

PUBLIC ROADS ACROSS PRIVATE LANDS

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I. TYPES OF PUBLIC ROADS CREATED BY USE.

A. Public Road by Dedication. *Utah Code Ann.* § 72-5-104(2)(a) states “[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.”

B. R.S. 2477 Rights of Way. In 1866, Congress passed an open-ended grant of “the right of way for the construction of highways over public lands, not reserved for public uses.” Act of July 26, 1866, Ch. 262, § 8, 14 Stat. 251, 253, *codified* at 43 U.S.C. § 932, *repealed* by the Federal Land Policy Management Act of 1976 (FLPMA), Pub. L. No. 94-579 § 706(a), 90 Stat. 2743.

1. Public Acceptance Required. Before title to an R.S. 2477 right of way vests, it must have been accepted by the public authorities of the state. Under Utah law, such acceptance occurs when the requirements for a public road by dedication are met. *See, e.g., SUWA v. BLM*, 435 F.3d 735 (10th Cir. 2005); *Lindsay Land and Livestock Co. v. Churnos*, 285 P. 646 (Utah 1929). Thus, aside from establishing the lands in question were public lands during the time in question, proving the existence of a R.S. 2477 right-of-way is virtually the same as proving a public road by dedication. *But see, San Juan County v. U.S.*, 754 F.3d 787 (D. Utah 2014) (differentiating Utah law from federal law regarding interruption and consistency of use).

2. Retroactive Application. In *Central Pacific Railway Co. v. Alameda County*, 284 U.S. 463, 76 L. Ed. 402, 52 S. Ct. 225 (1932), the United States Supreme Court held that R.S. 2477 applied retroactively to validate rights of way established prior to the enactment of the statute in 1866.

II. THE APPLICABLE LEGAL THEORY.

A. Roads Created Prior to Patent. If the claimant contends the public road was established prior to the lands being patented into private ownership, R.S. 2477 applies.

B. Roads created After Issuance of the Patent. If the claimant contends the road was created after the lands were patented into private ownership, the public road by dedication statute applies.

C. Public Use Pre and Post Patent. If the public used the road both prior to and following the land being patented into private ownership, the claimant should allege the road is an R.S. 2477 right of way or, in the alternative, a public road by dedication.

D. Mixed Land Status Roads. Many roads cross not only private lands but also public and state lands. In such instances, a claimant must allege both the existence of an R.S. 2477 right of way for those portions of the road crossing public lands and a public road by dedication for those portions crossing private lands. Although there is no state law corresponding to R.S. 2477 governing state lands, the Rights-Of-Way Across State Lands Act,

Utah Code Ann. § 72-5-201 et seq., grants a temporary public easement in roads crossing state lands.

III. WHEN DO THE STATUTES COME INTO PLAY?

A. Government as Property Owner/Claimant. When the Right-of-Way has been historically treated and defined as a road (often D road), it has been closed off by a private land owner, and the government does not wish to forfeit its claim to the road.

B. Government as Representative of the Public. If a private land owner closes off access to roads that have been used by the public generally for long periods of time for recreation, hunting, etc. it causes an understandable disruption among the general public. The governmental entity often feels an obligation to protect the interests of the public by bringing suit to establish the road as public. It also serves the purpose (particularly in rural areas experiencing growth in land development in areas that historically were range land, etc.) of establishing a precedent for other roads within the jurisdiction to both (1) put existing and future property owners on notice there could be public ways on the property, and (2) to deter existing and future landowners from closing off the public from historic roads.

IV. THE REQUIREMENTS TO ESTABLISH A PUBLIC ROAD BY DEDICATION (OR ACCEPTANCE OF A 14 R.S. 2477 RIGHT OF WAY).

A. The Requirement of Continuous Use.

1. The Frequency or Intensity of Use Required. There is no fixed standard to establish when this requirement is met and is difficult to address by words alone. In practice, a claimant should demonstrate as much use for as many purposes as the evidence permits. Then compare that record to prior decisions in which the court found a public dedication occurred, such as *Boyer v. Clark*, 326 P.2d 107 (Utah 1958) and *AWING Corp. v. Simonsen*, 112 P.3d 1228 (Utah 2005), which are at the lower end of the spectrum.

2. Guidance From Prior Utah Cases. Sporadic, occasional or desultory use is insufficient to constitute “continuous use.” See, e.g., *Cassity v. Castagno*, 347 P.2d 834 (Utah 1959). To be continuous however, the use need not be constant. In *AWINC Corp. v. Simonsen*, 112 P.3d at 1230, the court stated the continuous use requirement is met 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” (citing *Boyer v. Clark*, 326 P.2d 107 (Utah 1958)). 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 or chose to pass. 559 P.2d 948, 949 (Utah 1977). This includes seasonal use or use that is intermittently interrupted as a result of acts such as washouts, fires, or other interruptions that were not intended to prohibit the use of the road(s) by the public. In fact the recent changes in Utah law concern the specific issue of interruption of use.

3. The 2011 Legislative Amendment. In 2011, the Utah Legislature amended the public road by dedication statute in 2011. Specifically, *Utah Code Ann.* § 72-5-104(3) now provides that “[t]he requirement of continuous use under subsection (1) is satisfied if the use is as frequent as the public finds convenient or necessary and may be seasonal or follow some other pattern.”

B. Interruptions in Use. In 2011, the Utah Legislature amended the Public Road by Dedication statute to specify the means by which the public’s use of a road can be interrupted. More specifically, *Utah Code Ann.* § 72-5-104(2)(4) and (5) state:

(4) Continuous use as a public thoroughfare under Subsection (1) is interrupted only when:

(a) the regularly established pattern and frequency of public use for the given road has actually been interrupted for a period no less than 24 hours to a degree that reasonably put the traveling public on notice; or

(b) for interruptions by use of a barricade on or after May 10, 2011:

(i) the person or entity interrupting the continuous use gives no less than 72 hours advance written notice of the interruption to the highway authority having jurisdiction of the highway, street, or road and

(ii) the barricade is maintained for at least 24 consecutive hours.

(5) Installation of gates and posting of no trespassing signs are relevant forms of evidence but are not solely determinative of whether an interruption has occurred.

By requiring an actual interruption, these 2011 amendments were intended address the holding in *Wasatch County v. Okelberry*, 179 P.3d 768 (Utah 2008), which merely required an overt act intended to interrupt use and which is reasonably calculated to do so. Indeed, as stated in *Wasatch County v. Okelberry*, 357 P.3d 586, ¶ 42 (Utah App. 2015) (*Okelberry IV*), even if the owner closed and locked gates across the disputed road, it must be for a sufficient enough period or in a sufficient enough manner to put the public on notice that it was not for public use.

C. The “Public Thoroughfare” Requirement.

1. “Public” Use is Required. The continuous use required to result in a dedication must be as a public thoroughfare, that is, the use must be by members of the general public. Individuals with a private right to use the road, such as adjoining property owners who may have documentary or prescriptive rights to use the road, are not members of the public. See, e.g., *Utah County v. Butler*, 179 P.3d 775 (Utah 2008); *Kohler v. Martin*, 916 P.2d 910 (UT App. 1996); see also, *Jennings Investment, LC v. Dixie Riding Club*, 208 P.3d 1077 (Utah App. 2009) (addressing the use by prior owners). Likewise, permissive users of the road such as invites of adjoining landowners are not members of the public. *Id.*

2. The Meaning of “Thoroughfare.” In *Morris v. Blunt*, 161 P. 1127 (Utah 1916), the Utah Supreme Court defined “thoroughfare” as a place or way through which there

is passing or travel.” Dead ends alley and roads that do not connect to other roads and/or do not connect to a public destination are nevertheless thoroughfares within the meaning of the statute. *See, e.g., Bonner v. Sudbury*, 417 P.2d 646 (Utah 1966).

D. The Nature of Use How the Road Dedicated to the Public May be Used. The dedication depends on the type of use by the public. For example, if the use was by horse and by foot, the dedication would be for horse and by foot. If the use was by ATV and motorcycle, then the dedication would be for ATV and motorcycle. If the use was by motor vehicles, the dedication would be for motor vehicle use. *See, e.g., S. Utah Wilderness Alliance v. BLM*, 425 F.3d 735, 747-748 (10th Cir. 2005) (quoting *Jeremy vs. Bertagnole*, 101 Utah 1, 116, P.2d 420, 424 (Utah 1941) (“A bridle path abandoned to the public may not be expanded, by Court decree, into a boulevard.”))

V. EVIDENCE OF A PUBLIC ROAD BY USE.

A. Probate Court Records. Assuming the road predates statehood, probate court records may very well address things such as authority to construct the road, the right of the public to use the road, various purposes for which the road was used, orders declaring the width of the road, etc.

B. Original United States Survey and Field Notes. If the road was in existence at the time the lands were first surveyed, the road, along with other pertinent evidence such as homesteads, sawmills, corrals, etc., will be reflected on the map and discussed in the field notes.

C. Maps. The State of Utah, counties, cities, United States Department of Interior and various other government entities produce road and other maps that may evidence the existence of the road, its course, saw mills, mine tailings, etc. The search for such maps can be time consuming and expensive. University libraries, LDS Church archives, county road departments, Utah Department of Transportation, the BLM and the Forrest Service are good places to start.

D. Aerial Photographs. Commencing shortly following the end of World War II, various governmental entities have taken and maintain aerial photographs of lands for multiple purposes. These governmental entities include the BLM, Department of Agriculture, soil conservation districts, the National Resource Conservation Service, local planning and zoning departments, etc.

E. Google Maps: Often these are too recent to provide a great deal of probative evidence of use pre-dating private ownership or closure, however, it is quite helpful to provide an understanding to the Judge and jurors of what road or roads are in dispute, topography, landmarks, and to orient everyone regarding various parts of the road or roads.

F. Homestead Records. Original homestead records are available through the Department of Interior and include the homestead proof-testimony of witnesses which sets forth the period of occupancy, who resided on the homestead, what improvements were made, uses to which the land was put, etc. Often the descriptions are not extensive, but they provide an understanding of what was being done on the property. For example, if there was a saw mill on property, irrigation works, etc., it could be noted there and derive some probative evidence of the existence of roads to access the mills, works. etc.

G. Mining claims. The State of Utah, Division of Oil Gas & Mining, maintains records of mining claims, both patented and unpatented as does the BLM.

H. Water Diversions and Water Works. The State of Utah, State Engineers Office maintains records of water rights, etc.

I. Local Historical Societies. County and city histories are maintained by local historical societies and often contain probative evidence.

J. Written Family Histories.

K. Local and City Governing Body Minutes. These records often contain probative evidence such as road constructive maintenance and repair, declarations as to width, police enforcement activities, etc.

L. Old Newspapers. In addition to local histories, newspapers may have helpful information regarding accidents that could pertain to the road (in terms of use), social events (dances), etc.

M. Historic photos showing use. In connection with the histories and preparation of witnesses often historic photos will depict how the road was used (fishing, hunting, hiking, sightseeing, etc.).

N. Live Witnesses.

1. Public users.
2. Government officials.
3. Abutting landowners.
4. Road workers.
5. Wildlife officers.
6. Law enforcement.
7. UDOT officials (if Class B design road), etc.

VI. DETERMINING THE LOCATION OF A PUBLIC ROAD BY USE.

A. The documents mentioned above (other than the maps) often provide only circumstantial evidence of the actual location and sometimes the maps and aerial photos could

be inconsistent, e.g., the route could have changed because of erosion, washout, re-engineering, etc.

B. Even if the route changes in minor fashion over time, the “road” is nonetheless the same.

VII. DETERMINING THE WIDTH OF A PUBLIC ROAD BY USE.

A. R.S. 2477 Rights of Way. The width of an R.S. 2477 right of way is determined by reference to state law. *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1998).

1. Probate Court Determinations. If the road was created prior to statehood and a probate court entered any order establishing the width of such roads, it should be argued that this order is controlling.

2. State Statutes. *Utah Code Ann.* § 72-5-302(4)(a) states “. . . the scope of an R.S. 2477 right of way is that which is reasonable and necessary for all highway uses . . . determined according to the fact and circumstances, including:

- (i) Highway drainage facilities
- (ii) Shoulders adjacent to the right of way; and
- (iii) Maintenance activities defined in Section 72-5-301 that are reasonable and necessary.”

Utah Code Ann. § 72-5-302(4)(b) states that and R.S. 2477 right of way “. . . is presumed to be at least 66 feet wide if that is the usual width of highway rights of way in the area. The latter part is a big “if”. Generally, Courts have not been inclined to dedicate a full 66 feet when, for example, the road is a two track or single grader-width road (10-12 ft. wide). Rather, the Courts generally take a practical view, as explained below.

B. State Law Applicable to Public Roads by Dedication (and R.S. 2477 Rights of Way).

1. Pertinent statutes. Between 1898 and 1917, the law of the State of Utah provided that public highway easements “shall be at least sixty-six feet.” Sec. 25-1-1117, Rev. Stat. of Utah, 1898.

In 1917, the 1898 law was superseded by a statute giving counties the authority to determine the necessary width for public roads, to wit:

“[T]he width of rights of way to be used for county roads, alleys, lanes, trails, private highways, and by-roads shall be such as may be deemed necessary by the board of county commissioners; provided nothing in this section shall be so construed as to increase or diminish the width of either kind of highways already established or used as such” *Compiled Laws of Utah 1917*.

Utah Code Ann. § 72-5-108 sets forth the current law in this regard:

The width of rights of way for public highways shall be such as the highway authorities of the state, counties, cities or towns may determine for such highways under their respective jurisdiction.

2. Pertinent Case Law. Utah case law appears to require courts to defer to state statutes and local ordinances governing the width of highways:

[A] statute which establishes the width of a highway should be considered as a declaration of the width that is reasonably necessary for the convenience of the public generally. *Hunsaker v. Utah*, 509 P.2d 352, 354 (UT 1973) citing *Meservey v. Guilliford*, 93 P. 780 (Id. 1908).

Under Utah law, the width of a road is not limited to the beaten path:

Counsel for the appellant appear to insist that the public have only a right to travel on the beaten path, and must be confined to one rod in width. **We cannot agree with counsel that, where the public have acquired the right to a public highway by user, they are limited to such width as has actually been used by them.** The right acquired by prescription and use carries with it such width as is reasonably necessary for the public easement of travel, . . . The purpose for which the easement was acquired must determine the effect of the right parted with by the owner, and the width necessary for the enjoyment of the highway by the public. Where the easement is acquired by prescription or use such width must be determined from a consideration of the facts and circumstances peculiar to the case because in such event the court cannot say that in law the highway is of a certain width, in the absence of statutory provisions. **Whatever may be the width in any particular case, the easement cannot be limited, when acquired by user, to the actual beaten path.** *Whitesides v. Green*, 44 P. 1032, 1033 (UT 1896) (emphasis added).

In the absence of a controlling probate court order, statute or local ordinance, Utah case law provides that the width should be that which is “reasonable and necessary to ensure safe travel,” *Utah Code Ann.* § 72-5-104(3) (2009), consistent with the historical uses that resulted in dedication. See *Jeremy v. Bertagnole*, 101 Utah 1, 116 P.2d 420, 424 (1941).

C. Establishing the Reasonable and Necessary Width as a Factual Matter.

In the event the width of the road is not determined as a matter of law based on applicable statutes or ordinances, then it must be determined factually. At a minimum, the following evidence should be introduced.

1. Historical uses of the road resulting in the dedication.
2. Post dedication uses of the road consistent with historical uses.

3. The actual width of the beaten path.
4. The existence of (or need for) roadside improvements such as fill slopes, cut slopes, drainages, flare ditches, culverts, etc. and the widths thereof.
5. Expert testimony (by a civil engineer) of the following:
 - a. The minimum recommended width of the road based upon historical uses and current uses consistent therewith under applicable AASHTOW guidelines.
 - b. Accepted minimum right of way widths for such roads; and
Minimum width generally accepted to allow for maintenance of the road, drainages and other roadside improvements.

VIII. REMEDIES FOR HIGHWAY AUTHORITIES FOR INSTALLATIONS OBSTRUCTING A PUBLIC RIGHT OF WAY

A. Utah Code Ann. § 72-7-104. A highway authority may:

1. Remove the installation or demand the owner to remove the installation.
2. Provide notice to the owner to remove the installation. If, after notice, the installation is not removed within 10 days the installation may be removed at the owner's expense.
3. Similarly, the highway authority may recover the costs and expenses incurred in getting the installation removed, including the costs of a lawsuit, and \$10 a day from the notice of removal is served.

B. Monetary Remedies are Elective, Not Mandatory. Unless the conduct is egregious, often Judges are not inclined to significantly punish the private property owner. Accordingly, while there is potential for a governmental entity to obtain compensation for its expenditures on dedication lawsuits, recovery is not assured and should not be counted upon.

C. Time and Expense. These lawsuits are often quite expensive. They are fact dependent, require a great deal of research to shore up the historical record, often depend upon great deal of witness testimony, and may require experts to opine upon road width issues and historical records. So think carefully about what you are getting into and understand it can be a lengthy and expensive process.