maintenance by a Road Petition to that effect. These petitions are recorded in the county clerk and recorders office.

A dedication must be accepted within a reasonable time. In the absence of acceptance by the public, there can be no common-law dedication. If before acceptance the offer is revoked, or the public has otherwise lost its right to accept, the county loses its right to the public places designated on the plat.[26] This is possible since, until acceptance, the land remains the property of the grantor and in private ownership, so it is not protected from prescriptive claims by the public property exemption.

Although Section 43-2-111, C.R.S., states the duties of the County Road Supervisor, to include "…recommendations for road repair…" it does not specifically mandate that the County maintain all county roads. Certainly the county should maintain all roads they receive HUT funds for but that is not necessarily all of the county roads that exist. The presence of County maintenance is not a requirement for a road to be declared a public road.

(7) Prescriptive Right-of-Way:

To discuss this aspect of right-of-way we need to consider two state statutes. (1) CRS 43-1-202 which reads "All roads and highways which are, on May 4, 1921, by law open to public travel shall be public highways within the meaning of this part 2." (Part 2 is entitled "The Highway Law.") (2) CRS 43-2-201 Public Highways. This statute states that the following are declared to be public highways:

(a) All roads over private lands dedicated to the public use by deed to that effect, filed with the county clerk and recorder of the county in which such roads are situate, when such dedication has been accepted by the board of county commissioners."
(b) All roads over private or other lands dedicated to public uses by due process of law and not hereafter vacated by an order of board of county commissioners duly entered of record in the proceedings of said board.
(c) All roads over private lands that have been used adversely without interruption or objection on the part of the owners of such lands for twenty consecutive years.
(d) All toll roads or portions thereof which may be purchased by the board of county commissioners of any county from the incorporators or charter holders thereof and thrown open to the public.
(e) All roads over the public domain, whether agricultural or mineral.

To establish a public highway across private property a party must show that (1) the public used the road under claim of right and (2) in a manner adverse to the landowner's property interests; (3) the public use was uninterrupted for 20 years; and (4) the

[26] Board of County Commissioner's, Jefferson County v. Warneke, 85 Colo. 388, 276 P. 671 (1929)

landowner had actual or implied knowledge of the public's use and made no objection to such use.[27] The public's right results in an easement.

There are many other cases that state these four requirements to prove an adverse or prescriptive right for a road to be declared a public highway. They also show that adversity and claim of right constitute separate requirements.[28]

To satisfy the claim of right requirement, the people or person claiming a public road by adverse use must provide evidence that a reasonably diligent landowner would have had notice of the public's intent to create a public right-of-way. The claiming party must establish that a public entity took some overt action or actions that gave property owner notice of the public's claim of right. Such an act may include snowplowing, showing the road on a public road system map, using the road for mail delivery or school busses, expending public funds for the maintenance or improvement of the road, posting signage indicating a public road, or installing drainage systems for the road. Such an act establishing notice begins the prescriptive period.[29] Mere use by the public, not adverse, even for the prescriptive period, is not sufficient to establish intent on the part of the owner to dedicate.[30]

The people or person asserting the existence of a public road under CRS 43-2-201 (1) (c) must show that the public's use of the road is, or was, adverse and not permissive. That party 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. However, where the public use was over land that was vacant, unenclosed, and unoccupied, such use is regarded merely as permissive, not adverse. Use of a right-of-way which begins as permissive will continue as such only until the user gives the landowner notice or explicit disclaimer that the user is claiming an exclusive legal right and is possessing in an adverse or hostile manner. Resolutions adopted by the board of county commissioners provided adequate notice of adverse use.[31]

To be adverse, the use should be part of a pattern of general public use and not sporadic in nature.[32] However, in prescriptive easement cases, intermittent use on a long-term basis satisfied the requirement of adverse use.[33] Further, public use to access fishing, hunting, and other recreational activities has satisfied the requirement of adverse use.[34] However, the use of a road is not adverse where free travel along the road is obstructed

[27] Board of County Commissioners of Morgan County v. Kobobel, 74 P.3d 401 (Colo. App. 2002)
[28] Board of County Commissioners v. Flickinger, 687 P.2d 975 (Colo. 1894); State v. Cyphers, 74 P.3d 447 (Colo. App. 2003); Littlefield v. Bamberger, 32 P.3d 615 (Colo. App. 2001)
[29] McIntyre v. Board of County Commissioner's, __ P.3d __ (Colo. No. 02SC803, Mar. 15, 2004).
[30] Nilson v. Huempfner, 144 Colo. 87, 355 P.2d 316 (1960)
[31] Board of County Commissioner's v. W. H. I., Inc., 992 F.2d 1061 (10th Cir. 1993) (applying Colorado law and discussing CRS 43-2-201 (1) (c)).
[32] Board of County Commissioner's v. Flickinger, 687 P.2d 975 (Colo. 1894); see McIntyre v. Board of County Commissioner's, __ P.3d __ (Colo. No. 02SC803, Mar. 15, 2004).
[33] Weisiger v. Harbour, 62 P.3d 1069 (Colo. App. 2002)
[34] Board of County Commissioner's v. Flickinger, 687 P.2d 975 (Colo. 1894); Board of County Commissioner's v. White & Welch Co., 754 P.2d 770 (Colo. App. 1988)

by gates across the road, even though they are not locked. The use of the road under such conditions is permissive.[35] However, the mere existence of the gates is not conclusive that the public's use is permissive. They may exist only to keep livestock from wandering. Therefore, the reason for the gates and the intent of the property owner are very important.

The Tenth Circuit Court of Appeals discussed whether recording statutes apply to CRS 43-2-201 (1) (c) and concluded that CRS 43-2-201 (1) (c) does not require that "public use be based on color of title or properly recorded resolutions."[36] Other jurisdictions have reached the same conclusion in regard to establishing a public road through adverse use, title by adverse possession, or easement by prescription.[37] The issuance of a tax deed does not wipe out prescriptive right of public based upon adverse use of land prior to issuance of tax deed.[38]

The user must be confined to a definite and specific line. The public cannot acquire a prescriptive right to pass over a tract of land generally; in order to create a highway by prescription, the user must be confined to a definite and specific line or way. This is especially true where the property consists of wild or unenclosed lands. However, it is not required that there shall be no deviation from a direct line of travel or that all vehicles that traverse the road shall follow exactly the same route or travel the road in exactly the same rut. Slight variations in the line of travel are not fatal; it is sufficient that the travel has been confined to substantially the same line.[39]

The trial court must set forth in its decree a definite and certain description of the prescriptive way so there can be no possible doubt as to its location and width.[40] A highway's width is not limited to the actual beaten path but extends to such width as is reasonably necessary to accommodate the established public use.[41] However, passageways by prescription, whether public or private, are confined to the extent of actual adverse usage.[42]

A prescriptive right has to be proven in court and cannot ripen into anything more than an easement. Case Law calls these Common Law Prescriptive Easements. To obtain a Common Law Prescriptive Easement over a parcel of property, it is unnecessary to establish exclusive possession of that property.[43] That is why we have been trying to discourage everyone from using the term Prescriptive Right-of-way and call them a Common Law Dedication.

[35] Lang v. Jones, 191 Colo. 313, 552 P.2d 497 (1976)
[36] Board of County Commissioner's v. W. H. I., Inc., supra., 992 F.2d at 1066 (applying Colorado law)
[37] Jones v. Harmon, 175 Cal. App. 2d 869, 878, 1 Cal. Rptr. 192, 198 (1959)
[38] Town of Silver Plume v. Hudson, 151 Colo. 394, 380 P.2d 59 (1963)
[39] Shively v. Board of County Commissioner's, 159 Colo. 353, 411 P.2d 782 (1966)
[40] Board of County Commissioner's v. Osburn, 38 Colo. App. 212, 554 P.2d 700 (1976)
[41] Goluba v. Griffith, 830 P.2d 1090 (Colo. App. 1991)
[42] Board of County Commissioners v. Ogburn, 38 Colo. App. 212, 554 P.2d 700 (1976)
[43] Alexander v. McClellan, 56 P.3d 102 (Colo. App. 2002)