

CACHE COUNTY ATTORNEY



RECEIVED
NOV 28 2011
BY:

TO: Chris Harrild
FROM: Don Linton
DATE: November 28, 2011
REGARDING: Cherry Creek Road / Width

This is a response to your office's request regarding the Cherry Creek Road (hereinafter sometimes referred to as "Road"). My response is divided into two parts, to answer the two questions you presented: First, is the Road a public road; second what is the width of the Road.

1. Is the Road a public road: The Road is shown on two maps approved by the Surveyor General of the United States: one was accepted and approved in 1875; the second map shows the Cherry Creek Road and indicates it was accepted by the Surveyor General of the United States in 1897. While the issue is more complicated than can be discussed in depth here, The United State's Supreme Court has made it very clear that *"[w]hether the official survey [created by the United States Surveyor General] . . . is erroneous . . . is a question which was not within the province of the court below, nor is it the province of [even the United States Supreme Court] to consider and determine. Cragin v. Powell, 128 U.S. 691, 697 (1888) (Emphasis added).* There may exist additional issues – primarily concerned with any possible abandonment of the Road after its existence came into being; however, I am not concerned that there is merit to any position taken that the Road has been abandoned.

2. What is the width of the Road: The determination of the width of a public highway, established by an R.S. 2477¹ grant, is determined and controlled by state law. *Sierra Club v. Hodel*, 848 F.2d 1168 (10th Cir. 1988). During the time period of 1898 to 1917, the law of the State of Utah provided that public highway easements “shall be at least sixty six feet.” Sec. 25-1-117, Rev. Stat. of Utah, 1898. At this time the Road was part of the County Road system and therefore, as a matter of applicable state law, was determined to be 66' wide.

In 2003, Utah enacted legislation to codify a presumption as to the width of R.S. 2477 rights-of-way, to wit:

72-5-302. Rights-of-way across federal lands – Title –
Presumption – Scope.

(1) This part applies to all R.S. 2477 rights-of-way.

...

(b) Unless specifically determined by the state or political subdivision of the state with authority over the R.S. 2477 rights-of-way [Cache County], an 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.

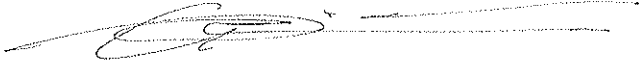
Utah Code Ann. § 72-5-302(1)(5)(b) (emphasis added). Since the founding of Cache County, the standard road width for all county roads has been 4 rods width (66' feet). Thus, under both the state law, as well as the local county ordinances, the established width of the Road is 66'.

Finally, Utah law specifically provides that the scope of county road easements include their necessary drainage facilities, shoulders, two lanes allowing for safe passage and all other road safety standards. Utah Code Ann. § 72-5-301. Courts are not entitled to substitute their judgement for what the counties have determined is necessary for road width. They are required to accept the county determination as to the necessary width. *See, Hunsaker v. Utah*, 509 P.2d 352, 354 (UT 1973) citing *Meservey v. Guilliford*, 93 P. 780 (Utah 1908).

¹Act of July 26, 1866, ch. 262 § 8, 14 Stat. 251, 253, codified at 43 U.S.C. § 932, repealed by Federal Land Policy Management Act of 1976, Pub.L. No. 84-579 § 706(a), 90 Stat. 2743. This law is commonly referred to as “R.S. 2477” (Hereinafter “R.S. 2477”).

To summarize then, the Road is a public road, and is 66' wide under previous and current state and County law. Obviously, this is a very short summary of the law, but I believe it should be helpful. If you have any further questions, please call.

Don

A handwritten signature in black ink, appearing to be the name 'Don', written over a horizontal line.