2007

Utah County and State of Utah by and through its Department of Natural Resources, Division of Wildlife Resources v. Randy Butler, Donna Butler, Margaret Condley, Elizabeth Condley, Blaine Evans, Linda Evans, and John Does 1-15 : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH COUNTY and STATE OF UTAH, by and through its DEPARTMENT OF NATURAL RESOURCES, DIVISION OF WILDLIFE RESOURCES, Plaintiffs / Respondents, v. RANDY BUTLER, DONNA BUTLER, MARGARET CONDLEY, ELIZABETH CONDLEY, BLAINE EVANS, LINDA EVANS, and JOHN DOES 1-15, Defendants / Petitioners.	Case No. 20070009-SC UCOA Case No. 20040809-CA

BRIEF OF PETITIONERS

On Writ of Certiorari to the Utah Court of Appeals

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STATEMENT OF JURISDICTION

This Court, having granted the Petition for Writ of Certiorari, has jurisdiction over the instant appeal pursuant to Utah Code Ann. § 78-2-2(3)(a) (2002) and Utah Code Ann. § 78-2-2(5) (2002).

STATEMENT OF ISSUES / STANDARDS OF REVIEW

1. Whether the district court and the court of appeals erred by determining that trespassers are members of the "public" for purposes of satisfying the Dedication Statute. On certiorari, this Court does not review the decision of the trial court but rather that of the court of appeals, which this Court reviews for correction of error. *Harper v. Summit County*, 2001 UT 10, ¶10, 26 P.3d 193 (citing *State ex rel. M.W. and S.W.*, 2000 UT 79, ¶8, 12 P.3d 80); *see also Landes v. Capital City Bank*, 795 P.2d 1127, 1129 (Utah 1990) (citing *Madsen v. Borthick*, 769 P.2d 245, 247 (Utah 1988)).

2. Whether the district court and the court of appeals erred by determining that the Bennie Creek Road had been continuously used as a public thoroughfare as required by the Dedication Statute. Rather than reviewing the decision of the trial court, this Court, on certiorari, reviews the decision of the court of appeals, which is reviewed for correction of error.

Harper v. Summit County, 2001 UT 10, ¶10, 26 P.3d 193 (citing *State ex rel. M.W. and S.W.*, 2000 UT 79, ¶8, 12 P.3d 80); *see also Landes v. Capital City Bank*, 795 P.2d 1127, 1129 (Utah 1990) (citing *Madsen v. Borthick*, 769 P.2d 245, 247 (Utah 1988)).

3. Whether the court of appeals erred by determining that the Dedication Statute does not require a specific ten-year period of continuous use. On certiorari, this Court does not review the decision of the trial court but rather that of the court of appeals, which this Court reviews for correction of error. *Harper v. Summit County*, 2001 UT 10, ¶10, 26 P.3d 193 (citing *State ex rel. M.W. and S.W.*, 2000 UT 79, ¶8, 12 P.3d 80); *see also Landes v. Capital City Bank*, 795 P.2d 1127, 1129 (Utah 1990) (citing *Madsen v. Borthick*, 769 P.2d 245, 247 (Utah 1988)).

4. Whether the court of appeals erred by determining that the statutory damages in Utah Code Ann. § 72-7-104 are automatic, and that the district court has no discretion in awarding such damages. As previously set forth, instead of reviewing the decision of the trial court, this Court, on certiorari, reviews the decision of the court of appeals, which is reviewed for correction of error. *Harper v. Summit County*, 2001 UT 10, ¶10, 26 P.3d 193 (citing *State ex rel. M.W. and S.W.*, 2000 UT 79, ¶8, 12 P.3d 80); *see also Landes v. Capital City Bank*, 795 P.2d 1127,

1129 (Utah 1990) (citing *Madsen v. Borthick*, 769 P.2d 245, 247 (Utah 1988)).

DETERMINATIVE AUTHORITY

The constitutional provisions, statutes, ordinances, rules, and regulations, whose interpretation is determinative in the instant appeal, are set out verbatim, with the appropriate citation, in the body and arguments of the instant Brief.

STATEMENT OF THE CASE

This case involves critical questions concerning the requisite legal principles and elements for dedication and abandonment of a private road to the public use and the statutory damages for failing to remove an installation within the right-of-way of a highway. The court of appeals misinterpreted and misapplied the law in the course of rendering its opinion.

Utah County and the State of Utah initiated this case by suing Petitioners, as property owners, seeking a determination that the route described as the Bennie Creek Road be deemed to have been dedicated and abandoned to the public use pursuant to statute. Upon denying the request of Utah County and the State for a temporary restraining order, Petitioners denied the allegations. Subsequent mediation efforts failed.

The parties appeared before the district court over the course of several days for trial. Following trial, the district court issued a Memorandum Decision, concluding that the Bennie Creek Road had been dedicated and abandoned to the public use. In its decision, the district court denied Utah County's request for statutory damages based on the alleged failure to remove a gate.

Petitioners filed a timely appeal and Utah County cross appealed. After oral argument, the court of appeals issued a published opinion in which it affirmed in part and remanded in part for a determination of statutory damages owed to Utah County. *See Utah County v. Butler,* 2006 UT App 444, 147 P.3d 963.

Petitioners filed a Petition for Writ of Certiorari. This Court granted the Petition.

STATEMENT OF FACTS

1. Utah County and the State of Utah, in October of 2000, sued Petitioners, as property owners, alleging illegal closure of a public road and easement as well as unjust enrichment (RR. 1-12, 186-99). In the Complaint, Utah County and the State sought a judicial determination that the route described as the Bennie Creek Road be deemed to have been dedicated and abandoned to the

public use pursuant to Utah Code Ann. § 72-5-104[1] and its predecessor statute, Utah Code Ann. § 27-12-89 (R. 6).

2. After the court denied the request of Utah County and the State for a temporary restraining order (R. 118-20), Petitioners denied the allegations (R. 268-77). Subsequent attempts to mediate the matter failed (*See, e.g.*, RR. 1285-89, 1372).

3. Over the course of several days in June 2004, Petitioners appeared before the district court for trial (R. 1442-55).

4. Thereafter, the district court issued its decision, concluding that the Bennie Creek Road had been dedicated and abandoned to the public use (R. 1456-73)[2]. In its decision, the district court denied Utah County's request for statutory damages based on the alleged failure to remove a gate (R. 1458-59).

5. Petitioners filed a timely appeal (R. 1620-23). Utah County cross appealed (R. 1630-31).

6. Following oral argument, the court of appeals issued a published opinion in which it affirmed in part and remanded in

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[1]*See* Utah Code Ann. § 72-5-104 (2001), a true and correct copy of which is attached hereto as Addendum A.

[2]A true and correct copy of the district court's Memorandum Decision (R. 1456-73) and its subsequent Findings of Fact, Conclusions of Law, and Order (R. 1507-26) memorializing the decision are attached hereto as Addendum B.

part for a determination of statutory damages owed to Utah County. *See Utah County v. Butler*, 2006 UT App 444, 147 P.3d 963, a true and correct copy of which is attached hereto as Addendum C.

7. Petitioners, through counsel, filed a Petition for Writ of Certiorari. This Court granted the Petition for Writ of Certiorari as to the following issues:

> 1. Whether trespassing may constitute a public use pursuant to the Dedication Statute, Utah Code Ann. § 72-5-104.
>
> 2. Whether the district court erred in its determination that the public had continuously used the road at issue in this case according to the requirements of the Dedication Statute.
>
> 3. Whether the district court failed to designate a specific ten-year period of continuous use and, if so, whether that failure constituted reversible error.
>
> 4. Whether the court of appeals erred in its application of Utah Code Ann. § 73-7-104(4) to the facts of this case.

See Order, dated March 15, 2007, a true and correct copy of which is attached hereto as Addendum D.

SUMMARY OF ARGUMENTS

1. The district court and the court of appeals erred by determining that trespassers are members of the "public" for purposes of satisfying the Dedication Statute. According to the record on appeal in the instant case, a substantial number of the governments' witnesses utilized at trial were trespassers on

Petitioners' property. By refusing to apply common law trespass to the elements of dedication set forth in Utah Code Ann. § 72-5-104, the district court and the court of appeals misinterpreted the requisite elements underlying the Dedication Statute. Because the use by trespassers is based upon wrongful conduct and a lack of good faith, equitable principles and sound public policy dictate that they are not members of the public for purposes of the Dedication Statute.

2. The district court and the court of appeals erred by determining that the Bennie Creek Road had been continuously used as a public thoroughfare as required by the Dedication Statute. Use of the Bennie Creek Road was interrupted by naturally occurring conditions, locked gates on the road, trespassing signs, a bog resulting from spring water and ditches, and the flow of irrigation water on the road.

The district court misinterpreted the Dedication Statute and misapplied the underlying legal principles of the statute pertaining to the elements of "continuous use" as a "public thoroughfare" when it determined that the Bennie Creek Road was in continuous use by the public as a public thoroughfare. Moreover, the court of appeals erred by basing its conclusion upon that of the district court, which failed to consider that the

aforementioned circumstances precluded the public from accessing the road as often as they found it convenient or necessary.

3. Both the trial court and the court of appeals erred by determining that the Dedication Statute does not require a specific ten-year period of continuous use. By refusing to specifically identify the ten-year period, the district court both misinterpreted and misapplied the Dedication Statute. The court of appeals, in turn, refused to enforce the specific ten-year period of time. By so doing, the court of appeals affirmed the district court's impermissible shifting of the burden of proof to Petitioners, as landowners. This failure further ignored the presumption to be employed in favor of the Petitioners, as landowners. The trial court's refusal to pinpoint the requisite ten-year period of time of continuous use was an impermissible effort to shift the burden of such a determination to the court of appeals, as a depository in which the burden and determination is then to be performed.

4. The court of appeals erred by determining that the statutory damages provided for in Utah Code Ann. § 72-7-104 are automatic, and that the district court has no discretion in awarding such damages. A position that statutory damages are automatic with no discretion to be exercised by the district court is contrary to the plain language of the statute, where the

Legislature utilized the permissive term "may" throughout various subsections of the statute.

Adopting the court of appeals' interpretation of the statute requires the insertion of the mandatory term "shall" into the statute, which is contrary to the legislative intent of the statute. By employing the permissive term "may" in contrast to the compulsory term "shall", the Legislature specifically intended and thereby enabled the court to exercise discretion in awarding the statutory damages provided for in the statute.

The district court exercised its discretion in the instant case by considering various factors surrounding the metal gate. An interpretation of Utah Code Ann. § 72-7-104 that enables the district court to exercise discretion in awarding damages is consistent with this being a case in equity.

ARGUMENTS

I. THE DISTRICT COURT AND THE COURT OF APPEALS ERRED BY DETERMINING THAT TRESPASSERS ARE MEMBERS OF THE "PUBLIC" FOR PURPOSES OF SATISFYING THE DEDICATION STATUTE.

A. The Dedication Statute and Related Legal Principles.

According to the Dedication Statute, which is set forth at Utah Code Ann. § 72-5-104 (2001), "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." *See* Utah Code Ann. § 72-5-104(1) (2001). Because private property is constitutionally protected,[3] "[t]he law does not lightly allow the transfer of property from private to public use." *Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1099 (Utah 1995).

Consistent with the constitutional protection that private property enjoys, the government's taking of property in circumstances such as the instant case "requires proof of dedication by clear and convincing evidence."[4] *Id.* (citing *Thomson v. Condas*, 27 Utah 2d 129, 130, 493 P.2d 639, 639 (1972); *Petersen v. Combe*, 20 Utah 2d 376, 377-78, 438 P.2d 545, 548 (1968)). "This higher standard of proof is demanded since the ownership of property should be granted a high degree of sanctity and respect." *Id.* (citing *Petersen*, 438 P.2d at 548-49 (Crockett, C.J., dissenting)).

Additionally, "'[t]he presumption is in favor of the property owner; and the burden of establishing public use for the required

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[3]According to the Utah Constitution, "Private property shall not be taken or damaged for public use without just compensation." *See* Utah Const. art. I, § 22. Moreover, the Fifth Amendment to the United States Constitution provides, "nor shall private property be taken for public use without just compensation." *See* U.S. Const. amend. V.

[4]The clear and convincing evidence standard requires "clear, explicit, and unequivocal evidence" that is "sufficiently strong to command the unhesitating assent of every reasonable mind." *See* 9A Am.Jur. Pl. & Pr. Forms *Evidence* § 140 (2005).

period of time is on those claiming it.'" *Leo M. Bertagnole, Inc. v. Pine Meadow Ranches*, 639 P.2d 211, 213 (Utah 1981) (quoting *Bonner v. Sudbury*, 18 Utah 2d 140, 143, 417 P.2d 646, 648 (1966)). Under Utah Code Ann. § 72-5-104, "'the highway, even though it be over privately owned ground, will be deemed dedicated or abandoned to the public use when the public has continuously used it as a thoroughfare for a period of 10 years, *but such use must be by the public.*'" *Thompson v. Nelson*, 2 Utah 2d 340, 345, 273 P.2d 720, 723 (1954) (quoting *Morris v. Blunt*, 49 Utah 243, 251, 161 P. 1127, 1131 (1916) (emphasis added)).

Finally, dedication and abandonment cases are cases in equity. *Richards v. Pines Ranch, Inc.*, 559 P.2d 948, 949 (Utah 1977). Consequently, this Court is not bound to recognize findings or determinations that are contrary to the evidence. *Id.*

B. Sound Public Policy Dictates that Trespassers Are Not Members of the Public for Purposes of Dedication and Abandonment of Private Property for the Public Use.

According to the record on appeal in the instant case, a substantial number of the governments' witnesses utilized at trial were trespassers on Petitioners' property (*see, e.g.*, R. 1639:39:7-12; R. 1639:55:9-12; R. 1639:71-72; R. 1640:232-33; R. 1640:287:3-7; R. 1640:347:4-21; R. 1640:378:16-21; R. 1641:509:9-17; R. 1642:709:16). The Petitioners, as landowners, among other

things, diligently posted "no trespassing" signs (*see, e.g., id.*), placed gates across the road (*see, e.g.*, R. 1642:710:18), and called the county sheriff to have trespassers removed (*see, e.g.*, R. 1645:1073:11-17).

Pursuant to common law trespass, "[t]he essential element of trespass is physical invasion of the land; '[t]respass is a possessory action.'" *Walker Drug Co., Inc. v. La Sal Oil Co.*, 972 P.2d 1238, 1243 (Utah 1998) (quoting *John Price Assocs., Inc. v. Utah State Conf., Bricklayers Locals Nos. 1, 2 & 6*, 615 P.2d 1210, 1214 (Utah 1980) and citing Restatement (Second) of Torts § 158 (1977)); *see also Wood v. Myrup*, 681 P.2d 1255, 1257 (Utah 1984). Trespass is a "wrongful entry . . . upon the lands of another." *See O'Neill v. San Pedro, L.A. & S.L.R. Co.*, 38 Utah 475, 479, 114 P. 127, 128 (1911).

The totality of the aforementioned circumstances demonstrates that most of the witnesses utilized by Utah County and the State were trespassers. As such, those witnesses should not and did not constitute members of the public for purposes of establishing dedication and abandonment of the Bennie Creek Road for the public use pursuant to Utah Code Ann. § 72-5-104. By refusing to apply common law trespass to the elements of dedication set forth in Utah Code Ann. § 72-5-104, the district court and the court of

appeals misinterpreted the requisite elements underlying the Dedication Statute.

In its opinion, the court of appeals concluded that Petitioners'

> proposed interpretation would render the Dedication Statute ineffective because no use could ever constitute public use. To give the Dedication Statute proper effect, we hold that nonpermissive use must be considered public use. We therefore agree with the trial court that trespassers are members of the "public" for purposes of determining whether the Dedication Statute has been satisfied.

Utah County v. Butler, 2006 UT App 444, ¶11, 147 P.3d 963 (citation omitted). The reasoning of the court of appeals is seriously flawed inasmuch as it equates nonpermissive use as one and same with trespassing. *Cf. Chapman v. Uintah County*, 2003 UT App 383, ¶2, 81 P.3d 761 (noting testimony of public use of road year-around, without permission and without encountering restrictions). Dedication and abandonment of private property to the public use is established when a highway or road is continuously used by members of the public as a public thoroughfare for the requisite period of time. This implies *good faith use* of the highway by the public. Trespassers are not good faith users, rather they come to the court with unclean hands based upon their wrongful conduct of invading another's property. *See Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1100 (Utah

1995) (distinguishing between members of the general public and those considered to be trespassers); *accord Vaughn v. Williams*, 345 So.2d 1195, 1199 (La. Ct. App.), *cert. denied*, 350 So.2d 896 (La. 1977) (holding that public authority is precluded from taking road unless landowner knowingly acquiesced in public use and maintenance, amounting to tacit dedication by landowner).

The court of appeals' decision, if allowed to stand, would reward the lawless and wrongful conduct of trespassing upon another's property and, in turn, penalize a landowners diligent efforts to protect his or her property within the parameters of the law. Such a result is contrary to the equitable principles underlying the instant case. *See Park v. Jameson*, 12 Utah 2d 141, 364 P.2d 1, 3 (1961) (recognizing that a plaintiff must come to equity with clean hands). "In other words, a party who seeks an equitable remedy must have acted in good faith and not in violation of equitable principles." *Hone v. Hone*, 2004 UT App 241, ¶7, 95 P.3d 1221. Because the use by trespassers is based upon wrongful conduct and a lack of good faith, equitable principles and public policy dictate that they are not members of the public for purposes of the Dedication Statute.

C. By Refusing to Apply Trespass Principles, the District Court and the Court of Appeals Impermissibly Relieved Utah County and the State of Their Burden and Ignored the

Presumption to be Employed in Favor of Property Owners.

The well-established legal principles underlying the dedication and abandonment statute dictate that Utah County and the State had the burden to prove by clear and convincing evidence that those traveling the Bennie Creek Road were not trespassers. *Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1099 (Utah 1995); *Campbell v. Box Elder County*, 962 P.2d 806, 808 (Utah Ct. App. 1998). By refusing to apply common law trespassing principles to the requisite elements of dedication, the district court and the court of appeals impermissibly relieved Utah County and the State of their burden to prove dedication by clear and convincing evidence; thereby shifting the burden to Petitioners, as landowners, to prove otherwise. Further, the refusal by the district court and the court of appeals to apply the law of trespass ignored the well-established presumption to be employed in favor of property owners, which is to be applied due to the high-degree of sanctity and respect of property ownership. *Cf.* *Draper City*, 888 P.2d at 1099; *Campbell*, 962 P.2d at 808.

II. THE DISTRICT COURT AND THE COURT OF APPEALS ERRED BY DETERMINING THAT THE BENNIE CREEK ROAD HAD BEEN CONTINUOUSLY USED AS A PUBLIC THOROUGHFARE AS REQUIRED BY THE DEDICATION STATUTE.

Before a private road can be taken and dedicated for public use pursuant to Utah Code Ann. § 72-5-104, three elements must be proven by clear and convincing evidence: "'there must be (i) continuous use, (ii) as a public thoroughfare, (iii) for a period of ten years.'" *Campbell v. Box Elder County*, 962 P.2d 806, 808 (Utah Ct. App. 1998) (quoting *Heber City Corp. v. Simpson*, 942 P.2d 307, 310 (Utah 1997)). The "continuous use" element is properly established if the public "made a continuous and uninterrupted use . . . as often as they found it convenient or necessary." *Boyer v. Clark*, 7 Utah 2d 395, 326 P.2d 107, 109 (1958). "[U]se may be continuous though not constant . . . . *provided it occurred as often as the claimant had occasion or chose to pass*. Mere intermission is not interruption." *Richards v. Pines Ranch, Inc.*, 559 P.2d 948, 949 (Utah 1977) (citation omitted and emphasis added). In sum, "under the continuous use requirement, members of the public must have been able to use the road whenever they found it necessary or convenient." *Campbell*, 962 P.2d at 809.

In the instant case, the district court acknowledged that use of the Bennie Creek Road was interrupted "by naturally occurring

conditions such as groundwater (spring water) in wet years and snow in the winter." (R. 1470). The district court also conceded that witnesses at trial testified "that there were locked gates on the road." (R. 1469). In fact, the district court readily acknowledged that "[t]here was testimony regarding *four gates* on the Benny [sic] Creek road between U.S. Highway 89 and the Uintah National Forest." (R. 1465) (Emphasis added). The district court further stated, "Virgil Neeves testified that between 1958 and 1980 there was a locked gate near the Gardner home (the last home traveling west toward the forest service property, now occupied by [Petitioner] Randy Butler) which was locked most of the time." (R. 1467-68).[5]

In its Memorandum Decision, the district court specifically noted that Mr. Mike Condley, who had lived in the area from 1970 until 1979, "firmly recalled a locked gate near the Gardner (Butler) home." (R. 1468). Shortly thereafter, by way of its Decision, the district court also acknowledged that "Defendant Blaine Evans and others put the locked gates farther west, near

[5]The district court also noted that Mr. Neeves "saw people stuck on the road and recalls a cable across the road to stop cars." Without explanation, the district court refused to consider this testimonial evidence, deeming it as "simply confused and inconsistent with all of the other testimony about obstructions on the road in question." (R. 1468).

the present cattle guard between the Butler home and forest service property." (R. 1467).

The district court, in addition to the gates, conceded that there "was substantial testimony about ["no trespassing"] signs along the road" and other locations "designating the area as private property." (R. 1466; *see also* R. 1639:39:7-12; R. 1639:55:9-12; R. 1639:71-72; R. 1640:232-33; R. 1640:287:3-7; R. 1640:347:4-21; R. 1640:378:16-21; R. 1641:509:9-17; R. 1642:709:16). Moreover, Petitioners, as landowners, called the county sheriff to have various individuals removed from their property, as trespassers (*see, e.g.*, R. 1645:1073:11-17; *see also* R. 1466).

Travel by way of the Bennie Creek Road to the Forest Service land was not only interrupted but precluded by what was commonly referred to as a bog in the road, which was the result of springs or ditches (R. 1462). According to the record, this bog made travel on the Bennie Creek Road difficult, if not impossible, during "certain seasons or certain times between 1925 and 1980" (R. 1462).

Additionally, unrebutted testimony provided at trial established that the road "is periodically used to deliver irrigation water to property along the road and that when that

occurs, the road becomes impassable." (R. 1466).[6] The testimony established that the road was used from 1950 through 1993 as the irrigation ditch to transport water to the property owners' pastures on both sides of the road (R. 1644:944:17-25; R. 1644:970:6-9). According to the testimony at trial, "about every three weeks" the road would be utilized for irrigation purposes "[f]or approximately six days" at a time (R. 1644:974:11-20).

With total disregard for the foregoing, the district court found that "neither the Gardner family nor the Otteson (Roach) families used that method or irrigation covering a period from 1925 to 1981." (R. 1466; R. 1518, ¶18). Ordinarily, to successfully challenge a finding, the appellant "must marshal the evidence in support of the finding[] and then demonstrate that despite this evidence, the trial court's finding[] [is] so lacking in support as to be 'against the clear weight of the evidence,' thus making [it] 'clearly erroneous.'" *Valcarce v. Fitzgerald*, 961 P.2d 305, 312 (Utah 1997) (citations omitted). There is no evidence to marshal in support of the district court's finding. As a result, in light of the aforementioned testimony and citations to the record, the trial court's finding is clearly erroneous.

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[6]The irrigation practices of the landowners were performed pursuant to "diligence rights" established in 1850 (R. 1645:1093:1-4).

The district court misinterpreted the Dedication Statute and misapplied the underlying legal principles of the statute pertaining to the elements of "continuous use" as a "public thoroughfare" when it determined that the Bennie Creek Road was in continuous use by the public as a public thoroughfare. Moreover, the court of appeals erred by basing its conclusion upon that of the district court, which failed to consider that the aforementioned circumstances precluded the public from accessing the road "as often as they found it convenient or necessary." *See AWINC Corp. v. Simonsen*, 2005 UT App 168, ¶11, 112 P.3d 1228.

III. BOTH THE TRIAL COURT AND THE COURT OF APPEALS ERRED BY DETERMINING THAT THE DEDICATION STATUTE DOES NOT REQUIRE A SPECIFIC TEN-YEAR PERIOD OF CONTINUOUS USE.

The Dedication Statute requires continuous use by the public for ten years before private property can be dedicated or abandoned to the public use. *See* Utah Code Ann. § 72-5-104(1) (2001); *Campbell v. Box Elder County*, 962 P.2d 806, 808 (Utah Ct. App. 1998). The district court failed to specifically identify such a ten-year period of time, which determination the court of appeals affirmed.

The district court in the instant case concluded that "the evidence is clear and convincing that for at least 10 years prior to 1958 the road was open and traveled by the public as often as

necessary or convenient . . . ." (R. 1470). In the course of its decision, the district court stated that

> even if it is concluded (which this Court does not) that the road was gated and locked in the late 50's and early 60's as described by the Butlers, the road was used as necessary and convenient by the public for more than 10 years before that time and, again, 10 years after that time.

(R. 1461; *see also* R. 1515, ¶28).

In *Draper City v. Estate of Bernardo*, 888 P.2d 1097 (Utah 1995), Draper City and several individuals, as plaintiffs, brought an action seeking declaration that a private road had been dedicated and abandoned to public use on the ground that it had been continuously used as a public thoroughfare for a period of ten years. *Id.* at 1098. The trial court granted summary judgment in favor of the plaintiffs, which the defendants appealed. *Id.*

On appeal, this Court stated that "neither [plaintiffs], the trial court in its findings, nor we have been able to pinpoint any ten-year period during which public use, as we have defined it, of the full length of the road is undisputed. Continuous use for ten years is required by section 27-12-89 [the predecessor statute to Utah Code Ann. 72-5-104]." *Id.* at 1100. Consequently, this Court reversed and remanded the case for further proceedings consistent with its opinion. *Id.* at 1101.

Likewise, the district court in this case failed to specifically pinpoint the requisite ten-year period of time, which the court of appeals affirmed. By refusing to specifically identify the ten-year period, the district court both misinterpreted and misapplied the Dedication Statute. The court of appeals, in turn, refused to enforce a specific ten-year period of time. In so doing, the court of appeals affirmed the district court's impermissible shifting of the burden of proof to Petitioners, as landowners. *Cf. Leo M. Bertagnole, Inc. v. Pine Meadow Ranches*, 639 P.2d 211, 213 (Utah 1981) (quoting *Bonner v. Sudbury*, 18 Utah 2d 140, 143, 417 P.2d 646, 648 (1966)). This failure also ignored the presumption to be employed in favor of the Petitioners, as landowners. *Id.* The trial court's refusal to pinpoint the requisite ten-year period of time of continuous use was an impermissible effort to shift the burden of such a determination to the court of appeals, as a depository in which the burden and determination is then to be performed.

IV. THE COURT OF APPEALS ERRED BY DETERMINING THAT THE STATUTORY DAMAGES PROVIDED FOR IN UTAH CODE ANN. § 72-7-104 ARE AUTOMATIC, AND THAT THE DISTRICT COURT HAS NO DISCRETION IN AWARDING SUCH DAMAGES.

In its cross-appeal to the court of appeals, Utah County challenged the district court's ruling that it was not entitled to statutory damages for the time period during which a metal gate

remained across the road after notice. The court of appeals misinterpreted and misapplied Utah Code Ann. § 72-7-104 in the course of reversing the district court.

Utah Code Ann. § 72-7-104(1) provides:

> If any person, firm, or corporation installs, places, constructs, alters, repairs, or maintains any approach road, driveway, pole, pipeline, conduit, sewer, ditch culvert, outdoor advertising sign, or any other structure or object of any kind or character within the right-of-way of any highway without complying with this title, the highway authority having jurisdiction over the right-of-way *may*:
>
> (a) remove the installation from the right-of way or require the person, firm, or corporation to remove the installation; or
>
> (b) give written notice to the person, firm, or corporation to remove the installation from the right-of-way.

See Utah Code Ann. § 72-7-104(1) (2001) (emphasis added).[7] Subsection (4) further provides that "[a] highway authority *may* recover: (1) the costs and expenses incurred in removing the installation, serving notice, and the costs of a lawsuit if any; and (b) $10 for each day the installation remained within the right-of-way after notice was complete." *See* Utah Code Ann. § 72-7-104(4) (2001) (emphasis added).

The appellate court's "primary goal in interpreting statutes is to give effect to the legislative intent, as evidenced by the

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[7]A true and correct copy of Utah Code Ann. § 72-7-104 (2001) is attached hereto as Addendum E.

plain language, in light of the purpose the statute was meant to achieve." *Foutz v. City of S. Jordan*, 2004 UT 75, ¶11, 100 P.3d 1171 (internal quotation marks omitted). In the course of interpreting a statute, the appellate court "presume[s] that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning." *C.T. v. Johnson*, 1999 UT 35, ¶9, 977 P.2d 479 (internal quotation marks omitted). Furthermore, the appellate court "read[s] the plain language of the statute as a whole, and interpret[s] its provisions in harmony with other statutes in the same chapter and related chapters." *Miller v. Weaver*, 2003 UT 12, ¶17, 66 P.3d 592. Only when a statute is ambiguous do we look to other interpretive tools such as legislative history. *See Adams v. Swensen*, 2005 UT 8, ¶8, 108 P.3d 725.

In the course of reversing the district court, the court of appeals held that the district court "did not have discretion to deny statutory damages" pursuant to the statute. *Utah County v. Butler*, 2006 UT App 444, ¶21, 147 P.3d 963. Such a position is contrary to the plain language of the statute, where the Legislature utilized the permissive term "may" throughout various

subsections of the statute.[8] *See* Utah Code Ann. § 72-7-104(1), (4), and (5)(b).

Adopting the court of appeals' interpretation of the statute requires the insertion of the mandatory term "shall" into the statute, which is contrary to the legislative intent of the statute. By employing the permissive term "may" in contrast to the compulsory term "shall", the Legislature specifically intended and thereby enabled the court to exercise discretion in awarding the statutory damages provided for in the statute. Such an interpretation does not render the statute superfluous or inoperative, rather it provides the district court with the discretion to more fully consider the totality of circumstances surrounding the structure.

The district court exercised its discretion in the instant case by considering various factors surrounding the metal gate. For example, in its decision, the district court noted that for some time since construction of the gate the road had been and had not been obstructed, and that "[n]o evidence was presented to clarify how many of the intervening 2,561 days were days when the road was obstructed and how many were not." (R. 1459). Consequently, the district court determined that Utah County, as

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[8]*See State v. Wallace*, 2006 UT 86, ¶10, 150 P.3d 540 (discussing the permissive term "may" in contrast to the compulsory term "shall" in the course of statutory interpretation).

the moving party, failed to meet its "burden of providing specific evidence of the number of days the Defendants have been in violation." (R. 1458).

The district court also exercised its discretion by taking into consideration the fact that Utah County, itself, placed a sign on the gate, which reads, "KEEP GATE CLOSED - PRIVATE PROPERTY TO FOREST SERVICE BOUNDARY - NO TRESPASSING OFF ROAD." (R. 1648: Defendants' Exhibit 80C. -- Photo of Utah County's Sign)[9] Utah County's placement of the sign demonstrates, at the very least, acquiescence in installation of the gate not to mention its closure across the road.

An interpretation of Utah Code Ann. § 72-7-104 that enables the district court to exercise discretion in awarding damages is consistent with this being a case in equity. *See Richards v. Pines Ranch, Inc.*, 559 P.2d 948, 949 (Utah 1977). "[E]quity cases afford courts discretion and latitude in fashioning equitable remedies." *Hughes v. Cafferty*, 2004 UT 22, ¶24, 89 P.3d 148. "A court acting in equity is not required to recite its decision in terms of specific factors or to adhere to formulaic tests. Rather, its obligation is to effectuate a result that serves

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[9]Utah County stipulated that it had placed the sign on the closed gate (R. 1645:1139-40). A true and correct copy of Defendants' Exhibit 80C is attached hereto as Addendum F.

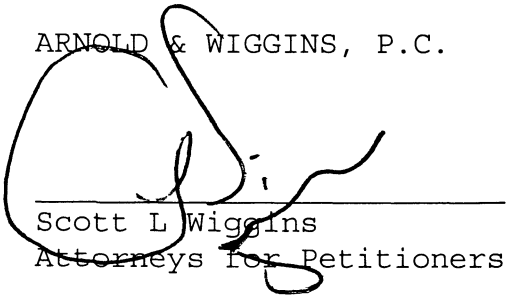
equity given the overall facts and circumstances of the individual case." *Id.*

CONCLUSION

Based on the foregoing, Petitioners respectfully ask that this Court reverse both the court of appeals' determination that the Bennie Creek Road was abandoned and dedicated to the public use and the conclusion that Utah County was automatically entitled to statutory damages under Utah Code Ann. § 72-7-104. Petitioners further request that the Court, in the course of its reversal, issue a clear and concise statement of the requisite legal principles and elements for dedication and abandonment of a private road to the public use as well as principles governing § 72-7-104 damages for failing to remove an installation within the right-of-way of a highway.

RESPECTFULLY SUBMITTED this 22nd day of May, 2007.

ARNOLD & WIGGINS, P.C.



Scott L Wiggins
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, SCOTT L WIGGINS, hereby certify that I personally caused to be mailed by First-Class Mail, postage prepaid, two (2) true and correct copies of the foregoing **BRIEF OF PETITIONERS** to each of the following on this 22nd day of May, 2007:

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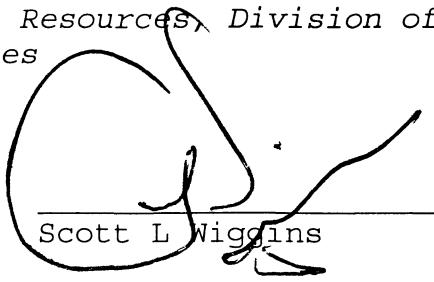

Scott L Wiggins

ADDENDA

Addendum A:	Utah Code Ann. § 72-5-104 (2001)
Addendum B:	Memorandum Decision and Findings of Fact, Conclusions of Law, and Order
Addendum C:	*Utah County v. Butler*, 2006 UT App 444, 147 P.3d 963
Addendum D:	Order dated March 15, 2007, granting Petition for Writ of Certiorari
Addendum E:	Utah Code Ann. § 72-7-104 (2001)
Addendum F:	Defendant's Exhibit 80C -- Photo of Utah County's Sign

Tab A

(b) If the highway is a county road, city street under joint title as provided in Subsection 72-3-104(3), or right-of-way described in Title 72, Chapter 5, Part 3, Rights-of-way Across Federal Lands Act, title to all interests in real property less than fee simple held under this section is held jointly by the state and the county, city, or town holding the interest.

(3) A transfer of land bounded by a highway on a right-of-way for which the public has only an easement passes the title of the person whose estate is transferred to the middle of the highway.

History: L. 1963, ch. 39, § 101; 1991, ch. 137, § 29; C. 1953, 27-12-101; renumbered by L. 1998, ch. 270, § 131; 2000, ch. 324, § 6; 2001, ch. 79, § 2.

Amendment Notes. — The 1998 amendment, effective March 21, 1998, renumbered this section, which formerly appeared as § 27-12-101, and added new Subsection (1), making related changes in subsection designation.

The 2000 amendment, effective March 16, 2000, added Subsection (2)(b), making a related change.

The 2001 amendment, effective March 9, 2001, added Subsections (2)(a)(ii) and (2)(a)(iii) and the (2)(a)(i) designation and substituted "transportation purposes" for "highway purposes" in Subsections (1) and (2)(a)(i).

NOTES TO DECISIONS

ANALYSIS

Rights of public and abutting owners.
Vacation of road.
Cited

Rights of public and abutting owners.

Erection of electric power lines on public highway right-of-way, the fee to which is not in the public but in the owner of the abutting property, is within the purview of the easement for highway purposes and is not an additional servitude for which the abutting owner is entitled to compensation. Pickett v. California Pac. Utils., 619 P.2d 325 (Utah 1980).

Statutes regulating water mains in relation to highways clearly indicated that legislature did not regard dedication of a street in a platted subdivision as the surrender of an easement with retention of the fee in the abutting owner. White v. Salt Lake City, 121 Utah 134, 239 P.2d 210 (1952).

Vacation of road.

When city vacated street property which was never used by the public and never platted as a street on the official records, the parties owning the land abutting on either side of such property were entitled to fee simple interests to the center line of the "street," because the grantor who deeded the street property to the city was also the grantor of the abutting landowners, and no intention to the contrary appeared in any of the original deeds. Fenton v. Cedar Lumber & Hdwe. Co., 17 Utah 2d 99, 404 P.2d 966 (1965).

Property developers' dedication of land for public rights-of-way in a plat of a subdivision gave a defeasible fee interest to the county in the land dedicated for the road and, once the county vacated the road, the abutting property owner succeeded to the fee simple title of that land. Falula Farms, Inc. v. Ludlow, 866 P.2d 569 (Utah Ct. App. 1993).

Cited in Nelson v. Provo City, 2000 UT App 205, 398 Utah Adv. Rep. 20.

COLLATERAL REFERENCES

Am. Jur. 2d. — 39 Am. Jur 2d Highways, Streets, and Bridges § 183.

C.J.S. — 39A C.J.S. Highways § 136.

72-5-104. Public use constituting dedication — Scope.

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

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

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

History: L. 1963, ch. 39, § 89; C. 1953, 27-12-89; renumbered by L. 1998, ch. 270, § 132; 2000, ch. 324, § 7.

Amendment Notes. — The 1998 amendment, effective March 21, 1998, renumbered this section, which formerly appeared as § 27-12-89

The 2000 amendment, effective March 16, 2000, substituted "is" for "shall be deemed to have been" in Subsection (1) and added Subsections (2) and (3)

NOTES TO DECISIONS

ANALYSIS

Acceptance.

When owner of land deeded it to city for public use but city never accepted it, no dedication took place and claim of purchaser from city was invalid as against subsequent purchaser from original owner of land William J Lemp Brewing Co v PJ Moran, Inc , 51 Utah 178, 169 P 459 (1917)

Burden of proof.

Where claim is made that a highway has been dedicated to public use, there is a presumption in favor of the property owner and the burden of establishing public use for the required period of time is on those claiming it Leo M Bertagnole, Inc v Pine Meadow Ranches, 639 P2d 211 (Utah 1981)

Change in highway.

A public highway over public lands is established, although there has been no official acceptance, when it has been used for longer than ten years, if travel has remained substantially unchanged, and practical identity of road preserved, that is sufficient, although there may have been slight deviations from the common way Lindsay Land & Live Stock Co v Churnos, 75 Utah 384, 285 P 646 (1929)

Slight change in course of highway or of its location that does not materially change or affect the general course thereof or affect its location, nor break or change the continuity of travel or use, does not constitute abandonment or affect public nature of highway Sullivan v Condas, 76 Utah 585, 290 P 954 (1930)

Control by landowners.

No dedication was shown under identically worded predecessor section where it appeared that an alleyway which had more or less been used by the public at will for a number of years had from time to time been closed by the abutting owners, who had at all times exercised control over it Culmer v Salt Lake City, 27 Utah 252, 75 P 620 (1904)

Estoppel.

Municipality may be estopped from asserting dedication by acts and conduct that have been relied on by others to their prejudice and, likewise, private individual may be estopped in the same way where he stands by and permits others to improve land claimed to have been dedicated Premium Oil Co v Cedar City, 112 Utah 324, 187 P2d 199 (1947)

Evidence.

Evidence showing, among other things, that roadway was used continuously for recreational and agricultural purposes and for access to other business activities supported the trial court's ruling that the roadway was dedicated or abandoned to the public Kohler v Martin, 916 P2d 910 (Utah Ct App 1996)

Generally.

Where all three elements under this section for the establishment of a public highway were satisfied, the court had no discretion to ignore that fact and erred in concluding that a road was not a public highway Heber City Corp v. Simpson, 942 P2d 307 (Utah 1997)

Intent of landowner.

—Necessary.

In order for a private road to become a public thoroughfare there must be evidence of intent

by the owner to dedicate the road to a public use and an acceptance by the public. Such intent may be inferred from declarations, acts or circumstances and use by the general public. Gillmor v. Carter, 15 Utah 2d 280, 391 P.2d 426 (1964) (but see cases noted under "—Not necessary" below).

For cases discussing landowner's intent to dedicate road to public use, see Wilson v. Hull, 7 Utah 90, 24 P. 799 (1890); Whittaker v. Ferguson, 16 Utah 240, 51 P. 980 (1898); Schettler v. Lynch, 23 Utah 305, 64 P. 955 (1901); Culmer v. Salt Lake City, 27 Utah 252, 75 P. 620 (1904); Brown v. Oregon Short Line R.R., 36 Utah 257, 102 P. 740 (1909); Morris v. Blunt, 49 Utah 243, 161 P. 1127 (1916); William J. Lemp Brewing Co. v. P.J. Moran, Inc., 51 Utah 178, 169 P. 459 (1917); Barboglio v. Gibson, 61 Utah 314, 213 P. 385 (1923).

—Not necessary.

The determination that a roadway has been continuously used by members of the general public for at least ten years is the sole requirement for it to become a public road; it is not necessary to prove the owner's intent to offer the road to the public. Thurman v. Byram, 626 P.2d 447 (Utah 1981).

To establish a dedication of a road to a public use, it is not necessary to prove landowner's intent to dedicate the road to a public use. Leo M. Bertagnole, Inc. v. Pine Meadow Ranches, 639 P.2d 211 (Utah 1981).

Private rights.

Creation of a private right in a public thoroughfare cannot occur; a prescriptive right is in conflict with the dedication of land to the use of the general public. Kohler v. Martin, 916 P.2d 910 (Utah Ct. App. 1996).

"Public" defined.

Owners of property abutting or straddling rural road and their personal visitors were not members of public generally within this provision; burden of proving real public use of that road continuously for ten years was not met in suit by subdividers who sought to establish that the road had become a public thoroughfare. Petersen v. Combe, 20 Utah 2d 376, 438 P.2d 545 (1968).

Rights granted to public.

City still owned fee to strip, acquired under Townsite Act (43 U.S.C § 718 et seq., now repealed), after alleged dedication thereof as public street, so that only right that public could have acquired would be right to easement across strip for traveling purposes, and only additional right contiguous property owners might acquire would be right of ingress to and egress from their property. Premium Oil Co. v. Cedar City, 112 Utah 324, 187 P.2d 199 (1947).

Rights of subsequent grantees.

Where land is dedicated by owner as highway and is accepted by public as such, all subsequent grantees of abutting lands are bound by dedication. Schettler v. Lynch, 23 Utah 305, 64 P. 955 (1901).

Sufficiency of proof of dedication.

Highway over privately owned ground will be deemed dedicated or abandoned to the public use when the public has continuously used it as a thoroughfare for a period of ten years. Morris v. Blunt, 49 Utah 243, 161 P. 1127 (1916).

For cases finding sufficient evidence to support finding of dedication to public use, see Sullivan v. Condas, 76 Utah 585, 290 P. 954 (1930); Jeremy v. Bertagnole, 101 Utah 1, 116 P.2d 420 (1941); Boyer v. Clark, 7 Utah 2d 395, 326 P.2d 107 (1958); Clark v. Erekson, 9 Utah 2d 212, 341 P.2d 424 (1959).

Mere use by public of private alley in common with owners of alley does not show a dedication thereof to public use, or vest any right in public to the way. Thompson v. Nelson, 2 Utah 2d 340, 273 P.2d 720 (1954).

Though dedication of one's land to public use should not be lightly regarded, where a narrow, private dead-end street was used by neighboring residents and the general public without interference for at least 25 years, and where the city had platted it as a public street in 1915 and had thereafter paved it and maintained a public street sign at its entrance, and where plaintiff who owned the fee simple interest in the land on which the street was situated had not paid any taxes on the street property for 25 years, this combination of factors was sufficient to justify finding that the street had been dedicated to public use. Bonner v. Sudbury, 18 Utah 2d 140, 417 P.2d 646 (1966).

Clear and convincing quantum and quality of proof is required for the establishment of a public thoroughfare or taking of another's property. Thomson v. Condas, 27 Utah 2d 129, 493 P.2d 639 (1972).

Where the trial court found that public had used north-south road for 12 years and that during this time, the road was ten feet wide, and the court found that there was insufficient use of an east-west road by the public to make it a public road, these findings of fact, supported by substantial evidence, compelled a holding that the north-south road was a public highway ten feet wide and that no public highway existed on the east-west road. Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co., 744 P.2d 1376 (Utah 1987)

Because there were material issues of fact as to whether people using a road were members of the general public or landowners in the area, who had either a private right or permission to use the road, and there were conflicting statements as to public use of the road for recre-

ational purposes, summary judgment in favor of the proponents of dedication was erroneous. Draper City v. Estate of Bernardo, 888 P.2d 1097 (Utah 1995).

Finding that a road was not a public thoroughfare was proper based on evidence that the road was generally used only during the deer hunting season and was frequently closed to the public at other times, and that its use during the hunting season was by permission of the owners. Campbell v. Box Elder County, 962 P.2d 806 (Utah Ct. App. 1998).

"Thoroughfare" and "public thoroughfare" distinguished.

Under identically worded predecessor section, a "thoroughfare" was a place or way through which there is passing or travel. It became a "public thoroughfare" when the public acquired a general right of passage. Morris v. Blunt, 49 Utah 243, 161 P. 1127 (1916).

Width of roadway.

Although there was some incidental evidence in the record regarding the width of the road in question, it was not error for the district court to refuse to determine the width of the road when that issue was not the focus of the litigation. Butler, Crockett & Walsh Dev. Corp. v. Pinecrest Pipeline Operating Co., 909 P.2d 225 (Utah 1995).

Generally, the width of a public road is determined according to what is reasonable and necessary under all the facts and circumstances. Kohler v. Martin, 916 P.2d 910 (Utah Ct. App. 1996).

COLLATERAL REFERENCES

Am. Jur. 2d. — 39 Am. Jur. 2d Highways, Streets, and Bridges § 24 et seq.

C.J.S. — 39A C.J.S. Highways § 15.

72-5-105. Highways once established continue until abandoned.

All public highways once established shall continue to be highways until abandoned or vacated by order of the highway authorities having jurisdiction over any highway, or by other competent authority.

History: L. 1963, ch. 39, § 90; C. 1953, 27-12-90; renumbered by L. 1998, ch. 270, § 133.

Amendment Notes. — The 1998 amendment, effective March 21, 1998, renumbered this section, which formerly appeared as § 27-12-90, and made a stylistic change.

NOTES TO DECISIONS

Analysis

Abutting owners' rights.
Bridges.
Notice of abandonment required.
Platted but unused streets.
Power of city to abandon.
Requisites for abandonment.

Abutting owners' rights.

While public may abandon street or highway insofar as it affects rights of public therein, such abandonment, however, will not affect rights of abutting owner with respect to use of easement for ingress and egress to and from his premises. Hague v. Juab County Mill & Elevator Co., 37 Utah 290, 107 P. 249 (1910).

Where property is sold with reference to a map or plat showing it to abut on a public highway, this constitutes an implied covenant that highway will not be obstructed or interfered with by grantor. While highway by abandonment may pass out of jurisdiction of local authorities, rights of abutting owners will not be affected. Tuttle v. Sowadzki, 41 Utah 501, 126 P. 959 (1912).

Bridges.

Bridge owned by county was an essential part of road and could not be abandoned except as provided by statute. Adney v. State Rd. Comm'n, 67 Utah 567, 248 P. 811 (1926).

Notice of abandonment required.

County commissioners may not order abandonment of a county road unless notice thereof is given. Ercanbrack v Judd, 524 P2d 595 (Utah 1974).

Platted but unused streets.

Corporation was able to give good title to land platted for streets and alleyways but never used as such, since under proviso in former law, road not used or worked for five years ceased to be a highway. Mallory v Taggart, 24 Utah 2d 267, 470 P.2d 254 (1970).

Tab B

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

State of Utah, et. al.,	:	
Plaintiffs	:	Memorandum Decision
vs.	:	Date: June 16, 2004
Randy Butler, et. al.,	:	Case Number: 000403~~27~~ 72
Defendants	:	Division VII: Judge James R. Taylor

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

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

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

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

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

Public Highway

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

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

Continuous Use

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

and sheep, not people.

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

Public Thoroughfare

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

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

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

The Court has also stated that a "'thoroughfare' is a place or way through which there is passing or travel. It becomes a 'public thoroughfare' when the public have a general right of passage." Gillmor v. Carter, 15 U.2d 280, 391 P.2d 426 at 428 (Utah 1964).

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

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

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

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

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

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

10 years

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

Reasonable and Necessary Width

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

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

Injunction

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

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

of the road.

Fines

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

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

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

Costs of Court

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

Conclusion

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

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

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

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

Dated this 16th day of June, 2004

Judge James R. Taylor
Fourth Judicial District Court

A certificate of mailing is on the following page.

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

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

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IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, STATE OF UTAH

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

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

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

The court has also stated that a "'thoroughfare' is a place or way through which there is passing or travel. It becomes a 'public thoroughfare' when the public have a general right of passage." Gilmore v. Carter, 15 U.2d 280, 291 P.2d 426 at 428 (Utah 1964).

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

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

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

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

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

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

ORDER

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

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

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

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

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

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

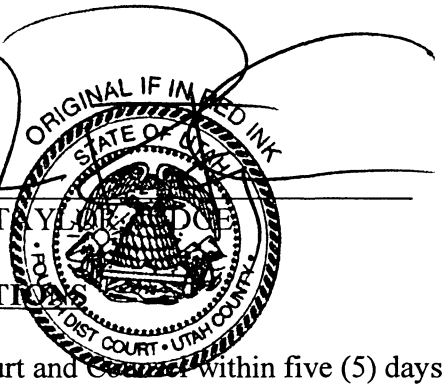
6. That Plaintiff Utah County's request for judgment, joint and several, against Defendants Randy Butler and Donna Butler at the rate of $10 per day from July 29, 1997 to the date of the order, plus interest at the legal rate from the date of judgment is hereby denied.

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

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

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

DATED this 16 day of Aug., 2004



JAMES R. TAYLOR, JUDGE

NOTICE OF OBJECTIONS

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

CERTIFICATE OF SERVICE

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

MARK E. ARNOLD
Arnold & Wiggins, P.C.
57 West 200 South #105
Salt Lake City, Utah 84101

MARTIN B. BUSHMAN
Assistant Attorney General
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Tab C

IN THE UTAH COURT OF APPEALS

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Utah County; and State of Utah, by and through its Department of Natural Resources, Division of Wildlife Resources, Plaintiffs, Appellees, and Cross-appellant, v. Randy Butler, Donna Butler, Blaine Evans, Linda Evans, Margaret Condley, Elizabeth Condley, and John Does 1-15, Defendants, Appellants, and Cross-appellees.	OPINION (For Official Publication) Case No. 20040809-CA F I L E D (November 2, 2006) 2006 UT App 444

Fourth District, Provo Department, 000403372
The Honorable James R. Taylor

Attorneys: Scott L. Wiggins, Salt Lake City, for Appellants
Mark L. Shurtleff and Martin B. Bushman, Salt Lake City, and M. Cort Griffin and Robert J. Moore, Provo, for Appellees

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Before Judges Bench, McHugh, and Thorne.

BENCH, Presiding Judge:

¶1 Defendants Randy Butler, Donna Butler, Blaine Evans, and Linda Evans appeal the trial court's conclusion that Bennie Creek Road (the Road) is a public highway under Utah Code section 72-5-104(1) (the Dedication Statute). See Utah Code Ann. § 72-5-104(1) (2001). Utah County cross-appeals the trial court's decision to deny statutory damages caused by Defendants' refusal to remove a gate after receiving service of notice. We affirm in part and remand for a determination of statutory damages owed to Utah County.

BACKGROUND

¶2 The Road runs west from U.S. Highway 89 into the Uinta National Forest (the National Forest), providing access to camping areas, hiking trails, and the Nebo Loop. Portions of the Road cross Defendants' properties before reaching the National Forest. In 1996, Defendants prevented public access to the Road by erecting a metal gate. On July 29, 1997, the Utah County Board of Commissioners served Defendants with notice ordering the removal of the gate from the Road. Because Defendants refused to remove the gate, Utah County and the State of Utah Department of Natural Resources (Plaintiffs) brought this action to have the Road declared a public highway and to force the removal of the metal gate.

¶3 Following an eight-day bench trial in June 2004, the court concluded that the Road had been dedicated to public use long ago and ordered the gate removed. At trial, the court heard testimony from previous and current landowners, various users of the Road, National Forest workers, and public employees assigned to maintain the Road. The testimony conflicted as to the prior use of gates, placement of no-trespassing signs, and ownership reactions to public use of the road. After evaluating the credibility of the witnesses and weighing the evidence, the trial court ultimately determined that the Road had been open to public use from the mid-1920s until about 1980.

¶4 The trial court issued a memorandum decision directing Plaintiffs to prepare a final order containing factual findings and conclusions of law consistent with those outlined in the memorandum. Defendants objected to the proposed findings of fact, conclusions of law, and order submitted by Plaintiffs, and requested a hearing. The trial court signed the proposed order without holding a hearing. Defendants now appeal.

¶5 Despite concluding that the Road had been dedicated to public use and that Defendants did not remove the gate after receiving proper notice, the trial court refused to award Utah County its demand for statutory damages. In refusing to make the award, the trial court ruled that conflicting evidence in the record as to whether the gate was locked prevented the court from being able to accurately calculate damages. Utah County cross-appeals the refusal to award statutory damages.

ISSUES AND STANDARDS OF REVIEW

¶6 Defendants argue that the trial court erred by determining that the Road was dedicated to public use under Utah Code section 72-5-104(1). See Utah Code Ann. § 72-5-104(1) (2001). "[W]hen reviewing a trial court's decision regarding whether a public highway has been established . . . , we review the decision for

correctness but grant the court significant discretion in its application of the facts to the statute." Heber City Corp. v. Simpson, 942 P.2d 307, 310 (Utah 1997).

¶7 Defendants also assert that the trial court abused its discretion by failing to rule on their objections to the proposed findings of fact, conclusions of law, and order. In challenging a discretionary decision of the trial court, Defendants must demonstrate that the court exceeded the measure of discretion the law affords it. This is done by showing that there is "no reasonable basis for the [court's] decision." Crookston v. Fire Ins. Exch., 860 P.2d 937, 938 (Utah 1993).

¶8 In its cross-appeal, Utah County claims that in light of Defendants' refusal to remove the gate after receiving proper notice in 1997, Utah County is entitled to an award for statutory damages. See Utah Code Ann. § 72-7-104 (2001). We review a trial court's conclusions of law for correctness, granting no deference to the trial court. See State v. Pena, 869 P.2d 932, 936 (Utah 1994).

ANALYSIS

I. PUBLIC ROAD

¶9 For a road to be dedicated to public use, it must be "continuously used as a public thoroughfare for a period of ten years." Utah Code Ann. § 72-5-104; see also Simpson, 942 P.2d at 310. Defendants claim that (a) the use relied upon by the trial court was not public use, and that (b) the use was not continuous (c) for a period of ten years.

a. Public Use

¶10 Defendants argue that because most of Plaintiffs' witnesses used the Road as trespassers, the witnesses should not be considered members of the public for purposes of determining that the Road was dedicated to public use. See Utah Code Ann. § 72-5-104(1). Defendants, however, provide no legal support for their argument, nor a compelling reason why trespassers cannot be considered members of the public.

¶11 In fact, "under Utah law . . . permissive use cannot result in either adverse possession or dedication of private property to the public." Campbell v. Box Elder County, 962 P.2d 806, 809 (Utah Ct. App. 1998); see also State v. Six Mile Ranch Co., 2006 UT App 104, ¶19, 132 P.3d 687 (holding that permissive use may not be considered in a public dedication determination). Under the Dedication Statute, public use cannot include permissive use, nor can it include use by "owners of adjoining property." Draper City v. Estate of Bernardo, 888 P.2d 1097, 1099 (Utah 1995).

Defendants' proposed interpretation would render the Dedication Statute ineffective because no use could ever constitute public use. To give the Dedication Statute proper effect, we hold that non-permissive use must be considered public use. We therefore agree with the trial court that trespassers are members of the "public" for purposes of determining whether the Dedication Statute has been satisfied. See Utah Code Ann. § 72-5-104(1) (2001).

b. Continuous Use

¶12 Defendants claim that, even if the trial court properly defined public use, the trial court erred in concluding that the Road was used continuously because there were gates along the road and seasonal weather conditions made the Road impassable at times.

¶13 While there was conflicting testimony at trial regarding the status and purpose of these gates, we are not in a position to closely scrutinize the factual findings of the trial court in public thoroughfare dedication cases. See Heber City Corp. v. Simpson, 942 P.2d 307, 309-10 (Utah 1997) (holding that factual issues in public dedication cases do not lend themselves to close review). Therefore, unless the findings of fact are clearly unsupported by the record, we will seek only to apply the trial court's factual findings to the law of abandonment and public dedication.

¶14 This court has interpreted the Dedication Statute as requiring "continuous and uninterrupted use of a road over ten years where 'the public, even though not consisting of a great many persons, made a continuous and uninterrupted use . . . as often as they found it convenient or necessary.'" Campbell, 962 P.2d at 809 (emphasis added) (omission in original) (citation omitted). "[U]se may be continuous though not constant. . . . [P]rovided it occurred as often as the claimant had occasion or chose to pass. Mere intermission is not interruption." Id. (omission in original) (emphasis added) (quotations and citation omitted).

¶15 Even though it appears that there were instances when seasonal weather rendered the Road temporarily impassible, the trial court found that the Road was used by the public whenever it was convenient or necessary. Additionally, the court held that the gates in question were generally unlocked from about 1925 until 1980 and were used merely to restrict the travel of livestock, not people. These times of impasse amount to "mere intermission[s]" of public use. Id. We therefore agree with the trial court's conclusion that the Road was in continuous use by the public for an extended period of time.

c. Period of Ten Years

¶16 Defendants argue that the trial court erred because it failed to identify an exact ten-year period during which the Road was continuously used. Language in the Dedication Statute requires a finding of continuous use for at least ten years, and therefore permits a finding of public dedication based on a time period greater than ten years. See Utah Code Ann. § 72-5-104(1) (2001). The trial court determined that the Road was continuously used by the public from about 1925 until 1980, or approximately fifty-five years. This fifty-five year span of public use clearly exceeds the statutory minimum requirement of ten years.

¶17 Defendants' arguments on this issue imply a challenge to the trial court's factual findings that the Road was continuously open to the public for a sufficient period of time. By failing to offer case law supporting their position and merely pointing to conflicting evidence in the record concerning the time period issue, Defendants simply invite this court to meddle with the trial court's findings of fact. Again, we will not closely scrutinize the factual findings of a trial court when reviewing public dedication cases; we seek only to ensure that the trial court has properly applied those facts to the law. See Simpson, 942 P.2d at 309-10. Therefore, we agree with the trial court that Plaintiffs properly demonstrated that the Road was continuously used by the public for at least ten years. See Utah Code Ann. § 72-5-104(1).

II. OBJECTIONS TO PROPOSED ORDER

¶18 After the trial court's decision, Defendants filed objections to the proposed findings of fact, conclusions of law, and order, with a request for a hearing, arguing insufficiency of the evidence. Despite Defendants' objections, the trial court entered the proposed findings and order without another hearing. Defendants argue that in ruling on their objections without holding a hearing, the trial court abused its discretion. We disagree.

¶19 The trial court is afforded great latitude in determining whether a hearing will be held on non-dispositive motions. See Utah R. Civ. P. 7(e). Under rule 7(e) of the Utah Rules of Civil Procedure, the trial court "may hold a hearing on any motion" but is not required to do so. Id. The proposed order eventually adopted by the trial court was sufficiently similar to the memorandum decision to provide a reasonable basis on which the trial court could decide to deny a hearing on the objections. Because Defendant's motion was simply an objection to the factual findings of the trial court, the court did not abuse its discretion by refusing to hold a hearing on Defendants'

objection. See Crookston v. Fire Ins. Exch., 860 P.2d 937, 938 (Utah 1993).

III. DAMAGES

¶20 In its cross-appeal, Utah County challenges the trial court's ruling that it is not entitled to statutory damages for the time the metal gate remained across the Road after Utah County served Defendants notice. Utah County argues that Defendants' failure to remove the gate after receiving proper service of notice automatically results in the statutory penalty. Under section 72-7-104, when an installation is not removed within ten days after service of notice is completed, "[a] highway authority may recover: (a) the costs and expenses incurred in removing the installation, serving notice, and the costs of a lawsuit if any; and (b) [ten dollars] for each day the installation remain[s] within the right-of-way after notice was complete." Utah Code Ann. § 72-7-104(4) (2001). More than nine years have passed since Defendants received service of notice, and the gate has apparently not been removed.

¶21 Utah County argues that it met its burden to show that service was completed and that the gate remained in place throughout this litigation. Utah County claims that the trial court did not have discretion to deny statutory damages. We agree. Pursuant to section 72-7-104(5), when the highway authority is granted a judgment after the removal of an installation is contested, it is entitled to the remedies referred to above. See id. § 72-7-104(5). It is clear from the record that Defendants did not remove the gate subsequent to receiving notice from Utah County. The record reflects that the trial court was reticent to award Utah County these costly damages. In declining to award damages, the trial court pointed to conflicting testimony regarding whether the gate was locked, despite finding that the Road was indeed a public highway, that notice to remove the gate was properly served, and that the gate was not removed.

¶22 We conclude that the installation of the gate clearly falls under the proscribed structures "of any kind or character" regardless of whether it was locked. Id. § 72-7-104(1). The record shows that the trial court gave much consideration to whether the gate remained locked after Defendants received notice. Such a factual determination is inapplicable to section 72-7-104(4), which concerns itself only with installations across public highways, not whether the installations are locked. See id. § 72-7-104(4). Because Utah County made a proper showing that the gate remained in place after notice was completed, the trial court should have awarded section 72-7-104(4) damages.

¶23 We recognize that this decision will, in effect, award Utah County substantial statutory damages despite its failure to take

advantage of the self-help remedies available to it under section 72-7-104(1). See id. § 72-7-104(1). We also recognize that this decision will force landowners to think twice about deciding whether to remove similar installations after receiving notice from a highway authority--even when the landowner intends to challenge the highway authority's decisions in court. The ten dollar per day penalty begins to accrue ten days after notice is completed, and continues to accrue until the installation is removed. The statute simply does not provide for a tolling of the penalty during a legal dispute between a landowner and a highway authority, nor does it limit the total amount a highway authority may recover. We are therefore constrained to reward the highway authority's decision to not remove the installation and conclude that damages should be calculated from ten days after completion of service of notice until such time as the gate is removed. Surely the legislature did not anticipate such a long gap between the completion of service of notice and removal of the installation. But the plain language of the statute prevents us from interpreting the provision for statutory damages otherwise. See id. § 72-7-104(1)-(5).

CONCLUSION

¶24 The trial court properly applied its factual conclusions to the law of abandonment and public dedication of a highway in finding that the Road is a public highway. The challenges by Defendants are largely an attack on the trial court's factual findings, which in public dedication cases, we will not closely scrutinize. However, the trial court erred by failing to award statutory damages after concluding that the gate remained across the Road well after Utah County completed service of notice. We therefore affirm the trial court's conclusion that the Road is a public highway under Utah Code section 72-5-104(1), and remand the case for a calculation of statutory damages consistent with this opinion and Utah Code section 72-7-104.

Russell W. Bench,
Presiding Judge

¶25 WE CONCUR:

Carolyn B. McHugh, Judge

William A. Thorne Jr., Judge

Tab D

IN THE SUPREME COURT OF THE STATE OF UTAH

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Utah County and State of Utah,
by and through its Department
of Natural Resources and
Division of Wildlife Resources,

Respondents,

v.

Case No. 20070009-SC
20040809-CA

Randy Butler, Donna Butler, Margaret Condley, Elizabeth Condley, Blaine Evans, Linda Evans, and John Does 1-15,

Petitioners.

ORDER

This matter is before the court upon a Petition for Writ of certiorari, filed on January 3, 2007.

IT IS HEREBY ORDERED, pursuant to Rule 45 of the Utah Rules of Appellate Procedure, the Petition for Writ of Certiorari is granted as to the following issues:

1. Whether trespassing may constitute a public use pursuant to the Dedication Statute, Utah Code Ann. § 72-5-104.

2. Whether the district court erred in its determination that the public had continuously used the road at issue in this case according to the requirements of the Dedication Statute.

3. Whether the district court failed to designate a specific ten-year period of continuous use and, if so, whether that failure constituted reversible error.

4. Whether the court of appeals erred in its application of Utah Code Ann. § 72-7-104(4) to the facts of this case.

A briefing schedule will be established hereafter. Pursuant to rule 2, the court suspends the provision of rule 26(a) that permits the parties to stipulate to an extension of time to

submit their briefs on the merits. The parties shall not be permitted to stipulate to an extension. Additionally, absent extraordinary circumstances, no extensions will be granted by motion. The parties shall comply with the briefing schedule upon its issuance.

For The Court:

Dated March 15, 2007

Christine M. Durham
Chief Justice

CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2007, a true and correct copy of the foregoing ORDER was deposited in the United States mail or placed in the Interdepartmental mail service, or hand delivered to the parties listed below:

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Dated this March 16, 2007.

By _____
Deputy Clerk

Case No. 20070009
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FOURTH DISTRICT, PROVO DEPT Case No. 000403372

Tab E

(1) the highway authority acquires right of ingress and egress by gift, agreement, purchase, eminent domain, or otherwise: or

(2) no right of ingress or egress exists between the right-of-way and the adjoining property.

History: L. 1963, ch. 39, § 134; C. 1953, 27-12-134; renumbered by L. 1998, ch. 270, § 173.

Amendment Notes. — The 1998 amendment, effective March 21, 1998, renumbered this section, which formerly appeared as § 27-12-134; deleted the former first paragraph, which provided that highway authorities are authorized to adopt regulations and require permits and surety bonds for structures or objects on public highway rights-of-way; and made stylistic changes throughout the section.

72-7-104. Installations constructed in violation of rules — Rights of highway authorities to remove or require removal.

(1) If any person, firm, or corporation installs, places, constructs, alters, repairs, or maintains any approach road, driveway, pole, pipeline, conduit, sewer, ditch, culvert, outdoor advertising sign, or any other structure or object of any kind or character within the right-of-way of any highway without complying with this title, the highway authority having jurisdiction over the right-of-way may:

(a) remove the installation from the right-of-way or require the person, firm, or corporation to remove the installation; or

(b) give written notice to the person, firm, or corporation to remove the installation from the right-of-way.

(2) Notice under Subsection (1)(b) may be served by:

(a) personal service; or

(b) (i) mailing the notice to the person, firm, or corporation by certified mail; and

(ii) posting a copy on the installation for ten days.

(3) If the installation is not removed within ten days after the notice is complete, the highway authority may remove the installation at the expense of the person, firm, or corporation.

(4) A highway authority may recover:

(a) the costs and expenses incurred in removing the installation, serving notice, and the costs of a lawsuit if any; and

(b) $10 for each day the installation remained within the right-of-way after notice was complete.

(5) (a) If the person, firm, or corporation disputes or denies the existence, placement, construction, or maintenance of the installation, or refuses to remove or permit its removal, the highway authority may bring an action to abate the installation as a public nuisance.

(b) If the highway authority is granted a judgment, the highway authority may recover the costs of having the public nuisance abated as provided in Subsection (4).

(6) The department, its agents, or employees, if acting in good faith, incur no liability for causing removal of an installation within a right-of-way of a highway as provided in this section.

(7) The actions of the department under this section are not subject to the provisions of Title 63, Chapter 46b, the Administrative Procedures Act.

History: L. 1963, ch. 39, § 135; 1990, ch. 300, § 1; C. 1953, 27-12-135; renumbered by L. 1998, ch. 270, § 174.

Amendment Notes. — The 1998 amendment, effective March 21, 1998, renumbered this section, which formerly appeared as § 27-12-135; in Subsection (1) substituted "this title" for "this chapter"; and made stylistic changes.

NOTES TO DECISIONS

ANALYSIS

Determination of nature of road.
Nature of remedies.
Removal.

Determination of nature of road.

Whether county officers were immune from suit for trespass after they had removed a locked gate from a roadway depended upon the public or private nature of the road as determined by the trial court and not the commissioners. Blonquist v. Summit County, 25 Utah 2d 387, 483 P.2d 430 (1971).

Nature of remedies.

None of the remedies of this statute is exclusive, nor are the remedies restrictive of the common-law right to summarily remove obstructions from a highway. Blonquist v. Summit County, 25 Utah 2d 387, 483 P.2d 430 (1971).

Removal.

If a road is public, notice that a gate will be removed does not make summary removal unlawful. Blonquist v. Summit County, 25 Utah 2d 387, 483 P.2d 430 (1971).

COLLATERAL REFERENCES

Am. Jur. 2d. — 39 Am. Jur. 2d Highways, Streets, and Bridges § 362 et seq.

C.J.S. — 40 C.J.S. Highways § 223 et seq.

72-7-105. Obstructing traffic on sidewalks or highways prohibited.

(1) A person may not:

(a) drive or place any vehicle, animal, or other thing upon or along any sidewalk except in crossing the sidewalk to or from abutting property; or

(b) permit the vehicle, animal, or other thing to remain on or across any sidewalk in a way that impedes or obstructs the ordinary use of the sidewalk.

(2) (a) Except under Subsection (2)(b), vehicles, building material, or other similar things may be placed temporarily on highways in a manner that will not impede, endanger, or obstruct ordinary traffic.

(b) A highway authority may prohibit or may require the removal of vehicles, building material, or other obstructions on any highway under their jurisdiction.

History: L. 1963, ch. 39, § 138; 1991, ch. 137, § 62; C. 1953, 27-12-138; renumbered by L. 1998, ch. 270, § 175.

Amendment Notes. — The 1998 amendment, effective March 21, 1998, renumbered this section, which formerly appeared as § 27-12-138; divided Subsections (1) and (2), adding the (a) and (b) designations; in Subsection (1), *in the introductory language, substituted* "A person may not" for "It is unlawful to"; in Subsection (2)(a) added "Except under Subsection (2)(b)" after "Vehicles"; in Subsection (2)(b) added "A highway authority may prohibit or may require removal of" and substituted "on any highway under their jurisdiction" for "are permitted to remain on any highway contrary to instructions from the highway authority having jurisdiction over the highway"; and made stylistic and punctuation changes.

Tab F


KEEP GATE CLOSED
PRIVATE PROPERTY TO
FOREST SERVICE BOUNDARY
TRESPASSING OFF ROAD
PRIVATE PROPERTY