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Norma Campbell, Lamont Campbell and The Campbell Cattle Company, a Utah general partnership Plaintiffs/Appellees vs. Box Elder County, Defendant/Appellant: Box Elder County, Third Party Plaintiff/Appelant vs. Norma Campbell, Lamont Campbell, The Campbell Cattle Company, a Utah general partnership, Paul D. Barnes, Evelyn Barnes, Coleen Barnes, Eldon Barnes, Wanda Barnes, Burke Heaton, and the Heaton Limited Family Partnership Third Party Defendants/Appellees : Brief of Appellee

Utah Court of Appeals

Bruce R. Baird; Attorney for Plaintiffs and Third-party defendants.
Jon J. Bunderson; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS
STATE OF UTAH

NORMA CAMPBELL, LAMONT CAMPBELL and THE CAMPBELL CATTLE COMPANY, a Utah general partnership Plaintiffs/Appellees, vs. BOX ELDER COUNTY, Defendant/Appellant	Case No. 970587-CA Priority 15
BOX ELDER COUNTY, Third Party Plaintiff/Appelant vs. NORMA CAMPBELL, LAMONT CAMPBELL, THE CAMPBELL CATTLE COMPANY, a Utah general partnership, PAUL D. BARNES, EVELYN BARNES, COLEEN BARNES, ELDON BARNES, WANDA BARNES, BURKE HEATON, and the HEATON LIMITED FAMILY PARTNERSHIP Third Party Defendants/Appellees	

BRIEF OF APPELLEES

APPEAL FROM A DECISION OF THE FIRST DISTRICT COURT,
BOX ELDER COUNTY, HONORABLE BEN H. HADFIELD

Bruce R. Baird # 0176
Bruce R. Baird, P. C.
Attorney for Plaintiffs and Third-party Defendants/Appellees
201 South Main Street, Suite 900
Salt Lake City, UT 84111-2215
Telephone: (801) 328-1400
Fax: (801) 328-1460
Email: brblaw@xmission.com

Jon J. Bunderson
Box Elder County Attorney
John Sorge (on the Brief)
Attorney for Appelant
45 North First East
Brigham City, UT 84302
Telephone: (801)734-9464

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Jon J. Bunderson
Box Elder County Attorney
John Sorge (on the Brief)
Attorney for Appelant
45 North First East
Brigham City, UT 84302
Telephone: (801)734-9464

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JURISDICTION

The Court of Appeals has jurisdiction over this matter pursuant to Section 78-2(a)-3(h), Utah Code Annotated. This case was poured over to the Court of Appeals from the Utah Supreme Court.

IDENTIFICATION OF PARTIES

The Plaintiffs and Third-party Defendants/Appellees will be referred to as "the Landowners". Box Elder County will be referred to as "the County".

ISSUES PRESENTED ON APPEAL

ISSUES I

THE TRIAL COURT CORRECTLY HELD THAT THE COUNTY HAD NOT ESTABLISHED BYCLEAR AND CONVINCING EVIDENCE THAT THE LANDOWNERS "RIDGE ROAD" HAD BEEN DEDICATED TO THE PUBLIC BY "CONTINUOUS[] USE[] AS A PUBLIC THOROUGHFARE"

Brief statement of the issue. After hearing the testimony of numerous witnesses, reviewing the documentary and photographic evidence, and personally driving with counsel on the Ridge Road, the District Court concluded that no portion of the so-called Ridge Road had been dedicated and abandoned to the public pursuant to Section 27-12-89 by being "continuously used as a public thoroughfare" for more than ten years. (Memorandum Decision dated July 1, 1997. Record at p. 589-597. (Record citations will be "R. ___".)) The issue on this appeal by the County is whether that decision was correct in light of the standard of review specified below.

Standard of review. The ultimate determination here is a mixed question of law and fact which the Court reviews for correctness. *Heber City Corp. v. Simpson*, 942 P.2d 307, 309 (Utah 1997). The District Court is given a "fair degree of latitude in determining the legal consequences under Section 27-12-89 of facts found by the court." *Id.* at 309-10. Granting such discretion to the District Court is appropriate in this kind of case because the legal requirements of Section 27-12-89, other than the ten-year requirement, "are highly fact dependent and somewhat amorphous." *Id.* at 310. The issues presented under Section 27-12-89 do not lend themselves well to close review on appeal as the appellate court "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." *Id.* "Therefore, when reviewing a trial court's decision regarding whether a public highway has been established under Section 27-12-89, [the appellate court will] review the

decision for correctness but grant the [District Court] significant discretion in its application of the facts to be statute." *Id.*

Further, if the appealing party "fails to challenge a factual finding and marshal the evidence in support of that finding [the appellate court] 'assumes that the supports the findings of the trial court and proceeds to a review of the accuracy of the lower court's conclusions of law and the application of that law in the case.'" *Id.* (citing *Saunders v. Sharp*, 806 P.2d 198, 199 (Utah 1991)).

Finally, "proof of dedication" by use as a public highway is required to be by "clear and convincing evidence." *Id.* at 310 (citing *Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1099 (Utah 1995)).

Preservation of issue for appeal. This issue is the crux of the case and preserved by the County's Notice of Appeal. (R. 652-3.)

ISSUE II

THE "DEDICATION BY USE" STATUTES, SECTION 27-12-89 AND 90, UTAH CODE ANNOTATED, EFFECT AN UNCONSTITUTIONAL TAKING VIOLATING THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 22 OF THE UTAH CONSTITUTION

Brief statement of the issue. Do the "dedication by use" provisions of Section 27-12-89 and 90 effect an unconstitutional taking of private property for public use without just compensation in violation of the Fifth Amendment to the United States Constitution and Article I, Section 22 of the Utah Constitution?

Standard of review. "Issues regarding the constitutionality of a statute are questions of law which [the appellate court] review[s] for correctness, affording no particular deference to the trial court's ruling. *Board of Commissioners, Utah State Bar v. Peterson*, 937 P.2d 1263, 1266

(Utah 1997). "A statute is presumed constitutional and '[the appellate court] resolve[s] any reasonable doubts in favor of constitutionality.'" *Id.* at 1267 (citing *Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 920 (Utah 1993)).

Preservation of issue for appeal. This issue was raised both for a declaratory judgment and as a defense to the counterclaims of the County. (R.0001-007.) The District Court issued a Memorandum Decision denying the Landowner's Motion for Summary Judgment on this issue and granting the County's Cross-motion for Summary Judgment on February 13, 1997. (R. 164-175.) There was no requirement to take a separate or cross-appeal on this issue.

RELEVANT STATUES AND CONSTITUTIONAL PROVISIONS

Section 27-12-89, Utah Code Annotated:

> **Public use constituting dedication.** A highway shall be deemed to have been dedicated and abandon to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years.

Section 27-12-90, Utah Code Annotated:

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

United States Constitution, Fifth Amendment (relevant portion):

> [N]or shall private property be taken for public use, without just compensation.

Utah Constitution, Article I, Section 22:

> Private property shall not be taken or damaged for public use without just compensation.

STATEMENT OF THE CASE

Course of Proceedings Below

After being threatened in a letter by the County with arrest (R. 004)[1] if they continued to lock the gates on an alleged "road" across their property which they considered to be private, the Landowners filed a Complaint seeking a declaratory judgment that a narrow dirt track through their property, commonly known as the "Ridge Road", was private and for an injunction to prevent the County from forcing the Ridge Road to be opened to the public. (R. 001-7.) The Landowners also sought a declaratory judgment that if the County had acquired any rights in the Ridge Road pursuant to Section 27-12-89 and 90, those statutes were unconstitutional takings of private property for public use without just compensation in violation of the Fifth Amendment to the United States Constitution and Article I, Section 22 of the Utah Constitution.

Decision(s) Below

The District Court, the Honorable Ben H. Hadfield presiding, heard extensive testimony from numerous witnesses over two days in October of 1996 determining whether to grant a preliminary injunction. (R. 185-587; the Exhibits to that testimony were not paginated as part of the Record on Appeal.) The District Court split the difference on the injunction ordering that the Ridge Road was a public road during the general fall rifle deer season but private during the rest of the year. (R. 107-9.) That injunction remains in effect pending this appeal.

As noted above, the District Court subsequently denied the Landowner's Motion for Summary Judgment on the constitutionality/takings issue and granted the County's Cross-motion for Summary Judgment on the same issue on February 13, 1997. (R. 164-75.)

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[1] The undisputed testimony is that one of the Box Elder County Commissioners told Mr. Campbell that he would force the Ridge Road to be open because Mr. Campbell could not "hold out for very long" because the "cattle price [wasn't] very good." (R. 254.)

Pursuant to a stipulation by the parties (R. 646-7), and Rule 65A, U.R.C.P., the District Court considered the testimony presented at the preliminary injunction hearing as applicable to consideration of the ultimate issue. In addition to that previous testimony, the District Court heard such additional testimony and received such additional evidence as the parties desired to present on May 30, 1997. (R. 619-650.) The District Court judge then drove the property with counsel for both parties. (R. 650.) No record was made of anything said during this site visit.

The District Court then issued its Memorandum Decision on July 1, 1997 (R. 589-597) holding that the Ridge Road was private and had not become a public highway pursuant to Section 27-12-89.

Thereafter, the County requested clarification of the July 1, 1997 Memorandum Decision regarding the applicability of that decision to those portions of the Ridge Road owned by Landowners Heaton and Barnes. (R. 598-600.) The District Court issued a Memorandum Regarding County's Request for Clarification of Ruling. (R. 601-602.) The District Court also issued a subsequent Memorandum Decision dated August 12, 1997 clarifying this issue. (R. 614-615[2].)

Still unclear of the District Court's ruling the County obtained permission from the Court for each side to submit a proposed "Decision and Order Clarifying Ruling". The District Court adopted the ruling proposed by the Landowners[3]. This executed decision was not paginated for the Record on Appeal. A true and correct copy is attached for the Court's convenience as Appendix "A".

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[2] This document is not stamped with the appropriate numbers in the Record on Appeal but it is found at the place it should be in the Record in numerical sequence.

[3] The Landowner's version of the proposed clarification decision was submitted to the Court on a pleading bearing the name of the County Attorney pursuant to a verbal stipulation by the parties in an effort to save time and get a decision issued expeditiously.

The County filed a Notice of Appeal of the initial Memorandum Decision (R. 603-604) and then also appealed the Clarifying Decision (R.652-653).

Statement of the Facts of the Case

In light of the standard of review specified above granting great deference to the District Court's findings of facts (and especially in light of the County's utter failure to marshal the evidence supporting those findings) the appropriate place to find the facts of this case for review by this Court is in the July 1, 1997 Memorandum Decision of the District Court and the Clarifying Decision of September 16, 1997. (R.589-597 and Appendix "A".) Citations to the Record of just some of the testimony backing up the District Court's decision are also provided below where there is any possible dispute in the evidence.

The Campbells are owners of property which is used primarily for raising cattle and located in a sparsely populated area of the County known as Clear Creek, Utah,. Extending up a ridge line from the western portion of the Campbell property is a road "best described as two distinct tire tracks" known locally as "the Ridge Road". (R. 589.) The Ridge Road leads to the northeast slope of the Sawtooth National Forest. The base of the Ridge Road starts, at the southernmost portion of the Campbell property at an access point where it meets a County road commonly referred to (at least for the purposes of description at trial) as the "Scofield Access". (R. 589.) Another access to the Ridge Road (variously called at trial the "Campbell Access" or "Northern Access") begins at the northwest boundary of the Campbell property, past the Campbell home and long after leaving the nearby County road, and winds through and around the Campbell's pastures and fields with a number of internal fences and gates. (R. .233-234.)

On its way up the ridge to the National Forest, after the two separate accesses join, the Ridge Road also traverses property owned by the Heaton and Barnes Landowners

checkerboarded with National Forest lands. (R. 589 and Appendix "A", p. 2-3.) The public has access to all areas of the Sawtooth National Forest accessible from the Ridge Road by means of other roads which are public owned. (R. 590.)

From approximately late November through at least March the Ridge Road is impassable due to snow and during April and May is impassable due to soggy conditions; also, during the annual spring run-off, the Scofield Access is impassable because of the depth and speed of Clear Creek. (R. 590.) When passable, the Ridge Road follows the trail of what was worn into the ground as a private sheep track in the late 1930's or early 1940's. (R. 589.) Along the track to the now-unused sheep camp the Ridge Road passes a rock quarry which was operated with the express permission of the Campbell's from early in the 1960's. (R. 590.) Past the sheep camp, the Ridge Road continues up a track graded in 1967 by the United States Forest Service with the express permission of the Campbell's. (R. 590.) Testimony from James Barnes, present during the discussions with the Forest Service regarding this agreement, indicated that the use by the Forest Service was with the express understanding that the Ridge Road as graded by the Forest Service would be a private, not public, road. (R. 311.)

The Landowners (and numerous other witnesses called by the Landowners) testified that the Scofield Access has been gated at its joinder with the County road at all times since its creation and has never been used by the general public except during the general deer season when the Campbells allowed deer hunters use of the road. (R. 590.) For at least the past 30 years the Scofield Access has been gated, nearly always locked, again except for the general deer season, and posted with a "Private Property" sign. (R. 590.)[4]

[4] This fact underlines the importance of the requirement that a party challenging a factual finding below marshal the evidence regarding that finding. In its Brief the County completely misrepresents the testimony on this important issue. Relying upon an out-of-context partial answer by Lamont Campbell, the County would have the

Lamont Campbell testified that he, and before him his father, occasionally allowed others to pass through the locked gates of the Scofield Access with permission[5], but that they at all other times refused to unlock the gates or allow use of the Ridge Road by the general public. (R. 590.) In addition to Mr. Campbell, no fewer than eight other witnesses testified consistently with substantially all of Campbell's assertions concerning the Scofield Access and the Ridge Road. (R. 590.)

The District Court did not make such similarly detailed findings regarding the "Northern" or Campbell Access to the base of the Ridge Road. However, the testimony was clear that this northerly Campbell Access was even less amenable to public use and was similarly seasonally inaccessible, gated, locked and signed as private. (See, for example, the testimony of Lamont Campbell, R. 233, 234, 240, 248 and 546; and, Dr. Lynn James of the United States Department of Agriculture's Poisonous Plants laboratory at Utah State University, R. 624-625.) Campbell did candidly acknowledge that at certain times when he was irrigating his lands he would leave the gate at the northerly Campbell Access briefly unlocked. (R. 243.)

Court of Appeals believe that Mr. Campbell testified that the Scofield Access was "generally unlocked during any period of the year until 1994" (County Brief, pp. 11-12) and that the District Court was incorrect in finding (R. 590) that the Scofield Access was generally locked. Though the County does not specify the testimony allegedly containing this admission, the Landowners believe the County to be referring to the following colloquy:

> Q. (BY MR. BAIRD) Mr. Campbell up until 1994, to your knowledge, was the Scofield access generally unlocked during any period of the year?
> A. In '94?
> Q. Up until 1994.
> A. Most years it was. I remember one year dad left it locked.
> Q. So during the deer season it was unlocked?
> A. That's correct.

Clearly, Mr. Campbell was only saying that the Ridge Road was generally unlocked during the general deer season each year and not all year round. This conclusion is further buttressed by numerous other portions of testimony where Mr. Campbell and others (including at least one witness called by the County) repeatedly testified to the gate being locked. See, for example, Lamont Campbell at R. 230-1, 238, 240 and 544; Paul Dean Barnes at R. 292 and 299; James Barnes at R. 309; Sam Ospital at R. 556; and, Alan Burt (called by the County) R. 446-7.

The Ridge Road does not show as public on a County highway map (Plaintiffs' Exhibit No. 40; R. 240-241). On another County map, listing public access roads, the Ridge Road is identified as a "trail" as opposed to the other possible designations of "deadend road, [] access road or [] state road . . . ." (Plaintiffs' Exhibit No. 43; R. 243-244.) Also, no testimony was presented by the County establishing any public expenditure of monies on the creation or maintenance of the Ridge Road nor any use by the County of the Ridge Road for official purposes such as policing the road by the County Sheriff.[6] (R. 248.)

On its behalf, the County called a number of witnesses, mostly deer hunters, who testified that on a few occasions they may have used the Ridge Road without seeing gates, locks, signs or asking permission[7]. (R. 590.) Virtually all of these witnesses, some of whom had only visited the area a few times in their whole lives over the last several decades, were easily tripped up during cross-examination and identified photographs as being of the Ridge Road when, in fact, the photographs were of a nearby road and not also recognizing the gate or sign which had been on the Scofield Access since the early 1960's. (See, e.g., R. 389, 390, 401, 403, 404, 429, 460, 463, 474-475, 544.) Also, the County failed to offer any proof that these few individuals allegedly using the Ridge Road were doing so at a time other than when the Landowners had unlocked the gates for their own personal convenience or when, as repeatedly shown, the gates had been destroyed by other trespassers. (See, e.g., R. 328.)

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[5] For example, the Campbell's let Chevron Oil use the Ridge Road for oil prospecting subject to a specific written agreement. R. 238.

[6] The testimony was undisputed that even the use of the Ridge Road by the County Surveyor was only with the permission of the Landowners. (R. 232.)

[7] The reliability of the testimony of these County witnesses was poisoned by the leading style of examination of the County Attorney over the repeated objections of counsel for the Landowners. See, e.g., R. 381 and 395.

SUMMARY OF ARGUMENTS

Point I. The "Ridge Road" was not used "continuously" by the public. The District Court was correct in concluding that the Ridge Road was not used continuously by the general public but that, instead, the use by the public was almost exclusively limited to the general rifle deer hunt season as permitted by the Landowners. The Ridge Road essentially goes from nowhere to nowhere in the middle of nowhere. Despite having several months to find a multitude of witnesses to allegedly generalized and regular use of the Ridge Road by general public, the County produced only a few confused witnesses testifying to, at best, irregular permissive use.

Point II. The Ridge Road was not used as a "public thoroughfare". The District Court was correct in concluding that the public's use of the Ridge Road was not as a "public thoroughfare". The general public did not have a right to use the Ridge Road at its convenience but, instead, only occasionally used the Ridge Road for limited purposes at the convenience of, and with the permission of, the Landowners.

Point III. Sections 27-12-89 and 90 are unconstitutional takings of private property for public use without just compensation. Sections 27-12-89 and 90, Utah Code Annotated, acting together work to take from private property owners their rights to use their property as they see fit, including their right to exclude others from the use of their property, for the benefit of the public through the auspices of the government without any thought of compensation in violation of the Fifth Amendment to the United States Constitution and Article I, Section 22 of the Utah Constitution.

ARGUMENT

INTRODUCTION

The County fails to discuss in its Brief to this Court the most recent and controlling case from the Utah Supreme Court. Because it is so central to this Court's review of this case, the facts and holding in *Heber City Corp. v. Simpson*, 942 P.2d 307 (Utah 1997) will be discussed here in detail.

Simpson involved the condemnation of property in Heber located near the airport. Central to the valuation of the property was the question of access by a road claimed to have been dedicated to the public as a highway pursuant to Section 27-12-89.

The trial court heard evidence from numerous witnesses that the road in question had been used for a number of purposes by the public over the course of decades. These uses, in addition to accessing the airport, 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.

Simpson, at 309.

In addition, the road in question in *Simpson* was shown on all maps as a public road and Wasatch County had used public monies to maintain the road. *Id.*

In analyzing *Simpson*, the Utah Supreme Court parsed the language of Section 27-12-89 and came up with a tripartite test for determining the public or private status of a road[8]. The first question to be considered was whether the use of the alleged road was "continuous"; the second test was whether the use was "as a public thoroughfare"; and, the third test was whether the use

was for more than ten years. *Id.* at 310. The Court recognized the potential for a considerable overlap in the first two tests (*Id.* at 310, fn. 6) and the highly fact-specific nature of the issues involved thus affording the District Court the lenient standard of review referenced above.

In considering whether the airport road in *Simpson* was used "continuously", the Supreme Court on whether the public's use of the road was "interrupted" or "uninterrupted" and whether the use was conducted by the public "as often as they found it convenient or necessary." *Id.* at 311. The Supreme Court, even though granting great deference to the District Court's application of the law to the facts of the case, reversed the District Court's decision. The Supreme Court held that the evidence showed as a matter of law that the public's use was uninterrupted and at the public's, as opposed to the landowner's, convenience.

Considering the "public thoroughfare" use test, the Supreme Court relied on its prior opinions on Section 27-12-89 and split this element into four more parts[9]. *Id.* at 311. The Court determined to look at whether there was "passing or travel", "by the public" without "permission". In *Simpson* the Supreme Court held that the general public had traveled on the airport road regularly, at the public's convenience, without permission of the landowner.

Every element of the analysis of Section 27-12-89 present in *Simpson* which the Supreme Court relied upon in reversing the District Court (except for the ten year issue) supports sustaining the District Court's decision here.

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[8] Though apparently unaware of the Supreme Court's decision two weeks earlier in *Simpson*, the District Court in the instant case adopted a very similar analytical methodology in its July 1, 1997 Memorandum Decision. (R. 593.)

[9] The Court acknowledged that the fourth of these tests, the landowners intent to dedicate the road to the public, had been subsequently abandoned. *Id.* at 311 (citing, among other cases, *Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1099 (Utah 1995)).

POINT I

THE DISTRICT COURT CORRECTLY FOUND THAT THE RIDGE ROAD WAS NOT USED "CONTINUOUSLY" BY THE PUBLIC

Unlike the use of the airport road in *Simpson*, the Ridge Road was used, according to the great weight of the testimony, at most only occasionally by anyone other than deer hunters during the general deer season. Whether talking about the use of the Campbell portion of the Ridge Road or those portions of the Ridge Road running through the Heaton and Barnes properties, the result of the analysis is the same.

The County, in its Brief at p. 17, lists some alleged thirty-six "different" (i.e., artificially fragmented) usages of the Ridge Road. Of those which weren't with the express permission of the landowners (almost half of the claimed "usages"), which indisputably can't count for the purposes of establishing a Section 27-12-89 road,[10] almost all of the uses are seasonal recreational uses related, principally, to hunting. Of course, that assumes that any of these witnesses were telling the truth and, further, assume that they were actually referring to the Ridge Road instead of to any number of similar-appearing roads in the area.

Most importantly, the Ridge Road was used by the public, on those few occasions when it was, at the convenience of the Landowners, and not at the convenience of the public. This Court, in its review of the District Court decision, must give great weight to the District Court's findings that the Ridge Road, when it was passable, was locked almost all the time at both the Scofield and Campbell Accesses except during the general rifle deer hunting season or whatever it was convenient to the Campbells (e.g., when Mr. Campbell was irrigating and needed frequent access). Further, this Court must give the same great weight to the conclusions of the District

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[10] *Simpson, supra* at 311-312.

Court regarding the Barnes and Heaton properties: that these Landowners relied on the locked Campbell gates and that the Ridge Road otherwise lead to or from nowhere and was not "continuously" used by the general public. Other than pointing out that the public could have used the portions of the Ridge Road which run over the Barnes and Heaton properties because of the lack of any locked internal gates, the County has not shown any evidence that any such use occurred on more than a sporadic basis.

The County's attempt to analogize the "continuous" element of the analysis of this case to the logic of a private prescriptive easement (County's Brief, p. 22-23) is fatally flawed for a number of obvious reasons. First, the prescriptive easement cases are limited to the rights of the claimed prescriptive user. Here, the County claims rights on behalf of the public-at-large based on the limited use of the few users who testified at trial. Second, the County seeks to expand the use from those limited rights occasioned to the prescriptive user to an unlimited use by the public. Further, by virtue of Section 27-12-90, the County seeks to render those rights perpetually in the control of the County.

The District Court correctly held that any use by the public was not "continuous" under Section 27-12-89 and thus there was no dedication by use.

POINT II

THE DISTRICT COURT CORRECTLY FOUND THAT THE RIDGE ROAD WAS NOT USED AS A "PUBLIC THOROUGHFARE"

The County, as noted above, totally fails to acknowledge the repeated holdings by the Utah Supreme Court, as recently as *Simpson* just last year, that permissive use simply doesn't count for consideration of the "public thoroughfare" prong of the Section 27-12-89 test. What

does count is, as outlined in *Simpson*, is use by the public for any and all purposes as opposed to use by a narrow section of the public for limited purposes.

And what counts more than anything is whether the use by the public was for the purposes and at the times deemed "convenient or necessary" by the public as opposed to the purposes and times merely acceptable to the landowners. *Simpson* at 311 (citing *Boyer v. Clark*, 7 Utah 2d 395, 326 P.2d 107, 109 (1958)). As shown beyond doubt above, the District Court was correct in holding that the use by the public of the Ridge Road was only when it was specifically permitted by the Landowners (e.g., the general rifle deer hunt season until some of the hunters abused their permissions, the National Forest Service, the oil company and gravel pit operators, the poisonous plants laboratory workers, or others who sought and obtained permission) or otherwise at the convenience of the Landowners (e.g., those who might have used the Ridge Road when the access gates were unlocked while the Campbells were irrigating their fields).

It may be a hackneyed cliché, but the Utah Supreme Court has essentially ruled that because of the highly fact-specific nature of the cases, a determination of the "public thoroughfare" prong of the Section 27-12-89 test is on the order of knowing a duck because it walks like a duck and quacks like a duck in the broad duck-discretion of the District Court. Here, the District Court heard the quacks and saw the waddle. The Ridge Road was not used as a "public thoroughfare".

POINT III

SECTIONS 27-12-89 AND 90 ARE UNCONSTITUTIONAL TAKINGS OF PRIVATE PROPERTY FOR PUBLIC USE WITHOUT JUST COMPENSATION

When faced with a constitutional challenge to a permanent physical occupation of real property this Court has invariably found a taking.

* * *

> To require [ ] that the owner [of property] permit another to exercise complete dominion [over the landowners' property] literally adds insults to injury.

Loretto v. TelePrompTer Manhattan CATV Corp., 458 U.S. 419, 427 and 436 (1982) (citations omitted).

> [E]ven if the Government physically invades only an easement in property, it must nonetheless pay compensation.

Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (citations omitted).

Sections 27-12-89 and -90, U.C.A., unconstitutionally take private property for public use without any compensation in obvious violation of the Fifth Amendment to the United States Constitution and Article I, Section 22 of the Constitution of the State of Utah. The language of these two constitutional provisions is clear. Similarly, the violation of these two provisions by Sections 89 and 90 is clear.[11] The two statues give the public and the government significant physical rights in private property and, further, take away the private property owner's rights to exclude others from their property. All without any compensation.

The United States Supreme Court has developed an analytical format in takings cases dependent, initially, on the classification of the nature of the governmental action in question given the facts of the case[12]. Currently, the Court recognizes three broad classifications: the first is a so-called "regulatory takings" case; the second is an outright seizure or physical occupation of property; and, the third is a hybrid where the government attempts to obtain some rights in the

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[11] The dismissal without significant comment by this Court of a challenge to Section 27-12-89 as being "entirely without merit" in *Kohler v. Martin*, 916 P.2d 910, 912, fn. 1 (Utah App. 1996) is unhelpful as providing no discussion of the merits of the constitutional argument or the manner in which it was raised.

[12] The District Court's consideration of this issue in its Memorandum Decision of February 13, 1997 (R. 164-175) is not analyzed in detail in this Brief because the decision relies extensively on an analysis of the presumed or

property of a landowner in exchange for some kind of governmental permit sought by the latter.

The case now before this Court is clearly of the second variety; i.e. a "physical invasion" or "title take" case. However, since the County may, as it did before the District Court, argue a "regulatory taking" analysis, to clarify the correct categorization the other two types of takings cases (regulatory and hybrid) will be discussed first.

"Regulatory takings". In regulatory takings cases, the Fifth Amendment claim is that the government has acquired private property rights not by outright seizure or occupation but by excessive regulation; regulation which, in the words of Justice Holmes, goes "too far" in destroying property rights. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The Supreme Court has adopted an ad hoc methodology for analyzing these types of cases identifying several factors that have particular significance. See, e.g., *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) and *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). These factors include (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. *Penn Central*, 438 U.S. at 123-25

In the Supreme Court's most recent pronouncement on regulatory takings, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), a developer had purchased two shorefront lots on a barrier island planning to construct single-family homes. At the time of purchase the properties were not subject to the state's coastal regulations. Two years later, however, the state enacted a law which barred the developer from erecting any permanent habitable structures on the lots.

"inferred" "intent" of the landowners (see, e.g., R. 168, 171) which is precluded by *Draper City v. Estate of*

The Court's decision in *Lucas* was consistent with earlier decisions where regulations denied a property owner all economically beneficial or productive use of the land: the Court found a taking and required compensation. The holding was stated as a (semi) bright line rule for regulatory takings cases: "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Id.* at 1019

With a logic applicable here, the *Lucas* Court stated that its takings jurisprudence has traditionally been guided by the understandings of American citizens regarding the content of, and the State's power over, the bundle of rights that they acquire when they obtain title to property. "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id* at 1027.

While at first blush the instant case has certain "regulatory takings" aspects, but, because the physical property of the Landowners is actually taken by the government for public use, the proper analytical framework for the Court the classic "physical invasion"/"title take" methodology discussed below.

Hybrid/exactions takings. The third general category of takings cases is a hybrid where a governmental entity uses its powers to issue permits required by a landowner to, essentially, blackmail the landowner into giving the government rights in the landowners property which the government would otherwise be required to pay for. The Supreme Court has recently begun examining these hybrid Takings Clause challenges using a substantive due process analysis.

Bernardo, 888 P.2d 1097, 1099 (Utah 1995).

"Instead of asking whether the government's action has gone too far, the Court has examined whether the governmental action substantially advances the state interest." David W. Tufts, *Taking a Look at the Modern Takings Clause Jurisprudence: Finding Private Property Protection Under the Federal and Utah Constitutions,* 1994 B.Y.U. L. REV. 893, 914. ("*Tufts*")

A classic example of this type of exactions takings case is *Nollan v. California Coastal Commission*, 438 U.S. 825 (1987). The Nollans owned a beachfront lot and sought to tear down an old bungalow on the premises to replace it with a larger house. As required by state law, they applied for a building permit from the California Coastal Commission. The Commission granted the building permit only on condition that the owners give "the public an easement to pass across [the] portion of their property" which lay between the water and the house. *Nollan*, 483 U.S. at 828. The Court held that the Commission's exaction violated the Takings Clause because there was no rational nexus between the landowners development proposal and the exaction required by the government.

In *Dolan v. City of Tigard,* 512 U.S. 374 (1994), a property owner wanted to expand her store and pave her parking lot. The City Planning Commission said she could do so, but only if she dedicated part of her land for a public greenway to minimize flooding allegedly associated with the property development, and for a pedestrian/bike path to relieve downtown traffic congestion. The Supreme Court held that this effected a compensable taking unless the city could show on remand that there was a "rough proportionality" between the required dedications and the impact of the proposed development. *Id.* at 391.

In both *Nollan* and *Dolan,* the Court employed a two-step substantive due process analysis. It first "determine[s] whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city." *Dolan*, 512 U.S. at 386 (citing *Nollan*,

483 U.S. at 837). The first inquiry was necessary because "if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition," then "[t]he evident constitutional propriety disappears." *Nollan*, 483 U.S. at 837. In both cases, the landowner prevailed; the government's attempts to exact a permanent public easement by making the granting of the easement a condition for obtaining a development permit was held to violate the Takings Clause.

Where the Court does find the requisite nexus, it will proceed to the next inquiry: "whether the degree of the exactions demanded by the city's permit conditions bear the required relationship to the projected impact of [the] proposed development." *Dolan,* 512 U.S. at create (citing *Nollan,* 483 U.S. at 834). The Court's "rough proportionality" test, then, was described as a test where "[n]o precise mathematical calculation is required, but the [government] must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.*

Obviously, the present case is not a "hybrid" variety. The Landowners are not seeking any favors from the County. They simply want to be left alone.

"Physical Invasion" Takings analysis. Whenever government regulation or action compels a property to owner to suffer actual physical invasion of property, that occupation "is a taking without regard to the public interests that it may serve." *Loretto v. TelePrompTer Manhattan CATV Corp.*, 458 U.S. 419,426 (1982). The Supreme Court stated its holding so clearly that this Court has no choice in this case but to comply: "[w]hen faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking." *Id. at* 427. (Emphasis added.)

In *Loretto,* the state of New York enacted legislation providing that a landlord could not interfere with the installation of cable television facilities on his property. A landlord brought suit against a cable TV company that had installed cables on the landlord's building alleging that the company's installation of cable under the provisions of the act was "a taking without just compensation." *Loretto*, 458 U.S. at 424. The Court ruled in favor of the landlord concluding that a permanent physical occupation, no matter how minor, constituted a taking of property for which just compensation was due "without regard to the public interests that it may serve." *Id.* at 426.

The Court stated that "when the 'character of the governmental action' . . . is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.* at 434-35. In a case of permanent physical occupation by the government, there is no question that property has been "taken for public use" and "whether a permanent physical occupation has occurred presents relatively few problems of proof." *Id.* at 437.

The Court in *Loretto* explained the logic of its holding by considering the rights a property owner has in the ownership of his property and how those rights are violated by a "physical invasion" authorized by the government:

> Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.' To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered on of the most treasured strands in an owner's bundle of property rights. Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property. Although deprivation of

> the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking, it is clearly relevant. Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.

Id. at 435-36. (Citations omitted, emphasis in original.)

Applying that reasoning to the facts here make the conclusion of the unconstitutionally of Sections 89 and 90 ineluctable. The Landowners would no longer possess, in any meaningful sense of the word, their own property (even though they have had the privilege of paying taxes on it during the several years that the County now claims the public has own the Ridge Road). Similarly, the Landowners would no longer be allowed to exclude the public from their property; indeed, that exclusion prohibition is not merely a tangential effect of the County's actions but precisely their intent. Finally, without obtaining government permission to close the Road on their private property, the landowners would be prohibited from selling the property underlying the Ridge Road if the County were allowed to prevail.[13]

Any fair summary of *Loretto*, would conclude that the United States Supreme Court has established one of its very few "bright line" tests: "[Government] regulations that compel the property owner to suffer a permanent physical invasion, no matter how inconsequential, violate the Takings Clause. *Tufts*, supra at 895. This case violates that rule.

Loretto is not the only unequivocal statement of this bright line test by the United States Supreme Court. In *United States v. Causby*, 328 U.S. 256 (1946), the Court held that

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[13] This future inability to exclude unwanted users of the Ridge Road exposes another weakness in the analysis of this issue by the District Court. The District Court took great pains to emphasize that the landowners had not suffered a "compelled physical invasion of [private] property". February 13, 1997 Memorandum Decision (R. 169) citing *Key v. City of Escondido*, 503 U.S. 519, 527 (1992) and *Lucas, supra at 505 U.S. 1015.* The logical

government-authorized "frequent flights immediately above a landowner's property constituted a taking". (Paraphrased in *Loretto*, supra at 430.) Surely, if flights over a property are a taking then driving on the property itself must also be a taking. The strict interpretation and imposition of the Court's rule that physical invasion equals compensable taking was recently reaffirmed in *Lucas*, 505 U.S. at 1028-9.

The case law applying Utah's analogous constitutional provision, while not as extensive, is, if anything, more favorable to the Landowners. The reason for this greater favorability lies in the subtle deviation between the State and Federal constitutional provisions. Article I, Section 22 includes as compensable not just the actual government "tak[ing]" of private property but also the "damag[e]" of such property. The Utah Supreme Court has held that this extra "damage" takings provision does not give a landowner a right to be compensated for a mere one-time event which may cause monetary loss without permanently impairing the value of the property or which is common to the public that large. *Rocky Mountain Thrift Stores, Inc. v. Salt Lake City Corp.*, 784 P.2d 459, 465 (Utah 1989).

However, "damage" that causes a "permanent or recurring interference with property rights" will amount to a taking. *Colman v. Utah State Land Board*, 795 P.2d 622, 627 (Utah 1990). Certainly, allowing the public unfettered permanent access to the Ridge Road on properties owned by the Landowners, even if somehow not a "taking" under Article I, Section 22 (which it obviously is), is a "permanent or recurring interference with property rights" and, thus, a compensable "damage" under that provision pursuant to *Colman*.

Because the County demonstrated a misunderstanding *of Colman* to the District Court, the *Colman* decision will be briefly analyzed here. Colman leased from the State a 5-mile long

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problem with this argument is that while the initial use by the public may not have been "compelled" the

canal under the waters of the Great Salt Lake which transported brine that Colman used for mineral extraction. In an effort to avoid widespread flooding in 1984, the State breached a causeway in the Lake that regulated Lake height and water flows. Colman alleged that the causeway breach would damage his canal walls and reduce its effectiveness in transporting brine. Colman sued on a number of theories including a claim that the State's actions violated Article I, Section 22. The trial court threw out Colman's complaint on several bases including governmental immunity, public trust, police powers and a finding that there was no compensable taking of a property interest. *Colman*, 795 P.2d at 624.

On the takings issue, the Utah Supreme Court on appeal first determined that Colman's lease was a protected property interest and then found that Colman's damage claims asserted sufficient facts "to constitute a 'taking' or 'damage' under" Utah's Constitution. *Id.* at 626-7. The Court then quickly dismissed an argument by the State similar to that raised to the District Court by Box Elder County: viz., that the State was merely "regulating" the property rather than "taking" or "damaging" the property.

The Court held that the complaint plead actual physical taking and not mere regulation. *Colman*, 795 P.2d at 628. By emphasizing particular language in *Bountiful City v. DeLuca*, 77 Utah 107, 292 P. 194 (Utah 1930), the *Colman* Court implied that the differentiating test was whether the governmental action amounted to "confiscation, destruction or deprivation" of the property. *Colman*, 795 P.2d at 628.

Colman concludes with discussions regarding emergency and sovereign immunity not relevant here. (The public trust issue raised in *Colman* is discussed in below.) On this reading, *Colman* offers little succor to Box Elder County. Certainly, *Colman* does not support a

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continuing use is precisely compelled by Section 27-12-90.

proposition that Utah's constitutional takings clause is interpreted less broadly than the Fifth Amendment. Further, *Colman* does not overrule the Utah Supreme Court's interpretation in *Rocky Mountain Thrift Stores v. Salt Lake City Corp.*, 784 P.2d 459, 465 (Utah 1989) of the additional "damage" language in Article I, Section 22 requiring compensation for a "permanent or recurring interference with property rights."

Before the District Court, the County's attempted to find in the state and federal takings jurisprudence a four part methodology for analyzing takings claims. (This analysis appears to be some kind of hybridization of various tests mostly coming from regulatory takings cases which, as explained above, is inapplicable to this physical invasion case.) Contrary to the County's analysis, the case here meets all four of these tests even if they were applicable.

Protected property interest. The County claimed to the District Court that it was not interfering with the Landowner's property interests because the Landowners had used the Ridge Road as a road in the past and could still use it as such. That obvious statement begs the obvious question. The County seeks to prevent the landowners from using the Ridge Road in the future as anything but a road open to the general public. As the United States Supreme Court has made clear in *Loretto* and literally scores of other cases, the right to use a piece of property includes the right to make all lawful uses of the property in the property owners discretion and not to be limited to only one government-chosen use; especially a limited use that primarily benefits the public as opposed to the property owner.

Governmental Action. The County tried to tell the District Court that it was taking no action to interfere with the property rights of the Landowners; blaming everything on the Landowners for their alleged lack of diligence in keeping the public off the Ridge Road. The Landowners presumed that Box Elder County had forgotten that it threatened to arrest the

Landowners if they closed the Ridge Road and further threatened to destroy and remove any gates or locks on the Ridge Road. The Landowners assumed that the County had also forgotten that it had affirmatively counterclaimed against the Landowners in this very action to have the Ridge Road declared public and to prevent the Landowners from closing the road without the County's permission.

Economic impact. Even the County couldn't keep a straight face when it claimed to the District Court that its actions would have no economic impact on the Landowners. The County clarified this impossible claim with an alleged exception that swallows their whole argument: "at least up to the point in time when the roadways became dedicated [there was no economic impact]." Oddly, the County claimed to the District Court that the Landowners "cannot extricate themselves from [the permanent use of the Ridge Road by the public] by saying that they now have different plans." Simply put: why can't the Landowners say that they now no longer want the public to use the Ridge Road and that such continued use imposes economic burdens on them? What constitutional provision prohibits a land owner from making whatever legal use they want of their land and excluding whomever they want from their property (invidious classifications excepted)? It cannot be seriously disputed that a piece of property burdened with a permanent, unsaleable, and unchangeable public road across it is worth less money than without the road.

Characteristics and use of the property. Again the County placed the same caveat (up to the time of alleged dedication) on its untenable claim to the District Court that having a permanent, unsaleable, unchangeable public road across their property did not interfere with the use of the property by the landowners. What does it matter if the Ridge Road (at the time that it was nothing more than a sheep trail) was allegedly essential to the former uses of the property by

the Landowners? Use of the Ridge Road by the public during that period was not essential to the Landowners. Anyway, those uses have changed and the Landowners no longer use the upper portions of the Ridge Road for business operations and now no longer want the Ridge Road to be used by the public at all. Any attempt by the County to eternally retain the roadway character for the benefit of the public against the wishes of the Landowners thus undeniably interferes with their desired use of the property.

Colman and *Rocky Mountain Thrift*, to the extent that they differ from the takings analysis under the Fifth Amendment, are even more favorable to the Landowners because of the extra "damage" language in Article I, Section 22 of the Utah Constitution. Undeniably, forcing the Landowners to continue to allow the public to use the Ridge Road imposes a "permanent [and] recurring interference with property rights" and is thus compensable as a taking under Article I, Section 22.

Before the District Court, the County tried to argue, relying on *Colman* and other cases, that somehow the Landowners' property was subject to the "public trust" doctrine. In *Colman*, the State attempted to claim that since the waters above the lands which it had leased to Colman were maintained for the "public trust" the State had some reserved rights to reverse the lease transition because of its impact on the waters without any obligation to pay damages to the lessor, Colman. Essentially, the State was claiming that its original lease to Colman was "without authority". *Colman*, 795 P.2d at 635. The Utah Supreme Court obviously found that argument questionable but decided not to reach it because there was no proof that the lease to Colman actually interfered with the public's use of the navigable waters over the canal.

In *National Parks and Conservation Association v. Board of State Lands*, 869 P.2d 909 (Utah 1993), (also relied upon by the County on the "public trust" issue before the District Court)

the Utah Supreme Court considered an appeal from a denial of intervention in a matter pending before the Board of State Lands. The only part of this case even tangentially relevant to the instant case is a brief reference to the *Colman* discussion of public trust lands. The Court stated that the "public trust" doctrine "projects the ecological integrity of public lands and their public recreational uses for the benefit of the public at large." *National Parks*, 869 P.2d at 919. The Court went on to observe that the "public trust doctrine, however, is limited to sovereign lands and perhaps other state lands that are not subject to specific trusts, such as school trust lands. *Id.*

The inapplicability of the "public trust" doctrine to this case is, obviously, that the properties of the Landowners on which the Ridge Road runs are not "sovereign lands" and have not been so for decades since they were settled by the pioneers. The "public trust" doctrine, however applicable it might be to the National Forest in the area, has nothing to do with this case.

The unconstitutionally of Sections 89 and 90 can be illustrated by extending the logic implicit in the two statues on three points. First, there is no constitutional magic regarding the 10 year period of use. If the statute were inherently constitutional, the Legislature could have set the triggering time period at one year, one month or even one day. Second, neither the Utah nor United States Constitutions contain any exemptions to their "Takings" clauses for "continuous" use. Assuming that the legislature has the power to make the kinds of determinations logically required for Sections 89 and 90 it could have specified something less than "continuous"; e.g., "intermittent" or "occasional". Third, there is no expressed or implied constitutional "Takings" protection for a statute aimed at acquiring dedications for road purposes through public usage as opposed to acquiring such property for other public purposes. Thus, Section 89 could just as easily have been directed at public use of private property for such things as airplane overflight, public navigation, fishing streams, hiking trails, cross-country skiing paths, trash dumps or any

other similar activity which might be conducted by the public as a trespass on private property. Finally, if it is constitutionally authorized to initially acquire public properties for such uses by virtue of past public uses, it would be similarly constitutional to declare, as does Section 90 regarding roads, that the government and public could not lose the properties and uses thus acquired without affirmative government action.

This Court cannot possibly sustain against a Takings argument the constitutionality of two statues which could thus logically read:

> **Section 89. Public use constituting dedication.** A [parcel of land] shall be deemed to have been dedicated and abandoned to the use of the public when it has been [occasionally] [sporadically] [once] used as a public [fishing stream] [hiking trail] [cross-country ski path] [trash dump] [airport landing overflight zone] for a period of [one year] [one month] [one day] [once].
>
> **Section 90. [Fishing streams] [hiking trails] [cross-country ski paths] [trash dumps] [airport landing overflight zones] once established shall continue until abandoned.** All public [fishing streams] [hiking trails] [cross-country ski paths] [trash dumps] [airport landing overflight zones] once established [however transiently] shall continue to be [such] until abandoned or vacated [only if they feel like it] by order of the [government].

CONCLUSION

The District Court was correct in exercising its substantial discretion holding that Ridge Road has not been dedicated to the public as a highway because the use of the Ridge Road by the public has not been "continuous" nor as a "public thoroughfare" as required by Section 27-12-89. The use by the public of the Ridge Road has been limited to, primarily, deer hunting on a seasonal basis, or with the permission of the Landowners. The use has been at the convenience of the Landowners as opposed to being at the convenience of the public.

If, for some reason, the District Court is overruled on the issue of "dedication by use", the provisions of Sections 27-12-89 and 90 effect a "physical invasion" taking of private property for public use without just compensation in violation of the Fifth Amendment of the United States Constitution and Article I, Section 22, of the Utah Constitution.

Respectfully submitted this 17th day of February, 1998.

Bruce R. Baird
Attorney for the Landowners (Plaintiffs and Third-party Defendants/Appellees)

CERTIFICATE OF MAILING

I hereby certify that on this 17th day of February, 1998 two (2) true and correct copies of the foregoing BRIEF OF APPELLEES was mailed, postage prepaid addressed to the following:

Jon J. Bunderson, Esq.
Box Elder County Attorney
Bunderson & Baron
45 North 100 East
Brigham City, UT 84302

Bruce R. Baird

APPENDIX "A"

JON J. BUNDERSON
BOX ELDER COUNTY ATTORNEY
45 NORTH FIRST EAST
BRIGHAM CITY UT 84302
(801) 734-9464

ORDER PROPOSED BY LANDOWNERS

IN THE FIRST JUDICIAL DISTRICT COURT

BOX ELDER COUNTY, STATE OF UTAH

NORMA CAMPBELL, LAMONT CAMPBELL, and THE CAMPBELL CATTLE COMPANY, a Utah general partnership, Plaintiffs, vs. BOX ELDER COUNTY, Defendant.	DECISION AND ORDER CLARIFYING RULING
BOX ELDER COUNTY, Third Party Plaintiff, vs. 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.	Case No. 960000248PR

Defendant and Third-Party Plaintiff requested a clarification in this matter regarding the application of the Court's July 1, 1997 ruling to the Barnes and Heaton property.

17 Sept 1997

Plaintiffs and Third-Party Defendants responded thereto.

The Court issued a Memorandum Decision dated August 12, 1997, and on August 13, 1997, counsel had a telephone conference with the Court, both counsel having waived all necessary formalities. Based upon that telephone conference, the files and records of the Court, and the stipulations of the parties presented in Court, and confirmed herein, the Court makes the following findings and order:

1. All owners of the so-called Barnes and Heaton properties are included in the group of third-party defendants, and all are represented by Bruce Baird.

2. The Barnes and Heaton properties are traversed by the same road which begins (or ends, as the case may be) on the Campbell property, the so-called Ridge Road, which extends for several miles and traverses not only the Barnes and Heaton properties but Forest Service land as well.

3. The use of the road as it traverses the Barnes and Heaton properties is the same use as was established by the evidence presented in this matter regarding the road across the Campbell property. In other words, a witness testifying that he was coming down the road approaching the Campbell property would have traversed the Heaton and Barnes properties to arrive at that point, while a witness testifying that he went up the road through the Campbell property would travel over the Barnes and

Heaton properties after leaving the Campbell property. These facts are established by the witness testimony, and by stipulation of the parties.

4. There were never any locked gates on either the Barnes or the Heaton properties, on this road, at any time prior to 1994, and some of the boundary fences have cattle guards in lieu of any gate. These facts are established by testimony and stipulation of the parties.

5. As noted in the July 1, 1997 Memorandum Decision issued by the Court, the public has access to certain areas of the Sawtooth National Forest through other roads which are public roads. Those public roads connect to the Ridge Road, which in turn traverses the Barnes and Heaton properties, and ultimately leads to the Campbell property. The road continues for many miles, crossing three Heaton properties, which are not contiguous with one another, alternately traversing the Heaton properties and public property. Regarding the Barnes property, these two parcels are contiguous with one another and the lower parcel is contiguous with the Campbell property. The road crosses these three parcels (one Campbell parcel, two Barnes parcels), then onto Forest Service ground at the Barnes/Forest Service boundary. These facts are established by evidence presented and stipulation of the parties.

6. Counsel both stipulate that sufficient evidence was presented to the Court, based upon the evidence and stipulations of the parties, to enable the Court to make a decision on the Third-Party Complaint, as it affects the Barnes and Heaton properties.

7. The Court concludes that the analysis in its July 1, 1997 ruling applies in part and does not apply in part to the Heaton and Barnes properties.

8. Particularly, the Court concludes that the road traversing the Barnes and Heaton properties, although it has been used in excess of ten years and has been accessed by the public, has not been used continuously. The same analysis is applied as in the Court's July 1, 1997 Memorandum Decision regarding this point.

9. Regarding the analysis of the road as a "public thoroughfare", the indicia of such include the three listed in the July 1 decision, Page 5. Numbers (1) and (3) apply to the Heaton and Barnes properties. Number (2) applies to uphill traffic, attempting to enter through the Campbell property. Regarding downhill traffic, there were no locked gates on the Heaton and Barnes properties prior to 1994, and the road through those properties was open to all downhill traffic who desired to use it at all times when seasonal conditions permitted; however if the gate was locked, downhill traffic would be stopped at or on the Campbell property.

10. Regarding the Barnes and Heaton properties, any portion of the analysis in the Court's July 1, 1997 decision based upon (a) roads or gates being locked, (b) intent of dedication to public use, or (c) distinctions between acquiescence and permission is applicable to uphill traffic. Concerning downhill traffic, the owners of the Barnes and Heaton properties were aware of the status of the gates on the Campbell property, and relied on those gates. This reliance leads the Court to find and conclude that the use of the Ridge Road across Barnes and Heaton property during the deer hunt is identical with the Campbell property, to wit, the landowners knowingly permitted hunters to use the road as an access to national forest land.

11. The finding that the Ridge Road was used for the sole purpose of recreation, and the attendant analysis in the July 1 decision does apply to the Barnes and Heaton properties.

12. The portion of the analysis in the July 1, 1997 decision regarding public policy and landowners being forced to prohibit use does apply to the Barnes and Heaton properties.

13. The Court concludes that the public has used the Ridge Road across the Barnes and Heaton properties for over ten years, but the road across those properties has not been used continuously as a public thoroughfare, and therefore the requirements of Section 27-12-89 are not satisfied, and therefore these portions of the roadway cannot be deemed abandoned and dedicated for use by the public.

14. The preliminary injunction previously issued by the Court will remain in effect during the course of any appeal, including the 1997 general deer hunt. This preliminary injunction applies to the Campbell, Barnes and Heaton properties.

DATED this 16 day of Sept. 1997.

BEN H. HADFIELD, DISTRICT JUDGE

STATE OF UTAH
FIRST DISTRICT COURT
BRIGHAM CITY

APPROVED AND STIPULATED AS PROVIDED HEREIN, REGARDING CERTAIN FACTS, AND APPROVED AS TO FORM AND CONTENT, BASED UPON THE RECORD AND STIPULATIONS IN THIS MATTER:

BRUCE R. BAIRD
ATTORNEY FOR PLAINTIFFS

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing DECISION AND ORDER CLARIFYING RULING to attorney for plaintiffs, Bruce R. Baird, 201 South Main Street, Suite 900, Salt Lake City UT 84111-2215, postage prepaid, this 21 day of August 1997.

Secretary