

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 : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WASATCH COUNTY, a body
politic of the State of Utah

PLAINTIFF/APPELLANT/CROSS-
APPELLEE

vs.

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

DEFENDANTS/APPELLEES/CROSS-
APPELLANTS

Case No. 20050389-CA

APPELLANT/CROSS-APPELLEE'S RESPONSE/REPLY BRIEF

APPEAL FROM THE RULING OF THE FOURTH DISTRICT COURT,
WASATCH COUNTY, HONORABLE JUDGE EYRE

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ARGUMENT

I. THE TRIAL COURT CORRECTLY FOUND BY CLEAR AND CONVINCING EVIDENCE THAT THE COUNTY ACQUIRED THE ROADS IN QUESTION BY SATISFYING THE REQUIREMENTS ESTABLISHED BY § 72-5-104 OF THE UTAH CODE.

A. Standard of Review

Findings of fact are reviewed under the clearly erroneous standard. In order to find clear error, “the court ‘must decide that the factual findings made by the trial court are not adequately supported by the record, resolving all disputes in the evidence in a light most favorable to the trial court’s determination.’” *AWINC Corp. v. Simonsen*, 2005 UT App 168, ¶ 7, 112 P.3d 1228 (quoting *State v. Pena*, 869 P.2d 639, 635-36 (Utah 1994)). In cases such as these, the dedication of property to the public must be proved by clear and convincing evidence. *Thomson v. Condas*, 493 P.2d 639 (Utah 1972). After the facts are found, appellate courts review the trial court’s ultimate determination for correctness. *Heber City Corp. v. Simpson*, 942 P.2d 307, 309 (Utah 1997).

Some degree of deference must be accorded to the trial court’s ruling as to the dedication of the roads because “the trial court is in the best position to determine whether the particular set of circumstances in question merits a conclusion that the property has been dedicated or abandoned to public use.” *Kohler v. Martin*, 916 P.2d 910, 912-13 (Utah App. 1996); *See also Campbell v. Box Elder County*, 962 P.2d 806, 808 (Utah Ct. App. 1998) (granting the trial court “significant discretion in its application of the facts to section [72-5-104] requirements” because the legal requirements are “highly fact dependant and somewhat amorphous.”). Broader discretion is generally

granted to the trial court when “the decisions are more fact-dependent, or when the *credibility of the witnesses* has a strong bearing on the decision.” *Kohler* at 912 (emphasis added). The trial court is in the best position to assess the credibility of the witnesses and to gain a sense of the proceeding as a whole. Where contradictory testimony is offered, the fact finder is free to weigh the conflicting evidence presented and to draw its own conclusions. *Covey v. Covey*, 2003 UT App 380 ¶ 28, 80 P.3d 553, *cert. denied*, 90 P.3d 1041 (Utah 2004). Wasatch County submits that the correct standard of review to be applied to the issue raised by the Okelberrys is whether the trial court’s findings are adequately supported by the record, regardless of whether contradictory evidence also exists.

B. The Okelberrys Failed to Properly Marshal the Evidence in Support of the Trial Court’s Findings. Accordingly, It Must be Assumed That All Findings are Adequately Supported by the Evidence.

The evidence presented by the Okelberrys as to the interruption of the public’s use of the roads is insufficient to defeat the trial court’s finding of abandonment and dedication. While the Okelberrys marshal a great deal of the evidence regarding the *frequency* of the public’s use of the road, they marshal virtually none of the evidence that rebuts their assertions regarding so-called “interruptive acts,” which they claim made the public’s use of the roads non-continuous. It is their duty to “present, in comprehensive and fastidious order, *every scrap* of competent evidence introduced at trial which supports the very findings the appellant resists.” *Oneida/SLIC v. Oneida Cold Storage*, 872 P.2d 1051, 1052-53 (Utah Ct. App. 1994) (citation omitted) (emphasis added). This, the Okelberrys have failed to do.

The competent evidence supporting the trial court's finding that the disputed roads were used continuously includes the evidence that rebuts their allegations of interruption. Not only were the Okelberrys assertions regarding "interruptive acts" controverted by the County's witnesses, they were also plainly contradicted by the testimony of their own witnesses. None of this evidence was marshaled. For example, Lee Okelberry testified that the gates were not locked from 1997 through the mid-1990's, and that signs were not posted. Trial Transcript, June 29 at 187, 196, 199-201. Don Wood also testified that Forest Service maps indicated that the four disputed roads were designated and numbered Forest Service roads. Trial Transcript, June 29 at 45-50. In addition, evidence favorable to the verdict¹ in the form of additional maps, testimony by the Okelberrys' own witnesses, including Glen Shepherd and Brian and Lee Okelberry, was not marshaled. Nor do the Okelberrys show that the evidence is legally insufficient to support the trial court's finding; rather they simply present the evidence supporting their position at trial and reargue its weight. Where evidence is inadequately marshaled, the Court is to assume "that all findings are adequately supported by the evidence." *Chen v. Stewart*, 2004 UT 82, ¶ 19, 100 P.3d 1177.

C. The Findings and Evidence Demonstrate that the Disputed Roads Were Dedicated, as a Matter of Law, to the Public.

Section 72-5-104(1) of the Utah Code provides that "[a] highway is dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years." Utah Code Ann. § 72-5-104(1) (2005). Evidence

¹ Some of this evidence is discussed in the interruptive acts section of this brief.

established, and the trial court found, the disputed roads had been used continuously by the public as a thoroughfare for at least ten years, if not for multiple periods of ten years, effectively abandoning and dedicating them to the public under section 72-3-104(1).

The Okelberrys argue that Utah case law has established that “the continuous use requirement is only satisfied when the evidence showing uninterrupted use is unrebutted and uncontradicted.” (Appellee’s Br. 23.) Although the Utah Supreme Court in *Heber City Corp.*, and this Court in *Kohler*, noted that the evidence presented in those cases was unrebutted or uncontradicted, it was not held that such is the operative legal test. Continuous use must be established at trial by “clear and convincing evidence,” not unrebutted or uncontradicted evidence. *Thomson*, 493 P.2d at 639. The Utah Supreme Court has held that to satisfy this requirement “members of the public must have been able to use the road whenever they found it necessary or convenient.” *Campbell*, 962 P.2d at 809. This “use need not be regular to be continuous,” and “[e]ven infrequent use can result in dedication of a road as a public thoroughfare.” *Id.* In the case at bar, the trial court found that the public used the roads freely and without interruption beginning in the late 1950’s through the late 1980’s or early 1990’s. Order, R. at 426, ¶4.

Under Utah law, the use of these roads by the public was continuous. Witnesses at trial testified that beginning in the 1950’s and prior to the locking of the gates in the late 1980’s or 1990’s they were always able to use the roads. No person, gate, lock, or sign ever interrupted their use of the roads. They were able to “use the roads *whenever* they found it necessary or convenient,” *Campbell* at 809 (emphasis added), and “as often as [they] had occasion or chose to pass.” *Richards v. Pine Ranch, Inc.*, 559 P.2d 948, 949

(Utah 1977). The Okelberrys did not produce one witness who denied the ability to “come and go” on the road at will and at his convenience.²

The Okelberrys characterize this use as intermittent and spasmodic; however, “the public, though not consisting of a great many persons, made a continuous and uninterrupted use . . . as often as they found it convenient or necessary.” *Boyer v. Clark* 326 P.2d 107, 109 (Utah 1958). That is all the law requires. The County had nine witnesses, a representative sampling of community users, testify to their use of the contested roads, though they were not the only non-permissive users of the roads.

It was clear, even from the testimony of the Okelberrys’ witnesses, that many people used the roads without permission. Lee Okelberry testified that the last few years that he was involved with the property “[t]here was more people all the time” using the roads. Trial Transcript, June 28 at 186. Another Okelberry witness, Glen Shepherd, testified that traffic had significantly increased the last ten years. Trial Transcript, June 29 at 215. He further testified that he attended a meeting that was organized in Wallsberg by members of the community who believed the roads that had been closed by the Okelberrys should remain open. *Id.* at 222-23. He stated that there were “quite a few people” at the meeting and that everyone in attendance had claimed to use the roads. *Id.* Lee Okelberry also testified that when the land was leased to a hunting group, “a bunch of people” signed some sort of document at the post office, disputing the closing off of the roads. Trial Transcript, June 29 at 199. Presumably, those that signed had used the

² Some Okelberry witnesses testified to using the Okelberrys’ property and roads with permission. However, there was no testimony by individuals who tried to use the roads but were prevented from using them.

roads and were upset at their recent closure. Moreover, several of the County's witnesses testified that when they used the roads they were often accompanied by others. *See, e.g.*, Trial Transcript, June 29 at 102 (testimony of Mark Butters that he used the roads with his family); Trial Transcript, June 28 at 157 (testimony of James Bessendorfer that he used the roads with his father and two sons). The evidence clearly showed that the roads were used non-permissively more often and by more individuals than just the witnesses at trial. Even so, the law does not impose a numerical prerequisite for the establishment of continuous use. In *Boyer*, the court found the road to be dedicated to the public even though "use of the road was not great because comparatively few people had need to travel over it," because "those of the public who had such a need, did so." 326 P.2d at 108. Given the rural location of these mountain roads, such a finding is likewise appropriate in this case. The evidence showed regular use by the County's witnesses, their friends, and members of their families over a period of many years. The trial court correctly concluded that the public's use was sufficient and continuous to warrant a finding of dedication.

D. The Public's Use of the Roads Was Not Interrupted.

The public made uninterrupted use the roads in question from the 1950's until the late 1980's or early 1990's. The Okelberrys argue that this use was interrupted by a variety of factors. The Okelberrys' argue that the roads in question were not used continuously, and thus not abandoned, because 1) at times persons were asked to leave the Okelberry property, 2) gates were kept across the roads, 3) these gates were, at times, locked, and 4) no trespassing signs were placed alongside the road, effectively

interrupting the public's use.

The Okelberrys cite *Draper City v. Estate of Bernardo* for the proposition that *any* intermittent interruption of the public's use of the roads is sufficient to preclude a finding that a road has been abandoned and dedicated to the public. 888 P.2d 1097 (Utah 1995). In *Draper City* the trial court granted summary judgment on behalf of the city, finding the road abandoned and dedicated to public use. *Id.* at 1098. On appeal, the Utah Supreme Court noted that some affidavits indicated that "no trespassing" signs were posted at the gates, trespassers were at times stopped and asked to leave, the police were often called to the property to remove trespassers, trenches were dug and concrete blocks stacked to prevent use of the road, and a gate was eventually placed across the road. *Id.* at 1100. The court held that the granting of summary judgment was inappropriate where such facts were in dispute. *Id.* at 1101. The court did not hold that the existence of any one of these "interruptive acts" alone would preclude a finding of abandonment and dedication; rather, the court simply held that the weighing of evidence by the trial court at that stage of litigation was improper and reversed the granting of summary judgment. *Id.*

The Okelberrys similarly misinterpret the facts and holding in *Campbell*. 962 P.2d 806. In *Campbell*, the landowners established that they had kept the gate across their road locked at all times, except for during the hunting season, when they would unlock it for the duration of the hunt. *Id.* at 809. Several members of the public testified that they had been unable to use the road because of the gate. *Id.* In *Campbell*, this Court found that because the road at issue was generally locked, it had not been used continuously and consequently could not be established as a public thoroughfare. *Id.* This Court, in

Campbell, did not find, as suggested by the Okelberrys, that any interruption of public access, however brief, is sufficient to break the ten year period of continuous use.

Rather, this Court held that a road open to the public a mere three weeks of each year was patently not available to the public for use whenever they found it necessary or convenient. Even if any interruptive act does serve to break the period of continuous use, the evidence in the instant case showed multiple ten year periods of uninterrupted public use of the disputed roads.

1. The evidence established that the general public made non-permissive use of the roads and were never expelled for using the roads.

The Okelberrys place a great deal of emphasis on the fact that they granted permission to some people to use their land and roads and, at times, expelled others. However, a significant portion of the testimony relied on by the Okelberrys concerning the granting of permission falls outside the relevant time period, i.e. after 1989. *See, e.g.*, Trial Transcript, June 30 at 83-84 (written permission slip allowing use of roads and land, dated 8/31/2000). More importantly, many witnesses testified to using the roads for decades without any permission. *E.g.*, Trial Transcript, June 28 at 190 (testimony of Martin Wall, who first used the roads in the 1950's, stating that he never asked for nor received permission to use the roads); *see also* Trial Transcript, June 29 at 141 (testimony of Okelberry employee, Jeff Jefferson, who stated that the majority of people he approached on the Okelberry property were there without permission).

The Okelberrys argue that the trial court ignored uncontroverted evidence indicating that they routinely expelled non-permissive users from their roads. However,

the great weight of the evidence established that persons were expelled for using the land adjacent to the roads, not the roads themselves. The record is replete with detailed examples of occasions where persons found on Okelberry property were asked to leave. However, there was no testimony showing one specific instance where a non-permissive user of the roads had been expelled, simply for using the roads.

Ray Okelberry testified that he left a note at a camp (identified as a car in the Okelberry brief), sometime within the last 20 years, advising the occupant that he or she was trespassing on private property. Trial Transcript, June 30 at 82. The camp, and its occupant, had been there for more than a week, and the individual was presumably on Okelberry property, and in fact trespassing. *See* Defendant's Exhibit 27. An Okelberry friend testified that the Okelberrys authorized him to ask non-permissive users to leave the property and roads. Trial Transcript, June 29 at 266. This friend, who only frequented Okelberry property during some hunting seasons, did not provide any examples or dates for his assertion that he had in fact asked anyone to leave the Okelberry roads, other than when he became involved in leasing the land in the mid-1990's. Trial Transcript, June 29 at 255-56. Jeff Jefferson, an Okelberry employee, testified that per Okelberry policy if he saw someone on the property he would ask them to leave. Trial Transcript, June 29 at 141. The following discussion with Jefferson took place during cross-examination:

A: Well, most of the time when people came on there they wouldn't stay on the road.

Q: So people you talked to were people that were off the road on property, is that what you're saying?

A: No - - **Yeah**, I'd run into people like that and on the road. And I'd ask them if they're suppose to be on there.

Trial Transcript, June 29 at 149 (emphasis on portion inexplicably omitted in Okelberry brief). Interestingly though, none of the Okelberrys testified to the existence of any policy regarding the expulsion of individuals either on the road or the property. Jeff Jefferson's testimony essentially was that he would ask people to leave the Okelberry property. It was only when pressed that he added the catchall property and roads statement. Trial Transcript, June 29 at 148-49.

The Okelberrys' tendency to tolerate the use of the contested roads is well-supported by the record. No witnesses at trial, who collectively used the roads from the 1950's through the 1990's, were ever asked not to use the roads during that time. During one deer hunt, Brandon Richins and his grandfather were stopped, but their presence was not contested once they indicated that they were not going to use the Okelberry property and were merely using the road to access public land where they would be hunting. Trial Transcript, June 29 at 11. Additionally, Mark Butters testified that while he was on the roads, he had, on occasion, passed by the Okelberrys and their sheepherders, but was never approached nor asked to leave the roads.³ Trial Transcript, June 29 at 122. In fact, Lee Okelberry testified that he could not recall asking anyone to leave during the 1950's or 1960's. Trial Transcript, June 29 at 184-85. He also testified that he had never turned anyone away who had business on the public lands. Trial Transcript, June 29 at 205.

³ Mark Butters testified that he was never asked to leave the roads. Jeff Jefferson testified to asking him to leave from 2000 and on, though he did not specify if this was for using the property or the roads. Trial Transcript, June 29 at 150-51.

Brian Okelberry similarly testified that he could not recall asking anyone to leave the property (and thus presumably also the roads). Trial Transcript, June 30 at 41. Ray Okelberry did not testify to expelling anyone from the area other than the instance where he left the note at the camp, as discussed above. Trial Transcript, June 30 at 82.

The trial court found that the testimony at trial showed “that the Okelberrys and their employees have at various times asked persons to leave *the property surrounding the roads*.” Supplemental Findings, R. at 488, ¶7 (emphasis added). Ejection of trespassers from adjacent land does not interrupt the continuous use of the roads themselves. The evidence clearly supports the trial court’s finding that individuals were not ejected solely for using the roads.

2. Even when the gates were closed, they did not interrupt public use of the roads.

The Okelberrys maintain that the trial court ignored uncontroverted evidence that there were gates across the roads and that the gates were, at times, closed. However, the evidence at trial made it evident that the gates were not always up, and when they were in place, they were unlocked and did not prevent or interrupt the public’s use of the roads.

Testimony was given by nearly all witnesses that the Okelberry property is fenced and that at times, gates crossed the disputed roads. All witnesses agreed that the fences and gates were “let down” during the winter months to prevent damage to such from the snow. There was also testimony that even in the summer months, the gates were not always closed and at times the gates were down. Martin Wall testified that “if there was no stock in there [the gates] would be down.” Trial Transcript, June 28 at 189. Ed Sabey similarly testified that the gates are not always up and that “once the sheep and cattle is

gone [the gates] were hardly put up, ever. . . .” Trial Transcript, June 28 at 271, 292. Ray Okelberry testified that the sheep would be on the property in May and June, and would return at the end of September. Trial Transcript, June 30 at 69-70. Gerald Thompson testified that sometimes the gates were open, at other times they were closed. Trial Transcript, June 28 at 244. Brandon Richins similarly testified that sometimes the gates were up, sometimes they were not. Trial Transcript, June 29 at 12, 25. Shane Ford testified that the gates would be open or closed, depending on which pasture the sheep were in. Trial Transcript, June 29 at 232. Lee Okelberry also testified that the gates were not up at all times during the summer. Trial Transcript, June 29 at 197.

Moreover, testimony indicated that the primary purpose of the gates was to keep the livestock on Okelberry property, not to control use of the road by the public. *See* Trial Transcript, June 30 at 25 (testimony of Brian Okelberry that “the purpose of the gates . . . is to keep the sheep in tack”). If sheep were to wander off the property the Okelberrys would be fined by the forest service. Trial Transcript, June 29 at 135. Lee Okelberry testified that cattle guards were put in because the wire gates would sometimes get cut off or rolled back, indicating that first and foremost, the purpose of the gates was livestock control. Trial Transcript, June 29 at 198.

The significance of an unlocked gate as an interruptive force in the context of section 72-5-104 has not been addressed by any appellate court in Utah. Some cases have, as pointed out by the Okelberrys, addressed the presence of gates without indicating whether the gates were locked. However, the language of the opinions indicates that more likely than not these gates were in fact locked. *See e.g., AWINC*

Corp., 2005 UT App 168, ¶ 3 (noting that “[t]he gates prevented use” of the road); *Kohler*, 916 P.2d at 914 (finding the gate prevented use of the road). A gate that is unlocked hardly prevents the public’s access to and use of any particular road.

The language used in section 72-5-104 is instructive. Section 72-5-104 requires that a roadway be “continuously *used*.” Utah Code Ann. § 72-5-104. An unlocked gate does not prevent or interrupt the public’s *use* of a road. In this case, witnesses testified that when the gates were up and closed they would simply open them, go through, and close the gates behind them. *See e.g.*, Trial Transcript, June 28 at 189-90 (testimony of Martin Wall that when the stock was in and the gates were up, “we would honor them, leave them the way we found them”); Trial Transcript, June 29 at 233 (testimony of Gerald Thompson that if a gate had to be put down to get in he would put it back up after going through). Lee Okelberry also testified that most people respected the gates’ obvious livestock purpose and would close the gates behind them. Trial Transcript, June 29 at 197-98. In this case, where the roads run through sheep country, it would be incongruous to allow such gates to serve as an interruption. Under the Utah Code, it is permissible to keep unlocked gates on Class B and D public roads. Utah Code Ann. § 72-7-106. Clearly, the mere presence of an unlocked gate would not serve as an interruptive act, particularly where the evidence established and the trial court found that the presence of gates was in fact not interruptive and did not affect use of the disputed roads. The trial court stated the presence of gates “did not prevent travel” and that prior to the installation of locks, “the roads in question were subject to continuous use” Order, R. at 425-26, ¶2, 4. The record adequately supports that finding.

3. The public made continuous use of the roads for more than thirty years before locks were placed at the gates.

The majority of the testimony presented at trial, by both sides, was that prior to the late 1980's or early 1990's the gates were not locked. The trial court found that the Okelberrys had locked the gates "at various times in the past." Supplemental Findings, R. at 488, ¶5. This is hardly to say that the trial court found that the gates were locked "periodically" as argued by the Okelberrys. In fact, the trial court found that the public used the roads "without interruption, they used the roads freely, and though not constantly, they used the roads continuously as they needed." Order, R. at 426, ¶4.

Ray Okelberry testified that he began locking some of the exterior gates in the late 1950's. Trial Transcript, June 30 at 135. He also testified that he locked the gates when moving the sheep. Trial Transcript, June 30 at 138-39. Ray Okelberry's testimony was directly contradicted by the testimony of his brother, Lee Okelberry, who testified that locks were not put on the gates while he was involved with the property (1950's through mid-1990's) and that he had never locked a gate. Trial Transcript, June 29 at 187, 196, 201. When shown a photograph of the lock on one of the gates, Lee testified that "I never had to go through it. I don't remember seeing that there. That's been put there after I left." *Id.* at 201. Brian Okelberry also testified that he believed the first locks were not placed on the gates until at least the 1980's. Trial Transcript, June 30 at 54. Neither Lee nor Brian Okelberry testified to locking the gates while moving sheep. Nor did the Okelberrys' employee Jeff Jefferson. As noted by the Okelberrys, not until the late 1980's or early 1990's did any County witnesses encounter locked gates.

The bulk of the evidence, presented by both the County and the Okelberrys, indicates that the gates were not locked until the late 1980's or 1990's. The trial court found that even if Ray Okelberry did lock the gates while moving sheep, "it is clear that individuals using the roads beginning in the late 1950's until the late 1980's or early 1990's used the roads *without interruption . . .*" Order, R. at 426, ¶4 (emphasis added). Such a finding is in harmony with Utah case law. In *Thurman v. Byram*, the Utah Supreme Court held that the disputed road had become dedicated to the public by continuous use, even though the property owners had periodically blocked the road "to facilitate the movement of sheep." 626 P.2d 447, 449 (Utah 1981). The trial court's finding that for more than thirty years the public made use of the roads whenever they found it necessary or convenient is supported by substantial evidence.

4. Signs indicating that the roads could not be used were only posted when the gates began to be locked.

The posting of signs along the Okelberry property did not prevent the public from using the roads, nor did the signs convey the message that use of the roads was prohibited. The Okelberrys maintain that because there is conflicting evidence regarding the posting of "no trespassing" signs, the trial court's conclusion regarding such was inappropriate. (Appellee's Br. 38). Though correctly noting that the "clear and convincing" standard applies in dedication cases, the Okelberrys fail to appreciate that the trial court is required to weigh conflicting evidence. Evidence need not be uncontroverted in order to be "clear and convincing." The presence of conflicting testimony is not sufficient to demonstrate that the trial court's findings are clearly

erroneous. It is an “elemental rule that the fact trier may believe one witness as against many, or many against one.” *Holbrook Co. v. Adams*, 542 P2d. 191, 193 (Utah 1975).

The overwhelming majority of the testimony at trial regarding the posting of signs addressed the presence of these signs *along* the roads. Ray Okelberry testified that he placed signs along the roads around the time that the property was purchased by the Okelberry family in the late 1950’s. Trial Transcript, June 30 at 137. Ray Okelberry’s assertion, however, is at odds with Lee Okelberry’s testimony that such signs were not put up at that time because such signs were not needed. Trial Transcript, June 29 at 187. Furthermore, there was no testimony given that signs along the roads indicated that use of the roads was prohibited. Instead, at most, they appear to have served as reminders to travelers that the property on either side of the roads was private.

The only testimony specifically addressing the presence of signage at the boundary gates came from Brian Okelberry and Jeff Jefferson. Brian Okelberry testified to the presence of signs on boundary gates from the 1970’s on. Trial Transcript, June 30 at 23-25. Again, such testimony is in conflict with the testimony given by Lee Okelberry who testified that signs were not posted until after he had been phased out by Ray (in the mid-1990’s) and the land was being readied for lease to a hunters group. Trial Transcript, June 29 at 199-200. Jeff Jefferson, who began to work for the Okelberrys in 1977 at the age of fourteen, testified to the presence of signs on all entrances. Trial Transcript, June 29 at 135. He did not indicate when these signs first appeared, though perhaps representative, he testified that it was not until 1992 that a “no trespassing” sign was placed at the Circle Springs entrance. *Id.* at 131.

The great weight of the testimony presented at trial was in harmony with Lee Okelberry's testimony. *See e.g.*, Trial Transcript, June 28 at 112-114, 125 (testimony of James Bessendorfer that signs did not appear until the mid-1990's); Trial Transcript, June 29 at 69 (testimony of Benny Gardner that signs at entrances began showing up after United Sportsman's came in); Trial Transcript, June 29 at 107, 123 (testimony of Mark Butters that signs at entrances appeared in the 1990's). Brian Okelberry testified that he did not start placing signs until the late 1980's and that United Sportsman's posted some signs in 1989 or 1990. Trial Transcript, June 29 at 39, 47, 51.

This Court, in *AWINC Corp.*, found that although there was evidence that "no trespassing" tires and rocks were placed along the disputed roads, "the signs conveyed, and were intended to convey, the message that travelers should stay off [the] . . . property, not that travelers should stay off the [road] in particular." 2005 UT ¶15. This Court went on to observe that "this was the understanding of those using the road during this period." *Id.* In the instant case, some witnesses testified to seeing "no trespassing" signs on the Okelberry property in recent years. They further testified that it was their understanding that the signs applied only to the property, not the roads. *See* Trial Transcript, June 29 at 14 (testimony of Brandon Richins that he assumed that the signs referred to the property and that the roads could be used to drive through and onto public land); Trial Transcript, June 29 at 72, 91 (testimony of Benny Gardner that he understood the signs to mean that he was not to get out of his truck and go onto the property); Trial Transcript, June 29 at 110 (testimony of Mark Buttars that he believed use of the roads was permissible as long as he stayed off the property). There was no evidence indicating

that the signs referred to use of the road. The trial court found that “no trespassing” signs were placed “along these roads,” Supplemental Findings, R. at 488, ¶6, indicating that the Court found the credible testimony to be that signs were posted on the property and were to warn passersby that use of the property, not the roads, was prohibited.

The record adequately supports the trial court’s finding that the public’s use of the roads was not interrupted by expulsion, gates, locks, or “no trespassing” signs.

II. THE EVIDENCE PLAINLY DEMONSTRATED THAT THE REQUIREMENTS FOR A FINDING OF EQUITABLE ESTOPPEL HAVE NOT BEEN MET.

A. The Public Can Only Lose It’s Interest in a Public Road by Strict Compliance with the Formal Abandonment Proceedings Set Forth in Section 72-3-108 of the Code.

Once established a public road continues as such until vacated or abandoned. Utah case law requires strict compliance with section 72-3-108 when vacating the public’s interest in a roadway. *See e.g., Erckanbrack v. Judd*, 524 P.2d 595, 587 (Utah 1974); *State v. Six Mile Ranch Co.*, 2006 UT App 104, 2005 WL 648099 (March 16, 2006). In the case at bar, the public’s interest in the roads vested entirely and completely when the requirements of dedication were met in the late 1960’s. That interest cannot be vacated or abandoned without satisfying the procedural requirements outlined in section 72-3-108. In *Clark v. Ereksen*, the Utah Supreme Court held that while the appellants had encroached on the disputed road by placing fences, buildings, and trees thereon for a period of time exceeding thirty years, this was ineffective in extinguishing the interest the public had acquired in the road, as the statutory requirements for vacation had not been met. 341 P.2d 424, 425-26 (Utah 1959).

B. The Facts of this Case do not Justify the Application of Equitable Estoppel Against the Government.

It is well-established that equitable estoppel may be applied against the government only in the most “exceptional cases.” The circumstances in this case are far from exceptional and do not warrant a finding of equitable estoppel against the County. The Supreme Court of Utah, quoting Judge Dillon, an expert in municipal law, stated that in order to apply equitable estoppel against the government “[t]he acts relied on must be of such character as to amount to a fraud, if the [government] were permitted to claim otherwise.” *Wall v. Salt Lake City*, 168 P. 766, 772 (Utah 1917) (italics omitted). The facts in the instant case simply do not rise to the level of fraud. The Utah Supreme Court more recently reaffirmed this position, holding that:

While there *may* be circumstances *so extreme* that we would be willing to uphold the application of equitable estoppel to prevent the assertion of rights in a public highway, we are unwilling to do so in this case. We are *extremely reluctant* to apply the doctrine of estoppel against the assertion of rights in a public highway by a government entity. . . . Where, as here, the landowner 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*.

Western Kane County v. Jackson Cattle Co., 744 P.2d 1376, 1378 (Utah 1987) (emphasis added). This case is far from exceptional and does not warrant a finding of equitable estoppel. Here, the Okelberrys did not rely on the “nonuse of the roadway by the public.” Their installation of locks and placement of signs was, in fact, openly hostile to the public’s longtime use of the roads at issue. The facts also show that the public strongly protested the placement of the locks on the gates, effectively rebutting any assertion that the Okelberrys relied on the public or County’s inaction. The facts also reveal that the

Okelberrys would not suffer any serious injury were the roads to remain open to the public as they were for more than thirty years.

C. The Elements of Equitable Estoppel Are Not Satisfied.

1. The County and public acted consistently with claims of ownership.

The County and the public acted consistently with their claimed interest in the roads. The public used the roads continuously for a period of time exceeding thirty years, and even to some degree following the Okelberrys attempts to restrict access to the disputed roads. *See e.g.*, Trial Transcript, June 28 at 109, 111, 117, 125, 275, 313 and June 29 at 16, 27, 64 (testimony given by various witnesses that they used the roads in the late 1990's through 2003). The Okelberrys list several actions they claim demonstrate inconsistency with the public's current assertion of ownership. However, these assertions, individually or collectively, are simply insufficient to support a finding of inconsistency on the part of the public.

First, the Okelberrys point to the County's failure to maintain the disputed roads. The County could find no authority requiring government maintenance for dedication. Though the government's maintenance of a road might well be evidence of dedication, the absence of maintenance does not establish inconsistency. Were this the case, it would be next to impossible for any road to be dedicated to the public, even if the statutory requirements outlined in the previous section were satisfied, rendering the statute practically worthless. Even so, several witnesses at trial testified to clearing the road on numerous occasions to make the road passable; the same "maintenance" activity engaged in by the Okelberrys. *See e.g.*, Trial Transcript, June 28 at 139-40, 181-82, 285 and June

29 at 86-88 (testimony of various County witnesses that they often removed fallen trees). Don Wood also testified that these roads appeared on Forest Services maps as roads maintained by the Forest Service. Trial Transcript, June 29 at 48.

The Okelberrys next argue that because the County permitted them to place “no trespassing” signs *alongside* the roads, the County acted inconsistently with its current position. The placement of “no trespassing signs” on Okelberry property is clearly permissible and the County would have no reason to tell them otherwise. This is particularly true where the public understood the signs to apply only to the property and not the roads. There is some testimony that signs later appeared on the gates, largely in connection with the hunting activities on the property, though by this time the public’s interest in the roads had already vested.

Moreover, the Okelberrys maintain that tolerating gates and at times locks is a display of inconsistency. Utah law allows for the placing of unlocked gates across certain types of roads. Utah Code Ann. § 72-7-106. Utah Code also states that the person for whose immediate benefit a gate is erected and/or maintained is to bear the expense. Utah Code Ann. § 72-7-106(3). As discussed previously, the trial court found the testimony that the gates were not locked until the 1990’s to be the most credible. This is well after the roads had become dedicated to the public. Furthermore, while the gates began to be locked periodically in the 1990’s, the public strongly objected, in many cases continuing to use the roads, and ultimately complaining to Wasatch County. This behavior put the Okelberrys on notice that their right to prevent use of the roads was being challenged. Lee Okelberry testified to these escalating tensions as gates were

locked. Trial Transcript, June 29 at 199. Once Wasatch County officials were made aware that access to the roads was being prevented, they took appropriate steps to protect the public's interest in the roads. This is not inconsistent with its current position, nor can it be characterized as inaction.

The Okelberrys go on to argue that the County allowed them to expel individuals from the road. As discussed in detail above, there is little evidence, if any, to support the assertion that the Okelberrys ever, let alone routinely, expelled non-permissive users solely for using the roads. As the trial court found, the Okelberrys and their employees asked "persons to leave *the property surrounding the roads.*" Supplemental Findings, R. at 488, ¶7 (emphasis added). The County could hardly be expected to ask the Okelberrys refrain from doing something they were not doing. Next, the Okelberrys cite to their sale of trespass permits as further establishing inconsistent behavior. The sale of permits for use of one's property is permissible. The Utah Supreme Court upheld a finding of dedication where property owners issued hunting permits for their property. *Thurman*, 626 P.2d at 449. In the case at bar, there was no testimony indicating that these trespass permits were issued solely for use of the roads; the permits were purchased to allow hunting on the Okelberry *property*. Trial Transcript, June 30 at 36-37. Mark Butters testified to "[b]uying the permits to allow us to be able to hunt or use Okelberry's property." Trial Transcript, June 29 at 116. He further testified that it was his understanding that the permits did not address use of the roads, as use of the roads for access to forest service property by the public was allowed. *Id.* The County would have no reason to ask the Okelberrys to cease selling permits for use of their property, and thus

cannot be found to have had inconsistently for allowing such sale.

Lastly, the Okelberrys argue that the County acted inconsistently by allowing them to lease their property for use by private hunting units. Again, allowing the Okelberrys to lease their *property* to hunting units is not inconsistent with the County's assertion that the roads are public. Though the leasing of this land was often accompanied by the locking of the gates, as discussed above, the public and ultimately the County challenged the Okelberrys right to restrict access to the roads by locking the gates, thus acting consistently with their interest in the roads.

2. The Okelberrys did not alter their position in reliance on County action or inaction

Another significant problem with applying equitable estoppel in this case is the absence of reliance. By the time the Okelberrys began locking their gates in the early 1990's, the public had been using the roads "as a thoroughfare to public lands and/or for recreation" for more than thirty years. Order, R. at 425, ¶6. The locking of the gates and placement of signs was openly hostile to the public's longtime use of the roads. The Okelberrys could not rely on "nonuse" because the roads were being used continuously by the public and had been for more than thirty years. Lee Okelberry acknowledged that he was aware that the public used the roads and that in the last few years he was involved with the property all the roads were being used by "more people all the time." Trial Transcript, June 29 at 186. The Okelberrys and their associates were also very aware that their locking of the gates was seriously challenged by the community. *See e.g.*, Trial Transcript, June 29 at 134, 147 (testimony of Jeff Jefferson that wire gates were being ripped out "constantly"); Trial Transcript, June 30, 258, 261 (testimony of Bruce Huvard

that gates, locks, and signs were damaged by the public in the 1990's). Furthermore, there were no representations, written or otherwise, made by the County indicating to the Okelberrys that it was, on behalf of the public, abandoning any interest in the roads. As noted earlier, when the locks were placed on the gates the public protested, and ultimately Wasatch County authorities were contacted.

Locks were not installed by the Okelberrys because they believed that the roads were not being used. By locking the gates the Okelberrys recognized that the public was freely using the disputed roads and sought to prevent further use. When the locks were placed at the gates, the Okelberrys were met with a significant amount of protest. Bruce Huvard testified that in the 1990's, when he leased the property for hunting, it was difficult to control access on the property because of public uproar. Trial Transcript, June 29 at 261, 265. To suggest that the Okelberrys locked the gates and were lulled into a sense of security in their right to control the roads by the County's failure to immediately initiate legal action disregards the evolution of the controversy that eventually led to the filing of this legal action. There was no reliance on the public's nonuse of the roads prior to the locking of the gates because the public was using the roads. Nor was there reliance on a submissive public response once the gates were locked because, as noted by witnesses, the public repeatedly challenged the Okelberrys' actions. For these reasons, this element of the inquiry fails.

3. The Okelberrys will suffer no serious injury if the roads remain public.

The Okelberrys also argue that they will suffer greatly if the status quo of the last forty years resumes. The only testimony in the entire trial record regarding potential

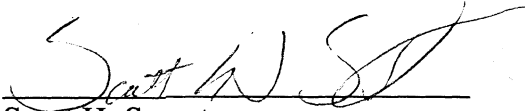
injury was given by Ray Okelberry who testified that his sheep and cattle operation would be put out of business were the roads to be reopened to the public. Trial Transcript, June 30 at 140. There was no explanation offered for why this would be the result when the sheep and cattle operation coexisted with the public's use of the roads for a period of time exceeding thirty years. Though not testified to by the Okelberrys, nor found in the record, the trial court believed that Shane Ford would not renew his Corporative Wildlife Management Unit lease on the Okelberry property were the roads reopened to the public. However, it is worth noting that there was no testimony that Ford *would* renew his lease in any case or that other hunting groups would be unwilling to lease the land. Even if the Okelberrys were unable to lease the land to such private groups, there is no indication that they could not again sell trespass permits to their property. Most importantly, even if evidence did support any of these foregoing potential financial setbacks, the Okelberrys should not be allowed to grieve the loss of income acquired by wrongfully restricting access to public roads.

Equitable estoppel is not properly applied in this case as the elements for such a finding cannot be established by the facts of this case, nor do they rise to a level sufficiently egregious to warrant a finding of equitable estoppel against the government.

CONCLUSION

This Court should uphold the trial court's finding that these roads are dedicated to the public and overturn the trial court's ruling on estoppel.

DATED this 9 day of May, 2006.

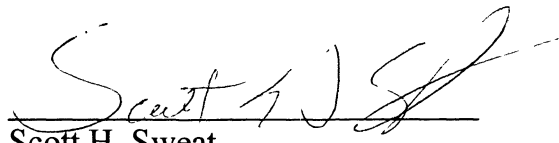


Scott H. Sweat

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the forgoing Appellant/Cross-Appellee's Response/Reply Brief, first class postage prepaid, this 10th day of May 2006 to the following:

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