocked gate is significant for purposes of § 72-5-104 because the gate interrupts the public’s ability to use the road in question.

The County asks this Court to rule as a matter of law that a road has been abandoned under § 72-5-104 unless the landowner had installed an obstacle that is capable of “preventing” the public from using the road. Insofar as unlocked gates do not completely “prevent” public use, the County asserts that the gates that had been in place across these roads since at least 1957 should not have been considered for purposes of § 72-5-104.⁷

In arguing for a rule requiring a wholesale prevention of use for purposes of

⁷Notably, this argument was accepted by the trial judge, who asserted in his post-trial colloquy that “just a gate itself on the road [does] not totally cut it off from being considered a public road.” Trial Transcript, June 30 at 155.

The trial court also suggested in its colloquy that there are Utah cases specifically holding that an unlocked gate is not enough to cut off public use. See Trial Transcript, June 30 at 155. As discussed in the Okelberrys’ Opening Brief, however, it does not appear that any Utah decision has directly addressed this question, and this question is instead a question of first impression for this Court. See Okelberrys’ Opening Brief at 34. In its Response/Reply Brief, the County likewise agreed that this is a question of first impression. County’s Response/Reply Brief at 12.

§ 72-5-104, the County asks for too much. The principal problem with this argument is that by suggesting that “prevention” is the requirement, the County fails to acknowledge that the reported cases only require a showing of “interruption.” Though related, these two concepts differ markedly in application.

As discussed in the opening brief, § 72-5-104 requires that the County prove that the road has “been continuously used as a public thoroughfare for a period of ten years.” In defining the term “continuously used,” Utah’s courts have consistently and repeatedly held that a road has only been continuously used where the public’s access has been “uninterrupted.” See, e.g., Heber City Corp., 942 P.2d at 311; Boyer v. Clark, 326 P.2d 107, 109 (Utah 1958); Six Mile Ranch Co., 2006 UT App 104 at ¶13; AWINC Corp. v. Simonsen, 2005 UT App 168, ¶11, 112 P.3d 1228; Chapman v. Uintah County, 2003 UT App 383, ¶22, 81 P.3d 761; Campbell v. Box Elder County, 962 P.2d 806, 809 (Utah Ct. App. 1998). By definition, the term “interrupt” means “to break or stop the uniformity, continuity, sequence, or course of” a particular event. Webster’s Third New International Dictionary 1182 (1993). Thus, an “interruption” occurs when there has been a “temporary cessation” of a particular activity. Id. By contrast, the term “prevent” refers to something much more permanent or lasting, such as an act that keeps something else “from happening or existing especially by precautionary measures,” or which makes something “impossible through advance provisions.” Webster’s Third New International Dictionary 1798 (1993).

The difference between these two concepts, though subtle, has dramatic implications when applied to a § 72-5-104 determination. For example, suppose that an unlocked gate, rigged so that it would close after each car had passed through, was placed across 400 South at State Street in downtown Salt Lake City. Drivers who wished to cross through the intersection could obviously stop their cars, get out and open the gate, and then drive through. The hindrance posed by this gate, while clearly annoying, would not be permanent. As such, it is clear that this gate would not “prevent” drivers from crossing through this particular intersection. It is also clear, however, that forcing the drivers to stop their cars, albeit momentarily, would nevertheless constitute an “interruption” of their commute, insofar as their travel would have been at least temporarily stopped or hindered.

This distinction is seen throughout the realm of traffic control devices. Stop signs and stop lights don’t prevent travel, but they do interrupt it. The mechanical arms that come down at railroad crossings don’t prevent travel either, but they do temporarily interrupt the public’s ability to use a particular road. Unlocked gates—such as those that the trial court specifically found had been in place across these roads since 1957—have the exact same effect. Like stop signs or stop lights or railroad crossing arms, such gates do not purport to physically prevent anybody from traveling through. Instead, such mechanisms simply act as an interruption. Under the accepted § 72-5-104 standard, this is enough.

In addition to being contrary to accepted law, there are two further problems with the County's prevention standard. First, the standard would effectively mean that *no trespassing* signs would no longer have a place in the § 72-5-104 analysis. Although the Utah Supreme Court partially relied upon the presence of such signs in Draper City v. Bernardo, 888 P.2d 1097, 1100 (Utah 1997), it is clear that such signs would fail the County's test because they do not have a physically preventive effect on anybody. By issuing such an opinion, this Court would render all such signs meaningless for purposes of protecting private property rights. This departure from prior law should not be countenanced here.

Second, the County's position would also prove unfair and unworkable in practice. Suppose that the Okelberrys had not just posted general *no trespassing* signs along their roads, but had instead been more specific—such as by posting flashing neon signs at five foot intervals that read: “This ROAD is Privately Owned. Stay Off.” Under the County's argument, these signs would have had no impact whatsoever upon a determination of whether these roads were being used as public thoroughfares. Suppose the Okelberrys had instead installed a parking garage-style mechanical arm across these roads, which was programmed to only lift up after the traveler had heard a recorded message saying that the roads were privately owned. The County's argument—which openly suggests that message of ownership doesn't matter—would render this type of obstacle ineffective as well, given the ease with which a traveler could simply ignore the message and move on. Suppose that the Okelberrys had instead installed railroad

crossing-style control arms and programmed them to drop in front of any car that attempted to cross without a ticket. This, too, would be insufficient, insofar these arms could simply be driven around.

As evidenced by the trespassers in this case, the practical reality of rural travel is that signs can be ignored, gates can be opened or destroyed, and locks can be removed. Thus, taking the County's "prevention as a requirement" argument to its logical conclusion, it is difficult to imagine that anything short of digging moats and erecting 10-foot tall reinforced steel fences would be sufficient. Given the sprawling, rural nature of the roads that are often involved in the § 72-5-104 cases, this burden would be severe for many Utah landowners.

Rather than accepting the County's argument and placing such a burden on rural landowners, this Court should instead follow the precedent and allow landowners to protect their property rights by simply installing an "interruptive" mechanism across their roads. In this case, the presence of closed yet unlocked gates provided just such an interruption. Given that the trial court expressly found such gates to have been in place since 1957, this Court should therefore hold that the trial court erred by concluding that these roads had been abandoned to the public.

B. The County's ability to place gates across class B or D roads is not analogous to the present situation.

The County next asserts that because Utah Code Annotated § 72-7-106 (2005) allows gates to be placed across class B or D roads, gates cannot then operate as an

interruption under § 72-5-104. County's Response/Reply Brief at 13. While § 72-7-106 does authorize such gates, there are several problems with applying that statute in this case.

First, the roads in question here are not class B or D roads. As set forth in Utah Code Annotated § 72-3-103(5) (2005), class B roads include those that were "construct[ed] and maintain[ed]" using public funds, as well as those public roads that have either been designated as class B roads by some governmental authority or which are simply located outside of any other classification system. The roads at issue here, however, were not constructed using public funds, but were instead constructed by private individuals. Additionally, the County's own witnesses testified that the County had never spent any money maintaining the roads and that there are no plans to do so in the future. See Trial Transcript, June 29 at 177; R. at 489, Supplemental Findings at ¶2. The comparison to class D roads suffers from these same problems, see Utah Code Annotated § 72-3-105(1), as well as the additional problem that the County is also required to have specifically designated class D roads on its own maps—a condition which was not established in this case at trial.

Second, § 72-7-106 specifically prevents the County from ever placing a gate across a class B or D road unless there has first been a determination by the county executive that such a gate is appropriate. Section 72-7-106(4) further states that a private citizen may *only* place a gate across a county road if it is "unlocked" and "nonrestrictive," and if there is prior "authorization of the county executive of that county." This black and

white rule requiring specific authorization by an elected official makes sense. After all, our transportation system simply could not tolerate the interruptions that would occur if gates—even unlocked gates—could be placed across county roads on a haphazard basis. Imagine, for example, the disruptions that would occur if a single homeowner in a typical subdivision were allowed to place an unlocked gate across his residential street. Though the neighbors could and would have the ability to get out of their cars, open the gate, and then drive through when they wanted to pass, this solitary gate would still have a highly interruptive and highly disruptive impact on that community.

In order to avoid such untenable situations, § 72-7-106 wisely recognizes that gates are by definition interruptive, and therefore prevents gates from ever being erected across a class B or D road by any party without a specific determination by the county executive that such a gate is appropriate for that particular crossing. As a result, the County's suggestion that this statute stands for the proposition that unlocked gates are *not* interruptive is exactly backwards. If unlocked gates across county roads were not interruptive, then there would be no need to so closely regulate them by state statute. Instead, it is only because such roads *are* interruptive that § 72-7-106 even exists.

Third, as a matter of principle, the fact the government has the ability to perform a certain act (such as installing gates across class B and D roads) in no way means that a private citizen would have the same ability to perform that same act without it being considered to be interruptive to public use. The government has the ability, for example, to establish toll roads and to prevent access to those roads without prior payment. See

Utah Code Annotated § 72-6-118 (2005). If a private citizen tries to start collecting money from travelers on a public road, however, he or she is guilty of a class B misdemeanor. See Utah Code Annotated § 76-8-416 (2005). Similarly, while the government clearly has the ability to perform excavations on its own roads, a private citizen simply does not have the same right except under certain limited circumstances. See Utah Code Annotated § 72-7-102 (2005).

Here, these gates have literally been in place for decades prior to the County even having a claim to the roads, and there has never been a determination by the County executive that these gates are warranted. The suggestion that § 72-7-106 supports the idea that these gates are not interruptive to the public's use should be rejected.

IV. CONTRARY TO THE COUNTY'S ASSERTIONS, INTERMITTENT INTERRUPTIONS ARE SUFFICIENT TO PREVENT PUBLIC DEDICATION UNDER § 72-5-104.

Finally, the County argues that the trial court could permissibly conclude that intermittent interruptions alone (such as through brief, periodic locking) do not defeat a determination of abandonment under § 72-5-104. County's Response/Reply Brief at 7-8. Notably, this specific argument was largely accepted by the trial court below. In his colloquy at the close of trial, the judge stated that although the roads "might [have] been closed at certain times," and that by "closed I mean locked," he still thought that "up until the late 80's basically those roads were open for use." Trial Transcript, June 30 at 154. In other words, the trial court's understanding was that roads can "basically" be abandoned under § 72-5-104, even though they might have been locked "at certain times" during the

relevant period. In the court's subsequent written ruling, the court then noted that the Okelberrys had claimed that the gates had been "periodically locked for several days at a time" throughout their period of ownership. R. at 415, Conclusions of Law at ¶3. In spite of this, the court still held that, *even taking the assertion of periodic locking as true*, the evidence of periodic locking would not be sufficient to defeat a finding of abandonment in this case because the members of the public who testified at trial had still managed to use the roads without interruption. R. at 415, Conclusions of Law at ¶4. Thus, the trial court below and the County here have asserted that the continuous use requirement of § 72-5-104 can be satisfied even where there was some intermittent interruption of public use, as long as other members of the public were able to use the road whenever they saw fit. This legal interpretation of § 72-5-104 is incorrect, however, and should be rejected.

According to this Court's decision in Campbell, the legal standard for § 72-5-104 abandonment is clear: for use to be "continuous," the public must have had the ability to use the roads "as often" or "whenever" the public deemed it necessary. 962 P.2d at 808-09. The continued validity of this standard was recently affirmed in Six Mile Ranch Co., the most recent decision by this Court addressing § 72-5-104, wherein this Court again held that abandonment only occurs where the public's ability to use the road was "continuous." 2006 UT App 104 at ¶13.

In asserting that the continuous use requirement can somehow be satisfied even where there have been intermittent interruptions, the trial court and the County have overlooked both the plain meaning of the statutory language and the language used in the

cases. As defined in Webster's dictionary, the term "continuous" means that something is marked by an "uninterrupted extension in time or sequence." Webster's Third New International Dictionary 493-94 (1993). Thus, a political party that ruled a country for 25 years, lost power for one year, and then ruled for another 24 years, could not be said to have "continuously" ruled for 50 years. A student who stays awake for 20 hours straight, naps for a half hour, then stays awake for another four hours, could not say that he or she was "continuously" awake for a full 24 hours. And, under this statute, a road which is open to the public for 364 days a year but which is closed on the 365th day is simply not open "continuously," nor is a road which was accessible to some, but not all, of the members of the public who tried using it.

Thus, when the trial court held in its Supplemental Findings that the roads had been periodically locked "at various times" in the pre-1989 past, R. at 488, Supplemental Findings at ¶5, that Supplemental Finding alone ought to have ended the analysis. By definition, the locking of a gate across a road for even a single day would have been sufficient to cut off the public's ability to "continuously" use that road, and would in turn have been sufficient to preserve the landowner's ownership rights. The statute does not require the landowner to have blocked the road whenever *every* member of the public desired to use the road, but instead simply requires an interruption of the general public's ability to use the road. By definition, this interruption would have occurred whenever *any* member of the public was stopped from using the road, whether it be by gate, lock, or

expulsion, and the periodic locking that was accepted by the trial court in this case therefore should have been dispositive for purposes of § 72-5-104.

In response, the County cites to the decision of the Utah Supreme Court in Thurman v. Byram, 626 P.2d 447 (Utah 1981), for the proposition that a landowner who periodically blocks his or her roads “to facilitate the movement of sheep” can still be held to have abandoned the roads under § 72-5-104. County’s Response/Reply Brief at 15 (quoting Thurman, 626 P.2d at 449). Thurman is distinguishable, however, on two different levels.

First, in the only Utah decision to discuss the facts of Thurman, the Utah Supreme Court in Draper City distinguished it and held it inapplicable. See 888 P.2d at 1101. Specifically, the Draper City court distinguished Thurman on three grounds: (1) that there was no evidence in Thurman that members of the public had ever been asked to leave the road; (2) that the road in Thurman “provided the sole access to certain public property”; and (3) that “state and county crews had ‘assisted in the installation of a bridge in the road’ in Thurman, thereby solidifying the conclusion that the Thurman road had always been public. Draper City, 888 P.2d at 1101 (citations omitted). This case can likewise be distinguished from Thurman on these same three grounds. Specifically: (1) unlike Thurman, the undisputed evidence in this case was that certain members of the public were asked to leave the roads; (2) unlike Thurman, there was no testimony that these roads are the sole source of access to any particular piece of public property; and (3) unlike Thurman, the undisputed evidence here was that the County has never spent any

money at all on these roads, but that these roads were instead constructed and maintained using private funds. Based on these same factors, this Court should follow the Supreme Court's lead in Draper City and distinguish Thurman here as well.

Second, should this Court determine that a consideration of Thurman is necessary, this Court should then conclude that Thurman has been overruled *sub silentio* by subsequent decisions of the Utah Supreme Court. Specifically, the court in Thurman held that a road could be abandoned to the public under § 72-5-104 even where there was evidence that the roads were periodically blocked by the landowner. Thurman, 626 P.2d at 449. Subsequent decisions of the Utah Supreme Court and of this Court, however, have interpreted the “continuous use” requirement of § 72-5-104 literally, a holding which is clearly at odds with Thurman. The decision in Heber City, which was decided sixteen years after Thurman, provides the clearest example of this. In Heber City, the Utah Supreme Court held that the “continuous use” requirement means that the public must have been able to use the road for the requisite period on a “continuous and uninterrupted” basis “as often as they found it convenient or necessary.” Heber City Corp., 942 P.2d at 311 (citing Boyer, 326 P.2d at 109). This same literalistic requirement has been applied in a wide number of post-Thurman decisions by this Court as well. See, e.g., Six Mile Ranch Co., 2006 UT App 104 at ¶13; AWINC Corp., 2005 UT App 168 at ¶11; Chapman, 2003 UT App 383 at ¶22; Campbell, 962 P.2d at 809.

Given the clarity of these rulings, this is indeed a case where “is” means “is,” “continuous” means “continuous,” and “whenever the public found it necessary” literally

means “*whenever* the public found it necessary.” To the extent that Thurman held otherwise, it is an aberration that is inconsistent with both the statute and the subsequent case law, and this Court would therefore be justified in concluding that it has been overruled *sub silentio*. Cf. Bear River Mut. Ins. Co. v. Wall, 978 P.2d 460, 460-65 (Utah 1999) (affirming a determination by the Utah Court of Appeals that a prior decision of the Utah Supreme Court had been overruled *sub silentio* by subsequent decisions).

In general terms, each of the interruptive acts identified in the Opening Brief in some way constituted an interruption of the public’s ability to continuously use these roads as public thoroughfares. The fact that these interruptions were not themselves continuous is irrelevant and is not required. Instead, the burden of continuity applies to the public’s use of the roads, not to the landowner’s interruption of that use, and a landowner’s private property rights are therefore protected even when there have only been periodic interruptions of public use. Such interruptions were shown in this case, were in fact accepted by the trial court, and the ultimate determination of abandonment was therefore in error.

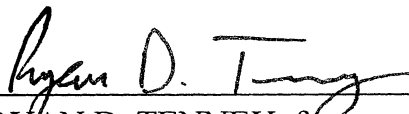
CONCLUSION

As both a statutory and a legal rule, a single interruptive act that prevented a single person from using a road on a single day would be sufficient to prevent public dedication of that road under § 72-5-104.

Here, this Court can and should conclude that the ultimate determination that these roads were abandoned was legally incorrect because: (1) there was un rebutted evidence

showing that some members of the public had been expelled from the roads; (2) the trial court specifically found that closed gates had been in place across the roads since 1957; and (3) the trial court specifically found that those gates had been periodically locked during the preceding decades. Under any or all of these interruptive acts, the trial court should have determined that § 72-5-104 was not satisfied, and these roads therefore should not have been declared public. This Court should reverse the decision of the trial court, and thereby not even reach the issue of estoppel.

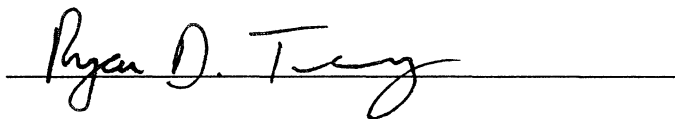
DATED this 12 day of July, 2006.



RYAN D. TENNEY, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Appellees/Cross-Appellants

MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing were mailed to the following, postage prepaid, this 12 day of July, 2006.

A handwritten signature in cursive script, reading "Ryan D. Tracy", is written over a horizontal line.