DISTRICT COURT, MOFFAT COUNTY, COLORADO Moffat County Combined Courthouse 221 West Victory Way, Suite 300 Craig, Colorado 81625 Telephone: 970-824-8524 _____ PLAINTIFF: GRIFFIN-HADDEN PROPERTIES, INC., a Colorado corporation v. DEFENDANT: THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF MOFFAT, COLORADO THIRD PARTY DEFENDANT: COLOWYO COAL, CO. , L.P., a Delaware Limited Partnership	DATE FILED: December 12, 2013 7:53 AM CASE NUMBER: 2009CV102 **▲COURT USE ONLY▲** _____ Case Number: 2009CV102 Div.: Ctrm.:
ORDER AND JUDGMENT OF THE TRIAL COURT	

THIS MATTER comes before the Court for a determination whether a certain road running through property owned by Griffin-Hadden Properties, Inc. ("GHP") is a public road. In October 2011, the Court ruled that the road in question was a public highway pursuant to C.R.S. § 42-2-201(1)(b). Because the Court found substantial compliance with the aforementioned statute, it did not enter a ruling as to the Board of County Commissioners' (the "Board") claim of a public road by adverse use. *See* C.R.S. § 42-2-201(1)(c). The Colorado Court of Appeals disagreed with this Court's finding of substantial compliance, reversed this Court's decision, and remanded the case for further proceedings. The case now comes before the Court solely on the issue of

whether there is a public road by virtue of adverse use for a period of more than twenty years under C.R.S.§ 42-2-201(1)(c).

For the sake of convenience and to avoid redundancy, the Court incorporates its findings contained in Paragraphs 1-6, 8-15 of its Order and Judgment of Trial Court issued on October 15, 2011. Defined terms used in that Order shall have the same meaning herein. This Court also adopts the defined terms contained in the Court of Appeals' opinion. Therefore a further recitation of facts is unnecessary. Any disputed facts are addressed below.

FINDINGS AND CONCLUSIONS

Under C.R.S. § 42-2-201(1)(c)

> [a]ll 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 declared to be public highways. A party seeking to establish a public highway via the statute bears the burden of proving that: "(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.

McIntyre v. Bd. of Cnty. Comm'rs, Gunnison Cnty., 86 P.3d 402, 406 (Colo. 2004); *Bd. of Cnty. Comm'rs of Saguache Cnty. v. Flickinger,* 687 P.2d 975, 980 (Colo. 1984). The Board must satisfy these elements by a preponderance of the evidence. *McIntyre*, 86 P.3d at 414; *Bockstiegel v. Bd. of Cnty. Comm'rs of Lake Cnty.*, 97 P.3d 324, 329 (Colo. App. 2004).

a) Whether the Board Has Demonstrated a Claim of Right to the Road.

In order to show "claim of right," one who seeks a public road must provide evidence that a reasonably diligent landowner would have had notice of the public's intent to create a public right of way. *McIntyre*, 86 P.3d at 406. "This 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." *Id.* This notice commences the prescriptive period and without it, prescription does not begin. *Id.*

> [P]lowing 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.

Id. at 414.

The Court has previously addressed this issue in its October 15, 2011 Order in Paragraph 17, in which it stated that "Moffat County did exercise dominion, control and responsibility over at least most of the portions of the road in question by way of upkeep, snowplowing, blading and maintaining the road until 1973 when the property was purchased by the Plaintiff." However, because the parties raise certain arguments not addressed in the Court's previous Order, the Court will address them here.

The Board asserts its claim of right by virtue of certain maps, road maintenance, and an attempted road dedication resolution in 1924. It argues that it established a claim of right to the Road as early as 1924 and no later than 1936. Conversely, GHP argues that a claim of right cannot be established until 1953 when the Board officially adopted its county road map.[1]

A review of the maps in this case is not necessary. The Court received several maps into evidence and they are described in the Court's previous Order in Paragraphs 8-14. GHP places much emphasis on the fact that the Board did not have an official or adopted road map until 1953. GHP argues that "only when a county adopts a map as a county road map" [can] such

[1] What is referred to herein as the "1953 Map" is officially titled the "General Highway Map Moffat County Colorado" and was prepared in 1948 by the Colorado State Highway Department in Cooperation with the U.S. Department of Commerce Bureau of Public Roads. It was revised as of January 1, 1952 and adopted by the Board in 1953. (Trial Ex. AA4; Record on Appeal CD at 1486).

action constitute 'laying claim' to a road." (GHP Rebuttal, 8/30/2013, at 4). It therefore urges the Court to find that any claim of right could not have happened until 1953.

Contrary to GHP's assertions, the Court does not interpret the law so narrowly. Although "the strongest indicator of a 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," "*public* road system map[s]" can also constitute an overt act giving rise to a claim of right. *McIntyre,* 86 P.3d at 414 (emphasis added). Had *McIntyre* intended to limit overt acts to only roads included on an adopted county road map, the Colorado Supreme Court certainly could have described it in such manner. Instead, the Court artfully chose the word "public" which implies to this Court any public entity-issued map in its jurisdiction. Other cases in Colorado have found that there can be a valid claim of right by "placing the footpath on a city map" or the where the road appears on a United States Geologic Survey map. *See McIntyre*, 86 P.3d at 408 (describing facts and reasoning in *Simon v. Pettit*, 687 P.2d 1299 (Colo. 1984)); *Bockstiegel*, 97 P.3d at 329-30 (trial court properly found claim of right where USGS map survey depicted road before county adopted road map 35 years later); *Simon v. Pettit*, 687 P.2d 1299, 1303 (Colo. 1984) (citing *Katrina v. Board of Commissioners*, 548 P.2d 1232 (Kan. 1976)) (public entity's informal action may indicate an intention to treat a road as a public one). There is nothing in Colorado law that requires a claim of right to be based on a county-approved road map. The Court therefore rejects GHP's argument in this regard, but does note that because the 1953 Map was the first map issued by the Board, it would serve as sound evidence that the Board asserted its claim of right in that year, had there not been other evidence of a claim of right as discussed below.

The Board maintains that the 1924 road petition and subsequent resolution are sufficient to establish a claim of right. (Trial Ex. Z-5, Z-6, Z-7). According to *Bd. of Cnty. Comm'rs for*

Garfield Cnty. v. W.H.I., Inc., 992 F.2d 1061 (10th Cir. 1993), unrecorded county road resolutions evidencing an intent to claim a road are sufficient to hold a landowner to notice of a public claim. *See also McIntyre*, 86 P.3d at 412. The *W.H.I.* court stated that the unrecorded resolution "illustrate[s] notice of adverse, open and notorious use by the public" pursuant to C.R.S. § 43-2-201(1)(c) and the twenty year period for establishing adverse possession begins to run upon adoption of the resolution, despite the resolution never having been recorded. *Id.* at 1066. The *McIntyre* Court cited to *W.H.I.* in its analysis regarding claim of right. It recognized that when the county in *W.H.I.* passed its resolution, it declared its intention to claim a public road, regardless of whether the resolution was recorded. The Court reasoned that the statute "does not require that public use be based on color of title or properly recorded resolutions. The [resolution served] only to illustrate notice of adverse, open, and notorious use by the public." *McIntyre*, 86 P.3d at 412 (quoting *W.H.I.*, 992 F.2d at 1066).

The Court agrees with the Board on this issue. Although the *W.H.I.* case pre-dates *McIntyre*, and therefore did not have the benefit of its holding, its logic stands on the same principles. Both courts were concerned with notice and whether there were sufficient acts on the part of the claimant to demonstrate an intent to use the road as a public road. Because *W.H.I.* held that an unrecorded resolution can provide the requisite notice under C.R.S. § 43-2-201(1)(c), and because *McIntyre* approved this holding, the Court finds that the 1924 resolution in this case is sufficient to demonstrate the Board's claim of right to the Road.

Evidence of maintenance on the Road supports the Court's finding. Although there is no testimony of maintenance in the 1920's, there was testimony that the county serviced the Road sometime in the late 1930's. (Trial Tr., 2/9/11, at 60-61). James Meineke lived on one part of the Property from 1946 to 1951. (James Meineke Dep. March 15, 2010, at 5, 9). He testified that the

county maintained MCR 47 to the "top of the hill" at least twice a year. (Id. at 12-13). Lily Johnson, whose family owned several parcels along MCR 47 and the Road (on both the east and west sides of the Property), testified that she lived on her family's property from 1951 to 1963.[2] (Trial Tr., 2/8/11, at 221). After Ms. Johnson moved away from home, she continued to visit her family weekly until 1979. (Id. at 221-22). Both before and after having moved away, Ms. Johnson recalled the family ranching operations which involved traversing the Property, and therefore the Road, approximately once a week to access other family ground. (Id. at 47). Her family never asked for permission to cross the Property. (Trial Tr., 2/7/11, at 233, 236-37). She witnessed county "maintainers" or "bladers" on MCR 47 at least twice a year, consistent with James Meinke's testimony. (Id. at 238-39). The vehicles, on occasion, would enter the Property and maintain the road to its far west boundary line, which included the Road. (Id. at 239-40). Ms. Johnson remembered this type of maintenance going on when she was a child and continuing into the 1960's. (Id. at 241). Ms. Johnson also recalled the county performing snow removal on MCR 47 and the Road until 1968, applying gravel to the road, installing a cattleguard in 1963, and widening MCR 47, including the Road, from a one-car to a two-car road.[3] (Id. at 242-43; Trial Tr., 2/8/11, at 7, 9, 50).

Although there is conflicting evidence from Alan Mead and John Jepkema as to maintenance of the Road, it is within this Court's province to determine which version to believe.[4] *State, Dep't of Natural Res., Wildlife Comm'n, Div. of Wildlife v. Cyphers*, 74 P.3d 447, 450 (Colo. App. 2003). The 1924 County resolution, coupled with periodic maintenance of the Road,

[2] Ms. Johnson lived on one of the parcels to the east of the Property.

[3] In fact, Ms. Johnson's father was paid by the county on several occasions to perform snow removal when the county was unable to get to MCR 47. (Trial Tr., Feb. 7, 2011, p. 242).

[4] The Court notes that Alan Mead's recollection of the Road began in 1967 (when he was eight years old) and John Jepkema did not move to the area until 1963. Their testimony therefore conflicts only with Ms. Johnson's testimony beginning in 1963 and not that of Mr. Homer and Mr. Meineke.

demonstrates that the Board asserted its claim of right beginning in 1924. Although the evidence regarding maintenance was disputed, there was enough evidence to support a finding that maintenance occurred along the Road from the late 1930's to at least 1963. The Court finds that the Board has demonstrated by a preponderance of the evidence that the Road was used by the public under a claim of right beginning in 1924.

b) Whether the Board has Demonstrated Adverse Use of the Road.

Once a claim of right has been demonstrated, the proponent must also show that the public used the road "in a manner adverse to the landowner's property interest." This is a separate element under the statute. *McIntyre*, 86 P.3d at 411. The use cannot be permissive. A claimant to a public road is "aided by a presumption that the character of the use is adverse when the use is shown to have been made for the prescribed period of time." *Flickinger*, 687 P.2D at 980; *Bockstiegel*, 97 P.3d at 330.

From 1922 to 1924, several people along the Road obtained land patents. These included Jack Barron, E.J. Marsden, W.W. Barnes and Albert Kowalsky.[5] These are the same parties, or relatives thereof, that petitioned the Board for a public highway in 1924. The Court is hesitant to infer adverse use based simply on land patents with no additional supporting testimony or evidence. The Board has not cited any case law supporting its position that adversity should be inferred from patents. After reviewing Exhibit GGG, it is very likely that these parties accessed their respective properties via the Road. But this does not, in turn, demonstrate that the use was adverse. Moreover, the Court cannot presume adversity in this instance because there is

[5] GHP argues that the Court cannot find adverse use as to an adjoining landowner because such use could not be hostile as against themselves. However, the Court does not look upon *Smith v. Fowler*, the case upon which GHP relies, so narrowly. In fact, the Court disagrees that this case stands for the proposition that GHP espouses. *Smith* held that the eradication of a common boundary fence due to flood waters "does not clothe an adjoining owner with possession of lands adversely to his neighbor." 333 P.2d at 1038. It does not hold that there is an absence of adversity where adjoining land owners share a claimed road.

evidence of permissive use during the prescribed period of time – namely the appearance of a gate on the Road as early as 1936. The Court therefore finds that the Board did not demonstrate by a preponderance of the evidence that adverse use began in 1924

The first evidence of adversity was in 1944 when Homer Wilson, on horseback, occasionally moved cattle along the Road.[6] Mr. Wilson moved cattle from 1944-1953. (Trial Tr. 2/9/11, at 59, 66-70). Lily Johnson offered testimony for the years in which she neighbored the Property (1951-1963) and for the years she lived in Craig and visited her family who remained on MCR 47 (1963-1980's). From the early 1950's to 1963, she witnessed vehicles accessing the Road to reach the Property. (Trial Tr. 2/7/11, at 235, 237). She and her family also used the Road to access what was known as the "Woodmansee Parcel," located on the far northwesterly side of the Property, and the "C.H. Mead Parcel," located on the southeasterly side of the Property, throughout her childhood and during the years she lived in Craig. (Id. at 236-237, 225, 229-231). She never witnessed anyone requesting or receiving permission to access the Property nor did she or her family request or receive permission. (Id. at 233, 236). Ms. Johnson witnessed members of the public using the Road 1-2 times per month from 1963 until GHP acquired the Property. (Id. at 235-237). Milton Mathis also testified to having used the Road to access the C.H. Mead Property. (Milton Mathis Dep., 4/15/2010, at 10-14). Burt Clements also accessed the Road three or four times a year, without permission, from 1965 to 1968 for hunting purposes. (Trial Tr. 2/7/11, at 170, 184, 195, 203). He witnessed other hunters accessing the Property as well. (Id. at 184). All of these facts tend to show adversity.

[6] The Court recognizes that the claim of right and evidence of adversity did not commence at the same time. The Court finds that the Board sustained its claim of right over the intermittent twenty years through various overt acts. The Road appears on the 1929 Map and the 1936 map prepared by the Colorado State Highway Department in cooperation with the U.S. Department of Agriculture, Bureau of Public Roads (the "1936 Map"). Both are evidence that the Board claimed a right to the Road. *See Bockstiegel,* 97 P.3d at 329 (relying on a 1912 county map and a 1936 Colorado State Highway Department Map as evidence of claim of right).

Another set of facts, however, demonstrate that the use was permissive. GHP places great emphasis on the presence of a gate at Plaintiff's Property Line. This is because, "the use of a road is not deemed adverse where free travel along the road is obstructed by a gate, even if the gate is not locked." *Lang v. Jones*,552 P.2d 497, 499 (Colo. 1976); *McIntyre*, 86 P.3d at 412 ("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"); *See also People ex rel. Mayer v. San Luis Valley Land & Cattle, Co,*. 5 P.2d 873, 875 (Colo. 1931); *Martino v. Fleenor*, 365 P.2d 247, 250 (Colo. 1961). In *Flickinger*, the Colorado Supreme Court held that while "the placement of a gate to obstruct free travel along a road will ordinarily render public use of the road permissive only, the placement of the gate does not conclusively establish the character of the public use as permissive and nonadverse." The same was reiterated in *McIntyre* in which the same court stated that although a fence or a gate is a strong indication that public use of the road is permissive; their presence does not provide the landowner with a conclusive presumption that the use is permissive. 86 P.3d at 412. This is because a gate may be erected for purposes other than obstruction of public travel. *Flickinger*, 687 P.2d at 981 (citations omitted) (other uses may include protection of property or for pasturing livestock).

The evidence here demonstrates the presence of a gate in 1936. The 1936 Map shows a gate at or near the Plaintiff's Property Line. (Trial Ex. AA3). James Meineke testified that there was a four-wire gate at Plaintiff's Property Line in 1944. (Meineke Dep., 3/15/2010, at 11). The 1953 Map depicts the presence of a gate or fence at or near the Plaintiff's Property Line. (Trial Ex. AA4). Lily Johnson testified that there was a gate at the Plaintiff's Property Line before the cattle guard was installed in 1963. (Trial Tr., 2/8/11, at 11). John Jepkema testified to a locked gate beginning in 1963, the year he moved to the area. (Trial Tr. 2/8/11, at 148, 157, 163). Alan

Mead recalled a wooden post, barbed wire fence in 1967 and believed that gate to be locked sometime "in that '66, '68 timeframe" when Bud Bower leased the property. (Trial Tr., 2/9/11, at 26-27). Burt Clements testified that there was a cable across the cattle guard in 1972 or 1973. (Trial Tr., 2/7/11, at 176). The evidence is consistent that there were many points in time from 1936 onward that access through the Property would have been permissive. The evidence presented is certainly a "strong indication" that any public use was permissive beginning in 1936 until the present day.

However, there was also testimony that the gate on the Road, prior to 1963, was for purposes other than to prevent the public from accessing the Property. Ms. Johnson testified that the gate used at Plaintiff's Property Line was used to delineate between the properties and "to keep livestock where they belong." (Trial Tr., 2/8/11, at 12). She further testified that the gates located within the Property, and therefore on the Road, were used for livestock purposes and not to prevent public access to the road. (Id. at 13). Lily Johnson was the only witness to testify that the gate was used for purposes other than to obstruct of travel.

Other testimony at trial revealed that the gate was specifically used to impede access. Mary Mathis testified that somewhere around 1955-1958, she recalled a gate close to Plaintiff's Property Line and that she and her family would stop at a nearby residence to obtain a key for the locked gate. (Trial Ex. 102; Mary Mathis Dep., 4/15/2010, at 18-31, 45-46). Alan Mead testified that in the 1967-68 time-frame, he and his family were provided with a key to the locked gate. (Trial Tr., 2/9/11, at 25-29). Finally, John Jepkema testified that during the twenty-five years he lived on MCR 47 (1963-1988), the gate at Plaintiff's Property Line was always locked and that he had to get a key in order to access the Property. (Trial Tr., 2/8/11, at 148).[7] The

[7] The Court recognizes that Mr. Jepkema lived at the intersection of MCR 47 and Highway 13, and therefore not at the exact location in dispute. However, Mr. Jepkema also testified that he traveled along MCR 47, through the

Court acknowledges that both Lily Johnson and Burt Clements do not remember there being a locked gate before GHP acquired the parcel. Trial Tr., 2/8/11, at 14. However, the Court finds that the bulk of the evidence on this issue favors GHP, and the other witnesses appear to have clearer recollections of relevant events. Overwhelming evidence that a key to the locked gated was regularly obtained by users of the road leads to the reasonable inference that GHP and its predecessors used the locked gate to obstruct public use of the Road. This in turn demonstrates that the use was permissive.[8] *See Brown v. Faatz*, 197 P.3d 245, 251 (Colo. App. 2008) (giving key to locked gate could be construed as giving permission); *Tomlin Enters., Inc. v. Althoff*, 103 P.3d 1069 (Mont. 2004) (trial court properly found neighborly accommodation where parties shared key or combination to locked gate and therefore concluded use permissive).

It is this critical fact that leads the Court to conclude that the gate located at Plaintiff's Property Line altered any adverse use into permissive use. Although *Flickinger* is persuasive, it is clearly distinguishable. There was no key in *Flickinger*. The primary purpose of that gate was for the benefit of a rancher pasturing his livestock. The evidence here supporting livestock use is not nearly as strong. Lily Johnson was the only witness who testified that the gate was used for livestock purposes. Three other witnesses testified that from the early 1960's onward, a key was provided to them in order to access the Property, demonstrating a different purpose for the gate. It is the Court's responsibility to assess the credibility of the witnesses, and the sufficiency, probative value, and weight of the evidence. *Bockstiegel*, 97 P.3d at 328. The Court therefore concludes that use of the Road was permissive. "Use of a road with the landowner's permission does not qualify as adverse use." *Cyphers*, 74 P.3d at 450.

Property, in order to hunt on the Woodmansee Parcel. He therefore had many opportunities to witness the attributes of the Road. (Trial Tr., 2/9/11, p. 149).

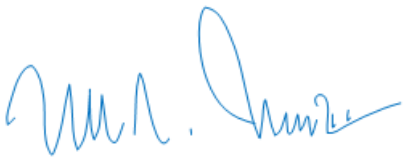
[8] The Board's reliance on *Proper v. Greager*, in this regard is misplaced. Although it is true that "silence on the part of the landowner does not render the use of the road permissive," here there was silence coupled with the offering and use of a key.

Because the Court finds the use permissive, it does not address the third and fourth elements of the public road test - that is whether (3) such use had been without interruption for the statutory period of twenty years and whether (4) the landowner had actual or implied knowledge of the public's use and made no objection.

The Court determines and orders that the Road is not a public highway under C.R.S. § 42-2-201(1)(c). Accordingly, the injunction against GHP is vacated. GHP has the right to maintain its gate located at the Plaintiff's Property Line, including the use of a lock, and otherwise restricting access to the public. The Board, its agents or representatives, including the Moffat County Sheriff's Office, are hereby prohibited from (a) modifying, removing or tampering with the gate or locks securing such gate on GHP's real property located in Sections 24 and 25, T5N, R9W of the 6th P.M.; and (b) from issuing any criminal citation to GHP for securing the gate by lock.

IT IS SO ORDERED this 10th day of December, 2013.

BY THE COURT:



Michael A. O'Hara III
District Court Judge