

2008

# Wasatch County v. Okelberry : Brief of Appellant

Utah Court of Appeals

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## Recommended Citation

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IN THE COURT OF APPEALS  
OF THE STATE OF UTAH

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

Plaintiff-Appellee,

vs.

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

Defendants-Appellants.

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Case No. 20080988-CA

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OPENING BRIEF OF APPELLANTS

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APPEAL FROM THE FINAL DECREE  
OF THE FOURTH JUDICIAL DISTRICT COURT OF WASATCH COUNTY,  
THE HONORABLE DONALD J. EYRE

---

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## **LIST OF PARTIES**

All parties are listed on the case caption.

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WASATCH COUNTY, a body politic of  
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Case No. 20080988-CA

OPENING BRIEF OF APPELLANTS

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**JURISDICTIONAL STATEMENT**

The trial court issued its ruling on October 23, 2008.<sup>1</sup> Okelberrys timely filed their notice of appeal on November 20, 2008.<sup>2</sup> The supreme court had jurisdiction under Utah Code § 78A-3-102(3)(j). This Court has pour-over jurisdiction under Utah Code § 78A-4-103(2)(j).

Although the appeal is timely with respect to the October 23, 2008, ruling, that ruling may not have been a final order. Based on the case of *Guisti v. Sterling Wentworth Corp.*,<sup>3</sup>

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<sup>1</sup>R. 676-668.

<sup>2</sup>R. 680-679.

<sup>3</sup>2009 UT 2, 201 P.3d 966.



decided after Okelberrys' appeal, it is arguable that Rule 7 of the Utah Rules of Civil Procedure required Wasatch County to submit an order implementing the trial court's ruling. Okelberrys is filing a separate motion addressing this potential jurisdictional issue.

### **ISSUES PRESENTED FOR REVIEW**

1. Where the trial court found gates had been locked, did the court act contrary to the Utah Supreme Court's direction in finding the locked gates did not interrupt public use?

a. Standard of appellate review: Whether a trial court on remand correctly interpreted the appellate court's decision is a question of law. The appellate court applies a correction of error standard.<sup>4</sup>

b. Preservation below: Okelberrys argued below that a "locked gate is clearly an interruption" and that "it is the act of blocking, not the result, that is important."<sup>5</sup>

2. Did the trial court rule based on a misunderstanding of the law and thus abuse its discretion in holding that Okelberrys did not interrupt use by stopping persons who were using their private roads?

a. Standard of review: "An appellate court reviews a trial court's legal interpretation of the Dedication Statute for correctness and its factual findings for clear error. But whether the facts of a case satisfy the requirements of the Dedication Statute is a mixed question of fact and law that involves various and complex facts, evidentiary resolutions, and

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<sup>4</sup>*Amax Magnesium Corp. v. Utah State Tax Comm'n*, 874 P.2d 840, 842 (Utah 1994).

<sup>5</sup>R. 630.

credibility determinations. Thus, an appellate court reviews a trial court's decision regarding whether a public highway has been established under the Dedication Statute for correctness but grants the court significant discretion in its application of the facts to the statute.”<sup>6</sup> Where the court exercises its discretion based on a misunderstanding of the law, however, that constitutes an abuse of discretion.<sup>7</sup>

b. Preservation below: The issue was raised in Okelberrys’ Memorandum Opposing Plaintiff’s Motion for Entry of Findings of Fact and Conclusions of Law.<sup>8</sup>

3. Did the trial court abuse its discretion in denying Okelberrys’ motion to allow presentation of additional evidence addressing intent and other factors made relevant by the Utah Supreme Court’s decision?

a. Standard of appellate review: “Like the motion for a new trial on the ground of newly discovered evidence, a motion to reopen the case to take additional testimony is normally addressed to the discretion of the trial court, and its discretionary denial or grant of the motion will be interfered with by an appellant court only for abuse.”<sup>9</sup>

b. Preservation below: Okelberrys sought this relief in their motion for new trial for presentation of additional evidence.<sup>10</sup>

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<sup>6</sup>*Wasatch County v. Okelberry*, 2008 UT 10, ¶ 8, 179 P.3d 768.

<sup>7</sup>*Gaw v. State*, 798 P.2d 1130, 1134 (Utah Ct. App. 1990).

<sup>8</sup>R. 621.

<sup>9</sup>*Pozzolan Portland Cement Co. v. Gardner*, 668 P.2d 569, 570 (Utah 1983) (citation omitted).

<sup>10</sup>R. 616-614.

4. Did the trial court err in concluding that the maintenance of unlocked gates did not interrupt use of the road as a public thoroughfare?

a. Standard of review: Because the testimony concerning the maintenance of gates was essentially undisputed, the only issue for decision is a question of law. Review is for correctness.

b. Preservation below: This issue was raised in Okelberrys' Memorandum Opposing Plaintiff's Motion for Entry of Findings of Fact and Conclusions of Law.<sup>11</sup>

### **DETERMINATIVE PROVISIONS OF LAW**

Utah Code § 72-5-104(1) (2006) is determinative of this appeal: "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."

### **STATEMENT OF THE CASE**

#### **A. Nature of the Case & Course of the Proceedings Below**

This is a civil case seeking a declaration that certain privately owned roads have become public under Utah Code § 72-5-104(1) (2006).

This is an appeal from the trial court's decision on remand. Wasatch County appealed and Okelberry cross-appealed from the original trial court decision in this case. The Court of Appeals decision on that appeal is reported at 2006 UT App 743, 153 P.3d 745, and the Utah Supreme Court opinion is reported at 2008 UT 10, 179 P.3d 768. A copy of the supreme court opinion is attached in the Appendix to this brief.

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<sup>11</sup>R. 627-622.

Wasatch County filed suit on August 24, 2001.<sup>12</sup> The case was tried in a bench trial from June 28-30, 2004.<sup>13</sup> The trial court ultimately entered an order determining that the roads had become public<sup>14</sup> but that the county was estopped from asserting an ownership interest in the roads.<sup>15</sup> Wasatch County appealed, and Okelberrys cross-appealed. The Court of Appeals issued its opinion November 30, 2006, sustaining Wasatch County's appeal and rejecting the Okelberrys' cross-appeal.<sup>16</sup> On Okelberrys' petition for writ of certiorari, the Utah Supreme Court reversed the court of appeals and remanded for further proceedings.

On remand, Wasatch County filed a motion for further findings.<sup>17</sup> Okelberrys responded<sup>18</sup> and filed a cross-motion for further findings.<sup>19</sup> Okelberrys' motion included a motion for new trial or for leave to present additional evidence addressing the new test adopted by the supreme court.<sup>20</sup> The trial court held oral arguments on the motion on

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<sup>12</sup>R. 10.

<sup>13</sup>R. 357-353.

<sup>14</sup>R. 424.

<sup>15</sup>R. 482.

<sup>16</sup>*Wasatch County v. Okelberry*, 2006 UT App 473, 153 P.3d 745, *rev'd*, 2008 UT 10, 179 P.3d 768.

<sup>17</sup>R. 605-597.

<sup>18</sup>R. 636-617.

<sup>19</sup>R. 616-611.

<sup>20</sup>*Id.*

September 26, 2008.<sup>21</sup> The court did not expressly rule on Okelberrys' motion for new trial or to present additional evidence, but issued a ruling on October 23, 2008, finding the issues in favor of Wasatch County.<sup>22</sup>

B. Statement of Facts

The roads in question run across several thousand acres of rural, undeveloped property that is owned by the Okelberrys in Wasatch County. Ray Okelberry, his brother Lee Okelberry, and their father first purchased this property in 1957.<sup>23</sup> The Okelberrys ran a sheep business and bought the mountainous property in order to relocate their herds to a higher, cooler elevation.<sup>24</sup> Ray and Lee Okelberry ultimately bought out their father's interest in the land, and, after Lee decided to retire from the business, Ray's sons Eric and Brian Okelberry then bought out Lee's interest.<sup>25</sup> At the present time, Ray, Eric, and Brian Okelberry own the land in question and continue to use it in their own livestock operations.

The Okelberrys' property is crisscrossed by a series of unimproved dirt roads. A color-coded map of the properties in question was attached as an exhibit during the pretrial proceedings,<sup>26</sup> and, for convenience, is reproduced and attached as an exhibit to this brief.

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<sup>21</sup>R. 667; Transcript of Oral Argument September 26, 2008.

<sup>22</sup>R. 676-668.

<sup>23</sup>Trial Transcript, June 30 at 61-62.

<sup>24</sup>Trial Transcript, June 30 at 61.

<sup>25</sup>Trial Transcript, June 30 at 62.

<sup>26</sup>R. at 371.

Evidence was presented at trial indicating that the County has not done any work to improve the physical condition of the roads.<sup>27</sup> The evidence presented at trial also indicated that, due to weather, the roads are only open for travel from Mid-May or June through November of each year.<sup>28</sup> To the extent that these roads can actually be referred to as “roads,” the evidence showed that they are rough, steep, rocky, and often obstructed by naturally falling trees.<sup>29</sup>

As indicated at trial, there are four ways in which the landowners have controlled access to the roads since 1957: (1) by granting permission to some people to use the roads, and then by expelling persons who were found on the roads without permission; (2) by maintaining a series of closed gates that cross each of the roads; (3) by periodically locking those gates; and (4) by posting no-trespassing signs along the roads.

#### Permission and Expulsion<sup>30</sup>

From the time that the Okelberrys purchased the property, they treated it and the roads that crossed it as private ground that was subject to their control. One of the chief ways in

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<sup>27</sup>Findings of Fact, R. at 419, ¶4; Supplemental Findings, R. at 489, ¶2; Trial Transcript, June 28 at 25-26; Trial Transcript, June 29 at 57; Trial Transcript, June 30 at 80.

<sup>28</sup>Findings of Fact, R. at 419, ¶5; Trial Transcript, June 28 at 61.

<sup>29</sup>*See, e.g.*, Trial Transcript, June 28 at 285 (testimony of County witness Ed Sabey, describing recurrence of falling trees); Trial Transcript, June 29 at 97 (testimony of County witness Benny Gardner, describing the roads as “rough” and “steep”); Trial Transcript, June 29 at 238-39 (testimony of Shane Ford, describing roads as “rocky” and “rough”); Trial Transcript, June 30 at 26 (testimony of Brian Okelberry, describing need for yearly tree removal).

<sup>30</sup>The evidence relating to this factor presented at trial appears to have been exclusive to the Okelberry roads, and does not apply to the West Daniels roads.

which the Okelberrys protected their private property rights was by granting permission to friends or neighbors to use the roads, and by expelling persons whom they found using the roads without permission. Ray Okelberry testified that as far back as 1957, he, Lee, and their father were granting permission—both orally and in writing—to friends and neighbors to use the roads.<sup>31</sup> Brian Okelberry offered similar testimony regarding the Okelberrys’ attempt to limit access to these roads by granting or withdrawing permission.<sup>32</sup> Brian testified that he and his family would routinely grant permission to people they knew to come up and “use the roads and to hunt” on their property.<sup>33</sup>

Several witnesses supported the assertion that the Okelberrys had been controlling access to the roads by granting permission and then expelling non-permissive users. Bruce Huvad, a longtime friend of the Okelberrys, testified that he has been using the roads with their specific permission since 1966.<sup>34</sup> Mr. Huvad also affirmatively testified that, between 1966 and 1990, he was asked by the Okelberrys to “kick people off” the property if he came upon them and learned that they did not have permission to be there.<sup>35</sup> During one exchange at trial, Mr. Huvad testified about his role as follows:

Q: During this period of time from 1966 to 1990 do you know if other people obtained permission to use those roads?

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<sup>31</sup>Trial Transcript, June 30 at 81.

<sup>32</sup>*See* Trial Transcript, June 30 at 35-36.

<sup>33</sup>Trial Transcript, June 30 at 35.

<sup>34</sup>Trial Transcript, June 29 at 252, 261.

<sup>35</sup>Trial Transcript, June 29 at 266.

A: They did.

Q: Do you know if other people used those roads that did not have permission?

A: Yes.

Q: Do you know if they were asked to leave?

A: When I was personally hunting there I would ask them to leave if they didn't have permission.<sup>36</sup>

Mel Price similarly testified. He stated that he has been using the roads since 1974.<sup>37</sup> He also specifically stated that he has asked for permission to use the roads during every year since then, and then authenticated a permission slip that he had received from Ray Okelberry granting him permission to “access all of my private roads on my private land.”<sup>38</sup> He further testified that his uncles and nephew have also received permission to use the roads from the Okelberrys, and that he had always understood that “a person needed permission to use the roads.”<sup>39</sup>

Jeff Jefferson testified regarding the permission/expulsion protocols as well. Mr. Jefferson started working for the Okelberrys on their property in 1977, and has worked there every summer since then.<sup>40</sup> Mr. Jefferson stated that the Okelberrys had a policy that when

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<sup>36</sup>Trial Transcript, June 29 at 256.

<sup>37</sup>Trial Transcript, June 29 at 153.

<sup>38</sup>Trial Transcript, June 29 at 163-65.

<sup>39</sup>Trial Transcript, June 29 at 166.

<sup>40</sup>Trial Transcript, June 29 at 130, 143.



one of their employees saw someone on the property, the employee was to approach the person, ask if they had permission, and then ask them to leave if they didn't have permission.<sup>41</sup> In fact, Mr. Jefferson specifically testified that he had had to ask one of the County's witnesses, Mark Butters, to leave the property on two different occasions.<sup>42</sup> As to the question of whether the expulsion policy was for the Okelberry roads and property, or whether it just applied to the Okelberry property itself, Mr. Jefferson was unequivocal that it applied to the property *and* the roads. On cross-examination, the following exchange occurred:

Q: You indicated that any time you saw people on the property you'd ask them to leave; is that correct?

A: That's correct.

Q: Is that any time you saw people driving on the roads?

A: Well, I'd ask if they, they had permission to be on there, 'cause I was informed that **it wasn't a public access**, you know, for people to be on there. So if they didn't have permission I would ask them to leave.

Q: When you say on there, do you mean on the roads or on the property?

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

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

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<sup>41</sup>Trial Transcript, June 29 at 141.

<sup>42</sup>Trial Transcript, June 29 at 141.

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

Q: Would you chase them down with your horse—

A: No.

Q: —or how would you talk to them?

A: Just as I was coming **up the road** I'd run into them. Try to do it nice, polite.<sup>43</sup>

In further support of this assertion, Glen Shepherd testified that he has specifically asked for and received written permission from the Okelberrys to use their roads.<sup>44</sup> Similarly, Shane Ford testified that he and his extended family have routinely used the roads and the property, with specific permission from the Okelberrys for both.<sup>45</sup>

#### Fences and Gates

At the time that the Okelberrys purchased the property in 1957, it was bordered by fences.<sup>46</sup> These border fences have remained in place throughout the Okelberrys' period of ownership. It was undisputed that there have also been wire gates across the contested roads since at least 1957.<sup>47</sup>

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<sup>43</sup>Trial Transcript, June 29 at 148-49 (emphasis added).

<sup>44</sup>Trial Transcript, June 29 at 212, 220.

<sup>45</sup>Trial Transcript, June 29 at 230-31.

<sup>46</sup>*See, e.g.*, Trial Transcript, June 28 at 147 (testimony of James Bessendorfer); Trial Transcript, June 29 at 174 (testimony of Lee Okelberry); Trial Transcript, June 30 at 62 (testimony of Ray Okelberry).

<sup>47</sup>R. 672 ¶ 20 (“The Court finds that there were gates at the entrances to each of the roads from 1957 to 2004.”) See also, e.g., Trial Transcript, June 28 at 39, 43, 48, 62, 64

As indicated by the Okelberrys, the purpose of these gates was twofold. First, the gates were used as a means of controlling the movement of the sheep and cattle within the Okelberry property.<sup>48</sup> Second, the gates were also kept closed by the Okelberrys and their employees as a means of controlling vehicular and pedestrian traffic. In a pretrial affidavit that was filed with the Court, for example, Lee Okelberry testified that the family had attempted to control access to the roads through “fences and gates.”<sup>49</sup> At trial, Brian Okelberry also specifically testified that “one of the purpose[s] of the gates” was “to control vehicles from going up and down the roads,”<sup>50</sup> and then later expressed his belief that the gates had been a sufficient means of asserting private control over the roads:

Q: Based upon your recollection and experience up there, do you have an opinion whether those roads have been open to the public and have been used continually during these summer months?

A: Not–Not–In my time we haven’t opened them. We closed the gates and tried to put a little control on it.<sup>51</sup>

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(testimony of Dee Sabey that there have “always” been gates); Trial Transcript, June 29 at 174 (testimony of Lee Okelberry); Trial Transcript, June 30 at 24 (testimony of Brian Okelberry indicating that there are both internal “pasture gates” and external gates “at each place that [the roads] goes on and off West Daniels” land); Trial Transcript, June 30 at 62, 137 (testimony of Ray Okelberry).

<sup>48</sup>See Trial Transcript, June 30 at 25 (testimony of Brian Okelberry); Trial Transcript, June 30 at 138 (testimony of Ray Okelberry).

<sup>49</sup>R. at 192, ¶5.

<sup>50</sup>Trial Transcript, June 30 at 25.

<sup>51</sup>Trial Transcript, June 30 at 43.

This assertion that there was a dual purpose for the gates was also backed up by Glen Shepherd, who at the time of trial had used the roads for 35 years and has been a neighbor of the Okelberrys for the past 14 years.<sup>52</sup> At trial, Mr. Shepherd testified that the gates have been kept closed “as far back as [he could] remember” and that his understanding was that the gates were kept closed, in part, to restrict the flow of persons.<sup>53</sup> This assertion was also backed up by Jeff Jefferson, who worked as a rancher for the Okelberrys every summer from 1977 through 2003.<sup>54</sup> He testified the purpose of the gates was to control both the livestock and the public.<sup>55</sup>

As for the West Daniels roads, the above testimony has obvious applicability to those roads with respect to the points at which Ridge Line runs onto and off of the West Daniels property. Additionally, testimony at trial also indicated that there were gates across Parker Canyon as well.<sup>56</sup>

#### Locks on the Gates

The Okelberrys presented testimony that they have been locking the gates on a periodic basis. Admittedly, there was some question at trial regarding the frequency and

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<sup>52</sup>See Trial Transcript, June 29 at 208.

<sup>53</sup>Trial Transcript, June 29 at 219.

<sup>54</sup>Trial Transcript, June 29 at 130, 143.

<sup>55</sup>Trial Transcript, June 29 at 135.

<sup>56</sup>See Trial Transcript, June 28 at 46-47 (testimony of Dee Sabey that there were gates on Parker Canyon); Trial Transcript, June 28 at 278 (testimony of Ed Sabey that there were gates across Parker Canyon).

scope with which those gates have been locked. Ray Okelberry affirmatively testified, for example, that he had begun locking the exterior gates as early as 1958 or 1959, and that the interior gates within his property have been locked for approximately the past 20 years.<sup>57</sup> More importantly, Ray Okelberry testified that he had made a habit of locking at least some of the gates every year while the sheep were being moved.<sup>58</sup> This was supported by Mel Price. Mel Price began accessing the property in approximately 1972, Trial Transcript, June 29 at 154, and testified that the gates had “always been locked” as far back as he could remember.<sup>59</sup>

Conversely, Brian Okelberry testified that, at least according to his memory, the exterior gates had only been locked since the 1980s,<sup>60</sup> while Lee Okelberry could not remember ever having personally locked the gates himself.<sup>61</sup> Additionally, the County presented testimony from several persons who indicated that they had never encountered a locked gate.<sup>62</sup>

In the initial set of findings, the trial court accepted Ray Okelberry’s contention that the gates were periodically locked while the sheep were being moved. The court thus found

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<sup>57</sup>Trial Transcript, June 30 at 135-37.

<sup>58</sup>Trial Transcript, June 30 at 138-39.

<sup>59</sup>Trial Transcript, June 29 at 160, 170.

<sup>60</sup>Trial Transcript, June 30 at 54.

<sup>61</sup>Trial Transcript, June 29 at 196.

<sup>62</sup>See, e.g., Trial Transcript, June 28 at 35, 40, 43, 48 (Dee Sabey); Trial Transcript, June 28 at 112, 119, 125 (James Bessendorfer).

that the Okelberrys have “locked those gates for periods of time” prior to “completely controll[ing] access” through constant locking in 1989.<sup>63</sup> On remand, the trial court reiterated the position, finding that Okelberrys had “locked some of the gates at some points between the 1950s and 1990.”<sup>64</sup>

### Signs

Finally, the evidence also indicates that the Okelberrys placed no trespassing signs along their roads as a means of informing the public that use was restricted. Ray Okelberry testified that he had started putting these signs up almost immediately upon purchasing the property in the late 1950s.<sup>65</sup> Other witnesses confirmed the existence of these signs throughout the relevant period. Bruce Huvad, for example, specifically remembered seeing the no trespassing signs up as of 1966.<sup>66</sup> Mel Price, who has been using the roads since the early 1970s, stated that there had been no trespassing signs posted along the roads as far back as he could remember.<sup>67</sup> Brian Okelberry similarly testified that there are signs on each of the boundary gates.<sup>68</sup> Jeff Jefferson also testified that “all entrances” were marked with a

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<sup>63</sup>Supplemental Findings, R. at 486.

<sup>64</sup>R. 672 ¶ 24. The trial court concluded that this didn’t restrict travel on the roads.  
*Id.*

<sup>65</sup>Trial Transcript, June 30 at 137.

<sup>66</sup>Trial Transcript, June 29 at 257-58, 268-69.

<sup>67</sup>Trial Transcript, June 29 at 160.

<sup>68</sup>Trial Transcript, June 30 at 25.

sign stating “no trespassing or keep out.”<sup>69</sup> Evidence also indicated that the West Daniels roads were marked with no trespassing signs as well.<sup>70</sup>

Following trial, the trial court concluded that the County had met its § 72-5-104 burden with respect to the contested roads. Specifically, the trial court concluded that there had been uninterrupted public use of the roads from 1960 until 1989. R. at 413, ¶8.<sup>71</sup>

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<sup>69</sup>Trial Transcript, June 29 at 135.

<sup>70</sup>See Trial Transcript, June 29 at 161; Trial Transcript, June 29 at 212.

<sup>71</sup>Although the trial court did specifically determine that there had been “no public use of the various roads in the 1940s or before and also that no evidence of vehicular use prior to the 1950s existed,” Findings of Fact, R. at 417, ¶10, the Court was somewhat ambiguous regarding the exact years for which the court believed § 72-5-104 had been satisfied. For example, in its discussion of the continuous use factor, the court determined that individuals had begun “using the roads beginning in the late 1950s until the late 1980s or early 1990s.” R. at 415, ¶4. In its discussion of the public thoroughfare requirement, the court was less specific, indicating simply that, “prior to the locking of the gates in the early 1990s, the roads were used as public thoroughfares.” R. at 414, ¶6. Finally, with respect to the ten year public use requirement, the court determined that the roads had been used “starting in 1960 until the early 1990's.” R. at 413, ¶7.

In its conclusory paragraph, however, the Court shortened the period somewhat with respect to the cutting off date. Specifically, the court determined that the roads had been used continuously “for a period of well over ten years prior to 1989 when the Okelberrys began locking the gates.” R. at 413, ¶8. Thus, the court specifically concluded that “the public has been effectively cut off from use of these public roads since 1989.” R. at 413, ¶8.

As discussed below, there is a presumption in favor of the property owner in cases brought under § 72-5-104. This brief will accordingly assume that the narrowest dates prevail and that the trial court’s ruling was that the roads had been continuously used from 1960 until 1989. As will be set forth below in the Argument section, however, the slight difference that may exist between 1957, 1958, 1959, or 1960 as a starting point, and 1989, 1990, or 1991 as an ending point will become meaningless given the years ultimately covered by the Okelberrys’ evidence.

## **SUMMARY OF ARGUMENT**

The Utah Supreme Court remanded this case for a determination in accordance with a new bright-line test, under which a single interruptive act is sufficient to prevent a private road from becoming public. This is true even if there exists extensive uninterrupted use. Although the fact of even frequent uninterrupted public use is thus irrelevant to determining whether use was interrupted on one occasion, the trial court's decision focuses on the occasions of public use. The trial court found gates were locked or shut and users stopped, but "found" these were not interruptive acts because there was no evidence of a general or regular policy of stopping users. The trial court misapplied the law established by the Utah Supreme Court. Because the trial court's own findings establish interruptions, the case should be remanded with instructions to enter judgment for Okelberrys.

Also, the trial court abused its discretion in denying Okelberrys' motion to reopen to present evidence addressing the a new test established by the Utah Supreme Court. The new test focused on the intent of the landowner, whereas prior cases had held intent was irrelevant. The trial court ruled against Okelberrys because they had failed to present evidence of their intent in placing signs and locking gates. Because intent was not relevant at the time of the first trial, fairness demands that the evidence be reopened to allow Okelberrys to present testimony on this issue.



## ARGUMENT

### **I: THE UTAH SUPREME COURT HELD THE LOCKING OF GATES WAS AN INTERRUPTION AS A MATTER OF LAW, REGARDLESS OF INTENT OR IMPACT.**

The trial court stated: “The Court finds that while there may have been occasions in which Mr. Okelberry locked the gates in the 1950s, 1960s, and 1970s, these were few and far between, were not intended to restrict public access, and were not reasonably calculated to interrupt public use of the roads.”<sup>72</sup> In making this conclusion, the trial court misinterpreted the supreme court’s mandate. The supreme court clearly held that if gates were locked at all, that constituted an overt act sufficient to enter a public use; there was no additional requirement that the locking be “reasonably calculated to interrupt public use.”

The court established a bright line test based primarily on intent:

An overt act that is intended by a property owner to interrupt the use of a road as a public thoroughfare, and is reasonably calculated to do so, constitutes an interruption sufficient to restart the running of the required ten-year period under the Dedication Statute.<sup>73</sup>

With respect to the locking of gates, however, the court held such an act per se establishes the required intent. If the gates were locked during the relevant time periods, the supreme court held that was a sufficient interruption: “The locking of gates for several days at a time constitutes an overt act intended to interrupt public use and reasonably calculated

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<sup>72</sup>R. 670.

<sup>73</sup>*Wasatch County v. Okelberry*, 2008 UT 10, ¶ 15, 179 P.3d 768, 774.

to do so.”<sup>74</sup> The only issue for the trial court to decide, therefore, was whether the gates were locked; the trial court was not asked to decide Okelberry’s intent in locking the gates nor whether the locked gates constituted an interruption of public use.

The trial court found that there were occasions in which Mr. Okelberry locked the gates in the 1950s, 1960s, 1970s. It follows that the use of the road as a public thoroughfare was interrupted. The trial court’s conclusion that the roads were dedicated to the public must be reversed with instructions to enter judgment that the roads remain private.

Even if the intent and impact of the locked gates had been an issue to be decided by the trial court, its decision demonstrates a misunderstanding concerning what a landowner must establish to retain the private character of his or her land. It is important to remember the context in which this issue arises. While Utah Code section 72-5-104(1) provides that a road can become “dedicated and abandoned” to the public by ten years continuous public use, that law must be interpreted to avoid conflict with the private property rights guaranteed by both the Utah and United States constitutions.<sup>75</sup> Section 22 of Article I of the Utah Constitution declares: “Private property shall not be taken or damaged for public use without just compensation.” The Fifth Amendment to the United States Constitution similarly states: “nor shall private property be taken for public use without just compensation.” The only interpretation of section 72-5-104(1) consistent with these constitutional protections is that

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<sup>74</sup>*Id.* ¶ 19.

<sup>75</sup>*Thurnwald v. A.E.*, 2007 UT 38, ¶ 4, 163 P.3d 623; *Uzelac v. Thurgood (In re Estate of S.T.T.)*, 2006 UT 46, ¶ 26, 144 P.3d 1083, 1091.

a landowner may, through inaction, dedicate or abandon his or her property, but the public cannot take that property without compensation if the owner takes reasonable measures to retain its private character. The public authority can not “take” a road unless the landowner’s knowing acquiescence in public use and maintenance “amounts to a tacit dedication by the landowner – a giving by the landowner rather than a taking by the public authority.”<sup>76</sup>

Prior to the supreme court decision in this case, several cases held that the intent of the landowner was not relevant.<sup>77</sup> The supreme court in this case, however, implicitly overruled these prior cases and held that intent is the determining factor. The court established a bright line test, quoted above, based primarily on intent.

The importance of intent rather than the impact is illustrated in *Town of Leeds v. Prisbrey*,<sup>78</sup> decided by the supreme court as a companion case to the instant matter. Joanne George, Prisbrey’s predecessor in title, had erected barricades across the claimed road once every seven years, but the evidence showed that the barricades did not actually interrupt the use of the road by anyone. “Mrs. George testified that she never encountered anyone attempting to travel on West Center Street during her roadblocks and knows of no one who was actually prevented from using the road because of her blockades.”<sup>79</sup> The supreme court

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<sup>76</sup>*Vaughn v. Williams*, 345 So. 2d 1195, 1199 (La. Ct. App. 1977).

<sup>77</sup>“[R]ecent cases have definitively stated that owner intent is now irrelevant to determining whether a road has been dedicated and abandoned to public use.” *Campbell v. Box Elder County*, 962 P.2d 806, 808 n. 3 (Utah Ct. App. 1998).

<sup>78</sup>2008 UT 11, 179 P.3d 757.

<sup>79</sup>*Id.* ¶ 3.

held that this evidence was nonetheless sufficient to interrupt use of the road as a public thoroughfare: “Although she did not block the public's *actual* use of the road because her roadblocks occurred during intermissions in the road's use, Mrs. George's intent and conduct were nevertheless sufficient to interrupt West Center Street's continuous use as a public thoroughfare for purposes of the Dedication Statute.”<sup>80</sup>

In the instant case, the supreme court also emphasized that actual impact was unimportant:

We emphasize here, however, that the action necessary by the landowner to establish an interruption in public use does not vary depending on the level of public use. An overt act intended and reasonably calculated to interrupt public use restarts the statutory period, and the effectiveness of such act is not tied to the level of public use. In other words, an act by a landowner sufficient to interrupt public use of a road used on a daily basis by the public is also sufficient to interrupt public use of a road used on a monthly basis by the public.<sup>81</sup>

Therefore, the trial court here erred by focusing on the impact of the locked gates. The trial court found there were “occasions in which Mr. Okelberry locked the gates,” but discounted this because “these were few and far between” and did not restrict public access.<sup>82</sup> But, as in *Prisbrey*, Mr. Okelberry was not required to show that he actually restricted any access. If Ray Okelberry locked the gates at all in the early years, as the trial court found,

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<sup>80</sup>*Id.* ¶ 7 (italics by the court).

<sup>81</sup>*Okelberry*, ¶ 17.

<sup>82</sup>R. 670.

that by definition constituted an interruption of public use regardless of whether any person's actual use was interrupted.

Finally, the trial court's finding that the locked gates were not intended to restrict public access is not supported by the evidence. The trial court noted that Brian Okelberry testified "that one of the purposes of the gates was to control vehicles 'from going up and down the roads.'"<sup>83</sup> Okelberrys acknowledge, as noted by the trial court, that there were witnesses who testified that they had not locked the gates and other witnesses who testified they had never seen any locked gates during the early years.<sup>84</sup> But this testimony goes only to whether the gates were locked in all, not to Okelberrys' intent in locking the gates. If the gates were locked, there was no other purpose for locking the gates but to restrict public use of the roads. Locking the gates is not necessary for controlled livestock; sheep are restrained as effectively by a gate that is wired shut. The only possible purpose for locks was to keep people out. The trial court's finding that the locks were not intended to restrict public access must be reversed.

**II: LEE OKELBERRY AND OTHERS INTERRUPTED USE OF THE ROAD AS A PUBLIC THOROUGHFARE BY STOPPING PERSONS TO JUDGE WHETHER THEIR PURPOSE IN USING THE ROADS WAS ACCEPTABLE.**

Lee Okelberry testified they maintained gates at each entrance to their private property, and stopped and questioned anyone who used to roads, to determine if they had

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<sup>83</sup>R. 674.

<sup>84</sup>*Id.*

what Lee believed was a legitimate reason for using the roads. He testified he stopped individuals on the roads to inquire about their reason for using the roads, and let them continue if he approved of the business.<sup>85</sup> Lee Okelberry testified he made such stops starting in 1957 when Okelberrys purchased the property.<sup>86</sup>

As the trial court acknowledged, other witnesses testified to stopping people using the roads.<sup>87</sup> Bruce Huvad testified he used the roads by permission beginning in 1966, but also, at the request of Okelberrys, would ask people to leave if they had not obtained permission.<sup>88</sup> Jeff Jefferson, who started working for the Okelberrys in 1977, also testified he asked people to leave the roads if they did not have permission.<sup>89</sup>

This evidence is corroborated by the many individuals who testified they recognized the property as private and asked permission to use it. Mel Price testified he obtained permission to use the roads.<sup>90</sup> Lee Okelberry testified he gave permission to the Taylors,

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<sup>85</sup>Transcript June 29, 2004, at page 209; transcript June 30, 2004, pages 180, 185.

<sup>86</sup>Transcript June 29, 2004, pages 183-85.

<sup>87</sup>R. 672-671.

<sup>88</sup>Transcript June 29, 2004, pages 254-56.

<sup>89</sup>Transcript June 29, 2004, pages 140-41, 149.

<sup>90</sup>Transcript June 29, 2004, page 163; Exhibit 20.

Thompsons, Youngs, and others.<sup>91</sup> Shane Ford testified his mother, whose family had previously owned the property, would ask permission.<sup>92</sup>

Okelberrys acknowledge that there were many people who were not stopped. Mark Butters testified that he used the Ridgeline road twenty times per summer.<sup>93</sup> Several individuals testified they had never been asked to leave the road.<sup>94</sup> Similar testimony was given concerning the other roads.

The trial court noted the evidence that individuals had been stopped when using the roads, but held that such actions did not constitute interruptions of public use because they did not interrupt public use of the roads “generally,” nor show there was a “regular” policy of requiring permission or approval to traverse the roads.<sup>95</sup> The trial court’s holding demonstrates a misunderstanding of the evidence necessary to prove an interruption of use. There is no requirement that the overt act interrupt use of the roads “generally” or that there be any “regular” policy of interrupting use or requiring permission. In fact, just the opposite was true in the *Prisbrey*<sup>96</sup> case. There the interruptive acts occurred only once every seven years, and never actually interrupted any use whatsoever. Factually, public use was

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<sup>91</sup>Transcript June 29, 2004, page 202.

<sup>92</sup>Transcript June 29, 2004, page 231.

<sup>93</sup>Trial Transcript, June 29 at 103.

<sup>94</sup>Dee Sabey, Trial Transcript, June 28 at 40; Martin Wall, Trial Transcript, June 28 at 197; Ed Sabey, Trial Transcript, June 28 at 271.

<sup>95</sup>*Id.*

<sup>96</sup>*Town of Leeds v. Prisbrey*, 2008 UT 11, 179 P.3d 757.

unrestricted. But, the Utah Supreme Court nonetheless held that these actions were legally sufficient to interrupt use of the road “as a public thoroughfare.”

The meaning of using a road “as a public thoroughfare” was explained by the Utah Supreme Court in *Morris v. Blunt*<sup>97</sup> as follows:

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. Under [the identically worded predecessor statute to section 72-5-104(1),] 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. Use under private right is not sufficient. If the thoroughfare is laid out or used as a private way, its use, however long, as a private way, does not make it a public way; and the mere fact that the public also make use of it, without objection from the owner of the land, will not make it a public way. Before it becomes public in character the owner of the land must consent to the change.<sup>98</sup>

In *Heber City Corp. v. Simpson*,<sup>99</sup> the Utah Supreme Court stated that the last requirement, that “the owner of the land must consent to the change” from private to public character, had been abandoned.<sup>100</sup> But, given the clear language of *Okelberry* focusing on the intent of the landowner, this Court must conclude that consent of the landowner is still

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<sup>97</sup>49 Utah 243, 161 P. 1127 (Utah 1916).

<sup>98</sup>*Id.* at 251, 161 P. at 1131, as quoted in *Heber City Corp. v. Simpson*, 942 P.2d 307, 311 (Utah 1997), but with an updated reference to the current statute.

<sup>99</sup>942 P.2d 307 (Utah 1997).

<sup>100</sup>*Id.* at 311.



a requirement. Indeed, any other rule would be unconstitutional for the reasons set forth in Point I above.

The act of stopping a traveler to judge whether the traveler's business is legitimate is an overt act consistent only with asserting control over the roads. Such acts show the landowner still regards the roads as private and has not consented to any change to a public character. Thus, Lee Okelberry's overall testimony is very consistent with that of Ray Okelberry: the roads were private and the Okelberrys took overt actions to interrupt use as a public thoroughfare on several occasions. This is sufficient to defeat the claimed dedication to the public. The trial court erred in holding they were required to "generally" or "regularly" restrict access. This Court should hold that the actions of the Okelberrys and their employees in stopping people who were using the roads constituted an overt act which was intended to and did interrupt use of the roads as a public thoroughfare.

**III: BECAUSE INTENT WAS NOT RELEVANT AT THE TIME OF THE FIRST TRIAL, OKELBERRY WAS ENTITLED TO A NEW TRIAL TO PRESENT EVIDENCE OF INTENT ADDRESSING THE NEW TEST ADOPTED BY THE SUPREME COURT.**

Prior to the supreme court decision in this case, several cases held that the intent of the landowner was not relevant. In 1998, this Court commented that "recent cases have definitively stated that owner intent is now irrelevant to determining whether a road has been dedicated and abandoned to public use."<sup>101</sup> The supreme court in this case, however, implicitly overruled these prior cases and held that intent is the determining factor. The court

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<sup>101</sup>*Campbell v. Box Elder County*, 962 P.2d 806, 808 n. 3 (Utah Ct. App. 1998).

established a bright line test that focuses on the intent of the property owner.<sup>102</sup> In remanding this case, the court again focused on intent: “it remains a factual question whether the Okelberrys intended the signs to interrupt public use of the roads.”<sup>103</sup>

In light of the new test adopted by the supreme court, Okelberrys moved for a new trial or for leave to present additional evidence addressing the new standard. The trial court did not rule or comment on the motion, but impliedly denied it by entering a final ruling without allowing additional evidence.

The Utah Supreme Court has directed “[a] court should consider a motion to reopen to take additional testimony in light of all the circumstances and grant or deny it in the interest of fairness and substantial justice.”<sup>104</sup> In contrast to a motion for new trial, “a motion to reopen does not require that the evidence be newly discovered or that it could not have been discovered during the pendency of the trial by a party acting with due diligence.”<sup>105</sup>

The case law controlling at the time of trial held intent was not relevant. Okelberrys accordingly did not present evidence of intent. Where the case was remanded for decision under a new standard, fairness demanded that Okelberrys be permitted to supplement the

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<sup>102</sup>*Okelberry*, ¶ 15.

<sup>103</sup>*Id.* ¶ 18.

<sup>104</sup>*Lewis v. Porter*, 556 P.2d 496, 497 (Utah 1976). *Accord A.K. & R. Whipple Plumbing & Heating v. Aspen Constr.*, 1999 UT App 87, ¶ 23, 977 P.2d 518.

<sup>105</sup>12-59 Moore's Federal Practice - Civil § 59.13. The Utah Supreme Court cited approvingly to the predecessor of this section in *Lewis v. Porter*, 556 P.2d 496, 497 (Utah 1976).

record to add the missing evidence of intent. The trial court denied that opportunity, but in its decision repeatedly faulted Okelberrys for failing to present evidence of intent regarding the no trespassing signs on the property. The trial court stated: “Yet none of Defendants’ witnesses at trial specified their intent when putting up the signs in the years prior to the 1980s and 1990s.”<sup>106</sup> The court concluded: “Without credible evidence showing that the signs were meant to apply to the roads themselves, the Court cannot infer an intent to interrupt the use of the roads from the posting of signs in the 1950s, 1960s, or 1970s, nor can it conclude that the earlier signs were “reasonably calculated” to interrupt public road use prior to the late 1980s or 1990s.”<sup>107</sup>

The trial court also claimed a lack of evidence of intent regarding locking of gates: “While Ray Okelberry testified that he locked gates beginning either in 1957 or 1958, he did not testify that he intended to keep the public from accessing the roads at this time.”<sup>108</sup> (Of course, there would be no other possible reason to lock gates than excluding the public from the property.)

Wasatch County acknowledged and the trial court concurred<sup>109</sup> that the test adopted by the Utah Supreme Court was a new test. The Utah Supreme Court remanded “for further

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<sup>106</sup>R. 671.

<sup>107</sup>*Id.*

<sup>108</sup>R. 673 ¶ 24.

<sup>109</sup>*Id.* 672, 669.

proceedings consistent with this opinion.”<sup>110</sup> There was no restriction against taking additional evidence relevant to the new standard. Denying the request to present additional evidence resulted in Okelberrys being judged against a standard that did not exist at the time of trial. The unfairness is obvious. This Court should hold the trial court abused its discretion in denying Okelberrys’ motion for leave to present additional evidence.

#### **IV: MAINTENANCE OF UNLOCKED GATES CONSTITUTED AN INTERRUPTION.**

The trial court held that “the simple existence of gates clearly does not constitute an overt act,” noting the gates were there before Okelberrys took control of the property.<sup>111</sup> This ignores the undisputed evidence that Okelberrys maintained and frequently replaced the gates.

It was undisputed that there have always been unlocked gates across these roads during the time considered by the Court.<sup>112</sup> Although individuals were able to open the gates and still use the roads, the presence of those gates created a presumption that the use was permissive and therefore interrupted use of the road “as a public thoroughfare.” Use by permission does not count as “public use” under the dedication statute.<sup>113</sup>

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<sup>110</sup>*Okelberry*, ¶ 20.

<sup>111</sup>R. 672.

<sup>112</sup>Transcript June 29, 2004, page 158.

<sup>113</sup>*Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1099 (Utah 1995).

Other states have ruled that an unlocked gate creates a presumption that any use was permissive. As stated by one court, “where a landowner places gates across a road through his land, it is notice to the public that they thereafter are passing through the land by permission and not by right, so that no prescriptive right to the use of the road can be acquired.”<sup>114</sup> Another court similarly held, in a case dealing with unlocked gates: “The erection of a gate across a road tends to evidence an intention on the part of the owner to assume and assert ownership and possession of the land over which the road runs.”<sup>115</sup> The court said such obstruction “is a strong indication that the use by others is permissive only.”<sup>116</sup> Another court holds that unlocked gates “conveys the clear message that any public use of that road is with the landowner's permission only,” although that presumption is not conclusive.<sup>117</sup>

This presumption of permissive use is consistent with Utah cases. The question under the continuous use requirement is whether the public's right to use the road was interrupted or “limited.”<sup>118</sup> Although some cases have considered the impact of locked gates on the continuous use inquiry,<sup>119</sup> it is significant that a number of the cases have also considered the

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<sup>114</sup>*Berger v. Berger*, 88 N.W.2d 98, 103 (N.D. 1968).

<sup>115</sup>*Williams v. Prather*, 196 So. 118, 120 (Ala. 1940).

<sup>116</sup>*Id.*

<sup>117</sup>*McIntyre v. Board of County Commissioners*, 86 P.3d 402, 412 (Colo. 2004).

<sup>118</sup>*Heber City*, 942 P.2d at 311 n. 9.

<sup>119</sup>*See, e.g., Campbell*, 962 P.2d at 809.

presence of gates as an interruptive force without deeming it necessary to even note whether those gates were locked.<sup>120</sup>

There are strong policy reasons for allowing a gate to act as an interruptive force, even in the absence of any evidence showing that that gate was locked. As indicated above, the Utah courts have long sought to achieve a balance between the competing interests that are at work in the § 72-5-104 cases. On the one hand, the government clearly has an interest in preserving the public's right to use roads that have been left to the public for a lengthy period of time. But, it is instructive that the statute itself only calls for public dedication where the landowners have “abandoned” the road.<sup>121</sup>

Where the landowner has taken some recognizable steps to assert some control over the roads, the public will be under no illusion that the roads are public. For example, in a case involving rural roads that are crossed by unlocked gates, a member of the public who wished to use the roads would still have to physically stop their car, get out, open the gate, drive through the gate, and then get out again to close the gate before proceeding onward. This is precisely what happened here, for example, with many of the County's own witnesses testifying that the gates were always kept closed as a means of keeping the Okelberrys'

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<sup>120</sup>See, e.g., *Draper City*, 888 P.2d at 1100; *AWINC Corp. v. Simonsen*, 2005 UTApp 168, ¶3, 112 P.3d 1228, 1229 (“fence wire drop gate”); *Kohler v. Martin*, 916 P.2d 910, 913 (Utah Ct. App. 1996).

<sup>121</sup>See Utah Code Ann. § 72-5-104(1).

livestock within the property.<sup>122</sup> As such, the members of the public who used these roads were always presented with a reminder upon both ingress and egress that these roads belonged to some other party, and that use of these roads was solely at the pleasure of that owner.

As indicated above, the law does not lightly allow the public takeover of a private property owner's land. The statute at issue in this case does not require a landowner to come up with an expensive, elaborate, or foolproof system for keeping out all trespassers. Instead, the statute allows the property owner to preserve his or her rights by simply creating some interruptive obstacle that limits the public's access to the private roads "as a public thoroughfare." Given the large number of rural ranches and farms in this state that are separated from the highways by nothing more than a wire fence or gate, this Court should reject the trial court's decision to read into the statute a heretofore non-existent requirement that all of those gates and fences actually be locked. Instead, this Court should affirm the obvious, common-sense reading of the statute, thereby holding that a landowner who has preserved and maintained a gate or fence across his or her road cannot be said to have "abandoned" that road under § 72-5-104. For this reason, this Court can and should conclude that there was not clear and convincing evidence showing that the roads involved in this appeal were ever abandoned to the public.

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<sup>122</sup>*See. e.g.*, Trial Transcript, June 28 at 40 (testimony of Dee Sabey); Trial Transcript, June 28 at 314 (testimony of Dick Baum); Trial Transcript, June 29 at 119, 123 (testimony of Mark Butters).

The presumption of permissive use is also mandated by constitutional considerations. A landowner may, through inaction, dedicate or abandon his or her property, but the public cannot take that property without compensation if the owner takes reasonable measures to retain its private character. A public authority can not take a road unless the landowner's knowing acquiescence in public use and maintenance "amounts to a tacit dedication by the landowner — a giving by the landowner rather than a taking by the public authority."<sup>123</sup> A gate, even an unlocked gate, clearly communicates to the public that the property is private. The public constitutionally cannot take the property where the landowner takes reasonable measures to communicate and retain its private character.

And, if the rule is that closed but unlocked gates do not interrupt use as a public thoroughfare, the result is that the public is taking more than the landowner gave—a violation of the constitutional prohibition against taking private property without compensation. If the road is public, presumably the public authority can prohibit the maintenance of gates.<sup>124</sup> Where the use Okelberrys supposedly permitted or abandoned to the public was a use that was always restricted by gates, it would be unconstitutional for the public to take more, without compensation. Indeed, a holding that the road is public and cannot be restricted by gates impacts the whole of the property – without gates, Okelberrys cannot use the property

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<sup>123</sup>*Vaughn v. Williams*, 345 So. 2d 1195, 1199 (La. Ct. App. 1977).

<sup>124</sup>Utah Code § 72-7-104(4) provides that "the highway authority having jurisdiction over the right-of-way may" remove from the right-of-way of any highway any structure installed by any person or "give written notice to the person . . . to remove the installation from the right-of-way." *Utah County v. Butler*, 2008 UT 12, ¶ 24, 179 P.3d 775, 784.

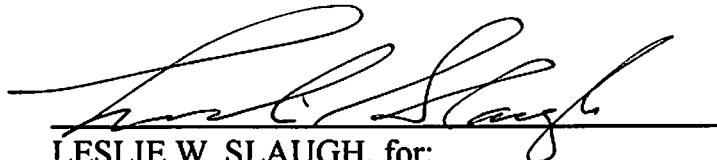


for livestock as they have always done. It follows that the constitutional protections of private property require that either unlocked gates be considered an interruption, or that the gates be permitted to remain even if the road is public.

### CONCLUSION

The trial court erred in again requiring proof that Okelberrys “generally” or “regularly” excluded members of the public from the roads. One intentional act every ten years is sufficient to preserve private property, regardless of whether anyone’s access was actually restricted. Because there was un rebutted evidence of purposeful blocking by Okelberrys, their roads were not “continuously used as a public thoroughfare for a period of ten years.” The decision of the trial court should be reversed with instructions to enter judgment for Okelberrys.

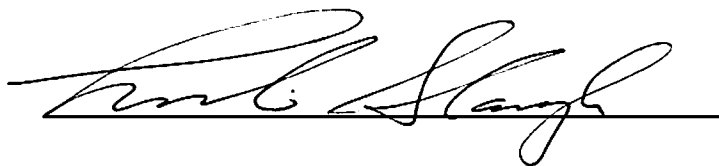
DATED this 7<sup>th</sup> day of April, 2009.

  
LESLIE W. SLAUGH, for:  
HOWARD, LEWIS & PETERSEN, P.C.  
Attorneys for Petitioners

**MAILING CERTIFICATE**

I hereby certify that two true and correct copies of the foregoing were mailed to each of the following, postage prepaid, this 7<sup>th</sup> day of April, 2009.

Thomas Low  
Scott H. Sweat  
Wasatch County Attorney's Office  
805 West 100 South  
Heber City, Utah 84032

A handwritten signature in black ink, appearing to read "Scott H. Sweat", is written over a horizontal line.

APPENDIX A

*Wasatch County v. Okelberry*, 2008 UT 10, 179 P.3d 768

*This opinion is subject to revision before final  
publication in the Pacific Reporter.*

IN THE SUPREME COURT OF THE STATE OF UTAH

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Wasatch County, a body politic  
of the State of Utah,  
Plaintiff and Respondent,

No. 20070011

v.

E. Ray Okelberry, Brian Okelberry,  
Eric Okelberry, West Daniels  
Land Association, Utah Division  
of Wildlife Resources, and John  
Does 1-25,  
Defendants and Petitioners.

F I L E D

February 12, 2008

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Fourth District, Heber Dep't  
The Honorable Donald J. Eyre, Jr.  
No. 010500388

Attorneys: Thomas L. Low, Scott H. Sweat, Heber City, for  
                  plaintiff  
                  Don R. Petersen, Leslie W. Slaugh, Provo, for  
                  defendants

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On Certiorari to the Utah Court of Appeals

DURRANT, Justice:

**INTRODUCTION**

¶1 In this case and two companion cases that we also  
decide today,<sup>1</sup> we consider the operation of Utah Code section 72-  
5-104(1) (the "Dedication Statute"), which provides as follows:  
"A highway is dedicated and abandoned to the use of the public  
when it has been continuously used as a public thoroughfare for a

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<sup>1</sup> Town of Leeds v. Prisbrey, 2008 UT 11, \_\_\_ P.3d \_\_\_; Utah  
County v. Butler, 2008 UT 12, \_\_\_ P.3d \_\_\_.

period of ten years.”<sup>2</sup> We granted certiorari in this case to consider whether the court of appeals erred in its application of the standard for ascertaining continuous use as a public thoroughfare under this statute. We conclude that it did so err. We reverse and remand for the entry of specific findings of fact relevant to the standard we announce today and for an application of that standard.

#### BACKGROUND

¶2 In 1957, Roy Okelberry and his sons, E. Ray and Lee, purchased a large tract of land (the “Property”) in Wasatch County near Wallsburg, Utah. E. Ray and Lee later acquired their father’s interest in the Property. Sometime thereafter, Lee sold his interest in the Property to E. Ray and E. Ray’s sons, Brian and Eric. E. Ray, Brian, and Eric Okelberry (the “Okelberrys”) currently own the Property and use it for their livestock operations.

¶3 Several unimproved mountain roads cross the Property, all of which begin and end (or connect with roads that begin and end) at points outside of it. Four of these roads are at issue in this case: Circle Springs Road, Thorton Hollow Road, Parker Canyon Road, and Ridge Line Road (collectively, the “Four Roads”).<sup>3</sup> When Roy, E. Ray, and Lee Okelberry purchased the Property in 1957, fences on its east and south sides separated it from United States Forest Service property, and wire gates along these fences controlled access to the Four Roads, requiring persons entering or exiting the Property to open the gates before proceeding.

¶4 In 2001, Wasatch County filed a Complaint for Declaratory Judgment and Quiet Title against the Okelberrys, the Utah Division of Wildlife Resources,<sup>4</sup> and West Daniels Land Association,<sup>5</sup> seeking to have the Four Roads declared dedicated

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<sup>2</sup> Utah Code Ann. § 72-5-104(1) (2001).

<sup>3</sup> The underlying lawsuit also included Maple Canyon Road. The trial court found that this road had not been dedicated and abandoned to the public. Neither party appealed this decision, and we do not address it here.

<sup>4</sup> Wasatch County settled its dispute with the Utah Division of Wildlife Resources in 2003.

<sup>5</sup> Portions of Ridge Line Road and Parker Canyon Road  
(continued...)

and abandoned to the use of the public pursuant to Utah Code section 72-5-104.<sup>6</sup> During a three-day bench trial, Wasatch County presented several witnesses who testified that they had used the Four Roads without the Okelberrys' permission for recreational purposes during the 1960s, 1970s, and 1980s. These witnesses also testified that although there were gates on the roads, their use of the roads was unrestricted. The Okelberrys presented evidence and testimony that members of the public had not had unrestricted access to the roads, but that the gates on the roads had been locked, at least occasionally, as early as the late 1950s and that "No Trespassing," "Keep Out," or "Private" signs were posted. The Okelberrys testified that they had given permission to a large number of people in the community to use

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<sup>5</sup> (...continued)

traverse property owned by West Daniels Land Association (the "Association") immediately adjacent to the Property. The Okelberrys are members and shareholders in the Association and use the Association's land, together with their own, for grazing livestock. The Association initially made an appearance through counsel, but counsel later withdrew and no successor was appointed. Wasatch County thereafter sought default summary judgment against the Association. The Okelberrys opposed this motion, arguing that as members of the Association they had "a vested interest to see that no judgment is entered in this matter on behalf of the plaintiff" and that, at trial, they "will present evidence that there are no established roads across the property of [the] Association." For reasons that are unclear from the record, the trial court did not enter a ruling on Wasatch County's default judgment motion prior to trial. In its posttrial Findings of Fact and Conclusions of Law, the court noted that the Association's "default was entered," but that the Okelberrys had been allowed to submit "[e]vidence regarding the use of those portions of the roads at issue which are located in [the] Association's property" at trial. The trial court made its determinations regarding the Four Roads without distinguishing between the Okelberrys' property and the Association's property. We likewise do not distinguish between the properties and refer only to the interests of the Okelberrys because the parties have not appealed this issue.

<sup>6</sup> An earlier version of this statute was in effect at the time Wasatch County claims the Four Roads were dedicated and abandoned to the use of the public. See Utah Code Ann. § 27-12-89 (1995). A 1998 amendment to the earlier version renumbered this section but made no substantive changes to it. 1998 Utah Laws 861. We therefore refer to the current version of the statute throughout this opinion.

their roads and Property and had sold trespass and hunting permits. And witnesses testified that the Okelberrys, in the mid-1990s, placed their Property in a cooperative wildlife management unit for use as a private hunting unit. The Okelberrys and their employees testified that when they encountered persons on the Property or roads without express permission to be there, they asked them to leave.

¶5 At the conclusion of the bench trial, the trial court entered findings of fact and conclusions of law and, later, supplemental findings of fact. The trial court found "that there was no public use of the various roads in the 1940s or before and also that no evidence of vehicular use prior to the 1950s existed." The court recognized that there were gates on the roads that the Okelberrys or their employees locked "[a]t various times in the past," but found that they were locked "on a more permanent basis" beginning in the early 1990s. In addition, the court found that "[p]rior to the gates being locked, the existence of the gates did not interrupt the public's use of the roads."

¶6 In its Conclusions of Law, the trial court stated as follows:

Taking even the [Okelberrys'] factual assertions as true, it is clear that individuals using the roads beginning in the late 1950s until the late 1980s or early 1990s used the roads without interruption, they used the roads freely, and though not constantly, they used the roads continuously as they needed. Therefore, [the] Court finds that prior to the interrupting mechanisms being put in place the roads in question were subject to continuous use . . . .

The trial court also found that the majority of those using the roads were nonpermissive users and members of the general public. Thus, the court determined that "[p]rior to the locking of the gates in the early 1990s the roads were used as public thoroughfares." And the court found "that the continuous use as a public thoroughfare continued for at least ten years, if not much longer, or for multiple periods of ten years." The court therefore concluded that Wasatch County had established by clear and convincing evidence that the Four Roads had been abandoned and dedicated to the public. The court decided, however, that Wasatch County was equitably estopped from opening the roads to public use because the Okelberrys had, since 1989, asserted private control over the roads. The court stated that "[t]o

allow the County now to assert an ownership interest in these roads would cause the Okelberrys injury [and] would be unjust.”

¶7 Wasatch County appealed the trial court’s equitable estoppel determination, and the Okelberrys cross-appealed the court’s decision that the Four Roads had been dedicated to the public. The court of appeals reversed the trial court’s equitable estoppel decision and upheld its decisions regarding the public dedication of the Four Roads.<sup>7</sup> We granted certiorari to determine whether the court of appeals applied the correct standard for determining whether a road has been continuously used as a public thoroughfare pursuant to Utah Code section 72-5-104. The parties do not challenge, and we do not address, the equitable estoppel issue.

#### STANDARD OF REVIEW

¶8 “On certiorari, we review for correctness the decision of the court of appeals, not the decision of the district court.”<sup>8</sup> “The correctness of the court of appeals’ decision turns on whether that court correctly reviewed the trial court’s decision under the appropriate standard of review.”<sup>9</sup> An appellate court reviews a trial court’s legal interpretation of the Dedication Statute for correctness and its factual findings for clear error.<sup>10</sup> But whether the facts of a case satisfy the requirements of the Dedication Statute is a mixed question of fact and law that involves various and complex facts, evidentiary resolutions, and credibility determinations.<sup>11</sup> Thus, an appellate court reviews “a trial court’s decision regarding whether a public highway has been established under [the Dedication Statute] . . . for correctness but grant[s] the court

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<sup>7</sup> See Wasatch County v. Okelberry, 2006 UT App 473, ¶ 33, 153 P.3d 745.

<sup>8</sup> D.J. Inv. Group, L.L.C. v. DAE/Westbrook, L.L.C., 2006 UT 62, ¶ 10, 147 P.3d 414.

<sup>9</sup> State v. Dean, 2004 UT 63, ¶ 7, 95 P.3d 276.

<sup>10</sup> See State v. Levin, 2006 UT 50, ¶ 20, 144 P.3d 1096.

<sup>11</sup> Heber City Corp. v. Simpson, 942 P.2d 307, 309-10 (Utah 1997).



significant discretion in its application of the facts to the statute."<sup>12</sup>

#### ANALYSIS

¶9 Both the United States and Utah Constitutions prohibit uncompensated takings of private property.<sup>13</sup> Yet, under certain circumstances, Utah statutory law allows property to be transferred from private to public use without compensation. The Dedication Statute at issue in this case allows for such a transfer. The statute provides that "[a] highway is dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years."<sup>14</sup> In light of the constitutional protection accorded private property, we have held that a party seeking to establish dedication and abandonment under this statute bears the burden of doing so by clear and convincing evidence.<sup>15</sup>

¶10 In a number of our past cases, we have sought to interpret the phrase "continuously used as a public thoroughfare." We have explained that such use occurs when "the public, even though not consisting of a great many persons, [makes] a continuous and uninterrupted use" of a road "as often as they [find] it convenient or necessary."<sup>16</sup> The court of appeals, borrowing language from one of our cases dealing with the doctrine of right-of-way by prescription, has added to this definition as follows: "[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."<sup>17</sup>

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<sup>12</sup> Id. at 310.

<sup>13</sup> U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just compensation."); Utah Const. art. I, § 22 ("Private property shall not be taken or damaged for public use without just compensation").

<sup>14</sup> Utah Code Ann. § 72-5-104(1) (2001).

<sup>15</sup> See Draper City v. Estate of Bernardo, 888 P.2d 1097, 1099 (Utah 1995); Bonner v. Sudbury, 417 P.2d 646, 648 (Utah 1966).

<sup>16</sup> Boyer v. Clark, 326 P.2d 107, 109 (Utah 1958).

<sup>17</sup> Campbell v. Box Elder County, 962 P.2d 806, 809 (Utah Ct. (continued...))

¶11 Despite the best efforts of this court and the court of appeals, a workable interpretation of "continuous use" in the context of the Dedication Statute has remained elusive. We have described ourselves as "hard-pressed to establish a coherent and consistent statement of the law on a fact-intensive, case-by-case review of trial court rulings."<sup>18</sup> In reviewing the case now before us, the court of appeals thoughtfully sought to bring some coherency and consistency to this area of the law by articulating a balancing test:

In deciding whether a locked gate acted as an interruptive force sufficient to restart the running of the statutory ten-year period, the trial court should weigh the evidence regarding the duration and frequency that the gate was locked against the frequency and volume of public use to determine if there is clear and convincing evidence that public use of the road was continuous.<sup>19</sup>

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<sup>17</sup> (...continued)  
App. 1998) (quoting Richards v. Pines Ranch, Inc., 559 P.2d 948, 949 (Utah 1977)). The entire passage from which this quote was extracted reads as follows:

"A way may be established by prescription without direct evidence of its actual use during each year. A use may be continuous though not constant. A right of way means a right to pass over another's land, more or less frequently, according to the nature of the use to be made by the easement; and how frequently is immaterial, provided it occurred as often as the claimant had occasion or chose to pass. It must appear not to have been interrupted by the owner of the land across which the right is exercised, nor voluntarily abandoned by the claimant. Mere intermission is not interruption."

Richards, 559 P.2d at 949 (quoting 1 Thompson on Real Property § 464 (1924)).

<sup>18</sup> Heber City Corp. v. Simpson, 942 P.2d 307, 310 (Utah 1997).

<sup>19</sup> Wasatch County v. Okelberry, 2006 UT App 473, ¶ 18, 153 P.3d 745. The balancing test articulated by the court of appeals  
(continued...)

¶12 We find the court of appeals' approach problematic. The proposed test could be read to suggest that the elements of the Dedication Statute are met where the duration and frequency of continuous use as a public thoroughfare simply outweigh the duration and frequency of interruption during a ten-year period. Under this standard, it could be argued that even where there is a significant interruption in the use of a road, if the period of use is greater than the length of the interruption, the requirements of the Dedication Statute would be satisfied. We think it unlikely that this is what the Legislature intended when it required that a road be "continuously used." Indeed, to balance interruptions in use against frequency of use in order to determine whether a road was continuously used is inconsistent with the very notion of continuous use--any sufficient interruption in use necessarily makes use noncontinuous. Moreover, we think that this balancing test fails to remedy the lack of predictability from which this area of the law suffers. Thus, while we reject the court of appeals' interpretive approach, its careful review of our case law and attempt to bring coherence to that case law highlights for us the need for a clear, workable standard. We take this opportunity to articulate such a standard.

¶13 In interpreting a statute, our goal is to ascertain the Legislature's intent.<sup>20</sup> We do so by first evaluating "the 'best evidence' of legislative intent, namely, 'the plain language of the statute itself.'"<sup>21</sup> We give the words of a statute their "plain, natural, ordinary, and commonly understood meaning, in the absence of any statutory or well-established technical meaning, unless it is plain from the statute that a different meaning is intended."<sup>22</sup>

¶14 The word "continuously" is neither defined in the Dedication Statute nor imbued with technical meaning. Thus, we understand "continuously" to have its plain meaning of "without

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<sup>19</sup> (...continued)  
applies only to locked gates, but it could arguably apply to other types of interruptions, and we consider its potentially broad application here.

<sup>20</sup> See Duke v. Graham, 2007 UT 31, ¶ 16, 158 P.3d 540.

<sup>21</sup> Id. (quoting State v. Martinez, 2002 UT 80, ¶ 8, 52 P.3d 1276).

<sup>22</sup> State v. Navaro, 26 P.2d 955, 956 (Utah 1933).

interruption."<sup>23</sup> A party claiming dedication must therefore establish by clear and convincing evidence that a road has been used without interruption as a public thoroughfare for ten years in order for the road to become dedicated to public use.

¶15 The lack of clarity in this area of the law stems largely from the fact that we have never set forth a standard for determining what qualifies as a sufficient interruption to restart the running of the required ten-year period under the Dedication Statute. We do so now by setting forth a bright-line rule by which we intend to make application of the Dedication Statute more predictable:

An overt act that is intended by a property owner to interrupt the use of a road as a public thoroughfare, and is reasonably calculated to do so, constitutes an interruption sufficient to restart the running of the required ten-year period under the Dedication Statute.

This rule does not change the burden of the party claiming dedication. For a highway to be deemed dedicated to the public, the party claiming dedication must establish by clear and convincing evidence that the road at issue was continuously used as a public thoroughfare for a period of ten years; credible evidence of the type of interruption defined above--an overt act intended to and reasonably calculated to interrupt use of a road as a public thoroughfare--simply precludes a finding of continuous use.

¶16 In order to elucidate this standard, we think it helpful to distinguish between an interruption in use and an intermission in use. The distinction lies in the intent and conduct of the property owner. As noted above, a road may be used continuously even if it is not used constantly or frequently.<sup>24</sup> For example, a road may be used by only one person once a month, but if this use is as frequent as the public finds

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<sup>23</sup> Merriam-Webster's Collegiate Dictionary defines "continuous" as "marked by uninterrupted extension in space, time, or sequence." Merriam-Webster's Collegiate Dictionary 270 (11th ed. 2003).

<sup>24</sup> See Campbell v. Box Elder County, 962 P.2d 806, 809 (Utah Ct. App. 1998).

it "convenient or necessary,"<sup>25</sup> and the landowner has taken no action intended and reasonably calculated to interrupt use, the use is continuous. The one-month period of time between usages is a mere intermission, not an interruption. Likewise, a road may be heavily traveled by the public during certain times of the year but impassable because of weather-related conditions at other times. Though the use is not constant, if it occurs as often as the public finds it convenient or necessary, and the landowner has taken no action intended and reasonably calculated to interrupt use, the use is continuous. The period of impassability due to weather is a mere intermission, not an interruption.

¶17 Continuous use may be established as to heavily or lightly used roads, as long as the use is as frequent as the public finds it convenient or necessary. We emphasize here, however, that the action necessary by the landowner to establish an interruption in public use does not vary depending on the level of public use. An overt act intended and reasonably calculated to interrupt public use restarts the statutory period, and the effectiveness of such act is not tied to the level of public use. In other words, an act by a landowner sufficient to interrupt public use of a road used on a daily basis by the public is also sufficient to interrupt public use of a road used on a monthly basis by the public.

¶18 We now apply our newly articulated test to the facts of the case at hand. The Okelberrys asserted at trial that there were signs on the roads indicating "No Trespassing," "Keep Out," or "Private," and that trespassers were at times asked to leave. Wasatch County conceded that such signs were posted, but argued that they referred only to property adjoining the roads and not the roads themselves. While the trial court assumed the Okelberrys' assertions to be true for purposes of its analysis, it made no actual findings as to when the signs were posted, what they appeared to reference, or whether trespassers were asked to leave. Thus, while it is clear that the posting of the signs constituted an overt act, it remains a factual question whether the Okelberrys intended the signs to interrupt public use of the roads and whether the posting of the signs was reasonably calculated to do so. Questions also remain as to when the signs were posted and whether trespassers were asked to leave, and if so, when and how many.

¶19 The Okelberrys also claimed at trial that the gates were periodically locked for several days at a time beginning in

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<sup>25</sup> Boyer v. Clark, 326 P.2d 107, 109 (Utah 1958).

the late 1950s. Here again, while the trial court assumed this claim to be true for purposes of its analysis, it did not make a factual finding on this issue. The locking of gates for several days at a time constitutes an overt act intended to interrupt public use and reasonably calculated to do so. But factual questions remain as to whether and when such an event or events occurred. We therefore remand this case for the trial court to make these factual determinations.

#### CONCLUSION

¶20 Utah Code section 72-5-104(1) provides that "[a] highway is dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years." We hold today that an overt act that is intended by the property owner to interrupt the use of a road as a public thoroughfare, and is reasonably calculated to do so, is an interruption in continuous use sufficient to restart the running of the ten-year period under this statute. If a party produces credible evidence of such an interruption, this evidence will preclude a finding of continuous use. Because the trial court did not make specific findings of fact regarding the Okelberrys' evidence of interruption in the use of the Four Roads as public thoroughfares, we reverse and remand for further proceedings consistent with this opinion.

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¶21 Chief Justice Durham, Associate Chief Justice Wilkins, Justice Parrish, and Justice Nehring concur in Justice Durrant's opinion.

**APPENDIX B**

**Ruling, August 27, 2004, R. 407-397**

2004

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

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

Plaintiff,

v.

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

Defendants.

**RULING**

Case No. 010500388  
Judge Donald J. Eyre

This matter was last heard by the Court during a trial on July 28, 29, and 30, 2004, where the parties were directed to prepare proposed findings of fact and conclusions of law. The Court has reviewed the file, considered the memoranda filed by the parties, heard oral arguments, and being fully advised in the premises issues the following ruling.

**FACTUAL SUMMARY**

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



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

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

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

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

5. West Daniels' Land Association is a record owner of certain parcels of real property located in Wasatch County over which the Ridge Line Road and the Parker Canyon road traverse. West Daniels Land Association property adjoins the Okelberry property. West Daniel's Land Association initially appeared through counsel who later withdrew.

No successor counsel was appointed. West Daniel's Land Association failed to respond to Plaintiff's motion for summary judgment and its default was entered. Evidence regarding the use of those portions of the roads at issue which are located in West Daniel's Land Association property was submitted at trial.

6. Circle Springs Road, Parker Canyon Road, and the portion of the Ridge Line Road from where it enters the Okelberry property on the southeast to where it connects with Parker Canyon Road are designated as Forest Service Roads on the map currently sold to the public by the Forest

Service. Circle Springs Road, Thorton Hollow Road, and Parker Canyon Road cross thorough into forest land some distance before they end.

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

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

10. At the time of the purchase of the property by the Okelberry's in 1957, the property was bordered on the east and the south by fences separating the Okelberry property and the United States Forest public property. There were also multiple gates along the roads: two gates controlled access from the "Big Glade" area, one gate controlled access to the Circle Springs Road, and one gate controlled access to the Ridge Line Road. the gates were wire gates; whoever went through the gates had to open them and close them behind them.

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

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

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

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

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

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

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

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

roads.

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

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

### RULING

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

First, the road must have been subject to "continuous use." Utah Courts have interpreted "continuous use" in various instances to mean the public has used the roads "extensively," *Bertagnole v. Pine Meadow Ranches*, 639 P.2d 211 (Utah 1981), "frequently and freely," *Thurman v. Bryam*, 626 P.2d 447 (Utah 1981). However, continuous does not mean constant. The supreme court has stated that "use may be continuous though not constant . . . provided it occurred as often as the claimant had occasion or chose to pass. Mere intermission is not interruption." *Campbell v. Box Elder County*, 962 P.2d 806, 809 (Ut. Ct. App. 1998) (quoting

*Richards v. Pines Ranch, Inc.*, 559 P.2d 948 (Utah 1977). Similarly, in *Boyer v. Clark*, 326 P.2d 107, 108 (Utah 1958), the supreme court found as a matter of law that a public highway existed even though “the use of the road was not great because comparatively few people had need to travel over it, but those of the public who had such need, did so.”

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

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

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and Plaintiffs met their burden proving the first element of the statute.

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

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

Third, and lastly, the continuous use as a public thoroughfare must have lasted for a

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

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

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

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

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

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

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

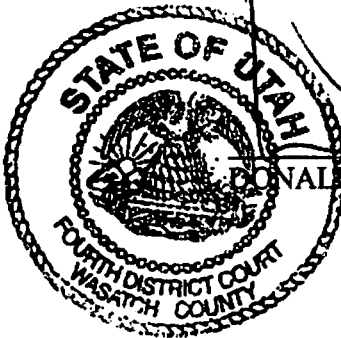
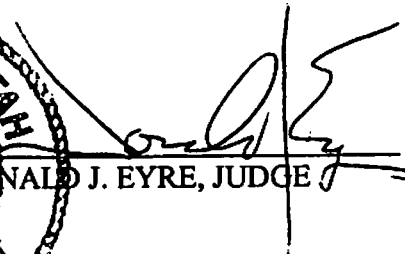


eliminate the hunting unit now being operated by Shane Ford. Admittedly little improvements have been made to the roads themselves, but doubtless large amounts of time and money has been expended on behalf of these business operations and the Defendants have relied on their private use of the road to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

**CONCLUSION**

By clear and convincing evidence the Court finds that the roads in question were abandoned to public roads, but the County is now estopped from opening them to public use because of their failure to bring an action against the Okelberrys who asserted private control over the roads for twelve years in opposition to their public status. The Court directs counsel for the Defendants to prepare findings of fact, conclusions of law, and final order consistent with this ruling, and directs counsel to submit the order to opposing counsel to review and to the Court for final approval.

DATED this 27<sup>th</sup> day of August, 2004.

   
DONALD J. EYRE, JUDGE

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 010500388 by the method and on the date specified.

METHOD NAME

Mail DON R. PETERSEN  
ATTORNEY DEF  
120 EAST 300 NORTH  
P.O. BOX 1248  
PROVO, UT 84603  
Mail SCOTT H SWEAT  
ATTORNEY PLA  
114 SOUTH 200 WEST  
P.O. BOX 625  
HEBER UT 84032

Dated this 27 day of August, 2004.

  
Deputy Court Clerk

**APPENDIX C**

**Findings of Fact and Conclusions of Law, October 22, 2004, R. 420-409**

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

Our File No.

Attorneys for Defendants Okelberry

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

<p>WASATCH COUNTY, a body public of the State of Utah,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>E. RAY OKELBERRY, BRIAN OKELBERRY, ERIC OKELBERRY, UTAH DIVISION OF WILDLIFE RESOURCES, WEST DANIELS LAND ASSOCIATION, and JOHN DOES 1-25,</p> <p style="text-align: center;">Defendants.</p>	<p style="text-align: center;"><b>FINDINGS OF FACT AND CONCLUSIONS OF LAW</b></p> <p style="text-align: center;">Case No. 010500388 Judge Donald J. Eyre</p>
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This matter came on for trial on July 28, 29 and 30, 2004. The Court heard the testimony of various witnesses and received various exhibits. Counsel was directed to prepare proposed Findings of Fact and Conclusions of Law. The Court has now reviewed the file, considered the memoranda filed by the parties, heard oral arguments and now, being fully advised in the premises, makes and enters the following:

**FINDINGS OF FACT**

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

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

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

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

5. The property in question where the roads are located is generally not accessible until mid-May or later and is generally not accessible after November 15` h

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### CONCLUSIONS OF LAW

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

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



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

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

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

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

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

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

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

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

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

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

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

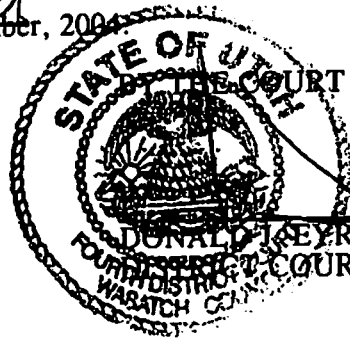
11. In Premium Oil v. Cedar City, 187 P.2d 199 (Utah 1947), the supreme court held that a strip of land once dedicated as a public road had been used in a manner directly in conflict with the land's dedication as a public road. The court stated that "the manner in which the city used the strip was openly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

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

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

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

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

 DONALD J. SEYRE  
FOURTH DISTRICT COURT JUDGE  
WARATCH COUNTY

*[Handwritten signature]*

APPROVED AS TO FORM:

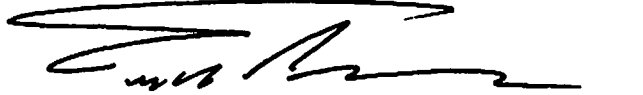
SCOTT H. SWEAT, ESQ.  
Deputy Wasatch County Attorney  
Attorney for Plaintiff

**NOTICE TO PLAINTIFF'S ATTORNEY**

TO: SCOTT H. SWEAT, ESQ.

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

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



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

MAILING CERTIFICATE

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

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

  
SECRETARY

G:\DRP\OKELBERY.FOF

**APPENDIX D**

**Order, October 22, 2004, R. 428-421**



*Handwritten initials*

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

Our File No. 25774

Attorneys for Defendants Okelberry

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

<p>WASATCH COUNTY, a body public of the State of Utah,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>E. RAY OKELBERRY, BRIAN OKELBERRY, ERIC OKELBERRY, UTAH DIVISION OF WILDLIFE RESOURCES, WEST DANIELS LAND ASSOCIATION, and JOHN DOES 1-25,</p> <p style="text-align: center;">Defendants.</p>	<p style="text-align: center;"><b>ORDER</b></p> <p style="text-align: center;">Case No. 010500388 Judge Donald J. Eyre</p>
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This matter came on for trial on July 28, 29 and 30, 2004. The Court heard the testimony of various witnesses and received various exhibits. Counsel was directed to prepare proposed Findings of Fact and Conclusions of Law. The Court reviewed the file, considered the memoranda filed by the parties, heard oral arguments, and now having heretofore entered its Findings of Fact and Conclusions of Law and being fully advised in the premises, makes and enters the following:

*Handwritten initials*

## ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

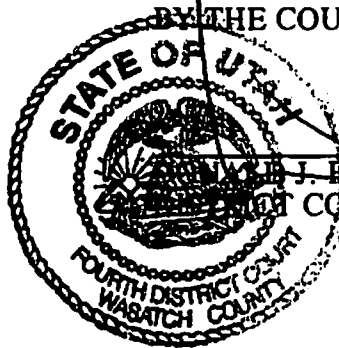
the city used the strip was openly hostile to the public use as a street and should have been notice to all that any dedication, if previously intended, has been abandoned. Under the facts of the case, the court held that the Plaintiff would be estopped to claim an improper abandonment or vacation. this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

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

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

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

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

BY THE COURT  
  
WILLIAM J. EYRE  
COURT JUDGE

*[Handwritten signature]*

APPROVED AS TO FORM:

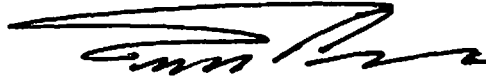
SCOTT H. SWEAT, ESQ.  
Deputy Wasatch County Attorney  
Attorney for Plaintiff

**NOTICE TO PLAINTIFF'S ATTORNEY**

TO: SCOTT H. SWEAT, ESQ.

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

DATED this 14 day of September, 2004.



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

**MAILING CERTIFICATE**

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

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



\_\_\_\_\_  
SECRETARY



**APPENDIX E**

**Supplemental Findings of Fact and Ruling on Motion to Amend Judgment,  
February 23, 2005, R. 489-481**

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

*10/04*

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

Plaintiff,

v.

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

Defendants.

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

Case No. 010500388  
Judge Donald J. Eyre

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

**FINDINGS OF FACT**

1. Testimony was presented at trial showing that though the roads at issue in this case are in many places rough and difficult to traverse, Wasatch County (the County) has not made any efforts in the past to pave, grade, or otherwise improve the condition of these roads.
2. Testimony was also presented at trial indicating that Wasatch County currently has no plans to improve these roads in the future.

*45*

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

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

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

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

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

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

prevent the Okelberrys from selling these trespass permits.

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

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

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

### **RULING**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

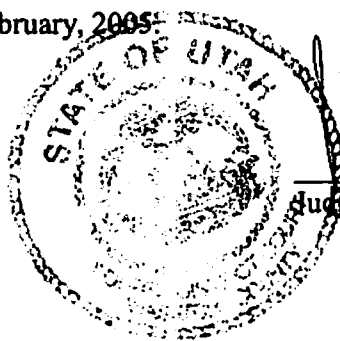


reliance on the asserted nonuse of the roadway by the public.” *Id.* at 1378. In *Western Kane* the Utah Supreme Court refused to apply equitable estoppel against the government because the “landowner had not substantially altered his position to his detriment in reliance on the asserted nonuse of the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

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

As such, the Court holds that the County is hereby estopped from asserting an ownership interest over these roads, and the County’s Motion to Amend Judgment is hereby DENIED. Counsel for the Defendants shall prepare an order consistent with this ruling.

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



Judge Donald J. Eyre

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 010500388 by the method and on the date specified.

METHOD	NAME
Mail	MARTIN B BUSHMAN ATTORNEY DEF NATURAL RESOURCE DIVISION 1594 W N TEMPLE STE 300 SALT LAKE CITY, UT 84116
Mail	DON R PETERSEN ATTORNEY DEF POB 1248 PROVO UT 84603
Mail	RYAN D TENNEY ATTORNEY DEF 2342 N 750 W LEHI UT 84043
By Hand	THOMAS L LOW
By Hand	SCOTT H SWEAT

Dated this 23 day of February, 2007.

  
Deputy Court Clerk

**APPENDIX F**

**Order, April 8, 2005, R. 492-490**

RMB

DON R. PETERSEN (2576), and  
RYAN D. TENNEY (9866), for:  
**HOWARD, LEWIS & PETERSEN, P.C.**  
ATTORNEYS AND COUNSELORS AT LAW  
120 East 300 North Street  
P.O. Box 1248  
Provo, Utah 84603  
Telephone: (801) 373-6345  
Facsimile: (801) 377-4991

Our File No. 27754

Attorneys for Defendants

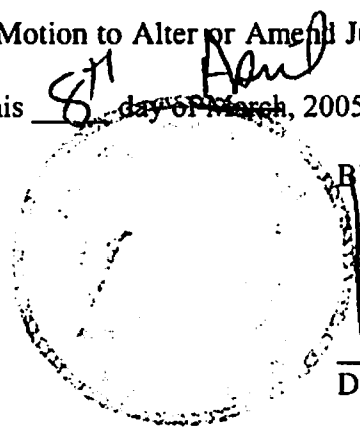
IN THE FOURTH JUDICIAL DISTRICT COURT OF WASATCH COUNTY

STATE OF UTAH

<p>WASATCH COUNTY,</p> <p>Plaintiff,</p> <p>vs.</p> <p>E. RAY OKELBERRY, et. al.,</p> <p>Defendants.</p>	<p><b>ORDER</b></p> <p>Case No. 010506388 Judge Donald J. Eyre</p>
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This Court hereby (I) supplements its findings of fact as was set forth in the Supplemental Findings of Fact and Ruling that were signed on February 18th, 2005, and (II) denies Plaintiff's Motion to Alter or Amend Judgment.

DATED this 8<sup>th</sup> day of March, 2005.



BY THE COURT

  
DONALD J. EYRE, JUDGE

49

Approved as to Form:

---

Scott H. Sweat  
Deputy Wasatch County Attorney

**MAILING CERTIFICATE**

I hereby certify that a true and correct copy of the foregoing was mailed to the following,  
postage prepaid, this 7 day of March, 2005.


Scott H. Sweat  
Wasatch County Attorney  
805 West 100 South  
Heber City, UT 84032

  
\_\_\_\_\_  
SECRETARY

**NOTICE PURSUANT TO RULE 7 OF THE UTAH RULES OF CIVIL PROCEDURE OF THE STATE OF UTAH**

Pursuant to Rule 7(f)(2) of the Utah Rules of Civil Procedure, notice is hereby given to Plaintiff, that this proposed order prepared by Defendants shall be the Order of the Court unless Petitioner files an objection in writing within five (5) days from the date of the service of this notice.

DATED this 7 day of March, 2005.

  
RYAN D. TENNEY  
Attorney for the Defendants

## **APPENDIX G**

**Further Specific Findings of Fact and Ruling on Defendants' Motion for Entry of Supplemental Findings and Conclusions; or Alternatively for New Trial or Presentation of Additional Evidence, R. 676-668.**

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

Wasatch  
08:08 PM 10/12/09

WASATCH COUNTY,  
Plaintiff,

v.

WEST DANIELS LAND ASSOCIATION et al,  
Respondent.

**FURTHER SPECIFIC FINDINGS OF  
FACT AND RULING ON DEFENDANTS'  
MOTION FOR ENTRY OF  
SUPPLEMENTAL FINDINGS AND  
CONCLUSIONS; OR ALTERNATIVELY  
FOR NEW TRIAL OR PRESENTATION  
OF ADDITIONAL EVIDENCE**

Case No. 010500388 PR

Judge Donald Eyre, Jr.

This matter comes before the Court on remand from the Utah Supreme Court. In a ruling filed February 12, 2008 (*Wasatch County v. Okelberry*, 2008 UT 10), the Supreme Court instructed this Court to enter "specific findings of fact regarding the Okelberrys' evidence of interruption in the use of the Four Roads as public thoroughfares." 2008 UT 10 ¶ 20. The Court has reviewed the file, reviewed trial transcript, considered the memoranda of both parties, heard oral argument, and now issues the following findings of fact and ruling:

**SPECIFIC FINDINGS OF FACT**

1. Several of Plaintiff's witnesses testified at trial that they used some or all of the four roads (Circle Springs Road, Ridge Line Road, Thorton Hallow Road, Parker Canyon Road) at issue here during various periods between 1957 and 2004.

2. Deon Sabey testified that he used all four roads several times beginning in the 1950s. He testified that when using the roads he never saw "no trespassing" signs on any of the roads, but did see gates on the roads. He never saw or encountered locks on any of the gates. He saw no markers on the gates. He saw others using the roads at various times, and was never asked to leave the roads, nor did he get permission to use any of the roads.

3. Moroni Besendorfer testified that he used all four roads several times beginning in the 1960s. He testified that he saw others on the road every year from the 1960s through the 1980s. He testified that he saw others use the roads and camp on adjoining property with their vehicles. He did not see any "no trespassing" signs until 1999. He saw no locked gates until "a few years" prior to the trial. He was never kicked off the roads or asked to leave, and never obtained permission to use



the roads.

4. Martin Wall testified that he used Circle Springs Road and Ridge Line Road regularly beginning in the 1950s, for hunting and gathering firewood. He testified that he never saw "no trespassing" signs. He saw gates on the roads, but they were not locked. He never received permission to traverse the roads.

5. Jake Thompson testified that he has used Circle Springs Road and Ridge Line Road regularly since the 1950s, and Thorton Hallow Road since at least the 1970s. He testified that he never saw "no trespassing" signs on the roads. He saw gates, but they were not locked. He never received permission to travel the roads, and was never kicked off the roads.

6. Ed Sabey testified that he has used all of the roads regularly since about the 1960s. He testified that he never saw "no trespassing signs," nor signs on Parker Canyon Road saying "no motorized vehicles." He saw gates, which were not locked. He had seen others on the roads. He never got permission to use the roads. He testified that about "15 years ago" (which would have been 1989), people were stopped from using Ridge Line Road.

7. Richard Baum testified that he used Ridge Line Road for biking about "20 years ago" (1984). He was never kicked off the road, and never saw "no trespassing signs." He did see "orange painted wood signs" on the road.

8. Brandon Richins testified that he has used Circle Springs Road, Ridge Line Road, and Parker Canyon Road starting in the late 1980s. He testified that he first saw "no trespassing" signs about 15-16 years ago (1988-89) on Circle Springs Road. He saw locked gates on Ridge Line Road since 2001. He never saw locked gates on Parker Canyon road, but saw "no motorized vehicle" signs. He never had permission to use the roads, and saw others on them.

9. Benny Gardner testified that he started using Circle Springs Road, Thorton Hallow Road, and Parker Canyon Road in about 1966. He testified that he did not see "no trespassing" signs until the 1990s. He saw the gates on the roads, but testified that they were not locked until "more recently." He testified that he saw others on the roads, was never kicked off the roads, and never got permission to use the roads.

10. Mark Buttars testified that he used all the roads starting in the 1960s, except Parker Canyon Road, which he started using in 1972. He testified that he saw "partial trespassing" signs on Thorton Hallow Road and Circle Springs Road starting in about 1992. He saw no signs prior to 1992. He never received permission to use the roads, and saw others on the roads. While he saw gates on the roads, he testified that they were never locked.

11. Defendants called several witnesses who also testified regarding public access to the roads between 1957 and 2004.

12. Jeff Jefferson mainly testified regarding the condition of the roads. He testified that each of the roads was rocky and would require a 4-wheel drive vehicle to pass, but that sometimes gates

were left open. He testified that he asked Mark Butters to leave the roads twice sometime after 2000. He also testified that the sign on a tire at the start of Circle Springs Road was put up in about 1992.

13. Melvin Price also testified about the condition of the roads: that they were only passable by 4-wheel drive vehicles. He testified that there have been locked gates and "no trespassing" signs on Ridge Line Road for at least 20 years. He testified that there were signs and locked gates on the other roads at some point, but did not specify a time frame. He testified that he got permission from the Okelberrys each year he used the roads, and that there was not much traffic or many others on the roads.

14. Lee Okelberry testified that his father purchased property surrounding the roads in 1957. He testified that the roads had gates and fences. He testified that Thorton Hallow Road and other roads were "better than a trail," but that the public was not there much in the 1950s. He testified that he occasionally he stopped and talked to people on Parker Canyon Road in the 1950s. He stated that "as the years went by there was a little more traffic" on the roads. He testified that in 1957 there was no need for "no trespassing" signs because "[t]here was no, not that much trespass up there." He further stated that there were no locks on the gates in 1957, but instead "[w]e put fasteners on them and we wired them to a post." "We never did lock anybody out of there," he stated. He testified that he asked wood gatherers to get off private land on occasion. He also testified that he "never locked" the gates. He testified that a locked gate shown to him as an exhibit was "put there after I left." Finally, he testified that "I think we stood up for the public quite a bit. If there was any that needed to go through there in any way, shape or form they could ask or they could go through there. We never turned nobody down that had any business down in there."

15. Glen Shepherd testified that there are now signs on all of the roads. He said he had permission for years from the Okelberrys to use the roads, who are "pretty free" with giving permission. He stated that the roads are generally seen as private rather than public roads, and that there have always been gates of some sort on the roads.

16. Shane Ford testified that the condition of the roads is pretty similar now (in 2004) to their condition in 1994. He testified that gates are now locked during hunting season. He believed that the roads have not been open to the public for continuous use.

17. Bruce Huvad testified that the roads were "very rough." He testified that he first went to the property in 1966, and saw "keep out" and "private" signs on the property at that time. He testified that he obtained permission from the Okelberrys each year from 1966 to 1990 to use the roads. He testified that there were always gates upon entering the roads between 1966 and 1990. He testified that there were others who used the roads without permission, but that they were not very numerous. He kicked people off the Okelberry property who were not "supposed to be on there" between 1966 and 1990. He testified that "some" of the gates were locked between 1966 and 1990, but did not specify exact dates.

18. Brian Okelberry testified that he started working on the property around the roads in the early 1970s. He testified that there have always been gates on the road since he's been there, and that one of the purposes of the gates was to control vehicles "from going up and down the roads."

He has given people permission to use roads at times. He testified that there were "keep out" signs on some of the gates. He testified that some of the gates have been locked "over periods of time." He testified that he started taking an active role in preventing trespassing around the late 1980s, and began putting up signs then. He testified that the first boundary locks were placed on the gates in the 1980s.

19. Ray Okelberry testified that there were gates on the roads beginning in 1957, and that as time passed more people came. He has told people to leave the roads "on occasion." He gave permission to Brian Gardner and others to use the roads. He began charging people for "trespass permits" beginning in the 1990s. He testified that there were locks on the gates in the 1990s and 2000s. He testified that the sign on the tire at the entrance to the Circle Springs Road was there "about 20 years." He testified that they started locking the Circle Springs and "1080 gate" (going into the Ridge Line Road) either the first or second year he was there. He testified that people may have cut the locks from gates at some points. He testified that he began putting up signs in 1957-59, but that "they didn't stay up," and hypothesized that the "wind blew them away." He also testified: "I'm not saying the gate was opened or locked all summer, but when I was getting ready to get those sheep out of there I locked those gates. And I've always had trouble keeping locks there."

20. The Court finds that there were gates at the entrances to each of the roads from 1957 to 2004.

21. The Court also finds that there may have been signs at various locations reading "keep out" and "private" beginning in the 1960s. However, the evidence shows that these signs did not restrict travel on the roads themselves, and it is unclear whether they were intended to refer to keeping off the roads or the surrounding property. None of Defendants' witnesses clarified whether the signs were intended to refer to the roads or the property. Ray Okelberry testified that the signs he placed "didn't do any good" anyway. More signs were placed by Brian Okelberry and others beginning in the late 1980s and 1990s.

22. The Court finds that occasionally persons may have been told to leave the property beginning in the 1950s, but this did not restrict travel on the roads. Restrictions on use of the roads began in the 1980s at the earliest. There was no evidence presented that the Okelberrys regularly kicked people off the roads at any time before the 1980s; the evidence instead shows that they freely intended to let others use the roads.

23. The Court finds that while some people obtained permission to use the roads, getting specific permission was not enforced, and many used the roads from 1957 to the 1990s without permission.

24. The Court finds that though the Okelberrys may have locked some of the gates at some points between the 1950s and 1990s, this did not restrict travel on the roads. There was no credible evidence presented that the Okelberrys intended to or actually did restrict travel prior to the 1990s due to the locking of gates. While Ray Okelberry testified that he locked gates beginning either in 1957 or 1958, he did not testify that he intended to keep the public from accessing the roads at this time. Lee Okelberry and Brian Okelberry, both Defendants' witnesses, testified that the boundary

gates at the entrances of the roads were never locked until at least the 1980s. Several of Plaintiff's witnesses also testified to this effect.

### **RULING**

The issue before the Court here is a fairly narrow one, though it must be decided based on a large amount of testimony and evidence. The Utah Supreme Court, on February 12, 2008, issued a written decision ordering this Court to enter "specific findings of fact regarding the Okelberrys' evidence of interruption in the use of the Four Roads as public thoroughfares." *Wasatch County v. Okelberry*, 2008 UT 10 ¶ 20. This Court has reviewed the evidence and made those specific findings of fact above, and will presently apply those findings to the now-applicable law.

In its February 12 decision, the Supreme Court articulated a "bright-line rule" to determine whether a road is dedicated and abandoned for use to the public under Utah Code Annotated § 72-5-104. This rule is as follows:

An overt act that is intended by a property owner to interrupt the use of a road as a public thoroughfare, and is reasonably calculated to do so, constitutes an interruption sufficient to restart the running of the required ten-year period under the Dedication Statute.

*Wasatch County v. Okelberry*, 2008 UT 10 ¶ 15.

The new rule thus contains three requirements: 1) there must be an overt act; 2) there must be a show of intention by a property owner to interrupt the public use of a road; 3) the overt act must be reasonably calculated to interrupt road use by the public. The Supreme Court explained that "credible evidence" which meets these three requirements "simply precludes a finding of continuous use." *Id.*

Defendants argue that they have presented evidence of "at least four types of acts" which would satisfy the above standard: "locked gates, unlocked gates, asking trespassers to leave, and posting signs." (Memorandum Opposing Plaintiff's Motion for Entry of Findings of Fact and Conclusions of Law ("Opp. Memo"), at 2.) The Court now addresses each of these.

The evidence at trial showed clearly that there were unlocked gates at the entrances to the roads (boundary gates) as well as some interior gates during all the years relevant to this issue. The question is whether unlocked gates would satisfy the requirements explained above. The Court holds that they do not. Defendants argue, using language from various cases in other states, that an unlocked gate creates a "presumption that any use was permissive." (Opp. Memo, at 11.) But the testimony at trial shows otherwise. Several witnesses testified of unlocked wire or metal gates which were used to control cattle, but none testified that this interrupted their use of the roads, or that they supposed that their use was permissive based on the presence of the gates. Perhaps most importantly, the simple existence of gates clearly does not constitute an overt act. The gates were apparently there even before Defendants took control of the property, and the requirement that travelers open and close such gates for the purpose of controlling livestock does not show intent to interrupt public use. The gates themselves "were not meant to restrict public travel on the Road[s]." *Utah County v. Butler*, 2008 UT 12 ¶ 16.

Defendants claim that "asking people to leave the roads" constitutes an overt act under the Supreme Court's standard. Indeed, multiple witnesses, including Bruce Huvad, Melvin Price, and Glen Shepherd testified that they obtained permission to use the roads. Some testimony was also presented at trial that, on occasion, the Okelberrys and others asked people to leave property

surrounding the roads. The evidence did not show, however, that this interrupted public use of the roads generally. Several of Plaintiff's witnesses testified that they used the roads freely during the 1960s, 1970s, and 1980s without any resistance. Lee Okelberry testified that the Okelberrys "never turned nobody down" who had legitimate business using the roads. None of Defendants' witnesses testified that there was a regular policy of requiring permission or approval to use the roads during that period, nor that asking persons to leave the property was intended to restrict public access to the roads themselves. As the Supreme Court stated in *Utah County v. Butler*, when individuals are not removed from the roads themselves, simply removing them from the adjoining property is not sufficient to constitute an overt act reasonably calculated to interrupt continuous use. *See 2008 UT 12 ¶ 17*. The evidence shows that it was not until the late 1980s and 1990s that the Okelberrys began requiring hunting permits and other permission to use the roads. As a result, the Court finds that these instances of asking persons to leave the property do not rise to the level of an overt act intended to interrupt public use of the roads prior to the 1990s.

Another possible interruptive act alleged by Defendants was the posting of "keep out" and "no trespassing" signs on the gates and the property surrounding the roads. The Utah Supreme Court has held that "it is clear that the posting of the signs constituted an overt act," but that less clear was whether posting the signs showed an intent to interrupt public use of the road and whether the act was reasonably calculated to do so. *Wasatch County v. Okelberry*, 2008 UT 10 ¶ 18. It appears that a majority of the "no trespassing" and "keep out" signs on the property at the time of trial were placed there in the late 1980s and 1990s. Ray Okelberry testified that he began putting up signs as early as 1957 or 1958, but that it "didn't do any good" to put the signs up. He also testified that the early signs "didn't stay up." Bruce Huvard testified that he saw signs as early as 1966 saying "keep out" and "private." Yet none of Defendants' witnesses at trial specified their intent when putting up the signs in the years prior to the 1980s and 1990s. Further, many of Plaintiff's witnesses testified that they never saw "no trespassing" signs until the late 1980s or 1990s, and that none of them were deterred in their travels along the roads by signs. The Utah Supreme Court held, in *Utah County v. Butler*, that "[s]igns posted against travel on property adjacent to the Road do not constitute an interruption of travel on the Road itself." 2008 UT 12 ¶ 17. Without credible evidence showing that the signs were meant to apply to the roads themselves, the Court cannot infer an intent to interrupt the use of the roads from the posting of signs in the 1950s, 1960s, or 1970s, nor can it conclude that the earlier signs were "reasonably calculated" to interrupt public road use prior to the late 1980s or 1990s.

Finally, Defendants submit that evidence of locked gates constitutes an overt act sufficient to satisfy the Supreme Court's standard. The Supreme Court held that "[t]he locking of gates for several days at a time constitutes an overt act intended to interrupt public use and reasonably calculated to do so." *Wasatch County v. Okelberry*, 2008 UT 10 ¶ 19. However, the Court also held that "factual questions remain as to whether and when such an event or events occurred." *Id.* Ray Okelberry testified that he started locking the Circle Springs and "1080 gate" (going into the Ridge Line Road) either the first or second year he was on his property. He testified that "when I was getting ready to get those sheep out of there I locked those gates." (Transcript of Bench Trial, June 30, 2004, at 138.) He also stated that "I've always had trouble keeping locks there," but that "I was there I might have been there a week or ten days that I had those gates locked." *Id.* at 138-39.

The Utah Supreme Court explained that evidence of an overt act must be "credible" to preclude a finding of continuous use under the dedication statute. *Wasatch County v. Okelberry*, 2008 UT 10 ¶ 15. That Court has previously held that a trial court has "the prerogative to judge the

credibility of the witnesses and to determine the facts.” *Casida v. Deland*, 866 P.2d 599, 602 (Utah 1993) (citing *Hanks v. Turner*, 508 P.2d 815, 816 (Utah 1973)). In making this determination, the Court is “not obliged to believe the self-serving testimony” of the witness. *Id.* Further, while a trial judge “should not arbitrarily reject competent, credible, uncontradicted testimony, nevertheless he is not compelled to believe evidence where there is anything about it which would reasonably justify refusal to accept it as the facts, and this includes the self-interest of the witness.” *Id.* (citing *Strong v. Turner*, 452 P.2d 323, 324 (Utah 1969)).

Though the Court properly takes into account Ray Okelberry's self-interest in assessing the credibility of his testimony, that alone is not dispositive. The main problem with Ray Okelberry's trial testimony regarding locked gates is that it contradicts not only the testimony of several of Plaintiffs' witnesses (specifically, Deon Sabey, Moroni Besendorfer, Martin Wall, Jake Thompson, Ed Sabey, Brandon Richins, Benny Gardner, and Mark Buttars), it also contradicts the testimony of Defendants' own witnesses, Brian and Lee Okelberry. Plaintiffs' witnesses who testified on the issue testified that they encountered no locked gates while using the roads until at least the late 1980s or 1990s, and some not until the 2000s.

Brian Okelberry testified that the first boundary locks were placed on gates in the 1980s. Lee Okelberry testified that “[w]e never did lock anybody out of there,” that he personally never locked any gates, and that any locks on gates shown to him as exhibits were put there “after I left,” which would have been in the 1990s, as he testified he stopped going to the area “about six years ago.” (Transcript of Bench Trial, June 29, 2004, at 198.) He specifically testified that locks were not put on the gates in 1957, but instead “[w]e put fasteners on them and we wired them to a post.” These statements by Brian and Lee Okelberry are especially significant because they are statements against interest. Brian Okelberry is a party to this case, and both were witnesses called by Defendants.


Plaintiff's witnesses also contradict Ray Okelberry's testimony. Defendants argue that Plaintiff's witnesses are “sporadic users” of the road and that their testimony regarding locked gates should not be given as much weight as a result. (Opp. Memo, at 9.) But the Supreme Court explained that “a road may be used continuously even if it is not used constantly or frequently.” *Wasatch County v. Okelberry*, 2008 UT 10 ¶ 16. “For example, a road may be used by only one person once a month, but if this use is as often as the public finds it ‘convenient or necessary,’ and the landowner has taken no action intended and reasonably calculated to interrupt use, the use is continuous. The one-month period of time between uses is a mere intermission, not an interruption.” *Id.*

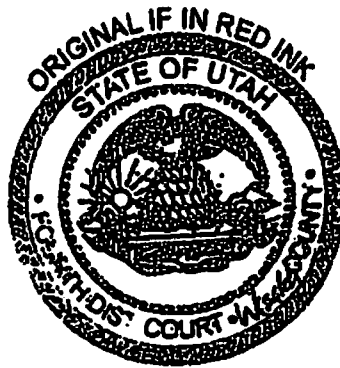
The Court finds that while there may have been occasions in which Mr. Okelberry locked the gates in the 1950s, 1960s, and 1970s, these were few and far between, were not intended to restrict public access, and were not reasonably calculated to interrupt public use of the roads. The Court finds that his testimony, to the extent it contradicts the testimony of Lee Okelberry, Brian Okelberry, and several of Plaintiff's witnesses (that the gates were not locked with that intent until at least the 1980s), is not credible evidence under the Supreme Court's standard. Defendants' other witnesses testifying about the existence of locked gates did not specify timeframes in which the gates were locked; therefore the testimony of the Okelberrys are Defendants' only evidence on this subject. As in *Utah County v. Butler*, the Court finds here that between the 1950s and at least the 1980s “the gates . . . were not erected or locked with the requisite intent and therefore did not interrupt the public's continuous use of the Road.” 2008 UT 12 ¶ 16.

## CONCLUSION

This Court ruled previously that "it is clear that individuals using the roads beginning in the late 1950s until the late 1980s or early 1990s used the roads without interruption, they used the roads freely, and though not constantly, they used the roads continuously as they needed." (Findings of Fact and Conclusions of Law, 22 September 2004, at 6-7.) Plaintiffs at trial made a showing by clear and convincing evidence that Circle Springs Road, Ridge Line Road, Thorton Hallow Road, and Parker Canyon Road were abandoned to the public. Defendants have offered no credible evidence of overt acts sufficient to change this determination under the Utah Supreme Court's newly created standard. Therefore the Court holds that under Utah Code Annotated § 72-5-104(1) each of the four roads was "dedicated and abandoned to the use of the public" by continuous use as a public thoroughfare for over 10 years.

Signed this 23 day of October, 2008.

  
DONALD J. EYRE  
District Court Judge



**CERTIFICATE OF SERVICE**

I hereby certify that, on the 23<sup>rd</sup> day of October, 2008, I caused a true and correct copy of the foregoing **FURTHER SPECIFIC FINDINGS OF FACT AND RULING ON DEFENDANTS' MOTION FOR ENTRY OF SUPPLEMENTAL FINDINGS AND CONCLUSIONS; OR ALTERNATIVELY FOR NEW TRIAL OR PRESENTATION OF ADDITIONAL EVIDENCE** to be delivered to the following parties:

Don R. Petersen  
Leslie W. Slaugh  
Howard, Lewis & Petersen, P.C.  
120 East 300 North Street  
P.O. Box 1248  
Provo, Utah 84603

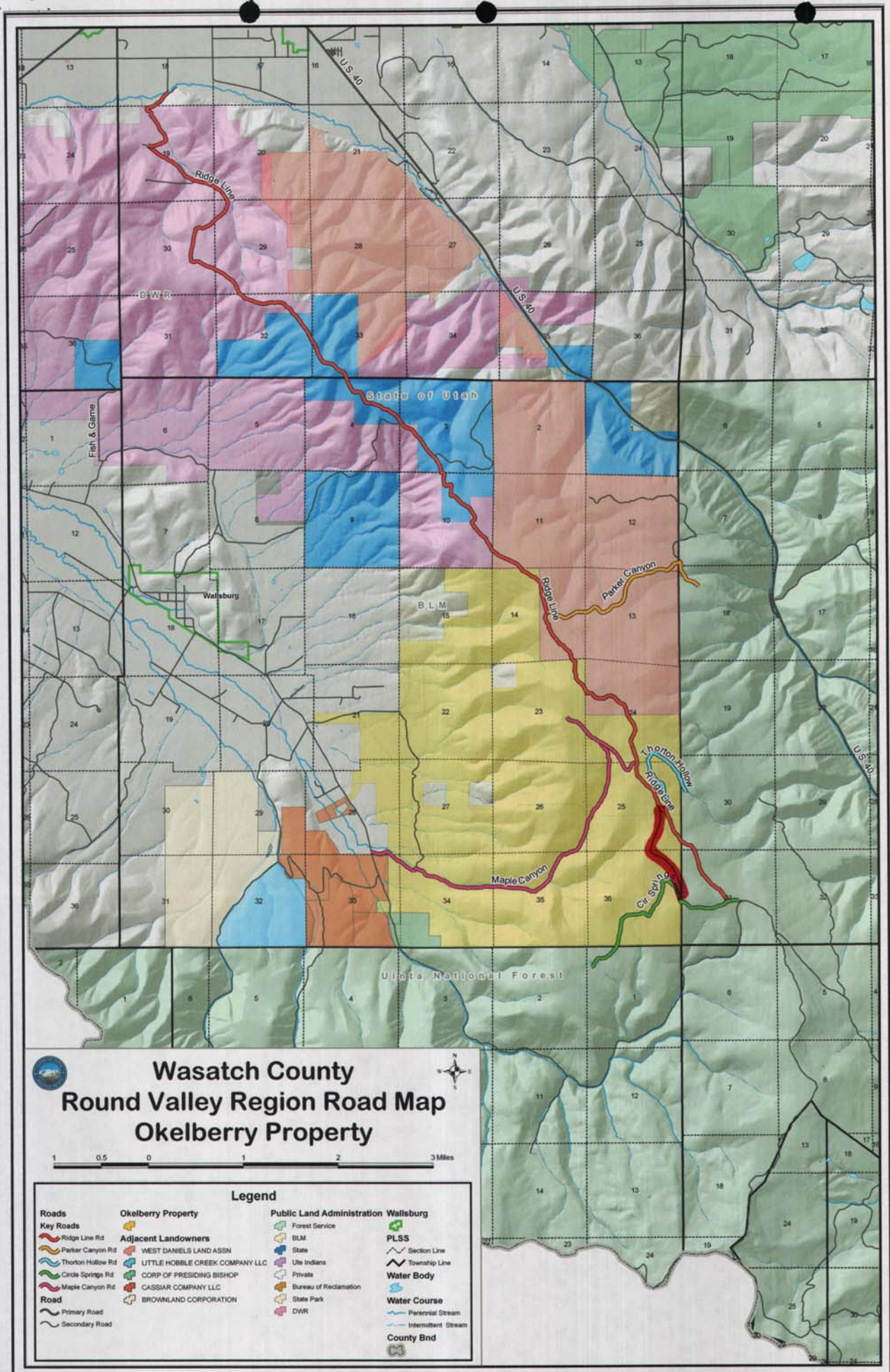
Thomas Low  
Scott H. Sweat  
Wasatch County Attorneys  
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Heber City, Utah 84032

*Janyla Barrett*  
*Deputy Clerk*



**APPENDIX H**

**Map of properties, R. 371.**



## Wasatch County Round Valley Region Road Map Okelberry Property

1 0.5 0 1 2 3 Miles

Legend			
<p><b>Roads</b></p> <p><b>Key Roads</b></p> <ul style="list-style-type: none"> <li><span style="color: red;">—</span> Ridge Line Rd</li> <li><span style="color: orange;">—</span> Parker Canyon Rd</li> <li><span style="color: blue;">—</span> Thornton Hollow Rd</li> <li><span style="color: green;">—</span> Circle Springs Rd</li> <li><span style="color: purple;">—</span> Maple Canyon Rd</li> </ul> <p><b>Road</b></p> <ul style="list-style-type: none"> <li><span style="color: grey;">—</span> Primary Road</li> <li><span style="color: grey;">—</span> Secondary Road</li> </ul>	<p><b>Okelberry Property</b></p> <p><b>Adjacent Landowners</b></p> <ul style="list-style-type: none"> <li><span style="color: red;">■</span> WEST DANIELS LAND ASSN</li> <li><span style="color: blue;">■</span> LITTLE HOBBLE CREEK COMPANY LLC</li> <li><span style="color: green;">■</span> CORP OF PRESIDING BISHOP</li> <li><span style="color: purple;">■</span> CASSIAR COMPANY LLC</li> <li><span style="color: orange;">■</span> BROWNLAND CORPORATION</li> </ul>	<p><b>Public Land Administration</b></p> <ul style="list-style-type: none"> <li><span style="color: green;">■</span> Forest Service</li> <li><span style="color: blue;">■</span> BLM</li> <li><span style="color: purple;">■</span> State</li> <li><span style="color: orange;">■</span> Ute Indians</li> <li><span style="color: grey;">■</span> Private</li> <li><span style="color: blue;">■</span> Bureau of Reclamation</li> <li><span style="color: purple;">■</span> State Park</li> <li><span style="color: red;">■</span> DWR</li> </ul>	<p><b>Wallsburg</b></p> <p><b>PLSS</b></p> <ul style="list-style-type: none"> <li><span style="color: grey;">—</span> Section Line</li> <li><span style="color: grey;">—</span> Township Line</li> </ul> <p><b>Water Body</b></p> <p><b>Water Course</b></p> <ul style="list-style-type: none"> <li><span style="color: blue;">—</span> Perennial Stream</li> <li><span style="color: blue;">—</span> Intermittent Stream</li> </ul> <p><b>County Bnd</b></p> <ul style="list-style-type: none"> <li><span style="color: grey;">—</span> County Boundary</li> </ul>



LEXSEE 1999 UT APP 87

**A.K. & R. Whipple Plumbing and Heating, Plaintiff, Appellee, and Cross-appellant,  
v. Aspen Construction, Thomas D. Guy, Claire B. Guy, and Diane M. Quinn,  
Defendants, Appellant, and Cross-appellees.**

Case No. 971580-CA

COURT OF APPEALS OF UTAH

*1999 UT App 87; 977 P.2d 518; 365 Utah Adv. Rep. 3; 1999 Utah App. LEXIS 31*

March 18, 1999, Filed

**PRIOR HISTORY:** [\*\*\*1] Third District, Coalville Department. The Honorable Pat B. Brian. The Honorable Frank G. Noel.

**DISPOSITION:** Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

**COUNSEL:** Joseph M. Chambers, Logan, and Kevin P. McBride, Park City, for Appellant.

Steven B. Wall, Salt Lake City, for Appellee.

**JUDGES:** Michael J. Wilkins, Presiding Judge. WE  
**CONCUR:** James Z. Davis, Judge, Gregory K. Orme, Judge.

**OPINION BY:** Michael J. Wilkins

**OPINION**

[\*\*520] OPINION

WILKINS, Presiding Judge:

[\*P1] Appellant Aspen Construction (Aspen) appeals from a judgment awarding appellee A.K. & R. Whipple Plumbing and Heating (Whipple) \$ 3,943 for heating, venting, and air conditioning (HVAC) work it performed, and allowing Whipple to foreclose on three separate mechanics' liens. Aspen also appeals the trial

court's decision to award Whipple \$ 7,500 in attorney fees. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

**BACKGROUND**

*P 2 In 1993*, Aspen, a general contractor, entered into an agreement with Whipple, a licensed plumbing contractor, to provide [\*\*\*2] labor and materials for HVAC and plumbing work on three separate properties. When problems arose with the HVAC work on one of the properties, Aspen discharged Whipple and refused to remit any further payment until corrections were made. Whipple responded by filing mechanics' liens on all three properties and commencing three separate foreclosure actions that were later consolidated for purposes of trial.

[\*P3] Before trial, Aspen filed a motion to dismiss the HVAC portion of Whipple's mechanics' lien claim on the basis that Whipple lacked proper HVAC licensure as required by *Utah Code Ann. § 58-55-604* (1998). The trial court granted Aspen's motion, however, it invoked common law principles of equity [\*\*521] and determined that because Whipple had conferred a benefit upon Aspen, Whipple should be awarded the value of that benefit. The court further determined that there were deficiencies in Whipple's HVAC work and therefore, awarded Whipple the value of this work, less the cost Aspen would incur in correcting the deficiencies.

[\*P4] In June 1995, the trial court issued a scheduling order which required Whipple to disclose all

witnesses by August 1, 1995, and respond to all discovery requests [\*\*\*3] by August 31, 1995. On September 22, 1995, Aspen filed another motion to dismiss alleging Whipple had violated the scheduling order by failing to disclose witnesses and respond to Aspen's discovery requests. The trial court denied Aspen's motion, ruling that Aspen was not sufficiently prejudiced because Whipple provided Aspen with a complete list of witnesses it intended to call at trial.

[\*P5] During trial, which took place in early October 1995, the court heard evidence concerning the value of the work Whipple had performed on the various properties. Aspen also pursued its counterclaim seeking damages for the allegedly defective HVAC work. The trial did not conclude as scheduled and was continued until November.

[\*P6] When the trial resumed in late November, the trial court allowed Ken Whipple to testify as an HVAC expert witness. Mr. Whipple, although not a licensed HVAC contractor during the earlier part of the trial, had obtained his HVAC license before the trial resumed. In response to Mr. Whipple's testimony, Aspen attempted to introduce the testimony of its expert regarding defects in the HVAC work. However, the trial court restricted the scope of this testimony because [\*\*\*4] Aspen failed to list its expert as a potential expert witness.

[\*P7] At the close of trial, Aspen argued that Whipple had failed to meet the threshold requirement of establishing valid mechanics' liens. In its minute entry dated November 30, 1995, the trial court requested that Aspen prepare findings of fact, conclusions of law, and a judgment, and concluded that, because neither party clearly prevailed, any award of attorney fees would be improper.

[\*P8] Aspen's counsel prepared a monetary judgment in favor of Whipple along with proposed findings of fact and conclusions of law. Whipple objected to the proposed findings because they did not include an order specifying foreclosure of the three liens and prepared separate findings which included an order of foreclosure. Aspen's counsel objected to Whipple's proposed findings, arguing there was insufficient evidence to support a foreclosure order. Whipple then filed a motion to reopen the case to take additional evidence regarding its compliance with the mechanics' lien foreclosure statute. The trial court granted Whipple's motion "in the interests of justice."

[\*P9] On September 19, 1996, the trial court held a supplemental hearing [\*\*\*5] and received evidence of the mechanics' liens and also took under advisement Whipple's request for reconsideration of an award of attorney fees. Whipple asserted that now having "prevailed" it was entitled to attorney fees as the "prevailing party." Aspen also requested attorney fees, arguing it prevailed at the outset on the claim for defective HVAC work. On March 31, 1997, the trial court entered formal findings of fact and conclusions of law and a judgment awarding Whipple \$ 3,943 for its HVAC work. The trial court also denied Aspen's fee request, instead awarding Whipple \$ 7,500 in attorney fees. In addition, the trial court allowed Whipple to foreclose on the three mechanics' liens and valued a portion of Whipple's plumbing work for sewer laterals at \$ 3,200. This appeal followed.

#### ISSUES AND STANDARDS OF REVIEW

[\*P10] Aspen raises several arguments on appeal. First, Aspen contends *Utah Code Ann. § 58-55-604* (1998) barred Whipple from maintaining this action and that the trial court erred in granting Whipple recovery on equitable grounds. This issue turns on the trial court's interpretation of a statute, which we review for correctness, without deference to the trial court's [\*\*\*6] conclusions. See *Butterfield Lumber, Inc. v. Peterson Mortgage Corp.*, 815 P.2d 1330, 1332 (*Utah Ct. App. 1991*). Second, Aspen argues the trial court abused its discretion in granting [\*\*522] Whipple's motion to reopen on grounds not provided in Rule 59 of the Utah Rules of Civil Procedure. "Consideration of a motion to grant a new trial or open a judgment for additional evidence under . . . [Rule 59] is a matter left to the discretion of the trial judge, and that decision will be reversed only if the judge has abused that discretion by acting unreasonably." *Paryzek v. Paryzek*, 776 P.2d 78, 81 (*Utah Ct. App. 1989*) (citation omitted).

[\*P11] Third, Aspen claims there is insufficient evidence to support the trial court's determination that Whipple adequately complied with section 38-1-7 of the mechanic's lien statute or its valuation of Whipple's plumbing work for sewer laterals. "We review the trial court's findings of fact for clear error and its legal conclusions for correctness." *Smith v. Batchelor*, 934 P.2d 643, 646 (*Utah 1997*). Fourth, Aspen argues the trial court erred in denying its request for attorney fees and failed to properly allocate Whipple's attorney fee award

[\*\*\*7] according to its underlying claims. Whether attorney fees are recoverable in an action is a question of law, which we review for correctness. *See Robertson v. Gem Ins. Co.*, 828 P.2d 496, 499 (Utah Ct. App. 1992). Finally, Aspen argues the trial court abused its discretion by refusing to dismiss Whipple's case for noncompliance with the scheduling order, permitting Ken Whipple to testify as an HVAC expert, and in limiting the testimony of Aspen's expert witness. Trial courts have broad discretion in managing the cases before them and we will not interfere with their decisions absent an abuse of discretion. *See Berrett v. Denver & Rio Grande W. R.R. Co.*, 830 P.2d 291, 293 (Utah Ct. App. 1992).

## ANALYSIS

### 1. Licensing Requirements

[\*P12] Aspen contends that Whipple's failure to comply with the licensing requirements of *section 58-55-604*, precludes Whipple from maintaining this action and that the trial court erred in allowing Whipple to recover on equitable grounds. We agree.

[\*P13] *Section 58-55-604 of the Utah Code* provides that "no contractor may . . . commence or maintain any action . . . for collection of compensation for performing any act for which a license [\*\*\*8] is required . . . without alleging and proving that he [or she] was a properly licensed contractor when the contract sued upon was entered into, and when the alleged cause of action arose." *Utah Code Ann. § 58-55-604* (1998). Our Legislature has determined that proper licensure is of paramount importance and that if a contractor performs work without the requisite license, it should be denied compensation. Thus, the statute serves the dual purpose of protecting the public from incompetent contractors, while sanctioning contractors who fail to obtain proper licensure.

[\*P14] However, this statutory bar is not without exception. We have recognized that the statutory bar "does not preclude the application of the previous common law exceptions to the general rule of non-recovery." *Govert Copier Painting v. Van Leeuwen*, 801 P.2d 163, 169 (Utah Ct. App. 1990). Thus, a court addressing the issue of whether an unlicensed contractor may maintain an action for quantum meruit must: (1) determine whether the contractor is properly licensed or whether its status as an unlicensed contractor places it

within the purview of *section 58-55-604*; and (2) determine whether the contractor is entitled [\*\*\*9] to relief under common law principles despite its non-licensure and support that conclusion with appropriate findings of fact. In other words, if the court concludes the claim falls within the purview of *section 58-55-604*, but the common law exceptions apply, then the statutory bar will not preclude suit. However, if the court determines *section 58-55-604* applies but the common law exceptions are inapplicable, then *section 58-55-604* absolutely bars the action.

[\*P15] Here, the trial court stated "*section 58-55-604 U.C.A.* is controlling in this case . . . [and Whipple's] failure to comply with the statute is sufficient grounds for the Motion to Dismiss to be granted as a matter of law . . ." The trial court then proceeded to allow Whipple to maintain its action below and ultimately recover under "principles of equity." The court failed to adequately explain which common law rules, if any, it applied in this case, or support its [\*\*\*523] decision with appropriate findings of fact. Nevertheless, because of our obligation to affirm the trial court on any available basis, *see White v. Deseelhorst*, 879 P.2d 1371, 1376 (Utah 1994), we address whether any of the common law exceptions [\*\*\*10] allow Whipple to maintain its action.

[\*P16] The Utah common law exceptions are premised on the theory that rigid insistence on proper licensure is unnecessary as long as the public is otherwise protected from the harm the statute is designed to prevent. *See American Rural Cellular v. Systems Communication Corp.*, 890 P.2d 1035, 1040 (Utah Ct. App. 1995). Utah courts have generally allowed unlicensed contractors to recover for quantum meruit in four instances where, notwithstanding the contractor's lack of proper licensure, the licensing statute's purpose is met.

[\*P17] First, unlicensed contractors have been allowed to recover when the party for whom the work is to be done possesses skill or expertise in the field. *See id.* Here, there is no evidence showing Aspen was knowledgeable or skilled in HVAC work. We cannot infer from Aspen's general contracting status that it possessed special skill or expertise sufficient to protect itself from incompetent HVAC work. *See Wilderness Bldg. Sys., Inc. v. Chapman*, 699 P.2d 766, 768 (Utah 1985) (rejecting unlicensed contractor's argument that contracting party's reservation of plumbing work for itself rendered it knowledgeable [\*\*\*11] in that field).

[\*P18] Second, an unlicensed contractor may recover if the work it performed was supervised by a licensed contractor. *See American Rural Cellular*, 890 P.2d at 1040. The cases in which this principle has been applied have all involved supervision or labor by a properly licensed third party thereby protecting the original contracting party from the unlicensed contractor's incompetence. *See Kinkella v. Baugh*, 660 P.2d 233, 236 (Utah 1983) (refusing to apply statutory bar where unlicensed contractor was supervised by licensed contractor and therefore, original contracting party "received whatever protection is afforded by compliance with the licensing statute"); *Motivated Management Int'l v. Finney*, 604 P.2d 467, 468 (Utah 1979) (allowing unlicensed contractor to recover where "at least part of the construction was performed by a licensed contractor" because the licensed party's involvement adequately protected original contracting party); *Fillmore Prods. v. Western States Paving, Inc.*, 561 P.2d 687, 690 (Utah 1977) (providing when general contractor hired unlicensed subcontractor to provide plumbing work, unlicensed subcontractor could recover because [\*\*\*12] entire project was supervised by licensed project engineer who ensured job was done properly). In this case, Aspen did not have the added protection of a properly licensed contractor to ensure the HVAC work was adequately completed. Instead, Whipple performed the work on its own without the supervision of someone with proper licensure. Thus, we conclude Whipple's HVAC work was not adequately supervised to invoke this exception to the statutory bar.

[\*P19] Third, if the reason a contractor fails to obtain proper licensure is minor and does not undermine its ability to perform its work, the unlicensed contractor may recover. *See American Rural Cellular*, 890 P.2d at 1040; *see also Loader v. Scott Constr. Corp.*, 681 P.2d 1227, 1229-30 (Utah 1984) (permitting recovery where contractor mistakenly, but in good faith, believed he could perform work under partner's license); *Lignell v. Berg*, 593 P.2d 800, 804-05 (Utah 1979) (allowing recovery where otherwise properly qualified contractor mistakenly allowed license to lapse for nonpayment of renewal fee). Here, the record shows Whipple has provided HVAC work for many years without proper licensure. Although Mr. Whipple claims he [\*\*\*13] believed in good faith his general plumbing contractors license allowed him to install HVAC forced air heating systems, the fact is, it did not. Until trial in this case,

Whipple had never complied with licensing requirements showing he possessed the technical competence or financial qualifications for licensure. Equally important, the trial court heard extensive evidence about the inadequacies of Whipple's HVAC work and ultimately concluded the HVAC work was deficient. Based on the foregoing, we conclude Whipple's failure to obtain proper HVAC licensure [\*\*524] precludes application of this common law exception.

[\*P20] Finally, courts have considered whether the contracting party relied on the subcontractor's representations that he was properly licensed and whether the subcontractor has posted a performance bond. *See American Rural Cellular*, 890 P.2d at 1041. Here, Whipple actively solicited and engaged in HVAC work for more than sixteen years. As a result, Whipple implicitly represented to its customers that it was properly licensed and qualified to perform such work. In addition, although Whipple claims it maintained liability insurance to protect its customers, Whipple has offered [\*\*\*14] no evidence of a performance bond. Therefore, we conclude Whipple does not fall within this final exception to the statutory bar.

P21 In sum, we have determined the trial court properly applied *section 58-55-604* to this case because Whipple performed HVAC work without proper licensure. We also conclude, however, that the trial court erred in allowing Whipple to recover for HVAC work under "principles of equity" because the common law exceptions to *section 58-55-604* are inapplicable in this case. We therefore reverse the trial court's ruling regarding this issue, and vacate any award to Whipple based on the HVAC work.

## 2. Motion to Reopen

[\*P22] Aspen next argues the trial court abused its discretion in granting Whipple's motion to reopen "in the interests of justice." We disagree.

[\*P23] The Utah Supreme Court has stated that it lies within the sound discretion of the trial court to grant a motion to reopen for the purpose of taking additional testimony after the case has been submitted but prior to entry of judgment. *See Lewis v. Porter*, 556 P.2d 496, 497 (Utah 1976). Furthermore, the court has directed lower courts to consider such a motion "in light [\*\*\*15] of all the circumstances and grant or deny it in the

interest of fairness and substantial justice." *Id.*

[\*P24] Here, the trial judge stated "[I am g]oing to grant the motion to reopen and in the interests of justice, I think there [are] some *glaring misunderstandings in the presentation of the evidence*; and the Court is going to allow the plaintiff to re- open as requested in their motion." (Emphasis added.) In addition, the mechanics' lien claims in this case were actually litigated and the court granted Whipple's motion to address the parties' basic disagreement over the validity of the liens at issue. Testimony of the filing, service, and content of the liens had already been received into evidence. The documents sought to be introduced by the motion to reopen were exhibits to Whipple's complaint served on Aspen to commence the actions. Nothing unexpected was allowed into evidence as a result of the motion to reopen being granted. The trial court's decision did not deprive Aspen of a full and fair consideration of the issues regarding the mechanics' liens. Therefore, we conclude the trial court did not abuse its discretion.

### 3. Compliance with Mechanics' Lien Statute [\*\*\*16] and Value of Lateral Work

[\*P25] Aspen also argues there is insufficient evidence to support two factual determinations by the trial court: (1) that Whipple complied with section 38-1-7 of the mechanics' lien statute; and (2) that the value of Whipple's plumbing work for sewer laterals was \$ 3,200. In contesting the trial court's ultimate conclusions regarding Whipple's compliance with the mechanic's lien statute and the value of its plumbing work, Aspen must show either that the conclusions are incorrect given the findings or that the "factual findings underlying . . . [the trial court's] determinations are clearly erroneous." *Cellcom v. Systems Communication Corp.*, 939 P.2d 185, 189 (*Utah Ct. App.* 1997). On appeal, Aspen attacks the findings themselves.

[\*P26] To challenge the trial court's findings, Aspen must "marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence[.]" thus making them clearly erroneous. *Id.* (citations omitted). We will uphold the trial court's findings of fact if the party [\*\*525] challenging the findings fails [\*\*\*17] to appropriately marshal all the evidence supporting the findings. See *Allred v. Brown*, 893 P.2d 1087, 1090

(*Utah Ct. App.* 1995).

[\*P27] Here, Aspen has simply failed to meet this burden. It did not marshal all the evidence supporting the trial court's findings or show that, viewing the evidence in a light favorable to the court's rulings, the findings were clearly erroneous.

Aspen ignores, for example, the fact that Whipple offered copies of the mechanics' liens into evidence which the court accepted into evidence as being authenticated documents. Aspen also disregards the extensive evidence presented at trial regarding the value of Whipple's plumbing work. Rather, Aspen merely restates those facts favorable to its position or in the alternative argues there was insufficient evidence to support the trial court's findings.

[\*P28] Although Aspen maintains it adequately marshaled the evidence in an addendum to its brief, the Utah Supreme Court has denounced the practice of marshaling evidence in an appendix stating that "this does not comply with the requirement to marshal evidence. It is improper for counsel to attempt to enlarge the page limit of briefing by placing critical [\*\*\*18] facts in appendices." *DeBry v. Cascade Enters.*, 879 P.2d 1353, 1360 n.3 (*Utah* 1994). Worse yet, the addendum does not include a properly focused marshaling of the evidence supporting particular findings under attack, but rather is a comprehensive catalogue of all testimony in the record. Thus, we must assume the evidence supported the findings underlying the trial court's determination that Whipple complied with section 38-1-7 of the mechanics' lien statute and that it adequately valued Whipple's plumbing work. Accordingly, Aspen's argument fails.

[\*P29] We note however, that the trial court's Conclusion of Law No. 5 includes Whipple's HVAC work as part of the order of foreclosure. As previously discussed, Whipple is precluded by *section 58-55-604* from recovering for its HVAC work. Thus, to the extent Conclusion of Law No. 5 is inconsistent with this opinion, it, and any part of the judgment that follows therefrom, is vacated.

### 4. Attorney Fees

[\*P30] Aspen next asserts the trial court erred in denying its request for attorney fees arguing that because it prevailed against Whipple on the HVAC portion of Whipple's mechanics' lien claim, it is the prevailing party.

In light [\*\*\*19] of our disposition of the preceding issues, this contention may have merit.

[\*P31] The Utah mechanics' lien statute provides "in any action brought to enforce any lien under this chapter the successful party shall be entitled to recover reasonable attorneys' fee, to be fixed by the court, which shall be taxed as costs in the action." *Utah Code Ann. § 38-1-18* (1997). In this case, although the trial court initially granted Aspen's motion to dismiss the HVAC portion of Whipple's mechanics' lien claim because of improper licensure, it went on to award Whipple the value of the work performed on Aspen's property. Based in part on this finding, the trial court concluded that Whipple was the prevailing party and entitled to an award of attorney fees. However, this conclusion may be erroneous in light of our determination that *section 58-55-604* precludes Whipple from recovering for its HVAC work. Based upon our review of the record, it appears the HVAC claim was the single most important issue in this case and Aspen, having fully prevailed on the HVAC claim in this appeal, may now be entitled to prevailing party status under *section 38-1-18*. If on remand the trial court determines Aspen [\*\*\*20] is the prevailing party<sup>1</sup> under *section 38-1-18*, then Aspen must be given the opportunity to present evidence regarding attorney fees incurred in pursuing its claim. We therefore remand this issue to the trial court for a redetermination of the attorney fees award consistent with this opinion and the entry of findings necessary to support the revised award.

1 On remand, the trial court may find helpful the guidance on this issue offered by *Mountain States Broad. Co. v. Neale*, 783 P.2d 551, 555-58 (*Utah Ct. App.* 1989).

[\*\*526] P32 Aspen also asserts the trial court erred in failing to properly allot Whipple's attorney fees award according to its underlying claims. We agree. The Utah Supreme Court has required a party seeking attorney fees to allocate its request for fees according to its underlying claim. *See Foote v. Clark*, 962 P.2d 52, 55 (*Utah* 1998). The party must differentiate between the fees and time expended for "(1) successful claims for which there may be an entitlement to attorney fees, (2) [\*\*\*21] unsuccessful claims for which there would have been an entitlement to attorney fees had the claims been successful, and (3) claims for which there is no entitlement for attorney fees." *Cottonwood Mall Co. v.*

*Sine*, 830 P.2d 266, 269-70 (*Utah* 1992). This requirement also obligates the trial court to make findings which closely resemble the requesting party's allocation of fees on each claim. *See Foote*, 962 P.2d at 55. Finally, the trial court must clearly identify and document the factors it considered dispositive in calculating the award. *See id.* Absent such an allocation and documentation, this court cannot adequately review the trial court's decision. *See 962 P.2d at 57.*

[\*P33] Here, Whipple submitted an affidavit requesting attorney fees. However, the affidavit did not differentiate between the work done that was subject to a fee award and work that was not. The court acknowledged that it "had difficulty, based on [Whipple's] attorney fee affidavit, in separating the amount of time involved with the mechanics' liens as opposed to the amount of time spent on other matters." Although Whipple's failure to apportion attorney fees was a sufficient basis for the trial court [\*\*\*22] to deny its fee request, *see Utah Farm Prod. Credit Ass'n v. Cox*, 627 P.2d 62, 66 (*Utah* 1981), the court went on to state that "in consideration of the complexity of the case and the total amount involved, plaintiff should be awarded . . . \$ 7,500 in attorney fees . . ."

[\*P34] Because the trial court failed to properly categorize the fee request or detail the factors it considered in computing the award, *see Foote*, 962 P.2d at 56 (concluding "where the parties' evidentiary submissions in support of a request for attorney fees are deficient, so will be the court's evaluation of those fees"), we reverse and remand the issue of fees to the trial court for a redetermination of the prevailing party, and, based on that determination, an award of attorney fees consistent with this opinion.

## 5. Scheduling Order and Expert Testimony

[\*P35] Finally, Aspen contends the trial court abused its discretion by failing to dismiss Whipple's case for noncompliance with the scheduling order, permitting Ken Whipple to testify as an HVAC expert, and in limiting the scope of testimony provided by Aspen's expert witness.

### A. Scheduling Order

[\*P36] Aspen asserts the trial court abused [\*\*\*23] its discretion in allowing Whipple to proceed with its case



despite its failure to comply with the trial court's scheduling order. Because the trial judge deals directly with the parties and the discovery process, he or she has great latitude in determining the most efficient and fair manner to conduct the court's business. *See Utah Dep't of Transp. v. Osguthorpe*, 892 P.2d 4, 6 (Utah 1995). As a result, trial courts have broad discretion in determining whether a violation of a scheduling order warrants sanction. *See id.* The purpose behind a scheduling order is to allow the parties to properly prepare for trial and to save the parties from unnecessary expenses. *See DeBry*, 879 P.2d at 1361.

[\*P37] Here, the trial court determined that although Whipple failed to adequately comply with the scheduling order, Aspen was provided with sufficient information to prepare for trial. The court noted that in Whipple's response to Aspen's interrogatories, Whipple had specified the witnesses it was going to call at trial and the substance of their testimony. Thus, the trial court determined Aspen was not prejudiced by Whipple's violation of the scheduling order. Because Aspen obtained [\*\*\*24] the information necessary to adequately prepare for trial, we conclude the trial court did not abuse its discretion in refusing to dismiss Whipple's case.

#### [\*\*527] B. Expert Testimony

[\*P38] Aspen also asserts the trial court abused its discretion in allowing Ken Whipple to testify as an expert regarding the cost and adequacy of Whipple's HVAC work and in limiting the scope of testimony provided by Aspen's expert witness. We conclude that any errors in this regard were harmless.

[\*P39] In order to prove its entitlement to relief on appeal, Aspen must show it was prejudiced or harmed by the trial court's action. *See Astill v. Clark*, 956 P.2d 1081, 1088 (Utah 1998). Because we have determined *section 58-55-604* precludes Whipple from maintaining an action to recover the cost of its HVAC work, the expert testimony regarding the valuation of Whipple's HVAC work is irrelevant. In other words, the cost Whipple

incurred in performing the HVAC work is no longer an issue. Furthermore, Aspen does not contest the court's finding concerning the cost Aspen will incur in repairing the defective HVAC work and therefore, we assume its accuracy. *See Cellcom*, 939 P.2d at 189. Thus, the trial [\*\*\*25] court's rulings regarding the admission of expert testimony could not have harmed or prejudiced Aspen in any way and therefore, we affirm the trial court's ruling on this ground.

#### CONCLUSION

[\*P40] Because Whipple failed to comply with the licensure requirements of *section 58-55-604* and none of the common law exceptions to the statutory bar apply, Whipple is precluded from recovering for its HVAC work. Further, we have determined the trial court did not abuse its discretion in granting Whipple's Rule 59 motion "in the interests of justice." Also, because Aspen failed to marshal the evidence in support of the trial court's findings regarding Whipple's compliance with the mechanics' lien statute and the value of Whipple's sewer lateral work, we decline to disturb those findings. We also remand the issue of attorney fees to the trial court for a redetermination of the prevailing party and a proper allocation of attorney fees to that party. Finally, Aspen was not prejudiced by the trial court's actions in failing to dismiss Whipple's case for noncompliance with the scheduling order, permitting Ken Whipple to testify as a HVAC expert, or in limiting the scope of testimony provided [\*\*\*26] by Aspen's expert witness.

[\*P41] Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

Michael J. Wilkins,

Presiding Judge

[\*P42] WE CONCUR:

James Z. Davis, Judge

Gregory K. Orme, Judge



LEXSEE 874 P2D 840

**Amax Magnesium Corp., Plaintiff and Respondent, v. Utah State Tax Commission  
and Tooele County, Defendants and Petitioners.**

No. 930158

**SUPREME COURT OF UTAH**

*874 P.2d 840; 238 Utah Adv. Rep. 6; 1994 Utah LEXIS 34*

**April 29, 1994, FILED**

**SUBSEQUENT HISTORY:**     [\*\*1] Released for  
Publication May 20, 1994. As Corrected May 26, 1994.

**PRIOR HISTORY:**     Original Proceeding in the Court  
of Appeals

**COUNSEL:** Mark K. Buchi, David K. Detton, R. Bruce  
Johnson, Steven C. Bednar, Salt Lake City, for Amax  
Magnesium.

Jan Graham, Att'y Gen., Brian L. Tarbet, Asst. Att'y  
Gen., Salt Lake City, for Tax Commission.

Ronald L. Elton, Tooele, and Bill Thomas Peters, Salt  
Lake City, for Tooele County.

**JUDGES:** RUSSON, Zimmerman, Howe, Stewart,  
Durham

**OPINION BY:** RUSSON

**OPINION**

[\*840] On Certiorari to the Utah Court of Appeals

*RUSSON, Justice:*

This case came to us on petition for a writ of  
certiorari to the Utah Court of Appeals. We granted  
certiorari to review the court of appeals' conclusion that  
*Amax Magnesium Corp. v. Utah State Tax Commission*,  
*796 P.2d 1256 (Utah 1990) (Amax I)*, requires the Utah

State Tax Commission to apply a twenty percent  
reduction in valuation pursuant to Utah Code Ann. §  
59-5-4.5 (Supp. 1986) to all of Amax Magnesium  
Corporation's property, whether real or personal. We  
reverse and remand.

FACTS

On January 2, 1987, Amax Magnesium Corporation  
(Amax) petitioned the Utah [\*841] State Tax  
Commission (Tax Commission) for a formal hearing  
concerning the 1986 [\*\*2] ad valorem tax assessment on  
Amax's property located in Tooele County, Utah. Amax  
argued that its property should have been assessed by  
Tooele County, not the state property tax division, and  
thus, Amax was entitled to a twenty percent discount  
pursuant to Utah Code Ann. § 59-5-4.5(1) (Supp. 1986).<sup>1</sup>  
Alternatively, Amax asserted that even if it was proper  
for the state tax division to assess its property, Amax was  
still entitled to a twenty percent discount to avoid  
unconstitutional taxation. Following formal hearings, the  
Tax Commission found that (1) it was proper for the state  
property tax division to assess the property, and (2) the  
twenty percent reduction prescribed by section 59-5-4.5  
did not apply to state-assessed property. Based on these  
findings, the Tax Commission concluded that the twenty  
percent reduction required by section 59-5-4.5 did not  
apply to Amax's property. Amax subsequently filed a  
petition for reconsideration, which the Tax Commission  
denied.

<sup>1</sup> Section 59-5-4.5(1), which has since been  
repealed, provided:

When the county assessor uses the comparable sales or cost appraisal method in valuing taxable property for assessment purposes, the assessor is required to recognize that various fees, services, closing costs, and other expenses related to the transaction lessen the actual amount that may be received in the transaction. The county assessor shall, therefore, take 80% of the value based on comparable sales or cost appraisal of the property as its reasonable fair cash value for purposes of assessment.

[\*\*3] On June 29, 1988, Amax petitioned this court to review the Tax Commission's decision. We reversed the Tax Commission, holding that the state's use of a tax valuation method identical to the county's on Amax's property without applying the county's twenty percent reduction as provided by section 59-5-4.5 violated article I, section 24 and article XIII, sections 2 and 3 of the Utah Constitution. *Amax I*, 796 P.2d at 1262. Accordingly, we remanded the case "for the purpose of calculating the reasonable fair cash value of Amax's real and personal property pursuant to the formula set out in Utah Code Ann. § 59-5-4.5." *Id.*

After a formal hearing on remand, the Tax Commission found that *Amax I* required property owners to "bear an equal portion of the tax burden in proportion to the amount of property owned" (quoting *id. at 1260*). The Tax Commission therefore concluded that the twenty percent reduction set forth in section 59-5-4.5 "should be applied to that portion of the 1986 AMAX taxable property which was valued using the same methodology as was used on the same type of property by the Tooele County Assessor [\*\*4] in 1986." Accordingly, on February 25, 1992, the Tax Commission ordered that "further proceedings be held before the Utah State Tax Commission to ascertain which properties located within Tooele County received the application of Utah Code Annotated § 59-5-4.5 in 1986 and to apply said statute to the same class of property owned by [Amax] as of January 1, 1986."

On March 26, 1992, Amax filed a second petition for review, asserting that the Tax Commission had failed to implement this court's remand order in *Amax I* by not giving Amax an across-the-board tax reduction on all of its assessed property. We transferred the case to the court of appeals pursuant to Utah Code Ann. § 78-2-2(4) (Supp. 1993) and Utah Rule of Appellate Procedure 42.<sup>2</sup> On March 3, 1993, the court of appeals issued *Amax Magnesium Corp. v. Utah State Tax Commission*, 848 P.2d 715 (Utah Ct. App. 1993) (*Amax II*), in which it held that the Tax Commission "failed to follow the directives of *Amax I* when it refused to apply section 59-5-4.5 to all Amax's property." *Id. at 719*. Tooele County petitioned for a writ of certiorari, which we granted. [\*\*5]

<sup>2</sup> Section 78-2-2(4) provides, "The Supreme Court may transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction, except [matters within the Supreme Court's exclusive jurisdiction]." Similarly, Utah Rule of Appellate Procedure 42(a) states, "At any time before a case is set for oral argument before the Supreme Court, the Court may transfer to the Court of Appeals any case except those cases within the Supreme Court's exclusive jurisdiction."

The sole issue before us is whether *Amax I* requires the Tax Commission to grant a [\*842] twenty percent reduction for all of Amax's property, whether real or personal.

#### STANDARD OF REVIEW

This case presents a question of law, namely, whether the Tax Commission and the court of appeals correctly interpreted this court's decision in *Amax I*. Therefore, we apply a correction of error standard. *Allen v. Utah Dep't of Health*, 850 P.2d 1267, 1269 (Utah 1993).

#### ANALYSIS

The Utah Constitution provides: [\*\*6]

All tangible property in the state, not exempt under the laws of the United States, or under this Constitution, shall be taxed at a uniform and equal rate in proportion to its value, to be ascertained as provided by law.

*Utah Const. art. XIII, § 2(1)*. Further, section 3 of article XIII states in part:

The Legislature shall provide by law a uniform and equal rate of assessment on all tangible property in the state, according to its value in money, except as otherwise provided in Section 2 of this Article. The Legislature shall prescribe by law such provisions as shall secure a just valuation for taxation of such property, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its tangible property.

*Utah Const. art. XIII, § 3(1)*. Pursuant to these sections, property taxation must be uniform and equal according to the property's value.

To meet these requirements, the legislature has provided that "all tangible property in this state . . . shall be taxed at a uniform and equal rate in proportion to its value," Utah Code Ann. § 59-1-1 (Supp. 1986), and that "all taxable property, except as otherwise provided by law, shall be [\*\*7] assessed at 100% of its reasonable fair cash value." Utah Code Ann. § 59-5-1(1)(a) (Supp. 1986). In these code provisions, the legislature has recognized the necessity of uniformity and equality in property taxation and set the assessment rate at one hundred percent of the property's reasonable fair cash value.

However, the legislature, realizing that various transaction costs will increase the assessed value under some methods, created an exception to the requirement that property be taxed at one hundred percent of its assessed value. Specifically, it provided that when the county assessor uses either the comparable sales or the cost appraisal method, the county must discount the appraised value by twenty percent. Utah Code Ann. § 59-5-4.5 (Supp. 1986). This exception was created in recognition that these valuation methods are particularly sensitive to inflation. *Board of Equalization v. Utah State Tax Comm'n ex rel. Benchmark, Inc.*, 864 P.2d 882, 885 (Utah 1993); *Amax I*, 796 P.2d at 1260; *Rio Algom Corp. v. San Juan County*, 681 P.2d 184, 190 (Utah 1984).

Given both the constitutional [\*\*8] and statutory requirements of uniformity and equality in property

taxation, this court reasoned in *Amax I* that it was unconstitutional to apply a reduction to only county-assessed property when state property was assessed using identical assessment methods. *Amax I*, 796 P.2d at 1261-62. Accordingly, we held that when either the county or the state uses the comparable sales or cost appraisal method of assessment, the property owner is entitled to a twenty percent reduction in valuation pursuant to section 59-5-4.5 and the Utah Constitution. *Id.* at 1260; see also *Board of Equalization*, 864 P.2d at 886 ("We held [in *Amax I*] that because the properties had been assessed by the same method, applying the 20 percent discount to one and not to the other violated the constitutional requirement of uniform and equal taxation.").

*Amax* nonetheless argues that because the last sentence of *Amax I* states that "we reverse and remand to the Tax Commission for the purpose of calculating the reasonable fair cash value of *Amax's* real and personal property pursuant to the formula set out in Utah [\*\*9] Code Ann. § 59-5-4.5," *Amax I*, 796 P.2d at 1262, its personal property is necessarily entitled to a twenty percent discount pursuant to section 59-5-4.5. We disagree.

*Amax I* provides that when identical methods of property valuation are used by [\*\*843] both the county and the state to assess taxable property, it is unconstitutional to give county property a reduction without giving state property the same reduction. 796 P.2d at 1260. However, when different methods of property valuation are used, the law does not mandate a reduction. *Rio Algom*, 681 P.2d at 194. Likewise, when neither the comparable sales nor the cost appraisal method of assessment is used, no such reduction is appropriate to either county- or state-assessed property, be it real or personal. See Utah Code Ann. § 59-5-4.5 (Supp. 1986) (requiring reduction only when comparable sales or cost appraisal method of assessment used). Accordingly, when the Tax Commission ordered that "further proceedings be held before the Utah State Tax Commission to ascertain which properties located within Tooele County received the application [\*\*10] of Utah Code Annotated § 59-5-4.5 in 1986 and to apply said statute to the same class of property owned by [*Amax*] as of January 1, 1986," it did not violate either the reasoning or the holding of *Amax I*. Rather, it acted properly in seeking to determine which of *Amax's* properties were assessed by using either the comparable sales or the cost

appraisal method.

Michael D. Zimmerman, Chief Justice

CONCLUSION

Richard C. Howe, Justice

We reverse the court of appeals' decision in *Amax II* and remand this matter to the Tax Commission for further proceedings as outlined in its February 25, 1992, order.

I. Daniel Stewart, Associate Chief Justice

Christine M. Durham, Justice

WE CONCUR:



LEXSEE 2005 UT APP 168

**AWINC Corp., Plaintiff and Appellee, v. Randy T. Simonsen, Defendant and Appellant.**

**Case No. 20030318-CA**

**COURT OF APPEALS OF UTAH**

*2005 UT App 168; 112 P.3d 1228; 523 Utah Adv. Rep. 27; 2005 Utah App. LEXIS 176*

**April 14, 2005, Filed**

**PRIOR HISTORY:** [\*\*\*1] Fourth District, Heber City Department. The Honorable Donald J. Eyre Jr.

standing argument and thus we refuse to deal with it in detail. *See Calhoun v. State Farm Mut. Auto. Ins. Co., 2004 UT 56, P34, 96 P.3d 916* (declining to address an issue that was inadequately briefed).

**COUNSEL:** Reed M. Richards, Ogden, for Appellant.

Gary A. Weston, Salt Lake City, for Appellee.

**JUDGES:** Judith M. Billings, Presiding Judge. WE  
**CONCUR:** James Z. Davis, Judge, Pamela T. Greenwood, Judge.

[\*\*\*2] [\*P3] Simonsen attempted to block access to Middle Fork Road. In 1996 or 1997, Simonsen placed a metal gate (the Gate) across Middle Fork Road and constructed a fence which extended 200 feet on each side of the Gate. Also in 1997, a fence wire drop gate (the Livestock Gate) was constructed across Middle Fork Road. The gates prevented use of that part of the road by AWINC.

**OPINION BY:** Judith M. Billings

## OPINION

[\*\*1229] BILLINGS, Presiding Judge:

[\*P1] Defendant Randy T. Simonsen (Simonsen) appeals from the trial court's determination that an unimproved mountain road which crosses Simonsen's property and leads to AWINC Corporation's property (AWINC) is a public road under *Utah Code section 72-5-104(1)*. *See Utah Code Ann. § 72-5-104(1)* (2004). We affirm.

[\*P4] From the 1960s until 1995, portions of what is now Simonsen's property were leased for sheep grazing purposes. One or more of the lessees placed rocks and tires along a neighboring road called Left Fork Road with words declaring "No Trespass." Signed rocks were also placed in the general area where Middle Fork Road accessed Left Fork Road, but these signs did not halt public use of Middle Fork Road.

## BACKGROUND

[\*P2] AWINC and Simonsen own property on adjacent parcels in the Uinta National Forest.<sup>1</sup> Both properties are accessed by an unimproved mountain road (Middle Fork Road).

[\*P5] At least four individuals testified that their friends and family used Middle Fork Road for recreational purposes on a regular basis. Cullen Goodwin, David Ellis, Fred Addis, and Kenneth Earle testified for AWINC as to their use of Middle Fork Road by themselves, friends, and members of their respective families over a period of many years. They testified that they did not own property in [\*\*\*3] the vicinity of Middle Fork Road nor in the Soldier Summit mountain area, that they used Middle Fork Road without ever

<sup>1</sup> AWINC has failed to adequately brief his

asking permission or having been given permission for its use, and that while operating motor vehicles on the road, it was common for them to encounter other people not part of their group or party who were also operating motor vehicles on the road. These individuals testified that they were never asked not to use the road, nor were they told that they could not use the road. Moreover, they testified that none of them at anytime had seen a gate across Middle Fork Road prior to the recent construction of the Gate and the Livestock Gate.

[\*P6] AWINC initiated litigation against Simonsen claiming a prescriptive easement, including a claim for trespass, damages for the erection of the Gate across Middle Fork Road, a request for permanent injunction requiring the opening of the Gate, and a request for a declaratory judgment that Middle Fork Road be determined a public road. The trial court dismissed AWINC's claims for a prescriptive easement, damages, and an injunction to remove the Gate. However, at the conclusion of the trial, the court determined [\*\*1230] that, pursuant [\*\*\*4] to *Utah Code section 72-5-104(1)* and its predecessor, *Utah Code section 27-12-89*, Middle Fork Road was a public road and directed Simonsen to remove the lock from the Gate blocking the road. Simonsen appeals.

#### ISSUES AND STANDARDS OF REVIEW

[\*P7] First, Simonsen argues the trial court erred in concluding Middle Fork Road was a public road because there was not sufficient evidence to sustain the clear and convincing burden of proof. To establish the dedication of a public road, we require clear and convincing evidence. *See Thomson v. Condas*, 27 Utah 2d 129, 493 P.2d 639, 639 (1972). It is well established that we review findings of fact under the clearly erroneous standard. *See State v. Pena*, 869 P.2d 932, 935 (Utah 1994). To find clear error, this court "must decide that the factual findings made by the trial court are not adequately supported by the record, resolving all disputes in the evidence in a light most favorable to the trial court's determination." *Id. at 935-36*.

[\*P8] Second, Simonsen argues that the trial court erred as a matter of law by determining that Middle Fork Road is a road abandoned to the public. We [\*\*\*5] review application of law for correctness. *See id. at 936* (stating that in reviewing "a trial court's determination of the law[,] . . . [an] appellate court decides the matter for itself and does not defer in any degree to the trial judge's

determination of law").

#### ANALYSIS

##### I. Marshaling

[\*P9] Simonsen argues that the court's factual findings were not supported by clear and convincing evidence. Because Simonsen challenges the factual findings, he "must marshal the evidence in support of the findings and then demonstrate that despite this evidence," the trial court's findings are not supported by clear and convincing evidence. *Young v. Young*, 1999 UT 38, P15, 979 P.2d 338 (quoting *In re Estate of Bartell*, 776 P.2d 885, 886 (Utah 1989) (other citation omitted)). To properly marshal the evidence, Simonsen must first list all of the evidence supporting the challenged finding. *See, e.g., Tingey v. Christensen*, 1999 UT 68, P7, 199 Utah 68, 987 P.2d 588. Simonsen must then show that the marshaled evidence is legally insufficient to support the findings when viewing the evidence and inferences in a light most favorable [\*\*\*6] to the decision. *See id.*

[\*P10] Simonsen has failed to properly marshal the evidence to show that the findings are not supported by clear and convincing evidence. Simonsen failed to, "in comprehensive and fastidious order, [present] every scrap of competent evidence introduced at trial which supports the very findings the appellant resists." *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah Ct. App. 1991) (emphasis added). Rather, Simonsen provided an incomplete list of evidence supporting the factual findings and then claims that the findings are not supported by clear and convincing evidence. Simonsen not only failed to provide a comprehensive list of evidence, but he also failed to "ferret out a fatal flaw in the evidence," and thus Simonsen fails "to convince [us] that the court's findings . . . [are] clearly erroneous." *Id.* Accordingly, we "assume[] that the record supports the findings of the trial court and proceed[] to a review of the accuracy of the lower court's conclusions of law and the application of that law in the case." *Heber City Corp. v. Simpson*, 942 P.2d 307, 312 (Utah 1997) (alterations [\*\*\*7] in original) (quotations and citations omitted).

##### II. Highway Abandoned to Public

[\*P11] *Utah Code section 72-5-104(1)* provides that in order to declare a highway dedicated and abandoned to the public, it must be established that the highway "has been continuously used as a public

thoroughfare for a period of ten years." *Utah Code Ann.* § 72-5-104(1) (2004). The Utah Supreme Court has determined that continuous use of a road exists when "the public, even though not consisting of a great many persons, made a continuous and uninterrupted use" not necessarily every day, but "as often as they found it convenient or necessary." *Boyer v. Clark*, 7 Utah 2d 395, 326 P.2d 107, 109 (1958); see *Heber City*, 942 P.2d at 311 [\*\*1231] (determining as a matter of law that a road was used continuously where the evidence demonstrated that "the public made a continuous and uninterrupted use of" the road "as often as they found it convenient or necessary"). Similarly, in *Richards v. Pines Ranch, Inc.*, the Utah Supreme Court stated that "use may be continuous though not constant. . . . provided it occurred as often as the claimant had occasion [\*\*\*8] or chose to pass. . . . Mere intermission is not interruption." 559 P.2d 948, 949 (*Utah* 1977) (quotations and citation omitted).

[\*P12] Simonsen argues that use of Middle Fork Road was not continuous because use was blocked by the Gate, the Livestock Gate, and "No Trespass" signs that both he and previous lessees installed. In *Campbell v. Box Elder County*, this court determined that there was not continuous use of a road because landowners generally locked a gate that crossed the road, and several witnesses testified that they were prevented access to the road due to the locked gate. See 962 P.2d 806, 809 (*Utah Ct. App.* 1998). However, *Campbell* is distinguishable from the instant case because the evidence demonstrates that members of the general public used Middle Fork Road significantly more than ten years before Simonsen erected the gates in 1996 and 1997.

[\*P13] For example, Earle, his family, and his friends used the road every year starting around July 4th through late October as early as the 1940s or early 1950s. Goodwin, Addis, their families, and their friends used Middle Fork Road every year during May and through October or [\*\*\*9] November starting in 1965. Further, Middle Fork Road was used as recently as either 1977 or 1978 by Ellis, who, along with family and friends, also used the road every year starting in May ending in November. Each witness testified that he used the road every year until the erection of the Gate in 1996 or 1997.

[\*P14] Moreover, each witness testified that he did not use the road every day, but that he used the road for recreational purposes on a regular basis so long as the weather permitted. Under Utah law, the public need only

use the road whenever they find it "necessary or convenient." *Id.* This evidence supports the trial court's determination that "the public used the road whenever they found it necessary or convenient and use was limited only by prevailing weather conditions."

[\*P15] Simonsen argues that the "No Trespass" signed rocks and tires placed in the area in the 1960s prevent a conclusion that the public used the road continuously. However, after reviewing the record, we are persuaded that the signs conveyed, and were intended to convey, the message that travelers should stay off of what is now Simonsen's property, not that travelers should stay off of [\*\*\*10] Middle Fork Road in particular. Further, it is undisputed that this was the understanding of those using the road during this period. Therefore, we agree that there was continuous use of Middle Fork Road.

[\*P16] We also agree with the trial court that Middle Fork Road was used as a public thoroughfare. To satisfy this requirement, there must be passing or travel by the public without permission.<sup>2</sup> See *Heber City Corp. v. Simpson*, 942 P.2d 307, 311 (*Utah* 1997). It is undisputed that there was travel over Middle Fork Road without permission.

<sup>2</sup> The Utah Supreme Court noted that "we have subsequently abandoned . . . the requirement that the owner must consent to the dedication." *Heber City Corp. v. Simpson*, 942 P.2d 307, 311 (*Utah* 1997).

[\*P17] In addition, the Utah Supreme Court has defined "public" in stating that adjoining property owners cannot be considered members of the public generally "because adjoining owners may have documentary or prescriptive rights to [\*\*\*11] use the road or their use may be by permission of the owners of the fee of the road." *Id.* at 312 (quoting *Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1099 (*Utah* 1995)). Here, the users of Middle Fork Road were not adjoining property owners. Each of the four users testified that he had never owned or leased property in the area of Middle Fork Road and used the road for recreational hunting, fishing, and camping. The trial court found the four users were members of the general public. We [\*\*1232] agree that the users were members of the public.

[\*P18] Finally, Simonsen contends that Middle Fork Road was not a public thoroughfare because the



users were given permission. The individuals who used Middle Fork Road testified that they obtained permission to hunt and paid a fee from time to time originally from a previous owner of a portion of what is now AWINC property and then later from AWINC. However, this permission was not for use of Middle Fork Road, but for use of what is now a portion of AWINC property. In addition, the hunting privileges were requested and secured in 1991 to 1993 at the earliest. As of that time, Ellis had been using Middle Fork [\*\*\*12] Road for at least thirteen years and Goodwin, Addis, and Earle for at least twenty-five years. Thus, we agree that any permission that was given "did not pertain to the [Simonsen property] or that portion of Middle Fork Road coursing across the [Simonsen property]" and was given long after the ten year statutory time period was fulfilled.

[\*P19] Finally, the evidence supports the trial court's determination that use of Middle Fork Road occurred for at least ten years. For example, Earle, his

family, and his friends used the road as early as the 1940s or early 1950s. Goodwin and Addis testified that their family and friends used Middle Fork Road starting in 1965. Thus, the evidence shows that continuous use by the public took place as early as the 1940s or 1950s--at least forty years before the erection of any gate or fence.

#### CONCLUSION

[\*P20] We conclude that Middle Fork Road was abandoned to public use. Accordingly, we affirm.

Judith M. Billings,

Presiding Judge

[\*P21] WE CONCUR:

James Z. Davis, Judge

Pamela T. Greenwood, Judge



LEXSEE 88 NW2D 98

**Frank X. BERGER, also known as Frank Berger, Plaintiff and Respondent, v. Ray F. BERGER, also known as Raphael F. Berger; Susan Berger, also known as Susie Berger, and Eugene Berger, Defendants and Appellants**

No. 7742

Supreme Court of North Dakota

*88 N.W.2d 98; 1958 N.D. LEXIS 64*

February 13, 1958

**SYLLABUS**[\*\*1] *Syllabus by the Court*

1. To establish a highway by prescription, there must have been general, continuous, uninterrupted and adverse use of the same as such by the public under a claim of right for a period of 20 years. Section 24-0701, NDRC 1943.

2. Mere user by the public of a highway is insufficient of itself to establish a highway by prescription or long use. The user must be adverse and hostile to the rights of the owner.

3. Regardless of how long it is continued, user by permission or license of the owner of the land sought to be impressed with a public easement of travel is not adverse and affords no basis for prescription.

4. Where before prescriptive rights have accrued to the public, a landowner places gates across a road through his land, it is notice, or at least a strong indication, to the public that thereafter they are passing through the land by permission and not by right.

5. If the evidence is equally as consistent with permissive use of a road, as with adverse use thereof, the plaintiff has failed to sustain the burden of proof resting upon him to show a use under a claim of right.

6. To establish a road over the land of another by prescription, [\*\*2] the evidence should be clear and

convincing.

7. The evidence is examined and it is held, in the case at bar, that it is more consistent with permissive use or license of the road in question than with adverse use or claim of public right, the use of the road having been always obstructed by gates and the plaintiff and the public having acquiesced in its use as thus obstructed.

**COUNSEL:** Floyd B. Sperry, Golden Valley, Baird & Baird, Dickinson, for appellants.

Reichert & Reichert, Dickinson, for respondent.

**JUDGES:** GRIMSON, C. J., and SATHRE, MORRIS and BURKE, JJ., concur.

**OPINION BY: JOHNSON****OPINION**

[\*99] JOHNSON, Judge.

This is an action in which the plaintiff asserts that there has been established by user or prescription a public road across the E 1/2 SE 1/4 of Section 30-141-91; that said road has been open and in use as a public highway for more than twenty years and that the public has established such prescriptive highway under the terms of Section 24-0701, NDRC 1943. He also asks that the defendants be enjoined and restrained from fencing and plowing up the alleged highway or in any manner

interfering with or obstructing the plaintiff and the public in the use thereof. The [\*\*3] defendants generally denied the allegations of the plaintiff's complaint; they assert that in 1947 a new road was built across the E 1/2 SE 1/4 and that the defendant, Ray F. Berger, paid the county for its construction; that the plaintiff is not denied access to his real property; that he has a way out; and asks for a dismissal of the action.

The case was tried to the court without a jury. The trial court held for the plaintiff and determined that the road in question had been established by user or prescription across the E 1/2 SE 1/4 Section 30-141-91, that is across defendants' land; that the action of the defendants in plowing [\*100] up the road and fencing it off in June of 1956, was illegal, and that they were enjoined and restrained from obstructing or interfering with the use of said highway by the plaintiff and the general public.

The defendants made a motion for a new trial on various grounds. This motion was denied by the trial court. They also made a motion to amend the answer in this action to conform to the proof. This was denied by the trial court.

With the motion for a new trial the defendants served extended specifications of error and alleged insufficiency [\*\*4] of the evidence.

The defendants appeal to this court and demand a trial de novo. In view of our disposition of this case it will not be necessary to discuss the specifications of error on the motion for a new trial, or the motion to amend the answer to conform to the proof.

We will determine the facts from the record anew without specific reference to the alleged specifications of error.

In *Berger v. Morton County*, 57 N.D. 305, 221 N.W. 270, this court held, following *Burleigh County v. Rhud*, 23 N.D. 362, 136 N.W. 1082, that since the adoption of Chapter 112 of the 1897 Session Laws, the common law rule with respect to the establishment of a highway by prescription is in force in this state.

The common law rule with reference to the acquisition of a road by prescription is embodied in Section 24-0701, NDRC 1943 which provides:

'All public roads and highways within this state which have been or which shall be open and in use as such, during twenty successive years, hereby are declared to be public roads or highways and confirmed and established as such whether the same have been laid out, established, and opened lawfully or not.'

A highway may be established by long public user [\*\*5] regardless of whether this mode of establishment is denominated user, prescription, or the acquisition of the right by limitation, it being, in any case, the adverse possession and use which establishes the highway. 39 C.J.S. Highways § 3, page 921.

The fundamental requirements for the establishment of a public highway by prescription are well defined. Prescriptive rights under our law accrue only if the fundamental rules laid down by the courts apply to the existing facts.

To establish a highway by prescription, there must have been general, continuous, uninterrupted, and adverse use of the same as such by the public under a claim of right, for a period equal to that for the limitations of real actions. It is unquestioned that a general, continuous, uninterrupted and adverse user of a highway, as such, by the public, under a claim of right, for a period equal to that of the limitation of real actions, in this state 20 years, Section 24-0701, NDRC 1943, will establish a highway by prescription, and bar the owner of the soil. See 57 Am.St.Rep., Highways by User, page 748 and cases cited.

Mere user of land by the public as a highway is insufficient of itself to establish a highway [\*\*6] by prescription or long use. The user must be adverse and hostile to the rights of the owners; and mere travel by the public does not of itself constitute adverse use of the property by the public. Regardless of how long it is continued, a user by license or permission of the owner of the land sought to be impressed with the public easement of travel is not adverse and affords no basis for prescription. 39 C.J.S. Highways § 9, page 929; *Harrison v. Harvey*, 202 Ark. 486, 150 S.W.2d 758; *People ex rel. Mayer v. San Luis Valley Land & Cattle Co.*, 90 Colo. 23, 5 P.2d 873; *Van Wieren v. Macatawa Resort Co.*, 235 Mich. 606, 209 N.W. 825. See also *Stickley v. Sodus Tp.*, 131 Mich. 510, 91 N.W. 745, [\*101] 59 L.R.A. 287; 57 Am.St.Rep. pages 757-758.

Many cases hold that to establish a prescriptive right

to a road or street the user must be open, adverse, and under a claim of right, and with the knowledge and acquiescence of the owner or owners of the land in or over which the easement is claimed. See 57 Am.St.Rep., page 749.

Permissive use has reference to the conduct of the landowner in acquiescing and consenting that the road be traveled by the public while adverse user imports [\*\*7] an assertion of right on the part of those traveling the road, hostile to that of the owner. 39 C.J.S. Highways § 9, page 929. The hostile use of a road over privately owned land necessary to establish a prescriptive right means a use inconsistent with the owner's right to exclusive use. It does not imply enmity or ill will and is consistent with friendly relations between user of the road and landowner. *King County v. Hagen*, 30 Wash.2d 847, 194 P.2d 357.

With these fundamental general rules in mind, it remains to set forth the essential facts disclosed by the record to see whether such user as is here shown of the road in question, meets the necessary requirements to establish it as a highway by user or prescription.

The plaintiff and the defendants are neighbors. The buildings of the plaintiff are located on the W 1/2 SE 1/4 Section 30-141-91. The buildings of the defendants are located in the E 1/2 SE 1/4 of the same section, township and range. Preceding the occupancy of the W 1/2 SE 1/4 of Section 30 by the plaintiff, his father, Charles Berger, had lived there for 48 years. He had homesteaded the place about 1902. He or his son, Frank X. Berger, had occupied the W [\*\*8] 1/2 SE 1/4 from that time until the trial the W 1/2 SE 1/4 from that time until the trial had existed over the E 1/2 SE 1/4 Section 30-141-91. This trail came in from the north going south for a considerable way and then turned east across the E 1/2 SE 1/4 of Section 30 to the east section line of that section. This trail probably originated in either 1912 or 1913. A bridge on the east section line of Section 30 was washed out about that time, so it was impossible to go over the section line and it appears that this trail was created shortly after that time. Some of the trail was on the plaintiff's place and crossed the entire E 1/2 of the SE 1/4 of the defendant Ray Berger's place. Both the plaintiff, Frank Berger, and his father, Charles Berger, claim that the trail was graded in 1920 or 1921. This work was done, it is claimed, by Charles Berger and his brother, John Berger, the father of Ray F. Berger, one of the

defendants in this action. Whether the trail was graded or graveled in the years specified is immaterial. It remained in about the same place from the time it began to be traveled until 1947. In 1947 the location of the trail was straightened and changed across [\*\*9] the E 1/2 SE 1/4. In that year the evidence shows that Ray F. Berger paid to Elling Helmer, one of the county commissioners of Stark County, the sum of \$ 20, for grading a private road on Section 30-141-91.

The road was used not only by Frank X. Berger, the plaintiff, but also by Ray F. Berger and by some people coming in from the north.

The evidence discloses that a gate was put in where the trail entered the section line at the east of Section 30, and had been maintained there by John Berger and Ray Berger, from about 1902, the time that the land was settled by his father John Berger. To use the trail it was necessary to go through this gate. It also appears that Frank, the plaintiff, had a gate on the east of his land, that is on the east line of the W 1/2 SE 1/4. It was put there either by his father, Charles Berger, or with his consent and acquiescence. So far as the evidence discloses there were gates on the east line of the W 1/2 of the SE 1/4 and on the east line of Section 30, where the trail entered [\*\*102] the section line there after crossing the E 1/2 of the SE 1/4 of Section 30.

Some third parties who testified in this action remembered the gates that were [\*\*10] on the trail. Some also remembered a cattle crossing on the east line of the W 1/2 of the SE 1/4 of Section 30. The witnesses that testified to having used the trail admitted that when they went through if the gates were closed, they also closed them.

It is significant that on cross-examination Frank X. Berger, the plaintiff, testified with reference to a gate as follows:

'Q. Now, Mr. Berger, have you ever talked to Ray about using this road?

'Mr. Reichert: Objected to as incompetent, irrelevant and immaterial.

'The Court: Overruled.

'A. Yes, I have.

'Q. Did Mr. Ray Berger say anything to you like

'Frank, would you please remember to keep that gate closed?'

'Mr. Reichert: This is objected to as immaterial.

'Mr. Baird: It is very material to the case, your Honor, to establish the point of the use of this road.

'The Court: Overruled.

'A. Keep it closed.

'Q. And didn't you agree to keep it closed? A. I did.'

It thus appears that not only did Frank have knowledge of a gate, but had agreed with the defendant, Ray Berger, to keep it closed. This testimony is revealing as it bears upon the intent of the defendant, Ray F. Berger, to retain control, possession and dominion [\*\*11] of his property. It is also evidence of the plaintiff's acquiescence of Ray Berger's attempt to retain control, possession and dominion of his land. It tends to negative the plaintiff's claim of adverse and hostile use of the trail as a basis for establishing a public right to its use.

In April 1947, Frank Berger went to see Ray about building a road across the E 1/2 SE 1/4 from its east line to the east line of the W 1/2 SE 1/4. It appears that the road was to be built with the understanding that the gates would be kept closed. The road as built in 1947 covered in part the trail road that had been across this property. It was paid for by Ray F. Berger. The fence was left on the E 1/2 of the SE 1/4 and the gate was moved to the location of the road as constructed.

In 1956 some trouble arose between the parties. The defendant, Ray F. Berger claims that his cattle got out into some silage and became bloated. At any rate in May 1956 the defendant, Ray F. Berger, in the presence of two witnesses, told the plaintiff that he was going to close the road and plow it up.

No one is claiming any public right to the road over the defendant, Ray Berger's place, except the plaintiff. [\*\*12] He has a way out to the north.

A close analysis of the evidence discloses no facts that show unequivocal and satisfactory proof of the intention of the defendants to grant an easement to the public or to relinquish dominion, possession and control of their property so as to establish a trail by continued

adverse user for a period of 20 years so as to come within the terms of Section 24-0701, NDRC 1943. The travel over the trail has always been obstructed by gates.

It must be conceded that placing obstructions across a road, such as a gate, is a strong indication that the use by others is permissive only, and that erection of a gate or gates across the road tends to evidence an intention on the part of the owner to assume and assert ownership and possession of the land over which the road runs. *Williams v. Prather*, 239 Ala. 524, 196 So. 118.

[\*103] In *Pierce v. Jones*, 207 Ark. 139, 179 S.W.2d 454, it was held that where a landowner places gates across a road through his land, it is notice to the public that they thereafter are passing through the land by permission and not by right, so that no prescriptive right to the use of the road can be acquired. See Elliott, *Roads* [\*\*13] and *Streets*, 4th Ed., Section 198, page 243.

The plaintiff never made any claim that the road in question had become a public highway until after the defendant gave him notice that he was going to close the gates. It is apparent from the evidence that the plaintiff until the spring of 1956 was perfectly satisfied with the arrangement to pass over the defendant's land through the gates; he had acquiesced therein. These gates had been placed on the land so that the defendant could keep his cattle on the farm.

To establish a public way by prescription it is necessary for the plaintiff to prove an adverse use of the land which had continued for more than 20 years under a claim of right and with the acquiescence of the defendants or their predecessor in title. The mere fact of the user by the public for the period required to establish a public way, raises no presumption that such use is adverse. To establish such a use a further fact must be proved, or admitted, that the general public used the way as a public right; and that it did, must be proved by facts which distinguish the use relied on from rightful use by those who have permissive right to travel over the private way. *Bullukian* [\*\*14] *v. Inhabitants of Town of Franklin*, 248 Mass. 151, 142 N.E. 804; *Sprow v. Boston & A. R. Co.*, 163 Mass. 330, 339, 39 N.E. 1024, 1025. In this last case it is said:

'If all the evidence which was introduced was equally consistent with the view that the uses relied on were of the latter character, (permissive use), the plaintiff failed to sustain the burden of proof resting upon him to show a

use under a claim of right.'

The burden of proof was upon the plaintiff. He has not sustained it by clear and convincing or satisfactory evidence such as establishes a public highway by prescriptive use.

The establishment of a public highway by prescription must be shown by preponderance of the evidence; and sometimes it is said that the evidence must be satisfactory, clear and definite or clear and convincing. 39 C.J.S. Highways § 23 c. pages 944, 945; *Burk v. Diers*, 102 Neb. 721, 169 N.W. 263; *Violet v. Martin*, 62 Mont. 335, 205 P. 221; *Maynard v. Bara*, 96 Mont. 302, 30 P.2d 93.

In *Burk v. Diers*, *supra*, it was held that passive permission by the owner of the land of the use of it by the public is not alone evidence of intent to dedicate to such use. It was further held that if a road claimed [\*\*15] as a highway was a mere neighborhood road, much stronger evidence of a dedication or of a prescriptive right would be required than if it was a thoroughfare or a part of an acknowledged highway.

In *Violet v. Martin*, *supra* [62 Mont. 335, 205 P. 223], the court said:

'In the case at bar, the public never assumed any jurisdiction or exercised any rights over the road in question; nor did it regard the travel there as adverse; there has always been a gate at one end, and since 1913 there has been a gate at the other end, *both of which have been recognized by the plaintiffs and such other persons as occasionally passed over it*. The evidence preponderates against the use of the road as followed since 1902 by the public \* \* \*. To charge the owner with abandonment and dedication or to credit the user with an adverse intent would penalize generosity and destroy neighborhood accommodation.' (Emphasis supplied.)

For similar remarks see *Burk v. Diers*, *supra*.

[\*104] The *Violet v. Martin* case presents a very similar situation to the one involved in the case at bar.

While undoubtedly some third parties used the alleged public highway, which the plaintiff is claiming, the road was [\*\*16] mostly used by the plaintiff and the

defendant, Ray Berger. It was not in any sense a thoroughfare or part of an acknowledged highway.

In *Burk v. Diers*, *supra*, it was also held that the facts and circumstances must be such as to indicate an unequivocal intent to devote the strip of land to a public use. No such intent can unequivocally be ascertained from the evidence presented in the case at bar. In *Maynard v. Bara*, 96 Mont. 302, 30 P.2d 93, the court held that before a road may be established by prescription over the land of another, the evidence must be clear and convincing that the use of the road by the public was adverse and not merely permitted by the landowner.

When the road in question here was changed in 1947 it was with the apparent acquiescence of the plaintiff. No user of the trail up to that time, from about 1912 or 1913 to 1947, indicated anything more than the permission of the defendant, Ray Berger, to allow the plaintiff and those of the public that wanted to use the trail, to pass over it through the gates on the E 1/2 SE 1/4 of Section 30-141-91. We believe that the evidence in this case is more consistent with permissive use or license to use the trail than [\*\*17] it is with the plaintiff's claim that it was adverse user which after 20 years established a prescriptive public highway. The facts shown by the plaintiff are not so unequivocal, or clear and convincing, as to warrant us in determining that the use of the trail in question amounts to a prescriptive right with which the defendants may not now interfere or terminate.

Nor does the evidence show that the plaintiff has acquired any easement in the defendants' land. He had access to the trail by the permission of the owner of the land, and it appears that that permission was always dependent upon the closing of the gates so that the defendants' cattle would not stray from his land. A permissive use of a right of way over another's land will not become an easement by prescription no matter how long continued unless it has been changed into an adverse use. 28 C.J.S. Easements § 18 d, Permissive Use, page 666. The defendant, Ray F. Berger, had a right to revoke the permissive use of the trail when the plaintiff no longer was willing to close the gates.

Accordingly the judgment of the trial court is reversed and the injunction is dissolved.



LEXSEE 962 P2D 806

**Norma Campbell; Lamont Campbell; and The Campbell Cattle Company, a Utah general partnership, Plaintiffs and Appellees, v. Box Elder County, Defendant and Appellant. Box Elder County, Third-party Plaintiff and Appellant, v. Norma Campbell; Lamont Campbell; The Campbell Cattle Company, a Utah general partnership; Paul D. Barnes; Evelyn Barnes; Coleen Barnes; Eldon M. Barnes; Wanda Barnes; Burke Heaton; and The Heaton Limited Family Partnership, Third-party Defendants and Appellees.**

Case No. 970587-CA

## COURT OF APPEALS OF UTAH

*962 P.2d 806; 346 Utah Adv. Rep. 9; 1998 Utah App. LEXIS 46*

June 25, 1998, Filed

**PRIOR HISTORY:**    [\*\*1] First District, Brigham City Department. The Honorable Ben Hadfield.

**DISPOSITION:** Affirmed.

**COUNSEL:** Jon J. Bunderson and John D. Sorge, Brigham City, for Appellant.

Bruce R. Baird, Salt Lake City, for Appellees.

Jan Graham, Norman K. Johnson, and Daniel G. MoQuin, Salt Lake City, for Amicus Curiae State of Utah.

**JUDGES:** Before Judith M. Billings, Judge. WE  
**CONCUR:** James Z. Davis, Presiding Judge, Michael J. Wilkins, Associate Presiding Judge.

**OPINION BY:** JUDITH M. BILLINGS

**OPINION**

[\*807] OPINION

BILLINGS, Judge:

Box Elder County appeals a trial court determination

that a section of "Ridge Road" owned by the Campbells and their co-appellees, the Barneses and Heaton, was not a public thoroughfare under Utah Code Ann. § 27-12-89 (1995). We affirm.

## FACTS

Ridge Road begins on the Campbells' property and continues many miles over property owned by the other appellees and by the United States Forest Service. Because the land ownership is in a checker board pattern, the road crosses back and forth between private property and Forest Service land. Other public roads cross the Forest Service land and join Ridge Road [\*\*2] after it traverses appellees' properties, and members of the public can access the Ridge Road either through the Campbells' property or through higher altitude Forest Service land.

The trial court found that the use of all privately owned segments of the road was identical because a gate on the Campbell section blocked access from the main road. However, at all relevant times there was a gate where Ridge Road turned off the main county road and onto the Campbell property. The gate on the Campbell property was generally locked, and several witnesses testified that they had been prevented from accessing Ridge Road by the locked gate. However, the Campbells customarily opened this gate during the October deer

hunt so that hunters could cross their property to access the Forest Service land. Based on these facts, the court concluded that Ridge Road had not become a public thoroughfare. Box Elder County appeals.

## ANALYSIS

Box Elder County argues the trial court erred as a matter of law when it concluded that Ridge Road had not been abandoned and dedicated as a public thoroughfare under Utah's public use dedication statute.<sup>1</sup>

1 Utah Code Ann. § 27-12-89 (1995) (Public use constituting dedication) states:

a highway shall be deemed to have been 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.

[\*\*3] In deciding whether a road has been dedicated to public use under section 27-12-89, a trial court must make initial fact [\*808] findings and then apply the law to those fact findings to determine whether they meet the statutory guidelines for public dedication. "We review this ultimate determination, which is a mixed question of fact and law, for correctness." *Heber City Corp. v. Simpson*, 942 P.2d 307, 309 (Utah 1997) (citing *State v. Pena*, 869 P.2d 932, 936 (Utah 1994)). However, we grant the trial court significant discretion in its application of the facts to section 27-12-89 requirements because "its legal requirements, other than the ten year requirement, are highly fact dependent and somewhat amorphous." 942 P.2d at 309 (citation omitted). Finally, because "the law does not lightly allow the transfer of property from private to public use," the county bears the burden of proving dedication to the public by "clear and convincing evidence." *Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1099 (Utah 1995)(citation omitted).

### I. Were the Trial Court's Findings of Fact Clearly Erroneous?

Box Elder County assigns error to several of the trial court's fact findings. However, [\*\*4] Box Elder County has failed to marshal the evidence supporting these findings or to establish that the findings are clearly erroneous.

To successfully challenge a trial court's findings of fact on appeal, "an appellant must marshal the evidence

in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.'"

*Valcarce v. Fitzgerald*, 1997 Utah LEXIS 105, 331 Utah Adv. Rep. 68, 70 (Utah 1997) (citations omitted). When a party fails to marshal the evidence supporting a challenged fact finding, we reject the challenge as "nothing more than an attempt to reargue the case before [the appellate] court." *Promax Dev. Corp. v. Mattson*, 943 P.2d 247, 255 (Utah Ct. App. 1997), cert denied, 943 P.2d 247 (Utah 1997) (quoting *Oneida/SLIC v. Oneida Cold Storage & Warehouse, Inc.*, 872 P.2d 1051, 1053 (Utah Ct. App. 1994)). Thus, we "assume[] that the record supports the findings of the trial court and proceed[] to a review of the accuracy of the lower court's conclusions of law and the application of that law in the case." *Heber City Corp.*, [\*\*5] 942 P.2d 307, 312 (quoting *Saunders v. Sharp*, 806 P.2d 198, 199 (Utah 1991)). Because Box Elder County has failed to marshal the evidence in support of the challenged fact findings and prove that they were clearly erroneous, we accept the trial court's fact findings for the purpose of our analysis.<sup>2</sup>

2 Box Elder County argues the trial court erred in finding that all three privately owned segments of Ridge Road were used identically. However, Box Elder County has not properly challenged the trial court's factual finding that the use was the same for all segments, and we therefore accept this key factual finding.

### II. Did the Trial Court Err in Concluding that Ridge Road

Was Not a Public Thoroughfare under Section 27-12-89?

Under section 27-12-89, a road "shall be deemed to have been dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years." Utah Code Ann. § 27-12-89 (1995). Three factors must be present for a road [\*\*6] to become a public highway by dedication under section 27-12-89: "there must be (i) continuous use, (ii) as a public thoroughfare, (iii) for a period of ten years." *Heber City Corp.*, 942 P.2d at 310. "Once the technical provisions of [section 27-12-89] have been satisfied, the road is a 'public highway.' The court has no discretion to ignore that fact." *Id.* at 313.<sup>3</sup>



3 Appellees also appear to argue that abandonment and dedication cannot take place unless the owner intended to dedicate the road to public use. This requirement appears in early cases. *See, e.g., Morris v. Blunt*, 49 Utah 243, 252, 161 P. 1127, 1131 (Utah 1916). However more recent cases have definitively stated that owner intent is now irrelevant to determining whether a road has been dedicated and abandoned to public use. *See Draper City*, 888 P.2d at 1099 (citations omitted) ("It is not necessary to prove that the owner of the private road had the intent to offer the road to the public. Rather, under section 27-12-89, the owner's intent may be inferred by the mere acquiescence in allowing the public to use the road.").

[\*\*7] In this case, the trial court found that Ridge Road has been used by the public for [\*809] over ten years. However, it concluded the road had not been dedicated to public use because it had not been used continuously as a public thoroughfare. The trial court based this conclusion on two fact findings: 1) Ridge Road was generally used only during the deer hunting season, and was frequently closed to the public at other times, and; 2) the use of Ridge Road during the hunting season was by permission of the Campbells, who removed the lock from the gate "and knowingly permitted hunters to use the road." Thus, we examine for correctness the trial court's conclusion that the pattern of use described in its findings of fact was not "continuous" use as a "public thoroughfare."

#### A. Continuous Use

We first address whether the trial court erred in concluding that the public's use of Ridge Road outside deer hunting season was not continuous. In *Boyer v. Clark*, 7 Utah 2d 395, 326 P.2d 107 (Utah 1958), the supreme court concluded there had been 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 [\*8] and uninterrupted use. . . as often as they found it convenient or necessary." 326 P.2d at 109. Similarly, in *Richards v. Pines Ranch, Inc.*, 559 P.2d 948 (Utah 1977), the supreme court stated that, "use may be continuous though not constant. . . . provided it occurred as often as the claimant had occasion or chose to pass. Mere intermission is not interruption." *Id.* at 949 (Emphasis added) (citation

omitted). Finally, in *Heber City Corp.*, 942 P.2d at 311, the supreme court found continuous use of a road where the evidence at trial demonstrated that the public "made a continuous and uninterrupted use of" the road "as often as they found it convenient or necessary." Based on this evidence, the court concluded "as a matter of law that [the road] . . . was used continuously." (Citation and footnote omitted).

Under Utah law, use need not be regular to be continuous. Even infrequent use can result in dedication of a road as a public thoroughfare. However, under the continuous use requirement, members of the public must have been able to use the road whenever they found it necessary or convenient. Here, the trial court explicitly found the public had not been able to use [\*9] Ridge Road as often as they found it necessary or convenient. On the contrary, the trial court found Ridge Road was generally barred by a locked gate, and several members of the public testified that they had been unable to use the road because of the gate. Thus the trial court concluded that the use of the road outside of deer hunting season was at the Campbell's convenience, rather than at the convenience of the public. The trial court correctly interpreted the statute when it determined that the county had not shown continuous public use of Ridge Road.

#### B. Use as a Public Thoroughfare

We next address whether the trial court correctly concluded that deer hunters' use of the road during hunting season was not use "as a public thoroughfare" because it was with the Campbell's permission. It is firmly established under Utah law that permissive use cannot result in either adverse possession or dedication of private property to the public. *See, e.g., Heber City Corp.*, 942 P.2d at 311-12; *Thurman v. Byram*, 626 P.2d 447, 449-50 (Utah 1981).

In this case, the trial court concluded that the deer hunters used Ridge Road with the Campbells' permission. The trial court based [\*10] this conclusion on testimony at the hearing that the Campbells had unlocked the gate every year except 1994 for deer hunting season and had relocked it at the end of each hunting season. The trial court correctly concluded that permissive use of Ridge Road could not result in dedication as a public thoroughfare.

#### CONCLUSION

962 P.2d 806, \*809; 346 Utah Adv. Rep. 9;  
1998 Utah App. LEXIS 46, \*\*10

The trial court correctly concluded Ridge Road was not dedicated to public use because it had not been continuously used as a public thoroughfare. We therefore affirm.

Judith M. Billings, Judge

WE CONCUR:

James Z. Davis, Presiding Judge

Michael J. Wilkins, Associate Presiding Judge



LEXSEE 888 P2D 1097

**Draper City, a municipal corporation and political subdivision of the State of Utah; Jack A. Garfield, an individual; Lena Pignanelli, an individual; Donald T. Marden, an individual; Draper Recreational Trails Association, an association; and Robert and Sharon Patterson dba Antique Acres, Plaintiffs and Appellees, and Henning and Geraldine B. Anderson; Arthur Burr; Corporation of the Presiding Bishopric of the Church of Jesus Christ of Latter-day Saints; Draper Irrigation Company; Estes Homes; Roberta M. and Grant E. Kirkham; Little Willow Irrigation Company; Metropolitan Water District of Salt Lake City; Edward E. and Caroline B. Morgan; Town of Riverton; Traverse Associates; Utah Valley Land; and Duane B. and Shaunna M. Woodmansee, Plaintiffs by Election and Appellees, v. Estate of Fannie Bernardo, deceased; Paul L. Bernardo, an individual and personal representative of the Estate of Fannie Bernardo; Jimmy T. Bernardo, an individual; John A. Bernardo, an individual; and John Does 1-20, Defendants and Appellants, and Randy H. and Joelene D. Charlton; Harold A. and Mary G. Daw; Earl J. and Vaunna Garfield; and Ruth Gordon, Defendants by Election and Appellants, and Corner Canyon Water Company, Intervening Defendant.**

No. 930502

## SUPREME COURT OF UTAH

*888 P.2d 1097; 256 Utah Adv. Rep. 22; 1995 Utah LEXIS 2*

January 19, 1995, FILED

**SUBSEQUENT HISTORY:**      [\*\*1] Released for  
Publication February 9, 1995.

**OPINION BY:** HOWE

**PRIOR HISTORY:**    Third District, Salt Lake County.  
The Honorable Leslie A. Lewis.

**OPINION**[\*1098] *HOWE, Justice:*

**COUNSEL:** Michael Z. Hayes, Lisa G. Romney, Salt Lake City, for all appellees, with the exceptions of Thomas D. Walk, Salt Lake City, for LDS Church. David L. Church, Salt Lake City, for Metropolitan Water District of Salt Lake City.

Dean W. Sheffield, Salt Lake City, for all appellants.

**JUDGES:** HOWE, Justice: WE CONCUR: Michael D. Zimmerman, Chief Justice, I. Daniel Stewart, Associate Chief Justice, Christine M. Durham, Justice, Leonard H. Russon, Justice

Draper City and several individuals commenced this action to have what is known as the Lower Corner Canyon Road, which lies within the City's limits, declared to have been dedicated and abandoned to the use of the public pursuant to Utah Code Ann. § 27-12-89 (1989) on the ground that it had been continuously used as a public thoroughfare for a period of ten years. Defendant Paul L. Bernardo, personal representative of the Estate of Fannie Bernardo, Jimmy T. Bernardo, and John A. Bernardo, along with thirty others, own property adjacent to the road, which is 14,000 lineal feet, or 2.65 miles, long. The trial court ordered each of the other

property owners whose [\*\*2] property "adjoined, abutted, or was crossed by" the road to join the action as either defendants or plaintiffs. Each owner consequently joined either as a plaintiff by election or as a defendant by election.

Both sides moved for summary judgment. The trial court granted summary judgment in favor of plaintiffs and plaintiffs by election. Defendants and defendants by election appeal.

#### FACTS

The trial court determined that there were no disputed issues of material fact and entered findings of fact to the following effect: In the southeast corner of the Salt Lake Valley in Draper City lies Corner Canyon. Since at least 1910, there has been a narrow and unpaved Lower Corner Canyon Road that connects with Upper Corner Canyon Road, which leads up over a mountain crest and down to the city of Alpine, Utah, a total distance of about nine miles. People used Lower Corner Canyon Road during the 1920s to mine and haul silica from a pit in the area. During the 1920s and 1930s, ranchers used the road to transport and graze livestock. During the depression years of the 1930s, people used the road to collect firewood in the canyon area. In the 1940s, the Metropolitan Water District of Salt Lake City [\*\*3] constructed an aqueduct and tunnel in the Corner Canyon area and used the road to transport equipment and laborers up the canyon. Employees of the District have continued to use the road to perform maintenance checks and to read meters and other measuring devices. In the 1950s, a natural gas pipeline was installed which crosses the road in several places, and the road was used to access this pipeline. Through the 1950s, '60s, and '70s, Salt Lake County graded the road and added road base when needed. Critical to this case, the court found that the road has been used by the general public, including boy scout groups, for recreational hiking, camping, horseback riding, and picnicking from the 1920s to the present time and for riding motorized vehicles, including cars, trucks, 4 x 4s, motorcycles, and all-terrain vehicles, since the 1930s.

#### ANALYSIS

Plaintiffs brought their action pursuant to section 27-12-89, which provides:

[\*1099] A highway shall be deemed to

have been dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years.

Utah Code Ann. § 27-12-89 (1989).

It is not necessary to prove that the owner of [\*\*4] the private road had the intent to offer the road to the public. *Thurman v. Byram*, 626 P.2d 447, 449 (Utah 1981). Rather, under section 27-12-89, the owner's intent may be inferred by the mere acquiescence in allowing the public to use the road. *Id.*; *Leo M. Bertagnole, Inc. v. pine Meadow Ranches*, 639 P.2d 211, 213 (Utah 1981).

The law does not lightly allow the transfer of property from private to public use. The public's taking of property in such circumstances as this case presents requires proof of dedication by clear and convincing evidence. *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. *Petersen*, 438 P.2d at 548-49 (Crockett, C.J., dissenting). In addition, "the presumption is in favor of the property owner; and the burden of establishing public use for the required [\*\*5] period of time is on those claiming it." *Bertagnole*, 639 P.2d at 213 (quoting *Bonner v. Sudbury*, 18 Utah 2d 140, 143, 417 P.2d 646, 648 (1966)). Clearly, plaintiffs bear the burden of demonstrating dedication to the public of Lower Corner Canyon Road.

Summary judgment is proper only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Jackson v. Dabney*, 645 P.2d 613, 615 (Utah 1982); Utah R. Civ. P. 56(c). We have carefully reviewed the many affidavits filed by the parties in support of and in opposition to the motions for summary judgment. Our analysis reveals a number of disputed issues of material fact. For discussion purposes, we will discuss use of the road prior to 1960 and then use after that year.

The main thrust of the affidavits filed by defendants is that people using the road as described in the court's findings of fact prior to about 1960 did so with the permission of the landowners over whose property the road coursed. For example, the people using the road during the 1920s and the 1930s to extract [\*\*6] silica

from a pit, to gather firewood, and to transport and graze cattle and sheep were either owners of land adjacent to the road, their employees, or people to whom permission had been given by the landowners. Access to the silica pit required use of only the lower part of the road. The general public did not use the road for hiking, picnicking, camping, horseback riding, or riding motor vehicles. The road was used for those purposes only by landowners, their family members, and people to whom express permission had been given. Boy scout groups using the road did so with permission and were ordered off the property when permission had not been given. The Metropolitan Water District of Salt Lake City is the owner of 10.87 acres in Corner Canyon, and its use of the road to reach its property was by permission or "by grant," although a District employee denied that it had a grant to use the road.

It is important here to note that our case law has distinguished between use of a road by owners of adjoining property and by the general public. "Such property owners cannot be considered members of the public generally, as that term generally is used in dedication by user statutes." *Petersen*, 438 P.2d at 546. [\*\*7] This is because adjoining owners may have documentary or prescriptive rights to use the road or their use may be by permission of the owners of the fee of the road. In *Thompson v. Nelson*, 2 Utah 2d 340, 345, 273 P.2d 720, 723 (1954), we made this point clear by quoting the following from *Morris v. Blunt*, 49 Utah 243, 251, 161 P. 1127, 1131 (1916):

Under this statute 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. Use under private right is not sufficient.*

[\*1100] Although the trial court found that there was no documentary evidence that people using the road had any private right, that finding does not preclude those users from having a right by prescription or that their use was by permission. Thus, we find that there is a material issue of fact as to whether people using the road prior to 1960 were members of the general public whose use could ripen into a public way or whether they were landowners [\*\*8] in the area who had either a private right to use the

road or permission of the owners over whose land the road coursed.

We turn now to use of the road since 1960. The trial court found that since that year (and prior thereto), members of the general public had used the road for hiking, camping, horseback riding, and riding motorized vehicles. This finding was based on affidavits filed by plaintiffs and by people who lived near the road and had opportunity to observe use of the road by the public. One affiant, Ronald E. Allen, averred that he had observed people using the road for recreational purposes in the 1950s and 1960s. These users are not identified, and the affidavit is silent as to whether they had permission to use the road. He avers only that *he* was not denied access to the road until 1990. The same infirmities exist with the affidavits of Marlon Parkin and Alan Summerhays. Parkin averred that he had seen many people use the road for recreational purposes since 1966. Summerhays averred that from 1960 to the present time, there has been continual use of the road by people for recreational purposes. The affidavits of all three affiants are silent as to whether these recreational [\*\*9] users used the full length of the road (2.65 miles) or whether they traveled only part way to reach their desired recreational destinations.

Defendants filed several affidavits which controverted the findings of fact and the averments made in plaintiffs' affidavits. These affiants generally acknowledged the following: Since the early 1960s, people who may properly be called members of the general public have used or attempted to use the road for recreational purposes or to reach private property on which they would recreate; these people were trespassers; some of them were stopped and asked to leave; sometimes, some of them were given permission to remain; owners posted "no trespassing" signs at the entrance to the road; on occasions, they have called the county sheriff or the Draper police to remove trespassers; and in the 1970s and 1980s, they blocked the road through means which varied from digging trenches to stacking concrete blocks and to piling dirt, rocks, and snow to prevent trespassing. It is unclear how successful these attempts at blocking were. Finally, in 1990, a gate was erected at the entrance to the road.

The affidavits filed by defendants also disputed the extent [\*\*10] of the road which may have been traversed by these recreational users. The affiants averred that for

the past twenty to twenty-five years, the road above the silica pit has been impassable by any vehicle because the road has been covered with vegetation, undergrowth, rocks, mud, and dirt. One affiant described this portion of the road as "no more than several unconnected paths." An engineer's inspection of the road made at the request of Draper City disclosed that an 800-foot section of the road was impassable due to a 4-foot gully. Because of this condition, a vehicle could not be driven to the end of the lower road where it connects with the upper road.

Plaintiffs counter that any possible obstruction of the road by defendants came too late since there had been public use for nearly sixty years prior to any obstruction attempts. However, neither they, 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.

In granting summary judgment, it is apparent that the trial court gave more weight to some [\*\*11] affidavits than to others. This was inappropriate at this stage of the litigation. On a motion for summary judgment, a trial court should not weigh disputed evidence, and its sole inquiry should be whether material issues of fact exist. *W.M. Barnes Co. v. Sohio Nat'l Resources Co.*, 627 P.2d 56, 59 (Utah 1981).

[\*1101] It is not the purpose of the summary judgment procedure to judge the credibility of the averments of parties, or witnesses, or the weight of evidence. Neither is it to deny parties the right to a trial to resolve disputed issues of fact. Its purpose is to eliminate the time, trouble and expense of trial when upon any view taken of the facts as asserted by the party ruled against, he would not be entitled to prevail.

*Holbrook Co. v. Adams*, 542 P.2d 191, 193 (Utah 1975). We have additionally held that "it only takes one sworn statement under oath to dispute the averments on the other side of the controversy and create an issue of fact." *Id.*

Due to conflicting sworn statements, clouds of doubt yet remain over the possible dedication of the road to the public. At this initial stage, plaintiffs have fallen [\*\*12]

short of presenting undisputed evidence which warrants summary judgment in their favor. Their affidavits certainly fail to clearly and convincingly prove their position. *See Petersen*, 438 P.2d at 548. "Summary judgment procedure is generally considered a drastic remedy," *Timm v. Dewsnup*, 851 P.2d 1178, 1181 (Utah 1993), and is appropriate only when the facts are clear and undisputed. We therefore reverse the trial court's conclusion that as a matter of law the road was dedicated to the public. Fact-sensitive cases such as this case do not lend themselves to a determination on summary judgment.

We distinguish the instant case from *Thurman v. Byram*, 626 P.2d at 450, where we upheld the dedication of a private road to the public under section 27-12-89. In *Thurman*, the general public had never been asked not to use the road, and the county sheriff had not been asked to prevent trespassing. *Id.* at 449. In contrast, there are averments in the instant case that trespassers were directed to leave and that the county sheriff and the Draper City police [\*\*13] were often asked to prevent this illegal activity. In *Thurman*, the road provided the sole access to certain public property, and state and county crews had assisted in the installation of a bridge in the road." *Id.* That is not the case for Lower Corner Canyon Road. It does not lead to any public property. According to several affiants, the road past the silica pit has been impassable for the past twenty to twenty-five years, making travel over the mountain crest to Alpine no longer possible. In addition, affiants denied that Salt Lake County had ever performed anything but minimal maintenance on the road except on a few isolated occasions. They also averred that Draper City, soon after its incorporation in 1978, affirmatively renounced any responsibility to maintain the road and posted a sign near its entrance to that effect. *Cf. Bertagnole*, 639 P.2d at 212-14 (upholding dedication of road to the public where numerous trespassers had never been ordered off the property and approximately 500 lots and 120 cabins were accessed by the road).

As part of the summary judgment, the trial court also found that "the worn surface of the [road] averages [\*\*14] between ten (10) to twenty-five (25) feet." It then concluded, "The reasonable and necessary right of way width for the [road] is thirty (30) feet." Since we hold that summary judgment was improper, we also hold that any legal determination of the necessary and reasonable width of the road was premature. Such a determination depends

upon the full adjudication of the relevant facts that will be unearthed at trial. We therefore also reverse the trial court's conclusion that the reasonable and necessary width for Lower Corner Canyon Road is thirty feet.

The summary judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

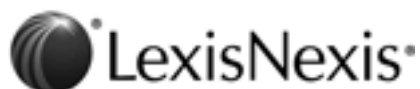
WE CONCUR:

Michael D. Zimmerman, Chief Justice

I. Daniel Stewart, Associate Chief Justice

Christine M. Durham, Justice

Leonard H. Russon, Justice



LEXSEE 798 P2D 1130

**Fay Gaw, Plaintiff and Appellant, v. State of Utah, by and through its Department of Transportation; Carbon County; City of Helper; Jimmy Wray Lingle; Allstate Ins. Company, an Illinois Corp.; Roadrunner Trucking, a New Mexico Corp.; and John Does I through X, Defendants and Appellees**

Case No. 890139-CA

Court of Appeals of Utah

*798 P.2d 1130; 143 Utah Adv. Rep. 27; 1990 Utah App. LEXIS 149***September 13, 1990, Filed**

**SUBSEQUENT HISTORY:** Certiorari Denied January 11, 1991.

**PRIOR HISTORY:** **[\*\*1]** Seventh District, Carbon County; The Honorable Boyd Bunnell.

**DISPOSITION:** This cause having been heretofore argued and submitted, and the Court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the judgment of the district court herein be, and the same is, reversed and remanded for further proceedings in accordance with the views expressed in the opinion filed herein.

**COUNSEL:** Robert J. Debry, Edward T. Wells, (Argued), Daniel F. Bertch, Gordon K. Jensen, Robert J. Debry & Associates, Attorneys at Law for Appellant, Salt Lake City, Utah.

Joy L. Sanders, (Argued), Jody K. Burnett, Snow, Christensen & Martineau, Attorneys at Law for Dept. of Transportation, Salt Lake City, Utah.

Robert R. Wallace, (Argued), Scott F. Squire, Hanson, Epperson & Smith, Attorneys at Law for Roadrunner Trucking, Salt Lake City, Utah.

Not involved in appeal, Robert Stevens, Richards, Brandt, Miller & Nelson, Salt Lake City, Utah.

**JUDGES:** Opinion of the Court by Gregory K. Orme, Judge. Richard C. Davidson, <sup>1</sup> Court of Appeals Judge, concurs; and J. Robert Bullock, <sup>2</sup> Senior District Judge, sitting by special appointment, Judge, concur.

1 Judge Davidson concurred in this opinion prior to his resignation effective September 1, 1990.

**[\*\*2]**

2 J. Robert Bullock, Senior District Judge, sitting by special appointment pursuant to Utah Code Ann. § 78-3-24(10)

**OPINION BY: ORME****OPINION****[\*1132] OPINION**

On April 16, 1984, Fay Gaw was turning left from a side street onto Highway 6 in Helper, Utah. Gaw apparently drove across a merge lane and into the through lane of traffic when she was hit by a truck driven by Jimmy Wray Lingle and owned by Roadrunner Trucking. Gaw was paralyzed from the chest down as a result of the accident. She brought suit against Lingle claiming that he had negligently operated the truck and against Roadrunner as the employer of Lingle. She also brought suit against the State of Utah claiming that the intersection was negligently designed, constructed and maintained. <sup>3</sup>



3 Gaw brought suit against other defendants, but they were dismissed from the case and are not parties to this appeal.

[\*1133] On January 30, 1986, Gaw's deposition was taken at the instance of Lingle. The court reporter transcribed the testimony and delivered a copy of the deposition to Gaw's [\*\*3] attorney. On March 14, Gaw received a sheet from the reporter on which to make appropriate corrections to her deposition. In May, Gaw's attorney sought and obtained an extension of time to correct the deposition and file it with the court. Gaw made approximately fifty changes to her deposition, which were filed with the deposition in June 1986.

In July 1986, defendants moved to suppress the changes in Gaw's deposition, claiming that the corrections were not made in compliance with Utah Rule of Civil Procedure 30(e), that Gaw had given a false excuse for making substantial changes to the deposition, and that the changes would prejudice the defendants. In February 1988, the court granted defendants' motions and suppressed the changes to Gaw's deposition.

In March 1988, the state filed a motion for summary judgment. Gaw filed a motion in opposition along with her own affidavit and the affidavits of two engineers who stated their opinions that the intersection was faultily designed. The trial court granted the state's motion for summary judgment, finding that Gaw had failed to produce any evidence that the intersection was faultily designed or that such design had caused the accident.

[\*\*4] In September 1988, a jury trial was held to determine the liability of Lingle and Roadrunner. On special verdict, the jury found Gaw 75% liable for the accident and Lingle 25% liable.

During the trial, Gaw attempted to admit testimony from a "human factors" expert to the effect that Gaw had behaved in a reasonable and prudent manner and that Lingle had not behaved reasonably under the circumstances. The trial court did not allow the expert to testify in conclusory legal terms about the reasonableness of the parties' actions. It did, however, allow the expert to testify extensively about the misleading nature of the intersection, the likelihood that Gaw was confused by the intersection markings, and the distinction between her subjective and objective confusion.

Defendants submitted three proposed jury

instructions, each of which stated that the conduct described in the instructions "is negligence." Gaw objected to these instructions because they effectively incorporated a standard of per se negligence contrary to Utah law. <sup>4</sup> The court noted Gaw's objection but gave the instructions as tendered.

4 Gaw also objected to one of the instructions because it did not state Lingle's duty of reasonable care within the instruction. Lingle's duty was adequately defined in other jury instructions and, therefore, we find this argument to be without merit.

[\*\*5] On appeal, Gaw raises three arguments. First, Gaw argues that the court improperly limited the testimony of her human factors expert. Second, Gaw challenges the jury instructions to which she objected below. Finally, Gaw argues that the court improperly granted summary judgment to the state, primarily due to the court's decision to suppress the changes Gaw sought to make to her deposition. We affirm in part, reverse in part, and remand for a new trial.

#### EXPERT TESTIMONY

Gaw challenges the trial court's decision prohibiting the human factors expert from testifying that Gaw's actions before the accident constituted reasonable, prudent conduct. <sup>5</sup> In order to prevail on this issue, Gaw must demonstrate that the trial court abused its discretion in excluding the expert testimony. *Ostler v. Albina Transfer Co.*, 781 P.2d 445, 447 (Utah Ct. App. 1989). Moreover, she must demonstrate [\*1134] that "the excluded evidence would probably have had a substantial influence in bringing about a different verdict." *Redevelopment Agency v. Tanner*, 740 P.2d 1296, 1303-04 (Utah 1987).

5 Gaw also argues that the trial court excluded testimony concerning the reasonableness of Lingle's conduct. However, the court made no specific ruling on that aspect of the expert's testimony. Thus, nothing in the record suggests that Gaw's expert was prohibited from discussing the reasonableness of Lingle's conduct. Gaw cannot challenge a ruling the court did not make.

[\*\*6] The Utah Rules of Evidence provide that a witness who has been qualified as an expert may testify "[i]f scientific, technical, or other specialized knowledge

will assist the trier of fact to understand the evidence or to determine a fact in issue." Utah R. Evid. 702. Moreover, that testimony may embrace "an ultimate issue to be decided by the trier of fact." Utah R. Evid. 704.

As a general rule, it is within the discretion of the trial court to determine whether a particular expert is qualified and whether particular testimony would be helpful and suitable in a particular case. *Ostler*, 781 P.2d at 447. However, the trial court does not properly exercise that discretion where its decision is based upon a misconception of law. *In re Carmaleta B.*, 21 Cal. 3d 482, 579 P.2d 514, 523, 146 Cal. Rptr. 623 (1978) (en banc). See also *Kirkham v. 4.60 Acres of Land*, 100 Idaho 785, 605 P.2d 959, 962 (1980) (court abuses discretion when it fails to apply the law). Cf. *Naranjo v. Naranjo*, 751 P.2d 1144, 1146 (Utah Ct. App. 1988) (though trial court has considerable discretion in adjusting financial interests of divorced parties, appellate court will overturn decision if based [\*\*7] upon misunderstanding or misapplication of the law).

In this case, the court based its decision to exclude the expert's testimony in large part upon its erroneous view that it was obligated to give the jury per se negligence instructions. The court stated with our emphasis:

[O]ne of the problems you have is this jury instruction that says: "If you violate the law, that's negligence. That's not what a reasonable person would do." How does that conform with [expert testimony that certain behavior is reasonable] if there is a violation of the law? . . . It's just inconsistent with what the jury has to determine. In other words, even though she may have been mis[led] and drove across, and the law says she won't drive across, *I have to tell the jury if she does that, regardless, she is negligent.* So that would make it inconsistent. I instruct them, and then [the expert testimony] would be inconsistent with my instructions. To me that creates a doubtful situation; doesn't help the jury at all[;] just confuses them.

Because the court based its decision to exclude the expert testimony on a misconception of the law, we hold that the decision was necessarily an abuse of discretion.

[\*\*8] Although we conclude that the court erroneously excluded the testimony, that error is harmless because the inclusion of that testimony would not have resulted in a different verdict. It is true that the court

prohibited the expert from specifically stating his opinion that Gaw's conduct was reasonable. However, the expert testified at length that the intersection was very confusing, that many drivers would have been confused by the intersection, and that Gaw was very likely confused by the intersection. The obvious conclusion from the expert's testimony was that Gaw acted reasonably under all the circumstances. Though the court should not have excluded those specific words, the message was clearly communicated in the expert's testimony. Consequently, we hold that even though the court abused its discretion in excluding the testimony, the abuse does not constitute reversible error.

#### JURY INSTRUCTIONS

The trial court, in three jury instructions, advised the jury that certain actions on the part of a driver constituted negligence. Gaw argues that these types of "per se" negligence instructions are inappropriate and constitute reversible error. We agree with Gaw's position, at least as [\*\*9] to one of the court's instructions, and therefore reverse the trial verdict against her.

The parties disagree about whether the violation of a statute or ordinance, such as occurred when Gaw made her illegal turn onto Highway 6, constitutes "per se" or "prima facie" negligence in Utah. [\*1135] Their confusion is not surprising because Utah appellate courts have also occasionally confused these terms.<sup>6</sup> However, though the terminology has been confused, the concept has remained the same and was succinctly stated in *Intermountain Farmers Ass'n v. Fitzgerald*, 574 P.2d 1162 (Utah 1978).

[T]he violation of a statute does not necessarily constitute negligence per se and may be considered *only as evidence of negligence* . . . . [The violation] may be regarded as "prima facie evidence of negligence, but is subject to justification or excuse . . . ."

*Id.* at 1164-65 (quoting *Thompson v. Ford Motor Co.*, 16 Utah 2d 30, 395 P.2d 62, 64 (1964)) (emphasis added). "Prima facie" negligence is the correct standard and a trial court commits prejudicial error when it gives a jury instruction which provides that the violation of a statute *is* negligence without the possibility for justification [\*\*10] or excuse.<sup>7</sup> *Id.* at 1164.

<sup>6</sup> Compare, e.g., *Jorgensen v. Issa*, 739 P.2d 80, 82 (Utah Ct. App. 1987) (using "per se"

terminology) with *Hall v. Warren*, 632 P.2d 848, 850-51 & n.1 (Utah 1981) (using "prima facie" terminology) (cited in *Jorgensen*, 739 P.2d at 82).

7 Trial courts need not and probably should not use the technical term "prima facie" in their jury instructions, at least not without clear explanation of the term. It is sufficient to state that the violation of a statute is evidence of negligence but "subject to justification or excuse if the evidence is such that it reasonably could be found that the conduct was nevertheless within the standard of reasonable care under the circumstances." *Thompson v. Ford Motor Co.*, 16 Utah 2d 30, 395 P.2d 62, 64 (1964). Moreover, as long as the concept is clear from the instructions, the terminology used will not invalidate the instruction.

The trial court in this case did not contemplate that the standard in Utah is "prima facie." During the [\*\*11] trial, at a conference in chambers, the court stated with our emphasis:

Because one of the problems you have is that we give this jury an instruction that says: "If you violate the law, that's negligence. That's not what a reasonable person would do." . . . I *have* to tell the jury if she [violates the law], she's negligent.

Based upon this mistaken view of the law, the court gave three jury instructions which Gaw challenges on appeal.

Instructions 14 and 18 provided:

[Instruction No. 14]: When the law makes it the duty of a driver of one vehicle to yield the right of way to a second vehicle, that duty arises as soon as the two vehicles are close enough to each other to constitute an immediate hazard. Such a hazard exists whenever a reasonably prudent person in the position of the driver of the first vehicle, would apprehend the probability of colliding with the second vehicle if the driver of the first vehicle attempted to proceed on the intended course of travel. Failure to yield the right of way under such circumstances is negligence.

[Instruction No. 18]: A vehicle may not be operated over, across, or within any painted or other dividing space, median or barrier of [\*\*12] a divided highway, if such space or median is clearly visible to a reasonably

observant person, except where authorized by an official traffic control device or peace officer.

Failure to operate a vehicle in accordance with the foregoing requirement of the law is negligence on the part of the driver.

These instructions, though not framed as "prima facie" instructions, allowed the jury to consider some limited justifications and excuses for the conduct which may be a technical violation of the law. For example, if Gaw could prove that she reasonably did not apprehend the probability of the collision when she proceeded into the intersection, her failure to yield might have been excused under instruction 14. Moreover, her failure to stay off the median strips and painted lines might have been excused under instruction 18 if she could prove that the lines in the intersection were not clearly visible to the reasonably observant person.

It is easy to envision facts not encompassed by the language in instructions 14 and 18 which would nevertheless tend to [\*1136] justify or excuse the prohibited conduct described in those instructions, making those instructions inappropriate in a range of cases. [\*\*13] However, the instructions appear, under the totality of the facts before us, to sufficiently encompass any justifications and excuses that Gaw actually offered at trial for her conduct. Consequently, we hold that instructions 14 and 18 were sufficient, if barely so, under the circumstances of this case.<sup>8</sup>

8 Although we hold that instructions 14 and 18 were sufficient in this case, we do not mean to suggest that they were in any way ideal instructions which could not be improved upon on remand to more fully explain the role and range of justifications and excuses for the proscribed conduct.

Unlike instructions 14 and 18, however, jury instruction number 17 does not provide for any justification or excuse. That instruction states:

The operator of a vehicle intending to turn left shall turn onto the roadway being entered, in the extreme left hand available lane for traffic moving in the new direction of travel.

Failure to operate a vehicle in accordance with the foregoing requirements of the law is negligence on the

[\*\*14] part of the driver.

If the jury found that Gaw had turned left into any lane other than the extreme left lane, the jury *had* to find Gaw negligent under this instruction. Neither this instruction, nor any other instruction read in conjunction with this instruction, allowed the jury to consider justifications or excuses for the improper turn. This was a strict "per se" instruction and we must therefore reverse on the basis of this instruction.

#### SUMMARY JUDGMENT

Finally, Gaw argues that the court erred when it granted the state's summary judgment motion. Summary judgment is only appropriate when the moving party has demonstrated "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c); *Transamerica Cash Res., Inc. v. Dixie Power & Water, Inc.*, 789 P.2d 24, 25 (Utah 1990). Because a challenge to summary judgment presents only questions of law, we review the trial court's decision for correctness, *id.*, and "analyze the facts and inferences in the light most favorable to the losing party." *Provo City Corp. v. State*, 795 P.2d 1120, 137 Utah Adv. Rep. 8, 9 (1990).

The trial court gave two [\*\*15] reasons for granting the state's motion. First, it found the affidavits from Gaw's experts were conclusory and without foundation and therefore did not support the conclusion that the intersection was faultily designed. Second, the court found that Gaw had unambiguously stated in her deposition as initially transcribed that she was not confused by the intersection. The court refused to consider the numerous changes she made to her deposition and ordered them suppressed. The court also refused to consider the assertions in her subsequent affidavit that she was confused, concluding she had not adequately explained the discrepancy on that issue which appeared from her deposition. Consequently, the court found that the design of the intersection was not a cause of the accident.

On appeal, Gaw argues that genuine issues exist as to both the inadequate design of the intersection and to her own confusion. She argues that the experts' affidavits sufficiently demonstrated that the intersection was faultily designed. Moreover, she argues that her original deposition, her amended deposition, and her affidavit all asserted the position that she was confused by the

intersection and all should [\*\*16] have been considered by the trial court. We now consider each of these arguments.

#### A. Expert Opinion Concerning Faulty Design

The trial court ruled that the affidavits of Gaw's experts concerning the faulty design of the intersection were inadequate because they were "without foundation as to the highway design and they do not specify what standards the State did not follow or should have followed in this instance." [\*1137] On appeal, Gaw argues that the court's conclusions were incorrect. Although we are not sure precisely what the trial court found missing from the experts' affidavits,<sup>9</sup> we hold that they adequately complied with the standard we set forth in *American Concept Ins. Co. v. Lochhead*, 751 P.2d 271 (Utah Ct. App. 1988).

<sup>9</sup> The court's two stated concerns were that the affidavits stated "conclusions without foundation as to the highway design" and that they failed to specify the standards which the state did not follow. Having reviewed the affidavits, we find that they contained both of these elements. As to foundation, both experts identified particular aspects of the intersection and surrounding area which made the intersection misleading and dangerous. As to the applicable standard, one expert stated that the design was "totally in conflict with normal engineering practices." The other expert identified and quoted from two publications dealing with highway safety and design. Consequently, we fail to perceive the deficiencies about which the trial court was concerned.

[\*\*17] In *Lochhead*, we articulated a standard for determining the sufficiency of an expert's affidavit in the summary judgment context. First, we stated that Utah Rule of Evidence 704 allowed the expert to state his opinion concerning the ultimate issue in the case. *Id.* at 273. We then recognized that "[a]n expert affidavit must also contain a sufficient factual basis for the opinion proffered." *Id.* at 274. See Utah R. Civ. P. 56(e).<sup>10</sup> To determine the extent of the factual basis required, we looked to Utah Rule of Evidence 703 which allows an expert to base an opinion on admissible evidence and inadmissible evidence of the kind that experts in the field use. *Id.* We concluded that the affidavit was sufficient if it articulated the facts upon which the opinion was based

and if the facts were of the "type usually relied upon by experts in the field." *Id.*

10 The rule requiring an expert affiant to state the factual basis for his or her opinion appears to be at odds with Utah Rule of Evidence 705, which allows an expert to give his or her opinion without stating the facts and data upon which he or she relied. However, Rule 705 also recognizes that the expert may have to divulge the basis for his or her opinion if the court requires and if requested upon cross examination. Since an affiant is not subject to cross examination, it makes some sense to require the expert affiant to divulge at least part of the basis for his or her opinion. Stated another way, Utah R. Civ. P. 56(e)'s explicit requirements that affidavits "be made on personal knowledge" and "set forth such facts as would be admissible in evidence," together with its implicit recognition that statements in an affidavit must not be conclusory in form, *Norton v. Blackham*, 669 P.2d 857, 859 (Utah 1983), and that affidavits not contain unsubstantiated opinions, *Treloggan v. Treloggan*, 699 P.2d 747, 748 (Utah 1985) (per curiam), control in the summary judgment context over Utah R. Evid. 705.

[\*\*18] In *Lochhead*, the expert was a licensed property and casualty claims manager. *Id.* at 273. His opinion was that American Concept had breached its duties of good faith and fair dealing. *Id.* That opinion was based upon an examination of American Concept's adjuster's files. *Id.* We held that because the adjuster's files were the type of materials upon which experts in the field relied, the affidavit was sufficient and, therefore, we reversed the summary judgment. *Id.* at 274.

Under the *Lochhead* analysis, the affidavits in this case were sufficient. Gaw's experts each averred to be engineers with some expertise in the area of traffic and/or highway design. Both experts stated in their affidavits that the intersection was dangerous and/or failed to meet safety standards in the industry. The basis for one expert's opinion was his examination of the intersection site. The other expert based his opinion on a diagram of the intersection, police reports and photographs, Gaw's deposition, and traffic court data. Clearly, the facts articulated in the affidavits are the type relied upon by experts in the field. Thus, we hold that the affidavits were sufficient and should not [\*\*19] have been disregarded

by the trial court. They raise an issue of material fact as to the negligent design of the intersection.

#### B. Evidence that Gaw was Confused by the Intersection

The state argued that even if the intersection was negligently designed, there was no evidence that Gaw was actually confused by the intersection and thus the intersection's design was not a proximate [\*1138] cause of the accident. The trial court agreed. Gaw argues that her original deposition, amended deposition, and affidavit all created an issue of fact concerning her confusion and all should have been considered by the court. We will treat each of these three sources separately.

##### 1. Original Deposition

First, Gaw argues that her original deposition alone was sufficient to raise an issue concerning her confusion. We disagree. Gaw was repeatedly asked during her initial deposition whether she was confused by the intersection. She repeatedly stated that she was not.<sup>11</sup>

11 The following excerpts are illustrative of Gaw's initial deposition testimony:

Q: Mrs. Gaw, when you entered the intersection on the day of the accident, were you confused by anything?

A: No, cause I had driven that two or three times or more.

...

Q: . . . Do you have any memory or do you feel that you were confused by any of these lines in this intersection?

A: Not that I remember. There was -- They didn't ever bother me before and I don't remember.

[\*\*20] The only testimony from her initial deposition relied upon by Gaw to demonstrate that she was confused by the intersection is as follows:

Q: Is there anything about the intersection markings or signs that you were unable to understand?

A: Well, it was always confusing there, the way they had the lines going that way, this way, and which way.

Q: What was the confusion?

A: Well, you really just had to watch what you're doing and stay in the lane and watch where you're going, because they were always marked crazy.

This testimony only demonstrates that the intersection required extra attention to successfully navigate it. It does not demonstrate that Gaw was in fact confused on the day of the accident, especially in light of her many statements that she had not been confused. See note 11, *supra*, and accompanying text. Thus, we hold that Gaw's initial deposition testimony was not sufficient to raise an issue of material fact concerning whether she was confused on the day of the accident.

## 2. Changes to Deposition Testimony

Gaw attempted to change her deposition testimony in over fifty places. She did so by means of "correction sheets," prepared by herself outside the presence [\*\*21] of the court reporter who took the deposition. The reporter filed the sheets along with the deposition as initially transcribed. Some of the changes were merely to clarify and to correct typographical errors but many were substantive. For example, Gaw was asked during the deposition: "Do you have any memory about whether or not, at the time of the accident, you were confused by the lane markings?" In her original deposition, she responded: "No, I don't." In her corrected answers she stated "Yes, I was confused for the lines were changed often." A few lines later she was asked: "That answer you gave to the previous question is, 'No, You don't know whether you were confused?'" Initially she responded: "Uh-huh." In her corrected answers she stated: "Yes I was confused, that place is very confusing to anyone." Finally, she was asked: "I want to make sure you're clear on that last question he was asking you. At this time, okay, do you have any memory or do you feel that you were confused by any of these lines in this intersection?" She responded: "Not that I remember. There was -- They didn't ever bother me before, I don't remember." She corrected the response to state "Yes, it is very [\*\*22] confusing for anyone."

Defendants moved to suppress the changes to Gaw's deposition. The court granted the motion to suppress and consequently did not consider the changed answers in its decision to grant the summary judgment motion. The basis for the court's decision was "that changes to the substance [of] the deposition testimony were entered by

plaintiff upon the deposition and not by the officer before whom the deposition was taken as required in Rule 30(e)." [\*1139] On appeal, Gaw asserts that the court erred in suppressing the deposition changes. We disagree.

Initially, we note that Utah Rule of Civil Procedure 30(e) is drafted very broadly to allow "changes in form or substance which the witness desires to make." Although some commentators have puzzled over the liberality of this rule, *see, e.g.,* Scully, *A Brief History of Deposition Editing*, 15 *Litigation* 43 (Spring 1989), courts have generally not limited the number and kinds of changes a deponent can make. *See, e.g.,* *Lugtig v. Thomas*, 89 *F.R.D.* 639, 641 (*N.D. Ill.* 1981) (mem.) (69 changes including many substantive changes); *Allen & Co. v. Occidental Petroleum Corp.*, 49 *F.R.D.* 337, 339 (*S.D.N.Y.* 1970) (mem.) [\*\*23] (377 changes of which 73 were substantive); *De Seversky v. Republic Aviation Corp.*, 2 *F.R.D.* 113, 114 (*E.D.N.Y.* 1941) (34 substantive changes). *But see* *Barlow v. Esselte Pendaflex Corp.*, 111 *F.R.D.* 404, 406 (*M.D.N.C.* 1986) ("manner and number of changes disclose a lack of good faith"). Thus, though defendants grouse about the kinds of changes Gaw made to her deposition testimony, that argument does not support suppression of the changes.

The question before us is whether the court should have suppressed the changes for Gaw's failures to comply with the requirements of Rule 30(e). Rule 30(e) requires that changes "be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them." Utah R. Civ. P. 30(e).

Although courts have allowed liberal changing of deposition testimony, they have been fairly strict in requiring compliance with the technical requirements of Rule 30(e). *See, e.g.,* *Sanford v. CBS, Inc.*, 594 *F. Supp.* 713, 715 (*N.D. Ill.* 1984) (mem.) (requiring specific reasons for each change); *Lugtig*, 89 *F.R.D.* at 642 (requiring changes to be written in deposition after original answer, specific reasons for changes, [\*\*24] and changes to be made by the reporter). That strictness has been tempered somewhat by the willingness of trial courts to permit deponents a further opportunity to comply with the technical requirements of Rule 30(e) rather than simply striking or suppressing attempted changes not in compliance with the rule. In *Sanford* and *Lugtig* the courts required the deponent to amend the depositions as per the rule, with the proviso this be done at the deponents' expense. 594 *F. Supp.* at 715; 89 *F.R.D.*

at 642. Moreover, where changes have been extensive, courts have allowed the opposing party to reopen the deposition for further examination, costs to be paid by the deponent whose changes, after all, created the problem. See, e.g., 594 F. Supp. at 715; 89 F.R.D. at 642. The patience of trial courts in this regard is not, however, boundless. In *Barlow*, the deponent made over a hundred changes to the deposition, including the deletion of large blocks of the deposition, and failed to provide any reasons for the changes. 111 F.R.D. at 406. Moreover, the changes were so extensive that it was "virtually impossible for the [court] reporter to enter the changes upon the deposition as [\*\*25] he is required to do." *Id.* The court found the *Barlow* deponent's actions to be "at variance with the letter and spirit of Rule 30(e)" and declared the attempted changes a "nullity." *Id.*

The facts before us do not warrant the same remedy reached by the *Barlow* court. Although there were numerous changes to the deposition in this case, many of which were admittedly substantive, Gaw offered some semblance of a specific reason for each. The reporter would not have had difficulty entering them on the deposition. Moreover, the method for making changes employed by Gaw, while at variance with the clear requirements of Rule 30(e), was consistent with the reporter's instructions on the correction sheet given to Gaw. <sup>12</sup> Suppression [\*1140] of the changes was a drastic remedy which courts usually reject in the absence of bad faith. <sup>13</sup>

12 The instructions on the correction sheet stated:

After reviewing the transcript of your deposition, please fill out this correction sheet indicating any changes you deem necessary.

This is a verbatim record of what was actually said and no grammatical corrections should be made. If there are corrections or, insertions, please initial the correction sheet and briefly state your reasons therefor. For example, spelling error, clarification, transcriber error, et cetera.

Please do all corrections with typewriter or black ink.

Complying with the instructions on this sheet can hardly be viewed as "bad faith" of the sort

which concerned the court in *Barlow*. See 111 F.R.D. at 406.

[\*\*26]

13 The only evidence of bad faith which appears from the record was the false representation to the court that Gaw was suffering from an undiagnosed and untreated diabetic condition during the initial deposition. It is noteworthy that this excuse was not offered on the correction sheet completed by Gaw herself nor in her subsequent affidavit, but appears only in Gaw's memorandum in opposition to defendants' motion to suppress, which was prepared and signed by counsel. Though we do not condone such a false representation to the court, it is better sanctioned under Utah R. Civ. P. 11 where made by an attorney rather than a party. Such an after-the-fact mischaracterization by counsel should not be the basis for the suppression of deposition changes which rule 30(e) so liberally allows. See also note 12, *supra*.

However, Gaw's response to the motion to suppress did not include, even in the alternative, a request for an opportunity to comply with the requirements of Rule 30(e) and an offer to reopen the deposition at her expense. She only argued that she was entitled to make the changes in the [\*\*27] manner she did. Moreover, on appeal she does not contend she was entitled to alternative relief but steadfastly continues to argue only that her changes were validly made despite her non-compliance with Rule 30(e). The matter being presented in this posture, where appellant did not seek the more moderate response of the *Sanford* and *Lutig* courts either at the trial court nor on appeal, we reject her argument that her deposition changes were properly made and affirm the trial court's decision to suppress them for failure to comply with Rule 30(e). It follows that nothing in her corrected answers was effective to create a factual dispute.

### 3. Gaw's Affidavit

Gaw submitted an affidavit, along with her memorandum in opposition to the state's motion for summary judgment. The trial court stated that Gaw's deposition demonstrated she was not confused by the intersection and that "the Court will not allow her to change those statements by affidavits . . . since she has offered no explanation as to why she would be mistaken

at the time of the deposition." Gaw asserts that the affidavit contained an adequate explanation which raised a genuine issue concerning her confusion. We agree.

[\*\*28] The general rule in Utah is that an affiant may not "raise an issue of fact by his own affidavit which contradicts his deposition, unless he can provide an explanation of the discrepancy." *Webster v. Sill*, 675 P.2d 1170, 1173 (Utah 1983). In *Webster*, the Utah Supreme Court affirmed a summary judgment because the contradictory affidavit "wholly failed to explain the discrepancy between the deposition and the affidavit." *Id.*

In this case, unlike *Webster*, Gaw did not wholly fail to explain the discrepancy. According to the affidavit, she had previously thought, including at her deposition, that she was turning into the merge lane of the highway and not into the through lane as was ultimately established. She thought she was properly following the lines through the intersection. She thought the lines had taken her correctly into the merge lane. Moreover, she assumed that the accident had occurred in the merge lane. At her deposition, she understood the questions to reflect these same assumptions, responded to them under these assumptions, and accordingly had no subjective sense of being confused. Only later, according to defendant, did she discover her assumptions were [\*\*29] incorrect and that she had actually driven into the through lane meaning to have driven into the merge lane. Therefore, at her deposition, she truly did not believe that she was confused by the intersection, although obviously she was thoroughly confused, having completely misapprehended her route of [\*1141] travel and what lane she ended up in.<sup>14</sup>

14 Gaw's human factors expert gave at trial the following explanation for Gaw's confusion and the discrepancy in the deposition:

[A] person can be mis[led], in which case they're not aware. And if they're not aware they're mis[led], that in that sense, they're really not confused . . . . [S]omeone on the outside looking at what happened [would say]: "Well, if she did that, it's very likely she was confused but didn't know it." You see, that's the difference. I'm more comfortable with the term 'mis[led],' than I am 'confused;' because some connotations of the word 'confused' would indicate that the person was aware they were confused. But -- There's some differences between those two terms.

[\*\*30] This case is similar to the case of *Kennett-Murray Corp. v. Bone*, 622 F.2d 887 (5th Cir. 1980). In *Bone*, there was a discrepancy between the affiant's affidavit and his earlier deposition. The court noted that the "affidavit did not purport to raise a new matter, but rather to explain certain aspects of his deposition testimony." *Id.* at 894. Namely, the affiant explained that certain responses were given under the mistaken assumption that the questions concerned one document when they in fact concerned another. The court was satisfied with the explanation in the affidavit because it was "at least plausible." *Id.* Cf. *Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361, 1364-65 (8th Cir. 1983) (opposite result reached where "affidavit was inherently inconsistent with his prior deposition [and] not plausible").

Although the trial court in this case apparently did not believe Gaw's explanation for the discrepancies, we find her explanation is not inherently inconsistent with the responses in her initial deposition.<sup>15</sup> We do not have to be persuaded by the explanation or even find it compelling. As long as it is plausible, the fact finder should be allowed [\*\*31] to weigh the credibility of the explanation. See *Tippens v. Celotex Corp.*, 805 F.2d 949, 953 (11th Cir. 1986) ("A definite distinction must be made between discrepancies which create transparent shams and discrepancies which create an issue of credibility."). Gaw's affidavit raised a genuine issue of fact concerning whether she was confused by the intersection.

15 Many of Gaw's deposition responses are consistent with the explanation in her affidavit of the apparent discrepancies. The following exchange is illustrative:

Q: On the date of the accident, did you use that merge lane?

A: Well, I always did before, but, sir, I don't know. I can't remember whether I went there or what. I pulled out into the center and he was coming and I stopped. That's it. I don't remember after that. I wish to God I did.

Q: What you are telling me, then, is you do not know whether you used the merge lane that you used on prior occasions in driving this same route on the day of the accident?



A: I always had before, so why would I change it for one time?

[\*\*32] C. Summary

The trial court erred in granting the state's summary judgment motion. The expert affidavits adequately raised a genuine issue of fact concerning the negligent design of the highway. Gaw's affidavit raised an issue of fact concerning whether Gaw was in fact confused by the intersection. The credibility of Gaw's final position was one for the trier of fact and not properly disposed of on summary judgment. We accordingly reverse the summary judgment and remand for a trial or other appropriate proceedings.

CONCLUSION

Although the court should have allowed Gaw's human factors expert to testify on the reasonableness of Gaw's conduct prior to the accident, the error was not prejudicial because the expert effectively conveyed his message even without using those magic words. The trial court gave jury instructions under the mistaken assumption that the violation of a statute or ordinance constitutes negligence "per se." It was reversible error to give an instruction to that effect. Finally, the trial court improperly granted the state's summary judgment motion because material issues of fact existed concerning the negligent design of the intersection and concerning whether Gaw [\*\*33] was in fact confused by the intersection.

[\*1142] We reverse and remand for a new trial or other proceedings consistent with this opinion.



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**Stephen A. Giusti, Plaintiff, Appellant, and Cross-Appellee, v. Sterling Wentworth Corporation, a Utah corporation; SunGard Data Systems; John Hyde; and Paul Erickson; Defendants, Appellees, and Cross-Appellants.**

**Nos. 20070648, 20070720**

**SUPREME COURT OF UTAH**

**2009 UT 2; 201 P.3d 966; 621 Utah Adv. Rep. 11; 2009 Utah LEXIS 8**

**January 16, 2009, Filed**

**SUBSEQUENT HISTORY:** Rehearing denied by *Giusti v. Wentworth*, 2009 Utah LEXIS 31 (Utah, Mar. 5, 2009)

**PRIOR HISTORY:** [\*\*\*1]

Third District, Salt Lake. The Honorable L. A. Dever. No. 000905359.

**COUNSEL:** Kathryn Collard, Salt Lake City, for plaintiff.

Lois A. Baar, Cecilia M. Romero, Salt Lake City, Laurence S. Shtasel, Philadelphia, PA, for defendants.

**JUDGES:** DURRANT, Associate Chief Justice. Chief Justice Durham, Justice Wilkins, Justice Parrish, and Justice Nehring concur in Associate Chief Justice Durrant's opinion.

**OPINION BY:** DURRANT

**OPINION**

[\*\*969] *DURRANT, Associate Chief Justice:*

**INTRODUCTION**

[\*P1] Sterling Wentworth Corporation ("SWC") terminated Stephen A. Giusti's employment. Giusti sued, asserting six claims against SWC and its parent corporation SunGard: (1) fraudulent inducement, (2) breach of contract, (3) breach of the implied covenant of

good faith and fair dealing, (4) promissory estoppel (claims two through four, collectively, the "contract claims"), (5) tortious interference and defamation, and (6) intentional infliction of emotional distress.

[\*P2] Between January 2001 and November 2006, all of Giusti's claims were resolved. Giusti voluntarily dismissed his claim for intentional infliction of emotional distress. The district court dismissed defendant SunGard for lack of personal jurisdiction and, in a series of orders, granted SWC's motion for [\*\*\*2] summary judgment on each of Giusti's remaining claims. The court then denied SWC's motion for attorney fees and limited its recovery of costs to \$ 55.

[\*P3] Giusti appeals, claiming that the district court erred in dismissing SunGard for lack of personal jurisdiction and in granting summary judgment to SWC on each of his claims.

[\*P4] SWC asserts that Giusti's appeal was untimely and that we therefore lack jurisdiction to consider it. SWC also cross-appeals, claiming that the district court erred in denying it attorney fees and in limiting its recovery of costs to \$ 55.

[\*\*970] [\*P5] We conclude that Giusti's appeal was timely. We also hold that the district court was correct in granting summary judgment to SWC on each of Giusti's claims, and therefore, we do not reach the issue of whether SunGard was properly dismissed for lack of personal jurisdiction. We further conclude that the

district court correctly denied SWC's claim for attorney fees and correctly limited its request for costs. We thus affirm each of the district court's decisions.

## BACKGROUND

[\*P6] In reviewing a grant of summary judgment, we view the facts in the light most favorable to the nonmoving party.<sup>1</sup> Applying that standard, we recite the facts [\*\*\*3] as follows. In February 1999, SunGard, a computer software and services company incorporated in Delaware, purchased, as a wholly owned subsidiary, SWC, a Utah corporation located in Salt Lake City. During the fall of 1999, John Hyde and Paul Erickson--SWC's President and Vice President of Operations, respectively--recruited Giusti for the position of Vice President of Sales.

1 See *Chapman v. Primary Children's Hosp.*, 784 P.2d 1181, 1182-83 (Utah 1989).

[\*P7] At the time of his recruitment, Giusti was employed as Senior Vice President of Marketing at Cambric Corporation in Salt Lake City. He had an annual base salary of \$ 125,000, which was due to increase to \$ 135,000 on January 1, 2000. He also had an \$ 800 per month car allowance, other benefits, and had received the first \$ 25,000 of a \$ 100,000 performance bonus, the remainder to be paid in installments based on Cambric's financial performance and Giusti's performance.

[\*P8] Giusti claims that, during negotiations, he and Hyde orally agreed that Giusti would be guaranteed twelve months of employment at SWC and that this guaranty was incorporated into an offer letter ("November offer letter"). Giusti signed and returned the November offer letter [\*\*\*4] to SWC and began work as Vice President of Sales on December 1, 1999.

[\*P9] According to Giusti, a few days after beginning work, Pat Black, the Human Resources Director at SWC, brought into Giusti's office the Sterling Wentworth Employment Agreement ("SWC employment agreement" or "employment agreement") for him to sign. The SWC employment agreement provided that Giusti's employment could be terminated at any time "with or without cause." Giusti claims that he told Black that this provision did not apply to him per his agreement with Hyde, and that, in reply, Black informed him that she had no knowledge of such an arrangement and that he was required to sign the form so she could process his benefit

enrollment. Giusti signed the SWC employment agreement on December 6, 1999.

[\*P10] Giusti claims that, within his first two weeks of employment at SWC, he observed a high level of organizational chaos within the company and confronted Hyde, questioning him about his previous representations that SWC and its client revenue base were strong. Giusti asserts that, in response, Hyde promised him a new level of compensation. Hyde amended the November offer letter to reflect this change, and the change appeared [\*\*\*5] in a letter dated December 13, 1999 ("December contract"). Where the November offer letter provided that Giusti would receive a "1% override of revenue produced by the sales people you manage," the December contract provided that he would receive "1% on corporate revenue." This change was handwritten on the December version of the November offer letter. Both parties initialed the change.

[\*P11] On April 26, 2000, Giusti indicated to SWC's financial personnel that he might exercise his one-time election to move from the monthly subsidy plan to the commission and override plan whereby he would receive a 1% override on all corporate sales as promised to him in the December contract. Within a few days, and after only five months of employment at SWC, Giusti's employment was terminated.

[\*P12] Giusti filed suit on July 10, 2000, claiming six causes of action against SWC and SunGard: (1) fraudulent inducement of employment, (2) breach of contract, (3) breach of the implied covenant of good faith [\*\*\*971] and fair dealing, (4) promissory estoppel, (5) tortious interference and defamation, and (6) intentional infliction of emotional distress.

[\*P13] Between January 2001 and November 2006, all six of Giusti's claims were [\*\*\*6] resolved in SWC's favor. In January 2001, the district court dismissed defendant SunGard for lack of personal jurisdiction. In March 2002, the court granted SWC's motion for summary judgment on Giusti's three contract claims.<sup>2</sup> In April 2003, Giusti voluntarily dismissed his claim for intentional infliction of emotional distress. In September 2005, the court granted SWC's motion for summary judgment on Giusti's tortious interference and defamation claims. In November 2006, the court dismissed Giusti's claim for fraudulent inducement, his only remaining claim. The November 2006 order ("November order") was entitled "Order Granting Summary Judgment and

Dismissal of Plaintiff's Complaint with Prejudice" and contained the following language:

[H]aving made a Minute Entry/Order dated April 21, 2006, containing the Court's thinking and its decision on the matter, now, the Court HEREBY FINDS, ADJUDGES, and ORDERS AND DECREES that: Summary Judgment is GRANTED on Plaintiff's claim for fraudulent inducement and Plaintiff's Complaint, in its entirety, is DISMISSED WITH PREJUDICE.

2 This ruling was confirmed in an order dated September 3, 2003.

[\*P14] The November order also provided that SWC could submit [\*\*\*7] a request for attorney fees. In December 2006, SWC submitted its motion for attorney fees, and the court denied the request in a final order dated June 8, 2007 ("June order"). A separate judgment, combining the November and June orders, was entered on July 10, 2007 ("July judgment").

[\*P15] The parties dispute some of the events that followed the entry of the June order and led up to the entry of the July judgment.<sup>3</sup> It is undisputed that Giusti's counsel prepared for entry a final judgment combining the contents of the November and June orders. The district court entered that judgment on July 10, 2007. Giusti filed his notice of appeal on August 6, 2007.

3 Giusti's counsel, Kathryn Collard, submitted an affidavit with her brief. In it, she recounts her conversations with the district court clerks who, according to Collard, informed her that the judge wanted Collard to prepare the July order for entry. SWC claims that this affidavit should be stricken as beyond the record on appeal. In reaching our conclusion that Giusti's appeal was timely, we did not rely on the contents of that affidavit. Nor does the existence of the affidavit or its contents affect our analysis in any way. Thus, we decline [\*\*\*8] to reach the issue of whether the affidavit was beyond the record on appeal.

[\*P16] SWC argues that Giusti's appeal was ripe as of June 8, 2007, the date of the final order denying

attorney fees, because "Plaintiff's Complaint had already been dismissed in its entirety . . . and Defendants' fee request had been denied." According to SWC, Giusti's appeal, filed on August 6, 2007--well over 30 days later--is therefore untimely.<sup>4</sup>

4 *Utah Rule of Appellate Procedure 4(a)* requires appeals to be filed "within 30 days after the date of entry of the judgment or order appealed from."

[\*P17] Giusti, on the other hand, contends that his appeal was timely because, according to *Utah Rule of Civil Procedure 7(f)(2)*, the July judgment was necessary and the appeal period did not begin running until the July judgment was entered on July 10, 2007.

[\*P18] Because the parties dispute which decision--the June order or the July judgment--triggered the appeal period, as a threshold matter, we must address that question to determine whether Giusti's appeal was timely. We have jurisdiction pursuant to *Utah Code section 78A-3-102(3)(j)* (2008).

## STANDARDS OF REVIEW

[\*P19] "We review a district court's decision to grant summary judgment for [\*\*\*9] correctness," giving no deference to the court below.<sup>5</sup> Summary judgment is appropriate if there is "no genuine issue as to any material [\*\*\*972] fact and . . . the moving party is entitled to judgment as a matter of law."<sup>6</sup>

5 *Swan Creek Vill. Homeowners Ass'n v. Warne*, 2006 UT 22, P 16, 134 P.3d 1122 (citation and internal quotation marks omitted); see also *Fenn v. Mleads Enters., Inc.*, 2006 UT 8, P 2, 137 P.3d 706.

6 *Utah R. Civ. P. 56(c)*.

[\*P20] We review a district court's denial of attorney fees for correctness,<sup>7</sup> while we review a district court's denial of costs for abuse of discretion.<sup>8</sup>

7 *Paul deGroot Bldg. Servs., LLC v. Gallacher*, 2005 UT 20, P 18, 112 P.3d 490.

8 *Young v. State*, 2000 UT 91, P 4, 16 P.3d 549.

## ANALYSIS

[\*P21] We [\*\*\*10] first discuss whether Giusti's appeal was timely. Because we conclude that it was, we

then discuss Giusti's claim that the district court erred in granting summary judgment to SWC on Giusti's (1) contract claims, (2) fraudulent inducement claim, and (3) tortious interference claim. We affirm the district court's grant of summary judgment on all issues, and we therefore do not reach Giusti's claim that the district court erred in dismissing SunGard for lack of personal jurisdiction.

[\*P22] Finally, we discuss the issues raised in SWC's cross-appeal: that the district court erred in denying SWC attorney fees and in limiting its recovery of costs to \$ 55. We affirm the district court's decision on this issue as well.

#### I. GIUSTI'S APPEAL WAS TIMELY

[\*P23] In arguing that his appeal was timely, Giusti relies on *rule 7(f)(2) of the Utah Rules of Civil Procedure*. That rule, along with our recent holding in *Code v. Utah Dep't of Health*,<sup>9</sup> establish that the July judgment was necessary, and therefore, Giusti's appeal was timely.<sup>10</sup>

<sup>9</sup> 2007 UT 43, P 4, 162 P.3d 1097.

<sup>10</sup> Giusti also argues that *rule 54(b) of the Utah Rules of Civil Procedure* applies to save his claim from a challenge to its timeliness. Because we [\*\*\*11] hold that *rule 7(f)(2)* controls this issue, we do not address Giusti's arguments based on *rule 54(b)*.

[\*P24] Giusti contends that under *rule 7(f)(2)* his appeal was timely because the rule requires that a separate order--in addition to the November and June orders--be entered. *Rule 7(f)(2)* provides that

[u]nless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.<sup>11</sup>

11 *Utah R. Civ. P. 7(f)(2)*.

[\*P25] Giusti argues that because "no order in conformity with the district court's [June order] was submitted by either party," the appeal period was not triggered until the entry of such an order in the form of the July judgment. The plain language of the rule, along with our decision in *Code*, support Giusti's argument.

[\*P26] *Rule 7(f)(2)* provides in pertinent part that "[u]nless [\*\*\*12] the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall . . . serve upon the other parties a proposed order in conformity with the court's decision."<sup>12</sup>

12 *Id.*

[\*P27] The rule is clear. A prevailing party *shall* prepare for entry a proposed order in conformity with the court's decision. There are only two exceptions to this mandate. First, if the court approves a proposed order that is submitted with an initial memorandum, then no additional order is necessary. Second, if the court directs that no additional order is necessary, then none is.

[\*P28] In this case, neither exception was satisfied. No proposed order was submitted with an initial memorandum, and the court did not direct the parties that no additional order was necessary. The court did not, for example, tell the parties that its June order was final for purposes of appeal and that no [\*\*973] additional order need be prepared. In the absence of such a directive, *rule 7(f)(2)* could only be satisfied if one of the parties prepared an order for entry. The burden was on SWC, as the prevailing party, to prepare the order. When SWC failed to meet its burden, Giusti [\*\*\*13] acted appropriately in preparing the order,<sup>13</sup> and the court entered it on July 10. Because the entry of the July judgment satisfied the requirements of *rule 7(f)(2)*, the July judgment triggered the appeal period, and Giusti's appeal, taken on August 6, was timely.

<sup>13</sup> *Code, 2007 UT 43, P 7, 162 P.3d 1097* (when the prevailing party fails to prepare an order for entry according to *rule 7(f)(2)*, "any party interested in finality--generally, the nonprevailing party--may submit an order").

[\*P29] This result is supported by our recent decision in *Code*,<sup>14</sup> in which we explained the correct

application of *rule 7(f)(2)*. In *Code*, the district court issued a memorandum decision in January dismissing plaintiff's claim.<sup>15</sup> When defendants, the prevailing party, failed to prepare a separate order for entry as required by *rule 7(f)(2)*, plaintiff prepared the order, and the court entered it in February.<sup>16</sup> Plaintiff appealed in March, and the court of appeals dismissed her case for lack of jurisdiction, holding that her appeal was untimely.<sup>17</sup> We reversed and held that "the [February] order, and not the [January] memorandum decision, constituted the district court's entry of judgment for appeal purposes."<sup>18</sup>

14 *Id.*

15 *Id. P 1.*

16 *Id.*

17 *Id. P 2.*

18 *Id. P 4.*

[\*P30] [\*\*\*14] In our opinion, we emphasized the broad and mandatory nature of *rule 7(f)(2)*: "[a] court should include [an] explicit direction *whenever it intends a document--a memorandum decision, minute entry, or other document--to constitute its final action*. Otherwise, *rule 7(f)(2)* requires the preparation and filing of an order to trigger finality for purposes of appeal."<sup>19</sup>

19 *Id. P 6* (emphases added).

[\*P31] Because the issue in *Code* turned on whether a memorandum decision constituted a final judgment, SWC argues that our holding "is limited to memorandum decisions or minute entries where finality is not discernible." SWC thus argues that our mandate in *Code* does not apply to *Giusti* because (1) the district court issued a final order rather than a memorandum decision, (2) the finality of that order was clearly discernible, and (3) the July judgment was unnecessary because it was "merely a compact summary of the two prior orders and did nothing more than restate what had already been resolved in the prior orders." We address each argument in turn.

[\*P32] First, our broad holding in *Code* is inclusive of *all* final district court decisions, regardless of how they are styled. We held that "whenever" a court intends [\*\*\*15] any "document" to constitute its final action, the court must explicitly direct that no additional order is necessary.<sup>20</sup> Otherwise, *rule 7(f)(2)* "requires" the preparation and entry of a separate order in conformity with the court's decision.<sup>21</sup> Thus the requirements of *rule 7(f)(2)* apply to every final decision issued by a district

court, not just memorandum decisions or minute entries, as SWC claims.

20 *Id.*

21 *Id.*

[\*P33] Second, our holding in *Code* removes the burden from litigants of discerning when the appeal period has been triggered. SWC argues that litigants retain this burden, and because the finality of the June order was "discernible," in that it "unequivocally ended the controversy between the parties[.]" the June order triggered the appeal period.

[\*P34] SWC is correct that a decision is final when it ends the controversy between the parties.<sup>22</sup> SWC is also correct that, pursuant to *rule 3 of the Utah Rules of Appellate Procedure*, an appeal of right may be [\*\*\*974] taken only from "final orders and judgments."<sup>23</sup> But *rule 3* does not trump *rule 7(f)(2)*. That is, while *rule 3* provides the substantive requirement for a decision's finality--that it end the controversy between the parties--*rule 3* does [\*\*\*16] not eviscerate the procedural requirements of *rule 7* for triggering the appeal period once a final decision is rendered.

22 We have defined a final judgment as one that "ends the controversy between the parties." *Salt Lake City Corp. v. Layton*, 600 P.2d 538, 539 (Utah 1979).

23 *Utah R. App. P. 3(a)*.

[\*P35] The rules work in concert: pursuant to *rule 3*, parties may take an appeal of right only from a final decision. And pursuant to *rule 7(f)(2)*, that decision triggers the appeal period only upon the occurrence of one of the following events: (1) the court approves an order submitted with an initial memorandum, (2) the court directs that no additional order need be entered, or (3) a party prepares an order for entry that is consistent with the court's final decision. It is the entry of the final order according to *rule 7(f)(2)* that triggers the appeal period. If the court fails to satisfy *rule 7(f)(2)*'s exceptions and if the prevailing party fails to prepare an order for entry, "the appeal rights of the nonprevailing party will extend indefinitely."<sup>24</sup>

24 *Code*, 2007 UT 43, P 6 n.1, 162 P.3d 1097.

[\*P36] The strict application of *rule 7(f)(2)* supports the judicial policy favoring finality, and it prevents the

confusion [\*\*\*17] that often leads--as it has here--to additional litigation when parties are left to divine when a court's decision has triggered the appeal period. In *Code*, we explained that "[w]e see no benefit to a system in which parties must guess, on a case-by-case basis, whether a judge's language in a memorandum decision 'imply[s],' 'invite[s],' or 'contemplate[s]' further action by the parties." <sup>25</sup> While we spoke in terms of a memorandum decision because that was the issue before us in *Code*, we take this opportunity to clarify that the rule's requirements and the policy supporting the rule apply to all final decisions, regardless of how they are styled.

<sup>25</sup> *Id.* P 6 (alterations in original) (citation omitted).

[\*P37] We reject SWC's argument that the July judgment was unnecessary and therefore the appeal period was triggered by the June order. In this regard, SWC argues that the July judgment was unnecessary because it was "merely a compact summary of the [November and June] orders and did nothing more than restate what had already been resolved in the prior orders." Even if, as SWC claims, the July judgment was a duplication of the November and/or June orders, that does not change our analysis that [\*\*\*18] the July judgment was nevertheless necessary to trigger the appeal period. That is, because the requirements of *rule* 7(f)(2) were not satisfied with the November or June order, the July judgment was the only order that satisfied *rule* 7(f)(2). Therefore, it triggered the appeal period.

[\*P38] *Rule* 7(f)(2) applies to every final decision issued by a district court. It therefore applies to the June order issued by the district court in Giusti's case. Because the district court did not direct that no additional order was necessary, SWC, as the prevailing party, had the obligation to prepare an order in conformity with the court's decision. When SWC failed to do so, Giusti acted appropriately in preparing the order, and the appeal period was triggered when that order, in the form of the July judgment, was entered on July 10. Thus, Giusti's appeal was timely. <sup>26</sup>

<sup>26</sup> Giusti seeks attorney fees on the ground that SWC's motion to dismiss his appeal as untimely was frivolous under *Utah Rule of Appellate Procedure* 33(b). A frivolous claim under *rule* 33 "is one that is not grounded in fact, not warranted by existing law, or not based on a good faith

argument to extend, modify, or reverse existing law." [\*\*\*19] While SWC's interpretation of the law is incorrect, we cannot say that its claim was groundless or made in bad faith. Accordingly, there is no basis on which to award attorney fees to Giusti.

## II. THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO SWC ON EACH OF GIUSTI'S CLAIMS

[\*P39] We now review Giusti's claim that the district court erred in granting summary judgment to SWC on Giusti's (1) contract [\*\*975] claims, (2) fraudulent inducement claim, and (3) tortious interference claim.

### A. *The District Court Did Not Err in Granting Summary Judgment to SWC on Giusti's Contract Claims*

[\*P40] Giusti first argues that the district court erred in granting SWC's motion for summary judgment on Giusti's three contract claims: breach of contract, breach of the covenant of good faith and fair dealing, and promissory estoppel. Each of these claims is based on Giusti's assertion that the November offer letter, operating as an employment contract, guaranteed him a minimum of twelve months of employment. <sup>27</sup> Because we hold that the November offer letter provided no guaranty of employment, the district court correctly granted summary judgment to SWC on each of Giusti's contract claims.

<sup>27</sup> While Giusti does not [\*\*\*20] clearly state the particular basis of each of his contract claims, it appears that his argument is that SWC (1) breached his employment contract by terminating his employment after only five months, (2) breached the covenant of good faith and fair dealing that was implied in the agreement by terminating his employment early, and (3) should be estopped from denying its promise of employment given Giusti's reliance on that promise.

[\*P41] Giusti signed three contracts in November and December 1999. First, he signed the November offer letter accepting employment with SWC. Second, he signed the December 5 SWC employment agreement containing an explicit provision that Giusti's employment could be terminated "without cause at any time." Third,

Giusti initialed the December 13 contract, which was a duplication of the November offer letter with only one change to his compensation scheme.

[\*P42] Giusti argues that the November offer letter--and, by extension, the December contract--contained a provision guarantying him twelve months of employment with SWC. SWC contends that the November offer letter merely "covered the terms of Plaintiff's compensation, including base salary, override, commissions, the amount [\*\*\*21] of a draw, stock options, vacation, and benefits." It did not "provide[] him with 'a minimum term' of twelve months employment at SWC." Additionally, SWC argues that because Giusti signed the SWC employment agreement containing the at-will provision, he agreed to the at-will nature of his employment.

[\*P43] Because the November offer letter provided no guaranty of employment, and because Giusti was an at-will employee, SWC argues that Giusti's contract claims--all based on his assertion that he was guaranteed twelve months employment--must fail. The district court agreed, and we affirm.

[\*P44] Under basic rules of contract interpretation, courts first look to the writing alone to determine its meaning and the intent of the contracting parties. <sup>28</sup> "If the language within the four corners of the contract is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law." <sup>29</sup> Only where there is ambiguity in the terms of the contract may the parties' intent "be ascertained from extrinsic evidence." <sup>30</sup> "A contractual term or provision is ambiguous if it is capable of more than one reasonable interpretation [\*\*\*22] because of uncertain meanings of terms, missing terms, or other facial deficiencies." <sup>31</sup> The question here is whether the November offer letter is ambiguous such that we may consider extrinsic evidence, including conversations between Giusti and Hyde. We conclude that it is not ambiguous. It reads as follows:

SWC will also provide you with a *monthly subsidy payment or non-recoverable draw for a 12 month period* to allow you to build the staff in the product area and grow your personal book of business and start receiving overrides and commission. *For [\*\*976] the first 12*

*months of employment SWC will provide you with a payment of \$ 7,500 per month. Your commission and overrides during that ramp up period will be applied to the subsidy payment. At anytime during the 12 month period you can make a one time election to move from the subsidy plan to the commission and override plan if you desire. (Emphases added.)*

<sup>28</sup> See *Deep Creek Ranch, LLC v. Utah State Armory Bd.*, 2008 UT 3, P 15, 178 P.3d 886.

<sup>29</sup> *Green River Canal Co. v. Thayn*, 2003 UT 50, P 17, 84 P.3d 1134 (citations and internal quotation marks omitted).

<sup>30</sup> *Deep Creek Ranch*, 2008 UT 3, P 16, 178 P.3d 886.

<sup>31</sup> *Daines v. Vincent*, 2008 UT 51, P 25, 190 P.3d 1269 [\*\*\*23] (citations and internal quotation marks omitted).

[\*P45] This language plainly does not guarantee Giusti's employment. There is no statement implying that his employment cannot be terminated or that it is guaranteed for any period. The language indicates only the level of compensation and benefits Giusti is to receive during the first twelve months of his employment, should it last that long. The contract does not guarantee that his employment *will* last that long. Because there is no ambiguity in the language of the contract, we need not, and must not, consider extrinsic evidence to determine its meaning.

[\*P46] Additionally, in Utah, we presume that employment contracts are at-will. <sup>32</sup> When an employer intends to alter the at-will arrangement and guarantee employment for a specified period, we require the employer to make that promise clear and definite: "There must be a manifestation of the employer's intent [to guarantee employment] that is communicated to the employee and sufficiently definite to operate as a contract provision." <sup>33</sup> Otherwise, as the court of appeals has held, "an employer could never tell a potential employee in a job interview what was expected of him or her over the next [\*\*\*24] few months or years without creating [a guaranty of employment] contract." <sup>34</sup> Here, the language in the November offer letter does not guarantee Giusti employment for twelve months. And we will not infer such a promise where it clearly does not exist.



32 *Uintah Basin Med Ctr. v. Hardy*, 2002 UT 92, P 21, 54 P.3d 1165; see also *Evans v. GTE Health Sys. Inc.*, 857 P.2d 974, 975 (Utah Ct. App. 1993).

33 *Johnson v. Morton Thiokol, Inc.*, 818 P.2d 997, 1002 (Utah 1991).

34 *Evans*, 857 P.2d at 978.

[\*P47] Additionally, a month after signing the November offer letter, Giusti signed the SWC employment agreement that contained an at-will employment provision. Section 6.2 of the agreement provides as follows:

*6.2 Termination With or Without Cause*

Employer may terminate Employee's employment with Employer without cause at any time upon two (2) weeks advance written notice to Employee.

[\*P48] According to Giusti, he reviewed this provision with Pat Black, the Human Resources Director, and told her that the provision did not apply to him. When Black responded that she had no knowledge of any other arrangement Giusti may have had with Hyde, Giusti signed the document. He did not strike out any provision of the agreement [\*\*\*25] or ask to sign it later so that he could speak with Hyde prior to signing it. Given that Giusti is a sophisticated executive who was savvy enough to recognize and question the at-will provision, he clearly could have noted his concerns on the document or refused to sign it until he could clarify his concerns. He did neither. And because the terms of the SWC employment agreement are clear, the conversation he claims he had with Black is inadmissible parol evidence. 35 The SWC employment agreement clearly provides, as does the November offer letter, that Giusti's employment was at-will.

35 Giusti also argues that Black fraudulently induced him to sign the SWC employment agreement by telling him that his signature was a prerequisite to her processing his benefit enrollment. Giusti presented no evidence that her statement was fraudulent. We therefore decline to address his argument on this point.

[\*P49] Giusti next argues that the November offer letter supersedes the SWC employment agreement and, therefore, his employment was not at will. As with his

other claims, this claim is based on Giusti's assertion that the November offer letter contained a guaranty of employment. Because the November offer [\*\*\*26] letter contained no such guaranty, this argument fails.

[\*P50] Finally, Giusti argues that the district court erred in dismissing his contract claims [\*\*\*977] that are unrelated to the termination of his employment. He fails, however, to adequately brief those claims. 36 His entire argument consists of two sentences and a footnote containing a six-item laundry list of Giusti's allegations against SWC and Hyde. We therefore decline to address this argument.

36 *Utah Rule of Appellate Procedure 24(a)(8)-(9)* requires adequate briefing of the arguments, including, "the contentions and reasons of the appellant with respect to the issues presented, . . . with citations to the authorities, statutes, and parts of the record relied on."

[\*P51] For all the foregoing reasons, the district court did not err in granting summary judgment to SWC on Giusti's contract claims.

*B. The District Court Did Not Err in Granting Summary Judgment to SWC on Giusti's Fraudulent Inducement Claim*

[\*P52] Giusti next argues that the district court erred in granting summary judgment to SWC on his claim that SWC "fraudulently induc[ed] him to leave his secure executive employment at Cambric and accept employment and employment contracts at SWC." The [\*\*\*27] district court granted summary judgment to SWC on this claim because it found that Giusti made "no showing of damages, a crucial element of [the] claim." The court was correct.

[\*P53] As the party moving for summary judgment, SWC had the burden of demonstrating that there was no genuine issue of material fact. 37 SWC asserted that Giusti had not demonstrated that he suffered damages--an essential element of his fraudulent inducement claim--and, therefore, there was no issue of material fact on the question of damages. 38 When, as here, the moving party "challenges an element of the nonmoving party's case on the basis that no genuine issue of material fact exists, the burden then shifts to the nonmoving party to present evidence that is sufficient to establish a genuine issue of material fact." 39 The district court found that

Giusti failed to satisfy this burden. Specifically, the court found that Giusti failed to raise a genuine issue of material fact regarding his damages, and the court granted summary judgment to SWC. We affirm.

37 *Utah R. Civ. P. 56(c)*.

38 The elements of a fraud claim include the following:

- (1) a representation; (2) concerning a presently existing material fact; (3) which [\*\*\*28] was false; (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage.

*Dugan v. Jones*, 615 P.2d 1239, 1246 (Utah 1980) (emphasis added).

39 *Eagar v. Burrows*, 2008 UT 42, P15, 191 P.3d 9 (internal citations and quotation marks omitted).

[\*P54] Giusti asserts that the district court erred in measuring his damages by comparing his Cambric compensation with his post-Cambric compensation. Giusti claims that in measuring his damages, the court should have considered the value of the SWC employment agreement and awarded him its full value. As we have held, however, the SWC employment agreement was not breached. Therefore, Giusti is not entitled to the benefit of that bargained-for agreement.

[\*P55] Rather, Giusti is limited to those damages necessary to compensate him for having been, as he claims, fraudulently induced to leave Cambric. Accordingly, the court measured Giusti's [\*\*\*29] damages by comparing what he earned at Cambric, in base salary and commissions, with what he earned at SWC, and later, at Callware.<sup>40</sup> Under this measure, if Giusti suffered a loss in compensation after leaving

Cambric, he suffered damages. Because Giusti failed to raise a genuine issue of material fact as to whether he incurred such damages, the court correctly granted SWC's motion for summary judgment.

40 Giusti accepted employment at Callware shortly after his employment was terminated at SWC.

[\*P56] The approach employed by the district court has been adopted by other jurisdictions.<sup>41</sup> [\*\*\*978] In Pennsylvania, for example, the Superior Court concluded that the plaintiff-employee was entitled to distinct damages for his fraudulent inducement claim. The court noted that "[d]amages for fraud are limited to what losses were immediately and proximately caused by the fraud" and held that it was the "loss of [the employee's] salary and benefits from [his prior employer that] was the injury caused by appellant's fraudulent misrepresentation."<sup>42</sup>

41 *See, e.g., Helmer v. Bingham Toyota Isuzu*, 129 Cal. App. 4th 1121, 29 Cal. Rptr. 3d 136, 143-44 (Ct. App. 2005); *Prokopoulos v. Rapp Collins World Wide, Inc.*, No 3:03-CV-1994-D, 2004 U.S. Dist. LEXIS 20507, at \*2 (N.D. Tex. Oct. 13, 2004).

42 *Lokay v. Lehigh Valley Coop. Farmers, Inc.*, 342 Pa. Super. 89, 492 A.2d 405, 410, 411 (Pa. Super. Ct. 1985).

[\*P57] [\*\*\*30] We agree with this approach and clarify that in the employment context, damages for fraudulent inducement consist of the losses that are "immediately and proximately caused" by the fraud. That is, the employee is entitled to recover the difference between the compensation provided by the employer whom the employee was induced to leave and the compensation that follows. The district court was correct in applying this measure to Giusti's claim.

[\*P58] Giusti also argues that, even if the court applied the correct measure of damages, it erred in calculating those damages. The district court found that Giusti's employment at Cambric provided him the following: \$ 125,000 annual salary, an \$ 800 per month car allowance, and a future periodic bonus based on the company's economic performance and Giusti's performance. The court then compared that compensation with Giusti's compensation at SWC, which provided Giusti the following: \$ 180,000 annual salary plus bonuses and other benefits. Finally, the court reviewed

Giusti's compensation from Callware and found that it constitutes the following: \$ 125,000 annual salary plus commissions and bonuses.

[\*P59] In comparing these figures, the court reviewed the [\*\*\*31] annual salaries and commission and bonus structures at Cambric, SWC, and Callware. The court concluded that Giusti earned the same annual salary at Callware as he did at Cambric (\$ 125,000), and that he earned more at SWC (\$ 180,000) than at Cambric. Thus, he suffered no damages in his annual salary as a result of leaving Cambric. Giusti disputes this finding, claiming that his base salary at Cambric was due to increase to \$ 135,000 in January 2000. Thus, according to Giusti, the court made a \$ 10,000 error in its calculations.

[\*P60] But even if the district court had determined that Giusti's annual salary was \$ 135,000 at Cambric, that determination would not have changed the court's conclusion that Giusti suffered no damages. That is, Giusti's annual salary at SWC was also a factor, and it far exceeded \$ 135,000--it was \$ 180,000. Based on these figures, Giusti earned \$ 45,000 more at SWC than at Cambric. Therefore, even if Giusti earned \$ 10,000 less at Callware than at Cambric (\$ 125,000 versus \$ 135,000 respectively), his total annual salary following his employment at Cambric still exceeded that of what he earned at Cambric, and any claimed error in the court's calculation of his annual [\*\*\*32] salary was harmless.<sup>43</sup>

43 *State v. Evans*, 2001 UT 22, P 20, 20 P.3d 888. ("[H]armless error is an error that is sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the proceedings.").

[\*P61] Based on its comparison of Giusti's bonus and commission structure at Cambric and Callware, the court rejected his claim that his bonuses at Cambric far exceeded those at Callware. Giusti claimed that he would have received \$ 75,000 in bonuses at Cambric. The court found that such a claim was "speculative at best and cannot be proven with requisite 'reasonable certainty' because [Giusti's future bonuses] are tied to [Cambric's] future economic performance as well as [Giusti's] future performance." As to his commissions at Callware, Giusti testified only that he received commissions, but that he could not remember how much.

[\*P62] Because Giusti claimed future bonuses at Cambric but failed to provide current commission figures

from Callware, [\*\*979] the court could not accurately compare the numbers to determine whether Giusti suffered any damages by leaving Cambric. And it correctly held that "[s]ummary judgment is warranted if a plaintiff fails 'to supply evidence, which, [\*\*\*33] if accepted as true, would clearly and convincingly support each element of a fraud claim.'" 44

44 The district court quoted *Republic Group v. Won-Door Corp.*, 883 P.2d 285, 292 (Utah Ct. App. 1994).

[\*P63] The district court was correct in (1) distinguishing between breach of contract and fraudulent inducement damages, (2) measuring damages by comparing Giusti's Cambric compensation with his post-Cambric compensation, and (3) granting summary judgment because Giusti failed to raise a genuine issue of material fact regarding his damages. Therefore, the district court did not err in granting summary judgment to SWC on Giusti's fraudulent inducement claim.

*C. The District Court Did Not Err in Granting Summary Judgment to SWC on Giusti's Tortious Interference Claim*

[\*P64] Giusti next argues that the district court erred in granting summary judgment to SWC on Giusti's tortious interference claim. Giusti claims that "Hyde and Erickson maliciously and intentionally interfered with [Giusti's] existing and prospective economic relations with SWC [by terminating his employment] for the wholly personal reason of saving their own jobs and not for any legitimate business purpose of their employer." The district [\*\*\*34] court correctly rejected this claim.

[\*P65] To recover damages for tortious interference, "a plaintiff must prove (1) that the defendant intentionally interfered with the plaintiff's existing or potential economic relations, (2) for an improper purpose or by improper means, (3) causing injury to the plaintiff." 45 When the defendants are also employees, however, the plaintiff must establish that the defendants were acting outside the scope of their employment *for purely personal reasons*. 46 Employees act for purely personal motives when their actions are *in no way connected with the employer's interests*. 47

45 *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 304 (Utah 1982) (citation omitted).

46 See *Lichtie v. U.S. Home Corp.*, 655 F. Supp. 1026, 1028 (D. Utah 1987).

47 See *Birkner v. Salt Lake County*, 771 P.2d 1053, 1057 (Utah 1989).

[\*P66] The two sides submitted conflicting evidence as to the reason for Giusti's termination. SWC cited numerous performance-based reasons,<sup>48</sup> while Giusti cited non-performance based reasons. Specifically, Giusti claims that because SWC failed to meet its revenue targets for the year, Hyde engaged in a "malicious plan to divert attention from his own failures to meet [\*\*\*35] SWC's revenue targets by blaming Giusti." Based on these claims, Giusti argues that there was a genuine issue of fact regarding the motive of Hyde, and therefore, summary judgment was inappropriate.

48 At his deposition, Hyde claimed that Giusti's employment was terminated because Giusti (1) failed to actively drive revenue and close deals for SWC, (2) was not sufficiently familiar with SWC's products, (3) created disharmony among the salesforce who worked for him, and (4) was not effective in promoting SWC products, training the sales organization, dealing with customers, helping close deals, or interacting with team members.

[\*P67] The district court correctly noted, however, that "when an employee's activity is so clearly within the scope of employment that reasonable minds cannot differ, the court may decide the issue as a matter of law."<sup>49</sup>

49 See *Christensen v. Swenson*, 874 P.2d 125, 127 (Utah 1994).

[\*P68] Here, the court correctly found that, as high level executives with the responsibility for the operation of SWC, "the right to terminate is an activity clearly within the scope of employment of Erickson and Hyde."<sup>50</sup> The court also noted that even if [\*\*980] Hyde had mixed motives for terminating [\*\*\*36] Giusti's employment, that does not prevent a grant of summary judgment.<sup>51</sup>

50 The court of appeals has explained that duties within the scope of employment include those that are "generally directed toward the accomplishment of objectives within the scope of the employee's duties and authority, or reasonably incidental thereto." *Nunez v. Albo, M.D.*, 2002 UT App 247, P 12, 53 P.3d 2.

51 See *Lichtie*, 655 F. Supp. at 1027 ("[I]f an

agent acts with mixed motives his or her conduct will be within the scope of employment[,] and summary judgment is appropriate.).

[\*P69] The district court was correct on all points. Giusti presented no evidence that Hyde and/or Erickson acted beyond the scope of employment and terminated Giusti's employment for purely personal reasons that were in no way connected with their employer's interests. Thus, Giusti failed to raise a genuine issue of material fact regarding Hyde's and Erickson's motives, and the court correctly granted summary judgment to SWC on Giusti's tortious interference claim.

### III. THE DISTRICT COURT DID NOT ERR IN DENYING SWC'S REQUEST FOR ATTORNEY FEES OR IN LIMITING ITS RECOVERY OF COSTS

[\*P70] We now address SWC's cross-appeal, in which it claims that the [\*\*\*37] district court erred in denying it attorney fees and in limiting its award of costs to \$ 55. We hold that the district court did not err in either regard. We address each argument below.

#### A. The District Court Did Not Err in Denying SWC Attorney Fees

[\*P71] SWC first argues that the district court erred in denying it attorney fees. In its order, the court noted that "attorney fees in Utah are awarded only as a matter of right under a contract or statute."<sup>52</sup> The court then reviewed section 7.3 of the SWC employment agreement and found that it did not provide for an award of fees to SWC under the facts of this case. The court was correct.

52 The district court quoted *Foote v. Clark*, 962 P.2d 52, 54 (Utah 1998).

[\*P72] Section 7.3 provides in relevant part the following:

In the event *either party defaults* in any of the terms or provisions of this Agreement the non-defaulting party shall be entitled to recover its, his or her reasonable attorney's fees and costs incurred, whether or not suit is commenced or final judgment obtained. (Emphasis added.)

[\*P73] "Fees provided for by contract . . . are allowed only in strict accordance with the terms of the contract." <sup>53</sup> The terms of section 7.3 require that there [\*\*\*38] be a defaulting party in order for an award of fees to be triggered. The district court correctly noted--and SWC has never claimed otherwise--that "[Giusti] is not a defaulting party." The court then ruled that section 7.3 was never triggered, and therefore, could not serve as the basis for an award of fees to SWC.

53 *Foote*, 962 P.2d at 54.

[\*P74] On appeal, SWC contends that while the precise terms of section 7.3 were unmet, SWC is nevertheless entitled to an award of fees. SWC cites *Utah Code section 78B-5-826* and our holding in *Bilanzich v. Lonetti*, <sup>54</sup> wherein we interpreted and applied *section 78B-5-826*.

54 2007 UT 26, 160 P.3d 1041.

[\*P75] *Section 78B-5-826* provides the following:

A court may award costs and attorney fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney fees. <sup>55</sup>

55 *Utah Code Ann. § 78B-5-826* (2008).

[\*P76] SWC argues that in *Bilanzich*, we interpreted this section broadly to mean that whenever litigation is based on a writing that contains a provision allowing at least one [\*\*\*39] party to recover attorney fees, the precise terms of the provision are irrelevant, and district courts should liberally award fees to prevailing parties. *Bilanzich*, however, is inapplicable.

[\*P77] In *Bilanzich*, we held that when a contract creates "an unequal exposure to the risk of contractual liability for attorney [\*\*981] fees," <sup>56</sup> district courts may apply *section 78B-5-826* to ensure that both parties are subject to the attorney fee provision. <sup>57</sup> Here, section 7.3 of the SWC employment agreement provided attorney fees to the "non-defaulting party." Thus, as to attorney

fees, neither party had a contractual advantage or assumed more contractual liability than the other; SWC and Giusti were subject to the provision equally. Accordingly, *Bilanzich* does not apply. SWC is entitled to fees only under the terms of section 7.3. That section requires a defaulting party. In this case, there was none, and the district court correctly denied SWC's claim for fees.

56 2007 UT 26, P 19, 160 P.3d 1041.

57 "[T]he language of the statute is not mandatory but allows courts to exercise discretion in awarding attorney fees and costs." *Id.* P 17.

#### B. The District Court Did Not Err in Limiting SWC's Recovery of Costs

[\*P78] SWC next argues that [\*\*\*40] the district court erred in limiting its recovery of costs. The district court ruled that *rule 54(d)* did not provide for costs except for \$ 55 in witness costs. <sup>58</sup> We review the district court's denial of costs for abuse of discretion, granting a high degree of deference to the court's decision. We hold that the court did not abuse its discretion in limiting SWC's award of costs. <sup>59</sup>

58 SWC also argues that it is entitled to costs under section 7.3 of the SWC employment agreement. Because we conclude that there was no defaulting party, section 7.3 was never triggered, and we do not address this argument.

59 *See, e.g., Pennington v. Allstate Ins. Co.*, 973 P.2d 932 (Utah 1998).

[\*P79] *Rule 54(d) of the Utah Rules of Civil Procedure* provides in pertinent part that

costs shall be allowed [\*\*982] as of course to the prevailing party unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause.

[\*P80] "Costs" as used in *rule 54* refers to fees that are paid to the court, fees that are paid to witnesses, costs that are [\*\*\*41] authorized by statute, costs incurred in

taking depositions, subject to the limitation that they were taken in good faith and appear to be essential for the development and presentation of the case.<sup>60</sup>

60 *Frampton v. Wilson*, 605 P.2d 771, 774 (Utah 1980).

[\*P81] SWC's Verified Memorandum of Costs, which it timely submitted pursuant to *rule 54(d)*,<sup>61</sup> requested total costs of \$ 13,329.56. Of that amount, \$ 2,039.60 was for photocopy costs, Westlaw charges, and witness fees. The remaining amount--\$ 11,289.96--was for deposition costs for ten individuals, including Giusti, whose deposition was taken over the course of seven sessions.

61 *See Utah R. Civ. P. 54(d)(2)*.

[\*P82] The court limited SWC's award to \$ 55 in witness costs and found that SWC's request for "copying costs and overnight delivery charges is not within the definition of costs." Turning to the deposition costs, the court found that, while SWC's depositions were taken in good faith, the case was decided on legal rather than factual grounds, and therefore, SWC failed to establish that the extensive deposition of Giusti was "essential for the development of the case[,] and since there is no method to parse out what portion may have been essential [\*\*\*42] from the overall claim, the claim is denied."

[\*P83] SWC argues that due to the factually intensive nature of Giusti's claims, all the depositions SWC conducted were essential to defending against each claim, and the depositions allowed SWC to "successfully move for dismissal of every one of [Giusti's] claims except one that [he] voluntarily dismissed." Additionally, SWC points out that the court did not explain why it denied costs regarding the other nine depositions. Thus, it claims, the district court erred.

[\*P84] In reviewing a district court's denial or award of costs, we apply a highly deferential standard. We also recognize that *rule 54(d)* is discretionary: "costs shall be allowed as of course to the prevailing party *unless the court otherwise directs*."<sup>62</sup> And there are two requirements for awarding deposition costs: the trial court must be persuaded that (1) the depositions were taken in good faith, and (2) they must appear to be essential to the development of the case.<sup>63</sup>

62 *Utah R. Civ. P. 54(d)(1)* (emphasis added).

63 *Frampton*, 605 P.2d at 774.

[\*P85] Given these considerations, the district court did not abuse its discretion in limiting SCW's award of costs. The district court specifically addressed [\*\*\*43] the two requirements for awarding deposition costs and found that, while the depositions were taken in good faith, the court was unpersuaded that the "extensive length of [Giusti's] deposition" was necessary.

[\*P86] SWC argues that Giusti's extensive deposition was necessary because of the factually intensive nature of his claims and because he was prone to giving long, speech-like answers. But such an argument is insufficient to demonstrate that the court abused its discretion. The court applied the correct standard, gave a legitimate reason for its decision, and therefore, did not abuse its discretion. We therefore affirm the court's decision to limit SWC's award of costs to \$ 55.

## CONCLUSION

[\*P87] First, *rule 7(f)(2)* and our decision in *Code* demonstrate that the July judgment was necessary, and therefore, Giusti's appeal was timely. Second, the district court did not err in granting summary judgment to SWC on each of Giusti's claims: (1) his contract claims fail because the November offer letter did not guarantee Giusti's employment; (2) his fraudulent inducement claim fails because Giusti failed to raise a genuine issue of material fact regarding his damages; and (3) his tortious interference [\*\*\*44] claim fails because Giusti failed to raise a genuine issue of material fact regarding Hyde's and Erickson's motives in terminating his employment.

[\*P88] Finally, the district court did not err in denying SWC attorney fees because the SWC employment agreement does not provide for them on the facts of this case. The district court also did not abuse its discretion in limiting SWC's award of costs. We therefore affirm each of the district court's decisions.

[\*P89] Chief Justice Durham, Justice Wilkins, Justice Parrish, and Justice Nehring concur in Associate Chief Justice Durrant's opinion.



LEXSEE 942 P2D 307

**Heber City Corporation, a municipal corporation, Plaintiff and Appellee, v. Lowell R. Simpson and Sandra S. Simpson, husband and wife, and Jay Simpson and Glenna R. Simpson, husband and wife, Defendants and Appellants.**

No. 960029

SUPREME COURT OF UTAH

*942 P.2d 307; 319 Utah Adv. Rep. 27; 1997 Utah LEXIS 51*

June 17, 1997, FILED

**PRIOR HISTORY:** [\*1] Fourth District, Wasatch Dep't. The Honorable Boyd L. Park.

**DISPOSITION:** Reversed the district court's decision that the Airport Road was not a public highway under section 27-12-89, and we remand for further proceedings to determine the just compensation to be paid by Heber City as a result of its condemnation of the Simpsons' property.

**COUNSEL:** Harold A. Hintze, Salt Lake City, for plaintiff.

Brant H. Wall, Salt Lake City, for defendants.

**JUDGES:** ZIMMERMAN, Chief Justice. Justice Howe, Justice Durham, Justice Russon, and Judge Taylor concur in Chief Justice Zimmerman's opinion. Having disqualified himself, Associate Chief Justice Stewart does not participate herein; District Judge Stanton M. Taylor sat.

**OPINION BY:** ZIMMERMAN

**OPINION**

[\*308] *ZIMMERMAN, Chief Justice:*

Lowell R. Simpson, Sandra S. Simpson, Jay Simpson, and Glenna R. Simpson ("the Simpsons") appeal a decision of the district court finding that a road

adjacent to their property and historically used to access the airport servicing Heber City (the "Airport Road") was not a "public highway" as defined by section 27-12-89 of the Utah Code and was therefore [\*2] properly closed by Heber City. We have jurisdiction to hear this case under *section 78-2-2(3)(j) of the Utah Code*. We reverse and remand.

This controversy arose out of Heber City's decision in 1992 to extend the length of its municipal airport's runway and expand the airport's protection zone.<sup>1</sup> To effect this expansion, Heber City sought to acquire by condemnation a portion of the Simpsons' property.<sup>2</sup> During the condemnation proceeding, the public nature of the Airport Road became an issue because the Simpsons contested the adequacy of the compensation offered by Heber City. Specifically, they asserted that the valuation of the condemned property interests should take into account the fact that the property had direct access to Highway 189 via the Airport Road.<sup>3</sup> The Simpsons argued that a purchaser of the condemned portion of their property would have paid a premium for its access to Highway 189 via a public highway. The Airport Road connected the airport to Highway 189 and ran exclusively over property owned by Heber City. Heber City, however, had previously acted unilaterally to close the Airport Road.<sup>4</sup> The road had to be closed to satisfy the requirements of the protection [\*3] zone. The Airport Road had also connected the Simpsons' condemned property to Highway 189. The Simpsons were not, however, landlocked by the closure because their

remaining property accessed Highway 189 via Daniels Canyon Road, which is a public highway.

1 The history of the creation of the airport is also relevant to this case. In 1947, Heber City and Wasatch County jointly acquired property for construction of the Heber Airport. The Simpsons and several other property owners in the area sold their property to be used for the airport. All but one of the deeds from these property owners expressly conveyed away the right to access their remaining property from the airport to be built on the property conveyed by them. The one property owner who did not convey away his rights-of-way across the airport facility was Mr. Howe. His property was landlocked by the airport, and therefore, he was expressly granted a right-of-way across the airport from his property to Highway 189.

2 Heber City acquired fee title to a portion of the Simpsons' property and an aviation easement over an additional portion of the Simpsons' property.

[\*\*4]

3 For ease of reference, we have appended a map of the Airport Road.

4 Heber City asserts that it closed the Airport Road at the insistence of the Federal Aeronautics Administration, which had determined that there was a risk that planes taking off or landing would collide with vehicles or pedestrians on the road. Heber City first closed the Airport Road in December 1988. However, Wasatch County objected to the road closure. Heber City and the County eventually worked out a compromise in which Heber City agreed to build a new road to provide access for properties landlocked by the closure of the Airport Road. The road was closed again in 1989 and has remained closed since that time.

[\*309] Heber City disputed whether the Airport Road was a public highway within the definition of section 27-12-89 of the Code, which requires continuous use as a public thoroughfare for a period of ten years. In effect, the City argued that it could close the road without compensating for the loss of direct access it provided because it was a private road owned by the City and running over City property.

The parties [\*\*5] agreed that this critical point of contention needed to be resolved before the issue of just compensation could be determined. Therefore, they stipulated that the trial could be bifurcated, separating the issue of whether the Airport Road was a public highway from the compensation portion of the condemnation proceedings. The district court entered an order bifurcating these issues.

During the trial concerning the "public" status of the Airport Road, the Simpsons presented numerous witnesses who testified that they had used the Airport Road for a variety of reasons other than for accessing the airport. These included attending shooting events at a gun club on property adjacent to the road, using it as a kind of "lover's lane," accessing businesses located along the road, riding horses, picnicking, and watching airplanes take off and land. The witnesses testified that the public used the road for these purposes from the opening of the road in 1947 until its closure in 1989.

In addition, the Simpsons presented the testimony of Robert Mathis, who had been the Wasatch County Planner from 1976 through the time of the trial. Mr. Mathis testified that when he became the Wasatch County Planner, [\*\*6] the Airport Road was designated on the county maps as a class B road. This designation means that the road is a public road entitled to state funds for maintenance and construction. *See* Utah Code Ann. § 27-12-22 (defining class B roads); *id.* § 27-12-127 (creating fund for class B and C roads); *Utah Admin. Code R926-3-4(1)* (establishing permissible uses of class B and C funds). According to Mr. Mathis, Wasatch County received money from the state for maintaining this road from sometime prior to 1976 through the time the Airport Road was closed in 1989. Mr. Mathis also testified that the County and Heber City disagreed as to whether formal proceedings to vacate the road were necessary before the road could be closed, with Heber City taking the position that no such proceedings were required. *See* Utah Code Ann. § 27-12-90 (providing procedure for vacating public road).

Following the conclusion of the trial on the public highway issue, the district court issued a memorandum decision finding that the Airport Road was not a public highway as defined by section 27-12-89 of the Code. In its memorandum decision, the district court stated:

The Court acknowledges that this [\*\*7] is a close decision. There is evidence of public use of the airport



roadway over an extended period of time. However, in the interest of fairness and justice, it would appear this was simply the type of roadway that should be exempted from the technical provisions of U.C.A. § 27-12-89.

Thereafter, the court entered an order denying the Simpsons the right to claim compensation for the Airport Road access to Highway 189.<sup>5</sup> The Simpsons moved for a new trial, but the district court denied this motion. The parties stipulated that the court's order constituted a final judgment under rule 54(b) of the Utah Rules of Civil Procedure, and the district court entered an order to that effect. The Simpsons appealed to this court.

5 Although both parties submitted proposed findings of fact and conclusions of law, the trial court did not adopt either. We therefore treat the trial court's memorandum decision as its findings and conclusions supporting its order.

We first state the appropriate standard of review. Here, [\*8] the district court examined section 27-12-89, made the requisite findings of fact, and determined that the facts found by it did not meet the statutory definition of a public highway. We review this ultimate determination, which is a mixed question of fact and law, for correctness. *See State v. Pena*, 869 P.2d 932, 936 (Utah 1994). Historically, we have given trial courts a fair degree of latitude in determining [\*310] the legal consequences under section 27-12-89 of facts found by the court. *See, e.g., Bonner v. Sudbury*, 18 Utah 2d 140, 417 P.2d 646, 648-49 (Utah 1966) (upholding conclusion that street had been dedicated to public use); *Thompson v. Nelson*, 2 Utah 2d 340, 273 P.2d 720, 723 (Utah 1954) (upholding conclusion that road was not public highway). Under section 27-12-89, a road is deemed "dedicated and abandoned" to the public if it "has been continuously used as a public thoroughfare for a period of ten years." Granting discretion to the trial court is appropriate under that section, as its legal requirements, other than the ten-year requirement, are highly fact dependent and somewhat amorphous. *See Pena*, 869 P.2d at 938, 940. The issues presented under section 27-12-89, therefore, do not [\*9] lend themselves well to close review by this court, as we would be hard-pressed to establish a coherent and consistent statement of the law on a fact-intensive, case-by-case review of trial court rulings. *See id.* Therefore, when reviewing a trial court's decision regarding whether a public highway has been established under section 27-12-89, we review the decision for

correctness but grant the court significant discretion in its application of the facts to the statute. Finally, we "require[] proof of dedication by clear and convincing evidence." *Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1099 (Utah 1995) (citing *Thomson v. Condas*, 27 Utah 2d 129, 493 P.2d 639, 639 (Utah 1972)).

The Simpsons argue that the Airport Road was a public highway by virtue of section 27-12-89 of the Utah Code. That section provides, "A highway shall be deemed to have been dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years." Utah Code Ann. § 27-12-89. Thus, for a road to become a public highway by dedication under section 27-12-89, there must be (i) continuous use, (ii) as a public thoroughfare, (iii) for a period of [\*10] ten years. To prevail on this appeal, the Simpsons must show that the district court could not correctly conclude that they failed to establish one or more of these three elements.<sup>6</sup>

6 Though each of the three elements under section 27-12-89 for the establishment of a public highway embodies a logically distinct requirement that must be satisfied, the elements are so intertwined that they are not readily susceptible to separate discussion. For example, it is difficult to analyze whether the "use" has been continuous without determining at the same time whether that "use" has been as a public thoroughfare. Recognizing this difficulty, we acknowledge that our attempt to give separate treatment for each of the three elements will necessarily involve some overlap between our discussions of the individual elements under section 27-12-89.

We begin our analysis under section 27-12-89 with the continuous use requirement. The witnesses presented at trial testified to using or observing others using the Airport Road [\*11] frequently and without interruption from just after the road's construction in 1947 until its closure in 1989. For example, Ray Lloyd, a local resident who had lived in the vicinity of the Airport Road for over fifty years, testified that he drove on the Airport Road to attend shooting events at a gun club from 1948 to 1955. During that time, no one ever challenged his right to drive on the road.<sup>7</sup> He further testified to observing other people use the road over an extended period of time for various purposes including riding horses, hauling hay,

and necking.

7 Mr. Lloyd testified that when the airport became operational in 1955, the gun club was required to relocate.

Other witnesses testified to significant commercial traffic on the Airport Road to various businesses located along the road. The testimony of Jay Simpson reveals substantial traffic on the Airport Road to a junkyard. He testified as follows:

Q Did you ever see or observe a junk yard or a used car type business or area?

A Oh yes.

Q [\*\*12] Where was that located in reference to the road that we are talking about?

A That was off from the oil, south of the oil south of Lloyd Brothers Garage or their yard. Approximately, 300 feet and they probably had 3 or 4 acres of ground that they had junk cars on. Everybody went down there for a part, it seemed like.

[\*311] Q And over what period of, or how many years would you say you have observed this type of use of the road that you have described?

A Early years there wasn't that many, back in the 40's and 50's there wasn't quite that many. But the late 50's, 60's it just kept getting more and more and more use.

Q Did that use continue in the fashion you have indicated up to the time it was closed?

A Yes, it did.

George Webb also testified that customers drove on the Airport Road to his shop for his livestock transportation business.

None of the witnesses testified to any interruption of the public's use of the road, other than its temporary closure in 1988 and final closure in 1989. Indeed, Mr. Mathis, the Wasatch County Planner, testified that the County considered the Airport Road, which was in the unincorporated portion of the county, to be a public road. [\*\*13] <sup>8</sup> Thus, the County certainly was not likely to restrict the public's use of the road. The uncontradicted

evidence demonstrates that the public "made a continuous and uninterrupted use of" the Airport Road "as often as they found it convenient or necessary." <sup>9</sup> See *Boyer v. Clark*, 7 Utah 2d 395, 326 P.2d 107, 109 (Utah 1958). We conclude that this evidence establishes as a matter of law that the Airport Road was used continuously for purposes other than reaching the airport. See *Draper City*, 888 P.2d at 1101 (emphasizing importance of preventing general public use of road to avoid statutory dedication).

8 Though the County classified the Airport Road as a class B road, this fact alone does not compel the conclusion that the road was a public highway under section 27-12-89. See *Bonner*, 417 P.2d at 648 ("The fact that [the road in question] was shown on the public records to be a public street" "will not necessarily establish it as a public way[.]"). In this case, Mr. Mathis admitted that he merely accepted the Airport Road's designation as a class B road from his predecessor. Therefore, we do not know why it was initially classified as a class B road.

[\*\*14]

9 The only evidence suggesting any limitation of the public's use was that the gun club moved to a new location after the airport became operational. This fact alone, however, is insufficient to justify the conclusion that the road was not continuously used. No other evidence suggested that any other public use of the road was limited. Furthermore, the fact that the gun club was required to move indicates that it was the shooting activities of the gun club in the immediate vicinity of the airport, not the public's use of the road, that prompted airport officials to relocate the club.

We now consider whether this "continuous use" was "use as a public thoroughfare." Perhaps our most detailed definition of "public thoroughfare" was announced in *Morris v. Blunt*, 49 Utah 243, 161 P. 1127, 1131 (Utah 1916), where we stated:

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. Under [the identically worded predecessor statute to section 27-12-89,] the highway, even though it be over privately owned [\*\*15] 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. Use under private right is not sufficient. If the thoroughfare is laid out or used as a private way, its use, however long, as a private way, does not make it a public way; and the mere fact that the public also make use of it, without objection from the owner of the land, will not make it a public way. Before it becomes public in character the owner of the land must consent to the change.

*See also Thompson, 273 P.2d at 723* (quoting same passage with approval). This definition establishes four general requirements: (i) There must be "passing or travel," (ii) the "use must be by the public," (iii) use by permission does not constitute use as a public thoroughfare, and (iv) "before [the road] becomes public in character the owner of the land must consent to the change." We have subsequently abandoned interpreting into the language of the statute the requirement that the owner must consent to the dedication. *Draper City, 888 P.2d at 1099* (citing *Leo M. Bertagnole, Inc. v. Pine Meadow Ranches, [\*\*16] 639 P.2d 211, 213 (Utah 1981); Thurman v. Byram, 626 P.2d 447, 449 (Utah 1981)*). We have, however, maintained the permissive [\*312] use element. *See, e.g., Thurman, 626 P.2d at 449*. Regarding the class of individuals who constitute "the public," we stated in *Draper City* that our case law has distinguished between use of a road by owners of adjoining property and by the general public. "Such property owners cannot be considered members of the public generally, as that term generally is used in dedication by user statutes." *Petersen, 20 Utah 2d 376, 438 P.2d 545 at 546*. This is because adjoining owners may have documentary or prescriptive rights to use the road or their use may be by permission of the owners of the fee of the road.

*888 P.2d at 1099; see also Petersen v. Combe, 20 Utah 2d 376, 438 P.2d 545, 547 (Utah 1968)*.

Having established the general legal principles of what it means to use a road as a public thoroughfare, we proceed to examine the evidence to determine whether this legal standard was satisfied. Several witnesses testified to use that could qualify as use as a public thoroughfare.<sup>10</sup> For example, Mr. Lloyd, while testifying about the shooting events at the gun club, stated: [\*17] "We always had a lot of spectators [sic] would always drive out on the weekends and watch the shoots or family people and stuff that [sic] was interested in it. It was a lot

of the community that came out there." As we noted above, other witnesses testified that numerous customers used the Airport Road to reach the various businesses located along that road. Moreover, there was testimony indicating additional public uses of the Airport Road as a "lover's lane" and also as a place to ride horses.

10 Under the facts of the instant case, the public's use of the Airport Road simply to go to and from the airport is of the permissive nature that will not lead to a dedication and abandonment to the public, as this is precisely how Heber City wanted the road used. *See Gillmor v. Carter, 15 Utah 2d 280, 391 P.2d 426, 428 (Utah 1964)* (finding owners' "agreement with duck clubs granting permission to use" road across their land to be inconsistent with statutory requirements for dedication of public highway). Therefore, evidence regarding this use of the road is irrelevant to our consideration of whether the Airport Road was used as a public thoroughfare.

[\*\*18] There is no indication in the district court's memorandum decision that it found any of the above evidence incredible. To the contrary, the district court specifically referred in its findings of fact to some of these public uses. Furthermore, when the court concluded its memorandum decision by "acknowledging that this is a close decision," the court stated, "There is evidence of public use of the airport roadway over an extended period of time." Indeed, no evidence to the contrary was presented. Moreover, Heber City never argued at trial or on this appeal that these uses were not by the "public." Because Heber City does not challenge the accuracy of the trial court's finding that "there is evidence of public use of the airport roadway," we do not review whether all of these uses were indeed by individuals who qualify as members of the public. When a party fails to challenge a factual finding and marshal the evidence in support of that finding, we "assume[] that the record supports the findings of the trial court and proceed[] to a review of the accuracy of the lower court's conclusions of law and the application of that law in the case." *Saunders v. Sharp, 806 P.2d 198, 199 [\*\*19] (Utah 1991)* (per curiam) (citing *Grayson Roper Ltd. Partnership v. Finlinson, 782 P.2d 467, 470 (Utah 1989); Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985)*).

The evidence establishes that the public used the Airport Road for whatever purposes they deemed

"convenient or necessary." <sup>11</sup> See *Boyer*, 326 P.2d at 109. On the basis of this evidence, we find as a matter of law that the public used the Airport Road as a public thoroughfare.

11 The sole evidence to the contrary was that the gun club relocated after the airport became operational. For the same reasons we discussed above, see *supra* note 9, this fact alone is insufficient to justify the conclusion that the Airport Road was not used as a public thoroughfare.

Having concluded that the first two elements under section 27-12-89 were satisfied, we turn to the final requirement in section 27-12-89: Continuous use as a public thoroughfare must occur for at least ten years. As we discussed above, the uncontroverted facts establish that the [\*\*20] public continuously used the Airport Road as a public thoroughfare [\*313] from essentially its moment of creation in 1947 until Heber City placed a barricade across it in 1989. This amounts to over forty years of continuous use as a public thoroughfare, easily satisfying the ten-year requirement. We conclude therefore that the facts compel the conclusion that the ten-year requirement was satisfied as a matter of law.

Our conclusion that all three elements under section 27-12-89 for the establishment of a public highway were satisfied is supported by the district court's memorandum decision. After acknowledging in its memorandum decision that "there is evidence of public use of the airport roadway over an extended period of time," the court added, "However, in the interest of fairness and justice, [the Airport Road] should be exempted from the *technical provisions* of U.C.A. § 27-12-89" (emphasis added). The plain language of section 27-12-89, however, does not support granting such an exception for the Airport Road. Once the technical provisions of that section have been satisfied, the road is a "public highway." The court has no discretion to ignore that fact. We hold that the court [\*\*21] erred in concluding that the Airport Road was not a public highway when closed by Heber City in 1989. <sup>12</sup>

12 The fact that the road has not been used since 1989 does not change its status as a public highway. In *Western Kane County Special Service*

*District No. 1 v. Jackson Cattle Co.*, 744 P.2d 1376, 1377-78 (Utah 1987), we held that a highway which had been dedicated and abandoned to the public by the public's use of it "from 1919 until 1931, when the highway was relocated and public use of the . . . road stopped," still maintained its status as a public highway though half a century had passed since the road was used by the public. See also *Clark v. Ereksion*, 9 Utah 2d 212, 341 P.2d 424, 425-26 (Utah 1959) (requiring property owner to remove encroachments, which included buildings, fences, and trees, from public road though some encroachments had been in place for thirty years). Furthermore, the City's placement of a barricade across the road does not change the public status of the road. *Memcott v. Anderson*, 642 P.2d 750, 753 (Utah 1982).

Section 27-12-90 of the Code provides the only method for eliminating the "public" status of a public highway. That section states, "All public highways once established shall continue to be highways until abandoned or vacated by order of the highway authorities having jurisdiction over any such highway, or by other competent authority." Utah Code Ann. § 27-12-90. The court found that Heber City had not formally abandoned or vacated the Airport Road under that section, and the City does not dispute this finding. Consequently, the Airport Road is still a public highway.

[\*\*22] We reverse the district court's decision that the Airport Road was not a public highway under section 27-12-89, and we remand for further proceedings to determine the just compensation to be paid by Heber City as a result of its condemnation of the Simpsons' property.

Justice Howe, Justice Durham, Justice Russon, and Judge Taylor concur in Chief Justice Zimmerman's opinion.

Having disqualified himself, Associate Chief Justice Stewart does not participate herein; District Judge Stanton M. Taylor sat. [\*314] Appendix: Map of Airport Road



LEXSEE 916 P2D 910

**Marden R. Kohler and Joy J. Kohler, Plaintiffs, Appellees, and Cross-appellants, v.  
Stephen C. Martin, Defendant, Appellant, and Cross-appellee.**

Case No. 950345-CA

## COURT OF APPEALS OF UTAH

*916 P.2d 910; 289 Utah Adv. Rep. 28; 1996 Utah App. LEXIS 56*

May 2, 1996, Filed

**PRIOR HISTORY:** [\*\*1] Fourth District, Wasatch County. The Honorable Guy R. Burningham.

**COUNSEL:** Robert Felton, Salt Lake City, for Appellant.

A. Dean Jeffs, Provo, for Appellees.

**JUDGES:** Before Judges Orme, Davis, and Jackson. Norman H. Jackson, Judge concurs. Gregory K. Orme, Presiding Judge concurs in the result only.

**OPINION BY:** DAVIS

**OPINION**

[\*910] OPINION

DAVIS, Associate Presiding Judge:

Stephen C. Martin appeals the trial court's rulings regarding access rights to a ten-foot-wide driveway occupying a portion of his property. We affirm in part, reverse in part, and remand in part.

**FACTS**

The property in question is a narrow strip of land approximately 56 feet wide and 277 feet long. A driveway approximately ten feet wide runs through the property and provides access to both the Martin and the Kohler residences. The testimony at trial [\*911] was that historically this entire strip of land was regarded and

treated as a public roadway (roadway). The roadway once led to a slaughterhouse, a public store, a creamery, a public swimming pool, and was also used for at least twenty-two years by the public as access to a business known as the "Buehler [\*\*2] Hot Pots." In addition, witnesses testified that the general public used the roadway for access to property to the north of the Buehler Hot Pots for recreational and agricultural purposes.

Despite its widespread public use and general reputation as a public thoroughfare, the roadway was included in the legal description of a larger parcel of private property to the north of the roadway. This property was purchased by Ferrin and Martha Whitaker in 1956. In 1966, appellee Marden R. Kohler's parents, Reed and Elda Kohler, approached the Whitakers, who were close friends, and advised them that they had an interest in buying the lot just south of theirs. Because the lot was landlocked, Reed and Elda Kohler asked for permission to use the driveway improved by the Whitakers to access the home they intended to construct. This permission was granted orally, and Reed and Elda Kohler purchased the lot and built the home.

After the Kohlers finished the home and moved in, the Whitakers requested payment from the Kohlers for an "ownership" interest in the driveway and for driveway maintenance. This money was never paid. Nevertheless, the Kohlers continued to use the driveway and to participate [\*\*3] in the maintenance of the property surrounding the driveway.

In 1981, the Whitakers sold their property to Karen

and Dick Bassett. The Bassetts were told by the Whitakers that Elda Kohler (Reed Kohler had since died) had permission to use the driveway while she was alive and then permission would terminate.

Martin purchased the property from the Bassetts in 1987. Prior to purchasing the property, Martin was told by the Bassetts that Elda Kohler had the right to use the driveway during her life only. After the purchase, Martin approached Elda regarding his understanding of use of the driveway, and Elda's response was noncommittal. In a subsequent conversation, Elda again refused to address the issue, and referred Martin to her son, Marden. Martin contacted Marden, and Marden expressed his understanding that the driveway was a public road, and that Martin had no right to gate the entrance to the driveway. After Elda Kohler died in 1992, Martin installed a locked gate at the entrance to the driveway. Marden and Joy Kohler subsequently brought this action, claiming that they owned an easement to the driveway and that the driveway was a public thoroughfare.

After a bench trial, the trial [\*\*4] court found by clear and convincing evidence that:

the roadway adjacent to Plaintiffs' real property and extending northward from the intersection of Second North Street and Second West Street of Midway City to a line extended westerly from the north side of Plaintiffs' asphalt driveway where it enters the Plaintiffs' property was historically and continuously used by the general public as a public thoroughfare for far in excess of a 10 year period of time. The width of the thoroughfare area extended from fences along its west side and east side which are still in their historic locations. The entire thoroughfare area was used by the general public both for passage of people and animals and for the travel and parking of vehicles. The use of the thoroughfare by the public was not only in connection with the use of the land now owned by the Plaintiffs, but also for access by the public to the lands north of the properties of these parties. The thoroughfare area was always open for the free and unobstructed passage of people and vehicles from its south end northward past the Plaintiffs' land from before 1922 to at least 1948.

Based upon these findings, the court ruled: (1) the roadway [\*\*5] on which the driveway was built was a public thoroughfare; (2) the Kohlers "are the owners of an easement and right of way over and upon the roadway"; and (3) the Kohlers "also own a prescriptive

easement for the permanent and unrestricted use" of the roadway. Martin appeals.

#### [\*912] ISSUES AND STANDARD OF REVIEW

Martin raises numerous issues for review.<sup>1</sup> However, we need reach only two: whether the trial court erred in ruling that the roadway was a dedicated, public thoroughfare pursuant to Utah Code Ann. § 27-12-89 (1995); and, if a public thoroughfare was created, whether the trial court erred in ruling that the entire strip of property was dedicated to the public. Martin does not challenge the factual underpinnings for the trial court's rulings. Instead, he argues the trial court misapplied the law, and urges this court to review the trial court's legal conclusions for correctness. *See Carrier v. Pro-Tech Restoration*, 909 P.2d 271, 272 (Utah App. 1995).

1. We do not address Martin's arguments regarding joinder and the alleged violation of *Article I, section 22 of the Utah Constitution*. Martin has not demonstrated that the trial court abused its discretion in failing to grant the motion for joinder of Midway City. Further, the argument regarding the unconstitutional taking is entirely without merit and need not be addressed. *See State v. Allen*, 839 P.2d 291, 303 (Utah 1992).

[\*\*6] Generally speaking, Martin is correct that "the effect of a given set of facts is a question of law and, therefore, one on which an appellate court owes no deference to a trial court's determination." *State v. Pena*, 869 P.2d 932, 936 (Utah 1994). However,

the critical question, and one of some subtlety, arises only after we have said that an issue is a question of law and no deference is owed the trial court. At this point, we must attempt to determine when the articulated legal rule to be applied to a set of facts--a rule that we establish without deference to the trial courts--embodies a de facto grant of discretion which permits the trial court to reach one of several possible conclusions about the legal effect of a particular set of facts without risking reversal.

*Id.* at 937.

The court in *Pena* concluded that a "spectrum of discretion exists and that the closeness of appellate review of the application of law to fact actually runs the entire length of this spectrum." *Id.* at 938. When the decisions are more fact-dependent, or when the

credibility of the witnesses has a strong bearing on the decision, broader discretion is generally granted to the trial [\*\*7] court. *Id.* At the other end of the spectrum, resolution of such issues as "whether a 'municipal function' has been delegated to a state commission in violation of *article VI, section 28 of the Utah Constitution*," is subject to de novo review as more of a policy determination than a factual issue. *Id.*

We must determine in this case whether the ruling that a public thoroughfare exists should be reviewed with some discretion granted to the trial court. The Utah Supreme Court has provided three criteria for assessing when some degree of deference should be given to the trial court's application of the law to the facts. These are:

(i) when the facts to which the legal rule is to be applied are so complex and varying that no rule adequately addressing the relevance of all these facts can be spelled out; (ii) when the situation to which the legal principle is to be applied is sufficiently new to the courts that appellate judges are unable to anticipate and articulate definitively what factors should be outcome determinative; and (iii) when the trial judge has observed "facts," such as a witness's appearance and demeanor, relevant to the application of the law that cannot be adequately [\*\*8] reflected in the record available to appellate courts.

*Id. at 939.*

Consideration of these criteria persuades us that some degree of discretion is appropriately accorded to the trial court in cases determining whether a public thoroughfare exists. While "ten years of public use" seems a clear rule of law, these cases, by their very nature, involve reconstruction of historical facts concerning timing, nature, and the extent of public usage. Usually, as here, witnesses are required to dredge the recesses of their minds for aged memories. Accordingly, this kind of testimony requires the trial court to do some weighing and assessing of the credibility of witnesses. In short, the trial court is in the best position to determine whether the particular set of circumstances in question merits a conclusion [\*913] that the property has been dedicated or abandoned to public use.

We therefore conclude that it is appropriate to review the trial court's ruling that a public thoroughfare was created with some degree of deference to the trial court. "Trial courts should be permitted some rein to grapple

with the multitude of fact patterns that may constitute a . . . [public thoroughfare] determination." [\*\*9] *Id. at 940.* However, we require that the dedication of property to the public be proven by clear and convincing evidence. *Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1099 (Utah 1995). "The law does not lightly allow the transfer of property from private to public use." *Id.*

#### ANALYSIS

The trial court ruled that based upon continuous use by the general public for a period greater than ten years, the roadway leading to the Kohler residence was impliedly dedicated to the public as a public highway. Section 27-12-89 of the Utah Code states, "A highway shall be deemed to have been dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years." Utah Code Ann. § 27-12-89 (1995). Moreover, once a public highway has been established pursuant to section 27-12-89, it remains a public highway unless expressly abandoned by the proper authorities. *Id.* § 27-12-90. "Highway" is defined as "any public road, street, alley, lane, court, place, viaduct, tunnel, culvert, bridge, or structure laid out or erected for public use, or dedicated or abandoned to the public, . . . including the entire area within the [\*\*10] right-of-way." *Id.* § 27-12-2(6).

Martin does not dispute the evidence of public use of the roadway, but contends that this evidence does not satisfy the requirements of section 27-12-89. Specifically, Martin argues that use of the roadway to access the Buehler Hot Pots does not qualify as "public use" because the Buehler Hot Pots was an adjoining property owner. Further, the public used the roadway as business invitees of Buehler Hot Pots, and it is well established that mere use of the roadway by adjoining property owners (and public invitees thereof) does not create a public thoroughfare. *See Bernardo*, 888 P.2d at 1099; *Petersen v. Combe*, 20 Utah 2d 376, 438 P.2d 545, 546 (1968); *Thompson v. Nelson*, 2 Utah 2d 340, 273 P.2d 720, 723 (Utah 1954) ("The mere use by the public of a private alley in common with the owners of the alley does not show a dedication thereof to public use, or vest any right in the public to the way." (citations omitted) (emphasis added)). Martin also contends that other use of the roadway was sporadic and would not independently support a ruling of public dedication.

Martin correctly states the law regarding use of property by adjoining [\*\*11] land owners. As our

supreme court recently stated,

It is important here to note that our case law has distinguished between use of a road by owners of adjoining property and by the general public. "Such property owners cannot be considered members of the public generally, as that term generally is used in dedication by user statutes." *Petersen*, 438 P.2d at 546. This is because adjoining owners may have documentary or prescriptive rights to use the road or their use may be by permission of the owners of the fee of the road.

*Bernardo*, 888 P.2d at 1099. The Buehler Hot Pots was an adjoining landowner; hence the rule excluding evidence of such use has application here. Nevertheless, there was abundant, un rebutted evidence in support of the trial court's conclusion that the roadway was used by the general public for purposes other than access to the Buehler Hot Pots for a period far in excess of the requisite ten years. The evidence was that the roadway was used continuously for recreational purposes, for agricultural purposes, and for access to other business activities. In addition, the Probst family, owners of the roadway from approximately 1939 to 1956, always considered [\*\*12] the roadway to be public, did not fence off the roadway, did not post any signs, and in general made no attempts to limit the passage of the public. Other individuals also testified that it was their opinion, and the general public opinion, that the roadway was public. In fact, when the Whitakers installed a gate blocking the roadway in 1970, adjoining [\*914] landowners hired an attorney to request that the roadway be reopened because it had been recognized as a public thoroughfare for over fifty years. The Whitakers subsequently removed the gate. Thus, clear and convincing evidence supports the trial court's ruling that the roadway was dedicated or abandoned to the public. *See Bonner v. Sudbury*, 18 Utah 2d 140, 417 P.2d 646, 648 (Utah 1966) (noting "all of the facts should be considered together; and where there is dispute about whether a public use is established, determination of the facts and resolution of the issue is primarily the responsibility of the trial court").

Because we affirm the trial court's ruling that a public thoroughfare had been created, Martin's argument that creation of a private right in a public thoroughfare cannot occur is well taken. "A prescriptive right [\*\*13] is in conflict with the dedication of land to the use of the general public." *Thurman v. Byram*, 626 P.2d 447, 449

(Utah 1981); *see also Thornley Land & Livestock Co. v. Morgan Bros. Land & Livestock Co.*, 81 Utah 317, 17 P.2d 826, 827 (1932) ("The use by individual persons in common with the public generally is regarded as permissive, and by such common use no individual person can acquire a right by prescription as against the owner of the fee."). We therefore reverse the trial court's rulings that the Kohlers own "an easement and a right of way over and upon the roadway," that the doctrines of promissory estoppel and equity prevent Martin from denying the existence of such an easement, and that the Kohlers had a prescriptive easement for use of the roadway.

Finally, Martin argues that even if a public thoroughfare was created, the trial court erred in failing to assess the reasonable and necessary width of the roadway. We agree. The trial court found that the public thoroughfare extended the full width of the land between the east and west fences. "Generally, the width of a public road is determined according to what is reasonable and necessary under all the facts and circumstances." [\*\*14] *Memcott v. Anderson*, 642 P.2d 750, 754 (Utah 1982). Because the trial court failed to make this determination, we remand for this limited purpose.<sup>2</sup>

2. Because we affirm the trial court's finding of a public thoroughfare, we also affirm the trial court's order requiring Martin to remove the gate obstructing this thoroughfare.

## CONCLUSION

We affirm the trial court's ruling that the roadway was, by clear and convincing evidence, dedicated to the public. We also affirm the ruling that Martin is required to remove the gate preventing access to this public road. We reverse the court's rulings concerning the existence of easements to the roadway because they are inconsistent with the ruling that the roadway is public. Finally, we remand for a determination of the necessary and reasonable width of this public road.

James Z. Davis,

Associate Presiding Judge

**CONCUR BY:** Jackson; Orme

**CONCUR**



916 P.2d 910, \*914; 289 Utah Adv. Rep. 28;  
1996 Utah App. LEXIS 56, \*\*14

I CONCUR:

Gregory [\*\*15] K. Orme,

Norman H. Jackson, Judge

Presiding Judge

I CONCUR IN THE RESULT ONLY:



LEXSEE 556 P2D 496

**Lloyd LEWIS, Plaintiff and Respondent, v. Lynn S. PORTER dba Lynn S. Porter  
Housemovers, Inc., Defendant and Appellant**

No. 14486

Supreme Court of Utah

*556 P.2d 496; 1976 Utah LEXIS 939*

November 1, 1976

**COUNSEL:** [\*\*1] George W. Preston, of Preston, Harris, Harris & Preston, Logan, for Defendant and Appellant.

David W. Sorenson, Logan, for Plaintiff and Respondent.

**JUDGES:** Maughan, Justice, wrote the opinion. Henriod, C.J., and Ellett, Crockett and Wilkins, JJ., concur.

**OPINION BY: MAUGHAN**

**OPINION**

[\*497] Plaintiff sued to recover a sum he claimed under an agreement with defendant. Plaintiff asserted defendant owed him \$11,122.30 for services rendered, and costs advanced. Upon trial to the court, plaintiff was awarded \$9,078.27. Defendant appeals. We affirm, and award costs to plaintiff.

The complaint was filed on March 20, 1974, the answer April 16, 1974. Counsel for both parties signed a notice of readiness for trial which was filed October 22, 1975. Due notice, dated November 19, 1975, set the matter for trial December 3 and 4, 1975.

On the date of trial defense counsel appeared, but defendant was absent. Defense counsel moved for a continuance, representing he had advised his client of the date of trial; but the client had gone on a vacation to Hawaii. He admitted he didn't know why his client

wasn't present in court. The court denied the motion.

The trial proceeded; both parties called [\*\*2] witnesses, and presented other evidence. On the day the court signed findings of fact, conclusions of law, and judgment, defendant filed a motion to reopen for the purpose of introducing new evidence. This motion was grounded on the assertion the exact nature of plaintiff's claim was unknown, and that he didn't discover until trial certain books, documents, and records needed to be discovered. The motion was denied on the ground defendant had 20 months to discover what books, records, and documents the plaintiff was relying on to support his claim.

On appeal, defendant contends the court erred in denying the motion to reopen. A motion to reopen to take additional testimony when a case has been submitted to the court, but prior to the entry of judgment, is addressed to the sound discretion of the court.<sup>1</sup>

<sup>1</sup> *Davis v. Riley*, 20 Utah 2d 325, 437 P.2d 453 (1968); *Tangaro v. Marrero*, 13 Utah 2d 290, 373 P.2d 390 (1962); *Kirkham v. Spencer*, 3 Utah 2d 399, 285 P.2d 127 (1955); *Mitchell v. Spanish Fork West Field Irrigation Co.*, 1 Utah 2d 313, 265 P.2d 1016 (1954); *Tuft v. Brotherson*, 106 Utah 499, 150 P.2d 384 (1944).

[\*\*3] Defendant contends the court abused its discretion in failing to hear additional evidence concerning matters of defense to the claims of plaintiff, which were not available at the time of the trial.

Specifically, his reasons are: (1) Not all of the documentary evidence had been discovered by the parties, viz, plaintiff did not have all the evidence available for his use in establishing his claim; (2) defendant's presence at the trial would have materially aided the court in reaching a decision.

Defendant had ample opportunity to produce his books and records to indicate his version of the transactions with plaintiff, and to be present at the trial. We discover no basis to ascribe abuse of discretion to the denial of the motion to reopen.

A court should consider a motion to reopen to take additional testimony in light of all the circumstances and grant or deny it in the interest of fairness and substantial justice. <sup>2</sup> Judged by this standard, the denial of defendant's motion subserves the interest of fairness and substantial justice.

2 6 A. *Moore's Federal Practice (2d Ed.)*, Sec. 59.04[13] p. 59-36.

[\*\*4] Defendant further contends the court erred in awarding judgment against defendant as an individual. The claim is plaintiff dealt with Lynn S. Porter Housemovers, Inc., a corporation; and, therefore, defendant is neither the proper party to the action, nor the one who is liable to plaintiff.

Such a claim was not in the pleadings or advanced at trial. It is raised for the first time on appeal. Any objection to a defect of parties is waived, if not asserted by a party as provided in Rule 12(h), U.R.C.P.

HENRIOD, C.J., and ELLETT, CROCKETT and WILKINS, JJ., concur.



LEXSEE 86 P3D 402

**Petitioners: KIM MCINTYRE and STEVE MCINTYRE, v. Respondents: BOARD OF COUNTY COMMISSIONERS, GUNNISON COUNTY, COLORADO; SIERRA MINERALS CORP. and OMYA INC.**

No. 02SC803

SUPREME COURT OF COLORADO

*86 P.3d 402; 2004 Colo. LEXIS 158*

March 15, 2004, Decided

**PRIOR HISTORY:** [\*\*1] Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 01CA2408. *Bd. of County Comm'rs v. McIntyre, 2002 Colo. App. LEXIS 1634 (Colo. Ct. App., Sept. 19, 2002)*

**DISPOSITION:** Reversed and remanded with directions.

**HEADNOTES**

Requirements for acquisition of a public road by prescription, § 43-2-201(1)(c), 11 C.R.S. (2002)- Claim of Right - Adverse Use -Twenty Year Prescriptive Period - Overt Act of Public Entity - Notice to Landowner.

**SYLLABUS**

In this case, the owners of private land in Gunnison County challenge a quiet title decree the trial court entered in favor of Gunnison County for a road across their property. The Supreme Court holds that the footpath across this property did not become a "public road" by prescription, because the county took no action to claim a public right to it, for example, by doing maintenance or placing the footpath on its trail and road system.

In order to acquire a public prescriptive right to a road, a claimant must show that: (1) members of the public have used the road under a claim of right and in a manner adverse to the landowner's property interest; (2) the public has used the road without interruption for the

statutory period of twenty years; and (3) the landowner must have had actual or implied knowledge of the public's use of the road and made no objection to such use. Part one of this test requires a showing of both adversity and a public claim of right.

[\*\*2] To satisfy the claim of right requirement, the claimant must provide evidence that a reasonably diligent landowner would have had notice of the public's intent to create a public right of way. The evidence must include some overt act on the part of the public entity responsible for public roads in the jurisdiction sufficient to give notice of the public's claim of right. This notification to the landowners starts the prescriptive period; without such notice, the prescriptive period does not begin.

**COUNSEL:** Kim McIntyre, Steve McIntyre, Tempe, Arizona, Petitioners Appearing Pro se.

David Baumgarten, Gunnison, Colorado, Attorney for Respondent.

Beth A. Dickhaus, Thomas J. Lyons, Denver, Colorado, Attorneys for Amicus Curiae, Colorado Counties, Inc.

**JUDGES:** JUSTICE HOBBS delivered the opinion of the court. JUSTICE MARTINEZ dissents, and CHIEF JUSTICE MULLARKEY joins in the dissent.

**OPINION BY: HOBBS****OPINION**

[\*404] EN BANC

JUSTICE HOBBS delivered the opinion of the court.

We granted certiorari in this case to review the court of appeals decision in *Board of County Comm'rs v. McIntyre*, 2002 Colo. App. LEXIS 1634, No. 01CA2408, 2002 WL 31112520 (Colo. App. Sept. 19, 2002).<sup>1</sup> The trial court ruled [\*\*3] on summary judgment that Gunnison County had obtained a road by prescription across certain private lands pursuant to *section 43-2-201(1)(c)*, 11 C.R.S. (2002). The court of appeals affirmed the trial court. We reverse. We hold that the county failed to meet the claim of right requirement of *section 43-2-201(1)(c)* for the establishment of a public road by prescription across the McIntyre lands.

1 We granted certiorari on the following issues:

1. Whether *section 43-2-201(1)(c)*, 11 C.R.S. (2002) requires the government to give notice of public use or of a public claim of right to the landowner before acquiring property by prescription.

2. Whether respondent denied petitioners' constitutional right to due process prior to property deprivation by taking a trail by prescription across petitioners' private property as a public road where respondent never notified petitioners of any claim of right for public use of that trail.

I.

The petitioners, Kim [\*\*4] and Steve McIntyre (McIntyres) own six mining claims near the Town of Marble in Gunnison County. They purchased their property from L.E. Schooley and Associates (Schooley) in 1994. Schooley had acquired the property by virtue of a tax deed in 1960; there is no evidence in the record of a deed in the chain of title that contains a dedication, reservation, or exception for a public road across the McIntyre property.

The McIntyre property includes a portion of an old electric tramway route that the Colorado Yule Marble Company operated to [\*405] haul marble to the Town of Marble from its quarry. The quarry adjoins the McIntyre land.

In 1941 the Marble Company ceased operations. Marble from the quarry was used in building the Lincoln Memorial and the Tomb of the Unknown Soldier, among other notable public buildings in the United States; so the quarry site has significant historical and tourist value to the Town of Marble and Gunnison County. The public has traversed the approximately three-plus mile route from the Town of Marble to the quarry site since the 1940s by four wheel drive vehicle and footpath. Only a footpath exists across the McIntyre property because of a steep gradient that veers [\*\*5] away from Yule Creek, severe erosion on sections of the footpath, and marble spoil piles which block vehicle access across the McIntyre lands.

William Bush, a Schooley partner, testified that approximately six to eight people per week walked the former tramway route across the McIntyre property from the 1960s to the 1990s to access the quarry site and public lands for recreation. Bush built and maintained a fence across the former tramway route on the McIntyre property for a short time in the early to mid 1960s. Some of these people who walked across the property during the 1960s to the 1990s requested permission; some did not. When requested, Bush always granted permission. Bush testified that he never saw any member of the public use a vehicle to cross the property.

In 1986, Schooley gave written permission to the Colorado Department of Mined Land Reclamation to enter the property and build a boardwalk over a washed out section of the route as part of a state mined land reclamation safety project on the Colorado Yule Marble Company quarry site. This agreement expressly provided that the landowner waived no rights by granting access permission to the State.

In the 1990s, the Colorado [\*\*6] Yule Marble Company reopened the quarry. Avoiding that portion of the impassable old tramway route across the McIntyre property, the Marble Company cut a new road to access the quarry from the vehicle-passable portion of the old tramway route. Concerned about liability arising from the deteriorating footpath and wastes that walkers left on their property, the McIntyres closed the footpath across

their property in the mid-90s.

At present a graveled road from Marble ends in a parking lot, located off of the McIntyre property, from which persons can take a private tour to the quarry site on a trail or the road that the quarry operators installed off of the McIntyre property in the 1990s. Foot access to the quarry's vicinity is also available from the parking lot via Forest Service trails.

At no time during the prescriptive period from the 1960s to the 1990s the trial court found to exist in this case did Gunnison County include the footpath across the McIntyre property on its road and trail system, or perform any maintenance activity on the path. The uncontested evidence in the record, including testimony of Gunnison County officials, was that the County had never assumed "jurisdiction" [\*\*7] over the trail on the McIntyre property during the prescriptive period.

However, when the McIntyres commenced excluding members of the public from their property, Gunnison County brought this action against them, seeking a declaratory judgment that the route across the McIntyre property is a public road pursuant to *section 43-2-201(1)(c)*. Following evidentiary hearings, the trial court granted a preliminary injunction against the McIntyres in favor of the County, preventing them from barring members of the public from using the footpath.

The County amended its pleadings under *C.R.C.P. 105* to quiet title against all property owners along the old tramway route from Marble. After further proceedings, the trial court entered a quiet title decree "for a public highway pursuant to *C.R.S. 43-2-201(1)(c)* dedicated to public uses under the jurisdiction of the Board of County Commissioners of the County of Gunnison, Colorado" for the entire length and width of the old tramway route, up to sixty feet in width. The court of appeals affirmed. No party to the quiet title action, other than the McIntyres, [\*\*406] appears before us to challenge the quiet title decree.

Limiting [\*\*8] our decision to the McIntyre property, we conclude that the trial court and court of appeals failed to properly apply the criteria of *Board of County Comm'rs v. Flickinger*, 687 P.2d 975 (Colo. 1984), in considering whether a public road existed by prescription across the McIntyre property. Among other requirements, *Flickinger* requires the public entity to prove a claim of right to the public road. The facts of

record on summary judgment do not support that Gunnison County took any overt action meeting the claim of right requirement to commence running of the prescriptive period for establishment of a public road on the McIntyre property under *section 43-2-201(1)(c)*. Accordingly, the trial court and court of appeals erred in ruling that the footpath along the former tramway route across the McIntyre property became a public road by prescription.

## II.

We hold that the county failed to meet the claim of right requirement of *section 43-2-201(1)(c)* for the establishment of a public road by prescription across the McIntyre property.

In conducting our review in this case, we recognize that a court may enter summary judgment when there is no disputed issue of material [\*\*9] fact and the moving party is entitled to judgment as a matter of law. We review de novo an order granting summary judgment. *Aspen Wilderness Workshop, Inc. v. Colorado Water Conservation Bd.*, 901 P.2d 1251, 1256 (Colo. 1995).

Our decision in this case reiterates that the claimant for a public road by prescription must demonstrate the following: (1) members of the public have used the road in a manner adverse to the landowner's interest *and* under a claim of right; (2) the public has used the road, continuously, for twenty years; and (3) the landowner had actual or implied knowledge of the public's use and made no objection to that use of the road.

We are concerned here with the claim of right requirement. To satisfy the claim of right requirement, the claimant must provide evidence that a reasonably diligent landowner would have had notice of the public's intent to create a public right of way. The evidence must include some overt act on the part of the public entity responsible for public roads in the jurisdiction sufficient to give notice of the public's claim of right. This notification to the landowners starts the prescriptive period; without such notice, [\*\*10] the prescriptive period does not begin.

### A. Private Prescription and Public Road Prescription Differentiated

The case before us commenced as an action against the McIntyres, then became a quiet title action between

Gunnison County and all claimants pursuant to *C.R.C.P. 105*. This rule provides for complete adjudication of the rights of all parties who, when served, have the opportunity to adjudicate their claim of right to an interest in the real property. *Board of County Comm'rs v. Timroth*, 87 P.3d 102, 2004 Colo. LEXIS 120, No. 02SC704, slip op. at 6-7 (Colo. March 8, 2004).

In the case before us, the trial court and the court of appeals ruled that twenty years of public use adverse to the property owner was itself sufficient to establish a public road by prescription under *section 43-2-201(1)(c)*. These rulings make the requirements for private prescriptive rights and public prescriptive road rights the equivalent of each other. They are not.

In regard to private prescriptive rights, *section 38-41-101(1)*, 10 C.R.S. (2003), provides that eighteen years of "adverse possession of any land shall be conclusive evidence of absolute ownership" in a case for recovery of title or possession [\*\*11] by the prior owner of the real property. *Section 38-41-103* provides, in addition, that a continuous claim of ownership under the color of a record conveyance or other instrument is "prima facie evidence of adverse possession" during the prescriptive period. *Section 38-41-106* reduces the eighteen year period to seven years when the residence, occupancy, or possession of the adverse possessor is under color of title, in law or equity deducible of [\*407] record, from the State of Colorado or the United States. *Section 38-41-108* recognizes the title of persons in actual possession of the lands under claim and color of title who have possessed the lands and paid taxes on the property for seven years. To the same effect is *section 38-41-109*, applicable to vacant and unoccupied land.

Missing from the private prescription statutes is the requirement of *section 43-2-201(1)* that the claimant of a public road prescriptive right must demonstrate a claim of right and use adverse to the landowner for the twenty year prescriptive period. As set forth in our case law, the requirements of *section 43-2-201(1)(c)* are: (1) members of the public must have used the road under a claim of right and in a manner [\*\*12] adverse to the landowner's property interest; (2) the public must have used the road without interruption for the statutory period of twenty years; and (3) the landowner must have had actual knowledge of the public's use of the road and made no objection to such use. *Board of County Comm'rs v. Flickinger*, 687 P.2d 975, 980 (Colo. 1984).

In contrast, a private prescriptive easement is established when the use is: "(1) open or notorious; (2) continued without effective interruption for [eighteen years]; and (3) the use was either (a) adverse or (b) pursuant to an attempted, but ineffective grant." *Lobato v. Taylor*, 71 P.3d 938, 950 (Colo. 2002).

The *Restatement (Third) of Property: Servitudes* § 2.18 cmt. f (2002) recognizes that although, in general, the requirements for a public prescriptive easement are the same as those for a private easement, some states do require a governmental body to assert some claim of ownership through acts of maintenance or otherwise. As shown by our case law construing *section 43-2-201(1)(c)*, Colorado is one of these states.

In conducting our analysis, we turn first to what [\*\*13] constitutes a public road; then we examine the claim of right requirement that must accompany the public's adverse use in order for a public road to exist by prescription.

#### B. What Is A Road Under *Section 43-2-201(1)(c)*

We first address what constitutes a "road" for purposes of public prescription under *section 43-2-201(1)(c)*.<sup>2</sup> In *Simon v. Pettit*, 687 P.2d 1299 (Colo. 1984), the claimed public "roads" were two "narrow but well-defined footpaths" across private property that members of the public had used for recreational access for the twenty year statutory period. *Id.* at 1300. Our previous decision in *Hale v. Sullivan*, 146 Colo. 512, 362 P.2d 402 (1961), provided for a broad definition of "road." In *Simon* we adopted a more restrictive definition.

<sup>2</sup> *Section 43-2-201(1)(c)* provides that "all roads over private lands that have been used adversely without interruption or objection on the part of the owners of such lands for twenty consecutive years" are public highways. Read in context with the other provisions of *section 43-2-201(1)*, *subsection (1)(c)* requires some form of "action or knowing inaction by the appropriate governmental body" for a public right. *Simon v. Pettit*, 687 P.2d 1299, 1303 (Colo. 1984). Title 43 addresses transportation; Article 2 addresses state, county, and municipal highways; and Part 2 addresses county and other public highways. It is within this part that the public prescription statute is codified; therefore, it follows that any "road," as contemplated in the statute, must meet the

definition of a county or other public highway. Since Part 2 does not contain a definitional section, we turn to our case law for the definition of "road" for the purposes of the public prescriptive right statute.

[\*\*14] We held that the legislature did not intend the synonymous terms "road" or "public highway" in *section 43-2-201(1)(c)* to include all footpaths in Colorado used adversely to the landowner by members of the public for twenty years or more. However, the legislature did intend that the courts consider the characteristics, conditions, and locations of the ways in applying the statute. *Simon*, 687 P.2d at 1302-03.

We concluded that the public entity responsible for maintaining public roads in the jurisdiction must take some action, formal or informal, indicating its intention to treat the right of way as a public road. *Id.* at 1303 (citing *Kratina v. Board of County Comm'rs*, 219 Kan. 499, 548 P.2d 1232 (1976)).

[\*408] Our reliance in *Simon* on the Kansas Supreme Court decision in *Kratina* is highly significant to the case before us. The Kansas Supreme Court emphasized that "mere use by the traveling public is ambiguous" as to whether the use was with landowner permission or not. On the other hand, "where public officials take some positive action, either formally or informally, such as improving or maintaining the road, the intention of the [\*15] public at least is unmistakable." *Kratina*, 219 Kan. at 504-505, 548 P.2d at 1237. "When a road is worked by public authorities the owner is chargeable with the knowledge that they do so under a claim of right." *Id.* at 505, 548 P.2d at 1237.

Due to the lack of any positive action by the claiming county or township that demonstrated a claim of right, the Kansas Supreme Court ruled that there could be no public road by prescription:

In any event, the court is satisfied that the rule adopted here is the more equitable one, and will resolve the difficulties inherent in attempting to determine the intent of a landowner and of the public on the basis of ambiguous acts alone. The cases just cited and others, to the extent that they support the establishment of a public road based on public travel alone, and dispense with any action by public

authorities, are disapproved.

In this case there was never any recognition, formal or informal, of the disputed road by any public body. Under the rule just announced there could be no public road by prescription.

*Id.* at 506-507, 548 P.2d at 1238.

When explicating *section 43-2-201(1)(c)*, [\*16] we adopted and applied the *Kratina* claim of right rule in *Flickinger* and *Simon*. In *Simon*, we recognized that a footpath might qualify as a public road in the jurisdiction if it were included on the government's map of its road system. We assumed that an action of the public entity, such as placing the footpath on a city map for the requisite twenty year prescription period, coupled with use by the public for that period, would meet both the claim of right and the adversity requirements for a prescriptive public road within the meaning of *section 43-2-201(1)(c)*. *Simon*, 687 P.2d at 1303. Nevertheless, because there was no evidence that the City of Boulder even knew the paths existed, much less maintained them or in any way accepted them as public streets, we held that the claimants had not met their burden of proving a claim of right pursuant to *section 43-2-201(1)(c)*.

Our reasoning and holding in *Simon* recognizes that *section 43-2-201(1)(c)* appears in the statutory provisions pertaining to the acquisition, funding, and maintenance of state, county, and city roads and road systems. Under these provisions, a county, for example, may obtain a public [\*17] road by (1) express or implied dedication of the road to the public by the property owner, *section 43-2-201(1)(a),(b)*; (2) purchase of a right-of-way, *section 43-2-204*; (3) condemnation and payment of just compensation for the property interest necessary for the road, *sections 43-2-112* and *43-2-204*; or (4) prescription, *section 43-2-201(1)(c)*. As we discuss in more detail below, to proceed by the fourth means, the public entity must establish its claim of right by some overt action that puts the landowner on notice that it intends to include the public way within its road system; only then can the public way be considered a "road" or "public highway," thus beginning the prescriptive period under *section 43-2-201(1)(c)*.

C. Requirements for Obtaining a Public Road by Prescription



The claimant of a prescriptive right for a public road across private property has the burden of proving compliance with the requirements for such a right by a preponderance of the evidence.<sup>3</sup> In *Board of County Comm'rs v. Flickinger*, 687 P.2d 975 (Colo. [\*409] 1984), we construed section 43-2-201(1)(c) to require the claimant to meet a three-part test for the establishment of a public road by prescription: [\*\*18]

(1) members of the public must have used the road under a claim of right *and* in a manner adverse to the landowner's property interest;

(2) the public must have used the road without interruption for the statutory period of twenty years; and

(3) the landowner must have had actual or implied knowledge of the public's use of the road and made no objection to such use.

*Id.* at 980 (emphasis added). The first part includes both adversity and claim of right.

3 In 1984, when we decided *Flickinger*, the standard of proof in adverse possession cases was by clear and convincing evidence. See *Flickinger*, 687 P.2d at 981, n.7; *Bd. of County Comm'rs v. Masden*, 153 Colo. 247, 385 P.2d 601 (1963) (holding that public entity had to prove existence of public road by prescription by clear and convincing evidence). However, in *Gerner v. Sullivan*, 768 P.2d 701 (Colo. 1989) we overruled the clear and convincing language in *Masden*, and held that a standard of preponderance of the evidence applies to adverse possession cases.

[\*\*19] *Flickinger* presented a factual situation very different from the case before us now. In 1953, the county included the road as part of the county road system.<sup>4</sup> After proper notifications and hearings, the Board adopted the map as the official map of the Saguache County road system. Because the road was now included in the county road system, it became eligible for state maintenance funds and Saguache County began receiving funds in order to maintain the road. *Id.* at 978-79.

4 Prior to 1924, the road existed as a "wagon" road, consisting of just two dirt tracks. In 1924, the road was converted to a dirt road in order to allow vehicular access. *Flickinger*, 687 P.2d at 978 n.2.

During the 1960s and 1970s, county employees graded the road using county equipment several times. Additionally, the county installed two culverts under the road in 1953, and cleared snow from the road at the request of local ranchers. The Flickingers were always aware that the public used the road for recreational [\*\*20] purposes and that governmental employees used it to access adjacent federal land. The Flickingers knew that public employees were keeping the road in good repair. Some users sought the Flickingers' permission to use the road; most did not. *Id.* at 979-80.

Occasionally the Flickingers had to tell users to leave their property if they camped on it or left trash, but they never interfered with the use of the road until 1977. In 1977, because of concerns about the increasing number of people crossing their property via the road, the Flickingers locked an existing gate. In 1978 the Department of Highways struck the road from the public highway inventory and ceased contributing payment of funds to Saguache County to maintain the road. *Id.* at 979.

Saguache County then sought an injunction barring the Flickingers from locking the gate to prohibit public access to the road. Ruling that the road was indeed a public road by prescription, the trial court issued the requested injunction. *Id.* at 980. We affirmed under section 43-2-201(1)(c), holding that this section codifies the common law method by which the public can obtain a property interest [\*\*21] for a public road by prescription. We identified the requirements necessary for such an acquisition: the public must have used the road: (1) under a claim of right and in a manner adverse to the landowner's property interest; (2) without interruption for the statutory period of twenty years; and (3) the landowner had actual or implied knowledge of the public's use and did not object to such use. We added that when a claimant shows that the use has continued for the prescriptive period of time, the claimant is afforded a presumption that the use was adverse.<sup>5</sup> *Id.*

5 To the extent that our holding in *Shively v. Bd. of County Comm'rs*, 159 Colo. 353, 411 P.2d 782 (1966) merges the statutory prescriptive period

and the claim of right requirements into a test that requires only a showing of public use for a twenty year period, we overrule that case as contrary to our decision in *Flickinger*.

The Flickingers argued that the gate at the foot of the road prevented the public from establishing [\*\*22] the requirement of adversity, despite the fact that they had never locked the gate until 1977. We concluded that "the placement of the gate does not conclusively establish the character of the public use as permissive and nonadverse. A gate, in other words, may be erected for purposes other than obstruction of public travel." *Id. at 981*. The evidence in *Flickinger* showed that the primary purpose of the gate was to benefit a rancher who used the Flickinger's property as pasture for his [\*410] livestock. Additionally, since the Flickingers had never made any attempt to lock the public from their property prior to 1977, we concluded that the purpose of the gate was to keep livestock away from a nearby highway, not to keep the public off of the Flickingers' land. *Id.*

We held that sufficient evidence existed to find that the public had used the Flickingers' road "under a claim of right and in a manner adverse to [their] property interests" since at least 1953. *Id. at 980*. The evidence showed that the county asserted the public character of the road when it incorporated it into the county road system. In addition: (1) the county received state funds to maintain the road; (2) [\*\*23] the public continuously entered the property and used the road for recreational purposes as well as to access adjacent lands; and (3) the Flickingers had "actual knowledge of the public use of the road and generally acquiesced in it." *Id. at 981*. Hence, both the requirement of adversity and the requirement of a claim of right were met in regard to a prescriptive right for a public road on Flickingers' property.

#### D. No Road Prescriptive Right In This Case

Although the route across the McIntyre property once supported vehicular travel on a tramway route from five to eight feet in width, in some places, to twelve to fifteen feet in width, in other places, the use the public made of this route during the statutory twenty year period was for a footpath. A scrap marble heap from previous marble quarrying operations along the route requires walkers to "scramble" over the pile; other obstacles to vehicular travel exist, such as fences and posts.

Because the public's use during the statutory twenty year period was for a footpath, our decision in *Simon* is particularly pertinent. Gunnison County must have taken some overt claim of right action, formal or informal, giving notice [\*\*24] to the landowner of the public's claim of right and demonstrating that it considered the footpath across the McIntyre land to be a public road, for example, by performing maintenance or including the footpath on its county road system during the prescriptive period. *Simon v. Pettit*, 687 P.2d 1299, 1303 (Colo. 1984).

The only evidence of maintenance by a public entity in the record before the trial court was that the Colorado Division of Mined Land Reclamation had entered the McIntyre property to build a boardwalk over a washed out section of the route to the old marble quarry site for safety purposes. This entry occurred by written permission of the McIntyres' predecessor in interest, with the agreement expressly providing that the landowner waived no rights by granting access permission to the State.

In the absence of any overt action by Gunnison County indicating its intention to treat the footpath along the old tramway route as a public road, the trial court and the court of appeals erred by conflating the adversity and claim of right requirements for establishment of a public road by prescription pursuant to *section 43-2-201(1)(c)* into a single criteria of public [\*\*25] use for the twenty year statutory period. Neither court applied all of the *Flickinger* requirements; in particular, the claim of right requirement. They examined only the adversity requirement.

But, our contemporary case law contains a restrictive reading of *section 43-2-201(1)(c)*, requiring twenty year use by the public of a road in a manner adverse to the landowner and under a public claim of right. In Colorado, two parallel lines of cases have developed from our courts. One line of cases addresses the requirement of adversity. The other line addresses claim of right. This claim of right must be supported by evidence of an overt act or acts that put the landowner on notice of the public's claim of right to a road across the property. We now discuss both requirements but preface our analysis with a discussion about the dedication cases.

#### 1. Dedication and Adverse Possession Distinguished

We first addressed public prescriptive rights in *Starr v. People*, 17 Colo. 458, 30 P. 64 (1892). In *Starr*, the question was whether the road at issue was a public highway at the time the action was instituted. *Id.* at 459, 30 P. at 65. We addressed [\*\*26] two alternative [\*411] theories: dedication and adverse possession. *Id.* Depending on the facts of the particular case, several factors could raise an implication of dedication on the landowner's part, including the fact that the public had used the road for a considerable length of time without objection by the landowner.

Use of the road by the public for a considerable length of time without objection by the owner of the land may increase the weight of the evidence, if any there be, arising from acts or declarations of the owner indicating his intent to dedicate. But mere use, without such acts or declarations, unless for a period of time corresponding to the statutory limitation of real actions, cannot be held sufficient to vest the easement in the public, as by prescription.

*Id.* at 460, 30 P. at 65. At that time we indicated that use by the public for the statutory time was itself sufficient to create a public prescriptive right.

We revisited the issue of dedication and implied dedication in *Mitchell v. City of Denver*, 33 Colo. 37, 78 P. 686 (1904). There, we reiterated that, in order for a private road to become a public highway [\*\*27] by dedication, the landowner must manifest some intent for that outcome. We left room for a future case involving adverse possession. We concluded that the evidence in *Mitchell* fell short of establishing a dedication or a prescriptive easement because the facts did not show either acquiescence by the landowner or adverse possession.

That the city of Denver, or some of its constituent municipal corporations, six or seven years before the trial graded this street, put up signposts at the intersection of the adjoining streets, and placed thereon the names thereof, is not, under the facts, sufficient evidence of acquiescence by the owners in this alleged assertion of public ownership, or sufficient to make out an

ownership arising from adverse possession.

*Id.* at 40, 78 P. at 687.

We next addressed the issue in *Lieber v. People*, 33 Colo. 493, 81 P. 270 (1905). Here, we repeated the rules of dedication set forth in *Starr* and *Mitchell*, but--because of a factual dispute as to whether the road the claimants sought actually crossed the land in question--we did not reach a conclusion regarding the requirements for creating a public road [\*\*28] on private property. *Id.* We simply observed that the evidence must show, with reasonable certainty, that public travel occurred on the land in controversy. *Id.* at 498, 81 P. at 271.

## 2. Adversity and Claim of Right

In 1931, we formally recognized that the public must make some public claim of right in order to establish a prescriptive easement.<sup>6</sup> *Mayer v. San Luis Valley Land & Cattle Co.*, 90 Colo. 23, 26 5 P.2d 873, 874 (1931). However, we did not fully address this requirement until 1984 when we discussed public prescriptive rights generally in *Simon v. Pettit*, 687 P.2d 1299 (Colo. 1984). In order to satisfy the requirements of section 43-2-201(1)(c), the public must use a road "adversely, under a claim of right, and without interruption for the statutory period of twenty years, and the landowner knows of but does not object to the use." *Id.* at 1302. This quote appears before we began discussing the definition of a "road" in *Simon*. At that point in the opinion, we were first explaining the necessary elements for a public prescriptive right. *Simon* was published a week after *Flickinger*. As demonstrated [\*\*29] by the commas in between the phrases, we clearly intended that adversity and claim of right constitute separate requirements for a public prescriptive right. We held that public maintenance of the road, or the inclusion of the road on a public road system map, would serve as strong evidence in favor of a public prescriptive right. *Id.* at 1303.

<sup>6</sup> We attach, as Appendix A, a survey of cases decided in other jurisdictions regarding the requirements for a public prescriptive right.

Prior to the case now before us, the court of appeals had addressed the claim of right requirement as well as the adversity requirement. *See Littlefield v. Bamberger*, 32 P.3d 615 (Colo. App. 2001). In *Littlefield*, the court [\*412] of appeals recognized that a county's use and

maintenance of a mail delivery route might qualify for a prescriptive easement, but upheld the trial court's determination that the evidence in the case did not support this conclusion. *Id.* at 620. In *Alexander v. McClellan*, 56 P.3d 102 (Colo. App. 2002), [\*\*30] the court of appeals affirmed the trial court order finding a public prescriptive right in the road at issue. *Id.* at 105. In support of its holding, the court of appeals cited to evidence showing continuous public use and maintenance of the road for at least the statutory twenty year prescriptive period.

Several witnesses testified to the public's continuous use of [the road] and the [public] maintenance of it for over twenty years. [The landowner] even testified that he was aware of traffic on [the road]; he admitted that, prior to acquiring the disputed property, he saw approximately ten cars per week, in addition to regular school bus traffic, using [the road].

*Id.* at 104.

In *Board of County Comm'rs v. Kobobel*, 74 P.3d 401 (Colo. App. 2002), the claimants presented very little evidence of public use of the road, and no evidence of a public claim of right, therefore, no public road by prescription existed. *Id.* at 404-405. In *State v. Cyphers*, 74 P.3d 447 (Colo. App. 2003), the court of appeals addressed both the issue of adversity and claim of right. Affirming the trial court's [\*\*31] holding in favor of a public prescriptive right, the court of appeals deferred to the trial court's findings of fact of continuous public use and public use of the road without the landowner's permission. *Id.*

In *Board of County Comm'rs v. W.H.I., Inc.*, 992 F.2d 1061 (10th Cir. 1993), the Tenth Circuit focused on whether the public had acquired a prescriptive right to a road pursuant to section 43-2-201(1)(c). Although the record was sparse on the issue, evidence did exist that the public used the road for the requisite period of time. *Id.* at 1065. The evidence also showed that the Board of County Commissioners had enacted a resolution declaring an intention to claim the road as a public road. The prescriptive period began, so the court ruled, when the Board passed its resolution. *Id.* at 1066. Although the resolution was improperly recorded, the court held the landowner to this notice of a public claim. *Id.* ("Section

43-2-201(1)(c) does not require that public use be based on color of title or properly recorded resolutions. The [resolution served] to illustrate notice of adverse, open, and notorious use by the public.").

[\*\*32] While a public claim of right is a separate and necessary requirement for establishing a public prescriptive right to a road, the claim of right requirement is integrally intertwined with the adversity requirement. Sporadic use of the road is not enough to establish adversity or put the property owner on notice of a public claim of right. *Turner v. Anderson*, 130 Colo. 275, 274 P.2d 972 (1954). In *Turner*, we held that occasional use of the road by members of the public did not rise to the level of a prescriptive right. *Id.* at 278-79, 274 P.2d at 974 ("a prescriptive right to the use of [a] road . . . was not established by the evidence, because the use of said road was irregular, infrequent, sporadic, and far more permissive than adverse.").

While evidence of a fence or gate on the road gives rise to a strong indication that any public use of the road is permissive, their existence does not provide the landowner with a conclusive presumption that the use is permissive. In *Mayer v. San Luis Valley Land & Cattle Co.*, 90 Colo. 23, 5 P.2d 873 (1931), the landowners kept unlocked gates on the road at issue. When the landowners eventually [\*\*33] locked the gates, the claimant brought an action seeking to have the road declared a public highway pursuant to section 43-2-201(1)(c). *Id.* at 24-26, 5 P.2d at 874-75. We observed that mere proof of public use of the land for the statutory period does not rise to the level of a prescriptive right. *Id.* at 26, 5 P.2d at 875. Addressing the requirement of adversity, we held that obstructing free travel with gates or fences will ordinarily prevent the public from acquiring a highway by prescription. *Id.* By constructing a gate across a road, a landowner conveys the clear message that any public use of that road is with the landowner's permission only; and the public's use is not adverse.

[\*413] In *Martino v. Fleenor*, 148 Colo. 136, 365 P.2d 247 (1961), we addressed the requirement of adversity and plainly held that public use for the prescriptive period is not alone sufficient to establish a public prescriptive right. Claimants, their relatives, friends, employees, and southern neighbors had used the road for more than forty-two years without the objection of the landowners. Because the landowners placed three wire gates across the road, [\*\*34] thus obstructing

travel, rendering the use permissive only, no public prescriptive right was established. *Id. at 141-42, 365 P.2d at 250.*

Similarly, in *Lang v. Jones, 191 Colo. 313, 552 P.2d 497 (1976)*, the road was consistently blocked by a gate, although the gate was not locked. *Id. at 315, 552 P.2d at 499.* The public's access was permissive because where gates obstruct free travel along the road, even if the gates are unlocked, the use of the road is not adverse. *Id.* Nevertheless, in *Flickinger*, we said that the existence of a gate did not give rise to a conclusive presumption of permissive use. There, the landowners used the gate to keep livestock in, rather than to keep the public out. *Board of County Comm'rs v. Flickinger, 687 P.2d 975, 981 (Colo. 1984).*

In *Walter v. Hall, 940 P.2d 991 (Colo. App. 1996)*, the court of appeals followed our reasoning in *Flickinger* that evidence of a gate is not conclusive evidence that use was only permissive. *Id. at 995.* Similarly, in *Littlefield v. Bamberger, 32 P.3d 615 (Colo. App. 2001)*, the court of appeals again [\*\*35] held that evidence of a fence, in and of itself, does not necessarily prove permissive use. *Id. at 620.*

### 3. Statutory Public Policy

In reviewing the case before us, we also look to the statutory public policy. The legislative intent of *section 43-2-201(1)(c)* is that the establishment of a public road by prescription is a narrow alternative to the other available means a public entity has for establishing a road, which include: (1) express or implied dedication of the road to the public by the property owner; (2) purchase of a right-of-way by the public entity; or (3) condemnation and payment of just compensation for the property interest necessary for the road.

The General Assembly has encouraged landowners to allow public use of their land; in turn, it has guarded against landowners losing their property rights when allowing such use. *See § 33-41-103, 9 C.R.S. (2003)* (limiting landowner liability for public use of private land). The vacant land exception also demonstrates this legislative policy, as we discussed in *Simon*. Travel over vacant land is deemed permissive and cannot serve as the predicate for a prescriptive right: [\*\*36]

Where the land is vacant and unoccupied and remains free to public use and travel

until circumstances induce the owner to enclose it, the mere travel across it, without objection from the owners, does not enable the public to acquire a public road or highway over the same. Such use by the public of vacant and unoccupied land by travel over it, even after the period of twenty years, is regarded merely as a permissive use.

*Simon v. Pettit, 687 P.2d 1299, 1301 (Colo. 1984).* See also *18-4-201(3), 6 C.R.S. (2003)*; *People v. Schafer, 946 P.2d 938, 942 (Colo. 1997).*

The trial court and court of appeals rulings in the case now before us, if upheld, would have the effect--contrary to Colorado public policy--of discouraging private landowners from allowing (1) the public to cross their land for recreational purposes to reach other private or public lands,(2) without this use causing adverse consequences to the property interests and title of the landowner.

Consistent with this statutory policy, the public entity claim of right requirement under *section 43-2-201(1)(c)*, recognized in *Simon* and *Flickinger*, establishes a restrictive [\*\*37] statutory policy towards public prescriptive road claims. The public entity claimant must establish the public's adverse use for the twenty year prescriptive period and take some overt action or actions that give the property owner notice of the public's claim of right in order for the prescriptive period to commence running under *section 43-2-201(1)(c)*. The strongest indicator of a [\*414] county's claim of right is the inclusion of the road on the county road system and the expenditure of public funds for maintaining the road.<sup>7</sup>

<sup>7</sup> Many of the states surrounding Colorado have definitively addressed this issue. Specifically, Idaho has required that the board of commissioners lay out and record a road in order to establish a public highway. *Cox v. Cox, 84 Idaho 513, 373 P.2d 929 (1962)*. Kansas requires some official action, either formal or informal, and cites maintenance or improvement of a road as a strong indicator that the public has gained a prescriptive right. *Kratina v. Board of County Comm'rs, 219 Kan. 499, 548 P.2d 1232 (1976)*. Very recently, the Montana Supreme Court held

that the public had acquired a prescriptive right where public funds had been expended for the maintenance of the road. *Smith v. Russell*, 2003 MT 326, 318 Mont. 336, 80 P.3d 431 (Mont. 2003). New Mexico recognizes public maintenance of a road as evidence that the public has established a prescriptive right. *Board of County Comm'rs v. Friendly Haven Ranch Co.*, 32 N.M. 342, 257 P. 998 (1927). Last year, the Wyoming Supreme Court held that a claimant must "bring home" notice of an adverse claim to a landowner, simply providing evidence that the landowners were aware of the public's use and could see the road from their home did not suffice to establish a prescriptive right. *Yeager v. Forbes*, 2003 WY 134, 78 P.3d 241, 256 (Wyo. 2003). Moreover, both Illinois and Missouri, from whom we have adopted constitutional provisions, are in accord with the requirement of a public claim of right. See *Swinford v. Roper*, 389 Ill. 340, 59 N.E.2d 863 (1945); *O'Connell v. Chicago Terminal Transfer R.R. Co.*, 184 Ill. 308, 56 N.E. 355 (1900); *Terry v. City of Independence*, 388 S.W.2d 769 (Mo. 1965).

[\*\*38] Accordingly, on the claim of right issue, the claimant must provide evidence that a reasonably diligent landowner would have had notice of the public's claim of right to the road. The evidence must include some overt act on the part of the public entity responsible for roads in the jurisdiction that it considers the road a public road. This notification commences the prescriptive period; without it, the prescriptive period never begins.

An overt act sufficient to provide notice of the public claim of right could include any number of actions. In a state such as Colorado, where snowfall is a frequent occurrence, plowing roads might constitute an overt act. Including a road on a public road system map, using the road for mail delivery or school buses, expending public funds for the maintenance or improvement of the road, posting signage indicating a public road, or installing drainage systems for the road could each be an act putting the landowner on notice of the public's claim of right to the road. As with the other requirements for establishing a public road by prescription, the public entity has the burden of proof by a preponderance of the evidence to demonstrate that it considered [\*\*39] the way across the private property a public road.

In the case before us, the only evidence of any public claim of right to access across the McIntyre property is that the Colorado Department of Mined Land Reclamation entered the property to construct a boardwalk over a washed out section of the trail for safety purposes. But this work occurred with the property owner's permission under an agreement between the State of Colorado and the property owner.

The uncontested facts of record on summary judgment do not demonstrate Gunnison County's claim of right for a public road on the McIntyre property that commenced the running of the twenty year prescriptive period; thus, the trial court erred in ruling that the prescriptive period had run against these property owners. The trial court's summary judgment order and quiet title decree in favor of Gunnison County must be vacated in regard to the McIntyre property. Because no other property owner appears to contest the trial court's quiet title decree in favor of the County, we presume that these claims were settled in favor of the County, or that the other private property owners impliedly dedicated the old tramway right-of-way across [\*\*40] their property to the County.

### III.

Accordingly, we reverse the judgment of the court of appeals and remand this case for further proceedings consistent with this opinion.

JUSTICE MARTINEZ dissents, and CHIEF JUSTICE MULLARKEY joins in the dissent.

### APPENDIX A

We have surveyed the case law from the highest courts of many states and found that [\*\*415] cases differ regarding the requirements for a public prescriptive right.

In the following cases the courts required only a showing of adversity.

*Carter v. Walker*, 186 Ala. 140, 65 So. 170 (1914) (recognizing that continuous adverse use by the public is sufficient to establish a prescriptive right).

*Spindler v. Toomey*, 232 Ind. 328, 331, 111 N.E.2d 715, 716 (1953) ("if the roadway here in question is free and common to all who have occasion to use it, and it has been so used for a period of twenty years or more, it is a

public highway by statute.").

*Mahoney v. Town of Canterbury*, 150 N.H. 148, 834 A.2d 227 (N.H. 2003) (requiring only adversity requirement to establish a public prescriptive right).

*Earle v. Poat*, 63 S.C. 439, 41 S.E. 525 (1902) [\*\*41] (reasoning that because all landowners hold their land subject to the right of the state to take some of that land for a road, public use may create a presumption of a public claim of right).

*Gore v. Blanchard*, 96 Vt. 234, 118 A. 888 (1922) (recognizing general rule that if use is open and notorious, it will be presumed adverse and under a claim of right).

The cases we find applicable here, based on our discussion in *Simon and Flickinger*, include both adverse use by the public and a public entity claim of right.

*Nelms v. Steelhammer*, 225 Ark. 429, 283 S.W.2d 118 (1955) (requiring public claim of right but allowing for slight deviation in path of travel in certain circumstances).

*Cox v. Cox*, 84 Idaho 513, 373 P.2d 929 (1962) (requiring board of commissioners to lay out and record road in order to establish a public prescriptive right).

*Swinford v. Roper*, 389 Ill. 340, 59 N.E.2d 863 (1945) (requiring both adversity and claim of right and noting that public maintenance is a strong indicator of a claim of right).

*O'Connell v. Chicago Terminal Transfer R.R. Co.*, 184 Ill. 308, 56 N.E. 355 (1900) [\*\*42] (evidence of public maintenance on land tended to show establishment of public prescriptive right although was not conclusive).

*Kratina v. Board of County Comm'rs*, 219 Kan. 499, 548 P.2d 1232 (1976) (public must take some official action, either formal or informal, such as maintaining or improving road in order to establish a public prescriptive right).

*Cummings v. Fleming County Sportsmen's Club, Inc.*, 477 S.W.2d 163, 167 (Ky. 1972) (public use must be "so manifest as to afford notice to an ordinarily prudent owner.").

*Downing v. Benedict*, 147 Ky. 8, 143 S.W. 756 (1912) (requiring exercise of public authority in order to establish public prescriptive right).

*Comber v. Plantation of Dennistown*, 398 A.2d 376 (Me. 1979) (claim of right is necessary to establish a public prescriptive right but sporadic instances of public maintenance will not serve to create such right).

*Mackenna v. Town of Searsmont*, 349 A.2d 760 (Me. 1976) (although public claim of right is required to establish public prescriptive right, road need not be formally dedicated or laid out).

*Sprow v. Boston & A.R. Co.*, 163 Mass. 330, 39 N.E. 1024 (1895) [\*\*43] (public must show that landowner had knowledge or reason to believe that public used the road under a claim of right).

*Bain v. Fry*, 352 Mich. 299, 89 N.W.2d 485 (1958) (use must be so open, hostile and notorious as to provide notice to the landowner that title to the land is denied).

*Trowbridge v. Van Wagoner*, 296 Mich. 587, 296 N.W. 689 (1941) (public use must be accompanied by some act by public authorities sufficient to give landowner notice that title to the land is denied).

*South Branch Ranch Co. v. Emery*, 191 Mich. 188, 157 N.W. 419 (1916) (mere use by public will not establish a public prescriptive right, some act of public control is necessary).

*Ladner v. Board of Supervisors*, 793 So. 2d 637, 639 (Miss. 2001) (public must show "exertion of dominion over the roadway in question.").

[\*416] *Armstrong v. Itawamba County*, 195 Miss. 802, 16 So. 2d 752 (1944) (public authorities must exercise jurisdiction over the road, such as overseeing its upkeep at public expense).

*Wills v. Reid*, 86 Miss. 446, 38 So. 793 (1905) (some expenditure of public moneys or exercise [\*\*44] of public power over a road is necessary in order to establish a public prescriptive right).

*Terry v. City of Independence*, 388 S.W.2d 769 (Mo. 1965) (where city took possession of public area, graded

it, oiled it, expended public funds in maintaining it and exercised dominion over it, public acquired prescriptive right).

*Smith v. Russell*, 2003 MT 326, 318 Mont. 336, 80 P.3d 431 (Mont. 2003) (public acquired prescriptive right where public funds had been expended for maintenance of the road).

*Swandal Ranch Co. v. Hunt*, 276 Mont. 229, 915 P.2d 840 (Mont. 1996) (evidence that county commissioner had declared a road on landowner's ranch supported a finding that the landowner had knowledge of the county's adverse claim to the road).

*Board of County Comm'rs v. Friendly Haven Ranch Co.*, 32 N.M. 342, 257 P. 998 (1927) (recognizing public maintenance of road as evidence that public has gained a prescriptive right).

*Speir v. Town of New Utrecht*, 121 N.Y. 420, 24 N.E. 692 (1890) (requiring proof that public authorities in some way recognized, kept in repair, or adopted road in order for it to become [\*\*45] a public road by prescription).

*Doyle Milling Co. v. Georgia-Pacific Corp.*, 256 Or. 271, 473 P.2d 135 (1970) (public use must adequately apprise landowner of nature of public claim of right so landowner knows a public servitude will burden the land unless the landowner takes proper action to prevent it).

*Donohugh v. Lister*, 205 Pa. 464, 55 A. 23 (1903) (where public authority had paved and repaved road several times, public acquired prescriptive right even though landowner had paid for curbing of road).

*Scheller v. Pierce County*, 55 Wash. 298, 104 P. 277 (1909) (where county, at times, refused to expend money on road and landowners at all times paid taxes on property, public prescriptive right did not arise).

*Cramer v. Dep't of Highways*, 180 W. Va. 97, 375 S.E.2d 568 (1988) (requiring adverse use as well as official recognition that road is public, which could include public maintenance or an order of recognition).

*Boyd v. Woolwine*, 40 W. Va. 282, 21 S.E. 1020 (1895) (in order to constitute public road, county court must have accepted or in some way recognized such road).

[\*\*46] *Witter v. Damitz*, 81 Wis. 385, 51 N.W. 575 (1892) (public construction and maintenance of a highway for statutory period of time constituted a public highway by prescription).

*Yeager v. Forbes*, 2003 WY 134, 78 P.3d 241, 256 (Wyo. 2003) (claimants must "bring home" notice of adverse claim to landowners).

*Board of Comm'rs v. Patrick*, 18 Wyo. 130, 104 P. 531, 107 P. 748 (1910) (public authority must assume some sort of control or jurisdiction over a road in order for it to become a public road by prescription).

#### DISSENT BY: MARTINEZ

#### DISSENT

JUSTICE MARTINEZ dissenting:

#### I.

I find two grave errors in the majority analysis which cause me to dissent. First, and most troublesome, is the majority's insertion of an additional requirement into the test for prescription of a public highway. Second, the majority conflates the test for whether a road is established by adverse possession with the determination of whether the route is a road in the first instance. I cannot agree with the majority's decision to add an additional requirement of government action to the test for prescription given the fact that the legislature has not changed the statute in [\*\*47] over one hundred years. Furthermore, I find that the majority's analysis of the threshold question of whether a particular route is a road under the prescription statute incorrectly includes elements of prescription. I respectfully dissent.

#### II.

The General Assembly enacted the section under which this case arises in 1893. Ch. [\*\*417] 147, sec. I, 1893 Colo. Sess. Laws 435. The legislature has not changed the law since that time. "The following are declared to be public highways . . . (c) All roads over private lands that have been used adversely without interruption or objection on the part of the owners of such lands for twenty consecutive years." § 43-2-201(1)(c), 11 C.R.S. (2003). This section codified the common law and definitively established that all roads on private lands that have been used adversely for more than twenty years,



without interruption or objection by the owner, become public highways. *Bd. of County Comm'rs v. Flickinger*, 687 P.2d 975, 980 (Colo. 1984).

We have interpreted this section in our previous cases and have held that a party seeking to establish a road across private property as a public highway must demonstrate: [\*\*48]

(1) members of the public must have used the road under a claim of right and in a manner adverse to the landowner's property interest;

(2) the public must have used the road without interruption for the statutory period of twenty years; and

(3) the landowner must have had actual or implied knowledge of the public's use of the road and made no objection to such use.

*Id.* Thus, our case law merely outlines what the statute dictates: there must be adverse, uninterrupted use for twenty years, with the owner's knowledge.

I disagree with the majority's analysis and application of this test because the majority attempts to separate our requirement that the use must be "under a claim of right and in a manner adverse" into two distinct requirements. As I do not find that we have ever stated that use under a claim of right is any different than adverse use, I cannot agree with the majority's analysis. Moreover, the majority's further assertion that this additional requirement applies only to public entities is untenable. I find the majority's departure from our previous case law, despite the fact that legislature has not changed the statute in over one hundred [\*\*49] years, an exercise of authority more properly left to the General Assembly.

First, the terms "use under a claim of right" and "adverse use" are synonymous. The majority contends that we have developed "two parallel lines of cases," one which addresses "claim of right" and the other which addresses "adversity". *Maj. Op.* at 20. However, the more obvious reading of our previous cases is that we have used the term "claim of right" only as explanation of, and thus synonymously with, the term "adverse use." For example, in *Lieber v. People*, 33 Colo. 493, 499, 81 P.

270, 271 (1905), we stated that to give a road a public character the use under section 43-2-201(1)(c) must have been "adverse (that is, under a claim of right)." *See also Mayer v. San Luis Valley Land & Cattle Co.*, 90 Colo. 23, 26, 5 P.2d 873, 875 (1931). Thus, both of these terms characterize the type of use that is required before a claim of prescription can be established: the use must be hostile to the owner's rights.

The case law in Colorado illustrates that we have used these terms synonymously to describe the single requirement of adverse use by the public. In *State v. Cyphers*, 74 P.3d 447 (Colo. App. 2003), [\*\*50] for example, the court of appeals found that ranchers', hunters', sightseers', and oil explorers' use of the road supported a finding of adverse use. The court did not require a claim of right by any public entity, pointing out that "it is not necessary that a governmental subdivision maintain the road to retain its status as a public highway." *Id.* at 450. Thus, the court of appeals clearly did not require anything more than adverse use by the public to establish a public highway by prescription. Similarly, in *Littlefield v. Bamberger*, 32 P.3d 615, 620 (Colo. App. 2001), the court of appeals held that a prescriptive right had not been established because there was not adverse use by the public. The court concluded that the use was "sporadic in nature, rather than part of a pattern of general public use." *Id.* The court made no mention of a requirement that the county had to make some overt act evidencing that the use was under a claim of right, holding only that there was not a sufficient showing of adverse use. *Id.* The court of appeals has used the term "claim of right" in place of adverse use. *Bd. of County Comm'rs v. Kobobel*, 74 P.3d 401, 405 (Colo. App. 2002). [\*\*51] However, in that case the court found only that the public's use was not over the length of the entire road and therefore a public highway was not established. *Id.* The court never considered the lack of any action by a public entity thus illustrating that the court was merely using the terms adverse use and use under a claim of right interchangeably. These cases confirm that although the facts in some cases involve action by a public entity, we have never held that such public action is a separate or additional requirement. Such action serves merely as evidence illustrating adverse use. In sum, we have required only that the use, whether by the general public or a public entity, be adverse to the landowner's interest.

We have further defined adverse use as "actual,

visible, exclusive, hostile." *Mayer*, 90 Colo. at 26; 5 P.2d at 875. This definition is consistent with both the definitions of "adverse use" and "claim of right" stated in Black's Law Dictionary. "Adverse use" is defined as "use without license or permission." Black's Law Dictionary 53 (6th ed. 1990). "Adverse" is defined further with specific regard to use of land: use of land is "adverse, [\*\*52] as against owner, if it is not made in subordination to him, is open and notorious." *Id.* The "claim of right doctrine," in regard to adverse possession, is defined as a claimant "in possession as owner, with intent to claim the land as his or her own, and not in recognition of or subordination to record title owner." *Id.* at 248. Both terms explain that the use must be hostile and not in subordination to the record property owner.

In short, these terms all serve to explain, and differentiate, adverse use from permissive use. This distinction is important because if the evidence shows that the use was permissive, there can be no prescriptive right. *Mayer*, 90 Colo. at 26; 5 P.2d at 874. As explained in the Restatement of Property, "claim of right" does not mean that the user must claim entitlement or title, as sometimes mistakenly asserted, but merely that the user must not behave as if no adverse use were being asserted. *Restatement (Third) of Property: Servitudes* § 2.16 cmt. f (2000). "Claim of right" therefore "adds little to the requirements expressed by the 'open or notorious' and continuity requirements. [\*\*53] " *Id.* Thus, the real question posed by the requirement that the use be adverse or under a claim of right is whether the public used the land without permission and in a manner that was hostile to the true owner. This evidence then serves to illustrate that the public was asserting its ownership over the property--the backbone of a claim of prescription. *See Bd. of County Comm'rs v. W.H.L., Inc.*, 992 F.2d 1061, 1066 (10th Cir. 1993). Action by the county could certainly be part of the evidence used to show an adverse use. However, county action is not a requisite for a showing of adverse use. *See id.* (County's actions "serve only to illustrate notice of adverse, open, and notorious use by the public.").

Although recognizing that "the claim of right requirement is integrally intertwined with the adversity requirement," Maj. Op. at 26, the majority still argues that we have actually established two separate requirements for a showing of adverse use. The majority states that in *Mayer*, "we formally recognized that the public must make some public claim of right in order to

establish a prescriptive easement." Maj. Op. at 23. However, in that case we stated only [\*\*54] that the public must have used the land, "adversely under claim or color of right." *Mayer*, 90 Colo. at 26; 5 P.2d at 874. Furthermore, we went on in that case to equate the terms: the use must be adverse "that is, under a claim of right." *Id.* at 26, 5 P.2d at 875. Although *Mayer* supports the proposition that the use must be adverse to the owner, thus evidencing a claim of ownership, that case says nothing to indicate that the evidence showing adverse use would be any different from that showing a claim of right.

Bolstering the point that "claim of right" is merely another way of saying "adverse use" is our outline of the requirements to establish a public highway across private property in *Flickinger*. There we outlined three requirements. Under the first, we stated "members of the public must have used the road under a claim of right and in a manner adverse to the landowner's property interest." *Flickinger*, 687 P.2d at 980. Although [\*\*419] the majority points to the "and" combining claim of right and in a manner adverse in *Flickinger*, and a comma separating claim of right and adverse in *Simon v. Pettit*, 687 P.2d 1299 (Colo. 1984), [\*\*55] <sup>8</sup> I find more persuasive the manner in which we initially laid out those requirements in *Flickinger*. We outlined only three requirements and numbered them accordingly. Had we intended to require four elements, I believe that we would have done so, or at least noted that the three requirements included subparts. More importantly, we did not analyze the terms use under a claim of right and adverse use differently or separate them in any way. Instead, we disposed of the first prong of the test in three sentences, and we moved on to discuss the plaintiff's constitutional claims. Thus, I have trouble reaching the majority's conclusion that we have previously established more than the three elements listed in *Flickinger*.

<sup>8</sup> In *Flickinger*, we stated that the use must be "under a claim of right and in a manner adverse to the landowner's interest." *Flickinger*, 687 P.2d at 980. In *Simon*, which was not decided on the basis of prescriptive rights, we noted the requirements of prescription and stated that the public must use a road "adversely, under a claim of right." *Simon*, 687 P.2d at 1302. Thus, we have used both the word "and" and a comma to separate these two descriptions of adverse use.

[\*\*56] Law in other states supports this analysis. Contrary to the majority's assertion that many cases require both adversity and a public claim of right," Maj. Op. at Appendix A, the Restatement clearly states that a majority of states do not require governmental action to establish a public highway by prescription.<sup>9</sup> *Restatement (Third) of Property: Servitudes* § 2.18 cmt. f (2000). States that do not adopt this approach base their conclusion on statutory language requiring governmental action. For example, the Supreme Court of Idaho has recognized that adverse use and use under a claim of right are synonymous. The Idaho Supreme Court outlined its requirements which included one that the use must be "adverse and under a claim of right." *Hodgins v. Sales*, 76 P.3d 969, 973 (Idaho 2003). The court went on to explain that these two terms are synonymous: "adverse use, also referred to as hostile use or use under a claim of right." *Id.* at 975; see also *Williams v. Harrsch*, 297 Ore. 1, 681 P.2d 119, 123 (Or. 1984) ("To establish a public roadway by prescription the use must be adverse or under a claim [\*\*57] of right and not merely by permission of the landowner."). Although some other states have laws which require official action, these cases support nothing more than a public policy argument that such a change should be made. See, e.g., *Bd. of Comm'rs v. Friendly Haven Ranch Co.*, 32 N.M. 342, 257 P. 998, 998 (N.M. 1927) (Statute defined public highways as all roads dedicated to public use or "recognized and maintained by the corporate authorities of any county."). Colorado's law does not presently include such a requirement and any change to our law is exclusively within the province of the legislature.

9 States that adopt the lost-grant theory of adverse possession have trouble extending prescription to the public. See *Mihalcz v. Woodmont*, 175 Conn. 535, 400 A.2d 270, 272-73 (Conn. 1978); *Kratina v. Bd. of Comm'rs*, 219 Kan. 499, 548 P.2d 1232 (Kan. 1976); *Restatement (Third) of Property: Servitudes* § 2.18 cmt. f (2000). The lost grant theory reasons that a landowner would not acquiesce in the use of land without expressly granting such a right. *Kratina*, 548 P.2d at 1235. However, as there can be no grant without a definite grantee, courts that adopt the lost-grant theory face the problem that the public is an indefinite grantee. *Restatement (Third) of Property: Servitudes* § 2.18 cmt. f (2000). Most courts have sidestepped this legal fiction and allowed a servitude for the public by

finding an implied dedication to the general public. *Id.* Thus, "the majority of American courts have permitted the acquisition of servitudes by long-continued public use." *Id.*

[\*\*58] Second, the majority states that only public entities are subject to this additional requirement. Although the majority points to different language discussing the requirements for public and private prescriptive rights, we have never held public entities to a different standard than private individuals. For example, in *Shively v. Board of County Commissioners*, 159 Colo. 353, 357, 411 P.2d 782, 784 (1966), we analyzed the sufficiency of evidence to support the finding of use under a claim of right; we stated that there is a presumption that the use is adverse when it has been made for the prescribed [\*420] amount of time.<sup>10</sup> We went on to say that the "rule is no different with respect to presumptive rights gained by the public under [section 43-2-201]." *Id.* at 357-58, 411 P.2d at 784. Thus, not only did we equate a claim of right with adverse possession, we specifically stated that the test of adversity is the same for public and private entities.

10 The majority's assertion that *Flickinger* overruled *Shively* is problematic for two reasons. First, *Flickinger* quotes *Shively* approvingly. Specifically, *Flickinger* says: "A party relying on section 43-2-201(1)(c) is aided by a presumption that 'the character of the use is *adverse* where such use is shown to have been made for a prescribed period of time.'" *Flickinger*, 687 P.2d at 980 (emphasis added) (quoting *Shively*, 159 Colo. at 357, 411 P.2d at 784). More importantly, but more subtly, our traditional presumption that public use is adverse when it continues for the prescribed period (twenty years) is further evidence that we have never before required a separate showing of a "claim of right" by a public entity. Such a "claim of right" does not fall under the presumption; the presumption only refers to adversity. *Flickinger*, 687 P.2d at 980; *Shively*, 159 Colo. at 357, 411 P.2d at 784. Yet, no case employing the presumption has gone on to examine whether there was a public claim of right. Consequently, any reference to "claim of right" as a requirement distinct from adversity necessarily arises for the first time in the majority's opinion in this case. Because this is the first instance in which we require a showing of

"claim of right," it is this opinion rather than *Flickinger* that overrules *Shively*.

[\*\*59] Furthermore, although our language varies in our explanation of the requirements for a prescriptive right, the substance of the requirements is the same. In the context of a private prescriptive easement, we have stated that the easement is established if the use is: "1) open or notorious, 2) continued without effective interruption for the prescriptive period, and 3) the use was either a) adverse or b) pursuant to an attempted, but ineffective grant." *Lobato v. Taylor*, 71 P.3d 938, 950 (Colo. 2002) (citing, e.g., *Restatement (Third) Property* §§ 2.17, 2.16). These requirements mirror those that we have outlined for the establishment of a public highway by prescription. First, the use must be open or notorious. This element is identical to our requirement for a public prescriptive right that the landowner have actual or implied knowledge of the public's use. *Flickinger*, 687 P.2d at 980. The landowner could not have such knowledge if the use were not open or notorious. Second, the use must continue for the prescriptive period. This requirement mirrors what we have required of the public--the use must continue for the statutory period of twenty years. [\*\*60] *Id.* Third, in the context of a private prescriptive easement, we stated that the use must be adverse or pursuant to an attempted but ineffective grant. Again, we required adverse use just as we have for public prescriptive rights. *Id.* We have never found adverse use, in either a public or private prescriptive rights case, and then denied the right for lack of a showing that the use was under a claim of right. In short, we have never required more of the public than a private individual to gain a prescriptive right.

The majority's desire to require an overt act on the part of public entities before a road can be established also confuses the test of adverse use with the determination of whether a route constitutes a road in the first place. As I feel that the distinction between these two issues may clarify my disagreement with the majority, I will discuss that issue next.

### III.

We have stated that an initial question in a prescriptive rights case is whether the route in question comes within the definition of a "road" so that it may be declared a public highway. *Simon*, 687 P.2d at 1302. The majority appears to combine the initial determination of whether [\*\*61] the route in question could even be

declared a "road," so as to have *section 43-2-201(1)(c)* apply, with the inquiry of whether a public highway was established by prescription. The majority concludes that the roadway was merely a footpath. However, the majority then argues that in order to turn a footpath into a public highway, all of the elements of prescription must be established. As I find that the statute and all of the elements of prescription do not apply unless the route in question is first determined to be a road, I disagree with the majority's analysis.

The word "road" "is a generic term and includes overland ways of every character; the scope to be given it, depending on the [\*421] context in which it appears." *Id.* (quoting *Hale v. Sullivan*, 146 Colo. 512, 518, 362 P.2d 402, 405 (1961)). Thus, the context determines whether the term should have a broad or a narrow interpretation. *Id.*

In *Simon*, we considered three things in deciding whether urban footpaths that cut through a vacant lot could constitute roads and thus come under the provisions of *section 43-2-201(1)(c)* for a prescriptive highway. First, we looked at the intention of the legislature [\*\*62] and decided that when the legislature adopted the statute it did not intend for eighteen-inch urban footpaths to be considered public highways. *Id.* at 1302. Second, we addressed whether there was any evidence that the city had adopted the footpaths as roads. *Id.* at 1303. Third, we discussed the public policy behind rigidly applying the statute to include such shortcuts. *Id.* at 1303-04. Applying all of these factors, we held that the footpaths in question did not come under the definition of a road so as to come under *section 43-2-201(1)(c)*. *Id.* at 1304. Thus, we stated, we did not need to address the additional issue discussed by the court of appeals: whether the public acquired prescriptive rights. *Id.*

*Simon* therefore illustrates that the initial determination of whether a route is a road, thus implicating *section 43-2-201(1)(c)*, is different from the question of whether or not a public highway is established under *section 43-2-201(1)(c)*. Although we considered evidence in that case of whether the city had accepted the paths as public streets, we did so in the context of whether the road at issue fell under the definition of road so as to enable the prescription [\*\*63] statute to apply. Furthermore, we specifically recognized that "*section 43-2-201(1)(c)* does not require the city to expend funds or otherwise demonstrate its willingness to

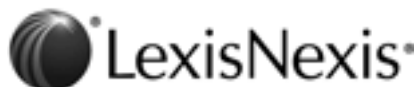
accept highways established by prescription." *Id. at 1303*. We stated that such evidence would strongly indicate that a path had acquired the status of a public highway. *Id.* However, those considerations were made in the context of whether the footpaths were roads so as to cause *section 43-2-201(1)(c)* to apply.

In short, the preliminary question of whether a route comes under the term "road" as used in the statute governing public highway prescription resolves only whether the statute applies. That determination is separate and distinct from the question of whether the public has established a public highway by prescription. If the majority truly believes the route at issue here is not a road, it would be more appropriate for the majority to resolve the case on that issue alone as we did in *Simon*, and leave the law of public prescription unaltered.

IV.

In sum, I disagree with the majority's requirement that in order for a public highway to be established by prescription, an official governmental entity [\*\*64] must make some formal action which the majority calls a "claim of right." I believe that we have required only a showing of adverse use, which is synonymous with use under a claim of right. Thus, I find that the majority's requirement is wholly new to our test for prescription as it has stood for over one hundred years. Furthermore, because I also disagree with the majority's analysis of whether the route in question is a road, I believe the trial court and the court of appeals decided this case correctly. Accordingly, I respectfully dissent.

I am authorized to say that CHIEF JUSTICE MULLARKEY joins in this dissent.



LEXSEE 49 UTAH 243

**MORRIS v. BLUNT ET AL.**

**No. 2814.**

**SUPREME COURT OF UTAH**

*49 Utah 243; 161 P. 1127; 1916 Utah LEXIS 131*

**December 5, 1916, Decided**

**SUBSEQUENT HISTORY:** [\*\*\*1] Rehearing denied December 30, 1916. dedicator. (Page 250.)

**PRIOR HISTORY:** Appeal from District Court, Third District; Hon. J. A. Howell, Presiding Judge.

Suit by Joseph N. Morris against Joseph Blunt, administrator of the estate of Jane Kersey, deceased, and others.

Judgment for plaintiff. Defendants appeal.

**DISPOSITION:** AFFIRMED.

#### HEADNOTES

1. DEDICATION--REQUISITES AND SUFFICIENCY. Since a dedication rests primarily in the owner's intent, there must be a concession intentionally made by him, provable by declarations or acts, or inferred from circumstances, though no form or ceremony is necessary, but it must appear that he knew of the public use and intended to grant to the public the right to such use. (Page 249.)

2. DEDICATION--EVIDENCE--SUFFICIENCY. Evidence *held* insufficient to show dedication of highway to public use. (Page 250.)

3. DEDICATION--REVOCATION. If a highway is established by dedication and acceptance by the public, it continues to be a highway as long as public use continues, regardless of attempted revocation by the

4. DEDICATION--USE--PUBLIC NATURE. Where the users of an alleged dedicated highway were of three classes, one using by a grant in a deed, another by the right of entry collateral to a canal easement, and the third by a right or claim not disclosed by the evidence, but using merely for egress from their own private land, there was no public use of the highway. (Page 250.)

5. HIGHWAYS--"PUBLIC THOROUGHFARE." A "thoroughfare" is a place or way through which there is passing or travel, and becomes "public" when the public have a general right of passage. (Page 250.)

6. DEDICATION--USE OF WAY UNDER PRIVATE GRANT--EFFECT. Under Comp. Laws 1907, section 1115, providing that a highway shall be deemed to have been dedicated to the use of the public when continuously used as a public thoroughfare for ten years, use under private right is insufficient to show dedication, and such use, however long, does not make the way public, and the mere fact that the public also use it without objection from the owner will not make the way public. (Page 250.)

7. EASEMENTS--PRESCRIPTIVE RIGHT--HIGHWAYS. A prescriptive easement does not arise in seven years by analogy to the statute barring action to recover realty when a plaintiff was not seized of the property within seven years, such statutes not applying to rights of way or easements, but prescriptive right can arise only by adverse use and enjoyment under claim of right uninterrupted and continuous for twenty

years. (Page 252.)

8.

**EASEMENTS--PRESCRIPTION--EVIDENCE--SUFFICIENCY.** Evidence held insufficient to show acquisition of highway easement by prescription; the use having been interrupted at various times during the alleged prescriptive period. (Page 252.)

9. **EASEMENTS--GRANT BY DEED--EFFECT.**

While a deed of a part of a tract conveying it, "together with all the appurtenances," would convey an existing highway easement, it would not serve to create an easement. (Page 253.)

10. **EASEMENTS--GRANT BY**

**DEED--REQUISITES AND SUFFICIENCY.** Generally, when the owner of a tract of land has arranged and adapted various parts, so that one derives a benefit from the other of a continuous and obvious character, and he sells one part without mentioning the incidental advantage or burdens of one in respect to the other, there is implied an understanding that such advantages and burdens continue. (Page 254.)

11. **EASEMENTS--SEVERANCE--REQUISITES**

**AND SUFFICIENCY.** Elements essential to constitute easement by severance are unity of title followed by severance, an apparent, obvious and visible servitude at the time of severance, reasonable necessity to the enjoyment of the dominant estate, and it must usually be continuous and self-acting. (Page 254.)

12. **EASEMENTS--WAYS OF**

**NECESSITY--REASONABLE NECESSITY OF USE.** An easement by severance in a right of way apparent at the time of severance does not exist except so far as is reasonably necessary to the use of the dominant estate, and the fact that a house on the severed tract faced toward an extended way not necessary to access did not give an easement thereon. (Page 255.)

13. **EASEMENTS--GRANT BY**

**DEED--LOCATION.** Generally on severance of title, if the deed conveys a right of way across land still held by the grantor, but does not fix its course or extent, and at the time of conveyance there was in use on the land reserved such a way plainly visible, and known to the parties, it will be deemed to have been intended by the grantor to be conveyed. (Page 256.)

14.

**EASEMENTS--CONVEYANCE--INSTRUCTIONS.** In construing any grant of right of way, the use, in character and extent, is limited to such as is reasonably necessary and convenient to the dominant estate and as little burdensome to the servient estate as possible for the use contemplated. (Page 257.)

**COUNSEL:** C. W. Collins for appellants.

A. A. Duncan for respondent.

**JUDGES:** LOOFBOUROW, District Judge. STRAUP, C. J., and FRICK, J., concur.

**OPINION BY:** LOOFBOUROW

**OPINION**

[\*245] [\*\*1128] LOOFBOUROW, District Judge.

This action was brought in equity to quiet title to certain lands and to restrain the defendants from interfering with the plaintiff's peaceable possession of the same. The plaintiff alleges title to the land and that the defendants wrongfully removed fence posts placed thereon by plaintiff, and threaten to remove them as often as plaintiff replaces them, and that defendants at divers times have crossed over said land with vehicles and on foot, and will continue to so interfere with the peaceable possession of plaintiff unless restrained, and plaintiff prays for a decree quieting title and enjoining the defendants from trespassing on said land.

The defendants admit that plaintiff [\*\*\*2] owns the land in question, but they claim a right of way across a part of said land for themselves, and that the roadway so used by them is a public highway. They admit that one of the defendants removed from said roadway certain posts placed thereon by plaintiff, and that they travel said road, but deny that they are trespassers thereon. They allege that on October 8, 1887, the plaintiff conveyed by warranty deed to Jane Kersey, now deceased, and through whom the defendants claim, the land that the defendants now occupy and which lies directly to the north of plaintiff's land, the boundary line being the north side of a canal running east and west between the two tracts, with all appurtenances thereto, and a right of way for ingress and egress over and across the lands of plaintiff with [\*246] vehicles and domestic animals, that for fifteen years prior to the making of said deed, and at the time of

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1916 Utah LEXIS 131, \*\*\*2

said conveyance, the road in question existed and was and had been used by the public, and that it was a well-defined, clearly marked road, and allege that the plaintiff has, by various acts, attempted to interfere with the use of said highway; and the defendants ask that their right [\*\*\*3] in said road be decreed to them, and that the plaintiff be enjoined from further interfering with the peaceable possession of said right by the defendants. The following sketch will explain the situation of the lands of the respective parties, [\*\*1129] the location of the canal, and the right of way in dispute:

[SEE SKETCH IN ORIGINAL]

The district court made findings of fact to the following effect, to wit: That the deed in question was executed and delivered by the plaintiff, Joseph N. Morris, to Jane Kersey on October 8, 1887, and that, after describing the land by metes and bounds, it contained the following clause:

"Together with a right of way for ingress and egress to said land from east line of said section over a strip of land one rod wide along the south side of and following the course of said Utah & Salt Lake Canal, said right of way to include the right of ingress and egress to and from said land first above conveyed with vehicles and domestic animals of all kinds at any and all times."

That subsequent to said conveyance said Jane Kersey died, leaving the defendants, except Joseph Blunt, her heirs, and that Joseph Blunt is the administrator of the estate of the [\*\*\*4] [\*247] said Jane Kersey, deceased. That the road in question is not, and never was, a public highway. That the canal through the lands in question has a shoulder or bank about eighteen inches above the general level of the land and extending from 1 to 1 1/2 rods south from the water's edge and along the south side of said canal. That the meaning of the phrase "a strip of land one rod wide along the south side of and following the course of said Utah & Salt Lake Canal" is that the south side of said canal is the outer edge of said shoulder or bank, and that the right of way specifically mentioned in the deed extends along the south or outer edge of said shoulder and extends from the east section line westerly along the course above indicated parallel to and 1 1/2 rods south of the high-water mark, following the meanderings thereof, more or less, to a point directly south of the southeast corner of defendants' land; thence westerly 2 1/2 rods; thence north across the canal to the land of the plaintiff, thereby leaving a square 2 1/2 rods

each way for the purpose of turning and crossing the canal. That the defendants have no right or interest in the lands of the plaintiff other than [\*\*\*5] as above indicated. The court issued an injunction restraining the defendants from in any manner interfering with the use by plaintiff of the lands owned by him, except as above indicated, thus closing to the defendants the road from about the southeast corner of defendants' land to the point where said road formerly crossed the canal a distance of about twenty rods.

The defendants at once perfected this appeal, assigning numerous errors which are specifically as follows: (1) That the court was wrong in its findings that the whole road was not a public highway; (2) wrong in its finding and conclusion that the strip of road about twenty rods in length from the east line of the defendants' land westerly to the point where formerly said road crossed the canal, did not pass to the defendants under the deed mentioned as an appurtenance to the land.

Upon examining the record and the evidence, we find that this suit was filed June 20, 1914. The evidence shows that on October 8, 1887, when Jane Kersey became the owner of the land now held by the defendants by a conveyance from [\*248] the plaintiff, the road extended west of the east line of her property about twenty rods, and then turned [\*\*\*6] north across the canal; that the road before that time had continued on west on the south side of the canal from that point through the section, and some of the people who lived to the west and those working on the canal traveled said road frequently; that it was unimproved, marked only by wheel tracks which were plainly visible; that it was open, without gates; that there were no signs to the effect that it was a private highway, and that there never have been such signs along the road; that the house bought by Jane Kersey, with the land, faced toward this road that extended west of the point where the district court found it turned north across the canal; that the Kersey place has been continuously occupied, and the occupants and the visitors traveled the road to and from the house; that there has been no change in the location of the road; that it is in substantially the same position on the ground now that it was twenty-seven years ago; that in making and cleaning the canal the excavated material and debris were thrown out on the south side of the canal, making the surface of the ground rough and uneven for a distance of 1 to 1 1/2 rods along the south side of the canal and through [\*\*\*7] its entire length upon the land in question; that numerous



49 Utah 243, \*248; 161 P. 1127, \*\*1129;  
1916 Utah LEXIS 131, \*\*\*7

boulders were thrown out of the canal; that no bridge existed at the point where defendants contend the road should cross the canal; that in about 1912 the plaintiff plowed the road to the canal bank, and that frequently, in plowing the lands adjoining the road, plaintiff deposited boulders from his land upon the road; that the defendants, with shovels, leveled the road and threw the rocks to the north toward the canal, and continued to travel the road as before; that in 1914 plaintiff set posts in the roadway where defendants crossed the canal, turning north, and that the defendants, or some of them, removed said posts and threw them [\*\*1130] aside and continued to cross at that point; that plaintiff closed the road on the south side of the canal running west from the defendants' present crossing in about 1910; that the road was plowed by plaintiff in about 1904; that in about 1907 plaintiff placed a wire gate at the public highway along the east line of the section; that [\*249] defendants objected and cut it down; that the water in the canal is about sixteen feet wide; that the company does not have title to the [\*\*\*8] land covered by the canal, and claims only by usage; that there is no bridge across the canal to the Jane Kersey place.

It will be seen that the defendants' complaint in this court is as to that part of the decree that turns the road across the canal at about the southeast corner of the defendants' land, instead of permitting an extension of twenty rods to the west, and then turn north across the canal as it did formerly.

They rely upon three grounds to hold the road in question, to wit: (1) That by long continual use it has become a public highway; (2) that by their and Mrs. Kersey's use they have an easement by prescription; (3) that said road was granted by said deed, both by the description of a road one rod wide, specially described, and also by reason of said road being appurtenant to the land conveyed in the deed. We will examine these questions in order:

First, that by long continual use the twenty rods of road in question has become a public highway; that is, that there has been a dedication by the owner to the public use and an acceptance by the public.

A dedication rests primarily in the intent of the owner. There must be a concession intentionally made by him, which [\*\*\*9] may be proved by declarations or by acts, or may be inferred from circumstances. No form or ceremony is necessary. It must, however, appear that he

knew of the use by the public, and intended to grant the right of way to the public. No formal acceptance by any public officer or agent is necessary, but there must be actual use by the public. *City of Cincinnati v. White*, 6 Pet. 440, 8 L. Ed. 452; *Morgan v. Railroad Co.*, 96 U.S. 716, 24 L. Ed. 743; *Harkness v. Woodmansee*, 7 Utah 227, 26 P. 291; *Whittaker v. Ferguson*, 16 Utah 240, 51 P. 980; *Schettler v. Lynch*, 23 Utah 305, 64 P. 955; *Culmer v. Salt Lake City*, 27 Utah 252, 75 P. 620; *Wilson v. Hull*, 7 Utah 90, 24 P. 799.

From the evidence, it appears that the plaintiff, two years before the commencement of this action, plowed the road to the canal bank; that frequently in plowing lands adjoining [\*250] the road plaintiff rolled boulders from the land into the road, which the defendants removed before they could travel the road; that plaintiff closed the road extending west from the Kersey crossing five years before the commencement of this action; that a wire gate was placed [\*\*\*10] by the plaintiff across the entrance to the road on the east section line seven years before the commencement of this action; and that the road was plowed by the plaintiff as much as ten years before the commencement of this action.

All these facts negative an intention on the part of the plaintiff to dedicate to public use. On the contrary, the fair inference to be drawn from them is that he intended not to dedicate the roadway to the public. It is true that, a dedication by the owner and an acceptance by the public once made, the highway thus established continues to be a highway as long as the public use continues; and if in this case the public use were sufficient to constitute an acceptance and the owner had in fact intended to dedicate, then the dedication would be complete; but we think there is no evidence tending to show that there ever was an intent to dedicate to public use.

Next we must consider the people who used this road. Did their traveling upon it constitute a use by the public? The evidence discloses three classes of persons only who used this road, to wit, the occupants of the Kersey place and their visitors, the workmen upon the canal, and some persons who lived [\*\*\*11] in the middle of the section.

As to the occupants of the Kersey place, they had an express grant of a right of way for ingress and egress contained in their title deed (not considering now the extent or limitation of the right conveyed in the deed), so they were not traveling the road by reason of its public

character, but under the express provision of their deed.

As to the workmen upon the canal, they were there under the right by "user" claimed by their company. The right of way for their canal, whatever it is, if it authorizes the occupancy of the land for canal purposes, carries with it the right, under reasonable limitations to enter the premises to construct, repair, and operate the canal, its headgates, its laterals, etc., which are a part of or connected therewith. So [\*251] these persons were not on this road by reason of its public character, but under whatever right by "user" the canal company had over this land for canal purposes.

As to the persons who lived in the center of the section, the evidence does not disclose how many there are or ever were, how frequently they used the road, by what right they traveled the road, nor the circumstances of their use, nor [\*\*\*12] that they have in any way improved their property depending upon the public use of the road, nor that they are in any respect so situated that closing the road will be an injury to them. Compare the case made as to them with the situation disclosed by the evidence in the case of *Schettler v. Lynch*, 23 Utah 305, 64 P. 955.

However, the people in the middle of this section are not in court, and their rights are not being determined. Their use of the road [\*\*1131] is material here only so far as it may have a bearing upon its public character, and the evidence as to their use of the road in question is very meager.

Complied Laws of Utah 1907, section 1115, provides:

"A highway shall be deemed to have been 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."

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. Under this statute 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 [\*\*\*13] as a thoroughfare for a period of 10 years, but such use must be by the public. Use under private right is not sufficient. If the thoroughfare is laid out or used as a private way, its use,

however long, as a private way, does not make it a public way; and the mere fact that the public also make use of it, without objection from the owner of the land, will not make it a public way. Before it becomes public in character the owner of the land must consent to the change. Elliott, Roads and Streets, section 5.

From a consideration of the facts in evidence, viewed in the light of the well-established principles of law, we must conclude, [\*252] as did the trial court, that there is disclosed no such intention on the part of the owner of the land to dedicate to public use, nor such use by the public constituting an acceptance as is necessary to show a dedication or abandonment to public use.

The second contention of the appellants is that by their and Mrs. Kersey's use they have an easement by prescription.

"The right to a public road or private way by prescription arises from the uninterrupted adverse enjoyment of it under a claim of right know to the owner for the requisite length [\*\*\*14] of time. Anciently the right to the easement arose by prescription from the use of the land for so long a time that there was no existing evidence as to when such use commenced. Its origin must have been at a time 'whereof the memory of man runneth not to the contrary.' Later the rule was changed by limiting the time of uninterrupted possession to 20 years." *Harkness v. Woodmansee*, 7 Utah 227, 26 P. 291.

"Prescription refers the right to the highway to the presumption that it was originally established pursuant to law, by proper authority; while dedication refers it to a contract either expressed or implied. Dedication implies a conveyance and an acceptance, while prescription requires an unbroken possession or use under claim of right." Elliott, Roads and Streets, § 191.

A prescriptive right to an easement does not arise in seven years, by analogy to the provision of the statute barring an action to recover real property when the person asserting title was not seized or possessed of the property in question within seven years. These statutes do not apply to rights of way or any other class of easements by prescription. The right by prescription can only arise by adverse [\*\*\*15] use and enjoyment under claim of right uninterrupted and continuous for a period of twenty years. *Harkness v. Woodmansee*, 7 Utah 227, 26 P. 291; *Funk v. Anderson*, 22 Utah 238, 61 P. 1006; *North Point Co. v. U. & S. L. C. Co.*, 16 Utah 246, 52 P. 168, 40 L. R.

A. 851, 67 Am. St. Rep. 607; *Lund v. Wilcox*, 34 Utah 205, 97 P. 33.

A prescriptive right in the public is disposed of by our conclusion, heretofore reached, that the evidence does not show use by the public, and that this was not a public highway; but there is still the question of a private [\*253] right of way by prescription. Under the well-established rule, the use, in order that it may ripen into a prescriptive title, must, in any case, not only be adverse and continuous, and under claim of right for a period of twenty years, but it must be uninterrupted throughout that period. In the case at bar the use of the defendants and their predecessors commenced in 1887, at which time there was a severance of the title to the parcels of land, and could not ripen into title by prescription until 1907. But the defendants' own testimony shows that the plaintiff plowed the road in question as early [\*\*\*16] as 1904, and from that time to the commencement of this action the plaintiff, from time to time, placed rocks in the road, from the plowed land adjoining, and that the defendants, with shovels, leveled the ground and removed the rocks to the north to make the road passable; and following these acts, and clearly indicating the attitude of each of the parties to this suit to the claim of the defendants to the ownership of this right of way at about the time the twenty-year period would have expired, plaintiff placed a wire gate across the road at the point where it left the public highway, and the defendants cut it down. From these circumstances we conclude that the use was not uninterrupted, and that no right by prescription could arise under these circumstances. *Wasatch Irrig. Co. v. Fulton*, 23 Utah 466, 65 P. 205; *Crosier v. Brown*, 66 W. Va. 273, 66 S.E. 326, 25 L. R. A. (N. S.) 174; *Reid v. Garnett*, 101 Va. 47, 43 S.E. 182; *Wooldridge v. Coughlin*, 46 W. Va. 345, 33 S.E. 233.

The third contention made by appellants is that the road was granted by deed both by the description of a road one rod wide, specially described, and also by reason of said road [\*\*\*17] being appurtenant to the land conveyed in the deed. The deed contained the very usual clause, following the specific description of the real estate, to wit, "together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining." Whatever passed under this clause as an appurtenance must have been an existing easement at the time of the making of the deed; *i. e.*, such rights were conveyed by [\*\*1132] this [\*254]

clause as were then belonging or in any wise then appertaining to said land. But during the unity of title no easement could exist as between parts of the land. An owner cannot have an easement in his own land because during the unity of title all the benefits and uses for easement are comprehended within his general ownership. Such a clause in a deed will not create a new right, nor, in case of severance of title, will it convey a right to a use for the benefit of one part of the land over another part. Such a right, if it is conveyed, must be by definite language which first creates or defines the easement and then conveys it. *Duvall v. Ridout*, 124 Md. 193, 92 A. 209, L. R. A. 1915C, 345.

An appurtenance [\*\*\*18] implied upon a severance of title is referred to the intent of the grantor, and such intent is gathered from conditions existing at the time of the severance of title and implied from such circumstances; and in general terms, the rule may be stated that when the owner of a tract of land has arranged and adapted the various parts so that one derives a benefit and advantage from the other of a continuous and obvious character, and he sells one of the parts without making mention of the incidental advantage or burdens of one in respect to the other, there is implied an understanding and agreement that such advantages and burdens continue as before the separation of title. *Ingals v. Plamondon*, 75 Ill. 118; *Carbrey v. Willis*, 7 Allen (Mass.) 364, 83 Am. Dec. 688; *Scott v. Moore*, 98 Va. 668, 37 S.E. 342, 81 Am. St. Rep. 749; *Grace M. E. Church v. Dobbins*, 153 Pa. 294, 25 A. 1120, 34 Am. St. Rep. 706; *Quinlan v. Noble*, 75 Cal. 250, 17 P. 69.

The elements essential to constitute an easement by severance are: (1) Unity of title followed by severance; (2) that at the time of the severance the servitude was apparent, obvious, and visible; (3) that the [\*\*\*19] easement is reasonably necessary to the enjoyment of the dominant estate; and (4) it must usually be continuous and self-acting, as distinguished from one used only from time to time when occasion arises.

We pass the fourth requirement, as to which there is a [\*255] clear conflict in the decided cases. There are decisions by courts of final jurisdiction in the various states holding that the servitude, in order to pass as implied upon severance, must be of a continuous nature, *i. e.*, one which may be enjoyed without the act of man, as a right to conduct water through a spout which discharges water automatically whenever rain falls.

*Bonelli Bros. v. Blakemore*, 66 Miss. 136, 5 So. 228, 14 Am. St. Rep. 550; *Fisk v. Haber*, 7 La. Ann. 652.

On the other hand, courts hold that the kind of easement is not to be considered, but merely whether it is apparent, designed to be permanent, reasonably necessary to the enjoyment of the property, and arises from a severance of a unified title. *Baker v. Rice*, 56 Ohio St. 463, 47 N.E. 653.

As to the first essential, *i. e.*, unity of title followed by severance, that, in this case, is admitted. As to the second, that [\*\*\*20] the servitude was apparent, obvious, and visible at the time of severance, the undisputed evidence is to the effect that at the time of severance the way in question was a well-defined, though unimproved, driveway. However, as to the third essential, *i. e.*, that the servitude is reasonably necessary to the enjoyment of the dominant estate, there is serious doubt. It must be borne in mind that the issue presented in this case is not whether the defendants shall have a roadway from their land to the public highway on the east--that far the way was decreed to the defendants by the district court--but whether or not this roadway shall end at the southeast corner of defendants' land, or extend twenty rods west, still over the plaintiff's land, and then across the canal, and enter the land of defendants. So the question here is whether or not the evidence discloses a reasonable necessity for perpetuating the twenty rods of roadway west from the southeast corner of defendants' land. The only evidence upon this subject is that the dwelling house upon the defendants' land, which was there at the time of severance, faced south some distance from and toward the canal and the extended roadway. [\*\*\*21] Does this disclose that the extension of the roadway, which the defendants seek, is reasonably necessary to the proper enjoyment of the property conveyed, or that this extension of the roadway materially adds to the value of [\*256] the land? We think not. From a careful consideration of the conditions and circumstances of the property at the time of severance, as disclosed by the evidence, we cannot find that there is any advantage whatever to the defendants' property in continuing the roadway past the southeast corner of defendants' land as decreed by the district court.

That there must exist a reasonable necessity is apparent from an examination of the decided cases. Some of these cases go to the extent that, in order to create a servitude upon severance, there must be shown an

absolute necessity. However, the requirement of reasonable necessity seems to be supported by the weight of authority and by reason. *Weidekin v. Snelson*, 17 Ill. App. 461; *Dolliff v. Boston and M. R. R.*, 68 Me. 173; *Wentworth v. Philpot*, 60 N.H. 193; *Brakely v. Sharp*, 9 N.J. Eq. 9; *Evans v. Dana*, 7 R.I. 306; *Jarvis v. Seele Mill Co.*, 173 Ill. 192, 50 N.E. [\*\*\*22] 1044, 64 Am. St. Rep. 107; *Root v. Wadhams*, 107 N.Y. 384, 14 N.E. 281; *Wells v. Garbutt*, 132 N.Y. 430, 30 N.E. 978; *McElroy v. McLeay*, 71 Vt. 396, 45 A. 898; *Paine v. Chandler*, 134 N.Y. 385, 32 N.E. 18, 19 L. R. A. 99; *Kelly v. Dunning*, 43 N.J. Eq. 62, 10 A. 276; *Miller v. Hoeschler*, [\*\*1133] 126 Wis. 263, 105 N.W. 790, 8 L. R. A. (N. S.) 327; *Ogden v. Jennings*, 62 N.Y. 526; *Sellers v. Texas C. R. Co.*, 81 Tex. 458, 17 S.W. 32, 13 L. R. A. 657.

Within this third proposition is included the contention that the roadway is extent, as is existed at the time of the conveyance, passed under the express terms of the deed by the description of "a right of way for ingress and egress to said land from the east line of section over a strip of land one rod wide along the south side of and following the course of said Utah & Salt Lake Canal," by reason of the fact that at the time of the conveyance there was upon the land such a right of way in use and known to the parties to the deed. The rule may be stated generally that upon the severance of title, if the deed contains a clause conveying a right of way across the land still [\*\*\*23] held by the grantor, but not fixing its course and extent, and it is made to appear that at the time of conveyance there was in use upon the land reserved such a way plainly visible, and known to the parties, [\*257] it will be deemed that the way intended by the grantor is the one actually in existence. *Gerrish v. Shattuck*, 128 Mass. 571; *O'Brien v. Schayer*, 124 Mass. 211; *Peabody v. Chandler*, 17 Misc. 655, 40 N.Y.S. 1028; *Bannon v. Angier*, 2 Allen (Mass.) 128.

This rule of law is well established, and is highly beneficial, but the cases to which we must look for illustrations of its application are from communities where conditions as to marked boundaries and inclosures are, and for a long time have been, fixed and settled, and in which its application is much more easily made than in a community such as that involved in this case. This community, as disclosed by the evidence, during the years involved, was in process of settlement, and the whole country was but recently largely open, and the traveler free to follow almost any course that promised to bring him most easily to his journey's end. Here we find

wheel tracks in almost any direction [\*\*\*24] without system, and without regard to section lines or property rights. When, in a community so situated, the time arrives for the fencing of fields and the establishing of permanent roads and rights of way, the strict application of this rule would, in many cases, produce fantastic results quite inconsistent with justice. In this case we feel that its applicability is doubtful. Here we have a grant of a right of way for ingress and egress to this land from the east line of the section along the south side of the canal. The evidence shows that at the time the deed was made the wheel tracks along the south side of the canal extended the whole length of the canal through the property of the plaintiff, with a turn-off at the point where the defendants now contend it should still remain. There is no reason suggested in the evidence why a turn-off at this point is more advantageous to defendants' land than at the southeast corner of the defendants' land. In construing any grant of right of way the use, in character and extent, is limited to such as is reasonably necessary and convenient to the dominant estate and as little burdensome to the servient estate as possible for the use

contemplated. [\*\*\*25] In the case before us the terms of the grant cannot be said to be wholly general. The way is to be along the south side of the canal, [\*258] and is to extend from the east line of the section, and is for the purpose of ingress and egress. In the absence of proof of disadvantage to the dominant estate occasioned by turning the road across the canal at the southeast corner of the land, the right of the servient estate to have the easement as little burdensome as possible consistent with the use contemplated should be recognized.

Under all the circumstances in this case, we are satisfied that the rule that, where the grant of a right of way is general, the fact that there is such a right of way visible and in use upon the land makes the grant certain, is not applicable.

For the reasons given, the decree of the district court is affirmed, with costs.

STRAUP, C. J., and FRICK, J., concur.



LEXSEE 668 P2D 569

**POZZOLAN PORTLAND CEMENT CO., a Utah corporation, Plaintiff and  
Appellant, v. Jack M. GARDNER, Defendant and Respondent**

No. 18812

Supreme Court of Utah

*668 P.2d 569; 1983 Utah LEXIS 1119*

July 28, 1983, Filed

**COUNSEL:** [\*\*1] John A. Rokich, Magna.

Richard G. McDougall, Salt Lake City for Petitioner.

Wendell E. Bennett, Salt Lake City for Respondent.

**OPINION BY: PER CURIAM**

**OPINION**

[\*570] The plaintiff filed a suit in equity against defendant, one of its directors, for an order requiring him to transfer a mineral lease issued by the State of Utah in his own name. The complaint sounded in breach of a fiduciary relationship.

After a hearing, the court ordered the transfer as requested. The court also ordered plaintiff to pay defendant \$485 for the first year of the lease. The order was in the form of an unsigned minute entry dated June 5, 1980. Before it was formalized, the defendant filed a motion to proffer additional testimony to show entitlement to similar payments for years subsequent to the first year of the lease, which would aggregate about \$1,800. The motion was granted. The finding and judgment (including allowance for the additional lease payments) were signed and formalized on July 19, 1982, without the court having acted on the plaintiff's objections thereto.

In September, 1982, the plaintiff moved to vacate that part of the judgment adding the amounts mentioned. As reasons, plaintiff [\*\*2] assigned the court's failure to

rule on plaintiff's objections before entry of judgment, and failure to notify of its entry before the time for appeal had expired. Recognizing the error, the court granted the plaintiff's motion to vacate the judgment at a hearing on October 12, 1982. At that time, the court denied the plaintiff's objections to the findings and decree and ordered the July judgment to be entered as of the date of the hearing--October 12, 1982. The plaintiff timely appealed therefrom and urged invalidity of the modified judgment on the grounds that under Rule 59(a), Utah R. Civ. P., evidence known by the defendant to exist at time of judgment could not be admitted as "newly discovered" evidence.

The trial court is vested with considerable discretion in a case like this. <sup>1</sup> The following language appears applicable and controlling:

Like the motion for a new trial on the ground of newly discovered evidence, a motion to reopen the case to take additional testimony is normally addressed to the discretion of the trial court, and its discretionary denial or grant of the motion will be interfered with by an appellant court only for abuse . . . . [footnotes omitted]. [\*\*3] <sup>2</sup>

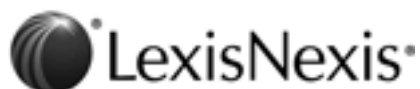
<sup>1</sup> *Lewis v. Porter, Utah, 556 P.2d 496 (1976).*

<sup>2</sup> *6A Moore's Federal Practice 59.04[13].*

There was no abuse of discretion in the instant case. The trial court had erred in signing the findings and judgment while the objection thereto was still pending and undecided. It was this error that prompted the trial court to grant the plaintiff's motion to vacate the judgment. The trial court subsequently denied plaintiff's objections.

By making the judgment previously entered effective as of October 12, the plaintiff was assured its right of appeal, which timely was exercised.

The judgment is affirmed, with no award of costs on appeal.



LEXSEE 2007 UT 38

Nikolas L. Thurnwald, Plaintiff and Appellant, v. A.E., Defendant and Appellee.

No. 20050721

## SUPREME COURT OF UTAH

2007 UT 38; 163 P.3d 623; 577 Utah Adv. Rep. 8; 2007 Utah LEXIS 102

May 8, 2007, Filed

**SUBSEQUENT HISTORY:** [\*\*\*1] Released for Publication August 8, 2007.

Rehearing denied by *Thurnwald v. Eatchel*, 2007 Utah LEXIS 141 (Utah, June 27, 2007)

Appeal after remand at, Sub nomine at *N.T. v. Doe (In re Doe)*, 2008 UT App 449, 2008 Utah App. LEXIS 441 (2008)

**PRIOR HISTORY:** Second District, Farmington. The Honorable Rodney S. Page. No. 044701480.

**COUNSEL:** Michael J. Boyle, Daniel S. Drage, Ogden, Utah, for plaintiff.

David M. McConkie, David J. Hardy, Salt Lake City, for defendant.

**JUDGES:** DURRANT, Justice.

**OPINION BY:** DURRANT

**OPINION**

On Certification from the Utah Court of Appeals

*DURRANT, Justice:*

**INTRODUCTION**

[\*\*624] [\*P1] By statute, an unwed father must, in order to preserve his paternal rights, file a paternity petition in court and register a notice of that petition with the Department of Health. <sup>1</sup> These documents may be

filed before the child's birth, but must be filed before the mother consents to adoption or relinquishes the child to an adoption agency. <sup>2</sup> The mother is required to wait twenty-four hours after the child's birth before consenting to adoption or relinquishing the child. <sup>3</sup> Thus, the typical unwed father is allowed a period that extends until twenty-four hours following the child's birth to file the requisite petition and to register a notice--or risk losing all rights to the child.

<sup>1</sup> See Utah Code Ann. §§ 78-30-4.13(3)(a), -4.14(6) (Supp. 2006); accord *id.* § 78-30-4.13(3)(a) (Supp. 2004), amended by ch. 137, § 6 & ch. 150, § 5, 2005 Utah Laws 894-96, 1017-18; Utah Code Ann. § 78-30-4.14(2)(b) [\*\*\*2] (Supp. 2004), repealed and reenacted by ch. 186, § 3, 2006 Utah Laws 835-37.

<sup>2</sup> Utah Code Ann. §§ 78-30-4.13(3)(d), -4.14(6) (Supp. 2006); accord *id.* §§ 78-30-4.13(3)(a), -4.14(b) (Supp. 2004).

<sup>3</sup> *Id.* § 78-30-4.19(1) (Supp. 2006).

[\*P2] The question posed in this case is whether the period provided by statute in which unwed fathers may preserve their rights by filing a paternity action and registering notice should be enlarged when it expires on a weekend or holiday. More specifically, the question is whether *rule 6 of the Utah Rules of Civil Procedure* applies to [\*\*625] enlarge these statutory deadlines. In this case, Nikolas Thurnwald did not file his paternity petition and register notice prior to his child's premature birth on Saturday morning of Labor Day weekend, and he was thereafter unable to file until the next Tuesday because the courts and state offices were closed.



Meanwhile, the mother, A.E., relinquished their child to L.D.S. Family Services for adoption on Sunday morning, at the expiration of the twenty-four-hour waiting period. Thurnwald's paternity petition was dismissed by the district court because he had not filed his petition and registered with the state prior to A.E.'s relinquishment. [\*\*\*3] Thurnwald argues on appeal that we should apply *rule 6* and deem his petition timely.

[\*P3] This case presents us with two alternatives for interpreting the statutes: (1) we could conclude, as did the district court, that the twenty-four-hour postbirth period is designed solely for the benefit of the mother and that the unwed father's obligation is tied in all instances to the mother's relinquishment--not to any time period to which *rule 6* applies; or (2) we could conclude that the effect of the statutes is to create a minimum filing period extending to twenty-four hours after the child's birth in which the unwed father has a right to file and register, and that this period is subject to extension under *rule 6*.

[\*P4] We hold that the first of these two alternatives, the one selected by the district court, is unconstitutional because it denies unwed fathers a postbirth time period in which to file and register if the birth falls on a weekend or holiday. When faced with two plausible interpretations of a statute, one constitutional and the other not, we are obligated to select the constitutional interpretation. Accordingly, we hold that *rule 6* applies to enlarge the filing period until the end of [\*\*\*4] the next business day in cases where the unwed father would not otherwise receive a full business day to file postbirth because part or all of the twenty-four-hour period falls on a holiday or weekend.

## BACKGROUND

[\*P5] The district court dismissed Thurnwald's petition after granting summary judgment against him; so we recite the facts in the light most favorable to Thurnwald.<sup>4</sup>

<sup>4</sup> *Johnson v. Hermes Assocs., Ltd.*, 2005 UT 82, P 2, 128 P.3d 1151 ("When reviewing a *rule 56(c)* motion for summary judgment, we recite the facts in the light most favorable to the non-moving party.").

[\*P6] Thurnwald and A.E. were involved in a romantic relationship for more than three years, and they lived together from August 2003 to April 2004. They

were living together in Davis County in early 2004 when A.E. became pregnant with their child. Thurnwald and A.E. initially discussed marriage and continued to live together. But in April 2004, A.E. moved out and went to live with her grandparents. During most of the pregnancy, A.E. was covered by her grandmother's health insurance.

[\*P7] After A.E. moved out, she and Thurnwald continued to date. They also had discussions about how to best prepare for the birth of their child. About [\*\*\*5] a month after A.E. went to live with her grandmother, Thurnwald and A.E. agreed that Thurnwald should move to Fruitland to work with his grandfather's company so he would have better working hours and be better able to afford to buy a house and support the child. In accordance with this plan, Thurnwald moved to Fruitland to start working and find a place to live. While there, he talked with A.E. on the phone daily and visited on the weekends. Approximately three weeks later, A.E. decided that she did not want to move to Fruitland; so Thurnwald moved back to Davis County.

[\*P8] The parties also discussed raising the child together and moving in with Thurnwald's parents. About a month before the child's birth, they discussed Thurnwald joining the military to provide a steady job and insurance for the family. And they discussed purchasing family insurance.

[\*P9] During A.E.'s pregnancy, Thurnwald went to all but one of her doctor appointments. He went shopping with A.E., and together they purchased several outfits for the baby. Thurnwald also purchased a car [\*\*626] seat, bassinet, crib, diaper bag, diapers, and some blankets.

[\*P10] On approximately August 17, 2004, A.E. told Thurnwald that, with her grandmother's [\*\*\*6] encouragement, she had gone to an appointment at L.D.S. Family Services to talk about adoption. The next day, Thurnwald and A.E. went to the L.D.S. Family Services office along with Thurnwald's mother. Thurnwald was told at that meeting that nothing was finalized but that A.E. had signed papers stating that L.D.S. Family Services would take care of the baby's birth if A.E. decided to give the baby up for adoption. The representative told Thurnwald and his mother to stop pressuring A.E. and let her make her own decision.

[\*P11] After the meeting at L.D.S. Family Services, A.E. told Thurnwald that she did not want to give the baby up for adoption and that he did not have anything to

worry about. Nonetheless, between August 18 and the child's birth, Thurnwald's mother made several calls on Thurnwald's behalf to determine his rights regarding the child, including calls to a lawyer and to the Department of Health. The Department of Health told them to get a lawyer if they thought the baby might be placed for adoption. The lawyer told them he would look into it and get back to them.

[\*P12] On August 21, approximately two weeks before the child's birth, Thurnwald and A.E. together attended a baby shower [\*\*\*7] for the child and received gifts to help care for a newborn. Approximately two days before the child's birth, Thurnwald and A.E. talked about selling his car and getting a car more suitable for the child.

[\*P13] On Saturday, September 4, 2004, A.E. went into premature labor. The child was born that day at 9:24 a.m. in Layton, Utah. Neither A.E. nor her family notified Thurnwald.

[\*P14] Thurnwald found out about the birth from one of A.E.'s co-workers at approximately 10:30 a.m. that same day when he called A.E.'s workplace to see if she wanted to go with him to a movie that night. Upon hearing that A.E. had given birth, Thurnwald called A.E. at the hospital. She told him that she was giving their child up for adoption. Thurnwald left work immediately and drove to the hospital. When he got there, A.E. refused to see him. Hospital personnel told Thurnwald that A.E. had registered as a "silent" patient and that he could not visit or speak with her or the child.

[\*P15] That same day, Thurnwald contacted his lawyer. But Thurnwald was unable to file the required paternity petition with the court and register with the Department of Health on Sunday or Monday because it was Labor Day weekend and state offices [\*\*\*8] and courts were closed. Instead, he filed a paternity petition with the court on Tuesday, September 7, at 12:05 p.m., and filed a notice with the registrar of vital statistics on the same day. In conjunction with the petition for paternity, he also filed an Order to Show Cause to stop any adoption proceedings.

[\*P16] In the meantime, A.E. waited twenty-four hours as required by statute and then, on Sunday morning, relinquished custody of the child to L.D.S. Family Services for adoptive placement.

[\*P17] At a hearing on the paternity petition, the parties agreed to continue the matter based on an agreement with L.D.S. Family Services that it would not finalize the adoption until this matter was concluded. Thereafter, on July 22, 2005, the district court granted summary judgment against Thurnwald because he did not file his paternity petition and notice before A.E.'s relinquishment. The district court concluded that, because it was not "impossible for him to comply with the filing requirements of the statute," Thurnwald's right to due process was not violated. The district court then dismissed the paternity petition in an order dated August 17, 2005. Thurnwald originally appealed this case to us, [\*\*\*9] but we transferred it to the court of appeals because we lacked original appellate jurisdiction over the case. After the parties filed their appellate briefs, the court of appeals certified this case back to us. We have jurisdiction pursuant to Utah Code section 78-2-2(3)(b).

#### STANDARD OF REVIEW

[\*P18] Because Thurnwald appeals from the district court's grant of summary judgment, [\*\*627] this case presents only questions of law that we review for correctness, "giv[ing] no deference to the district court's legal decisions."<sup>5</sup>

*5 Fericks v. Lucy Ann Soffe Trust, 2004 UT 85, P 10, 100 P.3d 1200.*

#### ANALYSIS

[\*P19] Utah's adoption statutes<sup>6</sup> require unwed fathers who desire to preserve their paternal rights to both file a paternity petition in court and register a notice of that petition with the state registrar of vital statistics in the Department of Health.<sup>7</sup> Both of these documents must be filed prior to either the birth mother's consent to adoption or her relinquishment of the child to an adoption agency,<sup>8</sup> but the mother may not consent "until at least 24 hours after the birth of her child."<sup>9</sup> The unwed father's strict compliance with the statute is mandated.<sup>10</sup> The consequence of failing to timely file a paternity [\*\*\*10] petition and register is the loss of "any right in relation to the child," including the right to notice of adoption proceedings and the right to consent or withhold consent to the child's adoption.<sup>11</sup>

<sup>6</sup> Some of the relevant adoption statutes have been amended since 2004 when Thurnwald filed his petition for paternity. We cite the current

statutes, but also reference the statutes then in effect. Unless otherwise noted, the amended statutes contain only organizational and stylistic changes, and have the same practical effect as those in effect in 2004.

7 Utah Code Ann. §§ 78-30-4.13(3)(a), -4.14(6) (Supp. 2006); *accord id.* § 78-30-4.13(3)(a) (Supp. 2004), *amended by* ch. 137, § 6 & ch. 150, § 5, 2005 Utah Laws 894-96, 1017-18; Utah Code Ann. § 78-30-4.14(2)(b) (Supp. 2004), *repealed and reenacted by* ch. 186, § 3, 2006 Utah Laws 835-37.

The current version of section 78-30-4.13(3) reads as follows:

(a) In order to preserve any right to notice and consent, an unmarried biological father may, consistent with Subsection 3(d):

(i) initiate proceedings to establish paternity . . . ; and

(ii) file a notice of the initiation of the proceedings described in Subsection (3)(a)(i) with the state registrar [\*\*\*11] of vital statistics within the Department of Health.

....

(d) The action and notice described in Subsection (3)(a):

(i) may be filed before or after the child's birth; and

(ii) shall be filed prior to the mother's:

(A) execution of consent to adoption of the child; or

(B) relinquishment of the child for adoption.

The predecessor of this section in effect in 2004 when Thurnwald filed his paternity petition reads as follows:

(3)(a) In order to preserve any right to notice and consent, an unmarried biological father may initiate proceedings to establish paternity . . . and file a notice of the initiation of those proceedings with the state registrar of vital statistics within the Department of Health prior to the mother's execution of consent or her relinquishment to an agency. That action and notice may also be filed prior to the child's birth.

Utah Code Ann. § 78-30-4.13(3)(a) (Supp. 2004).

Thurnwald cites the 2004 version of this statute in his brief; A.E. cites the 2006 version in hers. Neither party addresses whether the changes in this statute are relevant to our analysis. We therefore assume that the parties agree that the statute in effect in 2004 and the current statute require the [\*\*\*12] same actions of unwed fathers who wish to establish paternity to a child.

8 Utah Code Ann. §§ 78-30-4.13(3)(d), -4.14(6) (Supp. 2006); *accord id.* §§ 78-30-4.13(3)(a), -4.14(b) (Supp. 2004).

9 *Id.* § 78-30-4.19(1) (Supp. 2006).

10 *Id.* § 78-30-4.14(11); *accord id.* § 78-30-4.14(5) (Supp. 2004).

11 *Id.* § 78-30-4.14(ii); *accord id.* § 78-30-4.14(5) (Supp. 2004).

[\*P20] In effect, the adoption statutes give an unwed father until twenty-four hours after the birth of his

child to file a paternity petition and register--or risk losing all rights to his child. After the twenty-four-hour postbirth waiting period, the birth mother may consent to adoption or may relinquish the child to the custody of an adoption agency at any time and in so doing immediately deprive the father of any rights to the child.

[\*P21] Thurnwald argues that because the twenty-four-hour postbirth period expired on a holiday weekend, rendering him unable to preserve his paternal rights after the birth of the child, the district court should have applied *rule 6 of the Utah Rules of Civil Procedure* to enlarge the time for filing to the end [\*\*628] of the next business day after the child's birth. *Rule 6* provides:

In computing any period of time prescribed [\*\*\*13] or allowed by . . . any applicable statute, . . . [t]he last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday.<sup>12</sup>

<sup>12</sup> *Utah R. Civ. P. 6.*

If *rule 6* applies, Thurnwald argues, his petition was timely because it was filed before the end of the first full business day after his child's birth. Further, Thurnwald asserts that if *rule 6* does not apply, the statutes unconstitutionally deprive him of his right to due process.

[\*P22] On the other hand, A.E. argues that the twenty-four-hour waiting period is intended to benefit the birth mother, not the unwed father, and that *rule 6* cannot be used to enlarge the time for filing because the relevant statutory deadline is ultimately the time of the mother's consent or relinquishment. According to A.E., the statute governing the time period for filing a paternity petition "reveals an unambiguous legislative intent to require that unmarried biological fathers demonstrate a commitment to parenthood prior to a mother's relinquishment."

[\*P23] In sum, we are presented with two alternative interpretations [\*\*\*14] of the statutes controlling fathers' parental rights: (1) that the twenty-four-hour postbirth period is designed solely for the benefit of the mother and that the unwed father's filing period is tied in all instances to the mother's

relinquishment, so that *rule 6* is inapplicable; or (2) that the statutes create a minimum filing period that extends to twenty-four hours after the child's birth and may be enlarged in accordance with *rule 6 of the Utah Rules of Civil Procedure* if the last day of the period occurs on a weekend or holiday.

[\*P24] The district court adopted the first interpretation in granting summary judgment against Thurnwald. We hold, however, that application of the statutes in accordance with the district court's interpretation is unconstitutional because it would prematurely terminate an unwed father's opportunity to assert paternity when the child's birth occurs on a weekend or holiday. We first discuss the due process rights of unwed fathers and the constitutionality of Utah's adoption statutes, holding that unwed fathers cannot be denied a postbirth filing opportunity. We then address *rule 6 of the Utah Rules of Civil Procedure* and determine that it can be used to enlarge [\*\*\*15] the deadline for filing when the twenty-four-hour postbirth period falls on a weekend or holiday.

#### I. UTAH'S STATUTES VIOLATE DUE PROCESS IF THEY ARE INTERPRETED TO DEPRIVE UNWED FATHERS OF CHILDREN BORN ON WEEKENDS AND HOLIDAYS OF A POSTBIRTH OPPORTUNITY TO PRESERVE PATERNAL RIGHTS

[\*P25] Under both federal and state law, an unwed biological father has an inchoate interest in a parental relationship with his child that acquires full constitutional protection only when he "demonstrates a full commitment to the responsibilities of parenthood by [coming] forward to participate in the rearing of his child."<sup>13</sup> As explained by the United States Supreme Court in *Lehr v. Robertson*,<sup>14</sup>

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to

listen to his opinion [\*\*629] of where the [\*\*\*16] child's best interests lie. <sup>15</sup>

13 *Lehr v. Robertson*, 463 U.S. 248, 261, 103 S. Ct. 2985, 77 L. Ed. 2d 614 & n.17 (1983) (alteration in original) (internal quotation marks omitted); accord *In re adoption of B.B.D.*, 1999 UT 70, P 11, 984 P.2d 967.

14 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614.

15 *Id.* at 262.

[\*P26] In *Lehr*, the United States Supreme Court recognized that individual states may define when an unwed father has grasped that opportunity. It upheld the constitutionality of New York's paternity statute against a challenge by an unwed father of a two-year-old who had failed in the two years since his child's birth to legally claim his paternity by mailing a postcard to the state's registry. <sup>16</sup>

16 *Id.* at 263-65.

[\*P27] The United States Supreme Court has not, however, determined the rights of an unwed father of a newborn child or considered whether the United States Constitution places additional restrictions on the laws a state may enact to terminate unwed fathers' opportunities to assert their rights to newborns. Some courts have interpreted *Lehr* to herald greater protection of the father's opportunity interest in cases involving newborns, reasoning that in those cases the unwed father has not yet had the opportunity to fully demonstrate the level of his commitment [\*\*\*17] to the child. <sup>17</sup>

17 See, e.g., *Swayne v. L.D.S. Social Servs.*, 670 F. Supp. 1537, 1541 (D. Utah 1987) (noting that "[s]ome courts and commentators have determined that the potential interest recognized in *Lehr* may require greater constitutional protection if it is asserted, as in this case, at or near the time of birth rather than after a significant lapse of time as in *Lehr*," but holding that "[t]hat question need not be resolved [here]"); *In re Steve B.D.*, 112 Idaho 22, 730 P.2d 942, 945 (Idaho 1986) ("*Lehr* indicated both that the state may not deny due process and equal protection to unwed fathers who enjoyed established relationships with their children, and that the state

may not deny unwed fathers the opportunity to establish such relations--what the Court described as 'the inchoate interest in establishing a relationship with [the child] . . . .' *Lehr* establishes no measure of time constituting an adequate opportunity. However, because of a child's urgent need for permanence and stability, the unwed father must act quickly . . ." (quoting *Lehr*, 463 U.S. at 262-65)); *In re X.*, 559 N.E.2d 418, 424, 76 N.Y.2d 387, 559 N.Y.S.2d 855 (N.Y. Ct. App. 1990) (considering whether unwed fathers must ever be accorded "the full measure [\*\*\*18] of constitutional protection--the right to a continued parental relationship absent a finding of unfitness-- . . . where a child is placed for adoption before any real relationship can exist," and concluding as a matter of federal law "that such an interest must be recognized in appropriate circumstances").

[\*P28] In *Wells v. Children's Aid Society of Utah*, 18 we applied a due process analysis under the Utah Constitution to give greater protection to the rights of unwed fathers of newborns. We described an unwed father's opportunity interest in developing a relationship with his newborn as a "provisional right" that is itself protected by the *due process clause of the Utah Constitution*. <sup>19</sup> And we said that "[w]e measure the statutory specifications for the termination of that provisional right against the tests of compelling state interest and narrowly tailored means." <sup>20</sup> But because of the state's compelling interest in assuring speedy identification of the newborn's legal parents and the narrow tailoring of the statute, we held that section 78-30-4(3), the predecessor of the adoption statutes at issue in this case, was facially constitutional. <sup>21</sup>

18 681 P.2d 199 (Utah 1984).

19 *Id.* at 206.

20 *Id.*

21 *Id.* at 206-07.

[\*P29] [\*\*\*19] Under the old Utah Code section 78-30-4(3), <sup>22</sup> an unwed father was required to preserve his rights by registering a notice of claim to paternity with the Department of Health. <sup>23</sup> That section provided that the notice "may be registered prior to the birth of the child but must be registered prior to the date the illegitimate child is relinquished or placed with an agency licensed to provide adoption services." <sup>24</sup> The intent of

the statute was "to facilitate permanent and secure placement of illegitimate children whose unwed mothers wish to give them up for adoption and whose unwed fathers take no steps to officially identify themselves and acknowl [\*630] edge paternity." <sup>25</sup> Specifically, "[t]he registration requirement was viewed as a procedure that would protect the putative father's parental rights if he timely claimed his paternity." <sup>26</sup> Thus, the registration statute was intended to strike a balance between two competing interests: "the significant state interest in speedily placing infants for adoption and the constitutionally protected rights of putative fathers." <sup>27</sup>

22 Utah Code Ann. § 78-30-4(3) (Supp. 1983), *repealed by* Adoption Act Amendments, ch. 245, § 24, 1990 [\*\*\*20] Utah Laws 1173, 1178.

23 Utah Code Ann. § 78-30-4(3)(b).

24 *Id.*

25 *Swayne v. L.D.S. Social Servs.*, 795 P.2d 637, 641 (Utah 1990).

26 *In re Adoption of W.*, 904 P.2d 1113, 1117 (Utah Ct. App. 1995) (citing Recording of Utah Floor Debates, 41st Leg., February 6, 1975).

27 *In re Adoption of Baby Boy Doe*, 717 P.2d 686, 691 (Utah 1986).

[\*P30] In *Wells*, the unwed father challenged the constitutionality of this statute. <sup>28</sup> We held the statute "facially valid," stating as follows:

[T]he state has a compelling interest in speedily identifying those persons who will assume a parental role over newborn illegitimate children. Speedy identification is important to immediate and continued physical care and it is essential to early and uninterrupted bonding between child and parents. If infants are to be spared the injury and pain of being torn from parents with whom they have begun the process of bonding and if prospective parents are to rely on the process in making themselves available for adoptions, such determinations must also be final and irrevocable.

Section 78-30-4(3) is narrowly tailored to achieve the purposes identified above. No infringement of the unwed father's rights not essential to the statute's

[\*\*\*21] purposes has been identified. Due process does not require that the father of an illegitimate child be identified and personally notified before his parental right can be terminated. In the common cases of unwed fathers without desires to assume the responsibilities and to claim the rights of parenthood, such a requirement would frustrate the compelling state interest in the speedy determination described above. <sup>29</sup>

In subsequent cases, we continued to uphold the constitutionality of the old section 78-30-4 without engaging in additional analysis. <sup>30</sup>

28 *See Wells*, 681 P.2d at 207.

29 *Id.* at 206-07.

30 *In re B.B.D.*, 1999 UT 70, P 18, 984 P.2d 967; *Swayne v. L.D.S. Social Servs.*, 795 P.2d 637, 641-43 (Utah 1990); *In re Adoption of Baby Boy Doe*, 717 P.2d 686, 689 (Utah 1986); *Sanchez v. L.D.S. Social Servs.*, 680 P.2d 753, 755 (Utah 1984).

[\*P31] In *Wells*, we additionally held that the unwed father's as-applied due process challenge could not succeed because it had been possible for him to register before the birth mother consented to their child's adoption. <sup>31</sup> *Wells's* biological child was born in Salt Lake City on September 23, 1981. <sup>32</sup> *Wells*, who lived in Moab, Utah, mailed his registration form to [\*\*\*22] the Department of Health in Salt Lake City on that same day, but the form did not reach the Department of Health until September 30. <sup>33</sup> In the meantime, on September 24, the birth mother consented to the child's adoption. <sup>34</sup> Thus, *Wells's* registration was seven days late. In rejecting his as-applied challenge, we noted that *Wells* could not show that it had been impossible for him to file because he had "ample advance notice of the expected time of birth and the fact that the mother intended to relinquish the child for adoption, advice of counsel on filing the required form, and a copy of the form provided by a social worker for the department." <sup>35</sup> *Wells* had signed the form on September 18, but he said that he did not mail it until September 23 because he was waiting to ensure that the baby was his; if it was born any later he would have believed that someone else was the father. <sup>36</sup>

31 *Wells*, 681 P.2d at 207.

32 *Id. at 201.*

33 *Id.*

34 *Id.*

35 *Id. at 207-08.*

36 *Id. at 202.*

[\*\*631] [\*P32] Our decision in *Wells* is in many respects relevant to our analysis of the constitutionality of the adoption statutes and their effect in this case. Although the adoption code has been overhauled several times since we decided *Wells*, [\*\*\*23] <sup>37</sup> the statutory language at issue in that case was very similar to the language in the present statutes that requires unwed fathers to file prior to the mother's consent or relinquishment. But in *Wells* we did not consider the issue raised here--whether the statute can be constitutional if it completely cuts off postbirth rights of unwed fathers when the child is born on a weekend or holiday. In upholding the old section 78-30-4, we said only that "[n]o infringement of the unwed father's rights not essential to the statute's purposes has been identified."<sup>38</sup>

37 *See, e.g.*, Adoption Amendments, ch. 187, 2006 Utah Laws 834; Adoption Amendments, ch. 137, 2005 Utah Laws 891; Adoption Amendments, ch. 122, 2004 Utah Laws 546; Adoption Act Revision, ch. 168, 1995 Utah Laws 531; Adoption Act Amendments, ch. 245, 1990 Utah Laws 1173; *see also In re adoption of W., 904 P.2d 1113, 1118-19 (Utah Ct. App. 1995)* (explaining 1990 overhaul of adoption statutes).  
38 *Wells, 681 P.2d at 207.*

[\*P33] In this case, we therefore consider whether the infringement upon the unwed father's provisional right caused by interpreting the statutes to make it impossible for unwed fathers of children born on weekends or holidays [\*\*\*24] to preserve their rights postbirth is necessary to achieve the state's compelling interests. While in the past the adoption statutes required only that unwed fathers register with the state before the mother consented to adoption or relinquished the child, the adoption statutes now require an unwed father to both register notice and file a paternity petition before the child is relinquished. In addition, if the unwed father of a newborn desires to establish a right to withhold consent to his child's adoption (rather than simply to receive notice of the adoption and an opportunity to present evidence regarding the child's best interests), <sup>39</sup> he must

file in the paternity action a sworn affidavit "stating that he is fully able and willing to have full custody of the child[,] . . . setting forth his plans for care of the child[,] and . . . agreeing to a court order of child support and the payment of expenses incurred in connection with the mother's pregnancy and the child's birth."<sup>40</sup> He must also have "offered to pay and paid a fair and reasonable amount of the expenses incurred in connection with the mother's pregnancy and the child's birth, in accordance with his financial ability." [\*\*\*25] <sup>41</sup> These actions must all be taken before the mother consents to adoption or relinquishes the child.<sup>42</sup>

39 *See Utah Code Ann. § 78-30-4.13(11) (Supp. 2006); accord id. § 78-30-4.13(11) (Supp. 2004), amended by ch. 137, § 6 & ch. 150, § 5, 2005 Utah Laws 894-96, 1017-18.*

40 *Utah Code Ann. § 78-30-4.14(6)(b) (Supp. 2006); accord id. § 78-30-4.14(2)(b)(i) (Supp. 2004), repealed and reenacted by ch. 186, § 3, 2006 Utah Laws 835-37.*

41 *Utah Code Ann. § 78-30-4.14(6)(d) (Supp. 2006); accord id. § 78-30-4.14(2)(b)(iii) (Supp. 2004).*

42 *Id. § 78-30-4.14(6) (Supp. 2006); accord id. § 78-30-4.14(2) (Supp. 2004).*

[\*P34] As we previously held in *Wells*, it is beyond dispute that "the state must . . . have legal means to ascertain within a very short time of birth whether the biological parents (or either of them) are going to assert their constitutional rights and fulfill their corresponding responsibilities, or whether adoptive parents must be substituted."<sup>43</sup> The state also has compelling interests in promoting "early and uninterrupted bonding between child and parents" and in facilitating final and irrevocable adoptions.<sup>44</sup>

43 *Wells, 681 P.2d at 203.*

44 *Id. at 206.* Since we held in *Wells* that the paternity statutes [\*\*\*26] then in effect were necessitated by compelling state interests, the Legislature enacted section 78-30-4.12, codifying the compelling interests that we previously discussed and adding findings that "[t]he state has a compelling interest in requiring unmarried biological fathers to demonstrate [a full commitment to the responsibilities of parenthood] by providing appropriate medical care and financial support and by establishing legal

paternity, in accordance with the requirements of this chapter" as well as a compelling interest "in holding parents accountable for meeting the needs of children." Utah Code Ann. § 78-30-4.12(2)(a), (e) (Supp. 2006). We are not bound in our constitutional analysis by the Legislature's statements in support of the constitutionality of the laws that the Legislature has enacted.

[\*\*632] [\*P35] Yet we are persuaded that as interpreted by the district court in this case, the statute's effect of cutting off postbirth weekend and holiday filing opportunities for unwed fathers is not necessary to achieve the state's compelling interests, nor is such an interpretation a narrowly tailored means of achieving those interests. Under the adoption statutes as interpreted by the district [\*\*\*27] court, the unwed father whose child is born on a weekend or holiday would have no opportunity to assert his paternity after the birth of the child. Accordingly, no unwed father could be certain of when he must file a paternity action and register with the Department of Health in order to preserve his rights. He could not be certain that he will have time after the birth of his child to file because his child may be born on a weekend or holiday.

[\*P36] The lack of certainty presents particular problems for unwed fathers because they must not only register by filing a simple form with the state, but also file a paternity action in which they profess a willingness to take custody of the child, "set[] forth . . . plans for care of the child," and pay for birth expenses, all before the mother signs her consent and relinquishment.<sup>45</sup> On one hand, because an unwed father could not be assured of even a minimal amount of time to file after the child's birth under the district court's interpretation of the statute, there would be an incentive for the unwed father to commence an action and file early to preserve his rights. But on the other hand, the Legislature may have intended under the adoption [\*\*\*28] statutes for the unwed father to reach a certain maturity in the decision-making process regarding the care of the child after birth before filing a paternity action. Therefore, the unwed father also has an incentive to wait until he is ready to finally decide what is best for the child before taking the actions required by the adoption statutes.

45 Utah Code Ann. § 78-30-4.14(6) (Supp. 2006); *accord id.* § 78-30-4.14(2)(b) (Supp. 2004).

[\*P37] This is not a problem that we previously contemplated in *Wells* because in that case we were not presented with a situation where the father's rights were effectively cut off as of the time of the child's birth, leaving the father no postbirth opportunity to assert his rights. Wells was aware of his baby's birth that same day and presumably could have filed before the mother relinquished the baby the next day. In this case, although Thurnwald had the right--and opportunity--to assert his paternal rights prior to the birth of the child, the district court's interpretation of the statute has the effect of eliminating Thurnwald's postbirth opportunity altogether, essentially *requiring* him to have asserted his rights prebirth.

[\*P38] Neither this state nor any other [\*\*\*29] state that we know of has held it constitutionally permissible to cut off a father's right to assert his paternity interest at a time before the child's birth.<sup>46</sup> When the court of appeals was presented with a similar problem under the old section 78-30-4 in *In re K.B.E.*,<sup>47</sup> it held the statute unconstitutional as applied, stating that the statute was "not created to encourage a "race" for placement to cut off the rights of fathers who are identified and present."<sup>48</sup> In that case, the unwed father registered on the afternoon of the same day of his child's birth, but his registration was preempted by the actions of the mother who filed an adoption petition that morning.<sup>49</sup> The court explained that "[t]o deprive both [the unwed father] and [the child] of the possible benefits of their relationship simply because [the unwed father] [\*\*633] filed his notice just a few hours after [the mother] filed [her] petition for adoption . . . [flies] in the face of fundamental fairness and due process."<sup>50</sup>

46 The parties do not cite any such case from other jurisdictions and our own research has not uncovered any such case. In a recent case from Arkansas where a statute would have cut off a father's right [\*\*\*30] to notice when he failed to file prior to his child's birth, the court found that the father's due process rights were not violated, but it rested its conclusion on the fact that the father had actual notice, which allowed him to participate in the proceeding, and thus was not prevented from asserting a paternity claim. *See Escobedo v. Nickita*, 2006 Ark. LEXIS 178 \*1.

47 740 P.2d 292 (Utah Ct. App. 1987).

48 *Id.* at 296 (quoting *Sanchez v. L.D.S. Social Servs.*, 680 P.2d 753, 756 (Utah 1984) (Durham,



J., dissenting)).

49 *Id.* at 293.

50 *Id.* at 296.

[\*P39] In short, the lack of a guaranteed filing period after the child's birth under the district court's interpretation of the adoption statutes would create great uncertainty for unwed fathers and a risk of a sudden and unintentional loss of the opportunity to file that is unnecessary to the state's compelling interests. The statute already explicitly provides that the Legislature's concern for the mother's relationship with the child is important enough to require her to wait twenty-four hours before the relinquishment. In most instances when the mother relinquishes the child after the twenty-four-hour waiting period expires, the parties to the adoption [\*\*\*31] will not know for certain if the father has filed an adequate legal claim until they consult the state registry. In the meantime, the child usually goes home with a prospective adoptive family. Further, in cases involving a relinquishment on a holiday or weekend, the parties to an adoption already have to wait until the next business day to be certain that the father did not file an appropriate paternity petition and register his claim. In this case, L.D.S. Family Services contacted the registry the Tuesday after Labor Day weekend. Given these practical realities, the addition of a single business day in which the father may file does not unduly burden the state's compelling interest in prompt resolution of parental rights.

[\*P40] Additionally, the uncertain filing period that the statute would provide to unwed fathers under the district court's interpretation actually works against, rather than promotes, the state's compelling interest in permanent adoptions. If the rights of unwed fathers are well defined, it will be more difficult for fathers to mount as-applied constitutional challenges to the deprivation of their rights. As we said in *Sanchez v. L.D.S. Social Services*,<sup>51</sup> "a firm cutoff [\*\*\*32] date is reasonable, if not essential."<sup>52</sup> That firm cutoff date benefits all parties if it is tied to a certain time period after the child's birth rather than being left to the uncertainty of nature. In at least one case involving an as-applied challenge to the statute, we have expressed significant concern over an unwed father's unexpected loss of the opportunity to assert paternity where the child was born prematurely.<sup>53</sup> Such cases would be less troubling under an interpretation of Utah law that allows unwed fathers a guaranteed window after the child's birth to assert

paternity without risk that the mother's actions will deprive him of that right.

51 680 P.2d 753 (*Utah* 1984).

52 *Id.* at 755.

53 See *In re Adoption of Baby Boy Doe*, 717 P.2d 686, 690-91 (*Utah* 1986).

## II. RULE 6 APPLIES TO ENLARGE THE TIME THAT AN UNWED FATHER OF A CHILD BORN ON A WEEKEND OR HOLIDAY HAS TO FILE AND REGISTER

[\*P41] Having determined that the district court's interpretation of the statutes unconstitutionally deprives unwed fathers of due process, we now consider whether that unconstitutionality may be avoided by applying *rule 6 of the Utah Rules of Civil Procedure* to enlarge the time in which an unwed father may file [\*\*\*33] when the twenty-four-hour postbirth period falls on a weekend or holiday. As the Utah Court of Appeals has recognized, because the statutes controlling adoption do not "purport to contain[] a complete set of procedural guidelines to govern adoptions,"<sup>54</sup> the rules of civil procedure are generally applicable to adoption proceedings.<sup>55</sup> Therefore, we will apply *rule 6* to the relevant adoption statutes unless we conclude that its application would be inconsistent with those statutes.<sup>56</sup>

54 *Thiele v. Anderson*, 1999 UT App 56, P 15, 975 P.2d 481.

55 See *id.* PP 15-16 & n.6.

56 See *id.* PP 16-17 & n.6.

[\*P42] In determining whether application of *rule 6* would be inconsistent with the adoption statutes defining the filing deadlines [\*\*634] imposed on unwed fathers, we apply standard canons of statutory construction. "[O]ur primary goal is to give effect to the legislature's intent in light of the purpose the statut[es were] meant to achieve."<sup>57</sup> Additionally, because "no act should be declared unconstitutional unless it is clearly and palpably so," we read the statutes in a manner "consistent with basic constitutional rights."<sup>58</sup> Therefore, we follow the fundamental rule of statutory construction that "if a legislative [\*\*\*34] act is susceptible of two constructions, one conformable to the constitutional provision on the subject and the other not, [we] will adopt the one that is conformable, and reject the one that is not."<sup>59</sup>

57 *Evans v. State*, 963 P.2d 177, 184 (Utah 1998).

58 *Ellis v. Soc. Servs. Dep't of the Church of Jesus Christ of Latter-day Saints*, 615 P.2d 1250, 1255-56 (Utah 1980).

59 *Pleasant Grove City v. Holman*, 59 Utah 242, 202 P. 1096, 1098 (Utah 1921).

[\*P43] We initially agree with A.E. that the adoption statutes requiring unwed fathers to file a paternity petition, register, and take other actions "prior to the mother's . . . execution of consent to adoption of the child[,] or . . . relinquishment of the child for adoption" <sup>60</sup> are generally intended to cut off the unwed father's right to intervene at the same time that the mother's rights to the child are cut off. But as we noted above, the adoption statutes work in concert to give most unwed fathers twenty-four hours, covering a total of one business day after the birth of a child, to file a paternity petition and register--or risk losing all rights to his child. If we determine that the Legislature intended through this statutory scheme to create a minimum filing [\*\*\*35] period for unwed fathers that is connected to a calculable time period after the child's birth, *rule 6 of the Utah Rules of Civil Procedure* would apply to enlarge the filing period when the last day falls on a holiday or weekend. And unwed fathers would essentially be given a minimum period of one business day to file a petition for paternity and to register with the state after the child's birth--but beyond that point the unwed father could file only prior to the mother's consent or relinquishment. <sup>61</sup>

60 Utah Code Ann. § 78-30-4.13(3)(d)(ii) (Supp. 2006); *accord id.* § 78-30-4.13(3)(a) (Supp. 2004), *amended by* ch. 137, § 6 & ch. 150, § 5, 2005 Utah Laws 894-96, 1017-18.

61 In Indiana, a statutory scheme that differentiates between minimum and maximum time periods controls an unwed father's filing rights, where the unwed father must register by the later of thirty days after the child's birth or the filing of a petition for the child's adoption. *Ind. Code Ann. § 31-19-5-12* (LexisNexis 2006).

[\*P44] The question before us is, therefore, whether as a matter of statutory construction we should interpret the minimum filing period ending a total of one day after birth to be a time period allowed by [\*\*\*36] statute subject to enlargement by *rule 6*, or whether the filing period must in all cases be attached to the mother's

relinquishment. A.E. argues that the Legislature intended that unwed fathers demonstrate the appropriate commitment prior to the mother's relinquishment, whenever it occurs, and that the twenty-four-hour waiting period was enacted solely for the benefit of the mother. She cites for support to a treatise on family law, which suggests that such waiting periods derive

from the view that a woman cannot fully comprehend the significance of relinquishing all rights to her child until she has had the actual experience of giving birth. She needs time to reflect upon the wisdom of an earlier expressed intention to relinquish the child, or to reconsider an earlier reluctance to relinquish.

62

62 Joan H. Hollinger, *Adoption Law & Practice* § 2.11[1][a] (2006).

[\*P45] That the Legislature likely intended section 78-30-4.19 to give the mother sufficient time to consider her decision in light of the events of childbirth does not, however, rule out the probability that the Legislature was also concerned with defining the unwed father's rights. And as we described in the previous section, under [\*\*\*37] the Utah Constitution, an unwed father must also be given a reasonable opportunity to decide whether he will take the legal actions necessary to assert his paternal rights. Section 78-30-4.19 is part of a section of the Code that establishes procedures that strike a balance between [\*\*\*635] "the rights and interests of all parties affected by an adoption proceeding." <sup>63</sup> In fact, the Legislature states in section 78-30-4.12(3)(a) that "[i]n enacting Sections 78-30-4.12 through 78-30-4.21, the Legislature prescribes the conditions for determining whether an unmarried biological father's action is sufficiently prompt and substantial to require constitutional protection." <sup>64</sup> Thus, the statutes are subject to two possible interpretations: one where the statutes are intended to set a minimum filing period for unwed fathers and where that period is subject to enlargement by *rule 6*; and one where the filing period is linked only to the mother's relinquishment, whenever it occurs.

63 Utah Code Ann. § 78-30-4.12(1) (Supp. 2006).

64 *Id.* § 78-30-4.12(3)(a).

[\*P46] Where two interpretations of a statute are possible, we adopt the interpretation that is constitutional. Therefore, in this case, we interpret the adoption [\*\*\*38] statutes to provide unwed fathers with a minimum filing period that in most cases extends until a total of twenty-four hours after the child's birth. In the ordinary case, this gives the unwed father a total of one full business day after his child's birth to complete the requirements (although the business day may be split, for example, between Monday afternoon and Tuesday morning). This is a period of time that can be calculated before the end of the period and thus is one to which *rule 6 of the Utah Rules of Civil Procedure* applies. To assure that the unwed father always gets one business day after the child's birth, we apply *rule 6* any time the occurrence of a weekend or holiday means that the father is not afforded a full business day. In those cases, the filing period is extended to the end of the next business day.<sup>65</sup> In this case, because A.E. gave birth on Saturday morning, Thurnwald had until the end of the day on Tuesday to file.

<sup>65</sup> We recognize that the application of *rule 6* to the postbirth filing period may give some unwed fathers more than twenty-four hours after a child's birth to file a paternity petition. If the twenty-four-hour postbirth period falls exclusively on [\*\*\*39] weekdays, the unwed father has one full business day in which to file his petition. But if any portion of the postbirth period falls on a weekend or holiday, the unwed father has until the end of the next business day to file his petition, which may result in a postbirth filing period of more than twenty-four hours even exclusive of the weekend or holiday hours. For example, if the child is born at noon on Friday, the unwed father will have until the end of the business day on Monday to file his petition. This result is a consequence of *rule 6* allowing for a time period to run "until the end of the next day that is not a Saturday, a Sunday, or a legal holiday." *Utah R. Civ. P. 6*. When *rule 6* has no application because no portion of the relevant time period falls on a weekend or holiday, there is no basis for enlarging the time for filing.

## CONCLUSION

[\*P47] We hold that unwed fathers have a constitutional right to a postbirth opportunity to assert

paternity that is unduly infringed upon if Utah's adoption statutes are interpreted to eliminate that opportunity when a child is born on a weekend or holiday. Accordingly, we interpret Utah's adoption statutes to provide unwed fathers with a minimum [\*\*\*40] period of twenty-four hours after the child's birth to file a paternity claim. And in instances where unwed fathers do not receive a full business day after the birth to file their claims because part or all of the period falls on a holiday or weekend, we apply *rule 6 of the Utah Rules of Civil Procedure* to enlarge the filing period to the end of the next business day. Because Thurnwald's child was born on Saturday of Labor Day weekend and he filed his paternity petition and notice on Tuesday, the next business day, we hold that Thurnwald's petition was timely. We therefore reverse the district court's grant of summary judgment against him and remand for further proceedings consistent herewith.

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[\*P48] Justice Parrish, Justice Nehring, and Judge Barrett concur in Justice Durrant's opinion.

[\*P49] Having disqualified herself, Chief Justice Durham does not participate herein; District Judge William A. Barrett sat.

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## DISSENT BY: WILKINS

### DISSENT

[\*\*636] WILKINS, Associate Chief Justice, dissenting:

[\*P50] I respectfully differ with my colleagues. It appears clear that the Legislature intended to give an unmarried biological father a strictly limited but adequate period of time within which to take the legal steps necessary to assert [\*\*\*41] any claim he intends to make as a legal father. The period begins at the moment of conception and ends at the time the biological mother executes her consent to adoption. If he fails to act promptly, his claim to the child ends with the mother's. The usual biological processes result in a window of at least eight or nine months within which the unmarried biological father is at liberty to file the necessary legal action and notice. The only obstacle to successful preservation of this right is totally within the control of

the father: delay.

[\*P51] The limitation placed by statute on the legally effective consent to adoption by the biological mother is not linked to, nor does it appear to be intended to limit, action by the unmarried biological father. The father has until the mother consents to the adoption of the child. The mother is prohibited from consenting to the adoption for a period of 24 hours after the birth of her child. Although these two limitations are interrelated factually, they are independent legally. No direct reference to the "additional 24 hours, or one business day" relied upon by my colleagues appears in the statute relating to the father's limitations.

[\*P52] No predictable [\*\*\*42] cut-off date for the father's filing is discernable in advance. It is subject to calculation only in retrospect, and only when and if the mother gives her consent to adoption of the child. As a result, *Rule 6 of the Rules of Civil Procedure* (extending to the next business day an act required by a designated date) has no application. An unmarried biological father cannot possibly *rely* on *Rule 6* in waiting until Monday.

Only after it is too late can he even know that the deadline has arrived.

[\*P53] This result, harsh as it may at times appear, is in keeping with the policy set by the Legislature. Those who elect to father a child without benefit of marriage must take steps to assert their legal relationship with the child, or they risk losing it altogether. The policy of the law is to give the greatest benefit to the child, the innocent party in the overall situation, by encouraging either responsible parenting or prompt and early adoption. A father who waits the full gestation period before taking the necessary action to ensure his continued legal relationship with his child, does so at his own risk. The law acts to cut him off, in favor of his child, when prompt and legal adoption is the [\*\*\*43] alternative.

[\*P54] I find no constitutional impediment to the statutory process established by the Legislature in this regard. I would affirm the decision of the trial court.

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LEXSEE 2008 UT 11

**Town of Leeds, a Utah municipal corporation, Plaintiff and Appellee, v. Terry Prisbrey, Defendant and Appellant.**

No. 20061085

SUPREME COURT OF UTAH

*2008 UT 11; 179 P.3d 757; 597 Utah Adv. Rep. 17; 2008 Utah LEXIS 14*

February 12, 2008, Filed

**SUBSEQUENT HISTORY:** Released for Publication April 3, 2008  
Companion case at *Wasatch County v. Okelberry, 2008 UT 10, 179 P.3d 768, 2008 Utah LEXIS 15 (2008)*

**PRIOR HISTORY:** [\*\*\*1]

Fifth District, St. George. The Honorable James L. Shumate. No. 060500408.

**COUNSEL:** Heath H. Snow, Bryan J. Pattison, St. George, for plaintiff.

Jeffrey C. Peatross, St. George, for defendant.

**JUDGES:** DURRANT, Justice. Chief Justice Durham, Associate Chief Justice Wilkins, Justice Parrish, and Justice Nehring concur in Justice Durrant's opinion.

**OPINION BY:** DURRANT**OPINION**

[\*\*758] *DURRANT, Justice:*

**INTRODUCTION**

[\*P1] This case, along with two companion cases that we also decide today,<sup>1</sup> concerns *Utah Code section 72-5-104(1)* (the "Dedication Statute"), which provides that "[a] highway is dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years."<sup>2</sup> In this

case we consider whether a continuously manned twenty-four-hour roadblock is an interruption in continuous use sufficient to restart the running of the Dedication Statute's ten-year period. We hold that it is.

<sup>1</sup> *Utah County v. Butler, 2008 UT 12, 179 P.3d 775; Wasatch County v. Okelberry, 2008 UT 10, 179 P.3d 768.*

<sup>2</sup> *Utah Code Ann. § 72-5-104(1)* (2001).

**BACKGROUND**

[\*P2] The road known as West Center Street in the Town of Leeds originates at an intersection with Main Street, extends north to the crest of a small incline, [\*\*\*2] and then proceeds downhill across real property owned by Terry Prisbrey through a narrow "box" underpass beneath Interstate 15 to an area known as Angel Springs. In 2000, Mr. Prisbrey purchased the property from Joanne George, whose family had owned the property since 1878. Sometime thereafter, Mr. Prisbrey, in an attempt to restrict travel on the road, erected a chain link fence across the road at the entrance to the "box" tunnel and affixed "No Trespassing" signs to the fence. In response, the Town of Leeds filed this action seeking a declaratory judgment [\*\*759] deeming West Center Street dedicated to the public pursuant to *Utah Code section 72-5-104(1)*<sup>3</sup> and a temporary restraining order and injunction enjoining Mr. Prisbrey from restricting travel on the road.

<sup>3</sup> An earlier version of this statute was in effect at the time the Town of Leeds claims West Center

Street was dedicated and abandoned to the use of the public. *See* Utah Code Ann. § 27-12-89 (1995). A 1998 amendment to the earlier version renumbered this section but made no substantive changes to it. 1998 Utah Laws 861. We therefore refer to the current version of the statute throughout this opinion.

[\*P3] The trial court conducted evidentiary [\*\*\*3] hearings regarding the temporary restraining order. By stipulation of the parties, the hearings were consolidated with and considered as a trial on the merits. The trial court heard testimony from a number of witnesses who claimed that they used West Center Street whenever they wished, without restriction, and without obtaining Mrs. George's permission. The trial court also heard from Mrs. George, who testified that in October 1964, and again in October 1971, 1978, 1985, 1992, and 1999, she, alone or with the assistance of her sons, set up a twenty-four-hour roadblock on West Center Street for the purpose of retaining private ownership of the road. These roadblocks consisted of her or her sons' physical presence, sawhorses placed across the road, and "No Trespassing" signs placed on the sawhorses. Mrs. George testified that she never encountered anyone attempting to travel on West Center Street during her roadblocks and knows of no one who was actually prevented from using the road because of her blockades.

[\*P4] At the conclusion of the hearings, the trial court entered its Findings of Fact and Conclusions of Law. It concluded that "[m]embers of the public traveled West Center Street from [\*\*\*4] 1966 to 1996 as often as they found it convenient or necessary, at times chosen by them and, therefore, the public's use of West Center Street was continuous during that period of time." It also concluded that, during the same period of time, West Center Street was used as a public thoroughfare because "there was not sufficient action taken to adequately put the public on notice either that permission was needed to use West Center Street nor was there sufficient action taken by Mrs. George to obstruct the public's free and unrestricted passing and travel on West Center Street." And the court found that "continuous use of West Center Street as a public thoroughfare was made for a period of ten years (1966 to 1996)." Thus, the court concluded that the Town of Leeds had demonstrated by clear and convincing evidence that "West Center Street is a dedicated public road pursuant to *Utah Code Ann. § 72-5-104(1)*." The court ordered Mr. Prisbrey to remove

any obstructions of or signage on West Center Street and enjoined him from taking future action to prevent travel on the road. Mr. Prisbrey appealed; we have jurisdiction pursuant to *Utah Code section 78-2-2(3)(j)*.

## STANDARD OF REVIEW

[\*P5] We review [\*\*\*5] the "trial court's legal interpretation of the Dedication Statute for correctness and its factual findings for clear error."<sup>4</sup> But whether the facts of a case satisfy the requirements of the Dedication Statute is a mixed question of fact and law that involves various and complex facts, evidentiary resolutions, and credibility determinations.<sup>5</sup> Thus, we review the "trial court's decision regarding whether a public highway has been established under [the Dedication Statute] . . . for correctness but grant the court significant discretion in its application of the facts to the statute."<sup>6</sup>

<sup>4</sup> *Wasatch County v. Okelberry*, 2008 UT 10, P 8, 179 P.3d 768.

<sup>5</sup> *Heber City Corp. v. Simpson*, 942 P.2d 307, 309-10 (Utah 1997).

<sup>6</sup> *Id.* at 310.

## ANALYSIS

[\*P6] The Dedication Statute provides as follows: "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."<sup>7</sup> We have explained that a road is "continuously used" [\*\*760] when the public makes "a continuous and uninterrupted use" of it "as often as they [find] it convenient or necessary."<sup>8</sup> In *Wasatch County v. Okelberry*, a companion case that we decide today, we set forth a bright-line [\*\*\*6] rule for determining what qualifies as an interruption in continuous use sufficient to restart the running of the Dedication Statute's ten-year period: "[a]n overt act that is intended by a property owner to interrupt the use of a road as a public thoroughfare, and is reasonably calculated to do so."<sup>9</sup> Credible evidence of such an interruption precludes a finding of continuous use.<sup>10</sup>

<sup>7</sup> 1 *Utah Code Ann. § 72-5-104(1)* (2001).

<sup>8</sup> *Boyer v. Clark*, 7 Utah 2d 395, 326 P.2d 107, 109 (Utah 1958).

<sup>9</sup> 2008 UT 10, P 15.

<sup>10</sup> *Id.*

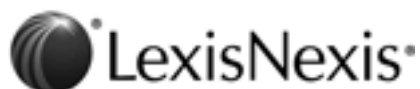
[\*P7] In this case, the trial court found that West Center Street was continuously used as a public thoroughfare from 1966 to 1996. But the court also found that Mrs. George, in 1964, 1971, 1978, 1985, 1992, and 1999, established twenty-four-hour physical roadblocks of West Center Street. This, Mrs. George testified, she did with the intent of retaining private ownership of the road. We conclude that Mrs. George's testimony is credible evidence of overt acts intended and reasonably calculated to interrupt the use of West Center Street as a public thoroughfare. Although she did not block the public's *actual* use of the road because her roadblocks occurred during intermissions in the road's use, Mrs. George's [\*\*\*7] intent and conduct were nevertheless sufficient to interrupt West Center Street's continuous use as a public thoroughfare for purposes of the Dedication Statute.<sup>11</sup> Because each of Mrs. George's roadblocks was an interruption sufficient to restart the running of the Dedication Statute, West Center Street has not been continuously used as a public thoroughfare for a period of ten years. We therefore reverse the trial court's decision and remand with an instruction to enter judgment in favor of Mr. Prisbrey.

11 *See id.* P 16 (explaining that periods of time between usages of an infrequently traveled road are mere intermissions, not interruptions, and that the distinction between an intermission and an interruption "lies in the intent and conduct of the property owner").

## CONCLUSION

[\*P8] Mrs. George's twenty-four-hour roadblocks constituted overt acts intended to interrupt the use of West Center Street as a public thoroughfare and were reasonably calculated to do so. These interruptions preclude a finding of continuous use. We reverse the trial court's decision deeming West Center Street a dedicated public road and remand with an instruction to enter judgment in favor of Mr. Prisbrey.

[\*P9] Chief Justice [\*\*\*8] Durham, Associate Chief Justice Wilkins, Justice Parrish, and Justice Nehring concur in Justice Durrant's opinion.



LEXSEE 2006 UT 46

**In the Matter of the Estate of S.T.T. Darlene Uzelac, Plaintiff and Appellee, v.  
Darryl Thurgood, Defendant and Appellant.**

No. 20040796

## SUPREME COURT OF UTAH

*2006 UT 46; 144 P.3d 1083; 559 Utah Adv. Rep. 4; 2006 Utah LEXIS 138*

August 25, 2006, Filed

**SUBSEQUENT HISTORY:** As Corrected December 8, 2006. Released for Publication November 3, 2006.

**PRIOR HISTORY:** [\*\*\*1] Third District, Salt Lake The Honorable Joseph C. Fratto, Jr. No. 003900606. *Thurgood v. Uzelac (In re S.T.T.), 83 P.3d 398, 2003 UT App 439, 2003 Utah App. LEXIS 132 (2003).*

**COUNSEL:** J. Bruce Reading, Salt Lake City, for plaintiff.

Jerrald D. Conder, Salt Lake City, for defendant.

**JUDGES:** DURHAM, Chief Justice. Associate Chief Justice Wilkins, Justice Durrant, Justice Parrish, and Justice Nehring concur in Chief Justice Durham's opinion.

**OPINION BY:** DURHAM

**OPINION**

[\*\*1085] On Certification from the Utah Court of Appeals

*DURHAM, Chief Justice:*

**INTRODUCTION**

[\*P1] This case comes before this court as the result of a visitation dispute between a child's maternal grandparents and her father. Following the unexpected

death of the child's mother, the grandmother petitioned the district court for custody of the child. However, the district court awarded custody to the father. Although the court's custody order urged the father to allow future visitation between the child and her grandparents, the parties were unable to agree upon an acceptable visitation schedule. As a result, the grandmother filed a petition for visitation pursuant to *Utah Code section 30-5-2* (Supp. 2005) (the Grandparent Visitation Statute). The district court granted the petition.

[\*P2] On appeal, the father asks this court to declare [\*\*\*2] that the district court's application of the statute violated his fundamental rights under the United States Constitution to manage the care, control, and custody of his child. While the father limits his arguments to an as-applied challenge, his claims appear to also directly challenge the constitutionality of any court's authority to order grandparent visitation. Because the Grandparent Visitation Statute grants courts authority to order grandparent visitation, we must undertake a facial constitutional analysis of the statute. Accordingly, we analyze first whether the plain language of the statute is unconstitutional, and second whether the trial court applied the statute in a manner that unconstitutionally infringed upon the father's liberty interest in the care, custody, and control of his child. We hold that the statute is constitutional, both on its face and as applied in this case.

**BACKGROUND**

[\*P3] Darryl and Shauna Thurgood were divorced



in February 1994. In December 1995, following a brief period of reconciliation, Ms. Thurgood gave birth to their daughter (the child). The following March, Ms. Thurgood and her child moved in with Ms. Thurgood's parents, Darlene [\*\*\*3] and Robert Uzelac, where they lived for the next three years. During that period, the child spent a substantial amount of time with her grandparents and interacted with them on a daily basis. When the child became old enough to attend preschool, one of her grandparents regularly picked her up from school and spent afternoons with her. The Uzelacs cared for the child during the week, took her camping on weekends, and vacationed with her.

[\*P4] The extent of the Uzelacs' involvement changed somewhat in February 1999, when Ms. Thurgood moved into her own home, taking the child with her. Thereafter, the grandmother continued to play a significant role in the child's life by babysitting the child several times each week and speaking to her on the phone almost daily. This ended just over a year later when Ms. Thurgood died unexpectedly after a short illness. As a result, Ms. Uzelac moved into the child's home to provide full-time care for the child.

[\*P5] Following Ms. Thurgood's death, Ms. Uzelac petitioned to be appointed as guardian and conservator of the child.<sup>1</sup> However, in June 2000, the district court awarded custody to the child's father, Mr. Thurgood, as the sole surviving [\*\*\*4] natural parent. In its order, the district court stated that there "ought" to be future visitation between the child and her maternal grandparents with Mr. Thurgood's approval and under "reasonable and liberal circumstances," and the court admonished the parties "to cooperate to see that the child visits appropriately with her grandmother."

<sup>1</sup> Ms. Uzelac was the only plaintiff before the district court. Mr. Uzelac never joined her as a party. However, to the extent that the time the child spends with Ms. Uzelac will also be spent with Mr. Uzelac, the district court's findings determined that it would be in the child's best interests to spend time with her maternal grandparents. Like the district court, we will refer to the grandparents where relevant, even though Ms. Uzelac is the only appellee.

[\*\*1086] [\*P6] Shortly thereafter, it became apparent that the parties could not work out a mutually acceptable visitation schedule. Mr. Thurgood first

received custody in June 2000, but he did not allow any visitation between [\*\*\*5] the child and the Uzelacs for five months. Thereafter, Mr. Thurgood granted Ms. Uzelac two visits in December 2000, one for the child's birthday and the other for a family Christmas party. The next visitation occurred in March 2001, when Mr. Thurgood allowed Ms. Uzelac to spend one hour with the child. Ms. Uzelac did not see the child again until July 2002, at which time she petitioned the court for visitation pursuant to the Grandparent Visitation Statute. In July 2002, the court granted Ms. Uzelac temporary visitation, pending a final resolution of this matter. Despite the court-ordered schedule for visitation on the first weekend of every month, Mr. Thurgood only allowed Ms. Uzelac to visit the child twice between July 2002 and January 2003. As a result, the district court ordered the father to allow Ms. Uzelac to make up for the lost visits by spending every other weekend with the child for an indefinite period of time. Subsequently, visitation took place every other weekend until December 2003, when the Utah Court of Appeals reversed the district court's order, holding that the district court had abused its discretion by ordering make-up visitation in excess of the visitation [\*\*\*6] necessary to remedy the number of visits the father had prevented. *Thurgood v. Uzelac*, 2003 UT App 439, PP 14-15, 83 P.3d 398. In January 2004, Mr. Thurgood moved to Florida with the child and the district court ordered temporary telephonic visitation between the child and Ms. Uzelac. The last telephonic visitation on record occurred in February 2004.

[\*P7] During this protracted litigation, Mr. Thurgood challenged the constitutionality of the Grandparent Visitation Statute, complaining that it infringed upon his liberty interest in the care, custody, and control of his child. The district court held the statute was constitutional, therefore giving Ms. Uzelac standing and the court jurisdiction to proceed to the question of whether visitation was in the child's best interests. The court then ordered the parties to conduct discovery regarding whether visitation was in the best interests of the child.

[\*P8] As part of its discovery order, the court ordered the performance of a "visitation evaluation by a duly qualified evaluator." The parties stipulated to the appointment of Valerie Hale, Ph.D. Although Mr. Thurgood was invited to participate in the evaluation [\*\*\*7] process, he declined to do so. Because Mr. Thurgood refused to participate, Dr. Hale was only able

to conduct an informal evaluation that was "limited to an assessment of the nature of the relationship between [the child] and her maternal grandparent without further input from Mr. Thurgood." Dr. Hale conducted her evaluation by meeting with the child and the Uzelacs at the Uzelacs' home during one of the scheduled grandparent visitation periods.

[\*P9] Based on her evaluation, Dr. Hale made the following findings: (1) "[t]here is a great deal of physical affection between the grandparents and [the child]"; (2) "[b]oth grandparents were patient [and] able to set and maintain limits" with the child; (3) "[t]he child responded to her grandparents as loved and trusted care givers"; (4) the child "expressed her desire to spend more time with her grandparents"; and (5) the child talked about the time when she lived in her grandparents' home with her mother. Dr. Hale concluded that, as a result of the grandparents' role as primary caregivers, the child "demonstrated a strong emotional attachment to her grandparents" that was as strong as parent-child emotional attachments [\*\*\*8] and that the loss of this attachment would devastate the child. In addition, Dr. Hale concluded that the child still had an emotional wound from her mother's death. Because Dr. Hale believed the child kept the memory of her mother alive through access to her grandparents, she concluded that a loss of the relationship with the Uzelacs would impede the child's ability to cope with her mother's death. Therefore, Dr. Hale recommended that it would be "in the best interests of the child to maintain a meaningful relationship with her maternal grandparents which is characterized by frequent and on-going visitation with them."

[\*\*1087] [\*P10] A trial regarding whether Ms. Uzelac should be granted permanent visitation was held on July 28, 2004. At the trial, Dr. Hale testified regarding her findings and her evaluation report was admitted into evidence. Mr. Thurgood countered Dr. Hale's testimony with the testimony of Brad Drown, a licensed clinical social worker. Mr. Drown testified that visitation would not be appropriate at that time due to the animosity between Mr. Thurgood and the Uzelacs, as was evidenced by the ongoing dispute.

[\*P11] The district court rejected Mr. Drown's recommendation, [\*\*\*9] determining instead that there is a "bond of love and affection between [the child] and both of her maternal grandparents." The court then

concluded that the parental presumption had been rebutted and visitation would be in the child's best interests. Therefore, the court ordered visitation between Ms. Uzelac and her grandchild.

[\*P12] Mr. Thurgood appealed the district court's decision to the Utah Court of Appeals, claiming that the district court's application of the Grandparent Visitation Statute violated his constitutional rights. The court of appeals certified the case to this court. We have jurisdiction pursuant to *Utah Code section 78-2-2(3)(b)* (2002).

## ANALYSIS

[\*P13] Parents have a constitutional right to manage "the care, custody and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). The U.S. Supreme Court has recognized that this right is "perhaps the oldest of the fundamental liberty interests." *Id.* at 65. This liberty interest encompasses parents' personal choices in family life beginning with their right to marry and conceive and extending to their right [\*\*\*10] to control the education of their children and raise them according to the dictates of their religion. *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (recognizing that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the 14th Amendment); *Wisconsin v. Yoder*, 406 U.S. 205, 232-233, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) (holding that compulsory high school attendance interfered with Amish parents' fundamental rights to raise their children according to the dictates of their religion); *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972) (recognizing the "rights to conceive and raise one's children"); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35, 45 S. Ct. 571, 69 L. Ed. 1070 (1925) (holding that a parent's liberty interest extends to the choice of education and upbringing of children); *Meyer v. Nebraska*, 262 U.S. 390, 399-401, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) (holding that the right to "marry, establish a home and bring up children" is protected by the *Due Process Clause of the Fourteenth Amendment* and includes the parents' right to control the education of [\*\*\*11] their children). In accordance with this right, parents are entitled to a presumption that they act in the best interests of their children, *see, e.g., Parham v. J.R.*, 442 U.S. 584, 602, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979) ("The law's concept of the family rests on a

presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."), and their child-rearing decisions are therefore generally entitled to deference, *see Troxel*, 530 U.S. at 69.

[\*P14] Notwithstanding the parental presumption, however, "the family itself is not beyond regulation." *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S. Ct. 438, 88 L. Ed. 645 (1944). The state as *parens patriae* has a "wide range" of authority that may ultimately limit parental autonomy in raising children. *Id.* at 167. The U.S. Supreme Court has long upheld the state's use of its *parens patriae* authority to protect children in many arenas; for example it has recognized a state's authority to mandate school attendance, *see Meyer*, 262 U.S. at 400 (acknowledging importance of education enforced in [\*\*\*12] most states by compulsory education laws), regulate child labor, *see Sturges & Burn Mfg. Co. v. Beauchamp*, 231 U.S. 320, 325, 34 S. Ct. 60, 58 L. Ed. 245 (1913) (allowing states to prohibit youths from working in dangerous occupations), and protect children from abuse and neglect, *see Santosky*, 455 U.S. at 766-67 [\*\*1088] (upholding state interest in "promoting the welfare of the child" through a parental termination proceeding as long as the state provides sufficient protection to parents to satisfy due process).

[\*P15] The state's power to protect the best interests of minor children also extends to divorce proceedings and custody determinations. *See Palmore v. Sidoti*, 466 U.S. 429, 433, 104 S. Ct. 1879, 80 L. Ed. 2d 421 (1984) (reversing a state court's decision to give a father custody based on the mother's interracial marriage and stating that "[t]he goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the *Equal Protection Clause*"; *cf. Utah Code Ann.* § 30-3-5(5)(a) (Supp. 2005) ("In determining parent-time rights of parents . . . the court shall consider [\*\*\*13] the best interest of the child."). In some cases, states have extended this authority to include the protection of relationships that children have formed with third parties. *See Campbell v. Campbell*, 896 P.2d 635, 643 (Utah Ct. App. 1995) (recognizing the state has a legitimate interest "in fostering relationships between grandparents and their grandchildren"); *cf. Utah Code Ann.* § 30-3-5(5)(a) (requiring courts to consider the best interests of the child in determining the visitation rights of immediate family members). For example, many states, like Utah, have

passed laws protecting the relationship between children and grandparents.<sup>2</sup>

<sup>2</sup> *See Ala. Code* § 30-3-4.1 (Supp. 2005); *Alaska Stat.* § 25.20.065 (2004); *Ariz. Rev. Stat. Ann.* § 25-409 (Supp. 2005); *Ark. Code Ann.* § 9-13-103 (2006); *Colo. Rev. Stat.* § 19-1-117 (2005); *Conn. Gen. Stat.* § 46b-59 (2005); *Del. Code Ann. tit. 10, § 1031* (2006); *Ga. Code Ann.* § 19-7-3 (2006); *Haw. Rev. Stat.* § 571-46.3 (Supp. 2005); *Idaho Code Ann.* § 32-719 (2006); 750 *Ill. Stat.* 5/607 (LexisNexis Supp. 2006); *Ind. Code Ann.* § 31-17-5-1 (2006); *Ky. Rev. Stat. Ann.* § 405.021 (2006); *Mich. Comp. Laws Serv.* § 722.27b (2006); *Minn. Stat.* § 257C.08 (2004); *Miss. Code Ann.* § 93-16-3 (2004); *Mo. Rev. Stat.* § 452.402 (Supp. 2005); *Mont. Code Ann.* § 40-9-102 (2005); *Neb. Rev. Stat.* § 43-1802 (2004); *Nev. Rev. Stat. Ann.* § 125C.050 (LexisNexis 2004); *N.M. Stat. Ann.* § 40-9-2 (LexisNexis 1999); *N.C. Gen. Stat.* § 5-13.2A (2005); *N.D. Cent. Code* § 14-09-05.1 (2004); 23 *Pa. Stat. Ann.* §§ 5311-5313 (West 2001); *R.I. Gen. Laws* §§ 15-5-24.1 to -24.3 (2003); *S.D. Codified Laws* § 25-4-52 (2006); *Tenn. Code Ann.* §§ 36-6-306 to -307 (2006); *Tex. Fam. Code Ann.* § 153.433 (Vernon Supp. 2005); *Vt. Stat. Ann. tit. 15, §§ 1011-1016* (2002); *Wis. Stat.* §§ 767.245, 880.155 (2003-04); *Wyo. Stat. Ann.* § 20-7-101 (2005).

[\*\*\*14] [\*P16] Utah first statutorily recognized the importance of grandparent relationships in 1975 when the legislature amended *Utah Code section 30-3-5*, which dealt with orders concerning children in a divorce proceeding, to address grandparent visitation. *Gribble v. Gribble*, 583 P.2d 64, 66 (Utah 1978) (citing *Utah Code Ann.* § 30-3-5 (1953)). The amended version of the statute instructed courts to consider "the welfare of the child" when granting grandparent visitation. *Utah Code Ann.* 30-3-5 (1953). The amendment reflected the "legislative intent to protect the relationships which affect the child whose parents are being divorced, and to be sensitive to the fact that relationships beyond those of parent-child may be important enough to protect vis-a-vis visitation." *Gribble*, 583 P.2d at 66. Two years later, in 1977, the Utah Legislature extended its recognition of grandparent visitation by adopting *Utah Code sections 30-5-1* and *-2*, the first Utah statutes dealing exclusively with the visitation rights of grandparents. 1977 Utah Laws page no. 566. [\*\*\*15] Specifically, *section 30-5-2*

provided, "The district court may grant grandparents reasonable rights of visitation to grandchildren, if it is in the best interest of the grandchildren." *Id.*

[\*P17] Since 1977, *section 30-5-2* has been amended a number of times. Its current iteration grants grandparents standing and provides that Utah courts may grant visitation if the grandparents rebut the presumption that "a parent's decision with regard to grandparent visitation is in the grandchild's best interests." *Utah Code Ann. § 30-5-2 (2)* (Supp. 2005). The statute then lists a number of factors that are relevant to the court's determination of whether the presumption has been rebutted. *Id.* In particular, the statute favors grandparents whose children have been separated from their grandchildren by death, divorce, separation, or loss of custody by the child of the grandparents. *See id. § 30-5-2 (2)(c), (e), (f).*

[\*\*1089] [\*P18] The district court granted Ms. Uzelac visitation pursuant to this statute. While Mr. Thurgood argues that the district court's order was an unconstitutional application of the statute, his arguments are framed as a facial challenge [\*\*\*16] in that he does not address any arguments unique to either the facts of his case or the district court's application of the statute. Rather, his argument suggests that courts can never constitutionally grant grandparent visitation over the objections of a fit custodial parent and thus the statute cannot be constitutionally applied under any circumstance. Moreover, the district court's authority to grant grandparent visitation is contingent upon the constitutional validity of the statute as a whole. Therefore, we begin our analysis of this case by addressing whether the statute unconstitutionally infringes upon a parent's right to the care, custody, and control of his or her children. Because we conclude that it does not, we then consider whether the statute was applied unconstitutionally in this case.

## I. UTAH'S GRANDPARENT VISITATION STATUTE IS CONSTITUTIONAL

### A. *Troxel v. Granville*

[\*P19] The only U.S. Supreme Court case addressing the federal constitutionality of grandparent visitation is *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). In *Troxel*, the children's paternal grandparents petitioned for bimonthly visitation following the death [\*\*\*17] of the children's father. *Id.*

*at 61.* The grandparents brought their petition pursuant to a Washington statute that allowed "any person" to petition the court for visitation rights "at any time" and authorized the court to order visitation if it would "serve the best interest of the child." *Id.* (quoting *Wash. Rev. Code. § 26.10.160 (3)* (1994)). The children's mother did not oppose all visitation, but she sought to limit it to one short visit per month. *Id.* The trial court disagreed with the mother's judgment and, over her objections, ordered visitation twice per month based on the "best interests of the children." *Id. at 61-62.* The Washington Court of Appeals reversed the trial court's order, and the grandparents sought review from the Washington Supreme Court. *Id. at 62.* The Washington Supreme Court granted the grandparents' petition and held that the statute was facially unconstitutional because it failed to require a "threshold showing of harm" before interfering with parental judgments and swept too broadly by allowing "any person" to petition the court at "any time," leaving the "best interest" standard as the only limiting [\*\*\*18] factor. *Id. at 63.* On certiorari, the U.S. Supreme Court affirmed the judgment of the Washington Supreme Court. *Id.*

[\*P20] A plurality of the Court held that, as applied, the Washington statute unconstitutionally infringed upon the mother's fundamental right to control the upbringing of her children, *id. at 73*, because it failed to accord proper deference to the parental presumption,<sup>3</sup> *id. at 68-69.* The grandparents did not allege or present evidence that their grandchildren's mother was unfit; therefore, the presumption that fit parents act in their children's best interests applied and the mother's decisions were entitled to deference. *Id.* Despite her right to the parental presumption, the trial court did not give any "special weight" to her decision regarding grandparent visitation. *Id. at 69.* In fact, the trial court essentially applied the opposite presumption, assuming that grandparent visitation was in the children's best interests. *Id.* The trial judge specifically stated, "I think [visitation with the] [grandparents] would be in the best interest of the children and I haven't been shown [\*\*\*19] it is not." *Id.* (first alteration in original). The trial judge then reminisced about the enjoyable summers he had spent with his own grandparents and expressed his hope that grandparent visitation [\*\*1090] would be as enjoyable an experience for the children in the case before him. *Id. at 72.* This approach effectively required the mother to prove that her proposed visitation schedule would be in the best interests of her children rather than

requiring the grandparents to prove that the children's best interests would be better served by their own, more generous visitation schedule. *Id. at 69.*

3 The plurality consisted of four justices. *Troxel v. Granville*, 530 U.S. 57, 60, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). Two other justices concurred in the judgment, voting to uphold the Washington Supreme Court's facial invalidation of its own statute. *Id. at 75-80* (Souter & Thomas, J., concurring in the judgment). The remaining three justices dissented. *See id. at 80-91* (Stevens, J., dissenting); *id. at 91-93* (Scalia, J., dissenting); *id. at 93-102* (Kennedy, J., dissenting).

[\*\*20] [\*P21] The plurality's conclusion that the trial court did not give the proper weight to the mother's decisions was supported by the fact that the mother did not seek to deny all visitation and that the district court did not make adequate findings to support its decision. *Id. 71-73.* The plurality deemed it important that the mother did not attempt to deny the grandparents all visitation, but merely wished to limit it beyond the visitation requests of the grandparents. *Id. at 71.* Despite her willingness to offer visitation opportunities to the grandparents, the trial court did not defer to her proposed schedule or make any findings that the mother's proposed visitation schedule was unreasonable. *Id. at 72.* Moreover, the trial court articulated only two formal findings to support its order to supercede the mother's decision: (1) that the grandparents were "part of a large, central, loving family . . . and [could] provide opportunities for the children in the areas of cousins and music," and (2) that "the children would be benefitted by spending quality time with [their grandparents]." *Id. at 72.* The plurality [\*\*21] believed that such meager findings indicated that the trial court's decision hinged on "a simple disagreement" between the trial judge and the mother regarding the children's best interests. *Id.* This was impermissible because the "*Due Process Clause* does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." *Id. at 72-73.* Therefore, based on the trial court's presumption that grandparent visitation was in the children's best interests and the trial court's meager findings, the plurality held that the trial court did not afford due weight to the mother's decision and thus applied the statute unconstitutionally. *Id. at 73.*

[\*P22] Although the plurality limited its holding to

the statute's unconstitutional application, it did criticize the statute as a whole. Specifically, the plurality stated the statute was "breathtakingly broad," essentially allowing "any person" to petition for visitation at "any time" and giving the court power to grant such a petition as long as it served the child's best interest. *Id. at 67.* [\*\*22] According to the plurality, this language "effectively permit[ted] any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review." *Id.* The plurality's censure did not end there. It also disapproved of the statute's failure to require that a court afford a parent's decision "any presumption of validity or any weight whatsoever," instead leaving the decision "solely in the hands of the judge." *Id.* The plurality recognized that this essentially meant that a Washington court could "disregard and overturn *any* decision by a fit custodial parent concerning visitation," *id.* (emphasis in original), which is exactly what it believed the trial court had done, *id. at 72.*

[\*P23] The plurality recognized that most state court visitation adjudication occurs on a case-by-case basis and therefore declined to hold that all nonparental visitation statutes violate the *Due Process Clause* as a per se matter. *Id. at 73.* However, the plurality's criticisms of the Washington statute's language and application provide guidelines concerning what a statute should include in order [\*\*23] to comport with due process. Following *Troxel*, statutes allowing a court to award visitation over the wishes of a parent must presume that fit parents act in their children's best interests. *Id. at 69-70.* Likewise, the plurality implied that statutes requiring a finding that the parent has unreasonably denied or limited visitation would be more likely to be upheld. *See id. at 71-72* (favorably citing to state statutes containing a requirement that visitation be unreasonably denied). Finally, given the plurality's criticisms of the district court's failure to make adequate factual [\*\*1091] findings, *id. at 72*, statutes ought to provide guideposts to aid courts in making specific determinations regarding the rebuttal of the parental presumption. Statutes that follow these guidelines provide greater assurance that courts will allow the parent to make the decision in the first instance and accord "special weight" to the parent's decision when it is reviewed. *Id. at 70.*

[\*P24] The plurality's decision also provides guidance regarding what *Troxel* and the *Due Process Clause* do not require. Although the plurality recognized

[\*\*\*24] that as a fit parent the mother was entitled to the parental presumption, the plurality did not say that a fit parent's decision regarding visitation was absolute; rather, the plurality clearly contemplated that the presumption might be rebutted. *See id. at 69*. The plurality stated that the decision about whether to cultivate an intergenerational relationship "is for the parent to make in the first instance. And, if a fit parent's decision . . . becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination." *Id. at 70*. Thus, the problem in *Troxel* was not the trial court's intervention, but its failure to give any deference to the mother's decision. *Id. at 69*. Similarly, the plurality decision does not impose the requirement that the parental presumption be rebutted by a showing of harm to the child. Indeed, the plurality specifically refused to determine whether the *Due Process Clause* requires a showing of harm or potential harm to the child as a condition precedent to granting visitation. *Id. at 73* (noting the plurality did not consider whether nonparental [\*\*\*25] visitation statutes must include a showing of harm or potential harm to the child as a condition precedent to granting visitation in order to satisfy due process).

[\*P25] In light of these federal constitutional standards, we now address whether *Utah Code section 30-5-2* provides sufficient structural safeguards to protect the constitutional rights of parents to make decisions concerning the care, custody, and control of their children.

#### B. Utah's Grandparent Visitation Statute

[\*P26] "[L]egislative enactments are endowed with a strong presumption of validity; and . . . they should not be declared unconstitutional if there is any reasonable basis upon which they can be found to come within the constitutional frame work [sic]." *Greaves v. State*, 528 P.2d 805, 806-07 (Utah 1974). Therefore, when analyzing the constitutionality of a statute, the court "presumes that the statute is valid" and "resolve[s] any reasonable doubts in favor of constitutionality." *State v. Lopes*, 1999 UT 24, P 6, 980 P.2d 191. Moreover, we will "construe the statute to avoid interpretations that conflict with relevant constitutional [\*\*\*26] mandates, so long as the resulting construction does not conflict with the reasonable or actual legislative purposes of the statute." *State v. Mohi*, 901 P.2d 991, 1009 (Utah 1995). With these principles in mind, we hold that *Utah Code*

*section 30-5-2* (Supp. 2005) can be interpreted consistently with the principles announced in *Troxel*.<sup>4</sup>

4 This case presents this court with its first *post-Troxel* opportunity to address the constitutionality of Utah's Grandparent Visitation Statute. Utah courts have, however, considered whether prior versions of the statute were constitutional under *pre-Troxel* jurisprudence. For example, in *Campbell v. Campbell*, 896 P.2d 635 (Utah Ct. App. 1995), the Utah Court of Appeals considered the constitutionality of a prior version of the Grandparent Visitation Statute, which provided, "The district court may grant grandparents and other immediate family members reasonable rights of visitation if it is in the best interests of the children." *Utah Code Ann. § 30-5-2* (Supp. 1994). The court of appeals concluded the statute was constitutional because it was "narrowly tailored to require 'reasonable' periods of temporary visitation only if the court [found] visitation to be 'in the best interest of the children,'" and it placed the burden of proving best interests on the grandparents rather than presuming that visitation was in the children's best interests. *Campbell*, 896 P.2d at 642-43 (quoting *Utah Code Ann. § 30-5-2* (Supp. 1994)). Thus, the visitation statute was "rationally related to promoting the State's legitimate interest in fostering relationships between grandparents and their grandchildren." *Id. at 643*. The Grandparent Visitation Statute has since been narrowed significantly. *See Utah Code Ann. § 30-5-2* (Supp. 2005).

[\*\*\*27] [\*\*1092] [\*P27] First, the Grandparent Visitation Statute protects parental liberty interests by explicitly incorporating a presumption that parents act in the best interests of their children. *Utah Code Ann. § 30-5-2(2)* ("There is a rebuttable presumption that a parent's decision [concerning grandparent visitation] is in the grandchild's best interests."). Accordingly, courts must generally give deference to a parent's grandparent visitation decisions and may only override them where the petitioning grandparent rebuts the presumption. A grandparent meets this burden when the grandparent shows that there are special circumstances that permit the court to set aside the parent's decision even after the court has given it special weight. *See id.* We read the statute to require that a court must, as a threshold matter,

specifically determine that the grandparent has met this burden in the process of considering whether the court should order visitation. The court's inquiry must acknowledge that, at all times, the burden of proof rests on the petitioner and not on the parent.

[\*P28] The Grandparent Visitation Statute does not specify a standard of proof [\*\*\*28] by which the parental presumption must be rebutted. The degree of proof required in a particular type of proceeding has "traditionally been left to the judiciary to resolve." *Santosky v. Kramer*, 455 U.S. 745, 755, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (internal quotation marks omitted). Because the parental presumption deals with parental liberty interests, and accordingly should be afforded great deference by the courts, we conclude that a clear and convincing standard of proof should apply to satisfy due process requirements. *See Santosky*, 455 U.S. at 769 (mandating the application of at least a clear and convincing standard in parental rights termination cases). Therefore, a grandparent petitioning the court for visitation under the Grandparent Visitation Statute must clearly and convincingly rebut the parental presumption.

5

5 Our requirement that the grandparents must rebut the presumption by clear and convincing evidence is consistent with prior versions of *section 30-5-2*. The 1998 version of *section 30-5-2* provided that in order for a court to override a parent's visitation decision, the court had to find "the petitioner has, by clear and convincing evidence, rebutted the presumption that the parent's decision to refuse or limit visitation with the grandchild was reasonable." *Utah Code Ann. § 30-5-2(2)(e)* (1998). The clear and convincing requirement was removed from the statute in 2000. *See Utah Code Ann. § 30-5-2* (2000).

[\*\*\*29] [\*P29] In addition to incorporating the parental presumption, Utah's Grandparent Visitation Statute contains a second structural component to prevent judgments based on mere disagreement between the judge and the parent by listing several relevant factors that may justify setting a parent's decision aside. These factors are: (1) whether the petitioner is a "fit and proper person"; (2) whether visitation with the grandchild has been "denied or unreasonably limited"; (3) whether the parent is "unfit or incompetent"; (4) whether the

petitioner has "acted as the grandchild's custodian or caregiver" or has a "substantial relationship with the grandchild" the loss of which is "likely to cause harm to the grandchild"; (5) whether the petitioner's child (the parent of the grandchild) "has died or become a non-custodial parent"; (6) whether the petitioner's child has been "missing for an extended period of time"; and (7) whether "visitation is in the best interest of the grandchild." *Utah Code Ann. § 30-5-2(2)(a)-(g)*. These factors can be grouped into three categories, which we will discuss below.

[\*P30] The first category generally addresses situations [\*\*\*30] where a family has been divided by some turn of fate--death, divorce, loss of custody, a missing person, or a declaration that a parent is unfit or incompetent. The statute recognizes that when a family unit has been touched by these events a situation may arise where the child's interests differ from those of the parent. This is particularly true where the direct family line between grandparents and grandchildren has been severed, leaving the "in-law" relationship as the only remaining adult connection. *Id. § 30-5-2(2)(c), (e), (f)*. Recognizing the potential for conflict in the relationship between the parent and the "in-law" and the resulting potential for interference with the grandparent-grandchild relationship, the statute provides [\*\*1093] an avenue for grandparents and grandchildren to maintain their relationship.<sup>6</sup>

6 Prior to 1992, the only grandparents eligible for court-ordered visitation under the Grandparent Visitation Statute were those grandparents "whose child, who is the parent of the grandchildren, is dead, or . . . is divorced or legally separated from the other parent of the grandchildren." *Campbell*, 896 P.2d at 640 n.9 (citing *Utah Code Ann. § 30-5-1(2)* (1989)). The current version of the Grandparent Visitation Statute does not incorporate this as a requirement, but rather includes it as one of several factors a court may consider when addressing a grandparent's petition for visitation. However, we note that it will be extremely difficult, if not impossible, for a grandparent to rebut the parental presumption where a family unit is intact because few, if any, of the statutory factors will apply. *See Campbell*, 896 P.2d at 640 n.9 ("[W]e note that the state has a stronger argument for court intervention to protect the extended family when the nuclear

family has been dissolved." (citation and internal quotation marks omitted)). Moreover, intact family units do not generally present the same emotional tensions as those that arise where the familial connections have been severed by an unfortunate twist of fate that has left only a strained in-law relationship in its wake. While it is true that parents in an intact family unit might unreasonably deny visitation to their own parents, the statute does not appear to be directed to such situations, but rather to those, such as the case before us, where an in-law has unreasonably denied visitation to the parents of his or her former spouse.

[\*\*31] [\*P31] The second group of statutory factors encompasses situations where the state has an interest in protecting the child from harm. Thus, a court may grant grandparents visitation if the grandparents can clearly and convincingly show they share a "substantial relationship" with the grandchild and the "loss or cessation of that relationship is likely to cause harm to the grandchild." *Id.* § 30-5-2 (2)(d). The state's interest may also extend to situations where the child's parent has "denied or unreasonably limited" visitation, *id.* § 30-5-2(2)(b), because of the increased probability that the parent is not acting in the child's best interests.

[\*P32] The third category of statutory factors may be more accurately categorized as necessary threshold findings. These are findings that a court must make in order to grant visitation. For example, a court cannot order visitation if the petitioning grandparent is not a "fit and proper person to have visitation with the grandchild." *Id.* § 30-5-2(2)(a). Likewise, a court cannot order visitation unless it is in the best interests of the child. *See id.* § 30-5-2(2)(g). This holds true even if the petitioner has satisfied [\*\*32] other statutory factors.

[\*P33] We recognize that the statute describes "best interests" and grandparent fitness as relevant factors to the determination of whether the parental presumption has been rebutted. *Id.* § 30-5-2(2)(g). However, a judge could not rely solely on these factors in determining whether the parental presumption has been rebutted and still comport with due process. *See Troxel, 530 U.S. at 72-73* ("[T]he *Due Process Clause* does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made."). Allowing

these factors alone to rebut the parental presumption would come too close to allowing a judge to supercede a parent's decisions based solely on a disagreement between the parent and the judge. Thus, while a grandparent must be fit to receive court-ordered visitation, we do not believe a grandparent's fitness, standing alone, would ever properly serve as a reason to override the parent's decision. Rather, it is only one of many factors that a court can consider in determining whether the circumstances allow it to intervene in the parent's [\*\*33] decision-making process. Moreover, in order for the statute to adhere to constitutional requirements, we read the statute to require that the parental presumption be rebutted by clear and convincing evidence before a court orders visitation based on the child's best interests. This distinction is not readily apparent from the plain language of the statute, but it is necessary to sufficiently protect parental rights. We recognize, of course, that the factual findings that support other statutory factors, such as whether the loss of a substantial grandparent relationship will affirmatively harm the child, will often overlap with facts relevant to the ultimate determination of whether grandparent visitation is in the child's best interests.

[\*P34] While the statute lists several means by which a grandparent can rebut the parental [\*\*1094] presumption, the presumption is most clearly rebutted when the court finds the existence of several relevant factors, such as in this case. Here, the court found that (1) Ms. Thurgood, the grandparent's child, had died; (2) the grandparents had a substantial relationship with the child, due in large part to a prior caretaking relationship, and the loss [\*\*34] of the grandparent-grandchild relationship would harm the child; (3) the grandmother was fit; and (4) Mr. Thurgood had unreasonably limited or denied visitation.

[\*P35] We therefore hold that the Grandparent Visitation Statute is not unconstitutional under *Troxel*. The statute expressly incorporates the parental presumption, thereby ensuring that courts give "special weight" to the decisions of fit parents. Moreover, it provides guidance to courts in determining whether the petitioning grandparents have established circumstances under which the courts can, nevertheless, supercede the parent's decision.

[\*P36] Our holding that the statute is constitutional does not suggest the statute is flawless. We acknowledge



that the statute is confusing and, consequently, provides very little guidance to a district judge trying to resolve a grandparent visitation dispute.<sup>7</sup> However, it is not our role to repair drafting defects that do not render a statute unconstitutional. This task falls to the legislature. Accordingly, we suggest, and indeed encourage, that our state legislature clarify the statute to provide more guidance to courts confronted with grandparent visitation issues. [\*\*\*35] We hope that our decision in this case will assist the legislature in that undertaking.

<sup>7</sup> This opinion has already addressed some of the flaws with this statute by clarifying the way in which some of the factors must be treated to satisfy constitutional requirements. *See supra* PP 29-34. For example, we specified that a grandparent's fitness is a threshold finding and that a court cannot rely on best interests alone and still comport with due process. *Supra* PP 32-33. However, our construction of the statute does not fully clarify the manner in which it should be applied. For example, the statute lists several "relevant" factors a court may consider in determining whether the parental presumption has been rebutted, including (1) whether the grandparent is fit, (2) whether visitation has been "denied or unreasonably limited", (3) whether "the parent is unfit", (4) whether the grandparent has acted as the child's caregiver or "otherwise has had a substantial relationship with the grandchild", (5) whether grandparent visitation is in the grandchild's best interests, and (6) whether the grandparent's child who is the parent of the grandchild has died, lost custody, or disappeared. *Utah Code Ann. § 30-5-2(2)*. Although we have attempted to categorize these factors and have provided some instructions regarding how they should be applied, the statute still does not provide a district court with much guidance regarding how the factors ought to be weighed or applied.

[\*\*\*36] [\*P37] Having determined that the Grandparent Visitation Statute is constitutional, we now turn to whether the trial court's application of the statute violated the liberty interests of Mr. Thurgood.

## II. AS APPLIED, THE GRANDPARENT VISITATION STATUTE DOES NOT INFRINGE UPON MR. THURGOOD'S LIBERTY INTERESTS

[\*P38] To determine whether the statute survives an as-applied challenge, we review the decision of the lower court to determine whether it meets the standards established by *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). "Constitutional challenges to statutes present questions of law, which we review for correctness." *Provo City Corp. v. Thompson*, 2004 UT 14, P 5, 86 P.3d 735. For the district court's application to be constitutional, the grandparents must have clearly and convincingly rebutted the presumption favoring Mr. Thurgood's decision regarding grandparent visitation, and the district court must have found that grandparent visitation was in the child's best interests. Moreover, this determination must be accompanied by sufficient findings of fact to justify state interference. We hold that the district court constitutionally [\*\*\*37] applied the statute.

[\*P39] As required by *Troxel*, 530 U.S. at 70, the district court gave special weight to Mr. Thurgood's decisions. Before ordering visitation, the district court placed the burden of proof on the grandparents to rebut the presumption that Mr. Thurgood's visitation decision was in the best interests of the child. In determining whether the grandparents rebutted this presumption, the district court closely followed the structure [\*\*1095] established by the relevant factors listed in the statute.

[\*P40] The district court first looked to the structure of the family. Specifically, the court noted that this was the second time that the courts had been asked to intervene in the affairs of this family, stating "[t]he two parents of [the child] 'invited' the intervention of this court into the issue of custody and visitation, in the first instance, by divorcing in the courts of the State of Utah, thus necessitating a custody and visitation order." (Supp. 2005).<sup>8</sup> Moreover, consistent with *Utah Code section 30-5-2(2)(e)*, the district court noted that Ms. Uzelac's daughter, Ms. Thurgood, had died.

<sup>8</sup> We note that visitation and custody rights were not ordered in the divorce decree as the parties were divorced before the child was born. However, the divorce necessitated the court's intervention after the child's birth by setting forth custody, visitation, and child support orders.

[\*\*\*38] [\*P41] The district court also found that visitation between the child and the grandparents had been unreasonably limited or denied. When Mr. Thurgood first received custody in June 2000, he did not

allow visitation for five months. After this five month period, he granted Ms. Uzelac two visits, one for the child's birthday and the other for a family Christmas party. The next visitation did not occur until March 2001, and it only lasted for one hour. Thereafter, Mr. Thurgood did not allow visitation or telephone calls until July 2002, despite repeated attempts by the Uzelacs to contact the child. After the judge ordered visitation in July 2002, Mr. Thurgood only allowed Ms. Uzelac to see the child twice between July 2002 and January 2003, when the district court issued a second visitation order. Following that order, Ms. Uzelac saw the child every other weekend throughout 2003 until Mr. Thurgood and the child moved to Florida in January 2004. Mr. Thurgood terminated all phone contact between the Uzelacs and the child one month later. Based on these findings, there was sufficient evidence for the district court to determine that visitation had been "denied or unreasonably limited, [\*\*\*39] " in satisfaction of one of the named statutory factors. *Utah Code Ann. § 30-5-2(2)(b)*.

[\*P42] Finally, the court considered the "substantial relationship" between the child and her grandparents, concluding that the loss of this relationship would be harmful to the child. *Cf. id. § 30-5-2(2)(d)*. The mother and the child lived with the Uzelacs, and the Uzelacs took care of the child on a daily basis throughout most of the child's first four years of life. Mr. and Ms. Uzelac picked the child up from school, took her camping on the weekends, and traveled with her. After the child's mother died, Ms. Uzelac lived with the child until Mr. Thurgood received custody. Moreover, the district court's conclusion that the child and the Uzelacs shared a substantial relationship was largely based on an expert's evaluation of the relationship between the child and the Uzelacs. The evaluation found that the child responded to her grandparents as "loved and trusted care givers," and that there was a "great deal of physical affection" between the child and the Uzelacs. The evaluation noted that during the evaluator's visit, the child reminisced about living in the [\*\*\*40] grandparent's home with her mother and "expressed [a] desire to spend more time with her grandparents." The evaluator concluded that (1) the child demonstrated an "emotional attachment to her grandparents [that] was as strong as [that] seen between parents and children"; (2) the attachment could be explained by the grandparents' role as primary caregivers; (3) the loss of her mother remained a deep emotional wound for the child that had not been resolved; (4) the child kept the memory of her mother alive through her

relationship with her grandparents; (5) the child would be unable to work through the loss of her mother without frequent access to her grandparents; and (6) the loss of contact with the Uzelacs would be devastating and cause the child to suffer. The evaluator therefore recommended that it would be in the best interests of the child to maintain a meaningful, ongoing relationship with the Uzelacs. The trial court agreed with these findings and found the presumption had been rebutted.

[\*P43] We agree that the evidence presented to the district judge clearly and convincingly rebutted the parental presumption, thereby permitting the court to override Mr. Thurgood's [\*\*\*41] [\*\*1096] decision even after giving it special weight. We also agree with the district court's finding that grandparent visitation was in the child's best interests<sup>9</sup> due to the child's attachment to her grandparents and the potential harmful ramifications of severing this relationship. Therefore, the district court did not abuse its discretion when it ordered grandparent visitation in this case.

9 Although the Grandparent Visitation Statute does not define "best interests," the district courts of this state have extensive experience in applying this standard, particularly in the family dissolution context. In addition, there are statutes addressing best interests in other contexts that provide guidance. For example, *Utah Code section 30-3-34* (Supp. 2005) establishes fifteen factors a district court may consider to determine best interests of the child in the context of parental visitation after divorce. The factors that the court may consider in determining whether more or less parent time should be awarded under *Utah Code section 30-3-34(2)* are:

- (a) parent-time would endanger the child's physical health or significantly impair the child's emotional development;
- (b) the distance between the residency of the child and the noncustodial parent;
- (c) a substantiated or unfounded allegation of child abuse has been made;
- (d) the lack of demonstrated parenting skills without safeguards to ensure the child's well-being during parent-time;
- (e) the financial

inability of the noncustodial parent to provide adequate food and shelter for the child during periods of parent-time; (f) the preference of the child if the court determines the child to be of sufficient maturity; (g) the incarceration of the noncustodial parent in a county jail, secure youth corrections facility, or an adult corrections facility; (h) shared interests between the child and the noncustodial parent; (i) the involvement of the noncustodial parent in the school, community, religious, or other related activities of the child; (j) the availability of the noncustodial parent to care for the child when the custodial parent is unavailable to do so because of work or other circumstances; (k) a substantial and chronic pattern of missing, canceling, or denying regularly scheduled parent-time; (l) the minimal duration of and lack of significant bonding in the parents' relationship prior to the

conception of the child; (m) the parent-time schedule of siblings; (n) the lack of reasonable alternatives to the needs of a nursing child; and (o) any other criteria the court determines relevant to the best interests of the child.

**[\*\*\*42] CONCLUSION**

[\*P44] The Grandparent Visitation Statute is consistent with the constitutional framework established in *Troxel v. Granville* and is therefore valid. Moreover, we find that the evidence presented below clearly and convincingly rebutted the parental presumption incorporated in the statute. As a result, the district court acted within its discretion when it superceded Mr. Thurgood's decision by ordering grandparent visitation based on the child's best interests. We therefore affirm.

[\*P45] Associate Chief Justice Wilkins, Justice Durrant, Justice Parrish, and Justice Nehring concur in Chief Justice Durham's opinion.



LEXSEE 345 SO 2D 1195

**GRIFFIN E. VAUGHN, Plaintiff-Appellee v. MRS. CARRIE DeMOSS WILLIAMS,  
wife of/and HAYDEN WILLIAMS, Defendants-Appellants**

No. 13,224

Court of Appeal of Louisiana, Second Circuit

345 So. 2d 1195; 1977 La. App. LEXIS 3868

April 25, 1977

**SUBSEQUENT HISTORY:** [\*\*1] Rehearing Denied April 25, 1977; Writ Refused October 21, 1977.

**PRIOR HISTORY:** Appealed from the Tenth Judicial District Court for the Parish of Red River, Louisiana. Hon. Peyton Cunningham, Jr., Judge.

**COUNSEL:** Pugh & Nelson, by Robert G. Pugh, Attorneys for Defendant-Appellant.

Gahagan & Gahagan, by Russell E. Gahagan, Attorneys for Plaintiff-Appellee.

**JUDGES:** Bolin, Hall and Marvin, JJ.

**OPINION BY:** HALL

## OPINION

[\*1196] *Statement of the Case*

Plaintiff, Griffin E. Vaughn, sued to enjoin defendant, Carrie DeMoss Williams, and her husband from blocking an alleged public gravel road by placing a gate across the road. The road connects property which plaintiff leases and on which he resides with a blacktopped parish road. Defendants answered alleging the road is a private road. Defendants also filed an exception pleading the unconstitutionality of *LSA-R.S. 48:491*. After trial, the district court held the road to be public based on a 1934 dedication, work done on the road by the Police Jury from 1969 to 1975, and public use of

the road. From a judgment declaring the road to be public, enjoining defendants from interfering with use of the road, and overruling the exception of unconstitutionality, [\*\*2] defendants appeal. We affirm.

### *Specification of Errors*

Defendants specify the district court erred:

(1) In finding that an authentic act of dedication in 1934 by the then owners of the property was intended to dedicate that portion of the road traversing the land owned by defendant.

(2) In holding that sufficient work had been done by the Police Jury for the road to become public under *R.S. 48:491*.

(3) In dismissing appellants' exception challenging the constitutionality of 48:491 on the grounds that defendant's property is being taken without due process of law and without just and adequate compensation.

### *Findings of Fact*

(1) The following is a schematic drawing of the property and road in question:

[\*1197] [SEE ILLUSTRATION IN ORIGINAL]

(2) Plaintiff leased property in Section 33 from Walter DeMoss in 1969, for agricultural purposes and has resided on Paps Hill since 1973.

(3) The road in dispute runs from Paps Hill across property owned by DeMoss, Joan Yarbrough Gresham, Reimer Calhoun and defendant, Mrs. Carrie D. Williams, to Parish Road 608. The gate erected by defendant is at the intersection of the gravel road with Parish [\*\*3] Road 608.

(4) There has been a road running easterly from Paps Hill across the S/2 of Sections 33 and 34 since at least 1917.

(5) This road was formally dedicated as a public road by instrument dated in 1934, executed by John C. Yarbrough and Mrs. Jimmie DeMoss King, mother and ancestor in title of Walter DeMoss and Carrie DeMoss Williams.

(6) The dedication described the eastern end of the road as running easterly across the DeMoss property to the Grand Bayou Road, which ran north-south along the east section lines of Sections 33 and 34, and which no longer exists.

(7) The extension of the road which runs southerly through the Carrie DeMoss Williams property in Section 3 to Parish Road No. 608 was built in 1937 along the course of an old wagon road, and has been in use since that time.

(8) The road from Paps Hill to Parish Road No. 608 has been maintained and kept up by the Red River Parish Police Jury to some extent, at least since 1969.

(9) The Police Jury has worked the road from one to three times a year since 1969. It has occasionally graded the road and occasionally placed gravel on the road. It ditched the road in 1975. At the time of trial, the road was well [\*\*4] ditched and there was substantial gravel in the roadbed.

(10) Plaintiff and defendant have both done maintenance work on the road. Plaintiff has worked it about three times a year. Defendant has worked and put gravel on the part of the road between her home and Road 608.

(11) The road was open to and used by the public until the gate at the intersection of the road with Parish

Road 608 was put up by defendant in late 1975.

[\*1198] (12) Defendant protested use of the road by the public at a Police Jury meeting in 1967. However, she thereafter made no further protests until erection of the gate. She saw the Police Jury grader working on the road on several occasions, knew the Jury placed gravel on the road, and expressly consented to some work done in 1969 and the ditching in 1975. She was aware of the road's use by the public.

#### *Specification of Error No. 1 - Formal Dedication*

The 1934 act of dedication described the road as beginning at the west extreme of the DeMoss property in Section 33, running west and east through that property, continuing easterly through the Yarbrough property, and further continuing *easterly* through the DeMoss property to intersect [\*\*5] the Grand Bayou Public Road. The part of road in dispute runs virtually due *south* through defendant's property and connects with Parish Road 608 rather than the Grand Bayou Road, which no longer exists.

It must be concluded that the act of dedication did not cover or include the southerly extension of the public road, which was built a few years later and apparently took the place of the easterly extension which led to the later abandoned Grand Bayou Road. The southerly extension in dispute is not a public road by virtue of the 1934 act of dedication.

#### *Specification of Error No. 2 - Informal Dedication*

The jurisprudence divides informal dedication into two categories: implied dedication and tacit dedication.<sup>1</sup> Implied dedication, nonstatutory in nature, requires both the landowner's intent to create a public road and the public's acceptance of the landowner's offer. Such intention to dedicate may be manifested by the actions of the landowner, while the acceptance by the public may be evidenced by public use. Tacit dedication is founded upon statute and its existence is determined by application of *LSA-R.S. 48:491*, which provides in pertinent part:

"All roads [\*\*6] . . . which have been or are hereafter kept up, maintained or worked for a period of three years by authority of any parish governing authority in its parish . . . shall be public

roads . . ."

An occasional "brushing up" or token maintenance of a private road does not establish a tacit dedication. *Jackson v. Town of Logansport*, 322 So.2d 281 (La.App.2d Cir. 1975), and authorities cited therein.

1 The distinction between implied and tacit dedication is not clearly made in all of the reported cases. The terms are sometimes used interchangeably and some cases seem to consider tacit dedication as a form of implied dedication. See, for example, *Wyatt v. Hagler*, 238 La. 234, 114 So.2d 876 (1959).

In *Boynnton v. Bertrand*, 309 So.2d 769 (La.App.3d Cir. 1975), it was held that regular grading approximately three times a year and occasional cleaning of ditches by the Police Jury was more than token maintenance and was sufficient to constitute a tacit dedication under the statute, even though [\*\*7] the property owners also participated in maintenance. In *Latour v. Dupuis*, 164 So.2d 620 (La.App.3d Cir. 1964), a tacit dedication was found where the Police Jury graded the road two or three times a year, put gravel on the road on one occasion, and trimmed trees in the ditches alongside the road. See also *Foshee v. Longino*, 236 So.2d 870 (La.App.3d Cir. 1970); *Mouton v. Bourque*, 253 So.2d 689 (La.App.3d Cir. 1971); and *Police Jury, Parish of Catahoula v. Briggs*, 291 So.2d 472 (La.App.3d Cir. 1974).

Tacit dedication does not result where active opposition is directly communicated by the landowner to the governing body. *Town of Eunice v. Childs*, 205 So.2d 897 (La.App.3d Cir. 1967), writ refused 251 La. 937, 207 So.2d 540 (1968). However, protests not made directly to the governing body or made after the road has been maintained by the governing body for three years do not prevent a tacit dedication under the statute. *Wyatt v. Hagler*, 238 La. 234, 114 So.2d 876 (1959); *Winn Parish Police [\*\*1199] Jury v. Austin*, 216 So.2d 166 (La.App.2d Cir. 1968).

The work done by the Police Jury in the instant case amounted to more than token maintenance. At [\*\*8] least since 1969, and particularly since 1973, the Police Jury has worked on the road several times each year, grading, ditching and adding gravel. It is significant that the southerly part of the road crossing defendant's

property in Section 3 is a continuation of or extension of a dedicated public road, and that the road has been used by the public for many years. Although defendant asserted the private nature of the road at a Police Jury meeting in 1967, she thereafter consented to work done by the Jury in 1969 and 1975, and allowed other maintenance to be done without protest.

Our conclusion is that the trial court was correct in finding the road to be a public road by reason of maintenance by the Police Jury for more than three years. There was a tacit dedication under *LSA-R.S. 48:491*.

#### *Specification of Error No. 3 - Constitutionality*

Appellants contend *LSA-R.S. 48:491* is unconstitutional in that it violates Article 1, Sections 2 and 4 of the Louisiana Constitution of 1974, which provides in part:

"Section 2. No person shall be deprived of life, liberty, or property, except by due process of law."

"Section 4. Every person has the right to acquire, own, control, [\*\*9] use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.

"Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. \* \* \*"

The statute, interpreted as applying only where the landowner has knowledge of and acquiesces in maintenance of a road by the public authority, and as not applying where the landowner opposes and protests such maintenance, does not offend the constitutional provisions. Knowledge, acquiescence, and usually acceptance of the benefits of public maintenance for a period of time under the statute amounts to a tacit dedication by the landowner - a giving by the landowner rather than a taking by the public authority. The landowner impliedly or tacitly gives his consent to the establishment of a public road. The statute establishing the public character of a road after maintenance by the

governing authority for a period of three years, as interpreted, does not amount to a taking of private property without due process of law [\*\*10] or without payment of just and adequate compensation.

The constitutionality of the statute is also supported by *Article VI, Section 24 of the Louisiana Constitution of 1974* which provides:

"Section 24. The public, represented by local governmental subdivisions, may acquire servitudes of way by prescription in the manner prescribed by law."

The acquisition of a servitude by the public under *LSA-R.S. 48:491* is closely akin to prescription. Compare *Frierson v. Police Jury of Caddo Parish*, 160 La. 957, 107 So. 709 (1926); *Goree v. Midstates Oil Corporation*, 205 La. 988, 18 So.2d 591 (1944).

The district court correctly overruled defendants' exception of unconstitutionality.

*Decree*

For the reasons assigned, the judgment of the district court is affirmed at appellant's costs.

Affirmed.



LEXSEE 2006 UT APP 473

**Wasatch County, a body politic of the State of Utah, Plaintiff, Appellant, and Cross-appellee, v. E. Ray Okelberry, Brian Okelberry, Eric Okelberry, Utah Division of Wildlife Resources, West Daniels Land Association, and John Does 1- 25, Defendants, Appellees, and Cross-appellants.**

Case No. 20050389-CA

COURT OF APPEALS OF UTAH

*2006 UT App 473; 153 P.3d 745; 566 Utah Adv. Rep. 35; 2006 Utah App. LEXIS 517*

November 30, 2006, Filed

**SUBSEQUENT HISTORY:** Writ of certiorari granted *Wasatch v. Okelberry*, 168 P.3d 339, 2007 Utah LEXIS 77 (Utah, 2007)

Reversed by, Remanded by *Wasatch County v. Okelberry*, 2008 UT 10, 2008 Utah LEXIS 15 (2008)

**PRIOR HISTORY:** [\*\*\*1] Fourth District, Heber Department, 010500388. The Honorable Donald J. Eyre Jr.

**COUNSEL:** Thomas L. Low and Scott H. Sweat, Heber City, for Appellant and Cross-appellee.

Ryan D. Tenney, Provo, for Appellees and Cross-appellants.

**JUDGES:** Carolyn B. McHugh, Judge. WE CONCUR: Russell W. Bench, Presiding Judge, Gregory K. Orme, Judge.

**OPINION BY:** Carolyn B. McHugh

**OPINION**

[\*\*748]

McHUGH, Judge:

[\*P1] Wasatch County (Wasatch) appeals the trial court's ruling that principles of estoppel prevent it from exercising control over roads, located on land owned by

West Daniels Land Association (the Association) and E. Ray Okelberry, Brian Okelberry, and Eric Okelberry (collectively, the Okelberrys),<sup>1</sup> that were [\*\*749] adjudicated abandoned and dedicated to the public. The Okelberrys cross-appeal the trial court's determination that the roads were dedicated to the public under *Utah Code section 72-5-104(1)*. See *Utah Code Ann. § 72-5-104(1)* (2001). We affirm in part and reverse and remand in part.

1 The Association owns property immediately adjacent to property owned by the Okelberrys. As members and shareholders in the Association, the Okelberrys used the Association's land in conjunction with their own for grazing livestock. The Association was initially included in the suit as a defendant. However, for reasons not clear from the record, it withdrew from the litigation. After the Association failed to appoint successor counsel, Wasatch sought default judgment against the Association. The Okelberrys opposed the motion and argued that as members of the Association they had the right to represent its interests at trial. The trial court did not directly enter a ruling on Wasatch's default judgment motion. Later, the court noted that default judgment had been entered against the Association in its Findings of Fact and Conclusions of Law. However, the trial court had allowed the Okelberrys to submit evidence with



respect to the roads located on both the Okelberrys' and the Association's properties at trial. Additionally, the trial court adjudicated the status of the roads located on the Association's property, implicitly rejecting Wasatch's argument that the Okelberrys lacked standing to represent the Association's interests. *See Zions First Nat. Bank v. C'Est Bon Venture*, 613 P.2d 515, 517 (Utah 1980) (recognizing that trial courts implicitly deny motions where later judgment is in conflict with and fails to give effect to the motions). Because Wasatch has not appealed the issue of the Okelberrys' standing to represent the interests of the Association, this court addresses the merits without distinguishing between the Okelberrys' and the Association's properties. *See Whitmer v. City of Lindon*, 943 P.2d 226, 228 n.1 (Utah 1997) (declining to address issue not appealed).

#### [\*\*2] BACKGROUND

[\*P2] In 1957, the Okelberrys<sup>2</sup> purchased a tract of rural, undeveloped property in Wasatch County. The property is criss-crossed by a series of unimproved dirt roads including the four roads at issue in this appeal: the Thorton Hollow Road, Ridge Line Road, Parker Canyon Road, and Circle Springs Road (the Four Roads).<sup>3</sup> The Four Roads begin and end at points outside the Okelberrys' property or are connected to roads that begin and end outside the property. At the time the property was purchased, it was bordered on the east and south by fences, separating the Okelberrys' property from United States Forest Service property. There were also multiple wire gates along the Four Roads such that persons traveling on the Four Roads generally had to open the gates before proceeding within the boundaries of the Okelberrys' property.

<sup>2</sup> The tract was initially purchased by E. Ray Okelberry, his brother, Lee Okelberry, and their father, Roy Okelberry. Sometime after 1957, Ray and Lee Okelberry bought their father's interest in the property. And later, when Lee decided to retire, Ray's sons, Eric and Brian Okelberry, bought Lee's interest. At the present time, Ray, Eric, and Brian Okelberry own the property and continue to use it for their livestock operation.

[\*\*3]

<sup>3</sup> The initial suit included a fifth road, Maple

Canyon Road, which the trial court determined had not been abandoned to the public. Because neither party appeals the trial court's decision with respect to Maple Canyon Road, it is not addressed here.

[\*P3] Sometime in 1989, the Okelberrys started barring public use of the Four Roads by constantly locking the gates and posting no trespassing signs. In the mid-1990s, the Okelberrys placed their property into a Cooperative Wildlife Management Unit (CWMU) that allowed them to realize a profit from exclusive hunting activities on the property. In 2001, twelve years after the Okelberrys began permanently locking the gates, Wasatch initiated suit to have the Four Roads declared public highways under *Utah Code section 72-5-104*. *See Utah Code Ann. § 72-5-104*.<sup>4</sup> Under that provision, "[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." *Id. § 72-5-104(1)*.

<sup>4</sup> An earlier version of this provision, *see Utah Code Ann. § 27-12-89* (1995), was in effect at the time Wasatch claims dedication or abandonment of the Four Roads occurred. However, the current version, *see id. § 72-5-104(1)* (2001), is "substantively identical" to the earlier version. *State v. Six Mile Ranch Co.*, 2006 UT App 104, P4 n.3, 132 P.3d 687. Therefore, in the interests of convenience, all references and citations will be to the current version. *See id.*

[\*\*4] [\*P4] After a three-day bench trial, the court entered findings of fact and conclusions of law. First, the court "specifically found that there was not public use of the [Four Roads] in the 1940s or before and also . . . no evidence of vehicular use prior to the 1950s." The court also specifically found that Wasatch had never performed any maintenance on the Four Roads.

[\*P5] Turning to the evidence and testimony presented at trial, the court noted that Wasatch had presented witnesses, members of the general public, who testified that for different periods of time between 1957 and 1989 they freely used the Four Roads. The court noted that the Okelberrys' witnesses alternatively testified that beginning in the 1960s, the gates on the Four Roads were generally kept closed and "periodically locked for several days at a time and that signs were also posted on the gates and property which stated 'No Trespassing -- Private Property.'" Additionally, employees of [\*\*750]

the Okelberrys testified that they had, at times, asked people trespassing on the property or the roads to leave. After weighing the evidence, the court assumed the truth of the Okelberrys' factual assertions and nonetheless [\*\*\*5] determined that it was "clear that individuals using the roads beginning in the late 1950s until the late 1980s or early 1990s used the roads without interruption, they used the roads freely, and though not constantly, they used the roads continuously as they needed."

[\*P6] The court also found that the majority of users were members of the general public, traveling without permission, and therefore used the Four Roads as a public thoroughfare. Finally, without defining exactly which ten years the Four Roads were used continuously as public thoroughfares, the court determined that between 1960 and 1990, public use "continued for at least ten years, if not much longer, or for multiple periods of ten years." Thus, the court concluded that the Four Roads had been dedicated to public use "well over ten years prior to 1989 when the Okelberrys began [permanently] locking the gates."

[\*P7] Although determining that the roads had been abandoned and dedicated to the public, the court found that Wasatch was equitably estopped from enforcing the dedication on behalf of the public. The court supported the estoppel determination with two findings. First, that "for a period of twelve [\*\*\*6] years [the Okelberrys] exerted control and used the roads in an openly hostile manner to the public use of the streets." And second, although "little improvements have been made to the roads themselves," the Okelberrys had expended "large amounts of time and money" on their sheep and cattle operations as well as cultivated their business relationship with the CWMU. Wasatch appeals the trial court's judgment that it is equitably estopped from opening the Four Roads to public use, and the Okelberrys cross-appeal the trial court's ruling that the Four Roads are public roads by dedication.

#### ISSUES AND STANDARDS OF REVIEW

[\*P8] The Okelberrys challenge the trial court's determination that the Four Roads were abandoned and dedicated to the public under *Utah Code section 72-5-104(1)*. See *Utah Code Ann. § 72-5-104(1)*. "The trial court's ultimate conclusion that the facts of this case either satisfy or do not satisfy the requirements of *section 72-5-104(1)* is a mixed question of fact and law, which we review for correctness." *State v. Six Mile Ranch Co.*,

*2006 UT App 104, P9, 132 P.3d 687* (citing *Heber City Corp. v. Simpson, 942 P.2d 307, 309 (Utah 1997)*). [\*\*\*7] However, because the legal requirements of a public highway determination under *section 72-5-104(1)* are "highly fact dependent and somewhat amorphous," we "give[] trial courts a fair degree of latitude in determining the legal consequences . . . of facts found by the court." *Id.* (quotations and citation omitted); accord *Heber City Corp.*, *942 P.2d at 309-10*. "Therefore, when reviewing a trial court's decision regarding whether a public highway has been established under *section [72-5-104(1)]*, we review the decision for correctness but grant the court significant discretion in its application of the facts to the statute." *Six Mile Ranch Co.*, *2006 UT App 104 at P9* (alteration in original) (quoting *Heber City Corp.*, *942 P.2d at 310*).

[\*P9] The Okelberrys also challenge the sufficiency of the evidence, arguing that Wasatch has not provided clear and convincing evidence of continuous use as a public thoroughfare. See *Utah Code Ann. § 72-5-104(1)*. "To establish the dedication of a public road, we require clear and convincing evidence." *AWINC Corp. v. Simonsen, 2005 UT App 168, P7, 112 P.3d 1228* [\*\*\*8] (citing *Thomson v. Condas, 27 Utah 2d 129, 493 P.2d 639, 639 (1972)*). Where a party challenges the sufficiency of the evidence, "[a]n appellate court must launch any review of factual findings from *rule 52(a) of the Utah Rules of Civil Procedure* and its clearly erroneous test . . ." *In re Z.D.*, *2006 UT 54, PP28-29, 147 P.3d 401, 561 Utah Adv. Rep. 10* (quotations omitted); see also *Utah R. Civ. P. 52(a)* ("Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."). Although it is appropriate for a "reviewing court to consider [\*\*751] the standard of proof the prevailing party below was required to meet," the trial court's findings of fact will only be reversed under the clearly erroneous standard embodied in *rule 52(a)* where a review of the record as a whole demonstrates the result is "against the clear weight of the evidence or leave[s] the appellate court with a definite and firm conviction that a mistake has been made." *In re Z.D.*, *2006 UT 54 at P40*; see also *Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co.*, *744 P.2d 1376, 1377 (Utah 1987)*. [\*\*\*9]

[\*P10] Alternatively, Wasatch argues that the trial court erred when it applied equitable estoppel to bar its

future attempts to open the Four Roads to public use. "[W]hether the trial court committed reversible error in applying the doctrine of equitable estoppel" to a public road determination is a question of law, which is "reviewed for correctness without any special deference." *Western Kane County*, 744 P.2d at 1377-78.

## ANALYSIS

### I. Dedication to the Public

[\*P11] Under *Utah Code section 72-5-104(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." *Utah Code Ann. § 72-5-104(1)*. Thus, for a road to become a public highway under the statute, three elements must be met, "there must be (i) continuous use, (ii) as a public thoroughfare, (iii) for a period of ten years." *Heber City Corp.*, 942 P.2d at 310, quoted in *Six Mile Ranch Co.*, 2006 UT App 104 at P11.

[\*P12] The Okelberrys argue that the trial court's findings of fact were not supported by clear and [\*\*\*10] convincing evidence; therefore, its conclusions that the Four Roads had been used continuously as public thoroughfares were in error. We will address each of these elements in turn, noting, however, that although each element "embodies a logically distinct requirement that must be satisfied, the elements are so intertwined that they are not readily susceptible to separate discussion." *Id.* at 310 n.6.

#### A. Continuous Use

[\*P13] Under Utah law, continuous use of a road exists when "'the public, even though not consisting of a great many persons, made a continuous and uninterrupted use' not necessarily every day, but 'as often as they found it convenient or necessary.'" *AWINC Corp.*, 2005 UT App 168 at P11 (quoting *Boyer v. Clark*, 7 Utah 2d 395, 326 P.2d 107, 109 (1958)). It is not required that public use be constant, rather it need only to have "occurred as often as the claimant had occasion or chose to pass. . . . Mere intermission is not interruption." *Id.* (omission in original) (quoting *Richards v. Pines Ranch, Inc.*, 559 P.2d 948, 949 (Utah 1977)).

[\*P14] The Okelberrys argue that the evidence of continuous use [\*\*\*11] of the Four Roads was not clear and convincing because, at trial, they presented

unrebutted evidence showing that the Okelberrys had expelled persons who lacked permission to use the roads and controlled access to the roads through closed gates that were periodically locked. At the heart of the Okelberrys' argument is the proposition that uncontested evidence of a closed or locked gate across a road, or a single instance where a party is ejected from the road, is an interruptive event sufficient to defeat any claim of continuous use by the public as a matter of law. While acknowledging the ease of application of such a bright-line test, we disagree.

[\*P15] In making public road determinations, the Utah Supreme Court has stated that "*all of the facts should be considered together*, and where there is dispute about whether a public use is established, determination of the facts and resolution of the issue is primarily the responsibility of the trial court." *Bonner v. Sudbury*, 18 Utah 2d 140, 417 P.2d 646, 648 (1966) (emphasis added). Prior cases have recognized that the presence of gates, including the frequencies with which they are closed or locked, is a factor [\*\*\*12] to be weighed heavily in making the continuous use determination. *See, e.g., Campbell v. Box Elder County*, 962 P.2d 806, 809 (Utah Ct. App. 1998) (taking into account that road had been [\*\*\*752] "generally barred by a locked gate," as well as testimony that the public "had been unable to use the road because of the gate"). Nonetheless, the presence of obstructions or gates, open or closed, unlocked or locked, has been treated as only one of the many factors a trial court may consider when determining if the public use was continuous. *See Thurman v. Byram*, 626 P.2d 447, 449 (Utah 1981) (affirming trial court's determination of public road despite finding that road was "periodically block[ed]" during the relevant time). Indeed, the Utah Supreme Court has declined opportunities to rely solely on the presence of a gate, locked or unlocked, to affirm trial courts' determinations that roads have not been dedicated to the public. *See Thomson v. Condas*, 27 Utah 2d 129, 493 P.2d 639, 640-41 (1972) (weighing presence of gates, locked and unlocked, along with signage, lack of governmental maintenance, nature of use, and character of users in finding [\*\*\*13] road was not abandoned); *Gillmor v. Carter*, 15 Utah 2d 280, 391 P.2d 426, 427 (1964) (relying on evidence of gates, as well as signs, grants of permission, past litigation initiated by the property owners alleging private road, and contracts for exclusive use); *cf. Wilhelm v. Pine Meadows Estates, Inc.*, 2001 UT App 285, No. 20000559-CA, 2001 Utah App. LEXIS 131,

at \*3 - \*4 (Oct. 4, 2001) (per curiam) (noting that the owners had blocked access to the road several times but also weighing character of users and nature of use); *Campbell*, 962 P.2d at 809 (examining evidence of locked gate and testimony by members of the public who had been unable to use the road because of the gate). While we leave open the possibility that evidence that a road was blocked by a locked gate may weigh heavily enough, given the other facts and circumstances, to be dispositive of the question of continuous use, we do not accept the Okelberrys' argument that any evidence of a locked gate, no matter how brief, is conclusive evidence of interrupted use.

[\*P16] Strong policy considerations underlie public highway determinations governed by [\*\*\*14] *Utah Code section 72-5-104*. Utah appellate courts have noted that because "the ownership of property should be granted a high degree of sanctity and respect," *Draper City v. Bernardo*, 888 P.2d 1097, 1099 (Utah 1995), "dedication of property to public use should not be lightly presumed," *Thurman*, 626 P.2d at 448. In consideration of this policy, the Utah Supreme Court has placed the burden of proving the existence of a public road by clear and convincing evidence on the party seeking the dedication. *See Draper City*, 888 P.2d at 1099 ("This higher standard of proof is demanded since the ownership of property should be granted a high degree of sanctity and respect.").

[\*P17] However, adopting the test urged by the Okelberrys would disrupt the delicate balance embodied in the clear and convincing standard. If a property owner was able to defeat a dedication claim by simply providing self-serving testimony that at some point she interrupted use of a road by locking a gate for a single short period of time within a ten-year period or ejecting a single person from the road, the dedication statute would be eviscerated. [\*\*\*15] *Cf. Petersen v. Combe*, 20 Utah 2d 376, 438 P.2d 545, 546-47 (1968) (reversing trial court's determination of dedication where evidence was almost exclusively provided by self-serving witnesses "having their own special and private interests in the road"); *Bonner*, 417 P.2d at 648 ("Resolution of [a dedication] issue cannot rest entirely upon what the owner says was his intent. In case controversy arises he can always avow that his intent was in accord with his interest." (footnote omitted)). At the same time, we note the difficulty property owners face in locating disinterested witnesses to testify that they were prevented from using the roads at

their convenience or the time of their choosing because they met with a locked gate or were turned away.<sup>5</sup> It is precisely for these reasons that a trial court is given great latitude in weighing the facts in light of the credibility and motivation of witnesses when determining if use of a road by the public was continuous. *See Petersen*, 438 P.2d at 549 (Crockett, C.J., dissenting) [\*\*753] (noting that "it is the prerogative of the trial judge to determine whether the tests [for dedication] have [\*\*\*16] been met" including a weighing of interested witness's testimony).

5 These failed attempts to use the road may be unknown to the property owners. Even in cases where the property owner ejected a member of the public, he is unlikely to retain identification or contact information that could be used to subpoena the member of the public for trial.

[\*P18] Thus, the question of continuous use should be approached as a multi-faceted inquiry that requires a trial court to weigh all the evidence presented in light of the credibility of witnesses. We recognize that evidence of gates, and in particular locked gates, during the relevant period is strong evidence of interrupted use. *See, e.g., Campbell*, 962 P.2d at 809 (noting that trial court's determination that there was not continuous use was permissibly premised on finding that road was "generally barred by a locked gate"); *Cox v. Cox*, 84 Idaho 513, 373 P.2d 929, 933 (Idaho 1962) ("Where gates are in existence across a road [\*\*\*17] barring the passage and making it necessary to open them in order to use the road, the existence of such gates is considered as strong evidence that the road was not a public road."); *cf. Thomson*, 493 P.2d at 640-41 (discussing gates, chains, and padlocks across road in affirming trial court's determination that dedication had not occurred). Nonetheless, in some instances, evidence of a gate, even a locked gate, may not weigh heavily enough to establish that there was an interruption of continuous use. *See, e.g., Utah County v. Butler*, 147 P.3d 963, 2006 UT App 444, PPI2-15 (affirming trial court's determination of dedication even where property owners presented evidence that gate across road had at one time been locked). In deciding whether a locked gate acted as an interruptive force sufficient to restart the running of the statutory ten-year period, the trial court should weigh the evidence regarding the duration and frequency that the gate was locked against the frequency and volume of public use to determine if there is clear and convincing

evidence that public use of the road was continuous.

[\*P19] In this case, the trial court balanced the frequency [\*\*\*18] and duration that the gates were locked against the frequency and volume of public use. The trial court found that even were it to accept as true "that beginning in the 1960s the gates were periodically locked for several days at a time," it was nonetheless "clear that individuals using the roads beginning in the late 1950s until the late 1980s or early 1990s used the roads without interruption, . . . and though not constantly, they used the roads continuously as they needed."

[\*P20] The trial court's conclusion is supported in the record. Several witnesses testified that they used the Four Roads during the relevant period and were never asked to leave and never encountered a locked gate. "[W]e do not set aside the trial court's factual findings unless they are against the clear weight of the evidence or we otherwise reach a definite and firm conviction that a mistake has been made." *Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co.*, 744 P.2d 1376, 1377 (Utah 1987). No such conviction is held here. Clear and convincing evidence may be premised on "[t]he testimony of one credible witness[] if believed by the court or jury." *Bonner v. Sudbury*, 18 Utah 2d 140, 417 P.2d 646, 648 (1966). [\*\*\*19] Here, the trial court may have relied on any one of many witnesses. We do not, therefore, disturb the trial court's conclusion that there was continuous use.

#### B. Public Thoroughfare

[\*P21] Three general requirements must be met to demonstrate that the road at issue was used as a public thoroughfare: "(i) [t]here must be passing or travel, (ii) the use must be by the public, [and] (iii) use by permission does not constitute use as a public thoroughfare." *Heber City Corp. v. Simpson*, 942 P.2d 307, 311 (Utah 1997) (quotations omitted). The Okelberrys do not challenge the trial court's findings that there was passing or travel nor do they challenge that the travel was engaged in by members of the public. Rather, the Okelberrys assert that it was error for the trial court to find that there was clear and convincing evidence of use as a public thoroughfare because they presented uncontested evidence that gates were maintained on the Four Roads throughout the relevant period. More simply, the Okelberrys argue that the mere presence of a gate, locked or unlocked, is conclusive proof of permissive use and therefore may, as a single inquiry, defeat a finding of

public [\*\*\*20] thoroughfare. [\*\*754] This court has rejected such a construction of Utah law.

[\*P22] "It is firmly established under Utah law that 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) (citing *Heber City Corp.*, 942 P.2d at 311-12; *Thurman v. Byram*, 626 P.2d 447, 449-50 (Utah 1981)). In *Campbell v. Box Elder County*, we recognized that a property owner's use of a gate was strong evidence, but not conclusive proof, of permissive use. *See* 962 P.2d at 809. There, we affirmed the trial court's determination that use was permissive where it was supported by evidence showing "the Campbells had unlocked the gate every year except 1994 for deer hunting season and had relocked it at the end of each hunting season." *Id.* However, we have since clarified the treatment of gates in *Campbell* by explaining that it is not the presence of the gate, alone, that indicates permissive use. *See State v. Six Mile Ranch Co.*, 2006 UT App 104, P23, 132 P.3d 687. Instead, *Campbell* stood "for [\*\*\*21] the proposition that an overt act, such as locking and unlocking a gate, provides evidence of permissive use." *Id.* While the overt act of locking and unlocking the gate under the facts and circumstances in *Campbell* was an indication of permissive use, the erection of a gate by a property owner does not conclusively establish the character of the public use as permissive because a gate "may be erected for purposes other than obstruction of public travel." *McIntyre v. Board of County Comm'rs*, 86 P.3d 402, 409-10 (Colo. 2004) (quotations and citation omitted). For example, because a gate may be erected across a public road for the purpose of controlling livestock, *see Utah Code Ann.* § 72-7-106 (2001), gates across roads do not always carry an inference of permissive use. *See, e.g., Lemont Land Corp. v. Rogers*, 269 Mont. 180, 887 P.2d 724, 728 (Mont. 1994) (noting that where "the gate was used to control livestock, not travel," it was insufficient evidence to support a conclusion of permissive use).

[\*P23] Therefore, "[w]hile evidence of a fence or gate on the road gives rise to a strong indication that [\*\*\*22] any public use of the road is permissive, their existence does not provide the landowner with a conclusive presumption that the use is permissive." *McIntyre*, 86 P.3d at 412; *see also Tomlin Enters., Inc. v. Althoff*, 2004 MT 383, P19, 325 Mont. 99, 103 P.3d 1069 ("[T]he fact that the passage of a road has been for years

barred by gates or other obstructions to be opened and closed by the parties passing over the land, has always been considered as strong evidence in support of a mere license to the public . . . ." (quotations and citation omitted)). Instead, trial courts are given wide latitude to determine if use is permissive because the "legal requirements [of *section 72-5-104*], other than the ten-year requirement, are highly fact dependent and somewhat amorphous." *Heber City Corp.*, 942 P.2d at 310.

[\*P24] The Utah Supreme Court has warned that in public road dedication cases, appellate courts should not attempt to "establish a coherent and consistent statement of the law on a fact-intensive, case-by-case review of trial court rulings." *Id.* Thus, under Utah law, trial courts are "permitted some reign to grapple with the multitude [\*\*\*23] of fact patterns that may constitute a . . . [public thoroughfare] determination." *Kohler v. Martin*, 916 P.2d 910, 913 (*Utah Ct. App.* 1996) (alteration and omission in original) (quotations and citation omitted). Because the trial court has significant discretion to weigh the myriad facts that provide evidence of non-permissive use, the trial court's determination that travel on the Four Roads was without permission is adequately supported by the record as is its determination that the Four Roads were used as public thoroughfares. Several witnesses testified to using the Four Roads for decades without seeking or obtaining permission and without encountering locked gates. Additionally, testimony from both parties tended to support the trial court's conclusion that the gates were primarily in place as a method of controlling the Okelberrys' livestock operations, not for the purpose of controlling public use. Both of these findings are sufficient to sustain the trial court's conclusion that the Four Roads were used without permission as public thoroughfares. See [\*\*755] *Thurman*, 626 P.2d at 449 (affirming finding of public thoroughfare and noting that "[a]lthough [\*\*\*24] testimony in the instant case indicated some of the use . . . was with permission, there was clear and convincing evidence of frequent and general use of the road without defendants' permission").

[\*P25] Because we do not have a firm conviction that the trial court was mistaken, we do not disturb the trial court's findings that the Four Roads were used continuously as public thoroughfares for a period of at least ten years. We affirm the trial court's determination that the Four Roads were dedicated to the public by action of *Utah Code section 72-5-104*. See *Utah Code*

*Ann. § 72-5-104(1)*. Upon affirming the trial court's judgment that the Four Roads were public roads, it is necessary to address the issue of equitable estoppel raised by Wasatch on appeal.

## II. Equitable Estoppel

[\*P26] Wasatch challenges the trial court's determination that Wasatch is equitably estopped from asserting the public's rights in the Four Roads because it had failed to do so for a period of twelve years. As a general rule, once a road is dedicated and abandoned to the public under *section 72-5-104(1)*, subsequent acts by the property owner [\*\*\*25] to limit the public's use cannot change its status as a public highway. See *Utah Code Ann. § 72-5-105* (Supp. 2006); *Heber City Corp. v. Simpson*, 942 P.2d 307, 313 n.12 (*Utah* 1997) (noting that the fact that the road had not been used by the public for several years "d[id] not change its status as a public highway"); *Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co.*, 744 P.2d 1376, 1377-78 (*Utah* 1987) (holding road was still a public highway although fifty years had passed since the road was used by the public); *Clark v. Erekson*, 9 Utah 2d 212, 341 P.2d 424, 425-26 (1959) (requiring landowner to remove encroachments on public highway even though some of the structures had been in place more than thirty years). Instead, under *Utah Code section 72-5-105*, "all public highways . . . once established shall continue to be highways . . . until abandoned or vacated by order." *Utah Code Ann. § 72-5-105(1)*. The Utah Supreme Court has interpreted the language of this section to require strict compliance with statutory procedures to effect an abandonment or vacation [\*\*\*26] of a public road by the government. See *Ercanbrack v. Judd*, 524 P.2d 595, 597 (*Utah* 1974).

[\*P27] There is no dispute that the Four Roads have not been abandoned or vacated by order under *section 72-5-105(1)*. Despite the requirements of that section, "there may be circumstances so extreme that" the doctrine of equitable estoppel may be applied against the government "to prevent the assertion of rights in a public highway." *Western Kane County*, 744 P.2d at 1378. However, to remain "in harmony with the expressed will of the legislature, which requires that a strict statutory procedure be followed for the vacation of a public road," courts should be "extremely reluctant to apply the doctrine of estoppel against the assertion of rights in a public highway by a government entity." *Id.*

[\*P28] To prevail on their claim of equitable estoppel, the Okelberrys were required to show three elements:

(1) an admission, statement, or act inconsistent with the claim afterward asserted, (2) action by the other party on the faith of such admission, statement, or act, and (3) injury to such other party resulting from allowing the first party to [\*\*\*27] contradict or repudiate such admission, statement, or act.

*Celebrity Club, Inc. v. Liquor Control Comm'n*, 602 P.2d 689, 694 (Utah 1979). Additionally, when estoppel is asserted against the government, the admission, statement, or act relied upon must amount to a "very clear, well-substantiated representation[] by [the] government entit[y]." *Anderson v. Public Serv. Comm'n*, 839 P.2d 822, 828 (Utah 1992). More specifically, in public roads cases, the Utah Supreme Court has indicated that the admission, statement, or act by the government must be an affirmative representation. See *Wall v. Salt Lake City*, 50 Utah 593, 168 P. 766, 769 (1917) (noting that case was uncommon and suitable for the application of estoppel because "the municipality by its own affirmative acts, declarations, and conduct, [\*\*756] misled the [property owner]" (emphasis added)).

[\*P29] The Okelberrys argue that *Premium Oil Co. v. Cedar City*, 112 Utah 324, 187 P.2d 199 (1947), set out a special test for estoppel against the government in public roads cases whereby estoppel may be premised on the government's acquiescence in the private [\*\*\*28] party asserting exclusive control over the roads. We disagree. The Okelberrys rely on the language in *Premium Oil* that states:

[W]here the public have long withheld the assertion of control over streets, and private parties have been . . . induced to believe the streets abandoned by the public, . . . with the acquiescence of those representing the public . . . the doctrine of equitable estoppel may be applied.

*Id.* at 204 (emphasis added) (quotations omitted). However, any exception created by *Premium Oil* allowing the assertion of estoppel against the government in public roads cases, where reliance is premised on

government inaction or acquiescence, was abrogated by subsequent legislation and case law. Cf. *Western Kane County*, 744 P.2d at 1378 ("We are extremely reluctant to apply the doctrine of estoppel against the assertion of rights in a public highway by a government entity. This reluctance is in harmony with the expressed will of the legislature, which requires that a strict statutory procedure be followed for the vacation of a public road." (citation omitted)).

[\*P30] At the time *Premium Oil* was decided in 1947, the [\*\*\*29] law governing abandonment of a public road was found in *Utah Code section 36-1-3* and stated: "All highways once established must continue to be highways until abandoned by order of . . . competent authority." *Utah Code Ann.* § 36-1-3 (1943) (emphasis added). Thus, the statute only required that the highway be "abandoned," and it may have been possible for a private property owner to reasonably rely on the government's "abandonment" or acquiescence in private control as an element of an estoppel claim. See *Premium Oil*, 187 P.2d at 204. However, in 1963, the Utah Legislature amended the language of *section 36-1-3*<sup>6</sup> by enactment of *Utah Code section 27-12-90*, which stated: "All public highways once established shall continue to be highways until abandoned or vacated by order of . . . competent authority." Act of 1963, ch. 39, § 90, 1963 Utah Laws 114, 141; *Utah Code Ann.* § 27-12-90 (1969) (emphasis added). In addition to the "abandoned or vacated" language of the 1963 amendment, the highway code was also amended in 1965, creating a strict statutory procedure for "abandon[ing] or vacat[ing]" a public highway. See Act of 1965, ch. 52, §§ 1-5, 1965 Utah [\*\*\*30] Laws 154, 154-56; *Utah Code Ann.* § 27-12-102.1 to -102.5 (Supp. 1969). Decisions of the Utah Supreme Court following enactment of these statutory procedures make it clear that a public highway may only be abandoned or vacated when there has been strict statutory compliance. See *Western Kane County*, 744 P.2d at 1378; *Henderson v. Osguthorpe*, 657 P.2d 1268, 1270 (Utah 1982); *Ercanbrack*, 524 P.2d at 597.

<sup>6</sup> *Utah Code section 36-1-3* was renumbered in 1953 to *section 27-1-3* without changing the language. See *Utah Code Ann.* § 27-1-3 (1953) (amended 1963).

[\*P31] Thus, under the modern statutes<sup>7</sup> and case law, a private property owner would no longer be able to reasonably rely on the government's acquiescence in

private control to establish a claim of estoppel. *See Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co.*, 744 P.2d 1376, 1378 (Utah 1987) ("[E]stoppel should not be available to circumvent the statutory process. [\*\*\*31] "). Instead, a property owner can only claim reasonable reliance where the governmental entity has made some affirmative representation that it intended to abandon or vacate the road in compliance with the statutory procedure. To hold otherwise would come dangerously close to recognizing a form [\*\*757] of adverse possession against the government whereby a private party could obtain equitable rights in a public road merely by exercising adverse control for a period of time. Utah law expressly prohibits any person from acquiring rights in a public road by adverse possession. *See Utah Code Ann. § 78-12-13* (2002).

7 *Utah Code section 27-12-90* was renumbered in 1998 to *section 72-5-105(1)* and remains substantively unchanged. *See Act of 1998, ch. 270, § 133, 1998 Utah Laws 806, 861; Utah Code Ann. § 72-5-105* (Supp. 2005). The current statutory procedure for abandoning or vacating a public road can be found at *Utah Code section 72-3-108*. *See Utah Code Ann. § 72-3-108* (2001).

[\*\*\*32] [\*P32] In this case, there was no evidence that Wasatch made any representation with respect to the Four Roads, let alone a representation that the statutory procedures had been or would be followed to abandon or vacate the Four Roads.<sup>8</sup> Instead, the trial court based its estoppel determination on the fact that Wasatch acquiesced in the private control by "failing to bring an action for twelve years." Therefore, we reverse the trial court's judgment preventing Wasatch from enforcing the public's rights in the Four Roads.<sup>9</sup>

8 Because we hold that the Okelberrys have not met the first element of a claim for equitable estoppel, we need not address the remaining elements.

9 Although our holding allows Wasatch to enforce the public's rights to access the Four Roads, nothing in this opinion should be read to suggest that the public has obtained any rights, hunting or otherwise, with respect to the Okelberrys' private property abutting the roads. On the contrary, members of the public are only free to travel over the Four Roads and have no rights, absent permission from the Okelberrys, to enter onto their land, which remains private.

[\*\*\*33] CONCLUSION

[\*P33] We do not have a firm conviction that the trial court erred when it determined that the Four Roads were dedicated and abandoned to the public pursuant to *Utah Code section 72-5-104(1)* after having been continuously used as public thoroughfares for a period of at least ten years. We also conclude that it was reversible error for the trial court to apply the doctrine of equitable estoppel against Wasatch's attempts to enforce the public's rights to use the Four Roads. We therefore affirm in part and reverse and remand in part for entry of judgment consistent with this decision.

Carolyn B. McHugh, Judge

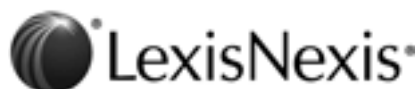
[\*P34] WE CONCUR:

Russell W. Bench,

Presiding Judge

Gregory K. Orme, Judge





LEXSEE 2008 UT 10

**Wasatch County, a body politic of the State of Utah, Plaintiff and Respondent, v. E. Ray Okelberry, Brian Okelberry, Eric Okelberry, West Daniels Land Association, Utah Division of Wildlife Resources, and John Does 1-25, Defendants and Petitioners.**

No. 20070011

SUPREME COURT OF UTAH

*2008 UT 10; 179 P.3d 768; 597 Utah Adv. Rep. 9; 2008 Utah LEXIS 15*

February 12, 2008, Filed

**SUBSEQUENT HISTORY:** Released for Publication  
April 3, 2008

**PRIOR HISTORY:** [\*\*\*1]

Fourth District, Heber Dep't, The Honorable Donald J. Eyre, Jr., No. 010500388.

*Town of Leeds v. Prisbrey, 2008 UT 11, 179 P.3d 757, 2008 Utah LEXIS 14 (2008)*

*Utah County v. Butler, 2008 UT 12, 179 P.3d 775, 2008 Utah LEXIS 17 (2008)*

*Wasatch County v. Okelberry, 153 P.3d 745, 2006 UT App 473, 2006 Utah App. LEXIS 517 (2006)*

**COUNSEL:** Thomas L. Low, Scott H. Sweat, Heber City, for plaintiff.

Don R. Petersen, Leslie W. Slaugh, Provo, for defendants.

**JUDGES:** DURRANT, Justice. Chief Justice Durham, Associate Chief Justice Wilkins, Justice Parrish, and Justice Nehring concur in Justice Durrant's opinion.

**OPINION BY:** DURRANT**OPINION**

[\*\*770] On Certiorari to the Utah Court of Appeals

*DURRANT, Justice:*

**INTRODUCTION**

[\*P1] In this case and two companion cases that we also decide today, <sup>1</sup> we consider the operation of *Utah Code section 72-5-104(1)* (the "Dedication Statute"), which provides as follows: "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." <sup>2</sup> We granted certiorari in this case to consider whether the court of appeals erred in its application of the standard for ascertaining continuous use as a public thoroughfare under this statute. We conclude that it did so err. We reverse and remand for the entry of specific findings of fact relevant to the standard we announce today and for an application of that standard.

<sup>1</sup> *Town of Leeds v. Prisbrey, 2008 UT 11, 179 P.3d 757; Utah County v. Butler, 2008 UT 12, 179 P.3d 775.*

<sup>2</sup> *Utah Code Ann. § 72-5-104(1)* [\*\*\*2] (2001).

**BACKGROUND**

[\*P2] In 1957, Roy Okelberry and his sons, E. Ray and Lee, purchased a large tract of land (the "Property") in Wasatch County near Wallsburg, Utah. E. Ray and Lee later acquired their father's interest in the Property. Sometime thereafter, Lee sold his interest in the Property to E. Ray and E. Ray's sons, Brian and Eric. E. Ray, Brian, and Eric Okelberry (the "Okelberrys") currently own the Property and use it for their livestock operations.

[\*P3] Several unimproved mountain roads cross the Property, all of which begin and [\*\*771] end (or connect with roads that begin and end) at points outside of it. Four of these roads are at issue in this case: Circle Springs Road, Thorton Hollow Road, Parker Canyon Road, and Ridge Line Road (collectively, the "Four Roads").<sup>3</sup> When Roy, E. Ray, and Lee Okelberry purchased the Property in 1957, fences on its east and south sides separated it from United States Forest Service property, and wire gates along these fences controlled access to the Four Roads, requiring persons entering or exiting the Property to open the gates before proceeding.

3 The underlying lawsuit also included Maple Canyon Road. The trial court found that this road had not been dedicated [\*\*\*3] and abandoned to the public. Neither party appealed this decision, and we do not address it here.

[\*P4] In 2001, Wasatch County filed a Complaint for Declaratory Judgment and Quiet Title against the Okelberrys, the Utah Division of Wildlife Resources,<sup>4</sup> and West Daniels Land Association,<sup>5</sup> seeking to have the Four Roads declared dedicated and abandoned to the use of the public pursuant to *Utah Code section 72-5-104*.<sup>6</sup> During a three-day bench trial, Wasatch County presented several witnesses who testified that they had used the Four Roads without the Okelberrys' permission for recreational purposes during the 1960s, 1970s, and 1980s. These witnesses also testified that although there were gates on the roads, their use of the roads was unrestricted. The Okelberrys presented evidence and testimony that members of the public had not had unrestricted access to the roads, but that the gates on the roads had been locked, at least occasionally, as early as the late 1950s and that "No Trespassing," "Keep Out," or "Private" signs were posted. The Okelberrys testified that they had given permission to a large number of people in the community to use their roads and Property and had sold trespass and [\*\*\*4] hunting permits. And witnesses testified that the Okelberrys, in the mid-1990s, placed their Property in a cooperative wildlife management unit for use as a private hunting unit. The Okelberrys and their employees testified that when they encountered persons on the Property or roads without express permission to be there, they asked them to leave.

4 Wasatch County settled its dispute with the Utah Division of Wildlife Resources in 2003.

5 Portions of Ridge Line Road and Parker

Canyon Road traverse property owned by West Daniels Land Association (the "Association") immediately adjacent to the Property. The Okelberrys are members and shareholders in the Association and use the Association's land, together with their own, for grazing livestock. The Association initially made an appearance through counsel, but counsel later withdrew and no successor was appointed. Wasatch County thereafter sought default summary judgment against the Association. The Okelberrys opposed this motion, arguing that as members of the Association they had "a vested interest to see that no judgment is entered in this matter on behalf of the plaintiff" and that, at trial, they "will present evidence that there are [\*\*\*5] no established roads across the property of [the] Association." For reasons that are unclear from the record, the trial court did not enter a ruling on Wasatch County's default judgment motion prior to trial. In its posttrial Findings of Fact and Conclusions of Law, the court noted that the Association's "default was entered," but that the Okelberrys had been allowed to submit "[e]vidence regarding the use of those portions of the roads at issue which are located in [the] Association's property" at trial. The trial court made its determinations regarding the Four Roads without distinguishing between the Okelberrys' property and the Association's property. We likewise do not distinguish between the properties and refer only to the interests of the Okelberrys because the parties have not appealed this issue.

6 An earlier version of this statute was in effect at the time Wasatch County claims the Four Roads were dedicated and abandoned to the use of the public. *See Utah Code Ann. § 27-12-89 (1995)*. A 1998 amendment to the earlier version renumbered this section but made no substantive changes to it. 1998 Utah Laws 861. We therefore refer to the current version of the statute throughout [\*\*\*6] this opinion.

[\*P5] At the conclusion of the bench trial, the trial court entered findings of fact and conclusions of law and, later, supplemental findings of fact. The trial court found "that there was no public use of the various roads in the 1940s or before and also that no evidence of vehicular use prior to the 1950s existed." The court recognized that there were gates on the roads that the Okelberrys or their

employees locked "[a]t various times in the past," but found that they were locked "on a more permanent basis" beginning in the early 1990s. In addition, the court found [\*\*772] that "[p]rior to the gates being locked, the existence of the gates did not interrupt the public's use of the roads."

[\*P6] In its Conclusions of Law, the trial court stated as follows:

Taking even the [Okelberrys'] factual assertions as true, it is clear that individuals using the roads beginning in the late 1950s until the late 1980s or early 1990s used the roads without interruption, they used the roads freely, and though not constantly, they used the roads continuously as they needed. Therefore, [the] Court finds that prior to the interrupting mechanisms being put in place the roads in question were subject to continuous [\*\*\*7] use . . . .

The trial court also found that the majority of those using the roads were nonpermissive users and members of the general public. Thus, the court determined that "[p]rior to the locking of the gates in the early 1990s the roads were used as public thoroughfares." And the court found "that the continuous use as a public thoroughfare continued for at least ten years, if not much longer, or for multiple periods of ten years." The court therefore concluded that Wasatch County had established by clear and convincing evidence that the Four Roads had been abandoned and dedicated to the public. The court decided, however, that Wasatch County was equitably estopped from opening the roads to public use because the Okelberrys had, since 1989, asserted private control over the roads. The court stated that "[t]o allow the County now to assert an ownership interest in these roads would cause the Okelberrys injury [and] would be unjust."

[\*P7] Wasatch County appealed the trial court's equitable estoppel determination, and the Okelberrys cross-appealed the court's decision that the Four Roads had been dedicated to the public. The court of appeals reversed the trial court's equitable estoppel [\*\*\*8] decision and upheld its decisions regarding the public dedication of the Four Roads. <sup>7</sup> We granted certiorari to determine whether the court of appeals applied the correct standard for determining whether a road has been

continuously used as a public thoroughfare pursuant to *Utah Code section 72-5-104*. The parties do not challenge, and we do not address, the equitable estoppel issue.

<sup>7</sup> See *Wasatch County v. Okelberry*, 2006 UT App 473, P 33, 153 P.3d 745.

## STANDARD OF REVIEW

[\*P8] "On certiorari, we review for correctness the decision of the court of appeals, not the decision of the district court." <sup>8</sup> "The correctness of the court of appeals' decision turns on whether that court correctly reviewed the trial court's decision under the appropriate standard of review." <sup>9</sup> An appellate court reviews a trial court's legal interpretation of the Dedication Statute for correctness and its factual findings for clear error. <sup>10</sup> But whether the facts of a case satisfy the requirements of the Dedication Statute is a mixed question of fact and law that involves various and complex facts, evidentiary resolutions, and credibility determinations. <sup>11</sup> Thus, an appellate court reviews "a trial court's decision regarding [\*\*\*9] whether a public highway has been established under [the Dedication Statute] . . . for correctness but grant[s] the court significant discretion in its application of the facts to the statute." <sup>12</sup>

<sup>8</sup> *D.J. Inv. Group, L.L.C. v. DAE/Westbrook, L.L.C.*, 2006 UT 62, P 10, 147 P.3d 414.

<sup>9</sup> *State v. Dean*, 2004 UT 63, P 7, 95 P.3d 276.

<sup>10</sup> See *State v. Levin*, 2006 UT 50, P 20, 144 P.3d 1096.

<sup>11</sup> *Heber City Corp. v. Simpson*, 942 P.2d 307, 309-10 (Utah 1997).

<sup>12</sup> *Id.* at 310.

## ANALYSIS

[\*P9] Both the United States and Utah Constitutions prohibit uncompensated takings of private property. <sup>13</sup> Yet, under certain circumstances, Utah statutory law allows property to be transferred from private to public use without compensation. The Dedication Statute at issue in this case allows [\*\*773] for such a transfer. The statute provides that "[a] highway is dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years." <sup>14</sup> In light of the constitutional protection accorded private property, we have held that a party seeking to establish dedication and abandonment

under this statute bears the burden of doing so by clear and convincing evidence.<sup>15</sup>

13 *U.S. Const. amend. V* [\*\*\*10] ("[N]or shall private property be taken for public use, without just compensation."); *Utah Const. art. I, § 22* ("Private property shall not be taken or damaged for public use without just compensation.").

14 *Utah Code Ann. § 72-5-104(1)* (2001).

15 *See Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1099 (*Utah* 1995); *Bonner v. Sudbury*, 18 *Utah* 2d 140, 417 P.2d 646, 648 (*Utah* 1966).

[\*P10] In a number of our past cases, we have sought to interpret the phrase "continuously used as a public thoroughfare." We have explained that such use occurs when "the public, even though not consisting of a great many persons, [makes] a continuous and uninterrupted use" of a road "as often as they [find] it convenient or necessary."<sup>16</sup> The court of appeals, borrowing language from one of our cases dealing with the doctrine of right-of-way by prescription, has added to this definition as follows: "[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."<sup>17</sup>

16 *Boyer v. Clark*, 7 *Utah* 2d 395, 326 P.2d 107, 109 (*Utah* 1958).

17 *Campbell v. Box Elder County*, 962 P.2d 806, 809 (*Utah Ct. App.* 1998) (quoting *Richards v. Pines Ranch, Inc.*, 559 P.2d 948, 949 (*Utah* 1977)). [\*\*\*11] The entire passage from which this quote was extracted reads as follows:

"A way may be established by prescription without direct evidence of its actual use during each year. A use may be continuous though not constant. A right of way means a right to pass over another's land, more or less frequently, according to the nature of the use to be made by the easement; and how frequently is immaterial, provided it occurred as often as the claimant had occasion or chose to pass. It must appear not to have been interrupted by the owner of the land across which the

right is exercised, nor voluntarily abandoned by the claimant. Mere intermission is not interruption."

*Richards*, 559 P.2d at 949 (quoting 1 *Thompson on Real Property* § 464 (1924)).

[\*P11] Despite the best efforts of this court and the court of appeals, a workable interpretation of "continuous use" in the context of the Dedication Statute has remained elusive. We have described ourselves as "hard-pressed to establish a coherent and consistent statement of the law on a fact-intensive, case-by-case review of trial court rulings."<sup>18</sup> In reviewing the case now before us, the court of appeals thoughtfully sought to bring some coherency and consistency [\*\*\*12] to this area of the law by articulating a balancing test:

In deciding whether a locked gate acted as an interruptive force sufficient to restart the running of the statutory ten-year period, the trial court should weigh the evidence regarding the duration and frequency that the gate was locked against the frequency and volume of public use to determine if there is clear and convincing evidence that public use of the road was continuous.<sup>19</sup>

18 *Heber City Corp. v. Simpson*, 942 P.2d 307, 310 (*Utah* 1997).

19 *Wasatch County v. Okelberry*, 2006 *UT App* 473, P 18, 153 P.3d 745. The balancing test articulated by the court of appeals applies only to locked gates, but it could arguably apply to other types of interruptions, and we consider its potentially broad application here.

[\*P12] We find the court of appeals' approach problematic. The proposed test could be read to suggest that the elements of the Dedication Statute are met where the duration and frequency of continuous use as a public thoroughfare simply outweigh the duration and frequency of interruption during a ten-year period. Under this standard, it could be argued that even where there is a significant interruption in the use of a road, if the [\*\*\*13] period of use is greater than the length of the interruption, the requirements of the Dedication Statute would be satisfied. We think it unlikely that this is what

the Legislature intended when it required that a road be "continuously used." Indeed, to balance interruptions in use against frequency of use in order to determine whether a road was continuously used is inconsistent with the very notion of continuous use--any sufficient interruption in use necessarily makes use noncontinuous. Moreover, we think that this balancing test fails to remedy the lack of [\*\*774] predictability from which this area of the law suffers. Thus, while we reject the court of appeals' interpretive approach, its careful review of our case law and attempt to bring coherence to that case law highlights for us the need for a clear, workable standard. We take this opportunity to articulate such a standard.

[\*P13] In interpreting a statute, our goal is to ascertain the Legislature's intent.<sup>20</sup> We do so by first evaluating "the 'best evidence' of legislative intent, namely, 'the plain language of the statute itself.'"<sup>21</sup> We give the words of a statute their "plain, natural, ordinary, and commonly understood meaning, in the [\*\*\*14] absence of any statutory or well-established technical meaning, unless it is plain from the statute that a different meaning is intended."<sup>22</sup>

<sup>20</sup> See *Duke v. Graham*, 2007 UT 31, P 16, 158 P.3d 540.

<sup>21</sup> *Id.* (quoting *State v. Martinez*, 2002 UT 80, P 8, 52 P.3d 1276).

<sup>22</sup> *State v. Navaro*, 83 Utah 6, 26 P.2d 955, 956 (Utah 1933).

[\*P14] The word "continuously" is neither defined in the Dedication Statute nor imbued with technical meaning. Thus, we understand "continuously" to have its plain meaning of "without interruption."<sup>23</sup> A party claiming dedication must therefore establish by clear and convincing evidence that a road has been used *without interruption* as a public thoroughfare for ten years in order for the road to become dedicated to public use.

<sup>23</sup> *Merriam-Webster's Collegiate Dictionary* defines "continuous" as "marked by uninterrupted extension in space, time, or sequence." *Merriam-Webster's Collegiate Dictionary* 270 (11th ed. 2003).

[\*P15] The lack of clarity in this area of the law stems largely from the fact that we have never set forth a standard for determining what qualifies as a sufficient interruption to restart the running of the required ten-year

period under the Dedication Statute. We do so now by setting [\*\*\*15] forth a bright-line rule by which we intend to make application of the Dedication Statute more predictable:

An overt act that is intended by a property owner to interrupt the use of a road as a public thoroughfare, and is reasonably calculated to do so, constitutes an interruption sufficient to restart the running of the required ten-year period under the Dedication Statute.

This rule does not change the burden of the party claiming dedication. For a highway to be deemed dedicated to the public, the party claiming dedication must establish by clear and convincing evidence that the road at issue was continuously used as a public thoroughfare for a period of ten years; credible evidence of the type of interruption defined above--an overt act intended to and reasonably calculated to interrupt use of a road as a public thoroughfare--simply precludes a finding of continuous use.

[\*P16] In order to elucidate this standard, we think it helpful to distinguish between an interruption in use and an intermission in use. The distinction lies in the intent and conduct of the property owner. As noted above, a road may be used continuously even if it is not used constantly or frequently.<sup>24</sup> For example, a [\*\*\*16] road may be used by only one person once a month, but if this use is as frequent as the public finds it "convenient or necessary,"<sup>25</sup> and the landowner has taken no action intended and reasonably calculated to interrupt use, the use is continuous. The one-month period of time between usages is a mere intermission, not an interruption. Likewise, a road may be heavily traveled by the public during certain times of the year but impassable because of weather-related conditions at other times. Though the use is not constant, if it occurs as often as the public finds it convenient or necessary, and the landowner has taken no action intended and reasonably calculated to interrupt use, the use is continuous. The period of impassability due to weather is a mere intermission, not an interruption.

<sup>24</sup> See *Campbell v. Box Elder County*, 962 P.2d 806, 809 (Utah Ct. App. 1998).

<sup>25</sup> *Boyer v. Clark*, 7 Utah 2d 395, 326 P.2d 107, 109 (Utah 1958).

[\*\*775] [\*P17] Continuous use may be established as to heavily or lightly used roads, as long as the use is as frequent as the public finds it convenient or necessary. We emphasize here, however, that the action necessary by the landowner to establish an interruption in public use does not vary [\*\*\*17] depending on the level of public use. An overt act intended and reasonably calculated to interrupt public use restarts the statutory period, and the effectiveness of such act is not tied to the level of public use. In other words, an act by a landowner sufficient to interrupt public use of a road used on a daily basis by the public is also sufficient to interrupt public use of a road used on a monthly basis by the public.

[\*P18] We now apply our newly articulated test to the facts of the case at hand. The Okelberrys asserted at trial that there were signs on the roads indicating "No Trespassing," "Keep Out," or "Private," and that trespassers were at times asked to leave. Wasatch County conceded that such signs were posted, but argued that they referred only to property adjoining the roads and not the roads themselves. While the trial court assumed the Okelberrys' assertions to be true for purposes of its analysis, it made no actual findings as to when the signs were posted, what they appeared to reference, or whether trespassers were asked to leave. Thus, while it is clear that the posting of the signs constituted an overt act, it remains a factual question whether the Okelberrys intended [\*\*\*18] the signs to interrupt public use of the roads and whether the posting of the signs was reasonably calculated to do so. Questions also remain as to when the signs were posted and whether trespassers were asked to leave, and if so, when and how many.

[\*P19] The Okelberrys also claimed at trial that the gates were periodically locked for several days at a time beginning in the late 1950s. Here again, while the trial court assumed this claim to be true for purposes of its analysis, it did not make a factual finding on this issue. The locking of gates for several days at a time constitutes an overt act intended to interrupt public use and reasonably calculated to do so. But factual questions remain as to whether and when such an event or events occurred. We therefore remand this case for the trial court to make these factual determinations.

## CONCLUSION

[\*P20] *Utah Code section 72-5-104(1)* provides that "[a] highway is dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years." We hold today that an overt act that is intended by the property owner to interrupt the use of a road as a public thoroughfare, and is reasonably calculated [\*\*\*19] to do so, is an interruption in continuous use sufficient to restart the running of the ten-year period under this statute. If a party produces credible evidence of such an interruption, this evidence will preclude a finding of continuous use. Because the trial court did not make specific findings of fact regarding the Okelberrys' evidence of interruption in the use of the Four Roads as public thoroughfares, we reverse and remand for further proceedings consistent with this opinion.

[\*P21] Chief Justice Durham, Associate Chief Justice Wilkins, Justice Parrish, and Justice Nehring concur in Justice Durrant's opinion.



LEXSEE 196 SO 118

**WILLIAMS v. PRATHER et al.****4 Div. 121.****SUPREME COURT OF ALABAMA***239 Ala. 524; 196 So. 118; 1940 Ala. LEXIS 385***May 9, 1940, Decided**

**PRIOR HISTORY:** [\*\*\*1] Appeal from Circuit Court, Russell County; J. S. Williams, Judge.

Suit in equity by Albert J. Williams against Mrs. M. L. Prather, as executrix of the will of W. B. Prather, deceased, and others, to enjoin interference with the use of an alleged public road. From a decree for respondents, complainant appeals.

Corrected and affirmed.

**DISPOSITION:** Corrected and affirmed.

## HEADNOTES

### 1. Judgment

Where, in suit in equity to enjoin interference with use of an alleged public road, full record of criminal prosecution of complainant for trespass arising out of use of such road was by agreement offered in evidence on issue as to character of road, probative force of such evidence could not be disregarded.

### 2. Highways

The placing of obstructions by owner across a road on his land is a strong indication that use by others of road is permissive only, and the erection of a gate across a road tends to evidence an intention on the part of owner to assume and assert ownership and possession of the land over which the road runs.

### 3. Highways

Evidence that use of road across defendant's land by public was largely confined to persons who wanted to use creek land for fishing and hunting, and that gate had been maintained across road from time to time, established that use of road was permissive, and that no right to use of road by public was obtained by prescription through long and uninterrupted use thereof.

### 4. Injunction

Where there is grave doubt as to complainant's right, preliminary injunctive relief will generally be denied.

### 5. Highways

In suit in equity to enjoin interference with use of an alleged public road, where it was reasonably apparent that all material facts were presented on hearing to dissolve preliminary injunction, and such facts foreshadowed a final result contrary to complainant's theory, chancellor properly dissolved preliminary injunction.

### 6. Appeal and error

In suit in equity to enjoin interference with use of an alleged public road, where it appeared chancellor was of impression that submission was for a final decree, and a decree was rendered in accordance with such view, but submission was only upon motion to dissolve preliminary injunction, decree would be corrected to extent of giving it a limitation to the motion only.

**COUNSEL:** Chauncey Sparks, of Eufaula, for appellant.

239 Ala. 524, \*, 196 So. 118, \*\*;  
1940 Ala. LEXIS 385, \*\*\*1

As a general rule an open, defined roadway in continuous use by the public as a highway, without let or hindrance, for a period of twenty years becomes a public highway by prescription. *Central of Georgia R. Co. v. Faulkner*, 217 Ala. 82, 114 So. 686; *Newell v. Dempsey*, 219 Ala. 634, 122 So. 881; *Ritter v. Hewitt*, 236 Ala. 205, 181 So. 289. The burden is on the landowner to show the use was permissive only, in recognition of his title and right to claim possession. *Ritter v. Hewitt*, *supra*; *Central of Georgia R. Co. v. Faulkner*, *supra*. It is the character rather than the quantum of use that controls. *Ritter v. Hewitt*, *supra*; *Cabbell v. Williams*, 127 Ala. 320, 28 So. 405. The hearing on a motion to dissolve a temporary injunction granted without a hearing should be considered [\*\*\*2] on the same basis as the granting of an injunction after hearing, under Code 1923, §§ 8304, 8305, 8307. *Lynne v. Ralph*, 201 Ala. 535, 78 So. 889. Where, if the defendant's allegations are true, the injunction will do him no harm and, if the plaintiff's allegations are true, a dissolution will involve him in irreparable injury, the injunction will not be dissolved. *Scholze v. Steiner*, 100 Ala. 148, 14 So. 552; *Francis v. Gilreath C. & I. Co.*, 180 Ala. 338, 60 So. 919; *Profile Cot. Mills v. Calhoun Water Co.*, 189 Ala. 181, 66 So. 50; *Yarbrough v. Taylor*, 191 Ala. 109, 67 So. 990; *First Nat. Bank v. Forman*, 230 Ala. 185, 160 So. 109; *Harrison v. Yerby*, 87 Ala. 185, 6 So. 3; *Union Cent. L. I. Co. v. Thompson*, 229 Ala. 433, 157 So. 852; *State v. Mobile & O. R. Co.*, 228 Ala. 533, 154 So. 91; *Holcomb v. Forsyth*, 216 Ala. 486, 113 So. 516; *Fleming v. Bryars*, 227 Ala. 660, 151 So. 846; *Cruce v. McCombs*, 221 Ala. 507, 129 So. 279; *Dean v. Coosa County Lbr. Co.*, 232 Ala. 177, 167 So. 566; *Hancock v. Watt*, 233 Ala. 29, 169 So. 704. Ex parte affidavits may be offered and considered in support of any of the facts in issue on granting or dissolution of temporary injunction. Authorities, *supra*.

J. [\*\*\*3] B. Hicks, of Phenix City, and H. A. Ferrell, of Seale, for appellees.

A public highway is one under the control of the public, dedicated by the owner, or used by the public for twenty years, or established in a regular proceeding, and every public thoroughfare is a highway. *Dunn v. Gunn*, 149 Ala. 583, 42 So. 686. As to what constitutes a dedication, see *Stollenwerck v. Greil*, 205 Ala. 217, 87 So. 338; *Harper v. State*, 109 Ala. 66, 19 So. 901; *McDade v. State*, 95 Ala. 28, 11 So. 375; *Lewman & Co. v. Andrews*, 129 Ala. 170, 29 So. 692. Appellant's case is rested upon the theory that the road has been in use for a period of

twenty years; that is, the public has a prescriptive right to it. Such right must be under a claim adverse and continuous for a period of twenty years. It cannot be permissive; for permissive use, however long, would never ripen into prescription. *Merchant v. Markham*, 170 Ala. 278, 54 So. 236; Elliott, *Roads & Streets*, 137; *Gosdin v. Williams*, 151 Ala. 592, 44 So. 611; *Jones v. Bright*, 140 Ala. 268, 37 So. 79; *Beverly v. State*, 28 Ala. App. 451, 185 So. 768.

**JUDGES:** LUCIEN D. GARDNER, C. J. WILLIAM H. THOMAS, VIRGIL BOULDIN and ARTHUR B. FOSTER, JJ., concurred.

**OPINION BY:** GARDNER

**OPINION**

[\*\*\*4] [\*526] [\*\*119] GARDNER, Chief Justice.

Complainant filed this bill seeking injunctive relief against respondents' obstruction of a certain road, which he insists is a public road, leading from the Hitchitie Settlement road and across the lands of respondents, into and through his lands.

There is no pretense this road was established or maintained by any public authorities, but complainant's case rests solely upon the doctrine of prescription through long and uninterrupted use thereof by the public as a matter of right. *Ritter v. Hewitt*, 236 Ala. 205, 181 So. 289; *Central of Georgia R. Co. v. Faulkner*, 217 Ala. 82, 114 So. 686; *Newell v. Dempsey*, 219 Ala. 634, 122 So. 881.

Nor is it questioned that complainant has shown damage peculiar to himself, that is, as to the matter of practical access from his lands to the public markets, and necessity for the road for the proper enjoyment of his property. *Ritter v. Hewitt*, *supra*.

The case presents purely a question of fact--whether the road is in fact a public road or only a private or plantation road, as some of the witnesses denominate it.

Respondents insist that whatever [\*\*\*5] use was made of this road by the public was permissive only, and that there has been no such continuous and uninterrupted use by anyone for the prescriptive period of twenty years, such as to create a presumption of dedication. *Newell v.*



239 Ala. 524, \*526; 196 So. 118, \*\*119;  
1940 Ala. LEXIS 385, \*\*\*5

*Dempsey, supra.*

On the motion to dissolve the preliminary injunction writ theretofore issued numerous affidavits were offered by the respective parties. Those for complainant tended to show continuous and uninterrupted use of the road by the parties as a matter of right for a period of more than twenty years, and pictures were introduced of some portions of the road indicating long usage,--some of the affidavits stating as much as fifty years or more. Most of these affidavits are of the same verbiage with changes only as to the length of time affiant had known the road, and it appears some of them were fully prepared when presented to the affiant for signature. A number of those giving affidavits to complainant (among them Arrant, Screws, Jackson and Kelly) subsequently repudiated the statement therein that the road was a public road, and made affidavits for respondents in support of the theory of its private character, and that whatever [\*\*\*6] use was made of the road was permissive only.

In addition, respondents offer affidavits of a number of citizens familiar with the road to the effect it was always considered simply as a plantation road, and that no member of the public made use thereof as a matter of right.

Perhaps considered from the standpoint of affidavits alone, the preponderance of the proof supports respondents' theory of the case. But the submission was not on affidavits alone. Several of the affiants testified in the criminal prosecution case of complainant when charged with trespass,--the presiding judge being the same official who sat as chancellor in this equity proceeding. [\*\*120] Among other issues in that prosecution was that of the character of this particular road, and the chancellor on that trial saw and heard the witnesses as they testified in regard thereto. The full record of that trial was by agreement offered in evidence on this submission, and its probative force as thus indicated cannot be disregarded. *Nelson v. Hammonds*, 173 Ala. 14, 55 So. 301.

There are other material facts disclosed by all the proof which we consider of much importance. Affiant Newsome gives a history [\*\*\*7] of this road, and his affidavit discloses that in fact there have been in the course of forty-five years three roads along this general direction--all of a private character. He details the disagreement arising over one of these roads, and the change to the present road, and that this affiant himself

built a wire fence across this road in 1916, which completely [\*527] closed it for two years or more. Then there was a gate across this road, sometimes kept closed; and in 1924, 1925 and 1926, when one Bellamy lived at the "Treadaway Home House" (as we understand the record, complainant now owns the Treadaway place), the gate across the road was "kept nailed up most of the time." Bellamy states that this road "comes to a dead end and stops in the upper part of the Treadaway place." On one of the maps in evidence, the terminus of this road is marked "cattle pen," which is on complainant's land, and where the proof shows a gate across the road. The proof is also to the effect there has been, and is now, a gate across this road on respondents' land.

We find no denial of these salient facts in complainant's affidavits. He states: "I have occupied or used land in this community for the [\*\*\*8] last twelve years. During that time this road has been continuously used by the public. Although it might have been closed by a gate in the summer time, I never locked this gate, but it was left unlocked for the purpose of admitting, back and forth, the public in the use of said road. \* \* \* It was a public road, continuously used by the public, although occasionally fastened to keep cattle in, but not by a permanent gate or fence. There was always left a gap open which the public could easily unlatch and continue along said public road."

It must be conceded that obstructions placed across a road, as indicated by this proof, is a strong indication that the use by others is permissive only, and the erection of a gate across a road tends to evidence an intention on the part of the owner to assume and assert ownership and possession of the land over which the road runs. Such was the holding of this court in *Whaley v. Wilson*, 120 Ala. 502, 24 So. 855, the criticism of which in *Locklin v. Tucker*, 208 Ala. 155, 93 So. 896, did not reach this particular question. See, also, 19 Corpus Juris 897, 898.

We think it clear enough from the proof the use by the public was [\*\*\*9] largely confined to those persons who wanted to use the creek lands for fishing and hunting, and, indeed, the very "dead end" of the road at a gate on complainant's lands also indicates its limited use for those on his own as well as respondents' plantation. Each case must of course rest upon its own peculiar facts, but the discussion found in the opinion of *Newell v. Dempsey*, 219 Ala. 634, 122 So. 881, is helpful.

Complainant himself occupied respondents' land as

239 Ala. 524, \*527; 196 So. 118, \*\*120;  
1940 Ala. LEXIS 385, \*\*\*9

tenant for some years and raised objections at times to the general use of the road by others. But in all events, admittedly, the gates have all along been across the road from time to time. From all the proof we think it clear that a permissive use only is shown.

Complainant's counsel argues that upon consideration of the motion to dissolve the injunction the matter of relative injury to one with no resultant harm to the other of the parties is to be weighed, and if the retention of the injunction will do respondents no harm, while its dissolution will work irreparable injury to complainant, the injunction will be retained for a final hearing of the cause. *Profile Cotton Mills Co. v. Calhoun Water Co.*, 189 Ala. 181, 66 So. 50. [\*\*\*10]

But this same authority states and gives application to another well-recognized rule (5 Pomeroy Equity Jur. section 264) to the effect that where there is grave doubt as to complainant's right, preliminary relief will generally be denied. See, also, to like effect, 32 Corpus Juris, § 680, p. 402. We think this latter principle applicable here.

It is reasonably apparent that all the material facts have on this hearing been presented, and all these facts being considered in conjunction with the admitted proof as herein outlined, foreshadows [\*\*121] the final result contrary to complainant's theory of the case. Such being

our conviction, the chancellor is not to be held in error in the decree dissolving the injunction.

It appears from a study of this record that the chancellor in fact was of the impression the submission was for final decree, and a decree was rendered in accordance with this view. But as we read the order of submission, it was only upon motion to dissolve, and it becomes necessary to correct the decree to the extent of giving it a limitation to the motion only.

Though mentioned in the pleading, we find no serious argument that the matter of the character of the [\*\*\*11] road, whether public or private, became res adjudicata as to this proceeding by reason of complainant's acquittal in his prosecution case for trespass, [\*528] and we consider it needs no discussion here.

The decree appealed from is corrected, as hereinabove indicated, and as thus corrected will be affirmed, with the cost of this appeal to be taxed against appellant.

Corrected and affirmed.

THOMAS, BOULDIN, and FOSTER, JJ., concur.



LEXSEE 2008 UT 12

**Utah County and State of Utah, by and through its Department of Natural Resources and Division of Wildlife Resources, Plaintiffs and Respondents, v. Randy Butler, Donna Butler, Blaine Evans, Linda Evans, Margaret Condley, Elizabeth Condley, and John Does 1-15, Defendants and Petitioners.**

No. 20070009

## SUPREME COURT OF UTAH

2008 UT 12; 179 P.3d 775; 597 Utah Adv. Rep. 5; 2008 Utah LEXIS 17

February 12, 2008, Filed

**SUBSEQUENT HISTORY:** Released for Publication April 3, 2008

Companion case at *Wasatch County v. Okelberry*, 2008 UT 10, 179 P.3d 768, 2008 Utah LEXIS 15 (2008)

**PRIOR HISTORY:** [\*\*\*1]

Fourth District, Provo Dep't. The Honorable James R. Taylor. No. 000403372.

*Utah County v. Butler*, 147 P.3d 963, 2006 UT App 444, 2006 Utah App. LEXIS 481 (2006)

**COUNSEL:** M. Cort Griffin, Robert J. Moore, Provo, for plaintiff, Utah County.

Mark L. Shurtleff, Att'y Gen., Martin B. Bushman, Asst. Att'y Gen., Salt Lake City, for plaintiff, State of Utah.

Scott L. Wiggins, Salt Lake City, for defendants.

**JUDGES:** DURRANT, Justice. Chief Justice Durham, Associate Chief Justice Wilkins, Justice Parrish, and Justice Nehring concur in Justice Durrant's opinion.

**OPINION BY:** DURRANT**OPINION**

[\*\*778] On Certiorari to the Utah Court of Appeals

*DURRANT, Justice:*

**INTRODUCTION**

[\*P1] In this and two companion cases that we also decide today,<sup>1</sup> we consider the operation and application of *Utah Code section 72-5-104(1)* (the "Dedication Statute"). The Dedication Statute provides that "[a] highway is dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years."<sup>2</sup> We granted certiorari in this case to review three issues related to the Dedication Statute: (1) whether the court of appeals erred in evaluating the trial court's determination that the public had continuously used the road at issue in this case according to the requirements of the Dedication Statute; (2) whether [\*\*\*2] trespassing may constitute a public use pursuant to the Dedication Statute; and (3) whether the court of appeals erred in reviewing the trial court's failure to designate a specific ten-year period of continuous use and, if so, whether that failure constituted reversible error. We affirm the decision of the court of appeals, which, like the trial court, found the road at issue to be dedicated and abandoned as a public highway.<sup>3</sup>

<sup>1</sup> *Town of Leeds v. Prisbrey*, 2008 UT 11, 179 P.3d 757; *Wasatch County v. Okelberry*, 2008 UT 10, 179 P.3d 768.

<sup>2</sup> *Utah Code Ann. § 72-5-104(1)* (2001).

<sup>3</sup> *Utah County v. Butler*, 2006 UT App 444, P 24, 147 P.3d 963.

[\*P2] We also granted certiorari to determine

whether the court of appeals erred in its application of *Utah Code section 72-7-104(4)* to the facts of this case. As to this issue, we reverse the decision of the court of appeals.

## BACKGROUND

[\*P3] Bennie Creek Road (the "Road") begins in Birdseye, Utah, at a junction with U.S. Highway 89 and proceeds approximately two and one-half miles west until it reaches the edge of the Uinta National Forest. The Road continues into the forest, providing access to hiking trails, camping areas, and the Nebo Loop Road. Before entering the forest, [\*\*\*3] the Road crosses real property owned by Randy Butler, Donna Butler, Blaine Evans, and Linda Evans (collectively, the "Butlers").

[\*P4] In 1996, Mr. Butler erected a locked gate across the Road. The following year, Utah County served Mr. Butler with notices instructing him to remove the gate. Mr. [\*\*779] Butler did not remove the gate and Utah County thereafter filed this action to have the Road declared dedicated and abandoned to public use pursuant to *Utah Code section 72-5-104(1)*.<sup>4</sup> Utah County also sought an order enjoining the Butlers from blocking access to the Road and forcing them to remove the gate and requested monetary relief from the Butlers of ten dollars a day for each day the Road remained closed following delivery of the notices pursuant to *Utah Code section 72-7-104(4)*.

4 An earlier version of this statute was in effect at the time Utah County claims the Road was dedicated and abandoned to the use of the public. See *Utah Code Ann. § 27-12-89* (1995). A 1998 amendment to the earlier version renumbered this section but made no substantive changes to it. 1998 Utah Laws 861. We therefore refer to the current version of the statute throughout this opinion.

[\*P5] During an eight-day bench trial, [\*\*\*4] the trial court heard testimony from over sixty witnesses--including previous and current owners of the relevant property, various recreational users of the Road, Utah Division of Wildlife Resources employees, Uinta National Forest workers, and county employees assigned to maintain the Road--regarding the use and condition of the Road from 1925 to the present time. These witnesses provided conflicting testimony as to the presence and purpose of gates on the Road, the placement of "No

Trespassing" signs, and the necessity of obtaining permission of a landowner to use the Road.

[\*P6] In its Findings of Fact, the trial court cited the conflicting testimony regarding locked gates. The gates, the court found, were used for controlling livestock "and not intended to restrict travel on the Road." The court also found that the signs and painted posts along the Road were positioned such that "they prohibited travel off of the Road, not on the Road." And with respect to other evidence that travel on the Road was restricted, the court found that winter snow impeded all travel on the Road, and that springs or bogs, which flooded the Road in wet years, impeded travel by vehicle but not by foot, horseback, [\*\*\*5] or wagon. The court also found that, although there was testimony that the Road was at times impassable because it was used to deliver irrigation water, "[a] clear and convincing majority of witnesses . . . traveled the Road unrestricted by irrigation practices." Based on these findings, the trial court concluded that the Road "has been dedicated and abandoned to the use of the public because it has been continuously used as a public thoroughfare for a period of ten years" and ordered the Butlers to remove "anything that blocks, locks, or otherwise interferes with public access across the Road."

[\*P7] Although the trial court otherwise found in favor of Utah County, the court denied Utah County's request for damages. The court explained in its Memorandum Decision that "for some of the time since construction of the metal Butler gate the [R]oad has been obstructed and for some of the time it has not." Because the county did not present evidence "to clarify how many of the intervening 2,561 days were days when the [R]oad was obstructed and how many were not," the court chose not to impose a monetary penalty on the Butlers.

[\*P8] The Butlers appealed the court's decision regarding the public dedication [\*\*\*6] of the Road, and Utah County cross-appealed the court's failure to award damages. The court of appeals affirmed the trial court's conclusion that the Road has been dedicated and abandoned to public use but reversed its damages determination.<sup>5</sup> We granted certiorari on three issues relating to the court of appeals' application of the Dedication Statute and one issue regarding the award of damages.

<sup>5</sup> *Utah County v. Butler*, 2006 UT App 444, 147 P.3d 963.

**STANDARDS OF REVIEW**

[\*P9] "On certiorari, we review for correctness the decision of the court of appeals, not the decision of the district court." <sup>6</sup> "The correctness of the court of appeals' decision turns on whether that court correctly [\*\*780] reviewed the trial court's decision under the appropriate standard of review." <sup>7</sup> As to the Dedication Statute, "[a]n appellate court reviews a trial court's legal interpretation of the Dedication Statute for correctness and its factual findings for clear error." <sup>8</sup> But whether the facts of a case satisfy the requirements of the Dedication Statute is a mixed question of fact and law that involves various and complex facts, evidentiary resolutions, and credibility determinations. <sup>9</sup> An appellate court therefore reviews [\*\*\*7] "a trial court's decision regarding whether a public highway has been established under [the Dedication Statute] . . . for correctness but grant[s] the court significant discretion in its application of the facts to the statute." <sup>10</sup> The question of whether the court of appeals properly awarded damages under *Utah Code section 72-7-104(4)* is an issue of statutory interpretation, a question of law that we review for correctness. <sup>11</sup>

<sup>6</sup> *D.J. Inv. Group, L.L.C. v. DAE/Westbrook, L.L.C.*, 2006 UT 62, P 10, 147 P.3d 414.

<sup>7</sup> *State v. Dean*, 2004 UT 63, P 7, 95 P.3d 276.

<sup>8</sup> *Wasatch County v. Okelberry*, 2008 UT 10, P 8, 179 P.3d 768.

<sup>9</sup> *Heber City Corp. v. Simpson*, 942 P.2d 307, 309-10 (Utah 1997).

<sup>10</sup> *Id.* at 310.

<sup>11</sup> *See Sill v. Hart*, 2007 UT 45, P 5, 162 P.3d 1099.

**ANALYSIS**

[\*P10] We granted certiorari to review three issues concerning the Dedication Statute, which reads as follows: "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." <sup>12</sup> The three issues relate to each of the three elements of this statute--"continuous use," "a public thoroughfare," and "a period of ten years"--which we review, in that order, below. Following [\*\*\*8] our review of the elements of the Dedication Statute, we address the final issue on which we granted certiorari, which concerns the damages to which a party claiming dedication is entitled under *Utah Code section 72-7-104(4)*.

12 *Utah Code Ann. § 72-5-104(1)* (2001).

**I. CONTINUOUS USE**

[\*P11] We first consider the court of appeals' affirmation of the trial court's finding that the Road was *continuously used* as a public thoroughfare. The Butlers argue that the trial court failed to consider a variety of circumstances that interrupted the public's continuous use of the road. We require parties challenging factual findings of a lower court to "first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below." <sup>13</sup> To accomplish this, a party "may not simply cite to the evidence which supports his or her position and hope to prevail." <sup>14</sup> Rather, a party should "construct the evidence supporting the adversary's position, and then 'ferret out a fatal flaw in the evidence.'" <sup>15</sup> "[P]arties that fail to marshal the evidence do so at the risk that the reviewing court [\*\*\*9] will decline . . . to review the trial court's factual findings." <sup>16</sup> Nevertheless, we "retain[] discretion to consider independently the whole record and determine if the decision below has adequate factual support." <sup>17</sup>

<sup>13</sup> *Wilson Supply, Inc. v. Fradan Mfg. Corp.*, 2002 UT 94, P 21, 54 P.3d 1177.

<sup>14</sup> *Wayment v. Howard*, 2006 UT 56, P 9, 144 P.3d 1147.

<sup>15</sup> *Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-day Saints*, 2007 UT 42, P 17, 164 P.3d 384 (quoting *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah 1991)).

<sup>16</sup> *Id.* P 19.

<sup>17</sup> *Id.* P 20.

[\*P12] In this case, the Butlers completely failed to marshal the evidence in support of the trial court's conclusion that the Road was continuously used as a public thoroughfare. In their brief, the Butlers simply asserted that "[t]here is no evidence to marshal in support of the district court's finding." This assertion is patently false, as there is abundant evidence in the record [\*\*781] supporting the trial court's finding. Moreover, the trial court repeatedly referenced such evidence in its written decision. Because the Butlers' failure to marshal is particularly egregious, we would ordinarily decline to review the factual findings of the [\*\*\*10] lower court under these circumstances. But because we decide this

case in tandem with two companion cases that also involve the Dedication Statute,<sup>18</sup> one of which sets forth the standard for ascertaining whether a road has been "continuously used,"<sup>19</sup> we choose to exercise our discretion and review the merits of the Butlers' arguments regarding continuous use in order to elucidate this standard by applying it to specific facts.

18 *Town of Leeds v. Prisbrey*, 2008 UT 12, 179 P.3d 757; *Wasatch County v. Okelberry*, 2008 UT 10, 179 P.3d 768.

19 *See Wasatch County*, 2008 UT 10, P 15.

[\*P13] The Butlers argue that the Road was not continuously used as a public thoroughfare because travel on the Road was interrupted by naturally occurring weather conditions, irrigation water, and locked gates. Additionally, the Butlers argue that use of the Road was not continuous because there were "No Trespassing" signs along the Road and the landowners, on occasion, called the county sheriff to have trespassers removed from their property. As we explain below, none of these occurrences amounted to an interruption in the public's continuous use of the Road for purposes of the Dedication Statute.

[\*P14] A road is continuously [\*\*\*11] used as a public thoroughfare when "the public . . . [makes] a continuous and uninterrupted use" of the road "as often as they [find] it convenient or necessary."<sup>20</sup> This "use may be continuous though not constant[] . . . provided it [occurs] as often as the claimant [has] occasion or [chooses] to pass. [. . .] Mere intermission is not interruption."<sup>21</sup> In a companion case that we decide today, we hold that "[a]n overt act that is intended by a property owner to interrupt the use of a road as a public thoroughfare, and is reasonably calculated to do so, constitutes an interruption sufficient to restart the running of the required ten-year period under the Dedication Statute."<sup>22</sup> Credible evidence of such an interruption precludes a finding of continuous use.<sup>23</sup>

20 *Boyer v. Clark*, 7 Utah 2d 395, 326 P.2d 107, 109 (Utah 1958).

21 *Campbell v. Box Elder County*, 962 P.2d 806, 809 (Utah Ct. App. 1998) (emphasis omitted) (quoting *Richards v. Pines Ranch, Inc.*, 559 P.2d 948, 949 (Utah 1977)).

22 *Wasatch County*, 2008 UT 10, P 15.

23 *Id.*

[\*P15] As to the Road, groundwater that flooded the Road in the spring and snow that covered the Road in the winter did not interrupt the Road's continuous use for purposes of the Dedication [\*\*\*12] Statute. These conditions, natural in origin, were not overt acts undertaken by the Road's owner.

[\*P16] Irrigation water that flooded the Road and gates along the Road, even though the result of overt acts, also did not interrupt continuous use of the Road for purposes of the Dedication Statute. The Road was periodically used to deliver irrigation water to property along the Road, but the record includes no evidence that the Road was flooded by the Road owner with the intent to interrupt the Road's continuous use as a public thoroughfare rather than to simply deliver irrigation water. Thus, because the overt acts undertaken to effect irrigation were not undertaken with the requisite intent of interrupting continuous use, they do not constitute an interruption sufficient to restart the running of the Dedication Statute's ten-year period. Similarly, the trial court found that gates along the Road were erected, and occasionally locked, for the purpose of controlling livestock. It explicitly found that the gates were not meant to restrict public travel on the Road. Although gates can, under appropriate circumstances, constitute an interruption for purposes of the Dedication Statute,<sup>24</sup> the gates [\*\*\*13] on the Road [\*\*782] were not erected or locked with the requisite intent and therefore did not interrupt the public's continuous use of the Road.

24 *See id. P 19* ("The locking of gates for several days at a time constitutes an overt act intended to interrupt public use and reasonably calculated to do so.").

[\*P17] The Butlers' arguments that removing trespassers from and posting "No Trespassing" signs alongside the Road interrupted the Road's continuous use as a public thoroughfare are likewise without merit. The only evidence regarding the removal of trespassers relevant to the time period during which the trial court found the Road to have been continuously used was the testimony of one witness who was "hunting well off the Road" at the time he was asked to leave. Because this individual was not removed from the Road itself, the action of the property owner does not constitute an overt act intended and reasonably calculated to interrupt continuous use of the Road as a public thoroughfare. Likewise, the trial court found that "No Trespassing"

signs prohibited travel off of the Road, but not on the Road. Signs posted against travel on property adjacent to the Road do not constitute an interruption [\*\*\*14] of travel on the Road itself. Thus, because none of the actions cited by the Butlers amount to an overt act intended and reasonably calculated to interrupt the use of the Road as a public thoroughfare, we affirm the court of appeals' conclusion that the trial court did not err in determining that the Road was continuously used as a public thoroughfare for purposes of the Dedication Statute.<sup>25</sup>

<sup>25</sup> See *Utah County v. Butler*, 2006 UT App 444, P 15, 147 P.3d 963.

## II. PUBLIC THOROUGHFARE

[\*P18] We next consider whether trespassing may constitute a "public" use pursuant to the Dedication Statute. The Butlers argue that some trespassers should not be considered members of the public for purposes of determining whether a road was continuously used as a public thoroughfare. Specifically, they contend that trespassers who knowingly use a private road without permission--in other words, criminal trespassers<sup>26</sup>--are not members of the public for purposes of the Dedication Statute. They contend that only persons who use a road without knowledge of its private status--individuals they call "good faith" trespassers--are members of the public capable of continuously using a road as a public thoroughfare. [\*\*\*15] The court of appeals rejected the Butlers' arguments and "agree[d] with the trial court that trespassers are members of the 'public' for purposes of determining whether the Dedication Statute has been satisfied."<sup>27</sup>

<sup>26</sup> *Utah Code section 76-6-206* defines criminal trespass. The relevant subsection reads as follows:

(2) A person is guilty of criminal trespass if . . .

. . .

(b) knowing his entry or presence is unlawful, he enters or remains on property as to which notice against entering is given by:

(i) personal communication to the actor by the owner or someone

with apparent authority to act for the owner;

(ii) fencing or other enclosure obviously designed to exclude intruders; or

(iii) posting of signs reasonably likely to come to the attention of intruders . . . .

*Utah Code Ann. § 76-6-206(2)* (2003 & Supp. 2007).

<sup>27</sup> *Utah County v. Butler*, 2006 UT App 444, P 11, 147 P.3d 963.

[\*P19] We have explained that certain persons are not members of the public for purposes of the Dedication Statute. Individuals with a private right to use a road, such as adjoining property owners who "may have documentary or prescriptive rights to use the road," are not members of the public, nor are those who have been given [\*\*\*16] permission to use a road.<sup>28</sup> But other than these two classes of individuals, we have not otherwise defined who constitutes the public for purposes of the Dedication Statute. To determine whether trespassers constitute members of the public for purposes of the statute, we must ascertain the intent of the legislature.<sup>29</sup> This we do by evaluating "the 'best evidence' of legislative intent, namely, 'the plain language of the statute itself.'"<sup>30</sup>

<sup>28</sup> *Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1099 (Utah 1995).

<sup>29</sup> See *Duke v. Graham*, 2007 UT 31, P 16, 158 P.3d 540.

<sup>30</sup> *Id.* (quoting *State v. Martinez*, 2002 UT 80, P 8, 52 P.3d 1276).

[\*\*783] [\*P20] Here, the Dedication Statute does not reference or imply the character of the use required of the user, only that users be members of the "public." The "public" is commonly understood to be "the people as a whole."<sup>31</sup> The plain language of the statute does not exclude trespassers, including criminal trespassers, from the class of persons who constitute the "public." All trespassers are therefore "public" users capable of continuously using a road for purposes of dedication. We affirm the court of appeals' conclusion in this regard.<sup>32</sup>

<sup>31</sup> *Merriam-Webster's Collegiate* [\*\*\*17]

*Dictionary* 1005 (11th ed. 2003).  
32 See *Utah County*, 147 P.3d 963, 2006 UT App 444, P 11.

[\*P21] Although we conclude that trespassers can establish a public highway, we stress that a road owner can preclude a finding of continuous use established by trespassers by providing credible evidence of an overt act intended and reasonably calculated to interrupt the use of the road as a public thoroughfare. For example, if a road owner erects and locks for several days at a time a gate across a road for the purpose of blocking public use, this act will restart the ten-year period and preclude a finding of continuous use even if someone jumps the gate or removes the lock and criminally trespasses on the road. Proper action by a road owner can interrupt continuous use by the public regardless of whether the persons using the road are criminal or "good faith" trespassers.

### III. PERIOD OF TEN YEARS

[\*P22] With respect to the third element of the Dedication Statute, the ten-year period, the Butlers argue that the trial court failed to identify a ten-year period of time in which the Road was continuously used as a public thoroughfare. They suggest that the trial court's finding that the Road was continuously used as a public thoroughfare [\*\*\*18] from approximately 1925 to 1980--a period of fifty-five years--is legally inadequate because the court failed to "specifically pinpoint" one ten-year period during those years.

[\*P23] We have explained that, under the Dedication Statute, "[c]ontinuous use as a public thoroughfare must occur for *at least* ten years." 33 The court of appeals concluded that this "permits a finding of public dedication based on a time period greater than ten years." 34 We agree. Here, the trial court's finding of fifty-five years of continuous use is more than adequate to support its determination that the Road was abandoned and dedicated to the public under the Dedication Statute. Thus, the court of appeals correctly affirmed the trial court's finding that the Road was continuously used as a public thoroughfare for a period of ten years.

33 *Heber City Corp. v. Simpson*, 942 P.2d 307, 312 (Utah 1997) (emphasis added).

34 *Utah County v. Butler*, 2006 UT App 444, P 16, 147 P.3d 963.

### IV. DAMAGES

[\*P24] Finally, we consider whether the court of appeals erred in its application of *Utah Code section 72-7-104(4)* to the facts of this case. *Subsection (1)* of this code section provides that "the highway authority having jurisdiction [\*\*\*19] over the right-of-way may" remove from the right-of-way of any highway any structure installed by any person or "give written notice to the person . . . to remove the installation from the right-of-way." 35 And under *subsection (3)*, if the highway authority gives notice and "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." 36 *Subsection (4)*, which is the focus of our review, provides that the "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." 37

35 *Utah Code Ann. § 72-7-104(1)* (2001).

36 *Id. § 72-7-104(3)*.

37 *Id. § 72-7-104(4)*.

[\*P25] In this case, Utah County served the Butlers with notice that the gate erected across [\*\*784] the Road by Mr. Butler should be removed, but the Butlers did not remove the gate. As a result, Utah County asked the trial court for statutory damages of ten dollars for each day the gate remained across the Road. The court denied Utah County's request, citing two considerations. [\*\*\*20] First, the court noted that Utah County created and placed a sign on the gate indicating that travel was allowed past the gate, but admonishing travelers to close the gate and stay on the Road until they reach the national forest. The court explained that "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" Utah County has to the Road. Second, the court stated that Utah County, "as the moving party in seeking to obtain the penalty, had the burden of proving specific evidence of the number of days the [Butlers] have been in violation." This, the court said, Utah County failed to do.

[\*P26] The court of appeals reversed the trial court, concluding that the trial court did not have discretion to deny statutory damages to Utah County. 38 According to the court of appeals, the highway authority is entitled to



the remedies in *section 72-7-104(4)* if it is granted a judgment in an action contesting the removal of an installation on a right-of-way.<sup>39</sup> In addition, the court explained that the gate across the Road "clearly falls under the proscribed [\*\*\*21] structures 'of any kind or character' regardless of whether it was locked."<sup>40</sup> Thus, the court of appeals suggested that the trial court's decision not to award damages was inappropriately based on the lack of evidence regarding whether the gate was locked after the Butlers received notice from Utah County.<sup>41</sup> The court of appeals concluded that "[b]ecause 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."<sup>42</sup>

38 *Utah County v. Butler*, 2006 UT App 444, P 21, 147 P.3d 963.

39 *Id.* The court of appeals based this conclusion on *section 72-7-104(5)*, which reads as follows:

(5) (a) If the person . . . refuses to remove [the installation] . . . , 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).

40 *Utah County*, 147 P.3d 963, 2006 UT App 444, P 22 (quoting *Utah Code Ann.* § 72-7-104(1)).

41 *Id.*

42 *Id.*

[\*P27] The Butlers argue that the word "may," as used throughout *section 72-7-104*, is a permissive term and gives the [\*\*\*22] trial court discretion to award damages. In contrast, Utah County argues that the word allows the highway authority to elect its remedy, which must then be granted by the court. We believe the word "may" as used throughout *section 72-7-104* goes to the highway authority's discretion with respect to the selection of a remedy. That is, the statute gives the highway authority permission, under *subsection (1)*, to

remove an installation or give notice to the offending person to remove it; under *subsection (3)*, to remove the installation at the expense of the person if, after giving notice, the person fails to remove it; under *subsection (4)*, to recover the costs of removing the installation, the costs of a lawsuit, and ten dollars a day; and, under *subsection (5)*, to bring an action to abate the installation as a public nuisance if the person refuses to remove or permit its removal.<sup>43</sup> Importantly, however, the statute does not suggest that the highway authority's chosen remedy *must* be granted by a court. Had the Legislature wished to mandate the award of damages or any of the other remedies in this section, it could have used the word "shall."<sup>44</sup> In the absence of such explicit legislative [\*\*\*23] intent, we deem the award of ten [\*\*\*785] dollars a day in damages, if elected by the highway authority, to be in the court's discretion.<sup>45</sup>

43 *Utah Code Ann.* § 72-7-104(1)-(5).

44 *See, e.g., Grant v. Utah State Land Bd.*, 26 Utah 2d 100, 485 P.2d 1035, 1036-37 (*Utah 1971*) ("[I]f the legislature had intended an applicant [for reinstatement of certain contracts of purchase of State land] to have an absolute right of reinstatement, instead of saying that an applicant 'may have his contract reinstated,' it could easily have used the word 'shall' or 'must,' and thus have rendered a mandatory meaning clear.").

45 *See State v. Wallace*, 2006 UT 86, PP 10-12, 150 P.3d 540 (interpreting the term "may" as permissive because the legislature replaced "shall" with "may" in the relevant statute and explaining that "in the absence of any clear legislative indication to the contrary, we take the Legislature at its word").

[\*P28] In sum, the word "may" in *section 72-7-104(4)* does give Utah County permission to seek ten dollars a day in damages for every day the Butlers' gate remained in place on the Road or to seek an alternative remedy, but it does not mandate that the trial court award those damages if sought. Because the grounds upon [\*\*\*24] which the trial court based its decision not to award damages--the sign placed on the gate by Utah County and the absence of evidence regarding when the gate was locked--are reasonable, the trial court did not abuse its discretion in declining to award Utah County damages under *Utah Code section 72-7-104(4)*. We therefore reverse the court of appeals'

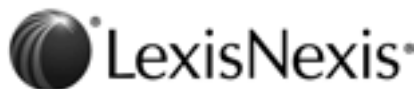
determination in this regard and affirm the decision of the trial court.

## CONCLUSION

[\*P29] We uphold the court of appeals' affirmation of the trial court's conclusion that Bennie Creek Road was abandoned and dedicated to public use because all three elements of the Dedication Statute were satisfied. First, we affirm the trial court's finding that Utah County established by clear and convincing evidence that the Road was continuously used as a public thoroughfare. The Butlers introduced no credible evidence of an overt act or acts intended and reasonably calculated to interrupt use of the road as a public thoroughfare--the only interruption sufficient to restart the running of the Dedication Statute's ten-year period and preclude a finding of continuous use. Second, we hold that trespassers are public users capable of establishing continuous use [\*\*\*25] under the Dedication Statute and

thus were properly considered by the trial court in its application of the Dedication Statute. Third, we conclude that the trial court's finding of a fifty-five year period of continuous use as a public thoroughfare satisfied the Dedication Statute's requirement that such use be made for a period of ten years. Finally, we reverse the court of appeals' conclusion that Utah County is entitled to monetary damages under *Utah Code section 72-7-104(4)* because the statute permits the election of such remedy by a highway authority, but does not mandate that the court award it. We conclude that the trial court did not abuse its discretion in electing not to award damages to Utah County under this statute. Affirmed in part and reversed in part.

[\*P30] Chief Justice Durham, Associate Chief Justice Wilkins, Justice Parrish, and Justice Nehring concur in Justice Durrant's opinion.



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Criminal actions--Provisions concerning--Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**NOTES:**

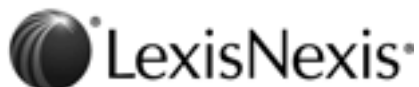
Related Statutes & Rules:

- Constitutional right to be informed of nature and cause of accusation, generally, *USCS Constitution, Amendment 6*.
- Prohibition against state's denial of due process or equal protection, *USCS Constitution, Amendment 14*.
- Grand jury procedure, generally, Rule 6, USCS Federal Rules of Criminal Procedure.
- Procedure as to indictment and information, generally, Rule 7, USCS Federal Rules of Criminal Procedure.

Research Guide:

Federal Procedure:

- 13 Moore's Federal Practice (Matthew Bender 3d ed.), ch 64, Seizing a Person or Property § 64.14.
- 15 Moore's Federal Practice (Matthew Bender 3d ed.), ch 100, The Structure of the Federal Judicial System §§ 100.04, 100.41.
- 15 Moore's Federal Practice (Matthew Bender 3d ed.), ch 101, Issues of Justiciability § 101.41.
- 15 Moore's Federal Practice (Matthew Bender 3d ed.), ch 102, Diversity Jurisdiction § 102.91.



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\*\*\* Current through the 2008 Second Special Session and the 2008 General  
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\*\*\* Annotations current through 2008 UT 75 (10/31/2008); 2008 UT App 418  
(11/14/2008) and November 1, 2008 (FEDERAL CASES) \*\*\*

TITLE 72. TRANSPORTATION CODE  
CHAPTER 7. PROTECTION OF HIGHWAYS  
PART 1. PROTECTION OF RIGHTS-OF-WAY

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*Utah Code Ann. § 72-7-104 (2008)*

§ 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 63G, Chapter 4, 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; 2008, ch. 382, § 2112.

**NOTES:**

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.

The 2008 amendment, effective May 5, 2008, updated references to conform to the recodification of Title 63.

**LexisNexis 50 State Surveys, Legislation & Regulations**

Highways

NOTES TO DECISIONS

ANALYSIS

Damages.

Determination of nature of road.

Nature of remedies.

Removal.

DAMAGES.

Subsection (4) authorizes a county to seek damages for landowners' refusal to remove a gate, but it does not mandate that the trial court award those damages if sought. Trial court did not abuse its discretion in electing not to award damages, as the grounds upon which it relied, the county's sign and the absence of evidence as to when a gate was locked, were reasonable. *Utah County v. Butler*, 2008 UT 12, 179 P.3d 775.

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.**

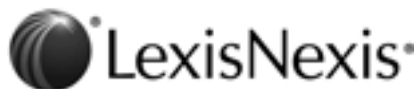
If a road is public, notice that a gate will be removed does not make summary removal unlawful. *Blonquist v. Summit County*, 25 Utah 2d 387, 483 P.2d 430 (1971).

**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.

USER NOTE: For more generally applicable notes, see notes under the first section of this article, part, chapter, subtitle, or title.



LEXSTAT UTAH CODE 72-5-104

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TITLE 72. TRANSPORTATION CODE  
CHAPTER 5. RIGHTS-OF-WAY  
PART 1. PUBLIC HIGHWAYS

**Go to the Utah Code Archive Directory**

*Utah Code Ann. § 72-5-104 (2008)*

§ 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.

**NOTES:**

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

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-- Necessary.  
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Rights of subsequent grantees.  
Sufficiency of proof of dedication.  
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#### 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. P.J. Moran, Inc.*, 51 Utah 178, 169 P. 459 (1917).

#### APPEALS.

Landowners' argument that it was inconsistent for the State to encourage property owners to provide the public with access to their property for recreational use under § 57-14-1 et seq. while at the same time allowing such use to support dedication of a road on that property to the public under this section was waived because landowners raised this argument for the first time on appeal, and did not preserve their right to assert it. *State v. Six Mile Ranch Co.*, 2006 UT App 104, 132 P.3d 687.

#### 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 P.2d 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 P.2d 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 P.2d 910 (Utah Ct. App. 1996).

Trial court's finding that a county had shown that a road was abandoned and dedicated to public use was reversed because it had failed to make specific findings as to when the property owners locked gates and posted signs, and whether trespassers were asked to leave, and if so, when and how many. *Wasatch County v. Okelberry*, 2008 UT 10, 179 P.3d 768.

**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 P.2d 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).

**INTERRUPTION IN USE.**

An overt act that is intended by a property owner to interrupt the use of a road as a public thoroughfare, and is reasonably calculated to do so, constitutes an interruption sufficient to restart the running of the required period of continuous public use. This rule does not change the burden of the party claiming dedication. *Wasatch County v. Okelberry*, 2008 UT 10, 179 P.3d 768.

Owner's 24-hour physical roadblocks in six separate years were overt acts intended and reasonably calculated to interrupt the use of the road as a public thoroughfare, so that although the owner had not blocked any actual use of the road because her roadblocks occurred during intermissions in the road's use, her intent and conduct were nevertheless sufficient to interrupt the road's continuous use for purposes of this section. *Town of Leeds v. Prisbrey*, 2008 UT 11, 179 P.3d 757.

**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 GRANTEEES.**

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 recreational 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).

Finding that an unimproved mountain road that crossed defendant's property and led to plaintiff's property was a public road under this section was proper because the road was used as a public thoroughfare, the users of the road were not adjoining property owners, and use of the road had occurred for at least 10 years. Thus, the road was dedicated and abandoned to the public. *AWINC Corp. v. Simonsen*, 2005 UT App 168, 523 Utah Adv. Rep. 27, 112 P.3d 1228.

Trial court did not err by determining that a road was a public road by dedication, but that side roads were not; sufficient evidence supported findings that the road had been continuously used as a public thoroughfare for more than

10 years as required by this section and that the public was not prevented from using the road, but only from using private property that abutted the road. *State v. Six Mile Ranch Co.*, 2006 UT App 104, 132 P.3d 687.

Summary judgment was granted in favor of a landowner and against a developer, excavator, and others, because the landowner presented clear and convincing evidence, including aerial photographs and testimony, that the road in issue had been continuously used as a public thoroughfare for a period of ten years and had thus been abandoned and dedicated to the use of the public. *Renfro v. McCowan*, 2006 U.S. Dist. LEXIS 84493 (D. Utah Nov. 9, 2006).

A road was properly found to have been abandoned and dedicated to public use because trespassers are public users capable of establishing continuous use under this section, the county established by clear and convincing evidence that the road was continuously used as a public thoroughfare for 55 years, and the owners introduced no credible evidence of an overt act reasonably calculated to interrupt the use of the road. *Utah County v. Butler*, 2008 UT 12, 179 P.3d 775.

#### "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.

USER NOTE: For more generally applicable notes, see notes under the first section of this article, part, chapter, subtitle, or title.



LEXSTAT UTAH CODE 78A-3-102

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TITLE 78A. JUDICIARY AND JUDICIAL ADMINISTRATION  
CHAPTER 3. SUPREME COURT

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*Utah Code Ann. § 78A-3-102 (2008)*

**Legislative Alert:** LEXSEE 2009 Ut. HB 11 -- See section 41.

§ 78A-3-102. Supreme Court jurisdiction

(1) The Supreme Court has original jurisdiction to answer questions of state law certified by a court of the United States.

(2) The Supreme Court has original jurisdiction to issue all extraordinary writs and authority to issue all writs and process necessary to carry into effect its orders, judgments, and decrees or in aid of its jurisdiction.

(3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

- (a) a judgment of the Court of Appeals;
- (b) cases certified to the Supreme Court by the Court of Appeals prior to final judgment by the Court of Appeals;
- (c) discipline of lawyers;
- (d) final orders of the Judicial Conduct Commission;
- (e) final orders and decrees in formal adjudicative proceedings originating with:
  - (i) the Public Service Commission;
  - (ii) the State Tax Commission;
  - (iii) the School and Institutional Trust Lands Board of Trustees;
  - (iv) the Board of Oil, Gas, and Mining;

(v) the state engineer; or

(vi) the executive director of the Department of Natural Resources reviewing actions of the Division of Forestry, Fire and State Lands;

(f) final orders and decrees of the district court review of informal adjudicative proceedings of agencies under Subsection (3)(e);

(g) a final judgment or decree of any court of record holding a statute of the United States or this state unconstitutional on its face under the Constitution of the United States or the Utah Constitution;

(h) interlocutory appeals from any court of record involving a charge of a first degree or capital felony;

(i) appeals from the district court involving a conviction or charge of a first degree felony or capital felony;

(j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction; and

(k) appeals from the district court of orders, judgments, or decrees ruling on legislative subpoenas.

(4) The Supreme Court may transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction, except:

(a) capital felony convictions or an appeal of an interlocutory order of a court of record involving a charge of a capital felony;

(b) election and voting contests;

(c) reapportionment of election districts;

(d) retention or removal of public officers;

(e) matters involving legislative subpoenas; and

(f) those matters described in Subsections (3)(a) through (d).

(5) The Supreme Court has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication, but the Supreme Court shall review those cases certified to it by the Court of Appeals under Subsection (3)(b).

(6) The Supreme Court shall comply with the requirements of Title 63G, Chapter 4, Administrative Procedures Act, in its review of agency adjudicative proceedings.

**HISTORY:** C. 1953, 78-2-2, enacted by L. 1986, ch. 47, § 41; 1987, ch. 161, § 303; 1988, ch. 248, § 5; 1989, ch. 67, § 1; 1992, ch. 127, § 11; 1994, ch. 191, § 2; 1995, ch. 267, § 5; 1995, ch. 299, § 46; 1996, ch. 159, § 18; 2001, ch. 302, § 1; renumbered by L. 2008, ch. 3, § 344; 2008, ch. 382, § 2209.

**NOTES:**

**REPEALS AND REENACTMENTS.** --Laws 1986, ch. 47, § 41 repeals former § 78-2-2, as enacted by Laws 1951, ch. 58, § 1, relating to original appellate jurisdiction of Supreme Court, and enacts the above section.

**AMENDMENT NOTES.** --The 2008 amendment by ch. 3, effective February 7, 2008, renumbered this section, which formerly appeared as § 78-2-2.

The 2008 amendment by ch. 382, effective May 5, 2008, updated references to conform to the recodification of Title 63.

This section has been reconciled by the Office of Legislative Research and General Counsel.

CROSS-REFERENCES. --Chief justice to preside over impeachment of governor, § 77-5-2.

Election contest appeals, §§ 20A-4-406.

Extraordinary writs, *Utah Const., Art. VIII, Sec. 3*; U.R.C.P. 65B Utah R. App. P. 19.

Jurisdiction, *Utah Const., Art. VIII, Sec. 3*.

## NOTES TO DECISIONS

### ANALYSIS

Appellate jurisdiction.

-- Attachment.

-- Final orders and judgments.

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-- Probate orders.

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-- Equity.

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-- District judge filling vacancy.

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Scope of review.

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Cited.

### APPELLATE JURISDICTION.

-- ATTACHMENT.

Although this section did not govern a land conveyance because it was not in effect when petitioner filed its writ of review, this section did not divest the Supreme Court of jurisdiction, because jurisdiction attached under the statute in effect when the petition for review was filed. *National Parks & Conservation Ass'n v. Board of State Lands*, 869 P.2d 909 (Utah 1993).

-- FINAL ORDERS AND JUDGMENTS.

The order granting the plaintiffs' motion for summary judgment was not a final order because the defendants' counterclaim and a third party's intervening claim remained pending before the trial court. Therefore, under the final judgment rule, the court did not have jurisdiction over the appeal because the defendants were not appealing from a final order or judgment. *Bradbury v. Valencia*, 2000 UT 50, 397 Utah Adv. Rep. 7.

-- FORMAL ADJUDICATIVE PROCEEDINGS.

Subdivision (3)(e) confers jurisdiction in the Supreme Court only over final orders and decrees that originate in formal

adjudicative proceedings in agency actions. *Southern Utah Wilderness Alliance v. Board of State Lands & Forestry*, 830 P.2d 233 (Utah 1992).

-- PROBATE ORDERS.

Final orders in probate were appealable under former § 20-2-2, Code 1943. *In re Clift's Estate*, 101 Utah 343, 122 P.2d 196 (1942).

-- SENTENCE REDUCTION.

When a conviction is reduced under § 76-3-402, the appeal lies in the court having jurisdiction of the degree of crime recorded in the judgment of conviction and for which defendant is sentenced, rather than the degree of crime charged in the information or found in the verdict. *State v. Doung*, 813 P.2d 1168 (Utah 1991).

-- TIMELINESS OF FILING.

Petition for review was dismissed where the Tax Commission's Fourth Order was unambiguously the last final agency action in the case, and taxpayer's petitions for judicial review in both the Supreme Court and the district court were filed late, depriving both courts of jurisdiction. *Union Pac. R.R. v. State Tax Comm'n*, 2000 UT 40, 999 P.2d 17.

CERTIORARI.

Even prior to express statutory authorization, Supreme Court had original jurisdiction to issue a writ of certiorari. *Young v. Cannon*, 2 Utah 560 (1880).

Where district court exceeded its jurisdiction on appeal from justice of peace, Supreme Court had power by certiorari to review jurisdictional question, judgment not being reviewable by further appeal. *Oregon Short Line R.R. v. District Court*, 30 Utah 371, 85 P. 360 (1906).

Supreme Court, and not justice thereof, was authorized to issue writ of certiorari, and statute, which conferred such power on justice of Supreme Court, had to give way to Constitution. *Robinson v. District Court*, 38 Utah 379, 113 P. 1026 (1910).

Supreme Court can exercise a reasonable discretion in granting or refusing a writ of certiorari. *Rohwer v. District Court*, 41 Utah 279, 125 P. 671 (1912).

When exercising certiorari jurisdiction granted by this section, the Supreme Court reviews the decision of the Court of Appeals, not of the trial court; therefore, the briefs of the parties should address the decision of the Court of Appeals, not the decision of the trial court. *Butterfield v. Okubo*, 831 P.2d 97 (Utah 1992).

DOCKETING STATEMENT.

-- CITATION.

In all cases appealed after January 1, 1987, reference in the docketing statement to this section will be considered insufficient; instead the appropriate subsection must be included to alert the Supreme Court that it has original appellate jurisdiction over the case. *Gregory v. Fourthwest Invs., Ltd.*, 735 P.2d 33 (Utah 1987).

IN GENERAL.

Supreme Court is exclusive judge of its own jurisdiction. *National Bank v. Lewis*, 13 Utah 507, 45 P. 890 (1896).

The Supreme Court is not a court of general original jurisdiction; it is a reviewing court. *Nielsen v. Utah Nat'l Bank*, 40 Utah 95, 120 P. 211 (1911).

Supreme Court can inquire into its own jurisdiction no matter how that question is called to its attention and regardless of whether parties desire it to do so. *Woldberg v. Industrial Comm'n*, 74 Utah 309, 279 P. 609 (1929).

Question of Supreme Court's jurisdiction to hear and determine an appeal is one that can be raised by the court on its own motion. *City of Logan City v. Blotter*, 75 Utah 272, 284 P. 333 (1929).

ORIGINAL JURISDICTION.

-- EQUITY.

Supreme Court no longer possesses any original jurisdiction in equity cases; in making its own findings in such cases, the court acts merely as an appellate or reviewing tribunal. *In re Raleigh's Estate*, 48 Utah 128, 158 P. 705 (1916).

-- EXTRAORDINARY WRITS.

Even prior to express statutory authorization, Supreme Court had jurisdiction to issue writ of mandamus in a proper case. *Maxwell v. Burton*, 2 Utah 595 (1880).

It did not necessarily follow from fact that Supreme Court had original jurisdiction to issue writs, enumerated in former *Utah Const., Art. VIII, Sec. 4*, that it was court's duty to issue such writs in every instance merely on applications for them. *State v. Booth*, 21 Utah 88, 59 P. 553 (1899).

Former *Utah Const., Art. VIII, Sec. 4*, in conferring authority upon the Supreme Court to issue writs of prohibition, contemplated a writ having the same character and functions as the writ defined by the territorial statute then in existence. *Barnes v. City of Lehi City*, 74 Utah 321, 279 P. 878 (1929).

After remittitur had gone down to district court, Supreme Court did not have exclusive jurisdiction to issue a writ of prohibition in the cause. *Plutus Mining Co. v. Orme*, 76 Utah 286, 289 P. 132 (1930).

Where situation called for relief more nearly analogous to purpose of writ of mandamus rather than to writ of prohibition, and neither standing alone would bring about desired result, Supreme Court had authority to issue both writs of mandamus and prohibition. *Child v. Ogden State Bank*, 81 Utah 464, 20 P.2d 599, 88 A.L.R. 1284 (1933).

Whether district court had jurisdiction was not determinative of whether Supreme Court would entertain application for writ of prohibition; whether there was a plain, speedy and adequate remedy at law was determinative. *Mayers v. Bronson*, 100 Utah 279, 114 P.2d 213 (1941).

Objections to jurisdiction of administrative tribunals are to be first presented to such tribunal before applying to Supreme Court for a writ of prohibition. *Furbreeders Agrl. Coop. v. Wiesley*, 102 Utah 601, 132 P.2d 384 (1942).

Supreme Court's discretion was exercised in favor of making writ of prohibition permanent to prevent enforcement of city court criminal contempt judgment, as against contention that petitioner had plain, speedy and adequate remedy by appeal, where alleged contempt was not committed in presence of court or judge, and court did not acquire jurisdiction over either person of petitioner or of offense claimed because of absence of initiatory affidavit required by former § 104-45-3, so that contempt proceedings were void. *Robinson v. City Court*, 112 Utah 36, 185 P.2d 256 (1947).

The term "original" in Subsection (2) adds nothing to the Supreme Court's writ jurisdiction -- and its absence in former § 78-2a-3(1) (now § 78A-4-103(1)) takes nothing from the jurisdiction of the Court of Appeals -- because jurisdiction over petitions for extraordinary writs necessarily invokes a court's jurisdiction to consider a petition originally filed with it as opposed to its appellate jurisdiction over cases that originated elsewhere. *Barnard v. Murphy*, 882 P.2d 679 (Utah Ct. App. 1994).

REHEARINGS.

-- DISTRICT JUDGE FILLING VACANCY.

A district judge called to sit in lieu of disqualified justice is a member of the court for all purposes so far as his right to participate in the case and in its decision and should sit in on a rehearing even after the vacancy is filled. *In re Thompson's Estate*, 72 Utah 17, 269 P. 103 (1927).

-- NEWLY ELECTED JUSTICE.

Member of Supreme Court, elected after case had been decided, was not entitled to participate in consideration for rehearing. *Cordner v. Cordner*, 91 Utah 474, 64 P.2d 828 (1937).

SCOPE OF REVIEW.

In original proceeding in Supreme Court to review proceedings of district court, Supreme Court will ignore mere irregularities or legal errors in trial court, and would limit review to question of whether district court exceeded its jurisdiction or was without jurisdiction in making and entering the judgment complained of. *Jeffries v. Third Judicial District Court*, 90 Utah 525, 63 P.2d 242 (1936).



Where no motion was made for directed verdict or new trial, Supreme Court was precluded from reviewing sufficiency of evidence in cause at law, since under former *Utah Const., Art. VIII, Sec. 9* and predecessor of this section review could be made only on questions of law. *Brigham v. Moon Lake Elec. Ass'n*, 24 Utah 2d 292, 470 P.2d 393 (1970).

#### TRANSFER AUTHORITY.

An appeal by criminal defendant under Rule 22(e) of the Utah Rules of Criminal Procedure from the denial of his motion to declare his sentence illegal was not an appeal of his capital felony conviction and the Supreme Court had the power to pour it over to the Court of Appeals for decision. *State v. Hua*, 926 P.2d 884 (Utah 1996).

#### ZONING APPEALS.

There is no provision that expressly grants the Court of Appeals original jurisdiction over district court review of land use decisions by local governmental entities. Therefore, the Supreme Court has original appellate jurisdiction over such cases under the catch-all provision in Subsection (3)(j). *Bradley v. Payson City Corp.*, 2003 UT 16, 472 Utah Adv. Rep. 12, 70 P.3d 47.

CITED in *Conder v. A.L. Williams & Assocs.*, 739 P.2d 634 (Utah Ct. App. 1987); *State v. Humphrey*, 823 P.2d 464 (Utah 1991); *Renn v. Utah State Bd. of Pardons*, 904 P.2d 677 (Utah 1995); *Coulter & Smith, Ltd. v. Russell*, 966 P.2d 852 (Utah 1998); *Clark v. Pangan*, 2000 UT 37, 998 P.2d 268; *County Bd. of Equalization v. Stichting Mayflower Recreational Fonds*, 2000 UT 57, 6 P.3d 559; *Lysenko v. Sawaya*, 2000 UT 58, 7 P.3d 783; *In re West Side Prop. Assocs.*, 2000 UT 85, 13 P.3d 168; *Clark v. Clark*, 2001 UT 44, 27 P.3d 538; *State v. Morgan*, 2001 UT 87, 34 P.3d 767; *Houghton v. Dep't of Health*, 2002 UT 101, 57 P.3d 1067; *State v. E.A.*, 2002 UT 126, 463 Utah Adv. Rep. 20, 63 P.3d 100; *Armed Forces Ins. Exch. v. Harrison*, 2003 UT 14, 472 Utah Adv. Rep. 5, 70 P.3d 35; *Comm. of Consumer Servs. v. PSC*, 2003 UT 29, 479 Utah Adv. Rep. 3, 75 P.3d 481; *State v. Warren*, 2003 UT 36, 482 Utah Adv. Rep. 19, 78 P.3d 590; *Utah DOT v. G. Kay, Inc.*, 2003 UT 40, 483 Utah Adv. Rep. 13, 78 P.3d 612; *State v. Casey*, 2003 UT 55, 488 Utah Adv. Rep. 14, 82 P.3d 1106; *ExxonMobil Corp. v. Utah State Tax Comm'n*, 2003 UT 53, 487 Utah Adv. Rep. 6, 86 P.3d 706; *Thomas v. Color Country Mgmt.*, 2004 UT 12, 492 Utah Adv. Rep. 9, 84 P.3d 1201; *Allstate Ins. Co. v. Wong*, 2005 UT 51, 122 P.3d 589; *United Park City Mines Co. v. Stichting Mayflower Mt. Fonds*, 2006 UT 35, 140 P.3d 1200; *Benjamin v. Amica Mut. Ins. Co.*, 2006 UT 37, 140 P.3d 1210; *Taylor v. State*, 2007 UT 12, 570 Utah Adv. Rep. 25, 156 P.3d 739; *Pratt v. Nelson*, 2007 UT 41, 578 Utah Adv. Rep. 31, 164 P.3d 366; *State v. Greuber*, 2007 UT 50, 581 Utah Adv. Rep. 34, 165 P.3d 1185.

#### COLLATERAL REFERENCES

UTAH LAW REVIEW. --The Utah Supreme Court and the Rule of Law: Phillips and the Bill of Rights in Utah, 1975 *Utah L. Rev.* 593.

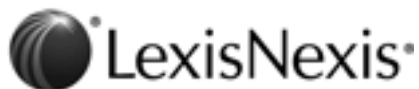
Recent Developments in Utah Law -- The Utah Court of Appeals, 1988 *Utah L. Rev.* 150.

AM. JUR. 2D. --20 *Am. Jur. 2d Courts* § 56 et seq.

C.J.S. --21 *C.J.S. Courts* § 9 et seq.

A.L.R. --Judgment granting or denying writ of mandamus or prohibition as res judicata, 21 *A.L.R.3d* 206.

Mandamus to compel disciplinary investigation or action against physician or attorney, 33 *A.L.R.3d* 1429.



LEXSTAT UTAH CODE ANN. § 78A-4-103

UTAH CODE ANNOTATED

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\*\*\* Current through the 2008 Second Special Session and the 2008 General  
Election \*\*\*

\*\*\* Annotations current through 2008 UT 75 (10/31/2008); 2008 UT App 418  
(11/14/2008) and November 1, 2008 (FEDERAL CASES) \*\*\*

TITLE 78A. JUDICIARY AND JUDICIAL ADMINISTRATION  
CHAPTER 4. COURT OF APPEALS

**Go to the Utah Code Archive Directory**

*Utah Code Ann. § 78A-4-103 (2008)*

**Legislative Alert:** LEXSEE 2009 Ut. HB 11 -- See section 42.

§ 78A-4-103. Court of Appeals jurisdiction

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

- (a) to carry into effect its judgments, orders, and decrees; or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

- (i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and
- (ii) a challenge to agency action under *Section 63G-3-602*;

(c) appeals from the juvenile courts;

(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony;

(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, parent-time, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63G, Chapter 4, Administrative Procedures Act, in its review of agency adjudicative proceedings.

**HISTORY:** C. 1953, 78-2a-3, enacted by L. 1986, ch. 47, § 46; 1987, ch. 161, § 304; 1988, ch. 73, § 1; 1988, ch. 210, § 141; 1988, ch. 248, § 8; 1990, ch. 80, § 5; 1990, ch. 224, § 3; 1991, ch. 268, § 22; 1992, ch. 127, § 12; 1994, ch. 13, § 45; 1995, ch. 299, § 47; 1996, ch. 159, § 19; 1996, ch. 198, § 49; 2001, ch. 255, § 20; 2001, ch. 302, § 2; renumbered by L. 2008, ch. 3, § 350; 2008, ch. 382, § 2210.

**NOTES:**

AMENDMENT NOTES. --The 2008 amendment by ch. 3, effective February 7, 2008, renumbered this section, which formerly appeared as § 78-2a-3.

The 2008 amendment by ch. 382, effective May 5, 2008, updated references to conform to the recodification of Title 63.

This section has been reconciled by the Office of Legislative Research and General Counsel.

CROSS-REFERENCES. --Composition and jurisdiction of military court, §§ 39-6-15, 39-6-16.

NOTES TO DECISIONS

ANALYSIS

Decisions of Board of Pardons.

Extraordinary writs.

Final order.

Habeas corpus proceedings.

Magistrate bind-over orders.

Post-conviction review.

Scope.

-- Sentence reduction.

Zoning issues.

Cited.

#### DECISIONS OF BOARD OF PARDONS.

The Court of Appeals hears appeals from orders on petitions for extraordinary writs challenging decisions of the Board of Pardons, except when the petition additionally challenges the conviction of or sentence for a first degree felony or a capital felony. Then the appeal is to be heard by the *Supreme Court*. *Preece v. House*, 886 P.2d 508 (*Utah* 1994).

#### EXTRAORDINARY WRITS.

The Court of Appeals had jurisdiction over a petition for a writ of mandamus directed against a judge of the district court based on its authority under this section to enforce compliance with a prior order and to issue writs in aid of its appellate jurisdiction. *Barnard v. Murphy*, 882 P.2d 679 (*Utah Ct. App.* 1994).

The term "original" in former § 78-2-2(2) (now § 78A-3-102(2)) adds nothing to the Supreme Court's writ jurisdiction -- and its absence in Subsection (1) takes nothing from the jurisdiction of the Court of Appeals -- because jurisdiction over petitions for extraordinary writs necessarily invokes a court's jurisdiction to consider a petition originally filed with it as opposed to its appellate jurisdiction over cases that originated elsewhere. *Barnard v. Murphy*, 882 P.2d 679 (*Utah Ct. App.* 1994).

Because, under this section, the Court of Appeals has appellate jurisdiction over adjudicative proceedings of state agencies, and because former § 63-46b-1 (now § 63G-4-102) preserves the availability of extraordinary writ proceedings to compel agency actions, the court had jurisdiction of a writ seeking to compel the recusal of the presiding officer appointed to conduct proceedings before the *Division of Environmental Response and Remediation*. *V-1 Oil Co. v. Department of Env'tl. Quality*, 893 P.2d 1093 (*Utah Ct. App.* 1995).

#### FINAL ORDER.

Because an order by the Division of Occupational and Professional Licensing converting a citation proceeding from an informal to a formal proceeding was not a "final agency action," the Court of Appeals lacked jurisdiction to consider a petition for review of that order. *Merit Elec. & Instrumentation v. Utah Dep't of Commerce*, 902 P.2d 151 (*Utah Ct. App.* 1995).

Appellate court lacked jurisdiction to consider an employer's appeal because its petition for review was filed prematurely one day before the Labor Commission ruled on its request for reconsideration of a workers' compensation award. *McCoy v. Utah Disaster Kleenup*, 2003 UT App 49, 467 Utah Adv. Rep. 23, 65 P.3d 643.

#### HABEAS CORPUS PROCEEDINGS.

The language of this section is sufficiently broad to include those cases where a criminal conviction is involved in a habeas corpus proceeding challenging extradition. *Hernandez v. Hayward*, 764 P.2d 993 (*Utah Ct. App.* 1988).

The Court of Appeals lacked original appellate jurisdiction of an appeal from the denial of an extraordinary writ involving an interstate transfer of a prisoner which bore no relation to his underlying criminal conviction, except that "but for" the conviction, he would not have been incarcerated in Arizona and then transferred to *Utah*. *Ellis v. DeLand*, 783 P.2d 559 (*Utah Ct. App.* 1989).

Appeal from the denial of a petition for writ of habeas corpus was properly before the Court of Appeals, where the writ challenged the post-conviction actions of the board of pardons and did not challenge the conviction in the trial court or the sentence, and the fact that defendant was serving a sentence for a first-degree felony did not require a transfer to the Supreme Court under the circumstances. *Northern v. Barnes*, 814 P.2d 1148 (*Utah Ct. App.* 1991), *aff'd*, 870 P.2d 914 (*Utah* 1992).

Appeal from the dismissal of a habeas corpus petition, in which defendant claimed only that his due process rights were violated at a hearing before the parole board, lay to the Court of Appeals rather than the Supreme Court; the latter has jurisdiction only over direct appeals of first degree or capital felony convictions and appeals in habeas corpus cases where the conviction or sentence is challenged. *Padilla v. Utah Bd. of Pardons*, 820 P.2d 473 (*Utah* 1991).

#### MAGISTRATE BIND-OVER ORDERS.

This section does not permit direct interlocutory appeal of magistrate bind-over orders. *State v. Quinn*, 930 P.2d 267

(*Utah Ct. App. 1996*).

A magistrate is not a court of record, so the Court of Appeals has no jurisdiction over an appeal of an interlocutory order from a magistrate's binding a criminal defendant over for trial. *State v. Fisk*, 966 P.2d 860 (*Utah Ct. App. 1998*).

#### POST-CONVICTION REVIEW.

Post-conviction review may be used to attack a conviction in the event of an obvious injustice or a substantial and prejudicial denial of a constitutional right in the trial. *Gomm v. Cook*, 754 P.2d 1226 (*Utah Ct. App. 1988*).

Notice of appeal, filed within 30 days of the order denying a motion for a new trial, rather than 30 days from a final judgment, was untimely, so that the appellate court lacked jurisdiction to do anything other than dismiss the action. If defendant could demonstrate in a motion to the trial court under Utah R. Civ. P. 65C that he had lost his right to appeal because of counsel's misrepresentations or ineffective assistance, he would be eligible to be resentenced, but a post-conviction petition was the proper remedy for such situations. (Unpublished decision.) *State v. Cox*, 2004 UT App 277.

#### SCOPE.

This statute defines the outermost limits of appellate jurisdiction, allowing the Court of Appeals to review agency decisions only when the legislature expressly authorizes a right of review. It is not a catchall provision authorizing the court to review the orders of every administrative agency for which there is no statute specifically creating a right to judicial review. *DeBry v. Salt Lake County Bd. of Appeals*, 764 P.2d 627 (*Utah Ct. App. 1988*).

This statute does not authorize the Court of Appeals to review the orders of every administrative agency, but allows judicial review of agency decisions "when the legislature expressly authorizes a right of review." *Barney v. Division of Occupational and Professional Licensing*, 828 P.2d 542 (*Utah Ct. App. 1992*), cert. denied, 843 P.2d 516 (*Utah 1992*).

#### -- SENTENCE REDUCTION.

When a conviction is reduced under § 76-3-402, the appeal lies in the court having jurisdiction of the degree of crime recorded in the judgment of conviction and for which defendant is sentenced, rather than the degree of crime charged in the information or found in the verdict. *State v. Doung*, 813 P.2d 1168 (*Utah 1991*).

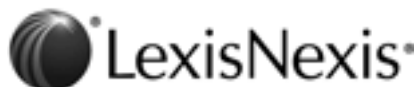
#### ZONING ISSUES.

Court of Appeals does not have original appellate jurisdiction to hear challenges to land use decisions by municipal governing bodies. *Bradley v. Payson City Corp.*, 2003 UT 16, 472 Utah Adv. Rep. 12, 70 P.3d 47.

CITED in *Scientific Academy of Hair Design, Inc. v. Bowen*, 738 P.2d 242 (*Utah Ct. App. 1987*); *In re Topik*, 761 P.2d 32 (*Utah Ct. App. 1988*); *State v. Humphrey*, 794 P.2d 496 (*Utah Ct. App. 1990*); *Johanson v. Fischer*, 808 P.2d 1083 (*Utah 1991*); *Heinecke v. Department of Commerce*, 810 P.2d 459 (*Utah Ct. App. 1991*); *State v. Humphrey*, 823 P.2d 464 (*Utah 1991*); *Schaumberg v. Schaumberg*, 875 P.2d 598 (*Utah Ct. App. 1994*); *Wisden v. Dixie College Parking Comm.*, 935 P.2d 550 (*Utah Ct. App. 1997*); *City of Kanab v. Guskey*, 965 P.2d 1065 (*Utah Ct. App. 1998*).

#### COLLATERAL REFERENCES

UTAH LAW REVIEW. --Recent Developments in Utah Law -- Judicial Decisions -- Constitutional Law, 1990 *Utah L. Rev.* 129.



LEXSTAT UTAH CONSTITUTION ART. I §22

UTAH CODE ANNOTATED

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\*\*\* Annotation current through 2008 UT 75 (10/31/2008); 2008 UT App 418 11/14/2008) and November 1, 2008  
(FEDERAL CASES) \*\*\*

CONSTITUTION OF UTAH  
ARTICLE I. DECLARATION OF RIGHTS

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*Utah Const. Art. I, § 22 (2008)*

§ 22. [Private property for public use.]

Private property shall not be taken or damaged for public use without just compensation.

**HISTORY:** Const. 1896.

**NOTES:**

CROSS-REFERENCES. --Eminent domain generally, § 78-34-1 et seq.

NOTES TO DECISIONS

ANALYSIS

Advance payment of compensation.

Airplane overflights.

Closing street.

Consequential damages.

-- Railroad.

-- Road construction.

-- School construction.

Contract rights.

Defense to condemnation proceeding.

Development exactions.

Elements of taking or damage.

Exhaustion of remedies.

Fair market value.

Garbage collection service.

Highway easement.

Intangible factors.

Interest in condemnation proceedings.  
 Inverse condemnation.  
 Just compensation.  
 -- Objection waived.  
 Loss of visibility.  
 Municipal employment restrictions.  
 Professional services.  
 Property interest.  
 Recovery under section.  
 Regulatory taking.  
 Relation to federal provisions.  
 Removal of personal property.  
 Ripeness of claim.  
 Section self-executing.  
 Statute of limitations.  
 Taxes.  
 Water connection fee.  
 Water rights.  
 Cited.

#### ADVANCE PAYMENT OF COMPENSATION.

This section provides merely that the property shall not be taken or damaged for public use without just compensation, and does not require compensation to be paid in advance. *Anderson Inv. Corp. v. State*, 28 Utah 2d 379, 503 P.2d 144 (1972).

#### AIRPLANE OVERFLIGHTS.

For discussion of taking issues in an action by landowners alleging that their land has been "taken" by overflights, see *Katsos v. Salt Lake City Corp.*, 634 F. Supp. 100 (D. Utah 1986).

#### CLOSING STREET.

Where city, without notice, petition, or hearing, closes a portion of a street and alley abutting on school board-owned property on both sides and used for vehicular travel, and thus creates a cul-de-sac as to privately owned property, there has been a taking requiring just compensation. *Boskovich v. Midvale City Corp.*, 121 Utah 445, 243 P.2d 435 (1952).

Closing of city street and alleged impairment of access to commercial properties was not a "damaging" or "taking" within the meaning of this section; the alleged damages resulted from a temporary, one-time occurrence and not a permanent, continuous, or inevitably recurring interference with property rights. *Rocky Mt. Thrift Stores, Inc. v. Salt Lake City Corp.*, 784 P.2d 459 (Utah 1989).

Business's complaint against the Utah Department of Transportation, following the closure of an access route to the business during a highway reconstruction project, failed to state a claim for inverse condemnation under the takings clause of this section; the business did not have a protectable property interest in an easement of access through the blocked routes and the business was accessible from another route during the reconstruction project. *Intermountain Sports, Inc. v. DOT*, 2004 UT App 405, 512 Utah Adv. Rep. 40, 103 P.3d 716.

#### CONSEQUENTIAL DAMAGES.

##### -- RAILROAD.

An action by an abutting owner for damages to his property occasioned by the construction and operation of a commercial railroad in a public street in front of his property by which ingress and egress to and from the property is impeded, and the use is otherwise directly affected, comes within this section. *Morris v. Oregon S.L.R.R.*, 36 Utah 14, 102 P. 629 (1909).

This section does not cover actions for interferences and annoyances in use of church property incident to the operation of a railroad. *Twenty-Second Corp. of Church of Jesus Christ of Latter-Day Saints v. Oregon S.L.R.R.*, 36 Utah 238, 103 P. 243, 23 L.R.A. (n.s.) 860, 140 Am. St. R. 819 (1909). But see *O'Neill v. San Pedro, L.A. & S.L.R.R.*, 38 Utah 475, 114 P. 127 (1911).

#### -- ROAD CONSTRUCTION.

Where plaintiff brought a mandamus action to require members of the state road commission to initiate eminent domain proceedings to assess damages allegedly caused by the impairment of ingress to and egress from plaintiff's property, such procedure was an effort indirectly to do that which could not be done directly. The plaintiff cannot employ mandamus to compel the state to pay damages, when, because of sovereign immunity, it cannot do so in a direct suit against the state or the road commission. *Springville Banking Co. v. Burton*, 10 Utah 2d 100, 349 P.2d 157 (1960).

This provision does not give consent to be sued, implied or otherwise, and where county and road commission completed highway project reducing grade below plaintiffs' abutting land and the project was a reasonable and necessary exercise of the police power to benefit the community as a whole, the abutting landowners were not entitled to sue for damages without the state's consent. *Fairclough v. Salt Lake County*, 10 Utah 2d 417, 354 P.2d 105 (1960).

Disallowance of item of damages pertaining to injury suffered by plaintiff for increased road noise due to condemnation of strip of frontage from his property and subsequent movement of highway closer to his house was proper, since all damages caused by taking or severing of land or manner of construction of improvement are consequential and not within constitutional provision, unless they would be actionable at common law or would affect land physically; to recover damages for taking of private property plaintiff had to show some physical injury or damage to property itself and damages did not include something which merely affected senses of persons who use property. *State ex rel. Rd. Comm'n v. Williams*, 22 Utah 2d 331, 452 P.2d 881 (1969).

#### -- SCHOOL CONSTRUCTION.

Damages to land, by the construction of a public improvement, though no part thereof is taken as provided for under § 78-34-10(3), is limited to injuries that would be actionable at common law, or where there has been some physical disturbance of a right, either public or private, which the owner enjoys in connection with his property and which gives it additional value. A definite physical injury cognizable to the senses and with a perceptible effect on the present market value is required. Where there was no physical injury to condemnees' remaining home tract by the building and operation of a school on condemned land joining the home tract, an award of damages was improper. *Board of Educ. v. Croft*, 13 Utah 2d 310, 373 P.2d 697 (1962).

#### CONTRACT RIGHTS.

A contract that is terminable at the will of either party does not by itself give rise to a protectable property interest because the mere expectation of benefits under such a contract does not give the promisor a legally enforceable right against a promise to provide future service and, therefore, does not by itself provide a basis for compensation for loss of future business. *Bagford v. Ephraim City*, 904 P.2d 1095 (Utah 1995).

Amendment of § 67-19-14.2, reducing the amount of unused sick leave that could be exchanged for insurance benefits by state employees at retirement, did not effect a taking of property because any property interest the employees had in the redemption of their sick leave did not vest until they retired. *Utah Pub. Empl. Ass'n v. State*, 2006 UT 9, 131 P.3d 208.

#### DEFENSE TO CONDEMNATION PROCEEDING.

Property owners could not defeat condemnation proceedings by state road commission on ground that they would be without remedy to recover damages done to their property, since in condemnation matters the commission assumes all liability. *Barnes v. Wade*, 90 Utah 1, 58 P.2d 297 (1936).

#### DEVELOPMENT EXACTIONS.

In reviewing development exactions, or contributions to a governmental entity imposed as a condition for approving a developer's project, such as mandatory dedications of land for roads, schools or parks, fees-in-lieu of mandatory



dedication, water or sewage connection fees, and impact fees, the reviewing body must determine: (1) whether requiring the exaction serves a legitimate government interest, and (2) whether the exaction is roughly proportional to the impact of the proposed development. *B.A.M. Dev., L.L.C. v. Salt Lake County*, 2004 UT App 34, 87 P.3d 710.

Developers did not have a legitimate claim of entitlement to pay water impact fees before having any recognized development projects or pending building permit applications and, therefore, did not have a protected property interest entitling them to prepay the fees at the lower rate before a rate increase. *Heideman v. Washington City*, 2007 UT App 11, 569 Utah Adv. Rep. 5, 155 P.3d 900.

#### ELEMENTS OF TAKING OR DAMAGE.

Complaint alleging the destruction of an underwater brine canal after enactment of the 1984 Great Salt Lake Causeway Act, which authorized breaching the causeway as a response to the rapid rise of the water level in the lake in order to prevent widespread flooding, alleged sufficient facts to constitute a "taking" or "damage" under this section. *Colman v. Utah State Land Bd.*, 795 P.2d 622 (Utah 1990).

#### EXHAUSTION OF REMEDIES.

In a dispute over noise from amplified outdoor concerts, the trial court erred in dismissing a takings claim by homeowners on the ground that they had failed to exhaust their administrative remedies because, under the relevant city ordinances, the homeowners were not required to appeal to the city's Takings Appeal Board as they were not seeking to have their property developed or subdivided. *Whaley v. Park City Mun. Corp.*, 2008 UT App 234, 190 P.3d 1.

#### FAIR MARKET VALUE.

The fair market value reimbursement requirement of § 10-2-424 (repealed, see now § 10-2-421) is to be read as congruent with the "just compensation" requirement of this provision. *City of Logan v. Utah Power & Light Co.*, 796 P.2d 697 (Utah 1990).

#### GARBAGE COLLECTION SERVICE.

Although plaintiffs, who operated a garbage collection service, were put at a severe, if not fatal, competitive disadvantage by city ordinance forcing residents to use the city's collection services, the ordinance did not result in a taking of the private business property. *Bagford v. Ephraim City*, 904 P.2d 1095 (Utah 1995).

#### HIGHWAY EASEMENT.

Erection of electric power lines on public highway easement, 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. Util.*, 619 P.2d 325 (Utah 1980).

#### INTANGIBLE FACTORS.

Intangible factors such as increased noise from new highway should not be segregated and a separate money value placed thereon in arriving at compensation for condemnation; this is true even where there has been an actual taking of property; nevertheless it is proper to take intangible factors into account in arriving at market value. *State Rd. Comm'n v. Rohan*, 26 Utah 2d 202, 487 P.2d 857 (1971).

#### INTEREST IN CONDEMNATION PROCEEDINGS.

Interest is recoverable only from the time of taking possession of the property under condemnation and the failure to allow interest from the commencement of the action does not violate this section. *State v. Peek*, 1 Utah 2d 263, 265 P.2d 630 (1953).

#### INVERSE CONDEMNATION.

Actions for inverse condemnation are recognized and cognizable in the State of Utah without enabling legislation. *Katsos v. Salt Lake City Corp.*, 634 F. Supp. 100 (D. Utah 1986).

Damages recoverable under this section must be physical and either permanent, continuous, or recurring. *Farmers*

*New World Life Ins. Co. v. Bountiful City*, 803 P.2d 1241 (Utah 1990).

If the damages are not a direct and necessary consequence of the construction or operation of a public use, they are not recoverable in an inverse condemnation action. *Farmers New World Life Ins. Co. v. Bountiful City*, 803 P.2d 1241 (Utah 1990).

Where there was no evidence that the injuries incurred by the landowner were unavoidable or necessary to the city's construction or use of the culvert, summary judgment for the city was proper. *Farmers New World Life Ins. Co. v. Bountiful City*, 803 P.2d 1241 (Utah 1990).

Landowner's inverse condemnation action involved claims under this section, which is self-executing; it did not arise out of, and was not dependent on, a waiver of immunity contained in the Utah Governmental Immunity Act (see Title 63, Chapter 30d). Therefore, landowner was not required to comply with the notice provisions of the governmental immunity chapter. *Heughs Land, L.L.C. v. Holladay City*, 2005 UT App 202, 525 Utah Adv. Rep. 26, 113 P.3d 1024.

#### JUST COMPENSATION.

Just compensation for property taken for a public use means compensation in money, and other property cannot be substituted therefor, no matter how valuable, against the wishes of the condemnee. *Shurtleff v. Salt Lake City*, 96 Utah 21, 82 P.2d 561 (1938).

A standard of what is "just compensation" in the ordinary case is the market value of the property taken, however, where proof of market value is not readily ascertainable because there is little possibility of a sale on an open market, opinion evidence of what the property would probably sell for on the market if there were others who could use it, would be a proper basis for determining such value. *Southern Pac. Co. v. Arthur*, 10 Utah 2d 306, 352 P.2d 693 (1960).

Tenant who voluntarily contracted away the right to compensation to his landlord, thereby allowing the landlord to negotiate a fair market value sale of the landlord's property to a city, was not constitutionally entitled to just compensation from the city. *W. Valley City v. Martin*, 2004 UT App 327, 509 Utah Adv. Rep. 13, 100 P.3d 248.

#### -- OBJECTION WAIVED.

Where each of the affected landowners accepted the tendered amount of money without raising any objections to the taking, or reserving any issues related to the taking, including the date of valuation, the statutory date of valuation and the date from which interest accrues on that value could not be changed. *DOT v. Ogden & Sons*, 805 P.2d 173 (Utah 1990).

#### LOSS OF VISIBILITY.

This section does not create a protectable interest in the visibility of commercial property from an abutting highway. A claim for loss of visibility is simply a claim for compensation of lost business profits, and an owner has no protectable property interest in the mere hope of future sales from passing traffic. *Ivers v. Utah DOT*, 2007 UT 19, 154 P.3d 802.

#### MUNICIPAL EMPLOYMENT RESTRICTIONS.

City had the power, by implication, to enact ordinances requiring appointive officers and employees to be residents of the city as a condition of employment and prohibiting certain political activities while working for the city, notwithstanding contention that the ordinances violated provision of this section prohibiting the taking of private property without just compensation. *Salt Lake City Fire Fighters Local 1645 v. Salt Lake City*, 22 Utah 2d 115, 449 P.2d 239, cert. denied, 395 U.S. 906, 89 S. Ct. 1748, 23 L. Ed. 2d 220 (1969).

#### PROFESSIONAL SERVICES.

This section does not make county liable to an attorney for services rendered by him in defending an indigent person. *Pardee v. Salt Lake County*, 39 Utah 482, 118 P. 122, 36 L.R.A. (n.s.) 377, Ann. Cas. 1913E, 200 (1911).

#### PROPERTY INTEREST.

Electric service district, which had notice that all or part of its service area could be annexed and its exclusive business privilege limited or terminated, had no protected property interest in its certificate of public convenience and

necessity. *Strawberry Elec. Serv. Dist. v. Spanish Fork City*, 918 P.2d 870 (Utah 1996).

#### RECOVERY UNDER SECTION.

To recover under this section, a claimant must possess a protectable interest in property that is taken or damaged for a public use. *Bagford v. Ephraim City*, 904 P.2d 1095 (Utah 1995).

#### REGULATORY TAKING.

If the effect of denying a conditional use permit is to leave property economically idle, the property owner has suffered a taking. *Diamond B-Y Ranches v. Tooele County*, 2004 UT App 135, 498 Utah Adv. Rep. 32, 91 P.3d 841.

#### RELATION TO FEDERAL PROVISIONS.

This provision is broader in its language than the similar provision in the *Fifth Amendment of the United States Constitution*. *Bagford v. Ephraim City*, 904 P.2d 1095 (Utah 1995).

This section protects all types of private property that are protected by the *Fifth Amendment of the United States Constitution*. *Bagford v. Ephraim City*, 904 P.2d 1095 (Utah 1995).

#### REMOVAL OF PERSONAL PROPERTY.

Where court ordered required owners of condemned property to show cause why they had not removed personal property from condemned realty or declare it abandoned, such order was not taking or damaging property without just compensation and there was no obligation on the state to pay the cost of removing personalty from the condemned land. *Utah Road Comm'n v. Hansen*, 14 Utah 2d 305, 383 P.2d 917 (1963).

#### RIPENESS OF CLAIM.

Because ranch owner had not made any attempt to file an inverse condemnation action under this section, his claim that the county made an unconstitutional taking without just compensation when it declared the ranch roads public was not ripe for review. *J.B. Ranch, Inc. v. Grand County*, 958 F.2d 306 (10th Cir. 1992).

Developers' claim that city's conditions on development were unreasonable and amounted to an unconstitutional taking of developers' property was unripe because developers had not sought just compensation under this section. *Anderson v. Alpine City*, 804 F. Supp. 269 (D. Utah 1992).

#### SECTION SELF-EXECUTING.

This section needs no legislation to activate it; it is mandatory and obligatory as it is. *Colman v. Utah State Land Bd.*, 795 P.2d 622 (Utah 1990); *Hamblin v. City of Clearfield*, 795 P.2d 1133 (Utah 1990).

#### STATUTE OF LIMITATIONS.

Right to recover consequential damages for injury to private property by reason of making public improvements is based upon this section, and therefore statute of limitations applicable to liabilities created by statute does not govern. *Webber v. Salt Lake City*, 40 Utah 221, 120 P. 503, 37 L.R.A. (n.s.) 1115 (1911).

#### TAXES.

Statute which authorized supervisors of drainage district to add 15% to amount of taxes to be assessed in drainage district did not violate the provisions of this section. *Elkins v. Millard County Drainage Dist. No. 3*, 77 Utah 303, 294 P. 307 (1930).

#### WATER CONNECTION FEE.

An ordinance requiring plaintiff, a shareholder in mutual irrigation company, to transfer shares to the city in exchange for connection to the municipal secondary water system when those without water shares could pay cash for their connection did not effect an unconstitutional taking of plaintiff's water shares. *Whitmer v. City of Lindon*, 943 P.2d 226 (Utah 1997).

## WATER RIGHTS.

Measure of damages for diversion and taking of water is not the difference in the value of the land with and without the water, but where the market value is not ascertainable the value of the water can be determined by the uses to which it has been put, and the owner is entitled to be compensated for the full measure of his loss. *Sigurd City v. State*, 105 Utah 278, 142 P.2d 154 (1943).

Where landowner had not appropriated underground waters or controlled waters of a river adjacent to his land, he was not entitled to damages for any diminution of the moisture in his soil by reason of water conservancy district's impounding, under an established right, the river's waters in a reservoir. *Weber Basin Water Conservancy Dist. v. Gailey*, 8 Utah 2d 55, 328 P.2d 175 (1958).

CITED in *Hansen v. Salt Lake County*, 795 P.2d 1120 (Utah 1990); *Walker v. Brigham City*, 856 P.2d 347 (Utah 1993).

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A.L.R. --Building restrictions, as property rights for taking of which compensation must be made, 4 A.L.R.3d 1137.

Restrictive covenant, right to enforcement thereof as compensable property right, 4 A.L.R.3d 1137.

Deduction of benefits in determining compensation or damages in proceeding involving opening, widening, or otherwise altering highway, 13 A.L.R.3d 1149.

Property for exchange for other property required for public use, condemning, 20 A.L.R.3d 862.

Restrictive covenant, existence of, as element in fixing price of property condemned, 22 A.L.R.3d 961.

Eminent domain: right to enter land for preliminary survey or examination, *29 A.L.R.3d 1104*.

Entry upon or exploration of land before condemnation, *29 A.L.R.3d 1104*.

Schools: liability of public schools and institutions of higher learning for taking or damaging private property for public use, *33 A.L.R.3d 703*.

Seizure of property as evidence in criminal prosecution or investigation as compensable taking, *44 A.L.R.4th 366*.

Validity, construction, and application of state relocation assistance laws, *49 A.L.R.4th 491*.

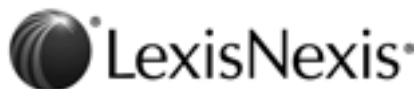
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Eminent domain: compensability of loss of visibility of owner's property, *7 A.L.R.5th 113*.

Abutting owner's right to damages for limitation of access caused by traffic regulation, *15 A.L.R.5th 821*.



LEXSTAT URCP RULE 7

UTAH COURT RULES ANNOTATED  
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STATE RULES  
UTAH RULES OF CIVIL PROCEDURE  
PART III. PLEADINGS, MOTIONS, AND ORDERS

*URCP Rule 7 (2008)*

Review Court Orders which may amend this Rule.

Rule 7. Pleadings allowed; motions, memoranda, hearings, orders, objection to commissioner's order.

(a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

(b) (1) Motions. - An application to the court for an order shall be by motion which, unless made during a hearing or trial or in proceedings before a court commissioner, shall be made in accordance with this rule. A motion shall be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought.

(2) Limit on order to show cause. An application to the court for an order to show cause shall be made only for enforcement of an existing order or for sanctions for violating an existing order. An application for an order to show cause must be supported by an affidavit sufficient to show cause to believe a party has violated a court order.

(c) Memoranda.

(1) Memoranda required, exceptions, filing times. All motions, except uncontested or ex parte motions, shall be accompanied by a supporting memorandum. Within ten days after service of the motion and supporting memorandum, a party opposing the motion shall file a memorandum in opposition. Within five days after service of the memorandum in opposition, the moving party may file a reply memorandum, which shall be limited to rebuttal of matters raised in the memorandum in opposition. No other memoranda will be considered without leave of court. A party may attach a proposed order to its initial memorandum.

(2) Length. Initial memoranda shall not exceed 10 pages of argument without leave of the court. Reply memoranda shall not exceed 5 pages of argument without leave of the court. The court may permit a party to file an over-length memorandum upon ex parte application and a showing of good cause.

(3) Content.

## URCP Rule 7

(A) A memorandum supporting a motion for summary judgment shall contain a statement of material facts as to which the moving party contends no genuine issue exists. Each fact shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits or discovery materials. Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party.

(B) A memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted, and may contain a separate statement of additional facts in dispute. For each of the moving party's facts that is controverted, the opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials. For any additional facts set forth in the opposing memorandum, each fact shall be separately stated and numbered and supported by citation to supporting materials, such as affidavits or discovery materials.

(C) A memorandum with more than 10 pages of argument shall contain a table of contents and a table of authorities with page references.

(D) A party may attach as exhibits to a memorandum relevant portions of documents cited in the memorandum, such as affidavits or discovery materials.

(d) Request to submit for decision. When briefing is complete, either party may file a "Request to Submit for Decision." The request to submit for decision shall state the date on which the motion was served, the date the opposing memorandum, if any, was served, the date the reply memorandum, if any, was served, and whether a hearing has been requested. If no party files a request, the motion will not be submitted for decision.

(e) Hearings. The court may hold a hearing on any motion. A party may request a hearing in the motion, in a memorandum or in the request to submit for decision. A request for hearing shall be separately identified in the caption of the document containing the request. The court shall grant a request for a hearing on a motion under Rule 56 or a motion that would dispose of the action or any claim or defense in the action unless the court finds that the motion or opposition to the motion is frivolous or the issue has been authoritatively decided.

(f) Orders.

(1) An order includes every direction of the court, including a minute order entered in writing, not included in a judgment. An order for the payment of money may be enforced in the same manner as if it were a judgment. Except as otherwise provided by these rules, any order made without notice to the adverse party may be vacated or modified by the judge who made it with or without notice. Orders shall state whether they are entered upon trial, stipulation, motion or the court's initiative.

(2) Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

(3) Unless otherwise directed by the court, all orders shall be prepared as separate documents and shall not incorporate any matter by reference.

(g) Objection to court commissioner's recommendation. A recommendation of a court commissioner is the order of the court until modified by the court. A party may object to the recommendation by filing an objection in the same manner as filing a motion within ten days after the recommendation is made in open court or, if the court commissioner takes the matter under advisement, ten days after the minute entry of the recommendation is served. A party may respond to the objection in the same manner as responding to a motion.

## URCP Rule 7

**HISTORY:** Amended effective November 1, 2003; April 1, 2004; November 1, 2005; April 1, 2008

**NOTES:**

Advisory Committee Note. -- The practice for courtesy copies varies by judge and so is not regulated by rule. Each party should ascertain whether the judge wants a courtesy copy of that party's motion, memoranda and supporting documents and, if so, when and where to deliver them.

Paragraph (f) applies to all orders, not just orders upon motion.

Amendment Notes.-- The 2004 amendment inserted "or in proceedings before a court commissioner" in Subdivision (b); substituted the first paragraph in Subdivision (c)(2) for a list of maximum lengths for different types of memoranda; in Subdivision (f)(2), substituted "serve upon the other parties" for "file" in the first sentence and added the last sentence; in Subdivision (g), substituted "recommendation" for "recommended order" several times and substituted "made in open court" for "entered" and added the clause beginning "or, if" in the second sentence; and added the second paragraph of the Advisory Committee Note.

The 2005 amendment added Subdivision (f)(3).

The 2008 amendment added Subdivision (b)(2) and redesignated former Subdivision (b) as Subdivision (b)(1).

Compiler's Notes. -- This rule is similar to *Rule 7, F.R.C.P.*

Cross-References.-- Amendment of pleadings to conform to evidence, motion for, U.R.C.P. 15(b).

Commencement of action, U.R.C.P. 3.

Consolidation of defenses made by motion, U.R.C.P. 12(g).

Counterclaim and cross-claim, U.R.C.P. 13.

Defenses and objections, U.R.C.P. 12.

Denial of motion, pleading after, U.R.C.P. 12(i).

Directed verdict and judgment notwithstanding the verdict, motion for, U.R.C.P. 50.

Dismissal of actions, U.R.C.P. 41.

Eminent domain proceedings, contents of complaint in, § 78-34-6.

Evidence in support of motion, U.R.C.P. 43(b).

Execution and proceedings supplemental thereto, U.R.C.P. 69A et seq.

Extraordinary relief, U.R.C.P. 65B.

Forcible entry or detainer, proof required, § 78-36-9.

Form of pleadings, U.R.C.P. 10.

"Judgment" defined, U.R.C.P. 54(a).

One form of action, U.R.C.P. 2.



## URCP Rule 7

Partition of property, complaint to set forth interests of all parties, § 78-39-2.

Pleading special matters, U.R.C.P. 9.

Relief from judgment or order, U.R.C.P. 60.

Requirements of signature, U.R.C.P. 11.

Service and filing of motions, pleadings and other papers, U.R.C.P. 5.

Special forms of writs abolished, U.R.C.P. 65B(a).

Supreme Court, rulemaking power of, § 78-2-4.

Temporary restraining orders, setting aside, U.R.C.P. 65A.

Time for service of written motions, U.R.C.P. 6(d).

## NOTES TO DECISIONS

Memorandum opposing summary judgment

Motions.

-- Amendments.

-- -- Complaint.

-- -- Prayer for relief.

-- New trial.

-- -- Particularization.

-- Setting aside conditional order.

Orders.

-- Correction.

-- Necessity

-- Submission to court

Reply memorandum.

Cited.

Memorandum opposing summary judgment

Failure of memorandum opposing summary judgment to set forth disputed facts in numbered sentences in a separate section as required by former R. Jud. Admin. 4-501(2)(B) was harmless, as the disputed facts were clearly provided in the body of the memorandum with applicable record references. *Salt Lake County v. Metro W. Ready Mix, Inc.* 2004 Utah LEXIS 55.

Motions.

-- Amendments.

-- -- Complaint.

Investors who lost money in a failed investment venture and whose multi-count complaint stemming from their losses was dismissed were properly denied the opportunity to amend their complaint because they never filed an actual motion, but merely cited Rule 15 without articulating any reasons why leave to amend their 136-page, 725-paragraph complaint was merited. *Coroles v. Sabey* 2003 Utah App. LEXIS 101.

## URCP Rule 7

-- -- Prayer for relief.

Although a trial court may deny a motion to amend the complaint for a movant's failure to present a written motion and a proposed amended complaint, that rule does not apply to the prayer for relief because, under Rule 54(c), the prayer does not limit the relief which the court may grant. *Behrens v. Raleigh Hills Hosp.*, 675 P.2d 1179 (Utah 1983).

-- New trial.

-- -- Particularization.

Only purpose for requiring particularization of grounds for motion for new trial is to inform court and other party of theories upon which new trial is sought; where defendant filed affidavit with motions setting forth theories, and judgment had been on pleadings, court and parties were sufficiently advised as to grounds for motion. *Howard v. Howard*, 11 Utah 2d 149, 356 P.2d 275 (1960).

-- Setting aside conditional order.

Where court on own initiative lowered from \$ 2,000 to \$ 1,000 value of building as found by jury and entered conditional order granting new trial unless plaintiff consented to reduction, court could restore jury findings under authority of this Rule, since plaintiff filed motion to set aside conditional order for new trial within ten days. *National Farmers' Union Property & Cas. Co. v. Thompson*, 4 Utah 2d 7, 286 P.2d 249, 61 A.L.R.2d 635 (1955).

Orders.

-- Correction.

Where judge made perfunctory or clerical mistake resulting from erroneous assumption that order prepared by counsel correctly reflected judgment of Supreme Court and trial court, judge could correct order on his own motion. *Meagher v. Equity Oil Co.*, 5 Utah 2d 196, 299 P.2d 827 (1956).

-- Necessity

Unless the court explicitly directs that no order needs to be submitted, no finality will be ascribed to a memorandum decision or minute entry for purposes of triggering the running of the time for appeal. *Code v. Utah Dep't of Health 2007 Utah LEXIS 106*.

-- Submission to court

If the prevailing party fails to submit an order within the 15-day period required by this rule, any party interested in finality, including the non-prevailing party, may submit an order. *Code v. Utah Dep't of Health 2007 Utah LEXIS 106*.

Reply memorandum.

District court had the discretion to consider points raised in a reply memorandum submitted in support of summary judgment although the original motion addressed only one cause of action, but other causes of action were addressed in the reply. No supplemental briefing was filed after the moving party stated it was seeking summary judgment on all of the claims, despite a request for leave to supplement an opposition document. *Dimick v. OHC Liquidation Trust 2007 Utah App. LEXIS 58*.

Cited in *Boskovich v. Utah Constr. Co.*, 123 Utah 387, 259 P.2d 885 (1953); *Thomas v. Heirs of Braffet*, 6 Utah 2d 57, 305 P.2d 507 (1956); *Holmes Dev., LLC v. Cook* 2002 Utah LEXIS 64 2002 UT 38 supreme court of utah, 48 P.3d 895 (Utah 2002); *Code v. Utah Dep't of Health 2006 Utah App. LEXIS 112*.

## URCP Rule 7

## COLLATERAL REFERENCES

Am. Jur. 2d. -- *56 Am. Jur. 2d Motions, Rules, and Orders* § 1 et seq.; *61A Am. Jur. 2d Pleading* §§ 31 et seq., 665

C.J.S. -- 60 C.J.S. *Motions and Orders* § 1 et seq.; 71 C.J.S. *Pleading* §§ 63 to 210, 140 et seq., 211 et seq

A.L.R. -- *Proceeding for summary judgment as affected by presentation of counterclaim*, 8 *A.L.R.3d* 1361.

Right to voluntary dismissal of civil action as affected by opponent's motion for summary judgment, judgment on the pleadings, or directed verdict, 36 *A.L.R.3d* 1113.



## LEXSTAT MOORES FEDERAL PRACTICE CIVIL 59.13

Moore's Federal Practice - Civil

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Volume 12 Analysis: Civil Rules 57 - 63  
Chapter 59 New Trial; Altering or Amending a Judgment  
B. NEW TRIALS

*12-59 Moore's Federal Practice - Civil § 59.13*

AUTHOR: by Martin H. Redish

**§ 59.13 Grounds for New Trial****[1] No Fixed Standard for Rule 59 Relief**

No fixed standard applies to the grant or denial of Rule 59 relief; rather, the applicable standard applied by the trial court in its exercise of discretion varies with the grounds for which relief is sought.<sup>n1</sup> The general grounds for a new trial are that the verdict is against the clear weight of the evidence, that the damages are excessive, that the trial was not fair, or that substantial errors occurred in the admission or rejection of evidence or the giving or refusal of instructions.<sup>n2</sup> Further, a district court has broad discretion to grant a new trial when necessary to prevent injustice.<sup>n3</sup> These bases are discussed in [2] (jury trials) and [3] (court trials), *below*; insufficient grounds are discussed in [4], *below*.

**[2] Jury Trial****[a] Reasonable Basis Test**

As a general rule, courts will not disturb jury verdicts in the absence of extreme circumstances, such as a case of manifest injustice or abuse of the jury's function. Courts will sustain jury verdicts if reasonable bases exist to uphold the verdict. In ruling on a Rule 59 motion, the court will search the record for evidence that could reasonably lead the jury to reach its verdict, drawing all reasonable inferences in favor of the verdict winner.<sup>n4</sup> However, a jury's verdict can be against the great weight of evidence, and thus justify a new trial, even if there is substantial evidence in support of the verdict sufficient to defeat a motion for judgment as a matter of law.<sup>n4.1</sup> But this does not mean that the district court should grant a motion for new trial simply because the court would have come to different conclusion.<sup>n4.2</sup>

**[b] Judicial Error or Misconduct****[i] Legal Errors****[A] Prejudice Required**

Any error of law (*see* [B]-[E], *below*) that is prejudicial is a sufficient ground for a new trial.<sup>n5</sup>

In defense of the "maximum recovery" rule, the Second Circuit has argued that "[t]o obtain a 'fair' judgment on damages in a case such as this, the law has traditionally deferred to the decision of a jury of laymen drawn from the community at large, and not to the 'seasoned judgment' of the trial judge."<sup>134</sup> On the other hand, while the "minimum recovery" standard could arguably be viewed as an undue invasion of the jury's province, it has been defended as necessary "in order to protect the party obliged to pay against a judge's assessment of damages."<sup>135</sup>

### **[E] Agreement to Remittitur Precludes Subsequent Appeal of Remittitur Order**

It is well established that when a party agrees to remittitur, that party may not thereafter appeal the remittitur order.<sup>136</sup> Though this rule is a venerable one, its wisdom is subject to serious question. If a plaintiff agrees to a remittitur only to avoid the loss of a verdict and a new trial, such agreement can hardly be deemed a voluntary waiver. If the plaintiff refuses to accept the remittitur, the court will order a new trial, which is a non-final, unappealable order. Thus, a plaintiff who disagrees with the remittitur is effectively denied any opportunity to obtain appellate review of the trial court's decision.

Despite the general prohibition on appeal of a remittitur, however, if the defendant argues on appeal that items were inappropriately included in the damage award, the plaintiff may be entitled to raise the inappropriateness of a remittitur that he or she has accepted.<sup>137</sup>

### **[3] Actions Without Jury**

#### **[a] Grounds Similar to Jury Trial Bases**

A new trial may be granted in a nonjury action if a new trial might be obtained under similar circumstances in a jury action (*see* [2], *above*).<sup>138</sup> Although addressed to the broad discretion of the trial court,<sup>139</sup> a motion for new trial in a nonjury case should be based on a manifest mistake of fact or error of law; the court should find substantial reasons before setting aside a judgment.<sup>140</sup>

#### **[b] Effect of Motion**

On a motion for new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions,<sup>141</sup> and direct the entry of a new judgment.<sup>142</sup>

#### **[c] Motion to Reopen Distinguished**

A Rule 59 motion is distinct from a motion to reopen to take additional testimony. A Rule 59 motion is made only after the entry of a judgment, whereas a motion to reopen is most commonly made before the jury has returned its verdict,<sup>143</sup> or while the judge has the case under advisement in nonjury actions. In a motion to reopen, the movant seeks to enter additional testimony into the record; because no judgment exists, the moving party is not seeking modification of an existing judgment. Although similar to a Rule 59 or Rule 60(b) motion based on newly discovered evidence, a motion to reopen does not require that the evidence be newly discovered or that it could not have been discovered during the pendency of the trial by a party acting with due diligence (*see* § 59.13[2][c]).<sup>144</sup>

Like a Rule 59 motion, a motion to reopen may be granted or denied in the district court's discretion.<sup>145</sup> The court must decide the motion in the interest of fairness and justice. A motion to reopen a bench trial is more likely to be granted than a motion to reopen a jury trial.<sup>146</sup> Similarly, a motion made during the early deliberations of a jury is more likely to be granted than a motion made later in the deliberations, or after the jury has given some indication of its verdict.

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

Wasatch

03/07/2011 12:19 9

WASATCH COUNTY,

Plaintiff,

v.

WEST DANIELS LAND ASSOCIATION et al,

Respondent.

**FURTHER SPECIFIC FINDINGS OF  
FACT AND RULING ON DEFENDANTS'  
MOTION FOR ENTRY OF  
SUPPLEMENTAL FINDINGS AND  
CONCLUSIONS; OR ALTERNATIVELY  
FOR NEW TRIAL OR PRESENTATION  
OF ADDITIONAL EVIDENCE**

Case No. 010500388 PR

Judge Donald Eyre, Jr.

This matter comes before the Court on remand from the Utah Supreme Court. In a ruling filed February 12, 2008 (*Wasatch County v. Okelberry*, 2008 UT 10), the Supreme Court instructed this Court to enter "specific findings of fact regarding the Okelberrys' evidence of interruption in the use of the Four Roads as public thoroughfares." 2008 UT 10 ¶ 20. The Court has reviewed the file, reviewed trial transcript, considered the memoranda of both parties, heard oral argument, and now issues the following findings of fact and ruling:

**SPECIFIC FINDINGS OF FACT**

1. Several of Plaintiff's witnesses testified at trial that they used some or all of the four roads (Circle Springs Road, Ridge Line Road, Thorton Hallow Road, Parker Canyon Road) at issue here during various periods between 1957 and 2004.

2. Deon Sabey testified that he used all four roads several times beginning in the 1950s. He testified that when using the roads he never saw "no trespassing" signs on any of the roads, but did see gates on the roads. He never saw or encountered locks on any of the gates. He saw no markers on the gates. He saw others using the roads at various times, and was never asked to leave the roads, nor did he get permission to use any of the roads.

3. Moroni Besendorfer testified that he used all four roads several times beginning in the 1960s. He testified that he saw others on the road every year from the 1960s through the 1980s. He testified that he saw others use the roads and camp on adjoining property with their vehicles. He did not see any "no trespassing" signs until 1999. He saw no locked gates until "a few years" prior to the trial. He was never kicked off the roads or asked to leave, and never obtained permission to use

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the roads.

4. Martin Wall testified that he used Circle Springs Road and Ridge Line Road regularly beginning in the 1950s, for hunting and gathering firewood. He testified that he never saw "no trespassing" signs. He saw gates on the roads, but they were not locked. He never received permission to traverse the roads.

5. Jake Thompson testified that he has used Circle Springs Road and Ridge Line Road regularly since the 1950s, and Thorton Hallow Road since at least the 1970s. He testified that he never saw "no trespassing" signs on the roads. He saw gates, but they were not locked. He never received permission to travel the roads, and was never kicked off the roads.

6. Ed Sabey testified that he has used all of the roads regularly since about the 1960s. He testified that he never saw "no trespassing signs," nor signs on Parker Canyon Road saying "no motorized vehicles." He saw gates, which were not locked. He had seen others on the roads. He never got permission to use the roads. He testified that about "15 years ago" (which would have been 1989), people were stopped from using Ridge Line Road.

7. Richard Baum testified that he used Ridge Line Road for biking about "20 years ago" (1984). He was never kicked off the road, and never saw "no trespassing signs." He did see "orange painted wood signs" on the road.

8. Brandon Richins testified that he has used Circle Springs Road, Ridge Line Road, and Parker Canyon Road starting in the late 1980s. He testified that he first saw "no trespassing" signs about 15-16 years ago (1988-89) on Circle Springs Road. He saw locked gates on Ridge Line Road since 2001. He never saw locked gates on Parker Canyon road, but saw "no motorized vehicle" signs. He never had permission to use the roads, and saw others on them.

9. Benny Gardner testified that he started using Circle Springs Road, Thorton Hallow Road, and Parker Canyon Road in about 1966. He testified that he did not see "no trespassing" signs until the 1990s. He saw the gates on the roads, but testified that they were not locked until "more recently." He testified that he saw others on the roads, was never kicked off the roads, and never got permission to use the roads.

10. Mark Buttars testified that he used all the roads starting in the 1960s, except Parker Canyon Road, which he started using in 1972. He testified that he saw "partial trespassing" signs on Thorton Hallow Road and Circle Springs Road starting in about 1992. He saw no signs prior to 1992. He never received permission to use the roads, and saw others on the roads. While he saw gates on the roads, he testified that they were never locked.

11. Defendants called several witnesses who also testified regarding public access to the roads between 1957 and 2004.

12. Jeff Jefferson mainly testified regarding the condition of the roads. He testified that each of the roads was rocky and would require a 4-wheel drive vehicle to pass, but that sometimes gates

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were left open. He testified that he asked Mark Buttars to leave the roads twice sometime after 2000. He also testified that the sign on a tire at the start of Circle Springs Road was put up in about 1992.

13. Melvin Price also testified about the condition of the roads: that they were only passable by 4-wheel drive vehicles. He testified that there have been locked gates and "no trespassing" signs on Ridge Line Road for at least 20 years. He testified that there were signs and locked gates on the other roads at some point, but did not specify a time frame. He testified that he got permission from the Okelberrys each year he used the roads, and that there was not much traffic or many others on the roads.

14. Lee Okelberry testified that his father purchased property surrounding the roads in 1957. He testified that the roads had gates and fences. He testified that Thorton Hallow Road and other roads were "better than a trail," but that the public was not there much in the 1950s. He testified that he occasionally he stopped and talked to people on Parker Canyon Road in the 1950s. He stated that "as the years went by there was a little more traffic" on the roads. He testified that in 1957 there was no need for "no trespassing" signs because "[t]here was no, not that much trespass up there." He further stated that there were no locks on the gates in 1957, but instead "[w]e put fasteners on them and we wired them to a post." "We never did lock anybody out of there," he stated. He testified that he asked wood gatherers to get off private land on occasion. He also testified that he "never locked" the gates. He testified that a locked gate shown to him as an exhibit was "put there after I left." Finally, he testified that "I think we stood up for the public quite a bit. If there was any that needed to go through there in any way, shape or form they could ask or they could go through there. We never turned nobody down that had any business down in there."

15. Glen Shepherd testified that there are now signs on all of the roads. He said he had permission for years from the Okelberrys to use the roads, who are "pretty free" with giving permission. He stated that the roads are generally seen as private rather than public roads, and that there have always been gates of some sort on the roads.

16. Shane Ford testified that the condition of the roads is pretty similar now (in 2004) to their condition in 1994. He testified that gates are now locked during hunting season. He believed that the roads have not been open to the public for continuous use.

17. Bruce Huvad testified that the roads were "very rough." He testified that he first went to the property in 1966, and saw "keep out" and "private" signs on the property at that time. He testified that he obtained permission from the Okelberrys each year from 1966 to 1990 to use the roads. He testified that there were always gates upon entering the roads between 1966 and 1990. He testified that there were others who used the roads without permission, but that they were not very numerous. He kicked people off the Okelberry property who were not "supposed to be on there" between 1966 and 1990. He testified that "some" of the gates were locked between 1966 and 1990, but did not specify exact dates.

18. Brian Okelberry testified that he started working on the property around the roads in the early 1970s. He testified that there have always been gates on the road since he's been there, and that one of the purposes of the gates was to control vehicles "from going up and down the roads."

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He has given people permission to use roads at times. He testified that there were "keep out" signs on some of the gates. He testified that some of the gates have been locked "over periods of time." He testified that he started taking an active role in preventing trespassing around the late 1980s, and began putting up signs then. He testified that the first boundary locks were placed on the gates in the 1980s.

19. Ray Okelberry testified that there were gates on the roads beginning in 1957, and that as time passed more people came. He has told people to leave the roads "on occasion." He gave permission to Brian Gardner and others to use the roads. He began charging people for "trespass permits" beginning in the 1990s. He testified that there were locks on the gates in the 1990s and 2000s. He testified that the sign on the tire at the entrance to the Circle Springs Road was there "about 20 years." He testified that they started locking the Circle Springs and "1080 gate" (going into the Ridge Line Road) either the first or second year he was there. He testified that people may have cut the locks from gates at some points. He testified that he began putting up signs in 1957-59, but that "they didn't stay up," and hypothesized that the "wind blew them away." He also testified: "I'm not saying the gate was opened or locked all summer, but when I was getting ready to get those sheep out of there I locked those gates. And I've always had trouble keeping locks there."

20. The Court finds that there were gates at the entrances to each of the roads from 1957 to 2004.

21. The Court also finds that there may have been signs at various locations reading "keep out" and "private" beginning in the 1960s. However, the evidence shows that these signs did not restrict travel on the roads themselves, and it is unclear whether they were intended to refer to keeping off the roads or the surrounding property. None of Defendants' witnesses clarified whether the signs were intended to refer to the roads or the property. Ray Okelberry testified that the signs he placed "didn't do any good" anyway. More signs were placed by Brian Okelberry and others beginning in the late 1980s and 1990s.

22. The Court finds that occasionally persons may have been told to leave the property beginning in the 1950s, but this did not restrict travel on the roads. Restrictions on use of the roads began in the 1980s at the earliest. There was no evidence presented that the Okelberrys regularly kicked people off the roads at any time before the 1980s; the evidence instead shows that they freely intended to let others use the roads.

23. The Court finds that while some people obtained permission to use the roads, getting specific permission was not enforced, and many used the roads from 1957 to the 1990s without permission.

24. The Court finds that though the Okelberrys may have locked some of the gates at some points between the 1950s and 1990s, this did not restrict travel on the roads. There was no credible evidence presented that the Okelberrys intended to or actually did restrict travel prior to the 1990s due to the locking of gates. While Ray Okelberry testified that he locked gates beginning either in 1957 or 1958, he did not testify that he intended to keep the public from accessing the roads at this time. Lee Okelberry and Brian Okelberry, both Defendants' witnesses, testified that the boundary

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gates at the entrances of the roads were never locked until at least the 1980s. Several of Plaintiff's witnesses also testified to this effect.

### RULING

The issue before the Court here is a fairly narrow one, though it must be decided based on a large amount of testimony and evidence. The Utah Supreme Court, on February 12, 2008, issued a written decision ordering this Court to enter "specific findings of fact regarding the Okelberrys' evidence of interruption in the use of the Four Roads as public thoroughfares." *Wasatch County v. Okelberry*, 2008 UT 10 ¶ 20. This Court has reviewed the evidence and made those specific findings of fact above, and will presently apply those findings to the now-applicable law.

In its February 12 decision, the Supreme Court articulated a "bright-line rule" to determine whether a road is dedicated and abandoned for use to the public under Utah Code Annotated § 72-5-104. This rule is as follows:

An overt act that is intended by a property owner to interrupt the use of a road as a public thoroughfare, and is reasonably calculated to do so, constitutes an interruption sufficient to restart the running of the required ten-year period under the Dedication Statute.

*Wasatch County v. Okelberry*, 2008 UT 10 ¶ 15.

The new rule thus contains three requirements: 1) there must be an overt act; 2) there must be a show of intention by a property owner to interrupt the public use of a road; 3) the overt act must be reasonably calculated to interrupt road use by the public. The Supreme Court explained that "credible evidence" which meets these three requirements "simply precludes a finding of continuous use." *Id.*

Defendants argue that they have presented evidence of "at least four types of acts" which would satisfy the above standard: "locked gates, unlocked gates, asking trespassers to leave, and posting signs." (Memorandum Opposing Plaintiff's Motion for Entry of Findings of Fact and Conclusions of Law ("Opp. Memo"), at 2.) The Court now addresses each of these.

The evidence at trial showed clearly that there were unlocked gates at the entrances to the roads (boundary gates) as well as some interior gates during all the years relevant to this issue. The question is whether unlocked gates would satisfy the requirements explained above. The Court holds that they do not. Defendants argue, using language from various cases in other states, that an unlocked gate creates a "presumption that any use was permissive." (Opp. Memo, at 11.) But the testimony at trial shows otherwise. Several witnesses testified of unlocked wire or metal gates which were used to control cattle, but none testified that this interrupted their use of the roads, or that they supposed that their use was permissive based on the presence of the gates. Perhaps most importantly, the simple existence of gates clearly does not constitute an overt act. The gates were apparently there even before Defendants took control of the property, and the requirement that travelers open and close such gates for the purpose of controlling livestock does not show intent to interrupt public use. The gates themselves "were not meant to restrict public travel on the Road[s]." *Utah County v. Butler*, 2008 UT 12 ¶ 16.

Defendants claim that "asking people to leave the roads" constitutes an overt act under the Supreme Court's standard. Indeed, multiple witnesses, including Bruce Huvad, Melvin Price, and Glen Shepherd testified that they obtained permission to use the roads. Some testimony was also presented at trial that, on occasion, the Okelberrys and others asked people to leave property

surrounding the roads. The evidence did not show, however, that this interrupted public use of the roads generally. Several of Plaintiff's witnesses testified that they used the roads freely during the 1960s, 1970s, and 1980s without any resistance. Lee Okelberry testified that the Okelberrys "never turned nobody down" who had legitimate business using the roads. None of Defendants' witnesses testified that there was a regular policy of requiring permission or approval to use the roads during that period, nor that asking persons to leave the property was intended to restrict public access to the roads themselves. As the Supreme Court stated in *Utah County v. Butler*, when individuals are not removed from the roads themselves, simply removing them from the adjoining property is not sufficient to constitute an overt act reasonably calculated to interrupt continuous use. See 2008 UT 12 ¶ 17. The evidence shows that it was not until the late 1980s and 1990s that the Okelberrys began requiring hunting permits and other permission to use the roads. As a result, the Court finds that these instances of asking persons to leave the property do not rise to the level of an overt act intended to interrupt public use of the roads prior to the 1990s.

Another possible interruptive act alleged by Defendants was the posting of "keep out" and "no trespassing" signs on the gates and the property surrounding the roads. The Utah Supreme Court has held that "it is clear that the posting of the signs constituted an overt act," but that less clear was whether posting the signs showed an intent to interrupt public use of the road and whether the act was reasonably calculated to do so. *Wasatch County v. Okelberry*, 2008 UT 10 ¶ 18. It appears that a majority of the "no trespassing" and "keep out" signs on the property at the time of trial were placed there in the late 1980s and 1990s. Ray Okelberry testified that he began putting up signs as early as 1957 or 1958, but that it "didn't do any good" to put the signs up. He also testified that the early signs "didn't stay up." Bruce Huvad testified that he saw signs as early as 1966 saying "keep out" and "private." Yet none of Defendants' witnesses at trial specified their intent when putting up the signs in the years prior to the 1980s and 1990s. Further, many of Plaintiff's witnesses testified that they never saw "no trespassing" signs until the late 1980s or 1990s, and that none of them were deterred in their travels along the roads by signs. The Utah Supreme Court held, in *Utah County v. Butler*, that "[s]igns posted against travel on property adjacent to the Road do not constitute an interruption of travel on the Road itself." 2008 UT 12 ¶ 17. Without credible evidence showing that the signs were meant to apply to the roads themselves, the Court cannot infer an intent to interrupt the use of the roads from the posting of signs in the 1950s, 1960s, or 1970s, nor can it conclude that the earlier signs were "reasonably calculated" to interrupt public road use prior to the late 1980s or 1990s.

Finally, Defendants submit that evidence of locked gates constitutes an overt act sufficient to satisfy the Supreme Court's standard. The Supreme Court held that "[t]he locking of gates for several days at a time constitutes an overt act intended to interrupt public use and reasonably calculated to do so." *Wasatch County v. Okelberry*, 2008 UT 10 ¶ 19. However, the Court also held that "factual questions remain as to whether and when such an event or events occurred." *Id.* Ray Okelberry testified that he started locking the Circle Springs and "1080 gate" (going into the Ridge Line Road) either the first or second year he was on his property. He testified that "when I was getting ready to get those sheep out of there I locked those gates." (Transcript of Bench Trial, June 30, 2004, at 138.) He also stated that "I've always had trouble keeping locks there," but that "I was there I might have been there a week or ten days that I had those gates locked." *Id.* at 138-39.

The Utah Supreme Court explained that evidence of an overt act must be "credible" to preclude a finding of continuous use under the dedication statute. *Wasatch County v. Okelberry*, 2008 UT 10 ¶ 15. That Court has previously held that a trial court has "the prerogative to judge the

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credibility of the witnesses and to determine the facts.” *Casida v. Deland*, 866 P.2d 599, 602 (Utah 1993) (citing *Hanks v. Turner*, 508 P.2d 815, 816 (Utah 1973)). In making this determination, the Court is “not obliged to believe the self-serving testimony” of the witness. *Id.* Further, while a trial judge “should not arbitrarily reject competent, credible, uncontradicted testimony, nevertheless he is not compelled to believe evidence where there is anything about it which would reasonably justify refusal to accept it as the facts, and this includes the self-interest of the witness.” *Id.* (citing *Strong v. Turner*, 452 P.2d 323, 324 (Utah 1969)).

Though the Court properly takes into account Ray Okelberry’s self-interest in assessing the credibility of his testimony, that alone is not dispositive. The main problem with Ray Okelberry’s trial testimony regarding locked gates is that it contradicts not only the testimony of several of Plaintiffs’ witnesses (specifically, Deon Sabey, Moroni Besendorfer, Martin Wall, Jake Thompson, Ed Sabey, Brandon Richins, Benny Gardner, and Mark Butters), it also contradicts the testimony of Defendants’ own witnesses, Brian and Lee Okelberry. Plaintiffs’ witnesses who testified on the issue testified that they encountered no locked gates while using the roads until at least the late 1980s or 1990s, and some not until the 2000s.

Brian Okelberry testified that the first boundary locks were placed on gates in the 1980s. Lee Okelberry testified that “[w]e never did lock anybody out of there,” that he personally never locked any gates, and that any locks on gates shown to him as exhibits were put there “after I left,” which would have been in the 1990s, as he testified he stopped going to the area “about six years ago.” (Transcript of Bench Trial, June 29, 2004, at 198.) He specifically testified that locks were not put on the gates in 1957, but instead “[w]e put fasteners on them and we wired them to a post.” These statements by Brian and Lee Okelberry are especially significant because they are statements against interest. Brian Okelberry is a party to this case, and both were witnesses called by Defendants.


Plaintiff’s witnesses also contradict Ray Okelberry’s testimony. Defendants argue that Plaintiff’s witnesses are “sporadic users” of the road and that their testimony regarding locked gates should not be given as much weight as a result. (Opp. Memo, at 9.) But the Supreme Court explained that “a road may be used continuously even if it is not used constantly or frequently.” *Wasatch County v. Okelberry*, 2008 UT 10 ¶ 16. “For example, a road may be used by only one person once a month, but if this use is as often as the public finds it ‘convenient or necessary,’ and the landowner has taken no action intended and reasonably calculated to interrupt use, the use is continuous. The one-month period of time between uses is a mere intermission, not an interruption.” *Id.*

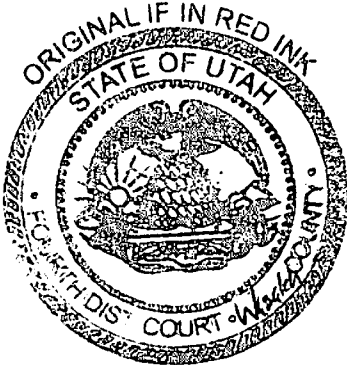
The Court finds that while there may have been occasions in which Mr. Okelberry locked the gates in the 1950s, 1960s, and 1970s, these were few and far between, were not intended to restrict public access, and were not reasonably calculated to interrupt public use of the roads. The Court finds that his testimony, to the extent it contradicts the testimony of Lee Okelberry, Brian Okelberry, and several of Plaintiff’s witnesses (that the gates were not locked with that intent until at least the 1980s), is not credible evidence under the Supreme Court’s standard. Defendants’ other witnesses testifying about the existence of locked gates did not specify timeframes in which the gates were locked; therefore the testimony of the Okelberrys are Defendants’ only evidence on this subject. As in *Utah County v. Butler*, the Court finds here that between the 1950s and at least the 1980s “the gates . . . were not erected or locked with the requisite intent and therefore did not interrupt the public’s continuous use of the Road.” 2008 UT 12 ¶ 16.

## CONCLUSION

This Court ruled previously that "it is clear that individuals using the roads beginning in the late 1950s until the late 1980s or early 1990s used the roads without interruption, they used the roads freely, and though not constantly, they used the roads continuously as they needed." (Findings of Fact and Conclusions of Law, 22 September 2004, at 6-7.) Plaintiffs at trial made a showing by clear and convincing evidence that Circle Springs Road, Ridge Line Road, Thorton Hallow Road, and Parker Canyon Road were abandoned to the public. Defendants have offered no credible evidence of overt acts sufficient to change this determination under the Utah Supreme Court's newly created standard. Therefore the Court holds that under Utah Code Annotated § 72-5-104(1) each of the four roads was "dedicated and abandoned to the use of the public" by continuous use as a public thoroughfare for over 10 years.

Signed this 23 day of October, 2008.

  
DONALD J. EYRE  
District Court Judge



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**CERTIFICATE OF SERVICE**

I hereby certify that, on the 23<sup>rd</sup> day of October, 2008, I caused a true and correct copy of the foregoing **FURTHER SPECIFIC FINDINGS OF FACT AND RULING ON DEFENDANTS' MOTION FOR ENTRY OF SUPPLEMENTAL FINDINGS AND CONCLUSIONS; OR ALTERNATIVELY FOR NEW TRIAL OR PRESENTATION OF ADDITIONAL EVIDENCE** to be delivered to the following parties:

Don R. Petersen  
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805 West 100 South  
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*Jaunya Barrett  
Deputy Clerk*

*WLS*

4TH DISTRICT COURT - HEBER  
WASATCH COUNTY, STATE OF UTAH

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WASATCH COUNTY, : MINUTES  
Plaintiff, : ORAL ARGUMENT  
 :  
 :  
vs. : Case No: 010500388 PR  
 :  
WEST DANIELS LAND ASSOCIATION :  
Et al, : Judge: DONALD J EYRE  
Defendant. : Date: September 26, 2008

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Clerk: whitneyw

PRESENT

Plaintiff's Attorney(s): THOMAS L LOW  
SCOTT H SWEAT  
Defendant's Attorney(s): DON R PETERSEN  
LESLIE W SLAUGH

Audio

Tape Count: 3:40

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HEARING

COUNT: 3:40

This matter comes before the court for oral argument on a decision remanded back to district court regarding supplemental findings of fact and conclusions of law. Parties are present.

Both parties have submitted proposed findings of fact and conclusions of law as well as supporting memorandum.

Argument by Mr. Scott Sweat.

Argument by Mr. Slaugh.

Response by Mr. Sweat.

Argument by Mr. Petersen.

The court will take this matter under advisement and render a written decision.

WBY  
10/18

DON R. PETERSEN (2576), and  
LESLIE W. SLAUGH (3752), for:  
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Our File No. 25774-1

Attorneys for Okelberry and West Daniels Defendants

IN THE FOURTH JUDICIAL DISTRICT COURT OF WASATCH COUNTY

STATE OF UTAH

<p>WASATCH COUNTY, a body politic of the State of Utah,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>E. RAY OKELBERRY, BRIAN OKELBERRY, ERIC OKELBERRY, UTAH DIVISION OF WILDLIFE RESOURCES, WEST DANIELS LAND ASSOCIATION, and John Does 1-25,</p> <p style="text-align: center;">Defendants.</p>	<p style="text-align: center;"><b>NOTICE OF APPEAL</b></p> <p style="text-align: center;">Case No. 010500388 Judge Donald J. Eyre</p>
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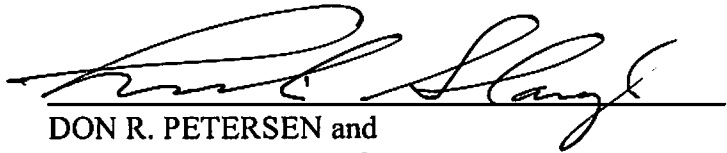
Defendants E. Ray Okelberry, Brian Okelberry, Eric Okelberry, and West Daniels Land Association hereby give notice of appeal to the Utah Supreme Court from the Further Specific Findings of Fact and Ruling on Defendants' Motion for Entry of Supplemental Findings and

WBY



Conclusions; or Alternatively for New Trial or Presentation of Additional Evidence, entered by the Honorable Donald Eyre, Jr., on October 23, 2008, and from all other adverse rulings in this matter.

DATED this 19<sup>th</sup> day of November, 2008.

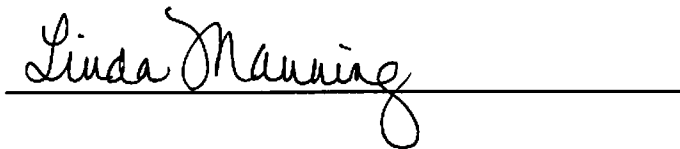


DON R. PETERSEN and  
LESLIE W. SLAUGH, for:  
HOWARD, LEWIS & PETERSEN, P.C.  
Attorneys for Defendants

**MAILING CERTIFICATE**

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 19<sup>th</sup> day of November, 2008.

Thomas Low  
Scott H. Sweat  
805 West 100 South  
Heber City, UT 84032



10/2

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Our File No. 25774-1

Attorneys for Okelberry and West Daniels Defendants

IN THE FOURTH JUDICIAL DISTRICT COURT OF WASATCH COUNTY

STATE OF UTAH

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

Plaintiff,

vs.

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

Defendants.

**MEMORANDUM OPPOSING  
PLAINTIFF'S MOTION FOR ENTRY  
OF FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

Case No. 010500388  
Judge Donald J. Eyre

Defendants E. Ray Okelberry, Brian Okelberry, Eric Okelberry, and West Daniels Land Association submit this memorandum in opposition to Wasatch County's Motion for Entry of Finding of Facts and Conclusions of Law and Request for Oral Arguments dated March 17, 2008. This memorandum also supports Defendants' Motion for Entry of Supplemental Findings and Conclusions; or Alternatively for New Trial or Presentation of Additional Evidence filed herewith.

*WML*

**I: A SINGLE INTERRUPTION OF USE DURING THE RELEVANT PERIOD IS SUFFICIENT TO PREVENT DEDICATION AS A PUBLIC ROAD.**

The decision of the Utah Supreme Court<sup>1</sup> has now established a bright line test for whether the use of a road was continuous:

An overt act that is intended by a property owner to interrupt the use of a road as a public thoroughfare, and is reasonably calculated to do so, constitutes an interruption sufficient to restart the running of the required ten-year period under the Dedication Statute.<sup>2</sup>

This Court has previously found there was no public vehicular use prior to the 1950s<sup>3</sup> and that gates were locked at least by the 1990s.<sup>4</sup> In light of this decision and the Court's prior findings, the issue now presented to the Court is very narrow: was there an interruptive act at least once every ten years from the late 1950s through the late 1980s. In other words, proof of just three interruptive acts, one each in the 1960s, 1970s, and 1980s, would defeat the County's claim.

Defendants presented evidence of at least four types of acts that prevent a finding of continuous use: locked gates, unlocked gates, asking trespassers to leave, and posting signs. Any one of these acts would be sufficient interruption; defendants presented proof of numerous

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<sup>1</sup>*Wasatch County v. Okelberry*, 2008 UT 10. Hereafter cited as *Okelberry*.

<sup>2</sup>*Okelberry*, ¶ 15.

<sup>3</sup>Findings of Fact and Conclusions of Law, ¶ 10 on page 4.

<sup>4</sup>Supplemental Findings of Fact and Ruling on Motion to Amend Judgment, ¶ 5.

interruptions. The law regarding these interruptions will be presented below along with a summary of the evidence.

**II: PRIVATE PROPERTY RIGHTS ARE CONSTITUTIONALLY PROTECTED AND CAN BE OVERCOME ONLY BY CLEAR AND CONVINCING EVIDENCE; ANY CREDIBLE EVIDENCE OF INTERRUPTION PRECLUDES A FINDING OF CONTINUOUS USE.**

Private property rights have constitutional protection. Section 22 of Article I of the Utah Constitution declares: "Private property shall not be taken or damaged for public use without just compensation." The Fifth Amendment to the United States Constitution similarly states: "nor shall private property be taken for public use without just compensation."

Wasatch County seeks a declaration based on Utah Code § 72-5-104, which provides a road will be deemed donated or dedicated to the public if the road has been "continuously used as a public thoroughfare for a period of ten years." Consistent with the constitutional prohibition of taking without just compensation, "a party seeking to establish dedication and abandonment under this statute bears the burden of doing so by clear and convincing evidence."<sup>5</sup> Additionally, the trial court is required to view the evidence in these cases in light of the "presumption" that exists "in favor of the property owner."<sup>6</sup>

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<sup>5</sup>*Okelberry*, ¶ 9.

<sup>6</sup>*Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1099 (Utah 1995) (quoting *Leo M. Bertagnole, Inc. v. Pine Meadow Ranches*, 639 P.2d 211, 213 (Utah 1981)).

The reason for requiring this higher standard of proof in public road cases is clear. As explained by the Utah Supreme Court, “[t]he law does not lightly allow the transfer of property from private to public use. . . . This higher standard of proof is demanded since the ownership of property should be granted a high degree of sanctity and respect.”<sup>7</sup> In an earlier public roads case, the Utah Supreme Court similarly stressed that “[w]here individual property rights are at stake, we must not treat such rights lightly.”<sup>8</sup>

The reported cases are illustrative. In *Draper City*, the Utah Supreme Court considered a case in which the city had brought suit against a rural landowner under § 72-5-104's predecessor statute.<sup>9</sup> The trial court had granted summary judgment on behalf of the city; the Supreme Court reversed.<sup>10</sup> In holding that the evidence did not support the public road determination, the Supreme Court emphasized the fact that there had been intermittent interruptions in the public's right to use the roads. Specifically, the evidence had shown that (1) the landowners had, on occasion, stopped persons who were using the roads and asked them to leave; (2) the owners had posted “no trespassing” signs at the entrance to the roads; (3) the owners had blocked the roads by digging trenches, stacking concrete blocks, and creating obstructive piles of dirt and rocks; and (4) the

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<sup>7</sup>*Draper City*, 888 P.2d at 1099.

<sup>8</sup>*Petersen v. Combe*, 20 Utah 2d 376, 438 P.2d 545, 546 (1968).

<sup>9</sup>*See generally* 888 P.2d at 1098-99.

<sup>10</sup>*Id.* at 1101.

owners had erected a gate at the entrance to the roads.<sup>11</sup> All of these acts were identified as interruptive acts by the Supreme Court.

In *Campbell v. Box Elder County*,<sup>12</sup> this court similarly affirmed a decision of a lower court holding that a public road had not been established.<sup>13</sup> In so doing, this Court determined that the continuous use requirement had not been satisfied because of evidence showing (1) that the owners had placed a gate across the road in question, and (2) that the gate had been locked during certain (but not all) months of the year.<sup>14</sup> As in *Draper City*, the court thus concluded that an interruption of public access, however brief, is still sufficient to break off the ten year period of continuous public use, thereby preserving the landowner's private property rights.

In contrast, the cases in which the Utah appellate courts have concluded that § 72-5-104 has been satisfied have been those in which the uncontroverted evidence showed that there had been absolutely no interruption of the public's right to use the roads during the requisite period. In *Heber City Corp. v. Simpson*,<sup>15</sup> for example, the Supreme Court affirmed a continuous use determination because of the fact that the “*uncontradicted*” evidence demonstrates that the public made a continuous

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<sup>11</sup>*Id.* at 1100.

<sup>12</sup>962 P.2d 806 (Utah Ct. App. 1998).

<sup>13</sup>*See generally* 962 P.2d at 807-08.

<sup>14</sup>*Id.* at 808-09.

<sup>15</sup>942 P.2d 307 (Utah 1997).

and uninterrupted use” of the contested roads.<sup>16</sup> Similarly, in *Kohler v. Martin*,<sup>17</sup> the court affirmed a public road dedication where there was “abundant, unrebutted evidence in support” showing continuous use.<sup>18</sup> Specifically, the court emphasized the fact that the landowners had “not fence[d] off the roadway,” had “not post[ed] any signs, and in general [had] made no attempts to limit the passage of the public.”<sup>19</sup>

In short, the controlling legal test is well-established. In order to ensure that § 72-5-104 is not used to arbitrarily and unfairly deprive a landowner of his or her property rights, the courts have insisted that the continuous use requirement is only satisfied when the evidence showing uninterrupted use is unrebutted and uncontradicted. If there has been competent or credible evidence of interruption, the continuous use requirement has simply not been satisfied, and § 72-5-104 is inoperative.

It follows that while the county must prove its case by clear and convincing evidence, the same standard does not apply to defendants. At most, defendants need establish an interruption only by a preponderance of the evidence. The clear and convincing standard applies to Wasatch County

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<sup>16</sup>942 P.2d at 311 (emphasis added).

<sup>17</sup>916 P.2d 910 (Utah Ct. App. 1996).

<sup>18</sup>*Id.* at 913.

<sup>19</sup>*Id.*

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because the county is attempting to take private property without compensation. Defendants are only trying to protect their property and do not face that constitutional hurdle. In fact, this Court must indulge a “presumption” in favor of defendants.<sup>20</sup>

### III: PUBLIC USE WAS INTERRUPTED BY LOCKED GATES.

A locked gate is clearly an interruption.<sup>21</sup> This Court found: “At various times in the past, the Okelberrys and their employees have locked these gates. Beginning in the 1990’s, the Okelberrys began locking these gates on a more permanent basis”<sup>22</sup> The finding that the post-1990 locking was “on a more permanent basis” implies that the gates were at least occasionally locked prior to then.

Ray Okelberry testified he locked the gates every year since 1957 when moving the sheep out.<sup>23</sup> It does not matter that there was no evidence of anyone who was actually blocked by the locked gates. The Supreme Court’s decision in *Town of Leeds v. Prisbrey*<sup>24</sup> case established it is the act of blocking, not the result, that is important.<sup>25</sup>

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<sup>20</sup>See *Draper*, 888 P.2d at 1099.

<sup>21</sup>*Okelberry*, ¶ 19.

<sup>22</sup>Supplemental Findings of Fact and Ruling on Motion to Amend Judgment, ¶ 5.

<sup>23</sup>Transcript June 30, 2004, page 138.

<sup>24</sup>2008 UT 11.

<sup>25</sup>*Id.* ¶ 7.

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Other witnesses also testified concerning locked gates. Jeff Jefferson, who had been on the property since 1977,<sup>26</sup> testified the cable lock on the Circle Springs gate as shown in Exhibit 7 has always been there.<sup>27</sup> Mel Price also testified that gate was locked.<sup>28</sup> He further testified that the gate on the Ridge Line road has been locked for twenty years.<sup>29</sup> Deon Sabey, a Wasatch County witness, testified the gates have been locked since the 1980s.<sup>30</sup> Dick Baum, another Wasatch County witness, acknowledged the gates could have been locked about twenty years ago (i.e., about 1984).<sup>31</sup>

As for the question of whether the gates were locked, the evidence that was presented at trial indicated that the Okelberrys had in fact locked the gates that controlled access to their roads. Ray Okelberry, for example, specifically testified that he had begun locking the exterior gates since the late 1950s, and that he had also made a habit of locking the gates every year while moving his own sheep.<sup>32</sup> His assertion that the gates were at least periodically locked was also supported by Mel Price.<sup>33</sup>

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<sup>26</sup>Transcript June 29, 2004, page 129.

<sup>27</sup>*Id.* page 146.

<sup>28</sup>*Id.* page 161.

<sup>29</sup>*Id.* page 160.

<sup>30</sup>Transcript June 28, 2004, page 42.

<sup>31</sup>Transcript June 28, 2004, page 314.

<sup>32</sup>Trial Transcript, June 30 at 138-39.

<sup>33</sup>Trial Transcript, June 29 at 160, 170.

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It is true that many of the County's witnesses testified that they had not encountered locks on the gates until the late 1980s. This discrepancy is, however, explainable on at least two levels. First, the testimony at trial was that the gates and the locks were repeatedly torn down through the years by trespassers and hunters. For example, Jeff Jefferson, the longtime Okelberry employee, testified that one wire gate had ultimately been replaced by an iron gate "because every week—you could put up the gate and the next day it would be ripped out."<sup>34</sup>

Second, none of the witnesses who testified on behalf of the County were anything but sporadic users of the roads. With slight variations in frequency, the testimony was generally that the roads were used by these witnesses on a limited number of occasions during the summer, and then again during the 2-3 week long hunting season in the fall.

In terms of claimed usage, the notable high point in the County's case was Mark Butters. In spite of the fact that virtually all of the evidence supported the notion that these roads are rough and very difficult to traverse, as well as the fact that the County's other witnesses generally claimed usage rates of no more than 5-6 times during a given summer, Mark Butters nevertheless testified that he uses the Ridge Line and Circle Springs roads approximately 20 times per summer. Assuming *arguendo* that this particular statement was true, and that by the term "summer" Mr. Butters was referring to the months of June, July, and August, it is worth noting that Mr. Butters was still only

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<sup>34</sup>Trial Transcript, June 29 at 134; *accord* Trial Transcript, June 29 at 186-87, 197-98 (testimony of Lee Okelberry); Trial Transcript, June 30 at 137-39 (testimony of Ray Okelberry).

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asserting that he used these roads at a rate of somewhere close to 1 1/2 times per week. The other witnesses, of course, were claiming usage at rates much lower than that.

Ray Okelberry testified that he was at the very least locking the gates for a short period every summer while he moved his sheep. Depending on the vagaries of chance and timing, such short term, periodic locking would not necessarily have impacted the County's collection of admittedly intermittent witnesses.

Given the intermittent nature of these witnesses' claimed usage, it is therefore clear that even the County's most persistent witnesses were by their own terms simply not in a position to rebut Ray Okelberry's testimony that he locked the gates when moving the sheep out.

Lee Okelberry operated on a different part of the property,<sup>35</sup> and thus had no occasion to go through some of the gates locked by Ray Okelberry when the sheep were being moved.<sup>36</sup> His testimony does not contradict the testimony of Ray Okelberry.

#### **IV: PUBLIC USE WAS INTERRUPTED BY UNLOCKED GATES.**

It was undisputed that there have always been unlocked gates across these roads during the time considered by the Court.<sup>37</sup> Although individuals were able to open the gates and still use the roads, the presence of those gates created a presumption that the use was permissive and therefore

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<sup>35</sup>Transcript June 30, 2004, page 141.

<sup>36</sup>Transcript June 29, 2004, page 201.

<sup>37</sup>Transcript June 29, 2004, page 158.

interrupted use of the road “as a public thoroughfare.” Use by permission does not count as “public use” under the dedication statute.<sup>38</sup>

Other states have ruled that an unlocked gate creates a presumption that any use was permissive. As stated by one court, “where a landowner places gates across a road through his land, it is notice to the public that they thereafter are passing through the land by permission and not by right, so that no prescriptive right to the use of the road can be acquired.”<sup>39</sup> Another court similarly held, in a case dealing with unlocked gates: “The erection of a gate across a road tends to evidence an intention on the part of the owner to assume and assert ownership and possession of the land over which the road runs.”<sup>40</sup> The court said such obstruction “is a strong indication that the use by others is permissive only.”<sup>41</sup> Another court holds that unlocked gates “conveys the clear message that any public use of that road is with the landowner's permission only,” although that presumption is not conclusive.<sup>42</sup>

This presumption of permissive use is consistent with Utah cases. The question under the continuous use requirement is whether the public's right to use the road was interrupted or

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<sup>38</sup>*Draper City v. Estate of Bernardo*, 888 P.2d 107, 1099 (Utah 1995).

<sup>39</sup>*Berger v. Berger*, 88 N.W.2d 98, 103 (N.D. 1968).

<sup>40</sup>*Williams v. Prather*, 196 So. 118, 120 (Ala. 1940).

<sup>41</sup>*Id.*

<sup>42</sup>*McIntyre v. Board of County Commissioners*, 86 P.3d 402, 412 (Colo. 2004).

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“limited.”<sup>43</sup> Though some cases have considered the impact of locked gates on the continuous use inquiry,<sup>44</sup> it is significant that a number of the cases have also considered the presence of gates as an interruptive force without deeming it necessary to even note whether those gates were locked.<sup>45</sup>

There are strong policy reasons for allowing a gate to act as an interruptive force, even in the absence of any evidence showing that that gate was locked. As indicated above, the Utah courts have long sought to achieve a balance between the competing interests that are at work in the § 72-5-104 cases. On the one hand, the government clearly has an interest in preserving the public's right to use roads that have been left to the public for a lengthy period of time. It is instructive in this regard that the statute itself only calls for public dedication where the landowners have “abandoned” the road.<sup>46</sup> In a very real sense, the prevailing logic here is one of reliance. If an owner has completely “abandoned” a particular road for such a lengthy period of time, it stands to reason that the public will have developed collective patterns of travel, commerce, and development during that time that would track and be reliant upon the existence of this “public thoroughfare.” This is exactly what happened, for example, in the *Heber City* case. In that case, the road in question had

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<sup>43</sup>*Heber City*, 942 P.2d at 311 n. 9.

<sup>44</sup>*See, e.g., Campbell*, 962 P.2d at 809.

<sup>45</sup>*See, e.g., Draper City*, 888 P.2d at 1100; *AWINC Corp. v. Simonsen*, 2005 UT App 168, ¶3, 112 P.3d 1228, 1229 (“fence wire drop gate”); *Kohler*, 916 P.2d at 913.

<sup>46</sup>*See* Utah Code Ann. § 72-5-104(1).

continuously been used by the public from 1947 until 1989.<sup>47</sup> Not only did a “number of businesses” spring up alongside the road, but the road also became a primary means of reaching the airport.<sup>48</sup> In such circumstances, it would indeed be unjust to allow a long absent landowner to suddenly emerge, claim ownership, and restrict the public's right to use a road that had never before been treated as anything but public.

On the other hand, where the landowner has taken some recognizable steps to assert some control over the roads, the public will be under no such illusions. For example, in a case involving rural roads that are crossed by unlocked gates, a member of the public who wished to use the roads would still have to physically stop their car, get out, open the gate, drive through the gate, and then get out again to close the gate before proceeding onward. This is precisely what happened here, for example, with many of the County's own witnesses testifying that the gates were always kept closed as a means of keeping the Okelberrys' livestock within the property.<sup>49</sup> As such, the members of the public who used these roads were always presented with a reminder upon both ingress and egress that these roads belonged to some other party, and that use of these roads was solely at the pleasure of that owner.

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<sup>47</sup>942 P.2d at 313.

<sup>48</sup>*Id.* at 312.

<sup>49</sup>*See. e.g.*, Trial Transcript, June 28 at 40 (testimony of Dee Sabey); Trial Transcript, June 28 at 314 (testimony of Dick Baum); Trial Transcript, June 29 at 119, 123 (testimony of Mark Butters).

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As indicated above, the law does not lightly allow the public takeover of a private property owner's land. The statute at issue in this case does not require a landowner to come up with an expensive, elaborate, or foolproof system for keeping out all trespassers. Instead, the statute allows the property owner to preserve his or her rights by simply creating some interruptive obstacle that limits the public's access to the private roads. Given the large number of rural ranches and farms in this state that are separated from the highways by nothing more than a wire fence or gate, this Court should reject the trial court's decision to read into the statute a heretofore non-existent requirement that all of those gates and fences actually be locked. Instead, this Court should affirm the obvious, common-sense reading of the statute, thereby holding that a landowner who has preserved and maintained a gate or fence across his or her road cannot be said to have "abandoned" that road under § 72-5-104. For this reason, this Court can and should conclude that there was not clear and convincing evidence showing that the roads involved in this appeal were ever abandoned to the public.

This presumption of permissive use from unlocked gates is consistent with the evidence in this case. Lee Okelberry testified, for example, that there were unlocked gates on all the roads but that in the early years he never saw people using the roads that didn't have legitimate business to be

there.<sup>50</sup> Where they did encounter someone whose business they didn't know, they stopped the individual to find what business he had.<sup>51</sup> In other words, Okelberrys asserted the right to control the roads (by stopping individuals to question them), and then decided whether to give permission to continue that use.

The presumption of permissive use is also mandated by constitutional considerations. A landowner may, through inaction, dedicate or abandon his or her property, but the public cannot take that property without compensation if the owner takes reasonable measures to retain its private character. A Louisiana court recognized this distinction, holding that the public authority could not take a road unless the landowner's knowing acquiescence in public use and maintenance “amounts to a tacit dedication by the landowner — a giving by the landowner rather than a taking by the public authority.”<sup>52</sup> A gate, even an unlocked gate, clearly communicates to the public that the property is private. The public constitutionally cannot take the property where the landowner takes reasonable measures to communicate and retain its private character.

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<sup>50</sup>Transcript June 30, 2004, page 180.

<sup>51</sup>*Id.* at page 185.

<sup>52</sup>*Vaughn v. Williams*, 345 So. 2d 1195, 1199 (La. Ct. App. 1977).



**V: PUBLIC USE WAS INTERRUPTED BY DEFENDANTS ASKING INDIVIDUALS TO LEAVE.**

Asking someone to leave the property must be considered an “overt act” that satisfies the new test adopted by the Utah Supreme Court. Several witnesses testified to asking people to leave the roads.

Bruce Huvad testified he used the roads by permission beginning in 1966, but also, at the request of Okelberrys, would ask people to leave if they had not obtained permission.<sup>53</sup> Jeff Jefferson, who started working for the Okelberrys in 1977, also testified he asked people to leave the roads if they did not have permission.<sup>54</sup>

Several other witnesses testified they stopped those traveling on the roads to inquire as to their business. Such stops must also be considered an “overt act” preventing uninterrupted public use. Lee Okelberry testified he made such stops starting in 1957 when then purchased the property.<sup>55</sup>

This evidence is corroborated by the many individuals who testified they recognized the property as private and asked permission to use it. Mel Price testified he obtained permission to use the roads.<sup>56</sup> Lee Okelberry testified he gave permission to the Taylors, Thompsons, Youngs, and

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<sup>53</sup>Transcript June 29, 2004, pages 254-56.

<sup>54</sup>Transcript June 29, 2004, pages 140-41, 149.

<sup>55</sup>Transcript June 29, 2004, pages 183-85.

<sup>56</sup>Transcript June 29, 2004, page 163; Exhibit 20.

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others.<sup>57</sup> Shane Ford testified his mother, whose family had previously owned the property, would ask permission.<sup>58</sup>

**VI: POSTED “KEEP OUT” AND “NO TRESPASSING” SIGNS INTERRUPTED ANY PUBLIC USE.**

The Utah Supreme Court clarified that a “no trespassing” or similar sign referring to the roads would be sufficient to interrupt use.<sup>59</sup> The Okelberrys presented substantial evidence to establish that there had been no-trespassing signs alongside the roads. Many of the witnesses discussed the presence of signs alongside the road system in general terms.<sup>60</sup> Other witnesses were more specific as to the particular signs they saw upon particular roads. With respect to Parker Canyon, both Mel Price and Glen Shepher testified that they had in fact seen no trespassing signs on that road.<sup>61</sup> With respect to Thornton Hollow, Mark Butters, testifying for the County, testified

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<sup>57</sup>Transcript June 29, 2004, page 202.

<sup>58</sup>Transcript June 29, 2004, page 231.

<sup>59</sup>*Okelberry*, ¶ 18.

<sup>60</sup>*See* Trial Transcript, June 30 at 137 (testimony of Ray Okelberry); Trial Transcript, June 29 at 257-58, 268-69 (testimony of Bruce Huvad); Trial Transcript, June 29 at 160 (testimony of Mel Price); Trial Transcript, June 30 at 25 (testimony of Brian Okelberry); Trial Transcript, June 29 at 135 (testimony of Jeff Jefferson).

<sup>61</sup>*See* Trial Transcript, June 29 at 161; Trial Transcript, June 29 at 212.

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that he had seen no trespassing signs as well.<sup>62</sup> Similar testimony was elicited with respect to Circle Springs.<sup>63</sup>

The county challenges this evidence by asserting the signs referred to the property adjoining the road, not to the roads themselves. Many of the signs, however, were posted at the entrances to the property.<sup>64</sup> Jeff Jefferson testified that all entrances were posted.<sup>65</sup> Signs posted at the entrances, even if a few feet away from the gate, obviously prohibit any travel beyond the gate and thus apply to both the roads and the surrounding property.

**VII: THE COURT SHOULD ALLOW ORAL ARGUMENTS.**

Defendants concur with Wasatch County's request that the Court allow oral arguments. Trial occurred four years ago and spanned three days. Oral arguments would allow counsel an opportunity to clarify any questions the Court may have.

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<sup>62</sup>Trial Transcript, June 29 at 106.

<sup>63</sup>Trial Transcript, June 29 at 161 (testimony of Mel Price).

<sup>64</sup>*E.g.*, exhibits 6, 8, 45, 47.

<sup>65</sup>Transcript June 29, 2004, page 135.

**VIII: A NEW TRIAL SHOULD BE GRANTED OR THE COURT SHOULD ALLOW ADDITIONAL EVIDENCE.**

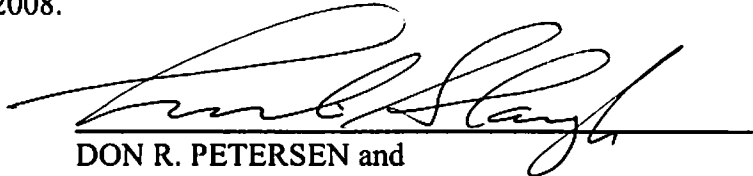
Counsel for defendants understand that Judge Eyre is no longer assigned to this case. In the event the matter is heard by another judge, a new trial should be granted. Resolution of the case may turn on credibility issues. Determination of credibility cannot be made from a written transcript.<sup>66</sup>

In addition, a new trial should be granted, or the parties should be permitted to reopen and present additional evidence. Wasatch County has acknowledged that the Utah Supreme Court adopted a new test to determine interruption. Fairness counsels the parties should be permitted to present evidence specifically focused on that test.

**CONCLUSION**

The Court determined the subject roads were not public and that the county could not take those roads, into which defendants had invested so much time and money, without paying just compensation. The evidence at trial still supports that decision. The Court should enter the findings and conclusions proposed by defendants, and reaffirm its prior order.

DATED this 5<sup>th</sup> day of May, 2008.



DON R. PETERSEN and  
LESLIE W. SLAUGH, for:  
HOWARD, LEWIS & PETERSEN, P.C.  
Attorneys for Defendants

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<sup>66</sup>See *In re Estate of Cassity*, 656 P.2d 1023, 1024 (Utah 1982) (new trial not required because only legal conclusions were at issue; otherwise a new trial would be required).

**MAILING CERTIFICATE**

I hereby certify that a true and correct copy of the foregoing was mailed to the following,  
postage prepaid, this 5<sup>th</sup> day of May, 2008.

Thomas Low  
Scott H. Sweat  
805 West 100 South  
Heber City, UT 84032

A handwritten signature in black ink, appearing to read "Scott H. Sweat", written over a horizontal line.

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DON R. PETERSEN (2576), and  
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Our File No. 25774-1

Attorneys for Okelberry and West Daniels Defendants

IN THE FOURTH JUDICIAL DISTRICT COURT OF WASATCH COUNTY

STATE OF UTAH

<p>WASATCH COUNTY, a body politic of the State of Utah,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>E. RAY OKELBERRY, BRIAN OKELBERRY, ERIC OKELBERRY, UTAH DIVISION OF WILDLIFE RESOURCES, WEST DANIELS LAND ASSOCIATION, and John Does 1-25,</p> <p style="text-align: center;">Defendants.</p>	<p><b>DEFENDANTS' MOTION FOR ENTRY OF SUPPLEMENTAL FINDINGS AND CONCLUSIONS; OR ALTERNATIVELY FOR NEW TRIAL OR PRESENTATION OF ADDITIONAL EVIDENCE</b></p> <p style="text-align: center;">Oral Argument Requested</p> <p style="text-align: center;">Case No. 010500388 Judge Donald J. Eyre</p>
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Defendants E. Ray Okelberry, Brian Okelberry, Eric Okelberry, and West Daniels Land Association hereby request that the Court enter the attached Second Supplemental Findings of Fact and Conclusions of Law, or alternatively that the Court grant a new trial or allow the presentation of additional evidence.

The grounds for this motion are as follows:

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1. The Utah Supreme Court remanded this matter for further proceedings, and the evidence presented at trial supports the requested findings and conclusions.

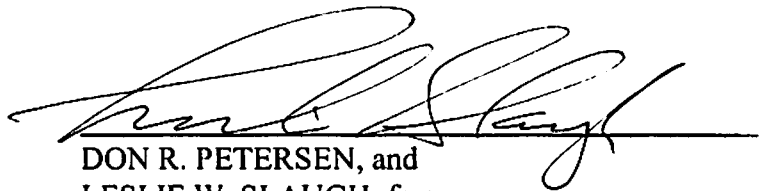
2. If Judge Eyre is not assigned to this case, Rule 63(a) allows the court to rehear the evidence or some part of it, and justice requires that be done because resolution of the case may turn on credibility issues.

3. The applicable law has changed since the original trial, and defendants are entitled under Rule 59(a)(7) to a new trial or to present additional evidence to respond to the new standard adopted by the Utah Supreme Court.

This motion is supported by the Memorandum Opposing Plaintiff's Motion for Entry of Findings of Fact and Conclusions of Law filed herewith.

Defendants further request that the Court schedule and receive oral arguments on this motion.

DATED this 5<sup>th</sup> day of May, 2008.




DON R. PETERSEN, and  
LESLIE W. SLAUGH, for:  
HOWARD, LEWIS & PETERSEN, P.C.  
Attorneys for Defendants

**MAILING CERTIFICATE**

I hereby certify that a true and correct copy of the foregoing was mailed to the following,  
postage prepaid, this 5<sup>e</sup> day of May, 2008.

Thomas Low  
Scott H. Sweat  
805 West 100 South  
Heber City, UT 84032

A handwritten signature in black ink, appearing to read "Scott H. Sweat", is written over a horizontal line.

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Our File No. 25774-1

Attorneys for Okelberry and West Daniels Defendants

IN THE FOURTH JUDICIAL DISTRICT COURT OF WASATCH COUNTY

STATE OF UTAH

<p>WASATCH COUNTY, a body politic of the State of Utah,</p> <p>Plaintiff,</p> <p>vs.</p> <p>E. RAY OKELBERRY, BRIAN OKELBERRY, ERIC OKELBERRY, UTAH DIVISION OF WILDLIFE RESOURCES, WEST DANIELS LAND ASSOCIATION, and John Does 1-25,</p> <p>Defendants.</p>	<p><b>SECOND SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW</b></p> <p>Case No. 010500388 Judge Donald J. Eyre</p>
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This case was tried to the Court on June 28, 29, and 30, 2004. Findings of Fact and Conclusions of Law were entered October 22, 2004, and Supplemental Findings of Fact and Ruling on Motion to Amend Judgment was entered February 23, 2005. Following an appeal by both parties, the Utah Supreme Court remanded the case to this Court for further proceedings. The Court now enters the following:

## SUPPLEMENTAL FINDINGS OF FACT

1. Since 1957, the Okelberrys and their employees have constructed and maintained gates at all points where the roads enter the property of defendants.
2. The gates have generally been kept closed except during the winters from 1957 to the present.
3. The presence of the gates has interrupted the travel of those traveling on the roads.
4. The presence of the unlocked gates reasonably communicated to those traveling on the road that the roads were private, but that the owners permitted other persons to use the roads.
5. Ray Okelberry or his employees have locked the gates at least once each decade from 1957 to 1990.
6. Beginning in the 1990's, the Okelberrys began locking these gates on a more permanent basis.
7. Beginning in 1957 and continuing to the present, the Okelberrys or their employees have posted "no trespassing" signs at the entrances to the defendants' property.
8. Beginning in 1957 and continuing through 1990, the Okelberrys or their employees or permittees would occasionally stop persons traveling on the road, ask their business, and ask the persons to leave if the business was not deemed legitimate or the persons had not otherwise received permission to use the roads. This occurred at least once in each decade during that time.

The Court having made the foregoing Findings of Fact, now makes and enters the following:

**CONCLUSIONS OF LAW**

1. The presence of unlocked gates interrupts public use and creates a presumption that any use of the roads is permissive, and Wasatch County did not rebut the presumption of permissive use.
2. The actions of the defendants in stopped persons using the road to inquire of their business constitutes an overt act interrupting public use even if the person is then permitted to continue travel on the road.
3. Wasatch County has not established by clear and convincing evidence that the roads were used continuously by members of the public during any 10 year period of time.
4. This Court's previous order, determining that the roads were not public, should remain in force.

DATED this \_\_\_\_ day of May, 2008.

BY THE COURT:

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DONALD J. EYRE  
DISTRICT COURT JUDGE

1011



3. E. Ray Okelberry is a record owner of certain parcels of real property ("subject property") located in Wasatch County in Township 5 South, Range 5 East, Salt Lake Base and Meridian, and more particularly depicted by way of map attached hereto as Exhibit A.

4. Brian Okelberry is a record owner of certain parcels of real property ("subject property") located in Wasatch County in Township 5 South, Range 5 East, Salt Lake Base and Meridian, and more particularly depicted by way of map attached hereto as Exhibit A.

5. Eric Okelberry is a record owner of certain parcels of real property ("subject property") located in Wasatch County in Township 5 South, Range 5 East, Salt Lake Base and Meridian, and more particularly depicted by way of map attached hereto as Exhibit A.

6. The Utah Division of Wildlife Resources is a record owner of certain parcels of real property ("subject property") located in Wasatch County in Township 5 South, Range 5 East, Salt Lake Base and Meridian, and more particularly depicted by way of map attached hereto as Exhibit A.

7. The West Daniels Land Association is a record owner of certain parcels of real property ("subject property") located in Wasatch County in Township 5 South, Range 5 East, Salt Lake Base and Meridian, and more particularly depicted by way of map attached hereto as Exhibit A.

8. John Does 1-25 represent any and all persons or entities who now or will claim any interest, known or unknown, in the subject property.

9. Each portion of the subject property is located in Wasatch County, State of Utah, and jurisdiction and venue are therefore proper in the above entitled court.

10. Various roadways run through, along, or about the subject property, including, but not limited to, the following: (1) the road commonly known as Ridge Line Road (depicted as

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Road 1 on Exhibit A); (2) the road commonly known as Parker Canyon Road (depicted as Road 2 on Exhibit A); (3) the road commonly known as Thorton Hollow Road (depicted as Road 3 on Exhibit A); (4) the road commonly known as Circle Springs Road (depicted as Road 4 on Exhibit A) and (5) the road commonly known as Maple Canyon Road (depicted as Road 5 on Exhibit A).

11. The entire roadway commonly known as Ridge Line Road (Road 1 on Exhibit A) has previously been used continuously as a public thoroughfare for a period of ten years and is therefore dedicated and abandoned to the use of the public under Utah Code Annotated § 72-5-104 and other applicable law.

12. The entire roadway commonly known as Parker Canyon Road (Road 2 on Exhibit A) has previously been used continuously as a public thoroughfare for a period of ten years and is therefore dedicated and abandoned to the use of the public under Utah Code Annotated § 72-5-104 and other applicable law.

13. The entire roadway commonly known as Thorton Hollow Road (Road 3 on Exhibit A) has previously been used continuously as a public thoroughfare for a period of ten years and is therefore dedicated and abandoned to the use of the public under Utah Code Annotated § 72-5-104 and other applicable law.

14. The entire roadway commonly known as Circle Springs Road (Road 4 on Exhibit A) has previously been used continuously as a public thoroughfare for a period of ten years and is therefore dedicated and abandoned to the use of the public under Utah Code Annotated § 72-5-104 and other applicable law.

15. The entire roadway commonly known as Maple Canyon Road (Road 5 on Exhibit A) has previously been used continuously as a public thoroughfare for a period of ten



years and is therefore dedicated and abandoned to the use of the public under Utah Code Annotated § 72-5-104 and other applicable law.

16. The scope of the right of way on each of these roads is defined by UCA § 72-5-104 as that which is reasonable and necessary to ensure safe travel according to the facts and circumstances.

17. Plaintiff is entitled to judgment against Defendants which permanently decrees as valid the public rights of way and which quiets title to such rights of way in favor of plaintiff and for the State of Utah for each of the roadways at issue in this complaint.

18. Plaintiff is likewise entitled to a permanent injunction preventing defendants from fencing or restricting access to the subject roads.

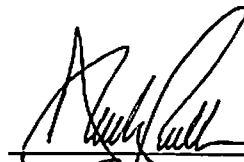
WHEREFORE, Plaintiff requests judgment as follows:

- A. Recognizing and affirming the public's right of way to each of the roadways listed; (1) Ridge Line Road, (2) Parker Canyon Road, (3) Thorton Hollow Road, (4) Circle Springs Road and (5) Maple Canyon Road.
- B. Quieting fee title to each roadway in favor of the County and the State of Utah;
- C. Defining the scope of the rights of way and title as that which is reasonable and necessary to ensure safe travel according to the facts and circumstances, as provided in UCA § 72-5-104 and other applicable provisions.
- D. Permanently enjoining Defendants as well as any subsequent purchasers or assignees from fencing, gating, or otherwise restricting public access or

travel upon the subject roads;

- E. For costs and attorney's fees as the Court deems appropriate.
- F. For such other and further relief as to the Court seems just and equitable in the premises.

DATED and signed this 24<sup>th</sup> day of August, 2001.

  
\_\_\_\_\_  
DEREK P. PULLAN  
MARK K. MCIFF  
Attorneys for Wasatch County



*[Handwritten signature]*

DON R. PETERSEN (2576), for:  
**HOWARD, LEWIS & PETERSEN, P.C.**  
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Facsimile: (801) 377-4991

Our File No. 25.774

Attorneys for Defendants Okelberry

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

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

Plaintiff,

vs.

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

Defendants.

**AFFIDAVIT OF LEE OKELBERRY**

Case No. 010500388  
Judge Donald J. Eyre

STATE OF UTAH        )  
                              : ss.  
COUNTY OF UTAH    )

LEE OKELBERRY, being duly sworn, states:

1. I am the brother of the defendant E. Ray Okelberry.
2. I owned a one-half interest in the property and sold the same to my brother, E.

Ray Okelberry, and his two sons.

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3. I am very familiar with the property and what have been referred to as "roads," which are nothing more than trails. These "roads" and/or trails were constructed by myself, my brother, and/or our predecessors.

4. I remember going up in the 1950s with a TD9 International tractor. This was the time when the "roads" were improved and created. This was done to help manage the sheep and to utilize the forage that hadn't been utilized in the past.

5. These roads have never been open to the public. I sold the property to my brother and his family in the 1980s. There was control over the "roads," with fences and gates.

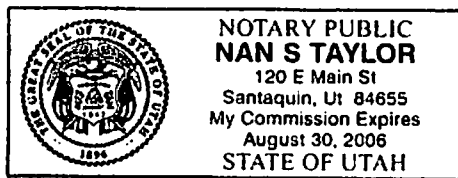
6. On occasion, permission has been granted to people who wanted to use the property for hunting, camping and obtaining firewood. I remember specifically granting permission for those purposes.

7. During the time when I was an owner of the property up until the middle of the 1980s, there was not public access to these "roads" and trails. I have been on the property on occasion since that time, and I have noted that the "roads" have been blocked with gates and fences, and that the gates were locked.

DATED this 4 day of March, 2003.

  
LEE OKELBERRY

SUBSCRIBED and sworn to before me this 4 day of ~~February~~ March, 2003.



  
NOTARY PUBLIC



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

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing document was mailed,  
postage prepaid, this 10 day of ~~February~~ March, 2003, to:

Derek P. Pullan  
Wasatch County Attorney  
Mark E. McIff  
Deputy Wasatch County Attorney  
805 West 100 South  
Heber City, UT 84032

  
Secretary

G:\DRP\LEEOKEL.AFF

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4TH DISTRICT COURT - HEBER COURT  
WASATCH COUNTY, STATE OF UTAH

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WASATCH COUNTY, : MINUTES  
Plaintiff, : BENCH TRIAL  
: :  
: :  
vs. : Case No: 010500388 PR  
: :  
WEST DANIELS LAND ASSOCIATION :  
Et al, : Judge: DONALD J. EYRE  
Defendant. : Date: June 28, 2004

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Clerk: roseb

PRESENT

Defendant(s): E RAY OKELBERRY  
Plaintiff's Attorney(s): SCOTT H SWEAT  
Defendant's Attorney(s): DON R. PETERSEN  
RYAN D TENNEY

Audio

Tape Count: 9:00

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TRIAL

This is the time set for bench trial. Both sides are ready to proceed.

Mr. Petersen would move the Court to invoke the exclusionary rule. Granted. All potential witnesses are sworn and excused from the courtroom.

TIME: 9:05 AM Opening statement given by Mr. Scott Sweat.

Opening statement given by Mr. Petersen.

TIME: 9:10 AM MS. ELIZABETH M. PALMIER, previously sworn, is questioned on direct by MR. SWEAT.

CROSS EXAMINATION by MR. PETERSEN. Witness excused.

TIME: 9:15 AM MR. DON J WOOD, previously sworn, is questioned on direct by MR. SWEAT. Plaintiff's Exhibits #1, #2, #3, #4 and #5 are marked, offered and received.

TIME: 9:25 AM CROSS EXAMINATION by MR. PETERSEN.

RE-DIRECT by MR. SWEAT.

RE-CROSS by MR. PETERSEN. Witness excused.

Case No: 010500388  
Date: Jun 28, 2004

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TIME: 9:31 AM MR. DEE SABEY, previously sworn, is questioned on direct by MR. SWEAT.

TIME: 10:10 AM CROSS EXAMINATION by MR. PETERSEN. Defendant's Exhibits #6, #7, #8, and #9 are marked.

TIME: 10:50 AM RE-DIRECT by MR. SWEAT. Witness excused.

Recess 10:55 a.m. Reconvene 11:05 a.m.

MR. JAMES MORONI BESENDORFER, previously sworn, is questioned on direct by MR. SWEAT.

Reces 11:50 a.m. Reconvene 1:00 p.m.

CROSS EXAMINATION by Mr. Petersen. Defendant's Exhibits #10, #11, and #12 are marked. Defendant's Exhibit #10 is offered, refused by the Court.

TIME: 1:55 PM RE-DIRECT by MR. SWEAT.

RE-CROSS by MR. PETERSEN. Witness excused.

TIME: 2:00 PM MR. MARTIN E. WALL is sworn and questioned on direct by MR. SWEAT.

TIME: 2:20 PM CROSS EXAMINATION by MR. PETERSEN.

RE-DIRECT by MR. SWEAT.

RE-CROSS by MR. PETERSEN. Witness excused.

Recess 2:40 p.m. Reconvene 2:55 p.m.

TIME: 2:55 PM MR. ROY DANIELS, previously sworn, is called to testify. Mr. Petersen would move to exclude this witness whereas he has been conversing with other witnesses after they have completed their testimony, outside the courtroom.

Mr. Daniels is questioned by the Court. The Court will not allow Mr. Daniels to testify and will exclude him as a witness

TIME: 3:05 PM MR. GERALD THOMPSON, previously sworn, is questioned on direct by MR. SWEAT.

TIME: 3:25 PM CROSS EXAMINATION by MR. PETERSEN.

RE-DIRECT by MR. SWEAT.

RE-CROSS by MR. PETERSEN. Witness excused.

TIME: 3:50 PM MR. JAMES ED SABEY is sworn and questioned on direct by MR. SWEAT.

TIME: 4:10 PM CROSS EXAMINATION by MR. PETERSEN. Defendant's Exhibits #13 and #14 are marked.

TIME: 4:40 PM RE-DIRECT by MR. SWEAT. Witness excused.

TIME: 4:45 PM MR. RICHARD MORGAN BAUM is sworn and questioned on direct by MR. SWEAT.

TIME: 4:50 PM CROSS EXAMINATION by MR. PETERSEN.

TIME: 4:55 PM RE-DIRECT by MR. SWEAT. Witness excused.

Court will recess at this time until 9:00 a.m. tomorrow morning.

TIME: 9:07 AM Court in session this 29th day of June, 2004.

MR. BRANDON T RICHINS is sworn and questioned on direct by MR.

Case No: 010500388  
Date: Jun 28, 2004

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SWEAT.

CROSS EXAMINATION by MR. PETERSEN. Defendant's Exhibits #15, 16 and #18 are marked. Defendant's Exhibit #9 is offered and received. Defendant's Exhibit #15 is offered and received.

RE-DIRECT by MR. SWEAT.

RE-CROSS by MR. PETERSEN. Witness excused.

TIME: 9:55 AM MR. DON WOOD, still under oath from yesterday, is recalled and questioned on direct by MR. SWEAT. Plaintiff's Exhibits #17 and #18 are marked, offered and received.

CROSS EXAMINATION by MR. PETERSEN. Defendant's Exhibit #19 is marked.

RE-DIRECT by MR. SWEAT.

RE-CROSS by MR. PETERSEN.

RE-DIRECT by MR. SWEAT. Witness excused.

TIME: 10:15 AM MR. BENNY GARDNER, previously sworn, is questioned on direct by MR. SWEAT.

CROSS EXAMINATION by MR. PETERSEN. Witness excused.

Recess 11:00 a.m. Reconvene 11:20 a.m.

MR. MARK BUTTERS is sworn and questioned on direct by MR. SWEAT.

TIME: 11:35 AM CROSS EXAMINATION by MR. PETERSEN. Witness excused.

Plaintiff rests.

Mr. Petersen would move to dismiss and would submit without argument. Motion denied.

Recess 12:00 p.m. Reconvene 1:15 p.m.

Defendant, Okelberry, will proceed at this time.

TIME: 1:15 PM MR. JEFF JEPPERSON is sworn and questioned on direct by MR. PETERSEN. Defendant's Exhibit #6, #7 and #8 are offered and received.

TIME: 1:34 PM CROSS EXAMINATION by MR. SWEAT. Witness excused.

TIME: 1:45 PM MR. MEL PRICE is sworn and questioned on direct by MR. TENNEY. Defendant's Exhibits #20 and #21 are marked, offered and received.

TIME: 2:00 PM CROSS EXAMINATION by MR. SWEAT. Witness excused.

TIME: 2:05 PM MR. LEE OKELBERRY is sworn and questioned on direct by MR. PETERSEN.

CROSS EXAMINATION by MR. SWEAT.

RE-DIRECT by MR. PETERSEN.

RE-CROSS by MR. SWEAT.

RE-DIRECT by MR. PETERSEN. Witness excused.

Recess 2:55 p.m. Reconvene 3:10 p.m.

MR. GLEN SHEPHERD is sworn and questioned on direct by MR. TENNEY.

CROSS EXAMINATION by MR. SWEAT.

Case No: 010500388  
Date: Jun 28, 2004

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RE-DIRECT by MR. TENNEY. Witness excused.

TIME: 3:30 PM MR. SHANE FORD is sworn and questioned on direct by MR. PETERSEN.

TIME: 3:45 PM CROSS EXAMINATION by MR. SWEAT. Witness excused.

TIME: 3:55 PM MR. BRUCE HUVARD is sworn and questioned on direct by MR. PETERSEN.

TIME: 4:15 PM CROSS EXAMINATION by MR. SWEAT. Witness excused.

Court will recess at this time until 9:00 a.m. tomorrow morning.  
Recess 4:20 p.m.

Court in session this 30th day of June, 2004.

TIME: 9:00 AM MR. WAYNE ROBERTSON is sworn and questioned on direct by MR. PETERSEN. Defendant's Exhibit #22 is marked.

CROSS EXAMINATION by MR. SWEAT

RE-DIRECT by MR. PETERSEN.

RE-CROSS by MR. SWEAT.

RE-DIRECT by MR. PETERSEN.

RE-CROSS by MR. SWEAT. Witness excused.

TIME: 9:25 AM MR. BRIAN OKELBERRY is sworn and questioned on direct by MR. PETERSEN. Defendant's Exhibits #23 and #24 are marked, offered and received.

CROSS EXAMINATION by MR. SWEAT.

RE-DIRECT by MR. PETERSEN.

RE-CROSS by MR. SWEAT. Witness excused.

TIME: 10:10 AM MR. JOSEPH FORD is called to testify. Objected to by Mr. Sweat, indicating that this witness was never designated as a witness, until last Friday by Mr. Petersen.

Response by MR. PETERSEN.

The Court will not allow this witness to testify. Potential witness, Mr. Joseph Ford, is excused.

Recess 10:05 a.m. Reconvene 10:30 a.m.

Mr. Petersen addressed the Court and argued on behalf of allowing Mr. Ford to testify. Denied by the Court.

TIME: 10:35 AM MR. RAY OKELBERRY is sworn and questioned on direct by MR. PETERSEN. Defendant's Exhibits #25, #26, #27, #28, #29, and #30 are marked by the Court. Defendant's Exhibits #25, #26, #27, #28, #29 and #30 are offered and received.

Defendant's Exhibits #31, #32, #33, and #34 are marked by the clerk. Defendant's Exhibits #19, and #22 are offered and received.

Defendant's Exhibits #11 and #12 are offered and received.

Defendant's Exhibits #13, #14 and #16 are offered and received.

Defendant's Exhibit #35 is marked. Defendant's Exhibits #31, #32 and #33 are withdrawn as duplicates. Defendant's Exhibits #36, 37, and #38 are marked by the Clerk. Defendant's Exhibit #34 is offered

Case No: 010500388  
Date: Jun 28, 2004

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and received.

Defendant's Exhibits #35 is offered and received. Defendant's Exhibit #36 is offered and received. Defendant's Exhibits #37 and #38 are offered and received.

Defendant's Exhibits #39, #40, #41, #42, #43 are offered and received. Defendant's Exhibit #44 is withdrawn as a duplicate. Defendant's Exhibit #45 is marked, offered and received.

Defendant's Exhibits #46 and #47 are marked. Defendant's Exhibit #46 and 47 are offered, and received. Defendant's Exhibits #48, #49, #50, #51 are marked. Exhibits #48, #49, #50 are offered and received. #51 is withdrawn as duplicate.

Defendant's Exhibits #52 and #53 are marked, offered and received. Defendant's Exhibits #54, #55, #56, and #57 are marked. Defendant's Exhibits #54 and #55 offered and received. Defendant's Exhibit #56 is offered and received.

Defendant's Exhibit #57 is offered and received.

Recess 12:00 p.m. Reconvene 1:15 p.m.

MR. OKELBERRY, still under oath, is questioned on direct by MR. PETERSEN. Defendant's Exhibits #58 and #59 are marked, offered and received.

Defendant's Exhibits #60 and #61 are marked, offered and received.

TIME: 1:30 PM CROSS EXAMINATION by MR. SWEAT. Witness excused.

Counsel discussed with the Court the timeline of the case and the defendant has one more witness to call.

The Court will allow both sides to file simultaneously proposed Findings of Fact in lieu of closing arguments to be filed by July 16, 2004.

Recess 1:50 p.m. Reconvene 1:55 p.m.

Mr. Petersen addressed the Court and indicated that the defendant will rest at this time.

Court will take the matter under advisement until proposed Findings of Fact are filed by both sides. After reviewing all the evidence and notes, the court will make a written ruling.



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Our File No. 25774

Attorneys for Defendants Okelberry

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

<p>WASATCH COUNTY, a body public of the State of Utah,  Plaintiff,  vs.  E. RAY OKELBERRY, BRIAN OKELBERRY, ERIC OKELBERRY, UTAH DIVISION OF WILDLIFE RESOURCES, WEST DANIELS LAND ASSOCIATION, and JOHN DOES 1-25,  Defendants.</p>	<p><b>ORDER</b>  Case No. 010500388 Judge Donald J. Eyre</p>
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This matter came on for trial on July 28, 29 and 30, 2004. The Court heard the testimony of various witnesses and received various exhibits. Counsel was directed to prepare proposed Findings of Fact and Conclusions of Law. The Court reviewed the file, considered the memoranda filed by the parties, heard oral arguments, and now having heretofore entered its Findings of Fact and Conclusions of Law and being fully advised in the premises, makes and enters the following:

## ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

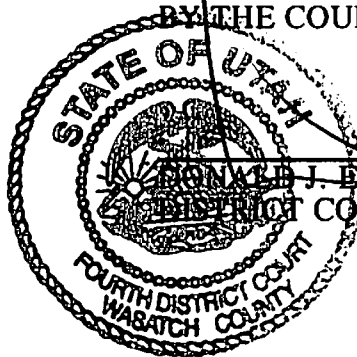
the city used the strip was openly hostile to the public use as a street and should have been notice to all that any dedication, if previously intended, has been abandoned. Under the facts of the case, the court held that the Plaintiff would be estopped to claim an improper abandonment or vacation. this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

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

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

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

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

BY THE COURT  
  
DONALD J. EYRE  
DISTRICT COURT JUDGE

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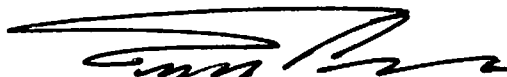
\_\_\_\_\_  
SCOTT H. SWEAT, ESQ.  
Deputy Wasatch County Attorney  
Attorney for Plaintiff

**NOTICE TO PLAINTIFF'S ATTORNEY**

TO: SCOTT H. SWEAT, ESQ.

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

DATED this 14 day of September, 2004.

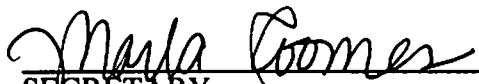


DON R. PETERSEN, for:  
HOWARD, LEWIS & PETERSEN  
Attorneys for Defendants Okelberry

**MAILING CERTIFICATE**

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

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

  
SECRETARY



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Our File No.

Attorneys for Defendants Okelberry

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

<p>WASATCH COUNTY, a body public of the State of Utah,  Plaintiff,  vs.  E. RAY OKELBERRY, BRIAN OKELBERRY, ERIC OKELBERRY, UTAH DIVISION OF WILDLIFE RESOURCES, WEST DANIELS LAND ASSOCIATION, and JOHN DOES 1-25,  Defendants.</p>	<p><b>FINDINGS OF FACT AND CONCLUSIONS OF LAW</b>  Case No. 010500388 Judge Donald J. Eyre</p>
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This matter came on for trial on July 28, 29 and 30, 2004. The Court heard the testimony of various witnesses and received various exhibits. Counsel was directed to prepare proposed Findings of Fact and Conclusions of Law. The Court has now reviewed the file, considered the memoranda filed by the parties, heard oral arguments and now, being fully advised in the premises, makes and enters the following:

**FINDINGS OF FACT**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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



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

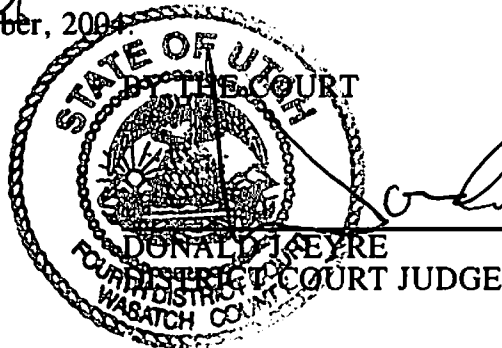
11. In Premium Oil v. Cedar City, 187 P.2d 199 (Utah 1947), the supreme court held that a strip of land once dedicated as a public road had been used in a manner directly in conflict with the land's dedication as a public road. The court stated that "the manner in which the city used the strip was openly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

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

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

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

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



APPROVED AS TO FORM:

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

**NOTICE TO PLAINTIFF'S ATTORNEY**

TO: SCOTT H. SWEAT, ESQ.

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



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

MAILING CERTIFICATE

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

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

Maria Coomes  
SECRETARY

G:\DR\OKELBERY.FOF

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

1009

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

Plaintiff,

v.

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

Defendants.

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

Case No. 010500388  
Judge Donald J. Eyre

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

**FINDINGS OF FACT**

1. Testimony was presented at trial showing that though the roads at issue in this case are in many places rough and difficult to traverse, Wasatch County (the County) has not made any efforts in the past to pave, grade, or otherwise improve the condition of these roads.
2. Testimony was also presented at trial indicating that Wasatch County currently has no plans to improve these roads in the future.

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

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

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

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

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

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

prevent the Okelberrys from selling these trespass permits.

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

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

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

### RULING

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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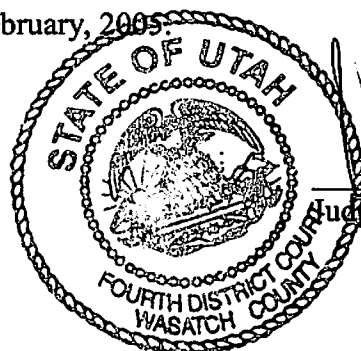
<sup>1</sup> This view is well-supported by the commentators. One respected commentator has thus noted that though “the application of estoppel doctrines against municipal corporations is not favored,” a municipal corporation is “[n]onetheless . . . subject to the rules of estoppel in those cases where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

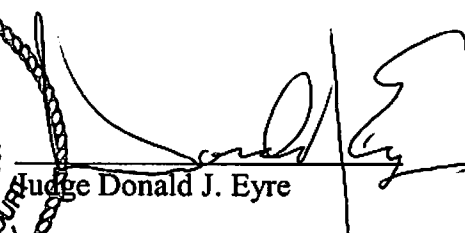
reliance on the asserted nonuse of the roadway by the public.” *Id.* at 1378. In *Western Kane* the Utah Supreme Court refused to apply equitable estoppel against the government because the “landowner had not substantially altered his position to his detriment in reliance on the asserted nonuse of the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

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

As such, the Court holds that the County is hereby estopped from asserting an ownership interest over these roads, and the County’s Motion to Amend Judgment is hereby DENIED. Counsel for the Defendants shall prepare an order consistent with this ruling.

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




  
Judge Donald J. Eyre

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 010500388 by the method and on the date specified.

METHOD	NAME
Mail	MARTIN B BUSHMAN ATTORNEY DEF NATURAL RESOURCE DIVISION 1594 W N TEMPLE STE 300 SALT LAKE CITY, UT 84116
Mail	DON R PETERSEN ATTORNEY DEF POB 1248 PROVO UT 84603
Mail	RYAN D TENNEY ATTORNEY DEF 2342 N 750 W LEHI UT 84043
By Hand	THOMAS L LOW
By Hand	SCOTT H SWEAT

Dated this 23 day of February, 2005.

  
Deputy Court Clerk

2008 FEB 12 PM 5:15

RMB

THOMAS LOW, #6601  
Wasatch County Attorney  
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805 West 100 South  
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Attorneys for Plaintiff

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

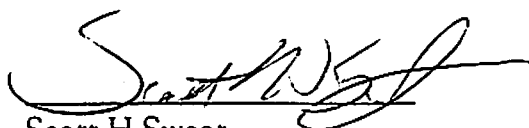
<p>WASATCH COUNTY, a body politic of the State of Utah</p> <p>Plaintiff,</p> <p>vs.</p> <p>E. RAY OKELBERRY, BRIAN OKELBERRY, ERIC OKELBERRY UTAH DIVISION OF WILDLIFE RESOURCES, WEST DANIELS LAND ASSOCIATION, and John Does 1-25</p> <p>Defendants.</p>	<p><b>MOTION FOR ENTRY OF FINDING OF FACTS AND CONCLUSIONS OF LAW AND REQUEST FOR ORAL ARGUMENTS</b></p> <p>Case No: 010500388</p> <p>Judge: Donald J. Eyre</p>
--	---

Plaintiff hereby moves the Court, to enter the proposed Supplemental Findings of Fact and Conclusions of Law attached hereto as Exhibit A. The basis for this motion is that on February 12, 2008, the Utah Supreme Court remanded this case to the district for further factual findings. This motion is supported by the Memorandum in Support of Motion for Entry of

1005

Findings of Fact and Request for Oral Arguments filed concurrently herewith. Wasatch County requests oral arguments on this matter.

Dated this 17 of March, 2008.

A handwritten signature in black ink, appearing to read "Scott H. Sweat", written over a horizontal line.

Scott H Sweat  
Deputy County Attorney

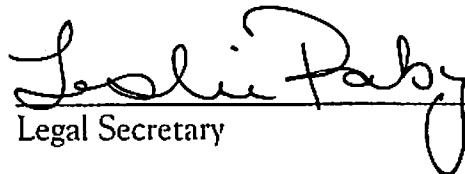
CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Motion for Entry of Finding of Facts and Conclusions of law and Request for Oral Arguments was:

mailed, first class postage pre-paid  
 faxed  
 delivered at District Court

on this 17 day of March, 2008, to the following:

Leslie Slaugh  
Howard, Lewis & Peterson, P.C.  
120 East 300 North Street  
P.O. Box 1248  
Provo, Utah 84603

  
Legal Secretary



**EXHIBIT A**

602

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Heber City, UT 84032  
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Fax: (435) 654-2947

---

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

---

WASATCH COUNTY, a body politic  
of the State of Utah

Plaintiff,

v.

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

Defendants.

\*

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\*

\*

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**SECOND SUPPLEMENTAL  
FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

Case No. 010500388

Judge DONALD J. EYRE, JR.

---

The above-entitled case was tried to the Court, the Honorable Donald J. Eyre, sitting without a jury, on June 28, 29 and 30, 2004. Both parties appealed. The Court of Appeals reversed the equitable estoppels holding and upheld the road dedication holding. The Utah Supreme Court remanded the case to this Court for further factual findings on the dedication issue. Upon Motion of the Plaintiff, and after

opportunity for briefing by the parties the Court makes the following Findings of Fact and Conclusions of Law.

### SUPPLEMENTAL FINDINGS OF FACT

#### NO TRESPASSING SIGNS

1. All of the witnesses brought by the county testified that no trespassing signs were not present on any of the roads prior to the late 1980's or early 1990's
2. Benny Gardner testified that when no-trespassing signs were first put up they were placed along the roads through the Okelberry property. This indicates that while Defendants tacitly acknowledged the roads as public, they considered it trespassing to leave the roadway and go onto the Okelberry Property. This testimony is supported by trial exhibits 35 and 40 which show no trespassing signs inside the boundaries of the Okelberry property at locations where side roads leave the main roads which are subject of this action.
3. The Court finds by clear and convincing evidence that that from 1960 to the late 1980's or early 1990's there were no signs or markers present on the subject roads indicating no-trespassing.

#### LOCKED GATES

4. All of the witnesses brought by the county testified that there were never any locked gates on any of the roads prior to the late 1980's or early 1990's
5. Ray Okelberry testified that he placed locks on the Circle Springs Road gate and the Ridge Line Road gate in 1957. He also testified that he locked the gates every year when he moved his sheep.

6. Brian Okelberry, the son and current partner of Ray Okelberry and one of the defendants herein testified that locks were not put on the gates until the 1980's.
7. Moroni Besendorfer was a shareholder in West Daniels Land Association. Lee Okelberry, is the older brother of Ray Okelberry, was a partner with Ray Okelberry in the livestock operation and owned approximately one half of the property currently owned by the Okelberry defendants. Lee Okelberry sold his property to his brother and nephews in 1991.
8. Both Moroni Besendorfer and Lee Okelberry testified that there were never any no-trespassing signs or markers or any locks on any of the gates on the roads in question from at the 1950's up until the late 1980's. Both testified that members of the public were not stopped from using the roads between the 1950's up until the late 1980's.
9. The Court finds these witnesses testimony especially credible on this issue because it is contrary to their apparent interests in this case, making fabrication on this issue unlikely.
10. The Court finds by clear and convincing evidence, that from 1960 to the late 1980's none of the gates on the subject roads were ever locked.

#### ASKING PEOPLE TO NOT USE THE ROADS

11. All the witnesses called by Wasatch County testified to using the roads without any permission, many for decades and that they were never stopped from using the road prior to the 1990's.
12. Okelberry Witnesses gave many examples of asking persons found off the road on the surrounding Okleberry property leave. None gave any example of asking people using only the roads to leave prior to the 1990's.

13. The Okelberrys themselves gave no testimony of ever stopping persons from using the roads or of having a policy of stopping people from using these roads prior to the 1990's.
14. The Court finds by clear and convincing evidence that from at least 1960 to the late 1980's there was no policy of stopping people from using the roads nor were persons stopped from using these roads.

#### CONCLUSIONS OF LAW

Having made and entered findings of fact which were established by clear and convincing evidence, the Court now makes and enters the following Conclusions of Law.

1. Prior to placement of no-trespassing markers or locked gates on these roads or stopping persons from using these roads, Ridge Line Road, Circle Springs Road, Thorton Hollow Road, and Parker Canyon Road had been used by the general public for periods ranging from at least 10 years to 30 or more consecutive years for motor vehicle and other travel over their entire length and whenever members of the public found it necessary or convenient.
2. Ridge Line Road, Circle Springs Road, Thorton Hollow Road, and Parker Canyon Road, are public roads dedicated and abandoned to the public in accordance with Section 72-5-104, *Utah Code Ann.*, 1953 and its predecessor, Section 27-12-89, *Utah Code Ann.*, 1953 as amended.
4. Judgment should be entered in favor of the Plaintiff and against the Defendants declaring, ordering and adjudging as follows:
  - (a) Ridge Line Road, Circle Springs Road, Thorton Hollow Road, and Parker Canyon

Road, each in their entirety are Public roads dedicated and abandoned to the public.

(b) The Defendants shall forthwith remove or cause to be removed the locks from any gates crossing these roads and no longer place any lock or device on the gates that prohibits ingress and egress through the gates by members of the public. Defendants shall permit access through the gates and along the roads whenever and at such times as either necessary or convenient to members of the public.

(c) A permanent injunction be issued enjoining the Defendants, their grantees, successors, assigns, heirs, agents and invitees from maintaining gates across these roads in a closed and locked condition and from obstructing or preventing access by the public to the use of these roads.

DATED this \_\_\_\_\_ day of March, 2008.

BY THE COURT

\_\_\_\_\_  
DONALD J. EYRE  
DISTRICT COURT JUDGE

FOURTH DISTRICT COURT - HEBER COURT  
WASATCH COUNTY, STATE OF UTAH

-----  
WASATCH COUNTY,  
Plaintiff,

vs.

WEST DANIELS LAND  
ASSOCIATION, Et al,  
Defendant.  
-----

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Case No. 010500388

BEFORE THE HONORABLE DONALD J. EYRE

WASATCH COUNTY COURTHOUSE

1361 SOUTH HIGHWAY 40

HEBER, UTAH 84032

BENCH TRIAL

ELECTRONICALLY RECORDED ON JUNE 28, 2004

Transcribed by: Jennifer Hermansen France, RPR, CSR

FILED  
UTAH APPELLATE COURTS

MAR 21 2007

FILED  
~~UTAH APPELLATE COURTS~~

~~JUL 21 2006 1~~

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A P P E A R A N C E S

FOR THE PLAINTIFF:        Scott H. Sweat  
                                 WASATCH COUNTY ATTORNEY  
                                 805 WEST 100 SOUTH  
                                 Heber, Utah 84032

FOR THE DEFENDANT:        Don R. Petersen,  
                                 Ryan D. Tenney  
                                 HOWARD LEWIS  
                                 120 EAST 300 NORTH  
                                 Provo, Utah 84604

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25

1 June 28, 2004

9:00 a.m.

2 P R O C E E D I N G S

3  
4 **THE COURT:** Good morning. We'll go on the  
5 record in the case of Wasatch County verses E Ray  
6 Okelberry and other defendants. The matter is set for  
7 trial at this time. Mr. Sweat, do you want to make an  
8 opening statement?

9 **MR. SWEAT:** Yes, your Honor.

10 **MR. PETERSEN:** Your Honor, we would invoke  
11 the witness exclusionary rule at this time.

12 **THE COURT:** Why don't you indicate the  
13 witnesses that you anticipate calling, Mr. Sweat.

14 **MR. SWEAT:** Your Honor, and I anticipate --

15 **THE COURT:** And if they're present in the  
16 courtroom if you'd stand.

17 **MR. SWEAT:** I anticipate calling Liz Palmier,  
18 Don Wood, Dee Sabey, Moroni Besendorfer, Martin Wall, Roy  
19 Daniels, Dick Baum, Jack Thompson, Benny Gardner, Jackie  
20 Mecum and Ed Sabey.

21 **THE COURT:** Okay. Mr. Petersen, do you have  
22 any witnesses here other than the parties?

23 **MR. PETERSEN:** No, we don't we just have our  
24 parties here today.

25 **THE COURT:** Okay. If all the people that

1 were indicated as witnesses, if you'd please stand and  
2 raise your right hand and take the witness oath.

3           **CLERK:** Do you and each of you do solemnly  
4 swear that the testimony you shall give in the matter now  
5 before this court shall be the truth, the whole truth and  
6 nothing but the truth, so help you God?

7           **WITNESS:** I do.

8           **WITNESS:** We do.

9           **THE COURT:** Okay. If you'd all go out in the  
10 foyer and stay there until you're called to be a witness.  
11 You're not to discuss your own testimony with anyone else  
12 or after you've testified review it with anybody. Thank  
13 you. Okay. Mr. Sweat, you may make an opening  
14 statement.

15           **MR. SWEAT:** Thank you, your Honor. Your  
16 Honor, this case is about historical use and public  
17 access. It was brought about because roads that have  
18 been used by the public for as long as most people can  
19 remember have been closed by defendants. The evidence  
20 today will show that members of the public used these  
21 roads when ever they found it convenient or necessary.

22           Evidence will show that up until around the  
23 1990's the public was never stopped or denied use of  
24 these roads. It will further show that up until about  
25 the 1990's there were never any signs or other

1 notification asking them not to use the roads. The  
2 evidence will show that not until the 1990's, long after  
3 these roads had become public by operation of law, did  
4 the defendants make any attempt to restrict access to  
5 these roads.

6 Evidence will also show that some of these  
7 roads are the only vehicle access to portion of forest  
8 land and that the public has, for many years, freely used  
9 these roads to access these portions of the forest. Of  
10 all of the witnesses will give evidence of unobstructed  
11 and interrupted use of the roads for well over the  
12 required ten years, certain witnesses will give key  
13 evidence of public use.

14 One of our first witnesses, Dee Sabey, will  
15 show that Maple Canyon Road was used by sheep ranchers  
16 from Utah County and Wasatch County to move vehicles  
17 trailing sheep herds into the Strawberry Valley each  
18 summer. Martin Wall will testify before he ever had a  
19 four-wheel drive he and friends modified automobiles,  
20 which they freely drove on these roads.

21 Roy Daniels will testify that as the district  
22 ranger for the forest service between 1971 and 1991 he  
23 used these roads to check on campers camp fires in the  
24 portions of the forest accessed by these roads. He will  
25 show that the forest has designated at least two of these

1 roads as part of the forest transportation system. He  
2 will also testify that the forest has provided  
3 maintenance on some of these roads.

4 Dick Baum will testify that he used one of  
5 these roads during winter and summer for biking and  
6 skiing since the 1970's. Your Honor, plaintiffs believe  
7 that the evidence will be clear and convincing that all  
8 of these roads are public roads by operation of law.  
9 Thank you.

10 **THE COURT:** Okay. Thank you, Mr. Sweat. Mr.  
11 Petersen.

12 **MR. PETERSEN:** Thank you, your Honor.  
13 Counsel, I appreciate the efforts of counsel and Court.  
14 Your Honor, the counsel is correct when they say the  
15 burden is on them. The burden is clear and convincing  
16 evidence, clear and convincing evidence. We're concerned  
17 with five separate roads here. In essence they've got to  
18 show by clear and convincing evidence that these five  
19 separate roads were used for a continuous period of at  
20 least ten years. We don't think they can even come close  
21 to that.

22 The evidence will show, your Honor, that in  
23 1957 my clients and their family purchased this property.  
24 That in 1957 there were fences and roads that were  
25 blocking off this property. The Court has an opportunity

1 to go up there. On the east side of the property it is  
2 bounded by Forest Service property. When they were there  
3 and they purchased that property there were fences across  
4 these roads in 1957.

5           The evidence will show that those fences and  
6 those roads have been there continuously since 1957. Not  
7 only have there been gates there, but they -- Beginning  
8 in about the 19, late 1970's they began to lock those  
9 gates. We would concede that there have been trespassers  
10 that have gone up there that have blown off blocks and so  
11 fourth, but that is not what the case law calls open to  
12 the public. Open to the public means it has to be open  
13 to the public. There's no gates, there's no obstruction.

14           Counsel mentioned Maple Canyon Road. The  
15 evidence on Maple Canyon Road, your Honor, will be such,  
16 you can't travel that with a four-wheel, with a vehicle.  
17 If you're going to travel that you're going to have to go  
18 up by a horse, maybe an ATV. And that's true with these  
19 other roads as well. They're just -- You can't  
20 navigate them with a vehicle. Even with a four-wheel  
21 drive vehicle.

22           The evidence will be that there are  
23 obstacles, that there are gates, that there are signs,  
24 that those signs have been there for a considerable  
25 length of time. And there's no way that they're going to

1 be able to meet a ten year provision as set fourth by the  
2 law. Your Honor, we sent up to the Court a trial  
3 memorandum. If the Court has seen that or not?

4 **THE COURT:** Yes, I've seen that and I've  
5 reviewed it.

6 **MR. PETERSEN:** Thank you.

7 **THE COURT:** Okay. Mr. Sweat, you may call  
8 your first witness.

9 **MR. SWEAT:** Thank you, your Honor. The  
10 Plaintiff would call Liz Palmier.

11 **THE COURT:** Ms. Palmier, if you'd come  
12 forward to the witness stand. Have a seat right up here.

13 **MR. SWEAT:** Thank you, your Honor.

14 **DIRECT EXAMINATION**

15 **BY MR. SWEAT:**

16 Q. Ms. Palmier, with you please state your name  
17 and address for the record?

18 A. Elizabeth M. Palmier, 1415 South 3350 East,  
19 Cedar City, Utah.

20 Q. And what --

21 A. P-A-L-M-I-E-R.

22 Q. And what is your occupation?

23 A. I'm a Wasatch County recorder.

24 Q. Is this an elective position?

25 A. Yes, it is.

1 Q. How long have you held this position?

2 A. Since 1995.

3 Q. What is the job of the county recorder?

4 A. We record maps, documents and we prepare all  
5 the maps for the taxing purposes for the county.

6 Q. Ms. Palmier, I'm going to show you what we're  
7 going to mark as Plaintiff's Exhibit 1.

8 **MR. SWEAT:** May I approach the witness, your  
9 Honor?

10 **THE COURT:** You may.

11 **MR. SWEAT:** Your Honor, for the Court and  
12 counsel's information this exhibit is the exact exhibit  
13 that I submitted at summary judgment. Rather than  
14 re-doing it I've just asked the clerk if we could put it  
15 and use it as an exhibit here at trial.

16 **THE COURT:** That's fine.

17 Q. **(BY MR. SWEAT)** Ms. Palmier, do you recognize  
18 what has been marked as Plaintiff's Exhibit 1?

19 A. Yes.

20 Q. Could you tell us what it is?

21 A. These are the aerial photos that have been  
22 maintained in the county recorder's office.

23 Q. Do you recognize, as you look at these, these  
24 specific photos?

25 A. Yes.



1 Q. These are copies --

2 MR. PETERSEN: Your Honor, we'd be willing to  
3 stipulate that this is a, what it's represented to be.

4 THE COURT: And having objection to be  
5 received by --

6 MR. PETERSEN: No, no, your Honor.

7 THE COURT: It's received.

8 (Plaintiff's Exhibit No. 1  
9 was received into evidence.)

10 MR. SWEAT: Thank you, your Honor. So we've  
11 had it admitted?

12 THE COURT: Yes.

13 MR. SWEAT: I have no further questions for  
14 this witness at this time.

15 THE COURT: I think Mr. Petersen has a  
16 couple.

17 MR. SWEAT: Okay.

18 THE WITNESS: Okay.

19 CROSS EXAMINATION

20 BY MR. PETERSEN:

21 Q. Ma'am, as a county recorder would you be  
22 aware if the county ever made any improvements on what  
23 they're trying to designated as roads?

24 A. Not on -- All we do is maintain the maps.  
25 We keep them there. We don't draw any of the maps.

1 Q. You wouldn't know if the roads were ever  
2 surveyed or improved in anyway by the county? You have  
3 to answer audibly.

4 A. No.

5 **MR. PETERSEN:** That's all.

6 **THE COURT:** Okay. Anything, Mr. Sweat? You  
7 may step down.

8 **MR. SWEAT:** Call Don Wood, your Honor.

9 **THE COURT:** Mr. Wood, if you'd come forward  
10 and have a seat here in this chair. You may proceed.

11 **MR. SWEAT:** Thank you, your Honor.

12 **DIRECT EXAMINATION**

13 **BY MR. SWEAT:**

14 Q. Mr. Wood, would you please state your name  
15 and address for the record?

16 A. My name is Don J. Wood. I live at 1116 East  
17 270 North Heber City, Utah.

18 Q. What is your occupation?

19 A. I'm the information system director for  
20 Wasatch County.

21 Q. How long have you held this position?

22 A. For the past seven years.

23 Q. And how long have you been involved or worked  
24 as an information system director or, in this type of  
25 occupation?

1 A. Well, concerning the mapping side of things  
2 I've been working with the county for 10 years or 11  
3 years in that profession.

4 Q. What is that typically called?

5 A. It is geographic information systems.

6 Q. And how long have you worked as part of  
7 geographic information system field?

8 A. 11 years for Wasatch County, 1 year for the  
9 U.S. Forest Service.

10 Q. And have you had any sort of training for  
11 this type of work?

12 A. Yes, I have a degree from Weber State  
13 University in geography.

14 Q. With the county as a GIS person, what are  
15 your duties?

16 A. GI person, our job is to, short of parcel  
17 maps for the county, we take care of all other mapping  
18 operations. We map road locations, we map streams, basin  
19 boundaries, we take care of voting maps, other political  
20 maps for the county, zoning maps, ect.

21 Q. Do you ever make maps?

22 A. Yes, sir.

23 Q. What information do you use when you make a  
24 map?

25 A. Any existing information that's available

1 from state or federal sources are from outside surveyors  
2 and such. We also generate our own information if that  
3 information is not available through use of GPS and other  
4 technologies.

5 Q. Would you consider yourself to have more or  
6 less experience in working with maps than the average  
7 person?

8 A. Yes, sir.

9 Q. More or less?

10 A. Oh, more, yes. Sorry, sir.

11 **MR. PETERSEN:** If counsel wants to introduce  
12 some maps, your Honor, we'd stipulate to them. I think  
13 we've all seen them.

14 **MR. SWEAT:** I've got several. Do you want to  
15 look at all of them?

16 **THE COURT:** Why don't you -- Why don't you,  
17 when you review them, see if you have any problems with  
18 the maps (INAUDIBLE).

19 **MR. SWEAT:** Your Honor, I appreciate Mr.  
20 Petersen's willingness to stipulate. I'll go through,  
21 just so we have a record of what maps each of these are.

22 **THE COURT:** Okay.

23 Q. **(BY MR. SWEAT)** Mr. Wood, do you recognize  
24 what's been marked as Exhibit No. 2?

25 A. Yes, sir.

1 Q. Would you tell the Court what that is?  
2 A. It's a map of this round valley region with  
3 some property ownership identified.  
4 Q. Who created that map?  
5 A. My department, sir, myself.  
6 **MR. PETERSEN:** Is this Exhibit 2?  
7 **MR. SWEAT:** This is Exhibit 2, yes.  
8 **THE COURT:** Any objection to No. 2?  
9 **MR. PETERSEN:** No, sir.  
10 **THE COURT:** It's received.  
11 (Plaintiff's Exhibit No. 2  
12 was received into evidence.)  
13 Q. **(BY MR. SWEAT)** Mr. Wood, I'm handing you  
14 what has been marked as Exhibit 3. Do you recognize  
15 that?  
16 A. Yes, sir.  
17 Q. Could you tell the Court what it is?  
18 A. It's a map that was prepared by the U.S.  
19 Geological Survey. It was published in 1907 it appears.  
20 **MR. SWEAT:** I'd move to admit, your Honor.  
21 **MR. PETERSEN:** No objection.  
22 **MR. SWEAT:** With counsel's stipulation.  
23 **THE COURT:** It's received.  
24 (Plaintiff's Exhibit No. 3  
25 was received into evidence.)

1 Q. (BY MR. SWEAT) Mr. Wood, have you reviewed  
2 this map?

3 A. Yes, I have.

4 Q. Now, are you aware of the roads that are the  
5 subject of this litigation?

6 A. Yes, sir.

7 Q. How are you aware of those roads?

8 A. I first became aware of them through contact  
9 with the Wasatch County Commission and County Attorney's  
10 Office. In subsequent time we had the pleasure of  
11 driving some of the roads and have studied maps from  
12 various agencies and organizations concerning the roads.

13 Q. Now, this map that you are looking at here  
14 you said it's dated 1907; is that correct?

15 A. On the map, yes.

16 Q. And does it show any of the roads that are  
17 the subject of this matter today?

18 A. Yes, sir, it does.

19 Q. Which one does it show?

20 A. Specifically the road Maple Canyon.

21 Q. That's 1947. Mr. Wood, I'm now showing you  
22 what has been marked as Exhibit 4. Have you seen this  
23 before?

24 A. Yes, sir.

25 Q. Can you tell us what it is?

1 A. It's a map of the international forest.

2 Q. Can you tell who published that map?

3 A. The Forest Service published this map.

4 Q. And what date was that map published?

5 A. As for the map 1947.

6 Q. And does it show any of the roads which are  
7 the subject of this litigation here?

8 A. Yes, sir, it shows Maple Canyon and Circle  
9 Springs, specifically these roads.

10 Q. Anything else? Does it show anything with  
11 trails?

12 A. Yes, it does. It shows s trail at Thorton  
13 Hallow.

14 Q. Does that trail on the map go all the way and  
15 connect in with --

16 A. Yes, sir, it does.

17 **MR. PETERSEN:** Connect with -- I missed  
18 that. Connect with what?

19 **MR. SWEAT:** Connect with Maple Canyon Road.

20 **THE WITNESS:** Yes, sir, it connects with the  
21 road coming out of Maple Canyon.

22 **THE COURT:** Any objections to No. 4?

23 **MR. PETERSEN:** No objection.

24 **THE COURT:** It's received.

25 (Plaintiff's Exhibit No. 4

1 was received into evidence.)

2 Q. (BY MR. SWEAT) Mr. Wood, I'm now showing you  
3 what has been marked as Exhibit No. 5. Do you recognize  
4 this?

5 A. Yes, sir.

6 Q. Can you tell us what it is?

7 A. It's a map of the international forest.

8 Q. From looking at it can you tell who published  
9 it?

10 A. It was published by the U.S. Forest Service.

11 Q. And does this -- And what date was this map  
12 published?

13 A. 1964.

14 MR. SWEAT: For the record, your Honor, this  
15 has a small map. And up in the top corner I have  
16 attached a blowup of the section of the area, which you  
17 are, which is the subject of today's matter.

18 Q. (BY MR. SWEAT) Mr. Wood, does this map show  
19 any of the roads which are the subject of this matter?

20 A. Yes, sir, it does.

21 Q. Could you tell us what roads are on this map?

22 A. It shows the road going down to Thorton  
23 Hallow, a road going along the ridge line that connects  
24 Thorton Hallow and Parker Canyon together with the access  
25 to the Forest Service on top. And it shows the Circle,



1 or the road going to Circle Springs.

2 Q. Tell me again which one it shows.

3 A. The road going to Circle Springs, Ridge Line  
4 Road going down to Parker Canyon and Thorton Hallow  
5 connecting to Ridge Line Road. It also shows a trail  
6 going down Maple Canyon.

7 **MR. SWEAT:** Again, I'd move to admit, your  
8 Honor.

9 **THE COURT:** Any objection?

10 **MR. PETERSEN:** No objection, your Honor.

11 **THE COURT:** It's received.

12 (Plaintiff's Exhibit No. 5  
13 was received into evidence.)

14 **MR. SWEAT:** Your Honor, I want to go back and  
15 create a little bit better record than what I've done.

16 Q. **(BY MR. SWEAT)** Mr. Wood, returning your  
17 attention to what's been marked as Plaintiff's Exhibit  
18 No. 2. You indicated you created that; is that correct?

19 A. Yes, sir.

20 Q. And at my request did you designate certain  
21 roads with certain colors and certain names?

22 A. Yes, sir.

23 Q. What color did you designate what we've  
24 designated as Maple Canyon Road?

25 A. On this particular map it's magenta.

1           **MR. PETERSEN:** It's what?

2           **THE WITNESS:** Magenta, kind of a pink color.

3           **MR. PETERSEN:** Pink?

4           **MR. SWEAT:** Kind of a pink, purple.

5           Q.    **(BY MR. SWEAT)** What color did you designate

6 Circle Springs Road?

7           A.    Circle Springs is green.

8           Q.    What color have you designated Ridge Line

9 Road?

10          A.    Ridge Line Road is red.

11          Q.    What color have you Parker Canyon Road?

12          A.    Parker Canyon is orange.

13          Q.    And what color have you designated for

14 Thorton Hallow Road?

15          A.    Thorton Hallow (INAUDIBLE) or light blue.

16          Q.    On the road designations, are those just the

17 designations that I asked you to put on them?

18          A.    Yes, you did.

19          Q.    You don't have any independent knowledge that

20 that's what that road is necessarily called other than

21 the maps you've seen?

22          A.    Other than the maps I've seen, no, sir.

23          Q.    Would it surprise you if different portions

24 of the roads were called different thing by different

25 people?

1 A. Oh, not at all, it happens constantly.

2 MR. SWEAT: Did I get them all admitted?

3 THE COURT: You did.

4 MR. SWEAT: I have no further questions at  
5 this time.

6 THE COURT: Okay. Any cross-examination, Mr.  
7 Petersen?

8 CROSS-EXAMINATION

9 BY MR. PETERSEN:

10 Q. Mr. Wood, the mere fact that the document  
11 shows a road, U.S. geological map or something, that  
12 doesn't necessarily make it a road to the public, does  
13 it?

14 A. Not, not necessarily.

15 Q. Some of these, which you've called roads are  
16 nothing more than trails, are they not?

17 A. The roads on the maps, if it's a trail it's  
18 signified as a dashed single line. If it's a road it's  
19 shown as a two line symbol. So the maps delineate for  
20 themselves whether it's classified as a trail or a road.

21 Q. Now, did I hear you say that you went up and  
22 traveled on these roads?

23 A. I've not been on all of them, but I did go  
24 with Mr. Okelberry, I believe, two years ago or so in  
25 November.

1 Q. Is that the only time you went up there?

2 A. That's the only time I've been on the Ridge  
3 Line Road as it goes through Mr. Okelberry's property,  
4 Thorton Hallow and Parker. I've never traveled Maple  
5 Canyon.

6 Q. So the only time that you've been on those  
7 roads is when you accompanied Mr. Okelberry and  
8 representatives of Wasatch County then?

9 A. That is correct, sir.

10 Q. Other than that you wouldn't have any first  
11 hand knowledge whether these were roads, trails or what  
12 they are?

13 A. Other than maps, no, sir.

14 Q. When you traveled on those roads with Mr.  
15 Okelberry it was with permission, was it not?

16 A. Yes, sir.

17 **MR. PETERSEN:** That's all.

18 **THE COURT:** Anything else, Mr. Sweat?

19 **MR. SWEAT:** Just a couple, your Honor.

20 **REDIRECT EXAMINATION**

21 **BY MR. SWEAT:**

22 Q. Mr. Wood, in your opinion typically when a  
23 map shows a road and place, does it signify any meaning?

24 **MR. PETERSEN:** I object, your Honor, I think  
25 that this goes beyond his expertise. All he is is a

1 mapper. He's not up there to --

2 **THE COURT:** He has a degree in geography.

3 **THE WITNESS:** Would you repeat the question,  
4 please?

5  
6 Q. **(BY MR. SWEAT)** Typically when a road is  
7 shown on a map does it have any significance?

8 A. Well, it certainly shows access to the  
9 property.

10 Q. What do you mean by that?

11 A. Well, it means that someone has tried a road  
12 and people are using that for access. Unfortunately  
13 those maps -- When they make the maps they don't go out  
14 and research every road to see exactly who is using those  
15 roads for access.

16 Q. Directing your attention to what has been  
17 admitted as Exhibit No. 1. Have you seen those aerial  
18 photographs before?

19 A. Yes, sir.

20 Q. Have you looked at these photographs here?

21 A. Yes, sir.

22 Q. And have you looked at them -- Are you able  
23 to see the roads in place on these photographs?

24 A. Sitting right here I would have to look  
25 through them and such, but we have in the office and

1 such, gone through and been able to identify them, yes,  
2 sir.

3 Q. Specifically Ms. Palmier testified that these  
4 aerial photographs were of 1962. Is that your  
5 understanding also?

6 A. This is my understanding.

7 Q. Can you take a moment and look at them?

8 A. Sure.

9 Q. Now, you deal with photographs of this sort  
10 in making maps all the time; is that a true statement?

11 A. We deal with aerial photography quite a lot,  
12 sir.

13 Q. If you look at there on those can you see  
14 what looks to be roads in the place at that time?

15 A. Yes, sir.

16 Q. Did you look long enough to see if all the  
17 roads are shown on these aerial photographs?

18 A. I followed Ridge Line, Thorton, Maple, and  
19 the beginning of Parker and Circle Springs. So I believe  
20 they're all representatives.

21 **MR. SWEAT:** No further questions, your Honor.

22 **THE COURT:** Anything else, Mr. Petersen?

23 **RE-CROSS-EXAMINATION**

24 **BY MR. PETERSEN:**

25 Q. Well, Maple Canyon, Mr. Wood -- Maple

1 Canyon shows as a trail, does it not?

2 A. On the photograph?

3 Q. Right. Or on your maps?

4 A. On some of the maps, yes, sir.

5 Q. Isn't that true that some of the roads that  
6 you call roads are designated as actually trails?

7 A. On some of the maps (INAUDIBLE) yes, sir.

8 Q. So when you show it as a road and the map  
9 shows it as a trail, do you think there's a conflict  
10 there in anyway?

11 A. Based upon our information to date it's a  
12 road, but what it was historically as for those maps I  
13 cannot speak. It was the same as a trail.

14 Q. You said that typically if it's a road it  
15 shows access?

16 A. Yes, sir.

17 Q. Is that correct?

18 A. Yes, sir.

19 Q. Isn't it true that you went up there you went  
20 through gates?

21 A. Yes, sir.

22 Q. And isn't it true that the county has never  
23 made any improvements on those so-called roads?

24 A. I wouldn't know that, sir.

25 Q. You've had dealing with the county

1 commissioner in regards to this matter, have you not?

2 A. Yes, sir, some people.

3 Q. And you've never been informed by the county  
4 commissioner or anyone from the county that they, at any  
5 time, have ever made any improvements up there?

6 A. No, I have not been told that.

7 **MR. PETERSEN:** That's all.

8 **THE COURT:** Anything else, Mr. Sweat?

9 **MR. SWEAT:** No, your Honor.

10 **THE COURT:** You may step down. Thank you.

11 Next witness.

12 **MR. SWEAT:** The Plaintiff would call Dee  
13 Sabey, your Honor.

14 **THE COURT:** Okay. Mr. Sabey, if you'd come  
15 forward and have a seat (INAUDIBLE). Go ahead.

16 **MR. SWEAT:** Thank you, your Honor.

17 **DIRECT EXAMINATION**

18 **BY MR. SWEAT:**

19 Q. Mr. Sabey, would you please state your full  
20 name and address for the record?

21 A. Deon Sabey.

22 Q. And your address?

23 A. Wallsberg.

24 Q. What is your birthday?

25 A. May the 6th in '36.



1 Q. How long have you resided in Wasatch County?

2 A. All my life.

3 Q. How long have you resided in Wallsberg?

4 A. All my life.

5 Q. Are you familiar with the area east and a  
6 little bit north of Wallsberg?

7 A. Yes.

8 Q. Could you tell us why you're familiar with  
9 that area?

10 A. Well, when I was a kid, 13, 14 years old, I  
11 was up there with June Tough. He bought that ground  
12 about year and I worked for him for approximately seven  
13 years, I think.

14 Q. And have you remained familiar with that area  
15 throughout your life?

16 A. Right.

17 Q. Do you own or have you ever owned any  
18 property up in that area?

19 A. Not right at that area. I own a little  
20 property down off of the, towards Wallsberg from there.

21 Q. I'm looking at what has been designated as  
22 Exhibit No. 2. Do you recognize that?

23 **MR. SWEAT:** May I have an Exhibit No?

24 **THE COURT:** You may.

25 Q. **(BY MR. SWEAT)** Do you recognize the area

1 depicted in that map?

2 A. Oh, yeah.

3 Q. Is the property that you own on that area?

4 A. Well, yeah, it's down off this -- It's  
5 along that fishing game road down, back the hill is what  
6 we call it over there. It's east of Wallsberg.

7 Q. Can you see the maps that have been  
8 designated on that, or the roads that have been  
9 designated, or designated as roads on that map?

10 A. Yes.

11 Q. In highlighted color?

12 A. Yes.

13 Q. Do any of those roads access your property?  
14 Do you have to go on any of those roads to get to your  
15 property?

16 A. Yes, the one that comes down off of -- I  
17 can't see too good. I left my glasses out in the truck.  
18 But it's the one from down off the fishing game, down  
19 into Wallsberg. I got the --

20 Q. (INAUDIBLE)?

21 A. Well, it's right down in here some where. I  
22 guess this is the town of Wallsberg here.

23 Q. The town of Wallsberg is here.

24 A. Oh, in here?

25 **MR. PETERSEN:** May the record show that the

1 witness incorrectly identified the town of Wallsberg.

2           **THE COURT:** It makes no (INAUDIBLE). And it  
3 also should reflect that he left his glasses.

4           **THE WITNESS:** I can't see.

5           **MR. SWEAT:** Do you wear glasses?

6           **THE WITNESS:** Yes, I do. And I'm sorry, I  
7 just ran --

8           **THE COURT:** Would it be helpful if you went  
9 out and got them in your truck?

10          **THE WITNESS:** Pardon?

11          **THE COURT:** Would it be helpful if you went  
12 out and got them in your truck?

13          **THE WITNESS:** I don't have them in my truck.  
14 They're left at home.

15          Q.    **(BY MR. SWEAT)** See what we've designated as  
16 Wallsberg on the map, Mr. Sabey, right here?

17          A.    Oh, yes. Is this the road from down off the  
18 fish and game?

19          **MR. PETERSEN:** Your Honor, I object. The  
20 witness is asking the questions.

21          **THE COURT:** Why don't you orient him. Orient  
22 him on the map and then ask your questions, Mr. Sweat.

23          Q.    **(BY MR. SWEAT)** Here's Wallsberg.

24          A.    Okay. It's right over back there, that  
25 little piece there. I know where it is.

1 Q. Do you see the --

2 MR. PETERSEN: They're leading and suggestive  
3 questions. I think we need to have a certain amount of  
4 leeway here, but coaching him in this manner --

5 THE COURT: He hasn't coached him yet. Go  
6 ahead, Mr. Sweat.

7 Q. (BY MR. SWEAT) Mr. Sabey, do you see this  
8 road that's highlighted here?

9 A. Right.

10 Q. Do you see this road highlighted here?

11 A. Right.

12 Q. Do you see this road highlighted here?

13 A. Yes.

14 Q. Do you see this road highlighted here?

15 A. Right.

16 Q. Do you see this road highlighted here?

17 A. Yes.

18 Q. Do you have to use any of those roads to get  
19 to your property?

20 A. No, no.

21 Q. Because you left your glasses at home I won't  
22 ask you to refer to the map any more. Mr. Sabey, are you  
23 aware of property that's owned by Mr. Okelberry?

24 A. Yes.

25 Q. And are you aware of roads that cross that

1 property?

2 A. Yes.

3 Q. Are you aware of property that's owned by  
4 West Daniels Land Association?

5 A. Yes.

6 Q. And are you aware of roads that cross that  
7 property?

8 A. Yes.

9 Q. Have you ever used any of those roads?

10 A. Yes, I've used them all.

11 Q. Mr. Sabey, do you have a general idea about  
12 when the Okelberry family first purchased property in  
13 this area?

14 A. I believe it was '57, I think, '58.

15 Q. And you've indicated that you're aware of who  
16 owned that property prior to the Okelberry family?

17 A. Yes.

18 Q. Who was that?

19 A. June Tough owned prior to Okelberrys.

20 Q. Do you know how long June Tough owned the  
21 property?

22 A. I think he owned it for seven years.

23 Q. Are you aware of a road called the Circle  
24 Springs Road?

25 A. Yes.

1 Q. Have you ever used the Circle Springs Road?

2 A. Lots of times.

3 Q. When do you recall first using this Road?

4 A. I was just a small kid. We was trailing  
5 sheep up through there. My father use to work for  
6 (INAUDIBLE). I` went through there with him. That was  
7 in the 40's when we was trailing sheep up there there.

8 Q. And that was along the Circle Spring Road?

9 A. Right.

10 Q. And where does that the Circle Spring Road  
11 travel to and from?

12 A. It goes from the Big Glade to Circle, down  
13 through Bear Wall and into Circle.

14 Q. And what portions of that road have you used?

15 A. All of it.

16 Q. When did you last use the road?

17 A. Oh, it's -- I can't remember the year. I  
18 heard that Ray and those guys had locked the gates. So I  
19 never went back inside the, even go back down in there.

20 Q. So you don't remember the year. Do you  
21 remember the decade?

22 A. Well, it was in the 80's, I'm sure, right in  
23 there. The middle 80's, some where along that.

24 Q. During when you first used the road in the  
25 1940's when you last use the road in the 1980's, about

1 how often would you use that road on a yearly basis  
2 thing?

3 A. Oh, when I was up there working I was on it  
4 practically every day, but after that I'd take my family  
5 down there to Circle two or three times a summer and we'd  
6 stay down there in a tent.

7 Q. And about what years would you take your  
8 family down?

9 A. Oh, it was in the 60's probably.

10 **MR. PETERSEN:** Your Honor, I'm going to  
11 object. We don't have anything. We're talking in such  
12 general terms from the 1940's to the 1980's. Unless we  
13 can be more specific, your Honor, I'd move to strike the  
14 testimony.

15 **THE COURT:** Well, he's now testified that he  
16 used it for family camping in the 1960's is I believe  
17 what he said right now. Go ahead, Mr. Sweat.

18 **MR. SWEAT:** Thank you, your Honor.

19 Q. **(BY MR. SWEAT)** Now, you've indicated you  
20 used this road for camping and that you've used it while  
21 working for people up in that area. Did you ever use it  
22 for anything else?

23 A. Well, we used it to go down and hunt deer  
24 practically every fall.

25 Q. When you first used this road did ever see

1 any no trespassing signs or any markers indicating no  
2 trespassing?

3 A. I've never seen a no trespassing sign on it.

4 Q. When you first use this road was there gates  
5 across the road?

6 A. No.

7 Q. Was there fences up when you first used the  
8 road?

9 A. Not at first, no.

10 Q. Do you recall when the fences were placed up?

11 A. I can't -- I can't remember the year they  
12 were put up, no.

13 Q. When you used this road did you ever see  
14 others use the road?

15 A. Lots of people.

16 Q. Were they typically the Toughs or the  
17 Okelberrys that owned the land?

18 A. No.

19 Q. Do you know who they were?

20 A. A lot of them was strangers and some that had  
21 livestock down in that country.

22 Q. Do you know why they were using the road?

23 A. Well, that's the only road into Circle  
24 Springs.

25 Q. Do you recall when -- You don't recall



1 when -- Do you recall when a gate was put up in front  
2 of this road?

3 A. I can't remember the year. I can remember  
4 when the fence was built, but I can't remember the year  
5 it was built.

6 Q. Do you remember the decade it was built?

7 A. I can't.

8 Q. When the fence was first put up was there a  
9 gate across this road at that time?

10 A. Yes.

11 Q. Was the gate locked?

12 A. No.

13 Q. When did you first see a locked gate on the  
14 road?

15 A. I never did see the locked gate on the road.  
16 They told me these guys had locked it and I never did go  
17 back in there any more.

18 Q. During the time that you used the road from  
19 when you first started till you quit using the road, were  
20 you ever asked by anyone not to use the road?

21 A. Never.

22 Q. Were you ever kicked off the road?

23 A. No, never.

24 Q. During that same time did you ever see anyone  
25 else be stopped from using the road?

1 A. No, I never did.

2 Q. Did you ever see anyone kicked off from using  
3 the road?

4 A. No.

5 Q. Are you aware of a road called Ridge Line  
6 Road?

7 A. Yes.

8 Q. And can you tell us about where Ridge Line  
9 Road runs?

10 A. Well, it runs all the way down, down the  
11 ridge, down through White Pole and down into Horse Gravel  
12 and down into Big Hallow.

13 Q. Where does it start?

14 A. Big Glade.

15 Q. And have you ever used the Ridge Line Road?

16 A. Yes.

17 Q. When did you first use the Ridge Line -- Or  
18 what portions of the Ridge Line Road have you used?

19 A. Well, from the Big Glade to White Pole. And  
20 then after they built the fish and game fence they built  
21 a road that continued on down into Wallsberg and down off  
22 the top, but I can't remember what year that they built  
23 the fish and game fence. But the Ridge Line Road did  
24 just go to the other side of White Pole, up onto that  
25 little point, and then it quit. It was always a good

1 trail beyond there, but it was never a road.

2 Q. What did people -- Did any people use the  
3 trail?

4 A. Oh, yeah, we use to go down there hunting  
5 deer in there all the time.

6 Q. How did you use the trail?

7 A. On horse back.

8 Q. Did you ever see other people using the  
9 trail?

10 A. Oh, yeah, lots of people.

11 Q. Going back to Ridge Line Road, you've  
12 indicated that you don't -- Was the road built in  
13 stages, is that what you're telling us?

14 A. Well, now from the Glade to White Pole,  
15 there's been a road there as long as I can remember. And  
16 then from White Pole to Parker, that's down at Robinson  
17 Reservoir, down the head of Parker. That road was built  
18 1950. I was there when that road was built.

19 Q. Is that's what's known as the Parker Canyon  
20 Road?

21 A. Yes.

22 Q. So the Ridge Line Road was built from the Big  
23 Glade at least to the Parker Canyon, we'll designate as  
24 the turnoff, at least in the 1950's; is that correct?

25 A. It was before the 50's because I was there in

1 the 50's and there was a road there then.

2 Q. When you used the Ridge Line Road, typically  
3 what did you use it for?

4 A. Well, we use to go down there hunt deer every  
5 fall. And then a lot of times in the summer we'd go down  
6 there and camp for the weekend down on White Pole.

7 Q. Do you have to use Ridge Line Road to access  
8 Parker Canyon?

9 A. Yes.

10 Q. And do you have to use Ridge Line Road to  
11 access Thorton Hallow?

12 A. Yes.

13 Q. During the time that you used this road about  
14 how often would you use the road?

15 A. Oh, several times in the summer -- In the  
16 summer we'd go down there. Specially in the fall. When  
17 it was getting time to hunt deer and that we'd be down  
18 there several times in the fall.

19 Q. Did you use the road for anything other than  
20 to hunt deer?

21 A. Well, we use to come down there in the summer  
22 sometimes and camp for a couple days to get away from  
23 people and that.

24 Q. Now, during the time that you used the road  
25 did you ever see other people use the road?

1 A. Oh, yeah, lots of them.

2 Q. Do you recall what they were using the road  
3 for?

4 A. Well, they was down in there hunting and  
5 looking around. I don't know. There was several people  
6 in there.

7 Q. When you first used this road did you see any  
8 no trespassing signs on the road?

9 A. Never.

10 Q. Did you see any sort of marking indicating  
11 that there was a no trespassing intent?

12 A. Nope, never.

13 Q. When you first used this road was there any  
14 gates across the road?

15 A. There was always gates across the roads.

16 Q. Where were the gates at?

17 A. Well, there was one coming off down into  
18 Thorton Hallow on the forest line, where you go off the  
19 forest line into Okelberrys, there was a gate there. And  
20 then there was -- Where you go into the West Daniels,  
21 there's two over at the head of Maple Creek. And then  
22 when you go into the West Daniels there's one there.

23 Q. What kind of gates are they?

24 A. Just wire gates.

25 Q. During the time you used the road did you

1 ever see any no trespassing signs or markers at any of  
2 those gates?

3 A. No.

4 Q. During the time you used the road did you  
5 ever see any locks on the gates?

6 A. Never.

7 Q. Were the gates always closed?

8 A. Well, yeah, they just keep them closed, try  
9 to keep the sheep and cattle separated.

10 Q. Are there any cattle guards across this road?

11 A. There's one where you come off the forest  
12 into Okelberry, I believe, years ago, but it was so full  
13 of mud you couldn't hardly tell it.

14 Q. I don't remember if I asked you, were the  
15 gates ever locked across the Ridge Line Road?

16 A. I never did see them locked, no.

17 Q. Did you ever see anyone not use the road  
18 because the gate was there?

19 A. No, I never did.

20 Q. What would people typically do when they used  
21 the road?

22 A. Well, they'd come down there to go, some of  
23 them go camping and hunting down in there.

24 Q. During the time that you used the road did  
25 anyone ever ask you to stay off the road?

1 A. No, never.

2 Q. Did anyone ever kick you off the road?

3 A. No.

4 Q. Did you ever observe anyone that you saw  
5 using the road be stopped or --

6 A. I never did, no.

7 Q. Were you aware of a road called Thorton  
8 Hallow Road?

9 A. Yes.

10 Q. I think you already testified that it  
11 branches off of Ridge Line Road; is that correct?

12 A. Right.

13 Q. Have you ever used Thorton Hallow Road?

14 A. Yes, lots of times.

15 Q. And what did you use Thorton Hallow Road for?

16 A. Well, we use to go down --

17 **MR. PETERSEN:** I think this has been asked  
18 and answered, hasn't it?

19 **THE COURT:** No, this is a -- This is a  
20 different one.

21 **MR. PETERSEN:** I thought he testified he used  
22 it several times in the summer and several times in the  
23 fall.

24 **THE COURT:** That's Ridge Line.

25 Q. **(BY MR. SWEAT)** What did you use Thorton

1 Hallow Road for?

2 A. We use to go down Thorton Hallow in the  
3 summer several times, not several, but we use to go down  
4 there off and on to look for deer up on that big open  
5 side hills and use to go up there and ride around.

6 Q. What portions of Thorton Hallow Road have you  
7 used?

8 A. Well, all the way through, just as far as it  
9 goes, down to the pond.

10 Q. Do you recall when you first used this road?

11 A. When I first used it was in the 50's when I  
12 was working for June Tough.

13 Q. And do you recall when you last used the  
14 road?

15 A. Oh, it's been several years. Like the other  
16 one, they started locking the gates and had that happened  
17 up there, I've never went back.

18 Q. Do you think you used the road in the 60's?

19 A. Oh, yeah, it was in the 60's, but it was  
20 nearly 80's when we quit using it.

21 Q. And when you were using Thorton Hallow Road  
22 did you ever observe others using that road?

23 A. Oh, yeah.

24 Q. How often would you see others using the  
25 road?



1 A. Oh, every time you was up there when you --  
2 There was lots of people use to go down there to look for  
3 elk and deer and that on that big open side hill.

4 Q. When you say go down there in the big open  
5 side hill, is that on Okelberry's property?

6 A. No, that's on the forest.

7 Q. But to access it you have to use the Thorton  
8 Hallow Road?

9 A. Yes.

10 Q. Is that what you're saying? When you first  
11 started using this road did you see any no trespassing  
12 signs on the road?

13 A. Never.

14 Q. When you first used this road were there  
15 gates across the road?

16 **MR. PETERSEN:** Now, is this the gate from  
17 where to where?

18 **MR. SWEAT:** We'll get into it. If there was  
19 a gate I'll ask him where it was?

20 Q. **(BY MR. SWEAT)** Were there any gates on  
21 Thorton Hallow Road?

22 A. The only gate there was when I was up there  
23 is where you go off Okelberry's onto the forest.

24 Q. Do you ever recall that gate being locked?

25 A. No, never.

1 Q. During the time that you used Thorton Hallow  
2 Road did you ever kicked off the road by anyone?

3 A. No.

4 Q. Were you ever asked not to use the road?

5 A. No.

6 Q. During the time that you used the road did  
7 you ever see or hear of anyone else being stopped from  
8 using the road?

9 A. Never.

10 Q. Are you aware of a road called Parker Canyon?

11 A. Yes.

12 Q. I believe you already testified that Parker  
13 Canyon was built in the 1950's?

14 A. Right.

15 Q. Do you know who built it?

16 A. Rothusburger built the road.

17 **MR. PETERSEN:** Who?

18 **THE WITNESS:** Rothusburger.

19 **MR. PETERSEN:** Rothusburger?

20 **THE WITNESS:** Right.

21 Q. **(BY MR. SWEAT)** Who was Rothusburger?

22 A. He owned a, a little construction outfit.

23 But Clark Robinson was the -- The Forest Service put  
24 the road in. Clark use to own the piece of ground down  
25 on Boomer.

1 Q. Regarding Parker Canyon Road, what portions  
2 of the road have you used?

3 A. All the way along.

4 Q. And the county has designated for purposes of  
5 this matter that Parker Canyon Road branches off of Ridge  
6 Line Road?

7 A. Right.

8 Q. Where does it end up?

9 A. Down onto Parker, down the head Parker on  
10 Boomer.

11 Q. And is that Okelberry land?

12 A. No, that's West Daniels.

13 Q. Does it go through -- So Parker's not  
14 located on Okelberry land at all; is that correct?

15 A. No.

16 Q. Where does Parker Canyon Road end?

17 A. It is -- It ends at the head of Parker.

18 Q. And is that West Daniels' land?

19 A. Yes, that and the Forest Service.

20 Q. Does it go through to the Forest Service?

21 A. Pardon?

22 Q. Does Parker Canyon Road go through into the  
23 Forest Service?

24 A. Yes.

25 Q. How far through does it go?

1 A. Well, the forest line is right, right head  
2 Parker.

3 Q. Do you recall when you first used Parker  
4 Canyon Road?

5 A. It was in the early 50's when they first  
6 built the road. We went down and help Clark pull his  
7 camp down there on Boomer.

8 Q. What else -- When did you last use the  
9 road?

10 A. Well, that probably been a couple years ago.  
11 I road a horse down there.

12 Q. During your time when you first and last used  
13 the road, did you use the road how often?

14 A. Oh, we use to use it several times a year.

15 Q. And what did you use it for?

16 A. Well, we use to use it for hunting, mostly.

17 Q. Now, you've indicated a couple of times that,  
18 for instance, your first use of Parker Canyon was to help  
19 someone pull a sheep camp down; is that right?

20 A. That was after the road was built, yes.

21 Q. Would you classify or consider that most of  
22 your use was in helping landowners or for other purposes?

23 A. Well, I use to help, help people that owned  
24 the land and I was also down there hunting deer. We use  
25 to go down there hunting deer every fall. We use to camp

1 there on White Pole and then we'd take that road on down  
2 to Boomer.

3 Q. When you first used this road did you ever  
4 see any no trespassing signs?

5 A. Never.

6 Q. Were you ever asked to leave the road or not  
7 use the road?

8 A. No.

9 Q. And was there any gates across this road when  
10 you first used it?

11 A. No.

12 **MR. PETERSEN:** At what point are we talking  
13 about here?

14 **THE COURT:** Ever he said.

15 **MR. PETERSEN:** Well, on Parker Canyon, but  
16 are we talking about on the Forest Service end or are we  
17 talking up on the other end? What are we talking about?

18 **MR. SWEAT:** I asked him for any gates.

19 Q. **(BY MR. SWEAT)** Is there any gates at all on  
20 Parker Canyon?

21 A. Well, yes, there's an a gate where you go off  
22 of the Cattle Association onto Parker, down Parker  
23 Canyon.

24 Q. Do you recall when that gate was put up?

25 A. I can't.

1 Q. Was it there when the road was first built?

2 A. No.

3 Q. Have you ever seen that gate locked?

4 A. No.

5 Q. Have you ever been denied access because of  
6 that gate?

7 A. No.

8 Q. During the time that you used this road did  
9 you ever see other people use the road?

10 A. Oh, yeah.

11 **MR. PETERSEN:** Well, your Honor, I'm going to  
12 object to that question, unless he can be more specific.  
13 Just to say generally -- Give us a day, time, place, so  
14 fourth.

15 **THE COURT:** He said first he used -- This  
16 is -- We're talking about Parker Canyon. He said he  
17 first used it in the early 1950's when it was first  
18 built. And he said he's never been prohibited from using  
19 it. And he said last time he used it was a couple years  
20 ago when he rode a horse down it.

21 **MR. PETERSEN:** Right, but he's also  
22 testifying about other people. And so that's what I  
23 object to.

24 **THE COURT:** Okay. Well, I think, the  
25 question was specifically asked to him?

1 Q. MR. SWEAT: To him. It was if he's ever seen  
2 any other people use Parker Canyon Road?

3 THE WITNESS: Yes, lots of people.

4 MR. PETERSEN: That I want -- I want to be  
5 specific.

6 THE COURT: Well, yes. Let's ask -- That  
7 is too general of a question. Ask him when he seen other  
8 people, specifically when he seen other people use it.

9 Q. (BY MR. SWEAT) When the road was first built  
10 did you ever see anyone use that road in the 50's?

11 A. Yes.

12 Q. What did you see them using the road for?

13 A. Well, they use to use it to go down there and  
14 hunt deer.

15 Q. During the 60's did you ever see anyone use  
16 the road?

17 A. In the fall, yes. There's a lot of people  
18 -- That was about the only time I was up there in the  
19 60's is when we was hunting deer.

20 Q. Did you ever see or hear of anyone during the  
21 50's or 60's be prohibited from using that road?

22 A. No.

23 Q. Have you heard of a road called Maple Canyon  
24 Road?

25 A. Yes.

1 Q. Do you know it by any different names?  
2 A. No, just Maple Creek Road.  
3 Q. Maple Creek Road?  
4 A. Well, Maple Canyon, Maple Creek.  
5 Q. Are both names used?  
6 A. Yes, both of them.  
7 Q. Where does that road go?  
8 A. Well, it takes off from the Ridge Line Road  
9 up to the head of Maple Creek and goes to Wallsberg,  
10 comes out down to John Youngs.  
11 Q. Does it connect to a road as John Youngs?  
12 A. Yes.  
13 Q. What road does it connect to?  
14 A. The county road.  
15 Q. Have you ever used Maple Canyon Road?  
16 A. Yes.  
17 Q. When did you first use Maple Canyon Road?  
18 A. Well, when we was kids -- See, that was the  
19 bottom of the sheep trail. They use to go up Maple Creek  
20 and then up Circle Hollow, they called it, and come out.  
21 Q. When you say, "they", who are you referring  
22 to?  
23 A. Well, there was several herds of sheep. You  
24 use to go up there and they use to trail sheep and cattle  
25 up there. Roundies, Nickels, Davis, Robinsons.



1 Q. Now, would the sheep trail ride up Maple  
2 Canyon Road?

3 A. No, no, they wouldn't go up Maple Canyon very  
4 far. They'd go up there at about where the, where they  
5 camp now and go up that canyon.

6 Q. What's that canyon called?

7 A. Circle Canyon.

8 Q. So did any part, any of the sheep people that  
9 went up through there, did they use Maple Canyon Road for  
10 anything?

11 A. Yeah, they used both camps up there when they  
12 had teams.

13 **MR. PETERSEN:** Objection, your Honor. If  
14 he's got first hand knowledge, not what other people did.

15 **THE COURT:** Let me hear what you observed.

16 Q. **(BY MR. SWEAT)** What did you observe when you  
17 went with the sheep up there?

18 **MR. PETERSEN:** Can we have a date and time on  
19 this?

20 **THE COURT:** It's in the 50's, I believe.

21 **THE WITNESS:** No, 40's.

22 **THE COURT:** 40's. Okay.

23 **THE WITNESS:** They stopped trailing --

24 **THE COURT:** Lay some foundation as to when he  
25 first went up with them.

1 Q. (BY MR. SWEAT) When did you first go up with  
2 the sheep herd?

3 A. It would been mid 40's, cause they stop  
4 trailing up there after that for not too long.

5 Q. And when you used it did you see any part of  
6 those sheep herds or use Maple Canyon Road?

7 A. Well, they use to pull their camps up and  
8 come back down into Circle.

9 MR. PETERSEN: Objection, he's not answering  
10 the question, your Honor.

11 Q. (BY MR. SWEAT) Did you see anyone use that?

12 A. Yes.

13 Q. You indicated they use to pull their camps,  
14 what do you mean by that?

15 A. Well, they'd pull them with a team at that  
16 time. And they'd pull the camps up around and meet the  
17 back in, on Circle.

18 Q. Why didn't they follow the sheep?

19 A. There was no road up there. All it is is  
20 trail, up Circle Canyon.

21 MR. PETERSEN: Are we talking Circle Canyon  
22 or are we talking Maple Canyon?

23 THE COURT: I think -- Well, why don't you  
24 -- He said he went up a portion of Maple Canyon over to  
25 Circle.

1                   **THE WITNESS:** Right.

2                   **Q. (BY MR. SWEAT)** Did the sheep start out in  
3 Maple Canyon then go to Circle?

4                   **A.** Yes, they use bed them right there at John  
5 Young's, right there on Maple Creek.

6                   **Q.** And did the camp go up the same route as the  
7 sheep?

8                   **A.** No, they use to go up Maple Creek, up where  
9 the road goes now and back into Circle.

10                  **Q.** That was the way they followed the sheep was  
11 to go around?

12                  **A.** Right, that --

13                  **MR. PETERSEN:** Your Honor, what "they" is  
14 what he saw and observed at a certain point in time. Not  
15 what --

16                  **THE COURT:** Yeah, it's not too helpful to the  
17 court, Mr. Sweat.

18                  **MR. SWEAT:** I apologize, your Honor.

19                  **Q. (BY MR. SWEAT)** When you observed the sheep  
20 trailing up through there you observed the camps go up  
21 Maple Canyon Road; is that correct?

22                  **A.** Right.

23                  **Q.** Is that reputation the community of regarding  
24 the use of that road and that trail by sheep herds?

25                  **A.** Well, sheep herds --

1           **MR. PETERSEN:** I missed that. What was the  
2 question again?

3           **MR. SWEAT:** Is that a reputation in the  
4 community regarding the use of both that trail and road  
5 to trail sheep?

6           **MR. PETERSEN:** That I object to, your Honor.

7           **THE COURT:** Well, we're going -- You can  
8 only rely upon what he, what he's observed and what his  
9 experiences were, not the reputation of what the  
10 community was.

11           **MR. PETERSEN:** Okay.

12           Q.   **(BY MR. SWEAT)** When did you last use this  
13 road?

14           A.   Oh, gosh, I don't know. Maybe -- Maybe ten  
15 years ago. Now, I didn't go clean through it ten years  
16 ago, I just went up to Okelberry's corral. I went up and  
17 helped them up there with the sheep.

18           Q.   When you used it -- Have you ever used it  
19 that you went the entire length of the road?

20           A.   Oh, yeah, lots of times.

21           Q.   When would be the first time that you used it  
22 to go the entire length of the road?

23           A.   It would be the early 50's.

24           Q.   When was the last time you think you used it  
25 to go the entire length of the road?

1 A. Oh, it'd be the -- It'd be in 80's.

2 Q. During between the 50's and the 80's  
3 approximately how often would you use the road in a given  
4 year?

5 A. Well, I've -- Of course, I use to help --  
6 We've pulled camps up there for Lee, that's Ray's  
7 brother. I helped him pull the camps up. Then we'd go  
8 up to the forest, up where the spring was, we'd go up  
9 there in the summer and camp once in a while.

10 Q. Did you ever use this road when it wasn't on  
11 behalf of Lee or one of the landowners?

12 A. Oh, yeah, lots of times.

13 Q. For what purpose?

14 A. Well, we'd go up there camping and go up  
15 there in the summer and stay a couple days up to the  
16 spring, recreation.

17 Q. Do you think there were any year from when  
18 you first started to when you last used the road to go  
19 all the way through, that you didn't use the road?

20 A. Pardon? I didn't hear that.

21 Q. Are there any years that you didn't use Maple  
22 Canyon Road?

23 A. Oh, probably not.

24 Q. During the time that you used the road did  
25 you ever see a no trespassing sign on the road?

1 A. No.

2 Q. Did you ever see a gate across the road?

3 A. Yes, the -- Oh, later years they put a  
4 fence across the bottom of it.

5 Q. Do you recall when that was?

6 A. I can't remember, no.

7 Q. When they put a fence across you're  
8 indicating they put a gate up; is that correct?

9 A. Yes.

10 Q. Do you ever recall that gate being locked?

11 A. Yes, I've seen that gate locked.

12 Q. When was that gate locked?

13 A. I really don't know. It was probably the  
14 late 80's or right in there sometime.

15 Q. During the time that you used the road were  
16 you ever asked by anyone not to use the road?

17 A. No.

18 Q. Did you ever have to break a lock off or  
19 anything to use the road?

20 A. No.

21 Q. During the time you used the road did you see  
22 others using the road?

23 A. Oh, yeah.

24 Q. Would they have been the Okelberrys?

25 A. No, they was just people up there.

1 Q. During the time that you used the road were  
2 you ever asked not to use the road or kicked off the  
3 road?

4 A. No.

5 Q. Did you ever see anyone else be asked not to  
6 use the road or get kicked off the road?

7 A. No.

8 Q. Did you ever ask -- We've talked about  
9 several roads. And we've just been talking about Maple  
10 Canyon, but regarding all the roads we've talked about  
11 did you ever ask anyone permission to use these roads?

12 A. No, never.

13 Q. You indicated that before the Okelberry  
14 family purchased the property up there that it was owned  
15 by June Tough?

16 A. Right.

17 Q. To your knowledge did June Tough ever post no  
18 trespassing signs?

19 A. Never.

20 Q. To your knowledge did June Tough ever lock  
21 any gates?

22 A. Never.

23 Q. To your knowledge did June Tough ever kick  
24 anyone off the property?

25 A. Never.

1 Q. Did he ever kick anyone off the roads?

2 A. No.

3 Q. Were you aware, generally, when the  
4 Okelberrys purchased the property?

5 A. Yes.

6 **MR. PETERSEN:** He's already been asked and  
7 answered that.

8 **THE COURT:** Yeah, he's already answered that  
9 (INAUDIBLE).

10 Q. **(BY MR. SWEAT)** When they first purchased the  
11 property did you see any changes in signage or fencing or  
12 gate use?

13 A. No.

14 Q. Do you have an opinion regarding why the  
15 Okelberrys started keeping people off the roads.

16 **MR. PETERSEN:** Objection, it's immaterial and  
17 irrelevant.

18 **THE COURT:** How's it relevant?

19 **MR. SWEAT:** I think it's going to just show  
20 that -- Your Honor, it's our contention that there's a  
21 time period that the Okelberrys did, in fact, start  
22 locking gates, putting up signs saying no trespassing.  
23 And I think it's relevant because it shows the reason  
24 why, when they started it's tied to an event that  
25 happened.



1           **THE COURT:** Well, why they did it is not  
2 really relevant to the determination the Court has to  
3 make, and that is whether there was sufficient use to  
4 establish public use.

5           **MR. SWEAT:** I do think it helps tie down when  
6 they started doing it.

7           **THE COURT:** Well, if it --

8           **MR. PETERSEN:** You'd almost have to be a mind  
9 reader to find out why.

10          **THE COURT:** Well, you can ask him when it  
11 was, if he knows when it was that they started to  
12 restrict the use. I think he's testified that was in the  
13 late 80's.

14          **MR. SWEAT:** I think he has, yes.

15          **MR. PETERSEN:** I believe it was the mid 80's,  
16 your Honor.

17          **THE COURT:** Time in the 80's.

18          **MR. PETERSEN:** Sometime in the 80's.

19          Q.    **(BY MR. SWEAT)** Mr. Sabey, to your knowledge  
20 has West Daniels Land Association ever tried to keep  
21 people from using any of the roads across their property?

22          A.    Not that I'm aware of.

23          **MR. SWEAT:** No further questions at this  
24 time, your Honor.

25          **THE COURT:** Any cross, Mr. Petersen?

1                   MR. PETERSEN: Thank you, your Honor.

2                                   CROSS-EXAMINATION

3 BY MR. PETERSEN:

4           Q.    Mr. Saybe, you were born in 1936?

5           A.    Right.

6           Q.    What month in 1936?

7           A.    May the 6th.

8           Q.    So that would make you 58?

9           A.    Right, 68.

10          Q.    68, excuse me. And you said you started  
11 working up there in the mid 40's?

12          A.    No, I started working for June Tough in the  
13 first, 50's. I use to trail sheep up there with my  
14 father when they took them up.

15          Q.    When did you actually become employed where  
16 you were up there working, is that the 50's?

17          A.    In 1950.

18          Q.    Okay. So from 1936 to 1950 you were not up  
19 there working or doing anything, you were just in the  
20 general area?

21          A.    Well, before June Tough bought the property  
22 my uncle owned it. And we use to go up there with the  
23 kids and play with his kids. Andersons owned it before  
24 June Tough got it.

25          Q.    Okay. So your knowledge of this area would

1 be about in 1950 forward, would it not?

2 A. '54?

3 Q. From 1950 forward.

4 A. Right.

5 Q. Now, how many months a year are these roads  
6 open up there from whether?

7 A. Oh, probably from the 1st of June until the  
8 1st of November.

9 Q. Okay. So June 1 to November 1, that's about  
10 the only time that the roads are open, would that be  
11 true?

12 A. Well, it all depends on the weather.

13 Q. Well, sure. But as a general rule, June 1st  
14 to November 1st. Other than that there's going to be too  
15 much snow and they're not going to be passable?

16 A. Well, now days they go up there with  
17 snowmobiles and down --

18 Q. Oh, okay. But I'm just asking you.

19 A. Oh, yeah, right.

20 Q. Okay. So we're talking about five months of  
21 the year that you can go up there?

22 A. Well, it would be more than that. It would  
23 be June, July, August, September, October, November,  
24 probably.

25 Q. So your knowledge would be five months of the

1 year beginning at about 1950 then; correct?

2 A. Right.

3 MR. SWEAT: I want to object. I think he  
4 said six months if you add those up.

5 THE COURT: Well, he said -- He's  
6 indicating that he thinks that you can access some of the  
7 roads through November is what he's saying.

8 Q. (BY MR. PETERSEN) As a general rule though,  
9 if there's too much snow after say mid November to get up  
10 there, isn't it, isn't that true?

11 A. Well, yeah.

12 Q. Now, Mr. Saybe, you said that there were  
13 locks, gates across these roads; would that be true?

14 A. Locks?

15 Q. Gates?

16 A. Yes.

17 Q. Okay. So when you first started going up  
18 there in the 19, say 1950, this property in yellow is the  
19 Okelberry property?

20 A. Right.

21 Q. And it crosses from Forest Service property  
22 onto what is called this Ridge Line Road. There was a  
23 gate there, was there not?

24 A. Right.

25 Q. And as it crosses over into Forest Service

1 property onto Okelberry property, this ones called Circle  
2 Springs, there was a gate there?

3 A. Not when I was first up there, no.

4 Q. No gate on that one?

5 A. No.

6 Q. Okay. Where was -- There was a gate here  
7 going onto the Okelberry property, then you said there  
8 were other gates too. This was a gate from leaving the  
9 Okelberry property onto the West Daniels property?

10 A. Right.

11 Q. Was there a gate as it goes from West Daniels  
12 back onto Okelberry property?

13 A. Right.

14 Q. And then as it leads to the Okelberry  
15 property back on West Daniels, was there a gate there?

16 A. Right.

17 Q. And was there a gate as it goes from the West  
18 Daniels back on the Okelberry property?

19 A. No.

20 Q. There wasn't a gate there? I'm looking at  
21 the top of what is Exhibit 2, you say there was not a  
22 gate there?

23 A. No.

24 Q. As it leaves the Okelberry property and goes  
25 back down onto the West Daniels property, was there a

1 gate at the very top?

2 A. Yes.

3 Q. Isn't it true, Mr. Sabey, that there were  
4 pretty much gates every where controlling access to those  
5 roads?

6 A. Yes, between sheep and cattle there were,  
7 yes.

8 Q. They were gates and they were put up, weren't  
9 they? And when you would go through them you'd have to  
10 take them down, drive through and put them backup again,  
11 would you not?

12 A. Yes.

13 Q. And you did that every time?

14 A. Yes.

15 Q. Now, when you started going up there you were  
16 working for property owners, were you not?

17 A. At first, yes.

18 Q. And so when you went up you went with  
19 permission?

20 A. Well, when I was up there I was employed  
21 there, yes.

22 Q. Sure so when you say that you're hauling a  
23 sheep camp or something like that up there, you're doing  
24 it on behalf of the property owner?

25 A. In the early 50's, yes.

1 Q. And what time did you stop working for  
2 property owners up there?

3 A. I stopped working for June in '57 when they  
4 sold it to Okelberry.

5 Q. And you worked for Mr. Okelberry for a period  
6 of time, did you not?

7 A. I was never -- I helped Okelberry, but I  
8 was never on the payroll.

9 Q. When you say you helped you were up there  
10 with permission then? You were doing something?

11 A. I was asked. I was never up on there. When  
12 I helped Okelberrys and that I helped them in the trials  
13 mostly.

14 Q. You helped move some sheep camps, did you  
15 not?

16 A. I helped Lee, yes. I helped Lee pull a camp  
17 up there.

18 Q. Okay. So you were there with permission,  
19 were you not?

20 A. That one day, yeah.

21 Q. Now, in regards to these so-called roads,  
22 this Circle Springs Road, and all these other roads, you  
23 haven't really been up there in the last 20 years, have  
24 you?

25 A. Oh, I've been -- It's been since 20's.

1 I've been up there since 20 years.

2 Q. Well, you told us about an occasion where you  
3 road your horse, I believe, in the Parker Canyon. That  
4 was two years ago?

5 A. I road my horse up Thorton Hallow, but I  
6 never go up into Ray's and them. I just didn't want to  
7 be, for the hassle and that. I road my horse up Thorton  
8 and over into Parker, Cummings and back down.

9 Q. Isn't it true then it's been at least 20  
10 years since you've been up there in a motorized vehicle?

11 A. Let's see, 20 -- Well, give or take a  
12 little bit probably, yes.

13 Q. Now, when you say you go up there to go  
14 hunting and you come into this Parker Canyon Road, isn't  
15 it true that there was a sign on the Forest Service  
16 property that would say, "no more motorized vehicles"?

17 A. I've never witnessed no sign down on that  
18 bottom road.

19 Q. Did you ever see a sign off the Thorton  
20 Hallow Road that says, "no motorized vehicles"?

21 A. Where in Thorton Hallow, at the top or the  
22 bottom.

23 Q. As you begin -- As you enter into the  
24 Forest Service property, a sign that says, "no motorized  
25 vehicles"?



1 A. I don't understand your question. Which --

2 Q. Well, you said you've gone into Thorton  
3 Hallow; is that correct?

4 A. Yes, from the highway, Highway 40.

5 Q. Oh, from Highway 40. You didn't come in off  
6 Ridge Line Road then?

7 A. Nope.

8 Q. Have you ever come off Ridge Line Road into  
9 Thorton Hallow?

10 A. Year ago, yes.

11 **MR. SWEAT:** I think -- Is Mr. Sabey talking  
12 about the last ride he took or is he talking about years  
13 ago? I think we need to pin it down.

14 **THE WITNESS:** I don't know what he's talking  
15 about.

16 **THE COURT:** Well, let's lay foundation for  
17 your questions.

18 Q. **(BY MR. PETERSEN)** In the last 20 years have  
19 you taken a motorized vehicle off Ridge Line Road into  
20 Thorton Hallow?

21 A. No.

22 Q. When you -- When was the last time you took  
23 a motorized vehicle from Ridge Line Road into Thorton  
24 Canyon?

25 A. It would be middle 80's, right in there, '84,

1 '85, something like that.

2 Q. When you got to the Forest Service boundary  
3 was there a sign that says, "no motorized vehicles"?

4 A. No, I never seen one.

5 Q. Likewise, down there on this Circle Springs,  
6 is there a sign as you come off of that into the Forest  
7 Service property that says, "no motorized vehicle"?

8 A. I haven't been down there for a few years,  
9 but I never seen no sign, no.

10 **MR. PETERSEN:** Your Honor, if we could have a  
11 few exhibits marked here.

12 **THE COURT:** You may.

13 Q. **(BY MR. PETERSEN)** While they're marking  
14 those exhibit -- Mr. Sabey, have you ever driven along  
15 what is called Ridge Line Road coming off Main Canyon  
16 Road?

17 A. Right.

18 Q. All the way over to the gun club?

19 A. Yes.

20 Q. You've driven that in a car, in a vehicle?

21 A. Not in a vehicle. I have on four-wheeler.

22 Q. Okay. You've never driven that in a vehicle,  
23 but only in an ATV I call?

24 A. Well, from Horse Gravel up from the Glade to  
25 Wallsberg I've driven a car down off there, but clean up

1 over and down into Daniels, no, I never have.

2 Q. Okay. That is not a passable road with a  
3 four, with anything less than an ATV or a horse, isn't  
4 it?

5 A. I have seen trucks up on there, yes, but I  
6 have never --

7 Q. You've never driven it?

8 A. No, I have in an AT, four-wheeler.

9 Q. Isn't it a fact that when you get up into  
10 this Okelberry property here, what you call White  
11 Pole --

12 A. Yep.

13 Q. -- it's awfully steep, is it not?

14 A. Not too bad there.

15 Q. That's not too -- Is it ever very steep up  
16 in that area?

17 A. In White Pole?

18 Q. Yeah, as you go north out of White Pole?

19 A. There's one little pitch before you leave  
20 White Pole, for may be a hundred feet there it's kind of  
21 steep and other than that it's not.

22 Q. Would it be your testimony that a person  
23 could drive a vehicle now from Main Canyon Road, all the  
24 way up over Ridge Line Road, down to the gun club?

25 A. I've -- I haven't been on that bottom end.

1 I've been down into Horse Gravel where the road goes down  
2 off into Wallsberg.

3 Q. But that's not a road that's a subject of  
4 that litigation, is it?

5 A. That's part of the Ridge Line Road I'd say.

6 Q. Well, it cuts off Ridge Line and goes down to  
7 Wallsberg, does it not?

8 A. Yes.

9 Q. That's not part of this litigation?

10 A. Well, I don't know what you're --

11 Q. How many years has it been since you've been  
12 on the north side of that Ridge Line Road?

13 A. North side, from where?

14 Q. You know where the gun club is?

15 A. Yes.

16 Q. You been up that road?

17 A. Not in a vehicle, no.

18 Q. It's blocked off, is it not?

19 A. I don't know. I've never been up to the gun  
20 club for several years.

21 Q. So you wouldn't know if you could traverse  
22 that or not. Are you aware of any gates that are over on  
23 that side of the road?

24 A. Yeah, there use to be a gate there at the gun  
25 club, but I don't know whether it's locked or not.

1 Q. Would it surprise you to learn that as of  
2 June 1st that gate was locked.

3 MR. SWEAT: Objection, relevance.

4 THE COURT: What does it matter? That's not  
5 part of this litigation. It's off Okelberry's property.

6 MR. PETERSEN: It is off of Okelberry's  
7 property, your Honor, but it goes to the credibility of  
8 the witness. If the witness says that he can travel that  
9 road, and the gates that are locked, and it's too steep,  
10 you can't do it. It goes to his credibility.

11 THE COURT: Well, he's testified he's never  
12 been on a vehicle, he's been on a four-wheeler, that's  
13 his testimony.

14 MR. PETERSEN: I think his testimony was that  
15 you could drive over it.

16 THE COURT: He said he seen -- He said he  
17 seen other vehicles on it.

18 MR. SWEAT: I think his testimony was he  
19 drove down and off, into Horse Gravel, which is off the  
20 Okelberry's property, down another road in the fish and  
21 game into Wallsberg.

22 THE COURT: How is that relevant?

23 MR. PETERSEN: Well, I think it goes to his  
24 credibility, your Honor. In fact, it's quite --

25 Q. (BY MR. PETERSEN) Can you identify what's

1 been marked as Exhibit No. 9, Defendant's Exhibit No. 9?

2           **MR. SWEAT:** Can I see the picture, your  
3 Honor, before --

4           **THE COURT:** Why don't you show it to Mr.  
5 Sweat.

6           **THE WITNESS:** I don't know what the picture  
7 is.

8           **THE COURT:** He doesn't know what it is.

9           Q.   **(BY MR. PETERSEN)** You couldn't identify what  
10 Exhibit No. 9 is?

11           A.   I don't know where it's at, no.

12           Q.   You wouldn't know if that's part of the Ridge  
13 Line Road or not?

14           **MR. SWEAT:** Your Honor, I'd like to make an  
15 objection. I think that we've made a record already that  
16 Mr. Sabey did not bring his glasses today. And maybe we  
17 could ask him how well he sees some of these exhibits.

18           **MR. PETERSEN:** Your Honor, he's here as their  
19 witness. And if he doesn't bring his glasses -- He's  
20 got to be able to (INAUDIBLE). He says he can't identify  
21 Exhibit No. 9.

22           **THE COURT:** Look at it again. See if you  
23 know, Mr. Richins. If you don't that's fine.

24           **THE WITNESS:** Well, I don't know whether  
25 there's a special location of it is.

1 Q. (BY MR. PETERSEN) That's fine, Mr. Sabey.  
2 Mr. Sabey, I want to show you what's been marked as  
3 Exhibit No. 6 and then ask you --

4 THE COURT: Show it to Mr. Sweat first.

5 Q. (BY MR. PETERSEN) Mr. Sabey, can you  
6 identify Exhibit No. 6? Excuse me, that's -- Pardon  
7 me. Let me get this one (INAUDIBLE). That's Exhibit No.  
8 6.

9 A. That's up there by the Glade some where.

10 Q. Do you know where?

11 A. It looks like probably where you come off the  
12 cattle country onto Okelberrys.

13 Q. Does that look like the way it was in 1950  
14 when you first went up there?

15 A. You mean the fence?

16 Q. Sure. And the gate?

17 A. Well, there's some signs there now, but there  
18 was no signs when I was up there.

19 Q. Okay. But I'm asking you about the fence and  
20 the gate. Is that about the way it looked in the 1950's.

21 A. Well, it's hard to say. There was a gate  
22 there then. So --

23 Q. Hard to say. But that does look like  
24 generally the area as you come off the Forest Service,  
25 the Glade onto the Okelberry property?

1 A. Well, yes, I'd say that's probably where it  
2 is.

3 Q. Okay. I'm showing you what's been marked as  
4 Exhibit No. 7 and ask you if that looks like the gate  
5 that comes off the Forest Service onto the private  
6 property?

7 A. Well, that's hard to say where the location  
8 is. You can see a chain around there with a lock on it.  
9 I've never seen the gate since they've been locked. I've  
10 never been up there since they've been locked.

11 Q. That's been at least 20 years then, has it  
12 not?

13 A. Yeah, pretty close.

14 Q. I'm showing you what's been marked as Exhibit  
15 No. 8 and ask you if you can identify that?

16 **MR. SWEAT:** Your Honor, I'm going to object.  
17 There's no foundation to where these gates or fences are.  
18 And Mr. Sabey has indicated that he doesn't recognize  
19 them?

20 **THE COURT:** Well, he has -- If he has --  
21 If he's able to identify them he can do so.

22 Q. **(BY MR. PETERSEN)** Can you identify that in  
23 anyway?

24 A. I've never -- I've never seen that gate,  
25 no.



1 Q. You've seen that sign that says, "keep out"?

2 A. I see it there, but I've never seen it.

3 Q. You wouldn't know how long that gates been  
4 there or how long that signs been there?

5 A. I have no idea.

6 Q. Now, the Circle Springs Road, you indicated  
7 that you trailed sheep up that road; is that correct?

8 A. Not up the road, no.

9 Q. Down the road?

10 A. There use to be a trail off, off of the  
11 Okelberry's property, right along the forest, and you'd  
12 come in at the Glade from Circle.

13 Q. Okay. But --

14 A. There -- The road comes up through  
15 Okelberry's, up through Bear Wallow. And the old sheep  
16 trail was down along the forest line.

17 Q. Okay. I'm just trying to get it in my mind.  
18 Circle Springs Road, my notes indicated that you said you  
19 trailed sheep on that road; is that correct?

20 A. I said we brung the sheep up Circle Spring's  
21 Canyon to Circle. And then they would go from Circle to  
22 the Big Glade, but they wouldn't go up the road. That's  
23 private beyond the road.

24 Q. So you never trailed sheep up Circle Springs  
25 Road then?

1 A. No.

2 Q. Then what use would you have for going on  
3 Circle Springs when you were working with the Toughs?

4 A. Circle Springs Road went through the Tough  
5 property.

6 Q. Right. But you just said you never trailed  
7 sheep up it.

8 A. Well, when I worked for June there was sheep  
9 on the road up and down there, but it was private  
10 property. They was not being trailed.

11 Q. All right. Well, then it would be correct to  
12 say, Mr. Sabey, that you never trailed on the Circle  
13 Springs Road?

14 A. I don't understand your question.

15 Q. Well, you trailed sheep up in that area, did  
16 you not?

17 A. Yes.

18 Q. You said you worked for the Toughs?

19 A. Right.

20 Q. You know where the Circle Springs Road is?

21 A. Yes.

22 Q. My question was did you ever trail sheep up  
23 or down that road?

24 A. June Tough's sheep, yes, I have.

25 Q. Okay. And that was in the 1950's?

1 A. Right.

2 Q. And then at that time you were there by  
3 permission, were you not?

4 A. Right.

5 Q. Now, you say that you came back on occasion,  
6 up until the mid 80s, and you would travel on that road  
7 every fall?

8 A. We use to go down there hunting deer every  
9 fall and then several times in the summer. We'd go down  
10 there and pitch a tent, me and my family, and we'd stay  
11 there at Circle Springs.

12 Q. Now, what kind of vehicle were you using when  
13 you say you did that?

14 A. Pickup truck.

15 Q. Is it your testimony that you can drive a  
16 pickup truck that's nota -- Was it a four-wheel drive?

17 A. No.

18 Q. Is it your testimony that you can drive a  
19 pickup truck, that's not a four-wheel drive, on the  
20 Circle Springs road all the way to the Forest Service  
21 property?

22 A. At that time, yes.

23 Q. Tell me exactly when you did that in a pickup  
24 truck?

25 A. It would be in the 60's.

1 Q. What kind of road was it?  
2 A. It was rough, but you could go up and down  
3 there.  
4 Q. How rough?  
5 A. Well, just a mountain road.  
6 Q. A lot of rocks?  
7 A. There a few rocks, yes.  
8 Q. Steep?  
9 A. Not too steep, no.  
10 Q. Did you ever have to cut trees off the road?  
11 A. Nope.  
12 Q. Never cut a tree off the road?  
13 A. Not when I was going up there camping in the  
14 summer, no.  
15 Q. Are you aware of any time when trees have had  
16 to be cut off that road?  
17 A. In the spring of the year when we'd take the  
18 sheep up there, we use to cut one once in a while.  
19 Q. That was a fairly common occurrence, wasn't  
20 it?  
21 A. Oh, not really a common, but yes,  
22 occasionally there was a tree across the road.  
23 Q. Now, do you think that road has changed any  
24 from today than what it was in the 1960's?  
25 A. I have no idea. I haven't been up there for,

1 probably for 18, 20 years.

2 Q. If there was testimony in this Court that  
3 it's barely passable in a four-wheel drive vehicle, would  
4 that be incorrect?

5 A. Well, I have no idea what it is now. But I  
6 know at that time we use to pull camps and that down in  
7 Circle.

8 Q. You'd pull camps, but that was for the  
9 owner's property, was it not?

10 A. Well, yeah, when we'd get down in there  
11 camping or in the tent we'd get down there.

12 Q. Now, you say you would go there in the fall  
13 of the year to hunt, would that be correct?

14 A. Yes.

15 Q. Wouldn't it be much more convenient to park,  
16 to stop on the Main Canyon Road and then to walk up the  
17 trails and hunt rather than drive all the way around?

18 A. Absolutely not.

19 Q. Absolutely not. How long does it take you to  
20 drive from Wallsberg to the Big Glade?

21 A. Oh, 35 minutes.

22 Q. Is that a pretty good road?

23 A. Up Main Canyon?

24 Q. Yeah.

25 A. Yes.

1 Q. As it exists right now?

2 A. Yes.

3 Q. And 35 minutes to go to the Big Glade. Then  
4 how long would it take to go from the Big Glade to the  
5 bottom of the Circle Springs Road?

6 A. Gosh, I don't know. Maybe another -- I  
7 don't have no idea.

8 Q. No idea. Could be as long as 45 to 60  
9 minutes?

10 A. Oh, no, no, no.

11 Q. Where as Wallsberg you could be up there  
12 within a half hour or less, could you not, if you wanted  
13 to hunt that area?

14 A. From Wallsberg?

15 Q. Sure.

16 A. Absolutely not.

17 Q. There are trails, are there not, off Main  
18 Canyon Road, up into that Forest Service area?

19 A. Yes, there's a road or trail from there up  
20 onto Circle.

21 Q. And there are people that do that park on the  
22 Main Canyon Road and will hunt in that area, are there  
23 not?

24 A. Well, I can't tell you what other people  
25 does.

1 Q. Have you ever see anybody hunt that area that  
2 way?

3 A. Lots of them.

4 Q. A lot more people hunt it that way than  
5 coming around the other way, is it not?

6 A. No, years ago it wasn't.

7 Q. Now, when you would come around in the 60's  
8 and get on that Circle Springs Road, you would have to  
9 open and shut the gate?

10 A. Yeah.

11 Q. And you would do that?

12 A. Sure.

13 Q. The Ridge Line Road, likewise, you testified  
14 that there were several gates that you would have to open  
15 and close to traverse on that road?

16 A. Right.

17 Q. This road that you say that was built in  
18 Parker Canyon in the 1950's, that was not built by the  
19 Forest Service, was it?

20 A. Now, I really don't know. Clark Robinson, he  
21 was the guy that owned the land down there. He told me  
22 that the Forest Service and himself built the road.

23 Q. If you come down that Ridge Line Road off the  
24 Forest Service property, and you're on your way to  
25 Parker, is that a rocky road?

1           A.    It's not the Forest Service off the Ridge  
2 Line Road.

3           Q.    Well, maybe you misunderstand me.  You're on  
4 the Big Glade.

5           A.    Okay.

6           Q.    You drive to Parker Canyon and you're on the  
7 Ridge Line Road.

8           A.    Oh, right.  Okay.  I follow ya.

9           Q.    Is that a rocky road?

10          A.    I haven't been up there for a while, but  
11 it  --

12          Q.    When you drove it 20 years ago  --

13          A.    Not too bad, no.  It was a mountain road.

14          Q.    Not too rocky?  Was there ever any trees  
15 crossing it?

16          A.    Oh, sometimes, once in a while or maybe one  
17 blow across or something.

18          Q.    Did you ever take a chain saw with you or an  
19 ax to remove trees?

20          A.    Yeah, we'd take an ax.

21          Q.    Did that happen on many occasions?

22          A.    Not very many, no.

23          Q.    How often do you think that would happen?

24          A.    Not very often.

25          Q.    Is it very steep in many areas?



1 A. Not too bad, no.

2 Q. Was it anything more than a trail?

3 A. A trail?

4 Q. Yes.

5 A. There was good road down there.

6 Q. No wider than seven or eight feet, wasn't it?

7 A. Well, it was -- It was wide enough for a  
8 car to go down there nice. You didn't scrape your place.

9 Q. You went down those roads and you never  
10 scraped on any trees or branches were never hanging over  
11 or anything like that?

12 A. They was mountain roads. Sure they was --

13 Q. It would scratch up a vehicle, would it not?

14 A. Oh, not too bad, not at that time.

15 Q. But it would do that, would it not?

16 A. Oh, sure.

17 Q. You didn't mind scraping up your vehicle to  
18 go down that road?

19 A. Not too much, no.

20 Q. When you would go through there would you  
21 always close the gates as you went through?

22 A. You bet ya.

23 Q. You figured that that was one of your  
24 responsibilities to close the gates?

25 A. Absolutely.

1 Q. Now, you indicated that you -- As I  
2 understand it, you came up in the Thorton Hallow area,  
3 you would actually stop on Highway 40, you've done that,  
4 and hunted or hiked up into that area; is that correct?

5 A. Not hiked, I've never hiked. I've rode a  
6 horse up in there.

7 Q. Okay. You'd ride a horse from Highway 40 up  
8 in there?

9 A. Right.

10 Q. Would you ever hunt in that matter?

11 A. No, I've never hunted up in that for, I have  
12 years ago, but not for the last 15, 20 years, no?

13 Q. And once again it's been 20 years or so since  
14 you've been in that area; is that correct?

15 A. Probably.

16 Q. That Thorton Hallow Road, is it very steep?

17 A. No, Thorton Hallow Road (INAUDIBLE) not very  
18 steep, no.

19 Q. To get down to the Forest Service property,  
20 that isn't very steep to get down in there?

21 A. No.

22 Q. Did you ever scrape your vehicle on trees or  
23 anything of that nature?

24 A. Oh, there'd be probably a few branches  
25 sticking out, yes. You'd probably -- It's a mountain

1 road.

2 Q. Have you ever driven a vehicle off of Ridge  
3 Line Road down Thorton Road?

4 A. Yes, several times.

5 Q. What kind of vehicle?

6 A. Pickup trucks.

7 Q. Did it have four-wheel drive?

8 A. No.

9 Q. Could you make it down there and back without  
10 four-wheel drive without any difficulties?

11 A. Absolutely. There use to be an old docking  
12 trail down there. We use to take two-ton trucks down  
13 there.

14 Q. No problem getting up and down that road?

15 A. Absolutely not.

16 Q. When you say an old docking trail, you were  
17 working for somebody to do that, were you?

18 A. Sure.

19 Q. So if there's testimony during the course of  
20 this trial that that's a steep road, rocky, you need a  
21 four-wheel drive to get up and down it, that would be  
22 incorrect?

23 A. Well, I don't know what it is now, but when  
24 we was up there absolutely.

25 Q. Do you think it's changed over the years?

1 A. I have no idea.

2 Q. Now, this Parker Canyon Road, did you ever  
3 drive a vehicle down that road?

4 A. From the Ridge Line Road?

5 Q. Yes.

6 A. Yes.

7 Q. When was the last time you did that?

8 A. Probably about the same time as --

9 Q. 20 years ago?

10 A. Probably.

11 Q. Is it steep?

12 A. Oh, it's really not too steep. There's a few  
13 little steep places in it.

14 Q. Any rocks?

15 A. It's a mountain road, of course, there's  
16 rocks.

17 Q. Did you scrap your vehicle in anyway?

18 A. Well, a little, yes.

19 Q. When you went down was it with permission  
20 when you traveled down there?

21 A. No.

22 Q. For what purpose did you go down there?

23 A. Well, we'd be down there hunting deer and  
24 that.

25 Q. And when you got to the bottom of Parker

1 Canyon and you came to the Forest Service property, was  
2 there a gate there?

3 A. On Parker? Yeah, there's a gate down at  
4 Parker.

5 Q. Would you drive on the Forest Service  
6 property?

7 A. No.

8 Q. You never drove on Forest Service property?

9 A. No, we'd stop there to the, that pond just  
10 the side of the forest line.

11 Q. Why wouldn't you drive on the Forest Service  
12 property?

13 A. Well, that road don't -- It just barely  
14 goes on the forest property, there's nowhere to go.

15 Q. You mean the roads dead ends on Forest  
16 Service property?

17 A. Yeah.

18 Q. So this would be inaccurate then when it  
19 shows the road coming, on Exhibit 2, it shows the road  
20 continuing on on the Forest Service property for a  
21 period, a distance anyway?

22 A. Oh, you can go on Forest Service property a  
23 little ways, but not very far.

24 Q. But you never did it?

25 A. Well, we use to stop there at the fence and

1 hunt around in there.

2 Q. You'd open the gate and go through the gate?

3 A. Well, if we had horses, yeah.

4 Q. Most the times when you went down that road  
5 it was with, you had business there. You were working  
6 for some of the owners with the sheep in that area. It  
7 was usually West Daniels, was it not?

8 A. No, we was down in there hunting deer mostly.

9 Q. Well, you said -- Part of your testimony  
10 was that's, how you got introduced to Parker Canyon, you  
11 were helping the landowners.

12 A. I have. I've helped them pull camp down  
13 there one time, down onto Parker or Boomer.

14 Q. You said you never saw any signs on the West  
15 Daniels' property?

16 A. No, I never did.

17 Q. Private property, keep out, never saw any  
18 signs?

19 A. No.

20 Q. You never saw any signs on the Forest Service  
21 property either then?

22 A. Oh, I've seen Forest Service signs, yes.

23 Q. Okay. What did they say?

24 A. They just -- Them yellow signs, the Forest  
25 Service property.

1 Q. Did it say anything? No motorized vehicles  
2 or any restrictions in anyway?

3 A. No, not at that time, no.

4 Q. Do you know if there's any restriction on  
5 that Forest Service property as to use of motorized  
6 vehicles?

7 A. Well, you -- You can't -- I really don't  
8 know. I haven't been down there for years. I don't  
9 know.

10 Q. Now, this Maple Canyon Road, have you ever  
11 driven that from the Wallsberg side up to the Ridge Line  
12 Road?

13 A. Yes.

14 Q. When was the last time you did that?

15 A. I can't tell you when the last time. It was  
16 probably been maybe 15 years ago or so.

17 Q. Why haven't you driven it in the last 15  
18 years?

19 A. I've just never had no, nothing to go up  
20 there for.

21 Q. No reason to use it then?

22 A. No.

23 Q. If there was testimony in this case, in this  
24 trial, that it's impassable, even with a four-wheel drive  
25 vehicle, would that be incorrect?

1 A. I have no idea. I haven't been up there --  
2 The last time I was up there is when I pulled up sheep  
3 camp up there for Lee. And I don't know how long ago  
4 that's been.

5 Q. So the last time you went up there was with  
6 permission by the owner?

7 A. Right.

8 Q. Would it surprise you to know that there,  
9 that part of the road is washed out?

10 A. I have no idea.

11 Q. Was it ever washed out that you ever saw?

12 A. I seen it get pretty darn rough, yes.

13 Q. That's a pretty rough road, is it not?

14 A. It's been pretty rough, yes.

15 Q. Now, as I understand when you herded sheep  
16 you never went all the way up Maple Canyon with your  
17 sheep, you'd go up part way and then turn off; is that  
18 correct?

19 A. No, we'd take sheep all the way up to --

20 Q. All the way to the Ridge Line?

21 A. When I worked there, yes.

22 Q. And you'd pull a camp up that road?

23 A. Absolutely.

24 Q. Was it difficult to pull a sheep camp up that  
25 road?



1 A. Not too bad.

2 Q. Would you describe that road as steep?

3 A. Oh, yeah, it was kind of steep and rocky.

4 Q. Did you ever have to cut any trees off the  
5 road?

6 A. Probably.

7 Q. It's not an uncommon occurrence, is it?

8 A. Well, in the spring there's always a few  
9 trees on them mountain roads.

10 Q. I thought, and maybe I'm incorrect, Mr.  
11 Sabey, that you said that you never trailed sheep all the  
12 way up Maple Canyon, but you would turn off at a certain  
13 point at Circle?

14 A. When I was employed there we'd let the sheep  
15 go all the way up Maple Creek, but when we was trailing  
16 them for somebody else we never did.

17 Q. You really don't have any need or use for  
18 that road now, do you?

19 A. No, I don't.

20 Q. You don't care if that's public road or not  
21 then?

22 A. Well, yeah, I care if it's there. If I ever  
23 want to go up there on a four-wheeler or something I --

24 Q. That's the only way you'd go on it would be a  
25 four-wheeler or with a horse, is it not?

1 A. Absolutely.

2 Q. You'd never drive a car up there would you?

3 A. I do a lot of horseback riding. I ride  
4 around in the hills a lot.

5 Q. So if you're going to use that area it would  
6 be with a four wheeler or by horse?

7 A. Well, probably.

8 Q. You indicated at the bottom of that Maple  
9 Canyon Road going to Wallsberg is that there is a gate?

10 A. Yeah, there's a gate there now, I think.

11 Q. And it's locked.

12 A. I have no idea.

13 Q. You never been close enough to look?

14 A. Yes, I've been through it. I was up there a  
15 few years ago and helped Ray and them ship their lambs  
16 out of Maple Creek, but I never seen whether the gate was  
17 locked. It wasn't locked when I went through.

18 Q. How far up that Maple Canyon Road did you go?

19 A. Probably a mile.

20 Q. You sure didn't go the whole way, did you?

21 A. No, I didn't. I didn't have no --

22 Q. You've been up there in the last 20 years,  
23 have you not, where you've seen locked gates?

24 A. Well, no, I -- I never have. I never seen  
25 the gate locked. There's a gate there, but I've never

1 seen it locked.

2 Q. You've been up there in the last 20 years  
3 when you've seen no trespassing signs, have you not?

4 A. I don't -- I never paid no attention  
5 whether there's trespassing signs or not.

6 Q. So whether they were there or not you  
7 wouldn't pay any attention to that?

8 A. Not when I was up there helping these guys,  
9 no.

10 Q. Mr. Sabey, though your testimony is such that  
11 when you first started going up there there were gates?

12 A. Not when I first started going up, no.

13 Q. When you went up --

14 **THE COURT:** Describe which road you're  
15 talking about, Mr. Petersen.

16 **MR. PETERSEN:** I thought that we established  
17 that this road coming off the Big Glade onto the  
18 Okelberry --

19 **THE COURT:** Well, you were talking about the  
20 Maple Canyon Road.

21 **THE WITNESS:** Yeah.

22 **THE COURT:** Now are you talking about the --

23 **MR. PETERSEN:** Oh, excuse me, your Honor.

24 **THE COURT:** Are you talking about Ridge Line  
25 now?

1           **MR. PETERSEN:** Let's go back.

2           **Q. (BY MR. PETERSEN)** Were there any gates on  
3 the Maple Canyon Road at all?

4           **A.** Not when I was first was going up there, no,  
5 there was not.

6           **Q.** But there was some gates on some of the other  
7 roads then?

8           **A.** Up on top, yes.

9           **Q.** Well, but we established, did we not, there  
10 was a gate that came off the Forest Service property onto  
11 the Okelberry property?

12          **A.** Right.

13          **Q.** And that gate was there when you first went  
14 up with the Toughs?

15          **A.** Right.

16           **MR. PETERSEN:** Can I have just a moment, your  
17 Honor, to confer with my client?

18           **THE COURT:** You may.

19           **MR. PETERSEN:** That's all, your Honor.

20           **THE COURT:** Anything else, Mr. Sweat?

21           **MR. SWEAT:** Just briefly, your Honor.

22                           **REDIRECT EXAMINATION**

23 **BY MR. SWEAT:**

24           **Q.** I apologize if I've asked these questions and  
25 forgot, but when you used Maple Canyon Road --

1 A. Yes, I've used it.

2 Q. Several times you used it it was on behalf of  
3 the property own; is that correct?

4 A. Yes.

5 Q. Did you ever use it for reasons completely  
6 personal, but not having anything to do with the property  
7 owners or people with sheep?

8 A. Yes, I've went up and down there for a ride,  
9 yes.

10 Q. And what type of vehicle did you use to do  
11 that?

12 A. Oh, I use to have a -- Well, I went up  
13 there in a four-wheel drive and before that I had a  
14 two-wheel drive I've went up and down there.

15 **MR. SWEAT:** I think that's all the questions  
16 I have, your Honor.

17 **THE COURT:** Anything else, Mr. Petersen?

18 **MR. PETERSEN:** No, sir.

19 **THE COURT:** You May step down. Okay. Let's  
20 take our morning recess. We'll be in recess until 11:05.

21 (A brief recess was taken.)

22 **THE COURT:** Okay. Mr. Sweat, you may call  
23 your next witness.

24 **MR. SWEAT:** Thank you, your Honor. Plaintiff  
25 calls Moroni Besendorfer.

1           **THE COURT:** Okay. Mr. Besendorfer, come  
2 forward and have a seat in the witness chair there. If  
3 you can get to it there. You may proceed.

4           **MR. SWEAT:** Thank you, your Honor.

5                           **DIRECT EXAMINATION**

6 **BY MR. SWEAT:**

7           Q. Mr. Besendorfer, would you please state your  
8 full name and address for the record?

9           A. James Moroni Besendorfer. I live on 1291  
10 South Casper Hill Road. That's my address in Heber,  
11 Utah.

12           **MR. PETERSEN:** What's city? I missed that,  
13 your Honor.

14           **THE COURT:** Heber City.

15           **MR. PETERSEN:** Heber City.

16           Q. **(BY MR. SWEAT)** And what is your birth date?

17           A. January the 27th, 1928.

18           Q. How long have you lived in Wasatch County?

19           A. 76 and a half years.

20           Q. Is that your entire life?

21           A. My entire life. Well, I'm not quite 76 and a  
22 half. I will be in another month, I think.

23           Q. Are you familiar with a area east and a  
24 little bit north of Wallsberg?

25           A. Yes, most of it.

1 Q. Do you own any property or own an interest in  
2 any property in that area?

3 A. I own some stock in the West Daniels Land  
4 Association.

5 Q. And when did you first acquire this stock?

6 A. Well, my dad acquired it back in the 50's.  
7 And then I got my stock from my parents since -- I  
8 don't know. I've had it for probably 30 years or 35.

9 Q. Other than the stock in West Daniels land did  
10 you owned or leased any property in this area?

11 A. In Wasatch County?

12 Q. No, in the area north or east of Wallsberg.

13 A. Well, I haven't personally, but our land  
14 association has several times.

15 Q. Have you ever used any of the roads that are  
16 in this area?

17 A. Ever since I was 12 years old.

18 Q. Mr. Besendorfer, I'm pointing now to what has  
19 been marked Plaittiff's Exhibit No. 2. Can you see that  
20 very well?

21 A. Pretty well.

22 **MR. SWEAT:** Can I hand it to him, your Honor,  
23 to look at a second?

24 **THE COURT:** Why don't you have him come down  
25 to the, there. He'd probably look at it better if he

1 doesn't have to hold it. You can go down to the map.

2 Q. (BY MR. SWEAT) Do you recognize the area  
3 depicted in this map?

4 A. Yes.

5 Q. Do you believe that the map is a fairly  
6 accurate portrayal of the area?

7 A. Well, it looks like it's okay to me as best  
8 as I can tell.

9 Q. As you're looking at the map can you see a  
10 road highlighted in red that has a designation of Ridge  
11 Line Road?

12 A. Yes.

13 Q. Are you familiar with that road?

14 A. Yes.

15 Q. Can you see a road highlighted, I believe, in  
16 blue, Thorton Hallow Road?

17 A. Oh, yes.

18 Q. Are you familiar with that road?

19 A. Yes.

20 Q. Can you see a road highlighted, I believe, in  
21 a yellow labeled Parker Canyon Road?

22 A. Yes.

23 Q. Are you familiar with that road?

24 A. Yes.

25 Q. You see a road highlighted in green labeled



1 Circle Springs Road?

2 A. Yes.

3 Q. Are you familiar with that road?

4 A. Yes, but I didn't travel that one as much as  
5 I did the others.

6 Q. Can you see a road highlighted kind of in a  
7 -- I've been told it's magenta? It looks kind of pink  
8 purplish labeled as Maple Canyon Road?

9 A. Yes.

10 Q. Are you familiar with that road?

11 A. Yes.

12 Q. Are you comfortable with looking at the  
13 exhibit or would you like to stay there by it? Or you  
14 may return to your seat. Okay. You go ahead and return  
15 to your seat. Mr. Besendorfer, are you familiar with the  
16 property that's owned by the Okelberry family?

17 A. Yes.

18 Q. And do you have a general idea about when the  
19 Okelberry family first purchased this property?

20 A. I -- I don't remember when they purchased  
21 it.

22 Q. Do you know who owned the property prior to  
23 the Okelberry family?

24 A. I just remember a sheep herder, but that's  
25 all I know about that.

1 Q. Directing your attention to the road that has  
2 been designated as Circle Spring Road, have you ever used  
3 that road?

4 A. I've been on it a few times, quite a few, but  
5 I didn't make it a habit of using it all the time.

6 Q. What portions of the road have you been on?

7 A. Well, the whole thing.

8 Q. Do you recall when you would of first used  
9 that road?

10 A. No, I, I couldn't give you any dates on it.  
11 It's been a lot of years ago.

12 Q. Do you recall when you last used the road?

13 A. Maybe -- Well, it's probably been ten years  
14 ago. The years go by fast. I think it would be that  
15 many years ago when I was on it last.

16 Q. Typically how often would you use this road  
17 per year?

18 A. Two, three time a year.

19 Q. When you used it did you always travel the  
20 entire length of the road?

21 A. Yes, I hauled salt for the cattle up that  
22 road a few times and --

23 Q. When you were using this road did you ever  
24 observe others using this road?

25 A. Well, there was always people going up and

1 down it, but I don't know who they were.

2 Q. Did you ever observe people at the end of the  
3 road?

4 A. Which end are you talking about?

5 Q. The Circle Spring on the forest end.

6 A. Yes, I've seen people up there.

7 Q. What would they do up there?

8 A. Well, some of them were camping and --

9 **MR. PETERSEN:** Your Honor, I object. We  
10 really need a foundation. What are we talking about in  
11 the last 10 years, 20, 30, 50?

12 **THE COURT:** Well, he said he hasn't been on  
13 that road for the last, 10 years ago. So why don't you  
14 -- Why don't you lay some foundation, Mr. Sweat, as to  
15 what time period you are asking questions concerning.

16 **MR. SWEAT:** Thank you, your Honor.

17 Q. **(BY MR. SWEAT)** You indicated you were last  
18 up there about 10 years ago. Prior to that time about  
19 how many times per year did you use that road?

20 A. Just maybe a couple of times each year.

21 Q. And do you think it's -- 10 years ago would  
22 be in the 90's. Do you think during the 80's you used  
23 that road a couple times a year?

24 A. Yes, in the 80's.

25 Q. During the entire 80's, from '81 to '89?

1 A. Well, I use to use it every spring. And  
2 quite often during the summer we'd make a trip up there  
3 also when we'd go into that area.

4 Q. Do you think you used it during the 70's?

5 A. Yes.

6 Q. The entire decade of the 70's?

7 A. Yes, I think so.

8 Q. Do you think you used it during the 60's?

9 A. Yes.

10 Q. The entire decade of the 60's?

11 A. Yes.

12 Q. During each of those decades you used it a  
13 couple times a year?

14 A. Well, in those earlier years we used it most.

15 Q. Why did you use it more?

16 A. Well, it was a good area to get into and it  
17 was a short way for us to get up there for us to take  
18 salt into salt our cattle. It was a shorter distance, so  
19 that's the reason we used it.

20 Q. During those -- During the 60's did you  
21 ever observe people camping on the forest there at Circle  
22 Springs?

23 A. Well, there was always people camping up  
24 there.

25 Q. During the 60's did you see people --

1           **MR. PETERSEN:** Your Honor, I object to always  
2 people camping. You know, unless we can specify  
3 something.

4           **THE COURT:** Well, that's his testimony. You  
5 can cross-examine him.

6           **MR. PETERSEN:** Wouldn't it be fair though,  
7 your Honor, if we could pin this down in some date, time,  
8 place?

9           **THE COURT:** We're talking about the 60's,  
10 70's and 80's. He's testified that he used it, that  
11 road, 2 to 3 times a year during those decades.

12           **MR. PETERSEN:** That I understand, but then to  
13 say, I always saw people up there camping, your Honor.

14           **THE COURT:** Well, that's what his testimony  
15 is. I can't change it.

16           **MR. PETERSEN:** Well, I object to it. It's  
17 not being -- There's no foundation for that type of  
18 testimony.

19           **THE COURT:** Overruled. This is -- I'll  
20 make this comment. He's testified that he saw people  
21 camping on the forest, not on --

22           **MR. PETERSEN:** All right.

23           **Q. (BY MR. SWEAT)** During the 70's did you see  
24 people camping on the forest of Circle Springs?

25           **A.** Yes.

1 Q. Did you ever see during the 60's or 70's  
2 those people camping, did they have vehicles?

3 A. They all had vehicles. And most of them were  
4 camping with tents. Some of them had camp trailers and  
5 stuff like that.

6 Q. Other than what has been designated as the  
7 Circle Springs Road is there any other way to access  
8 those camping sites that you saw with a vehicle?

9 A. Well, if they -- If they come down the, I  
10 guess it's referred to there as the Ridge Line Road, they  
11 could come in from that area.

12 Q. Would they have to connect into the Circle  
13 Spring Road?

14 A. Yes.

15 Q. During the times that you used this road, the  
16 60's, the 70's and the 80's, did you ever see locked  
17 gates on this road?

18 A. No.

19 Q. Did you ever see gates on this road?

20 A. No, I never did see any gates on that  
21 particular road.

22 Q. Did you ever see any signs or marks  
23 indicating that there was no trespassing on this road?

24 A. No, never.

25 Q. Did you ever encounter a locked gate on this

1 road when the entire --

2 MR. PETERSEN: We back at Circle Springs?

3 THE COURT: We're still at Circle Springs.

4 THE WITNESS: No, I never did.

5 Q. (BY MR. SWEAT) Now, when you used this road  
6 you were using it to salt the cattle; is that correct,  
7 you've indicated?

8 A. Usually that's what we did. We would haul  
9 our salt up that road and take it up on the top, the  
10 ridge.

11 Q. And that was as a permittee on the forest, is  
12 that --

13 A. Well, we had permits on the forest, yes.

14 Q. Is that where you were taking salt to was the  
15 forest?

16 A. Yes, and on our own private land up there  
17 also.

18 Q. Did you have private land on Circle Springs?

19 A. No.

20 Q. Specifically with Circle Springs, when you  
21 were talking salt up that road or traveling on that road,  
22 was it in conjunction with your status as a permittee  
23 with the Forest Service?

24 A. Yes.

25 Q. Did you ever use it for any other purpose?

1           A.    Well, I went up there once or twice just to  
2 hunt deer, that sort of thing, but it was always used  
3 with the association.

4           Q.    During the time that you used the road did  
5 ever hear or see anybody kicked off the road?

6           A.    No.

7           Q.    Or prohibited from using the road?

8           A.    No.

9           Q.    You can see on the map what has been  
10 designated as Ridge Line Road. Is that what you know the  
11 road as?

12          A.    Yes, I'm not sure when it was given that  
13 name, but that's -- I guess the Forest Service gave it  
14 that name.

15          Q.    Have you ever used the Ridge Line Road?

16          A.    Many, many times.

17          Q.    What portions have you used?

18          A.    From Daniels Summit on through to Big Hallow.

19          Q.    How did you use the road?

20          A.    Well, I used it for many different things. I  
21 rid my horse down there lots and lots of times. I've  
22 driven vehicles down there lots of times. I've driven my  
23 snowmobile across there many times. So it's a very many  
24 times.

25          Q.    When did you first use Ridge Line Road?



1 A. When I was 12 years old.

2 Q. What did you use it for?

3 A. I went up there as a, with a group of boy  
4 scouts. We camped between the Big Glade and Burnt  
5 Springs, on the side of the road. There was ten of us  
6 and our scout master. And we went down -- We hiked  
7 from there down passed the Big Glade down to the head of  
8 Thorton Hallow. And we trimmed the bark off of Aspen  
9 Trees for a couple of men that had an accessor plant in  
10 Charleston.

11 Q. And you used the Ridge Line Road for that  
12 purpose?

13 A. Yes, that's right.

14 Q. Did you also use the Thorton Hallow Road  
15 where it's depicted there?

16 A. Yes.

17 Q. Just for the Court's information and the  
18 record, can you indicate on the exhibit where the Big  
19 Glade is?

20 **MR. SWEAT:** Do you have any objection if he  
21 shows me where Big Glade is?

22 **MR. PETERSEN:** No, no objection.

23 **THE WITNESS:** This map shows the road. Let's  
24 see, it's the (INAUDIBLE).

25 Q. **(BY MR. SWEAT)** Right where --

1 A. There's a road that goes up to the peak,  
2 strawberry Peak, and that's where --

3 Q. For the record --

4 A. -- (INAUDIBLE) just off from the peak road  
5 there about a quarter of a mile.

6 Q. For the record the witness is pointing to  
7 where Ridge Line Road and Circle Spring Road come  
8 together on the south end of Ridge Line Road; is that  
9 correct?

10 A. That's right.

11 Q. When did you first use Ridge Line Road from  
12 the top all the way to the bottom?

13 A. You mean from Daniel Summit?

14 Q. From Big Glade to --

15 A. Big Hallow.

16 Q. Big Hallow.

17 **MR. PETERSEN:** Excuse me. Where's Big Hallow  
18 now?

19 **THE COURT:** Why don't you show him -- Why  
20 don't you have him show him on the map.

21 **MR. SWEAT:** Show us on the map where Big  
22 Hallow is.

23 **THE WITNESS:** Big Hallow is where the road  
24 comes out at the gun club.

25 **MR. PETERSEN:** Oh, all the way to the --

1                   **THE WITNESS:** Clear down here. There's Big  
2 Hallow comes out down here at the gun club.

3           Q.     **(BY MR. SWEAT)** Do you recall when you first  
4 used the road that entire length?

5           A.     Well, yes, I do. I can't give you the exact  
6 year, but I can tell you a little bit about it. I had an  
7 international scout. And I hauled salt clear along that  
8 ridge in the back of that scout. It was four-wheel drive  
9 and it's the only way we could get through there was with  
10 that scout. It was two or three places in there where it  
11 was quite rocky and we could use that to get the salt in.  
12 I had the back of it full of salt for the cattle.

13          Q.     You say you don't remember the exact year.  
14 Can you give us an estimate of what, within two or three  
15 years of when it may have been?

16          A.     I don't know that I could give you exact --  
17 I'd have to look back and see how old that scout is cause  
18 I just bought it. And I can't tell you the exact year,  
19 but it's been a lot of years ago. That's all I can tell  
20 you.

21          Q.     Do you recall -- Or what is the first year  
22 you specifically recall the year that you would of used  
23 that road, that you're absolutely sure you used that  
24 road?

25          A.     1940, I was 12 years old.

1 Q. All the way to the bottom?

2 A. Yes.

3 Q. What did you use it for then?

4 A. Well, we walked through it. I rode my horse  
5 through it. Well, I didn't ride my horse through until I  
6 was 14, but I walked through that many times hunting deer  
7 with my dad.

8 Q. When did you last use Ridge Line Road?

9 A. Last year.

10 Q. What portions of it did you use last year?

11 A. I went from Daniels Summit down to the first  
12 gate that was locked. That would be -- I'd have to  
13 tell you -- It's just north of Clides Reservoir. And  
14 that's the first gate that's locked. There's a cattle  
15 guard there and the gate was locked. That's as far as I  
16 went and turned around and came out.

17 Q. When was the last time you used Ridge Line  
18 Road and went clear through off of what or onto what is  
19 now the state property there?

20 A. (INAUDIBLE) state property, the Forest  
21 Service or just state?

22 Q. No, the fishing game.

23 **THE COURT:** (INAUDIBLE) the blue.

24 **MR. SWEAT:** Yeah.

25 **THE COURT:** The blue designated --

1           **MR. PETERSEN:** Do you have a map?

2           **THE WITNESS:** Yeah.

3           **Q. (BY MR. SWEAT)** Do you know whose property is  
4 designated in yellow?

5           **A.** I think that's Mr. Okelberry.

6           **Q.** Do you know whose property is designated in  
7 this --

8           **A.** That's West Daniels' land.

9           **Q.** -- brown color?

10          **A.** Uh-huh.

11          **Q.** Do you know whose property is designated in  
12 this pink?

13          **A.** I think that's fish and game.

14          **Q.** Do you know whose property is designated in  
15 this blue?

16          **A.** Well, that would be state property.

17          **Q.** When was the last time that you rode the  
18 entire length of the Ridge Line Road from the Big Glade  
19 area down to the state fish and game property?

20          **A.** Oh, well, I rode it every year until the  
21 gates were locked, which has been maybe four or five  
22 years ago. Since the game permits were let by Mr.  
23 Okelberry. And I couldn't get through, so I didn't go.

24          **Q.** So you rode it every year up until five years  
25 ago, is that your testimony?

1 A. About that time.

2 Q. And you indicated that you first saw a locked  
3 gate at that time?

4 A. Yes, that's the first time I ever saw a gate  
5 locked.

6 Q. During your time of -- When you first  
7 recall taking salt down and five years ago when you again  
8 used the entire length, you indicated you used it at  
9 least once a year?

10 A. Well, prior to the time the gates were locked  
11 we used it lots of times each year, many times.

12 Q. Prior to the gates being locked were there  
13 gates in place?

14 A. Not in my early years, but later on when the  
15 fences were built there were gates put on them, but they  
16 were never locked. You could just open the gates up,  
17 shut them and go through.

18 Q. Do you ever recall seeing no trespassing  
19 signs along Ridge Line Road?

20 A. No, not until just the last four or five  
21 years.

22 Q. During the 60's did you ever see any other  
23 people use Ridge Line Road?

24 A. Yes, there were lots of people up there.

25 **MR. PETERSEN:** I object, your Honor. Lots of

1 people -- what the heck does that --

2           **THE COURT:** Why don't you -- Why don't you  
3 have him qualify -- Ask him what he means by lots.

4           Q.    **(BY MR. SWEAT)** What does that mean by lots  
5 of people?

6           A.    Campers, people on horse back or people that  
7 were gathering cattle and this sort of people. They were  
8 there all the time. All the time. Even in the  
9 wintertime there were people up there.

10          Q.    Did you go up in the wintertime?

11          A.    Yes.

12          Q.    What did you go up for in the wintertime?

13          A.    Snowmobiling.

14          Q.    When did you first go snowmobiling on Ridge  
15 Line Road?

16          A.    First year I went up there was 1969.

17          Q.    Where there any no trespassing signs when you  
18 went snowmobiling?

19          A.    No.

20          Q.    Where there any locked gates?

21          A.    No.

22          Q.    The gates on Ridge Line Road where they  
23 always kept closed?

24          A.    Not always, but when the cattle -- When  
25 they put our cattle out there we usually put the fences

1 up and we'd shut the gates, but they ever never locked.

2 Q. When you were up snowmobiling was it in  
3 conjunction with accessing your land or was it purely  
4 recreation?

5 A. Purely recreation.

6 Q. Where did you usually snowmobile when you  
7 snowmobiled on Ridge Line Road?

8 A. Well, we went the full length of it.

9 Q. That's down to Big Hallow?

10 A. Clear down to Big Hallow.

11 Q. And how often -- You say you went first in  
12 1969. When did you last go snowmobiling up there?

13 A. Let's see. Probably about in 1980, along in  
14 there someplace. That's the last snowmobile I bought.  
15 So it would be about 1980. I can't be exactly sure, but  
16 I think that's pretty close.

17 Q. When you were snowmobiling up there between  
18 1969 and 1980 did you ever see anyone else snowmobiling  
19 on that road?

20 A. Yes.

21 Q. Did you ever see any no trespassing signs on  
22 that road?

23 A. No.

24 Q. When you first used this road was there any  
25 cattle guards across the road, Ridge Line Road?



1 A. No.

2 Q. Do you know if there are any there now?

3 A. Yes.

4 Q. Where are they?

5 A. Well, there's the -- When you -- When you  
6 take the Ridge Line Road the first one is -- Just as  
7 you -- Well, I don't know how to explain it to you. If  
8 you go up Hobble Creek and turn back towards the north  
9 there's the first cattle guard right there. And the next  
10 cattle guard is over at Shingle Hallow.

11 Q. And these are on Ridge Line Road?

12 A. Yes.

13 Q. Can you point them out on the map on Ridge  
14 Line Road?

15 A. I don't think it shows some of this here.

16 Q. Can you point out any cattle guards that are  
17 on the road depicted on the map as Ridge Line Road?

18 A. There's one cattle guard back here and then  
19 the other way down there. Let's see. Here in Thorton  
20 there's one -- There's one just as Thorton, it would be  
21 right in there someplace.

22 Q. Now, as a property or a shareholder in West  
23 Daniels land did you use Ridge Line Road to access your  
24 property?

25 A. Yes.

1 Q. Have you been able to use it since the gates  
2 were locked?

3 A. I haven't. I don't know if any of the  
4 property owners have been up there or not.

5 Q. Do you have another way you access the West  
6 Daniels land?

7 A. Not down on the lower end, unless we come up  
8 Big Hallow. And we can't come up there any more.

9 Q. You've already indicated that you first used  
10 Thorton Hallow Road when you were 12 years old; is that  
11 correct?

12 A. That's correct.

13 Q. When did you last use Thorton Hallow Road?

14 A. Well, I walked down it -- Do you want --  
15 Are you saying to use it as a vehicle or just walk on it.

16 Q. Tell us both, when you last --

17 **MR. PETERSEN:** Which road are we talking  
18 about?

19 **THE COURT:** Thorton Hallow

20 **MR. SWEAT:** Thorton Hallow?

21 Q. **(BY MR. SWEAT)** When you last --

22 A. Thorton Hallow Road, I walked down it about  
23 four years ago.

24 Q. And when did you last drive a vehicle down  
25 it?

1 A. And the last time I drove a vehicle down  
2 there has been quite a while, it's been at least ten  
3 years ago.

4 Q. And when you used Thorton Hallow Road what  
5 portions of the road did you use?

6 A. The whole thing, the entire road.

7 Q. I mean onto the Forest Service property?

8 A. Yes.

9 Q. Between when you first used this road and 10  
10 years ago when you last used this road, how often per  
11 year would you think you used the road?

12 A. Well, we would use -- After the gates were  
13 locked we quit using it. We couldn't get in there.

14 Q. And that was?

15 A. Year before last, two years ago.

16 Q. Prior to that how often per year would you  
17 use the road?

18 A. Probably about six times a year.

19 Q. What would you use the road for?

20 A. Sometimes recreation, sometimes moving  
21 cattle, sometimes just driving down it, family members  
22 and what not.

23 Q. Did you ever use it in the wintertime?

24 A. The upper part of it, the part that's close  
25 to Ridge Line Road.

1 Q. What would you use it for?

2 A. Snowmobiling.

3 Q. During -- From the time you first used it  
4 until you last used it, let's say the 10 years ago, did  
5 you ever see no trespassing signs on Thorton Hallow Road?

6 A. No, never.

7 Q. Was there ever any gates blocking access to  
8 the road?

9 A. No. Well, the gates were there, but you  
10 could open them.

11 Q. Where were gates at on Thorton Hallow Road?

12 A. Well, the gates right -- I don't know how  
13 to explain that to you. They're right at the upper part  
14 of it. There's a fence right through it, but that's down  
15 on the forest. The gate that was locked is right up on  
16 Ridge Line Road.

17 Q. So once you're through -- Once you're on  
18 the Ridge Line Road then there's not a gate down into  
19 Thorton Hallow?

20 A. Not till you get down in there. Then there's  
21 a drift fence that was put up in there. And they've had  
22 a gate on it.

23 Q. Was that gate ever locked when you --

24 A. No.

25 Q. When you get to the forest is there a fence

1 between Okelberry's property and the forest? As you  
2 come -- As you come kind of southeast on Thorton Hallow  
3 Road and it comes to the forest boundary, is there a  
4 fence there?

5 A. Yes, there's a fence that goes clear across  
6 there.

7 Q. Is there a gate there?

8 A. Yes.

9 Q. Is there a cattle guard there?

10 A. Not on that fence there isn't.

11 Q. During the 60's did you use that road for the  
12 purposes you've already indicated?

13 A. Yes.

14 Q. Did you ever see any other people using the  
15 road?

16 A. Yes.

17 Q. Do you know what they were using the road  
18 for?

19 A. Well, people came in there with tents and for  
20 recreation purposes. We drove cattle through there all  
21 the time.

22 Q. Did they --

23 A. There was a -- We hauled salt down in there  
24 for our cattle.

25 Q. The campers you saw did they camp on the

1 Okelberry property?

2 A. Well, there'd be campers along that whole  
3 Ridge Line Road. So some of them probably were on  
4 Okelberry's property. Some of them would be on the  
5 forest. Some of them are on West Daniels Land  
6 Association. So they -- I've seen campers all the way  
7 through there, many times.

8 Q. Did you ever see anyone prohibited from using  
9 Thorton Hallow Road?

10 A. From the top end you mean?

11 Q. Yeah.

12 A. I haven't seen anybody that was stopped  
13 there, accept since the gates were locked on the upper  
14 Ridge Line Road that's where it stalled them off and you  
15 couldn't go any further.

16 Q. Did you ever get permission to use Thorton  
17 Hallow Road?

18 A. No.

19 Q. Were you required to use Thorton Hallow Road  
20 to get access to West Daniels property?

21 A. Not West Daniels, no. You could go across  
22 the Blaze Trail and get onto it, but it wasn't, it wasn't  
23 called a road. It was Blaze Trail.

24 Q. So if you needed to move cows from West  
25 Daniels up pass the Okelberry's there was a Blaze Trail

1 you could use?

2 A. Yes.

3 Q. Is that typically how you would move the  
4 cows?

5 A. Well, we used the Blaze Trail, but we also  
6 used the Ridge Line Road all the way through.

7 Q. Did you ever get permission to use that road?

8 A. No.

9 Q. You've seen what's been designated as Parker  
10 Canyon Road. Is that your understanding what that roads  
11 called?

12 A. Yes.

13 Q. Have you ever used Parker Canyon Road?

14 A. Yes.

15 Q. When was the first time you used Parker  
16 Canyon Road?

17 A. Probably -- Well, as a boy I used it, but  
18 not to drive a vehicle on, but I walked it with my dad  
19 many times. And after I got to the age of 14 we drove  
20 cattle through there all the time. I mean every summer  
21 we moved cattle through there.

22 Q. Where would you move cattle from to when you  
23 used that road, from what location to what location?

24 A. Well, we moved cattle in going both  
25 directions. In the spring we would move cattle through

1 there. And the Forest Service line is right at Parker  
2 Hallow. And that would be the first zoned area that we  
3 would put our cattle onto. And then in the fall when  
4 we'd come back through we would cross over that?

5 Q. Have you ever used Parker Canyon for  
6 something other than in conjunction with the cattle?

7 A. Yes, I hunted deer in there many times. I  
8 got -- Maybe I shouldn't even tell you, but I won a  
9 prize from a big buck I shot there.

10 Q. Where did you shoot the big buck?

11 A. Right in Parker.

12 Q. On the Forest Service side?

13 A. Yes.

14 Q. You would have used the road on that day?

15 A. Yes.

16 Q. Did you ever see others using the road into  
17 Parker Canyon?

18 A. Yes.

19 Q. Typically what would they be using the road  
20 for?

21 A. Well, most of them used it for recreation  
22 during deer season. There were lots of campers up there  
23 at the head of Parker.

24 **MR. PETERSEN:** Well, your Honor, this  
25 rambling discussion -- I mean, what -- Certainly we



1 can pin that down in some way.

2           **THE COURT:** Well, I want you to ask him how  
3 often he went hunting and how often he -- He's  
4 testified that he used it, this area, from the time he  
5 was 14 until -- Well, you haven't asked him when the  
6 last time he used it.

7           **MR. SWEAT:** I haven't.

8           **Q. (BY MR. SWEAT)** When was the last time you  
9 used Parker Canyon Road?

10          **A.** I walked up Parker Canyon two years ago clear  
11 to the top of the canyon.

12          **Q.** Did you see anybody using Parker Canyon at  
13 that date?

14          **A.** No, the gates were locked and nobody could  
15 get in there.

16          **Q.** Prior to the gates -- Let me start over.  
17 During the 60's did you ever see people use Parker Canyon  
18 Road?

19          **A.** Yes.

20          **Q.** Would they use it to access the forest?

21          **A.** It's the only way they could get onto it.

22          **Q.** Did you ever see people camp on the forest at  
23 Parker Canyon?

24          **A.** Yes.

25          **Q.** Did they use vehicles?

1           A.    Yes.

2           Q.    Did you see that you think every year during  
3 the 60's?

4           A.    Yes.

5           Q.    Did you ever see people use Parker Canyon to  
6 camp on the forest in the 70's?

7           A.    Yes.

8           Q.    Do you think that there were people that  
9 camped on the forest in Parker Canyon every year during  
10 the 70's?

11          A.    Yes.

12          Q.    Do you ever remember a year during the 60's  
13 or 70's they didn't use it?

14          A.    No.

15          Q.    Did you ever see people park, or camp on the  
16 forest in the 70's?

17          A.    Yes.

18          Q.    Was there ever a year or did you ever see  
19 people use or camped at Parker Canyon in the 80's?

20          A.    Yes.

21          Q.    Did they have vehicles?

22          A.    Yes.

23          Q.    Did you ever see people using Parker Canyon  
24 Road in the 80's?

25          A.    Yes.

1 Q. Did you ever see people using Parker Canyon  
2 Road in the 70's?

3 A. Yes.

4 Q. Is there any other way to camp in Parker  
5 Canyon with a vehicle except by using Parker Canyon Road?

6 A. Not unless they walked in. If they used  
7 vehicles that's the only way they could get in.

8 Q. When do you first recall seeing a no  
9 trespassing sign that would of kept someone off of the  
10 Parker Canyon Road?

11 A. It would have been probably five or six years  
12 ago. It's when the gates were locked.

13 Q. Did you see a no trespassing signs prior to  
14 the gates being locked?

15 A. No.

16 Q. The two events kind of happened  
17 simultaneously?

18 A. I guess.

19 Q. Now, you were a shareholder in West Daniels  
20 Land Association; is that correct?

21 A. Yes.

22 Q. Did anybody ever come to you to get  
23 permission to use Parker Canyon Road?

24 A. No.

25 Q. Did anybody ever come to you to get

1 permission to use portions of the Ridge Line Road that  
2 went through West Daniels?

3 A. No.

4 Q. Are you aware of anyone coming to West  
5 Daniels to get permission to use those roads?

6 A. Not that I know of.

7 Q. Do you think you would of heard about it if  
8 some on had?

9 A. I heard about it when they did, but I never  
10 heard about it before that.

11 Q. When they --

12 **MR. PETERSEN:** Heard about -- Shoot, I  
13 missed the answer. You heard about when they came to get  
14 permission?

15 **THE COURT:** Yes.

16 Q. **(BY MR. SWEAT)** Did some one finally come get  
17 permission, come and ask permission?

18 A. They didn't from me cause I, I was a  
19 stockholder, but they did from the resident.

20 Q. When did they ask -- When did they first --

21 A. And I can't tell you the exact time when they  
22 did, but --

23 Q. Can you give us an estimate?

24 A. But the gates were locked. So there was no  
25 permission to be given.

1 Q. So it was after the gates were locked?  
2 A. Right.  
3 Q. Prior to the gates being locked --  
4 A. No permission, they just went through, people  
5 did.  
6 Q. You've seen what's been designated as Maple  
7 Canyon Road; is that correct?  
8 A. Yes.  
9 Q. Have you ever used Maple Canyon Road?  
10 A. Yes.  
11 Q. Do you recall when you first used Maple  
12 Canyon Road?  
13 A. Like I said, I don't recall when we first  
14 used it. It's been too many years ago.  
15 Q. Do you recall when you last used Maple Canyon  
16 Road?  
17 A. Used it about -- Let's see. When did I go  
18 down there? It's probably been 10, 12 years ago that I  
19 went through it?  
20 Q. How did you use it? Did you drive a vehicle?  
21 Did you ride a horse?  
22 A. Drove a vehicle, international scout.  
23 Q. You don't remember when you first used the  
24 road. Do you think you used the road during the 60's?  
25 A. We probably did, but I can't say for sure.

1 Q. Do you think you used it during the 70's?

2 A. Same answer.

3 Q. Did you use this road as much as you used the  
4 other roads up there?

5 A. No, not as much as we did the Ridge Line.

6 Q. When you used the road do you ever remember  
7 any no trespassing signs on the road?

8 A. No.

9 Q. Do you remember any locked gates on the road?

10 A. No.

11 Q. Do you remember any gates on the road?

12 A. Just at the very bottom of the hill.

13 Q. What kind of gate was it?

14 A. Just a wire gate.

15 Q. Was there any no trespassing sign on the  
16 gate?

17 A. No.

18 Q. Was there anything in the vicinity indicating  
19 no trespassing for the road?

20 A. No.

21 **MR. SWEAT:** I have no further questions at  
22 this time, your Honor.

23 **THE COURT:** Mr. Petersen, cross?

24 **MR. PETERSEN:** Do you want -- My cross is  
25 going to go for a while. If you want to --

1           **THE COURT:** Well, how long do you expect?

2           **MR. PETERSEN:** Well, it will go into the  
3 lunch hour. I don't know if the Court wanted to break  
4 now or --

5           **THE COURT:** Well, let's -- Okay. We'll  
6 take a noon break. We'll have -- We'll resemble again  
7 at 1:00.

8                           (The noon recess was taken.)

9

10           **THE COURT:** We'll return to the case of  
11 Wasatch County verses Okelberry. Mr. Besendorfer, will  
12 you come and return to the witness stand. You may  
13 proceed, Mr. Petersen.

14           **MR. PETERSEN:** Thank you, your Honor.

15                           **CROSS-EXAMINATION**

16 **BY MR. PETERSEN:**

17           Q. Mr. Besendorfer, you indicated that the  
18 Circle Springs Road -- I'm looking at Exhibit 2. The  
19 one in green coming down here, that's the road that you  
20 would take salt down to cattle?

21           A. I don't think that's the right road. You got  
22 the wrong road.

23           Q. I think it was your testimony, was it not,  
24 that you went down Circle Springs Road to take salt to  
25 cattle?

1 A. Went up Circle Spring Road to take salt, not  
2 down it, up.

3 Q. How would you go up it?

4 A. Well, we went in over to Wallsberg and the  
5 road comes out right down in Wallsberg.

6 Q. That's Maple Canyon, is it not?

7 A. Well, that's the road that goes on it, yeah.

8 Q. As I understand your testimony before was  
9 that the Circle Springs Road, you went down that road to  
10 take salt to cattle?

11 A. No, we went up the road to take salt to  
12 cattle, not down.

13 Q. Well, could you step over to the exhibit and  
14 explain to me how you go up to Circle Springs Road?

15 A. Start right here and this is Wallsberg, up  
16 around there, and over onto the Ridge Road. Then we  
17 follow down that.

18 Q. This is Circle Springs down here?

19 A. Well, that's -- Yeah, that's probably part  
20 of it. This is Maple Spring right here.

21 Q. Maple Canyon. You can return to the witness  
22 stand. My notes indicate, Mr. Besendorfer, that your  
23 testimony was that you used the Circle Springs Road to  
24 take salt to cattle, would that be an error then?

25 A. Well, we use Maple Creek most the time.



1 Q. Okay.

2 A. The Circle Spring Road is the one that maybe  
3 I was confused on, but the other one I'm not.

4 Q. Okay. Well, it's a fact, is it not, that the  
5 permits that were owned by shareholders of West Daniels  
6 Cattle, those permits were not south of this property in  
7 question, but was east, isn't that true?

8 A. That's true.

9 Q. So there would be no need for you to take  
10 salt and cattle down Circle Springs Road cause there was  
11 no permits over there owned by any of the West Daniels  
12 shareholders?

13 A. Not at that time.

14 Q. So could we not say then, Mr. Besendorfer,  
15 that in respect to your testimony as to Circle Springs  
16 Road, that you never took salt down that road for the  
17 cattle?

18 A. Yeah, we never did take salt down, we always  
19 took it up.

20 Q. No, no, no. I'm not talking about Maple  
21 Canyon, I'm talking about Circle Springs?

22 A. Well, if we took salt up there I used that  
23 road, but I can't tell you exactly when.

24 Q. Once again, I'm talking about this green  
25 road, marked on Exhibit 2, that's called Circle Springs

1 road?

2 A. Okay. Then I'll backup and say Maple Creek  
3 Road. We always used that one all the time. We use  
4 Circle Spring Road occasionally, but not like we did  
5 Maple Spring.

6 Q. But my question is though, when you testified  
7 that you took salt down Circle Springs Road to cattle  
8 that would be incorrect, would it not?

9 A. Yes, cause we never went down, we always went  
10 up.

11 Q. So you were miss -- You were not correct in  
12 using the Circle Springs Road, you meant the Maple Creek  
13 Road?

14 A. Well, we used them both, but we didn't use  
15 the Circle Spring Road as much as we did Maple Creek  
16 Road.

17 Q. Okay. Now, you said that you went down  
18 Circle Springs Road two or three times a year to haul  
19 salt, but we concluded that would not be correct then?

20 A. We didn't go down. If I said down I said it  
21 wrong, cause we went up it.

22 Q. No, no, no. I don't want to be labor this  
23 point.

24 **MR. PETERSEN:** And I think the Court  
25 understands where we're coming from?

1                   **THE COURT:** Go to the next.

2                   Q.     **(BY MR. PETERSEN)** We are clear, are we not,  
3 that going up Circle Springs Road there were no permits  
4 that was owned by West Daniels shareholders?

5                   A.     That's correct.

6                   Q.     So to be hauling salt you'd be using the Main  
7 Canyon Road, would you not, Ridge Line Road?

8                   A.     Sometimes, not all the time.

9                   Q.     Okay. Now, when you said you testified --  
10 When you testified that you used the Circle Springs Road  
11 two or three times a year, that would be incorrect,  
12 because we've now learned that you didn't use that road  
13 to haul salt?

14                  A.     We didn't use it to haul salt all the time.  
15 We did once in a while. It depended on the weather in  
16 the springtime when we used it. But we used that, that  
17 road a lot.

18                  Q.     I'm talking about the Circle Springs, not the  
19 Maple Creek

20                  A.     I'm talking about Circle Springs. Maple  
21 Creek we used more, it was a better road.

22                  Q.     Circle Springs, you never used that road in  
23 connection with any cattle that you owned?

24                  A.     Not only to haul salt up it.

25                  Q.     No. Circle Springs, the road in red, you

1 never used that --

2 A. That's green, Maple Spring is the other one.  
3 Maple Creek is the red one.

4 Q. Okay. The one in green, you never used that  
5 road in connection with any cattle that you owned, did  
6 you?

7 A. I don't quite understand your question. We  
8 used the road to haul salt up there to get onto the Ridge  
9 Line Road, but we didn't use that road as often as we did  
10 the Maple Creek Road.

11 Q. Mr. Besendorfer, we're making a record here.

12 **THE COURT:** Well, Mr. Petersen, you've asked  
13 him four times. Clearly the Court can see there's a  
14 portion of Circle Creek Road that connects onto the Ridge  
15 Line Road. If you want -- He might not of gone down  
16 the Circle Creek Road, but --

17 **MR. PETERSEN:** I'm just talking, your Honor,  
18 about the Okelberry property. He would not of ever used  
19 the Circle Springs Road on the Okelberry property with  
20 his cattle.

21 **THE COURT:** Well, he can use a portion of it,  
22 that's his testimony, but you can cross-examine him  
23 again.

24 **MR. PETERSEN:** Well, I don't -- I don't see  
25 where there would be any portion. The Circle Springs

1 Road comes over here and connects to Ridge Line Road, but  
2 if --

3 **THE COURT:** Well, as you -- Look at this  
4 map that he used (INAUDIBLE). There's a very small  
5 portion before it kind of makes a U-turn and goes back  
6 down, going south.

7 **MR. PETERSEN:** Well, that doesn't line up  
8 with this Exhibit 2. That's not designated as the Circle  
9 Springs Road.

10 **MR. SWEAT:** It is in our complaint. It's  
11 designated as parts of Ridge Line Road, but it didn't  
12 (INAUDIBLE).

13 **MR. PETERSEN:** It looks like you (INAUDIBLE)  
14 maps here.

15 **THE COURT:** (INAUDIBLE) I can recall from  
16 our, that, from our, just looking at it on the ground  
17 that that road goes and then, and then connects onto  
18 another road and then it goes on down (INAUDIBLE).

19 **MR. PETERSEN:** Just --

20 **THE COURT:** Ask your next question.

21 **MR. PETERSEN:** Okay.

22 Q. **(BY MR. PETERSEN)** Okay. Just for the  
23 record, Mr. Besendorfer, you never used what is called  
24 the Ridge Line Road to access cattle on Forest Service  
25 property?

1 A. Now, how did you say that? I missed --

2 Q. Okay. Let me --

3 **THE COURT:** Are you talking about Ridge Line  
4 now?

5 **MR. PETERSEN:** I'm talking about Ridge Line,  
6 excuse me.

7 Q. **(BY MR. PETERSEN)** You never used the --  
8 No, I'm talking about Circle Springs. You never used the  
9 Circle Springs Road to access Forest Service property for  
10 your cattle?

11 A. Well, yes, we did. We used a part of it,  
12 yes.

13 Q. Well, no, I'm talking about the very end of  
14 it when it goes on to Forest Service property?

15 A. Well, that's how we got onto the Forest  
16 Service property was through the use of that road. It  
17 came off of Forest Service property, then it went through  
18 Mr. Okelberry's, then it came back onto Forest Service  
19 property.

20 Q. Do you see where I'm pointing my --

21 A. Yes.

22 **THE COURT:** Why don't you go down to the map,  
23 Mr. Besendorfer, and testify or even point out on the map  
24 where the area of the road he's talking about.

25 Q. **(BY MR. PETERSEN)** Let me ask you this. Do

1 you see where my pen is pointing like this? Did you ever  
2 go down to that point to service any of your cattle?

3 A. No, we didn't go down that way ever to  
4 service the cattle cause our cattle was back the other  
5 way.

6 Q. Right, right. So there was no need to use  
7 this road going down to the Forest Service property was  
8 there?

9 A. For salt, yes.

10 Q. Right where my pen is pointing, you never did  
11 put salt down there?

12 A. No, not there we didn't.

13 Q. The salt would be over this way?

14 A. Yes, and on down and it came up this way and  
15 it was all in this area.

16 Q. Now, we concluded, Mr. Besendorfer, that you  
17 were not traveling this road down to the Forest Service  
18 property in connection with the use of your cattle?

19 A. Well, I guess that would be pretty near being  
20 correct. There might be times when we used it, but --

21 Q. So when you said that you traveled it two or  
22 three times a year that would be incorrect as well, would  
23 it not?

24 A. No, because I've traveled it a lot of times.  
25 Not every year, but most every year I went down the

1 Circle Springs Road clear down and backup several times,  
2 but we didn't use it in connection with some of the  
3 salting procedures that we had for our cattle.

4 Q. Now, why would you need -- You said you  
5 didn't travel it every year, but almost every year?

6 A. Yes.

7 Q. Now, why would you go down there if you had  
8 no need for your cattle?

9 A. Well, because I was just a guy that went up  
10 and enjoyed the Forest Service and those roads. And I  
11 rode them a lot, all over. Not just that one, but many  
12 others.

13 Q. Now, when you said you traveled it two or  
14 three times a year though that would be incorrect  
15 because --

16 A. No, I don't think so.

17 Q. -- this would only be for recreation?

18 A. Well, it would be for recreation mostly, but  
19 sometimes we used it for the cattle salting and other  
20 stuff like that too. (INAUDIBLE).

21 Q. My notes indicate, Mr. Besendorfer, your  
22 testimony was you used it two or three times a year.  
23 Part of those two to three times a year was to haul salt  
24 to cattle.

25 A. We hauled salt up there, but I couldn't tell



1 you. I think it was -- It could of been two or three  
2 times some year and maybe another year not at all. I  
3 took it up there with an international scout. And I  
4 found out a bunch of times how old my scout was.

5 Q. Last time you traveled that road was ten  
6 years ago.

7 A. Probably.

8 Q. That's what your testimony was.

9 A. That's about right.

10 Q. How would you describe that road?

11 A. Not a very good road, but it was usable.

12 Q. Not a very good road. Does that mean it was  
13 rocky?

14 A. Yes, in places it was rocky.

15 Q. Was it steep?

16 A. In places quite steep.

17 Q. Did you ever have to remove any trees from  
18 the road?

19 A. Yes.

20 Q. Did that happen frequently?

21 A. Well, it depended on the time year. If I  
22 went down that early in the spring, yes. We moved logs  
23 and trees off of it that had fallen during the winter  
24 months.

25 Q. How did you remove them?

1           A.     Saws.

2           Q.     Take a chain saw?

3           A.     No, crosscut, two handed crosscut saw. In  
4 those days they didn't have chain saws.

5           Q.     Would you have to do that every year you'd go  
6 down that road?

7           A.     Almost every year we ever went through there  
8 we removed a few trees. Sometimes we could move them  
9 just by hand. Sometimes I hooked my scout onto them and  
10 pulled them out with a chain.

11          Q.     Mr. Besendorfer, let's me show you what's  
12 been marked as Exhibit 6 and ask you if you can identify  
13 that?

14          A.     I think this is at the head -- I can't tell  
15 you the name of those roads that come together up there  
16 at the head of Thorton.

17          Q.     That's not around the Circle Springs Road?

18          A.     It isn't since I've been there in ten years.

19          Q.     Show you what's been marked as Exhibit 7 and  
20 ask you if you can identify that?

21          A.     Well, I guess that could be any number of  
22 places, but I can't tell you just by looking at two poles  
23 where it's at.

24          Q.     Okay. And Exhibit 8, can you identify that?

25          A.     Yeah, this is a portion of that road down

1 there.

2 Q. Circle Springs?

3 A. I think that's where it's at. I'm not  
4 positive, but I think. Just I can't get enough view of  
5 everything, but --

6 Q. The keep out sign, does that look familiar?

7 A. Never did see it.

8 Q. Never?

9 A. Nope.

10 Q. Now, you said that you traveled that road,  
11 we're talking about Circle Springs, a couple sometimes a  
12 year in the 1970's?

13 A. And I think it's before that, cause I went  
14 back and checked the age of my International Scout. And  
15 I bought the Scout in 1964. And so we traveled it  
16 several times after that.

17 Q. Tell me the exact date in 1964 when you went  
18 down that road?

19 A. Oh, I couldn't tell you the exact date. It  
20 was in the early spring.

21 Q. Are you sure?

22 A. Well, if my memory serves me. That's the  
23 best I could tell you.

24 Q. Did you make note of it anywhere or write  
25 anything down?

1 A. No.

2 Q. What time of year would that have been?

3 A. In the spring.

4 Q. What time?

5 A. Oh, probably about middle May, towards the  
6 end of May, some where around there.

7 Q. End of May, 1964?

8 A. Probably some where in there.

9 Q. But you can't give us an exact date?

10 A. No, I can't.

11 Q. Who was with you?

12 A. My dad.

13 Q. What time of day was it?

14 A. We started up there probably about 10:00 in  
15 the morning. After we loaded up with salt and started up  
16 there about 10:00 in the morning. And we got up to --  
17 We got up to the Ridge Road probably 11, 11:30, some  
18 where in there.

19 Q. Well, now, was this 1964, the day you're  
20 telling about, for the purpose of taking salt to cattle?

21 A. That particular time it was.

22 Q. Now, there were no cattle though on the  
23 Forest Service in 1964 at the end of Circle Springs Road?

24 A. That's right, but the cattle were up further.  
25 They were -- We had to go up that way to get down to

1 where we could take the salt to.

2 Q. Once again, why would you travel to the end  
3 of Circle Springs Road onto the Forest Service property  
4 to deliver salt?

5 A. Well, when I took the salt up, the reason I  
6 took it is because they couldn't get up there with a  
7 two-wheel drive truck. And so our cattle association  
8 asked me if I'd take it up with the Scout, it was  
9 four-wheel drive. So I took -- I think I took -- One  
10 spring I took three loads up there. And we dumped them  
11 out on the Ridge Line Road. And then a guy by the name  
12 of Duke Johnson went up there with his pack horse and  
13 scattered that salt.

14 Q. Okay. But we're talking about the spring of  
15 1964.

16 A. Well --

17 Q. You said you went down Circle Springs Road.  
18 There would be no need to go down that to carry salt,  
19 cause you didn't have any cattle down there?

20 A. No, but we put salt out early in the spring  
21 and then it was delivered and spread out during the  
22 summer months. That was the need for it.

23 Q. But the salt, you just said, was up on the  
24 Ridge Line Road?

25 A. Well, that's where we scattered it up there,

1 but we went up -- The only way we could get to Ridge  
2 Line Road at that particular time was to go up that other  
3 road.

4 Q. And you're back on Maple Creek, Maple Canyon  
5 Road?

6 A. At that time, yes, two of those.

7 Q. Well, I'm down here on the Circle Springs?

8 A. I'm talking about Circle Spring too.

9 Q. Well, there's no need in 1964, when you say  
10 you went up with your father, to take salt, there would  
11 be no need to go down Circle Springs cause you didn't  
12 have any cattle down in Circle Springs?

13 A. We always had cattle over through that area,  
14 after, during the summer months. We didn't in the  
15 spring, no, but in the summer months we always had cattle  
16 through there.

17 Q. Okay. When was the next time you went in  
18 1964?

19 A. What do you mean the next time?

20 Q. The next time you went down to Circle Springs  
21 Road?

22 A. Well, I can't tell you the exact date.

23 Q. Are you sure you went?

24 A. I guess, as near as I sit here I remember it.

25 Q. Tell me when you went in 1965.

1           A.    I don't think we went up Circle Springs Road  
2 in '65.  I think we went up Hearts Gravel in '65.

3           Q.    So we can take '65 out of it.  What about  
4 '66?

5           A.    Well, I can't -- I couldn't tell you exact  
6 years every year that we hauled salt up there cause we've  
7 hauled it so much and so many times.

8           Q.    Well, basically what you're testifying to are  
9 times that you delivered salt to cattle?

10          A.    Well, delivered it up on the hill so that our  
11 riders could scatter the salt.  And they scattered it  
12 clear up to the head of Boomer clear up to, clear across  
13 Buck Springs, Murdock and clear through that country.

14          Q.    Now, Mr. Okelberry is a shareholder in West  
15 Daniels, is he not?

16          A.    I guess.

17          Q.    And Mr. Okelberry gave permission to other  
18 shareholders to cross over his property, did he not?

19          A.    Not then.

20          Q.    He didn't give permission?

21          A.    No, cause we -- There was nothing to stop  
22 you, you just went through it.

23          Q.    Well, there were gates, were there not?

24          A.    I don't recall that there were ever any  
25 fences when I was, when I went through there the first

1 few times. Maybe a lay down fence and some of them were  
2 not even up at that time of year.

3 Q. Well, now, looking at this area from the  
4 Forest Service property onto Mr. Okelberry's property has  
5 there not always been a fence there?

6 A. No, not always.

7 Q. Not always a fence?

8 A. Not always.

9 Q. Hasn't there always been a gate there?

10 A. No, there were never any fences there when I  
11 was young. They put the fences up later in years.

12 Q. So there was no fence separating the private  
13 property from the Forest Service property?

14 A. That's correct.

15 Q. You're absolutely sure on that?

16 A. Well, I remember it. That's the way it was.  
17 I remember when they put those fences in there. I was  
18 just a young kid. And I helped them put a lot of them  
19 up.

20 Q. There was no gate then over here on, coming  
21 from the Forest Service property onto the Circle Springs  
22 Road?

23 A. That's correct.

24 Q. There's no fence in that area either?

25 A. No fence, not at first. It was later, but



1 not at first.

2 Q. Well, when's later?

3 A. Well, maybe -- See, the sheep and the  
4 cattle ran together there for years and years when I was  
5 a young kid. Then they started putting fences up. And  
6 those fences probably put up in the 50's.

7 Q. And did you have any business up there in the  
8 50's? Did you have cattle up there?

9 A. Yes, I did. My dad did and I roped for him  
10 all the time.

11 Q. Is that part of the West Daniel's property?

12 A. Yes, part of it and the Forest Service.

13 Q. And on this private property did you have any  
14 business up on the private property?

15 A. Which private property are you talking about?

16 Q. Well, I'm talking about the Okelberry  
17 property.

18 A. Well, probably had no business on it, but we  
19 were there.

20 Q. Now, tell me when you used this Circle  
21 Springs Road in the 1970's?

22 A. Well, it would be about the same time of year  
23 every year as we used it to haul salt and whatever up  
24 there. I can't tell you exact dates.

25 Q. The same for the 80's then?

1 A. About the same.

2 Q. So really the reason why you're up there  
3 using the Circle Springs Road is for the salt, to get the  
4 salt to the cattle?

5 A. That's usually what it was for.

6 Q. You said that you saw people up there. Give  
7 me a date when you saw people, other than yourself, in  
8 the 60's, 70's or 80's using that Circle Springs Road?

9 A. Well, when I went through there you would  
10 almost always see a camp and people doing recreational  
11 things up there along that road, almost always.

12 Q. Now, we're talking about the Glade, are you  
13 not, down there --

14 A. No, I'm talking about clear along that Ridge  
15 Line Road and ahead of Circle Spring and Maple Creek,  
16 there were always camps along there.

17 Q. I haven't even gotten to that yet. I'm  
18 talking about when you saw people camping on Forest  
19 Service property that comes off this Circle Springs Road.  
20 In the 60's, the 70's or the 80's, when did you ever see  
21 people camping there?

22 A. It would be in June.

23 Q. Give me a date?

24 A. Oh, I can't give you an exact date.

25 Q. Can you give me a year?

1           A.    Well, it was up there almost every year.  So  
2 it would have to be almost every year.

3           Q.    So every time you took salt up there  --  We  
4 concluded you didn't take salt to the end of Circle  
5 Springs Road?

6           A.    Right.

7           Q.    Did you see people camping there?

8           A.    Not at the end of the road, no.

9           Q.    Where were they camping?

10          A.    Where it joins onto these other roads we did.  
11 Up on the Forest Service there.

12          Q.    Well, we're black in the Glade area, are we  
13 not?

14          A.    No, no, you're off the Glade.

15          Q.    Well, on Mr. Okelberry's property?

16          A.    No, we were  --  The Forest Service  --  The  
17 Circle Spring Road runs along part of forest property  
18 there.  Now, I  --  Right in there.  Yeah.

19          Q.    Okay.  Well, that's Forest Service property.  
20 That's where you see people camping?

21          A.    Yes.  And along the Ridge Road all the way  
22 through.

23          Q.    Okay.  What I'm  --  I've got my finger  
24 pointed here.  This is the east of the Okelberry  
25 property.  That's where you see the campers?

1           A.    Yes.

2           Q.    Now, on Ridge Line Road, you said that you  
3 have gone from Daniels to Big Hallow?

4           A.    Right.

5           Q.    So that would be from what is called Glade,  
6 would that be true?

7           A.    Well, the Glade is just about middle of it.

8           Q.    Right in here?

9           A.    Uh-huh.

10          Q.    All the way over  --

11          A.    To Big Hallow.

12          Q.    --  to the gun club?

13          A.    Uh-huh.

14          Q.    You said you've traveled that on horse?

15          A.    I've traveled on horse.  I've traveled on  
16 snowmobile.

17          Q.    Okay.  Okay.  Let's go back.  When was the  
18 last time you traveled on horse?

19          A.    Oh, about 15 years ago on a horse.

20          Q.    Now, you had to go through gates, did you  
21 not?

22          A.    Not in that area we didn't.

23          Q.    You didn't have to open any gates here as you  
24 get off the Forest Service property onto the Okelberry  
25 property?

1           A.    No.  Last time I went through there on my  
2 horse there weren't any gates up.  There were gates, but  
3 they were not up.

4           Q.    They were not up.  So you just would ride  
5 your horse (INAUDIBLE).  Were there any gates as you left  
6 the Okelberry property onto the West Daniels property?

7           A.    No, there were gates, but they were not up.

8           Q.    Tell me when you did that.

9           A.    Last time I went through there was about 15  
10 years ago.

11          Q.    What time a year was it?

12          A.    It was in about the 20th of September.

13          Q.    And for what purpose did you do that?

14          A.    Moving cattle.

15          Q.    So you were not just on the Ridge Line Road  
16 you were all over the place, were you not?

17          A.    No, we drove the cattle right on the Ridge  
18 Line Road.  In fact, we followed that all the way through  
19 clear out to the Strawberry pasture.

20          Q.    Now, when you did this 15 years ago you  
21 weren't in a vehicle, you were on a horse?

22          A.    I was on a horse that time, but there were  
23 vehicles with us that followed along with us, along the  
24 road.

25          Q.    How is that Ridge Line Road?  Is it a good

1 road?

2 A. We called it the CC Road. There's nobody  
3 around here that remembers that but me. And they  
4 improved that road. It was always a road, but it was  
5 never improved until the CCC, civil conservation core  
6 came in there and improved that road. And then there  
7 were a lot of people that started to use it. And that's  
8 when I was a very young boy.

9 Q. Well, we're talking about 15 years ago, Mr.  
10 Besendorfer --

11 A. Well --

12 Q. -- when you went up that road?

13 A. This -- The --

14 Q. You say there were some vehicles that were  
15 with you.

16 A. Yes.

17 Q. Whose vehicle was with you 15 years ago?

18 A. Duke Johnson's.

19 Q. What kind of vehicle was it?

20 A. It was a Chevrolet truck.

21 Q. Four-wheel drive?

22 A. No.

23 Q. You could drive that road without four-wheel  
24 drive?

25 A. Well, that part of it he could, yes.

1 Q. Now, did he drive all the way from the Glade  
2 over to the gun club?

3 A. No.

4 Q. He couldn't do that because you can't  
5 traverse that without four-wheel drive or more than that,  
6 would that be true?

7 A. Well, some of them did. I never did, but I  
8 took my four-wheel drive vehicle through it several  
9 times.

10 Q. Okay. You tell me 15 years ago you said you  
11 rode your horse over there and there were vehicles that  
12 made that. Which vehicle -- Oh, give me the name of a  
13 person that drove a vehicle 15 years ago over that road.

14 A. Now, where are you talking from? Which parts  
15 of the road?

16 Q. I'm talking about from the Glade all the way  
17 over to the gun club?

18 A. I --

19 **THE COURT:** Well, he's -- He's told you  
20 when he did it on his horse he didn't go all that way.  
21 He just drove cattle. Are you asking him --

22 **MR. PETERSEN:** No, I thought he said he went  
23 the whole way.

24 **THE WITNESS:** I did, on my Scout,  
25 International Scout, but that wasn't the year. That was

1 15 --

2 **MR. PETERSEN:** Maybe I misunderstood.

3 **THE COURT:** You asked him -- We got this 15  
4 years ago. You asked him when the last time he rode on a  
5 horse on the Ridge Line Road and he said 15 years ago  
6 driving cattle. But that was not -- The question was  
7 not the last time he rode a horse all the way through it.

8 **MR. PETERSEN:** I'm sorry, your Honor.

9 Q. **(BY MR. PETERSEN)** Tell me the last time you  
10 rode a horse all the way.

11 A. I -- I can't remember when I rode a horse  
12 clear from the Daniels Summit to the Big Hallow. I had  
13 my knees replaced and I couldn't ride horse any more.

14 Q. Well, I misunderstood then. 15 years ago  
15 there were not other vehicles that you saw going all the  
16 way over there?

17 A. Oh, yes, I saw vehicles go all the way over.

18 Q. 15 years ago?

19 A. Yes.

20 Q. Tell me the name of the person that drove the  
21 vehicle over there?

22 A. Well, there were a lot of people that went  
23 through there, recreational people.

24 Q. Okay. Give me the name of one person.

25 A. Well, I don't -- My son for one, Jeffery



1 Besendorfer.

2 Q. 15 years ago drove his vehicle over?

3 A. Yes.

4 Q. Was it a four-wheel drive vehicle?

5 A. Yes.

6 Q. Did you see him drive it?

7 A. Well, I saw him come out of Big Hallow. I  
8 was down there to meet him.

9 Q. No gates blocking it off?

10 A. No gates.

11 Q. Is it very steep in that area?

12 A. Places, there are some real steep places,  
13 couple places really steep and rocky.

14 Q. Show you what's been marked as Exhibit 9 and  
15 ask you if you can identify that?

16 A. I think this is just up out of White Pole  
17 just as you go over the top of the ridge.

18 Q. That would be the Ridge Line Road?

19 A. No -- Well, it would be a part of it, yeah.

20 Q. Is that very steep in that area?

21 A. Yeah, it's pretty steep.

22 Q. You can do that without having a four-wheel  
23 drive vehicle?

24 A. Some of them did, but I never did. Deer  
25 hunters went over there all the time.

1 Q. Give me the date that you saw deer hunters  
2 driving up over Ridge Line Road on, where this picture --

3 A. Oh, I can't give you a date. It would be  
4 during deer season. It would have been in October any  
5 time after the 20th of October, between that and the last  
6 of October. That's when we hunted in there almost every  
7 day.

8 Q. You, yourself, drove that in your  
9 International Scout?

10 A. Right.

11 Q. How many times?

12 A. I don't know how many times, several.

13 Q. Two?

14 A. More than that.

15 Q. Three?

16 A. I'd guess probably 15 times.

17 Q. 15 times you drove that road?

18 A. A lot of times. Several times a year. I did  
19 it ever since I owned a Scout.

20 Q. Why would you drive it 15 times?

21 A. When?

22 Q. Why?

23 A. Why? Just for the fun of it. We went  
24 through there looking for deer. We went through there  
25 for recreational purposes. We drove that -- I mean, I

1 lived in that area. So that was the reason that we went  
2 through it. We just enjoyed being there. And we did it  
3 several times, many times.

4 Q. Okay. Now, tell me again, when was the last  
5 time you drove your Scout over that road?

6 A. I can't tell you the exact time. I think we  
7 drove that, let's see, 1970 -- I can't give you the  
8 exact year, but it was a 1970 International Scout V-8 and  
9 we drove it up through there. And I had my dad and I had  
10 my two sons with me.

11 Q. Okay. Give me --

12 A. And we picnicked up on the top there after we  
13 went up on White Pole.

14 Q. Give me the last time you drove your  
15 International Scout?

16 A. Last time I drove it?

17 Q. Over that road, yeah.

18 A. I'd say about 1975, '74. It would be in the  
19 middle of the summer.

20 Q. Okay. So approximately 30 years ago is the  
21 last time you went over that road with your Scout?

22 A. With the Scout, yes.

23 Q. Since that time you've been over it with a  
24 horse?

25 A. Not with a horse, but with snowmobiles lots

1 of times.

2 Q. Okay. So other than the snowmobile the last  
3 time you drove it it was '74, '75?

4 A. About then. It's as near as I could put it  
5 down. I didn't write it down or anything, I just did it.

6 Q. And when you said you drove that with a  
7 snowmobile, when is the last time you did that?

8 A. I bought a 1969 Alpine Snowmobile Bombadier  
9 640E and I drove that up there. I bought it in January.  
10 And I drove it across there about the 15th of February  
11 the first time I went over with that snowmobile. And I  
12 drove it several years after that.

13 Q. Okay. You're telling me the first time, when  
14 was it, 15th of February when?

15 A. 1969.

16 Q. 1969. And then you drove that again several  
17 times later?

18 A. Several times later.

19 Q. So we got two or three times more then you  
20 went on it?

21 A. Oh, more than that. We drove it two, three  
22 times a year for at least ten years.

23 Q. Now, when you're on a snowmobile how deep was  
24 the snow up there?

25 A. If you're up around Strawberry Peak it's six,

1 seven feet deep, eight feet. I marked it on trees in  
2 several areas. Down there it wasn't that deep. It may  
3 be three feet deep, maybe up as high as four in some  
4 drift areas.

5 Q. How would you know you were on Ridge Line  
6 Road?

7 A. Cause you can see it right through there.  
8 You can see where the Aspen and the roads have been  
9 marked. And you can see them. Sometimes we would get  
10 off the road, but most often we were on the road.

11 Q. Well, wouldn't you, when you're up in an area  
12 like that, go out in the open fields and drive around?

13 A. There aren't many open -- There aren't any  
14 open fields up there. You get out in the Aspen sometimes  
15 and back off the road and there are some areas where  
16 there's not quite so many. But we generally stayed right  
17 on the road. The only open place I can think of down  
18 through there that was fairly open is where we had the  
19 oil well, and that's long gone.

20 Q. When you went up on there did you ever  
21 trespass on Mr. Okelberry's property?

22 A. Not there we didn't.

23 Q. Where did you trespass?

24 A. Cause that wasn't his land. We went down the  
25 road -- We came -- When we came through there --

1 Q. Just answer my question. You said you didn't  
2 trespass on his property.

3 A. Well, we went across -- We stayed on the  
4 Ridge Line Road. And I guess that went through his  
5 property.

6 Q. You never got off it? Never trespassed on  
7 his property?

8 A. No, we stayed on there, Ridge Line Road most  
9 all the way down there.

10 **MR. SWEAT:** Your Honor, I'm going to object  
11 to his using the word trespass until he shows that there  
12 was trespassing signs in place.

13 **MR. PETERSEN:** It's cross-examination, your  
14 Honor.

15 **THE COURT:** Well, mis-characterization --  
16 You asked him if he was on Okelberry's property or if he  
17 ever got off the road on Okelberry's property, but that's  
18 kind of a legal conclusion whether he was trespassing or  
19 not.

20 Q. **(BY MR. PETERSEN)** Did you ever get off Mr.  
21 Okelberry's property?

22 A. Did we get off from it?

23 Q. Uh-huh.

24 A. Yes, we were always off from it, into the  
25 Forest Service and all those areas down there we went on,

1 but there were no trespassing signs. So I guess we  
2 wouldn't ever know if we were trespassing or not.

3 Q. Now, looking at Exhibit No. 8 could that no  
4 trespassing sign been covered up with snow when you were  
5 up there with a snowmobile?

6 A. I don't think it would have been covered up  
7 with snow. It might have been close to it, but --

8 Q. Would you go over the fences?

9 A. Fences were let down.

10 Q. Did you go over gates?

11 A. They were let -- They were -- Most all  
12 those fences up there were let fences. There were only  
13 two electric fences.

14 Q. Are you aware of any locked gates over on the  
15 fish and game side of that Ridge Line Road?

16 A. Any what?

17 Q. Locked gates?

18 A. Locked?

19 Q. Yes.

20 A. No, not on the fish and game. At Big Hallow  
21 after a while they locked that one gate, but they opened  
22 it up later.

23 Q. Now, are you aware of a gate as you begin  
24 that road, Ridge Line Road, just by the gun club?

25 A. Yes, there's a gate there. There didn't --

1 There wasn't a gate there until later years.

2 Q. Well, we're speaking about right now. Is  
3 there a gate there right now?

4 A. Well, I haven't been up there this year, so I  
5 don't know if there's one there or not.

6 Q. Was there one last year?

7 A. There wasn't the last year. You could go  
8 through it. My son went through it with his snowmobile  
9 three to four times, up this forest oil well.

10 Q. Would it surprise you to learn that that gate  
11 was there and locked as of June 1st this year?

12 A. It probably was. I don't know.

13 Q. When you go up the road a little bit further  
14 there's another gate, isn't there?

15 A. That's right.

16 Q. Do you know if they keep that gate locked or  
17 not?

18 A. I don't know now whether they do or not. It  
19 wasn't there then.

20 Q. Are you aware of any signs in that area that  
21 say no motorized vehicles?

22 A. I think they put one up last year. I'm not  
23 sure, but might of have done. I don't know.

24 Q. Prior to last year are you aware of any signs  
25 that said no motorized vehicles?



1 A. No, no, I never saw any.

2 Q. Do you feel that you have a right to drive on  
3 that, up in that area on your snowmobile?

4 A. Well, I don't know if we have a right or not,  
5 but we went up the road.

6 Q. Now, this Thorton Hallow Road, you're  
7 familiar with that?

8 A. Yes.

9 Q. I think your testimony was that you have not  
10 driven a vehicle on that road in the last ten years?

11 A. I haven't.

12 Q. When you drove on that road ten years ago  
13 would you describe it?

14 A. The road?

15 Q. Uh-huh.

16 A. I can tell you when it was built.

17 Q. No, just -- I want you to describe what it  
18 was like ten years ago.

19 A. It wasn't too bad of a road. I hauled a deer  
20 up out of there, out of the head of Thorton on my car.

21 Q. Was it rocky?

22 A. In places it's kind of rocky, but not so you  
23 couldn't travel it.

24 Q. Was it steep?

25 A. No, not too bad.

1 Q. Was it very narrow?

2 A. In places, yes.

3 Q. Would you scrape the sides of your vehicle?

4 A. No.

5 Q. You never scraped it on trees or shrubs or  
6 anything?

7 A. No, I don't think I ever did.

8 Q. Now, you said that you had occasion to use  
9 that because that's the road that you would move cattle  
10 up and down.

11 A. Right.

12 Q. And that would be true, would it not, because  
13 you were -- You had permits over in this area over in  
14 here with the Forest Service.

15 A. Right.

16 Q. Cattle permits.

17 A. Right.

18 Q. So you could go up and down this road,  
19 Thorton Hallow Road, to get your cattle in and out.

20 A. Right.

21 Q. And when you were on Mr. Okelberry's  
22 property, isn't it true that he gave you permission? He  
23 gave permission to everybody that was a member of the  
24 West Daniels to use that road?

25 A. Not to my knowledge.

1 Q. He had cattle himself, did he not, to put in  
2 that area?

3 A. Yes.

4 Q. And without that permission you would not of  
5 been able to move that, the cattle up and down that road,  
6 would you?

7 A. Well, I don't know if they ever got  
8 permission, but we had to move our cattle through there  
9 all the time.

10 Q. You said that you used that road  
11 approximately six times a year. And that was in  
12 connection with moving cattle, wasn't it?

13 A. Usually, yes. I went down in there for just  
14 other, just to drive around, but --

15 Q. Now, at the end of this Thorton Hallow Road  
16 did you ever see a sign on the Forest Service property  
17 that said no motorized vehicles?

18 A. No.

19 Q. When did you sell your Forest Service  
20 permits?

21 A. Me?

22 Q. Yes.

23 A. Well, let's see -- I'll have to look -- I  
24 can't remember the exact date. I sold it to a doctor.  
25 And I think it was about in 19, probably about 1985, '84,

1 along there.

2 Q. About 20 years ago?

3 A. About -- Maybe not quite that many.

4 Q. Well, since you've sold your Forest Service  
5 permit you really don't have any need for it, do you?

6 A. Any need for?

7 Q. To go up and down the Thorton Hallow Road.

8 A. I don't have any real need, no.

9 Q. There's a gate, was there not, between the  
10 Okelberry property and the Forest Service property?

11 A. Just recently.

12 **MR. SWEAT:** Where -- Where --

13 Q. **(BY MR. PETERSEN)** Well, on Thorton Hallow  
14 Road it goes from private property, Mr. Okelberry's to  
15 the Forest Service, does it not?

16 A. That does.

17 Q. Isn't there a gate?

18 A. Are you talking about by the pond?

19 Q. Well, I'm just talking where ever that  
20 boundary fence is.

21 A. Well, that's the boundary line.

22 Q. Okay. There's a fence there, is there not?

23 A. Yes, it was put up by the Forest Service.  
24 And it had a gate on it, but it was never locked. And  
25 there's a pond right by the side of it.

1 Q. Okay. Well, that gate, you say it was never  
2 locked, but it was up. And if you'd go through it you'd  
3 open it up and close it again, would you not?

4 A. Yes, during the time that we had cattle up  
5 there. But when we didn't have cattle there the gate was  
6 never up, it was always open. They just dug it out the  
7 side and that's where it was always open.

8 Q. Well, you used that mostly when you put  
9 cattle up and down. And when you did that you would open  
10 and close the gate?

11 A. Well, in the early years it, there was no  
12 fence in there. That was put in later.

13 Q. If the testimony should be, in this Court,  
14 that that fence has been there since the 1930's, would  
15 that be incorrect?

16 A. That's incorrect.

17 Q. And if the testimony is that there's been a  
18 gate there since the 1930's, that would be incorrect as  
19 well?

20 A. That would be incorrect.

21 Q. Now, when did you buy your cattle permit?

22 A. Me?

23 Q. Yes.

24 A. I didn't buy one. I got it from my parents.

25 Q. When did you obtain that?

1           A.    Well, I can't tell you the exact time.  I'd  
2 have to go back and look on my records.  But I can't tell  
3 you the exact, when I bought that or when I got it.  And  
4 I --

5           Q.    50's, 60's?

6           A.    Let's see.  How old is my oldest son?  I  
7 can't remember his age.  He's 50.  So 50 years ago is  
8 when I've had it.  About --

9           Q.    50 years ago you obtained the cattle permits?

10          A.    About 50 years ago.

11          Q.    And by virtue of being a shareholder in West  
12 Daniels you were allowed to use those permits?

13          A.    Yes.  Well, we obtained them and they were  
14 Forest Service permits.

15          Q.    Now, you said that on this road, we're  
16 talking about the Thorton Hallow Road, that you would see  
17 people there?

18          A.    Yes.

19          Q.    What people did you ever see in the 1950's?

20          A.    I did see too many in the 50's, but I saw  
21 people in there all the time hunting deer.  And some of  
22 them were camped out.

23          Q.    Were they on Mr. Okelberry's camped out or  
24 were they on Forest Service property?

25          A.    Well, I know they're on the Forest Service.

1 And I don't know if they're on Mr. Okelberry's or not. I  
2 couldn't testify yes or no on it, because they are camped  
3 along that road in many areas. And I don't know if they  
4 were on his property or somebody elses.

5 Q. Can you give us one date that you can confirm  
6 that you saw people using that road in the 1950's?

7 A. Using the Thorton Road in the 50's?

8 Q. Yes.

9 A. I can't give any exact date, no. I just --

10 Q. Can you give us an exact date for the 1960's  
11 when you saw people using that road?

12 A. No, I couldn't give you a date. I just went  
13 down through there and I just saw people. I don't know  
14 what date it was, but I saw them.

15 Q. Can you give us a date in the 1970's?

16 A. No, not an exact date.

17 Q. Now, the Parker Canyon Road, that goes over  
18 property owned by West Daniels Association?

19 A. Right, part of it does.

20 Q. Do you know who the president of West Daniels  
21 Land Association is?

22 A. Yes.

23 Q. Let me show you what's been marked as Exhibit  
24 No. 10 and ask you if you can identify that?

25 **MR. SWEAT:** Is that this letter?

1           **MR. PETERSEN:** Yeah, that's that --

2           **THE WITNESS:** Well, Dan Rite is the president

3 of it.

4           **MR. SWEAT:** Your Honor, I'm going to object

5 to this.

6           **THE COURT:** What's your objection?

7           **MR. SWEAT:** It's hearsay.

8           **THE WITNESS:** And I don't --

9           **THE COURT:** Just a second.

10          **THE WITNESS:** Okay.

11          **THE COURT:** Well, he hasn't offered it yet.

12          Q.    **(BY MR. PETERSEN)** You can identify that

13 signature as Mr. Rite's?

14          A.    I can identify it. I -- As near as I can

15 tell it's Dan Rite's.

16          Q.    And he's the president of the association, is

17 he not?

18          A.    Yes.

19          **MR. PETERSEN:** Your Honor, we'd offer Exhibit

20 No. 10.

21          **THE COURT:** Well, you haven't laid any

22 foundation as to what it is. When you can do so I might

23 consider it.

24          Q.    **(BY MR. PETERSEN)** Mr. Besendorfer, this is a

25 letter, is it not, that's dated August 7th, 2000.



1           A.    Well, that's what it says on it.  And that's  
2 all I can go by.

3           Q.    And it says to who it may concern?

4           A.    That's what it says.

5           Q.    And the letter itself is in connection with  
6 all the roads on the West Daniels Land Association.  
7 That's what it  --

8           A.    That's what it says.

9           Q.    And it refers to all the roads on the West  
10 Daniels Land Association property are private?

11          A.    That's what it says.  That all's I can go by.

12          Q.    All right.

13               **MR. PETERSEN:**  Your Honor, we'd offer Exhibit  
14 No. 10.

15               **THE COURT:**  I won't receive it unless you can  
16 lay some foundation.  He's never seen it before.  He  
17 doesn't know what, where it came from and what the basis  
18 for it is.

19               **MR. PETERSEN:**  Well, he's, can identify Mr.  
20 Dan Rite's signature.  He can identify Mr. Rite as being  
21 the president of West Daniels Land Association.

22               **THE COURT:**  But he's  --  If you're going to  
23 receive  --  On what exception of the hearsay rule are  
24 you receiving it.

25               **MR. PETERSEN:**  Well, I don't think it is an

1 exception, your Honor, because he can identify the  
2 signature.

3           **THE COURT:** Well, it's still hearsay. It's  
4 -- It either comes in as a business record or a public  
5 record or, you know, if this was personal correspondence  
6 that he had any involvement of, but I'm not going to  
7 receive it at this point in time.

8           **Q. (BY MR. PETERSEN)** Well, Mr. Besendorfer,  
9 would you agree with the conclusion here that the roads  
10 on the West Daniels Land Association property are  
11 private.

12           **A.** Well, I guess as far as you could say that  
13 they're private.

14           **Q.** So as far as you're concerned then Parker  
15 Canyon Road is a private road?

16           **A.** I can't answer that yes or no because it's  
17 been used by many other people. And it goes on to the  
18 Forest Service. And during deer season there's a lot of  
19 people down there. And they cross over West Daniels land  
20 to get to there.

21           **Q.** Once again, can you give me a day, time and  
22 place in the 1950's when you saw people using Parker  
23 Canyon Road?

24           **A.** No, I can't give you an exact date.

25           **Q.** Could you give me --

1 A. It's too many years ago.

2 Q. -- in regards to the 1970's?

3 A. I couldn't.

4 Q. The 1980's?

5 A. I know when I used it.

6 Q. Other than yourself.

7 A. And our hunting group used it.

8 Q. But as far as when you say other people you  
9 can't give us a specific date or even close to a date,  
10 can you?

11 A. I can tell you that it would be during deer  
12 season from about the 20th of October through the 30th of  
13 October, 31st. I think the season was 11 days. And I  
14 know our party used it all the time. And we used it from  
15 about 19, about 1950.

16 Q. And that's for deer hunting?

17 A. At that time particular time, yes, but we  
18 used it with the cattle also. But that was for deer  
19 hunting. That's the last -- You asked me last time and  
20 that's, that's when we used it.

21 Q. In regards to this Maple Canyon Road, you  
22 said that you've used that road, but the last time was 10  
23 to 12 years ago?

24 A. Some where in there. I can't give an exact  
25 date.

1 Q. Now, in connection with this Maple Canyon  
2 Road, did you go from one end to the other here, starting  
3 not far from Wallsberg all the way up to Ridge Line Road?

4 A. Yes.

5 Q. You drove that? Was it in a vehicle or was  
6 it in a truck?

7 A. It was my Scout.

8 Q. Your International Scout?

9 A. Yes.

10 Q. And for what purpose did you do that?

11 A. That's when I hauled salt up there too.

12 Q. Okay.

13 A. We hauled salt in three different roads to  
14 get up there.

15 Q. And this is about 10 to 12 years ago?

16 A. No, it's been longer than that when I drove  
17 up there.

18 Q. But how long has it been since you drove that  
19 Maple Canyon Road?

20 A. Oh, you mean since I drove it personally?

21 Q. Yeah.

22 A. Oh, it's probably been 20 years ago or  
23 longer. I don't know when I drove it last.

24 Q. Okay. So it's been 20 years or more since  
25 you've traveled that whole Maple Canyon Road?

1           A.    The whole thing clear through, but the upper  
2 part I've been on it several times since.

3           Q.    Could it be as long as 30 or 40 years ago  
4 that you drove the whole thing?

5           A.    No, it wasn't that long ago.

6           Q.    So we're going back 20 years ago when you  
7 drove the whole road?

8           A.    About, I can't say exactly. I'd just have to  
9 guess. It could of been 21 years. It might of been 22  
10 years ago.

11          Q.    Is it a rough road?

12          A.    In places, yes.

13          Q.    Is it steep?

14          A.    In places.

15          Q.    Is it narrow?

16          A.    In places.

17          Q.    Not a road that you would travel unless you  
18 had a real reason to travel, is it?

19          A.    Well, I don't know. I had a reason to travel  
20 it. That's why I was on it.

21          Q.    And that was to take the salt?

22          A.    And we went up there for deer hunting. We  
23 went through it. We didn't -- I guess that's a reason.

24          Q.    Do you know if that road has ever been washed  
25 out from time to time?

1           A.    In some two or three places it was pretty  
2 well washed out, but  --

3           Q.    And that happens periodically, doesn't it, on  
4 that Maple Canyon Road?

5           A.    Occasionally, yes, it does.

6           Q.    It gets washed out?

7           A.    It gets partly washed out, so that it makes  
8 it difficult to get across those places.

9           Q.    Do you know if you can even drive it today?

10          A.    I hadn't been on it that  --  I couldn't tell  
11 you today what it's like.

12          Q.    You wouldn't know whether or not you could  
13 travel that road today then?

14          A.    I couldn't tell you today.

15          Q.    Now, you said that you saw people using that  
16 road?

17          A.    Up on the top up toward the Ridge Line.

18          Q.    Okay.  So I'm pointing with my pen, here.  
19 We're talking Ridge Line Road.  That's where you saw  
20 people using the road?

21          A.    No, up right  --  Where it goes back and it  
22 doubles back up there.  A little further in than that.  
23 Right in there in places.

24          Q.    Okay.  We're looking at, I think this is  
25 section 24.  You didn't see down further, Maple Canyon

1 Road -- You didn't see people using it down further  
2 then?

3 A. No, I never saw anybody down there.

4 Q. And you never saw anybody drive from one end  
5 of the road to the other?

6 A. I never -- They weren't driving with me.  
7 So I never saw anybody.

8 Q. These people that you saw in the upper end,  
9 could you give us a date on that?

10 A. Well, all I can say would be the sometime  
11 when I delivered salt up there. And that would have been  
12 some where the middle of May and the first of June.

13 Q. Every year?

14 A. Almost every year we did that.

15 Q. If I were to give you a specific -- In the  
16 50's, if you could give us a specific date you would not  
17 be able to do that?

18 A. No, I couldn't give you an exact date.

19 Q. And you couldn't give us an exact date in the  
20 60's?

21 A. No.

22 Q. Or the 70's?

23 A. No.

24 Q. Or even the 80's?

25 A. Not an exact date. It would have to be

1 approximately.

2           **MR. PETERSEN:** Can I have a minute with my  
3 client, your Honor?

4           **THE COURT:** You may.

5           **Q. (BY MR. PETERSEN)** Mr. Besendorfer, let me  
6 show you what's been marked as Defendant's Exhibit No.  
7 11, it's a picture, and ask if you can identify that.

8           **A.** No, this is something that's been put in  
9 there later. I can -- I can't tell you.

10           **Q.** You wouldn't know where that's at? How about  
11 Exhibit No. 12, Defendant's Exhibit No -- Can you  
12 identify that?

13           **A.** No.

14           **Q.** This is a picture of a sign, Mr. Besendorfer,  
15 that says road closed to motorized vehicles. Did you  
16 ever see any signs like that on any Forest Service  
17 property?

18           **A.** Not up there I didn't, I haven't.

19           **Q.** Did you ever see --

20           **A.** I never seen -- Okay. Go ahead.

21           **Q.** Did you ever see a sign like that on any of  
22 the fish and game property?

23           **A.** Yes.

24           **Q.** Okay. Where did you see the sign like that  
25 on the fish and game property?



1 A. I think they got one up there by the gun  
2 club.

3 Q. Okay. Anywhere else?

4 A. No, I've never seen any anywhere else, unless  
5 it was down around Wallsberg someplace, but I --

6 Q. So this is a sign that says closed to  
7 motorized vehicles, you said it's down by the gun club,  
8 but you indicated several years back you actually  
9 traveled that in your International Scout?

10 A. I did.

11 Q. And that would be contrary to this sign then?

12 A. I don't know if it would or not.

13 **MR. PETERSEN:** That's all, your Honor.

14 **THE COURT:** Anything else, Mr. Sweat?

15 **MR. SWEAT:** Just a couple, your Honor.

16 **REDIRECT EXAMINATION**

17 **BY MR. SWEAT:**

18 Q. Mr. Besendorfer, you indicated that you sold  
19 out on your cow permit 20 years ago, is that correct?

20 A. That was a forest permit, yes.

21 Q. Since that time have you ever used the Parker  
22 Canyon Road?

23 A. Yes.

24 Q. Into the forest?

25 A. Yes.

1 Q. Have you used Thorton Hallow Road into the  
2 forest?

3 A. Yes.

4 Q. You just indicated when Mr. Petersen showed  
5 you a picture that had a sign, that you didn't really  
6 know where that sign sat?

7 A. That's right.

8 Q. But you did say that you'd seen one up by the  
9 gun club?

10 A. Right.

11 Q. Do you recall when you saw it up by the gun  
12 club?

13 A. About a year ago I think I saw it for the  
14 first time. I think it's probably been in there longer  
15 than that, but that's the first time I saw ever saw it?

16 MR. SWEAT: No further questions.

17 THE COURT: Anything else, Mr. Petersen?

18 MR. PETERSEN: Just briefly

19 **RE-CROSS-EXAMINATION**

20 **BY MR. PETERSEN:**

21 Q. You indicated you sold your forest permits  
22 about 20 years ago and you've used these roads since  
23 then, but you can't give us a date, time or place when  
24 you've done that?

25 A. Pardon me? I didn't hear.

1 Q. In the last 20 years since you've sold your  
2 Forest Service permits you can't give us a date, time,  
3 when you used those roads?

4 A. Well, I've -- I can give you a date last  
5 year when I used all of that road.

6 Q. You're talking the Ridge Line Road?

7 A. I'm talking Ridge Line, I'm talking about  
8 Thorton, I'm talking about Parker, I'm talking about  
9 White Pole, I'm talking about part of this Circle Springs  
10 Road and I'm talking about part of the Maple Creek Road  
11 and Hearts Gravel.

12 Q. Well, Hearts Gravel isn't even a subject of  
13 this lawsuit, is it?

14 A. I guess not. I don't know.

15 Q. Now, when you did that a year ago you had to  
16 go through gates, did you not?

17 A. The gates were not up. The gates were all  
18 down.

19 Q. Were the locks blown off?

20 A. No, they -- They were just open. They  
21 hadn't been -- No one had been up there to put them up.  
22 And when we went through last spring my son and I, we cut  
23 the trees out clear down through, clear down to White  
24 Pole.

25 Q. Where did you cut trees out at?

1           A.     Along the Ridge Line Road.

2           Q.     So all along Mr. Okelberry's property you cut  
3 trees?

4           A.     We cut trees that had --

5           Q.     How many trees did you cut?

6           A.     -- fallen across.   Probably two or three.

7           Q.     You wouldn't of been able to traverse that  
8 road without cutting those trees out?

9           A.     Not at that time we wouldn't.   We went  
10 through from one piece of property to the next and the  
11 next.

12          Q.     Did you tell Mr. Okelberry you were cutting  
13 trees that was on his property?

14          A.     No.

15          Q.     You just went and did it?

16          A.     Well, they were across the road and we had to  
17 get down onto our property.   So there was no other way to  
18 get in there.

19          Q.     Now, your purpose of doing that was to get  
20 done on the West Daniels property?

21          A.     Right.

22          Q.     And Mr. Okelberry has always given permission  
23 to the members of the West Daniels Land Association to  
24 travel on that road, has he not?

25          A.     I guess, I don't really know.

1 Q. All right.

2 MR. PETERSEN: That's all.

3 THE COURT: Anything else, Mr. Sweat?

4 MR. SWEAT: No, your Honor.

5 THE COURT: You may step down. Thank you.

6 Next witness.

7 MR. SWEAT: The plaintiff would call Martin  
8 Wall.

9 THE COURT: Okay. Mr. Wall, come forward. I  
10 assume you were sworn this morning?

11 MR. SWEAT: He was not, your Honor.

12 THE COURT: Okay. Come forward. Okay.  
13 Raise your right hand and the clerk will give you an  
14 oath.

15 CLERK: You do solemnly swear that the  
16 testimony you shall give in the matter now before this  
17 Court shall be the truth, the whole truth, and nothing  
18 but the truth, so help you God?

19 THE WITNESS: I do.

20 THE COURT: Have a seat.

21 DIRECT EXAMINATION

22 BY MR. SWEAT:

23 Q. Mr. Wall, would you please state your full  
24 name and address for the record?

25 A. Martin E. Wall, 1245 East Main Canyon Road,

1 Wallsberg.

2 Q. Do you go by Martin?

3 A. Martin or Ed, either one. I'll answer to  
4 pretty near anything.

5 Q. How do most people know you by?

6 A. Ed.

7 Q. What's your birth date?

8 A. January 15, '36.

9 Q. How long have you lived in Wasatch County?

10 A. Most of my life.

11 Q. Do you recall when you moved to Wasatch  
12 County?

13 A. I beg your pardon?

14 Q. Do you recall when you moved to Wasatch  
15 County?

16 A. Oh, I was born and raised in Wasatch County.

17 Q. Oh, okay.

18 A. In Wallsberg, yeah. I moved away for a short  
19 time when I was working construction.

20 Q. Now, are you familiar with the area over east  
21 of the City of Wallsberg?

22 A. Yes, sir.

23 Q. Why are you familiar with that area?

24 A. Oh, that's our old stomping grounds I guess  
25 that's the best way you could describe it. Do a lot of

1 hunting, picnicking, traveling around through that  
2 country.

3 Q. Do you own any property up in the mountains  
4 east and north of Wallsberg?

5 A. No, sir.

6 Q. Have you ever leased any property up in that  
7 area?

8 A. No, sir.

9 Q. Have you ever worked for anyone that owns  
10 property up there?

11 A. No, sir.

12 Q. Have you ever worked for anyone that has  
13 leased property up there?

14 A. No, sir.

15 Q. I want to show you what has been marked as  
16 Exhibit No. 2. And I don't know if you've ever seen this  
17 exhibit, but if you want you can step down and take a  
18 look at it for a minute.

19 **MR. SWEAT:** With the Court's permission?

20 **THE COURT:** If you want to go down and  
21 examine it closer so you can orient yourself.

22 **THE WITNESS:** Okay. Uh-huh.

23 **THE COURT:** Why don't you point out to him  
24 where Wallsberg is. That might help him orient himself.

25 **THE WITNESS:** Okay. And this could be the

1 Ridge Road, Ridge Line. Uh-huh. Maple Canyon. Okay.

2 Q. (BY MR. SWEAT) You just discussed several  
3 roads. Are you familiar with those roads?

4 A. Yes, I am.

5 Q. Let's start with Circle Springs Road. Are  
6 you familiar with that road?

7 A. Yes.

8 Q. Do you understand it to be about where it's  
9 depicted on this map?

10 A. Uh-huh, correct.

11 Q. Have you ever traveled upon that road?

12 A. Yes.

13 Q. What portions of that road have you traveled?

14 A. The whole length of it.

15 Q. When did you first use that road?

16 A. Oh, good grief. Mid 50's, exact dates I  
17 couldn't tell you, but through the mid 50's until it was  
18 impossible to get in there any more.

19 Q. When was it impossible to get in there any  
20 more?

21 A. When Mr. Okelberry put up the no trespassing  
22 signs.

23 Q. Do you remember when that was?

24 A. Oh, I can't remember, sir, no. I'm getting  
25 old. My memory isn't what it use to be.



1 Q. Was it 30 years ago?

2 A. No, it's not been that long, no, no.

3 Q. Ten years ago?

4 A. Yeah, that area. Ten years ago, uh-huh.

5 Q. Why did you first use this road?

6 A. Why?

7 Q. Why?

8 A. Hunting, and we used it in the wintertime,  
9 snowmobiling.

10 Q. Did you have a snowmobile in the mid 50's?

11 A. No, no.

12 Q. So your first use would have been --

13 A. Hunting, uh-huh.

14 Q. Typically from the mid 50's up until  
15 approximately 10 years ago, how often would you use  
16 Circle Springs Road in a given year?

17 A. Oh, I would say two or three times on hunting  
18 trips. You know, you wouldn't go in there every year,  
19 but when you was hunting that area you would go in there  
20 two or three times in the -- You know, we hunted the  
21 whole valley, we didn't just hunt that side. So it  
22 depended on where we was, you know.

23 Q. From the time that you first started going in  
24 till you stopped when the no trespassing signs come up,  
25 did you ever run into locked gates?

1           A.    No.

2           Q.    Were there fences and gates across that road?

3           A.    There was, yes.

4           Q.    Could you tell us where the gates were?

5           A.    Well, the Ridge Road forks just after you get  
6 off the Main Canyon Road.  You're going north, that road  
7 forks, the one -- They both actually continue along the  
8 ridge, but the left fork of that goes down in there and  
9 cuts down into Circle.

10          Q.    Is there a gate some where along there?

11          A.    Yes, there is.

12          Q.    Where at?

13          A.    It's not too far from where that road forks.

14          Q.    Is it fair to say it's where it crosses into  
15 Mr. Okelberry's property?

16          A.    Uh-huh.

17          Q.    Is there another gate where it crosses back  
18 into the forest property on the south end?

19          A.    The two roads come back together on the south  
20 end.

21          Q.    I'm speaking particularly about Circle  
22 Springs Road back here.

23          A.    Circle Springs Road -- No, Circle Springs  
24 does not go back onto the forest.  It ends at the forest  
25 boundaries there.

1 Q. Ends at the forest boundary?

2 A. Uh-huh.

3 Q. Can you get into the forest from there?

4 A. Yes.

5 Q. Is there a gate there?

6 A. I would say there -- No -- There use to  
7 be a gate off to the left of the springs there, as I  
8 recall.

9 Q. When you --

10 A. I wouldn't want to swear to that, but it  
11 seems like there was.

12 Q. What kind of gates were they?

13 A. Wire gates.

14 Q. Were they always closed when you used the  
15 road?

16 A. Uh-huh, yes, yeah, most of the time. Now,  
17 the ones on the main roads there, like the road that  
18 drops down into Circle, if there was no stock in there  
19 they would be open.

20 Q. Yeah, let's speak just about, just this green  
21 road, Circle Springs Road.

22 A. Uh-huh.

23 Q. Are the gates always up on that road?

24 A. If there was no stock in there they'd be  
25 down. During the summer when there was stock, why the

1 stock, would have them closed. And we would honor them,  
2 leave them the way we found them.

3 Q. During the time that you used that road were  
4 you ever asked by anyone not to use it?

5 A. No.

6 Q. Did you ever seek permission from anyone to  
7 use that road?

8 A. No.

9 Q. Did you ever see or were you ever with other  
10 people that used that road?

11 A. Oh, yes, there was the family, our hunting  
12 companions and one thing or another.

13 Q. Did any of them own property up in this area  
14 that you're aware of?

15 A. No.

16 Q. Did you ever hear or see of others being told  
17 to stop using that or not to use that road between the  
18 50's and approximately 10 years ago?

19 A. Not -- Not until Mr. Okelberry was, posted  
20 in there.

21 Q. Now, are you aware of the road depicted in  
22 red, the Ridge Line Road?

23 A. Uh-huh.

24 Q. Have you ever traveled on that road?

25 A. Yes, sir, many times.

1 Q. When do you think you first traveled on the  
2 Ridge Line Road?

3 A. I think in mid 50's.

4 Q. Why did you use the Ridge Line Road?

5 A. Oh, we'd use that to get into Circle and to  
6 get through White Pole and off on the other side into  
7 Thorton Canyon, that area out in there. I mean, that  
8 give you access to the whole top of that mountain there.

9 Q. When did you last use this road?

10 A. Last year, deer hunting.

11 Q. Was there any gates in place?

12 A. Yes.

13 Q. Were there no trespassing signs?

14 A. Yes.

15 Q. Were the gates locked?

16 A. Yes.

17 Q. How did you go through?

18 A. I beg your pardon?

19 Q. How did you use the road to go through?

20 A. I just used the road up to the gates and  
21 that's it.

22 Q. Oh.

23 A. That was the end of it.

24 Q. When was the last time you used that entire  
25 length of the Ridge Line Road from where it enters Mr.

1 Okelberry's property?

2 A. You know, I -- I could not give you a date.  
3 I would say approximately oh, 20, 25 years ago.

4 Q. And the last time you used it was there any  
5 no trespassing signs?

6 A. No, sir, there was not.

7 Q. Was there any locked gates?

8 A. No.

9 Q. Do you recall if there were any gates across  
10 the road?

11 A. There's gates there, yes.

12 Q. Typically when you'd use it would you leave  
13 the gate open?

14 A. If the gate was closed I would close it when  
15 I went through.

16 Q. Did you ever see others using the road as you  
17 did?

18 A. Yes, sir.

19 Q. Typically -- Or when you saw others do you  
20 know what they were using the road for?

21 A. Same thing I was. Just get out and tour the  
22 country. You know, get out, get out in the woods and  
23 hunt. Do a little camping, whatever the occasion was,  
24 you know.

25 Q. And were you ever asked by anyone not to use

1 the Ridge Line Road?

2 A. No, sir.

3 Q. Do you ever recall seeing any no trespassing  
4 signs during that time?

5 A. No, sir.

6 Q. Do you recall ever seeing locked gates during  
7 that time?

8 A. No, sir.

9 Q. I want to bring your attention to what has  
10 been designated as Thorton Hallow Road, this blue section  
11 on the map.

12 A. Uh-huh.

13 Q. Have you ever driven on that road?

14 A. Just the upper end of it, but, you know, just  
15 for a short distance off from the Ridge Road. I've never  
16 been clear down into Thorton Canyon all the way, no. But  
17 I have done it to, you know, access the upper part of  
18 Thorton and them canyons.

19 Q. But you've never went clear through into the  
20 Forest Service?

21 A. I haven't, no.

22 Q. About how much of it --

23 A. Well, yeah. Now, as I understand it the  
24 forest ain't, is not very far from what we call White  
25 Pole. And you'd go into White Pole and then take that

1 road that lead off towards Thorton.

2 Q. Reach about Thorton Hallow?

3 A. Uh-huh. I don't know exactly where the,  
4 where the property line is through there.

5 Q. And why were you using the road?

6 A. Hunting.

7 Q. Have you ever heard of a road called Parker  
8 Canyon Road?

9 A. Yes, yes, it's basically the same road, isn't  
10 it? Or forks off from it.

11 Q. Is Thorton Hallow and Parker Canyon the same  
12 canyon?

13 A. I believe they're, you know -- They both  
14 come up right into that same area.

15 Q. Have you ever been down into Parker Canyon?

16 A. I haven't, no.

17 Q. Have you ever been down into Thorton Hallow?

18 A. No.

19 Q. Are you aware of a road called Maple Canyon  
20 Road?

21 A. Yes.

22 Q. Have you ever driven on Maple Canyon Road?

23 A. Yes, sir, many times.

24 Q. When did you first drive on Maple Canyon  
25 Road?



1           A.    The same time, through the 50's, yeah, mid  
2 50's.

3           Q.    And what portion of Maple Canyon Road would  
4 you use?

5           A.    Full length of it.

6           Q.    The full length being --

7           A.    Being from the Wallsberg road, Main Canyon  
8 Road to the Ridge Road.

9           Q.    And when did you last use Maple Canyon Road?

10          A.    It's been quite sometime ago, yeah. I don't  
11 know date wise. I'm going to say 20 years.

12          Q.    Some where around the 80's?

13          A.    Uh-huh, yeah.

14          Q.    And you started using it in the 50's?

15          A.    Yes.

16          Q.    From the 50's to the 80's how often per year  
17 do you think you'd use Maple Canyon Road?

18          A.    Oh, that was really a favorite spot of ours  
19 to go hunting. I would say we would use that two or  
20 three times every hunt. We really enjoyed riding up  
21 through there.

22          Q.    And you'd drive clear up and connect into the  
23 Ridge Line Road?

24          A.    Yes, uh-huh.

25          Q.    During that time did you ever see a no

1 trespassing sign?

2 A. No.

3 Q. Were you ever asked by anyone not to use the  
4 road?

5 A. No.

6 Q. Were there gates across this road?

7 A. Yes.

8 Q. Did you ever run into a gate that was locked  
9 across this road? Were the gates always closed on this  
10 road?

11 A. That again would depend on whether there was  
12 stock in the area or not. Sometimes they're up sometimes  
13 they're down.

14 Q. Did you ever see or hear of anyone being  
15 stopped from using Maple Canyon Road while, during the  
16 time that you used it?

17 A. Yeah -- Not during the time I used it, no.

18 Q. You've since heard that people are stopped?

19 A. Since that time, yeah, it's stopped. You  
20 can't use it.

21 Q. Going back to Ridge Line Road. How far have  
22 you traveled down from Ridge Line Road to the Big Glade  
23 area?

24 A. Well, the full length of it I guess you would  
25 say. Going north on that thing it gets pretty near

1 impossible to what we use to call the -- Oh, what did  
2 we call that? Anyway it gets over there where it's  
3 pretty near impossible along the north end of it there.

4 Q. Is that on Mr. Okelberry's property? Is that  
5 on fish and game property? Where --

6 A. That's on fish and game property.

7 Q. Fish and game property?

8 A. Uh-huh.

9 Q. And you've traveled down to that point?

10 A. Oh, yes, yeah.

11 Q. During the between the 50's and 80's did  
12 you --

13 A. Yes.

14 Q. -- travel the entire length?

15 A. Yes.

16 Q. Do you think you'd do that each year?

17 A. No, we wouldn't run that every year, but  
18 some, you know, periodically we'd run over there.

19 Q. In the time that you used the Ridge Line Road  
20 and would go across did you are get stopped anywhere  
21 along the Ridge Line Road?

22 A. No.

23 Q. Did you ever see no trespassing signs  
24 anywhere along the Ridge Line Road?

25 A. No.

1 Q. Did you ever run into locked gates anywhere  
2 along the Ridge Line Road?

3 A. No.

4 Q. How did you use the road? What -- Did you  
5 walk them?

6 A. We had four-wheel drive pickups that we would  
7 drive on, you know, pickup.

8 Q. And that's what you have always used?

9 A. Yeah.

10 Q. Did you ever use anything besides a  
11 four-wheel drive?

12 A. That was about all, yeah. That was our main  
13 way of going.

14 Q. Even in the 50's when you was younger did you  
15 use four-wheel drives?

16 A. No, they didn't have them then, at least we  
17 didn't have them. We wasn't quite that rich then.

18 Q. How did you use the roads then?

19 A. We had old cars, old trucks, sort of things  
20 we put together. Whatever we could get in and go on.

21 **MR. SWEAT:** I have no further questions at  
22 this time, your Honor.

23 **THE COURT:** Mr. Petersen, cross?

24 **MR. PETERSEN:** Thank you, your Honor.

25 **CROSS-EXAMINATION**

1 BY MR. PETERSEN:

2 Q. Mr. Wall, I gather you're a hunter?

3 A. Yes.

4 Q. Do you like to --

5 A. I've been out a few times.

6 Q. Do you like to hunt every year?

7 A. Yes, sir.

8 Q. And do you hunt other areas besides this  
9 property designated on Exhibit 2? Do you ever go  
10 anywhere else to hunt?

11 A. Yes, sir.

12 Q. Where else would you hunt?

13 A. We hunt Strawberry Valley and other parts of  
14 the Wallsberg area and up in the Strawberry Valley.

15 Q. And this would be from the 1950's, would it  
16 not?

17 A. Yes, uh-huh.

18 Q. So when you're talking about a hunting  
19 season, the hunting season lasts what, 2 to 3 weeks?

20 A. Uh-huh, yes.

21 Q. So 2 to 3 weeks you're hunting not only in  
22 this area designated, set fourth in Exhibit 2, but you're  
23 hunting other areas as well?

24 A. That would depend on the particular year, you  
25 know.

1 Q. Sure.

2 A. You wouldn't hunt that whole area I described  
3 all in one year. You may kind of concentrate here and  
4 here, you know. And you wouldn't -- You couldn't cover  
5 that whole thing in one hunting season.

6 Q. No, that would be too much, wouldn't it?

7 A. Yes, yeah.

8 Q. So would there be years that you would  
9 concentrate on the, it was Exhibit 2, and other areas  
10 where you would concentrate in other areas?

11 A. Yeah.

12 Q. Like Strawberry?

13 A. Basically, yeah, yeah.

14 Q. So if it was a year that you were not  
15 concentrating on this Exhibit 2, where that's designated,  
16 you wouldn't be up there that often, would you?

17 A. You may go up there, you may not. I mean,  
18 you know, it's -- It depended on where you want to go  
19 that particular hunt, day.

20 Q. But you would -- You would hunt these other  
21 areas. You would hunt where ever you thought it was the  
22 best hunting?

23 A. Of course, yes, sir.

24 Q. And you've got about 2 or 3 weeks to do it?

25 A. Yes, sir.

1 Q. Now, this Circle Springs Road, you indicated  
2 the last time that you went there was 10 years ago?

3 A. Oh, did I say 10 or 20?

4 Q. It could be been --

5 A. It's been quite sometime ago, yeah.

6 Q. So as far as the Circle Springs Road, and I'm  
7 indicating this, I think it's marked in green.

8 A. Yes, yes.

9 Q. It could be up to 20 years ago since you've  
10 hunting that ground?

11 A. It's been quite a while since I've hunted in  
12 there, yes. I would say since Mr. Okelberry closed the  
13 gates.

14 Q. And it could be as long as 20 years ago?

15 A. I could not say a specific time, sir.

16 Q. I think your testimony on direct examination  
17 was 10 years ago. And then --

18 A. Okay. Okay.

19 Q. -- you indicated it could be even longer  
20 than that then?

21 A. It's possible.

22 Q. Let me show you what's been marked as  
23 Defendant's Exhibit No. 6 and ask you if you can identify  
24 that?

25 A. No, sir, I can't.

1 Q. It doesn't look familiar as far as going on  
2 to the Circle Spring area?

3 A. Not really, huh'uh.

4 Q. I'll show you what's been marked as  
5 Defendant's Exhibit No. 7 and ask you if you can identify  
6 that?

7 A. No, sir.

8 Q. Does that look like any gates that would lead  
9 onto the Circle Springs area?

10 A. Well, it could be, yes. I mean, all the  
11 gates up there, they're just a wire gate, you know. Back  
12 then that's what they were, just a wire gate.

13 Q. Sure. Let me show you what's been marked as  
14 Defendant's Exhibit No. 8. There's a no trespassing  
15 sign. Did you ever see, at any time see that no  
16 trespassing sign there?

17 A. And there again, I can't really definitely  
18 say I've seen that, no, sir, that I recall.

19 Q. Is it possibly it could of been there and you  
20 just wouldn't notice it?

21 A. Well, if it was there I'd notice it, of  
22 course, keep out, yeah.

23 Q. You indicated that your memory is not as good  
24 as it use to be. Would that be true? And I think you  
25 indicated on direct examination that you would not go



1 there every year in Circle Springs to hunt that area?

2 A. Not every year, no.

3 Q. There were gates though leading into the  
4 Circle Springs?

5 A. Yes, sir.

6 Q. Did you ever go in there using those gates  
7 when you had to open the gates and close them again?

8 A. Yes.

9 Q. And your memory goes back to the 1950's, does  
10 it not?

11 A. Yes, uh-huh.

12 Q. So going back to the 1950's, there were gates  
13 in that area then?

14 A. Yes, uh-huh.

15 Q. You indicated that the Circle Springs Road  
16 ends at the Forest Service line?

17 A. Yes.

18 Q. Doesn't go beyond that?

19 A. No.

20 Q. And that there is a wire gate there?

21 A. As I recall there was. Like I say, I  
22 couldn't definitely say, but as I recall there was a gate  
23 there to get through, uh-huh.

24 Q. You said when ever there was a gate you would  
25 honor it. You would not -- You'd open the gate, drive

1 through and then close the gate?

2 A. That's correct.

3 Q. At the end of that Circle Springs Road did  
4 you ever see a sign that looked like this? I'm showing  
5 you what's marked as Defendant's Exhibit No. 12.

6 A. Well, I seen signs like that, but I cannot  
7 particularly say where that sign was at, that particular  
8 one.

9 Q. We're looking at a sign that says road closed  
10 to motorized vehicles. You said you've seen that sign.  
11 Have you seen it in this area where the Okelberry  
12 property is, signs like that?

13 A. No.

14 Q. You've seen it elsewhere then?

15 A. I've seen it other places, yes.

16 Q. But not in this area?

17 A. I can't recall seeing it in this Circle Road,  
18 no, sir.

19 Q. Now, on this Ridge Line Road, you said you  
20 started using that in the mid 50's?

21 A. Yes, sir.

22 Q. And once again, this would be something that  
23 you would hunt, not every year, but periodically you  
24 would hunt in that area?

25 A. Yes, uh-huh.

1 Q. So we couldn't -- You wouldn't -- It  
2 wouldn't be accurate to say that you used that road every  
3 year to hunt?

4 A. Not every year, no, but a whole bunch.

5 Q. You indicated that last year you used that  
6 road and there were gates in place?

7 A. Yes.

8 Q. And so you didn't really go down that road at  
9 all then last year?

10 A. From the Main Canyon Road to the fence, to  
11 the gate. I did use it, yes.

12 Q. From Main Canyon in -- And that's an area  
13 where you're traversing over Forest Service property, is  
14 it not?

15 A. Correct, yes.

16 Q. Now, as far as the Thorton Hallow Road and  
17 the Parker Canyon Road, you indicated that you really  
18 never gone to the bottom of those roads?

19 A. I haven't, no.

20 Q. So you're not claiming that you've used those  
21 roads over any period of time?

22 A. Just the upper end of them roads. From the  
23 Ridge Line Road off into that area, you know, never went  
24 clear down in there, no.

25 Q. Never been to the bottom of those roads?

1 A. No, sir.

2 Q. You indicated that Thorton Hallow Road is in  
3 the White Pole area?

4 A. Yes, it is.

5 Q. And you indicated that both the Thorton  
6 Hallow and the Parker Canyon kind of merge or they're in  
7 the same --

8 A. As I recall, yeah.

9 Q. Actually there's quite a distance, is there  
10 not, between the Thorton Hallow Road and the Parker  
11 Canyon Road?

12 A. You know, I don't --

13 Q. You wouldn't know.

14 A. I don't know.

15 Q. Do you recall signing an affidavit that's on  
16 file with the Court, which affidavit is dated the 23rd of  
17 January, 2003?

18 A. Okay.

19 Q. Do you recall signing an affidavit?

20 A. Yes.

21 Q. You stated, "I have personally used the  
22 following roads as indicated; Parker Canyon Road from  
23 1950 to the present". That would not be accurate,  
24 because you never went to the bottom of Parker Canyon  
25 Road, did you?

1 A. Well, from what I understand that Parker  
2 Canyon Road comes in and hooks into the Ridge Line Road.

3 Q. Okay. But --

4 A. As long -- You know, if I'm not mistaken.

5 Q. It does do that. But you never went to the  
6 bottom of Parker Canyon Road.

7 A. No, but I did use the upper end of the road.

8 Q. Okay. But this is not accurate when you said  
9 Parker Canyon Road from 1950 to present. It should say  
10 the upper part of Parker Canyon Road then.

11 A. Well, okay.

12 Q. Same with Thorton Hallow Road, you stated  
13 under oath that you used the Thorton Hallow Road from  
14 1950 to present.

15 A. Uh-huh.

16 Q. That would only be the upper part of Thorton  
17 Hallow Road, would it not?

18 A. Yeah, yeah, you're right.

19 Q. And that wouldn't be on a yearly basis, that  
20 would be just on the years that you were hunting in that  
21 area?

22 A. Correct.

23 Q. Now, the Maple Canyon Road, could you  
24 describe that road?

25 A. Well, that road takes off from the Main

1 Canyon Road, that is main road through Wallsberg, goes up  
2 through Maple Canyon, what we always called Maple Creek,  
3 same thing, Maple Canyon, and it would connect into the  
4 Ridge Line Road. And it was just a road that went up  
5 that canyon and give you access to the country.

6 Q. Now, in this of these exhibits, some of these  
7 maps, that's indicated as a trail, would that be  
8 accurate?

9 A. Well, I guess that would be depend on whether  
10 you considered it a trail or a road. But we would always  
11 take it, like the pickups or an old beat up car, whatever  
12 we had at that time and we would go through.

13 Q. It's a pretty rocky road, isn't it?

14 A. Oh, yes, it was. It was kind of a rough  
15 road, yeah.

16 Q. And pretty steep, was it not?

17 A. It wasn't too bad for steep, no, but it was  
18 pretty rough. You are climbing all the way up it.

19 Q. It would be impossible to travel that road in  
20 an ordinary passenger car, would it not?

21 A. It would if I was driving it, it was my car.  
22 Yes, it would.

23 Q. You wouldn't drive a car up it?

24 A. No.

25 Q. You wouldn't go up in anything other than a

1 four-wheel drive vehicle, would you?

2 A. Yeah, pickup, you know, something that --  
3 Correct, yeah.

4 Q. Do you know if you could travel that road  
5 today?

6 A. Personally I don't know, but from what I  
7 understand it it's grown in and rocks and that's fell  
8 down into (INAUDIBLE) things where it's practically  
9 impossible, impassable.

10 Q. It's almost impassable then?

11 A. That's what I understand.

12 Q. And there have been periods of time since the  
13 1950's when it has been impassable, has it not?

14 A. Not really, no.

15 Q. Are you aware of any time since the 1950's  
16 when it was washed out?

17 A. No, sir, I can't say that I have, no.

18 Q. Your use of that road would be on these  
19 occasions when you'd go up there and hunt, isn't it, this  
20 use of the Maple Canyon Road, when you'd go up there and  
21 hunt in the fall of the year?

22 A. Yes. Of course, we would go in there other  
23 times also, you know, just to get out in the woods, take  
24 the family out picnicking. And you know, it was a nice,  
25 pretty, green canyon to get up into and enjoy.

1 Q. Isn't it true there was a gate down in the  
2 Wallsberg side?

3 A. Yes.

4 Q. There was a gate there?

5 A. Uh-huh.

6 Q. Would you open the gate and go through it?

7 A. Yes.

8 Q. Close the gate?

9 A. Yes.

10 Q. And isn't it a fact that there's a gate up on  
11 the Ridge Line Road?

12 A. There was a gate on the Ridge Line Road, but  
13 not on the Maple Creek Road. The Maple Creek Road, as I  
14 recall, it never had a gate on the upper end of it.

15 Q. So the gate that you're referring to is not  
16 on the Maple Canyon Road side, it's some where else on  
17 the Ridge Line Road side?

18 A. Correct, uh-huh, unless it's been put there,  
19 you know, since Mr. Okelberry owned it.

20 Q. Now, on this Ridge Line Road, you indicated  
21 that it's almost impossible to travel the full length of  
22 that. That would be correct, would it not?

23 A. On the Ridge Line Road?

24 Q. On the Ridge Line Road.

25 A. I don't think I said that, sir.



1 Q. My notes indicate that the full length, the  
2 north end, almost impossible.

3 A. That's clear over to the north end where the  
4 road just kind of fades out and no more road.

5 Q. Just about goes out. Let me show you a  
6 picture, if I may. This is Defendant's Exhibit No. 9 and  
7 ask you if can identify that?

8 A. Oh, I would say that's the road coming up out  
9 of White Pole.

10 Q. On the Ridge Line --

11 A. It sure looks like it. On the Ridge Line  
12 Road, uh-huh. You know, it's hard to tell looking at  
13 something like that.

14 Q. Sure.

15 A. But that's what I would say that was.

16 Q. That's almost in one of those areas when you  
17 described it's impossible or impassable?

18 A. That is low range and four-wheel drive.

19 **MR. PETERSEN:** Can I confer with my client  
20 for just a minute?

21 **THE COURT:** You may.

22 **MR. PETERSEN:** I think that's all, your  
23 Honor.

24 **THE COURT:** Anything else, Mr. Sweat?

25 **REDIRECT EXAMINATION**

1 **BY MR. SWEAT:**

2 Q. Mr. Wall, when Mr. Petersen was asking you  
3 questions he was asking a lot about whether you would  
4 hunt every area every year.

5 A. Uh-huh.

6 Q. And you indicated that you wouldn't  
7 necessarily hunt every --

8 A. Correct.

9 Q. -- road every year. Did you ever use these  
10 roads for other than hunting?

11 A. Yeah, we would go in them -- Like I told  
12 him earlier we'd use these just to get out in the woods,  
13 you know, just to get out and travel, enjoy it.

14 Q. Is there ever a chance that one year that you  
15 maybe didn't hunt and use Maple Canyon Road, that you  
16 would of just taken a ride up it?

17 A. Very definitely.

18 Q. Is there ever a chance that once when you  
19 didn't use Main or Ridge Line Road to hunt you would of  
20 just taken a drive on it?

21 A. Yes, yes. We would gather wood up in that  
22 area in the fall, firewood.

23 Q. Now, you indicated that you have a hard time  
24 remembering exact dates; is that correct?

25 A. That's correct, yeah, back that far.

1 Q. You kind of remember the 50's. Why do you  
2 remember the 50's?

3 A. Oh, I was married in the 50's. That's when I  
4 turned 18. And I was a big guy, you know, tough. I  
5 could get around. Had wheels of mine own and everything,  
6 you know. And that's just kind of when everything  
7 started happening.

8 Q. Stands out a little more?

9 A. Yeah.

10 Q. You're a little less definite on when you  
11 quit using these roads; is that correct?

12 A. Well, I still use them as much as I can until  
13 I run into a no trespassing sign.

14 Q. Is there any doubt in your mind that you used  
15 the roads as indicated between the 50's and the 80's?

16 A. No doubt whatsoever.

17 **MR. SWEAT:** That's all I have, your Honor.

18 **THE COURT:** Anything else, Mr. Petersen?

19 **MR. PETERSEN:** Yes, sir.

20 **RE-CROSS-EXAMINATION**

21 **BY MR. PETERSEN:**

22 Q. Mr. Wall, you indicated you used these roads  
23 to gather, go gather firewood?

24 A. Yes, uh-huh.

25 Q. Okay. Now, you -- You said you used the

1 Maple Canyon Road?

2 A. Yes.

3 Q. Tough road to travel up?

4 A. Uh-huh.

5 Q. Rugged road?

6 A. Well, it -- No worse than any other roads.

7 I mean, you get out in the mountains all the roads are

8 rough, bumpy, rocky roads.

9 Q. Sure. Where are you going to gather firewood  
10 on the Maple Canyon Road?

11 A. On the Maple Canyon Road?

12 Q. Yes.

13 A. You don't. You get up onto the, up onto the  
14 Ridge Line Road.

15 Q. Tell me where --

16 A. And get into a patch of pines up there, see,  
17 and cut wood.

18 Q. Well, where's that going to be?

19 A. Go either direction from where Maple Canyon  
20 hooks into it. Or you can come up what they call the  
21 other -- Oh, what's that rough son of a gun? There's  
22 another one that goes up on there.

23 Q. You're not going to gather wood off the Maple  
24 Canyon Road, that's private property.

25 A. No, no, there's really not -- Not off the

1 Maple Canyon. But even if you did gather it up off the  
2 Maple Canyon, you know, it's no biggy.

3 Q. You're up here on mountain ridge, on the  
4 Ridge Line Road.

5 A. Uh-huh, that's where we would get wood is  
6 along the Ridge Line Road. See, it goes through patches  
7 of pines. And it was pretty good wood gathering.

8 Q. Where are you going to gather wood on the  
9 Ridge Line Road?

10 A. You want me to show you there?

11 Q. Yeah. Are you going to be on the West  
12 Daniels' property?

13 A. Let's see. Now, where are we here? Maple  
14 Canyon, Maple Canyon. Okay. Now, here is the Ridge  
15 Line. You could gather wood through this area. There  
16 are lots of big patches of pine here.

17 Q. You're indicating the private property of Mr.  
18 Okelberry and the West Daniels Land Association; is that  
19 correct?

20 A. Who owned the grounds that time particular I  
21 could not say.

22 Q. You said you were up there gathering wood --

23 A. Uh-huh.

24 Q. -- on private property. Did you gain  
25 permission to do that?

1 A. No, sir.

2 Q. How many years has it been since you went up  
3 there to gather wood?

4 A. Oh, 70, late 70's.

5 Q. Haven't gathered wood since the late 70's?

6 A. Yeah. The reason I say that -- See, I  
7 bought me a truck, a four-wheel drive truck, in '75. And  
8 that's what I would gather wood in, you know. It let me  
9 get up there and get wood.

10 Q. Okay. You said that you went up in the 50's.  
11 Can you give us a date when you went up in the 50's?

12 A. No, sir, I can't.

13 Q. Was it more than once?

14 A. Yeah. You know, hunting and --

15 Q. No, no, to gather wood.

16 A. No, I didn't gather wood then.

17 Q. Didn't gather wood in the 50's?

18 A. No, no.

19 Q. How about the 60's?

20 A. No, no.

21 Q. And the last time you went up was the 70's?

22 A. Yeah, through the 70's. Yeah, early to mid  
23 70's, uh-huh.

24 Q. So there's about a 3 or 4 or 5 year period  
25 when you were gathering wood?

1 A. Yes, approximately.

2 Q. All right.

3 **MR. PETERSEN:** That's all.

4 **THE COURT:** Anything else, Mr. Sweat?

5 **MR. SWEAT:** No, your Honor.

6 **THE COURT:** You may step down.

7 **THE WITNESS:** Thank you.

8 **THE COURT:** Okay. Now, we'll take an  
9 afternoon recess. We'll be in recess until 5 minutes to  
10 3:00.

11 (A brief recess was taken.)

12 **THE COURT:** Mr. Sweat, you may call your next  
13 witness.

14 **MR. SWEAT:** The Plaintiff would call Roy  
15 Daniel, your Honor.

16 **THE COURT:** Okay.

17 **MR. SWEAT:** Or Daniels.

18 **THE COURT:** Daniels?

19 **MR. SWEAT:** I think so.

20 **THE COURT:** Okay. Mr. Daniels, come forward  
21 and have a seat here and we'll get started.

22 **THE WITNESS:** Thank you.

23 **MR. PETERSEN:** Your Honor, we have to object  
24 to this witness on several grounds. One is Mr. Daniels  
25 has been conferring, contrary to the directions of the

1 Court this morning, with the witnesses. We observed Mr.  
2 Besendorfer or Mr. Wall talking with Mr. Daniels,  
3 reviewing testimony, reviewing dates, and contrary to the  
4 instructions of the Court, reviewing he's testimony with  
5 him.

6 **THE COURT:** Okay. Mr. Daniels, have you  
7 talked with any of the witnesses that have already  
8 testified?

9 **THE WITNESSS:** Yes.

10 **THE COURT:** Okay. What did you talk about?

11 **THE WITNESS:** They talked about -- I didn't  
12 -- I made very few comments. They asked me about some  
13 fences. I told them where I believed them to be. They  
14 made comments about their length of time they (INAUDIBLE)  
15 and that's about the size of it. They never talked about  
16 their testimony.

17 **THE COURT:** Didn't you get my instruction to  
18 you, you weren't to confer with one another after you  
19 testified?

20 **THE WITNESS:** Well, I was sitting there. I  
21 should of excused myself.

22 **THE COURT:** I'm not going to hear your  
23 testimony. Next witness.

24 **THE WITNESS:** I'm excused?

25 **THE COURT:** Yeah, you're excused.



1           **THE WITNESS:** Thank you.

2           **THE COURT:** Mr. Wall, Mr. Besendorfer, you're  
3 not to talk with any witnesses that are here to testify.

4           **MR. PETERSEN:** We understand that one of the  
5 witnesses that they designated, your Honor, was sitting  
6 in the courtroom for a period of time, but I guess we'll  
7 cover him when we get to it.

8           **MR. SWEAT:** Who's that?

9           **UNIDENTIFIED:** Pedro, Paris and Pedro.

10          **UNIDENTIFIED:** Oh, he's not going to testify.  
11 He's not on our list.

12          **MR. SWEAT:** He's in here right now.

13          **UNIDENTIFIED:** He's not on our list.

14          **MR. PETERSEN:** Well, what's he in here for?  
15 Get him out of here.

16          **THE COURT:** Next witness.

17          **MR. SWEAT:** Your Honor, I've got them  
18 staggering in. Let me check and see who's here and who's  
19 not here.

20          **UNIDENTIFIED:** Dick Baum is suppose to be  
21 here at 3:30, but Jake is here now if you want to go with  
22 Jake.

23          **MR. SWEAT:** Okay. We call Jake Thompson,  
24 your Honor.

25          **THE COURT:** Okay. Mr. Thompson, come forward

1 and have a seat here in the witness stand.

2           **MR. PETERSEN:** Your Honor, we'd make the same  
3 motion in respect to Mr. Thompson that we made in respect  
4 to Mr. Daniels. He was in the hall conferring with Mr.  
5 Besendorfer, Mr. Wall. They were discussing testimony.

6           **THE COURT:** Mr. Thompson, after Mr.  
7 Besendorfer and Mr. Wall had testified did you talk with  
8 them?

9           **THE WITNESS:** Yeah, but I didn't talk about  
10 what, his ground. We was talking about that up by the  
11 oil rig.

12           **THE COURT:** So did you review with them what  
13 they testified concerning?

14           **THE WITNESS:** No, not really.

15           **THE COURT:** Did you talk about some other  
16 grounds (INAUDIBLE) location?

17           **THE WITNESS:** Yeah, we were talking about  
18 where the forest fence was, where it come through there  
19 by the oil rig, where they drilled that oil rig up there.

20           **THE COURT:** That's on the north end?

21           **THE WITNESS:** (INAUDIBLE). Yeah, north end  
22 of the bridge.

23           **THE COURT:** Any further inquiries, Mr.  
24 Petersen?

25           **MR. PETERSEN:** Well, your Honor, I think that

1 Mr. Thompson was there during the full course of the  
2 conversation with Mr. Daniels. They were sitting  
3 together. They were observing. They were listening to  
4 the same conversation. One of them with Mr. Daniels  
5 would of been --

6 **THE COURT:** Well, I asked you if you want to  
7 inquire further. Right now I have not found anything  
8 that would disqualify him.

9 **MR. PETERSEN:** Sure. Mr. Thompson, you were  
10 sitting out in the hall, were you not?

11 **THE WITNESS:** Yes.

12 **MR. PETERSEN:** And you were on the, sitting  
13 on a seat and Mr. Daniels was sitting next to you, was he  
14 not?

15 **THE WITNESS:** Yes.

16 **MR. PETERSEN:** And you carried on a  
17 conversation with Mr. Besendorfer and Mr. Wall?

18 **THE WITNESS:** Yes.

19 **MR. PETERSEN:** And how long did that  
20 conversation go on?

21 **THE WITNESS:** Oh, maybe five minutes.

22 **MR. PETERSEN:** So pretty much the length of  
23 the last break that we had in court?

24 **THE WITNESS:** Yeah.

25 **MR. PETERSEN:** So if that was five, ten

1 minutes, whatever it is, that's what you talked about?

2           **THE WITNESS:** Yeah.

3           **MR. PETERSEN:** Was there ever a time when you  
4 were, when Mr. Daniels was talking alone to Mr.  
5 Besendorfer and Mr. Wall?

6           **THE WITNESS:** Alone?

7           **MR. PETERSEN:** Alone.

8           **THE WITNESS:** I think we was all involved in  
9 the conversation.

10           **MR. PETERSEN:** And that conversation involved  
11 more than just the oil well in that area.

12           **THE WITNESS:** No, Mr. Wall wanted to know  
13 where the fence line come through there where that road  
14 went back to that, that oil rig site, he wanted to know  
15 if that road went on down. And I said no, it goes into  
16 Parker. And he wanted to know where the forest fence  
17 was. And we all commented where we thought it was  
18 (INAUDIBLE).

19           **MR. PETERSEN:** Where's the forest fence that  
20 you're talking about?

21           **THE WITNESS:** I'm not sure. I thought it was  
22 the one that came up over the Wallsberg side down through  
23 the pines and come right close to that oil rig there.  
24 But I'm not sure if that's here or the one above it.

25           **MR. PETERSEN:** You heard the admonition from

1 the Court this morning, did you not, not to confer with  
2 one another concerning your testimony?

3 **THE WITNESS:** Well, I didn't think we was  
4 talking about testimony.

5 **MR. PETERSEN:** You thought it was okay?

6 **THE WITNESS:** Maybe I'm wrong, but I didn't  
7 think it was testimony.

8 **MR. PETERSEN:** Your Honor, I submit it's the  
9 same conversation that Mr. Daniels and Mr. --

10 **THE COURT:** Well, I disqualified Mr. Daniels,  
11 but I haven't heard anything yet that would disqualify  
12 Mr. Thompson. Mr. Daniels talked about, indicated that  
13 they talked about how long they'd been hunting and those  
14 type of things. And that's the reason I disqualified Mr.  
15 Daniels, but it's not what Mr. Thompson is listing. I'm  
16 not going to disqualify him.

17 **MR. PETERSEN:** Were you privy to any of those  
18 conversations about hunting and so fourth?

19 **THE WITNESS:** Well, I think everybody's  
20 talked about being able to hunt that area.

21 **MR. PETERSEN:** I mean out in the hall, did  
22 you talk about hunting?

23 **THE WITNESS:** It was mentioned.

24 **MR. PETERSEN:** And did you discuss with them  
25 your hunting on that property?

1                   **THE WITNESS:** Probably. I've hunted there  
2 for so many years. Me and Clay use to run into a lot of  
3 these guys up there.

4                   **MR. PETERSEN:** Did Mr. Besendorfer and Mr.  
5 Wall talk about their hunting?

6                   **THE WITNESS:** I don't know.

7                   **MR. PETERSEN:** But you talked about your  
8 hunting?

9                   **THE WITNESS:** I just said I don't know the  
10 dates that I started, you know, the actual date, the year  
11 that I started. I know about approximately.

12                   **MR. PETERSEN:** Your Honor, we'd ask then that  
13 if he's not going to be excused then he cannot talk about  
14 any dates or any hunting on that property, your Honor.  
15 That's --

16                   **THE COURT:** Well, he -- We'll get onto it  
17 and see if you want to make any objection to him. Go  
18 ahead, Mr. Sweat.

19                   **MR. SWEAT:** Your Honor, before we start,  
20 based on that information, if we were to ask the Court to  
21 listen to Mr. Daniels, but not discuss anything regarding  
22 hunting.

23                   **THE COURT:** I -- You know -- Mr. Sweat,  
24 you have an obligation making sure your witnesses don't  
25 confer with each other. This is, you know -- Part of

1 this penalty is that they discussed, they met together at  
2 all. And I don't know -- To a certain extent I don't  
3 know how much they've tainted each others testimony. But  
4 I'm not going to permit Mr. Daniels to testify as partial  
5 sanction for you not making sure your witnesses didn't  
6 confer with one another.

7 DIRECT EXAMINATION

8 **BY MR. SWEAT:**

9 Q. Mr. Thompson, would you please state your  
10 full name and address for the record?

11 A. Gerald Thompson, 1165 East 100 North  
12 Wallsberg, Utah.

13 Q. And what is your birth date?

14 A. November the 16th, 1937.

15 Q. How long have you lived in Wallsberg?

16 A. Since 1966.

17 **THE COURT:** Were you sworn in earlier, Mr.  
18 Thompson?

19 **THE WITNESS:** Yes.

20 Q. **(BY MR. SWEAT)** Okay. Are you familiar with  
21 the area east and a little bit north of Wallsberg?

22 A. Yes.

23 Q. Why are you familiar with that area?

24 A. I spend a lot of time on that area, from  
25 Wallsberg right over through the, by the hills, through

1 the flats and up on top, clear up as far as three forks.

2 Q. Do you own any property in that area?

3 A. No.

4 Q. Have you ever leased any property in that  
5 area?

6 A. No.

7 Q. I'd like to draw your attention to what has  
8 been marked as Exhibit No. 2. Can you take a moment and  
9 review this exhibit?

10 **THE COURT:** You can go -- You can step down  
11 and look at it if you want, Mr. Thompson. Look at that,  
12 Mr. Thompson -- The Court's got to take a phone call.  
13 It's an emergency call. So we'll be in a short recess.

14 (A brief recess was taken.)

15 **THE COURT:** Okay.

16 **MR. SWEAT:** Your Honor, before I get started,  
17 Mr. Petersen has brought to my attention that there is  
18 one of the roads here that hasn't been highlighted. We'd  
19 ask the Court's permission, I believe it was highlighted  
20 in the complaint as part of the Ridge Line Road, to be  
21 able to highlight that at the next break, just in a red  
22 marker?

23 **THE COURT:** Do you acknowledge that, Mr.  
24 Petersen?

25 **MR. PETERSEN:** Yeah, that -- I think that's



1 correct, your Honor. I think it's on there.

2 **THE COURT:** Okay. You may do so.

3 **MR. SWEAT:** Thank you, your Honor.

4 **DIRECT EXAMINATION CONT.**

5 Q. **(BY MR. SWEAT)** Mr. Thompson, how long have  
6 you lived in Wallsberg?

7 A. 49 years, 48 or 49 years. It was '56 when I  
8 moved there. So --

9 Q. I think we went over this. And you're  
10 familiar with the area to the east and a little bit north  
11 of Wallsberg?

12 A. Yes.

13 Q. And you just reviewed this map that covers  
14 that area; is that correct?

15 A. Yes.

16 Q. Do you recognize the roads there shown on  
17 that map?

18 A. Yes.

19 Q. Are you aware of a road called the Circle  
20 Springs Road?

21 A. Yes.

22 Q. Where does that road go?

23 A. Well, it goes off the Ridge Line and goes  
24 around by Circle Springs and right back onto the Ridge  
25 Line Road, through Bear Wallow.

1 Q. On the Circle Spring Road, would you look at  
2 (INAUDIBLE) road to indicate this Circle Spring Road on  
3 the map?

4 A. Yeah.

5 Q. Is that your understanding of it here, this  
6 green road?

7 A. I guess. I've only been down on there one  
8 different time, but that many years ago, but I know the  
9 road borders the gate there where you go in there and  
10 goes right back on Ridge Line Road.

11 Q. You say you used this Circle Spring Road one  
12 time?

13 A. Yeah, I've been out on that road several  
14 times.

15 Q. Several times or one time?

16 A. Several times. I've been caught in muddy  
17 country up there during deer hunting. We couldn't get up  
18 through them pines, because people was stuck. So we went  
19 around there and we'd come out there at the Big Glade.

20 Q. On Circle Springs or are you --

21 A. No, it ain't Circle Springs. It's the road  
22 that borders the gate to go into Circle Springs. I could  
23 show you. I could go down there and show you. —

24 Q. Please.

25 A. (INAUDIBLE) this is the road here, right

1 (INAUDIBLE) the gate to Circle is right here and that  
2 road comes right back to Ridge Line Road.

3 Q. Okay. This road where it shows in green,  
4 it's going down this way, have you ever used that road?

5 A. I've been on it, but it's been a lot of years  
6 ago. I never did spend my time on it.

7 Q. What do you call that road, the green road?

8 A. Circle Springs I guess, or just Circle.

9 Q. You indicate that you have driven on that  
10 road?

11 A. I haven't driven down in there, no.

12 Q. How did you --

13 A. I've driven on the road that borders it and  
14 goes back to the Ridge Line.

15 Q. How long --

16 A. I walked down in there one year hunting, bow  
17 hunting.

18 Q. Did you walk down the road?

19 A. Yes, sir.

20 Q. Do you remember what year that was?

21 A. It's been so many years ago I couldn't tell  
22 you.

23 Q. Do you recall seeing any no trespassing signs  
24 when you walked town there?

25 A. Not then no, sir.

1 Q. Do you recall any locked gate?

2 A. No.

3 Q. Are aware of a road called Ridge Line Road?

4 A. Yes.

5 Q. Could you show us on the map what you  
6 understand to be Ridge Line Road?

7 A. This road here in red, and it goes way down  
8 and it goes over to the gun club.

9 Q. Have you ever used the Ridge Line Road?

10 A. Yes.

11 Q. When do you think you first used the Ridge  
12 Line Road?

13 A. Oh, it's probably in mid 50's is when I used  
14 it the first time. I've been down as far as Hearts  
15 Gravel, but I never went from there on over until after  
16 they built that -- When did they build that fish and  
17 game road up on there?

18 Q. You indicate as far as Hearts Gravel. To get  
19 to Hearts Gravel do you have to leave the Okelberry  
20 property?

21 A. Yeah.

22 Q. Do you have to leave --

23 A. Probably go through it a time or two. I  
24 can't see it.

25 Q. Do you have to leave the West Daniels'

1 property?

2 A. No. You might go -- You might leave it  
3 right down towards where you drop off the hill. I'm not  
4 sure. There's so many fences through there that I don't  
5 know.

6 Q. Do you remember when you first used that  
7 property?

8 A. Yes.

9 Q. Why did you use it?

10 A. I was just up there deer hunting.

11 **MR. PETERSEN:** Your Honor, I would move to  
12 exclude any testimony about his deer hunting. This is  
13 one of the areas that he discussed with the witnesses in  
14 the hall.

15 **THE COURT:** Overruled.

16 Q. **(BY MR. SWEAT)** When did you last use the  
17 Ridge Line Road?

18 A. Well, the last time I used the Ridge Line  
19 Road is when Ray put the guy to stop everybody from going  
20 down in there during the deer hunt.

21 Q. What year was that, do you remember?

22 A. Well, it's -- My boy is 32 now and he  
23 started hunting up there when he was 16. So it would  
24 probably be -- He'd have to be some where between 16  
25 and probably 20 years old the last time he used it. But

1 they stopped me at that gate there where you come through  
2 the pines there by Thorton Hallow.

3 Q. And asked you not to use the road?

4 A. They told me I had to pay \$50 to hunt down in  
5 there. And I said I'm not hunting on your property.

6 Q. Were there any signs saying no trespassing on  
7 the road?

8 A. Well, they had a bunch right there by the  
9 gate. I can remember that. They had some red paint on  
10 the gate.

11 Q. Was there any locks on the gate or were the  
12 gates open?

13 A. I have no idea. The gate was open when we  
14 come through it.

15 Q. Before that time, from the first time you  
16 hunted to that time, did you ever see any no trespassing  
17 signs on that road?

18 A. No.

19 Q. Were you ever stopped from hunting?

20 A. That's the only time I was ever stopped on  
21 it.

22 Q. Did you ever use the roads other than just to  
23 hunt?

24 A. Yes.

25 Q. What did you use it for?

1 A. Just to take the family for a picnic or  
2 something and go up over there.

3 Q. And you'd use the Ridge Line Road?

4 A. Uh-huh.

5 Q. Was you ever stopped from using it on one of  
6 those trips?

7 A. No.

8 Q. Did you ever encounter a locked gate?

9 A. No.

10 Q. Were there gates?

11 A. Yes.

12 Q. What kind of gates were they?

13 A. They was wire gates, post and wires, you  
14 know. We'd set them back up when we'd go through them.

15 Q. Were they up all time?

16 A. Well, not all the time. I went through there  
17 when the gates have been down, but I always tried to make  
18 a point to -- If I had put a gate down I put it back up  
19 and I went through.

20 Q. So between the 50's, when you indicated you  
21 first started, and up to 20 years ago, how often per year  
22 do you think you would used that road, Ridge Line Road  
23 now?

24 A. Oh, I'd use it several times during the hunt.  
25 And I'd always go at least once or twice with the family

1 up there just for ride, just to get, you know -- In the  
2 evenings or go up for a picnic.

3 Q. Do you think there --

4 A. Sometimes we'd go farther down than we did  
5 the time before, you know.

6 Q. Do you think there was ever a year that you  
7 didn't use the Ridge Line Road?

8 A. Not up till the time they stopped me there.  
9 And that's -- After that I quit going up there cause it  
10 wasn't worth the hassle, fightin everybody.

11 Q. When you used it did you ever see others use  
12 it the same as you?

13 A. Oh, yeah.

14 Q. Were they people that owned the road or had  
15 property on the road?

16 A. No, I've passed a lot of hunters up in there  
17 and a lot of people from town was up in there riding  
18 around. You certainly always run into somebody,  
19 specially during the hunt.

20 Q. Did you ever ask permission to use the Ridge  
21 Line Road?

22 A. No.

23 Q. Are you aware of a road called Thorton Hallow  
24 Road?

25 A. Yes.



1 Q. Can you point out on the map where that road  
2 is?

3 A. Right in here. Now, when I first started  
4 going up in there, I can't remember a road in there the  
5 first time I went in there.

6 Q. When do you first remember a road being in  
7 there?

8 A. Well, as far as the year and date I don't  
9 know. I just -- When we went there last we went there  
10 with spots. I didn't know that I -- I can't remember  
11 the road the first time we went.

12 Q. Do you remember the last time you went in  
13 there?

14 A. Probably --

15 Q. You can go ahead and sit back down.

16 A. Probably just before they put their, blocked  
17 the road there off of us. I stayed right away from there  
18 after he started blocking that road.

19 Q. About how -- You say you don't remember the  
20 first time you went in there. Did you go in there during  
21 the 70's?

22 A. Yeah, it'd be --

23 Q. Did you go in this during the 60's?

24 A. Well, I might have. I didn't spend much time  
25 up around there. There are too much pine trees and I

1 don't like pines.

2 Q. Did you ever see a locked or a gate on that  
3 road?

4 A. Yeah.

5 Q. Was it locked?

6 A. No, not then.

7 Q. Did you ever see a no trespassing sign on  
8 that road?

9 A. No.

10 Q. Did you ever see anyone else using that road?

11 A. Yeah.

12 Q. Do you know a road called Parker Canyon Road?

13 A. Yes.

14 Q. Can you point that out to us?

15 A. Right in here. It goes this way. It goes  
16 east to (INAUDIBLE) north east.

17 Q. And have you ever driven on that road?

18 A. Yes.

19 Q. You can go ahead and sit. Do you remember  
20 the first time you went on that road?

21 A. No, not really. It was -- It was after I'd  
22 hunted there for a while, cause I didn't know there was  
23 even a road down there for a long time.

24 Q. Do you remember when the last time was you  
25 went on that road?

1 A. Yeah.

2 Q. When was that?

3 A. Oh, it could of been 10, 12 years ago. I was  
4 on horse back when I went down it then though, last time.

5 Q. Was there any signs on the road saying you  
6 couldn't use the road?

7 A. I didn't see any where I come through. I  
8 took the trail there at the oil rig. It goes through.  
9 And I think it goes clear over to about Three Forks.  
10 When I crossed that road I turned and went down toward to  
11 where it ends out on the ridge there and come back.

12 Q. So did you come up the Ridge Line Road to get  
13 to the Parker Canyon Road? Is that what you --

14 A. No, I come around Hearts Gravel and where the  
15 oil ridge was, went through the gate there, the hole in  
16 the fence or whatever it was and hit that trail. Then  
17 there's a trail that goes over and down through Thorton  
18 and on over to about Three Forks. I guess it goes that  
19 far. That's as farther as I've been on it. But I just  
20 -- But for a horse back ride that --

21 Q. Have you ever been clear down to the, where  
22 it goes into the Forest Service at the end of Parker  
23 Canyon?

24 A. I've been to the end of that road. So if  
25 I've -- If the forest is this side of it I've crossed

1 it.

2 Q. Do you remember a gate there?

3 A. Seems like I can remember a gate there, but  
4 I'm not sure. It seems like it's down towards the end.

5 Q. Other than hunting did you ever use Parker  
6 Canyon Road?

7 A. Yeah, that's what I was telling you here. I  
8 was just out for a horseback ride when I went down in  
9 there --

10 Q. Other than that one time did you ever use it?

11 A. -- the last time. I hunted down there once  
12 before.

13 Q. Other than that one time you rode the horse  
14 and hunting did you ever use Parker Canyon Road?

15 A. No.

16 Q. Are you aware of a road called Maple Canyon  
17 Road?

18 A. Yes.

19 Q. Have you ever used that road?

20 A. Yes.

21 Q. When did you first use that road?

22 A. It'd be right around the time I first moved  
23 there in Wallsberg. I went up it several times. And it  
24 got so rough that it was hard to get up and down.

25 Q. When was it you first moved to Wallsberg?

1 A. '56.

2 Q. When did it get so rough that you quit using  
3 it?

4 A. Oh, probably in the 60's, early 60's. I  
5 don't know.

6 Q. From when you first used it in the 50's to  
7 the 60's did you use it how often per year?

8 A. Maybe once. I -- Well, mostly once, but I  
9 may have went down it a second time. I don't know.

10 Q. When you used Maple Canyon Road did you use  
11 -- What portion of the road did you use?

12 A. Just from where you'd go into Wallsberg there  
13 on up to where it turns back down to Ridge Line Road  
14 north.

15 Q. When you used that road did you ever see  
16 gates across the road?

17 A. Yeah, there's a gate at the bottom.  
18 (INAUDIBLE) the oil at Wallsberg there was a gate we use  
19 to go through it.

20 Q. Is that gate locked?

21 A. No, not then.

22 Q. During the time that you just testified you  
23 used it was the gate ever locked?

24 A. No.

25 Q. Did you ever see other people use that road?

1 A. Yes.

2 Q. Did you ever see any no trespassing signs on  
3 that road?

4 A. No.

5 MR. SWEAT: That's all the questions I have  
6 at this time, your Honor.

7 THE COURT: Mr. Petersen, cross?

8 MR. PETERSEN: Thank you, your Honor.

9 CROSS-EXAMINATION

10 BY MR. PETERSEN:

11 Q. Now, Mr. Thompson, I understand you moved up  
12 in that area in 1956?

13 A. Yes.

14 Q. You moved to Wallsberg in 1956? Prior to  
15 1956 you were never in that area?

16 A. I was in there one time in 1955. Only I  
17 didn't go down the Ridge Road. I just hunted with my  
18 father and stepbrother. And we come from Daniels to the  
19 Big Glade.

20 Q. And that's about as far as you went?

21 A. Yeah.

22 Q. So you didn't go on Ridge Line Road or any of  
23 these other roads?

24 A. Not until after I moved there.

25 Q. Okay. Now, the Circle Springs Road, my

1 understanding is you only used that one time?

2 A. I walked down into Circle Springs one time,  
3 yes.

4 Q. Okay. You never drove down there in a car?

5 A. No.

6 Q. Is the reason you walked down there is  
7 because the road was so rough?

8 A. No, I was bow hunting. I parked a car out on  
9 the road that goes around back on the Ridge Line Road.  
10 They call it Bear Wallow Road or use to. I don't know  
11 what they call it now or what the name really is.

12 Q. What year was it you went down that Circle  
13 Springs Road?

14 A. I can't tell you the date on that. I can't  
15 remember. I wasn't interested in dates and stuff then.  
16 I was out hunting and I --

17 Q. It wouldn't of been in 1955 then?

18 A. No.

19 Q. Was it in 1956 when you moved there?

20 A. It was after that.

21 Q. Would it of been in the 60's?

22 A. No, it would be in the later part of the  
23 50's.

24 Q. Then the Ridge Line Road, you started using  
25 that in the mid 50's you said.

1 A. Yeah.

2 Q. It wouldn't of been in '55 then, cause you  
3 weren't living up there?

4 A. I don't think I went clear through on the  
5 Ridge Line Road. I went down into, oh, probably to  
6 Hearts Gravel.

7 Q. What I'm asking is --

8 A. Well, I didn't go that far -- Excuse me.  
9 I'd go down into them pines just about where that forest  
10 fence took off and then walked down from there.

11 Q. When would of been the first year you would  
12 of used Ridge Line Road?

13 A. '56 or '57.

14 Q. Now this Hearts --

15 A. (INAUDIBLE) that far, I didn't go clear  
16 through on it now.

17 Q. But that's the first time you'd ever gone on  
18 Ridge Line Road was '56, '57?

19 A. Yeah.

20 Q. You said you went as far as the Hearts Gravel  
21 Road?

22 A. Well, was just above there. I was just  
23 saying I went just up out of White Pole in them pine till  
24 I hit the fence, then I walked down off there on foot.

25 Q. This first time you used it in '56, '57 were



1 you walking or were you driving?

2 A. I drove down to the pines then I walked. I  
3 didn't go on down. I turned around and drove back when I  
4 got to (INAUDIBLE).

5 Q. Okay. You drove to the pines. Where were  
6 the pines at?

7 A. I'll try to show you here as much as I can.  
8 At White Pole there's (INAUDIBLE) bridge that comes up  
9 here (INAUDIBLE) come off this plat and down on top.  
10 There's a lot of pine trees along here. And then right  
11 over here someplace there's a fence and went down to  
12 where by that oil rig plat and the road from Hearts  
13 Gravel use to come around to there. I always went down  
14 through them pines there.

15 Q. Okay. So as I understand then you drove that  
16 once in '56 or '57; would that be correct?

17 A. Yes.

18 Q. Now, did you ever drive it again in the 50's?

19 A. I would imagine. Yeah, I definitely drove it  
20 again, cause I hunted there every year and we'd always  
21 drive up on there.

22 Q. Do you have a recollection of driving up and  
23 down that road more than once in the 1950's?

24 A. Oh, yeah, I'm sure I was up there several  
25 times during the 1950's.

1 Q. Several times in --

2 A. I hunted deer every year up there.

3 Q. Several times in the 50's?

4 A. Yes. I don't know -- I didn't even know  
5 the road went on down to Ridge Line at that time in my  
6 life. I drove there to hunt and I was able -- The  
7 first time I drove clear off is after they built that  
8 fish and game road up in there. It was after then that I  
9 drove clear off to the gun club.

10 Q. Now, when you came off of the Forest Service  
11 property onto the Ridge Line Road was there a gate there?

12 A. There was a lot of gates between the Big  
13 Glade and down to White Pole. And the only gate I seen  
14 after that was the fence I was telling you about that I  
15 walked down had a gate on it, there on top.

16 Q. If you recall, as you went on this Ridge Line  
17 Road, if there was a gate when you went up in '56, '57?

18 A. Yes, there was several gates on the east end  
19 there.

20 Q. Was the gate opened or closed when you went?

21 A. Well, sometimes it was open, sometimes it was  
22 closed.

23 Q. It just depends then?

24 A. Yeah, we have open gates all the way through  
25 there.

1 Q. I'll show you what's been -- Let me show  
2 you what's been marked as Exhibit 6 and can ask you if  
3 you can identify that?

4 A. That looks like -- I'm not sure. That  
5 looks like Circle Springs Road or else the road that  
6 comes -- After you cross over into Thorton Hallow, you  
7 go up just a little rise and there was a gate right  
8 there. And then the road back here to Circle Spring.  
9 Now, it could be that gate or it could be Circle Springs  
10 gate. I don't know. It looks familiar to me, but I'm  
11 really not sure which gate it is.

12 Q. There's a keep out sign on it. Do you  
13 remember seeing that sign?

14 A. Let's see it again. I think there's a sign  
15 there now that says keep out if that's the, going down in  
16 the --

17 Q. No, I'm asking you when you went there the  
18 first time -

19 A. No, I didn't see no trespassing signs at all.

20 Q. Let me show you what's been marked Exhibit,  
21 Defendant's Exhibit No. 9 and ask you if you can identify  
22 that?

23 A. Yeah, that's the ledges going up over from  
24 White Pole to the top of the ridge there, where I was  
25 just talking about.

1 Q. Would you describe that as a steep, rocky  
2 road?

3 A. Yes, it is.

4 Q. Difficult to get over?

5 A. Well, yeah, you got to take your time.

6 Q. Now, when you went deer hunting did you hunt  
7 other areas besides this area here? Did you go in other  
8 areas?

9 A. Well, from probably ahead of Maple Creek  
10 where that canyon comes up, probably from there, Cummings  
11 is back north and west. That's about as far as we went,  
12 up towards Cummings Canyons.

13 Q. So when you say north and west is it, is that  
14 across the Main Canyon Road there, some where up in that  
15 area?

16 A. It's -- No, it's up on the Ridge Road, but  
17 it's right at the head of Maple Creek. The road comes in  
18 below there from Maple Creek, but there's a draw that  
19 comes down Maple Creek and cross right there. That's why  
20 I say the head of Maple Creek.

21 Q. So you'd hunt there where -- Are there any  
22 other areas in Wasatch County or anywhere else you'd  
23 hunt?

24 A. Oh, yeah, I hunted on the south side of  
25 Wallsberg over in the oaks and up the little valley. But

1 when I went up there it was pretty basically from  
2 Cummings back north and west, Cummings.

3 Q. So you're hunting over the years has not been  
4 confined to this area. There would be other areas you  
5 would hunt?

6 A. Well, it was mostly this area until I got  
7 stopped.

8 Q. There were occasions you would go into other  
9 areas though?

10 A. When I -- After I was stopped going down  
11 there then I moved to other areas.

12 Q. Now, this Ridge Line Road, how would you  
13 describe that? Is it rocky?

14 A. Well, I'll tell you the first time I went in  
15 there I took a -- Not the first time I went in there,  
16 but I took a car in there one time, a 1955 Ford. And I  
17 parked just below them ledges right there.

18 Q. Well, my question was --

19 A. So that says something about the road, it's  
20 passable.

21 Q. Was it rocky?

22 A. No, it's not too rocky till you -- There  
23 rocks here and there, but it ain't solid rock. There's a  
24 lot of mud there when it gets wet. And there's holes,  
25 mud holes, you know, that gathers.

1 Q. That's pretty hard on your car, wasn't it?  
2 A. Well, it could of been, but I made it all  
3 right. I was going hunting and I drove right to it.  
4 Q. Did you have to move any trees out of the  
5 way?  
6 A. No.  
7 Q. Any time you went up there did you ever move  
8 any trees?  
9 A. No trees, no.  
10 Q. Did you ever take that Ford vehicle up there  
11 again on that road?  
12 A. No.  
13 Q. Why not?  
14 A. I had a truck by then. I didn't need it.  
15 I'd take the truck up.  
16 Q. Too rough?  
17 A. Yeah, it was a rough road, but it wasn't that  
18 bad. I made it in there and out. The guy that was with  
19 me had a 1954 Chev and he made it in and out. So --  
20 Q. Do you think the roads have improved over the  
21 years? Is it a better road last time --  
22 A. No, I don't think they've improved. I think  
23 the four-wheelers get in there with the mud and stuff and  
24 dig ruts and stuff. I don't know. I don't think they've  
25 improved any. I think they was better back then

1 (INAUDIBLE).

2 Q. So they're worse now than they were then?

3 A. Well, the last time I was on them there was a  
4 few more ruts in them.

5 Q. Well, the last time you went up there it's  
6 been over ten years ago then?

7 A. It's been a while since I went up there. I  
8 don't know the exact date. It was during the hunt.

9 Q. Now, you said that you would run into people  
10 up there?

11 A. Yeah, run into a lot of people I knew.

12 Q. Give me a time in the 1950's when you ran  
13 into people up there?

14 A. During the deer hunt.

15 Q. 1956, '57?

16 A. From '56 on through. I'd always --

17 Q. Where? What -- When in 1956?

18 A. During the deer hunt.

19 Q. Where?

20 A. Down in White Pole, through that area.

21 Q. Who?

22 A. Well, I run into some Edwards that use to  
23 hunt there from Charleston. I run into Russel Wall. He  
24 use to bring his family up there to hunt. I run into  
25 them.

1 Q. You have a clear recollection of that in  
2 1956?

3 A. Yeah, I knew the guy personally. I talked to  
4 him.

5 Q. What brings it to mind it was 1956 you  
6 remember that?

7 A. Well, maybe it was -- I told you '56 or '57  
8 the first time. But they hunted there every year just  
9 like we did.

10 Q. Okay. So the first time you went up in that  
11 area was 1956 or 1957?

12 A. Yes.

13 Q. You signed an affidavit that's been filed  
14 with this Court, did you not?

15 A. I guess, I don't know.

16 Q. In this affidavit you stated that you used  
17 those roads beginning in 1955.

18 A. Well, I told you that I come in as far as the  
19 Big Glade in 1955.

20 Q. You said you used the Ridge Line Road from  
21 1955 to 1966. That would be incorrect, wouldn't it?

22 A. Well, I don't know if it is or not. I can't  
23 remember that far back really.

24 Q. Your testimony on direct and now  
25 cross-examination is the first time you went in there was



1 1956 and maybe 1957?

2 A. Yeah.

3 Q. So this affidavit --

4 A. That's the first time I hunted in there.

5 Q. Okay. Well, this affidavit is in error, is  
6 it not?

7 A. I couldn't tell you cause I can't remember  
8 that far back, really I can't. I can't give you no  
9 specific years or dates. I moved there in '56 and I've  
10 hunted there every since.

11 Q. Okay. When you said in your affidavit that  
12 you began in 1955, my question is that is an error, is it  
13 not?

14 A. Well, I think maybe the understanding there  
15 is I moved to Wallsberg in 1955 for a short period of  
16 time. Then I moved back out. I went over there and  
17 stayed with my in-laws for a while because the mine was  
18 shutting down and stuff. Then I went back to Park City.  
19 Then after they shut down I come back and moved there and  
20 got a job at Geneva Steel. I worked there for 30 years.

21 Q. And when you say that your recollection is  
22 not too good; that's correct, is it not?

23 A. It is. I -- I -- As far as giving the  
24 dates. But I know from '56 on I hunted there every year  
25 till I was run out that day.

1 Q. But you also said you hunted other years,  
2 other areas.

3 A. I did, after they, after they stopped me from  
4 going in there. I'm not going to fight with people to go  
5 in there and hunt. I go out for recreation and have a  
6 good time.

7 Q. Okay. The Thorton Hallow Road, you said when  
8 you went on that the first time there wasn't a road.

9 A. I didn't know if there's a road. I couldn't  
10 remember seeing a road in there. We walked down through  
11 some pines and that.

12 Q. So your recollection is the first time you  
13 went into Thorton Hallow you can't remember if there's a  
14 road or not?

15 A. That's right.

16 Q. You didn't drive in then?

17 A. No.

18 Q. And the first time you went in there was the  
19 70's and not the 60's or the 50's?

20 A. Well, I guess. Like I say, I'm kind of  
21 just --

22 Q. Well, I'm just comparing the testimony --

23 A. -- trying to put it all together here, but  
24 I'd imagine that's about when I started -- I drove down  
25 in there with Dee Sabey one time. That's the first time

1 a new road was in there. But I walked down in there,  
2 just to the head of it, before then.

3 Q. Well, then your affidavit when you said you  
4 went into Thorton Hallow Road started in 1955; that's  
5 incorrect, is it not?

6 A. Yes, I guess so. I can't remember going down  
7 in there in '55. I really -- The first year I hunted  
8 in there was in 1955, but I didn't spend that much time  
9 in there. So it with have to be '56 are after.

10 Q. Parker Canyon Road, you said you can't  
11 remember the first time you went into that road?

12 A. No, I can't.

13 Q. So in your affidavit when you said you  
14 started in 1955 that affidavit would incorrect too,  
15 would it not?

16 A. No, not entirely, cause I went to White Pole  
17 in them first years and that road -- I'd been on a road  
18 that went over to a ridge right there. I'd only go maybe  
19 less then a quater of a mile. Then we'd go up over a  
20 ridge and back down by the White Pole pond.

21 Q. Mr. Thompson, on direct-examination your  
22 testimony was you can't remember the first time you went  
23 on Parker Canyon Road?

24 A. I can't.

25 Q. Okay. But in your affidavit --

1 A. I don't know when the road was even built in  
2 there. I couldn't tell you.

3 Q. Okay. But in your affidavit you said your  
4 first time you went in was 1955?

5 A. Well, that's the first time I went in that  
6 area.

7 Q. You realize you're under oath?

8 A. Yeah, but I can't remember telling you that.

9 Q. You said that you think there was a gate  
10 there when the first time you went in?

11 A. Down towards the end of it, probably where  
12 the forest comes through, if that's where it comes  
13 through. It seems like I could remember a gate.

14 Q. Okay. The Maple Canyon Road, you said it was  
15 very rough?

16 A. Well, it got pretty rough.

17 Q. Hard to get up and down?

18 A. Well, I thought it was too hard to go that  
19 way when there's better ways.

20 Q. And that was in the 60's?

21 A. Well, you're -- You're loading the bullets.

22 Q. Well, I'm just --

23 A. It had be between 1956 and when they started  
24 keeping people from in there. And I cannot remember the  
25 exact dates or years.

1 Q. You can't remember exact dates or years?

2 A. No, that's been a long time ago.

3 Q. And that's true for all these roads. You  
4 can't remember exact dates or years?

5 A. Probably, but I've been on them. So that's a  
6 fact.

7 Q. Now, you said that you used the Maple Canyon  
8 Road once. Would this be something you remember or you  
9 don't remember?

10 A. Maple Canyon?

11 Q. Uh-huh.

12 A. I used that more than once. I just told you  
13 I used it more than once.

14 Q. Mr. Thompson, we can review your testimony,  
15 it's all on tape. My notes indicate that you started to  
16 use that once in 1960?

17 **MR. SWEAT:** My recollection is he used Circle  
18 Springs once.

19 **THE COURT:** Well, he's -- Mr. Petersen,  
20 just ask him direct questions. Don't -- Cause the  
21 Court will recall what was said and what wasn't said.

22 **MR. PETERSEN:** Thank you, your Honor.

23 Q. **(BY MR. PETERSEN)** You said there was a gate  
24 at the bottom of Maple Canyon Road.

25 A. There was, just after you leave the oil in

1 Wallsberg.

2 Q. It wasn't locked, but there was a gate there?

3 A. Yes.

4 Q. And that's in the 1960's?

5 A. Yeah.

6 **MR. PETERSEN:** Can confer with my client,  
7 your Honor?

8 **THE COURT:** You may.

9 **MR. PETERSEN:** Thank you. That's all I have,  
10 your Honor.

11 **THE COURT:** Anything else, Mr. Sweat?

12 **MR. SWEAT:** Just briefly, your Honor.

13 **REDIRECT EXAMINATION**

14 **BY MR. SWEAT:**

15 Q. Mr. Thompson, you've indicated that you have  
16 driven this Ridge Line Road from this end clear down to  
17 the gun club?

18 A. Yeah.

19 Q. What did you drive it in?

20 A. Jeep.

21 Q. Have you only done that once?

22 A. No -- Well, clear through, yeah, once. Got  
23 a little steep going off the end there by the country  
24 club. But I've been up that first ridge from Hearts  
25 Gravel in my pickup many times, but I didn't go through

1 it all.

2 Q. You've indicated Hearts Gravel is down off of  
3 this area; is that correct?

4 A. This is the fish and game road (INAUDIBLE)  
5 Hearts Gravel here.

6 Q. So you say you've driven --

7 A. From right here you go this way up on the  
8 ridge. There's -- It's a pretty good road up in there.  
9 And then this part drops off (INAUDIBLE).

10 Q. So from right here to right here how many  
11 times have you driven the entire length of that?

12 MR. PETERSEN: What was that again? I missed  
13 that.

14 MR. SWEAT: From where Ridge Line Road enters  
15 into Okelberry property where it leaves the West Daniels  
16 property.

17 Q. (BY MR. SWEAT) How many times do you think  
18 you've driven the length of that road?

19 A. Well, it'd have to be, I'll bet you five  
20 times a year at least, or maybe more.

21 Q. And when --

22 A. Plus you're counting the deer hunt and the  
23 trips I made up in the summer.

24 Q. And when was the last time you went on that  
25 road?

1 A. Last time I went on that road was last  
2 summer. I only went up there to the --

3 Q. When was last time you drove the entire  
4 length of that road?

5 A. Well, that would be in the later 60's or 70's  
6 probably.

7 Q. And when did you first drive the entire  
8 length of that road from --

9 **THE COURT:** Well, Mr. Sweat, he's testified  
10 he's only driven the whole length of the road once.

11 **MR. SWEAT:** I'm -- I'm meaning --

12 **THE COURT:** I think you confused him. Why  
13 don't you ask him again when the last time he drove the  
14 area from where it leaves West Daniels' property to where  
15 it leaves Mr. Okelberry's property.

16 Q. **(BY MR. SWEAT)** From where it starts here to  
17 where it leaves here when was the first time you drove  
18 that road?

19 A. The first time I drove it?

20 Q. The entire length of that road, yeah.

21 A. It would be the later 60's early 70's when we  
22 went the full length, clear to the gun club.

23 **THE COURT:** Again, Mr. Sweat, you're  
24 confusing him.

25 Q. **(BY MR. SWEAT)** Okay. Do you see where the



1 road starts on Mr. Okelberry's property.

2 A. Yep.

3 Q. Do you see where it comes off of West  
4 Daniels' property, right here?

5 A. Yeah.

6 Q. Right now I'm calling this, from here to  
7 here --

8 A. Oh --

9 Q. -- the length of the road.

10 A. Okay.

11 Q. When was the last time you drove that much of  
12 the road?

13 A. I guess when they stopped me there that time.  
14 That was the last day I went down in there.

15 Q. When was the first time you drove that length  
16 of the road?

17 A. In my own outfit I would say it was 1957 or  
18 '58.

19 Q. In between those two times you've already  
20 testified that you drove that length of the road, am I  
21 right, five or six times or am I mis-characterizing it?

22 A. Oh, when I -- When I went up there deer  
23 hunting we'd make it -- I'd go in and out of there just  
24 about every day of the hunt. We figure at least five  
25 times.

1 Q. During those times did you ever see a locked  
2 gate?

3 A. No, not till they stopped me that day. It  
4 wasn't locked then. The gate was open then. They had it  
5 all painted up to stop me.

6 MR. SWEAT: That's all I have, your Honor.

7 THE COURT: Mr. Petersen?

8 MR. PETERSEN: Thank you.

9 RECROSS EXAMINATION

10 BY MR. PETERSEN:

11 Q. Mr. Thompson, you said that you have driven  
12 five times a year on the Ridge Line Road?

13 A. Yeah, at least.

14 Q. In your affidavit, which is dated the 23rd of  
15 January, 2003, you stated, "Ridge Line Road from 1955 to  
16 1996". We've covered the 1955 issue. "My use of the  
17 Ridge Line Road typically occurred several times per  
18 year". Several, how do you interpret several?

19 A. Well, like I just got through saying, I went  
20 in and out of there often to hunt deer. I didn't -- I  
21 camped up there the first few days and then I'd go back  
22 to work. And I'd drive back in every time I got a chance  
23 to hunt more.

24 Q. Do you interpret several to mean five times a  
25 year?

1 A. Well, approximately. It varied some.

2 Q. It would be some years you wouldn't even go  
3 up, wouldn't there?

4 A. No, I went up every year till I was kept out  
5 of there. And when I started hunting it till they locked  
6 the gate, I hunted there every year.

7 Q. Now, there was one time that you drove all  
8 the way from the Glade to the gun club over the Ridge  
9 Line Road?

10 A. Yes.

11 Q. Only one?

12 A. Well -- Huh?

13 Q. Only once?

14 A. Yeah, it's a pretty steep going off the gun  
15 club there. So if we hadn't been in the Jeep I wouldn't  
16 of been there then.

17 Q. Did you run into any locked gates?

18 A. No.

19 Q. Let me show you what's been marked as  
20 Defendant's Exhibit 11 and ask you if you can identify  
21 that?

22 A. Yeah, that's the gate there on Hearts Gravel,  
23 I think, where you start up over where the fish and game  
24 road comes in.

25 Q. Is that a gate on Hearts Gravel or is that a

1 gate on Ridge Line Road?

2 A. I don't know. I can't -- That looks like  
3 the one they use to have at Hearts Gravel, but I couldn't  
4 say for sure, it's been too many years.

5 Q. When you traveled --

6 A. You can't see enough of it anyway.

7 Q. When you traveled on that road did you see  
8 any signs that's indicated on Defendant's Exhibit 5?

9 A. No, not back then I didn't. I've never been  
10 down it since. So I don't know about after.

11 Q. You never saw a sign that said road closed to  
12 motorized vehicles?

13 A. No, I've seen them since, but not back then.

14 Q. Now, you said the last time you drove that is  
15 when they stopped you and wanted \$50 to hunt?

16 A. Uh-huh.

17 Q. Can you give us any idea when that was?

18 A. Well, I tried to tell you once. It's when my  
19 boy was hunting with me. So he was old enough to hunt.  
20 Maybe some where -- He'd have to be between 16 and 20,  
21 some where through there. I don't know. Somebody -- A  
22 big tall guy stopped me there driving a four-wheeler. He  
23 told me if I went down there it would cost \$50. And I  
24 said I'm not hunting on your place.

25 Q. So that could be 10 years ago, 15 years ago?

1           A.    Oh, it was -- It's probably been over 10  
2 years ago or been 10 or so. I don't know. Some where  
3 around there.

4           Q.    Now, as I understand, Mr. Thompson, when you  
5 traveled on Ridge Line Road you did indicate there were  
6 gates there?

7           A.    Yes, sir.

8           Q.    If they were up you would drive through and  
9 put them backup again?

10          A.    Uh-huh.

11               **MR. PETERSEN:** That's all.

12               **THE COURT:** Anything else, Mr. Sweat?

13               **MR. SWEAT:** No, your Honor.

14               **THE COURT:** Okay. Thank you. You can step  
15 down. Next witness.

16               **MR. SWEAT:** The Plaintiff would call Ed  
17 Sabey, your Honor.

18               **THE COURT:** Okay. Mr. Sabey, come forward to  
19 the witness stand up here. You were sworn this morning;  
20 is that correct, Mr. Sabey.

21               **THE WITNESS:** I haven't been.

22               **THE COURT:** You haven't been sworn?

23               **THE WITNESS:** No.

24               **THE COURT:** Okay. Raise your right hand and  
25 take an oath.

1                   **CLERK:** You do solemnly swear that the  
2 testimony you shall give in the matter now before this  
3 Court shall be the truth, the whole truth, and nothing  
4 about the truth, so help you God?

5                   **THE WITNESS:** Yes.

6                   **THE COURT:** Have a seat. Okay. Mr. Sweat,  
7 you may proceed.

8                   **MR. SWEAT:** Thank you, your Honor.

9                                   **DIRECT EXAMINATION**

10 **BY MR. SWEAT:**

11                   Q. Mr. Sabey, would you please state your full  
12 name for the record?

13                   A. James Ed Sabey.

14                   Q. And what is your address?

15                   A. 3273 South 3400 West, Heber City.

16                   Q. And what is your birth date?

17                   A. July 22nd 1945.

18                   Q. How long have you lived in Wasatch County?

19                   A. All my life.

20                   Q. Are you familiar with the area east and a  
21 little bit north of the City of Wallsberg?

22                   A. I am.

23                   Q. Why are you familiar with that area?

24                   A. I just spend a lot of time up there.

25                   Q. Do you own or have you ever owned any

1 property up in that area?

2 A. No.

3 Q. Have you ever leased any property in that  
4 area?

5 A. No.

6 Q. Have you ever used any of the roads that are  
7 up in that area?

8 A. Yes, I have.

9 Q. I'd like you to take a look at what's been  
10 marked as Exhibit No. 2. If you'd like you can walk down  
11 here and take a look at it. Do you recognize the area  
12 depicted in that map?

13 A. Yes, I do.

14 Q. On that map there's a road labeled the Circle  
15 Springs Road, have you ever driven on that road?

16 A. I have.

17 Q. When did you first use that road?

18 A. I don't know, probably in the 60's when I  
19 first started.

20 Q. Why did you use that road?

21 A. Just grew up there hunting.

22 Q. When you used that road what portion of the  
23 road would you have used?

24 A. The whole thing, from the Big Glade probably  
25 out to Circle Springs and back, you know.

1 Q. The Circle Springs is that located on the  
2 forest?

3 A. It is.

4 Q. And is there a gate between the forest and  
5 Mr. Okelberry's property at the Circle Springs side?

6 A. Yes.

7 Q. What kind is that?

8 A. Just wire gate.

9 Q. When was the last time you used that road?

10 A. A week or so ago with you guys.

11 Q. Prior to that ride when was the last time you  
12 used that road?

13 A. I'm not sure. It's been sometime, cause  
14 every since the Okelberrys have trespassed it or locked  
15 the gates and asked people, I've never -- I've  
16 respected their rights and I've never been up there on  
17 them till that day with you guys.

18 Q. You indicated that you used the road in the  
19 60's; is that correct?

20 A. I have.

21 Q. Did you use it ever in the 70's?

22 A. I did.

23 Q. Did you ever use it in the 80's?

24 A. I'm sure I did. I don't know when they --  
25 I don't know when Ray and them stopped or started locking



1 the gates or trespassing them. That's when I quit, when  
2 ever that was.

3 Q. Do you have any sort of estimate of when that  
4 was?

5 A. I can guess maybe 15 years ago, but I'm just  
6 -- That's just a guess. I've used it -- I've used it  
7 since, since then, but I've never driven a vehicle on it.  
8 Almost -- I have kind of an annual thing. I go up  
9 there the weekend of Thanksgiving and I usually go up  
10 either Thorton Hallow or, and I ride down the ridge and  
11 come home, on horse, but as far as driving a vehicle I  
12 haven't. I've done that for many years.

13 Q. During the time between the 60's and 15 years  
14 ago did you use that road very much, the Circle Springs  
15 Road?

16 A. You don't go up there a lot, but you do go up  
17 occasionally, maybe twice a year, three times. I didn't  
18 go out on Circle as much as I did the other roads.

19 Q. During that time did you ever see a no  
20 trespassing sign?

21 A. There was -- I don't know when they put  
22 that tire up on the tree, but it's been sometime. But I  
23 did see that. But it hasn't been --

24 Q. Is that when you quit going?

25 A. No, I went even after that out on Circle. I

1 mean, I've driven out there. I never, after that tire  
2 was there. The gate wasn't -- There was never a locked  
3 gate. I just assumed it was a trespass or a driveway.

4 Q. You assumed it was a --

5 A. A driveway to the forest.

6 Q. But you didn't go on the property, is that  
7 what you're --

8 A. Just drove the road.

9 Q. You say you have seen -- Other than last  
10 week have you ever seen a locked gate up there?

11 A. No, I haven't.

12 Q. Have you ever seen others use the Circle  
13 Springs Road?

14 A. A lot of people.

15 Q. So a couple times a year you're up there you  
16 typically see someone else using that?

17 A. Yeah.

18 Q. Would they would be the Okelberrys?

19 A. I've seen those people up there occasionally.

20 Q. Have you seen other people other than the  
21 Okelberrys?

22 A. I have.

23 Q. Do you know what they were using the road  
24 for?

25 A. Mostly hunting.

1 Q. Are you aware of a road called Ridge Line  
2 Road? Have you ever used the Ridge Line Road?

3 A. I have.

4 Q. What portions of the Ridge Line Road have you  
5 used?

6 A. Whole thing, from Big Hallow onto the Big  
7 Glade.

8 Q. You've driven the entire length from the Big  
9 Glade down to Big Hallow?

10 A. I have.

11 Q. When did you first make that type of a drive?

12 A. Oh, probably in the 60's. I don't know when  
13 the fish and game purchased that ground and put that road  
14 up through there, but that's, that's when I first did.

15 Q. Why did you use that road that time?

16 A. The first time?

17 Q. First time.

18 A. Just to go. Just to see what was there.

19 Q. Did you see any no trespassing signs anywhere  
20 along that road?

21 A. No.

22 Q. Did you encounter any gates?

23 A. Yeah, there's gates.

24 Q. What kind of gates were they?

25 A. Just wire.

1 Q. Do you recall specifically where the gates  
2 were on that first drive?

3 A. Yeah, there was one there at the -- After  
4 you get up on top there was one between the fish and game  
5 and the Cattle Association. And then there's also one as  
6 you come out of White Pole there between the Okelberrys  
7 and Cattle Association, and also there ahead of Maple  
8 Creek and Cummings, there's a fence and a gate there.

9 Q. When was the last time you used this road?

10 A. Before with you guys?

11 Q. Yep.

12 A. When they stopped people from going in.

13 Q. And you don't remember when that date was?

14 A. No. Like I say probably 15 years ago or when  
15 ever that was.

16 Q. Between the first time you used it and when  
17 you stopped using it maybe 15 years ago about how often  
18 per year would you use Ridge Line Road?

19 A. I don't know, several times. Several times a  
20 month probably.

21 Q. What would you typically use it for?

22 A. Just in the summer -- I like to go up  
23 there. I like that country. I like to go up there. I  
24 like to ride. I like to ride the -- Just go up and  
25 look around. And then I hunt. I've hunted deer up there

1 all my life and elk.

2 Q. Did you ever encounter a locked gate between  
3 those two when you first and last went?

4 A. I've never seen a locked gate up there.

5 Q. Were there gates along there?

6 A. Yeah, there were gates.

7 Q. Were they always up?

8 A. No, they weren't always up, but usually.

9 Q. And have you ever observed other people using  
10 this road?

11 A. I have.

12 Q. Do you know why they were using the road?

13 A. I'm assuming the same reason I was there,  
14 hunting or just there.

15 Q. From when you first started using the road  
16 until you last used the road were you ever asked not to  
17 use this road?

18 A. No.

19 Q. Did you ever ask anyone's permission to use  
20 this road?

21 A. No.

22 Q. Did you ever think you needed to ask anyone's  
23 permission to use this road?

24 A. No, I didn't.

25 Q. Are you aware of a road called Thorton Hallow

1 Road?

2 A. I am.

3 Q. Have you ever driven along that road?

4 A. I have.

5 Q. When did you first use that road?

6 A. The same time.

7 Q. What was the reason you used it?

8 A. For hunting or just to be there.

9 Q. What portion of Thorton Hallow Road as  
10 depicted on Exhibit 2 did you use?

11 A. From the Ridge Line Road down to, just below  
12 the forest fence.

13 Q. When did you last use Thorton Hallow Road?

14 A. Same time probably, 15 years.

15 Q. Typically how often per year would you use,  
16 during that time period would you use Thorton Hallow  
17 Road?

18 A. Probably the same, once or twice a month  
19 maybe in the summer, seldomly in the winter.

20 Q. Did you ever see people, other people using  
21 that road?

22 A. I have.

23 Q. What would you see them using the road for?

24 A. Same thing.

25 Q. When you say the same thing could you be a

1 little more specific?

2 A. Hunting or just up there, just camping.

3 Q. Where would people camp at?

4 A. Usually down just barely on the forest there,  
5 back to the south after you go through the cattle guard  
6 usually is where most people, if they did, they'd stay  
7 there.

8 Q. Would you typically see people there each  
9 year camping?

10 A. I would.

11 Q. When you saw these people camping did they  
12 have vehicles or did they walk in?

13 A. Oh, no, they had vehicles and camps and  
14 trailers.

15 Q. Is there any other way to access that area  
16 accept through the Thorton Hallow Road with a vehicle?

17 A. No.

18 Q. Did you ever ask permission to use Thorton  
19 Hallow Road?

20 A. I haven't.

21 Q. Was there ever gates across Thorton Hallow  
22 Road?

23 A. Oh, yeah, wire gate.

24 Q. Were they ever locked?

25 A. No.

1 Q. Are you aware of a road called Parker Canyon  
2 Road?

3 A. I am.

4 Q. And have you ever used that road?

5 A. I have.

6 Q. When did you first use Parker Canyon Road?

7 A. Probably the same time.

8 Q. And what was the reason for using that road?

9 A. Just hunting or just to be there, just for a  
10 ride.

11 Q. When would you of last used Parker Canyon  
12 Road?

13 A. Last November.

14 Q. What did you use it for then?

15 A. Just -- I was headed home. I rode my horse  
16 up Parker Canyon Thanksgiving weekend, and I rode up over  
17 the top and home.

18 Q. Was there any no trespassing signs at that  
19 time?

20 A. I seen a CMU signs down there, but I never  
21 seen a no trespassing sign.

22 Q. But you came in from the end of the road, is  
23 that what you're indicating?

24 A. I come in from the highway.

25 Q. Prior to that horse ride when was the last



1 time you used Parker Canyon Road? When was the last time  
2 you used it with a vehicle?

3 A. About the same -- When ever they put that  
4 fence between the Cattle Association and Forest Service,  
5 when ever that was. I come up over -- I come up over  
6 Big Hallow, or up Hearts Gravel and from down on there  
7 when they'd fence that fence that year. I think it's  
8 probably been five or six or so years ago.

9 Q. That was the last time you used that?

10 A. Yep.

11 Q. Was there any locked gates at that time?

12 A. No.

13 Q. Was there any no trespassing signs at that  
14 time?

15 A. I didn't see any.

16 Q. Can you indicate to the Court where you came  
17 up and how you accessed Parker Canyon Road on that time  
18 on the map.

19 A. How I came?

20 Q. Yeah.

21 A. (INAUDIBLE) up here. I came from the  
22 highway, up this canyon here and I rode back this way.

23 Q. No, I asked you when you last used Parker  
24 Canyon with a vehicle.

25 A. When ever that was that the fish and game or

1 the state put that fence in.

2 Q. That's the last time you used it?

3 A. Yep, unless with you guys was the last time.

4 Q. Do you recall how long that was?

5 A. When they fenced that?

6 Q. Parker Canyon.

7 A. Or when I was with you guys?

8 Q. No, no, when they fenced it.

9 A. I'm guessing six years or five or six years  
10 ago or so. I'm not sure about that.

11 Q. And how would you -- When you last --  
12 Before with me, when you last drove a vehicle down Parker  
13 Canyon, how did you access Parker Canyon Road?

14 A. I come up from Hearts Gravel and up over the  
15 top, the Big Hallow way, from (INAUDIBLE).

16 **THE COURT:** The other direction.

17 **MR. SWEAT:** The other direction.

18 **THE WITNESS:** From the north.

19 **MR. SWEAT:** I'm trying to get him to show it  
20 on the map. You know where it is.

21 **THE COURT:** I have (INAUDIBLE).

22 **THE WITNESS:** I don't see that -- I don't  
23 see the road that goes down Hearts Gravel there. I see  
24 the one that goes down Big Hallow.

25 Q. **(BY MR. SWEAT)** Yeah, it's not highlighted.

1           A.    Up over the  --  Up over the drop.

2           Q.    How often do you use Parker Canyon Road?  You

3 say that  --

4           A.    Pardon?

5           Q.    How often do you use Parker Canyon Road?

6           A.    Oh, just regular  --  I mean not  --  I

7 wasn't up there every day.  I mean, we'd go up once or

8 twice a month maybe or  --  A lot in the fall.

9           Q.    Could you give us a time frame of when you

10 would go up?

11                   **MR. SWEAT:**  I've confused myself, your Honor.

12           Q.    **(BY MR. SWEAT)**  Could you tell us when you

13 started using Parker Canyon Road to when you last used

14 Parker Canyon Road.

15           A.    Well, that's probably in the 60's or maybe

16 even a little before that when we was up there hunting

17 deer until, you know  --  I mean, I  --  As far as

18 accessing it, like I say, I went up there when they put

19 that fence down on there.  I rode down over there and

20 seen that fence and then I come back and that's the last

21 time I've been up there with a vehicle.  That's been

22 five, six years ago.

23           Q.    So it would be fair to say in the mid 90's

24 was the last time you used it?

25           A.    It would.

1 Q. Some where from either side, take or give a  
2 few?

3 A. It would.

4 Q. And the first time you used it was in the  
5 60's? Between that time how often per year do you think  
6 you would use Parker Canyon Road?

7 A. Once or twice a month and several times in  
8 the fall when we were hunting more or less.

9 Q. During that period of time did you ever see a  
10 no trespassing sign?

11 A. I never did.

12 Q. Did you ever see a locked gate?

13 A. No.

14 Q. Were there gates in existence?

15 A. There was.

16 Q. Were they always up?

17 A. No, usually, but not always.

18 Q. What type of gates were they?

19 A. Just wire.

20 Q. And during that time period when you used the  
21 road did you see other people using the road?

22 A. I did.

23 Q. What would they be using the road for?

24 A. Hunting and just -- Usually hunting. Most  
25 the time when I was up there that's what most people are

1 doing up there. Cattle Association sometimes up there  
2 and they access it.

3 Q. Are you aware of a road called Maple Canyon  
4 Road?

5 A. I am.

6 Q. Can you see where it's designated on the map?

7 A. Yes.

8 Q. Is that you're understanding of what's Maple  
9 Canyon Road?

10 A. Yes.

11 Q. Do you have another name for it that you use?

12 A. Maple Creek.

13 Q. Have you ever used that road?

14 A. Yes.

15 Q. When was the first time you have used Maple  
16 Canyon Road?

17 A. In the early 50's. And part of that road on  
18 the Ridge Line I did in the early 50's too. My brother  
19 was herding sheep up there and I went up there with him  
20 when I was six, and that would be in '51. That's just  
21 from White Pole to Maple Creek was the only stretch I  
22 ever rode on that that early.

23 Q. When was the first time you went up there  
24 that you wasn't up there working to somebody?

25 A. I don't know. I mean, just up on my own when

1 we was in high school would be in the 60's.

2 Q. Did you ever see any no trespassing signs?

3 A. No.

4 Q. Did you ever see any locked gates?

5 A. No.

6 Q. Were there gates on Maple Canyon Road?

7 A. Oh, yeah.

8 Q. Where were the gates located?

9 A. Down at the bottom.

10 Q. What type of gate was it?

11 A. It was just wire.

12 Q. When was the last time you drove the entire  
13 length of Maple Canyon Road?

14 A. It's been a while. I think it washed out  
15 about in, about '80, early 80's. And I drove it once  
16 after that. And that was the last time I went down.  
17 It's probably like in '85 I went down it, but it was a  
18 -- I think Ray had probably took the Cat up there, but  
19 it was rough, really rough when I come down it.

20 Q. Between when you first started using the road  
21 and when you last drove the entire length, about how many  
22 times per year do you think you'd use this road?

23 A. Once or twice or three times, not a lot.

24 Q. Did you ever see other people using this road  
25 when you were using it?

1 A. I did.

2 Q. Were they the Okelberrys?

3 A. No.

4 Q. Did you know some of the people you saw using  
5 it?

6 A. I did.

7 Q. Do you know why they were using it?

8 A. Mostly hunting.

9 Q. During the time that you've indicated that  
10 you used the road was there people using the road all  
11 throughout that time?

12 A. There was.

13 Q. Were you ever denied access to this road?

14 A. No.

15 Q. Were you ever asked not to use this road?

16 A. No.

17 Q. Did you ever see anybody else be asked not to  
18 use this road?

19 A. Not to my knowledge, until the last few  
20 years.

21 **MR. SWEAT:** That's all the questions I have  
22 at this time, your Honor.

23 **THE COURT:** Mr. Petersen, cross?

24 **MR. PETERSEN:** Thank you.

25 **CROSS-EXAMINATION**

1 BY MR. PETERSEN:

2 Q. Mr. Sabey, what is your occupation?

3 A. I work for the engineering department at  
4 Wasatch County.

5 Q. Are you we are here as a representative of  
6 Wasatch County or on your own?

7 A. I'm just here on my own.

8 Q. You had occasion, did you not, to drive  
9 vehicles up there twice --

10 A. I did.

11 Q. -- recently? And in driving those vehicles  
12 you did that as an employee of Wasatch County?

13 A. I did, yes.

14 Q. Once you went up to show the attorneys drive  
15 up there, did you not?

16 A. I did.

17 Q. And the other time we went up and the judge  
18 and attorney was in another vehicle?

19 A. Yes.

20 Q. So on those two occasions you were  
21 representing Wasatch County?

22 A. I was.

23 Q. And you work in what department?

24 A. The engineering.

25 Q. Has Wasatch County ever done any work, at any



1 time, to your knowledge, on any of those roads?

2 A. Not to my knowledge, no.

3 Q. And Wasatch County, if the Court declared  
4 those to be public roads, would never do any work up  
5 there either, would they?

6 A. I don't think so.

7 Q. So they have no intention of improving the  
8 roads or anything like that?

9 A. No, I don't think so.

10 Q. Now, when we call them roads in some respects  
11 it's sort of a misnomer, is it not?

12 A. I don't understand. Why?

13 Q. Well, sometimes they're no more than trails?

14 A. I mean, they're access and you drive a  
15 vehicle on them.

16 Q. Well, let's talk about the Circle Springs  
17 Road. We went down the Circle Springs Road, didn't we?

18 A. We didn't go all the way to the end, no.

19 Q. It got very rough, didn't it?

20 A. It is.

21 Q. Very narrow?

22 A. It is.

23 Q. Scraping vehicles on the sides with the limbs  
24 and trees and leaves and what have you?

25 A. It does.

1 Q. Yeah. Circle Springs couldn't be wider than  
2 what, seven or eight feet at the most?

3 A. Maybe, at places. With limbs hanging out,  
4 maybe.

5 Q. That's the way it was when we went up a few  
6 weeks ago, was it not?

7 A. It was.

8 Q. And that's the way it was when you started  
9 going up in the 60s?

10 A. I think the roads were better the more they  
11 were driven from what they are when I was up there with  
12 you guys.

13 Q. So you think the roads have deteriorated over  
14 the years?

15 A. I think just the lack of people being on them  
16 has caused vegetation and stuff to grow.

17 Q. Well, we're talking about the Circle Springs  
18 Road. You say you started going up there in the 60's.  
19 Was it a better road in the 60's than it is today?

20 A. I never did notice vegetation scratching my  
21 truck ever in the 60's. Maybe I wasn't as particular,  
22 but I never did notice it ever -- I never did ever  
23 notice it scratching my pickup.

24 Q. Did you ever, when you went on Circle  
25 Springs, have to remove any trees out of the road?

1 A. Any time you drive in the mountains you have  
2 to remove trees.

3 Q. Okay. And if you don't remove the trees then  
4 how do you get down the road?

5 A. Well, I usually remove them. I don't -- I  
6 don't like we did, drive out through people's property  
7 and around out through the forest like we did when we  
8 were up there.

9 Q. Okay. There were some trees that had to be  
10 removed when we went up prior to the judge going up,  
11 wasn't that true?

12 A. That's true.

13 Q. So we cut some -- You cut some?

14 A. Did.

15 Q. Or Shane Ford or somebody cut them?

16 A. Somebody did, yes.

17 Q. Somebody cut. And then when we went up with  
18 the judge there were more trees that were cut up?

19 A. I'm not sure there was more. I don't know,  
20 but there may have been. I don't know if there was any  
21 more from when -- There was trees we had driven around  
22 the time before that weren't cut out that we cut out  
23 later.

24 Q. That's typical any time that you would use  
25 these roads up there. I'm talking about all the roads,

1 not just Circle Springs?

2 A. Pretty much, yes.

3 Q. It would be safe to say that Circle Springs,  
4 that road is a rough, rocky road, is it not?

5 A. It is.

6 Q. And it would be safe to say that to traverse  
7 that you would have to have a four-wheel drive vehicle?

8 A. No.

9 Q. You think you could do it without a  
10 four-wheel drive?

11 A. I've been up there many times.

12 Q. Well, when we -- When you went up the last  
13 two weeks, twice you had that vehicle in four-wheel drive  
14 on many occasions, did you not?

15 A. I'm not sure -- The only time I put mine in  
16 four-wheel drive is when we went through those, between  
17 those trees off the road. The only reason I did that is  
18 so I wouldn't slide the county vehicle into a tree, but  
19 if them trees were out of the road you would never had to  
20 have a four-wheel drive.

21 Q. On Circle Springs Road?

22 A. Yes.

23 Q. You wouldn't need a four-wheel drive to get  
24 down there?

25 A. No, I've driven there many times without --

1 I've driven a -- I use to drive a '79 Datsun.

2 Q. No, I'm talking about right now.

3 A. I don't think you'd have to right now if  
4 those trees were out of the road.

5 Q. By trees you mean the ones that need to be  
6 cut out?

7 A. Yes.

8 Q. You would agree then that it's a rough, rocky  
9 road seven to eight feet wide?

10 A. I would. I would

11 Q. And you would agree that it does scratch up  
12 your car, vehicle, whatever, as you go down it?

13 A. Probably. I don't know whether it scratches  
14 it or not, but there's limbs out in the road.

15 Q. You would agree that to get onto Circle  
16 Springs Road you have to go through a gate?

17 A. Yes.

18 Q. And you've seen that gate locked on occasion,  
19 have you not?

20 A. I have never seen that gate locked until I  
21 was up there with you that day.

22 Q. Let me show you what's been marked as  
23 Defendant's Exhibit 6 and ask you if you can identify it?

24 A. That's the gate, accept it's got a metal gate  
25 on there now.

1 Q. All right. Let me show you what's marked as  
2 Defendant's 8. Is that the metal gate?

3 A. Yeah.

4 Q. Is that about the way it looked to you when  
5 you started going up in the 60's as set forth in Exhibit  
6 6?

7 A. Except there was never a no trespassing sign  
8 there.

9 Q. Okay. You're saying that that keep out and  
10 that no trespassing sign wasn't there.

11 A. It wasn't.

12 Q. But there was this wire gate?

13 A. There was.

14 Q. And you would always respect that, would you  
15 not?

16 A. I would. I mean -- Like I said before I  
17 had driven that road, but I never, I never went off from  
18 it. I went down to Circle Springs. And if we were  
19 hunting down there that's where I hunted.

20 Q. I ask you to look at Defendant's Exhibit 7.  
21 Is that -- Would that be a representation of the way it  
22 looked in 19, in the 60's when you started going up?

23 A. I don't think so.

24 Q. You don't think that would be a fair  
25 representation?

1 A. No, I never seen a lock or cable on that.

2 Q. Okay. Disregard the lock and the cable.

3 Then would that be --

4 A. Yeah, pretty much, maybe, without any kind of  
5 a lock on it.

6 Q. Now, you said you went up in the 50's, but at  
7 that time you were with your brother, you were up there  
8 with permission. You were -- Your brother was herding  
9 sheep or something.

10 A. He was. Like I said, I did. I went up there  
11 with him. And we come up to White Pole and then up the  
12 ridge and down Maple Creek when I was up there with him.

13 Q. Now, you've hunted in that Circle Springs  
14 area, have you?

15 A. I have. I don't hunt that a lot.

16 Q. But you do hunt it occasionally?

17 A. I have.

18 Q. If you were to hunt the Circle Springs area  
19 wouldn't it be more convenient to come off the Main  
20 Canyon Road than to go up in that area rather than drive  
21 around?

22 A. It depends on why you're hunting it.

23 Q. You're hunting deer.

24 A. If you're walking or riding a horse it  
25 probably -- I mean, you could ride a horse probably up

1 from the highway, up the main canyon no trouble, but if I  
2 was walking I'd want to drive out there.

3 Q. My question was isn't it more convenient to  
4 use the Main Canyon Road to hunt that area than it is to  
5 drive around?

6 A. Not if you're hunting right on Circle  
7 Springs, around the head there it's not. I mean, it  
8 wouldn't be for me.

9 Q. There are trails, are there not, coming up  
10 the Main Canyon Road?

11 A. There is.

12 Q. Have you ever been on those trails?

13 A. I have.

14 Q. Have you ever hunted that way?

15 A. No, I haven't.

16 Q. The Ridge Line Road, wouldn't it be safe to  
17 say that's a narrow road as well?

18 A. It is.

19 Q. It's a rocky road?

20 A. It is in places.

21 Q. There are places where in the last two weeks  
22 they had to remove poles, trees across the road?

23 A. Yes.

24 Q. True? Removing these trees, that happens  
25 about any time of the year, does it not?



1 A. It does.

2 Q. Not just in the fall or the summer or the  
3 spring. I mean, you could be up there and have to face  
4 those trees?

5 A. It's true.

6 Q. If the Court were to open that up and  
7 somebody comes by and sees a tree and they don't have a  
8 saw how are they going to get down the road?

9 A. Probably the same way you did. Either they  
10 drag it out with a pickup or drive around it.

11 Q. You can drive around it and trespass on the  
12 property? You have to answer audibly.

13 A. Probably so.

14 Q. Okay. So to the average person that doesn't  
15 have a saw or an ax or something, they're just going to  
16 drive out on somebody's property?

17 A. Or over it, yeah. Or over the tree.

18 Q. Most of those trees are big enough that it's  
19 going to block the road. You're not going to be able to  
20 drive over it, isn't that true?

21 A. Well, some of them probably, yes.

22 Q. Now, once again, when you'd go on the Ridge  
23 Line Road this was gates, were there not?

24 A. There was.

25 Q. There was a gate coming off of the Forest

1 Service property onto the Okelberry property?

2 A. There was.

3 Q. And there were other gates as you come off  
4 this Ridge Line Road, isn't there?

5 A. There was.

6 Q. Gates separating the Okelberry property from  
7 the West Daniels property.

8 A. There was.

9 Q. And likewise, West Daniels from Okelberry?

10 A. Yes.

11 Q. And when you would traverse up there many  
12 times those gates were up, were they not?

13 A. They were.

14 Q. And when they were up you would drive through  
15 and then put them back up?

16 A. I would, unless it was late in the fall when  
17 they never put them up. Once the sheep and cattle is  
18 gone they were hardly ever put up, ever, in the spring or  
19 till spring when they come back.

20 Q. That was until 15 years ago then?

21 A. Pardon?

22 Q. This was -- You said you haven't been up  
23 there in the last 15 years (INAUDIBLE).

24 A. I haven't. Well, I don't know if it was 15  
25 years. I don't know when Ray and them started to --

1 Q. Well, that was an approximation, was it not?

2 A. Yes, it was.

3 Q. 15 years ago. So you really wouldn't know  
4 much about what's gone on up there in the last 15 years?

5 A. I never -- Until you guys that's the first  
6 time I've been back.

7 Q. The Thorton Hallow Road, isn't it true that  
8 if a person wanted to hunt that road that there is a  
9 road, a right of way, whatever, across the Forest Service  
10 property, you get on the Okelberry property it would go  
11 directly over to Thorton?

12 A. Down along the fence?

13 Q. Yeah, just parallel to the fence.

14 A. There never was until they started locking  
15 the gates and then they started driving four-wheelers  
16 down along there. Which is a trespass across the Forest  
17 Service in my estimation.

18 Q. But there is a -- You can see a road or  
19 whatever you want to call it from the --

20 A. But that's what I'm saying.

21 Q. Off the Main Canyon Road here right over to  
22 Thorton Hallow?

23 A. But that's what I'm saying, it's cause people  
24 just, cause that's the only access they've had to get in  
25 there, they've went that way and trespassed across the

1 Forest Service, which is illegal.

2 Q. Okay. But there were other trails, was there  
3 not, coming on this Glade down into Thorton and all the  
4 way down to Parker?

5 A. There is.

6 Q. And some of those the Forest Service had  
7 blocked off with piling up dirt, have they not?

8 A. From Thorton Hallow to Parker?

9 Q. No, I'm talking about here in the Glade.  
10 They had trails that would go down from the Glade to  
11 Thorton to Parker.

12 A. There's still a trail that goes across there.

13 Q. Sure. Do you know if they blocked those off?

14 A. No. I mean, as far as vehicle traffic you  
15 can't drive them, but you can drive, you can ride horse.

16 Q. Can you take a four-wheeler?

17 A. I -- I wouldn't. I've ridden horse along  
18 there many time though.

19 Q. Do you know if the Forest Service has blocked  
20 any of those trails off with dirt?

21 A. I think they have. Yes, there's piles of  
22 dirt down there.

23 Q. If this --

24 A. I guess, assuming that's who did it.

25 Q. This road, whatever you want to call it, from

1 this Glade over to Thorton Hallow, that has not been  
2 blocked off, has it?

3 A. No.

4 Q. And people are using that, are they not?

5 A. You mean along the Forest Service fence?

6 Q. Right.

7 A. I'm assuming there is. You can see tracks  
8 there. I've never seen anyone on it.

9 Q. Now, you say that you have seen people using  
10 the Thorton Hallow Road?

11 A. I have.

12 Q. Can you give me dates, times and places in  
13 the 60's when you did, saw that?

14 A. Mostly always in the fall when I've seen  
15 people up there. There's not a lot of people go up there  
16 in the summer. There is some. From the time they start  
17 archery hunting till deer hunts over and then you don't  
18 see a lot of people.

19 Q. So generally you won't see many people till  
20 the fall?

21 A. There's a few that goes up there, but not a  
22 lot.

23 Q. But not a lot. Now, when you were hunting up  
24 there were you hunting in any other areas in Wasatch  
25 County or any where else?

1 A. Was I?  
2 Q. Yeah.  
3 A. Yeah.  
4 Q. Where else would you hunt?  
5 A. Usually -- Before all this -- Where you  
6 had the designated area to hunt, I would hunt up in the  
7 south side of Wallsberg and also the north side of  
8 Daniels Canyon.  
9 Q. Would you hunt those areas as much as you  
10 would this property in question?  
11 A. No, I never did.  
12 Q. But you did hunt in those areas?  
13 A. I did.  
14 Q. The hunting season is what, two to three  
15 weeks?  
16 A. They're less now.  
17 Q. Back in the 60's and the 70's.  
18 A. Yeah, probably ten days most the time.  
19 Q. Ten days. So you're --  
20 A. Two weeks, yeah.  
21 Q. The time that you were hunting up and using  
22 this area would be ten days, approximately. And your  
23 time would be split somewhat between this property in  
24 question and these other areas that you would hunt?  
25 A. No, that's not true, cause I use to -- I

1 mean, you're talking one hunt. I mean, back earlier you  
2 could hunt, you could boy hunt, you could hunt elk, you  
3 could hunt deer with a rifle.

4 Q. Well, I'm talking about --

5 A. I mean, you're looking at probably a two  
6 month period you could hunt.

7 Q. Okay. I'm talking about you.

8 A. That's what I'm saying.

9 Q. You had a deer hunting license?

10 A. That's true.

11 Q. And that would go how long?

12 A. You could hunt with an archery. You could  
13 kill -- You could hunt with a -- If you didn't kill a  
14 deer with an archery tag you could hunt with a rifle.

15 Q. How long have you had an archery tag?

16 A. All my life. That's -- Usually in the 60's  
17 when I was on Circle Springs that's what we was doing is  
18 archery hunting out there.

19 Q. Did you have a archery tag last year?

20 A. I did.

21 Q. Did you hunt other areas that you just told  
22 us about?

23 A. Last year?

24 Q. Yes.

25 A. Yes, I didn't go out there.

1 Q. But in the 60's and 70's you went into this  
2 other areas to hunt, did you not?

3 A. I did.

4 Q. You weren't exclusively in this area?

5 A. No.

6 Q. You can't give us a specific date, time, when  
7 you saw people on this Thorton Hallow Road?

8 A. I mean, any time from when I was up there  
9 till -- In fact, I seen people up there after Ray had  
10 start locking the gates down, down in Thorton Hallow or  
11 in Parker Hallow. How they had gotten there I'm not  
12 sure, but I had seen people down in there. I had come up  
13 from the highway and there was, and there was some people  
14 down in there hunting then.

15 Q. Now, there is a gate, is there not, going  
16 down into Thorton Hallow Road off of the Okelberry  
17 property?

18 A. There is.

19 Q. There's another --

20 A. Well, where do you talk -- Off of --  
21 There's not one off of Okelberry's into Thorton Hallow.  
22 There's one on the Cattle Association.

23 Q. I'm talking about -- Well, the Cattle  
24 Association isn't even around Thorton Hallow, is it?

25 A. Parker Hallow? Where you talking now?



1 Q. I'm talking about Thorton Hallow.

2 A. Okay. There is a gate there, yes.

3 Q. In fact, Thorton Hallow is not around West  
4 Daniels?

5 A. No, not too far, but it is a ways.

6 Q. There is a gate between Thorton Hallow and  
7 the Forest Service?

8 A. Yes.

9 Q. Did you ever recall seeing a sign on the  
10 Forest Service property which says no motorized vehicles?

11 A. Not to my knowledge I have never.

12 Q. Do you know if motorized vehicles are allowed  
13 on the Forest Service property?

14 A. I don't think they are.

15 Q. And that would be ATV's or anything then?

16 A. Yes, that's what I'm -- That's what I said  
17 when you said that roads down there, I said they were  
18 probably trespassing. That's why I said that.

19 Q. So people are down there camping, they're not  
20 to have motorized vehicles?

21 A. Well, this has just been in the last few  
22 years that they've done this. It hasn't been 15 years  
23 ago. When I was up there all the time you could, you  
24 could and did, people did take four-wheelers and  
25 everything as far as you could. And they went pretty

1 near down where the trail cuts across from that one  
2 you're talking about lower.

3 Q. Now, did you ever see people camping in this  
4 Forest Service area off the Thorton Hallow Road?

5 A. Yes.

6 Q. You saw them with four-wheelers?

7 A. I seen them with pickups.

8 Q. And you realize that that's an area that's  
9 not for motorized vehicles?

10 A. Well, it was then. That what I'm saying,  
11 it's only been the last few years that they've, have not  
12 let motorized vehicles up there. I don't know when that  
13 was, but it hasn't been -- 15 years ago you could  
14 access almost anywhere you could go on a four-wheeler.

15 Q. You don't recall ever seeing any signs up  
16 there that says no motorized vehicles?

17 A. The first sign I seen up there that said no  
18 motorized vehicles was when I came up from -- Where?  
19 Across the Cattle Association where they put that new  
20 fence in there at Robinson Reservoir. And they struck  
21 some, them plastic signs up right in the middle of the  
22 road there that said no motorized vehicles. And there'd  
23 been four-wheelers driven over them. And that's after  
24 Ray and them started locking it up. And I'm assuming  
25 that some -- I mean, there had been nobody on the road

1 accept for who'd come down the top. That's the first  
2 signs I had ever seen no motorized vehicles up there.  
3 That's probably been maybe five or six years ago.

4 Q. The camping that you see up there is mostly  
5 in the Glade, is it not?

6 A. Right now?

7 Q. Yes.

8 A. Yes.

9 Q. And the camping you've seen over the year has  
10 been in the Glade?

11 A. During the summer, yes.

12 Q. Now, Parker Canyon Road, you said you rode a  
13 horse up there last November?

14 A. I did.

15 Q. It you come up from Highway 40?

16 A. I did.

17 Q. Wouldn't that be a better way to hunt that  
18 area would be to come up from Highway 40 than it would be  
19 to drive around on Parker Canyon?

20 A. Not really. If you've ever been up that  
21 trail, by the time you get from Parker Canyon, the road,  
22 the highway up to the where you and I was that day,  
23 unless you're in darn good shape you've had your hunt  
24 right to there.

25 Q. Wouldn't it be true to describe Parker Canyon

1 and this Thorton Hallow as narrow?

2 A. The road?

3 Q. Yes.

4 A. Yes.

5 Q. No more than seven or eight feet.

6 A. It depends on where you measure. Yes, I mean  
7 there's trees that come out into it in spots. It's the  
8 same width. The road that goes down Thorton is probably  
9 wider. Most -- Like I said about the others, I think  
10 the roads, the more they were traveled the wider they  
11 were.

12 Q. Wouldn't it be true that they're rocky roads,  
13 Thorton Hallow and Parker Canyon?

14 A. They are.

15 Q. Wouldn't it be true that they're steep in  
16 places?

17 A. They are.

18 Q. Wouldn't it be true as you're going down  
19 there you're going to scrape on trees and bushes and  
20 leaves and so fourth?

21 A. It depends how careful you are I guess.

22 Q. Once again on Parker Canyon is there a gate  
23 to come off Ridge Line Road onto Parker Canyon?

24 A. No, there's not one at the top. There's one  
25 at the Cattle Association.

1 Q. Where is that gate at?

2 A. Where it comes off of Ray's onto the Cattle  
3 Association, right at the head of Maple Creek, there  
4 between Maple Creek and White Pole.

5 Q. No, I'm over on Parker Canyon now.

6 A. There's a gate --

7 Q. (INAUDIBLE) way down here?

8 A. There's a gate down when you get right to the  
9 bottom when you hit the forest fence.

10 Q. Okay. So the bottom of Parker Canyon there  
11 is a gate on the Forest Service?

12 A. Yeah, there is.

13 Q. You've never seen a sign in there that says  
14 no motorized vehicles?

15 A. I have never.

16 Q. But as far as you know it's not open to  
17 motorized vehicles?

18 A. Well, no, I've never seen a sign there,  
19 never.

20 Q. As you come up this Ridge Line --

21 A. There's two gates right there is what I was  
22 saying when I said they put a sign up there. When the  
23 Forest Service fenced that fence there was a gate right  
24 there at Parker Hallow that turns back to the south,  
25 where we were that day and drove out there, I've never

1 seen a sign on that road that says no motorized vehicles.

2 But down just a little further to the north  
3 along that fence line there's that same road that goes  
4 back to the Forest Service. And they put a gate there  
5 right by a pond. And there was two of them plastic signs  
6 that said no motorized vehicles. And there have been  
7 people that have driven over there. And that was long  
8 after it had been blocked off.

9 Q. I understand there is a gate then between the  
10 West Daniels property and the Forest Service property?

11 A. Yes.

12 Q. And as you come down Ridge Line Road to get  
13 to Parker Canyon there are other gates?

14 A. Yes.

15 Q. There's a gate from the Okelberry property to  
16 the West Daniels property?

17 A. Yes.

18 Q. And there are several gates as they  
19 crisscross over that?

20 A. There is.

21 Q. And when you would traverse down that road  
22 and those gates were up you would go through and then put  
23 them backup again?

24 A. I would, unless it was in the fall or winter  
25 after everything was gone or before they're there in the

1 spring.

2 Q. Now, when can you use that road up there? It  
3 snows quite a bit up there, does it not?

4 A. Probably from -- In a vehicle, probably  
5 from, I'm guessing June till November.

6 Q. So from June 1st to November 1st on an  
7 average?

8 A. Oh, maybe. Yeah, on an average probably.

9 Q. Now, as far as your use on this Parker Canyon  
10 Road, you couldn't give us dates and times when you've  
11 used that over the years, can you?

12 A. Just -- No. Just randomly?

13 Q. Just randomly. The Maple Canyon Road, some  
14 of these exhibits here designate that as a trail; would  
15 that be correct?

16 A. I haven't been up there for a while, but the  
17 last time I was down it you could almost say it was a  
18 trail?

19 Q. A pretty bad road?

20 A. It was.

21 Q. When was the last time you were there?

22 A. I'm guess in the middle 80's.

23 Q. You indicated that it had been washed out?

24 A. It had.

25 Q. That's not an unusual occurrence on that

1 road, is it?

2 A. Well, that's the first time I've seen it. So  
3 you could -- I mean, you could drive it then, but it  
4 wasn't the best road.

5 Q. Have you driven that road more than once?

6 A. Maple Creek?

7 Q. Yeah.

8 A. Maple Canyon?

9 Q. Yeah.

10 A. Yes. When I was in high school we use to go  
11 up Maple Creek a lot. We use to fish up there.

12 Q. From the Wallsberg side up to the Ridge Line  
13 Road?

14 A. Well, we never -- I mean, we never went all  
15 the way up every time. But we use to go up there and  
16 fish up, creek up through there, up to them springs.  
17 And --

18 Q. Well, isn't it safe it say that that is a  
19 narrow, rough road?

20 A. It is.

21 Q. And isn't it enough -- Isn't it accurate to  
22 say that most people would never want to drive a vehicle  
23 up there for the damage that it could cause to a vehicle?

24 A. It depends on what kind of vehicle you drive,  
25 I guess. I mean, four-wheelers and stuff like that I



1 think there would be a lot of people that drive it.

2 Q. Oh, four-wheelers, but what about a four, a  
3 pickup truck?

4 A. I can't really say. I haven't been -- Like  
5 I say, I haven't been up there for 20 years probably. So  
6 I mean, I'm not -- I'm not saying there's not -- It  
7 could be a super highway for all I know today.

8 Q. It's been that long since you've been there?

9 A. It's been 20 years probably.

10 **MR. PETERSEN:** Can I have just a moment with  
11 my client?

12 **THE COURT:** You may.

13 **MR. PETERSEN:** Can I have these marked, your  
14 Honor?

15 **THE COURT:** (INAUDIBLE).

16 Q. **(BY MR. PETERSEN)** Mr. Sabey, we've talked  
17 about that road or trail or whatever you want to call it,  
18 from the Glade over to Thorton Hallow.

19 A. Okay.

20 Q. I'm going to show what's been marked as  
21 Exhibit 13 and 14 and ask you if you can identify those?

22 A. I'm not sure about this one. I've never --  
23 I don't know if I've ever seen this one, but the day --

24 Q. And you're referring to Exhibit 13?

25 A. The day I was up there Ray had his truck

1 parked right down there the day I was with you guys,  
2 right there along the fence?

3 Q. We're looking at Exhibit 14.

4 A. Yes.

5 Q. Would that be a fair representation --

6 A. And that tree wasn't there the day we was up  
7 there. They pulled that tree across there after we'd  
8 left, that day we was there, cause they had that truck  
9 and them guys was down there fixing fences the day we  
10 were there.

11 Q. Okay. Would that be a fair representation of  
12 that area if you take the tree out?

13 A. Until -- Until I was there with you guys  
14 I've never seen that before like that, never. And I  
15 think --

16 **MR. PETERSEN:** That's all I have, your Honor.

17 **THE COURT:** Anything else, Mr. Sweat?

18 **MR. SWEAT:** Just one thing, your Honor.

19 **REDIRECT EXAMINATION**

20 **BY MR. SWEAT:**

21 Q. Mr. Sabey, Mr. Petersen asked you about a  
22 trail or a track that goes along into Thorton Hallow down  
23 the side of the forest fence. Can you get a vehicle down  
24 that road?

25 A. I don't know. I've never -- I've never

1 ridden a horse down that trail. I couldn't tell you.

2 From what I seen from where we were that day I'd say no.

3 Q. And just to clarify in my mind, Mr. Petersen  
4 asked you about signs that said no motorized vehicles?

5 A. Yes.

6 Q. And is it my understanding that you indicated  
7 that during the time that we had talked about it, when  
8 you used those roads, there were no signs of that sort?

9 A. No, I had never seen them.

10 **MR. SWEAT:** That's all I have, your Honor.

11 **THE COURT:** Anything else, Mr. Petersen?

12 **MR. PETERSEN:** No, sir.

13 **THE COURT:** Okay. You may step down.

14 **THE WITNESS:** Thank you. Good to see you.

15 **THE COURT:** Next witness, Mr. Sweat?

16 **MR. SWEAT:** The Plaintiff would call Dick  
17 Baum, your Honor. Your Honor, this is the last witness  
18 that I kind of scheduled from today.

19 **THE COURT:** Well, good, we're about through.

20 **MR. SWEAT:** I imagine I will have two,  
21 possibly three tomorrow. I'd make a motion that I can  
22 recall Don Wood and kind of get him to introduce some  
23 exhibits that weren't done by another witness.

24 **THE COURT:** Uh-huh. Okay. Mr. Baum, were  
25 you previously sworn? Did you take an oath?

1           **MR. SWEAT:** He was not. He was not, your  
2 Honor.

3           **THE COURT:** Okay. Mr. Baum, come forward to  
4 the witness stand right here, if you can get through the  
5 mess. Raise your right hand and take an oath.

6           **CLERK:** You do solemnly swear that the  
7 testimony you shall give in the matter now before this  
8 Court shall be the truth, the whole truth, and nothing  
9 but the truth, so help you God?

10           **THE WITNESS:** I do.

11           **THE COURT:** Have a seat.

12                                   **DIRECT EXAMINATION**

13 **BY MR. SWEAT:**

14           Q. Mr. Baum, would you please state your full  
15 name for the record?

16           A. Richard Morgan Baum.

17           Q. And what is your address?

18           A. 185 North 200 West Midway, Utah.

19           Q. And what is your birth date?

20           A. December 4th of '43.

21           Q. How long have you lived in Wasatch County?

22           A. 58 years.

23           Q. Are you familiar with the area that's north  
24 and northeast of the City of Wallsberg?

25           A. Well, I'm familiar with that area, but it

1 seems like the area that we're talking about is south,  
2 southeast of Wallsberg.

3 Q. Have you ever -- Let me show you what has  
4 been marked as Exhibit No. 2.

5 **THE COURT:** He can come down to the map.

6 Q. **(BY MR. SWEAT)** Do you want to come down and  
7 take a look at that?

8 **THE COURT:** Why don't you point out where  
9 Wallsberg is.

10 Q. **(BY MR. SWEAT)** This is Wallsberg. This is  
11 Heber City up here.

12 A. Okay. **(INAUDIBLE)**.

13 Q. Can you see a depiction of the road that's  
14 highlighted in red?

15 A. Yep.

16 Q. Are you familiar with that road?

17 A. Yes.

18 Q. What do you call that road?

19 A. Wallsberg Ridge.

20 Q. You can return to your seat.

21 **MR. SWEAT:** Your Honor, may the record  
22 reflect that he was referring to, what we have depicted  
23 as Ridge Line Road.

24 **THE COURT:** It may so reflect.

25 Q. **(BY MR. SWEAT)** Mr. Baum, do you own any

1 property in this area.

2 A. No.

3 Q. Have you ever leased any property in this  
4 area?

5 A. Nope.

6 Q. And that road that you called the Wallsberg  
7 Ridge that I've identified or called the Ridge Line Road,  
8 have you ever used that road?

9 A. Yes.

10 Q. What portions of that road have you used?

11 A. All of it.

12 Q. When do you first recall using that road?

13 A. Probably when I first got a four-wheel drive  
14 truck in about 1970 or so.

15 Q. And where would you have went that, on that  
16 first time you used that road?

17 A. I -- It seemed like we went up to Daniels  
18 Summit and then north from there.

19 Q. And how far down the Ridge Line Road did you  
20 use that time?

21 A. I think I got to a little bit north of  
22 Wallsberg Town and turned around and come back because it  
23 was just a rugged road.

24 Q. Since that time have you ever used that road,  
25 other than that first time?

1 A. Yes.

2 Q. When was the last time you used that road?

3 A. It's probably -- I didn't cover the entire  
4 road depicted there, but the last time would have been  
5 probably 1999, I think.

6 Q. What portion of the road did you use at that  
7 time?

8 A. I went -- Parked in Wallsberg and I ride  
9 mountain bike. And I road north of the cemetery and up  
10 east onto the ridge, and then south to Strawberry Peak,  
11 and then west from there and come out Little Hallow  
12 Creek.

13 **THE COURT:** Why don't you have him show you  
14 on the map.

15 Q. **(BY MR. SWEAT)** Can you show me where that  
16 -- Essentially show us where Strawberry Peak might be?

17 A. Okay. There's this road right here. The  
18 cemetery is right here. I rode up here, hit the road  
19 here, rode up to -- I don't know. It doesn't even show  
20 Strawberry Peak. It's (INAUDIBLE). Well -- Okay. And  
21 then I went north. Okay. It's probably up this road  
22 here. It was a big loop.

23 **MR. SWEAT:** Your Honor, may the record  
24 reflect that he showed traversing the entire length of  
25 Ridge Line Road across both West Daniels and the

1 Okelberry property?

2 **THE COURT:** The record may so reflect.

3 **MR. PETERSEN:** Well, I don't think it's the  
4 entirely Ridge Line Road.

5 **THE COURT:** Well, the entire Ridge Line Road  
6 that we're concerned with. The only portion of the road  
7 we're concerned with is the property that crosses West  
8 Daniels and Mr. Okelberry's property.

9 **MR. PETERSEN:** That's true. But I just  
10 wanted to make sure that (INAUDIBLE).

11 Q. **(BY MR. SWEAT)** Mr. Baum, do you often go  
12 biking up that road?

13 A. Not often, but I do probably every other year  
14 or every third year, something like that.

15 Q. And when did you first go biking up that  
16 road?

17 A. Probably about 20 years ago.

18 Q. When you first went up do you recall seeing  
19 any no trespassing signs?

20 A. I remember hitting closed gates, but I don't  
21 remember any no trespassing signs.

22 Q. Would the gates have been locked?

23 A. They could of been. I remember there was  
24 cows there. And on a bike we usually -- You know, if  
25 some is fastened very securely we'll throw our bikes over



1 the fence and climb over.

2 Q. Have you ever traversed the road from the  
3 south coming back towards Heber?

4 A. Yeah.

5 Q. And do you -- How do you do that?

6 A. I've ridden that in a four-wheel vehicle, on  
7 a motorcycle, on a mountain bike and on skis.

8 Q. Typically between the first time you used  
9 that road and the last time you used it, how many times  
10 per year would you say you use that road?

11 A. I would say once every other year, once every  
12 third year, something like that.

13 Q. And one year it maybe bicycle, one year it  
14 maybe a truck and one year it maybe skis?

15 A. Yep.

16 Q. Do you ever recall seeing a no trespassing  
17 signs anywhere along that road?

18 A. You know, I think I've seen plywood painted  
19 orange it seems like. I don't recall seeing any no  
20 trespassing signs.

21 Q. The orange plywood, where would that have  
22 been?

23 A. It seemed like that was about halfway between  
24 Wallsberg and Big Glade. That's what my recollection is.

25 Q. Can you point to that on the map by chance?

1           A.    Well, it would have been in this area here,  
2 cause this is, you know, where I get on it usually and  
3 this is -- I either go down Main Canyon or come out  
4 Daniels Summit. So that's about halfway right in here  
5 some where.

6           Q.    Do you recall when you would of first seen an  
7 orange painted board or anything?

8           A.    It doesn't seem like it was there. When I  
9 first started using that road it was, it was in a truck.  
10 And I don't remember seeing those there at that time.  
11 That would of been in the 70's. And maybe in the 80's,  
12 probably late 80's I want to say.

13          Q.    When you were using this road did you ever  
14 observe others use this road?

15          A.    Yeah, the last time I rode it I passed  
16 somebody in a truck coming the other way. There aren't  
17 very many people, but I -- When I went up there, rode  
18 my bike on it during the deer hunt one year and passed a  
19 bunch of people.

20          Q.    Now, when you ski on this road are the gates  
21 typically up?

22          A.    It seemed like the one at the, just on the  
23 north end of Big Glade. The road forks and goes around a  
24 mountain. The road goes around both sides of the  
25 mountain and come back together on the north end. And

1 then there's a gate just north of that. And it seemed  
2 like that was closed. But that's the only one that seems  
3 like it was closed.

4 Q. As you've used this road over the years has  
5 there ever been a time that you've felt like it's went  
6 from being rather open to more closed?

7 A. Well, yeah, just, you know, like I say, I use  
8 to be able to ride my truck, drive a truck up there and  
9 there were gates closed. But I didn't feel like I was  
10 trespassing when I open the gate and go through and then  
11 I close them. But then, like I say, when I'm -- A  
12 little bit later down the road after I took up mountain  
13 biking and I was up there on a mountain bike, it seemed  
14 like I was seeing those plywood signs or painted posts or  
15 something.

16 Q. Have you ever seen other people using those  
17 roads?

18 A. Well, yeah, that time during the deer hunt  
19 and the time recently, probably been in '99 or so I  
20 passed someone going north, I was going south. Those  
21 were the only times I can recollect seeing anybody.

22 **MR. SWEAT:** I have no further questions at  
23 this time, your Honor.

24 **THE COURT:** Mr. Petersen, cross?

25 **MR. PETERSEN:** Thank you, your Honor.

CROSS-EXAMINATION

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BY MR. PETERSEN:

Q. Mr. Baum, when you're up there skiing, is this cross country skis you're on?

A. Yeah.

Q. When you're up there cross country skiing how deep is the snow?

A. The elevation varies up there and the aspect of the mountain varies, but it would be anywhere from about -- It's hardly ever more than three feet deep. Sometimes -- I think one time I actually hit mud on some of the south facing slopes.

Q. Could it get as deep as ten feet in some areas up there?

A. Not unless it's a (INAUDIBLE). It doesn't -- I ski up there all the time and it's hardly ever more than three feet deep.

Q. Well, your testimony, I believe, was that you go up there on that, you call the Wallsberg Ridge, we've been referring to it as the Ridge Line Road. You go up there once a year or every other year or every third year; is that correct?

A. Yeah. I wouldn't say I go up there every year though. I'd say that -- I don't go up there that often.

1 Q. No, no, it wouldn't -- Excuse me. Every  
2 other year or every third year?

3 A. Yeah.

4 Q. Okay. Now, when you go up there every other  
5 year or every third year, is that when you're skiing or  
6 is that when you're riding your ATV or is that when  
7 you're in a truck?

8 A. That includes all that. Sometimes it's even  
9 on foot. Sometimes I'll hike up from Thorton Hallow and  
10 go up to, I think it's Palmer Canyon, loop around and  
11 come back down to Thorton.

12 Q. You're up there more or less to do hiking and  
13 things like that. You're not up there hunting then?

14 A. No, I quit hunting about 20 years ago.

15 Q. And you say that when you're up there every  
16 other year or every third year you'll sometimes see  
17 someone?

18 A. Yep.

19 Q. And that someone that you're seeing could --  
20 You don't know if they're the property owners or if  
21 they're up there with permission or what then?

22 A. No, I didn't quiz them on what they were  
23 doing.

24 Q. You said you saw someone in '99 and you don't  
25 know who that was.

1 A. Well, I know they were in a pickup truck and  
2 there was two guys, but I -- I mean, it could have been  
3 -- I mean, it wasn't a government truck or anything. It  
4 was a private truck, but I don't know who it was.

5 Q. When you're up there on your ATV do you  
6 sometimes come to rocky roads, narrow roads on that  
7 mountain ridge?

8 A. I'd say. Yeah, specially north of Wallsberg,  
9 but even the south portion, yeah.

10 Q. Do you ever come to areas where it's blocked  
11 off with trees?

12 A. I don't recall ever doing that.

13 Q. Never had to stop or go around a tree then?

14 A. I don't remember doing that.

15 **MR. PETERSEN:** That's all I have, your Honor.

16 **THE COURT:** Anything else, Mr. Sweat?

17 **MR. SWEAT:** Just a couple questions, your  
18 Honor.

19 **REDIRECT EXAMINATION**

20 **BY MR. SWEAT:**

21 Q. Mr. Baum, the time that you've used that road  
22 have you ever been asked by anyone not to use it or stay  
23 off of it?

24 A. No.

25 Q. Were you ever asked to leave?

1 A. No.

2 MR. SWEAT: That's all I have, your Honor.

3 THE COURT: Anything else, Mr. Petersen?

4 MR. PETERSEN: No, sir.

5 THE COURT: You may step down. Thank you.

6 Okay. You say, Mr. Sweat, you have probably three more  
7 witnesses?

8 MR. SWEAT: That's what I anticipate, your  
9 Honor.

10 THE COURT: And you're prepared after to call  
11 your witnesses?

12 MR. PETERSEN: Yes, we are, your Honor.  
13 We're prepared to start at 12:00 tomorrow. In fact,  
14 we've got some witnesses subpoenaed at 9:00, but I think  
15 we can put them off till 12:00.

16 THE COURT: Okay. We'll be in recess until  
17 9:00 a.m. then.

18 MR. PETERSEN: Thank you.

19 THE COURT: Thank you, counsel.

20 (Where upon Court recessed for the day.)

21

22

23

24

25

1 CERTIFIED COURT REPORTER'S CERTIFICATE

2 WASATCH COUNTY,

3 Plaintiff,

4 vs.

5 WEST DANIELS LAND ASSOCIATION Et al,

6 Defendant.

7 I, Jennifer Hermansen France, a Certified Court  
8 Reporter in and for the State of Utah, do hereby certify:

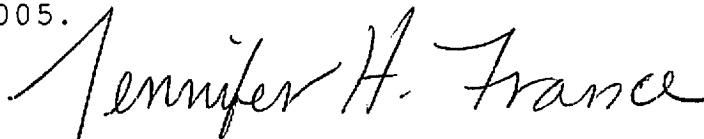
9 That this proceeding was transcribed by me from the  
10 transmitter records made of these proceedings.

11 That this transcript is full, true, correct and  
12 contains all of the evidence and all matters to which the  
13 same relate which were audible throughout said recording.

14 That I am not of kin or otherwise associated with  
15 any of the parties herein or their counsel, and that I am  
16 not interested of the events thereof.

17 That certain parties were not identified in the  
18 record, and therefore, the name associated with the  
19 statement may not be the correct name as to the speaker.

20 WITNESS my hand at Midvale, Utah, the 20th day of  
21 August, 2005.

22 

23 Jennifer Hermansen France, RPR, CSR

24 Utah State Courts

25



FOURTH DISTRICT COURT - HEBER COURT  
WASATCH COUNTY, STATE OF UTAH

\_\_\_\_\_  
WASATCH COUNTY, :  
Plaintiff, :  
 :  
vs. : Case No. 010500388  
 :  
WEST DANIELS LAND :  
ASSOCIATION Et al, :  
Defendant. :  
\_\_\_\_\_ :

BEFORE THE HONORABLE DONALD J. EYRE

HEBER DISTRICT COURT  
1361 SOUTH HIGHWAY 40  
HEBER CITY, UTAH 84032

BENCH TRIAL  
ELECTRONICALLY RECORDED ON JUNE 29, 2004

Transcribed by: Jennifer Hermansen France, RPR, CSR

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1 June 29, 2004

9:07 a.m.

2 P R O C E E D I N G S

3

4 THE COURT: Good morning. Mr. Sweat, we'll  
5 go to the case of Wasatch County verses Okelberry,  
6 continuation of the trial. You may call your next  
7 witness.

8 MR. SWEAT: Thank you, your Honor. Before we  
9 do that I would like to make a record. I'd talked with  
10 Mr. Petersen that I might have some direct type  
11 examinations for his client, Mr. Okelberry and possibly  
12 Brian. And I think he's willing to make a record that I  
13 could ask those on cross-examination rather than calling  
14 them twice

15 MR. PETERSEN: We have no objection to that,  
16 your Honor.

17 THE COURT: Okay. That's fine.

18 MR. SWEAT: And our Plaintiff would call  
19 Brandon Richins.

20 THE COURT: Was he sworn yesterday?

21 MR. SWEAT: He was not, your Honor. These  
22 were ones I didn't even have show up yesterday, some of  
23 them anyway.

24 THE COURT: Okay. Mr. Richins, come forward  
25 and come up here to the witness stand. Okay. Raise your

1 right hand and take an oath before you sit down.

2 CLERK: You do solemnly swear that the  
3 testimony you shall give in the matter now before this  
4 Court will be the truth, the whole truth, and nothing but  
5 the truth, so help you God.

6 THE WITNESS: Yes.

7 THE COURT: You may have a seat. Okay. Mr.  
8 Sweat, you may proceed.

9 MR. SWEAT: Thank you, your Honor.

10 DIRECT EXAMINATION

11 BY MR. SWEAT:

12 Q. Mr. Richins, will you please state your full  
13 name and address for the Court?

14 A. Brandon T Richins. 501 West Main Canyon Road  
15 Wallsberg, Utah.

16 Q. What's your birth date?

17 A. December 19th, 1973.

18 Q. And you've lived in Wasatch County for how  
19 long?

20 A. Oh, my whole life.

21 Q. Okay. Are you familiar with the area east  
22 and a little bit north of the town of Wallsberg?

23 A. Yes.

24 Q. I'd like to direct your attention to what has  
25 been marked as Exhibit No. 2, which is a map. If you

1 like you can come down and take a look and see if you  
2 recognize the area depicted in this map.  
3 A. (INAUDIBLE).  
4 Q. You can return to your seat. Specifically  
5 referring to the mountainous area north and east of  
6 Wallsberg, do you own any property up in that area?  
7 A. I don't.  
8 Q. Have you leased any property up in that area?  
9 A. No.  
10 Q. Have you used any of the roads that are in  
11 that area?  
12 A. Yes.  
13 Q. Are you aware of a road called Circle Spring  
14 Road?  
15 A. Yes.  
16 Q. Can you see it depicted on my map?  
17 A. Yeah, it's the green road there.  
18 Q. The green road?  
19 MR. SWEAT: I would ask the record reflect  
20 that he has --  
21 THE COURT: Why don't you have him point it  
22 out so we know specifically which one (INAUDIBLE). The  
23 record may reflect he's identified what on the map is the  
24 Circle Springs Road.  
25 MR. SWEAT: Thank you, your Honor.

7

1 Q. (BY MR. SWEAT) Have you ever used that road?  
2 A. I have.  
3 Q. What portions have you used of that road?  
4 A. I've went all the way down.  
5 Q. What do you mean all the way down? Where  
6 does that end up?  
7 A. I just went down as far as I could over in  
8 the springs and open area.  
9 Q. When did you first use that road?  
10 A. I can't recall on that one.  
11 Q. Do you have an idea when it might have been?  
12 A. Well, childhood memories I can't exactly  
13 remember, but --  
14 Q. When's the first time you actually recall  
15 using that road?  
16 A. Sometime in my teenage years after I had my  
17 driver's license I went down there.  
18 Q. Why did you go down that road?  
19 A. Just for a ride.  
20 Q. At that time did you go all the way to the  
21 end of the road?  
22 A. I think so.  
23 Q. When did you last use this road?  
24 A. Oh, I actually went down the road before the  
25 property line last year to help my father lift some wood,

8

1 but that was just partially, not very far.  
2 Q. When was the last time you went clear down  
3 the road?  
4 A. Oh, it's been a few years ago.  
5 Q. Do you recall about when?  
6 A. I can't.  
7 Q. Between the time you first went down the road  
8 and when you last went down the road, did you use road  
9 very often?  
10 A. No.  
11 Q. Why did you quit going down the road?  
12 A. Other interest, maybe with the signs, didn't  
13 know whether I was going to get in trouble or not.  
14 Q. What signs are those?  
15 A. No trespassing.  
16 Q. When do you first remember seeing a sign?  
17 A. To the best of my knowledge I'd say 15, 16  
18 years ago.  
19 Q. And once you saw the sign you quit going  
20 down?  
21 A. No. I've been down that one since with the  
22 understanding that there was public land on the far sides  
23 and the road was just access.  
24 Q. Have you ever encountered a locked gate on  
25 that road?

9

1 A. I don't recall.  
2 Q. Have you ever been asked by anyone not to use  
3 that road?  
4 A. No.  
5 Q. Are you aware of a road called the Ridge Line  
6 Road?  
7 A. I am.  
8 Q. Could you point that road out to us on the  
9 map?  
10 A. It's directly across the top.  
11 MR. SWEAT: Your Honor, may the record  
12 reflect that he's pointed what we've designated as the  
13 Ridge Line Road.  
14 THE COURT: It may so reflect.  
15 Q. (BY MR. SWEAT) Have you ever used this road?  
16 A. Yes.  
17 Q. When do you first recall using this road?  
18 A. Like before when I was young I have vague  
19 memories of using it, but since I became a licensed  
20 driver I've used it quite frequently.  
21 Q. Do you recall when the first time you used  
22 the road would have been?  
23 A. I would of had my license in the summer of  
24 '90 and I'd taken a couple vehicles between '90 and '94.  
25 I don't recall how many times I've taken, but I know I've

10

1 taken at least two vehicles that I rode over the top.

2 Q. Just one time each?

3 A. I'm not sure how many times each, but like,  
4 for sure at least once each.

5 Q. Do you recall when that was?

6 A. My first vehicle would have been '90, I owned  
7 that '90 to '92. I took that one. And I purchased a '93  
8 truck in '93 and I used it. And I went on a mission and  
9 left in '94. So it would have been '93, '94 area.

10 Q. When first used the road did you ever  
11 encounter a locked gate?

12 A. When I first used the road, no. There were  
13 signs and at times there may have been gates up, but they  
14 were not locked.

15 Q. Did you ever encounter anyone up there  
16 patrolling the area?

17 A. When I was young, before I had my driver's  
18 license, we went hunting with my grandfather and there  
19 was people patrolling the area.

20 Q. And did they stop you from using the roads?

21 A. They tried to stop us from using the road.  
22 Asked us not to come in and we informed them that we were  
23 just passing through to get to some public land. And  
24 they watched us to make sure that we passed through. And  
25 then we got to where we wanted to go and hunted on public

11

1 land.

2 Q. Do you recall when the last time you used  
3 this road?

4 A. The last time I used that road I, for sure,  
5 was in, that I can recall I know I used it in 2000, the  
6 summer of 2000 and we used it frequently four-wheeling.

7 Q. You used it frequently that year?

8 A. I did.

9 Q. Was there no trespassing signs in place at  
10 that time?

11 A. There was.

12 Q. Was there locked gates at that time?

13 A. No.

14 Q. Did anybody ever try to keep you off the road  
15 in 19 or 2000?

16 A. No.

17 Q. Were there gates up in 2000?

18 A. I can't remember for sure if they were up or  
19 not cause there was times when there were gates up and  
20 times when they weren't, but they were not locked.

21 Q. What did you use the road for in 2000?

22 A. Just to access public lands for just riding  
23 ATV.

24 Q. Where would you go on the road when you used  
25 it?

12



1           A. All the way across from the Big Glade till  
2 you can get to the other side and come down the state  
3 land there.  
4           Q. And what type of vehicle did you use then?  
5           A. An ATV.  
6           Q. When did you stop using the Ridge Line Road?  
7           A. It seems to the best of my knowledge that  
8 when we went and attempted in 2001 there were locked  
9 gates and have been since.  
10          Q. Was that the first time you encountered  
11 locked gates?  
12          A. Yes.  
13          Q. You indicated that prior to locked gates you  
14 had seen signs; is that correct?  
15          A. Yes.  
16          Q. What was your belief in using the road prior  
17 to the locked gates?  
18               MR. PETERSEN: Now, what are we -- At what  
19 point are we talking about here?  
20               THE COURT: He's talking -- He's asking  
21 what his understanding as to the use of the roads prior  
22 to the locked gates in 2001.  
23               MR. PETERSEN: My question was where were  
24 those locked gates that he's referring to?  
25               THE COURT: Why don't you ask him that

13

1 question.  
2           Q. (BY MR. SWEAT) Where were the locked gates  
3 that you saw in 2001?  
4           A. Along the Ridge Line at the property line.  
5           Q. Could you point on the map where the locked,  
6 where you encountered the locked gate that kept you from  
7 using it?  
8           A. I think it would be hard to know exactly on a  
9 map, but as you leave the Big Glade and come down along  
10 here, it seems like probably just before you get to the  
11 Maple Canyon Road there would be a gate, and then another  
12 one down further, but I can't -- Some where down in  
13 there.  
14          Q. My previous question was that prior to you  
15 running into the locked gates, but after you had seen the  
16 no trespassing signs you indicated you still used the  
17 road; is that correct?  
18          A. Right.  
19          Q. And what was your belief or understanding of  
20 why you would still use the road?  
21          A. My understanding is that I was legally  
22 authorized to use the road to access public land as long  
23 as I didn't disturbed the property but I just passed  
24 through.  
25          Q. When you were using the road in 2000 did you

14

1 ever see others using the road?  
2 A. On occasion I would see someone, pass  
3 someone.  
4 Q. Did you know who they were?  
5 A. Yeah, usually.  
6 Q. Were they -- Were they any of the  
7 Okelberrys or any of the people that worked for them?  
8 A. I don't recall on that road. I'd seen them  
9 around, but I don't remember, but I don't believe I've  
10 ran into them on that road. Mostly just towns people  
11 doing what I was doing.  
12 Q. Have you ever used a road called Thorton  
13 Hallow Road?  
14 A. I have.  
15 Q. Would you point to that road on the map?  
16 MR. SWEAT: Your Honor, may the record  
17 reflect that the Defendant or that the witness has  
18 pointed out what Plaintiff has designated as Thorton  
19 Hallow Road.  
20 THE COURT: The record may so reflect.  
21 Q. (BY MR. SWEAT) When did you first use that  
22 road?  
23 A. It would have been when I was young, with my  
24 family. And I haven't used that one a whole lot since.  
25 Q. Did you -- When was the last time you used  
15  
1 that road?  
2 A. I can't recall.  
3 Q. You indicated you only used it with your  
4 family. Did you ever use it by yourself at all?  
5 A. You know what, I probably may have, riding  
6 around, but I can't say because I don't recall.  
7 Q. Did you ever use Parker Canyon Road?  
8 A. I have.  
9 Q. Can you point that road out to us on the map?  
10 Do you recall when you first used that road?  
11 A. The first time -- Like I said, all my life  
12 we -- So it would of been a childhood memory the first  
13 time. The most recent time would of been '99, 2000.  
14 Q. And what would you of used the road for in  
15 '99 or 2000?  
16 A. Joy riding.  
17 Q. At that time did you run into any locked  
18 gates on that road?  
19 A. No.  
20 Q. Did you run into any no trespassing signs.  
21 A. I don't remember. I (INAUDIBLE) from that  
22 road.  
23 Q. Why did you stop using that road?  
24 A. Just because you can't get through the gate  
25 to get over to it from the easier side.

1 Q. Would you of used that road in 2000?  
2 A. Yes.  
3 Q. In 1999?  
4 A. Yes.  
5 Q. Typically during the years you used that road  
6 how many times per year would you think you used that  
7 road?  
8 A. Not as often as the Ridge Line, maybe once a  
9 year.  
10 Q. Are you familiar with a road called Maple  
11 Canyon Road?  
12 A. Yes.  
13 Q. Can you point that road out to us? Have you  
14 ever used that road?  
15 A. I have.  
16 Q. What portions of that road have you used?  
17 A. The whole road.  
18 Q. Why did you first use that road?  
19 A. Just another way to ride up there.  
20 Q. When you say ride up there --  
21 A. Well, there's times where maybe our family  
22 may have been camped somewhere up there on the Big Glade,  
23 and let's try this road or let's go this way this time.  
24 Q. When was the last time you remember using the  
25 Maple Canyon Road?

17

1 A. It seems two years ago, two, three years ago.  
2 Q. What did you use it for on that trip?  
3 A. We was riding four-wheelers.  
4 Q. And was the gate locked on that time, that  
5 day?  
6 A. It was up top, but we came up from the  
7 Wallsberg side. And it had been locked for a long time,  
8 but during this time for some reason it was unlocked. So  
9 we knew that there was, that there was litigation on  
10 whether those roads should be open. And we thought well,  
11 maybe they're open now. And so we rode up and  
12 encountered a locked gate at the top.  
13 Q. When was the last time you -- Did you ever  
14 use that road that you didn't encounter a locked gate  
15 other than --  
16 A. It was years ago.  
17 Q. Do you recall about when?  
18 A. Probably 15, 16 years ago.  
19 Q. Do you ever remember seeing a no trespassing  
20 sign on Maple Canyon Road?  
21 A. Yes.  
22 Q. When did you first see a no trespassing sign?  
23 A. Probably 15, 16 years ago to the best of my  
24 knowledge.  
25 Q. And did you ever use the road other than the

18

1 one time that the gate had been locked and was open, did  
2 you ever use the road after you saw a no trespassing  
3 sign?

4 A. No, because there was a locked gate.

5 Q. So the lock came about the same time as the  
6 no trespassing sign?

7 A. If my memory serves correctly.

8 Q. Was the only reason you used these roads was  
9 for riding your ATV and for camping with your family?

10 A. Riding, camping and hunting.

11 Q. Of the roads we've discussed what roads would  
12 you of used for hunting?

13 A. Ridge Line by far the most.

14 Q. How often do you think you hunted up there?

15 A. Oh, every year essentially.

16 Q. Do you think you used that road every year?

17 A. I would say so, since I had a license to  
18 drive.

19 Q. When did you -- How long ago did you get a  
20 license to drive?

21 A. It would of been -- I was 16, I'm 30 now,  
22 so it would have to be '90. I think I said '89 or '90.

23 Q. Other than the two places you've indicated  
24 you've encountered locked gates have you ever encountered  
25 any other locked gates on the roads that we've discussed?

19

1 A. No.

2 MR. SWEAT: I have no further questions at  
3 this time.

4 THE COURT: Mr. Petersen, cross?

5 MR. PETERSEN: Thank you, your Honor.

6 CROSS-EXAMINATION

7 BY MR. PETERSEN:

8 Q. Mr. Richins, it would be safe to say, would  
9 it not, that in respect to the Circle Spring Road you  
10 used that very little?

11 A. Yeah.

12 Q. You said the last time you used it you went  
13 down to get wood, but you didn't go all the way to the  
14 bottom?

15 A. No, we never went to the property line.

16 Q. When you got the wood were you on Forest  
17 Service property or were you on private property?

18 A. Forest Service.

19 Q. And do you know if you need permission to go  
20 down there and gather wood?

21 A. On forest?

22 Q. Yes.

23 A. They had a wood permit.

24 Q. Are you sure you went -- Was there a fence  
25 there and a gate --

20

1 A. No.  
2 Q. -- separating the Forest Service from the  
3 private property?  
4 A. No. We didn't go that far, just off the,  
5 before we got to the fence.  
6 Q. You didn't go all the way to the fence?  
7 A. No.  
8 Q. Well, if you didn't go all the way to the  
9 fence then you would of been on private property, would  
10 you not? Cause if the fence separates the private  
11 property from the Forest Service property --  
12 A. No, it would be the Forest Service just where  
13 the road leaves near the Big Glade.  
14 THE COURT: There's a portion of the, that  
15 road that's on the Forest Service side.  
16 THE WITNESS: Right.  
17 Q. (BY MR. PETERSEN) When you gathered the wood  
18 you were not on it?  
19 A. Yeah, we was --  
20 Q. On private property?  
21 A. No.  
22 Q. So the last time you didn't even go down this  
23 Spring Road then?  
24 A. No, no.  
25 Q. Well, we can pretty well discount the Circle

21

1 Spring Road, can we not?  
2 A. Yes.  
3 Q. Cause you haven't traveled it that much?  
4 A. Not very often.  
5 Q. And we can pretty much discount the Thorton  
6 Hallow Road too, could we not? Cause you said you'd been  
7 on that very little.  
8 A. Very little.  
9 Q. So we're really talking about the Ridge Line,  
10 Road Parker Canyon and --  
11 A. Right.  
12 Q. -- and Maple Canyon Road?  
13 A. Right.  
14 Q. Now, you say that you've gone all the way  
15 from the Big Glade all the way over to the gun club; is  
16 that true?  
17 A. Well, before you -- There's a point once  
18 you get across the top where you can turn and come down  
19 into Wallsberg. And that would be where I went.  
20 Q. So you didn't --  
21 A. Didn't go all the way to the gun club. I  
22 have, but --  
23 Q. You didn't go all the way to the gun club?  
24 A. I have in the past, but very seldom. Mostly  
25 -- Before you there's a gate there that's protecting the

22

1 road, so turn down and come into Wallsberg.  
2 Q. Well, when you said you took two vehicles  
3 over the top, and this was between '90 and '94, were you  
4 talking about going all the way to the gun club or were  
5 you talking about turning off and going down to  
6 Wallsberg?  
7 A. Turning off and going to Wallsberg.  
8 Q. That's a pretty rough road, is it not, going  
9 up there?  
10 A. The -- I guess it would be the north-east  
11 end that it is fairly rocky.  
12 Q. Is it very steep?  
13 A. Yeah.  
14 Q. Let me show you what's been marked as  
15 Defendant's Exhibit No. 9 and ask you if you can identify  
16 that?  
17 A. Yes.  
18 Q. What is that?  
19 A. That's the north-east end of the road.  
20 Q. Is that on the Okelberry property?  
21 A. I don't believe that portion is.  
22 Q. Okay. Is it designated as the Ridge Line  
23 Road?  
24 A. Yes.  
25 Q. That's pretty steep, is it not?

23

1 A. Yeah.  
2 Q. And that's an accurate representation of it?  
3 A. Yeah.  
4 MR. PETERSEN: Your Honor, we'd offer Exhibit  
5 9.  
6 THE COURT: Any objection?  
7 MR. SWEAT: No objection.  
8 THE COURT: It's received.  
9 (Defendant's Exhibit No. 9  
10 was received into evidence.)  
11 Q. (BY MR. PETERSEN) Certainly wouldn't take  
12 anything but an ATV or a four-wheel drive type vehicle up  
13 there, would you?  
14 A. I haven't taken anything but a four-wheel  
15 drive.  
16 Q. You wouldn't drive your own passenger car up  
17 there, would you?  
18 A. No.  
19 Q. Let me show you what's been marked as Exhibit  
20 6 and ask you if you can identify that?  
21 A. Yes.  
22 Q. What is that?  
23 A. That's one of the grates on the Ridge Line  
24 Road, I believe.  
25 Q. Do you know where it's at?

24

1           A.    I'm not sure exactly which one it is from the  
2 picture.  
3           Q.    Now, when you come through this gate has it  
4 been up or has it been down?  
5           A.    I've encountered both.  
6           Q.    So there's been occasions when the gate has  
7 been up, you'd go through, you'd open the gate?  
8           A.    Right, open the gate, drive through and close  
9 the gate.  
10          Q.    Did you always close the gate if it was up?  
11          A.    Yes.  
12          Q.    So you acknowledge that there was a gate  
13 there?  
14          A.    Yes.  
15          Q.    And I think you indicated there were other  
16 gates along the Ridge Line Road?  
17          A.    I think there was two.  
18          Q.    And there were occasions when those gates  
19 were closed, was there not?  
20          A.    Yeah.  
21          Q.    And if they were closed you would close them  
22 after you went through?  
23          A.    Right.  
24          Q.    Well, there occasions when you went down the  
25 road then, it was covered with trees?

25

1           A.    Sometimes there'd be a new fallen tree that  
2 you would have to drive around.  
3           Q.    What would you do when you came to a new  
4 fallen tree?  
5           A.    Try to move it out of the way and if I  
6 couldn't I would just go around as close as possible.  
7           Q.    And to go around you'd have to leave the  
8 roadway, wouldn't you?  
9           A.    Somewhat.  
10          Q.    By doing that you'd be going out onto private  
11 property?  
12          A.    Well, I guess so, but it was usually warn  
13 where other people have --  
14          Q.    Would it be safe to describe the Ridge Line  
15 Road as narrow?  
16          A.    In places.  
17          Q.    Would it be safe to describe it as rocky?  
18          A.    On the north-east end, otherwise not too bad.  
19          Q.    Would it be safe to say that if it had rained  
20 it would become impassable?  
21          A.    Well, it depends on what you're driving I  
22 guess.  
23          Q.    It can get pretty muddy up there, can it not?  
24          A.    It can.  
25          Q.    Now, as I understand, the last time you said

26

1 you went up there was in 2000 and you were on  
2 four-wheelers?  
3 A. Right.  
4 Q. So the last time you used the Ridge Line Road  
5 was four-wheelers in 2000?  
6 A. Yeah, me and my wife on a four-wheeler.  
7 Q. And did you go all the way over and then down  
8 to Wallsberg?  
9 A. Correct.  
10 Q. So in -- On that occasion you were not  
11 accessing any public ground, any public property?  
12 A. Well, we was camped on the one side, towards  
13 the south end. And then we rode to the, through to get  
14 to the state side.  
15 Q. Well, but this occasion you told us about  
16 where you went up and then down to Wallsberg?  
17 A. Right.  
18 Q. You weren't camping on that occasion?  
19 A. Well, no, we were camping, but we went home  
20 on that road to get home.  
21 Q. So in that since you weren't accessing any  
22 public property?  
23 A. Well, home I guess.  
24 Q. Do you -- Any Forest Service property I  
25 should say?

27

1 A. I believe there would be some on the  
2 north-east side.  
3 Q. Do you know if there's any --  
4 A. We didn't stop and camp, no.  
5 Q. Do you know if there's any restriction using  
6 ATV's or any motorized vehicles on Forest Service  
7 property?  
8 A. In some areas there are, but I don't recall  
9 being restricted there.  
10 Q. Anywhere there?  
11 A. Not on that road.  
12 Q. Well you --  
13 A. And we've encountered forest people.  
14 Q. Oh, okay. Let me show you what's been marked  
15 as Exhibit No. 4. Clearly it's been marked Exhibit No.  
16 4. That's a picture. Have you ever seen a sign like  
17 that on Forest Service property?  
18 A. Yes.  
19 Q. Where have you seen signs like that?  
20 A. Usually off of a main road where people have  
21 tried to ride and destroy the ground, they'll put them  
22 there is where I've seen them.  
23 Q. Did you ever see any signs like that off of  
24 Circle Spring Road?  
25 A. It's been, like I say, a while since I've

28



1 been down there. So I don't know.  
2 Q. Thorton Hallow Road?  
3 A. I don't know.  
4 Q. Parker Canyon Road?  
5 A. I don't remember seeing one there, no.  
6 Q. But you do remember seeing in that general  
7 area up there on Forest Service property?  
8 A. Yeah, usually several areas where people are  
9 taken off the main road trying to create their own,  
10 you'll see them put something like that.  
11 Q. You have seen signs that say, "area closed"?  
12 A. Right.  
13 Q. Now, you indicated that you have come across  
14 locked gates on the Ridge Line Road?  
15 A. Yes.  
16 Q. When the gates are locked then you turn  
17 around and you don't go any further then?  
18 A. Yes.  
19 Q. Have you ever attempted to blow those locks  
20 off with a rifle or gun?  
21 A. No.  
22 Q. Do you know of anybody that ever has?  
23 A. No.  
24 Q. Have you ever seen any signs on Forest  
25 Service property that say, "no motorized vehicles"?

29

1 A. Yeah.  
2 Q. And that's not an uncommon sign to see, is  
3 it?  
4 A. No.  
5 Q. If it says, "no motorized vehicles" would  
6 that restrict you from driving your ATV's on there?  
7 A. Yeah.  
8 Q. Would it restrict you from driving your  
9 trucks and so fourth?  
10 A. Yeah.  
11 Q. With signs like that why would you want to  
12 access the Forest Service property?  
13 A. Hiking, or horse back riding or people could  
14 do that.  
15 Q. Have you ever ridden a horse up there?  
16 A. I haven't.  
17 Q. This Parker Canyon Road you indicated you  
18 traveled that before?  
19 A. Yes.  
20 Q. Was there a fence and a gate separating the  
21 private property from the Forest Service property?  
22 A. It seems like there was a fence, but I really  
23 cannot recall. I haven't used that road that much like I  
24 have the Ridge Line.  
25 Q. You haven't used Parker Canyon?

30

1 A. I have a couple times in recent years, but  
2 not like the Ridge Line one.

3 Q. So Parker Canyon you haven't used very much,  
4 much like Thorton Hallow, you haven't used that --

5 A. Well, I've used it more than Thorton Hallow,  
6 but maybe once a year just to run --

7 Q. But you don't recall if there's a fence and a  
8 wire gate separating the private property from the Forest  
9 Service property?

10 A. I can't recall. It seems like there's a  
11 fence, but I can't recall a gate.

12 Q. If you don't recall a gate how did you get  
13 onto the Forest Service property?

14 A. Just drove through.

15 Q. Drove through the fence?

16 A. Well, I don't remember if I had to open a  
17 gate or not. I may have. I just can't remember.

18 Q. Your recollection just isn't that good?

19 A. No.

20 Q. And that would apply, would it not, as to how  
21 many times you've been on the Parker Canyon Road, your  
22 recollection would not be that good?

23 A. Right.

24 Q. Now the Maple Canyon Road. You said that  
25 you've traveled that and the last time was -- Was it

31

1 two or three years ago?

2 A. Right.

3 Q. You rode an ATV?

4 A. Right.

5 Q. You came up from the Wallsberg side?

6 A. Right.

7 Q. Let me show you as what's been marked as  
8 Defendant's Exhibit 15 and ask you if you can identify  
9 that?

10 A. That looks like coming from the Wallsberg  
11 side, up further on the oiled road, Main Canyon Road.  
12 That's not the way I accessed it though.

13 Q. You didn't access it that way?

14 A. No, there's oil rig road, the old oil rig  
15 road. You can go partially up that and then there's a  
16 road that takes you over and connects to the Maple Creek  
17 Road and goes up. And that's the ones that was.

18 Q. So there's another access you say? Could you  
19 come down here and describe -- This gate here is right  
20 down here on the main canyon road, is it not?

21 A. Yes, I believe so.

22 Q. And that one says no trespassing and posted?

23 A. Right.

24 Q. You didn't go through this one then. This  
25 was -- Was it locked up?

32

1 A. I didn't even go that way. So I wouldn't  
2 know if it was there or not.

3 Q. Okay. Well and demonstrate how you got on  
4 that Maple Canyon Road.

5 A. If this is that road -- This is Main Canyon  
6 Road I assume right here?

7 Q. Yes.

8 A. There's another road -- What road is this?  
9 Some where there's a road here where the old oil rig road  
10 was. You can drive over here. And then there's another  
11 road that takes you over and connects here some where and  
12 goes on that road?

13 Q. So you were accessing over private property  
14 and then, here, and then on the Okelberry property to get  
15 on the Maple Canyon Road?

16 A. Right.

17 MR. PETERSEN: Your Honor, I move to strike  
18 his testimony as to the use of that Maple Canyon Road  
19 because there, he's accessing it over roads that county  
20 is not asking to be open to the public.

21 THE COURT: Well, but he did use it. That's  
22 -- I overrule your --

23 MR. PETERSEN: Your Honor, we would offer  
24 Exhibit 15 as the gate that's on the maple, on the main  
25 canyon road.

33

1 THE COURT: Well, he doesn't -- Any  
2 objection, Mr. Sweat?

3 MR. SWEAT: No objection, your Honor.

4 THE COURT: It's received.  
5 (Defendant's Exhibit No. 15  
6 was received into evidence.)

7 Q. (BY MR. PETERSEN) Now, when you drove that  
8 Maple Canyon Road two or three years ago you're on an  
9 ATV?

10 A. Right.

11 Q. If you weren't on that ATV you couldn't of  
12 gone up that road, could you?

13 A. Probably not.

14 Q. In order to access that Maple Canyon Road  
15 you'd have to have an ATV?

16 A. I would think so or a very old truck.

17 Q. You indicated that however you access that  
18 road at that time there was a no trespassing sign?

19 A. I believe so.

20 Q. But -- And there was actually a gate  
21 crossing the road, but the gate happened to be open?

22 A. Right.

23 Q. So even though it said no trespassing you  
24 went right through it then?

25 A. Right.

34

1 Q. Well, wouldn't it be safe to say, Mr.  
2 Richins, that your use of those roads up there really  
3 would only constitute the Ridge Line Road?  
4 A. Mostly, yeah.  
5 Q. And there have been occasions when you  
6 couldn't access that because the gates were locked?  
7 A. Right, in recent years.  
8 Q. You couldn't access it because there were  
9 trees across the roads and so fourth?  
10 A. I've always been able to move them or  
11 whatever, in most cases. Four-wheeler, you need a fairly  
12 narrow area.  
13 Q. Or drive around them?  
14 A. Yeah, but on a four-wheeler I could usually  
15 clear enough I could get through.  
16 MR. PETERSEN: That's all.  
17 THE COURT: Anything else, Mr. Sweat?  
18 MR. SWEAT: Just briefly, your Honor. May I  
19 approach the witness, your Honor?  
20 THE COURT: You may.  
21 REDIRECT EXAMINATION  
22 BY MR. SWEAT:  
23 Q. Mr. Richins, you indicated that you hadn't  
24 used Thorton Hallow Road very much?  
25 A. Right.

35  
1 Q. Could can you give us an estimate of during  
2 your entire lifetime how many times, how many times you  
3 would of used that would constitution not very much?  
4 A. A couple times.  
5 Q. Your entire life you've been down there a  
6 couple times?  
7 A. That I recall vaguely.  
8 Q. Two times?  
9 A. Yeah.  
10 Q. Parker Canyon Road, how many times during  
11 your life do you think you've used that road?  
12 A. I would guess four or five.  
13 MR. PETERSEN: I missed that. What was that  
14 now?  
15 THE COURT: Four or five.  
16 MR. PETERSEN: Okay.  
17 THE WITNESS: I use these roads much more  
18 frequently as I've got older until the locked gates.  
19 Q. (BY MR. SWEAT) But even on Parker Canyon,  
20 your entire life you've only used it five times?  
21 A. Like I say, I really don't know cause I was  
22 most my life so far I've been young, so -- About two or  
23 three times since '99, 2000.  
24 Q. Mr. Petersen showed you this picture with  
25 areal photos.

1 A. Right.  
2 MR. PETERSEN: What number was that?  
3 THE COURT: Exhibit -- It's marked as  
4 Exhibit 16.  
5 Q. (BY MR. SWEAT) You don't know where that is;  
6 is that correct?  
7 A. I can't know because there's signs like that  
8 all over the place that look just like that.  
9 Q. Typically when you see a sign like that does  
10 it mean leave the area?  
11 A. No, it just means stay on the road and don't  
12 drive off through the boonies.  
13 Q. Does it mean that any area, any road in the  
14 area is closed?  
15 A. It doesn't, unless it's stuck right in the  
16 middle of the road, which I haven't seen on that one.  
17 Q. I'm showing you what's been admitted as  
18 Exhibit 15.  
19 A. Okay.  
20 Q. You indicated that that is the bottom, when I  
21 mean the bottom I mean the west end of main canyon;  
22 right?  
23 A. Right, just close to the oil road there.  
24 Q. Is that how it's always looked?  
25 A. No.

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1 Q. All those signs have always been there?  
2 A. I don't think so.  
3 Q. Do you recall when it didn't look like this  
4 here?  
5 A. When I was younger.  
6 Q. What was different?  
7 A. Probably 15, 16 years ago would be my best  
8 guess.  
9 Q. What would of been different 15 or 16 years  
10 ago?  
11 A. Either the gates were open or else you could  
12 open them and go through and close them.  
13 Q. As long as you can remember has there been  
14 signs like these (INAUDIBLE)?  
15 A. In the last 15, 16 years for sure, but I  
16 don't think previous to that.  
17 Q. Do you remember a time that there weren't any  
18 signs there?  
19 A. Maybe when I was young.  
20 Q. The last time you when were camping, you  
21 returned home?  
22 A. Right.  
23 Q. You had been camping on forest property; is  
24 that correct?  
25 A. Right.

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1 Q. And you were now leaving and returning home?  
2 A. Right.  
3 Q. So you weren't accessing forest property.  
4 It's fair to say you were de-accessing forest property?  
5 A. De-accessing forest property.  
6 Q. Maple Canyon Road, how many times would you  
7 say you've used that road in your lifetime?  
8 A. Half dozen times, to travel the whole length  
9 of it.  
10 Q. What to you do if don't travel the whole  
11 length of it?  
12 A. Well, years ago when I was younger when the  
13 oil rig road was finished you could go over there and  
14 kind of go around there. It was always open when I was  
15 young.  
16 Q. You say it was always open, does that mean  
17 these gates here were always open?  
18 A. That wasn't where we'd access usually from,  
19 but you could get through there at one time.  
20 Q. The place you did access from, you're calling  
21 it oil rig road?  
22 A. Uh-huh.  
23 Q. Were there no trespassing signs there?  
24 A. Earlier on I don't think so, until 15, 16  
25 years ago would be my best guess, about when all the

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1 other ones started to go up.  
2 MR. SWEAT: That's all I have, your Honor.  
3 THE COURT: Anything else, Mr. Petersen?  
4 MR. PETERSEN: Just briefly, your Honor.  
5 RE-CROSS-EXAMINATION  
6 BY MR. PETERSEN:  
7 Q. Mr. Richins, to access this Maple Canyon Road  
8 you go up what you call the oil well road?  
9 A. Right.  
10 Q. That road has been closed, has it not?  
11 A. It has since, yeah. But when they did close  
12 it and buried it in the bottom part was still travelable.  
13 Q. But you cannot -- To go on that road now  
14 you'd be trespassing, would you not?  
15 A. Unless you're going all the way to the top I  
16 would think.  
17 Q. If you come off that oil well road to access  
18 Maple Canyon as you did, you're going to have to cross  
19 over the Okelberry property, are you not?  
20 A. Right.  
21 Q. And to do that you'll have to be trespassing,  
22 won't you?  
23 A. If -- My understanding was if you're using  
24 it for access then it's okay if the gates are open.  
25 Q. Well, there's no roads over there that are

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1 open to the public, are there?  
2 A. The roads -- Not that I know. I don't  
3 know. It's kind of like the rig road, you use it to get  
4 to the forest or whatever.  
5 Q. The point is though the manner in which you  
6 accessed Maple Canyon Road the last time you went up you  
7 went over private property?  
8 A. Right.  
9 Q. And you indicated that when you did that it  
10 was on an ATV?  
11 A. Right.  
12 Q. You couldn't really drive a four-wheel drive  
13 vehicle a four-wheel drive vehicle up Maple Canyon Road  
14 now?  
15 A. Huh'uh, probably not.  
16 MR. PETERSEN: That's all.  
17 THE COURT: Anything else, Mr. Sweat?  
18 MR. SWEAT: No, your Honor.  
19 THE COURT: You may step down. Thank you,  
20 sir. Okay. Your next witness.  
21 MR. SWEAT: Your Honor, at this time we would  
22 recall Don Wood.  
23 THE COURT: Okay. Mr. Wood, if you would  
24 return to the witness stand. The Court reminds you  
25 you're still under oath.

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1 DIRECT EXAMINATION  
2 BY MR. SWEAT:  
3 Q. Mr. Wood, we asked you some questions  
4 yesterday or I did about your experience and training.  
5 Is that all still true?  
6 A. Yes, sir.  
7 MR. PETERSEN: What number is that?  
8 MR. SWEAT: You know, I have it marked as 6,  
9 but I think that's wrong. Is it still 6?  
10 CLERK: (INAUDIBLE).  
11 THE COURT: It's the next one, No. 17.  
12 MR. SWEAT: I just cross out and write 17 on  
13 it.  
14 THE COURT: You may, uh-huh.  
15 Q. (BY MR. SWEAT) Mr. Wood, I'm showing you  
16 what has been marked as Exhibit No. 17. Do you recognize  
17 it?  
18 A. Yes, sir.  
19 Q. Can you tell us what it is?  
20 A. It's an international forest map.  
21 Q. Can you tell who published it?  
22 A. It was published by the Forest Service.  
23 Q. And do you see the date that it was  
24 published?  
25 A. 1975 is on the map.

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1 MR. SWEAT: Move to admit, your Honor.  
2 MR. PETERSEN: We have no objection.  
3 THE COURT: It's received.  
4 (Defendant's Exhibit No 17  
5 was received into evidence.)  
6 MR. SWEAT: Thank you.  
7 BY MR. SWEAT:  
8 Q. As you look at that map can you see the area  
9 that is subject of this matter?  
10 A. Yes, sir, I can.  
11 Q. And can you see any of the roads that are the  
12 subject of this matter?  
13 A. Yes, sir.  
14 Q. Do you see any designation on any of those  
15 roads that is --  
16 A. Well, on the Circle Spring Road there is a  
17 road service number.  
18 Q. What's that number?  
19 A. My understanding of the Forest Service is  
20 rather than put road names on all of their roads, which  
21 would be too complicated, they assign the road a number.  
22 And that road is a unique identifier for that road on the  
23 forest. In this case the map shows Circle Spring Road  
24 having No. 129.  
25 Q. Does the legend indicate anything about the  
43  
1 number down or about the type of marking on it?  
2 MR. PETERSEN: Well, your Honor, I think the  
3 exhibit speaks for itself. And this is an employee of  
4 the county not an employee of the Forest Service.  
5 THE COURT: Well, it's been received. So he  
6 can describe what he's observing. That's all that he's  
7 doing?  
8 Q. (BY MR. SWEAT) Can you describe what the --  
9 A. According to the legend the symbol that's  
10 associated with Circle Spring Road shows it as a forest  
11 road.  
12 Q. In your work as a GIS analyst or (INAUDIBLE)  
13 do you often work with Forest Service maps?  
14 A. Yes, sir.  
15 Q. Do you have any understanding of what it  
16 means when the Forest Service designates a number for a  
17 road?  
18 A. As I explained --  
19 MR. PETERSEN: That one I would object to,  
20 your Honor, he's trying to --  
21 THE COURT: Yeah, I don't know if you've laid  
22 sufficient foundation. He doesn't know if he's --  
23 Unless you're going to lay some foundation as to how he  
24 might know what the Forest Service uses it for --  
25 Q. (BY MR. SWEAT) When you work with these do  
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1 you work with -- When you work with maps have you ever  
2 worked with Forest Service personnel?  
3 A. Yes, sir.  
4 Q. Have you ever discussed with them the  
5 meanings and the, what they use to make their maps?  
6 A. You mean the means of the numbers on the  
7 maps?  
8 Q. The meanings of symbols on their maps and why  
9 they would or wouldn't put a symbol on a map?  
10 A. Yes, sir, we have worked with them.  
11 Q. In your working with members of the Forest  
12 Service have you ever received an understanding of what  
13 it means for them to number a road?  
14 A. Yes, sir.  
15 Q. And what is that understanding that you have?  
16 A. The understanding is that --  
17 MR. PETERSEN: Well, your Honor, that's based  
18 on hearsay. Your Honor, it's what the Forest Service  
19 personnel is telling him. If there's something on the  
20 map that's admitted so be it, but for him to interpret it  
21 and to base it upon what information he's getting from  
22 Forest Service personnel, your Honor, we object to that.  
23 THE COURT: Overruled. I mean, it's his  
24 business. He's a map markers.  
25 THE WITNESS: Our --

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1 THE COURT: Excuse me, go ahead.  
2 THE WITNESS: Our understanding is that those  
3 are the unique identifiers used by the Forest Service to  
4 identify the roads in their road inventory.  
5 MR. SWEAT: Am I now at 18?  
6 CLERK: (INAUDIBLE).  
7 MR. PETERSEN: May I see that other exhibit?  
8 THE COURT: You may proceed, Mr. Sweat.  
9 MR. SWEAT: Thank you, your Honor.  
10 Q. (BY MR. SWEAT) Mr. Wood, I am now showing  
11 you what has been marked as Exhibit -- What did I mark  
12 it as?  
13 A. 18.  
14 MR. SWEAT: Is that correct?  
15 CLERK: Yes.  
16 Q. (BY MR. SWEAT) Would you take a minute and  
17 review that? Can you tell us what it is?  
18 A. It is a forest, international forest map.  
19 Q. And does it purport to show who it was  
20 published by?  
21 A. It is published by the Forest Service.  
22 Q. And what is the date on that map?  
23 A. The date on this map -- It has compiled  
24 1989. I believe this is the same map you can purchase  
25 today, however. Is there another date on this that --

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1 MR. SWEAT: We would submit, your Honor.  
2 MR. PETERSEN: We have no objection.  
3 THE COURT: It's received.  
4 (Plaintiff's Exhibit No. 18  
5 was received into evidence.)  
6 Q. (BY MR. SWEAT) Mr. Wood, if you went out to  
7 the Forest Service today to purchase a map for this area  
8 would this be the map you would purchase?  
9 A. Yes, sir.  
10 Q. Looking at the map, does it again include  
11 areas that are the subject of this matter?  
12 A. Yes, sir, it does.  
13 Q. Again, does it include the roads that are the  
14 subject of this matter?  
15 A. Yes, sir.  
16 Q. Are there any designations on the map  
17 regarding these road, regarding the roads?  
18 A. Yes. On the map it appears that there is a  
19 designation for the Circle Springs Road, the Parker  
20 Canyon Road and then, or the Ridge Line (INAUDIBLE) and  
21 then the Thorton Hallow.  
22 Q. Is it the same designation for Circle Springs  
23 as before?  
24 A. Same number? I would have to look at the  
25 previous exhibit.

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1 THE COURT: The previous one was No. 129.  
2 THE WITNESS: It's 129 on this map.  
3 Q. (BY MR. SWEAT) And you said there was  
4 another designation?  
5 A. There is a designation it appears for Ridge  
6 Line Road and the road that connects to Parker Canyon.  
7 Q. What's that designation?  
8 A. It is 044.  
9 Q. And where does that -- From looking at the  
10 map what portion -- Would you get up and shows us on  
11 the Exhibit No. 2 what portion is designated as 044 of  
12 the roads?  
13 A. If it appears on their map the designation  
14 includes this Parker Canyon Road we identified here and  
15 then the Ridge Line roads that connects it back to the  
16 Forest Service.  
17 Q. And is it your understanding that the  
18 designation for the roads on this map is the same as the  
19 prior map?  
20 A. Yes. The legend on this map says that they  
21 are -- It actually says, "Forest Service maintained,  
22 but not for passenger vehicles".  
23 Q. Would you read that again, please?  
24 A. Sure. In this particular symbol, which is  
25 the numbers in the vertical box, it says, "national

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1 Forest Service under route markers, not maintained for  
2 passenger cars".

3 MR. SWEAT: That's all the questions I have  
4 at this time, your Honor.

5 THE COURT: Cross, Mr. Petersen?

6 MR. PETERSEN: Thank you, your Honor.

7 CROSS-EXAMINATION

8 BY MR. PETERSEN:

9 Q. Mr. Wood, in regards to Plaintiff's Exhibit,  
10 I think it's Exhibit 17. In regards to that -- In  
11 regards to Exhibit 17 is it not true that the designation  
12 for Maple Canyon is that of a trail?

13 A. For part of the canyon, yes, sir.

14 Q. And the designation for Parker Canyon is  
15 Primitive Road?

16 A. That's correct, sir.

17 Q. The designation for Circle Springs is  
18 Primitive Road?

19 A. Yes, sir.

20 Q. The designation for Thorton is trail?

21 A. On the Forest Service property, yes, sir.

22 Q. And the Ridge Line Road is designated  
23 Primitive Road?

24 A. Yes, sir.

25 Q. You indicated that this is not, these

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1 so-called roads are not maintained by, for passenger  
2 service?

3 A. As for the current road map it says not  
4 maintained for passenger cars.

5 Q. So they don't want any passenger cars down  
6 there, would that be true?

7 A. Well, the Forest Service is saying it's not  
8 maintained for passenger cars.

9 Q. Does that mean that they want to restrict  
10 passenger cars?

11 A. I would assume they're warning people not to  
12 go down it because passenger cars may get stuck or not be  
13 able to traverse the road.

14 Q. Do you know if there are any signs down there  
15 that restrict, on any of those roads, motorized vehicles?

16 A. I can't speak to any signs that are on those  
17 roads.

18 Q. Have you ever been down to the bottom of  
19 those roads as it goes on to Forest Service property?

20 A. I have, on Thorton and Parker Canyon.

21 Q. Did you see any signs?

22 A. Parker Canyon I recall there was a sign that  
23 says you were at the trail head that came up Parker  
24 Canyon. I don't remember --

25 Q. I'm going to show you -- I'm going to show

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1 you a sign, a picture that's marked as Defendant's  
2 Exhibit 19 and ask you if you've ever seen that sign in  
3 Parker Canyon?

4 A. This is Parker Canyon or Thorton Hallow?

5 Q. Parker.

6 A. I don't recall seeing this.

7 MR. SWEAT: I'm going to object to him  
8 testifying to what canyon it is. I think he needs to ask  
9 the witness what canyon it is.

10 THE COURT: He knows -- It hasn't been  
11 admitted, so we don't know what foundation it is.

12 Q. (BY MR. PETERSEN) Do you know -- Did you  
13 ever see a sign like that when you went down Parker  
14 Canyon?

15 A. It's possible. I don't recall this specific  
16 sign.

17 Q. Were there similar signs like that on any  
18 other Forest Service property?

19 A. I have seen signs like that on Forest Service  
20 property, yes, sir.

21 Q. Mr. Wood, I'm going to show you what's been  
22 marked as Defendant's Exhibit 16 and ask if you've ever  
23 seen signs like that on Forest Service property?

24 A. Yes, sir, I've seen signs like this on Forest  
25 Service property.

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1 Q. Have you seen it on any of the Forest Service  
2 property that these so-called roads lead to?

3 A. Nothing that I can say for sure.

4 Q. You testified that the Forest Service will  
5 not maintain these roads and --

6 A. Excuse me?

7 Q. Forest Service will not maintain the roads.

8 MR. SWEAT: I object. I think that  
9 mis-characterizes his testimony. He said it's not  
10 maintained for passenger car.

11 THE COURT: He's always -- What he's done  
12 is he's read from a legend of Exhibit No. 18 indicating  
13 that it's not maintained for passenger car use.

14 Q. (BY MR. PETERSEN) Would that be your  
15 experience?

16 A. Repeat the question once again. I'm sorry.

17 Q. The legend says it's not maintained for  
18 passenger service by the Forest Service.

19 A. Yes, sir.

20 Q. My question was is that what you -- Is that  
21 -- Based -- Not just the legend, but based on your  
22 experience would that be true?

23 A. I would say it's true.

24 Q. So even though the legend says that, based on  
25 your experience, they don't go up and maintain those

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1 roads?  
2 A. Well I -- The road is not for passenger  
3 travel, for passenger cars.  
4 MR. PETERSEN: Okay. That's all.  
5 THE COURT: Anything else, Mr. Scott? Or Mr.  
6 Sweat? I'm sorry.  
7 MR. PETERSEN: Oh, I had --  
8 THE COURT: Go ahead.  
9 MR. PETERSEN: Can I follow-up on that?  
10 Q. (BY MR. PETERSEN) Getting back, Mr. Wood, to  
11 Plaintiff's Exhibit 18.  
12 A. Yes, sir.  
13 Q. Is it not true that the -- On that one the  
14 Ridge Line Road is designated unapproved road?  
15 A. That is correct.  
16 Q. And Maple Canyon is designated unapproved  
17 road?  
18 A. That is correct, sir.  
19 Q. Circle is designated unapproved road?  
20 A. Yes, sir.  
21 Q. Thorton Hallow is designated trail?  
22 A. On the Forest Service portion, yes, sir.  
23 Q. And the Parker Canyon is designated trail?  
24 A. Once again, on the Forest Service portion,  
25 yes, sir.

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1 MR. PETERSEN: Okay. That's all.  
2 REDIRECT EXAMINATION  
3 BY MR. SWEAT:  
4 Q. Mr. Wood, I believe you already testified  
5 that on Exhibit 18 that designates what we have  
6 designated as part of the Ridge Line Road from where it  
7 enters the Okelberry property from the south-east, down  
8 that road onto what we've designated as Parker Canyon  
9 Road, down to the forest, designates that as a road; is  
10 that right?  
11 A. That is correct, sir.  
12 Q. And after it gets to the Forest Service does  
13 it have a designation for what's left?  
14 A. There is -- There is a small (INAUDIBLE)  
15 that extends onto the Forest Service then it changes to  
16 trail.  
17 Q. Is there a number designated on it or is it  
18 just a type of --  
19 A. For the trail connect Parker there is a  
20 number assigned to the trail, but it is the same number,  
21 044, that appears is on the Ridge Line.  
22 Q. Is it a different type of designation for  
23 both Thorton and for the --  
24 A. Thorton is just a trail, a trail owned by  
25 Forest Service property.

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1 Q. You say on Forest Service property, is that  
2 where it leaves the Okelberry property and enters the  
3 forest (INAUDIBLE)?  
4 A. That is correct.  
5 Q. And what does it show prior to or on the  
6 Okelberry property?  
7 A. It shows it as a road.  
8 Q. It shows it as a road. Mr. Petersen showed  
9 you this, what has been marked as Exhibit 19.  
10 MR. SWEAT: Has that been submitted?  
11 THE COURT: No, it hasn't.  
12 Q. (BY MR. SWEAT) Have you seen signs like that  
13 before?  
14 A. On the Forest Service, yes, sir.  
15 Q. And if you were to come upon a sign like that  
16 how would you interpret that sign?  
17 A. That the roads in this area is closed.  
18 Q. Would you interpret it that the road that you  
19 came to on to get there is closed?  
20 A. No, just from that portion, from that sign  
21 further on down the road is closed.  
22 Q. Is there anything on those maps that, in your  
23 mind, prohibits passenger cars on the roads?  
24 A. As far as the maps is --  
25 MR. PETERSEN: Your Honor, that's an

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1 interpretation for the Court to make, not his knowledge  
2 of looking at the map.  
3 THE COURT: The map speaks for itself.  
4 MR. SWEAT: No more questions, your Honor.  
5 THE COURT: Anything else, Mr. Petersen?  
6 MR. PETERSEN: Just briefly.  
7 RE-CROSS-EXAMINATION  
8 BY MR. PETERSEN:  
9 Q. Mr. Wood, Exhibit 17 is a U.S. Forest Service  
10 map dated 1975; is that correct?  
11 A. Yes, sir.  
12 Q. And Exhibit 18 is a US Forest Service map  
13 dated 18 or 1989?  
14 A. It shows in the bottom from the date it  
15 complied in 1989, yes, sir.  
16 Q. They've changed some designations from one  
17 map to another --  
18 A. Yes, sir.  
19 Q. -- is that correct? But we concluded that  
20 the Forest Service doesn't do any maintenance. They  
21 don't do any road work up there, do they?  
22 MR. SWEAT: Your Honor, I object. I don't  
23 think that's --  
24 THE COURT: It's not what -- That's not  
25 where we're at, Mr. Petersen. We don't know that he's

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1 -- He doesn't know. All he can do is just read from  
2 what it says on the map.

3 MR. PETERSEN: Well, that's what I'm getting  
4 at.

5 Q. (BY MR. PETERSEN) Do you have any idea why  
6 they would change designation in this 14 year period of  
7 time?

8 A. I have no -- I have no knowledge as to why  
9 they changed the designations.

10 Q. The county hasn't gone up there and done any  
11 work, have they?

12 A. Not to my knowledge.

13 Q. Okay. There are other roads, so-called roads  
14 designated on these maps, are there not? They're not  
15 open to the public? Would that be true?

16 A. There are many roads shown on the maps. As  
17 far as which ones are open to the public I --

18 Q. So the mere fact that they designate  
19 something on the maps as a road doesn't necessarily mean  
20 it's a public road?

21 A. That is correct.

22 MR. PETERSEN: That's all.

23 THE COURT: Anything else, Mr. Sweat? Any  
24 other questions for Mr. Wood?

25 REDIRECT EXAMINATION

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1 BY MR. SWEAT:

2 Q. On Exhibit No. 18 there are roads that have  
3 no number designation; is that correct?

4 A. Yes, sir, there are.

5 Q. And on a Forest Service map would that mean  
6 anything to you?

7 A. If there was no number designation on the  
8 road it means it's a loss, that the Forest Service has no  
9 say or control on that road whatsoever or does any  
10 maintenance on that road.

11 MR. SWEAT: That's all I have, your Honor.

12 MR. PETERSEN: I have nothing further, your  
13 Honor.

14 THE COURT: Okay. You may step down. Thank  
15 you. Next witness.

16 MR. SWEAT: The Plaintiff would call Benny  
17 Gardner, your Honor.

18 THE COURT: Okay. Mr. Gardner, if you'd come  
19 forward and go to the witness stand.

20 THE WITNESS: Up there?

21 THE COURT: Yes, up here. Have you taken a  
22 witness oath?

23 THE WITNESS: Yes.

24 THE COURT: Okay. You may have a seat then.

25 DIRECT EXAMINATION

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1 BY MR. SWEAT:  
2 Q. Mr. Gardner, would you please state your full  
3 name and address for the for the record?  
4 A. Speak a little louder, please.  
5 Q. Would you please state your full name and  
6 address for the record?  
7 A. Benny Gardner, 3649 South 3600 West  
8 Charleston, Utah.  
9 Q. What is your birth date?  
10 A. April 7, '39.  
11 Q. How long have you lived in Wasatch County?  
12 A. How long what?  
13 Q. Have you lived in Wasatch County?  
14 A. I lived in Wasatch County, let's see, 65  
15 years.  
16 Q. Are you familiar with the area east and a  
17 little bit north of the town of Wallsberg?  
18 A. Yes.  
19 Q. I would like to direct your attention to  
20 what's been marked as Exhibit 2. Would you come and take  
21 a look at this? It's a map, is it not?  
22 A. Yes.  
23 Q. Are you familiar with the area depicted in  
24 the map?  
25 A. Which area do you want me to --

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1 Q. Here's Wallsberg.  
2 A. Wallsberg there. This area here (INAUDIBLE).  
3 Q. Okay. You can return to your seat. Have you  
4 owned any property up in that area?  
5 A. No.  
6 Q. Have you ever leased any property up in that  
7 area?  
8 A. No.  
9 Q. I have ever worked for anyone that owned  
10 property up in that area or leased property?  
11 A. Yeah, I worked a couple times for Verg and  
12 Jim Thompson.  
13 Q. Where did they own property at or where do  
14 they own property at?  
15 A. Well, I helped Verg herd sheep out on  
16 Toadstool, just west of Circle. And I helped him down on  
17 White Pole.  
18 Q. When would that have been?  
19 A. That was in '55 or '56.  
20 Q. How many times did you help him?  
21 A. Just once.  
22 Q. Other than that have you ever worked for  
23 anyone up there?  
24 A. No.  
25 Q. Are you aware of a road called Circle Springs

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1 Road?  
2 A. Pardon?  
3 Q. Are you aware of a road called Circle Springs  
4 Road?  
5 A. Yes.  
6 Q. Could you point it out to us on the map?  
7 A. This is Maple Creek. This must be Big Glade  
8 right in here, huh?  
9 MR. PETERSEN: May the record show that he's  
10 miss -- He's not correctly designating where the Big  
11 Glade is and designated private property of Mr.  
12 Okelberry.  
13 THE COURT: It may. I can't see.  
14 THE WITNESS: This line road goes out this  
15 way. So Big Glade would be right here. I would say this  
16 one here is the one that goes out to Circle.  
17 MR. PETERSEN: May the record show that he's  
18 pointing at Ridge Line Road going north away from Circle  
19 Springs Road.  
20 THE COURT: Okay.  
21 Q. (BY MR. SWEAT) Would you take your seat, Mr.  
22 Gardner? Could you tell us where your understanding is  
23 that Ridge Line Road goes without looking at the map?  
24 A. Ridge Line Road that I understand --  
25 Q. I'm sorry. Let's go back to Circle Springs

61

1 Road?  
2 A. Circle Springs? You come onto Big Glade and  
3 hit the ridge right, Ridge Line Road right up there where  
4 you can drop down on Big Glade and you come off Big Glade  
5 just a little ways, turn left, left and go out west.  
6 Q. So you turn west out of Big Glade?  
7 A. Yes.  
8 Q. And then where does that road go?  
9 A. Pardon?  
10 Q. Where does that road go?  
11 A. That goes out to Circle Springs and  
12 Toadstool.  
13 Q. Have you ever been on that road?  
14 A. Yes.  
15 Q. When did you first use that road?  
16 A. First time I used that road was probably in  
17 '65, '66.  
18 Q. What did you use that road for?  
19 A. Well, me and my brother went out there to  
20 Circle Springs and built a tree house there. He's a bow  
21 hunter.  
22 Q. Circle Springs, is that located on Mr.  
23 Okelberry's property or the Forest Service?  
24 A. Not now it's not, that's on the forest.  
25 Q. You said it was about '64 that you went out

62

1 and built a, you call it a tree house?  
2 A. Yes.  
3 MR. PETERSEN: Was it '64 or '65?  
4 MR. SWEAT: '64, '65.  
5 THE WITNESS: In that area.  
6 MR. SWEAT: In that area.  
7 Q. (BY MR. SWEAT) When you went out there at  
8 that time do you remember any gates that you had to cross  
9 through?  
10 A. Yes, there was a gate just as you go into Mr.  
11 Okelberry's place. And then there's a gate just before  
12 you go out of his place into the forest.  
13 Q. When you went there in '64 or '65, on that  
14 first trip, do you recall seeing no trespassing signs?  
15 A. There was no trespassing signs.  
16 Q. There was or there was not?  
17 A. Was not.  
18 Q. I asked that badly, I'm sorry. Were there  
19 any locked gates?  
20 A. No.  
21 Q. Were there gates?  
22 A. There were gates.  
23 Q. Do you recall if they were up?  
24 A. Pardon?  
25 Q. Do you recall if the gates were open or

63

1 closed?  
2 A. At that time I think they were open.  
3 Q. What kind of gates were they?  
4 A. They was just barbwire gates strung from one  
5 post to another.  
6 Q. When was the last time you traveled on the  
7 Circle Spring Road?  
8 A. Last time I traveled on that was October  
9 24th, 1999.  
10 Q. Why did you travel that road that day?  
11 A. Me and my two boys went out there hunting.  
12 Q. On that day did you see any no trespassing  
13 signs?  
14 A. Yes.  
15 Q. Did you see any locked gates?  
16 A. The morning we went to go out there the gate  
17 was locked. We turned around and went back down to  
18 Willow Springs and went hunting.  
19 Q. When was the last time you actually went  
20 through Mr. Okelberry's property to Circle Springs on  
21 that road?  
22 A. That same day. We come back that afternoon.  
23 Somebody must of called the sheriff and went up there and  
24 cut the locks.  
25 MR. PETERSEN: Objection to what he's

64

1 supposing.

2 THE COURT: It's stricken.

3 Q. (BY MR. SWEAT) When you went back later what  
4 was the case at that point?

5 A. We went back later in the afternoon and the  
6 gate was open.

7 Q. When you traveled on that day where did you  
8 go to?

9 A. Through Okelberry's property. You mean, is  
10 that what you're talking about?

11 Q. Yeah. When you went back and the gate was  
12 open how far down the road did you go?

13 A. We went to Circle Springs.

14 Q. When was the first time that you went up  
15 there on Circle Springs and saw a locked gate?

16 A. That was the first day I'd seen it locked.

17 Q. That was the very first time?

18 A. First time I'd seen.

19 Q. When did you first see a no trespassing sign  
20 up there?

21 A. I can't remember just what day or what year  
22 it was. It was right after Mr. Okelberry sold his  
23 hunting rights to the United Sportsmen and no trespassing  
24 sign, no nothing.

25 Q. Was it United Sportsmen's no trespassing

65

1 signs?

2 A. Yes.

3 Q. Between the time you first used that road in  
4 '64 and when you last used it in '99, did you use that  
5 road very much?

6 A. We went up there several times, yes.

7 Q. Several times between those years or --

8 A. Between those years.

9 MR. PETERSEN: Shoot, I missed that. What  
10 years are we talking about?

11 MR. SWEAT: Between '64 and '99.

12 Q. (BY MR. SWEAT) Did you use that road every  
13 year?

14 A. I wouldn't say we used it every year, but I  
15 used it, we used it several times.

16 Q. When you say several can you give a, give us  
17 an indication of what that means?

18 A. Pardon?

19 Q. When you say several can you give us an  
20 indication of what that means?

21 A. Mostly when we went hunting.

22 Q. Did anyone ever try to, other than when you  
23 saw the lock in '99 did anyone ever try to keep you from  
24 using that road?

25 A. No.

66

1 Q. Did anyone ever kick you off the road?  
2 A. No.  
3 Q. During the several times you used that road  
4 did you ever encounter anyone else using the road?  
5 A. Yes.  
6 Q. Do you know what they were using the road  
7 for?  
8 A. Hunting.  
9 Q. Up until '99 were you ever aware of anyone  
10 being stopped for using that road?  
11 A. Pardon?  
12 Q. Up until 1999 when you encountered the locks  
13 were you aware of anyone being stopped from using that  
14 road?  
15 A. No.  
16 Q. Are you aware of a road known as Ridge Line  
17 Road?  
18 A. Known as what?  
19 Q. The Ridge Line Road.  
20 A. Yes.  
21 Q. Have you ever traveled on that road?  
22 A. Yes.  
23 Q. Could you tell us, basically describe where  
24 the Ridge Line Road goes or comes --  
25 A. Ridge Line Road starts like I say, you drop  
67  
1 off from, into Big Glade and go clean over and you go  
2 clean over and come out at the gun club if you want.  
3 Q. Have you ever traveled the entire length of  
4 the Ridge Line Road to the gun club?  
5 A. Yes, I have.  
6 Q. When did you first do that? I realize you  
7 probably can't give the exact time and day, but  
8 approximately when did you first do that?  
9 A. Now, am I suppose to answer that at one time  
10 or just kind of broke up?  
11 Q. Have you ever taken a trip where you started  
12 the beginning and went clear to the gun club, started at  
13 Big Glade?  
14 MR. PETERSEN: I think the question was when  
15 was the first time you used the Ridge Line Road.  
16 THE COURT: No, the question was when was the  
17 first time he used the whole length of the road.  
18 Q. (BY MR. SWEAT) Do you understand the  
19 question?  
20 A. Yeah, I'm trying to think. I don't think I  
21 ever used it all but one time. I think the closest I  
22 went is down into what we call Hearts Gravel, from Big  
23 Glade down to Hearts Gravel.  
24 Q. And have you went to the Big Glade to Hearts  
25 Gravel at one time?

1 A. Yes.  
2 Q. When did you first do that?  
3 A. Probably mid 80's.  
4 Q. How many times have you made that ride from  
5 Big Glade to Hearts Gravel?  
6 A. I don't know for sure, probably seven or  
7 eight times.  
8 Q. When was the last time you made that trip  
9 from the Big Glade to the Hearts Gravel?  
10 A. I would say probably the early 90's.  
11 Q. Between the first time you went in the 80's  
12 when you went in the 90's did you ever encounter no  
13 trespassing signs?  
14 A. The only time I ever encountered trespassing  
15 signs is right after Okelberry sold his hunting rights to  
16 the United Sportsmen.  
17 Q. Is that the same time you saw them on Circle  
18 Spring Road?  
19 A. Yeah.  
20 Q. How many times a year do you think you would  
21 use Ridge Line Road?  
22 A. Well, from, like I said, from Big Glade over  
23 to White Pole probably seven or eight times a year.  
24 Q. Have you ever used a road called Thorton  
25 Hallow Road?

69

1 A. Yes.  
2 Q. When do you recall first using that road?  
3 A. First used that probably in the mid 80's.  
4 Q. What did you use that road for?  
5 A. Hunting.  
6 Q. Where were you hunting?  
7 A. Down on the forest. We'd go through -- It  
8 was Mr. Okelberry's property down onto the forest, down,  
9 accept for that lower pond.  
10 Q. At that time did the road go through the  
11 forest land?  
12 A. Yes.  
13 Q. Was there a gate there?  
14 A. There was a gate as you went into Okelberry's  
15 property and a gate as you went out of Okelberry's into  
16 the forest.  
17 Q. First time you used it were those gates  
18 locked?  
19 A. No.  
20 Q. When you used it in '64 --  
21 THE COURT: He said mid 80's.  
22 MR. SWEAT: Oh, mid 80's, I apologize.  
23 Q. (BY MR. SWEAT) When you used it in the mid  
24 80's did anyone try to keep you off the road?  
25 A. No.

70

1 Q. When was the last time you used the Thorton  
2 Hallow Road?  
3 A. That was in '94.  
4 Q. And what did you use it for on that day?  
5 A. Hunting.  
6 Q. Was there any no trespassing signs in place  
7 at that time?  
8 A. Yes.  
9 Q. Were there any locked gates at that time?  
10 A. No.  
11 Q. Where was the no trespassing signs at that  
12 time?  
13 A. They was as you just entered Mr. Okelberry's  
14 property, all the way down through there he had them on  
15 the trees.  
16 Q. All the way along the road he had them on  
17 trees?  
18 A. All the way along the road there was trees  
19 that had no trespassing on them.  
20 Q. So even after you went through into his  
21 property there was no trespassing signs?  
22 A. No, after you went through his property there  
23 was no trespassing signs.  
24 Q. I'm sorry I maybe misunderstanding. While  
25 the road goes through his property you say all along  
71  
1 there were no trespassing signs?  
2 A. On the trees he had no trespassing, on the  
3 trees going through his property?  
4 Q. What did you understand that to mean?  
5 A. I understood that I couldn't get out of that  
6 truck and get on the property and go hunting on his  
7 property.  
8 Q. During the time you first used Thorton Hallow  
9 and you last used it did you use it any time in between?  
10 A. Say that again.  
11 Q. How many times a year did you use Thorton  
12 Hallow.  
13 A. Oh, probably six or seven.  
14 Q. What would you use it for?  
15 A. Hunting.  
16 Q. Between the 80's and the 90's were you ever  
17 stopped from using the road?  
18 A. No.  
19 Q. Did you ever see other people use the road?  
20 A. Yes.  
21 Q. Do you know what they were using the road  
22 for?  
23 A. Hunting.  
24 Q. Did you ever --  
25 A. And camping.

1 Q. Where did they camp at?  
2 A. They'd camp down on the forest, after you get  
3 off Mr. Okelberry's property they'd camp down right there  
4 by the bottom pond.  
5 Q. Did you see them using vehicles to camp or  
6 did they --  
7 A. Yes.  
8 Q. Is there any other way that you know of  
9 getting to that spot of the Forest Service other than  
10 through Thorton Hallow Road?  
11 A. If you wanted to ride a horse or walk up the  
12 trail you could.  
13 Q. Is there anyway to get a vehicle down there?  
14 A. Not unless it was a four-wheeler. And last  
15 time I was down there I don't think you could get a  
16 four-wheeler (INAUDIBLE).  
17 Q. As far as an automobile or a four-wheel drive  
18 truck would you have to use the road?  
19 A. The last time -- The only time I went clean  
20 through there you couldn't.  
21 Q. When you say clean through there do you mean  
22 Thorton Hallow Road or you mean down the side of the  
23 fence?  
24 A. From -- If you -- The road -- The trail  
25 of the road come back into Thorton Hallow at the bottom

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1 if you come in that way.  
2 Q. Oh, I understand now. Up from highway 40?  
3 A. Well, no, you couldn't come up from highway  
4 40. You'd have to go down and around and come up through  
5 Parker and use that trail. Come back in that way. You  
6 could walk-in that way or ride a horse. I think they did  
7 bull doze a trail through there, but I think you could  
8 just go all the way with a four-wheeler if you wanted.  
9 The last time I remember going down through there.  
10 Q. Have you ever used Parker Canyon Road?  
11 A. Parker Canyon Road is the one you turn off  
12 the White Pole Road and you go through White Pole and  
13 come back towards Comington, Station and Thorton, right?  
14 Q. I'm asking you about Parker Canyon.  
15 A. Yeah, that's the one -- I used that.  
16 Q. When did you first use that road?  
17 A. That was in '66 when we went down there with  
18 my brother to build a tree house. I think they called it  
19 Robinson Pond.  
20 Q. How did you access -- How did you use that  
21 road?  
22 A. We had pickups.  
23 Q. And on that day did you see no trespassing  
24 signs?  
25 A. No.

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1 MR. PETERSEN: What day are we talking about?  
2 THE COURT: Back in '66.  
3 Q. (BY MR. SWEAT) When was the last time you  
4 used Parker Canyon Road?  
5 A. I'd say it was '94.  
6 Q. What did you use it for on that day?  
7 A. We was hunting.  
8 Q. And in '94 did you see any no trespassing  
9 signs on that road?  
10 A. All the way through Okelberry's property.  
11 You get on the forest you never see no trespassing signs.  
12 Q. Did you see any on West Daniels land?  
13 A. If that was on West Daniels land I never seen  
14 any there.  
15 Q. Now, in '94 when you saw the signs when you  
16 used Parker Canyon again was there signs throughout Mr.  
17 Okelberry's property, is that what you testified?  
18 A. Let me read what I said. I think there might  
19 have been some no trespassing on the Daniel's, cattle  
20 permit, cause I'm sure you wasn't able to hunt through  
21 there.  
22 Q. Between '66 when you first used it and '94  
23 when you last used it, did you frequently or infrequently  
24 use Parker Canyon Road?  
25 A. Pardon?

75

1 Q. During the time you first used it and you've  
2 last used it, how often did you use that road?  
3 A. Parker Road?  
4 Q. Yeah.  
5 A. Oh, maybe four or five times a year.  
6 Q. And what would you use it for?  
7 A. Hunting.  
8 Q. And in between those two times when you'd use  
9 it four or five times a year were you ever stopped from  
10 using the road?  
11 A. No.  
12 Q. Were you ever -- Did you ever encounter a  
13 locked gate on the road between '94 and '66?  
14 A. No.  
15 Q. During that time when you would use the road  
16 did you ever see other people using the road?  
17 A. Yea.  
18 Q. What were they using the road for?  
19 A. Probably hunting or recreation. I don't  
20 know, I never asked them.  
21 Q. Are you familiar with the road known as Maple  
22 Canyon Road?  
23 A. Yes.  
24 Q. Can you tell us where that road begins and  
25 ends?

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1           A.    That road takes off down Maple Creek just  
2 after you come, Ridge Line Road through Mr. Okelberry's  
3 place and then it goes on down into Maple Creek off the  
4 Ridge Line Road before you get over into Comings, what  
5 they call top of Comings, where we use to camp and  
6 Thompson's on down.

7           Q.    It starts on the Ridge Line Road, you said.  
8 Where does it end?

9           A.    Maple Creek.

10          Q.    Where's that?

11          A.    Maple Creek Road ends out on the highway by  
12 John Young's, the Main Canyon Road they call it.

13          Q.    Have you ever used Maple Canyon Road?

14          A.    Yes.

15          Q.    When did you first use Maple Canyon Road?

16          A.    It was probably in the late 60's early 70's.

17          Q.    And why would you of used the road?

18          A.    Well, we use to camp up on Comings.

19 (INAUDIBLE) Comings. And we'd that every once in a while  
20 to go up, if it wasn't too wet. If it was wet or snow or  
21 something you couldn't use it, it was too rough a road.  
22 You got to go the other way.

23          Q.    When was the last time you used Maple Canyon  
24 Road?

25          A.    Probably the mid 80's.

77

1           Q.    When you used it in the 80's did you see any  
2 no trespassing signs?

3           A.    No.

4           Q.    Prior to that time in the 80's did you ever  
5 see any no trespassing signs?

6           A.    No.

7           Q.    Did you ever encounter any locked gates  
8 between when you first used it in the 80's?

9           A.    Not locked, no. It was shut, but not locked.

10          Q.    Between when you first used Maple Canyon Road  
11 and when you last used it in the 80's how often would you  
12 use that road?

13          A.    Oh, maybe two or three times a year.

14          Q.    And what would you typically use the road  
15 for?

16          A.    We'd use it for hunting.

17          Q.    What type -- How would you use it?

18          A.    In a pickup.

19          Q.    During that time did you ever observe other  
20 people using the road?

21          A.    Yes.

22          Q.    Did you know who they were?

23          A.    Yes.

24          Q.    Were they people that -- Were they the  
25 Okelberrys or people that worked for the Okelberrys?

78

1 A. No.  
2 Q. Who would they have been?  
3 A. They was my brothers and cousins that follow  
4 me. They follow me one of the two.  
5 Q. Were they ever asked not to use the road?  
6 A. Not that I'm wear of.  
7 Q. Did you ever see or hear of them getting  
8 kicked off the road during that time?  
9 A. No.  
10 MR. PETERSEN: Objection if it that's based  
11 on some hearsay or something, your Honor.  
12 THE COURT: Well, he's responded. Overruled.  
13 MR. SWEAT: That's the only questions I have  
14 at this time, your Honor.  
15 THE COURT: Okay. Cross, Mr. Petersen?  
16 MR. PETERSEN: Yes.  
17 THE WITNESS: Can I have a drink of water?  
18 THE COURT: You bet. It's free.  
19 CROSS-EXAMINATION  
20 BY MR. PETERSEN:  
21 Q. Mr. Gardner, you couldn't identify the Circle  
22 Spring Road on the map, could you?  
23 A. No, it's not a very good map.  
24 Q. It's not a very good map?  
25 A. Not for me to look at.

79

1 Q. I see. But you had a difficult time  
2 identifying these other roads too, would you not?  
3 A. Probably on a map, yes. I'm not very good  
4 reading maps.  
5 Q. Okay. So we really can't rely on any  
6 exhibits, we have to rely on your memory, would that be  
7 true? Yes or no?  
8 A. Yes.  
9 Q. Now, in regards to the Circle Spring Road you  
10 indicated that the first time you went there was in '64,  
11 '65, would that be true?  
12 A. '64, '65, is that what you said?  
13 Q. That's what you testified to. I'm just  
14 asking you if that's accurate?  
15 A. Yes.  
16 Q. Okay. And you indicated the last time you  
17 used it was October 24th, 1999?  
18 A. Yes.  
19 Q. Do you remember signing an affidavit that's  
20 on file with the Court?  
21 A. Pardon?  
22 Q. Do you remember signing an affidavit?  
23 A. Yes.  
24 Q. Do you remember in your affidavit that you  
25 said that you used the Circle Spring Road from 1960 to

80

1 2001?

2 A. I might have said that. I don't remember  
3 what I wrote in that affidavit.

4 Q. Which is accurate your affidavit or your  
5 testimony in court today?

6 A. Well, I'd say my testimony is.

7 Q. So we can say that the affidavit that you  
8 signed under oath is not accurate?

9 A. I don't remember signing that under oath.

10 Q. Well, let me show you a copy of it. The  
11 original would be on file with the Court. It seems to be  
12 dated the 29th day of January, 2003. And I ask you if  
13 that's your signature?

14 A. Yes.

15 MR. PETERSEN: I think the Court can take  
16 notice that the affidavit is on file.

17 THE COURT: It is.

18 Q. (BY MR. PETERSEN) You said in October 24th,  
19 1999 that you went there and the gate was locked, so you  
20 went, you turned around?

21 A. Yes.

22 Q. And then came back in the afternoon and the  
23 gate was unlocked?

24 A. Right.

25 Q. Isn't it true that on that day that you

81

1 received permission to use the Circle Springs Road from  
2 Mr. Brian Okelberry?

3 A. No, I didn't. It was open and when ever the  
4 gate, roads open I was told you can use that road to go  
5 to the forest. We checked on that when he first owned  
6 it.

7 Q. Did you ever talk to Mr. Brian Okelberry  
8 about using the roads?

9 A. No, I didn't.

10 Q. Do you know him?

11 A. Yes, I know him.

12 Q. Can you identify him in Court today?

13 A. Yes, I can.

14 Q. And at no time did he ever give you  
15 permission to use the roads?

16 A. No.

17 Q. Did you ever talk to him about using the  
18 roads?

19 A. No.

20 Q. Never?

21 A. Not that --

22 Q. Now, in 1999 the sign -- You said there was  
23 a sign that says no trespassing?

24 A. Right.

25 Q. But you interpret that mean you can still use

82

1 the road, just don't get off the roads?

2 A. Right. As long as we didn't get off and go  
3 hunting on his property we was told we could use that  
4 road to go through to the forest. Not by Mr. Okelberry,  
5 but --

6 Q. The signs that you saw there in '99 said no  
7 trespassing, did it not?

8 A. Yes.

9 Q. It said keep out?

10 A. I think it did.

11 Q. Do you know what kind of gate was there when  
12 you went through in '99?

13 A. Well, when we pulled up there that morning  
14 and it was locked, if I remember right it was dark, but I  
15 think it was, I think it had net wire on the bottom and  
16 two or three barbs on the top.

17 Q. It was locked at that time?

18 A. It was locked.

19 Q. Have you ever had occasion to destroy any  
20 locks on any gates up there?

21 A. No, I haven't.

22 Q. You've never taken a rifle and blown off the  
23 locks?

24 A. No, that's stupid.

25 Q. It would be a fact that your use of that

83

1 Circle Springs Road is rather limited, isn't it?

2 A. Yes.

3 Q. Now, the Ridge Line Road, there's always been  
4 a gate from the Forest Service property onto the Ridge  
5 Line Road, has there not?

6 A. Yes.

7 Q. And has that gate always been open when  
8 you've gone through there or been occasions when it's  
9 been closed?

10 A. The one that hooks to the forest and Mr.  
11 Okelberry's, is that the one you're talking about.

12 Q. Yes.

13 A. It's never -- It's -- What was the  
14 question again?

15 Q. The question is there's been a gate between  
16 the Forest Service property and Mr. Okelberry's  
17 property --

18 A. Yes.

19 Q. -- coming off the Glade?

20 A. Right.

21 Q. And there have been occasions when you have  
22 seen that gate closed, isn't that true?

23 A. Yes.

24 Q. Now, this road that we're talking about, the  
25 Ridge Line Road, is that the same gate that gets you into

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1 the Circle Springs Road?  
2 A. No.  
3 Q. So their two separate gates then?  
4 A. Right.  
5 Q. And are there gates on both entrances?  
6 A. Yes.  
7 Q. And when that gate is closed would you open  
8 it and just go through or would you turn around and go  
9 back?  
10 A. We would open it and go through.  
11 Q. Would you close the gate again?  
12 A. Yes, we would.  
13 Q. Now, you say that you went on an occasion up  
14 that Ridge Line Road and over to Heart and then down to  
15 Hearts Gravel Road?  
16 A. Yes.  
17 Q. Now, the Hearts Gravel Road is closed, is it  
18 not?  
19 A. The Hearts Gravel Road as far as I know it's  
20 closed since I was on it.  
21 Q. Is it your understanding that's open to the  
22 public?  
23 A. Hearts Gravel Road, yes.  
24 Q. You indicated that the last time you used the  
25 Ridge Line Road was in the early 90's, would that be

85

1 true?  
2 A. Yes.  
3 Q. In your affidavit you said you used the Ridge  
4 Line -- Well, when was -- When was the first time you  
5 started using the Ridge Line Road?  
6 A. I would say it was in mid 70's.  
7 Q. Okay. So you first started using the Ridge  
8 Line Road in the mid 70's. In your affidavit you said  
9 you used the Ridge Line Road from 1962 to 2001. Now, the  
10 affidavit would be an error, would it not?  
11 A. Well, I've used that road all the way through  
12 that year, yeah. No, I think I should be right.  
13 Q. Well, Mr. Gardner, what are we to believe  
14 your affidavit or what your testifying to today?  
15 A. Well, when I wrote that affidavit I wasn't  
16 very, I guess, thinking as straight as I am now. So I  
17 think (INAUDIBLE).  
18 Q. So we're to disregard the affidavit and rely  
19 on your testimony today?  
20 A. Yes.  
21 Q. I gather the times you went up there was  
22 mostly in the fall of the year, would that be true?  
23 A. Yes.  
24 Q. Did you ever encounter trees across the road?  
25 A. Broke down ones, yes.

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1 Q. What would you do when you come down, come to  
2 a tree that had blown over the road?

3 A. Well most -- Most of the time we -- Well,  
4 let me restate that. I don't recall but maybe one or two  
5 that we encountered across the road that was -- If we  
6 had something to saw it in two we'd saw it in two and go  
7 through.

8 Q. You do recall there were trees covering the  
9 Ridge Line Road?

10 A. There have been, yes.

11 Q. One or two times, and you carried saws and  
12 then you'd saw through that?

13 A. We use to go up there and get fire wood in  
14 the 80's. And if there was a tree down we'd saw to it  
15 and go through.

16 Q. Well, what if you didn't have a saw?

17 A. Well, we couldn't, didn't have nothing to  
18 moved it with we wouldn't go through.

19 Q. So on -- These one or two times that you  
20 testified to when there was trees across the road, was  
21 there one occasion you had a saw and another occasion  
22 when you didn't have a saw?

23 A. I really can't remember. Most the times I  
24 didn't have a saw. If we had a chain we'd hook up to it  
25 and pull it out of the road or break the end off and pull  
87

1 it around. A couple of us would get out and pull it  
2 around where we could pass.

3 Q. Well, now, I'm not sure I'm following you.  
4 You said there was or was not occasion when you had a saw  
5 and you sawed it out?

6 A. I said if we had a saw.

7 Q. Do you remember?

8 A. I remember one occasion we had sawed one and  
9 that was before we hit the Big Glade. That wasn't on the  
10 Ridge.

11 Q. Well, I'm talking about the Ridge Line Road.  
12 You indicated there has been one or two occasions when  
13 there's been trees across the road on Ridge Line Road,  
14 but you can't remember what you did when you got to the  
15 trees then, with that be safe to say?

16 A. The couple times that I remember that the  
17 trees was along the Ridge Line Road it was on fish and  
18 game property. It was after you come up out of the White  
19 Pole and over the rocky going down into what we call  
20 Hearts Gravel. There was a couple there and I recall we  
21 had a saw and we sawed it in two. Once we didn't we  
22 pulled it around and made room that way.

23 Q. Do you ever recall seeing any trees on the  
24 Okelberry property that was covering the roads?

25 A. No.

1 Q. Never?  
2 A. No.  
3 Q. Now, the Thorton Hallow Road you said that  
4 you first began using that road in the mid 80s, would  
5 that be correct?  
6 A. Yes.  
7 Q. And the purpose for going there was for  
8 hunting?  
9 A. Yes, we'd go down there and go in the forest  
10 to hunt.  
11 Q. Is there any other purpose for using that  
12 road?  
13 A. Pardon?  
14 Q. Was there any other purpose for using that  
15 road?  
16 A. We use to go down there and set at that lower  
17 pond and watch for deer or elk come in and see what come  
18 in.  
19 Q. Any other purpose?  
20 A. No.  
21 Q. Then you said the last time you used it was  
22 in 1994?  
23 A. Yes.  
24 Q. In your affidavit you said that you used the  
25 Thorton Hallow Road from 1965 to 2001. Is this another  
89  
1 occasion when we should disregard your affidavit and rely  
2 on your testimony?  
3 A. Well, I understand I probably, probably  
4 thinking about the times now that I went down in them  
5 roads when I was driving. Then when I wrote the  
6 affidavit I was probably with other people then.  
7 Q. Well, now, you testified under oath just a  
8 few minutes ago the first time you used it was the mid  
9 80's, the last time you used it was '94. Now, are you  
10 going to say that's not accurate?  
11 A. No, that's accurate.  
12 Q. Okay. So then we just, we need to disregard  
13 the affidavit?  
14 A. Yeah, disregard it.  
15 Q. As I understand, you said that there was a  
16 gate from the Thorton Hallow private property onto the  
17 Forest Service property?  
18 A. From -- Yes, there's a gate that separates  
19 the forest and Okelberry's.  
20 Q. The gate is always -- Has there always been  
21 a gate there when you've gone out?  
22 A. Yes.  
23 Q. I wasn't sure that I followed you on the  
24 signs. Was there ever a time when you saw no trespassing  
25 signs there?

1 A. Yes, there was signs all the way on the trees  
2 going down through his property till you hit the forest.  
3 And I never seen any after you got across his property  
4 into the forest.

5 Q. The forest -- Do you interpret the no  
6 trespassing signs to mean you're okay on the road, but  
7 just don't get off the road?

8 A. Can't get off and hunt, yes. Can't get off  
9 and get wood or anything like that and anything.

10 Q. You don't recall seeing any signs down on the  
11 Forest Service property, no trespassing, anything of that  
12 nature?

13 A. No.

14 Q. Do you recall any signs on the Forest Service  
15 property restricting motorized vehicles?

16 A. I have. I've seen them signs.

17 Q. What did the signs say?

18 A. It said restriction -- No traveling on  
19 these roads. And the signs that I've seen up there they  
20 usually bull dozed the road up and put the sign right  
21 where they bull dozed the property or the --

22 Q. Well, the point is, Mr. Gardner, you have  
23 seen on the Thorton Hallow Road on the Forest Service  
24 side that says no motorized vehicles?

25 A. I don't recall that on the forest side, no.

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1 Q. Okay. Well, then as I understand you do  
2 recall seeing signs on the Forest Service property that  
3 says no motorized vehicles; is that correct?

4 A. I have seen it on the forest, yes, but not on  
5 that particular place.

6 Q. But you don't recall ever seeing it on the  
7 Thorton Hallow area?

8 A. No.

9 Q. You indicated that you can't come up from  
10 Highway 40 into that Thorton Hallow area?

11 A. In a motor -- In a truck or a  
12 four-wheeler --

13 Q. Right, but no, you can come up and hunt in  
14 that area, can't you?

15 A. You can walk up from Daniels Road if you  
16 want. You can walk up Thorton Hallow Canyon --

17 Q. Sure.

18 A. -- and ride a horse up there.

19 Q. Sure. And there are trails up in that area,  
20 aren't there?

21 A. Well, sure there is.

22 Q. So if you want to hunt that Thorton Hallow  
23 area you don't have to come down that road, you can come  
24 up Highway 40?

25 A. Right.

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1 Q. Now, the Parker Canyon Road, you said the  
2 Parker Canyon Road connects in some way to the Hallow,  
3 Thorton Hallow Road?  
4 A. If you want to walk it or ride a horse.  
5 Q. Well, we're talking about roads though.  
6 We're talking about the road you go on connects as the  
7 Parker Canyon Road connect --  
8 MR. SWEAT: I'm going to object, your Honor.  
9 I think that mis-characterizes his testimony. I think he  
10 said there was a trail that connected the two canyons.  
11 MR. PETERSEN: Well, that's what I'm trying  
12 to find out.  
13 THE COURT: That is what his testimony was.  
14 THE WITNESS: There's no road.  
15 Q. (BY MR. PETERSEN) There's no road?  
16 A. There's trails for walking. You might get  
17 over it with a four-wheeler. I don't know. I --  
18 Q. You said the last time that you used the  
19 Parker Canyon Road was '94?  
20 A. Yes.  
21 Q. Your affidavit you said the last time you  
22 used the Parker Canyon Road was 2001. Once again should  
23 we disregard the affidavit?  
24 A. Disregard it.  
25 Q. Disregard the affidavit and rely on your  
93  
1 testimony in Court today?  
2 A. Yes.  
3 Q. Did you ever see any signs once you leave the  
4 private property going on the Forest Service property  
5 about no trespassing?  
6 A. Just on the private property side not on the  
7 forest side.  
8 Q. Okay. So you did see a sign on the private  
9 property that said no trespassing?  
10 A. Yes.  
11 Q. And once again, you interpret that to mean  
12 it's okay to drive on the road, just don't get off of it?  
13 A. Right, don't get off and hunt.  
14 Q. Now, as you come off that Parker Canyon Road  
15 and you go onto the Ridge Line Road, were there any gates  
16 and fences in that area?  
17 A. There's a fence. And if you want to call it  
18 a gate there was a gate there, just not a very good one.  
19 Q. The Maple Canyon Road, now have you ever  
20 traveled that road from one end to the other?  
21 A. Yes.  
22 Q. And is it your testimony that you can travel  
23 that in a four-wheel drive vehicle?  
24 A. We went up in a two-wheel drive vehicles.  
25 Q. A witness earlier this morning for the

1 county, Mr. Brandon Richins, testified the only way you  
2 can traverse that road is on an ATV. Would you agree  
3 with that?

4 THE COURT: Why don't you -- Why don't you  
5 lay some foundation as to when. I think the last time he  
6 was there was in the 80's.

7 MR. PETERSEN: Okay.

8 Q. (BY MR. PETERSEN) Your first use of that  
9 road you said was in the late 60's or early 70's?

10 A. Yes.

11 Q. In your affidavit you said it was 1968, but  
12 it could have been as late as the 70's; is that correct?

13 A. Could have been.

14 Q. Now, the first time you went up that road  
15 what were you traveling in?

16 A. Pickup.

17 Q. Four-wheel drive?

18 A. No.

19 Q. It wasn't a four-wheel drive?

20 A. No.

21 Q. Is it a good road?

22 A. No, it's not a good road.

23 Q. Rough road?

24 A. It's a rough road.

25 Q. So if there's testimony -- When was the

95

1 last time you went on it?

2 A. When the last time I went on it, it was  
3 probably in the mid 80's.

4 Q. And what was the condition of the road at  
5 that time?

6 A. It wasn't any better than the first time I  
7 went up.

8 Q. Pretty bad?

9 A. It was in bad shape.

10 Q. So you would not know what the condition of  
11 the road was right now?

12 A. No.

13 Q. Do you know if that road ever washes out from  
14 time to time?

15 A. Yes.

16 Q. Does that make it impassable when that  
17 happens?

18 A. If you want to take a chance of getting down  
19 in the ruts. I have and we've had to work our butts off  
20 getting out. (INAUDIBLE).

21 Q. Well, then it's been about 20 years since  
22 you've traveled that road?

23 A. Yes.

24 Q. So you would not know what the current  
25 condition of it is now?

96

1 A. Not now.  
2 Q. And even when you traveled it the last time  
3 in the mid 80's it was a pretty rough road?  
4 A. It was rough.  
5 Q. Isn't that --  
6 A. That's why we quit traveling it.  
7 Q. Isn't that the way we characterize all these  
8 roads, they were rough roads?  
9 A. Most generally, in places they are.  
10 Q. Steep?  
11 A. Well, in some places they are.  
12 Q. Rocky?  
13 A. Yes.  
14 Q. And sometimes trees would fall over on the  
15 roads?  
16 A. Sometimes.  
17 MR. PETERSEN: That's all.  
18 THE COURT: Mr. Sweat, anything else?  
19 MR. SWEAT: No, your Honor.  
20 THE COURT: Okay. You may step down.  
21 THE WITNESS: Thank you.  
22 THE COURT: We'll take our morning recess.  
23 We'll be in recess until, oh, quarter after.  
24 (lunch recess was taken.)  
25 THE COURT: Okay. We return to the case of

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1 Wasatch County verses Okelberry. Mr. Sweat, you can call  
2 your next witness.  
3 MR. SWEAT: The Plaintiff would call Mark  
4 Butters, your Honor.  
5 THE COURT: Okay. Mr. Butters, come forward  
6 and appear on the witness stand. Have you taken an oath  
7 previously?  
8 MR. SWEAT: He has not, your Honor.  
9 THE COURT: Okay. Raise your right hand and  
10 take an oath.  
11 CLERK: You do solemnly swear that the  
12 testimony you shall give in the matter now before this  
13 Court shall be the truth, the whole truth, and nothing  
14 but the truth, so help you God.  
15 THE WITNESS: Yes.  
16 THE COURT: Have a seat. You may proceed.  
17 MR. SWEAT: Thank you, your Honor.  
18 DIRECT EXAMINATION  
19 BY MR. SWEAT:  
20 Q. Will you please state your full name and  
21 address for the record?  
22 A. It's Mark Brigg Butters. 2105 East Main  
23 Canyon Road, Wallsberg.  
24 Q. How long have you lived in Wallsberg?  
25 A. I've lived there 42 years.

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1 Q. Are you familiar with the area east and a  
2 little bit north of Wallsberg, the mountains up in that  
3 area?  
4 A. Yes.  
5 Q. Why are you familiar with that area?  
6 A. We use to -- I use to hunt there. Most all  
7 my life I've hunted until the CWMU started.  
8 Q. Have you ever owned any property up in that  
9 area?  
10 A. No, I haven't.  
11 Q. Have you ever leased any property up in that  
12 area?  
13 A. No.  
14 Q. Have you ever worked for anybody that's owned  
15 or leased property up in that area?  
16 A. No, I haven't.  
17 Q. I want to show you what's been marked as  
18 Exhibit No. 2. If you want to just step down and look I  
19 guess. It's a map and see if you can recognize the area  
20 and point out where is Wallsberg on the map?  
21 A. (INAUDIBLE).  
22 Q. That's Wallsberg?  
23 A. (INAUDIBLE).  
24 Q. Okay. Do you recognize -- (INAUDIBLE) what  
25 this road would be here?

99

1 A. (INAUDIBLE) Ridge Line Road and this is the  
2 mountains east of my house that we use to hunt in all the  
3 time.  
4 Q. Okay. Do you recognize what would be Maple  
5 Canyon Road on there? Where does it go?  
6 A. It comes off Ridge Line Road and comes down  
7 and comes up (INAUDIBLE).  
8 Q. Do you recognize Circle Springs Road on  
9 there?  
10 A. (INAUDIBLE).  
11 Q. Do you recognize Thorton Hallow Road?  
12 A. (INAUDIBLE).  
13 Q. Do you recognize Parker Canyon Road?  
14 A. (INAUDIBLE).  
15 MR. SWEAT: Your Honor, can the record  
16 reflect that he did identify the roads as we have  
17 designated them on Exhibit 2?  
18 THE COURT: It may so reflect.  
19 Q. (BY MR. SWEAT) Mr. Butters, have you ever  
20 used the Circle Springs Road?  
21 A. Yes.  
22 Q. Why have you used that road?  
23 A. We've used it for access for hunting. We've  
24 used it for access for hauling fire wood.  
25 MR. PETERSEN: Excuse me, could we have the

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1 witness speak a little louder.

2 THE COURT: Can you speak up some?

3 THE WITNESS: I'm sorry. We've used it as  
4 access to haul fire wood off of Circle Springs. And  
5 we've used it for access to hunt the forest. And also as  
6 well to hunt Okelberry's property when we was, when it  
7 was legal for the public to hunt it.

8 Q. When did you first use this road?

9 A. Probably when I was five years old with my  
10 father and my grandfather.

11 Q. When did you last use this road?

12 A. It would have been about '92.

13 Q. During the first time you used it and the  
14 last time you used it did you ever see any locked gates  
15 across the road?

16 A. No.

17 Q. Did you ever see no trespassing signs?

18 A. I have seen partial trespassing signs about  
19 '92. And at that time we was also to buy trespass  
20 permits to hunt on Okelberry's property before they  
21 started their CWMU.

22 Q. During the time that you first saw no  
23 trespassing signs and the time you first used it, how  
24 often would you use the road?

25 A. We probably access the road to get over onto

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1 Circle Springs probably at least 20 times a summer.

2 Q. Why would you do that?

3 A. To haul fire wood and also to, a lot of times  
4 just go for a ride and look for deer and elk over around  
5 Circle Springs.

6 Q. When were you born?

7 A. '59.

8 Q. You indicated you first used the road when  
9 you were about six years old?

10 A. Yes.

11 Q. What year would that be?

12 A. '65.

13 Q. Did you ever observe other people use the  
14 Circle Springs Road during that time?

15 A. Yes.

16 Q. Were -- Do you know what they were using  
17 the road for?

18 A. A lot of people from Wallsberg would access  
19 it over there to haul fire wood.

20 MR. PETERSEN: Your Honor, I think he can  
21 testify to what he did, but he's assuming other people  
22 did something.

23 THE COURT: Well, unless he observed --

24 MR. PETERSEN: He saw what he observed.

25 THE COURT: Unless he observed it.

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1 Q. (BY MR. SWEAT) What did you observe people  
2 using it for?  
3 A. Hunting, hauling fire wood, just out for a  
4 ride in the mountains.  
5 Q. Are you aware of a road called the Ridge Line  
6 Road?  
7 A. Yes.  
8 Q. Let me backup one more time. Before you  
9 first bought the trespass permit to hunt on Mr.  
10 Okelberry's property --  
11 A. Yes.  
12 Q. -- did you ever seek permission to use  
13 Circle Spring Road?  
14 A. No, I never have.  
15 Q. Now, bring your attention to Ridge Line Road,  
16 are a you wear of that road?  
17 A. Yes.  
18 Q. Have you ever used that road?  
19 A. Yes.  
20 Q. When do you think you first used that road?  
21 A. Probably when I was eight years old.  
22 Q. And why would you of used that road?  
23 A. To go hunting with my father, to haul fire  
24 wood with my father.  
25 Q. When did you last use the road?

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1 A. About '96.  
2 Q. What did you use the road for on that  
3 occasion?  
4 A. We -- We had permission from Mr. Huvard to  
5 go in there and haul fire wood out of Maple Canyon.  
6 Q. Other than that time you had permission when  
7 was the last time you used that road?  
8 A. Pardon me?  
9 Q. Before you used it in '96 with permission  
10 when would be the last time have been you used that road?  
11 A. '95.  
12 Q. Did you get permission on that date?  
13 A. No, I didn't.  
14 Q. Was there any locked gates along that road on  
15 that date?  
16 A. No, there wasn't.  
17 Q. Was there no trespassing signs in place?  
18 A. Not that I remember.  
19 Q. Between 1967 when you first used it and 1995  
20 when you last used it without asking permission, how  
21 often would you use that road?  
22 MR. PETERSEN: Which one are we talking  
23 about?  
24 MR. SWEAT: Ridge Line.  
25 THE WITNESS: At least 20 times a summer.

1 Q. (BY MR. SWEAT) Typically what was your use  
2 for that road?  
3 A. To haul fire wood, to access the forest, to  
4 go scouting for deer and a lot of times just to go for a  
5 ride in the mountains.  
6 Q. Are you aware a road called Thorton Hallow  
7 Road?  
8 A. Yes.  
9 Q. Have you ever used that road?  
10 A. Yes.  
11 Q. When did you first use Thorton Hallow Road?  
12 A. Probably about '67.  
13 Q. When did you last use Thorton Hallow Road?  
14 A. About '94.  
15 Q. What did you typically use that road for?  
16 A. To access the forest property, to hunt and  
17 also to haul fire wood.  
18 Q. Did you ever -- During between '67 and '94  
19 did you ever seek permission from Mr. Okelberry to use  
20 that road?  
21 A. We did seek permission. It was through Mr.  
22 Huvard to haul fire wood.  
23 Q. Was that in -- When was that?  
24 A. That would of been '94.  
25 Q. How many times did you seek permission to get  
105  
1 fire wood?  
2 A. One time.  
3 Q. Prior to that time in '94 did you ever seek  
4 permission to use Thorton Hallow Road?  
5 A. No.  
6 Q. Prior to '94 did you ever see locked gates on  
7 Thorton Hallow Road?  
8 A. No.  
9 Q. Did you ever see no trespassing signs?  
10 A. I have seen partial trespassing signs.  
11 Q. In your mind did they tell you not to use the  
12 road?  
13 A. No. To not -- Not to get off the road onto  
14 their property.  
15 Q. Have you ever used a road called Parker  
16 Canyon Road?  
17 A. Yes.  
18 Q. When did you first use that road?  
19 A. Probably would have been in '72.  
20 Q. When did you last use that road?  
21 A. About '92.  
22 Q. During that time how often would you use that  
23 road?  
24 A. Around 50 times.  
25 Q. What did you use that road for?

1 A. To locate deer for deer hunting and to access  
2 across and over to the forest, the fish and game ground  
3 to come down behind Wallsberg town.  
4 Q. I can't remember if I asked you or not, you  
5 indicated 50 times, was that 50 times between '72 and '92  
6 or was that 50 times per year or what was the --  
7 A. It would of probably been 50 times in  
8 between.  
9 Q. Were you ever topped from using that road?  
10 A. No.  
11 Q. Did you ever see no trespassing signs on that  
12 road?  
13 A. No, not until it was about '92.  
14 Q. Have you ever used a road called Maple Canyon  
15 Road?  
16 A. Yes.  
17 Q. When did you first use that road?  
18 A. '65.  
19 Q. Where there any signs or any markers  
20 indicating to keep out at that time?  
21 A. No.  
22 Q. Where there any locked gates at that time?  
23 A. No.  
24 Q. When did you last use Maple Canyon Road?  
25 A. About '86.

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1 Q. Was there a sign, any signs up at that time?  
2 A. No.  
3 Q. Was there any locked gates at that time?  
4 A. No.  
5 Q. Did anyone try to keep you off the road at  
6 that time?  
7 A. No.  
8 Q. And how often between when you first used it  
9 and when you last used it would you use the road say in a  
10 given year?  
11 A. Probably about 75 times a year.  
12 Q. What would you use it for?  
13 A. The wintertime we'd use it for snowmobiling,  
14 to access the forest for the top of the mountain. And  
15 the summertime to use, just to ride up the canyon to,  
16 just for a pleasure ride.  
17 Q. Did anybody ever try to keep you from using  
18 that road between those times?  
19 A. No.  
20 Q. Did anybody ever ask you not to use those  
21 roads during that time?  
22 A. No.  
23 Q. You've indicated that you kind of recall when  
24 no trespassing signs were put up, is that --  
25 A. Yes.

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1 Q. Were they -- You indicated that you said  
2 there was partial no trespass be signs?  
3 A. Yes.  
4 Q. Was there ever a time that it was completely  
5 signed for no trespassing?  
6 A. When they started their CWMU.  
7 Q. Do you remember, have a date do you recall  
8 that would be?  
9 A. It would of been about '94.  
10 Q. You indicated you purchased a trespass  
11 permit; is that correct?  
12 A. Yes.  
13 Q. What was that permit for?  
14 A. To haul fire wood off of Okelberry's property  
15 up by the head of Maple Canyon.  
16 Q. At that time did you ever use the roads --  
17 Strike that. Prior to purchasing the trespass permit was  
18 there ever a time that there were signs up that you used  
19 the road, used any of the roads that we've discussed?  
20 A. Yes.  
21 Q. When would that have been?  
22 A. '91, '92.  
23 Q. And why would you use the roads at that time?  
24 A. To access the forest by Parker Canyon and  
25 Thorton Hallow.

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1 Q. Did you believe you were trespassing to use  
2 the roads?  
3 A. No. As long as we stayed on the road I felt  
4 that, and we didn't get their property to deface their  
5 property in anyway, I felt that it was okay.  
6 MR. SWEAT: That's all the question I have at  
7 this time, your Honor.  
8 THE COURT: Mr. Petersen, cross?  
9 CROSS-EXAMINATION  
10 BY MR. PETERSEN:  
11 Q. Do you have relatives in Wallsberg?  
12 A. Yes.  
13 Q. The Youngs?  
14 A. Yes.  
15 Q. Do you know if they sought permission from  
16 the Okelberrys to go on their property?  
17 A. I'm not positive.  
18 Q. Do you know of anybody, besides yourself,  
19 that got permission to go on their property?  
20 A. My brothers got permission. When I went on  
21 the property we, my brothers obtained permission. I do  
22 know Thompsons, Jack Thompson and some of the Youngs,  
23 Glen Young, Dee Young obtained trespass permits to go on  
24 their property to hunt deer.  
25 Q. It wasn't uncommon then for people to go to

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1 the Okelberry's and obtain permission to go on the  
2 property and use the roads then, was it?  
3 A. No.  
4 MR. SWEAT: Your Honor, I object to get some  
5 foundation as to what time.  
6 THE COURT: What time are we talking about?  
7 Q. (BY MR. PETERSEN) What time period was this?  
8 A. '91 to '93 approximately.  
9 Q. Did it go into the 80's? Are you aware of  
10 any permission that was given in the 1980's?  
11 A. I'm not aware of any.  
12 Q. The 70's?  
13 A. No.  
14 Q. So what you're talking about is a two year  
15 time period there, '91, '92, '93, something like that?  
16 A. Yeah, about three years there.  
17 Q. And would that just apply to you or just to  
18 the people that you know of that got permission?  
19 A. That applied to whoever wanted to hunt on  
20 Okelberry's property.  
21 Q. Now, for those years did you -- You say you  
22 got a trespass permit to get wood. Did you get a permit  
23 to hunt deer?  
24 A. I did in '92. I got a trespass permit from  
25 Mr. Okelberry to --

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1 Q. To hunt.  
2 A. -- to hunt deer on their property during  
3 that year.  
4 Q. And what year did you get the permit to haul  
5 wood?  
6 A. I think it was '94.  
7 Q. So you considered at that time it was  
8 necessary for you to get permission to go on the  
9 property?  
10 A. True.  
11 Q. And you felt like that if you didn't get  
12 permission you would not be allowed to go on the  
13 property?  
14 A. Right.  
15 Q. The Circle Springs Road, you say you used  
16 that 20 times a summer?  
17 A. At least.  
18 Q. And what months would you go up there?  
19 A. It would be from probably the middle of May  
20 through October.  
21 Q. You really couldn't access that property  
22 until June, could you, because of the weather? There  
23 would be snow up there, wouldn't there?  
24 A. It depended on the summer or on the spring.  
25 Q. Sure, it depended on the year. That's about

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1 five months. Were you -- Is it your testimony you're  
2 going up there once a week on Circle Springs?

3 A. Before -- Before I was married, yes. We  
4 would -- We would go up there almost every weekend  
5 during the summertime.

6 Q. And when were you married?

7 A. In '92.

8 Q. And after that you stopped going up there  
9 that often?

10 A. Yes.

11 Q. Once a week you'd go up, you'd go down Circle  
12 Springs Road. Would you describe the road?

13 A. It's very bumpy.

14 Q. Okay. It's a rough, rocky road, would that  
15 be true?

16 A. Certain parts of it are very rough.

17 Q. And were rocks in it?

18 A. In the middle of the road, yes.

19 Q. Did you ever go down the road when trees had  
20 fallen over the road?

21 A. I have been down the road when there has been  
22 trees that had been, already been cut out the road, but  
23 they had fallen across.

24 Q. We're talking about Circle Springs. You  
25 never had to remove any trees, but you saw where trees

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1 had been removed?

2 A. Yes.

3 Q. Do you know who did that removal?

4 A. I don't.

5 Q. How -- How wide is Circle Springs?

6 A. Circle Springs itself?

7 Q. No, the road.

8 A. Oh, the road? Probably about 20 feet.

9 Q. Well, aren't there places on that road where  
10 you'd scratch your car on the limbs and the trees and the  
11 bushes?

12 A. There is now.

13 Q. Well, wasn't there back in those days?

14 A. The brush hadn't quite gotten out that far  
15 yet.

16 Q. Well, you haven't been on that road for  
17 almost ten years, have you?

18 A. I haven't been on it for quite a while.

19 Q. Well, when you traveled that road, isn't it  
20 true that you would scrape your vehicle on the limbs and  
21 trees and so fourth in certain places on Circle Springs?

22 A. I don't recollect where it was growing in  
23 that much at that time to get into it with your vehicles.

24 Q. Isn't it true that to travel certain portions  
25 of that road you need a four-wheel drive vehicle?

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1 A. No.  
2 Q. You could drive the whole road without a  
3 four-wheel drive?  
4 A. In a two-wheel drive truck, yes.  
5 Q. Could you drive that road if it rained  
6 recently?  
7 A. In a two-wheel drive truck, no.  
8 Q. In a four-wheel drive?  
9 A. Yes.  
10 Q. If you had rain on that road you could travel  
11 that road?  
12 A. Yes.  
13 Q. Why did you buy permits to use that road if  
14 you felt like it was open to the public?  
15 MR. SWEAT: I'm going to object. I think  
16 that mischaracterizes his testimony.  
17 THE COURT: It does mischaracterize his  
18 testimony. He bought permits to hunt on the property.  
19 He bought permits to cut wood on the property, not to use  
20 the roads. That's his testimony. You might pursue it  
21 further.  
22 Q. (BY MR. PETERSEN) Well, did you use those  
23 roads during that period of time without buying that  
24 trespass permit?  
25 A. Well, which time?

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1 Q. When you bought these permits.  
2 A. We used the roads to access forest property.  
3 Q. But it was buying the permits that allowed  
4 you to use the roads, wasn't it?  
5 A. Buying the permits to allow us to be able to  
6 hunt or use Okelberry's property.  
7 Q. Right. But without the permits you couldn't  
8 of used the roads, isn't that true?  
9 A. No. I --  
10 Q. That's not your understanding?  
11 A. No.  
12 Q. Or do you have an understanding on that?  
13 A. I understood that it was a public access.  
14 You could get through there as long as you didn't get off  
15 on their property and do what you wasn't suppose to on  
16 their property.  
17 Q. Now, the last time you used the Ridge Line  
18 Road was in '96?  
19 A. About that, yeah.  
20 Q. And you gained permission from a Mr. Huvad?  
21 A. Yes.  
22 Q. At that time did you see any no trespassing  
23 signs?  
24 A. Yes.  
25 Q. There are places on the Ridge Line Road when

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1 you used that in '96, very narrow, is that true?  
2 A. Yes.  
3 Q. There were places where you would scrape your  
4 vehicle with the trees and shrubbery, would you not?  
5 A. Yes.  
6 Q. And it can be very steep in places, can it  
7 not?  
8 A. There is a couple spots that it's fairly  
9 steep.  
10 Q. Where are those spots?  
11 A. That would be after you leave Okelberry's  
12 property and drop, start dropping down into the fish and  
13 game and the Cattlemen Association property into Parker  
14 Canyon.  
15 Q. Isn't it very steep on the Okelberry property  
16 as well?  
17 A. The Ridge Line Road is not real steep.  
18 Q. Let me show you what's been marked as  
19 Defendant's Exhibit No. 9 and ask you if you can identify  
20 that?  
21 A. This would be -- This -- To me this looks  
22 like this would be after you drop off of, off the ridge  
23 out of their property and start up the other side of the  
24 mountain where you turn to go down into Parker Canyon to  
25 come over the top of the mountain to the fish and game  
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1 property and Dougway.  
2 Q. Would you identify that as being part of the  
3 Ridge Line Road?  
4 A. Yeah.  
5 Q. That's pretty steep, is it not?  
6 A. It's awful rocky, but --  
7 Q. Have you ever driven over it?  
8 A. Yes.  
9 Q. 20 times a summer?  
10 A. At least, yes.  
11 Q. 20 times a summer you would jump over this  
12 area that's shown on Exhibit No. 9?  
13 A. We'd go to the Ridge Line Road.  
14 Q. 20 times over the Ridge Line Road, but not  
15 over this area depicted in Exhibit No. 9?  
16 A. That part there, it would be between 15 and  
17 20 times a summer.  
18 Q. Were you going over an ATV or a four-wheel  
19 drive vehicle?  
20 A. ATV's.  
21 Q. So you wouldn't tackle that, what's depicted  
22 as Exhibit No. 9, in anything other than an ATV then?  
23 A. I have been across it a few times in a  
24 four-wheel drive truck, but --  
25 Q. Have you been all the way over to the gun  
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1 club?  
2 A. Yes.  
3 Q. Did you encounter any gates?  
4 A. On the Ridge Line Road? Yes.  
5 Q. Yes. Were they locked?  
6 A. They was not locked.  
7 Q. Do you know if they were locked at all during  
8 the year?  
9 A. I don't know.  
10 Q. Have you been over there in the last year?  
11 A. No, I haven't.  
12 Q. As you come onto the Okelberry property from  
13 Forest Service property there's a fence, is there not?  
14 A. Yes.  
15 Q. And there's a gate there, is there not?  
16 A. Yes.  
17 Q. And there's two accesses onto the Okelberry  
18 property. And there's fences and gates on both accesses?  
19 A. Yes.  
20 Q. And when you've on occasions come on that  
21 property those gates have been up, isn't that true?  
22 A. They -- They've always been closed. And  
23 we've always closed them after we've went through them.  
24 Q. Okay. So this 20 times a summer when you'd  
25 go up there the gates were always closed, you'd go

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1 through them and you'd close them again?  
2 A. Yes.  
3 Q. There are other gates, are there not, as you  
4 leave the Okelberry property and go onto the West  
5 Daniels' property, there's a gate there, is there not?  
6 A. Yes.  
7 Q. And that was the same, that gate would be  
8 closed and you'd go through it, open it, and then go  
9 through it, and then come back and close it?  
10 A. Yes.  
11 Q. And as you go further up the Ridge Line Road  
12 there are other gates going on and off the Okelberry  
13 property, would that not be true?  
14 A. On the Ridge Line Road it says, no. I know  
15 of four gates.  
16 Q. Four gates -- Is that four gates beyond  
17 when we're down here in the Glade?  
18 A. That would be between the Glade and the --  
19 Q. Okay. So there were four gates between the  
20 Glade --  
21 A. And Parker Canyon.  
22 Q. -- and Parker Canyon?  
23 A. Yeah.  
24 Q. That doesn't include this gate, this area  
25 going over to Circle Springs?

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1 A. Yes.  
2 Q. That would be a fifth gate then?  
3 A. Well, that -- That would -- That would  
4 include going into Circle Springs.  
5 Q. Now, when you would access these areas you  
6 say you went into to gather wood did you have permits  
7 from the Forest Service to gather wood?  
8 A. When they started selling permits, yes.  
9 Before they started selling permits, when it was just  
10 open to the public, no.  
11 Q. When you go into the Forest Service there was  
12 a gate there. You'd have to open the gate and go onto  
13 Forest Service ground?  
14 A. Yes.  
15 Q. And you close the gate again?  
16 A. Yes.  
17 Q. Did you ever see any signs that restricted  
18 motorized vehicles on Forest Service property?  
19 A. Not that I recall, no.  
20 Q. Would you drive your whatever, your ATV or  
21 four-wheel drive on that Forest Service property without  
22 any consideration to where you were going?  
23 A. No. We would stay on the roads. We wouldn't  
24 get off the roads.  
25 Q. You don't recall ever seeing a sign that says  
121  
1 no motorized vehicles though?  
2 A. No, I don't.  
3 Q. So as far as you're concerned once you got on  
4 the Forest Service property as long as you stayed on the  
5 road you could drive any kind of vehicle you wanted?  
6 A. Yes.  
7 Q. This Thorton Hallow Road, that's a narrow  
8 road, is it not?  
9 A. Yes, it is.  
10 Q. Did you ever encounter any trees across the  
11 road on that one?  
12 A. Not that I had to remove myself, no.  
13 Q. Did you see where trees had been removed?  
14 A. Yes.  
15 Q. You were up this 20 times a summer, but you  
16 never had to remove any trees?  
17 A. No, I didn't.  
18 Q. When you were up there did you ever meet the  
19 Okelberrys?  
20 A. I've passed them a few times. I've passed  
21 their sheep herders, but I haven't really stopped and  
22 talked to them.  
23 Q. Well, they're -- They have cattle and they  
24 have sheep up in that area, are you aware of that?  
25 A. Yes.

1 Q. Is that one reason why you closed the gates?  
2 A. Yes.  
3 Q. You said that, in the Thorton Hallow there  
4 was some partial trespassing signs?  
5 A. In -- They had partial trespassing signs.  
6 Q. What to you mean by partial?  
7 A. Just it wasn't clear -- It wasn't clear  
8 around their fence line or that. It was just -- They  
9 did have a few signs. They would have a sign by the  
10 gate. And this was in, that I remember, about '91 when  
11 they started selling their trespass permits for people to  
12 go in there hunting.  
13 Q. Before that you saw trespassing, no  
14 trespassing signs?  
15 A. Not before '91.  
16 Q. Well, did that trespass, no trespassing --  
17 How did you interpret that?  
18 A. I -- I interpreted that it was, that you  
19 was not to be able, not suppose to get on their property.  
20 Q. So if the sign says no trespassing that means  
21 you can still travel on the roads?  
22 A. I felt good about traveling across the road  
23 to access the forest property.  
24 Q. Maple Canyon, the last time you went down  
25 that road was in 1986?

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1 A. Yeah.  
2 Q. Were you on an ATV?  
3 A. Yes.  
4 Q. Would you ever travel that road in anything  
5 but an ATV?  
6 A. No.  
7 Q. That's about the only way you can travel that  
8 road, isn't it?  
9 A. That or by horse.  
10 Q. It's pretty rough.  
11 A. Yeah, it is.  
12 Q. Are you aware of any locked gates?  
13 A. No.  
14 Q. Isn't there a gate coming off the Main Canyon  
15 Road.  
16 A. Not that I recall. I know there's one in  
17 Maple Creek.  
18 Q. Where -- Where it begins on Main Canyon  
19 Road, you don't recall seeing a gate there.  
20 MR. SWEAT: Your Honor, I'd just ask Mr.  
21 Petersen to clarify as to when.  
22 MR. PETERSEN: Right now, presently.  
23 THE COURT: (INAUDIBLE).  
24 THE WITNESS: I haven't seen a gate right off  
25 Main Canyon Road, no.

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1 Q. (BY MR. PETERSEN) Have you see any gates?  
2 A. There is a gate where they unload their sheep  
3 in their corral in the bottom of the Maple Canyon.  
4 Q. How far off of Main Canyon is that gate?  
5 A. Off the Main Canyon Road? Probably half a  
6 mile or more.  
7 Q. Does it have no trespassing signs on it?  
8 A. Right now I don't know. I haven't been  
9 there.  
10 Q. It's in Wallsberg, is it not?  
11 A. Yeah.  
12 Q. But you haven't had occasion to look at it?  
13 A. Well, I -- There's other people that live  
14 below there. And I don't -- I don't go across their  
15 land to go up there.  
16 Q. Now, this Maple Canyon, the only way you  
17 would traverse that one is on an ATV?  
18 A. Yes.  
19 Q. And you'd say that would be 75 times a year?  
20 A. We would -- We would snowmobile in the  
21 wintertime a lot. We would leave our house, my  
22 grandfather's house, which is just right there close to  
23 Maple Canyon. And we would take our snowmobiles, go up  
24 Maple Canyon and then go over onto the Strawberry peeks  
25 over onto the forest.

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1 Q. Did you ever cross off the roads?  
2 A. I haven't left the road, yes.  
3 Q. You never cross off the roads onto the  
4 Okelberry property when you're snowmobiling?  
5 A. What do you mean by cross off?  
6 Q. Well, leave the roads?  
7 A. We did in the winter while snowmobiling  
8 (INAUDIBLE).  
9 Q. So you wouldn't confine yourself to the roads  
10 when everything was covered with snow, would you?  
11 A. We would -- We wouldn't go up through the  
12 trees, no.  
13 Q. So you take the -- On this Maple Canyon  
14 Road you wouldn't necessarily follow what was the road,  
15 you'd take whatever way you wanted to get up the road,  
16 get to the top, would that be true?  
17 A. No, no, there's only one way to the top and  
18 that's the road going up the bottom of Maple Canyon.  
19 Q. So it's your testimony that you never got off  
20 of that road when you're snowmobiling?  
21 A. Not while going up the canyon, no.  
22 Q. Never crossed over onto private property?  
23 A. No.  
24 MR. PETERSEN: That's all.  
25 THE COURT: Mr. Sweat, anything?

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1 MR. SWEAT: No further questions, your Honor.  
2 THE COURT: You may step down. Thank you.  
3 Okay. Mr. Sweat, we're going to take our noon recess at  
4 this time. We'll start taking testimony again at 1:15.  
5 How many more witnesses do you have?  
6 MR. SWEAT: That was my last witness, your  
7 Honor.  
8 THE COURT: He's your last witness?  
9 MR. SWEAT: The Plaintiff would rest.  
10 MR. PETERSEN: They rest, your Honor? We  
11 move to dismiss on the grounds they haven't proved a  
12 prima fascia case. We'll submit without arguing.  
13 THE COURT: Denied.  
14 MR. PETERSEN: We'll be prepared to begin at  
15 1:15, your Honor.  
16 THE COURT: 1:15. Okay. How many witnesses  
17 do you anticipate?  
18 MR. PETERSEN: I anticipate the rest of today  
19 and the best part of tomorrow.  
20 THE COURT: Okay. I just wanted to know to  
21 plan on it. Okay. Thank you.  
22 MR. PETERSEN: Thank you.  
23 MR. SWEAT: Thank you, your Honor.  
24 (lunch recess was taken.)  
25 THE COURT: We'll return to Wasatch County

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1 verses Okelberry and others. The Plaintiff has rested.  
2 Mr. Petersen, you may call your first witness.  
3 MR. PETERSEN: Thank you. We'll call Jeff  
4 Jefferson.  
5 THE COURT: Okay. Mr. Jefferson, come  
6 forward to the witness stand. Okay. Raise your right  
7 hand and take an oath.  
8 CLERK: You do solemnly swear that the  
9 testimony you shall give in the matter now before this  
10 Court shall be the truth, the whole truth, and nothing  
11 but the truth, so help you God?  
12 THE WITNESS: Yes.  
13 THE COURT: Have a seat.  
14 MR. PETERSEN: Can we have the witness just  
15 step down and look at Exhibit 2?  
16 THE COURT: You may.  
17 DIRECT EXAMINATION  
18 BY MR. PETERSEN:  
19 Q. Mr. Jefferson, this has been marked and  
20 received as Exhibit No. 2. Does this aerial look  
21 familiar to you?  
22 A. Yes, sir.  
23 Q. Are you familiar with the roads that are  
24 designated on there?  
25 A. Correct.

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1 Q. Okay. You can take the witness stand. Would  
2 you state your name, please?  
3 A. Jeffery Curtis Jefferson.  
4 Q. And your address?  
5 A. 251 East 300 North Santaquin, Utah.  
6 Q. And what is your occupation?  
7 A. Driver.  
8 Q. And who do you work for?  
9 A. At this time I'm working for Tina Rock.  
10 Q. And what is your date of birth?  
11 A. 8th month, 4th day, '63.  
12 Q. Now, did you ever have occasion to work for  
13 Ray Okelberry and his sons?  
14 A. Yes.  
15 Q. Did you ever have occasion to work in this  
16 area that's the map that's set fourth in Exhibit 2?  
17 A. Correct.  
18 Q. When did you go to work up there?  
19 A. I started helping the Okelberrys in '77.  
20 Q. And did you work continuously every summer  
21 for them?  
22 A. That's correct.  
23 Q. Up until last -- Did you work last summer?  
24 A. Last summer up to August, August the 13th.  
25 Q. During this period of time did you ever

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1 reside in Wallsberg?  
2 A. Yes.  
3 Q. And when did you live in Wallsberg?  
4 A. From about '77 to '87.  
5 Q. And when did you first go on the property?  
6 A. In '77 when I was going up the road towards  
7 Peatree that's when I met Mr. Okelberry.  
8 Q. When did you start to work on the property?  
9 A. That day.  
10 Q. What sort of work did you do?  
11 A. Docked and fixed things.  
12 Q. Did you herd cattle?  
13 A. Yes.  
14 Q. During the course of every summer, being up  
15 there, would you traverse most of these roads?  
16 A. Correct, I'd travel that territory pretty  
17 seldom, very often.  
18 Q. Did you ever have occasion to work on the  
19 West Daniels' property?  
20 A. That's correct.  
21 Q. Did you herd cattle there?  
22 A. Yes, and I managed it.  
23 Q. You managed it?  
24 A. The West Daniels Cattle Association.  
25 Q. When you left West Daniels did you take the

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1 cattle out of the Forest Service property?  
2 A. Yes, sir.  
3 Q. Now, do -- Based upon your experience,  
4 going back to 1977, are you familiar with the area where,  
5 that's called Ridge Line Road?  
6 A. Yes, sir.  
7 Q. And the Circle Springs Road?  
8 A. Correct.  
9 Q. It would be -- Is there a gate from the  
10 forest, a fence and gate from the Forest Service property  
11 onto Mr. Okelberry's property?  
12 A. Yes, sir.  
13 Q. And both spots?  
14 A. Yes, sir.  
15 Q. Let me show you what's been marked as  
16 Defendant's Exhibit No. 6 and I ask you if you can  
17 identify that?  
18 A. This is at the gate going into Circle.  
19 Q. Is that a fair representation as to what it  
20 looked like when you began working there?  
21 A. That's correct, even the old tire on the tree  
22 is still there.  
23 Q. I'm showing you what's been marked as  
24 Defendant's Exhibit No. 7 and ask you if you can identify  
25 that?

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1 A. This is a lock on a gate.  
2 Q. Is that the same gate?  
3 A. Uh-huh, yeah, yes, at that time.  
4 MR. PETERSEN: Your Honor, we'd offer Exhibit  
5 6 and 7.  
6 THE COURT: Any objection.  
7 MR. SWEAT: Can I see them first, your Honor?  
8 No objection.  
9 THE COURT: They're received.  
10 (Defendant's Exhibit No. 6 & 7  
11 was received into evidence.)  
12 Q. (BY MR. PETERSEN) Mr. Jefferson, looking at  
13 Defendant's Exhibit No. 6 it shows a, is that a tire in  
14 the tree?  
15 A. That's correct.  
16 Q. What does it say?  
17 A. It says keep out.  
18 Q. It also shows, does it not, some other signs,  
19 looking just down from that tire in the tree there's a  
20 red one.  
21 A. It's no trespassing.  
22 Q. Do you know when that was put up then?  
23 A. It was about in '92 is when that one was put  
24 up.  
25 Q. There's another sign in yellow over on

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1 the --  
2 A. That's the same time.  
3 Q. And what does that sign say?  
4 A. No trespassing.  
5 Q. Then there's a red one up here on the post?  
6 A. That's a government thing saying that the  
7 public should not go beyond this point because they're  
8 doing activity underneath there, the government trappers.  
9 I even had to check with the government trappers before I  
10 went pass that point.  
11 THE COURT: Mr. Sweat?  
12 MR. SWEAT: Your Honor, I'm going to object  
13 to that, unless he's got some foundation as to what it  
14 is. I haven't -- I didn't see the red sign. Are you  
15 sure that's not just wood with paint on it?  
16 Q. (BY MR. PETERSEN) Counsel wants to know is  
17 that actually a sign or was it just wood with paint?  
18 A. No, that's a sign that Mike Tammus, the  
19 government trapper put up. When I was managing that I  
20 always had to check with him before I went beyond that  
21 point when he put up them signs.  
22 Q. What would the signs say?  
23 A. They'd be doing some kind of activity to  
24 control.  
25 Q. Looking at Defendant's Exhibit No. 7, there  
133  
1 appears to be a chain and a gate and a lock. Has that  
2 always had a lock on it?  
3 A. Yes, that fence has.  
4 Q. I'm going to show you what's been marked as  
5 Defendant's Exhibit No. 8 and ask you if you can identify  
6 that?  
7 A. Yes, that's the up to date going into Circle.  
8 Q. That's what it looks like now?  
9 A. Yes, and then the tire is still in the tree.  
10 Q. The wire gate has been replaced by an iron  
11 gate; is that correct?  
12 A. That's correct, because every week -- You  
13 could put up the gate and the next day it would be ripped  
14 out.  
15 Q. Is that a fair representation of the way it  
16 looks today?  
17 A. Yes.  
18 MR. PETERSEN: Your Honor, we'd offer Exhibit  
19 8.  
20 THE COURT: Any objection?  
21 MR. SWEAT: No objection.  
22 THE COURT: It's received.  
23 (Defendant's Exhibit No. 8  
24 was received into evidence.)  
25 Q. (BY MR. PETERSEN) Now, Mr. Jefferson, as you  
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1 would go up this Ridge Line Road were there other gates?  
2 A. Yes.  
3 Q. And where would those other gates be?  
4 A. The gates are always on the boundary fence.  
5 The fence digs, the (INAUDIBLE) digs through the boundary  
6 fence. So every time you hit a boundary fence there'd be  
7 a gate there.  
8 Q. What was the purpose of having the gates?  
9 A. Control the public and animals. If the  
10 animals got out on the forest then they got citation.  
11 Q. So it was necessary to keep the gates closed?  
12 A. Yes, cause the animal -- Yeah, cause the  
13 public would tear them out or leave them open.  
14 Q. Now, were there any signs on those other  
15 gates such as the one we just saw?  
16 A. That's correct. They all -- All entrances  
17 was marked.  
18 Q. And what were they marked?  
19 A. No trespassing or keep out.  
20 Q. When would you begin working up there? What  
21 time of year would this be?  
22 A. Early May and end of April I'd start going up  
23 there if the snow had left and start standing fence.  
24 Q. And on the high country how -- On an  
25 average when could you get up there?

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1 A. Well, like it depend on the year, how deep  
2 the snow was. North slopes you couldn't get up there  
3 until mid June on a normal year. I'd say mid May, mid  
4 May, soonest.  
5 Q. You're familiar with a road called Circle  
6 Springs Road?  
7 A. Yes, sir.  
8 Q. You first went on that road in 1977?  
9 A. Yeah, I road a horse across there.  
10 Q. And you were up there last summer I suppose;  
11 is that correct?  
12 A. Yes, sir.  
13 Q. Is there any different -- Has that road  
14 changed at all in that period of time?  
15 A. No, sir, it's never been maintained.  
16 Q. If you were to traverse that road in 1977  
17 would it be basically the same condition as it is now?  
18 A. Yes, it is.  
19 Q. Would you describe that road?  
20 A. It's narrow in some spots, very rocky, washes  
21 out. It's a poor road. There's been accidents on that  
22 road.  
23 Q. What kind of accidents has there been?  
24 A. People going down there that ain't suppose to  
25 be down there and sliding off.

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1 Q. Can you traverse that road with an ordinary  
2 pickup truck without four-wheel drive?  
3 A. I like my pickup. I wouldn't, no.  
4 Q. You're familiar with a road known, designated  
5 as Ridge Line Road?  
6 A. Yes, sir.  
7 Q. Would you describe that road?  
8 A. It's muddy, muddy, ruddy, steep and narrow.  
9 Q. I'm going to show you what's been marked as  
10 Defendant's Exhibit No. 9 and ask you if you can identify  
11 that?  
12 A. Yeah, that's what they assume, they call a  
13 road.  
14 Q. Where is that?  
15 A. That's just north -- That's on the private  
16 of the West Daniels. It's right above the Parker Road,  
17 just right there.  
18 Q. Is that a fair representation of the way it  
19 looked in 1977?  
20 A. Yes, it's always looked that way.  
21 Q. Is it a fair representation the way it looks  
22 today?  
23 A. It's pretty much the same, rocky and  
24 terrible.  
25 MR. PETERSEN: Your Honor, we'd offer Exhibit

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1 No. 9.  
2 MR. SWEAT: No objection.  
3 THE COURT: It's received.  
4 (Defendant's Exhibit No. 9  
5 was received into evidence.)  
6 THE COURT: I think we already received it  
7 once.  
8 THE CLERK: I've received that.  
9 THE COURT: Yeah, we've received it once I  
10 think.  
11 MR. PETERSEN: Oh, have we?  
12 Q. (BY MR. PETERSEN) Are you familiar with the  
13 road known as the Parker Canyon?  
14 A. Yes, sir.  
15 Q. Would you describe that road?  
16 A. When you start going down off the higher road  
17 it's steep and narrow, and it's slick and rocky and  
18 ruddy.  
19 Q. Is it a road where there are rocks on it?  
20 A. Yes, there's rocks on it. And it's mud, it's  
21 slick, it's like clay in some areas.  
22 Q. On all these roads if it rains up there does  
23 that -- Does that have any effects on the roads?  
24 A. It does.  
25 Q. Is it easy to get stuck if it rains?

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1 A. Oh, yeah. I've been stuck up there many  
2 times and had to walk out.  
3 Q. You're familiar with the Thorton Hallow Road?  
4 A. Yes, sir.  
5 Q. Would you describe that?  
6 A. Thorton Hallow Road is narrow, rocky. You'll  
7 knock your mirrors off if you go down on the wrong time  
8 of year.  
9 Q. By that there's how much growth close to the  
10 road?  
11 A. Yes.  
12 Q. Is that the way it was when you first went up  
13 there in the 70's?  
14 A. Yes, it's pretty -- It's kept the same.  
15 Q. Now, are you familiar with a road known as  
16 the Maple Canyon Road?  
17 A. Yes, sir.  
18 Q. Would you describe that one?  
19 A. Gees, I don't know how to -- I don't even  
20 call it a road. It's washed out. It's rocky. I'd call  
21 it a path before I'd call it a road.  
22 Q. Could you drive that road with a four-wheel  
23 drive vehicle?  
24 A. No.  
25 Q. Could you drive any of these roads without a

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1 four-wheel drive vehicle?  
2 A. No, sir.  
3 Q. You need four-wheel drive?  
4 A. I'd -- I'd (INAUDIBLE).  
5 Q. Could you get on that Maple Creek -- Could  
6 you traverse that on a ATV?  
7 A. It depends -- It depends on how well you  
8 like your ATV. I'd say no if it was mine.  
9 Q. Now, did you ever see people up there? Ever  
10 run across any people on occasion?  
11 A. Every once in a while I'd run across people.  
12 Q. And when -- When was that?  
13 A. Around the hunts. It would be around the  
14 hunts. I'd run into a few people.  
15 Q. And when you were up there in May, June,  
16 July, August, did you see people up there site seeing,  
17 gathering wood or anything like that?  
18 A. Yes, sir.  
19 Q. And did you see more people though during the  
20 deer hunt?  
21 A. Yes, uh-huh.  
22 Q. And when you'd see these people what would  
23 you do?  
24 A. Well, I was -- I worked for the Okelberrys.  
25 So they had a policy that you approach them, you know,

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1 and be kind and everything. And ask them if they had  
2 permission to be on that. If they didn't you ask them to  
3 leave. And that's -- The majority of people didn't  
4 have permission.  
5 Q. Did that happen very often where you'd seek,  
6 have to remove --  
7 A. Not too bad. That there wasn't very many  
8 people up there.  
9 Q. Do you know a gentlemen by the name of  
10 Butters, Mark Butters?  
11 A. Yes, sir.  
12 Q. Did you ever remove him from --  
13 A. I asked him about twice to leave.  
14 Q. And did he leave?  
15 A. He went that way, so I assume he did.  
16 Q. In your opinion are those roads being used  
17 continuously by the public?  
18 A. No.  
19 Q. Now, is it possible to access the Forest  
20 Service property by not using those roads?  
21 A. Yes, sir.  
22 Q. On Highway 40 can you access Parker Canyon?  
23 A. Yes, sir.  
24 Q. Can you access Thorton Hallow?  
25 A. Yes, sir, there's trails.

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1 Q. There are trails that go up?  
2 A. Yeah, they're marked on the freeway.  
3 Q. Right off the road you can see them?  
4 A. Oh, yeah, big signs, Forest Service signs.  
5 Q. And likewise, can you access that Circle  
6 Springs area from off of Main Canyon?  
7 A. Yes, sir, right there at Willow Springs  
8 there's a trail that goes up through the Hallow.  
9 Q. Do you know, on occasion, if people have used  
10 those trails and have accessed that area in that manner?  
11 A. Yes, sir, I see people all the time when I'm  
12 riding through there, hiking up through there.  
13 MR. PETERSEN: Thank you.  
14 THE COURT: Mr. Sweat, cross?  
15 MR. SWEAT: Can I get the exhibits, your  
16 Honor?

17 CROSS-EXAMINATION

18 BY MR. SWEAT:  
19 Q. Now, is it Jefferson; is that right?  
20 A. Jefferson, yes, sir.  
21 Q. Mr. Jefferson, how old were you when you  
22 first started working for Mr. Okelberry?  
23 A. Well, I'm assuming I was 14, if I remember  
24 right.  
25 Q. And you've worked for him every year until

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1 last year?  
2 A. Yes, sir, uh-huh, right up to last year.  
3 Q. Any years you didn't work for him?  
4 A. No, sir, I always helped him.  
5 Q. Full-time job?  
6 A. When I was younger not full-time, you know,  
7 just cause I was young, going to school. But as I grew  
8 up it was full-time.  
9 Q. When did it become a full-time job?  
10 A. I can't remember right off bat, but it's been  
11 quite a while.  
12 Q. When you was younger you worked full-time  
13 during the summer or part-time during the summer?  
14 A. Full-time.  
15 Q. Did dock all year round?  
16 A. No, you do it in the spring.  
17 Q. What else did you do him?  
18 A. Fence, put up the fences.  
19 Q. At 14?  
20 A. Uh-huh.  
21 Q. Who did you work with?  
22 A. Who did I work with? There was his boy,  
23 Eric, and Shanna. There's a few of us.  
24 Q. And was all the time your summers spent in  
25 what's depicted in the yellow on the map here?

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1 A. No, I did it on the Forest Service. I put up  
2 fences on the Forest Service and stuff like that.  
3 Q. Does Mr. Okelberry own property in any other  
4 parts of the state that you're aware of?  
5 A. Yes, sir.  
6 Q. Did you ever go and work on any of those?  
7 A. Yes, sir.  
8 Q. Is it fair to say you spent as much time  
9 working in other areas as this area?  
10 A. No, I did it more cause I lived there.  
11 Q. Did Mr. Okelberry ever have you work when he  
12 was not on the property?  
13 A. Yes, sir.  
14 Q. You'd go up by yourself and fix things?  
15 A. Not by myself. He always wanted us, you  
16 know, a couple people together so in case somebody got  
17 hurt.  
18 Q. So it was typically if there was a member of  
19 the Okelberry family working with you?  
20 A. No, it wouldn't be that. Maybe it was my  
21 brother or someone, but he didn't want us up there alone.  
22 Q. And that started in 1977?  
23 A. Yeah, uh-huh.  
24 Q. I'm showing you what's been admitted as  
25 Exhibit 6.

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1 A. Uh-huh.  
2 Q. Did you take that picture?  
3 A. Yes, sir.  
4 Q. When did you take it?  
5 A. I took that picture three, three years ago or  
6 so.  
7 Q. What does the red sign say?  
8 A. Which sign? The one that the government puts  
9 up?  
10 Q. Yeah.  
11 A. It's just pretty much telling us to -- I  
12 can't quote it. So pretty much they're doing activity  
13 to, for control, like coyotes and stuff like that. And  
14 it just tells not to go beyond that point because there  
15 might be something setup that they don't want no harm to  
16 come along to anybody. So I always checked with Mike  
17 Tammus when he put them up to know that I wouldn't be in  
18 the wrong area.  
19 Q. Did you put the tire up that's on the tree?  
20 A. No, sir.  
21 Q. Do you recall it being up in '77?  
22 A. I remember as long as I can remember.  
23 MR. SWEAT: Did you move that picture off the  
24 wall?  
25 MR. PETERSEN: Which one?

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1 MR. SWEAT: Did you use that one?  
2 MR. PETERSEN: Yeah.  
3 Q. (BY MR. SWEAT) I'm showing you what's been  
4 marked as Exhibit 7?  
5 A. Yes.  
6 Q. (INAUDIBLE) indicate that picture is?  
7 A. That is at Circle gate.  
8 Q. And did you put that cable on at that time?  
9 A. No, sir.  
10 Q. Has that cable always been there?  
11 A. It's been pretty much there.  
12 Q. Same cable?  
13 A. (INAUDIBLE) they had to put this cable on --  
14 There was a chain that they tore off there and they put  
15 that cable to replace the chain.  
16 Q. So when did the cable go on?  
17 A. Oh, I'd say -- Gees, it's been on long as I  
18 can remember.  
19 Q. Do you remember the chain?  
20 A. I remember the chain. It's been like, quite  
21 a few years.  
22 Q. Did you take that picture?  
23 A. I'm not sure.  
24 Q. Do you know when that picture was taken?  
25 A. No.

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1 Q. You also testified that where Ridge Line Road  
2 crosses into Mr. Okelberry's property there's a gate  
3 there?  
4 A. That's correct.  
5 Q. Is that correct?  
6 A. Yes, sir, and a cattle guard.  
7 Q. Is there a cattle guard there too?  
8 A. Yes, sir.  
9 Q. What's the cattle guard to for?  
10 A. In case people -- They had problems there  
11 that guys kept ripping the gate out. And they think it  
12 was an extra caution not to let the live stock onto the  
13 forest, stay out of trouble.  
14 Q. Do you know who put the cattle guard there?  
15 A. No, sir.  
16 Q. Has it been there as long as you've ever seen  
17 it?  
18 A. I can -- It's been there a long time.  
19 Q. Isn't it true that many times the gate is  
20 open and the cattle guard is not blocked by a gate?  
21 A. It's very seldom. It's only open if like,  
22 somebody in the public has been across it and left it. I  
23 don't catch that gate open very often.  
24 Q. When you were 14 how did you get around up  
25 there?

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1 A. On horse.  
2 Q. Are you able to cover the entire area  
3 contained to these roads in a single day?  
4 A. Yes, sir, I use to wear a pair of shoes off  
5 of a horse in two weeks.  
6 Q. You indicated there's been accidents on  
7 Circle Springs Road; is that correct?  
8 A. Yeah, just one that I know.  
9 Q. Just one?  
10 A. Yeah. A person went down there. They ripped  
11 the gate out and tried to go past that one spot and slid  
12 off into the canyon.  
13 Q. Did you see them rip the gate out?  
14 A. I did not see them rip it out, but they  
15 admitted it.  
16 Q. Do you know who that was?  
17 A. Uh-huh.  
18 Q. Who was that?  
19 A. Huh.  
20 Q. Who was it?  
21 A. It was -- What's -- I try to think of his  
22 name -- Lives down there -- I know where he lives. I  
23 can try and think of his name. Lives by the Round Belly  
24 Road. Carlsons, Carlson kid.  
25 Q. You indicated that any time you saw people on

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1 the property you'd ask them to leave; is that correct?

2 A. That's correct.

3 Q. Is that any time you saw people driving on  
4 the roads?

5 A. Well, I'd ask if they, they had permission to  
6 be on there, cause I was informed that it wasn't a public  
7 access, you know, for people to be on there. So if they  
8 didn't have permission I would ask them to leave.

9 Q. When you saw on there, do you mean on the  
10 roads or on the property?

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

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

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

18 Q. Would you chase them down with your horse --

19 A. No.

20 Q. -- or how would you talk to them?

21 A. Just as I was coming up the road I'd run into  
22 them. Try to do it nice, polite.

23 Q. So in a given month how many days would you  
24 think you were up on the property?

25 A. A lot. I'd cross it -- I know the --

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1 Gees, I'd cross it all the time riding up.

2 Q. Riding up where?

3 A. I'd be riding to Thorton, check cows, put  
4 salt out, or over to Station, over to Parker.

5 Q. Is that when you were working for West  
6 Daniels' land, managing the land?

7 A. Uh-huh. And I worked for Ray Okelberry  
8 though. Ray Okelberry is the one that I was under. Then  
9 I'd put fence up and stuff. So quite a few. I can  
10 actually say numbers, quite a bit. I about lived on that  
11 mountain in the summertime?

12 Q. From when to when?

13 A. Just as soon as school was out. And then on  
14 weekends before school got out when the fences need to  
15 start going up, to late fall to put the fences down.

16 Q. Who else worked up there at the Okelberry's?

17 A. There was Eric and there was Dave. Dave  
18 Okelberry and Eric and Shanna and -- I could -- If I  
19 stopped and thought I could rattle off quite a few names.

20 Q. You indicated the entire time you worked up  
21 there you ran into Mark Butters twice?

22 A. More than that, and Stacy Butters.

23 Q. What years would that have been?

24 A. 2002, 2003, about every year. I tried to be  
25 -- Cause they -- Their grandma sort of lived right

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1 below Maple Creek. So I tried to be descent with them.  
2 Q. Every year from about 2000 you'd have to ask  
3 them to leave?  
4 A. More, sooner than that.  
5 Q. Have you ever driven a vehicle down Maple  
6 Canyon Road?  
7 A. No.  
8 Q. Have you ever driven a four-wheeler down  
9 Maple Canyon Road?  
10 A. No.  
11 Q. Have you ever driven a vehicle up over this  
12 area here?  
13 A. Nope.  
14 Q. Never once?  
15 A. I wouldn't try.  
16 Q. Have you ever driven a four-wheeler up over  
17 here?  
18 A. Nope.  
19 MR. SWEAT: That's all the questions I have  
20 at this time, your Honor.  
21 THE COURT: Anything further, Mr. Petersen?  
22 MR. PETERSEN: Nothing further, your Honor.  
23 THE COURT: You may step down.  
24 MR. PETERSEN: May we excuse this witness,  
25 your Honor?

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1 THE COURT: You may.  
2 THE WITNESS: I can leave?  
3 THE COURT: You can go.  
4 THE WITNESS: Thank you.  
5 MR. PETERSEN: Call Mel Price.  
6 THE COURT: Okay. Mr. Price, come forward  
7 and come up here to the witness stand. Okay. Raise your  
8 right hand and take an oath.  
9 CLERK: You do solemnly swear that the  
10 testimony you shall give in the matter now before this  
11 Court shall be the truth, the whole truth, and nothing  
12 but the truth, so help you God?  
13 THE WITNESS: I do.  
14 THE COURT: Okay. You may proceed.  
15 MR. TENNEY: Thank you.  
16 DIRECT EXAMINATION  
17 BY MR. TENNEY:  
18 Q. Could you go ahead and state your name for  
19 the record?  
20 A. Melvin Price.  
21 Q. Melvin Price. And where do you live, Mr.  
22 Price?  
23 A. I live in Heber City.  
24 Q. Could you give your address for the Court?  
25 A. 1449 South Industrial Parkway.

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1 Q. And how long have you lived there?  
2 A. At that address about 24 years.  
3 Q. Okay. And what's currently your occupation?  
4 A. I'm an electrician.  
5 Q. Mr. Price, we're wondering if you could tell  
6 us whether you're familiar with the property that's been  
7 marked in yellow on this map here marked as Exhibit 2?  
8 A. Yes.  
9 Q. And how is it that you've come to be familiar  
10 with that property?  
11 A. I've used that property to hunt and recreate  
12 on for several years.  
13 Q. When was the first time that you recall  
14 accessing that property?  
15 A. Oh, I hunted there with my uncles when I was,  
16 before I was of age to hunt, probably about 13. So maybe  
17 '75, '74.  
18 Q. So it's -- And have you accessed that  
19 property continuously or frequently during that time?  
20 A. Yes.  
21 Q. So it would be safe to say then that you've  
22 regularly been on that property for the past 30 years or  
23 so?  
24 A. Yes.  
25 Q. I'm wondering if you can step down off the

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1 stand for a moment, just to make sure that we're  
2 oriented, and identify for the Court whether you're  
3 familiar with the road that's been marked here in red as  
4 the Ridge Line Road?  
5 A. Yes.  
6 Q. And you're familiar with this road here in  
7 this pink magenta color?  
8 A. Yes.  
9 Q. And this road here, this blue one, Thorton  
10 Hallow?  
11 A. Yes.  
12 Q. And again with this Circle Springs Road?  
13 A. Yes.  
14 Q. I'm wondering if we could just walk through  
15 -- Go ahead and have a seat. If we could walk through  
16 your experiences with each of these roads just to  
17 establish your familiarity with them. Regarding Ridge  
18 Line Road, how often or when was the first time you  
19 recall accessing that road?  
20 A. Probably '72 or '3, '4, maybe some where in  
21 there.  
22 Q. And when was the last time that you recall  
23 accessing that road?  
24 A. About a month ago.  
25 Q. A month ago. And then during the ensuing 30

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1 years between the first and last time how often do you  
2 think you've accessed that road?  
3 A. Every year.  
4 Q. Every year since then. And during those  
5 years would it be once a year twice a year?  
6 A. Probably, if I didn't have a hunting tag  
7 maybe twice or three times a year.  
8 Q. Uh-huh. And if --  
9 A. Well, I do a lot more than that, 10 or 20.  
10 Q. 10 or 20. In your experiences with this road  
11 during what months of the year is this road passable by  
12 motorized vehicle?  
13 A. I'd say between the middle of May till  
14 October.  
15 Q. Middle of May. And then during the other  
16 months is it passable at all or is it passable  
17 infrequently?  
18 A. I've snowmobiled on that property in the  
19 wintertime.  
20 Q. Uh-huh.  
21 A. So it's passable on a snowmobile or an T ATV.  
22 Q. But then from your experiences from mid  
23 October through the middle of May is it accessible at all  
24 with a four-wheel drive vehicle, truck?  
25 A. No, I wouldn't say so.

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1 Q. And during the passable months, during the  
2 summer season and the late spring, what are the  
3 conditions generally of Ridge Line Road?  
4 A. Well until the -- Until the spring snow  
5 runoff you can't get through a lot of the dark timber,  
6 the snow stays deep in there till the middle of May or  
7 so.  
8 Q. Middle May or so. And then from May through  
9 middle of October is it, it is a passable road according  
10 to your --  
11 A. Yes.  
12 Q. -- your knowledge. What sorts of  
13 conditions, if you described that road as a driving  
14 surface how would you describe it?  
15 A. It's rough. It's rough and rocky and if it's  
16 rained at all it's muddy.  
17 Q. Is it steep?  
18 A. In areas, uh-huh.  
19 Q. According to your knowledge of this road how  
20 wide is this road?  
21 A. Almost -- For the most part it's maybe 6 or  
22 8 feet wide. It will scratch your truck in a lot of  
23 areas.  
24 Q. And have the conditions, specifically has the  
25 width of this road changed in anyway during the 30 years

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1 that you've been familiar with it?  
2 A. Not a bunch --  
3 Q. Not a bunch.  
4 A. -- I wouldn't say.  
5 Q. So then according to your memory, even back  
6 during the 70's and 80's, it was still about 6 feet wide,  
7 7 feet wide?  
8 A. Yeah.  
9 Q. Okay. In terms of how passable exactly this  
10 road is would it be, would a person be able to access  
11 this road with a passenger car, typical?  
12 A. No.  
13 Q. Would a person be able to access this road  
14 under, even during the summer season with a none  
15 four-wheel drive car?  
16 A. I don't think so.  
17 Q. So then according to your understanding a  
18 person would have to have a four-wheel drive vehicle to  
19 access it?  
20 A. Yes.  
21 Q. And then you talked about when it rains.  
22 When it rains would a person have difficulty, even with a  
23 four-wheel drive truck, traveling along the Ridge Line  
24 Road?  
25 A. There's some areas that get pretty slick and

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1 muddy.  
2 Q. Okay. To the best of your knowledge, are  
3 there any gates cutting off access to the Ridge Line  
4 Road?  
5 A. Yes.  
6 Q. Could you step down and identify on the map  
7 where those gates are?  
8 THE COURT: Counsel? Just -- Just to make  
9 this comment. I've heard this story now probably 15, 20  
10 times. I don't, you know -- I don't think there's any  
11 (INAUDIBLE), take any exception as to where the gates are  
12 or the condition of these roads, are we?  
13 MR. PETERSEN: Well, I don't know. Your  
14 Honor, we don't want to be redundant, but if --  
15 THE COURT: Well, I mean, I've heard this  
16 story, you know -- Every witness, I don't think as to  
17 the condition of the roads, the width or where the gates  
18 are located, I don't think there's been any dispute among  
19 any of the witnesses, have there?  
20 MR. PETERSEN: I don't think so. I think  
21 everybody agrees there are gates there. You know, if  
22 we're willing to assume that as a fact then we don't need  
23 to dwell on it.  
24 THE COURT: You know --  
25 MR. TENNEY: According to my understanding

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1 there has been some dispute as to the conditions. You've  
2 heard some witnesses say they can get up there with cars.  
3 We've had certain witnesses say they can get up there.  
4 That these roads are passable with none four-wheel drive  
5 vehicles. Yet we've had testimony from other witnesses  
6 that have said these roads are impassable by anything but  
7 an ATV.

8 THE COURT: It depends on which road and  
9 which area.

10 MR. TENNEY: True.

11 THE COURT: And the Court drove the roads.  
12 So the Court has personal knowledge as to what the  
13 conditions of the roads are, at least today. So --

14 MR. TENNEY: (INAUDIBLE).

15 THE COURT: I just make that comment. I  
16 mean, you can make whatever record you want. I don't  
17 think there's any dispute as to where gates are located  
18 or the, or the condition of the roads. There might be  
19 some dispute as to, with respect to what type of vehicle  
20 can be used to go up the roads.

21 MR. TENNEY: Okay.

22 THE COURT: But proceed.

23 Q. (BY MR. TENNEY) Can you identify, according  
24 to your knowledge, where those gates are?

25 A. The gate on top, if I read the map right, is  
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1 just on the property line right here. And then I'm not  
2 sure where the gate on the bottom is on this property  
3 line. This ones -- Actually it had to be this one.

4 Q. All right. If you can return to your seat.  
5 We'll go ahead skip ahead through a few of those  
6 questions. According to your memory have those gates  
7 been locked?

8 A. Yes.

9 Q. How far back have they been locked?

10 A. In time?

11 Q. In time.

12 A. I guess I always thought they were locked. I  
13 can't remember. I don't remember back, maybe 20 years or  
14 something.

15 Q. So just to make sure we're on the same page.  
16 So according to your understanding, for the past 20 years  
17 those gates, that control access to Ridge Line Road, have  
18 been locked?

19 A. Yes.

20 Q. Okay. Have there been signs, no trespassing  
21 signs posting along the roads?

22 A. Yes.

23 Q. And how far back have those signs been  
24 posted?

25 A. I think they've always been there.

1 Q. So at least for the past 20 years?  
2 A. Yes.  
3 Q. Okay. Let's move onto Circle Springs Road.  
4 Are you familiar with Circle Springs Road?  
5 A. Not as familiar. I haven't been on Circle  
6 Springs Road for several years.  
7 Q. Okay. Based upon the memory that you do have  
8 of it, in general terms, is it passable by none  
9 four-wheel drive vehicle?  
10 A. No.  
11 Q. Were there gates controlling access to Circle  
12 Springs Road?  
13 A. Yes.  
14 Q. And were those gates locked?  
15 A. Yes.  
16 Q. And were there signs posted at the entrances  
17 to the Circle Springs Road indicating there's no  
18 trespassing?  
19 A. Yes.  
20 Q. Okay. Moving onto Parker Canyon Road. Is  
21 Parker Canyon Road, according to the best of your  
22 knowledge, passable by a none four-wheel drive vehicle?  
23 A. No.  
24 Q. And were there -- Are there gates  
25 controlling access to Parker Canyon Road?

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1 A. I don't think there's a gate on that  
2 particular road, but there's gates before it on both  
3 sides.  
4 Q. And those gates, have they ever been locked  
5 in your experience?  
6 A. Yes.  
7 Q. And has there been signs there that have  
8 indicated there's no trespassing?  
9 A. Yes.  
10 Q. Okay. Moving onto Maple Canyon Road. Does  
11 Maple Canyon Road passable by a none four-wheel drive  
12 vehicle?  
13 A. The last time I tried to go down that road it  
14 was washed out.  
15 Q. Washed out. And before it was washed out was  
16 it passable at all?  
17 A. I don't think by a none four-wheel drive  
18 vehicle. You could get a four-wheel drive in.  
19 Q. And then was there a gate at the entrance to  
20 Maple Canyon Road?  
21 A. I don't recall one.  
22 Q. Okay. Thorton Hallow, is it passable by a  
23 none four-wheel drive vehicle?  
24 A. No.  
25 Q. It's not. Regarding the property in general,

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1 have you, in the past, asked permission from the  
2 Okelberrys or anybody that manages the property to enter  
3 the roads?  
4 A. Yes.  
5 Q. And who have you asked property -- Who have  
6 you asked permission from?  
7 A. Ray Okelberry.  
8 Q. Have you asked permission from other persons  
9 or just Ray Okelberry?  
10 A. I think I asked (INAUDIBLE) one year.  
11 Q. And how often have you asked permission?  
12 A. Every year.  
13 Q. Every year that you've used these roads.  
14 Have you asked permission to use the property in general  
15 or have you asked specifically for permission to use the  
16 roads?  
17 A. Well, both, access to the property and to  
18 camp and hunt on the property.  
19 Q. Okay. Are you familiar with this document  
20 that's been identified as Plaintiff's Exhibit 20?  
21 A. Yes.  
22 Q. Could you tell us what this is?  
23 A. "I, Ray Okelberry, give Mel Price" --  
24 Q. I'm sorry, before we go there, can you just  
25 tell us in general what this is?

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1 A. This gives me permission to use his property  
2 to hunt bear and permission to access it.  
3 Q. And did you personally obtain this from Mr.  
4 Okelberry?  
5 A. Yes.  
6 Q. And when did you do that?  
7 A. Last year, last May.  
8 Q. Okay. Could you read it for the Court?  
9 THE COURT: Are you offering it?  
10 MR. TENNEY: Oh, I'm sorry. We'd like to  
11 offer it as --  
12 THE COURT: Any objection?  
13 MR. SWEAT: Your Honor, I'm not going to  
14 object to it as a permission slip, but I am going to  
15 object to how the, another statement in there saying how  
16 long it's been happening. I think Mr. Okelberry is here.  
17 I think he can testify to that if we need to.  
18 MR. TENNEY: That's fine. So I'd like to  
19 offer this --  
20 THE COURT: It's received.  
21 (Defendant's Exhibit No. 20  
22 was received into evidence.)  
23 MR. TENNEY: -- as Exhibit 20.  
24 Q. (BY MR. TENNEY) Could you read for us that  
25 permission slip?

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1           A.    "I, Ray Okelberry, give Mel Price permission  
2 to set bear bait on my private land. And he also has a  
3 right to access all of my private roads on my private  
4 land".

5           Q.    Thank you. Are you familiar with this  
6 document, which is similarly marked as Exhibit 21?

7           A.    Yes.

8           MR. TENNEY: I'd like to offer that as  
9 Defendant's Exhibit 21.

10          MR. SWEAT: Same objection, your Honor. My  
11 objection isn't to the document as a permission slip,  
12 just to the statement in it.

13          THE COURT: Okay. It's received.  
14 (Defendant's Exhibit No. 21  
15 was received into evidence.)

16          Q.    (BY MR. TENNEY) Would you tell the Court  
17 what exactly this document is?

18          A.    It gives permission to use the property to  
19 hunt turkeys.

20          Q.    And you received it when?

21          A.    This year, April 20th.

22          Q.    (INAUDIBLE). So is it fair to say, according  
23 to your understanding, that you have specifically asked  
24 for permission to use the Okelberry's roads when ever you  
25 use them?

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1           A.    Yes, sir.

2           Q.    Have you traveled the Okelberry property and  
3 the Okelberry roads with other persons?

4           A.    Yes.

5           Q.    And who have those persons been?

6           A.    My uncles, my nephew.

7           Q.    And to the best of your knowledge have those  
8 persons also asked for and received permission to use the  
9 roads?

10          A.    Yes.

11          Q.    They have. According to your understanding  
12 of the Okelberry property over the past 30 years have  
13 these roads been public or private?

14          A.    Private roads.

15          Q.    Have they always been private roads or has  
16 there ever been a time when the public had free access to  
17 them according to your understanding?

18          A.    I've always understood that it was private  
19 property, private roads.

20          Q.    So you've always understood then that a  
21 person needed permission to use those roads?

22          A.    Yes.

23          Q.    Okay. Have you seen other persons using  
24 those roads while you've been using them?

25          A.    I have.

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1 Q. How often have you seen other persons using  
2 these roads?  
3 A. This spring during the turkey hunt we seen a  
4 couple guys on four-wheelers.  
5 Q. Would you say that you frequently see other  
6 persons on these roads while you're using them?  
7 A. No, that's the only ones I can recall.  
8 Q. So in your experience has there been any sort  
9 of substantial traffic on these roads?  
10 A. No.  
11 Q. You've not seen large numbers of people on  
12 these roads?  
13 A. No.  
14 Q. Have you seen campers parked along the  
15 various roads along the Okelberry property?  
16 A. No.  
17 MR. TENNEY: We have no further questions.  
18 THE COURT: Any cross, Mr. Sweat?  
19 MR. SWEAT: Thank you, your Honor.  
20 CROSS-EXAMINATION  
21 BY MR. SWEAT:  
22 Q. Mr. Price, do you pay the Okelberrys anything  
23 for your permission to use the road?  
24 A. No.  
25 Q. Is it kind of just a gift to you to use the  
1 road or to use their property?  
2 A. Yeah, I consider them as personal friends.  
3 Q. How did you meet the Okelberrys?  
4 A. My dad ran a service station when I was  
5 growing up and he always done business with us.  
6 Q. Have you received a letter like that from the  
7 Okelberrys every year?  
8 A. I have.  
9 Q. Since 1975?  
10 A. No. Before it became a private hunting unit  
11 it was always a verbal agreement between the Okelberrys  
12 and I. After it became a private hunting unit and he  
13 leased the property for hunting rights to other people  
14 then I had written permission so that I had some proof  
15 with me if his operator happened to stop us.  
16 Q. When would that have been that you first had  
17 a written, first written permission slip?  
18 A. Oh, I'm just going off memory, maybe early  
19 80's.  
20 MR. SWEAT: Your Honor, (INAUDIBLE).  
21 THE COURT: You may.  
22 Q. (BY MR. SWEAT) I'm showing you what's been  
23 marked as Exhibit 7?  
24 A. Okay.  
25 Q. Can you see what that is?

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1 A. A locked gate.  
2 Q. Do you have a key to that lock?  
3 A. I don't have one right now, no.  
4 Q. Can you see what is marked as Exhibit 6?  
5 A. Yes.  
6 Q. Do you see the tire in the tree?  
7 A. Yes.  
8 Q. When do you remember that tire first existing  
9 in that tree?  
10 A. There again just going off memory, maybe  
11 80's, early 80's.  
12 Q. So your memory wasn't always there?  
13 A. No, but the tire was always there. The  
14 property has always been marked with paint marks on the  
15 trees.  
16 Q. Well, was it there in the early 80's or was  
17 it there before the early 80's?  
18 A. The tire?  
19 Q. Yeah.  
20 A. I think the tire was probably there in the  
21 early 80's.  
22 Q. You've indicated that there's two gates along  
23 Ridge Line Road that you're aware of. How are they  
24 locked?  
25 A. Just with a chain and a lock.

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1 Q. Do you have a key to those locks?  
2 A. I don't have right now. I have had keys to  
3 them. Or there's been a key hidden.  
4 Q. Have you been up there this year?  
5 A. Yes.  
6 Q. Did you access the property this year?  
7 A. Yes.  
8 Q. Was it a keyed lock this year?  
9 A. The only gate I went through is the lower  
10 gate and it was not locked. The time I was hunting was  
11 early in the spring and they hadn't, didn't have their  
12 cattle up and the gates, their fences weren't up yet.  
13 Q. Fences weren't up and the gates wasn't  
14 locked?  
15 A. No, he lays the fences down in the  
16 wintertime.  
17 Q. Has there ever been any other times that  
18 you've been up there since '74, '75 now that the gates  
19 weren't locked?  
20 A. I think I've, you know -- Sometimes the  
21 gates aren't locked in the spring because they leave them  
22 down if the wintertime. To my recollection during the  
23 summertime after they get the cattle in there they lock  
24 the gates. And I've been there when the gates have been  
25 pulled down.

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1 Q. You see anyone pull the gates down?  
2 A. I have not. I always report it to the  
3 Okelberrys when I see it.  
4 Q. Do you enjoy using the property up there?  
5 A. Yes.  
6 Q. Do you think you will a be able to use the  
7 property in the future?  
8 A. Well, I hope so. I keep the gates locked  
9 when they're suppose to be and take good care of the  
10 property, making sure it's clean so it will ensure future  
11 use.  
12 MR. SWEAT: That's all the questions I have,  
13 your Honor.  
14 THE COURT: Mr. Petersen, anything else? I  
15 mean -- Sorry.  
16 MR. TENNEY: No, nothing further.  
17 MR. PETERSEN: May we excuse this witness?  
18 THE COURT: You may. You're excused.  
19 MR. PETERSEN: Thank you, very much. We'll  
20 call Lee Okelberry.  
21 THE COURT: Okay. Mr. Okelberry, come up  
22 here to the witness stand.  
23 MR. PETERSEN: Before he does that, your  
24 Honor, could we just show him Exhibit 2?  
25 THE COURT: Yes. Why don't you stand right  
171  
1 in front of this map right there --  
2 THE WITNESS: Okay.  
3 THE COURT: -- and have a look at it.  
4 MR. PETERSEN: (INAUDIBLE) look at this?  
5 THE WITNESS: Okay. I think it looks  
6 familiar, that yellow one anyway.  
7 MR. PETERSEN: Okay. You can take the  
8 witness chair.  
9 THE COURT: Before you step down raise your  
10 right hand and take an oath from the clerk.  
11 CLERK: You do solemnly swear that the  
12 testimony you shall give in the matter now before this  
13 Court shall be the truth, the whole truth, and nothing  
14 but the truth, so help you God?  
15 THE WITNESS: Well, I do.  
16 THE COURT: Have a seat.  
17 DIRECT EXAMINATION  
18 BY MR. PETERSEN:  
19 Q. Mr. Okelberry, would you state your name,  
20 please?  
21 A. Lee Okelberry.  
22 Q. And what is your address?  
23 A. Goshin, Utah. The telephone is Box 132 on  
24 the post office. And the telephone -- Do you need  
25 that?



1 Q. No, we don't need the telephone.  
2 A. Okay.  
3 Q. What is your occupation?  
4 A. I guess you'd call it farmin and ranchin.  
5 It's kind of an all trader. Everything that comes with  
6 that work.  
7 Q. Okay. How old are you?  
8 A. 77 plus.  
9 Q. And are you a brother to Ray Okelberry?  
10 A. Yes, I am.  
11 Q. Did you and your brother, Ray, and your  
12 father purchase this property that's indicated in yellow?  
13 A. Yes.  
14 Q. And was that a purchase in 1957 that you  
15 made?  
16 A. That was.  
17 Q. So that would of made you how old at the  
18 time?  
19 A. Well, I have to do some adding and thinking  
20 about it.  
21 Q. Around 26 years?  
22 A. I'd imagine. I was full of business and  
23 young.  
24 Q. Okay. Now, do you have a recollection of  
25 what this property looked like, the roads looked like in

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1 1957 when you purchased the property?  
2 A. I do.  
3 Q. Mr. Okelberry, was there a fence along the  
4 property that you purchased on the east side and the  
5 Forest Service property?  
6 A. Yes.  
7 Q. Were there gates on what is known as the  
8 Ridge Line Road and Circle Springs Road?  
9 A. Yes, they all had gates on them.  
10 Q. Was there a fence on the south side of the  
11 property that you purchased?  
12 A. Yes, it went down through there just about to  
13 the bottom.  
14 Q. And was there a gate on that Circle Springs  
15 Road?  
16 A. I think -- I think there was over in that  
17 corner, in that top corner.  
18 Q. Were there fences, other fences on that  
19 property you purchased over on the north end and so  
20 fourth?  
21 A. Well that -- That property goes straight  
22 there for a couple three sections. And then it makes  
23 that left hand turn for about a mile. And it jogs  
24 through there in a couple places. But every time I went  
25 into the forest or into that private property there was a

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1 gate on each end of the private property.

2 Q. So every time your property went onto other  
3 private property, which is now West Daniels, it would --

4 A. Yeah.

5 Q. -- you'd have a (INAUDIBLE)?

6 A. But it was mostly along one of them triangles  
7 where that road went through that property.

8 Q. Are you familiar with what is known at the  
9 Ridge Line Road?

10 A. Yes, I am.

11 Q. Now, what was the condition of that road in  
12 1957? Would it be safe to call it a road?

13 A. Well, I don't think you could take a car up  
14 through there. You could take one of them little trucks  
15 through there, but whether you get back out of there  
16 without tearing out the front end or the transmission or  
17 the rear end or something with big rocks. It wasn't very  
18 good shape.

19 Q. Was it rocky?

20 A. I'll say. Lots of rocks.

21 Q. Was it very steep in places?

22 A. Yes, there's some steep.

23 Q. When you went up there in 1957 do you know if  
24 there was any trees covering that road?

25 A. There's trees along it -- When there's

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1 trees -- There's always trees when you go up in the  
2 spring. And there's always trees the first part of the  
3 summer. You have to have a saw and a good ax and cut  
4 them trees out to get down, up and down them roads.

5 Q. Was that a frequent occurrence?

6 A. Yes, that was every year.

7 Q. Was it just in the spring when you'd have to  
8 cut trees out?

9 A. No, no, you get a windstorm and you might get  
10 10 or 15 trees crossing that length of it down through  
11 there. Pine Trees or Aspens.

12 Q. Now, when you were there in 1957 did you ever  
13 see anybody besides you and your family traversing that  
14 road in anyway?

15 A. I -- I met the fence crews in there from  
16 the other side, from the Cattle Association. They was  
17 there and come there and have dinner with us.

18 Q. Okay. But they were there putting up  
19 fencing?

20 A. They were putting fences up their share and  
21 we was putting our fences up too. We was taking care of  
22 the stock.

23 Q. Did you ever see anybody just driving on that  
24 road?

25 A. It wasn't very good to drive on just to be a

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1 driving. Sometimes they'd go, traverse it on down  
2 through there to Boomer and the end of our yellow  
3 property. They'd go down through there to get on down  
4 into there. That road didn't go on down across the red  
5 at that time. They built that road after that.

6 Q. You mean the road that continued onto the  
7 north?

8 A. Yes, that went on down and out towards Heber.  
9 That was built after.

10 Q. That road wasn't even there then?

11 A. No.

12 Q. Now, are you familiar with what is known as  
13 the Thorton Hallow Road?

14 A. I'll say.

15 Q. When you purchased that property what was the  
16 condition of that road?

17 A. Well, if you'd throw the rocks out you might  
18 get down there and get back out, but this was, had to be  
19 repaired.

20 Q. Was it more than a trail?

21 A. Well, it was a little better than a trail,  
22 but just two-wheel tracks.

23 Q. Now, did you have occasion when you were the  
24 owner of, part owner of that property to ever grade  
25 Thorton Hallow?

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1 A. To what?

2 Q. To grade it?

3 A. I sure did.

4 Q. Well, what did you do?

5 A. Well, I had -- The first time I went in  
6 there I went with a little T9 International Caterpillar.  
7 And that's all we had at that time. And we did a lot of  
8 work with that. It was up there when that fire went  
9 through there. We had a fire up there. And that little  
10 Caterpillar was there then. And I helped fight that fire  
11 with that little Caterpillar.

12 Q. Was that the purpose why you graded that road  
13 was to fight the fire?

14 A. No, not the purpose. The purpose is so we  
15 could get in there and take care of the fences. We had  
16 to -- We had to join -- We joined the Forest Service  
17 and places we had to maintain that fence with the Forest  
18 Service and on the private, certain parts of the private  
19 we had to maintain it our self.

20 Q. Now, other than you and your family do you  
21 know if anyone else ever used that Circle Springs Road up  
22 there?

23 A. I think that --

24 THE COURT: You're talking about Thorton  
25 Hallow.

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1 THE WITNESS: Thorton Hallow or --  
2 THE COURT: You haven't moved onto Circle  
3 Springs yet.  
4 MR. PETERSEN: Oh, pardon me. Okay.  
5 Q. (BY MR. PETERSEN) We're on Thorton Hallow?  
6 A. Yeah, we're still on Thorton Hallow.  
7 Q. All right. Excuse me (INAUDIBLE) Thorton  
8 hallow. Okay. That's the one you graded?  
9 A. Yep, I've graded that and made a reservoir  
10 down in there.  
11 Q. Okay?  
12 A. And I put a cattle guard on that fence down  
13 there also.  
14 Q. And you've described the condition of that  
15 road when you purchased the property?  
16 A. Well, that's the one I just told you it's  
17 kind of hard to get down through there with a truck. And  
18 then you can only go just a little ways below the forest  
19 fence. It didn't go on down there only just a hundred  
20 yards or two below that forest fence and there was no  
21 road.  
22 Q. Well, before you graded that is it possible  
23 to go down that area with a truck?  
24 A. Well, it seemed like we had more troubles,  
25 cause we didn't have all them four-wheel drive trucks  
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1 then. Now you can go about any place, but then you had  
2 to be pretty careful where you went.  
3 Q. Now, did you ever see members of the public  
4 people that didn't have business up there using that  
5 Thorton Hallow Road?  
6 A. Not then.  
7 Q. Back in the 50's?  
8 A. No.  
9 Q. Well, let's go to the Circle Springs Road.  
10 Are you familiar with that road?  
11 A. I am.  
12 Q. Did that exist in 1957 when you purchased the  
13 property?  
14 A. I think there was a gate through the line  
15 down through there to that spring. I think you could get  
16 down through there and probably should of had a saddle  
17 horse to make the route.  
18 Q. Did you grade that road?  
19 A. I graded part of it.  
20 Q. Is that that TD9 you told us about?  
21 A. Yes.  
22 Q. What was the purpose in grading that road?  
23 A. So we could get down in there. We salted the  
24 sheep. We packed salt with the trucks and put out salt  
25 troughs, made salt troughs?

1 Q. I think you testified that there was a fence  
2 and a gate at the end of that?

3 A. There was.

4 Q. Was there a gate and a fence at the end of  
5 the Thorton Hallow?

6 A. Yes, that was -- That fence on that yellow  
7 line joins the Forest Service there was a constant  
8 continuous fence.

9 Q. Now, when you purchased that property did you  
10 ever see anyone other than your family or people that had  
11 business up this using that Circle Springs Road?

12 A. People that maintained the fence and the  
13 cowboys that took care of the cows on the other side,  
14 they used it. And they'd stop and we'd talk things over  
15 and see how things were going.

16 Q. Okay. Are you familiar with a road known as  
17 the Maple Canyon Road?

18 A. I sure am.

19 Q. What was that situation in 1957?

20 A. A guy prior to us had took a little  
21 Caterpillar up through there and partly graded it out.  
22 But it's steep and rocky and rock slides and it's --  
23 There's nothing -- You've got to have gravel and dirt  
24 to cover over them big rocks to get over them. And it  
25 wasn't used very much. And then I -- So I took that D9

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1 Cat up there, D9 Cat, just a small Cat the first time,  
2 I've been up over that road three times with a  
3 Caterpillar.

4 The second time I took a 9 (INAUDIBLE) Cat, a  
5 bigger cat and graded it out. And then the third time I  
6 took my D6 Caterpillar up there and graded it out. But  
7 it's so steep. And then you got them -- There's water  
8 that come down there in the spring and wash the road out.  
9 And then rocks fall down in there, the ledges, and then  
10 rock slides. And they covered up the road. It's  
11 constant battle to keep that road open.

12 Q. Well, after you did that grading there could  
13 you use that as a --

14 A. Yeah, I did follow-up through there the first  
15 year or two. And then the next spring you might go up  
16 there and you couldn't get up it. The trees -- It  
17 would be full of trees and rocks. And you'd have to get  
18 out and saw the trees off and throw the rocks out.

19 Q. When you purchased that property in 1957 is  
20 that anything -- Did you see any people, any other  
21 people other than those who had business using --

22 A. I don't think they even knew that road was  
23 there in 1957.

24 Q. Now, are you familiar with the Parker Canyon  
25 Road

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1           A.    That's just down north of our property there.  
2   And that's about as far as I went into that, down that  
3   canyon within the caterpillar. I know that they took a  
4   D8 Caterpillar in there and made two or three big  
5   reservoirs right down in there below that corner of that  
6   yellow, our property. So there was a Caterpillar down  
7   there. And I don't know whether that was Daniels Canyon  
8   Cattle or who --  
9           Q.    Somebody went down there and made a pond, did  
10 they?  
11          A.    Yeah, they made some big reservoirs down  
12 there. In the spring there'd be quite a bit of runoff.  
13 And they build these reservoir to hold enough water for  
14 all summer.  
15          Q.    Now, is that, that Parker Canyon, is that one  
16 that you personally did any work on like you did in --  
17          A.    No, I didn't. I went down to it. I went  
18 down to our line where we went through that yellow, to  
19 the north. And you're going to that -- That's where  
20 that construction is around that corner down in there.  
21          Q.    Now, when you purchased the property in 19,  
22 in the 1950's, 1957 did you see anybody that didn't have  
23 business using that Parker Canyon Road?  
24          A.    Well, if we did we'd like them to stop a  
25 little bit cause that's the first company we'd seen for  
183  
1 all spring long. There wasn't too much use if any on it.  
2 I don't remember seeing any, anybody hunting in the fall  
3 or anybody traversing it in the spring that at any time  
4 have business in there.  
5          Q.    Would that be applicable for the 1950's?  
6          A.    I'd say it was.  
7          Q.    Okay. Now, we go into the 1960. Were those  
8 -- were any of those roads being used in the 1960's that  
9 you're aware of by anybody that didn't have business  
10 there?  
11          A.    I couldn't tell you but as the years went by  
12 there was a little more traffic on them roads.  
13          Q.    What time a year would that be?  
14          A.    Well, I had got in there the first of June  
15 and couldn't, couldn't go down for, sweat and snowbanks  
16 or one thing another on them. So it would be accurate  
17 first of June and it was before and then in the fall and  
18 I'd say by the middle of, the first of November they  
19 would be covered up with snow and they wasn't used then.  
20          Q.    So they weren't even passable from November  
21 to May or so?  
22          A.    That's right, there was no use on them at  
23 all.  
24          Q.    Now, in those summer months and in the fall,  
25 if you saw anybody that was there that didn't have

1 business would you ask them to leave?

2 A. I don't recall ever asking anybody, though at  
3 that time to leave. If we seen somebody then we probably  
4 make their acquaintance and find out what business they  
5 had. But I don't remember even who would come other than  
6 the boys that put the fence up or the cowboys that coming  
7 to gather a few cows up.

8 Q. They're basically the only people you  
9 remember being up there?

10 A. That's right, for quite a while in there.

11 Q. Now, have you sold your interest in that  
12 property to your brother, Ray?

13 A. Yes.

14 Q. And was that about 7 or 8 years ago?

15 A. Yes.

16 Q. To your knowledge, were those roads being  
17 used by public other than those, people other than those  
18 who had official business there?

19 A. Well, let me backup just a little bit. Now,  
20 that's -- Some of them people from Wallsberg would come  
21 up there and camp on the top of that ridge in one or two  
22 places. Two or three families is all I knew that would  
23 come up in there at that time. And they finally got so  
24 they was camping on the Forest Service rather than pull  
25 over there through all them rocks on our place?

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1 Q. On the Forest Service would that be what is  
2 known as the Glade?

3 A. Yep, the Glade.

4 Q. That's where they camp?

5 A. They'd camp on the edge of the Glade and on  
6 the Forest Service there.

7 Q. And -- But were they using these roads that  
8 we've been talking about? Were they driving on those  
9 roads? Are you aware of any of that?

10 A. The last few years they was using those  
11 roads. There was more people all the time. And that was  
12 all on them. It got to the point that the gates would  
13 disappear along that green strip where it joined the  
14 forest. They just take pinchers and cut the wire and cut  
15 the gate off. And we -- We'd gather our horses. We  
16 had three or four herds of sheep and each heard had about  
17 three horses. And by the time we got them put in we had  
18 10, 15 horses over there.

19 Q. Is it your memory that when people were  
20 through using those roads it was after they cut through  
21 the gate some way to get into it?

22 A. Not after they was through using them, it was  
23 when they was using them.

24 Q. Yeah, it was when they was using them, yeah.

25 A. Yes. We'd put them horses in there and the

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1 next thing we know we'd go up there and the gate would be  
2 gone. And four or five times I had to track them horses  
3 clear back over into Glide Creek and found them horses  
4 going back into Strawberry Valley. And when I was  
5 bringing the horses back I found the gate rolled up and  
6 thrown in them big pine trees to the east of that  
7 property. Three or four times I found them gates down in  
8 them pine trees.

9 Q. So that happened on more than one occasion?

10 A. Yes, three times I think.

11 Q. Okay. That's all, Mr. Okelberry.

12 THE COURT: Mr. Sweat, cross?

13 MR. SWEAT: Thank you, your Honor.

14 CROSS-EXAMINATION

15 BY MR. SWEAT:

16 Q. Mr. Okelberry, when you purchased the  
17 property in 1957 were there no trespassing signs where  
18 the roads would cross into your property?

19 A. I don't think we needed no trespassing signs.  
20 There was no, not that much trespass up there.

21 Q. Did you put locks on the gates in 1957?

22 A. No, sir. We put fasteners on them and we  
23 wired them to a post. We never did lock anybody out of  
24 there.

25 Q. Did you use trucks to access that property in  
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1 57?

2 A. I can't hear you.

3 Q. I'm sorry. Did you use trucks to access the  
4 property? Or how did you access the property?

5 A. Well, we took the truck in there. It was  
6 mostly two-wheel trucks standing at that time cause there  
7 wasn't no four-wheel drive trucks.

8 Q. Typically when did you take the sheep up onto  
9 the property?

10 A. Well, we'd -- In the spring we'd take them,  
11 probably first part of June, the last part of May, right  
12 in there above the property above the road there at, in  
13 the mouth of the main canyon and over in there above  
14 Taylors.

15 Q. Where did you bring them through?

16 A. We'd take them there on that -- Can I step  
17 down?

18 THE COURT: You bet. Go ahead.

19 MR. SWEAT: I'll hold it up for him, Judge.

20 THE WITNESS: We'd let out one band right  
21 here. And we'd let out another band up into here and  
22 then go up through, or up into here. We had two bands.  
23 One band to take this north half and the other band to  
24 take this. And this road went across the flat. I  
25 maintained that road quite a few times.

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1 Q. (BY MR. SWEAT) Where typically would you put  
2 your camps at when you had your sheep up there?

3 A. There wasn't too many camping places up  
4 there.

5 Q. No, I say your sheep camp or your herder, did  
6 he ever camp up there?

7 A. Well, that's what I'm talking about.

8 Q. Okay.

9 A. You had to find -- We had -- We had a  
10 little place right in here. We camped right in here.  
11 There's a little spring right there. And then there was  
12 -- Over in this area right here and down this road and  
13 about along in here we had the camp right here. The rest  
14 of this country is so rocky that you couldn't utilize it  
15 with a vehicle. You couldn't pull -- You'd pull the  
16 front end right out from underneath the camp.

17 Q. You've indicated the property at the end of  
18 Circle Springs Road, there was a gate here?

19 A. Yeah, there was a gate there.

20 Q. When did you take the sheep out in the fall?

21 A. We took them out by the 1st of July. We took  
22 them out of that private property and put them up into,  
23 over in Mud Creek and Brian's Fork area and up in the  
24 west part of the Duchesne and scattered three or four  
25 herds of sheep around on the Forest Service. And they

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1 come back, about the 1st of October they was back in  
2 there. You had to be off in the forest by the 1st of  
3 October.

4 Q. Okay. Your welcome to sit down. If you're  
5 more comfortable standing I don't want to -- When would  
6 you typically take the sheep out in the fall?

7 A. 1st of October -- No, there -- We'd stay  
8 there -- After the 1st of November, October -- The  
9 last of October if you got a foot of snow you had to  
10 leave. When ever you got a snow storm, a big snow storm,  
11 you had to leave cause you couldn't get around up there.  
12 And that would go into the 1st of November -- The first  
13 week in November you had to be out that's the rule, or  
14 earlier if you had trouble.

15 Q. So you tried to get out before the snow fell?

16 A. Well, we'd stay there until the snow fell and  
17 then we'd move on through down the lower country and get  
18 out of there as quick as we could.

19 Q. Did you ever see people gathering wood on  
20 your ground?

21 A. I sure did.

22 Q. Did you ever ask them to get off?

23 A. I sure did.

24 Q. When would that have been?

25 A. I can let you have a little description, up  
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1 to the top of that -- That road -- There was a big  
2 Aspen about 90 feet long and tall and was dead and it  
3 died. And it was never had no limbs on it at the top,  
4 just one little bunch of limbs up on the top of it. And  
5 I had Roy Daniels with me. And we was looking for a  
6 place to put the cattle guard.

7 And we come up around the turn and there was  
8 a woman and a man and two or three kids. And I stopped.  
9 And they cut this great big tree down. I pulled up there  
10 with this Roy Daniels. He was the ranger with the Forest  
11 Service. And he can verify this. And he -- I pulled  
12 right, you know, from here to you from this woman.

13 And I said, "What are you folks doing up  
14 here?" She said, "Well, you old fool, can't you tell  
15 this tree is dead and it needs to be cut out of here".  
16 And I said, "Hey, do you know who you're talking to".  
17 She said, "Oh, are you Mr. Okelberry?" She said, "You  
18 know I've been trying to catch up to you all spring long  
19 so I could cut these dead trees". And I said, "You get  
20 this family gathered up right now and get them in that  
21 trough, and put your saw back in that truck, and get out  
22 of here right now".

23 And that's the only ones I've run out of  
24 there. And I went on down the road for about a mile,  
25 mile and a half with Roy Daniels. And we selected a

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1 place to put the cattle guard and put a flag by it. And  
2 come back and so help me God, they had come back and cut  
3 that tree up in logs and took it and they was gone. And  
4 we saw them down there about 30 minutes to an hour. Now,  
5 that was the neighbors we had there.

6 Q. Was that the only -- You say that was the  
7 only ones you ever kicked out?

8 A. No, I was a little rough with some of them.  
9 Some of them people ask, out of Wallsberg, would ask if  
10 they couldn't come up and get some of the dead pines.  
11 And I did give -- There's some Youngs that helped us  
12 take care of the sheep. And I did give them Young  
13 people, families, permission to go cut some of them dead  
14 trees that was down on the roads.

15 Q. You had more trouble with people cutting wood  
16 on your property other than that one family?

17 A. Well, after a while they cut them any place.  
18 They just take right out through where ever they could  
19 drive and cut the dead trees. It's quite a bit of Aspen  
20 that would die.

21 Q. And did you kick those people off too?

22 A. Well, if you don't see them you don't kick  
23 them out.

24 Q. You indicated that you and Roy Daniels, who  
25 was the forest ranger, is that what you indicated?

1           A.    You bet.  
2           Q.    You were placing the cattle guard; is that  
3 correct?  
4           A.    I built -- I took one up there and put it  
5 in. And I can show you right there at Thorton Hallow,  
6 right down on the fence. Put your pencil on the Thorton  
7 Hallow Road, where it goes through the -- Where it goes  
8 through the forest fence I put a cattle guard there. I  
9 brought it up myself from Goshin and put it in there?  
10          Q.    Now, there's a cattle guard right here too;  
11 is that right?  
12          A.    That's right, and I put it in too.  
13          Q.    Did Mr. Daniels help you select that site  
14 also?  
15          A.    No, that -- That went onto the Cattle  
16 Association. The greens where he was associated and the  
17 Daniels Canyon Cattle was orange.  
18          Q.    Now, I'm speaking where Ridge Line Road  
19 crosses out from the forest into your property up here.  
20 Did you put that cattle guard in too?  
21          A.    I'm not sure if I put that one in or not. I  
22 had three cattle guards and I've been trying to think  
23 where I put them. But I know I put the one down there  
24 for the, where it goes into that orange. And I put that  
25 one on Thorton Hallow. Is that one on the forest -- Is

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1 that on the forest line right there? Maybe the forest  
2 put that one in right there.  
3          Q.    They could of put that one in?  
4          A.    Yes.  
5          Q.    Did you always keep a gate locked across that  
6 cattle guard, was it the head of Ridge Line Road there?  
7          A.    No.  
8          Q.    Was there times that there was just the  
9 cattle guard and no gate?  
10          A.    When we put that cattle guard there that  
11 would take care of it. You couldn't keep a gate up when  
12 I put that cattle guard there. That's why that cattle  
13 guard was put in there.  
14          Q.    But you think it may have been the forest  
15 that put that one in?  
16          A.    Well, right on the main line, the forest,  
17 they had the business of maintaining that line right  
18 there.  
19          Q.    Did you ever catch people hunting on your  
20 ground?  
21          A.    I've caught a few. Mostly them people that  
22 would help me I'd give them permission, one or two of  
23 them.  
24          Q.    Did you ever kick any of them off for hunting  
25 on your ground?

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1           A.    You got to be pretty careful.  You might get  
2 the hell beat out of you.  
3           Q.    It's happened before, hasn't it?  
4           A.    Well, I was careful.  So  --  
5           Q.    When you owned this property did any sheep  
6 herds ever trail up through Circle Hollow?  
7           A.    Circle  --  That use to be the  --  There use  
8 to be sheep that trailed from over across the Glade and  
9 down that circle line and go through a gate and come out  
10 down in there in that private property, them trail herds.  
11 And there was two or three trail herds when we first got  
12 up and used that to get up, go up in the spring or come  
13 out in the fall.  
14          Q.    How did they get their camps down that way?  
15 Would they follow right down?  
16          A.    They couldn't follow.  They had to take the  
17 camps down around.  
18          Q.    Where would be down around?  
19          A.    They had to take it back over to Daniels  
20 Canyon and come down the highway and up through, and on  
21 up through the town and into the bottom down in there  
22 where that highway comes up into there.  And they'd meet  
23 down in there at the bottom of Circle.  
24          Q.    You indicated that gates would just  
25 disappear; is that correct?

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1           A.    That's right.  
2           Q.    Did you ever lock gates?  
3           A.    I never locked them gates.  
4           Q.    Are you aware of the Forest Service ever  
5 provided any maintenance on any of these roads?  
6           A.    Well, the one time  --  
7           MR. PETERSEN:  Which one were you pointing  
8 at?  
9           MR. SWEAT:  I'll ask him which one.  
10          THE COURT:  I think it was a general question  
11 on any of the roads.  
12          THE WITNESS:  That  --  That main line from  
13 that one corner down to the orange, that joined the  
14 Forest Service.  And at that time when we got it the  
15 Forest Service took that line, had that  --  That was  
16 their responsibility to put that line up.  And we had a  
17 guy by the name of Dick Whyship, was the assistant  
18 supervisor down at the Provo office.  
19                    He called us in and he said  --  And he  
20 pounded his fist down on the table like that, bounced the  
21 papers around and he said, "As of this minute, right now  
22 that fence belongs to you".  And I said, "How we gonna  
23 herd the cows out?  Who's going to maintain it?"  And he  
24 said, "If you want it maintained you're going to maintain  
25 it.  And you're going to herd your sheep, keep your sheep

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1 off of us. And they can herd -- They can keep their  
2 cows off of you or you'll have to herd them off". So we  
3 automatically took control of the fence.

4 Q. With respect to any of the roads that go from  
5 the forest to the forest, did the forest provide any  
6 maintenance at all on any of those roads?

7 A. I don't get any if they did.

8 Q. After you had your sheep out in the fall  
9 would you go backup and do much in the property?

10 A. No, I don't think once we left the top we  
11 ever did get backup on the top.

12 Q. During the summertime when you would have  
13 sheep or something up there, were you up there every day?

14 A. No, I wasn't there every day, but I was there  
15 once a week or something like that. The gates would be  
16 down and you'd have a herd of cows on you once you left  
17 with the sheep.

18 Q. Was it your, pretty much a common occurrence  
19 that the gates would be down when you got back?

20 A. No, at first when we put them gates in there  
21 we had pretty good respect for them gates. It's just  
22 when you had some wild hunters. Mostly the hunters was  
23 doing it. It wasn't the live stock people that was  
24 taking them gates.

25 Q. So mostly people would respect the gates,  
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1 open and close them?

2 A. Yes.

3 Q. But every so often they'd just tear them  
4 right off?

5 A. You bet. They just cut them off, roll them  
6 up and take them. That's how come we put them cattle  
7 guards in.

8 Q. When you were up there did you ever see any  
9 people camping on the forest in Thorton Hallow or Parker  
10 Canyon?

11 A. Up the top of Thorton Hallow there was some  
12 Taylors, they were some people that would help us and  
13 they camped in there. There would only be one or two  
14 camps in there, that's all there was.

15 Q. Was there any on Parker Canyon?

16 A. I don't know what stopped down in Parker  
17 Canyon cause I didn't get down in Parker Canyon. That  
18 was on the Cattle Association.

19 Q. When did you last get up to this area?

20 A. When did I what?

21 Q. When were you last going up to the area a  
22 lot, to the property?

23 A. Oh, about six years ago, I guess.

24 Q. When you was up there six years ago did you  
25 see a lot of no trespassing signs on the roads?



1 there.

2 Q. Since about when? Oh, after since you've  
3 left it's been put there, is that what you're saying?  
4 I'm showing you what's been marked as Exhibit 7. Do you  
5 see the gate with the cable and the lock on it?

6 A. Uh-huh.

7 Q. Did you put that there?

8 A. No, sir, I did not.

9 Q. Do you remember that being there?

10 A. I never had to go through it. I don't  
11 remember seeing that there. That's been put there after  
12 I left.

13 MR. SWEAT: I think that's all the questions  
14 I have, your Honor.

15 THE COURT: Anything else, Mr. Petersen?

16 MR. PETERSEN: Yes, just briefly.

17 REDIRECT EXAMINATION

18 BY MR. PETERSEN:

19 Q. Mr. Okelberry, you indicated you gave  
20 permission to some people to go on your property, would  
21 that be correct?

22 A. Just maybe a half a dozen people is all.

23 Q. Uh-huh.

24 A. In the fall they'd help us gather the sheep  
25 off of the mountain and help us come around and move the

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1 camps. And that was welcome help. And we do them a  
2 little favor if they wanted to hunt. There was one or  
3 two that pulled a camp over there ahead of Thorton  
4 Hallow.

5 Q. Well, was some of the people that you gave  
6 permission was people by the name of Youngs?

7 A. Yes.

8 Q. People by the name of Thompsons?

9 A. Youngs helped us with them sheep. There was  
10 a couple of them.

11 Q. Uh-huh.

12 A. They helped us gather the sheep, move them.  
13 And if they needed some wood I give them permission to  
14 cut a little wood or they'd come up in there and help me  
15 move some camps.

16 Q. Okay. Did you give permission to people by  
17 the name of Thompson to come up on your property and use  
18 those roads?

19 A. Thompsons?

20 Q. Thompsons. Does that sound familiar?

21 A. I think so.

22 Q. How about Taylors, do you remember giving  
23 permission --

24 A. Taylors is the bottom end of that north road  
25 that comes up in there. And they helped my dad quite a

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1 bit of the time in there. They was with him. And he was  
2 getting a little older all the time. And he --

3 Q. Did you give permission to people by the name  
4 of Taylors to use your roads and come on the property?

5 A. I don't think we ever discussed using the  
6 roads.

7 Q. Was it permission to come onto your property  
8 then?

9 A. They use to go up through the bottom and ride  
10 a horse up through there. That's how they got there.  
11 They went up through that rough road that you couldn't  
12 grade or do anything with it, up Maple. But I don't  
13 think they ever did take a vehicle up in that road.

14 Q. No, my question was do you -- You have on  
15 occasion give permission to people to come onto your  
16 property?

17 A. I have, yes.

18 Q. And I asked if some of those people were by  
19 the name of Taylor?

20 A. Yes, I know the Taylors.

21 Q. Okay. And you did give them permission, did  
22 you?

23 A. I did.

24 Q. All right. That's all.

25 A. And I think my dad give them some permission.

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1 Q. Okay. Thank you.

2 THE COURT: Anything else, Mr. Sweat?

3 MR. SWEAT: There is, your Honor. I lost my  
4 train of thought.

5 RE-CROSS-EXAMINATION

6 BY MR. SWEAT:

7 Q. Mr. Okelberry, you just indicated that you  
8 gave permission to use the, your ground not the roads; is  
9 that correct?

10 A. Well, you can call it a road or a trail or  
11 whatever you want to call it. I guess it's been called  
12 both things.

13 Q. Was it your understanding --

14 A. If it wasn't graded it was a trail. If it  
15 was graded it was partly a road. So --

16 Q. Was it your understanding that those trails  
17 or roads or whatever that led to the forest land was open  
18 for use by the public to get to the forest?

19 A. There was no consideration for the use of the  
20 public or nothing else with the Forest Service. Anybody  
21 that had any business in there could get through the road  
22 without any trouble at all.

23 Q. And you didn't require them to ask  
24 permission?

25 A. Not the Forest Service. You don't tell them

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1 what to do.

2 Q. How about hunters or campers that were trying  
3 to get to the Forest Service?

4 A. Hunters can be quite a thorn in the side. I  
5 remember it very vividly. I told you that he shot the  
6 signs down. I was standing right there and the security  
7 guards was there. And that's how -- That's how  
8 considerate they was of us and the property. They was  
9 showing the security guards they was still going to go  
10 through there. And I'll --

11 Q. And you indicate --

12 A. I think we stood up for the public quite a  
13 bit. If there was any that needed to go through there in  
14 any way, shape or form they could ask or they could go  
15 through there. We never turned nobody down that had any  
16 business down in there.

17 MR. SWEAT: That's all I have, your Honor.

18 REDIRECT EXAMINATION

19 BY MR. PETERSEN:

20 Q. Do you recall, Mr. Okelberry, when this  
21 happened, this confrontation you testified to, that shot  
22 the signs, when people shot --

23 A. I can't hear you.

24 Q. When people shot things up, do you recall  
25 when that was?

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1 A. I don't know for sure. We was having some  
2 hard times with the sheep and was quite hard to make ends  
3 meet. And I remember talking to the Taylors and half a  
4 dozen people from the town down there. And I says, "Now,  
5 we are having some bad times here. And we're going to  
6 lease this hunting rights to somebody". And I went right  
7 to them people from Wallsberg and ask them if they was  
8 interested in it. And there wasn't a one that was going  
9 to pay for any leasing to run up in there. And that's  
10 about the time that this took place. And we, we leased  
11 it to this hunting club or people. Ray might could tell  
12 you what the score was there.

13 Q. You don't remember -- Do you remember the  
14 year that happened?

15 A. No, I don't, but it wasn't too far back, I do  
16 know that.

17 Q. All right. Thank you.

18 THE COURT: Anything else, Mr. Sweat?

19 MR. SWEAT: No, your Honor.

20 THE COURT: You may step down. Thank you.

21 Let's take our afternoon recess at this time. We'll be  
22 in recess until 3:10.

23 (A brief recess was taken.)

24

25 THE COURT: We'll return to the case of

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1 Wasatch County verses Okelberry. Mr. Petersen, you may  
2 call your next witness.

3 MR. PETERSEN: We'll call Mr. Glen Shepherd.

4 THE COURT: Okay. Okay. Mr. Shepherd, come  
5 forward to the witness stand right up here. Okay. Raise  
6 your right hand and take an oath from the clerk. Stand  
7 up, please.

8 CLERK: You do solemnly swear that the  
9 testimony you shall give in the matter now before this  
10 Court shall be the truth, the whole truth, and nothing  
11 but the truth, so help you God?

12 THE WITNESS: Yes.

13 THE COURT: You may be seated. Okay. Mr.  
14 Tenney, you may proceed.

15 MR. TENNEY: Thank you.

16 DIRECT EXAMINATION

17 BY MR. TENNEY:

18 Q. Could you please state your name for the  
19 Court?

20 A. Glen Shepherd.

21 Q. Glen Shepherd. And where do you currently  
22 live?

23 A. In Wallsberg.

24 Q. And can you give your address?

25 A. It's 2377 East Main Canyon Road.

207

1 Q. Thank you. Mr. Shepherd, where were you  
2 born?

3 A. In Provo.

4 Q. And your current occupation?

5 A. A carpenter.

6 Q. Carpenter. Are you familiar with Ray  
7 Okelberry's property?

8 A. Yes.

9 Q. How is it you're familiar with this property?

10 A. My grandpa's had a ranch up there and I've  
11 stayed up there for years.

12 Q. Years. And then do you currently live near  
13 his property?

14 A. Yeah, I'm right adjacent his property.

15 Q. Okay. Could you come down and identify on  
16 this map that's been marked Exhibit 2, where exactly your  
17 house is?

18 A. It might be helpful maybe if -- Maple Creek  
19 right here. I'm right at the bottom of the Main Canyon  
20 Road, right where Maple Creek comes out.

21 Q. Thank you. You can return to your seat. So  
22 then your property, is it directly adjacent or is there  
23 anything in between your property?

24 A. Our family's property adjacents the whole  
25 back of Okelberry's there.

208

1 Q. Okay. And how long have you lived in that  
2 property?  
3 A. 14 years.  
4 Q. And then how long has that property been in  
5 your family?  
6 A. A hundred years.  
7 Q. A hundred years. In the course of your  
8 residency at that house and in the course of your  
9 family's ownership of that property, have you become  
10 familiar with the various roads that travel through Ray  
11 Okelberry's property?  
12 A. Yes. I've walked them probably the last 30,  
13 35 years.  
14 Q. And just a rough estimate, how many times do  
15 you think you've been over these roads in the past 35  
16 years?  
17 A. Oh, thousands of times.  
18 Q. Thousands. Every year you go on there how  
19 often?  
20 A. Yeah. 30 or 40 times every year.  
21 Q. Okay. Let's just walk briefly through the  
22 various roads, just to discuss your knowledge of how they  
23 are as roads. The Maple Canyon Road, would it be fair to  
24 say that's the road you're most familiar with?  
25 A. Yeah.

209

1 Q. Is that road passable by none four-wheel  
2 drive vehicle?  
3 A. No.  
4 Q. Has it ever been passable by none four-wheel  
5 drive vehicle?  
6 A. No.  
7 Q. Oh. Are there signs posted at the entrances  
8 of Maple Canyon Road indicating that it's private  
9 property?  
10 A. Yes.  
11 Q. Have they always been there?  
12 A. They've been there for years that I remember.  
13 Q. And is there ever -- Do you ever have any  
14 problems with those signs?  
15 A. Yeah, they disappear all the time.  
16 Q. And what do you think causes that  
17 disappearance?  
18 A. It's vandalism.  
19 Q. Vandalism. How long has that been going on  
20 with those signs?  
21 A. Forever, since I can remember.  
22 Q. Is there a gate that you keep at the entrance  
23 to the Maple Canyon Road from your property?  
24 A. Yes.  
25 Q. Is it currently locked?

210

1 A. Yes.  
2 Q. And has it been locked in the past?  
3 A. Yes.  
4 Q. How long in the past has it been locked?  
5 A. Well, I remember it locked probably the last  
6 seven years.  
7 Q. Last seven years. And before that was it  
8 ever locked?  
9 A. I'm not sure of that.  
10 Q. Not sure. Was it closed during the time that  
11 it wasn't locked?  
12 A. It's always been closed.  
13 Q. And then even during that time when it wasn't  
14 necessarily locked there was still signs there while it  
15 was closed saying that it was --  
16 A. Yes.  
17 Q. -- private property? Let's move onto the  
18 other roads. Ridge Line Road, is it passable by none  
19 four-wheel drive vehicle?  
20 A. No.  
21 Q. And are there signs on it?  
22 A. Yes.  
23 Q. Circle Springs Road, is it passable by none  
24 four-wheel drive vehicle?  
25 A. No.

211

1 Q. And are there signs there?  
2 A. Yes.  
3 Q. Parker Canyon Road is it passable by a none  
4 four-wheel drive vehicle?  
5 A. No.  
6 Q. And are there signs there?  
7 A. Yes.  
8 Q. Thorton Hallow Road, is it passable at all by  
9 a none four-wheel drive vehicle?  
10 A. No.  
11 Q. And are there signs there?  
12 A. Yes.  
13 Q. Regarding your use of this property, do you  
14 -- You said that you're the adjacent landowner, but  
15 you've also said that you go onto these roads. Do you  
16 have the Okelberry's permission to go on these roads?  
17 A. Yes, I've had the Okelberry's permission for  
18 years.  
19 Q. For years. How do you go about getting their  
20 permission?  
21 A. Just contact them. They're always going  
22 through Wallsberg. So I can see them all the time.  
23 Q. Yeah. Are they pretty free with giving  
24 permission?  
25 A. Yes, that's probably some of the problem.

212

1 They give permission and then it's got to where everybody  
2 wants to use it for free.  
3 Q. Would it be fair to say you're familiar with  
4 the town of Wallsberg, the people in Wallsberg?  
5 A. Yes.  
6 Q. To the best of your knowledge do people in  
7 Wallsberg regard these as private roads or public roads?  
8 A. I think they'd be private roads.  
9 Q. Do you know of other people from the town who  
10 travel on these roads?  
11 A. Yes.  
12 Q. Do these people, to the best of your  
13 knowledge, ask for permission?  
14 A. Yes.  
15 Q. They do. So your understanding then is the,  
16 is the general public perception that these are, in fact,  
17 private roads?  
18 A. Yeah, they are private roads.  
19 Q. Okay. Now, when you've been on these roads  
20 in the past have you observed other persons using these  
21 roads?  
22 A. Yes.  
23 Q. Would -- How often do you see other people?  
24 A. Very seldom using, other than hunting season,  
25 trying to get through them.

213

1 Q. Like I said, just rough estimation, during  
2 hunting season how many people would you say?  
3 A. Oh, you might see, during the hunting season,  
4 probably two cars maybe, three cars through the season.  
5 Q. Through the whole season?  
6 A. That I see.  
7 Q. And then is there evidence that there are a  
8 lot of other people that you just don't see?  
9 A. Yes, there's travel through there. You can  
10 see it.  
11 Q. Now, during the none hunting season, in your  
12 experience have there been other persons on these roads?  
13 A. Very seldom are they used. I'm sure once in  
14 a while, but very seldom.  
15 Q. Have you ever seen people camping on these  
16 roads during none hunting season?  
17 A. Yes.  
18 Q. Has it been often?  
19 A. No.  
20 Q. Have you ever seen people taking picnics,  
21 picnicking drives during the none hunting season?  
22 A. No.  
23 Q. Do you ever see people just out site seeing  
24 during the none hunting season?  
25 A. No.

214

1 Q. No. So would then would it be fair to say  
2 that during the none hunting season there just really  
3 isn't a lot of traffic on these roads?

4 A. There's not.

5 Q. There's not. Now, you said that you've been  
6 living there and involved with this property for 30 years  
7 or so. In the past, in the 1960's, 70's and 80's was  
8 there traffic on these roads during those time periods?

9 A. Very seldom traffic was ever through there.  
10 You could walk them every day for weeks and never see  
11 anybody on them.

12 Q. Okay. During the 1960's -- Let's just walk  
13 through the decades. During the 1960's do you recall  
14 seeing people out picnicking, joy riding, traveling  
15 through these roads?

16 A. There's very seldom ever see anybody in  
17 there.

18 Q. And then during the 1970's did you ever see  
19 people picnicking, driving, just traveling through.

20 A. No.

21 Q. And during the 1980's?

22 A. No.

23 Q. Was this a time when the traffic on these  
24 roads seem to have increased?

25 A. Yeah, probably the last ten years.

215

1 Q. And then has there been any sort of response  
2 that you've been able to identify from the Okelberrys and  
3 the other property owners to this increase in traffic?

4 A. Yes.

5 Q. And what's that response been?

6 A. Just more vandalism, people trying to use  
7 their property.

8 Q. Has there been any sort of increase in terms  
9 of the upkeep of the gates or signs or anything like  
10 that?

11 A. Yes, a lot.

12 Q. What's happened during that time?

13 A. Tear the gates out and the fences down.

14 Q. And then how do the Okelberrys responded as  
15 there's been this increase?

16 A. Try to put in better gates and more signs and  
17 stuff.

18 Q. And then, I guess the last question would be  
19 have you ever kicked anybody off of your property?

20 A. Off of mine?

21 Q. Or off of the roads leading from your  
22 property into the Okelberry's property?

23 A. Really not any Okelberry's, but off of ours I  
24 have.

25 Q. Yeah. Have you ever observed people trying

216

1 to get from your property onto the Okelberry's roads?  
2 A. Yes.  
3 Q. And then have you had any encounters with  
4 those people?  
5 A. A few times.  
6 Q. And can you describe those encounters?  
7 A. People hunting that shouldn't be hunting on  
8 their property. I've tried to run them off. They'll  
9 just ride right past ya.  
10 Q. Uh-huh.  
11 MR. TENNEY: Okay. I have no further  
12 questions at this time.  
13 THE COURT: Mr. Sweat --  
14 MR. PETERSEN: Can we have just a moment?  
15 There was that one picture in mind. Can we approach and  
16 see if we've got this picture?  
17 THE COURT: Go ahead.  
18 MR. TENNEY: Oh, right. All right. Before  
19 we conclude, has this already been admitted?  
20 THE COURT: What number is it?  
21 MR. TENNEY: This is No. 15.  
22 CLERK: Yeah.  
23 Q. (BY MR. TENNEY) Are you familiar with this  
24 picture right here?  
25 A. Yes.

217

1 Q. Could you describe this to the Court what  
2 this is?  
3 A. This is about 300 yards above my house.  
4 Q. So then on the map this would be --  
5 A. This is right there at the entrance of Maple  
6 Creek Canyon.  
7 Q. Is this gate -- Is this gate typically  
8 locked?  
9 A. Yeah, it's been cut three or four times in  
10 the last couple years.  
11 Q. And how long has this gate been at the  
12 entrance at the Maple Canyon Road?  
13 A. It's been there probably 20 years I'd  
14 imagine.  
15 Q. 20 years. And then before that gate was put  
16 in was there any sort of wire gate or anything?  
17 A. There was always a wire gate.  
18 Q. So for the last 20 years there's been this  
19 metal gate and then before that there was a wire gate?  
20 A. Yeah, and there's a double set, just like  
21 that right in front of my house. We just keep them  
22 closed part time.  
23 Q. So has there ever been a time in your  
24 involvement with that entrance to the Maple Canyon Road  
25 that there's not been a gate of some sort leading off the

218

1 road?

2 A. There's always been a gate because we've had  
3 live stock and Okelberrys has always had live stock  
4 (INAUDIBLE).

5 Q. And then as far back as you remember have  
6 these gates been open or have they been closed?

7 A. They've been closed.

8 Q. And have there been efforts taken by the  
9 property owners to make sure they're closed during that  
10 time?

11 A. Yes.

12 Q. Is the purpose of closing those gates and  
13 your involvement with these gates, has the purpose been  
14 just to keep out live stock or keep live stock in or have  
15 there been other purposes as well?

16 A. Yeah, it's private property is what I figure.

17 Q. And so then would it be fair to say that the  
18 purpose of these gates is also to keep people out not  
19 just live stock?

20 A. Yes.

21 Q. Okay. Thank you.

22 THE COURT: Mr. Sweat?

23 CROSS-EXAMINATION

24 BY MR. SWEAT:

25 Q. Mr. Shepherd, you say you've been up on these  
219

1 roads thousands of times?

2 A. Thousands of times.

3 Q. Do you still go up on these roads?

4 A. Yes, I do.

5 Q. Do you still have permission to go up on  
6 there?

7 A. Yes, I still do.

8 Q. Do you get written letters from Mr. Okelberry  
9 giving you permission to go up on there?

10 A. Yes, I do.

11 Q. What do you use these roads for?

12 A. Oh, gaining access to other places there.  
13 Just riding.

14 Q. What other places are that?

15 A. I ride to the other side of the mountain  
16 right there.

17 Q. Did you ever go down to Thorton Hallow?

18 A. Yeah, I've been to Thorton Hallow, but I've  
19 also been the Main Canyon way too.

20 Q. Ever been to Parker Canyon?

21 A. Yes.

22 Q. Is that what you use the roads for is to get  
23 there sometimes?

24 A. Yes, but I ride up Daniels all the time too.

25 Q. How about Circle Springs, do you ever ride



1 out to Circle Springs?  
2 A. Yes.  
3 Q. You indicated that -- Is this the gate  
4 that's --  
5 A. That's above --  
6 Q. -- on your property?  
7 A. Yeah, that's right above my house. I can see  
8 it from my house.  
9 Q. You indicated those signs have been on those  
10 gates for about seven years; is that correct?  
11 A. They've been there -- Them gates have been  
12 there -- My house -- I built my house 14 years ago  
13 and they were there -- I'm sure them gates have been  
14 there probably at least 20 years.  
15 Q. I believe you just testified that the signs  
16 have been there seven years?  
17 A. The signs have been there for years on the  
18 gates. The gates has been there for at least 20 years,  
19 them gates right there.  
20 Q. Do you like being able to go up on these  
21 roads?  
22 A. Yeah, but if I lose my permission I'll go --  
23 The Forest Service, I'm right there too. I mean, if Ray  
24 sells and somebody else owns it I'll have to use some  
25 other means if I don't get permission.

221

1 Q. Mr. Shepherd, did you attend a meeting in  
2 Wallsberg?  
3 A. Yes.  
4 Q. A couple years ago?  
5 A. Yes, I did.  
6 Q. Was that meeting brought about to talk to  
7 people who were, believed those roads should remain open?  
8 A. Yes.  
9 Q. At that time when you went did you believe  
10 those roads should remain open?  
11 A. Well, I probably did at that time.  
12 Q. You actually filled out a form, didn't you --  
13 A. I haven't done my research enough on it.  
14 Q. But at the time that's what you believed,  
15 huh?  
16 A. I believed at the time, but from what I've  
17 seen I wouldn't believe it now.  
18 Q. Were you the only one that was at that  
19 meeting?  
20 A. No, there was quite a few people at that  
21 meeting.  
22 Q. And were -- Was the general consensus that  
23 they'd all used those roads just like you?  
24 MR. TENNEY: Objection, your Honor. I'm not  
25 sure that he's competent to testify about the general

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1 consensus of the meeting.  
2 MR. SWEAT: He was there, your Honor.  
3 THE COURT: He said he was there. Overruled.  
4 Q. (BY MR. SWEAT) Was that the general  
5 consensus that everybody used these roads?  
6 A. I believe so, but I think everybody had  
7 permission.  
8 Q. You think you were the only one that's used  
9 these roads, but everybody showed up?  
10 A. No, but I think everybody's had permission  
11 too to use them. He's give everybody permission to get  
12 fire wood in there and all sorts of --  
13 Q. Do you think everybody's got a written permit  
14 like you?  
15 A. I don't know if they have either a verbal or  
16 written permit.  
17 Q. Is it nice to be able to travel these roads  
18 and not have anybody else on the roads?  
19 A. Well, it's nice to be able to travel the  
20 roads.  
21 Q. Kind of like your private preserve if no one  
22 else is up there?  
23 A. Well, if I want to go to Thorton or that I  
24 can be there just as quick going the forest route.  
25 Q. Have you ever seen people go through your  
223  
1 yard to get through to Maple Canyon?  
2 A. Yes.  
3 Q. Quite a bit?  
4 A. Not very -- Just very seldom.  
5 MR. SWEAT: Can I have a moment, your  
6 Honor --  
7 THE COURT: Yeah.  
8 MR. SWEAT: -- to confer?  
9 Q. (BY MR. SWEAT) Mr. Shepherd, did you come  
10 meet with me at the County Attorney's office --  
11 A. Yes, I did.  
12 Q. -- a few months ago? And did you tell me  
13 that --  
14 MR. PETERSEN: Objection, your Honor.  
15 Counsel is not going to be a witness.  
16 MR. SWEAT: I'm asking him what he told me.  
17 MR. PETERSEN: Well, that makes him a  
18 witness. Can't be a county -- Can't be a witness --  
19 THE COURT: Well, if it's to impeach --  
20 MR. PETERSEN: Well, he's going to impeach  
21 him with what he supposedly told him then counsel will  
22 have to be a witness.  
23 THE COURT: Well, he hasn't asked a question.  
24 He hasn't asked a question yet. Let's see if he  
25 (INAUDIBLE). Overruled. But Mr. Sweat, if he doesn't  
224

1 answer the way you think he's going to answer then  
2 there's no way you're going to be a witness.  
3 MR. SWEAT: I understand that, your Honor.  
4 Q. (BY MR. SWEAT) Do you remember telling me  
5 you wanted to build a barn across there in that, where  
6 the road goes through?  
7 A. Yeah, but I'm going to put the road in.  
8 MR. TENNEY: Could we get clarification which  
9 road you're talking about, sir?  
10 THE COURT: The road at his house.  
11 THE WITNESS: At my house. I'll put it on  
12 the other side of the bus garage.  
13 Q. (BY MR. SWEAT) Now, it's your testimony that  
14 in the 30 or 35 years that you've been up there thousands  
15 of times, you've very seldom seen anybody else on these  
16 roads?  
17 A. I don't see very many people on them roads.  
18 Q. Did you ever see any of the people that  
19 showed up at the meeting at Wallsberg?  
20 A. Oh, a few of them, yeah. They've had  
21 permission too. Most of them are related to me.  
22 Q. Do you know they've had permission?  
23 A. Yes.  
24 Q. Have you seen their slips?  
25 A. No, but I'm --

225

1 Q. You're sure though, right?  
2 A. I mean, they -- They know Ray real well.  
3 I'm sure they've had permission.  
4 Q. You're sure they have?  
5 A. Yes.  
6 Q. Have you heard Ray tell them they had  
7 permission?  
8 A. No, but most of the people that are up there  
9 have had permission from him.  
10 Q. Is your assumption anyway?  
11 A. Is my assumption.  
12 Q. Because you've had permission?  
13 A. Yes.  
14 MR. SWEAT: No further questions, your Honor.  
15 THE COURT: Anything else?  
16 MR. TENNEY: Just a few more.  
17 REDIRECT EXAMINATION  
18 BY MR. TENNEY:  
19 Q. Counsel just asked you if you have used these  
20 roads freely to go places like Parker Canyon and Circle  
21 Springs. Have you ever gone up to these places, Parker  
22 Canyon, Circle Springs, any of the places on the property  
23 without having gotten permission first?  
24 A. No, I haven't.  
25 Q. You haven't. Counsel indicated that you

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1 attended this meeting three years ago and you said at the  
2 time that you wanted these roads open; is that correct?

3 A. Yes.

4 Q. And you've now said that you don't want them  
5 open. What's changed?

6 A. They're private property, I figure. And I  
7 don't have no grounds to open somebody else's property.

8 Q. And so then in the past three years what,  
9 what's changed your mind? Is it just you thought about  
10 it?

11 A. The vandalism and stuff on property.

12 Q. Okay. Thank you.

13 MR. TENNEY: No further questions.

14 THE COURT: Anything else, Mr. Sweat?

15 MR. SWEAT: No, your Honor.

16 THE COURT: You may step down. Thank you.

17 Next witness?

18 MR. PETERSEN: We call Shane Ford.

19 THE COURT: Okay. Mr. Ford, come forward and  
20 come up to the witness stand.

21 MR. PETERSEN: Before he takes the witness  
22 stand, your Honor, could he just look at Exhibit 2  
23 and --

24 THE COURT: Yes. Before you -- While you  
25 pass, stop there and look at that map and familiarize

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1 yourself with it.

2 THE WITNESS: Okay.

3 THE COURT: Okay. Raise your right hand and  
4 take an oath before you step -- Oh, sorry.

5 CLERK: You do solemnly swear that the  
6 testimony you shall give in this matter now before this  
7 Court shall be the truth, the whole truth, and nothing  
8 but the truth, so help you God?

9 THE WITNESS: I do.

10 THE COURT: Have a seat.

11 DIRECT EXAMINATION

12 BY MR. PETERSEN:

13 Q. Would you state your name, please?

14 A. Shane Ford.

15 Q. And your address?

16 A. PO Box 67 in Alberta, Utah, 84626 is my zip.

17 Q. What is your occupation?

18 A. I'm an outfitter.

19 Q. And what does an outfitter do?

20 A. I lease large blocks of private land, put  
21 them into corporative agreements with the State of Utah.  
22 Those agreements guarantee me the permits I use to sell  
23 to run my business.

24 Q. Is that called a corporative wildlife  
25 management unit?

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1 A. They are.

2 Q. Is this area that we're looking at in Exhibit  
3 2, is that part of this CWL, CWM?

4 A. Yeah, the yellow and that pink shaded area  
5 there is in the CWMU program presently.

6 Q. We're talking about the Okelberry property  
7 and the West Daniels property?

8 A. Correct.

9 Q. When you have that kind of a unit what does  
10 that do? What can you do with that?

11 A. Well, what it is -- It's a corporative  
12 agreement that we enter into with the state and the  
13 private landowners enter into with the state. There are  
14 -- What it is is a -- It's a -- It's a mechanism to  
15 generate guaranteed permits for the landowners use. In  
16 the trade-off for those guaranteed permits there are  
17 permits issued annually to public hunters to hunt that  
18 land as well. So that's kind of the trade-off that goes  
19 on there.

20 Q. Now, did your family own any of these  
21 property that's part of that unit?

22 A. Yeah, they did.

23 Q. As you drive around up there and carved in  
24 the Aspen trees you'll see the name of Ford. Have you  
25 noticed that?

229

1 A. Yeah.

2 Q. Anybody's name that's Ford is likely to be a  
3 relative?

4 A. Yeah, there's, you know, to different  
5 degrees, but I would guess that most of them are all a  
6 relative of mine some where or another.

7 Q. Now, did your great-grandfather own the  
8 property at one time?

9 A. He did.

10 Q. And did that stay in the Ford family for a  
11 period of time?

12 A. To my recollection I think 1918 to around '36  
13 is when they owned it.

14 Q. Does your family, the Ford family, have  
15 occasion to go back in that area for reunions?

16 A. We do. We have a reunion there at the Big  
17 Glade almost every year.

18 Q. Could you point the Big Glade out again here  
19 on this map?

20 A. The Glade would sit just right, right where  
21 this road forks there in section 31.

22 Q. When is your first recollection of having a  
23 family reunion there?

24 A. Junior high school age. You know, mid  
25 1980's, '84, '85, in that neighborhood.

230

1 Q. And when you would go there for a family  
2 reunion it would be in the summer months?  
3 A. Correct, usually mid to late July.  
4 Q. Would you travel on this road called Ridge  
5 Line Road and go down any of those roads, do you know?  
6 A. We did. We took one trip every year. As  
7 part of that reunion we would go down -- My  
8 great-grandfather's name was in that Quaky tree down  
9 there just pass the Maple Creek turnoff in 1918. We like  
10 to always go down as just a little family trip and go to  
11 that tree. And then we turn around and go back out.  
12 Q. Have you had occasion to cut that out?  
13 A. I did. It's at my house now.  
14 Q. And that was carved in 1918?  
15 A. 1918.  
16 Q. When you would go up there in these reunions  
17 do you know if permission was ever sought to travel on  
18 those roads?  
19 A. I didn't. My mother was always kind of in  
20 charge with that. She was fairly good friends with Mr.  
21 Okelberry's wife at the time. And she would always --  
22 I can remember quite often she would call and just tell  
23 her we were having our reunion. Would it be okay if we  
24 went down and did that? I remember always doing that.  
25 Q. As you would go onto the Okelberry property

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1 would you go through gates?  
2 A. Yes.  
3 Q. And do you know if you went through any other  
4 gates as you went down the Mountain Ridge Road?  
5 A. Through any other gates?  
6 Q. Yes.  
7 A. I guess I'm (INAUDIBLE).  
8 Q. As you travel on this property were there  
9 other gates on the property?  
10 A. There's a few gates as you go across that  
11 top, you know, just depending on where the sheep were,  
12 depending on how they were using it at the time, they'd  
13 be open or closed, depending on which pasture they were  
14 in.  
15 Q. How often did you have these reunions?  
16 A. We have them annually. We have them at the  
17 Glade quite regularly. Probably three years out of five  
18 we'll have them at the Glade. The last one we had there  
19 I believe was in 2002 I think was the last year that we  
20 had one there. We're having one there this year.  
21 Q. You'll go back again this year?  
22 A. Uh-huh.  
23 Q. Do you know if when you hold those reunions  
24 you always sought permission?  
25 A. To my knowledge we did. Like I said, that

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1 was kind of my mother's, that was one of the things she  
2 handled it. And I know that she did, you know, did  
3 always try to call them and tell them, ask them if we  
4 could go on. Tell them the days, the day we were going  
5 to go in and what we were doing.

6 Q. Now, what was your -- You've been to  
7 reunions there -- What was your next involvement with  
8 this property?

9 A. The next, you know -- My next work there or  
10 the next things I did there I hired on with the state,  
11 state government as a trapper in 1994. And I had  
12 occasion to be on that place, you know, here and there  
13 from 1994 up until I quit in 2002 I believe.

14 Q. So about eight years?

15 A. Yeah, in that neighborhood.

16 Q. What does a trapper do?

17 A. Just works on live stock problems with  
18 coyotes, bear, mountain lion, just -- It's -- That's  
19 another corporative agreement between private landowners  
20 and the state government that, you know, the state  
21 government provides a service to those people that are  
22 having live stock problems, you know, damage caused by  
23 predators (INAUDIBLE).

24 Q. In connection with that work did, was it  
25 necessary for you to travel on what is known as the Ridge

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1 Line Road?

2 A. Yes.

3 Q. Thorton Hallow, Parker Canyon?

4 A. Yeah, you know, we were around all of that,  
5 you know, all of the country in question here.

6 Q. Are those roads, when you started in 1994,  
7 were they about the same now as they were at that time?

8 A. Yeah, I don't know much change in them.  
9 They're pretty similar.

10 Q. I want to show you a picture here, if I may.  
11 I'm showing you what's been marked as Defendant's No. 6,  
12 Exhibit 6, and ask you if you can identify that?

13 A. That's the Circle Springs gate or what we  
14 call the Circle Springs gate where you go into Circle  
15 Springs off of the public ground.

16 Q. Now, you can see the -- Mr. Ford, you can  
17 see depicted on there a tire. Can you see that tire?

18 A. Yes, sir.

19 Q. It says keep out on it.

20 A. Uh-huh.

21 Q. Do you know if that tire was there when you  
22 were camping with your reunions and the (INAUDIBLE)?

23 A. Those tires have been there a long time. You  
24 know, as long as I can remember being around that place  
25 there was the big tires in the trees. You know, that's

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1 some of the first signage I remember on that, you know  
2 that property, seeing those big tires. And I do remember  
3 us doing our reunion stuff, I always remember seeing  
4 those big tires, spray painted tires?  
5 Q. It's also depicted on there, is it not, up  
6 here, the sign right there. To you know what that says?  
7 A. I can't really tell just from the picture. I  
8 mean, it looks like an old no trespassing sign.  
9 Q. Okay. Can you tell what that yellow one says  
10 right there?  
11 A. The yellow one says no trespassing.  
12 Q. And then there's another red one. Do you  
13 know what that red right there would be?  
14 A. I -- I can't really read it in the picture,  
15 but I'd pretty sure it's a trap sign. Like the trappers,  
16 if they're working that country if they have equipment  
17 set on the property and a sign saying there's a trap or  
18 something that they got set on that property, they're  
19 required to post the entrances of the property with  
20 signs. And that would be my guess as what it is, but  
21 it's in that picture (INAUDIBLE)  
22 Q. And is that (INAUDIBLE) the property?  
23 A. Yeah, yeah, that's just you know a  
24 prerequisite that the program puts on you. If you have  
25 equipment you got to have it posted.

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1 Q. I'll show you what's been marked as  
2 Defendant's Exhibit 8 and ask you if you can identify  
3 that?  
4 A. Yeah, I can identify it. That's the same  
5 gate, Circle Springs.  
6 Q. Is that the metal gate to replace the one  
7 that's shown on Exhibit 6?  
8 A. Yes, correct.  
9 Q. And does that show that tire in the tree?  
10 A. Yes.  
11 Q. Now, you've indicated that you worked as a  
12 trapper from '94 to '02, did you ever -- Well, let me  
13 ask. How often would you go into this area?  
14 A. You know, it was a real pretty site specific  
15 situation. It wasn't -- The Wallsberg country wasn't  
16 my specific district. I trapped districts that bordered  
17 it. So I would go there kind of upon request. I would  
18 be there traditionally from late spring through the  
19 middle parts of the summer would be the times of year  
20 that we would be there.  
21 You could be there for a week at a time if,  
22 you know, if he was to say you was having lion or bear  
23 problems in there we would stay for a week at a time and  
24 work on it. You know, it could be just a day here or  
25 there. So every year was different. It would just

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1 depend on the land and how things went.

2 Q. Did you ever run across anybody from the  
3 public, any site seers, wood cutters and so fourth going  
4 up?

5 A. I never did when I was trapping. The people  
6 I saw there were either employees of Mr. Okelberry, of  
7 West Daniels people. There were people there, but they  
8 were always people that had business there. You know,  
9 the people that I saw there, which wasn't a whole lot of  
10 people any ways, were people that had business there.

11 Q. Now, you left the service of the state in  
12 '02. What's your next involvement with the property? Is  
13 that this hunting unit you told us about?

14 A. Yeah, I leased the -- I leased the hunting  
15 rights to it and began hunting it in 2002, I think, was  
16 the first fall we hunted Wallsberg.

17 Q. And how often do you get there now? Is it by  
18 the fact you have a hunting unit?

19 A. I'm there a lot now, probably a lot more now  
20 than I was before. We spend -- We're there every week  
21 in the summer months. You know, at least a day or two a  
22 week in the summer months. And then from, you know, from  
23 late August through middle of November we, either I'm  
24 there or somebody that works for me is there pretty much  
25 every day. We have a camp that we keep there and, you

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1 know, we have people there pretty study.

2 Q. Do you run across people from the general  
3 public there now as go up there?

4 A. You know, pretty limited scale. The first  
5 year maybe more so than the last couple, but not -- You  
6 know, every time you're hunting private land you're going  
7 to have some trespassing issues, but not -- I wouldn't  
8 say any more so than anywhere else, but yeah, there's --  
9 We definitely have to ask some people to leave. And that  
10 happens every year.

11 Q. That -- Those people that come and want to  
12 hunt on this private property that you've got  
13 (INAUDIBLE)?

14 A. I assume that's what they're -- Yeah, I  
15 mean, they're there. They're there in the hunting season  
16 hunting, you know. They're there with rifles and those  
17 are the people that we've had to ask to leave.

18 Q. Now, on these pictures the one pictures shows  
19 the metal gate. Is it locked during the hunting season?

20 A. It is.

21 Q. And are other gates locked up there during  
22 the hunting season?

23 A. Yes, they're locked.

24 Q. In respect to the roads that are there, this  
25 Ridge Line Road, would you describe that?

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1 A. It's just awful rough, narrow, rocky road.  
2 You know, it's just a pretty poor mountain road.

3 Q. The Maple Creek Road, would you describe  
4 that?

5 A. Maple Creeks probably one of the roughest  
6 ones up there. I don't think there's anyway to get a  
7 vehicle down it. Well, I guess depending on how hard you  
8 wanted to try. But it's more of a four-wheeler trail,  
9 horse road. You know, you can ride horse up and down it.  
10 You can ride a four-wheeler down it. It's real rocky.  
11 You know, got some awful big rocks in it, pretty darn  
12 rough road.

13 Q. The Parker Canyon Road, how would you  
14 describe that?

15 A. Just the same, just narrow, rough, pretty  
16 rough roads.

17 Q. Thorton Hallow?

18 A. The same thing. They're -- All those  
19 roads, you know, are just what they are. They're not  
20 much.

21 Q. Circle Springs?

22 A. Circle is a rough road.

23 Q. Now, when you -- You take hunters up on the  
24 property, I suppose?

25 A. We do.

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1 Q. And do you camp up there?

2 A. We do.

3 Q. When you're up there with your, with your  
4 guide service and so forthwith, your hunter, are you  
5 using those roads to hunt on?

6 A. We use -- We do use the roads. We use them  
7 with four-wheelers. Mostly we use very little vehicles  
8 up there. Most of our hunting we'll use vehicles in the  
9 camp. Park our vehicles at camp. And, you know, I'd say  
10 90, 95 percent of your hunting is done either on horse  
11 back or hiking or four-wheelers. You know, we don't use  
12 vehicles on those roads very little just cause they're so  
13 rough.

14 Q. Is that the reason why you don't use them is  
15 because they're so rough?

16 A. Yeah, it's -- You can pretty much destroy a  
17 truck in a fall if you want to.

18 Q. In respect to people wanting to hunt on the  
19 Forest Service area. If a person wanted to hunt the  
20 Thorton Hallow and Parker Canyon is there other ways to  
21 access that besides on these roads?

22 A. Well, there is -- You can access from  
23 Daniels. Now, there's trails up both canyons. You know,  
24 you can you access it from Daniels Canyon. As far as  
25 Thorton goes, you know, you can be to the Thorton Hallow

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1 Pond, I would guess, just as fast as walking from  
2 Okelberry's gate as you can driving around it. You know,  
3 I've never timed it, but it's not too far to get down  
4 there. So there's other access into those places. It  
5 would be mostly a foot.

6 Q. You're saying that you could actually walk  
7 from where the Okelberry gate is over to Thorton Hallow  
8 and onto that gate?

9 A. I can't imagine more than ten minutes going  
10 down. It's not very far.

11 Q. Can you see where ATV's have?

12 A. They're twiddling on it now. I don't know  
13 how farther they've got it. I kind of quit paying  
14 attention over the last year or so. But they were --  
15 They're kind of carving their way down that fence. And I  
16 don't know if they can get there or not now, but they  
17 were working towards it.

18 Q. Can you access that Circle Springs Road from  
19 the Main Canyon Road?

20 A. Yeah -- Well, you can't access the road,  
21 but you can, you know, you can hike from Willow Springs  
22 up to Circle pretty quick. I mean it's -- You can --  
23 I would bet I could hike from Willow Springs to Circle  
24 faster than I could drive the Big Glade and around to  
25 Circle Road and get down to it.

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1 Q. Now, in your opinion are those roads, have  
2 they been open to the public for continuous use?

3 A. Not in my lifetime. No, not in my experience  
4 up there.

5 Q. Fine.

6 MR. PETERSEN: That's all.

7 THE COURT: Cross, Mr. Sweat?

8 MR. SWEAT: Thank you, your Honor.

9 CROSS-EXAMINATION

10 BY MR. SWEAT:

11 Q. Your experience up there, for all intense and  
12 purposes, begins in about 1994; is that right?

13 A. Well --

14 Q. Before that you testified you went up family  
15 reunion?

16 A. '84 -- '84, '85 is when, you know, when I can  
17 remember going up there. Our families been going there  
18 prior to that, but really, my memory of it's not --

19 Q. And that was maybe three out of every five  
20 years?

21 A. In that area.

22 Q. And then you went up as a trapper in 1994; is  
23 that right?

24 A. Correct.

25 Q. Currently you run the WC, CWMU; is that

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1 correct?  
2 A. I do.  
3 Q. Is that your livelihood?  
4 A. Well, it's part of it. I operate several.  
5 Q. Now, to put a CWMU together who is it you  
6 have to contract with?  
7 A. Well, the private land -- I contract with  
8 the private landowners and they in turn contract with the  
9 division of Wild Life Resources or the State of Utah.  
10 It's a -- You know, I make a contract to lease their  
11 hunting rights and they in return contract with the state  
12 to provide the a hunting right to the public and, you  
13 know, and to enter that ground into the program.  
14 Q. And so what do you get out of putting that  
15 together?  
16 A. Pardon me?  
17 Q. What do you get out of it?  
18 A. I get the permits -- I get the guaranteed  
19 permits that are generated by that unit to sell.  
20 Q. So you sell the permits?  
21 A. I do.  
22 Q. What does the landowner get out of it?  
23 A. The landowner gets the land, the money that I  
24 pay him to lease his hunting.  
25 Q. How many permits did you get to sell up there

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1 last year?  
2 A. Six bull elk, I think we get 18 deer. I'm  
3 not sure if we get 18 or 9. I think it got changed to 9.  
4 I think we may have got 18 deer last year. Of that we  
5 don't use hardly any. But I think I get 6 and 18. I'm  
6 not exactly sure on the cows. 6 or 7 (INAUDIBLE) tags.  
7 Q. Does the property owner, do they get any tags  
8 to sell?  
9 A. No, they do not.  
10 Q. They just get the lease from you?  
11 A. Right.  
12 THE COURT: Before (INAUDIBLE) before you go,  
13 just so the Court knows, how many permits does the state  
14 get to sell?  
15 THE WITNESS: Well, the state -- The public  
16 -- It's not the state doesn't sell the permits, the  
17 state offers permits to the public through a draw. They  
18 receive, last year I think it was in neighborhood of 25  
19 antler (INAUDIBLE) permits, they got one bull moose tag,  
20 two buck deer and a bull elk.  
21 THE COURT: (INAUDIBLE).  
22 Q. (BY MR. SWEAT) Is there a set price on what  
23 you charge for those permits?  
24 A. Oh, you'd like to think there is, but -- It  
25 will range anywhere from \$7,500 to 9,000 depending on,

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1 you know, the year and the time and how that works.

2 Q. Does it depend any on how well people have  
3 done on the past --

4 A. Of course it does.

5 Q. Kind of deer they got?

6 A. Of course it does.

7 Q. Kind of elk they got?

8 A. Of course it does.

9 Q. You indicated you can walk to Circle Springs  
10 from the road in about ten minutes?

11 A. No, not from Circle. I said ten minutes from  
12 the road down to Thorton.

13 Q. From the road to Thorton?

14 A. Uh-huh.

15 Q. How about someone that's 70 years old? How  
16 long would it take them to walk down?

17 A. That's all relative. I don't know. I can't  
18 answer that. It depends on how good shape they're in.  
19 It's all down hill.

20 Q. Do you think if these roads are closed,  
21 Circle, Thorton, Parker, do you think less hunters get  
22 down there?

23 A. You know, I would assume so, but that being  
24 said there's -- The guys that -- If I can, I think  
25 the guys that want it go down there now have a better

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1 experience going down there. Cause, you know, the guys  
2 that actually want to get down there will do the work to  
3 get down there. And, you know, I've actually talked to  
4 guys that are on their horses that think it's great,  
5 because they can ride their horses down that fence line  
6 and have a little less competition. But yeah, you know,  
7 I would definitely say there's going to be less, less  
8 people down there.

9 Q. Do you like have less competition too?

10 A. On the forest?

11 Q. On your CWMU?

12 A. I shouldn't have any competition on my CWMU.  
13 A CWMU permit is only valid on a CWMU. So you know  
14 there's --

15 Q. Are the wild life allowed to go back and  
16 fourth across it?

17 A. Sure.

18 Q. So if there's less wild life got in some of  
19 these areas neighboring areas there's more of a chance  
20 that a big ones going to stay in your area?

21 A. Well, you're targeting different wild life.  
22 I'm targeting five to seven year old bulls. Where as  
23 other hunters targeting spike elks. So we're not hunting  
24 the same, not even hunting the same elk. As a general  
25 rule there's lottery tags for Wasatch bulls that guys can

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1 go hunt there, which surely we're targeting the same elk  
2 then, but that's in a real limited scale?  
3 Q. (INAUDIBLE) those bulls you leave a lot of  
4 time for young bulls to grow up, don't you?  
5 A. Sure.  
6 Q. '94 as a trapper, did you use these roads?  
7 A. I did.  
8 Q. What did you use them with?  
9 A. Government vehicle and horse, both.  
10 Q. Did you ever drive clear to the fence in  
11 Thorton Hallow?  
12 A. Not in a government truck.  
13 Q. Did you ever drive to Parker Canyon?  
14 A. Not clear to the fence. The farthest I ever  
15 went in a government truck was down to White Pole.  
16 Q. Is it your testimony that it can't be done?  
17 A. Pardon me?  
18 Q. Is it your testimony it can't be done?  
19 A. No, it's not my testimony it can't be done.  
20 Q. Is your testimony that most people don't do  
21 it?  
22 A. I would say that's accurate.  
23 Q. You indicate that where you're up there  
24 you're seeing a lot people that are wanting to come and  
25 hunt on the property; is that right?

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1 A. I don't think I said a lot, but there are  
2 some.  
3 Q. Did you ever meet anybody that ever expressed  
4 where they wanted to go through the roads and express  
5 their anger or their disgust or their --  
6 A. Yeah, I've talked to -- Really only one  
7 person that comes to mind that was quite hostile about  
8 it.  
9 Q. Were there any that weren't hostile, but just  
10 said, you know, we know we use to go down those roads all  
11 the time and now you don't let us?  
12 A. Not that I had conversations with. The  
13 people I had conversations with there had a few with guys  
14 that maybe elk killed at Thorton or at Parker Canyon that  
15 wanted to come through. Anybody that I've ever talked to  
16 that was civil about it we let come through and go down  
17 and get their elk. And that kind of stuff went on a  
18 little bit. But didn't have a lot of conversations, you  
19 know, just a few that were -- Like I say, one comes to  
20 mind that was pretty hostile, but other than that --  
21 Q. So you have the power of the pass to let  
22 people go through if they want to go through while you  
23 have the CWMU?  
24 A. Well, yes, I'm the operator of the unit.  
25 Q. Between '83 and '90 how many times do you

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1 think you went to this area?  
2 A. Oh, not a lot. Two times a year at the most.  
3 Q. When you went up as a trapper were you aware  
4 if they were selling trespass permits to get onto Mr.  
5 Okelberry's property?  
6 A. Yeah, I was. I mean, I was aware that there  
7 was some, you know, some commercial hunting going on  
8 there, like that type of stuff going on.  
9 MR. SWEAT: May I have a second, your Honor?  
10 THE COURT: You may.  
11 Q. (BY MR. SWEAT) When does your current  
12 contract end with this CWMU?  
13 A. I have a ten year lease with Mr. Okelberry  
14 right now, but there's, you know, there's some other  
15 things involved with that. So --  
16 Q. Okay.  
17 MR. SWEAT: That's all I have, your Honor.  
18 THE COURT: Okay. Anything else, Mr.  
19 Petersen?  
20 MR. PETERSEN: No, I don't think so, your  
21 Honor.  
22 THE COURT: Okay. Do you know, was there  
23 another CWMU prior to yours?  
24 THE WITNESS: There was.  
25 THE COURT: Okay.

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1 THE WITNESS: There was.  
2 THE COURT: Okay.  
3 THE WITNESS: I believe it began in '94, '95  
4 was the first year it was in, either '94 or '95.  
5 THE COURT: Okay. Thank you. You may step  
6 down.  
7 MR. PETERSEN: We call Bruce Huvad.  
8 THE COURT: Okay. Mr. Huvad, come forward.  
9 Come up here to the witness stand.  
10 MR. PETERSEN: Mr. Huvad -- Could we have  
11 him look at this exhibit?  
12 THE COURT: Okay. Come down here first and  
13 look at this map and orient yourself.  
14 MR. PETERSEN: Can you just look at this map  
15 and see if (INAUDIBLE)?  
16 THE WITNESS: It does.  
17 MR. PETERSEN: (INAUDIBLE)?  
18 THE WITNESS: Yes.  
19 MR. PETERSEN: Okay.  
20 THE COURT: Come up here and raise your right  
21 hand and take an oath.  
22 CLERK: You do solemnly swear that the  
23 testimony you shall give in the matter now before this  
24 Court shall be the truth, the whole truth, and nothing  
25 but the truth, so help you God?

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1 THE WITNESS: I do.  
2 THE COURT: Have a seat.  
3 DIRECT EXAMINATION  
4 BY MR. PETERSEN:  
5 Q. Would you state your name, please?  
6 A. Robert Bruce Huvard.  
7 Q. And what is your address?  
8 A. 564 East 600 South Salem, Utah.  
9 Q. And what is your occupation?  
10 A. Retired and plus I run a hunting and guiding  
11 business, owner, operator.  
12 Q. How old are you?  
13 A. 61.  
14 Q. What does an outfitter do? A guy in the  
15 outfitter, what kind of work is that?  
16 A. You take people -- You procure permits or  
17 licenses for people and then guiding, then guide them on  
18 hunting trips for deer, elk and other species.  
19 Q. Now, are you familiar with this Okelberry  
20 property, generally the property that's designated on  
21 Exhibit 2?  
22 A. I am.  
23 Q. When did you first become acquainted with  
24 that property?  
25 A. In 1966.

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1 Q. And for what purpose did you go there?  
2 A. I went there to ask permission to go hunting.  
3 Q. And who did you seek permission from?  
4 A. The Okelberrys.  
5 Q. And what were you going to hunt?  
6 A. Deer.  
7 Q. And was permission given to you to hunt the  
8 property?  
9 A. It was.  
10 Q. When you went there in 1966 did you go  
11 through any gates to get onto the property?  
12 A. I did.  
13 Q. Did you see any signs there in 1966?  
14 A. I did.  
15 Q. What were the signs?  
16 A. Keep out and private.  
17 Q. Did you have occasion to travel over the  
18 roads?  
19 A. I did, what there was of them.  
20 Q. How would you describe the, in 1966 the  
21 Mountain Ridge or the Ridge Line Road?  
22 A. Horse trail.  
23 Q. Not very good?  
24 A. Extremely bad.  
25 Q. Could you travel on that with a truck or a

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1 four-wheel drive type vehicle?  
2 A. In '66 -- I wouldn't have tried it at all.  
3 I would of traveled on foot or with a horse.  
4 Q. In 1966 where did you do your hunting?  
5 A. Mainly on the Okelberry property.  
6 Q. Did you come down onto the Circle Springs  
7 Road?  
8 A. Yes, I did.  
9 Q. What was the condition of that road?  
10 A. Extremely rough.  
11 Q. Did you go down the Mountain Ridge, or  
12 maintain or the Ridge Line Road?  
13 A. I did.  
14 Q. How far down did you go in 1966?  
15 A. To where you could overlook Heber City area.  
16 Overlook what's today is the, a gun club.  
17 Q. You didn't go all the way to the gun club,  
18 you went through the (INAUDIBLE)?  
19 A. Yes.  
20 Q. What was that road like as you went down, as  
21 left the Okelberry property and went down there?  
22 A. Extreme -- It was more a trail than it was  
23 a road.  
24 Q. Was it difficult to get over?  
25 A. Yes, it was.

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1 Q. Did you, in 1966, go down into the Parker  
2 Canyon area to hunt?  
3 A. Yes.  
4 Q. What was the condition of that road?  
5 A. Horse trail.  
6 Q. And the Thorton Hallow Road, what was the  
7 condition there?  
8 A. That was just about the same. It might have  
9 been better at times, but it was pretty rough, Thorton  
10 Hallow Road.  
11 Q. In 1966 did you have occasion to see any  
12 other hunters up there?  
13 A. I did.  
14 Q. Do you know if they were there by permission  
15 or not?  
16 A. There was two that were and there was one  
17 gentlemen and his son that were not.  
18 Q. Did you have any conversation with them?  
19 A. I asked them what they were doing there.  
20 Q. Did you ask them to leave?  
21 A. I asked them that they -- I told them they  
22 shouldn't be there on private property without  
23 permission.  
24 Q. Now, did you go back on subsequent years?  
25 A. I did.

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1 Q. And what years did you go back?  
2 A. I went back pretty near every year up to  
3 1990.  
4 Q. So from 1966 to 1990 you hunted in that area?  
5 A. Yes, I did.  
6 Q. And during that period of time did you obtain  
7 a hunting unit permit or was that after?  
8 A. It was after that period.  
9 Q. Okay. When you hunted from 1966 to 1990 did  
10 you obtain permission from the Okelberrys?  
11 A. I did.  
12 Q. Did you do that every year?  
13 A. I didn't have to every year. I asked them if  
14 I, you know -- Occasionally I'd -- One or two years  
15 between.  
16 Q. Now, during that period of time did you go  
17 through gates --  
18 A. Yes, I did.  
19 Q. -- to get onto the Okelberry property?  
20 A. I did.  
21 Q. And were there subsequent gates as you went  
22 up the mountain, the Ridge Line Road?  
23 A. There were.  
24 Q. Did those roads change in that period of  
25 time? Did they become better roads or better trails or  
255  
1 whatever?  
2 A. They did become better.  
3 Q. Very much so or did they stay about the same?  
4 A. At times they were a lot better when the  
5 property owners took their equipment in there and did  
6 work on them.  
7 Q. And did you observe that over a period of  
8 time?  
9 A. Yes.  
10 Q. During this period of time from 1966 to 1990  
11 do you know if other people obtained permission to use  
12 those roads?  
13 A. They did.  
14 Q. Do you know if other people used those roads  
15 that did not have permission?  
16 A. Yes.  
17 Q. Do you know if they were asked to leave?  
18 A. When I was personally hunting there I would  
19 ask them to leave if they didn't have permission.  
20 Q. Were there very many people?  
21 A. No.  
22 Q. Did they constitute many --  
23 A. No.  
24 Q. Now, you obtained a hunting unit. You called  
25 that a CWMU.

1 A. I did.  
2 Q. When did you obtain that?  
3 A. In 1995.  
4 Q. And you had that hunting unit from 1995 till  
5 what time?  
6 A. 2001.  
7 Q. Mr. Ford just testified, I believe, he took  
8 that unit over in 2002; would that be correct?  
9 A. That is correct.  
10 Q. During this period of time from 1995 to 2001,  
11 would you go up there during times other than the hunting  
12 season?  
13 A. Yes.  
14 Q. What would you do when you would go up there  
15 during other times?  
16 A. Check the posting; go up and clear the roads  
17 as needed to be cleared in the spring; replace locks that  
18 had been blown off or cut off; fix any gates they pulled  
19 down; different things like that.  
20 Q. Now, you say you would go up and check  
21 posting. What do you mean by check posting?  
22 A. No trespassing signs that were posted on the  
23 property and the perimeter of the property.  
24 Q. Now, you indicated that you saw signs like  
25 that in 1966 when you began hunting up there?

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1 A. Not the signs like I put up. But I did say,  
2 saw signs that -- There were signs that said keep out  
3 and private.  
4 Q. Then you said you would clear roads. In what  
5 way would you clear roads?  
6 A. Chain saw.  
7 Q. These -- Because of trees that would fall  
8 down?  
9 A. Yes, if I didn't do them they didn't get  
10 done, unless Kelly brought the sheep in on the place.  
11 And I was doing them for, courtesy for Ray because they  
12 were his roads.  
13 Q. Was this a -- Is this a big problem up  
14 there, clearing roads of those trees?  
15 A. It is.  
16 Q. Is it something that's just done once in the  
17 spring of the year or do the trees fall down during the  
18 summer and the fall?  
19 A. I took the lease -- I started leasing the  
20 property in 1993. And depending on the type of storms we  
21 had during the year, there'd be an average of two to five  
22 times a year we'd have to, at least that many times, you  
23 know, to clear trees and stuff off the roads to be able  
24 to use those roads up there.  
25 Q. Would -- Would you carry in your vehicle a

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1 chain saw to help you do that?  
2 A. A chain saw or a hand saw, all the time.  
3 Q. You'd sometimes use a hand saw on those  
4 trees?  
5 A. Oh, yeah.  
6 Q. You indicate that you would fix gates. In  
7 what way would you fix gates?  
8 A. Replace them, dig new post holes and put  
9 cement, steel posts back in or replace the regular green  
10 steel post that they'd pull out, the fence, you know, the  
11 wire and everything else.  
12 Q. Now, you indicated that you had this hunting  
13 unit from '95 on, but you leased the property in '94; am  
14 I correct in that?  
15 A. '93.  
16 Q. Excuse me, in '93. How did it go during this  
17 period of time when you were up there in '93, '94?  
18 A. '93 and '94 -- '93 was not too bad once  
19 people realized that we had the lease on it and without  
20 paying they weren't allowed on the property.  
21 Q. Did you -- Was this before the hunting unit  
22 that you were, that you were charging people to use that?  
23 A. Yes, yes, I was.  
24 Q. And did you have an arrangement with the  
25 Okelberrys in some way that --

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1 A. I had assigned -- We had assigned police on  
2 the, for the hunting on the property.  
3 Q. And so you would charge so much per person to  
4 come on there and to hunt?  
5 A. Yes, I would.  
6 Q. And if they weren't -- And if they didn't  
7 pay were they not allowed to use the roads?  
8 A. I kept everybody off, period.  
9 Q. That was in -- Let me see if I got this  
10 right. That was in '93?  
11 A. Actually in '94 --  
12 Q. '94?  
13 A. -- I started that.  
14 Q. You started that in '94 and '95?  
15 A. 5 and 6 and 7, I allowed nobody on that.  
16 Q. And how did it go for that period of time up  
17 through '96?  
18 A. It wasn't too bad. I had a few trespassers,  
19 a few, you know, the gates and stuff, locks shot off. I  
20 had a, you know, some people confronted me. I told them  
21 get off, like the day they come on the property. I  
22 pretty -- It was no trespassing. No usage unless you  
23 pay.  
24 Q. What would you charge to do that?  
25 A. What would I charge?

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1 Q. Yeah.

2 A. Anywhere from -- At first it was \$200 per  
3 person. Then when it became a CWMU I charged anywhere  
4 from \$1,200 for deer permit to \$3500 or better for an elk  
5 permit.

6 MR. PETERSEN: Excuse me, just one minute,  
7 your Honor.

8 Q. (BY MR. PETERSEN) In 1997 what happened  
9 then, anything?

10 A. It became more difficult to control access on  
11 the property.

12 Q. In what way did it become more difficult?

13 A. I was threatened; called at home; I was  
14 threatened on the property; I was actually shot at on the  
15 property -- Shot at while I was on the property;  
16 tearing gates down; and shooting locks off. Just really  
17 tough.

18 Q. And did you -- Were you up there full-time?

19 A. No, I was not up there full-time, but I was  
20 up there -- I had people hired to patrol it for me,  
21 specially on weekends.

22 Q. And would they keep people off the property  
23 then?

24 A. They definitely would.

25 Q. Until '97 though you didn't have that sort of  
261

1 problem then?

2 A. I had it locked up.

3 Q. Now, in the spring of the year how soon could  
4 you get into that property?

5 A. June, sometime in June. Sometime -- Or  
6 middle to late June.

7 Q. And how late in the season could you be  
8 there?

9 A. Depending on whether conditions we could be  
10 there till November, but, you know, first part of  
11 November sometime. We usually got enough snow up there  
12 that pretty well took care of any travel there on the  
13 north face.

14 Q. Are you aware that as far as accessing the  
15 Forest Service property that it's possible to do that by  
16 not using these roads?

17 A. Definitely.

18 Q. Do you know if hunters have ever done that  
19 before?

20 A. Definitely.

21 Q. If they wanted to hunt the Parker Canyon and  
22 the Thorton Hallow area where would they come from?

23 A. If they were wanting to hunt Parker Canyon  
24 they could come in from the bottom, down off of U.S. 40  
25 down there. On Thorton Hallow you could go right up to

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1 the forest, to the exit of the private property and ride  
2 down the fence line. On Circle Springs you could drive,  
3 you could leave the Big Glade there -- I mean, it's  
4 accessed right there from the Big Glade. And you could  
5 drive up to the Okelberry fence line and ride around the  
6 fence to access Circle Springs.

7 Q. Okay.

8 A. That's what I did before I asked permission  
9 to gain hunting on Okelberry.

10 Q. So you've actually done that then before you  
11 had permission?

12 A. Oh, yeah, uh-huh.

13 MR. PETERSEN: May I confer just one moment,  
14 your Honor?

15 THE COURT: You may.

16 Q. (BY MR. PETERSEN) Mr. Huvard, when you were  
17 in control up there and you were asking people to leave,  
18 was it to leave because the hunting or to leave and not  
19 use the roads?

20 A. It was to leave and not use the roads.  
21 That's private property.

22 Q. Did you use those roads -- When you had  
23 your hunting unit up there were you using those roads  
24 much?

25 A. I was.

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1 Q. Did you use horses as well?

2 A. I used horses to hunt.

3 Q. Did you walk as well?

4 A. Yes.

5 Q. Did you have ATV's as well?

6 A. I did.

7 MR. PETERSEN: Thank you.

8 THE COURT: Mr. Sweat, cross?

9 CROSS-EXAMINATION

10 BY MR. SWEAT:

11 Q. Mr. Huvard, you indicated that when you had  
12 the CWMU you weren't up there every day; is that correct?

13 A. That's correct.

14 Q. You also indicated that you never let anyone  
15 use the roads, even if they were just going through; is  
16 that correct?

17 A. That's correct.

18 Q. Is there a possibility that some of the  
19 people you indicate were hired, that were up there every  
20 day, may have let people use the roads to get through if  
21 they were going on to the forest?

22 A. There is a possibility, but I wasn't aware of  
23 it. It wasn't authorized.

24 Q. What changed in 1997 that suddenly it all  
25 became real tense or however you put it?

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1 A. And what became -- It was the attitude.  
2 Q. In 1997 things really got bad; right?  
3 A. It was the attitude of the public.  
4 Q. Isn't it true that's really the first year  
5 you completely shut off the roads?  
6 A. It is not.  
7 Q. Is that about the time you first really  
8 started patrolling the roads?  
9 A. It is not.  
10 Q. How did you meet the Okelberrys?  
11 A. How did I meet the Okelberrys?  
12 Q. Yeah.  
13 A. I met the Okelberrys by going on their  
14 property and asking, driving, walking -- Actually I  
15 walked from the fence line to a sheep camp and asked  
16 permission. That's when I first met the Okelberrys.  
17 Q. What brought you up to this area? You say  
18 you're from Salem, Utah. Did you ever live in Wallsberg?  
19 A. No.  
20 Q. Between the 60's and the 90's did you ever  
21 hunt anywhere else in the state?  
22 A. I did.  
23 Q. You indicated between '66 and '90 when you  
24 were just asking permission that you would kick people  
25 off Okelberry property; is that correct?

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1 A. That is true.  
2 Q. Did Mr. Okelberry ask you to do that?  
3 A. They wasn't -- Unless they had permission  
4 they wasn't suppose to be on there, I was told that.  
5 Q. Were you asked to kick people off it?  
6 A. I was asked to ask them to leave, yes. I  
7 don't kick anybody off, I ask them to leave.  
8 Q. How often were you up there in any given week  
9 between '66 and '90?  
10 A. On any given week.  
11 Q. Did you come up every week during that time?  
12 A. During the hunting seasons, yes.  
13 Q. Even when you were hunting in other areas?  
14 A. No, not when I was hunting other areas. I  
15 was not this during that time.  
16 Q. Do you currently hunt up in this area?  
17 A. I do not.  
18 Q. Do you currently run CWMU's at this time?  
19 A. I buy permits from CWMU operators, yes.  
20 Q. And then resell them or --  
21 A. I guide them.  
22 Q. And you guide them? Since Mr. Ford has taken  
23 over have you guided any up in this CWMU?  
24 A. No, I have not. I have not made those  
25 arrangements with him.

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1 Q. When you're up there between 1996 and 1990  
2 were the gates locked at that time?  
3 A. Yes, some of them were.  
4 Q. Which gates were locked?  
5 A. The one where, from Circle Spring -- I  
6 mean, excuse me. The way you access Thorton Hallow Road,  
7 the one coming onto the main Okelberry property.  
8 THE COURT: Why don't you go up and point?  
9 THE WITNESS: I'll show you the gates that  
10 were locked at that time.  
11 THE COURT: Go down to the map and show.  
12 THE WITNESS: This gate here was locked.  
13 This gate here was locked.  
14 Q. (BY MR. SWEAT) Between '66 and '90 was there  
15 always a gate at that point on Ridge Line Road where it  
16 crosses into the Okelberry property?  
17 A. Yes, there was.  
18 Q. Was there a cattle guard there?  
19 A. I can't remember if there was or not for that  
20 full period of time. I don't recollect whether there was  
21 or not.  
22 Q. Is there one there now?  
23 A. Where, the Ridge Line Road?  
24 Q. Yes.  
25 A. No, it's further up.

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1 Q. Where this road crosses from Ridge Line into  
2 Okelberry property, you don't believe there's a cattle  
3 guard there now?  
4 A. There's cattle guards -- One, two -- Yes,  
5 there is. Yes, there is.  
6 Q. And was that -- Was there a gate over that  
7 cattle guard all the time when you went up --  
8 A. Yes, there was.  
9 Q. -- between '66 and '90? So any testimony to  
10 the contrary would be wrong?  
11 A. I believe so. There was always a gate there.  
12 If it wasn't up it was because of a cattle guard, it was  
13 just pulled back.  
14 Q. You indicate that there's a, there was a keep  
15 out sign between '66 and '90 every year up there?  
16 A. Yes, there was, keep out and private.  
17 Q. So any testimony to the contrary would just  
18 be wrong?  
19 A. Evidently it would be. There's still some of  
20 those signs there some where on the top, real old signs,  
21 small signs.  
22 Q. Small signs or what kind of signs were they?  
23 A. They were small. Those type of signs that  
24 they used in those days were small, probably four, three  
25 inches or four inches by about eight inches or ten inches

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1 was the maximum size of those signs, like this.  
2 Q. And that's the types of signs you saw '66 to  
3 '90?  
4 A. Yes.  
5 MR. SWEAT: That's all the questions I have,  
6 your Honor.  
7 THE COURT: Anything else, Mr. Petersen?  
8 MR. PETERSEN: Your Honor, I wonder if I  
9 could reopen on direct for this witness.  
10 THE COURT: What area do you want to cover?  
11 MR. PETERSEN: I want to cover with your  
12 Honor some pictures that he took of this area as you go  
13 along this Ridge Line Road down in this area over here.  
14 THE COURT: We're not concerned with that.  
15 It's not part of this lawsuit.  
16 MR. PETERSEN: It's not part of the lawsuit,  
17 your Honor, but I think it goes to the credibility of  
18 witnesses that said that they have traversed that area.  
19 His testimony would be that it would be impossible  
20 because the gates have been locked and the terrain and  
21 what have you.  
22 THE COURT: Well, but -- We're talking  
23 about a 50 year period of time that people have testified  
24 to. How in the world is it going to be helpful to this  
25 Court, at some point in time in the last ten years, that

1 there was a gate on one end of that property that was  
2 locked when people have testified that, you know -- Or  
3 sometime during that 50 year period of time they  
4 traversed that road.

5 MR. PETERSEN: Well, if that was it, your  
6 Honor, but I think the testimony was that of recent date  
7 they've done that. But if it won't be helpful to the  
8 Court then --

9 THE COURT: Well, you can ask them. Go  
10 ahead. I'm not going to stop you, but I don't --

11 MR. PETERSEN: If it's not going to be  
12 helpful to the Court, your Honor, we won't pursue that  
13 area. I have nothing further of this witness.

14 MR. SWEAT: (INAUDIBLE).

15 THE COURT: Okay. You may step down. Thank  
16 you.

17 MR. PETERSEN: Your Honor, we've moved along  
18 rather quickly. We've finished the witnesses that we  
19 intended to call this afternoon. But we do have a number  
20 of witnesses for tomorrow, your Honor. We expected to  
21 finish early afternoon tomorrow.

22 THE COURT: Okay. How many more witnesses do  
23 you have?

24 MR. PETERSEN: We have -- We have six more  
25 witnesses, your Honor, and this would include both

1 Okelberrys.  
2 THE COURT: And you don't think -- You  
3 think that we could finish by early afternoon.  
4 MR. PETERSEN: Oh, I think so. Well, I don't  
5 know about early afternoon, but I expect we'll be done in  
6 the afternoon sometime.  
7 THE COURT: Okay. We'll reconvene at 9:00  
8 a.m. then.  
9 MR. PETERSEN: Thank you.  
10 (Where upon Court recessed for the day.)  
11  
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1 CERTIFIED COURT REPORTER'S CERTIFICATE  
2 WASATCH COUNTY,  
3 Plaintiff,  
4 vs.  
5 WEST DANIELS LAND ASSOCIATION Et al,  
6 Defendant.  
7 I, Jennifer Hermansen France, a Certified Court  
8 Reporter in and for the State of Utah, do hereby certify:  
9 That this proceeding was transcribed by me from the  
10 transmitter records made of these proceedings.  
11 That this transcript is full, true, correct and  
12 contains all of the evidence and all matters to which the  
13 same relate which were audible throughout said recording.  
14 That I am not of kin or otherwise associated with  
15 any of the parties herein or their counsel, and that I am  
16 not interested of the events thereof.  
17 That certain parties were not identified in the  
18 record, and therefore, the name associated with the  
19 statement may not be the correct name as to the speaker.  
20 WITNESS my hand at Midvale, Utah, the 19th day of  
21 August, 2005.  
22  
23 Jennifer Hermansen France, RPR, CSR  
24 Utah State Courts  
25

FOURTH DISTRICT COURT - HEBER COURT  
WASATCH COUNTY, STATE OF UTAH

---

WASATCH COUNTY, :  
Plaintiff, :  
 :  
vs. : Case No. 010500388  
 :  
WEST DANIELS LAND :  
ASSOCIATION, Et al, :  
Defendant. :  
 :

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BEFORE THE HONORABLE DONALD J. EYRE

WASATCH COUNTY COURTHOUSE  
1361 SOUTH HIGHWAY 40  
HEBER, UTAH 84032

BENCH TRIAL  
ELECTRONICALLY RECORDED ON JUNE 30, 2004

Transcribed by: Jennifer Hermansen France, RPR, CSR

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A P P E A R A N C E S

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23  
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1 June 28, 2004

9:00 a.m.

2 P R O C E E D I N G S

3 THE COURT: Wasatch County verses E. Ray  
4 Okelberry and others, defendants. Mr. Petersen, you may  
5 call your next witness.

6 MR. PETERSEN: Thank you. We'll call Mr.  
7 Wayne Robertson.

8 THE COURT: Is he out in the hall?

9 MR. PETERSEN: Yes, sir.

10 THE COURT: Okay. Mr. Robertson, if you'd  
11 come up here to the witness stand.

12 MR. PETERSEN: (INAUDIBLE) if you'd take a  
13 look at this exhibit, please.

14 THE COURT: Come down and examine this  
15 exhibit before you --

16 MR. PETERSEN: (INAUDIBLE).

17 THE COURT: Okay. Come up and raise your  
18 right hand and take an oath from the clerk.

19 CLERK: You do solemnly swear that the  
20 testimony you shall give in the matter now before this  
21 Court shall be the truth, the whole truth, and nothing  
22 but the truth, so help you God?

23 THE WITNESS: I do.

24 THE COURT: Have a seat.

25 DIRECT EXAMINATION

4

1 BY MR. PETERSEN:

2 Q. Would you state your name, please?

3 A. Wayne Robertson.

4 Q. And, Mr. Robertson, what is your address?

5 A. Goshen, Utah.

6 Q. And your occupation?

7 A. Truck and business.

8 Q. How old are you?

9 A. 63.

10 Q. What is your date of birth?

11 A. 8/4/40.

12 Q. You had an opportunity, did you not, to look  
13 at what's been designated as Plaintiff's Exhibit No. 2,  
14 did you not?

15 A. You'll have to speak up just a little bit.  
16 I'm hard of hearing.

17 Q. Okay. You had an opportunity, did you not,  
18 to look at what's been designated as Exhibit No. 2?

19 A. Yes.

20 Q. Now, are you familiar with that property?

21 A. Yes, I am.

22 Q. And how is that?

23 A. Well, my family owns it. We herded sheep on  
24 there.

25 Q. And which -- Which property did your family

5



1 herd sheep on?  
2 A. Well, my dad and grandfather own Section 11.  
3 That's what we call Boomer.  
4 THE COURT: Why don't you point it out on the  
5 map, Mr. Robertson?  
6 Q. (BY MR. PETERSEN) Point out generally where  
7 that's at.  
8 A. It would be just this section right here, I  
9 assume. This is the road -- Dad built the road from  
10 White Pole down into Parker Canyon and on across here.  
11 MR. PETERSEN: Okay. I think the record  
12 should show that he's pointing to what we've been  
13 commonly calling Parker Canyon Road.  
14 THE COURT: Yes, and I assume the portion  
15 you're, the section you're talking about is presently  
16 owned by the West Daniels Land Company.  
17 THE WITNESS: Okelberrys as far as I know.  
18 Q. (BY MR. PETERSEN) No, it's West Daniels.  
19 A. Oh, is it.  
20 Q. Yeah. Okay. You can take the witness chair  
21 there. Now, did you have occasion to work up there as a  
22 boy?  
23 A. Yes, I herded sheep up there.  
24 Q. Did your father own sheep?  
25 A. Yes.

6

1 Q. What is your first recollection? How old  
2 were you?  
3 A. Well, I can never not remember going up  
4 there.  
5 Q. Okay.  
6 A. Probably eight, seven, eight years old.  
7 Q. Now, when you first went up there to herd  
8 sheep how did you get into that area?  
9 A. We had a pack in with pack outfit and leave  
10 in a tent up there.  
11 Q. Did you come down the Ridge Line Road at all?  
12 A. No, not at that time.  
13 Q. You were packing in from what we'd call  
14 Highway 40 then? Is that --  
15 A. Yes.  
16 Q. Do you recall that your father built Parker  
17 Canyon Road?  
18 A. He built a road from White Pole down to  
19 Parker Hollow and on across Section 11.  
20 Q. Was there a road there before he built that?  
21 A. No.  
22 Q. And do you recall what year he did that?  
23 A. It sticks in my, best of my recollection as  
24 1952.  
25 Q. And what did he do? How did you build it?

7

1 What kind of equipment?  
2 A. Well, he hired a man with a dozer to come in  
3 and build a road.  
4 Q. Caterpillar tractor type?  
5 A. Yeah.  
6 Q. Before he did that did that road -- There  
7 was no road down Parker Canyon?  
8 A. No.  
9 Q. And what was the purpose in building that  
10 road?  
11 A. So we could get a camp wagon down there, live  
12 in a camp, didn't have to live in a tent.  
13 Q. It was a lot better to stay in a sheep camp,  
14 was it?  
15 A. You bet.  
16 Q. Then after you built that road in 1952 did  
17 you begin to use what we, what is known as Ridge Line  
18 Road?  
19 A. Yes.  
20 Q. Would you describe the condition of Ridge  
21 Line Road?  
22 A. Do what?  
23 Q. Would you describe the condition of what was  
24 known as --  
25 A. Well, it was just a, more or less a two track

8

1 road about as long as a pickup.  
2 Q. Was it -- Was it a rocky road?  
3 A. In places.  
4 Q. When you used that was the trees covering the  
5 road a problem at all?  
6 A. Well, every spring -- We'd be the first  
7 ones in there in the spring. And sometimes we'd spend  
8 three days, four days cutting trees so we could get down  
9 in there.  
10 Q. So before you could even use the road you'd  
11 have to cut trees?  
12 A. Right.  
13 Q. Was that typical of every year?  
14 A. Some years was worse than others, but just  
15 about every year there would be some trees across the  
16 road.  
17 Q. Now, as you carry on along this Ridge Line  
18 Road pass this road that your father made, the Parker  
19 Canyon, was there a road going north?  
20 A. No, there was no road there then.  
21 Q. Did it even exist?  
22 A. No.  
23 Q. Did it exist after your father sold, up until  
24 the time that your father sold the property?  
25 A. No, there was nothing ever changed there that

9

1 I could ever remember until -- I think dad sold that in  
2 '57.

3 Q. Now, during the period of time that your, you  
4 were using that Ridge Line Road, who would use the road?

5 A. Just the live stock people.

6 Q. Were there any gates on the road?

7 A. I remember my mother complaining about the  
8 gates. One time I was opening and closing the gates and  
9 she was driving the pickup. She counted seven gates down  
10 across the top of that mountain.

11 Q. Was there a gate separating the Forest  
12 Service property onto what is known as the Okelberry  
13 property now as you --

14 A. Yes, I think that's what, where the first  
15 gate was.

16 Q. And you remember that there, from that point  
17 down to this Parker Canyon Road there were seven gates?

18 A. Yeah, seven total.

19 Q. During this early 50's when were you up  
20 there, to the best of your knowledge, was that road open  
21 and used continuously by the public?

22 A. I never seen anybody in there but live stock  
23 people.

24 Q. Do you know if there was a road that has now  
25 been labeled Thorton Hallow Road?

10

1 A. I think there was a road there then, but I'm  
2 not sure. I don't ever remember. We never used Thorton  
3 Hallow. So I couldn't testify to that.

4 Q. Would you know if there was a road known as  
5 Circle Springs Road? Would you know if there was any  
6 roads down in that area?

7 A. No.

8 Q. Do you know if there was a road called the  
9 Maple Canyon Road?

10 A. Come out of Wallsberg?

11 Q. Yes.

12 A. Yeah, there was.

13 Q. There was -- There was that road coming out  
14 that way? Do you know the condition of that road at all?  
15 Did you ever travel it?

16 A. Well, I just remember going in there with my  
17 parents and it was pretty rough.

18 Q. Do you know if any of those roads were ever  
19 opened and used continuously by the public?

20 A. I don't.

21 MR. PETERSEN: That's all.

22 THE COURT: Mr. Sweat, cross?

23 CROSS-EXAMINATION

24 BY MR. SWEAT:

25 Q. Mr. Robertson, you indicated that your family

11

1 sold the land in 1957; is that correct?  
2 A. To the best of my recollection, yes.  
3 Q. Did you go up there much after that?  
4 A. No.  
5 Q. You indicated that you believe your family  
6 owns Section 11; is that correct?  
7 A. Yes. Should I point it out to you?  
8 Q. If you don't mind.  
9 A. It would be this section right here. Okay.  
10 Dad built the road from White Pole down to Parker Hallow.  
11 Then he built this road across here. Right here is what  
12 they call Mud Spring.  
13 Q. Well, that shows it was Section 12?  
14 A. Well, it could of been 12 or 11. I don't  
15 know.  
16 Q. You indicated, to the best of your knowledge,  
17 that Parker Canyon Road was built in 19, or what has been  
18 designated as Parker Canyon Road on this map, was built  
19 in 1952; is that correct?  
20 A. Yes.  
21 Q. Could it have been as earlier as 1950?  
22 A. Pardon me?  
23 Q. Could it have been a year or two, either way,  
24 earlier or later?  
25 A. It could of been a year or two, but to the

12

1 best of my recollection it was 1952.  
2 Q. And after that you would bring your camp down  
3 the Ridge Line Road?  
4 A. Yeah.  
5 Q. What type of vehicle would you use to pull  
6 it?  
7 A. We usually -- Well, we had a ton and a half  
8 -- He had a ton and a half Chev truck and he had a  
9 four-wheel drive pickup.  
10 Q. When you'd bring your camp down that road is  
11 that then how you would leave and access that property is  
12 through that road? About how many times a summer would  
13 you go up and down that road?  
14 A. Well, dad brought groceries up once a week.  
15 Q. Same day every week?  
16 A. No.  
17 Q. Typically once a week? When you say he  
18 brought them up, did you ride with your dad or was you up  
19 there watching --  
20 A. I was up there herding the sheep.  
21 Q. So you weren't necessarily using the road  
22 once a week, your dad may have been; is that correct?  
23 How often did you use the road to get in and out?  
24 A. Usually just to get in there in the spring if  
25 I had to pull a camp in or pull it back out.

13

1 Q. So maybe twice a year?  
2 A. Yeah.  
3 Q. And in those two times a year you don't  
4 recall seeing a lot of people using that road, is that  
5 what your testimony was?  
6 A. Very seldom anywhere.  
7 Q. Now, you indicated that you've also used  
8 Maple Canyon Road?  
9 A. Maple Canyon?  
10 Q. Maple Canyon Road. You -- I believe that's  
11 what your testimony was. Do you know where Maple Canyon  
12 Road is?  
13 A. No. Is it the one that goes down to  
14 Wallsberg?  
15 Q. I'm going to show you on this exhibit what's  
16 designated as Maple Canyon Road.  
17 A. Well, we --  
18 Q. Are you familiar with that road?  
19 A. We did use it to get back and forth to  
20 Wallsberg.  
21 Q. How did you --  
22 A. We never -- We never used that road very  
23 often, only if he had business at Wallsberg. He always  
24 went to the top of Daniels and down the highway.  
25 Q. And so your use of that road would have been

14

1 starting in 1952, give or take a year, up until 1957 when  
2 you sold the property; is that correct?  
3 A. You mean the road from White Pole down to  
4 Parker.  
5 Q. I mean the Ridge Line Road, I'm sorry.  
6 A. Yeah.  
7 Q. And frankly the White Pole down to Parker,  
8 the same use?  
9 THE COURT: You have to answer out loud.  
10 THE WITNESS: Pardon me?  
11 THE COURT: I say you have to answer out  
12 loud.  
13 THE WITNESS: Oh, okay.  
14 THE COURT: Was your answer yes to that  
15 question?  
16 THE WITNESS: Nodding the head ain't getting  
17 it?  
18 THE COURT: No, it's not. It's not  
19 recording.  
20 Q. (BY MR. SWEAT) When you were up there in  
21 1952 to 1957 did you ever see locks on any of those seven  
22 gates?  
23 A. No.  
24 Q. Did you ever see no trespassing signs on any  
25 of those gates?

15

1 A. Not that I recall.  
2 Q. Did you ever see people hunting on your  
3 property in the fall?  
4 A. We was never in there in the fall.  
5 Q. When did you typically come on the property?  
6 A. We usually got in there the first part of  
7 June and stayed till the middle of July.  
8 Q. So about a month and a half each year?  
9 A. Yeah.  
10 MR. SWEAT: That's all I have, your Honor.  
11 THE COURT: Anything else, Mr. Petersen?  
12 MR. PETERSEN: Just briefly, yeah.

13 REDIRECT EXAMINATION

14 BY MR. PETERSEN:

15 Q. You said that you had traveled on that Ridge  
16 Line Road. Would you stay up there for the full month  
17 and a half when you were herding sheep or would you come  
18 out of there on occasion?  
19 A. Usually I stayed in there the full time. I'd  
20 go in with the sheep and come out with them.  
21 Q. Now, when -- Would you trail your sheep out  
22 the Ridge Line Road when you --  
23 A. No, we would go down Parker Hallow when we  
24 left.  
25 Q. And how would you trail your sheep in?

16

1 A. We usually come up Boomer.  
2 Q. So you -- And that would bring them in off  
3 Highway 40, would it?  
4 A. Yeah.  
5 Q. Bring them in that way and take them out the  
6 same way you brought them in?  
7 A. We'd unload down -- Usually truck them up  
8 to, right there by where the old Acorn Inn use to be.  
9 Unload there and then trail up Boomer Canyon. Well, just  
10 kind of moved them up on the mountain. And then when  
11 we'd come out we went down Parker Hallow to the highway.  
12 And then up the highway to Strawberry.  
13 Q. And on those times that you were on this  
14 Ridge Line Road would it be safe to describe it more as a  
15 trail than a road?  
16 A. Well, it was a, just a two rut road. It  
17 wasn't a -- If you passed another car or truck there  
18 you usually have to pull off the side and let one of them  
19 go.  
20 Q. Would that be a safe description for the  
21 Maple Canyon Road as well?  
22 A. Maple Canyon? You'll have to --  
23 THE COURT: That's the road to Wallsberg.  
24 THE WITNESS: Well, I couldn't testify to  
25 that. I don't know.

17

1 Q. (BY MR. PETERSEN) You're not that familiar  
2 with the Maple Canyon then?

3 A. No.

4 Q. Okay.

5 MR. PETERSEN: That's all.

6 THE COURT: Anything else, Mr. Sweat?

7 MR. SWEAT: Just one thing, your Honor.

8 RECROSS-EXAMINATION

9 BY MR. SWEAT:

10 Q. Mr. Robertson, you indicated that you would  
11 come in with the sheep and leave with the sheep?

12 A. Yes.

13 Q. Was there ever any years that instead of  
14 coming down the Ridge Line Road, yourself, you followed  
15 the sheep up in and followed the sheep back out, trailing  
16 them?

17 A. Well, I usually went in with the sheep and  
18 came out with the sheep. I remember there were several  
19 years that I did pull a camp out that way and pull it in.

20 Q. So between '52 and '57 you used it. Some  
21 years you pulled the camp, some years you took care of  
22 the sheep?

23 A. Right.

24 MR. SWEAT: That's all, your Honor.

25 THE COURT: Anything else, Mr. Petersen?

18

1 REDIRECT EXAMINATION

2 BY MR. PETERSEN:

3 Q. Mr. Robertson, did you ever use the road  
4 known as the Main Canyon Road? Does that sound familiar  
5 to you?

6 A. Well, the Main Canyon Road, to my knowledge,  
7 is the one that went down to Wallsberg.

8 Q. Yeah. And is that the one you're talking  
9 about when you say that you went to Wallsberg?

10 A. Yeah. Dad went that way several times, I  
11 remember, cause he had business in Wallsberg.

12 Q. So when you went to Wallsberg it wasn't on  
13 the, it wasn't on the Maple Canyon Road, it was on the  
14 Main Canyon Road?

15 A. Yeah.

16 Q. All right. Thank you.

17 THE COURT: Anything else, Mr. Sweat?

18 MR. SWEAT: Just one last question.

19 RECROSS-EXAMINATION

20 BY MR. SWEAT:

21 Q. Did you ever use the Maple Canyon Road?

22 A. Myself?

23 Q. Or to go to Wallsberg? Yeah.

24 A. Myself?

25 Q. Yes.

19

1 A. No.  
2 Q. Did you ever use Main Canyon Road to go to  
3 Wallsberg?  
4 A. No.  
5 Q. So you really don't know what road your  
6 father used?  
7 A. Other than I may have rode with my dad in and  
8 out that way.  
9 Q. Okay. Do you recall if it was ever down  
10 Maple Canyon?  
11 A. Oh, I don't remember.  
12 Q. Thank you.  
13 THE COURT: Okay. You may step down. Thank  
14 you.  
15 THE WITNESS: Thank you.  
16 MR. PETERSEN: Excuse this witness, your  
17 Honor?  
18 THE COURT: You may be. You're excused.  
19 MR. PETERSEN: Thank you very much. We'll  
20 call Brian Okelberry.  
21 THE COURT: Let's see. Were you sworn when  
22 we start?  
23 THE WITNESS: No, sir.  
24 THE COURT: Okay. Raise your right hand and  
25 take an oath.

20

1 CLERK: You do solemnly swear that the  
2 testimony you shall give in the matter now before this  
3 Court shall be the truth, the whole truth, and nothing  
4 but the truth, so help you God?  
5 THE WITNESS: Yes.  
6 THE COURT: Have a seat.  
7 DIRECT EXAMINATION  
8 BY MR. PETERSEN:  
9 Q. Brian, would you state your name, please?  
10 A. Brian Okelberry.  
11 Q. And your address?  
12 A. Goshen, Utah.  
13 Q. You're one of the defendants in this action,  
14 are you not?  
15 A. Yes.  
16 Q. And you're one of the owners of the property  
17 in question, are you not?  
18 A. Yes.  
19 Q. What is your date of birth?  
20 A. January 1, 1962.  
21 Q. So that makes you how old?  
22 A. 42.  
23 Q. You've had an opportunity, have you not, to  
24 examine what is Exhibit 2?  
25 A. Just the same as my map.

21



1 Q. Well, come and take a look at it. Yes?  
2 A. Is this one different than the other?  
3 Q. No, this is the same -- This is the same as  
4 what you've been (INAUDIBLE).  
5 A. Okay.  
6 MR. PETERSEN: Your Honor, we've had what's  
7 been marked as Defendant's Exhibit 22, which is a map  
8 prepared by Wasatch County. I think counsel would  
9 stipulate the admission of this map.  
10 MR. SWEAT: I would, your Honor.  
11 THE COURT: It's received.  
12 (Defendant's Exhibit No. 22  
13 was received into evidence.)  
14 Q. (BY MR. PETERSEN) I'd like to refer to  
15 Exhibit 22 and also to Exhibit 2, Mr. Okelberry, during  
16 your testimony. Now, do you have a recollection of going  
17 up onto this property at a young age?  
18 A. Yes, I traveled with my dad since I was  
19 little.  
20 Q. How old were you when you started going up  
21 there, do you know?  
22 A. Well, I would be in diapers, but I wouldn't  
23 be able to remember all that. But --  
24 Q. How old were you when you had your first  
25 memory?

22

1 A. My memory goes to '69.  
2 Q. About '69 you can have a memory?  
3 A. Uh-huh.  
4 Q. When did you start working up there, do you  
5 know?  
6 A. I started herding sheep there in 1973, I was  
7 11. And there was an Indian who drank two bottles of  
8 rubbing alcohol. And my dad hauled him over to Heber  
9 Hospital and I was left there at the bottom of Maple  
10 Creek at that time.  
11 Q. In charge of the sheep? Are you familiar  
12 with the roads?  
13 A. Yes.  
14 Q. Familiar with the Ridge Line Road and the  
15 other roads that have been --  
16 A. I never called it Ridge Line. What we call  
17 Ridge Line Road was the fish and game road from Hearts  
18 Gravel on down, we call it White Pole Road, Parker Road,  
19 but I'm showing you what you're calling Ridge Line Road.  
20 Q. What -- During the course of this trial  
21 what we've been using as --  
22 A. Yes.  
23 Q. -- for terminology. So your -- Your  
24 recollection goes back into the early 70's then --  
25 A. Yes.

23

1 Q. -- approximately? Have those roads changed  
2 much over the years?

3 A. I don't think they've changed much, you know.  
4 Sometimes we work on them and they're a little better and  
5 sometimes they're a little worse. There's some that are  
6 impassable now that were passable and -- They haven't  
7 changed too much.

8 Q. The Ridge Line Road, do you recall as you  
9 entered the Ridge Line Road from Forest Service Road if  
10 there were gates on those entrance?

11 A. There's always been gates there in my time.

12 Q. Now, what's been marked as Exhibit 22, it  
13 shows two entrances, does it not? One on Circle Springs  
14 and then one that goes on to Ridge Line Road?

15 A. Yes.

16 Q. To the best of your recollection have there  
17 always been gates on those two entrances?

18 A. Yes.

19 Q. As you go up the Ridge Line Road are there  
20 other gates?

21 A. There's gates on -- There's four gates  
22 inside the property as pasture gates. And then there's a  
23 gate at each place that it goes on and off West Daniels.

24 Q. To your recollection --

25 A. Four more.

24

1 Q. -- have there always been gates as they've  
2 gone on and off of West Daniels?

3 A. Yes. One's a cattle guard now.

4 Q. To your recollection were there ever any  
5 signs around those gates?

6 A. Yes.

7 Q. And where were there signs?

8 A. Each gate, on the pasture gates inside, on  
9 the boundary gates.

10 Q. On the boundary gates there were signs?

11 A. Yes.

12 Q. And what would the signs say?

13 A. Keep out.

14 Q. What was the purpose of those signs, do you  
15 know?

16 A. Well, the purpose of the gates, the purpose  
17 of the signs is to try to keep the sheep in tack.

18 Q. Was it also to restrict vehicles from going  
19 up and down the road?

20 A. I've had the gates took down. It's just best  
21 if they keep out.

22 Q. Yeah, but was that one of the purpose of the  
23 gates, to control vehicles from going up and down the  
24 roads?

25 A. Yes.

25

1 Q. Now, when you would go up there in the spring  
2 of the year did you ever have to cut trees out?  
3 A. Yeah.  
4 Q. And was that a common occurrence every year?  
5 A. It's pretty common. There's places where  
6 there's trees. Continuous, yes.  
7 Q. Would you have to cut trees on the Ridge Line  
8 Road?  
9 A. Yes.  
10 Q. Would you have to do that every year?  
11 A. If I was the, not the first one there I  
12 would, it may be necessary. But I'd say every year I've  
13 cut a tree up there, yes.  
14 Q. And the cutting of trees, is it just  
15 restricted to the spring of the year when you go onto the  
16 property initially, or does it happen during the course  
17 of the year as well?  
18 A. A tree can fall any time. It's a forest  
19 country.  
20 Q. And have you done that on occasion?  
21 A. Yes.  
22 Q. How would you describe the Ridge Line Road at  
23 the present time?  
24 A. There's parts of the Ridge Line Road that's  
25 impassable and there's parts that are pretty good.

26

1 Q. Where are the parts that are impassable?  
2 A. I can show you on the map.  
3 Q. Okay. Why don't you come over here on  
4 Exhibit 2 and show us.  
5 A. This map is not the same as our other map.  
6 You got this map in red on the other map.  
7 Q. Okay. Let's --  
8 MR. SWEAT: Your Honor, we've talked about  
9 that. I have not yet had a chance to highlight that.  
10 THE COURT: Okay.  
11 MR. SWEAT: I don't have a red marker.  
12 THE COURT: Get a red marker.  
13 MR. PETERSEN: I wonder if we could show this  
14 to the Court. Your Honor, the time and part that he's  
15 talking about (INAUDIBLE).  
16 THE WITNESS: Right there to right there. I  
17 was (INAUDIBLE) since '73 right there. There's old pines  
18 on it (INAUDIBLE).  
19 Q. (BY MR. PETERSEN) How is it to travel on the  
20 Ridge Line Road if it's been rained on or it's wet or  
21 what have you?  
22 A. Well, up on top where it's not steep  
23 (INAUDIBLE) that's -- And then there's some dips. We  
24 haven't done work there's some holes (INAUDIBLE). What  
25 was the question again?

27

1 Q. Okay. I'm just asking -- The question was  
2 how is the road after it's been raining?  
3 A. It can be muddy.  
4 Q. Okay. Now, are you familiar with what is  
5 called the Parker Canyon Road?  
6 A. Yes.  
7 Q. I want to (INAUDIBLE) an exhibit. It shows  
8 the road going from Ridge Line Road down to Highway 40?  
9 A. That's what it shows.  
10 Q. And is that accurate?  
11 A. No.  
12 Q. Where as on Exhibit 2 it doesn't show that;  
13 is that correct?  
14 A. Its got to go in there a little bit, further  
15 than it does.  
16 Q. You're familiar with that road?  
17 A. Yes.  
18 Q. What's the condition of that road?  
19 A. I'm usually on my horse on that road. So I  
20 drove down there two or three times. It's not very --  
21 I guess they describe it as a mountainous road. It's  
22 just a rough, mountainous road.  
23 Q. When you go on that, in that area, do you  
24 prefer to go on a horse rather than a vehicle?  
25 A. Well, I'm usually doing horse work. I hauled

28

1 Bentonite when we made some ponds down there. I follow  
2 Cat trails, which is closed now. The time I remember  
3 driving down there with a pickup load of Bentonite.  
4 Usually I'm going down there moving cows, but that's --  
5 Yes, I can be down there quicker on a horse than you can  
6 in a truck.  
7 Q. So if you wanted to drive on that Parker  
8 Canyon Road you'd be, it'd be quicker to take a horse  
9 than it would be to take a vehicle?  
10 A. It would be for me. Right down that Thorton  
11 fence and over there, I guarantee I can beat you.  
12 Q. Is that passable in anything but a four-wheel  
13 drive vehicle?  
14 A. If you want to say continuous, no, but parts,  
15 yes.  
16 Q. Now, on Parker Canyon is there ever a problem  
17 with fallen trees?  
18 A. Yes, it's timber also.  
19 Q. Have you, on occasion, cut trees off of that  
20 road?  
21 A. I don't think I've cut a tree for a while  
22 (INAUDIBLE) White Pole pass down Parker Canyon.  
23 Q. Are you aware that other employees of yours  
24 or other people have cut trees?  
25 A. Yes.

29

1 Q. Now, are you familiar with what is known as  
2 the Thorton Hallow Road?  
3 A. Yes.  
4 Q. Would you describe that one?  
5 A. Same, mountainous, short road. It's a pretty  
6 short road. And it goes through some heavy thick quakers  
7 right there at the top on part of it. And there's  
8 usually some big trees down. Sometimes -- A lot of  
9 times that road you can't go on. And then sometimes it's  
10 been cut and you can. We've cut it. And then it makes a  
11 turn and it's kind of -- It's not really the steepest  
12 one. It comes down a little canyon. It's pretty good,  
13 it's pretty rocky right there. It goes down to the  
14 forest fence and stops.  
15 Q. Now, is it necessary to cut trees every year  
16 on that road?  
17 A. I've never seen it when one of them big trees  
18 didn't fall on that road, no. Yes, it's necessary to cut  
19 trees on that road every year. (INAUDIBLE).  
20 Q. Can you travel on that road in anything less  
21 than a four-wheel drive vehicle?  
22 A. If it's dry (INAUDIBLE) conditions again. If  
23 it's just dry you can drive it in a two-wheel drive  
24 pickup.  
25 Q. Are you familiar with what is known as a

30

1 Circle Springs Road?  
2 A. Yes.  
3 Q. And would you describe that road?  
4 A. That ones pretty rocky. Pretty rocky up the  
5 road, but you can get down it.  
6 Q. Is that a road also that you have to remove  
7 trees on?  
8 A. There's -- I've done quite a lot of sawing  
9 on that road. I can -- I'm the one that goes down  
10 there -- Yes, there's trees. I'm making my answering  
11 too long, aren't I?  
12 Q. No, you're okay. Don't worry about that. Is  
13 there a gate that separates your private property from  
14 the Forest Service property on Circle Springs Road?  
15 A. Yes.  
16 Q. Is that gate been there as long as you can  
17 remember?  
18 A. Yes.  
19 Q. Likewise over on Parker Canyon and Thorton  
20 Hallow, are there gates that separate your property and  
21 the Forest Service property?  
22 A. Yes. There's a cattle guard at Thorton  
23 Hallow, but there's gates.  
24 Q. Now, is it -- Are there trails -- You  
25 know where the Big Glade is?

31

1 A. Yes, I know where the Big Glade is.  
2 Q. Are there trails from the Big Glade along the  
3 Forest Service property that would take you back to  
4 Thorton Hallow and Parker Canyon?  
5 A. Big Glade, the forest closed the road that  
6 drives right down (INAUDIBLE), the head of cattle  
7 (INAUDIBLE) it puts you right down, and the forest closed  
8 the road. And then there's a Glades trail. It's about  
9 like these others if you wanted to go saw it out. It  
10 goes clear down to Parker, but they closed that off.  
11 Now, the way I bring the cattle to come out of there is  
12 up against the forest fence, the boundary fence, or else  
13 that trail I'm talking about. And you can go right along  
14 that boundary fence, yes.  
15 Q. Now, you say there's a boundary -- There's  
16 a boundary --  
17 A. That yellow and green right there.  
18 Q. Okay. Well, why don't you come down and show  
19 us where that boundary road is, where you trail the  
20 cattle. Glade --  
21 MR. PETERSEN: I hope the Court -- Can you  
22 see that, Judge? Do you want to just kind of sit up so  
23 the Judge can see it?  
24 THE COURT: I know where Glade is at.  
25 THE WITNESS: Glade, there's fence right here

32

1 between the cows and the sheep. Go through that gate. I  
2 go down along here and this is how I come to Thorton and  
3 this is how I come here. I come along, come right along  
4 here and I come through this gate right here to the Glade  
5 (INAUDIBLE) right down the road like that to Strawberry.  
6 So I come right along here all the time.  
7 Q. (BY MR. PETERSEN) So your trail -- Is this  
8 -- Are these cattle you're moving along like this?  
9 A. Right here we come into Parker. There's one  
10 cow trail that goes like this, goes through this forest  
11 trail. And then Glade (INAUDIBLE). Just come along that  
12 trail and come up to Cummings and hit the fence.  
13 Cummings being right here. See that big canyon? Then  
14 you come along like this.  
15 Q. So when you trail the cattle off of there  
16 you're not going back onto Ridge Line Road using that?  
17 A. No, I don't.  
18 Q. You're --  
19 A. I drove cattle along that Ridge Line Road  
20 before with, a couple times (INAUDIBLE). This is sheep  
21 country and this is cow country.  
22 Q. Now, if someone wanted to go from the Big  
23 Glade here over into the Thorton Hallow area or the  
24 Parker Canyon, if they want to hike or whatever, could  
25 they take those trails that you've been telling us about?

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1 A. I can get down that road right there without  
2 breaking into a jog, Thorton Hallow in probably 13  
3 minutes.  
4 Q. That's on one of those trails?  
5 A. Yeah.  
6 Q. That's fine. You can return. Now, are you  
7 familiar with what is known as Maple Canyon?  
8 A. We call it -- I call it Maple Creek, but I  
9 know where you're talking about.  
10 Q. Okay. And could you describe that road? Is  
11 it passable by a car?  
12 A. There's nobody -- We're not driving -- My  
13 (INAUDIBLE) not driving it and I don't think they're  
14 sneaking in on it. They are on an ATV a little bit.  
15 It's not passable by a vehicle though.  
16 Q. Since your recollection of the early 70's has  
17 that road or do you know of anybody that's been using  
18 that road? Has it been passable?  
19 A. Yeah, (INAUDIBLE) Cat down it in '78, washed  
20 out in '83.  
21 Q. And is that a common occurrence, it will wash  
22 out?  
23 A. Well, I've not drove it since 1982. So  
24 whether it's washing out or not from '82 -- I mean,  
25 that's the year it washed out is '83. They just took the

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1 Cat down in '78 to make it passable. In '77, that's when  
2 we run the Cat down in '78.  
3 Q. Washing out is not an uncommon occurrence  
4 there in that Maple Canyon Road then?  
5 A. No, even the one we travel down below has got  
6 a big rut in it right now that we've spent a lot of money  
7 on.  
8 Q. Now, are you aware of -- Have you ever,  
9 over the years, given permission to people to use your  
10 roads up there and to hunt on your property?  
11 A. Yes.  
12 Q. How often have you ever done that?  
13 A. Well, most people I meet up there and I know  
14 I give permission, people that know me. Until here at  
15 the last when they made it a hunting unit and during the  
16 hunting season I've explained it as this, if you rent  
17 your house out I can't let you stay in it any more, pard.  
18 I can't tell you you can go on there during the hunting  
19 season. And that's probably been since '94.  
20 Q. Now, have -- Do you recall people, names of  
21 people that you've given permission to use the roads and  
22 to hunt in that area?  
23 A. I recall some, but you have a document -- I  
24 sold trespass permits too. And you have a exhibit with  
25 them names on it.

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1 Q. Okay.  
2 A. Be the best recollection with dates.  
3 Q. Do you have a -- Do you recall the  
4 testimony of a gentlemen the other day who said that he  
5 went up there and without permission?  
6 A. Yes, I do.  
7 Q. And do you recall ever giving permission to  
8 he or children or someone in that family to hunt there?  
9 A. First time I met him. Like I say, if I know  
10 them and they ask.  
11 Q. Mr. Okelberry, let me show you what's been  
12 marked as Defendant's Exhibit's 23 and 24 and ask you if  
13 you can identify those?  
14 A. Yes.  
15 Q. Does your handwriting appear on those?  
16 A. Both of them. Mostly this. This is me.  
17 Q. And when you say this, which one is that?  
18 A. 24.  
19 Q. What is Exhibit 24?  
20 A. It's a paper I wrote 12/28/91. I give them  
21 (INAUDIBLE). This the people that bought the trespass  
22 permits.  
23 Q. And what did they pay for those trespass  
24 permits?  
25 A. \$50.

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1 Q. What year was that?  
2 A. It would be been the season of '91.  
3 Q. So that -- Does that constitute a list of  
4 names of people that paid you to go up there, use the  
5 roads and use your property to hunt?  
6 A. Yes.  
7 MR. PETERSEN: Your Honor, we'd offer Exhibit  
8 24.  
9 THE COURT: Any objection?  
10 MR. SWEAT: No objection, your Honor.  
11 THE COURT: It's received.  
12 (Defendant's Exhibit No. 24  
13 was received into evidence.)  
14 Q. (BY MR. PETERSEN) Tell us what Exhibit 23  
15 is.  
16 A. Exhibit 23 is a, it's dated here for 1992.  
17 And the price went up here to a \$100 for people that  
18 bought this year and hadn't bought any previously, is  
19 what this is sayin. And then this list of people over  
20 here is people that had bought before. It's not my  
21 writing. It's given to me by the Gardners. And I don't  
22 know who wrote it.  
23 Q. Is your name -- We're talking about Exhibit  
24 23.  
25 A. Yes.

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1 Q. Does your handwriting appear --  
2 A. Right here.  
3 Q. When you say right there, you're talking  
4 about the right, upper right hand corner?  
5 A. Yes.  
6 Q. And do you know whose, whose handwriting the  
7 rest of that is in?  
8 A. I know who gave me the paper. I don't know  
9 who did the writing.  
10 Q. Who gave you the paper?  
11 A. Jane Gardner.  
12 Q. And what is that again now? Does that show a  
13 list of --  
14 A. It's a list of people that she sold permits  
15 to.  
16 Q. Did you authorize her to do that?  
17 A. Yes.  
18 MR. PETERSEN: Your Honor --  
19 THE WITNESS: You see there, that's times 50  
20 and that's times (INAUDIBLE).  
21 MR. PETERSEN: Your Honor, we'd offer Exhibit  
22 No. 23.  
23 THE COURT: Any objection?  
24 MR. SWEAT: No objection, your Honor.  
25 THE COURT: It's received.

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1 (Defendant's Exhibit No. 23  
2 was received into evidence.)  
3 Q. (BY MR. PETERSEN) Was it after those years  
4 that hunting unit was formed and you went that direction  
5 with the hunting unit?  
6 A. Yes. Well, they -- That was a hunting --  
7 Q. Okay. That --  
8 A. But it became a different hunting.  
9 Q. Are you familiar with an organization called  
10 United Sportsman?  
11 A. Yes.  
12 Q. And were you ever associated with them in  
13 anyway?  
14 A. Yes.  
15 Q. And for what purpose?  
16 A. They leased the ground to hunt on  
17 exclusively.  
18 Q. Do you remember the period of time when that  
19 happened?  
20 A. It's either '89 or '90. I should of found  
21 out.  
22 Q. Did they post any signs up there?  
23 A. Yes, they posted that -- They posted  
24 designated camping areas on the interior and they really  
25 posted, metal signs. How -- Who they was. Pretty big

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1 sign.  
2 Q. I'm going back --  
3 A. (INAUDIBLE).  
4 Q. Okay. Going back in your recollections into  
5 the 1970. Did you ever see people using the Ridge Line  
6 Road that were not up there on some sort of business or  
7 had some reason to be up there?  
8 A. In 1970?  
9 Q. In the 1970's?  
10 A. No, when I was there in '73 camped at Bear  
11 Wallow there was one person that come by there, Boyce  
12 Young.  
13 Q. Was he there by permission do you know?  
14 A. I met him and we walked and he had my okay to  
15 be there.  
16 Q. Other than that are you aware of any other  
17 people that was up there in the 70's?  
18 A. I know there was other people, but I don't  
19 -- I'm trying to think who I would of met there in the  
20 70's. I seen him only when I was herding sheep there.  
21 Q. Okay. In the 1980's were any of these roads  
22 being used by the public that you're aware of?  
23 A. Well, there was people that we know that use  
24 them roads. It was all right with us if they used them  
25 roads.

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1 Q. Did you grant permission to people to use the  
2 roads?  
3 A. I never refused permission to anyone to use  
4 them roads that asked me that I knew up there. There's  
5 only one guy that I caught killing elk on there and I  
6 didn't know him. He wasn't suppose to be in there. And  
7 I made him buy one of them trespass permits or -- And  
8 he did it.  
9 Q. Did he -- In the 1990's, now we're in this  
10 period of time when you had, you authorized people and  
11 you would sell permits to go up there and so forth and  
12 you had hunting units; is that correct?  
13 A. Yes.  
14 Q. Now, were there ever occasions when there  
15 were people up there that you asked to leave?  
16 A. I don't think -- I can't think -- you  
17 know, that -- I tried turning the hunting over to this  
18 like, Shane and Bruce so I don't have to go up there and  
19 fight with people. And plus I, you know, taken care of  
20 the sheep and cattle. I -- I'm not the one that sits  
21 at the gate and turn -- A lot of people keep testimony  
22 that they were turned away. I would of frankly got them  
23 to buy a permit and worked with them, you know. I don't  
24 think of anybody I've kicked off.  
25 Q. How much time would you spend in an average

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1 year up there?

2 A. Well, we're there in the spring. And like in  
3 the 70's when I'm herding sheep I'm there every day.  
4 Since then it's more of a weekly thing. And when we're  
5 movin the cattle through there, we're moving the cattle  
6 through there. I don't know how many. Sometimes it's a  
7 lot and sometimes it's not very much. But I know that's  
8 not the answer to your question.

9 Q. Well, you'd go up in the spring of the year,  
10 approximately when is that?

11 A. Oh, it's -- It's the end of May, part of  
12 May when we go up in there.

13 Q. And you participate in that?

14 A. Yes.

15 Q. Were you there when you'd bring the cattle  
16 back off the forest?

17 A. Yes.

18 Q. Would you be up there during the summer  
19 months on your property in connection with your sheep  
20 operation?

21 A. In connection with trying to keep the cows  
22 out of there.

23 Q. But that would bring you up there between --

24 A. Yes.

25 Q. -- the spring and the summer months?

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1 A. You bet. I got to be there at least every  
2 two weeks.

3 Q. Now, the times that you're -- Based upon  
4 your recollection and experience up there, do you have an  
5 opinion whether those road have been open to the public  
6 and have been used continually during these summer  
7 months?

8 A. Not -- Not -- In my time we haven't  
9 opened them. We closed the gates and tried to put a  
10 little control on it.

11 Q. Okay. And some of those gates been locked  
12 over periods of time?

13 A. Yes.

14 MR. PETERSEN: That's all.

15 THE COURT: Mr. Sweat, cross?

16 MR. SWEAT: Thank you, your Honor.

17 CROSS-EXAMINATION

18 BY MR. SWEAT:

19 Q. I understand where you said you were born in  
20 1962; is that right?

21 A. Yes.

22 Q. And you were up there in 1972 with --

23 A. I was there in '72. I started herding sheep  
24 in '73.

25 Q. And you'd be how old at that time?

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1 A. 11.  
2 Q. Herding it by yourself?  
3 A. I was by myself. There's a tree up there  
4 that says I love you (INAUDIBLE). I was a lonely boy.  
5 Q. Mr. Okelberry asked you if you ever refused  
6 people permission. You said you never refused. Did  
7 people always asked permission to use the roads?  
8 A. People would come in there, can we be in  
9 here? And like I said, pre to when it was a hunting unit  
10 I'd give them permission to camp in there, and stay in  
11 there, and cut wood in there, and build a fire in there  
12 (INAUDIBLE) other place.  
13 Q. So really the permission they were asking for  
14 was to use the property not the road?  
15 A. How do you get in and out without use the  
16 road? They were asking to be on the grounds.  
17 Q. To be on your ground; is that correct?  
18 A. That's right. And -- That's right. There  
19 was mostly -- There was a small group of people that  
20 camped there.  
21 Q. Again that wasn't driving the road, that was  
22 camping on your ground; is that correct?  
23 A. Well, they drove through there, but there are  
24 certain roads they asked if they could use too, certain  
25 ones that I didn't want them to too. I told them not to

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1 use certain roads too, like that Circle Springs Road.  
2 They've made some new roads there that I didn't want. So  
3 we definitely discussed roads.  
4 Q. Is the Circle Spring Road the new road?  
5 A. I could show you on the map.  
6 Q. No, the one designated as Circle Springs, is  
7 that the new road?  
8 A. No, that's not the new road. That's the one  
9 that they need to stay on if you go in there.  
10 Q. You indicated that someone killed an elk and  
11 you made them buy a trespass permit?  
12 A. That's the one I was selling them, yes.  
13 Q. What year was that?  
14 A. It would be '91 or '92.  
15 Q. You were up there in '72?  
16 A. Staying in '73. '72 is when we was still  
17 running (INAUDIBLE). I was up there then, but not  
18 living.  
19 Q. When did you first start to take more of an  
20 active role in dealing with the property?  
21 A. Well -- Well, what's -- What do you mean  
22 dealing with the property? I guess '73 is when we  
23 started dealing with every inch of the property.  
24 Q. Do you recall when you started taking a hand  
25 in posting the property, putting signs up saying no

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1 trespassing on the property?  
2 A. Yes, after United Sportsman is when I started  
3 taking a bigger hand in there.  
4 Q. When was that?  
5 A. Well, the United Sportsman was either '89 and  
6 '90.  
7 Q. What made you take a bigger hand in starting  
8 to post the property?  
9 A. United Sportsman is the ones on police  
10 testimony is talking about six yards at the gate.  
11 There's never been anything like that before. And they  
12 posted the ground and they had interior no camping signs.  
13 Them's the ones he's talking about they shot. They took a  
14 shoot and blast -- You can still see the Aspen trees  
15 where they blasted them, but they destroyed -- United  
16 Sportsman's signs lasted one year and they refused to  
17 come back. Said they'd never been in such a hard place  
18 to handle.  
19 Q. That was in 1990; right?  
20 A. I believe so. And so then I was left --  
21 Mori said, "You, you post the (INAUDIBLE)".  
22 Q. So that was in 1990?  
23 A. That's when I came more active role in it.  
24 Q. Did you personally put up any no trespassing  
25 signs in 1970's?

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1 A. In 70's, no.  
2 Q. In the 1980's?  
3 A. The 80's, yes.  
4 Q. Late 1980's?  
5 A. Yes.  
6 Q. Not the early 1980's?  
7 A. No, not yet.  
8 Q. Did you ever personally put a lock on any of  
9 the gates that give access to these roads?  
10 A. (INAUDIBLE) interior one.  
11 Q. Any of the boundary gates did you put a lock  
12 on?  
13 A. I wasn't the one that put the locks on, that  
14 was help. The interior one I took and put on. They  
15 ripped the whole brace down. I put it to keep our sheep  
16 separate from Lee's. I was tired of it. And that brace  
17 got all ripped out the same year. And I didn't lock it  
18 again. Just, please close the gate. So I --  
19 Q. And this was an interior gate; is that  
20 correct?  
21 A. Yes, that's the gate I fixed. Metal fence we  
22 call it. It would be on the Ridge Line Road.  
23 Q. When you were 11 did anybody ask you  
24 permission to use the roads up there?  
25 A. No. I only seen that one guy. He told me

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1 how he knew everybody in my family.  
2 Q. Were you patrolling the roads when you were  
3 up there in the 70's?  
4 A. No, I was herding sheep.  
5 Q. When did you buy your Uncle Lee out?  
6 A. I think '91. Better not -- I said think.  
7 Q. Did he still own property up there the first  
8 year that United Sportsman came in?  
9 A. Yes, sir.  
10 Q. So that would of been the year before?  
11 A. I think he -- We also had -- You'll see  
12 on them papers, them trespass permits, we had to divide  
13 that with him. So he was there after. I think only one  
14 year after.  
15 Q. In the 80's were you -- How old would you  
16 have been?  
17 A. I graduated from high school in 1980, if that  
18 helps you.  
19 Q. And in the 80's you worked up there every  
20 summer?  
21 A. I've never (INAUDIBLE) with my life? Maybe  
22 that's good or bad, but I've always had a job right here.  
23 Q. Do you have other areas in the state that you  
24 keep sheep or cattle?  
25 A. Yes.

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1 Q. Have you ever worked in any of those areas?  
2 A. Yes.  
3 Q. Did you ever herd sheep in any of those areas  
4 during the 70's or the 80's?  
5 A. 70's we was pretty condensed there with  
6 sheep.  
7 Q. Cattle --  
8 A. Question again?  
9 Q. During the 70's or 80's did you ever herd  
10 cattle or sheep in any other areas of the state then --  
11 A. Yes.  
12 Q. So it would be fair to say that you weren't  
13 always in this area?  
14 A. No, as I said, once we move out of there with  
15 the sheep, when I wasn't herding them (INAUDIBLE) people  
16 that maybe sometimes only once in two weeks.  
17 Q. Do you have more than one herd of sheep?  
18 A. When we first started in there we put one  
19 herd of sheep in there in spring. And Lee put one herd  
20 of sheep in there in the spring. And we came back with  
21 two in the fall. And Lee came back with two in the fall.  
22 By the time we bought Lee out we was having one herd on  
23 the spring on the whole thing. And we was coming back in  
24 the fall with one herd. And that's why we started the  
25 hunting thing because of the elk hogging up, taking our

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1 feed. We'd go to the fish and game and complain and they  
2 said hey, you can market it. And that's when a lot of  
3 the trouble started right there too.

4 Q. Prior to that time there wasn't a lot of  
5 trouble?

6 A. No, cause the sheep was there and we had  
7 feed. And we didn't have a lot of trouble.

8 Q. Is your entire sheep herd kept in that one  
9 herd or do you have other herds in other parts of the  
10 state?

11 A. Our entire sheep herd is on the International  
12 Forest, but other parts of the state, yes.

13 Q. So sometimes when you'd have a herd of sheep  
14 here would you have another herd of sheep some where else  
15 in the state?

16 A. Well, I told you at first Ray would have two  
17 herds and we had a total of four, so it would behalve.  
18 Now, the last two years I haven't put the sheep on it.  
19 In the fall I have, but not the spring.

20 Q. My question was during the 1970 -- Now, you  
21 just said you had four herds of sheep at that time; is  
22 that correct?

23 A. In the 70's.

24 Q. So two herds may have been here, but two  
25 herds may have been some where else?

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1 A. Two herds would come from Juab County to  
2 Strawberry, yeah.

3 Q. So you would maybe spend sometime during  
4 those summers up with those other herds; is that true?

5 A. If I was up there herding I was there every  
6 day. And when I wasn't -- I herd in Juab County too.  
7 In '77 I was in Juab County. That's the only two years I  
8 can give you specifically where I was.

9 Q. So the 70's and 80's you weren't always  
10 herding this herd, you might been herding another herd at  
11 other times; is that true?

12 A. In the 80's?

13 Q. In the 70's or 80's?

14 A. In the 80's I mostly over seen the herders.  
15 So I'd be there on a weekly basis just to check on  
16 whoever was there in the 80's.

17 Q. I think I already asked you. You indicated  
18 that you never personally put up any no trespassing signs  
19 until the late 80's early 90's?

20 A. That's correct.

21 MR. SWEAT: That's all I have, your Honor.

22 THE COURT: Anything else, Mr. Petersen?

23 MR. PETERSEN: Yeah, just briefly.

24 REDIRECT EXAMINATION

25 BY MR. PETERSEN:

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1 Q. Mr. Okelberry, when you come back in the fall  
2 would you not have all your sheep together and bring them  
3 into that area?  
4 A. When we come back in the fall we come off the  
5 forest. So we're taking on the feed we'd bring as many,  
6 what sheep we had and bring into that area, that private  
7 area there, yes.  
8 Q. Sure. So all your sheep came back into that  
9 area in the fall?  
10 A. No, not all of our sheep.  
11 Q. Where -- Did you have sheep some where  
12 else?  
13 A. On the other side of the valley.  
14 Q. Okay.  
15 A. What year you on now?  
16 Q. Well, I'm just talking generally speaking.  
17 A. Well, in the 70's we wasn't on the other side  
18 of the valley. We was condensed right there.  
19 Q. Okay. So all your sheep --  
20 A. In the 80's we was on the other side of the  
21 valley (INAUDIBLE). Well, from '77 on we was on the  
22 other side of the valley.  
23 Q. Now, when you'd come back in the fall would  
24 that require you to be in that area?  
25 A. Yes.

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1 Q. And you were in that area in the spring, were  
2 you not?  
3 A. Yes.  
4 Q. And you were in that area during the summer  
5 months as well cause you had cattle up there?  
6 A. Since '75 we had cattle up there. '74  
7 (INAUDIBLE).  
8 Q. You indicated that you're aware that locks  
9 were put on gates?  
10 A. Yes.  
11 Q. And I -- I gather that the locks on the  
12 exterior were off of your property. You had employees  
13 put those locks on, did you? Interior locks you put on?  
14 A. I think Ray put the first locks on. Then  
15 when you start renting out to hunting people then they  
16 start putting locks on.  
17 Q. Very good. Thank you.  
18 THE COURT: Anything else, Mr. Sweat?  
19 MR. SWEAT: Just briefly, your Honor.  
20 RECROSS-EXAMINATION

21 BY MR. SWEAT:

22 Q. During the time that you were up there in the  
23 70's and 80's did you ever see somebody driving down one  
24 of those roads that you didn't intercept or didn't catch  
25 and just saw them driving on through?

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1 A. Did I see anybody I didn't know?  
2 Q. Yeah, did you ever see a vehicle that you  
3 just saw drive down one of those roads?  
4 A. The people that's testified in here that they  
5 was driving down them road without permission, I didn't  
6 know them.  
7 Q. Did -- I'm saying did you ever see a  
8 vehicle driving down those roads that you did not  
9 intercept?  
10 A. Not to my recollection. I talked to people  
11 that I seen on the road.  
12 Q. You were always able to talk to every one?  
13 A. Usually on a horse and either I might be in  
14 -- Yeah, usually so.  
15 Q. So that would be --  
16 A. I kind of think (INAUDIBLE). I've seen  
17 people I know drive down them roads I didn't stop.  
18 Q. When, to your recollections, was the first  
19 gates placed or the first locks placed on any of the  
20 boundary gates?  
21 A. To my recollection. To my recollection the  
22 80's.  
23 MR. SWEAT: No further questions, your Honor.  
24 MR. PETERSEN: I have nothing further, your  
25 Honor.

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1 THE COURT: You may step down. Thank you.  
2 MR. PETERSEN: Call Joseph Ford.  
3 MR. SWEAT: Who you calling?  
4 MR. PETERSEN: Joseph Ford.  
5 THE COURT: What's the last name, Mr.  
6 Petersen?  
7 MR. PETERSEN: Ford.  
8 THE COURT: Ford?  
9 MR. PETERSEN: Yeah.  
10 THE COURT: Okay. Mr. Ford, come to the  
11 witness stand. Mr. Sweat, did you have --  
12 MR. SWEAT: Your Honor, I'm going to object  
13 to Mr. Ford. Mr. Petersen did notify me that he did want  
14 to use him, but he notified me on Friday. It wasn't on  
15 his witness designation list.  
16 MR. PETERSEN: That's true, your Honor, but  
17 the time for designated witnesses for both parties had  
18 come and gone. And they've used witnesses that were not  
19 at the designated time. And they let us know and we have  
20 not objected to it.  
21 THE COURT: Well, what are you going to use  
22 him for?  
23 MR. TENNEY: Just basic background in terms  
24 of the use of the roads for the 1940's and 50's. Mr.  
25 Ford is related to the Ford family. They own the

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1 property (INAUDIBLE).  
2 THE COURT: Yeah, is it going to be  
3 repetitive of other testimony we've had?  
4 MR. PETERSEN: No.  
5 MR. TENNEY: No, no.  
6 THE COURT: You feel you're prejudice, Mr.  
7 Sweat, because you weren't aware of -- Have you done  
8 any further investigation?  
9 MR. SWEAT: I will admit I probably would not  
10 have taken his deposition, your Honor.  
11 THE COURT: Have you used -- Well, we have  
12 -- The reason we have cut off dates for the designation  
13 of witnesses is to let other people prepare for that. I  
14 -- If you don't -- If he wasn't designated previously  
15 usually I don't permit people to call witnesses if they  
16 haven't been designated. So --  
17 MR. SWEAT: Okay.  
18 MR. PETERSEN: (INAUDIBLE) excuse you, Mr.  
19 Ford. Thank you.  
20 THE COURT: You're excused, Mr. Ford.  
21 MR. PETERSEN: Does the Court want to take  
22 the mid morning break at this time, your Honor?  
23 THE COURT: If you think it would be helpful.  
24 MR. PETERSEN: I think it would be.  
25 THE COURT: Okay. We'll take --

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1 MR. PETERSEN: (INAUDIBLE).  
2 THE COURT: We'll be in recess until, oh,  
3 let's make it 10:30 then.  
4 (A brief recess was taken.)  
5 THE COURT: Okay. Mr. Petersen, you may call  
6 your next witness.  
7 MR. PETERSEN: Your Honor, to revisit the  
8 issue of Mr. Ford. He would be in the nature of a  
9 rebuttal witness.  
10 THE COURT: Rebuttal -- You can't have --  
11 You can't call a rebuttal witness.  
12 MR. PETERSEN: Well, to rebut the testimony  
13 that we've heard from the plaintiff.  
14 THE COURT: What particular witness is he  
15 going to rebut?  
16 MR. PETERSEN: Well, he's going to rebut  
17 evidence that would supposedly show that there were roads  
18 up there in the 40's and that they were being used and  
19 what have you.  
20 THE COURT: Who would testify to that?  
21 (INAUDIBLE) members in the 50's.  
22 MR. PETERSEN: I think it was testimony from  
23 Mr. Besendorfer, your Honor, to that effect.  
24 THE COURT: Well, my notes says Mr.  
25 Besendorfer -- I don't see him talking anything about

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1 the 40's.

2 MR. PETERSEN: Well, if we're not concerned  
3 about the 40's then that's fine, your Honor, then we  
4 won't need him.

5 THE COURT: He said his dad acquired an  
6 interest in the West Daniels Land property in the 50's.  
7 He acquired it from his father, his interest. So he's  
8 observed people -- He, himself, has used the property  
9 in the 50's, the 60's, the 70's, and the 80's.

10 MR. PETERSEN: Okay. Well if we're not  
11 concerned about the 40's then we don't need him. We'll  
12 call Ray Okelberry, your Honor.

13 THE COURT: Okay. Mr. Okelberry, come  
14 forward and take the witness stand and be sworn.

15 MR. SWEAT: Your Honor, if I may interrupt.  
16 I do think that Mr. Besendorfer did talk about Thorton  
17 Hallow Road in the 1940's, is my recollection.

18 THE COURT: Well, I have him testifying that  
19 he first used the Thorton Hallow Road when he was 12.

20 MR. SWEAT: I don't know the math on that,  
21 your Honor.

22 THE COURT: And so he was born in --

23 MR. SWEAT: But I do think he said he walked  
24 down with the scout troop.

25 THE COURT: Yeah, when he was 12.

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1 MR. SWEAT: That's correct.

2 THE COURT: But he didn't drive it when he  
3 was 12.

4 MR. SWEAT: He did not.

5 THE COURT: We'll think about it.

6 MR. PETERSEN: All right.

7 THE COURT: Be sworn, Mr. Okelberry.

8 CLERK: You do solemnly swear that the  
9 testimony you shall give in the matter now before this  
10 Court shall be the truth, the whole truth, and nothing  
11 but the truth, so help you God?

12 THE WITNESS: Yes.

13 THE COURT: Have a seat.

14 DIRECT EXAMINATION

15 BY MR. PETERSEN:

16 Q. Would you state your name, please?

17 A. My name is Ray Okelberry and I live in  
18 Goshen, Utah.

19 Q. And you're one of the defendants in this  
20 action, are you not?

21 A. Yes.

22 Q. You're one of the owners of the property and  
23 roads in question, are you not?

24 A. Yes.

25 Q. And when did you acquire this property?

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1 A. We purchased in March, March 23rd of 1957.  
2 Q. Let me show you, Mr. Okelberry, what's been  
3 marked as Defendant's Exhibit No. 26 and ask you if you  
4 can identify this?  
5 A. Yes, I do identify it.  
6 Q. Is that the agreement by which you purchased  
7 the property?  
8 A. Yes.  
9 Q. And it was purchased from a Jay Reed Tough  
10 and a Barbra L. Tough?  
11 A. That's right.  
12 MR. PETERSEN: Your Honor, we'd offer Exhibit  
13 26.  
14 THE COURT: Any objection?  
15 MR. SWEAT: No objection.  
16 THE COURT: It's received.  
17 (Defendant's Exhibit No. 26  
18 was received into evidence.)  
19 Q. (BY MR. PETERSEN) Mr. Okelberry, I ask you  
20 if you can identify what's been marked as Defendant's  
21 Exhibit 25?  
22 A. This seems to be the anchorage and  
23 description of the property.  
24 Q. Is that the deed by where you, by which you  
25 obtained --

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1 A. Well, it says warranty deed. So that's it.  
2 Q. And this deed is dated the 15th day of  
3 February, 1962, is it not?  
4 A. Yes, that's --  
5 MR. PETERSEN: Your Honor, we'd offer  
6 Exhibit, Defendant's Exhibit 25.  
7 MR. SWEAT: No objection.  
8 THE COURT: It's received.  
9 (Defendant's Exhibit No. 25  
10 was received into evidence.)  
11 Q. (BY MR. PETERSEN) When you first purchased  
12 this property, Mr. Okelberry, what was it used for?  
13 A. My father, my brother, our family, we were in  
14 the sheep business. We was out there in Juab County and  
15 it got too hot and dry up there. And we had the  
16 opportunity it buy some property a little higher  
17 elevation. So that's why we purchased the property, so  
18 the sheep would do better. And we also, at that time,  
19 bought permits that joined onto this, the forest permits  
20 for the sheep. And that's how we got it. It was a move  
21 to expand the operation and the sheep would do better.  
22 Q. Now, it was purchased, was it not, with your  
23 brother, Lee, and your father and yourself?  
24 A. Yes.  
25 Q. And you've subsequently, you and your boys

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1 have purchased their interest out, have you not?

2 A. Lee and I acquired dad's interest out of  
3 there, dad and mother's. And since that time Lee sold  
4 -- He had half interest. And my two sons, Brian and  
5 Eric, we purchased Lee's half interest out of there. And  
6 then later on we bought Lee's sheep, but we bought his  
7 property first.

8 Q. Now, what is your date of birth?

9 A. April the 14th, 1938.

10 Q. And you purchased this in 1957. So if my  
11 math is right, would that make you about 19 years old?

12 A. 19 years old.

13 Q. Do you have a recollection of going on the  
14 property in 1957?

15 A. Yes.

16 Q. Would you describe -- Well, first of all,  
17 was there a fence separating your property on the east  
18 side from the Forest Service property.

19 A. Yes, the property is pretty well fenced.

20 Q. Were there gates as you came off the Forest  
21 Service property onto your property?

22 A. Yes, we joined the cattle and cattle had been  
23 there forever. And, of course, our side was sheep and  
24 their side was cattle. So they had to have a fence.

25 There was a good fence. And there were gates on all of

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1 them. Gates on all of the fences and interior fences and  
2 cross fences to keep --

3 Q. On the -- On the south side of your  
4 property was there a fence between you and the Forest  
5 Service property?

6 A. Yes. The end of '57 there was a fence there.

7 Q. Was there a gate separating your property and  
8 the --

9 A. Yes, going into Circle there was a gate  
10 there.

11 Q. Likewise, on the north end of your property,  
12 separating you from private property and what have you?

13 A. Yes, yes.

14 Q. Were there gates on those as well?

15 A. Yeah, they were critical gates, the exterior  
16 gates.

17 Q. Now, you're familiar with what has been  
18 called the Ridge Line Road during the course of this  
19 trial, were you not?

20 A. Yes.

21 Q. What was the condition of that in 1957?

22 A. Basically they were trails. That's how we  
23 termed it. There's a vast difference in the property.  
24 We've got property that goes down and joins Wallsberg on  
25 the west side.

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1 Q. Well, now, we're just talking about the Ridge  
2 Line Road.  
3 A. Okay. Well, I never did hear it called the  
4 Ridge Line Road till I got a map from these, from the  
5 county. There was just the top -- White Pole Road,  
6 that's all -- I never have heard Ridge Line Road in my  
7 life.  
8 Q. Now, is it your memory that in 1957 that this  
9 was more or less a trail then?  
10 A. They were trails. In places that's all they  
11 were.  
12 Q. No, just the Ridge Line Road, that's all  
13 we're talking about. Was the Ridge Line Road a trail?  
14 A. It was a trail and an improved trail. You  
15 could drive a vehicle on it, a four-wheel drive vehicle.  
16 Q. Okay. Was it rocky?  
17 A. It was definitely rocky.  
18 Q. Were there trees that would fall down and  
19 cover the road?  
20 A. Trees were a problem, yes.  
21 Q. Did you have to remove trees from off the  
22 road?  
23 A. Yes.  
24 Q. Now, how far did the Ridge Line Road go?  
25 A. The Ridge Line Road, when we went in there in

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1 1957 it went to White Pole pass, and that's the head of  
2 the Parker Canyon Road. They was basically a trail down  
3 there. And it hadn't been too many years prior that they  
4 first built that road.  
5 Q. Okay. Was it after that period of time then  
6 that what is called the Ridge Line Road was built further  
7 onto the north?  
8 A. I -- It -- When the fish and game built  
9 them or people started using, the fish and game come up  
10 there to fence the boundary line between Okelberry's  
11 property and the fish and game property and West Daniels'  
12 property. And they built those roads in there in the  
13 70's. And after they got them built they went up there  
14 and tried to close them. And the people, they --  
15 Q. Well, okay. That's okay. They're built in  
16 the 70's. Now, in the 50's when you were up there, on  
17 the Ridge Line Road, did you ever see any people that  
18 didn't have business up there using that road?  
19 A. The first year we was in there my father, he  
20 had one of them Madison Camps and the roads through our  
21 property were better than when you got over --  
22 Q. No, no, no. Just answer the question, Mr.  
23 Okelberry. Did you ever see anybody use --  
24 A. I never did. We camped there at White Pole  
25 pass. And we camped there for a month. And I don't

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1 recall seeing anything. My father, myself, and finally  
2 dad left and I was there.

3 ME. SWEAT: When was that?

4 MR. PETERSEN: This was in 1957.

5 Q. (BY MR. PETERSEN) Now, for the rest of the  
6 50's did you see people using that road?

7 A. I saw -- I saw -- The only people I  
8 remember of -- We was in there in the spring and the  
9 West Daniels Land Association had people in there that  
10 came up there with their cattle. And I can't tell you  
11 exactly when I first met them, but they were up in there  
12 checking their cattle. And they rode up there on horses.  
13 They didn't come down Ridge Line Road. They had ridden  
14 up from Boomer or they had ridden up from Parker Canyon  
15 off the highway.

16 And I think a favorite that Reed Edwards  
17 herded the cattle a lot. I always saw a truck parked  
18 there at Thorton Hallow. And it was easier to ride a  
19 horse up there. And I'm sure I met him. And before that  
20 I met Floyd Boner. Floyd Boner was there in '57. He was  
21 the president of the Cattle Association. But he'd come  
22 in there on a horse.

23 Q. Okay. As far as the 60's are concerned, did  
24 you see anybody driving up, using that Ridge Line Road,  
25 that didn't have business up in that area?

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1 A. It was primarily business. And Duke Johnson,  
2 and then this was a Lindon Maxfield that I see bring  
3 trucks. And they came through our property. And they  
4 went down close to White Pole to take care of those  
5 cattle. And that's about all I can remember. And then I  
6 did see Dee Sabey. I was up there herding the sheep.  
7 And Dee Sabey, and I don't know if, it was probably '57.  
8 And I think him and his wife came up there. And it was  
9 right around, pretty close to the Glade, but it was on  
10 our property.

11 And he came there. And he'd been -- He'd  
12 been herding the sheep for the people that owned it  
13 before us. And he, you know, he was real friendly and  
14 real nice. And I was (INAUDIBLE) sheep. But he's the  
15 only one I remember, him and the cow people. In the 60's  
16 and --

17 Q. When would you go up? And what time of year  
18 would you go?

19 A. Well, it was -- Exactly. We never did land  
20 in there till -- The first year we went in there about  
21 the 16th of June. And we're not talking about up on the  
22 high part. We're talking about this piece of ground,  
23 lower elevation. We unloaded down there on the 16th of  
24 June. And to get into that property we had to notify  
25 June Tough to come up and open the gate down there by

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1 PeeTrees. What's PeeTree's now?  
2 There was a wire gate there about 4 feet  
3 high, and oh, come in 14 feet wide. And it was all  
4 bordered with wood and had a chain around there. And we  
5 got there with -- We got there to go through there with  
6 our sheep and we couldn't get through. So June came over  
7 and opened that gate and took us up. And right above it  
8 there's a tin shed there. And he had a -- He'd done  
9 some work up there on that bench trying to clean the  
10 sagebrush off. And he had a Cat in that old tin shed.  
11 And he also had it locked. So the gate was locked there.  
12 That was my first encounter with that property.  
13 And then we went from there -- We just --  
14 We don't drive the sheep, we just let them feed. And  
15 they dispersed up over onto the top of that area up  
16 there. So it would be -- It was getting around pretty  
17 close time to go onto the forest the 1st of July that  
18 year. But since that time we always try to have sheep in  
19 there around May 1, May 5. And that's the lower  
20 elevation.  
21 And then we never could pull the camps up on  
22 top. We went up on the top. I remember we was up there  
23 on the 13th of June one year, right there by the Glade.  
24 And it was so wet we got stuck. So we couldn't get in  
25 there. But generally you can get in there by the 10th.

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1 It seems like the last few years, 20 years it's got  
2 drier. But you can't -- The north side doesn't even  
3 stay -- The north side there's some pine trees. And so  
4 it's wet. And I've been stuck in a lot of places along  
5 the Ridge Line Road. And I mean, you had to sleep in the  
6 truck overnight.

7 Q. Okay. Mr. Okelberry, that's okay. Generally  
8 speaking then you'd go up there sometime in May; is that  
9 correct?

10 A. On the lower end and the higher country in  
11 June.

12 Q. And then you'd move your cattle or sheep at  
13 that time to higher ground; would that be correct?

14 A. Well, approximately the 1st of July we'd --  
15 The permits that was on Forest Service -- We were  
16 allowed to go on the Forest Service. Some years it was a  
17 little drier. And they might let you on a day or two  
18 earlier. But maybe they'd hold you off till the 6th of  
19 July.

20 Q. Okay. Now, as to your private ground, when  
21 would you have your sheep on your private ground?

22 A. May and June.

23 Q. Did you move your sheep off your private  
24 ground onto the Forest Service ground then?

25 A. Yes.

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1 Q. And then would you bring the sheep back  
2 again?

3 A. Yes, in the fall or the last day of September  
4 or the first day of October. Right around the 1st of  
5 October.

6 Q. Now, that time from July or when ever you  
7 moved them off onto the Forest Service ground until you  
8 brought them back, would you still be on your property up  
9 there, for any reason?

10 A. Yes, the two permits that we purchased there,  
11 the Tough permits, was fairly close to it. So, you know,  
12 we always had straggler sheep. And then you had the  
13 fences. And the wind would blow and the trees would fall  
14 down on the fences, and you had to keep them up to keep  
15 the cows out. And we had ponds of water there that we  
16 were trying to conserve till fall. So we was in there  
17 quite often, you know, just to check to see for  
18 trespassing cattle and --

19 Q. Okay. Now, in the 70's did you see people  
20 using the Ridge Line Road that didn't have business up  
21 there in the 70's?

22 A. Well, I don't think so too much, but as time  
23 passed more people did come. And then they introduced  
24 those elk in there in about -- They introduced them in  
25 '62 or '63. And we never had a problem up to that point.

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1 People -- The local people came in to hunt deer. And  
2 most -- The Thompsons was there and they always like to  
3 hunt on the Glade. Taylors was there. They like to hunt  
4 Maple Creek.

5 Q. Did those people ever ask permission for you  
6 to --

7 A. Thompson's never missed a year that they  
8 didn't get permission and neither did Taylors.

9 Q. How did it go in the 80's?

10 A. Well, I don't -- The 80's, there was  
11 getting more elk. They put -- They introduced 16 elk  
12 down there on that Wallsberg property that they bought  
13 from (INAUDIBLE). Introduced 16 and I don't know how  
14 many more thereafter, but the herd grew. Now it's 800 a  
15 head. And as the herd grew, you know, the anxiety grew  
16 in Wallsberg and Heber and all over.

17 Q. Well, just --

18 A. My God, just terrible.

19 Q. Okay. Just answer the questions here, Mr.  
20 Okelberry. Are you familiar with what is known as the  
21 Thorton Canyon Road?

22 A. Yes.

23 Q. Okay. What was the condition of the Thorton  
24 Canyon Road in 1957 when you bought your property?

25 A. In 1957 we had two herds of sheep in there.

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1 And they somewhat got mixed. There was division fences  
2 in there and we -- There was an old corral down, made  
3 out of Aspen in Thorton Hallow. And we had to go down to  
4 that corral. And we had to rebuild the corral somewhat.  
5 And we had to clear the road out to get down there. And  
6 that was my first experience down in there. And then I  
7 think my brother, in '57, took the Caterpillar down in  
8 there and built the pond in Thorton Hallow.

9 Q. Okay. Well, prior to your brother building,  
10 working on that road, was it passable by a vehicle?

11 A. Well, I'd say it was. It was passable to the  
12 forest fence and -- The forest fence was there. And  
13 the road went through the forest fence, down to an old  
14 trail down there at Thorton Hallow.

15 Q. What was the condition of the road?

16 A. It was just an improved trail.

17 Q. You call it more of a trail than a road?

18 A. Yeah, you just get on a trail, you know.  
19 It's already got the two wheels. And all you got to do  
20 is clear the other side up to go down with the other two  
21 wheels.

22 Q. Okay. Was it rocky?

23 A. It was rocky.

24 Q. Was this an area where trees would fall over  
25 onto it?

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1 A. There was a big problem there. There was  
2 some big trees there.

3 Q. How would you remove those trees back in the  
4 50's and 60's?

5 A. Well, back that time you was 19 years old, 20  
6 and you had an ax. We had them big six foot, where one  
7 guy got on one side and one guy got on the other side,  
8 but that had to be two. A lot of times you was there  
9 alone, so you just took an ax. And, you know, an ax  
10 broke you could go get something to put it in. So it was  
11 a very reliable tool.

12 Q. Now, was there a gate separating your  
13 property from the Forest Service property on that Thorton  
14 Hallow Road?

15 A. Yes.

16 Q. Going over to the Parker Canyon Road, are you  
17 familiar with that one?

18 A. Yes, I was familiar with it.

19 Q. How would you describe that when you  
20 purchased this property in 1957?

21 A. Well, it was almost impossible to get there.  
22 I told you in '57 my father and I went down there. And  
23 there was -- Before you get to White Pole pass there's  
24 a steep place along that side, that thick Aspens, and  
25 it's very sidely. So we worked on that road and we --

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1           It was terrible to get down in there. And it  
2 was worse to get out, and that's when it was dry. And if  
3 it was dry you couldn't get out, or if it was wet you  
4 couldn't get out. But it was hard to get down in. And  
5 it's still hard today to get down there.

6           Q. Was Parker Canyon, is that an area where you  
7 get covered over with trees?

8           A. Yes, there's trees there.

9           Q. And would you have to remove those trees?

10          A. Right, you had to remove them.

11          Q. Now, the trees that you would remove, was it  
12 on other times then when you came up there in the May,  
13 June time frame? Would there be other times in the year  
14 when you would have to remove the trees?

15          A. The only time you'd have to -- After it was  
16 once cleared out you was all right, unless you got, you  
17 know, a fast moving front in there and a wind storm or  
18 something like that. Sometimes late in the spring it  
19 would snow. And, you know, with full leaves it get, snow  
20 gets on and that's a lot of trees down. I seen that two  
21 or three times.

22          Q. Now, are you familiar with what is known as  
23 the Circle Springs?

24          A. I know the Circle Springs.

25          Q. When you purchased the property there was

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1 there a gate separating your property from the Forest  
2 Service property?

3          A. Yes, it was boundary fence along that fence,  
4 all along there.

5          Q. Would you describe that Circle Spring Road?

6          A. Yes, where you come onto our property off of  
7 the forest from the Glade. You come from the Glade, you  
8 go onto our property, and it's pretty hard to get there.  
9 I mean, there's some pines and twist and lots of rocks  
10 and quite steep, but you can get there. You can navigate  
11 there. And then you get down there about 200 yards  
12 before our property and there's some mud holes in there.  
13 I've been stuck in them, high centered. A lot of other  
14 people -- Some of the other people have too.

15                 Then you get to our property and it's nothing  
16 but rocks over to where what we call Bear Wallow or the  
17 Circle, or going -- The Bear Wallow comes -- There's  
18 a pond there. We build -- Well, there was a pond that  
19 Toughs built or I don't know who built it, but it was  
20 there when we got there. It's very rough. I mean, it's  
21 hard to even get there in a truck. I never did see a  
22 car. And that's where we camped. And I personally built  
23 that corral area, what I call the Bear Wallow.

24                 And then from there on down it doesn't  
25 improve. It just -- There's a little draw that goes

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1 down through there. And there's a lot of big rocks in  
2 it. And then when you go through the V, it's -- In '57  
3 we couldn't get clear to Circle. And we didn't -- So  
4 we really didn't cut it out. We went about -- We got  
5 in that V, and that's as far as I pulled the camp wagon.  
6 And -- But there --

7 We did work on that fence and had to put the  
8 fence up. And we had the sheep along that fence. And  
9 there was a gate there at Circle, but it was a dead end.  
10 Circle goes out and it dead ends. Now, a lot of years  
11 ago that funneled all the sheep off from this western  
12 desert out here. They came up Provo Canyon, through  
13 Wallsberg and up Circle Springs up there. That was a  
14 trail for the sheep. And they went there and they  
15 watered on Circle, the next day they'd be over on the  
16 Glade. They'd come up through our property. And that's  
17 where that --

18 Q. Now, is -- Is this Circle Spring Road, has  
19 it changed much since 1957 to the present time?

20 A. I think the Thompsons are probably going down  
21 there to camp and -- Not every year they'd go down  
22 there to camp, but I can't see much change in it.

23 Q. Are Thompsons people that you gave permission  
24 to cross your property?

25 A. That's right. Thompsons was awfully good

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1 neighbors, very honorable people. And they had sheep in  
2 there at that time. And they also trailed up that trail,  
3 the old trail. They were the last people to own sheep in  
4 Wallsberg there and use that trail. They trailed from  
5 the mouth of Maple Canyon up Circle. They didn't go up  
6 Maple, they went up Circle. And they brought their camp  
7 wagon around through Main Canyon.

8 Q. Now, in regards to all those roads up there,  
9 the Circle Springs, the Ridge, Thorton, Parker, have they  
10 changed much since 1957?

11 A. Well, when we went there in 1957 there was a  
12 big fire that came in there in the fall time. I don't  
13 know if a deer hunter set it or what happened. It burned  
14 approximately a third of that property we had up there.  
15 And it did burn some sheep up. And so my brother had  
16 that TD9 Caterpillar or the family had it. And, you  
17 know, we was getting nervous.

18 The county wasn't doing too much, but they  
19 did make an effort. But we -- We thought the whole  
20 herd of sheep was going to burn up. Well, you know, I  
21 was 19. I was pretty nervous about it. But anyway, my  
22 brother brought that Caterpillar up so we could get up  
23 Maple Creek. And he grade -- That's the first place he  
24 did. He graded up Maple Creek and later he went up onto  
25 the top.

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1                   And what -- Mother nature put the fire out.  
2 It was going towards Heber. And then it turned around  
3 and came back and burnt down to the outskirts of  
4 Wallsberg. And then it snowed or something.  
5                   Q. Your brother testified that he used that TD9  
6 tractor and made some improvements up there. Do you --  
7                   A. On them -- On them roads.  
8                   Q. Do you recall that?  
9                   A. That was the same time. That was the first  
10 time we ever had a Caterpillar up there. But he had to  
11 build the road. I'm not saying -- That was a horse  
12 trail up Maple Creek. We went up Maple Creek in '57.  
13 And in the fall we got in there. And I'm not saying that  
14 somebody hadn't brought a vehicle down there prior to  
15 that, but the canyon was washed out.  
16                   We couldn't get up there. The county  
17 couldn't get up there. That's why we brought the  
18 Caterpillar in. And I -- You know, he left that fall  
19 and we had it in pretty good shape. But the following  
20 winter of '57 was a very wet year. And I'm not so sure  
21 that it didn't flood out the next year. But -- So we  
22 basically used it for a horse trail.  
23                   But it was handy for us to go there. Well,  
24 it was right up through the main, our property. And I  
25 rode it up there two or three -- Well, not two or three

1 times, two times a day. And it's a very dry, hot, steep,  
2 rough canyon. On a horse --  
3                   Q. Now, your brother testified that he made some  
4 improvements with that TD9. Did you ever make any  
5 improvements yourself?  
6                   A. I think my brother had that TD9 up there  
7 three times in '83. Well, he had that -- Later he came  
8 in there with a D6 the last time my brother was there.  
9 And then I had a Caterpillar there in 1983. And I  
10 cleaned the road out. I was up on top and I cleaned the  
11 ponds out. And I came down Maple Creek Canyon. I didn't  
12 really do a lot, but I made it so, you know --  
13                   I didn't ever backup, I don't think, to get  
14 maybe one or two big rocks. And I came down and that  
15 made it passable in a vehicle. And I don't know how long  
16 it lasted. I don't know if it was one year or two or  
17 three years before it flooded out again.  
18                   Q. Now, on the Maple Canyon Road, what was the  
19 condition in 1957 when you went up there?  
20                   A. It was nothing more than a horse trail. I  
21 spent a lot of time with an ax cutting out so I could get  
22 the sheep up part of it. I couldn't -- You can't even  
23 drive the sheep it's so thick. And I -- That was a  
24 fast, suppose to be, to get to the top. And the horse up  
25 -- You'd ride down through there. Oak is hard on you,

1 you know. It wears out a pair of levis in about a week  
2 up there. So that's why -- That's really one place  
3 cowboys need chaps.

4 Q. There was some testimony that that road has  
5 washed out over the years; would that be correct?

6 A. Quite frankly, but it's not that much. I  
7 mean, I don't know how often, but we've had the  
8 Caterpillar in there four times. And every time we tried  
9 to improve the road.

10 Q. Is it passable right now by an automobile?

11 A. Not to my knowledge. I think -- I think a  
12 four-wheeler -- They snuck through there last summer or  
13 tried. And they've tried to go up and down there and  
14 clean out the rocks. It's only four-wheelers.

15 Q. Now, on these roads, trails in question, has  
16 the county ever made any improvements at all?

17 A. No, not one, not one penny.

18 Q. Has the Forest Service ever made any  
19 improvements?

20 A. When we first went in there they was putting  
21 the fences up.

22 Q. I'm talking about roads.

23 A. Not to my knowledge ever had to do anything  
24 on the roads. And I can't get them to do anything.

25 Q. Now, you indicate that over the years you've

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1 given permission to people, for people to use those  
2 roads, have you?

3 A. I definitely have. My father was a peaceful  
4 guy. And in 1957 he gave permission to the -- The  
5 first ones was the Youngs. They ride down there at the  
6 base of the hill and they -- Those people up there  
7 really, you know -- They heated their houses with wood.  
8 And so it's a big problem for them. They wanted wood and  
9 my father was very generous with that. He gave them  
10 permission.

11 But he did not like people to come in there  
12 and abuse what they thought was their authority to say,  
13 "Hey, this is my ground. I'm going to go up there". He  
14 was that kind of a guy. He would give you anything, but  
15 you got permission. So I followed in his foot steps and  
16 so did my brother.

17 Q. Was this permission sometimes by oral and  
18 sometimes written?

19 A. Right.

20 Q. Was it sometimes necessary for you to remove  
21 people from being up there?

22 A. At first it wasn't because you had Thompson  
23 and a few -- And Jake Sabey, he always rode his horse  
24 up there. And just the best people in the world. Just  
25 the best people in the world. And you didn't have a

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1 problem. If they saw your sheep they come and told you.  
2 And if it was dinner time you brought them in and fed  
3 them. And that, that's the way it was when we first we  
4 went there. But it just kept getting worse and worse and  
5 worse.  
6 Q. Okay. Let me show you what's been marked as  
7 Exhibit 27 and ask you if you can identify that?  
8 A. Yeah, "This is private property, must leave  
9 now or I will get the law for trespassing".  
10 Q. Is that a notice?  
11 A. That's a notice.  
12 Q. Is that a notice that you left for someone up  
13 there?  
14 A. I put that on somebody's camp and they left.  
15 They left. When I -- They left me the note. I saw the  
16 people and, you know, but they left. I really didn't  
17 kick them out.  
18 Q. This is marked as Exhibit 27.  
19 MR. PETERSEN: We would offer 27, your Honor.  
20 THE COURT: Any objection?  
21 MR. SWEAT: Can I look at it one more time?  
22 THE COURT: Does it have a date on it or  
23 anything?  
24 MR. SWEAT: Does it have a date on it?  
25 MR. PETERSEN: I don't think it does.

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1 MR. SWEAT: Did you say he wrote that?  
2 Q. (BY MR. PETERSEN) Is this in your  
3 handwriting, Mr. Okelberry?  
4 A. I -- It's in my handwriting and printing.  
5 Q. Do you know the date when, approximately when  
6 you did this?  
7 A. No, I don't. It's quite an old piece of  
8 paper. I don't know how long. It's been within the last  
9 20 years.  
10 THE COURT: Well, I'll receive it for --  
11 It could be demonstrative of his testimony that he's told  
12 people to leave on occasion.  
13 MR. SWEAT: No objection, your Honor.  
14 (Defendant's Exhibit No. 27  
15 was received into evidence.)  
16 Q. (BY MR. PETERSEN) Let me show you what's  
17 been marked as Defendant's Exhibit 28 and ask you if you  
18 can identify that one?  
19 A. Yeah, that's -- I met Brian Gardner up  
20 there one time. And he was camped next to our property.  
21 And he was -- He liked the area. Let's see, I did date  
22 this one, 8/31/2000. He was camped there next to the  
23 property. And he was worried about getting through  
24 there. I'll read it. And I wrote it on the back of the  
25 check cause I met him in a truck up there.

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1 It says, "I, Ray Okelberry, give permission  
2 to Brian Gardner and his folks to go through or around my  
3 locked gates, and permission to use my roads to access my  
4 property in Wasatch County. Ray Okelberry". I don't  
5 know how much better you can be than that.

6 MR. PETERSEN: We'd offer Exhibit 28, your  
7 Honor.

8 MR. SWEAT: No objection, your Honor

9 THE COURT: It's received.

10 (Defendant's Exhibit No. 28  
11 was received into evidence.)

12 Q. (BY MR. PETERSEN) Mr. Okelberry, I show you  
13 what's been marked as Defendant's Exhibit 29 and ask you  
14 if you can identify that?

15 A. Well, this is just another one. If somebody  
16 wanted to get permission to go up there and we granted  
17 them permission.

18 Q. Is this a letter that you received?

19 A. Right. Somebody -- They didn't even know  
20 me. Let's see, "A client of mine and an acquaintance of  
21 yours, Joann Huvad, suggested that I contact you about  
22 hunting on your property. I have recently moved to the  
23 Wasatch front where I work as a personal painter. Joann  
24 comes in and works with me a couple times a week.

25 She was nice enough to ask your father if he

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1 knew of any ranchers in the area who may be willing to  
2 allow hunters access to their land and he recognized you.  
3 Finding a good place to hunt is very important to me.  
4 And hunting on your property is a privilege. I wouldn't  
5 take lightly -- I won't take it lightly. Thanks for  
6 your help.

7 I am originally from Pinedale, Wyoming. And  
8 while growing up there I learned many valuable lessons.  
9 These include the importance of wildlife, the land, the  
10 people who work the land, as well as the use of good  
11 manners while a guest on another person's property.

12 If you wouldn't mind dropping me a line to  
13 let me know what your feelings and policies are about  
14 having hunters on your land I would greatly appreciate  
15 it. If you are so inclined to let me hunt on your land I  
16 -- I would like to come by sometime so you can conduct  
17 an interview or just get to know me. I would also like  
18 to see your ranch and hear what you have to say as well.  
19 Feel free to call me" -- I don't know, telephone  
20 numbers and addresses.

21 Q. This was a letter dated August 11th, 1998?

22 A. Whatever it says.

23 MR. PETERSEN: Your Honor, we'd offer Exhibit  
24 29.

25 MR. SWEAT: No objection.

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1 THE COURT: It's received.  
2 (Defendant's Exhibit No. 29  
3 was received into evidence.)  
4 Q. (BY MR. PETERSEN) Mr. Okelberry, I show you  
5 what's been marked as Defendant's Exhibit 30. It appears  
6 to be photocopies of checks. Did you sometimes charge  
7 people to go on your property?  
8 A. Oh, let's see. Jack and Kathleen Thompson,  
9 August the 28th, I can't, '90. And then here's Robby D.  
10 Johnson and Anita Johnson, September the 7th, '94. And  
11 they paid \$50 for what they call a trespass permit.  
12 Q. And was that typical of what you would --  
13 A. At this time we had Wayne and Jane Gardner  
14 there. Approximately 1990 -- It started out from '96,  
15 1996 up to -- Well, let me see. Approximately 1990 --  
16 We had Bruce Huvard in there and that's when we started  
17 this permission deal. He like to hunt the other area.  
18 We gave him permission. And that's when we first started  
19 out at (INAUDIBLE) down on these permits. And then this  
20 was about '91 that Brian, he mentioned that he let Jane  
21 and Wayne Gardner in. And I don't know if that is one or  
22 two years, it doesn't matter. But anyway they -- They  
23 might have been there two or three years, but all  
24 basically they did is let their friends in. And they --  
25 Q. No, now, the question, Mr. Okelberry, does

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1 this Exhibit 30 represent people that paid you for going  
2 on your roads and hunting on that property?  
3 A. That particular year there was probably 50,  
4 50 people of those. And we gave out permits for two  
5 years, it could have been three years.  
6 Q. Is this a representative of what you did?  
7 A. Right.  
8 MR. PETERSEN: Your Honor, we'd offer Exhibit  
9 30.  
10 MR. SWEAT: No objection.  
11 THE COURT: It's received.  
12 (Defendant's Exhibit No. 30  
13 was received into evidence.)  
14 MR. PETERSEN: Your Honor, I'd like to review  
15 with the witness some pictures, if I may, and have the  
16 witness mark on Exhibit 22 --  
17 THE COURT: Where the pictures are at?  
18 MR. PETERSEN: Where they're at.  
19 THE COURT: Okay. That's fine.  
20 UNIDENTIFIED: Your Honor, (INAUDIBLE) 22 is  
21 received.  
22 THE COURT: Yeah --  
23 UNIDENTIFIED: (INAUDIBLE).  
24 THE COURT: (INAUDIBLE) offered 22.  
25 MR. PETERSEN: Oh, we'd offer 22.

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1 THE COURT: That's the small portion of  
2 Exhibit 2.  
3 MR. SWEAT: Don, would you agree that it's no  
4 different than (INAUDIBLE)?  
5 MR. PETERSEN: Yeah.  
6 MR. SWEAT: No objection, your Honor.  
7 THE COURT: It's received.  
8 (Defendant's Exhibit No. 22  
9 was received into evidence.)  
10 MR. PETERSEN: (INAUDIBLE).  
11 THE COURT: (INAUDIBLE).  
12 THE WITNESS: I have, sir.  
13 THE COURT: Okay.  
14 Q. (BY MR. PETERSEN) Let me show you what's  
15 marked --  
16 MR. SWEAT: If you don't mind showing me each  
17 one. Can you tell me where they are? I guess he can  
18 tell me. If you just want to do one at a time, that way  
19 I can keep track of them.  
20 Q. (BY MR. PETERSEN) Mr. Okelberry, let me show  
21 you what's been marked as Defendant's Exhibit 19 and ask  
22 you if you can identify that?  
23 A. Yes, sir.  
24 Q. And what is that?  
25 A. That's after you go off from the West Daniels

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1 land onto, off of Parker Canyon Road on the Forest  
2 Service. You know, if the gates right here about, I  
3 don't know how many feet, and there, as the enter the  
4 forest, there's a sign that says no motorized vehicles  
5 with the United States Forest Service sign.  
6 Q. Is that a fair representation?  
7 THE COURT: Why don't you have him see when  
8 he took the photo.  
9 Q. (BY MR. PETERSEN) Do you know when that was  
10 taken?  
11 A. I'd say at that picture was taken about four  
12 years ago.  
13 Q. Is that sign still there?  
14 A. I doubt if it's there. Sabey told me  
15 sometimes when people --  
16 Q. Oh, no, no (INAUDIBLE).  
17 A. Okay. They just run over them, that's all  
18 they do. Pick them up and throw them away if they can.  
19 Q. That is a picture going on the Forest Service  
20 property on Parker Canyon Road; is that correct?  
21 A. Yes, and the Forest Service installed that.  
22 Q. And is that a fair representation of that  
23 sign that was there?  
24 A. That's exactly it.  
25 MR. PETERSEN: Your Honor, we'd offer Exhibit

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1 19.  
2 MR. SWEAT: No objection.  
3 THE COURT: It's received.  
4 (Defendant's Exhibit No. 19  
5 was received into evidence.)  
6 Q. (BY MR. PETERSEN) Would you mark 19, on this  
7 map, where that's at?  
8 A. You bet I can. It's right -- Do you want  
9 the gate or do you want the --  
10 Q. I want where that picture, what the picture  
11 shows.  
12 A. Just through the gate, just right there. Do  
13 you want me to mark this No. 19 or something?  
14 Q. Yes.  
15 A. Is it 19?  
16 Q. Yes. I'll show you what's been marked as  
17 Exhibit 6.  
18 MR. PETERSEN: And I think Exhibit 6 has been  
19 received, has it not?  
20 THE COURT: It has.  
21 MR. SWEAT: Can I look at it, just since  
22 you're going to review to it, so I have an idea?  
23 Q. (BY MR. PETERSEN) Where is Exhibit 6, Mr.  
24 Okelberry?  
25 A. There's no question where that's at. You're  
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1 on the Glade on the Forest Service and you come -- Our  
2 border that borders the Forest Service and goes on our  
3 private ground at Circle Springs.  
4 Q. Okay. Would you mark that on the, on this  
5 exhibit right here?  
6 A. Yeah, let's get it down here. What number  
7 are you calling that?  
8 Q. 6. I'm showing you what's been marked as  
9 Exhibit 7.  
10 MR. PETERSEN: I think this has been received  
11 as well.  
12 THE WITNESS: That's the same gate and same  
13 area. It could of been a little later. And it just  
14 shows that the gates locked.  
15 Q. (BY MR. PETERSEN) Would you mark Exhibit 7  
16 where that's at?  
17 A. 6 and 7.  
18 MR. SWEAT: Don, would you show me 7?  
19 THE COURT: It's the -- It's the lock.  
20 MR. SWEAT: Oh, it's the metal gate on  
21 Circle?  
22 THE COURT: Yeah.  
23 MR. SWEAT: Or is it the lock? 7 was the  
24 lock with the cable?  
25 MR. PETERSEN: Yeah.

1 MR. SWEAT: Okay.  
2 Q. (BY MR. PETERSEN) (INAUDIBLE) marked as  
3 Exhibit 8 and ask you if you can identify that?  
4 A. Well, that the same area -- If you notice  
5 on this picture the post has been broken off, the gate  
6 was taken out of there, and we replaced it with a big  
7 steel gate.  
8 Q. So Exhibit 8 shows the replacement gate  
9 (INAUDIBLE)?  
10 A. Right.  
11 Q. Okay. Would you put an 8 on there?  
12 MR. SWEAT: Don, are you getting dates on  
13 these pictures? If you're not going to ask dates I'm  
14 going to go back and ask dates on every one. If you want  
15 to ask it might save a little time.  
16 Q. (BY MR. PETERSEN) What is the date on this  
17 picture? Is that when it was taken?  
18 A. (INAUDIBLE) let's see, 2000 through 2004. It  
19 was either 2003 or 2002.  
20 THE COURT: That's No. 8?  
21 MR. PETERSEN: It has a -- Yes, it has a  
22 date here, 6/15/04.  
23 Q. (BY MR. PETERSEN) So is that the date it was  
24 likely taken?  
25 A. Well, you sure can't argue with that then.

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1 Q. Okay.  
2 MR. PETERSEN: It has a date on it 6/15/04.  
3 THE COURT: Thanks.  
4 Q. (BY MR. PETERSEN) Mr. Okelberry, let show  
5 you what's been marked as Defendant's Exhibit 9.  
6 MR. PETERSEN: I think that's been admitted,  
7 has it not?  
8 Q. (BY MR. PETERSEN) Can you identify --  
9 A. Does it got a date on it? Some pictures do  
10 and some don't.  
11 Q. Can you identify where that --  
12 A. I know exactly where it's at. You go down  
13 into White Pole, and instead of going down into Parker  
14 Canyon you make a left and head down towards the fish and  
15 game grounds at the -- That was the White Ledges we  
16 call a rough road that --  
17 Q. Do you know when this picture was taken?  
18 A. I don't know. I can't remember when all  
19 these pictures were taken.  
20 Q. But has that --  
21 A. It looks the same today. I think it looks  
22 the same.  
23 Q. Has that changed at all over the years?  
24 A. Well, there's been a few more people beat the  
25 machinery up going up them rocks. It might be a little

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1 smoother than it was.  
2 Q. But is that a fair representation --  
3 A. Yes.  
4 Q. -- of those roads?  
5 A. Yes.  
6 Q. Okay. Could you put No. 9 on there?  
7 A. Yeah, it's over here. No. 9 is right there.  
8 Q. I'm showing you what's marked as Exhibit 15.  
9 Can you identify that?  
10 A. This is the gate down coming off the Main,  
11 Main Canyon Road there in Wallsberg. It's about 300  
12 feet, 400 feet maybe from Glen Shepard's house. It's the  
13 entrance to our property going up Maple Creek. It goes  
14 up there to a corral. We improved the road up there  
15 about a quarter mile so our sheep corral, we ship all  
16 sheep and a lot of cattle out there in the fall.  
17 MR. PETERSEN: I'm not sure if this got  
18 admitted or not, your Honor, 15?  
19 MR. SWEAT: Can I see it, Don?  
20 CLERK: It has.  
21 MR. SWEAT: Yeah, I got one.  
22 THE COURT: It's received.  
23 (Defendant's Exhibit No. 15  
24 was received into evidence.)  
25 THE COURT: Ask him if he knows what date it

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1 was taken.  
2 Q. (BY MR. PETERSEN) Do you know what date that  
3 picture was taken?  
4 A. There's a date on there I can see. I can't  
5 make it out. It might be '01 or '91, I don't know. It's  
6 been there for approximately 20 years.  
7 Q. And is that a fair representation?  
8 A. A very good one.  
9 Q. I'm showing you what's been marked as  
10 Defendant's Exhibit's 11 and 12 and ask you if you can  
11 identify those?  
12 A. I don't know where these gates are. They're  
13 -- They're pretty close to the boundary on West Daniels  
14 land. West Daniels land use to be some state land down  
15 in there. It joins on the fish and game. So that would  
16 be the boundary. Basically you go onto that state ground  
17 off of West Daniels ground.  
18 Q. Do you know when these pictures were taken?  
19 A. I think it's -- I don't know if they were  
20 taken three or four years ago.  
21 Q. Is that a fair representation of the way it  
22 looked then when (INAUDIBLE)?  
23 A. Yes, if you give it to me I'll show you how  
24 they set. This post -- This post right here -- This  
25 post right here, (INAUDIBLE). That post there is the

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1 same post as this one is right here. And so that oak  
2 tree is the same and they kind of overlap right there.  
3 There's a big gate up there. It's locked,  
4 you can see this thing right here, it's locked. And  
5 right at the side of the gate there's a sign that says,  
6 "Road closed to motorized vehicles. Access restricted to  
7 protect the water shed and to encourage wildlife use.  
8 Please pack out trash. Wild life restoration".  
9 MR. PETERSEN: We'd offer, your Honor,  
10 Exhibit's 11 and 12.  
11 THE COURT: Any objection?  
12 MR. SWEAT: No objection.  
13 THE COURT: It's received.  
14 (Defendant's Exhibit No.'s 11 & 12  
15 was received into evidence.)  
16 Q. (BY MR. PETERSEN) Would you mark that on the  
17 map? Where was that?  
18 A. It's 11 and 12?  
19 Q. Yes. Let me show you what's been marked as  
20 Exhibit No. 13 and ask you if you can identify that?  
21 A. Well, I can. I took this picture the day I  
22 was up there with you and Sabey.  
23 Q. There's a date on that.  
24 A. 6/15/04 and it shows that we went down to  
25 Thorton Hallow. We got down to Thorton Hallow and made a  
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1 turn and didn't even get out of the car. Took this  
2 picture. And this is the trail that comes from the  
3 closed gate what we call the 1080 gate in the mouth of  
4 Thorton in the pine trees, that we got locked.  
5 And I guess -- It use to be an old cow  
6 trail down there and all the west Daniels cattle trail  
7 along this fence. So this was just -- The  
8 four-wheelers start to use it. And they've made this --  
9 And it looked -- It's four-wheelers, but there's two  
10 tracks there again. So it use to be a trail and it's  
11 just what the hunters have done.  
12 Q. Now, is this a picture on Forest Service  
13 property that --  
14 A. That's on Forest Service.  
15 Q. -- parallels the fence?  
16 A. Right, it parallels that forest boundary  
17 (INAUDIBLE).  
18 MR. PETERSEN: We'd offer 13, your Honor.  
19 THE COURT: Have you been having him put  
20 numbers on these last few photos.  
21 THE WITNESS: Oh, yeah, let's see, what's  
22 that number?  
23 Q. (BY MR. PETERSEN) I think you did. You got  
24 11 and 12 on there?  
25 A. I got 11 and 12.  
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1 Q. And this is 13.  
2 THE COURT: Any objection?  
3 MR. SWEAT: No objection, your Honor.  
4 THE COURT: It's received.  
5 (Defendant's Exhibit No. 13  
6 was received into evidence.)  
7 Q. (BY MR. PETERSEN) Let me show you what's  
8 been marked as Exhibit 14 and ask you if you can identify  
9 that?  
10 A. I can. That's right at the 1080 gate. And  
11 it's looking directly north and a long the Forest  
12 Service, Okelberry boundaries. And this is the entrance  
13 to that picture you just had. This is where you start to  
14 go down, come out on that road there.  
15 Q. Now, when you say the 1080 gate, you mean the  
16 gate that divides your property and the Forest Service  
17 property and the Ridge Line Road?  
18 A. Yes, and those big pines and Ridge Line Road.  
19 Q. And does that show that parallel road or  
20 trail or whatever?  
21 A. The fence goes right alongside of it. Like I  
22 say, it use to be an old cow trail.  
23 THE COURT: This is again at the bottom of  
24 Thorton Hallow?  
25 MR. SWEAT: Can you show us on the --

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1 THE WITNESS: It's that -- That picture you  
2 got is where it comes out in Thorton Hallow, right in  
3 Thorton Hallow. This is where you start down. It's  
4 already -- I don't think it's a half mile long, three  
5 eighths of a mile.  
6 THE COURT: Okay. So this is -- This is --  
7 THE WITNESS: Where you come off the road you  
8 know --  
9 THE COURT: Down -- Down towards the Glade  
10 then.  
11 THE WITNESS: The gate, yeah.  
12 THE COURT: Yeah.  
13 THE WITNESS: That big gate you went through.  
14 And then the gate was locked.  
15 THE COURT: Okay.  
16 THE WITNESS: And this is the trail that  
17 they've used. It use to be a cow trail. I drove cows  
18 along it. And the four-wheelers started using it. I  
19 don't know if anybody went down in a Jeep or not.  
20 MR. SWEAT: Don, I'm just a little confused.  
21 Could you have him point them out just on the map just so  
22 I'm aware?  
23 MR. PETERSEN: Sure.  
24 Q. (BY MR. PETERSEN) Would you step up here,  
25 Mr. Okelberry, and show on the map. Or maybe you could

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1 do it right here on this one (INAUDIBLE). Why don't you  
2 show --  
3 A. This is just the same map, isn't it?  
4 Q. Yeah, it is.  
5 A. All right. Right there, you remember where  
6 we went through that gate and we had to saw them trees  
7 out.  
8 MR. SWEAT: Okay.  
9 THE WITNESS: And you went down there with  
10 Don. And Ed, I think, went down there and cut the --  
11 Ed and I don't remember who else. But --  
12 MR. SWEAT: (INAUDIBLE) 14.  
13 MR. PETERSEN: 14 would be right here looking  
14 at --  
15 THE WITNESS: Okay. Right here, right here.  
16 THE COURT: Looking up towards the --  
17 THE WITNESS: Thorton. You'd be there and  
18 you just --  
19 THE COURT: Along the boundary fence.  
20 THE WITNESS: Just parallel.  
21 MR. SWEAT: (INAUDIBLE) Circle or over here  
22 at Maple?  
23 THE WITNESS: No, no. No, you're right, it's  
24 right here. It goes down to Thorton.  
25 MR. PETERSEN: Put a 14 in there, put a 14.  
100

1 THE WITNESS: Okay. That's exactly where  
2 your, it's at. You got it figured out right?  
3 MR. SWEAT: Where's 13 -- You're indicating  
4 that that (INAUDIBLE).  
5 MR. PETERSEN: (INAUDIBLE).  
6 THE WITNESS: Well, it'd be right here. 13  
7 would be right there, right there. Let's get it right.  
8 MR. PETERSEN: Don't mark (INAUDIBLE). Just  
9 put --  
10 THE WITNESS: Okay.  
11 MR. PETERSEN: Just put the numbers on there.  
12 THE WITNESS: All right.  
13 MR. SWEAT: So 13 is down in, 14 is  
14 (INAUDIBLE)?  
15 THE WITNESS: Yeah, it's about three eighth  
16 -- No, it says -- It shows that it's less than a half  
17 mile long.  
18 MR. PETERSEN: Okay. Has 14 been received?  
19 THE COURT: It hasn't. Any objections, Mr.  
20 Sweat?  
21 MR. SWEAT: No, your Honor.  
22 THE COURT: It's received.  
23 (Defendant's Exhibit No. 14  
24 was received into evidence.)  
25 MR. SWEAT: Did we get dates on those? I  
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1 apologize.  
2 MR. PETERSEN: No.  
3 THE COURT: Say 6/15/04.  
4 MR. SWEAT: Thank you.  
5 Q. (BY MR. PETERSEN) Now, Mr. Okelberry, let me  
6 show you what's marked as Defendant's Exhibit 16 and ask  
7 you if you can identify that?  
8 A. Yeah, this is just as you go off the Glade  
9 and you go through them pine trees there (INAUDIBLE).  
10 You go down to -- It's headed down towards Thorton.  
11 It's just this side of Thorton. It's just this side the  
12 1080 gate. There was an old trail that went down there.  
13 Cabin Hallow, I don't know. Cabin -- There's so many  
14 names, but the canyon this side of Thorton Hallow. And  
15 there's an old road --  
16 Q. Does it have a date on it?  
17 A. Yeah, it says 6/24/04.  
18 Q. And is there a sign on there?  
19 A. Right. It's a sign in the middle of that  
20 road or that trail, it went down there. And it's on  
21 Forest Service property. And it says area closed. I  
22 don't know if somebody shot the top of it off, but that's  
23 all it says, it says area closed. I can show you where  
24 it's at on the map.  
25 Q. Show us on the map.

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1 A. It's back and off in the, off in the Glade.  
2 Let's see. Here's the Glade, you come off the Glade.  
3 It's right along in here someplace.  
4 Q. Mark that with a 16.  
5 A. (INAUDIBLE). It's right where that -- Just  
6 pass where that sheep fence and the cattle fence divides.  
7 So it's right in here someplace. I don't know how to  
8 mark it. We've got too many marks there.  
9 Q. It's on forest property?  
10 A. Yeah, it's on forest. Let's call that one  
11 -- What?  
12 Q. 16.  
13 A. Okay. No. 16. It's close --  
14 Q. South or north or -- Which way (INAUDIBLE)?  
15 A. Let's see. You're looking -- You'd be  
16 looking like down on Highway 40.  
17 Q. Okay.  
18 A. If you took off walking and just kept going  
19 down here you'd end up on Highway 40.  
20 MR. PETERSEN: Your Honor, we'd offer 16.  
21 THE COURT: Any objection?  
22 MR. SWEAT: No objection.  
23 THE COURT: It's received.  
24 (Defendant's Exhibit No. 16  
25 was received into evidence.)

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1 MR. PETERSEN: Your Honor, I have just a few  
2 other photos (INAUDIBLE).  
3 Q. (BY MR. PETERSEN) A couple other photos  
4 here. Maybe that's the same one.  
5 A. Yeah, it's the same one.  
6 MR. PETERSEN: I guess the record ought to  
7 show that Exhibit 16 and 31 are the same. We'll only  
8 used 31.  
9 THE WITNESS: (INAUDIBLE).  
10 Q. (BY MR. PETERSEN) Let me show you what's  
11 been marked -- Mr. Okelberry, let me show you what's  
12 been mark as Exhibit 32.  
13 A. You've already used this. This is a gate --  
14 Q. (INAUDIBLE).  
15 A. -- going down towards Big Hallow.  
16 Q. (INAUDIBLE).  
17 THE COURT: (INAUDIBLE) we don't want to have  
18 any more duplicates.  
19 MR. PETERSEN: And I think we've used 33 too,  
20 have we not?  
21 A. That's the -- That's Parker Canyon. You've  
22 used that.  
23 Q. All right. How about 34?  
24 A. 34 is a picture going down into Thorton  
25 Hallow that says no motorized vehicles. Similar to the  
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1 one in Parker Canyon and the one that went down into the  
2 Cabin. And it's just through the fence. There's a  
3 boundary fence right there below the 1080 gate. And it's  
4 a boundary fence that goes along there for about five  
5 miles. And it's just on the forest side.  
6 MR. PETERSEN: Your Honor, we'd offer --  
7 Q. (BY MR. PETERSEN) Well, do you know the date  
8 this was taken?  
9 A. I don't think it's got a date on it. I think  
10 those signs were put up four or five years ago. And I  
11 don't think they're there today.  
12 Q. Okay. Would you mark that on the exhibit  
13 where 34 is?  
14 MR. PETERSEN: And we would offer 34, your  
15 Honor.  
16 MR. SWEAT: No objection.  
17 THE COURT: It's received.  
18 (Defendant's Exhibit No. 34  
19 was received into evidence.)  
20 MR. SWEAT: Can I see where he marked it?  
21 MR. PETERSEN: Yeah. Show him where it is.  
22 THE WITNESS: It's right on Thorton Hallow  
23 right there. Either side, do you want to mark it? What  
24 was the number of that one?  
25 THE COURT: 34.

1 Q. (BY MR. PETERSEN) I'm showing you what's  
2 been marked as Exhibit 35 and ask you if you can identify  
3 that?  
4 A. Yeah, that's -- That's below Bear Wallow,  
5 Circle, down towards the Circle Spring Road. Some years  
6 ago these people weren't happy going over to --  
7 Q. No, just identify it.  
8 A. No, it's a cutoff road that they use down  
9 there with their four-wheelers to get down to Circle.  
10 Q. Was this a representation of the Circle  
11 Spring Road as we've been referring to it during the  
12 course of this trial?  
13 A. Pretty close.  
14 Q. Do you know the date that that was taken?  
15 A. I don't know. It might of been eight years  
16 ago, it might of been six years ago.  
17 Q. Is it a fair representation as to the way the  
18 road looks today?  
19 A. Right. I think that was the trail they was  
20 using.  
21 THE COURT: I don't think -- It's not the  
22 Circle Creek Road.  
23 Q. (BY MR. PETERSEN) That's not Circle Springs  
24 Road then?  
25 A. Yeah, it's -- What they did instead of

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1 making -- Circle Springs makes a loop and they made a  
2 cutoff. So it's right -- It's right next to the road.  
3 Q. Well, for the road, the area you see down  
4 here, these rocks and so fourth, is that a fair  
5 representation of Circle Springs Road?  
6 A. Yes, that is. That would be a fair  
7 representation.  
8 Q. Is that a fair representation the way it  
9 looks today?  
10 A. I haven't seen it today, but it would be a  
11 little greener maybe. That's it.  
12 Q. Okay.  
13 MR. PETERSEN: We'd offer 35, your Honor.  
14 MR. SWEAT: No objection.  
15 THE COURT: It's received.  
16 (Defendant's Exhibit No. 35  
17 was received into evidence.)  
18 Q. (BY MR. PETERSEN) Mr. Okelberry, let me show  
19 you what's been marked as Exhibit 36 and ask you if you  
20 can identify that?  
21 A. That's pretty close to the Circle Springs  
22 gate. This is a -- It's right by Circle Springs gate.  
23 It's just saying restricted area, keep out, no  
24 trespassing.  
25 Q. Does it have a gate on it?

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1           A.    11/6/01.  It's part of the Ridge Line Road  
2 that doesn't exist.  What you're calling the Ridge Line  
3 don't exist.  
4           Q.    Oh, okay.  Would you show the Court what area  
5 (INAUDIBLE)?  
6           A.    Well, I got to get oriented here.  This map  
7 you got showing -- The one you sent to me here, you  
8 know, and told us to start with.  
9           Q.    No, we're not talking about this road.  
10          A.    Right here.  Yeah, it's this road right  
11 there.  It's right there.  
12          MR. SWEAT:  Through the fence?  
13          THE WITNESS:  Just through the fence.  
14          MR. SWEAT:  Into your property?  
15          THE WITNESS:  On the map we received you'd  
16 have a mark, but you don't show the two joining one  
17 another.  
18          MR. SWEAT:  Can you show me on the big map  
19 just to get a better --  
20          THE WITNESS:  Yeah, I can show you.  It's  
21 this part right here, this road right here.  This area  
22 that you don't have joined.  You don't have it joined on  
23 this map either, the Circle Springs Road.  
24          MR. SWEAT:  We tried to prevent it.  It  
25 doesn't show up.

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1           THE WITNESS:  Well, that's a good map maker.  
2           MR. SWEAT:  (INAUDIBLE).  
3          Q.    (BY MR. PETERSEN)  Is that representative of  
4 the area?  
5          A.    That's representative.  
6          MR. PETERSEN:  Your Honor, we'd offer 36.  
7          MR. SWEAT:  No objection.  
8          THE COURT:  It's received.  
9                (Defendant's Exhibit No. 36  
10                was received into evidence.)  
11          MR. SWEAT:  Can we get a date on 36?  
12          THE COURT:  It's '01 also.  
13          MR. SWEAT:  Thank you.  
14          Q.    (BY MR. PETERSEN)  Now --  
15          A.    I don't think I marked it down here.  Did we  
16 get a number?  
17          Q.    Put it on there.  
18          A.    What number did you have?  
19          Q.    36.  
20          A.    Oh, okay.  
21          Q.    I'll show you what's marked as 37.  Is that  
22 still in that same area?  
23          A.    Well, that's exactly it.  This is shown --  
24 This is the road or trail that goes around there.  This  
25 is the road or the trail.

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1 Q. Is that -- Do you know the date on that?  
2 A. (INAUDIBLE) it says '04, so 6/14.  
3 Q. It might show some trees in the road; is that  
4 correct?  
5 A. Right, that shows -- The logging trees is  
6 when those Youngs, the last people were up there was the  
7 Youngs. And they -- We gave them the logs to build  
8 their barn down there in Wallsberg. And this is --  
9 This is kind of the road that they made around there.  
10 Q. Exhibit 38, is that still in the same area  
11 there?  
12 A. Yes, that's on the -- That's as you come in  
13 on the Circle. And this is the -- They're showing it  
14 here. And it goes around and hits on that V that hits  
15 onto the 1080 Road, what you're calling the Ridge Line  
16 Road. This is just before you come to that V. That  
17 shows trees on the road.  
18 Q. Okay. I think Glen testified that he, did he  
19 not, that these trees are not being removed any more; is  
20 that correct? And that road (INAUDIBLE).  
21 A. Yeah, I use to cut that road out all the  
22 time. I liked kind of -- I didn't want to go back on  
23 the forest and then go around to the 1080 Gate and not  
24 cut across there. But I haven't cut it out for eight or  
25 ten years.

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1 MR. PETERSEN: We'd offer 37 and 38, your  
2 Honor.  
3 MR. SWEAT: No objection.  
4 THE COURT: They're received.  
5 (Defendant's Exhibit's No. 37 & 38  
6 were received into evidence.)  
7 THE WITNESS: I've got quite a few numbers.  
8 Q. (BY MR. PETERSEN) Mr. Okelberry, let me  
9 show you what's been marked as Defendant's Exhibit 39 and  
10 ask you if you can identify that?  
11 A. Well, that's a tree where you turn off from  
12 Ridge Line Road to go down Maple Creek Trail, Maple Creek  
13 Canyon.  
14 Q. Now, does that -- Do you know what day that  
15 was taken?  
16 A. No, it looks like mid summer. I don't know.  
17 It says -- Here we go, 8/22/00.  
18 Q. And is that a fair representation as you --  
19 A. It's right there at that turn where you go  
20 down.  
21 Q. To go down -- To go down to Maple Canyon?  
22 A. Right.  
23 MR. PETERSEN: Your Honor, we'd offered 39.  
24 MR. SWEAT: No objection  
25 THE COURT: It's received.

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1 (Defendant's Exhibit No. 39  
2 was received into evidence.)  
3 Q. (BY MR. PETERSEN) Can you identify Exhibit  
4 40?  
5 A. Yeah, it's got to be the same trees. I think  
6 there's a -- there's a -- there's a brand there on that  
7 tree and there's a sign that says something. I don't  
8 know, treadmill, trespassing, but it's the same picture  
9 basically. It's right close to -- It's within ten  
10 feet.  
11 MR. SWEAT: Did we mark those on the map?  
12 MR. PETERSEN: Yes.  
13 Q. (BY MR. PETERSEN) Did you mark 39 and 40 on  
14 that map?  
15 A. Yes. I'll give you this picture right here.  
16 Well, it's right there. What did you call them?  
17 Q. 39 and 40.  
18 A. All right.  
19 MR. SWEAT: Can we have the date on those,  
20 please?  
21 THE COURT: 8/22/2000.  
22 MR. PETERSEN: I think we've offered these,  
23 39 and 40, have we not?  
24 THE COURT: Yes, they're received.  
25 (Defendant's Exhibit's No. 39 & 40

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1 were received into evidence.)  
2 Q. (BY MR. PETERSEN) Mr. Okelberry, let me show  
3 you what's marked as Exhibit 41 and ask you if you can  
4 identify that?  
5 A. Yeah, that's that -- As you head down Maple  
6 Creek that thing -- This is a trail out there that my  
7 brother pushed to get the sheep out to the edge where you  
8 look down on Wallsberg. And we -- It's just a trail.  
9 And you're showing it comes off the Maple Canyon trail in  
10 pink.  
11 Q. Now, is that the Maple Canyon Road?  
12 A. No, it's just the side of it. It's just  
13 little --  
14 Q. Is this -- It goes up here?  
15 A. Yeah, right there. That's what that is.  
16 Q. Okay.  
17 MR. PETERSEN: Your Honor, what's his  
18 pointing to is --  
19 THE WITNESS: You can't get -- You can't  
20 get a truck up it.  
21 MR. PETERSEN: He's pointing to this area,  
22 this area right here.  
23 THE COURT: Okay.  
24 THE WITNESS: See that area right there?  
25 Q. MR. PETERSEN: Now --

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1 THE COURT: Put the number on it.  
2 THE WITNESS: Okay.  
3 Q. (BY MR. PETERSEN) (INAUDIBLE) 41. And it  
4 has a date on it of 8/26/00.  
5 A. Okay.  
6 Q. Now, do Exhibit's --  
7 A. That's up a little bit before there.  
8 Q. Do Exhibit's 42 and 43, is that showing the  
9 same view?  
10 A. Yeah, that's just basically the same area.  
11 It's just shown as a trail instead of a -- That's what  
12 that is. I don't know how you want to mark it.  
13 Q. Exhibit's --  
14 THE COURT: Well, hold -- If once is good  
15 enough to show them all, why offer three?  
16 THE WITNESS: Well, one just shows it's a  
17 little more brush than the other one. I don't know. It  
18 doesn't matter to me.  
19 MR. PETERSEN: They're taking it different  
20 spots on that trail.  
21 THE COURT: Well, if you want to offer  
22 them --  
23 THE WITNESS: The trail is a half of a mile  
24 long, 3/8th.  
25 Q. (BY MR. PETERSEN) Okay. The Exhibit 42 has  
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1 a date of 8/25/00, does it not?  
2 A. Yes.  
3 Q. And Exhibit 43 does not have a date. Was  
4 that taken approximately the same time, do you know?  
5 A. I would think it would be about the same  
6 time.  
7 MR. PETERSEN: Your Honor, we would offer 41,  
8 42 and 43.  
9 MR. SWEAT: No objections.  
10 THE COURT: They're received.  
11 (Defendant's Exhibit's No. 41, 42 & 43  
12 were received into evidence.)  
13 Q. (BY MR. PETERSEN) I think we got the same  
14 thing. Is this the same thing then, 44?  
15 A. The same thing.  
16 MR. PETERSEN: We won't offer 44, your Honor,  
17 it's the same general area.  
18 Q. (BY MR. PETERSEN) Mr. Okelberry, let me show  
19 you what's been marked as Defendant's Exhibit 45 and ask  
20 you if you can identify that?  
21 A. This is the fence as you're coming out of  
22 White Pole back onto Okelberry property. It says keep  
23 out and it's got some barricade there and it shows the  
24 net wire fence goes across the road.  
25 Q. Where is that on the exhibit?

1 A. It's in those pine or exhibit's -- Let's  
2 see. Where are we at here? It's right there.  
3 Q. Would you mark that with a 45? Now, is this  
4 showing leaving your property going onto the West  
5 Daniels' property.  
6 A. It's -- It's just off to the left. It's  
7 coming backup.  
8 Q. Okay. So leaving West Daniels going on to  
9 your property?  
10 A. Yes.  
11 Q. And is this depicting a gate here and some  
12 kind of a barricade over here?  
13 A. Yes. Well, it's just a broach. It's really  
14 a brace, braces for the fence and the gate post, that's  
15 what it is.  
16 Q. It appears to be a sign up here on an old  
17 tire of some sort.  
18 A. Yeah, it's the same tire system that says  
19 keep out.  
20 Q. You know how long that signs been up there?  
21 A. I'd say it's been there approximately 20  
22 years. The rubber tire appeared first. Them was the  
23 first things we started putting up was the -- Well, it  
24 could have been longer than that, the rubber, just the  
25 rubber -- But all the paint and stuff -- The paint

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1 got heavy the last 10 or 15 years, but the old rubber  
2 tire could have been in there for 30 years, up to 30  
3 years.  
4 MR. PETERSEN: Your Honor, we'd offer 45.  
5 THE COURT: Any objection?  
6 MR. SWEAT: No objection to the exhibit, your  
7 Honor, no.  
8 THE COURT: Do you know when that picture was  
9 taken? Does it have (INAUDIBLE)?  
10 (Defendant's Exhibit No. 45  
11 was received into evidence.)  
12 Q. (BY MR. PETERSEN) Do you have any idea when  
13 that picture was taken?  
14 A. Unless it's on it I don't know (INAUDIBLE).  
15 I'd say it was taken five years ago. It could have been  
16 four years or better, it could have been eight years ago.  
17 Q. Is it a fair representation of what it looks  
18 now?  
19 A. Yeah, the pine trees are still there and I  
20 think the fence looks the same. It's in a heavy bunch of  
21 pine trees just before you drop into White Pole pass.  
22 MR. PETERSEN: Your Honor, we'd offer that  
23 exhibit.  
24 THE COURT: It's received already.  
25 Q. (BY MR. PETERSEN) Let me show you what's

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1 been marked as Exhibit 46 and ask you if you can identify  
2 that?

3 A. Yes, sir, I can. That's -- You go over  
4 down to the gun club and you start up through the fish  
5 and game ground. It's up there about a mile. And  
6 there's a barricade and a locked gate. This picture was  
7 -- I took this picture just the other day. The gate's  
8 locked and you can see up by the grass, there isn't any  
9 traffic on the road.

10 Q. That's over on the Forest Service property,  
11 is it?

12 A. That's on the fish and game ground.

13 Q. That's what I --

14 A. Could be on some school ground, but it's on  
15 ground that they've got now.

16 Q. Could you mark that on the map where it's at?

17 A. Well, I don't know where -- You got Big  
18 Hallow here, but I don't know where all the lines are. I  
19 don't know exactly there. It's up that road about less  
20 than a mile I'd say.

21 Q. You took that picture recently, did you?

22 A. Just the other day.

23 Q. Was that gate locked?

24 A. Gates locked and there's a big barricade. If  
25 we have any more pictures that show a big barricade

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1 around it. No way to even get a four-wheel drive around  
2 it, a four-wheel, a four-wheeler or a motorcycle. Well,  
3 I guess you can always invent something. I didn't get  
4 the number of that, your Honor. What's that one?

5 THE COURT: 46.

6 THE WITNESS: 46.

7 THE COURT: You offering it?

8 MR. PETERSEN: We're offering it, your Honor.

9 THE COURT: Any objection?

10 MR. SWEAT: No objection.

11 THE COURT: It's received.

12 (Defendant's Exhibit No. 46  
13 was received into evidence.)

14 Q. (BY MR. PETERSEN) I'm going to show you  
15 what's marked as Exhibit's 48, 49 and 50. Is that in  
16 that same general local?

17 A. That's just below the barricade and they put  
18 two big rocks in the road. I think they put them there  
19 -- You can see they've been put there this spring.

20 Q. Okay. What is 49?

21 A. That's showing the lock that's down in that  
22 round pipe on that gate.

23 Q. Okay. And Exhibit 50, what does that show?

24 A. 50 is -- A month ago this gate was locked.  
25 It's right by the gun club and the others. Anyway I took

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1 these pictures. The gate there is open. They got it  
2 open. You drive up the road about three quarters of a  
3 mile and then they have this barricade and the gate  
4 closed.  
5 Q. Will you mark that on the exhibit?  
6 A. Well, we got three. How do you want to mark  
7 them?  
8 Q. Where ever they're at.  
9 A. (INAUDIBLE) Wait a minute. What's it  
10 called, 48?  
11 MR. PETERSEN: Your Honor, we'd offer 48, 49  
12 and 50.  
13 THE COURT: Any objection?  
14 MR. SWEAT: I don't know what rows they are,  
15 but I sure don't have any objection to them, your Honor.  
16 THE COURT: They're received, but they're --  
17 (Defendant's Exhibit's No. 48, 49 & 50  
18 were received into evidence.)  
19 MR. SWEAT: I think the Counties made a --  
20 UNIDENTIFIED: (INAUDIBLE) 47.  
21 MR. PETERSEN: We're not offering 51. That's  
22 (INAUDIBLE).  
23 THE COURT: Let me -- Mr. Sweat, was the  
24 State part of this lawsuit at one time?  
25 MR. SWEAT: It was, your Honor. And I think  
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1 the Court can take notice of the record that the County  
2 settled with the State. And those roads are going to be  
3 locked at certain times when the, when it's agreed upon.  
4 And other times they're going to be unlocked for public  
5 access.  
6 THE COURT: And that's part of that agreement  
7 as part of the record.  
8 MR. SWEAT: That is correct, your Honor.  
9 MR. PETERSEN: It sure made it difficult to  
10 travel on though.  
11 Q. (BY MR. PETERSEN) Let me show you what's  
12 marked as 47, your Honor, or Mr. Okelberry, and see can  
13 you identify that?  
14 A. I sure can. This is through the 1080 Gate.  
15 Q. When you say the 1080 Gate, what do you mean  
16 by that?  
17 A. I don't know what exhibit we call the 1080  
18 Gate, 6 and 7.  
19 THE COURT: That's the -- Isn't it --  
20 We're calling that the bottom of Thorton Hallow.  
21 THE WITNESS: Or the entrance of Thorton  
22 Hallow.  
23 THE COURT: Okay.  
24 MR. PETERSEN: (INAUDIBLE).  
25 THE WITNESS: It's in those pine trees. But  
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1 anyway, you go through that gate, that gate onto the  
2 Forest Service, you drive about a half mile and here's  
3 this -- This is division, a division fence between  
4 Okel, my brother and me keep two herds of sheep. And  
5 then now he's gone, this is just another division down  
6 along that Ridge Line Road to keep the herds from mixing.  
7 THE COURT: So it's on the Ridge Line Road  
8 then?  
9 THE WITNESS: Yes.  
10 THE COURT: It's not on -- Okay.  
11 THE WITNESS: Yes, it's on the Ridge Line  
12 Road and it's --  
13 THE COURT: Just --  
14 THE WITNESS: -- basically just ahead of  
15 Maple Creek or ahead of Thorton Hallow.  
16 MR. PETERSEN: It's offered for the purpose  
17 to show that there were gates.  
18 THE WITNESS: Interior gates.  
19 THE COURT: Well, have we ever -- Nobody  
20 has ever said there weren't any gates.  
21 MR. PETERSEN: (INAUDIBLE).  
22 THE COURT: (INAUDIBLE).  
23 THE WITNESS: Well, I didn't write that  
24 picture down. What number was it?  
25 THE COURT: 47.

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1 UNIDENTIFIED: Is it received?  
2 THE COURT: You offering it?  
3 MR. PETERSEN: Yes, sir.  
4 MR. SWEAT: What number is it?  
5 THE COURT: 47. It's received.  
6 (Defendant's Exhibit No. 47  
7 was received into evidence.)  
8 Q. (BY MR. PETERSEN) Mr. Okelberry, let me show  
9 you what's marked as Exhibit 52 and 53 and ask you if you  
10 can identify those pictures?  
11 A. Well, this picture I think we viewed. It's  
12 part of this road that we told you we'd never cut out  
13 between Circle and Thorton.  
14 Q. Isn't this Thorton?  
15 A. Oh, this picture here is the one, the day we  
16 were up there with County Attorney Sweat.  
17 Q. Right.  
18 A. And Sabey. And it's -- That's going down  
19 the Parker Canyon Road is what that one is. And so is  
20 this one here is going down Parker Canyon. Both in  
21 Parker Canyon.  
22 Q. Okay. Both 52 and 53 --  
23 A. They're about halfway down, aren't they?  
24 Q. And it's showing logs across the road, does  
25 it not?

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1 A. Yeah, it shows logs across the road.  
2 MR. PETERSEN: We'd offer 52 and 53.  
3 MR. SWEAT: Your Honor, I find the one with  
4 me in it highly objectionable, but I won't object to it.  
5 THE COURT: Okay. It's received.  
6 (Defendant's Exhibit's No. 52 & 53  
7 was received into evidence.)  
8 THE WITNESS: 53 and 4?  
9 THE COURT: 52 and 3.  
10 MR. PETERSEN: May I consult with the  
11 witness?  
12 THE COURT: You may.  
13 Q. (BY MR. PETERSEN) (INAUDIBLE).  
14 A. That's what I call 1080 Gate. I don't know.  
15 Have you got a picture of that (INAUDIBLE)?  
16 Q. I'm sure we do.  
17 THE COURT: I think -- Well, wasn't that  
18 one of the very first ones that --  
19 MR. PETERSEN: This is coming -- This is  
20 coming off of Forest Service land onto the Okelberry's  
21 land just above the Circle Springs.  
22 THE COURT: Well, it's the other entrance.  
23 It's --  
24 MR. PETERSEN: It's the other end.  
25 THE COURT: It's the other end.

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1 MR. SWEAT: It's the other entrance. Okay.  
2 THE WITNESS: Yes, sir.  
3 UNIDENTIFIED: Do you want this little one  
4 too (INAUDIBLE), Mr. Petersen?  
5 MR. PETERSEN: Yes, if you could.  
6 MR. SWEAT: It's the same picture, isn't it?  
7 MR. PETERSEN: I think you're right.  
8 MR. SWEAT: I think it's exactly the same  
9 picture.  
10 THE COURT: Just offer one if it's the same  
11 picture.  
12 MR. PETERSEN: Counsel points that out to me,  
13 your Honor. We're not going to offer 50. We'll offer  
14 55, but not 57.  
15 Q. (BY MR. PETERSEN) Can you identify --  
16 UNIDENTIFIED: 57 is over.  
17 MR. PETERSEN: Oh, excuse me. What is it?  
18 THE COURT: He's offering 55 not 56.  
19 UNIDENTIFIED: That's 54.  
20 MR. PETERSEN: 54 (INAUDIBLE).  
21 THE COURT: Okay. 54?  
22 MR. PETERSEN: (INAUDIBLE).  
23 THE WITNESS: What -- This number is kind  
24 of smudged. Is it --  
25 THE COURT: 55.

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1 THE WITNESS: It says this picture was taken  
2 10/3 and I can't tell, but it's 0. So it's got to be '00  
3 or '01 or --

4 Q. (BY MR. PETERSEN) And the what is that  
5 (INAUDIBLE)?

6 A. Is that 55? It looks like a 59.

7 Q. Okay. But it's a 55.

8 A. Well, that's -- That's the entrance off of  
9 Thor -- You go to the Glade and then you proceed down  
10 to our private property boundary and that's it, right  
11 there. That's the entrance into, in the pines, the 1080  
12 Gate or the, the one before you get to Thornton Hallow.

13 THE COURT: On the Ridge Line Road.

14 THE WITNESS: On the Ridge Line Road.

15 Q. (BY MR. PETERSEN) Now, that's depicting a  
16 wire gate.

17 A. That's a -- That picture was taken before  
18 they put the steel gate up. And that's the way --  
19 Well, when we first went there it shows the cattle guard.  
20 All those cattle guards, they won't head sheep or cows or  
21 horses. They just jump in them. So we have to put a  
22 wire fence across them to keep the livestock in. So all  
23 the gates with cattle guards -- All cattle guards have  
24 a gate across them, unless somebody has hauled them off.

25 Q. Okay. Now, this has actually been replaced

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1 by a metal gate?

2 A. Yes, sir.

3 Q. There are some signs on there, are there not?

4 A. Yeah. Can you see that rubber tire in them  
5 trees?

6 Q. Right. And it looks like there's a sign here  
7 on the gate itself.

8 A. Yes.

9 MR. PETERSEN: Your Honor, we'd offer Exhibit  
10 55.

11 MR. SWEAT: Which one is this again?

12 THE COURT: 55.

13 MR. SWEAT: And did we have a date for it?  
14 Cause that's an '01.

15 MR. PETERSEN: Yeah. It looks like 10/3/0  
16 something.

17 MR. SWEAT: No, the companion picture may  
18 showed a little bit more. It looks like it's been dated  
19 as '01.

20 MR. PETERSEN: Actually I think they're two  
21 different pictures. This one shows a little more up  
22 here.

23 MR. SWEAT: Okay. If you want to substitute  
24 that up here.

25 MR. PETERSEN: It looks like it's 10/3/01.

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1 It looks like we would use 50 -- Is that 54?  
2 UNIDENTIFIED: Yes.  
3 THE COURT: Okay.  
4 MR. PETERSEN: Your Honor, it looks like  
5 they're a little bit (INAUDIBLE). We'd offer 54 and 55,  
6 showing a little bit more on one than the other.  
7 THE WITNESS: They're the same gate.  
8 MR. PETERSEN: Same gate. Would you put --  
9 Would you mark 54 and 55?  
10 MR. SWEAT: No objection.  
11 THE COURT: They're received.  
12 (Defendant's Exhibit's No. 54 & 55  
13 was received into evidence.)  
14 Q. (BY MR. PETERSEN) Let me show you what's  
15 been marked as 56. Is that showing the same gate?  
16 A. That's the same gate. It just shows that  
17 somebody has broke the post off and it shows our locks on  
18 it.  
19 MR. PETERSEN: We'd offer 56, your Honor.  
20 MR. SWEAT: What's the gate on that?  
21 MR. PETERSEN: It looks like 10/3/01.  
22 Q. (BY MR. PETERSEN) Now, you indicated that  
23 wire gate has now been replaced by a metal gate?  
24 A. Yes.  
25 Q. Let me show you what's been marked as Exhibit  
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1 57 and ask you if that's the metal gate?  
2 A. That's the metal gate.  
3 Q. When was that replaced, the wire with the  
4 metal?  
5 A. It was either last year or the year before.  
6 Q. And this has a date on it of 6/15/04, does it  
7 not?  
8 A. 6/15/04.  
9 MR. PETERSEN: Your Honor, we'd offer Exhibit  
10 57.  
11 THE COURT: It's received.  
12 (Defendant's Exhibit No. 57  
13 was received into evidence.)  
14 MR. PETERSEN: I just have a couple more that  
15 I wanted to do.  
16 THE COURT: Do you want to take that noon  
17 recess and you can decide what you want to use?  
18 MR. PETERSEN: (INAUDIBLE) that's Thorton  
19 Hallow and I'm down on (INAUDIBLE). The noon recess will  
20 be fine, your Honor.  
21 THE COURT: Okay. We'll take a noon recess  
22 at this time. We'll reconvene at 1:15.  
23 (The noon recess was taken.)  
24 THE COURT: Wasatch County verses Okelberry.  
25 Mr. Okelberry, you want to return to the witness stand.

1 DIRECT EXAMINATION CONT.

2 Q. (BY MR. PETERSEN) Mr. Okelberry, we only  
3 have two more pictures, 58 and 59. Can you identify  
4 those?

5 A. Thorton Hallow.

6 Q. Do you know when those pictures were taken?

7 A. This one says 6/2/04, but the other is older  
8 than that.

9 Q. Any idea when the other one was taken?

10 A. No, I don't.

11 Q. Now, the Exhibit 58, is that looking into the  
12 Forest Service property?

13 A. That's down about 15 feet on the Forest  
14 Service side looking into our property showing a locked  
15 gate and the corral is there on our property.

16 Q. And is that a fair representation of what  
17 that area has looked for the last, since you walked  
18 across in '57?

19 A. The fence has been built six or eight  
20 different times, but that's the way it looks.

21 Q. Are there any signs -- Are there any signs  
22 on there?

23 THE COURT: Mr. Sweat (INAUDIBLE).

24 MR. SWEAT: Is he also saying that the lock  
25 was there in '57 on that gate?

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1 THE WITNESS: No, I didn't say that.

2 MR. SWEAT: Okay.

3 Q. (BY MR. PETERSEN) Were any signs on there?  
4 You'll see a yellow marker (INAUDIBLE).

5 A. I -- But there's a no trespassing sign  
6 there. And I think the posts are painted red.

7 Q. Looking at 59, you're not sure what date that  
8 picture was taken. There's a sign on there. Do you know  
9 if that sign is still there?

10 A. No, I don't. I don't think it is, but it  
11 was. There was signs in all them canyons, but no  
12 motorized vehicles.

13 Q. Both these pictures, fair representations?

14 A. Yeah, I can recognize them.

15 MR. PETERSEN: We'd offer 58 and 59, your  
16 Honor.

17 MR. SWEAT: Your Honor, I'd like a little  
18 clarification on I believe it was 58. He's indicated  
19 that there were some signs there. He's saying they're a  
20 fair representation that they are there. Is he thinking  
21 they're a fair representation that those signs were there  
22 in '57?

23 THE COURT: Why don't you ask him when he, if  
24 he put the sign there or, and if he knows when it was  
25 place.

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1 Q. (BY MR. PETERSEN) Looking at Exhibit 59, Mr.  
2 Okelberry, that sign that was there. Do you know if that  
3 sign is still there or not?

4 A. No, I don't know if it's there or not, but I  
5 -- I took the picture, the sign was there, and I took  
6 the picture in Parker Canyon, the sign was there. We've  
7 got several pictures showing like the same time in March,  
8 April.

9 THE COURT: Are we talking about the sign on  
10 the Forest Service that says no motorized vehicles?

11 THE WITNESS: Yes, that's the one we're  
12 talking about.

13 MR. SWEAT: That's not the one I'm talking  
14 about, your Honor. I'm talking about --

15 THE COURT: I think Mr. Sweat is talking  
16 about you said there was a no trespassing sign on the  
17 gate.

18 MR. PETERSEN: Oh --

19 THE WITNESS: There's a -- There's a --  
20 There's a no trespassing sign and then a yellow one and  
21 then it's painted red. I can read the sign that says no  
22 trespassing. I know the signs probably been there 18, 20  
23 years, but I can't -- I don't know when we put the  
24 first signs up there, but there's always been a gate  
25 there.

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1 MR. SWEAT: Thank you, your Honor.

2 MR. PETERSEN: We'd offer 58 and 59, your  
3 Honor.

4 THE COURT: Any objection?

5 THE WITNESS: That picture -- Excuse me.  
6 That picture.

7 MR. PETERSEN: Which one are you talking  
8 about?

9 THE WITNESS: With this gate. I think right  
10 next to it that's a cattle guard that my brother said he  
11 put in. But on those cattle guards, we always have to  
12 gate them. All cattle guards are gated, cause the cows  
13 will walk over them and sometimes they jump in them and  
14 you can't get them out, horses likewise.

15 THE COURT: Any objection if they're  
16 received?

17 MR. SWEAT: No objection, your Honor.

18 THE COURT: They're received.

19 (Defendant's Exhibit's No. 58 & 59  
20 were received into evidence.)

21 Q. (BY MR. PETERSEN) Mr. Okelberry, let me show  
22 you what's been marked as Exhibit 60 and ask you if  
23 that's a letter that you received from the United States  
24 Department of Agriculture?

25 A. Yeah, I received this one.

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1 Q. What date does that have?  
2 A. This was October 8th, 2003. And they was  
3 going down in there --  
4 Q. No, you're just identifying them. Did you  
5 receive this in the mail?  
6 A. Yes.  
7 Q. Is that your post office box?  
8 A. It came to me, Ray Okle -- Box 74. I got a  
9 new one now, it's 415.  
10 Q. And pursuant to Exhibit 60, are they asking  
11 for permission to access your property?  
12 A. Let's see. It says, "Ray Okelberry" --  
13 Q. No, no, just --  
14 A. Yeah, they're asking -- "As you have the  
15 soul authority to allow or deny access to your property,  
16 I would like to express my appreciation for your  
17 corporation in this effort. By your allowing our staff  
18 access to conduct the inventory work, our results will  
19 have more complete information for providing forest  
20 estimates in Utah. Sincerely Michael J. Willson, program  
21 manager, Interior West Forest Inventory and Analysis,  
22 U.S. Department of Agriculture".  
23 Q. I'll show you what's marked as Exhibit 61.  
24 Is that also a letter from the Forest Service?  
25 A. Yeah, that was a year earlier requesting us

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1 to let them down there for basically the same thing.  
2 Q. Did you grant their request?  
3 A. I sure did. And I think they sent us a  
4 letter -- I think there's a letter thanking us for  
5 letting us go on our property.  
6 MR. PETERSEN: We would offer 60 and 61, your  
7 Honor.  
8 MR. SWEAT: Your Honor, my objection would be  
9 relevance. They're not asking to use the roads. They're  
10 asking to go down in the property and look at two and a  
11 half acres (INAUDIBLE). That would be my only objection.  
12 THE COURT: Well, the Court will receive for  
13 whatever weight the Court can give to them.  
14 (Defendant's Exhibit's No. 60 & 61  
15 was received into evidence.)  
16 Q. (BY MR. PETERSEN) Mr. Okelberry, you  
17 indicated that there were gates on your property in 1957  
18 when you purchased it going on --  
19 A. Yes.  
20 Q. -- leaving your property? When did you  
21 start locking those gates.  
22 A. The two gates -- The Circle Springs and the  
23 1080 Gate and the big pine trees, we started locking them  
24 either the first or second year I was up there. I was up  
25 there herding those sheep myself. And come around about

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1 the, just about the 1st of July -- We were entitled to  
2 go on the forest on the 1st of July.

3 Q. Now, by those two gates are we referring to  
4 the gate going to the Circle Springs Road?

5 A. The first gate, yes. That's the first gate I  
6 locked, Circle. I had the sheep ready to go and somebody  
7 left the gate opened and trespassed on the Forest  
8 Service. I brought them back and locked the gate.

9 Q. Now, when you say the other gate, was that  
10 the gate that goes -- The 1080 Gate, is that the one  
11 that goes onto the Ridge Line Road?

12 A. That's right, and those big pines. I locked  
13 that. We had two bands of sheep, as I stated before.  
14 One was on one side of that fence, the middle division  
15 fence, and one was on the other. It was my  
16 responsibility that, for the ranch and the Okelberrys, to  
17 get the sheep over there. I had had problems and I  
18 wasn't going to have any problems. I locked them.

19 Q. As to what is, you refer to as the middle  
20 gate, when did you start locking that one?

21 A. Oh, I didn't have to lock that. It was  
22 inside our property. We didn't start locking that until  
23 20 years ago, 18 years ago, 20 years ago.

24 Q. And this Maple Canyon, when did you start  
25 locking that?

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1 A. 20 years ago I'd say, 18, 20 years ago.

2 Q. Now, the pictures that we've been referring  
3 to have various signs on them and so fourth. When did  
4 you start putting signs up?

5 A. Well, we had trouble. It didn't do any good  
6 to put signs up.

7 Q. No, the question is when did you start  
8 putting them up?

9 A. I think that I placed some signs in the 50's;  
10 '57, '58, '59. But they didn't stay up. I put some  
11 signs and they -- I don't know what happened. Maybe  
12 the wind blew them away.

13 Q. But it's your testimony you started putting  
14 signs up then when?

15 A. '57, '58, '59, right in there. I had a  
16 problem, but -- It just continually got worse and as  
17 the years progressed we had to put up more signs.

18 Q. Okay. Now, in your opinion were any of those  
19 roads, that we've been discussing here, open continuously  
20 for a ten year period of time?

21 A. No. Since we've been in there and Tough --  
22 Since '57 those gates have been up all the time. It has  
23 been mentioned they're dropped fences. Up in that higher  
24 elevation it's from 8,000 to 92 or 300 feet, in there  
25 where we join the Forest Service. And then on the --

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1 So it's higher elevation. And you have to let the fence  
2 down or the snow tears it apart.

3 So you put the fence up in there as soon as  
4 you -- Before you get the livestock in there, as soon  
5 as the snow leaves, you stab the fence up. And you have  
6 to repair, take all the trees off the fence, not just the  
7 roads. You take all the trees off. And you have to  
8 bring the fence up to a standard guidelines on the Forest  
9 Service side. It has -- The braces have to be up. You  
10 know, you don't get (INAUDIBLE). It's an endless job to  
11 get the fences up.

12 And then, like we said, we leave there the  
13 1st of July. And after we left we come maybe back --  
14 When I first went in there in '57 or '58 I -- You're  
15 still looking for sheep. So you go back in there off and  
16 on all summer. And the cows, and the trespass problem  
17 with the cows.

18 And I'm not saying the gate was opened or  
19 locked all summer, but when I was getting ready to get  
20 those sheep out of there I locked those gates. And I've  
21 always had trouble keeping locks there. They might cut  
22 the wire off or they might cut the -- I don't know how  
23 they got these locks off, but they'd get through the  
24 gate. But I didn't -- I didn't make it a personal  
25 endeavor to lock that gate every day in July.

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1 When I got out of there with the sheep I --  
2 When I was there I might of been there a week or ten days  
3 that I had those gates locked. Four or five days on the  
4 one side and four or five days or maybe ten days on the  
5 other side. When I left I didn't make --

6 Q. Okay. Mr. Okelberry, I think you've answered  
7 the question.

8 A. Okay. Thank you.

9 Q. Now, let me refer to Exhibit 18 (INAUDIBLE).  
10 It's this exhibit. That is a map. The property that's  
11 indicated in green that's Forest Service property, isn't  
12 it?

13 A. Well, it only goes from Utah Lake out to  
14 Duchesne.

15 Q. Oh, no, just answer the question. Is the  
16 property in green, that's the Forest Service?

17 A. Yes, yes.

18 Q. And your property is here in white as far as  
19 (INAUDIBLE).

20 A. Yes, yes.

21 Q. You're surrounded almost on, well, at least  
22 on two sides, are you not?

23 A. I'm completely surrounded by Forest Service  
24 property.

25 Q. All right. Now, it's possible to access

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1 those areas that are on Forest Service property without  
2 going on to your property, isn't it?  
3 A. That's correct.  
4 Q. If you wanted to go to Parker Canyon or to  
5 Thorton Hallow you could come up on Highway 40, couldn't  
6 you?  
7 A. Yes.  
8 Q. There are trails up there, are there not?  
9 A. Yes.  
10 Q. And Circle Springs, there are trails coming  
11 up off Main Canyon, are there not?  
12 A. From the Main Canyon Road into Circle I've  
13 looked at it, it's between an eighth and quarter mile to  
14 my corner post up there. And there's an old trail and  
15 old road up there.  
16 Q. Now, if these roads were open to the public  
17 what would that do to your cattle and sheep operation?  
18 A. In 1957 you had to close all the gates.  
19 Q. No, just answer the question. What would --  
20 A. Well, it would put you out of business. You  
21 can't -- You can't let all these people --  
22 Q. Okay.  
23 MR. PETERSEN: That's all.  
24 THE COURT: Anything else, Mr. -- Mr.  
25 Sweat, cross?

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1 MR. SWEAT: Thank you, your Honor.  
2 CROSS-EXAMINATION  
3 BY MR. SWEAT:  
4 Q. Mr. Okelberry, you indicated that at one  
5 time you owned part of that property and your brother  
6 owned part of that property; is that true?  
7 A. Yes, that's true.  
8 Q. Which -- Could you show us on this map  
9 where the dividing line was?  
10 A. Oh, just down, halfway down from the center.  
11 He owned the north end and I owned the --  
12 Q. Some where down in (INAUDIBLE)?  
13 A. Yeah, yes. It's -- We had somebody divide  
14 it up and we flipped. So it was an even division.  
15 Q. You indicated that over the years you've had  
16 more and more people come on your property; is that  
17 correct?  
18 A. Well, more and more pressure against the  
19 gates, yes.  
20 Q. When you say pressure, what do you mean by  
21 that?  
22 A. More vandalism and more destruction, tearing  
23 the gates off, more requests for permission, which we  
24 granted.  
25 MR. SWEAT: Your Honor, where is the stack of

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1 all those exhibits that just got entered?  
2 THE COURT: Right -- (INAUDIBLE) there and  
3 these are the other ones.  
4 Q. (BY MR. SWEAT) Mr. Okelberry, I'm going to  
5 show you what has been marked as Exhibit 59?  
6 A. Yes.  
7 Q. I believe you identified that as being  
8 Thorton Hallow; is that correct?  
9 A. Yes.  
10 Q. Is this sign placed through the fence in  
11 Thorton Hallow?  
12 A. It was just through the fence a little ways.  
13 Q. It wasn't on the fence it was through the  
14 fence a little ways?  
15 A. It was right next to the road.  
16 Q. Exhibit No. 40, where did we mark that on the  
17 map?  
18 A. It's right as you turn down Circle Spring  
19 Trail, right there, 40. Right there, sir.  
20 Q. Is that inside your property?  
21 A. Yes. That's right at the side of the Ridge  
22 Line Road.  
23 Q. Is that where the -- Is that where this  
24 road branches off of Ridge Line Road here?  
25 A. No, it's a over -- It's farther down on the

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1 (INAUDIBLE) -- Right -- the other way, sir.  
2 Q. Right here?  
3 A. Farther.  
4 Q. Right here?  
5 A. Right there. Right there.  
6 Q. (INAUDIBLE)?  
7 A. That first picture you showed me, that's  
8 where that is (INAUDIBLE). Off of Ridge Line Road down  
9 to Circle and Maple Canyon.  
10 THE COURT: It's Maple Canyon rather than  
11 Circle.  
12 THE WITNESS: That's right, excuse me. Some  
13 people are calling this Circle Road, but it's Maple,  
14 Maple Creek Canyon. It's not Ridge Line. Some one goes  
15 down -- It's a trail. It goes down to Wallsberg.  
16 Q. (BY MR. SWEAT) Would you tell me again where  
17 Exhibit No. 36 is?  
18 A. That's right at the, just about, less than a  
19 hundred feet north of the Circle Spring gate on the  
20 property off the Forest Service.  
21 Q. It's out here on this side of the fence?  
22 A. Uh-huh, right. That's -- It's right there.  
23 That first road you got coming off, first red one.  
24 Q. Right here?  
25 A. No.

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1 Q. It's right here?  
2 A. Yes, that's where that's at.  
3 Q. Does the gate -- Does the -- Is there  
4 only one gate there where Circle Springs goes through?  
5 A. There's only one gate there, sir.  
6 Q. And then this road branches up from there; is  
7 that right?  
8 A. Well, it -- It's closed, that part of it.  
9 You got it there.  
10 Q. The one that's shown there?  
11 A. Yes.  
12 Q. And this is shown going into that area; is  
13 that right?  
14 A. Yes, sir.  
15 Q. Mr. Okelberry, you've testified that you're  
16 aware that sheep use to be trailed up what you call  
17 Circle Hallow; is that correct?  
18 A. Yes, they did -- There was only one herd  
19 when I got there in '57. All those herds have been  
20 stopped. They've gotten trucks. But Thompsons had a  
21 herd there in Wallsberg. And they still used that. And  
22 they went up Circle.  
23 Q. You went up a time or two with some of those  
24 herds early on, is that true, prior to '57 (INAUDIBLE)?  
25 A. Right. 1941 my father had some sheep over

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1 Strawberry Valley. And they was -- They trailed sheep  
2 back from Daniels Summit; from over in Strawberry Valley  
3 around the lake; and they was trailing back to Daniels  
4 Summit; came around to the Glade, or they came to the  
5 Glade and they took this Circle trail that went on down  
6 there. It was a trail. It went down to Circle. Then it  
7 continued on down to Circle. Your maps don't show this  
8 is a trail any more, but it come out down right there by  
9 Young's, right down on the main, let's see, Main Canyon  
10 Road.

11 Q. Is it your understanding that prior to that  
12 time there were several herds of sheep that would come up  
13 and back over that trail over the years?

14 A. They -- They -- That's exactly right.  
15 There were several herds, but it was before my time. I  
16 -- Let's see. Allens had to come up there. I don't  
17 know. There'd be thousands of sheep that came up there.  
18 There was a lot of sheep in Wallsberg too, but they  
19 didn't all come up that thing.

20 But that use to be the access into Strawberry  
21 Valley is through, on that Circle Trail. Now these maps  
22 don't even show that. They show it goes to Circle Spring  
23 and dead ends. And that's where it does dead end now,  
24 but after the sheep stop trailing in there they don't use  
25 that.

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1 Q. Could you ever of pulled a wagon or camp up  
2 that trail?

3 A. I wouldn't of thought so, but that canyon it  
4 is a circle. From Circle Springs and it makes a half a  
5 circle. And it is washed out terrible when I was there.  
6 And it's been -- It's been quite a few years since I  
7 was there. And I herded sheep in there.

8 And I had dispute with the Forest Service  
9 with a fellow permittee. And I got that Brian Adamson to  
10 come up there and settle that dispute. And I asked him  
11 about that. And he said no, they use to take -- They  
12 use to take sheep camp down that Circle. And I couldn't  
13 believe it. But back in them days it would them  
14 (INAUDIBLE) and the 33. They would only weigh about 1500  
15 pounds. That was the main source rather than -- They  
16 say they went up Maple, but they didn't go up Maple.

17 Q. At least you don't believe they went up  
18 Maple?

19 A. No, nobody ever told me they went up Maple,  
20 the horse trail.

21 Q. Taking your attention to what has been marked  
22 as Exhibit No. 1. Do you recognize the country in that?

23 A. I don't recognize one thing with that map,  
24 it's black and white.

25 THE COURT: Why don't you point out to him

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1 (INAUDIBLE).

2 THE WITNESS: Get me oriented. I see what it  
3 looks like the bottom of that highway coming up there.

4 Q. Is there a Prove or (INAUDIBLE) Canyon?  
5 Right here would be take off of Parker Canyon. This is  
6 what has been designated as Ridge Line coming down to  
7 here. This is Parker Canyon. Can you tell me about  
8 where your property would end on this?

9 A. I can't tell you at all on that. If you've  
10 got another map or a map that, where the highway is --  
11 If you got a map coming up from the highway -- There's  
12 a trail that comes up from Parker from the highway.

13 Q. No, I'm talking about on your property. Is  
14 White Pole where Parker Canyon and Ridge Line meet? Is  
15 that a big open area there?

16 A. Well, you got a highway -- You got a  
17 highway down there.

18 Q. (INAUDIBLE)?

19 A. Where's your trail? Parker Canyon. I mean,  
20 I can figure it out.

21 Q. There's Parker to the forest. Right here  
22 from Parker up?

23 A. Where does the forest property?

24 Q. Right there.

25 A. The forest property goes down and comes out

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1 of Whiskey Spring. Is that what you're talking about,  
2 whiskey spring down here?

3 Q. Not down here, I'm talking about right over  
4 here.

5 A. You go -- Well, what you have to do is you  
6 have to go up Daniels Canyon up to here and then come up  
7 on Parker.

8 Q. Okay. So it would be up in here some where?

9 A. Oh, it's straight down and it goes about  
10 straight east.

11 Q. (INAUDIBLE) view it right there.

12 A. I can't tell. (INAUDIBLE) you got maps that  
13 you can tell.

14 MR. SWEAT: I have no further questions if he  
15 can't orient himself on that, your Honor.

16 THE COURT: Okay. You may return to your  
17 seat. He's not going to ask you more questions about the  
18 map.

19 MR. SWEAT: Yeah, sorry about that.

20 THE COURT: No, no.

21 THE WITNESS: Oh, (INAUDIBLE).

22 THE COURT: You're not all the way through.

23 THE WITNESS: Why don't you get a good map up  
24 here. It's easy. Go up -- You go up Daniels and you  
25 hit Parker Canyon. The Forest Service got a big sign up

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1 and you just jump out there and run up to the top of the  
2 hill.

3 Q. (BY MR. SWEAT) Is your testimony that you  
4 think the fish and game road was built in about the  
5 1970's; is that correct?

6 A. I would think so. They bought that property  
7 after we bought ours in '57.

8 Q. Could it have been as early as the 60's?

9 A. Could have been. I think they brought the  
10 property about '62.

11 Q. About '62?

12 A. And they built the fences there later after  
13 that. They built the boundary fence up on our north end  
14 of our property. And that's -- Would it be -- Like I  
15 said, there's not no -- It's the 60's and 70's. They  
16 was -- They was about 15, 20 years before they built  
17 the fences, I thought, but my memory could be off. But  
18 they built that fence, part of it, on the north end of  
19 our property.

20 Q. You indicated that the first time you came  
21 through the property you entered through the, you said  
22 the Peetrose gate or --

23 A. Well, it's old Peetree that owns it now.

24 Q. Peetree?

25 A. But it's down there by Taylors.

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1 Q. Can you show me on the map where that is?  
2 I'll bring it to you?

3 A. All right. It was down on the Main Canyon  
4 Road, down here. It's about down -- Let's see now.  
5 That's -- That's Youngs. So it's down in here. I  
6 don't know whether it shows it, but anyway that was the  
7 main gate to our property that we went in. I call it  
8 Peetree. Peetree built it. He build a big cat down  
9 there at the entrance. It's still there. That's where  
10 we unloaded the first sheep we had. The first experience  
11 I had in Wallsberg.

12 MR. SWEAT: I have no further questions, your  
13 Honor.

14 THE COURT: Anything else, Mr. Petersen?

15 MR. PETERSEN: I don't think so, your Honor.  
16 We'll excuse this witness. I think we have a witness out  
17 in the hall. Could I just take a minute?

18 THE COURT: Yeah. Now you can step down.

19 THE WITNESS: Thank you.

20 THE COURT: Your witness is not here yet, Mr.  
21 Petersen?

22 MR. PETERSEN: Just walked in, your Honor,  
23 and my co-counsel is chatting with him right now.

24 THE COURT: Is this your last witness or do  
25 you have more of them?

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1 MR. PETERSEN: This will be our last witness,  
2 yes. Just as a matter of procedure, your Honor. Counsel  
3 and I were discussing during the noon lunch hour, is this  
4 a matter that you would like closing arguments on? Would  
5 you prefer a brief, submitted by a brief? What would be  
6 the best and most productive for the Court?

7 THE COURT: Well, whatever you want to do.  
8 In recent cases I have asked counsels, you know. I could  
9 hear your closing arguments, but sometimes it's more  
10 helpful for the Court if you would prepare (INAUDIBLE)  
11 finding of fact, conclusion of law based upon how you see  
12 the facts that have come into the case, and then apply  
13 what the law is to that and make conclusions of law based  
14 upon the law. The Court will make a decision.

15 MR. PETERSEN: I think that would be helpful  
16 to the Court. We'd certainly be willing to do that, your  
17 Honor.

18 MR. SWEAT: I'd certainly be willing to do  
19 that, your Honor. And you're saying you'd want that in  
20 lieu of closing arguments?

21 THE COURT: That's -- You know, I've found  
22 that to be helpful. (INAUDIBLE) you can make your  
23 argument based upon, based upon (INAUDIBLE). Or you can  
24 file a, you can file a separate memo as closing arguments  
25 (INAUDIBLE).

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1 MR. PETERSEN: Well, I think maybe findings  
2 the fact, conclusion of law would be, have a little more  
3 meat on the bones. Would this be something we'd submit  
4 simultaneously?  
5 THE COURT: Yes. Could you do that in ten  
6 days?  
7 MR. PETERSEN: With the 4th of July coming up  
8 would it be possible to have a little longer than that?  
9 THE COURT: Well, let's say by the, submit  
10 them by the 16th of July.  
11 MR. PETERSEN: That would be fine, your  
12 Honor.  
13 THE COURT: That's a Friday. Then the Court  
14 would make a decision based there on.  
15 MR. PETERSEN: I hate to delay the Court.  
16 Let me see this. Your Honor, I just want a quick --  
17 Just break for five minutes, your Honor.  
18 THE COURT: Okay. We'll have a five minute.  
19 MR. PETERSEN: Thank you.  
20 THE COURT: Just -- Let me ask you, Mr.  
21 Sweat. Do you anticipate any rebuttal witnesses?  
22 MR. SWEAT: Not at this time, your Honor.  
23 THE COURT: Okay.  
24 (A brief recess was taken.)  
25

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1 MR. PETERSEN: Your Honor, we have another  
2 witness ready to testify, but we've reviewed his  
3 testimony and I think it's very -- It's somewhat  
4 repetition of what you've already heard. So we'll rest  
5 at this time.  
6 THE COURT: Okay. And Mr. Sweat, you have no  
7 rebuttal witnesses?  
8 MR. SWEAT: I do not, your Honor.  
9 THE COURT: Okay. So what we've discussed is  
10 that we will -- Each of you will submit simultaneous  
11 proposed findings of fact and conclusion of law in lieu  
12 of closing arguments on or before the 16th of July. Let  
13 me just make comments. This is not the first case like  
14 this that I've tried. In fact, I -- I tried several  
15 when I was in a position similar to Mr. Sweat, trying to  
16 defend the public's right to use roads that go over  
17 private property.  
18 I think we're both aware the reason we're  
19 here is because our state legislature has a statute which  
20 says that based upon certain use of thoroughfares or  
21 whatever you want to call roads over private ground, that  
22 you meet certain requirements it could be declared a  
23 public road.  
24 I grew up in a rural area. I've hunted in  
25 areas very similar to this. You know, I -- Where

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1 there's public ground and private ground intermixed, and  
2 I can understand those who've testified that, you know,  
3 that they've used these roads in the past. You know,  
4 it's kind of part of growing up in rural Utah is that you  
5 went, you thought you had right on the roads, even if  
6 they crossed private ground.

7 Most landowners 30 years ago, you know, just  
8 as Mr. Okelberry and his predecessors, they knew most  
9 people and they didn't care, as long as they didn't cause  
10 any damage to them. And as time went on, you know,  
11 society changes and more people come into areas. Clearly  
12 there's been a substantial increase in population in  
13 Wasatch County and also a substantial increase in  
14 recreational use in Wasatch County.

15 And there puts the private landowner and the  
16 livestock in a difficult position. Do you continue the  
17 old ways or do you permit people to use your roads or at  
18 some point in time you stop them. And that's what's  
19 occurred here. I don't -- You know, based upon the  
20 evidence I've heard, up until the late 80's basically  
21 those roads were open for use. They might of been closed  
22 at certain times. When I mean closed I mean locked.

23 Clearly the case law is such that a gate,  
24 although some evidence of intent to keep people out as  
25 long as it's not locked and it's not enforced that's --

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1 There's case law to the effect that just a gate itself on  
2 the road is not totally cut it off from being considered  
3 a public road. But when those -- When the landowners  
4 started to see that they could also make some money on  
5 hunting rights, it's nearly impossible to prevent people  
6 from not paying to go hunting on your property if you  
7 have open roads. That was a time period when this  
8 started.

9 And, you know, the Court's just going to have  
10 to determine based upon the evidence that I've heard and  
11 the law that's out there, as to whether or not prior to  
12 the stopping of the public on those roads, whether  
13 they've been established a public road. And it's an  
14 interesting question to me if -- Can you have a public  
15 road? Let's say you met the criteria back in the 40's  
16 and 50's and then there was cut off in the, but it was  
17 never officially declared a public road by Court  
18 declaration or otherwise determination. Can it be  
19 stopped through none use?

20 Clearly I don't think it's been a public road  
21 since 1990. That's when the Okelberrys, and it's clear  
22 evidence that that's when they started preventing public  
23 individuals from using that road. Most everybody used  
24 it, their described use was prior to 19, the early 90's.  
25 And that's the testimony of the Okelberrys is that's when

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1 they really started to enforce their exclusion of others  
2 from their lands.

3 But can there be an abandonment of what was  
4 once a public road by -- This lawsuits was not filed  
5 until 2001. That's more than ten years after, but cane  
6 there be an abandonment of that? So whether -- There's  
7 interesting legal questions.

8 MR. SWEAT: Was you indicating you wanted  
9 briefs on those, your Honor?

10 THE COURT: Well, you know, I don't know --  
11 I don't know if -- I don't know if our -- There might  
12 be case law out there, but I haven't seen any in any  
13 other cases that you've had unless it -- I don't think  
14 there's any in Utah, unless it's something that I've  
15 overlooked before. But there can be an abandonment of an  
16 easement.

17 Let's say that -- Let's say if Mr.  
18 Besendorfer had established that he had a personal  
19 easement to cross this property based upon his use over a  
20 period of 20 years, clearly the law is that if he felt he  
21 used that for a period of time he can abandon a  
22 prescriptive easement. Can the -- Can the public  
23 abandon a public easement?

24 Those are difficult questions. Those are  
25 like -- They're more like public policy type questions

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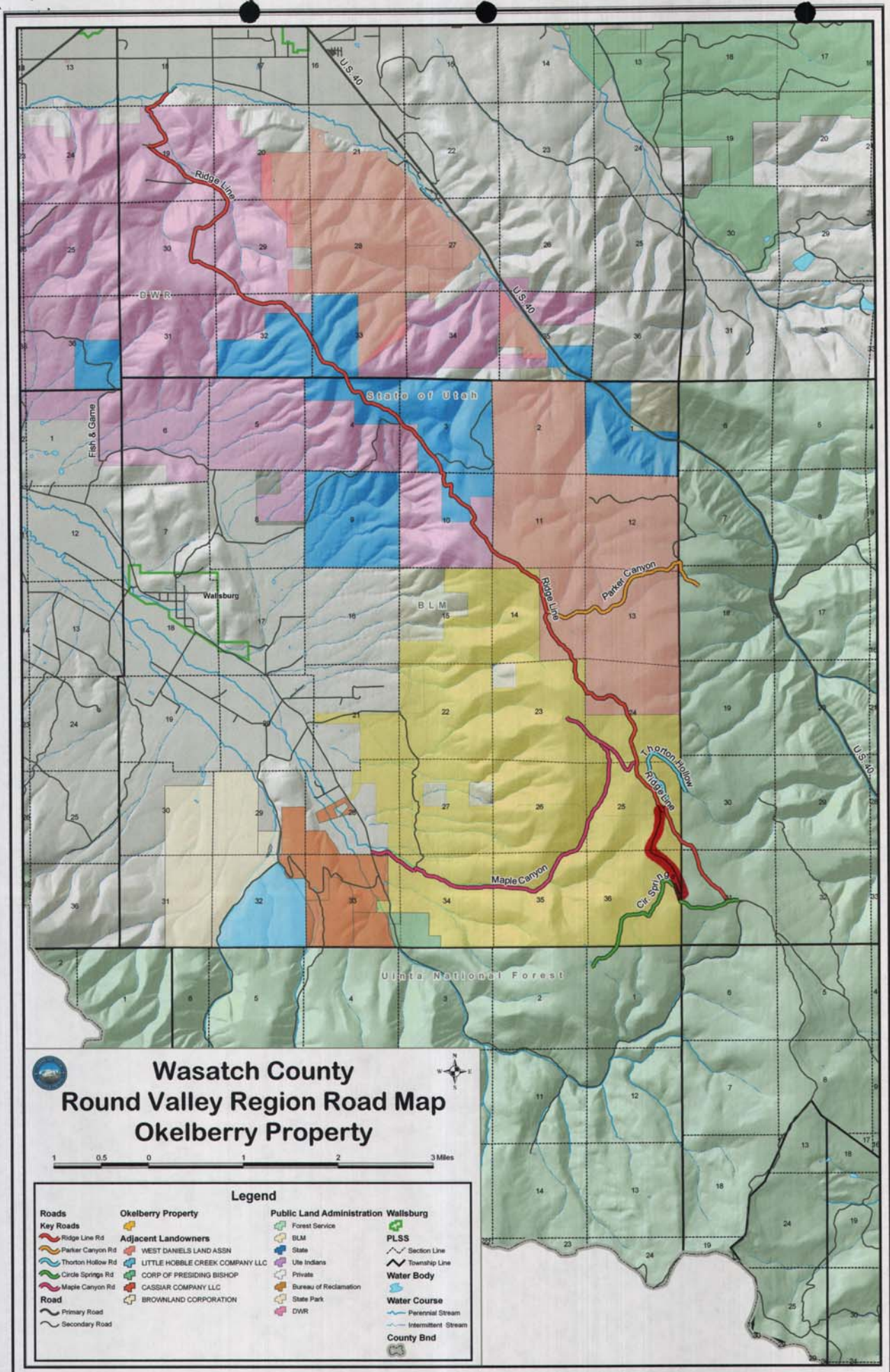
1 than legal questions. But we'll make a decision based  
2 upon the law and the evidence. I appreciate counsel,  
3 your courtesies. And it's nice getting to know all you  
4 people. Thank you.

5 MR. SWEAT: Thank you, your Honor.  
6 (Where upon court concluded.)

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1 CERTIFIED COURT REPORTER'S CERTIFICATE  
2 WASATCH COUNTY,  
3 Plaintiff,  
4 vs.  
5 WEST DANIELS LAND ASSOCIATION Et al,  
6 Defendant.  
7 I, Jennifer Hermansen France, a Certified Court  
8 Reporter in and for the State of Utah, do hereby certify:  
9 That this proceeding was transcribed by me from the  
10 transmitter records made of these proceedings.  
11 That this transcript is full, true, correct and  
12 contains all of the evidence and all matters to which the  
13 same relate which were audible throughout said recording.  
14 That I am not of kin or otherwise associated with  
15 any of the parties herein or their counsel, and that I am  
16 not interested of the events thereof.  
17 That certain parties were not identified in the  
18 record, and therefore, the name associated with the  
19 statement may not be the correct name as to the speaker.  
20 WITNESS my hand at Midvale, Utah, the 1st day of  
21 September, 2005.  
22  
23 Jennifer Hermansen France, RPR, CSR  
24 Utah State Courts  
25



## Wasatch County Round Valley Region Road Map Okelberry Property



Legend			
<b>Roads</b>	<b>Okelberry Property</b>	<b>Public Land Administration</b>	<b>Wallsburg</b>
<b>Key Roads</b>	<b>Adjacent Landowners</b>	Forest Service	PLSS
Ridge Line Rd	WEST DANIELS LAND ASSN	BLM	Section Line
Parker Canyon Rd	LITTLE HOBBLE CREEK COMPANY LLC	State	Township Line
Thornton Hollow Rd	CORP OF PRESIDING BISHOP	Ute Indians	<b>Water Body</b>
Circle Springs Rd	CASSIAR COMPANY LLC	Private	Water Course
Maple Canyon Rd	BROWNLAND CORPORATION	Bureau of Reclamation	Perennial Stream
<b>Road</b>		State Park	Intermittent Stream
Primary Road		DWR	<b>County Bnd</b>
Secondary Road			

May 21, 2003

Mel Price  
1449 S. Industrial Parkway  
Heber City, UT 84032

To Whom It May Concern:

I Ray Okelberry give Mel Price permission to set bear bait on my property and he also has the right to access all of my roads on my private land. Mel Price has been getting permission to use my roads and land for the past 28 years.

Respectfully,

*Ray Okelberry*

Ray Okelberry

