

2008

# Gillmor v. Blue Ledge Corporation : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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NADINE F. GILLMOR,

Plaintiff and Appellant,

-VS-

BLUE LEDGE CORPORATION,

Defendant and Appellee.

Case No. 20080045- CA

District Court Case No. 940600087

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OPENING BRIEF OF APPELLANT

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APPEAL FROM A FINAL JUDGMENT OF THE THIRD DISTRICT COURT FOR  
SUMMIT COUNTY

---

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## TABLE OF CONTENTS

	<u>Page</u>
I. JURISDICTION .....	1
II. STATEMENT OF THE ISSUES PRESENTED ON APPEAL .....	1
ISSUE 1 AND STANDARD OF REVIEW. ....	1
ISSUE 2.A AND STANDARD OF REVIEW .....	1
ISSUE 2.B. AND STATEMENT OF REVIEW .....	2
ISSUE 3 AND STANDARD OF REVIEW .....	2
III. STATUTES AND RULES OF IMPORTANCE TO THE APPEAL .....	2
IV. STATEMENT OF THE CASE .....	4
A. NATURE OF THE CASE. ....	4
B. COURSE OF PROCEEDINGS AND DISPOSITION BY TRIAL COURT. ....	4
C. BRIEF STATEMENT OF THE FACTS OF THE CASE .....	6
V. SUMMARY OF THE ARGUMENT .....	9
VI. ARGUMENT .....	9
I. THE TRIAL COURT DID NOT HOLD BLUE LEDGE TO THE CORRECT PROCEDURAL BURDEN IT WAS REQUIRED TO MEET TO OBTAIN PARTIAL SUMMARY JUDGMENT ON ITS AFFIRMATIVE QUIET TITLE CLAIM.. ....	9
A. A STRONG PRESUMPTION EXISTS IN FAVOR OF THE VALIDITY OF THE CLARK PATENT. ....	10
B. BLUE LEDGE DID NOT PRESENT UNCONTROVERTED EVIDENCE TO OVERCOME THE PRESUMPTION THAT THE CLARK PATENT IS VALID .	11
C. THE TRIAL COURT DID NOT LOOK TO FEDERAL LAW IN DETERMINING WHETHER BLUE LEDGE WAS ENTITLED TO JUDGEMENT AS A MATTER OF LAW. ....	16

## TABLE OF CONTENTS

	<u>Page</u>
D. SINCE THE TRIAL COURT INCORRECTLY HELD THAT BLUE LEDGE MET ITS BURDEN, WHEN IT NEITHER ADDUCED SUFFICIENT UNCONTROVERTED EVIDENCE TO PREVAIL NOR SHOWING ENTITLEMENT AS A MATTER OF FEDERAL LAW, THE SUMMARY JUDGMENT SHOULD BE REVERSED .....	18
II. 43 U.S.C. § 1166 BARS BLUE LEDGE'S ATTACK OF THE CLARK PATENT..	18
A. IF THE <i>CLEGG</i> PATENT CONVEYED ANYTHING, <i>CLEGG</i> AND BLUE LEDGE ARE SUCCESSORS OF THE UNITED STATES AND GILLMOR CAN ASSERT 43 U.S.C. § 1166 AGAINST BLUE LEDGE. ....	19
B. A RULING THAT THE <i>CLARK</i> PATENT CONVEYED NOTHING, OR ISSUED ERRONEOUSLY, DOES NOT PREVENT GILLMOR FROM ASSERTING 43 U.S.C. § 1166 AGAINST BLUE LEDGE .....	21
C. APPLICATION OF 43 U.S.C. § 1166 TO BLUE LEDGE'S CLAIM IS CONSISTENT WITH THE PRINCIPLE OF REPOSE IN STATUTES OF LIMITATIONS .....	22
III. THE TRIAL COURT UNJUSTLY REWARDED BLUE LEDGE FOR ITS DELAY IN SEEKING A FINAL JUDGMENT WHILE SUBJECTING GILLMOR TO A PENALTY FOR THE SAME DELAY BY DISMISSING GILLMOR'S ADVERSE POSSESSION CLAIM.	24
H. CONCLUSION .....	28
CERTIFICATE OF SERVICE .....	29
ADDENDUM:	
Third District Court, Summit County, Final Judgment, 03/21/2008 .....	A
Third District Court, Summit County, Ruling and Order, 12/31/2007 .....	B
Third District Court, Summit County, Ruling and Order, 12/07/2007 .....	C
Third District Court, Summit County, Ruling and Order, 11/08/2005 .....	D

## TABLE OF AUTHORITIES

### Page

### Cases:

<i>Belle Fourche Pipeline Co. v. State</i> 766 P.2d 537 (Wyo. 1988) .....	15
<i>Burke v. Southern Pacific R. Co.</i> 234 U.S. 669, 34 S. Ct. 907, 58 L. Ed. 1527) .....	17
<i>Crystal Lime &amp; Cement Co. v. Robbins,</i> 8 Utah 2d 389, 335 P.2d 624 (1959) .....	26
<i>Department of Social Servs. v. Romero,</i> 609 P.2d 1323, (Utah 1980) .....	26
<i>Dept. of Transportation &amp; Public Facilities v. First National Bank,</i> 689 P.2d 483 (Alaska 1984) .....	21
<i>H.F. Allen Orchards v. U.S.,</i> 749 F.2d 1571 (Fed. Cir. 1984) .....	12
<i>Harmon City, Inc. v. Nielsen &amp; Senior,</i> 907 P.2d 1162 (Utah 1995) .....	1
<i>Hermansen v. Tasulis,</i> 2002 UT 52, 48 P.3d 235, 238 .....	1
<i>Hirtler v. Hirtler,</i> 566 P.2d 1231, 1231 (Utah 1977) .....	22
<i>Kinney-Coastal Oil Co. v. Kieffer,</i> 277 U.S. 488, 48 S.Ct 580, 72 L.Ed 961 (1928) .....	14
<i>Massey v. Griffiths,</i> 2007 UT 10, 152 P.3d 312 .....	1, 12
<i>Med-Trust Reinsurance Co. Ltd. v. U.S.,</i> 37 Fed. Cl 428, 434 (1997) .....	12
<i>Mountain States Telephone &amp; Telegraph Co. v. Atkin, Wright &amp; Miles, Chartered,</i> 681 P.2d 1258 (Utah 1984) .....	10
<i>Orvis v. Johnson,</i> 2008 UT 2, 117 P.3d 600. ....	1, 10

## TABLE OF AUTHORITIES

	<u>Page</u>
<i>Proctor v. Painter</i> , 15 F.2d 974 (9th Cir. 1926) .....	16
<i>Rohan v. Boseman</i> , 2002 UT App 109, 46 P.3d 753. ....	2
<i>Sunrise Valley, LLC v. Kempthorne</i> 528 F.3d 1251 (10th Cir. May 20, 2008) .....	14
<i>State of Louisiana v. Garfield</i> 211 U.S. 70, 77 (1908) .....	22
<i>Thompson v. Ford Motor Co.</i> , 395 P.2d 62, 63 (Utah 1964) .....	15
<i>U.S. v. Good</i> 257 F. Supp.2d 1306 (U.S. Dist. Ct. Col., 2003) .....	19
<i>United States v. Chandler-Dunbar Water Power Co.</i> , 209 U.S. 447(1908) .....	22
<i>United States v. Etcheverry</i> 230 F.2d 193 (9th Cir. 1956) .....	17, 18, 19
<i>United States v. Maxwell Land-Grant Co. et al</i> 121 U.S. 325, 7 S.Ct.1015 (1887) .....	11
<i>United States v. Oregon Lumber Co.</i> , 260 U.S. 290 (1922) .....	23
<i>United States v. Otley</i> 127 F.2d. 988 (9th Cir. 1942) .....	11
<i>United States v. Throckmorton</i> , 98 U.S. 61 .....	11
<i>Watt v. Western Nuclear, Inc.</i> 462 U.S. 36,130 S.Ct 2218, 76 L.Ed 2d 400 (1983) .....	14
<i>Wollan v. U.S. Dept. of Interior</i> 997 F.Supp. 1397 (D.Colo. 1998) .....	19, 20
<i>Young v Felornia</i> , 244 P.2d 862 (Utah 1952) .....	15

## TABLE OF AUTHORITIES

### Page

#### **Statutes:**

UTAH CODE ANN. § 78A-3-102(3)(j) .....	1
UTAH CODE ANN. § 78A-3-102(4) .....	1

#### **Rules:**

Utah R. Civ. P. 41(b) .....	2, 6
UTAH R. CIV. P. 54(b) .....	6, 27
UTAH R. CIV. P. 56 .....	15
UTAH R. CIV. P. 56 (A) .....	3
UTAH R. CIV. P. 56(c) .....	3, 10
UTAH R. CIV. P. 56(d) .....	3
UTAH R. CIV. P. 56(e) .....	3
UTAH R. CIV. P. 60(e) .....	6

#### **Other Authorities:**

42 U.S.C. § 1166 .....	3, 18, 19, 20, 21, 22, 24
------------------------	---------------------------

## I. JURISDICTION

The Utah Supreme Court took jurisdiction, initially, pursuant to UTAH CODE ANN. § 78A-3-102(3)(j). The Utah Supreme Court transferred this appeal<sup>1</sup> for decision to this Court, the Utah Court of Appeals, pursuant to UTAH CODE ANN. § 78A-3-102(4).

## II. STATEMENT OF THE ISSUES PRESENTED ON APPEAL

### Issue 1 and Standard of Review:

Appellee moved for summary judgment on its affirmative counterclaim to quiet title to certain real property. Did the trial court err in how it applied the respective procedural burdens borne by the parties? The standard of review for that issue is correctness. See *Orvis v. Johnson*, 2008 UT 2, ¶¶ 1 & 6, 117 P.3d 600, 601.

### Issue 2.a. and Standard of Review:

Did the trial court also then err in quieting title in appellee, determining that no title passed to appellant's predecessor in interest, via patent, in 1930? The standard of review for that issue is correctness. *Orvis*, 117 P.3d at 601. ("An appellate court reviews a trial court's 'legal conclusions and ultimate grant or denial of summary judgment' for correctness.") (*quoting Massey v. Griffiths*, 2007 UT 10, ¶ 8, 152 P.3d 312); see also, *Harmon City, Inc. v. Nielsen & Senior*, 907 P.2d 1162, 1167 (Utah 1995) ("Because the propriety of ... a summary judgment ... presents questions of law, we accord no deference to the trial court's determinations and review the issues under a correctness standard.") & *Hermansen v. Tasulis*, 2002 UT 52, at ¶10, 48 P.3d 235, 238 ("We review the trial court's summary judgment for correctness, considering only whether the trial court correctly applied the law and correctly concluded that no disputed

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<sup>1</sup> By order dated June 16, 2008, this Court consolidated CA-20080358 with this appeal as both are from judgments in the same trial court proceeding.

issues of material fact existed.”).

**Issue 2.b. and Standard of Review:**

Did the trial court err when it ruled that appellant could not assert the federal statutory six-year statute of limitations defense to bar appellee’s quiet title counterclaim? The standard of review for that issue is correctness based on the same case law cited as to Issue 2.a., *supra*.

**Issue 3 and Standard of Review:**

Did the trial court err in 2007 when, in spite of the parties’ joint inaction since the 2005 summary judgment ruling hearing, it dismissed with prejudice appellant’s claims and defenses based on adverse possession for failure to prosecute them but did not also dismiss with prejudice appellee’s counterclaim? A trial court’s order dismissing an action with prejudice for failure to prosecute is reviewed under an abuse of discretion standard. *Rohan v. Boseman*, 2002 UT App 109, ¶ 15, 46 P.3d 753, 756.

**III. STATUTES AND RULES OF IMPORTANCE TO THE APPEAL**

**UTAH R. CIV. P. 41(b). Dismissal of Actions.**

(b) Involuntary dismissal; effect thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

///

#### **UTAH R. CIV. P. 56(a) & (c)-(e). Summary judgment.**

(a) For claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

#### **43 U.S.C. § 1166. Limitations of suits to annul patents**

Suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patents.

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## **IV. STATEMENT OF THE CASE**

### **A. Nature of the Case**

This case involves competing claims of title under federal patents to about thirty one acres in Summit County, Utah. Almost eighty years ago, a regional federal land office in Salt Lake City issued two certain patents, the Clegg mining patent in 1929 and the Clark homestead grazing patent in 1930. Ownership claims arising from them have come into conflict between Gillmor, who is the successor to the Clark patent, and Blue Ledge, which is the successor to the Clegg patent, as follows.

In 1917, a person named John A. Clark applied for a homestead grazing patent. Mr. Clark was married to Johanna A. Clark. After Mr. Clark's death, Ms. Clark was substituted on the Clark homestead patent application. Between 1925 and 1927, a person named Charles L. Clegg formally protested Ms. Clark's patent application in a land office administrative proceeding. In 1929, the United States issued Mr. Clegg a mining patent. In 1930— after and notwithstanding Mr. Clegg's protest to the Clark application— the same land office issued Ms. Clark a homestead patent.

Appellant maintains that Ms. Clark was a successor in ownership to the United States via her homestead patent. Mr. Clegg had six years to file an action to try and annul the Clark Patent. Mr. Clegg never challenged the issuance of the Clark patent.

### **B. Course of Proceedings & Disposition By Trial Court**

In November 2005, a trial court of the Third Judicial District in the Summit County Department denied Blue Ledge's motion for summary judgment as to Gillmor's adverse possession claim and granted partial summary judgment to Blue Ledge on its quiet title claim subject to the outcome of Gillmor's adverse possession claim. In deciding Blue Ledge's motion for summary judgment, the trial court acknowledged that the evidence

raised unanswered questions about the parties' conflicting claims of right. Yet, the Court granted Blue Ledge's motion. The trial court rested exclusively on an incorrect legal presumption advanced by Blue Ledge that a patent that issues second in time is void from the beginning. The District Court wrote on November 8, 2005:

"While the court would like to give a presumption of regularity to the 1930 [Clark] patent, the court sees no possible benefit in making a factual determination about the incidents of that day. Nothing could be provided that is meaningful, in the court's mind, to the events of that day and why things happened as they did. No witnesses should shed any light on motivation and meaning, and the court believes the 1929 [Clegg] patent conveys title and it is unbroken to defendant [Blue Ledge.]

## DISCUSSION

### QUIET TITLE

As to the motion concerning this claim of defendants, the court finds no factual disputes that are material and judgment should be granted as a matter of law to defendant.

The 1929 [Clegg] patent makes any further attempts at conveyance, or any later patents of the same, void, *ab initio*. The statute of limitations applies only to the United States or its successors, and is not applicable here. A collateral attack on the homestead [Clark] patent is allowed by defendant. The Court sees nothing but a legal dispute about the effect of these 1929 and 1930 patents."

®. 436-437)

So, in spite of an applicable legal presumption advanced by Gillmor— *viz.*, that a patent is presumed valid if issued— and in spite of evidence tending to rebut the incorrect legal presumption advanced by Blue Ledge, the trial court resolved what it saw as "nothing but a legal dispute" by choosing the legal presumption that led to summary judgment and that essentially avoided an adjudication of the facts demonstrating conflicting claims of right.

Neither party moved the case forward until, in September 2007, Gillmor approached Blue Ledge regarding settlement and indicated that she would file a motion

to revisit the partial summary judgment on the federal patent conflict if settlement did not occur. In October 2007, Blue Ledge's response to that settlement overture was to file, under UTAH R. CIV. P. 41(b), a motion to dismiss Gillmor's adverse possession claim for failure to prosecute it. Also in October 2007, Gillmor certified her adverse possession claim ready for trial and filed, under UTAH R. CIV. P. 54(b), a motion requesting the trial court to reconsider its 2005 summary judgment ruling. The trial court denied Gillmor's motion but granted Blue Ledge's motion, dismissing Gillmor's adverse possession claim with prejudice in December 2007.

In January 2008, Gillmor moved, under UTAH R. CIV. P. 60(b), for the trial court in the interests of justice to dismiss both parties' claims since both had failed to prosecute them, or alternatively, dismiss her claim without prejudice. The trial court denied that motion. On March 21, 2008, the trial court entered a final judgment for Blue Ledge from which this appeal lies. R. 645-647 & Addendum hereto.

**C. Brief Statement of the Facts of the Case**

1. The real property at issue in this case comprises portions of the surface estate of three patented alleged mining claims. It is hereafter referred to as "the disputed property." R. 359 & 396.

2. In 1917, John Clark applied to the United States of America Department of the Interior, within the regional Land Office located in Salt Lake City, Utah ("Land Office"), for a homestead patent on land on which he had made entry, land that includes the disputed property. Ex. A to R. 522-526.

3. Between 1917 and 1926, Mr. Clark died and Ms. Johanna A. Clark his widowed spouse was substituted for Mr. Clark on the homestead patent application. Ex. A to R. 522-526.

4. Between 1925 and 1927, Charles D. Clegg protested Ms. Clark's patent application in an administrative proceeding before the Land Office docketed as "Contest No. 4781." Ex. A to R. 522-526 & Ex. A to 536-539.

5. The crux of Contest No. 4781 was Mr. Clegg's allegation of mining claims, underneath the ground of the disputed property, that allegedly dated back to before Mr. Clark's 1917 homestead patent application, specifically, alleged to date to 1916. Ex. A to R. 522-526 & Ex. A to 536-539.

6. Ms. Clark at one point, but for a reason not apparent from the record of Contest No. 4781 that is a part of the record of this case, conceded to judgment to at least some part of Mr. Clegg's protest. Exs. A, B & C to 536-539.

7. On May 22, 1929, the Land Office issued as to the disputed property a mining patent to Mr. Clegg, the predecessor in interest of appellant Blue Ledge. Ex. C to R. 332-352.

8. On December 20, 1930, the Land Office issued as to the disputed property the homestead patent for which Mr. and Ms. Clark had applied. Ex. A of Att. 1 to R. 358-383.

9. Mr. Clegg never filed an action challenging the Clark patent.

10. As part of a Judgment and Decree of Partition entered on February 14, 1981, in a partition action initiated by Edward L. Gillmor in the Third Judicial District Court in and for Salt Lake County, State of Utah, Civil No. 223998, Frank Charles Gillmor was awarded certain real property located in Summit County, Utah, which was part of a larger parcel more particularly known as the Clark Ranch Property. The Clark Ranch includes the disputed property. ¶ 5 of Att. 3 to R. 358-383 & Att. 4 to R. 358-383.

11. The source title document for the Clark Ranch Property is the Clark Patent. ¶ 6 of & Ex. A to Att. 3, to R. 358-383.

12. The appellant Nadine Gillmor is the spouse of the since deceased Frank Gillmor and title of the Clark Ranch passed to her in 1995 when Frank Gillmor died. ¶¶'s 1-3 of Att. 3 to R. 358-383.

13. In 1983, the United Park City Mines Company (hereinafter "United Park") claimed title to the surface of certain portions of the Clark Ranch by reason of mining claims which United Park held descended down from the Clegg Patent. Included in the surface rights claimed by United Park was an alleged overlap of the Clegg Patent onto part of the Clark Ranch. Frank and Mrs. Gillmor instructed Frank's attorneys, Hal Christensen and H. James Clegg, to try and resolve these conflicts with United Park, but a settlement was never reached. ¶¶'s 7-13 of Att. 3 to R. 358-383 & Atts. 2 & 4 to R. 358-383.

14. In each of the years from 1983 through November, 1995, the portion of the Clark Ranch Property awarded to Frank was leased by Frank and/or Mrs. Gillmor to others who used the property for livestock grazing. From 1983 through 1995, Mrs. Gillmor visited the Clark Ranch Property each year during the grazing season and often several times per year. As a consequence of these visits, Mrs. Gillmor knows that the Clark Ranch Property, including the disputed area in the Northwest Quarter of Section 11, was all unfenced and open pasture and that pasture was grazed by Frank and Mrs. Gillmor's lessees during each of those years. Mrs. Gillmor is unaware of any other use under claim of right or title that was made on the Clark Ranch Property including the disputed area in Section 11 during any of those years. ¶ 14 of Att. 3 to R. 358-383.

15. In each of the years from 1983 through 1995, the Summit County

Assessor's Office assessed property taxes against the surface ownership on the Clark Ranch Property, including the property on which the Clegg and Woodrow mining claims overlapped. The property tax notices pertaining to said surface ownership of the Clark Ranch Property were sent to Frank and/or Mrs. Gillmor in each of those years and Frank and Mrs. Gillmor timely paid those property taxes. ¶ 15 of and Ex. B to Att. 3, to R. 358-383.

16. In 1995, Mrs. Gillmor sued Blue Ledge Corporation for adverse possession and Blue Ledge Corporation counterclaimed to quiet title claiming that the Clegg and Woodrow Mining Claims voided the Clark Patent. R. 114-118 & 135-152.

## **V. SUMMARY OF THE ARGUMENT**

Appellant Gillmor respectfully submits that the trial court has made several decisions requiring reversal. In considering appellee Blue Ledge's motion for summary judgment, it did not apply the correct procedural burden on Blue Ledge or accord Gillmor the benefit of legal presumptions and reasonable evidentiary inferences. The trial court also did not look to the correct federal laws in determining Blue Ledge was entitled to judgment as a matter of law and Gillmor could not avail herself of an applicable statute of limitations. Finally, when both parties had delayed the trial court abused its discretion in dismissing Gillmor's claim certified for trial but awarded Blue Ledge a final judgment on its counterclaim.

## **VI. ARGUMENT**

### **I. THE TRIAL COURT DID NOT HOLD BLUE LEDGE TO THE CORRECT PROCEDURAL BURDEN IT WAS REQUIRED TO MEET TO OBTAIN PARTIAL SUMMARY JUDGMENT ON ITS AFFIRMATIVE QUIET TITLE CLAIM.**

Blue Ledge moved for summary judgment on *its* claim to quiet title. Blue Ledge

thus needed to “show both that there is no material issue of fact *and* that [it] the movant is entitled to judgment as a matter of law.” *Orvis v. Johnson*, 2008 UT 2, ¶ 10, 117 P.3d 600, 602 (*citing* UTAH R. CIV. P. 56(c))(emphasis in original).

Where the moving party would bear the burden of proof at trial, the movant must establish each element of his claim in order to show that he is entitled to judgment as a matter of law. In order to meet his initial burden on summary judgment, therefore, [Appellees] must [have] present[ed] evidence sufficient to establish that [quieting title in its favor] is appropriate under the facts of the case, and that no material issues of fact remain. The burden on summary judgment then shifts to the nonmoving party [Appellants] to identify contested material facts, or legal flaws in the [claim that title should be quieted in Appellee].

*Id.* Appellant respectfully submits that the trial court did not hold Blue Ledge to that burden.

Also, it is settled that “[d]oubts, uncertainties or inferences concerning issues of fact must be construed in the light most favorable to the party opposing summary judgment. Litigants must be able to present their cases fully to the court before judgment can be rendered against them unless it is obvious from the evidence before the court that the party opposing judgment can establish no right to recovery. The trial court must not weigh evidence or assess credibility.” *Mountain States Telephone & Telegraph Co. v. Atkin, Wright & Miles, Chartered*, 681 P.2d 1258, 1261 (Utah 1984) (footnotes omitted).

**A. A STRONG PRESUMPTION EXISTS IN FAVOR OF THE VALIDITY OF THE CLARK PATENT.**

At the threshold of the trial court’s inquiry on summary judgment, it was confronted with the strong presumption in that the Clark Patent held by Gillmor is valid in all respects. The United States Supreme Court has commanded that this presumption be afforded to the Clark Patent, as being one of the variety of federal land patents:

**[A]ll the presumptions are in favor of the validity of the title**, and in regard to which a wise policy has forbidden that they should be thus attacked, and those like the present, in which an action is brought in a court of chancery to vacate, to set aside, or to annul the patent itself, or other evidence of title from the United States, is very obvious.

*United States v. Maxwell Land-Grant Co. et al*, 121 U.S. 325, 379 7 S.Ct.1015, 1028

(1887)(citing *United States v. Throckmorton*, 98 U.S. 61). In order to overcome that strong presumption, clear and convincing evidence is required:

In either case, however, the deliberate action of the tribunals, to which the law commits the determination of all preliminary questions and the control of the processes by which this evidence of title is issued to the grantee, ***demands that to annul such an instrument and destroy the title claimed under it, the facts on which this action is asked for must be clearly established by evidence entirely satisfactory to the court***, and that the case itself must be within the class of causes for which such an instrument may be avoided.

*Id.* (emphasis added). Also,

[t]o avoid such 'solemn evidences of title emanating from the government of the United States under its official seal' requires the observance of the early established rule that it 'cannot be done upon a bare preponderance of evidence which leaves the issue in doubt' even more than in suits between private parties for such cancellations. Only 'that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful.'

*United States v. Otley*, 127 F.2d. 988, 995 (9th Cir. 1942).

**B. BLUE LEDGE DID NOT PRESENT UNCONTROVERTED EVIDENCE TO OVERCOME THE PRESUMPTION THAT THE CLARK PATENT IS VALID.**

Not only did Blue Ledge not offer uncontroverted, clear and convincing evidence to overcome that presumption of validity, at the oral argument in 2005, Blue Ledge's counsel effectively admitted that Blue Ledge could not offer evidence to explain why the Clark Patent was issued that would establish any error in its issuance:

"We claim to have been issued a mining patent on May 22, 1929. We seek to quiet title against a competing claim held by Ms. Gillmor, under which she claims to have a right to this property pursuant to a grazing patent that was issued on



December 20, 1930.

**We have a hunch** that the reason this becomes an issue dates back to 1929 when my client received a mining patent... . In that patent the property was described by a metes and bounds description. **What should have happened** at that point is that the federal surveyor should have gone back to the map, and should have drawn in the land that had been patented to [Blue Ledge's predecessor in interest].

...

In 1930, about a year and a half after my client's predecessor had received its mining patent... a woman named Johanna Clark received a grazing homestead patent from the federal government for what was known as the 'Clark Ranch.' ... **We think that what happened is** that the surveyor had not gone back in the meantime, after my client's predecessor received its mining patent, because it was by metes and bounds. If you look at the patent my client's predecessor received, it's a **hairy list** of metes and bounds descriptions and they didn't go back—the surveyor didn't go back immediately and plot all that on the map. So in 1930, **when the government went to give Johanna Clark her grazing patent, which is for the surface estate only, they goofed**, because the mining patent hadn't been plotted on the map."<sup>2</sup>

The Land Office issued the Clark Patent **only a year after** it issued the Clegg Patent.

Blue Ledge's "guess" is that the land office "goofed," perhaps because the Clegg Patent was not clearly described. Blue Ledge's guesswork, however, is plainly insufficient to overcome the strong presumption in favor of validity of the Clark Patent and therefore Blue Ledge can in no way be entitled to judgment as a matter of law on summary judgment. "[T]he party opposing summary judgment is entitled to the benefit of 'all applicable presumptions, inferences and intendments...'" *Med-Trust Reinsurance Co. Ltd. v. U.S.*, 37 Fed. Cl 428, 434 (1997) (quoting *H.F. Allen Orchards v. U.S.*, 749 F.2d 1571, 1574 (Fed. Cir. 1984)); see also, *Massey*, 2007 UT 10, ¶ 8, 152 P.3d at 314-315 (Utah Supreme Court held summary judgment movants were entitled to quiet title only because they had presented evidence to successfully rebut and thus overcome the

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<sup>2</sup> R. 627 at 2-4.

statutory legal presumption of tax deed validity resting with non-movant).

Mr. Clegg had formally protested Ms. Clark's patent application at the Land Office, but the Land Office issued the Clark Patent anyway. In 1928 the Land Office ruled that Ms. Clark's homestead entry was "to the extent of the conflict hereby cancelled." However, that ruling begs the question of whether there was any "conflict" between the two patents. No evidence whatsoever was presented on that point by Blue Ledge and no evidence whatsoever was presented to explain why the Land Office concluded that it could issue lawfully both the Clark Patent and the Clegg Patent for the same ground.

Blue Ledge conceded, as it had to since it had no evidence to present, it simply did not know what happened between 1928 and 1930 to explain why both patents issued on the heels of Mr. Clegg's protest. Blue Ledge has never given answers or produced evidence or Land Office records that could possibly have carried its burden on summary judgment if the trial court had applied the parties' respective burdens properly. According to Blue Ledge's counsel, the Clark family and Mr. Clegg had been fighting against each other over land in the 1920's, Ms. Clark "confessed judgment" to Mr Clegg's protest but nevertheless "[w]e don't know what happened" after that and "[i]t looks like somebody made a clerical error."

Since, even if Ms. Clark at one point in the Land Office proceeding conceded to Mr. Clegg's protest and the Land Office canceled her homestead entry to the extent it "conflicted" with the Clegg Patent, the Land Office's proceeded to issue the Clark Patent, it is reasonable to infer that the Land Office's action was based on its finding that no "conflict" would exist between the two patents, even though they encompassed the same land. Gillmor was not required to explain or come forward with any, let alone

further, evidence sustaining the validity of the Clark Patent. Nevertheless, Gillmor's counsel argued to the trial court the implausibility that the Land Office would engage in a meaningless and nugatory act, versus the plausibility that the Land Office ultimately adjudicated that it had something valid to convey to Ms. Clark. Furthermore, especially in light of Mr. Clegg's protest, it is plausible to infer that the Land Office would only have issued the Clark Patent if doing so was going to be in harmony with the Clegg Patent it had issued one year before.

That argument posited to the trial court by Gillmor's counsel is supported by the Clark Patent itself. The Clark Patent contains the following language:

"Excepting and reserving, however, to the United States all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same pursuant to the provisions and limitations of the Act of December 29, 1916 (39 Stat., 862)."

Ex. A of Att. 1 to R. 358-383. The Clark Patent was issued, by its plain reference, under the Stock-Raising Homestead Act ("SRHA") of 1916. *Id.* Like every homestead patent that issued at the time, the Clark Patent contained the SRHA-required reservation "to the United States 'all the coal and other minerals' in the land." *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 37-40, 130 S.Ct 2218, 76 L.Ed 2d 400 (1983) (quoting SRHA); see also *Kinney-Coastal Oil Co. v. Kieffer*, 277 U.S. 488, 505-506, 48 S.Ct 580, 72 L.Ed 961 (1928)(equity suit by oil and gas leaseholder to enjoin homestead patentee from surface use incompatible with continued mining operations proper because lease included implied right to reasonably necessary surface use but not proper to cancel homestead patent for same land); *Sunrise Valley, LLC v. Kempthorne*, 528 F.3d 1251, 1253 (10th Cir. May 20, 2008) (quoting *Watt*) (congressional purpose reserving mineral rights under SRHA was "to facilitate the

concurrent development of both surface and subsurface resources" because "ranching and farming do not ordinarily entail the extraction of mineral substances," and surface lands were patented "chiefly... for grazing and raising forage crops... for the support of a family"); *Belle Fourche Pipeline Co. v. State*, 766 P.2d 537 (Wyo. 1988). There is in fact a reasonable explanation for the issuance of the two patents, therefore, and that is that they do not conflict. The Land Office plainly determined to grant Ms. Clark all of the surface rights in the land except those reasonably necessary for mining under the mineral rights the United States reserved to itself. Having reserved the mining rights to itself in the Clark Patent, the United States saw fit to grant those mineral rights to Mr. Clegg. But Mr. Clegg would be limited in his use of the surface to those activities reasonably related to the reserved mineral rights the United States granted him. That explanation was rejected by the trial court without any evidence to support its rejection.

This is a perfectly reasonable interpretation, entirely consistent with the express language of the Clark Patent, entirely consistent with the express language of the statute referenced in the Clark Patent and entirely likely given the Congressional mandate to the Land Office. Blue Ledge offered no evidence to refute this reasonable explanation and so failed in its burden on summary judgment.

"Under this rule [UTAH R. CIV. P. 56], it is clear that if there is any genuine issue as to any material fact, the motion should be denied." *Young v. Felornia*, 244 P.2d 862, 863 (Utah 1952). "On summary judgment the adverse party is entitled to have the court survey the evidence and all reasonable inferences fairly to be drawn therefrom in the light most favorable to him." *Thompson v. Ford Motor Co.*, 395 P.2d 62, 63 (Utah 1964).

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**C. THE TRIAL COURT DID NOT LOOK TO FEDERAL LAW IN DETERMINING WHETHER BLUE LEDGE WAS ENTITLED TO JUDGEMENT AS A MATTER OF LAW.**

The trial court seemed to look solely to the date of issuance of the federal patents as a fact dispositive of whether the United States held any interest it could grant to Clark after the Clegg Patent was issued. That overlooked Gillmor's counsel's argument of the applicable federal law to the trial court, that Blue Ledge had the burden to "go back to the dates of the application[s]... [and] the land office records, to show [the trial court] that the land office did not know what it was doing when it issued the Clark Patent, or that the Clark Patent was in fact not first in right, even though it was issued second in time." R. 000426 at 14-15. The ultimate question of whether any federal patent, Clark's or Clegg's or anyone else's, is thus not answered by resort to applying state law recording principles, which was the argument presented by Blue Ledge. R.340-342. . See generally, *Proctor v. Painter*, 15 F.2d 974, 975 (9th Cir. 1926) ("The question whether a patent from the United States for public lands is valid or invalid is not always one of easy solution" but evidence showed that the land office did not have jurisdiction to dispose of land and issue patent therefor).

The trial court focused exclusively and therefore erroneously on the fact that the date of issuance of the Clegg Patent predated the date of issuance of the Clark Patent. In its citation to federal law, Blue Ledge relied exclusively on *Proctor*, and a string citation in *Proctor's* to support the argument that "[t]he Supreme Court has repeatedly held that patents for lands which have been previously granted, reserved or appropriated are absolutely void." 15 F.2d at 975 (citations omitted).<sup>3</sup> Blue Ledge failed to explain, however, what the Supreme Court's use of the phrase "reserved or

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<sup>3</sup> R. 000627 at 5.

appropriated” meant. In fact, federal law is clear that the date of “issuance” or “grant” is emphatically **not** what determines either the validity or scope of a patent that has issued. Instead, the date that an applicant’s claim of right arose in favor of the patent application is determinative. See *United States v. Etcheverry*, 230 F.2d 193, 196 (9th Cir. 1956)(citing cases). *Proctor’s* use of the phrase “absolutely void” which was highlighted by Blue Ledge was plainly a reference to patents which had been subjected to an evidentiary showing that the lands claimed by the void patent had been “previously granted, reserved or appropriated.”

In the portion of the *Proctor* decision Blue Ledge omitted to bring to the trial court’s attention, which immediately followed the portion of the opinion Blue Ledge quoted, the Ninth Circuit stated that “[o]n the other hand, if ***the Land Department has jurisdiction to dispose of the land and*** to issue a patent therefor, ***an erroneous determination of the facts upon which the right to a patent depends, or an entire failure to determine such facts, will not avoid the patent.*** *Id.* (citing *Burke v. Southern Pacific R. Co.*, 234 U.S. 669, 34 S. Ct. 907, 58 L. Ed. 1527)(emphasis added). Applying that statement of law to this case, since the Land Office ultimately determined that the Clark Patent should issue— whether because her application or her claim of right preceded the claim of right of Clegg, or for some other reason not known to Gillmor, Blue Ledge or the trial court, the Clark Patent was found not to conflict with the Clegg Patent in the eyes of the Land Office. The Land Office is the administrative agency with jurisdiction to make such determinations. The Clark Patent reserved mineral rights and the Clegg Patent granted mineral rights. Clearly, Blue Ledge did not meet its burden under federal law to show that the Clark Patent would be void in the circumstances.

Given that Mr. Clegg had protested the Clark homestead application but the Land Office issued the Clark Patent anyway, it is at least possible that the Land Office intended the Clark Patent to be superior to the Clegg Patent, because there is case law that, when a patent issues, the title and claim of right that comes with the patent relates back to the date of the entry on the land. *Etcheverry*, 230 F.2d at 196 (“A patent from the United States ***operates to transfer the title, not merely from the date of the patent, but from the inception of the equitable right upon which it is based.***” [Emphasis added]).

**D. SINCE THE TRIAL COURT INCORRECTLY HELD THAT BLUE LEDGE MET ITS BURDEN, WHEN IT NEITHER ADDUCED SUFFICIENT UNCONTROVERTED EVIDENCE TO PREVAIL NOR SHOWING ENTITLEMENT AS A MATTER OF FEDERAL LAW, THE SUMMARY JUDGMENT SHOULD BE REVERSED.**

Appellant respectfully submits that the trial court did not apply the correct procedural summary judgment burden on Blue Ledge as set forth in *Orvis, supra*. A summary judgment movant on its own claim has an “affirmative duty to provide the court with facts that demonstrate both that the party is entitled to judgment as a matter of law and that there are no material issues of fact that would require resolution at trial.” 2008 UT 2, ¶19, 117 P.3d at 605. It cannot be fairly said that Blue Ledge did that, and the trial court should have denied the summary judgment motion on Blue Ledge’s claim.

**II. 43 U.S.C. § 1166 BARS BLUE LEDGE’S ATTACK OF THE CLARK PATENT.**

The trial court concluded that Blue Ledge could “collateral[ly] attack” the Clark Patent but Gillmor could not assert a statute of limitations defense. See Section IV.B., *supra*. These legal conclusions, which appellant challenges, *infra*., appear to have been based on the trial court’s antecedent incorrect finding that the Land Office conveyed nothing to Ms. Clark in 1930 contrary to the presumption to which the Clark

patent was entitled and contrary to the reasonable inferences drawn therefrom.<sup>4</sup>

**A. IF THE CLEGG PATENT CONVEYED ANYTHING, CLEGG AND BLUE LEDGE ARE SUCCESSORS OF THE UNITED STATES AND GILLMOR CAN ASSERT 43 U.S.C. § 1166 AGAINST BLUE LEDGE.**

The trial court noted correctly that 43 U.S.C. § 1166 “applies only to the United States *or its successors*.” See Section IV.B., *supra*. (emphasis added). Appellant respectfully submits that the trial court then erred in ruling that the statute “is not applicable here.” *Id.* Under 43 U.S.C. § 1166, “suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patents.” LexisNexis 2008.

In *Wollan v. U.S. Dept. of Interior*, 997 F.Supp. 1397 (D.Colo. 1998), plaintiff Wollan sought a determination that he had a valid claim of right to acreage based on a mining claim that dated back to **1890** and asserted his claimed interest had priority over claims of others who had acquired title pursuant to a patent issued in **1986**. *Id.* at 1399-1400. The federal trial court ruled that the action was barred by the federal six-year statute of limitations, because it commenced 11 years after the 1986 patent. *Id.* at 1401-1402. “Because **only the government may contest and seek the cancellation**

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<sup>4</sup> “Despite the language of the 1872 Mining Act that claimants ‘shall have the exclusive right of possession and enjoyment of all [the] surface,’ courts have limited those rights to uses reasonably related to mining operations” *U.S. v. Good*, 257 F. Supp.2d 1306, 1309 (U.S. Dist. Ct. Col., 2003)(internal citations omitted); see also *U.S. v Etcheverry*, *supra*. 230 F.2d at 195. Blue Ledge does not even claim in this case to be the successor in interest to the mining estate associated with the Clegg Patent. Its claim is limited to the surface estate in the disputed property. However, as Gillmor believes it must have been, the Land Office conveyed the surface estate in 1930 to Ms. Clark with reservation of mineral rights. The Land Office had conveyed to Mr. Clegg in 1929 those mineral rights which had been reserved out from Ms. Clark’s first in time homestead patent entry and application filed back in 1917. If this is correct, Blue Ledge’s claim in this case is to nothing at all.



**of an issued patent**, § 1166 applies with equal force when a third party stands in the shoes of the federal government to compel the vacatur or annulment of a patent.” *Id.* at 1401 (emphasis added). “Once the six-year statute of limitations for challenging a patent specified in 43 U.S.C. § 1166 expire[d], the patent [had] become[ ] unassailable.” *Id.* at 1401-1402.

Any action to challenge and seek annulment of the Clark Patent, brought by the United States or a third party like Blue Ledge, had to be filed no later than **December 20, 1936**. Blue Ledge’s suit was commenced more than seventy years after that date. Assuming the Clegg Patent conveyed something to Mr. Clegg, Mr. Clegg was plainly a successor in ownership to the United States. Blue Ledge’s quiet title claim in this case is based entirely on itself being successor in interest to Mr. Clegg. Therefore, logically, Blue Ledge— like Mr. Clegg many years ago— is a successor to the United States if the Clegg Patent conveyed something. Mr. Clegg many years ago stood in the shoes of the federal government. Blue Ledge today stands in the shoes of the federal government and is subject to the statutory limitations of actions defense.

After the Clark Patent issued, Mr. Clegg did not file an action to annul it within six years, or at all. This undisputed fact is enhanced by a second one: back in the 1920's and 1930's, Mr. Clegg knew of Ms. Clark’s claim to the land, protested her patent application and still did nothing after it issued. Blue Ledge not only stands in the shoes of the federal government. It stands in the shoes of Mr. Clegg, and Mr. Clegg stood still when the Land Office issued the Clark Patent. The trial court should have found the Blue Ledge suit barred by 43 U.S.C. § 1166 because of when it was filed.

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**B. A RULING THAT THE CLARK PATENT CONVEYED NOTHING, OR ISSUED  
ERRONEOUSLY, DOES NOT PREVENT GILLMOR FROM ASSERTING 43  
U.S.C. § 1166 AGAINST BLUE LEDGE.**

At the 2005 summary judgment hearing, counsel for Gillmor reminded the trial court of the legal presumption that the Land Office conducted its activities properly and issued the close in time Clegg and Clark Patents in harmony with each other. R 000426 at 17-18. However, even in the very unlikely event that the Land Office did not have anything to dispose of when it issued the Clark Patent, Blue Ledge's quiet title claim seeking its annulment still gets hung up on 43 U.S.C. § 1166.

At that hearing, counsel also raised the case of *Dept. of Transportation & Public Facilities v. First National Bank*, 689 P.2d 483 (Alaska 1984). In that case, even though the subject patent had issued improperly, the Alaska Supreme Court affirmed that Alaska stood in the shoes of the federal government for purposes of a suit that was effectively seeking to annul a patent. *Id.* at 486 n. 13. The state was "estopped to deny validity" of the patent because the six-year statute had run. *Id.*

The trial court concluded on November 8, 2005, that the Clark Patent was void *ab initio*. This led to the trial court's conclusion that 43 U.S.C. § 1166 "is not applicable here." In other words, because the Court ruled that Gillmor got nothing she was not a successor in ownership to the United States, and therefore she could not stand in the shoes of the United States to assert the statute against Blue Ledge. However, even where a patent is void *ab initio*, 43 U.S.C. § 1166 prevents any challenge to the validity of the patent once the six-year limitations period has expired. The United States Supreme Court has stated:

***"It is said that the instrument was void and hence was no patent. But the statute presupposes an instrument that might be declared void."***

***When it refers to 'any patent heretofore issued,' it describes the purport and source of the document, not its legal effect. If the act were confined to valid patents it would be almost or quite without use.*** In form the statute only bars suits to annul the patent. ***But statutes of limitation, with regard to land, at least, which cannot escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy.*** This statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place.

*United States v. Chandler-Dunbar Water Power Co.*, 209 U.S. 447, 450 (1908)

(emphasis added)(internal citations omitted); see also, *State of Louisiana v. Garfield*, 211 U.S. 70, 77 (1908) (citing with approval *United States v. Chandler-Dunbar Water Power Co.* where "it was decided that this act applied to patents even if void because of a previous reservation of the land, and it was said that the statute not merely took away the remedy but validated the patent").

**C. APPLICATION OF 43 U.S.C. § 1166 TO BLUE LEDGE'S CLAIM IS CONSISTENT WITH THE PRINCIPLE OF REPOSE IN STATUTES OF LIMITATIONS.**

"Statutes of limitations are not designed exclusively for the benefit of individuals but are also for the public good. These statutes of repose are intended to prevent the revival and enforcement of stale demands; against which it may be difficult to defend, because of lapse of time, fading of memory, and possible loss of documents." *Hirtler v. Hirtler*, 566 P.2d 1231, 1231 (Utah 1977). Similarly, the United States Supreme Court stated long ago:

"The defense of the statute of limitations is not a technical defense but substantial and meritorious. The great weight of modern authority is to this effect. . . . Such statutes are not only statutes of repose, but they supply the place of evidence lost or impaired by lapse of time by raising a presumption which renders proof unnecessary. . . . Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They

promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together. . . . They are founded upon the general experience of mankind that claims, which are valid, are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand creates, therefore, a presumption against its original validity, or that it has ceased to subsist. This presumption is made by these statutes a positive bar; and they thus become statutes of repose, protecting parties from the prosecution of stale claims, when, by loss of evidence from death of some witnesses, and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth."

*United States v. Oregon Lumber Co.*, 260 U.S. 290, 299-300 (1922) (internal citations and quotations omitted).

The Clark Patent issued in 1930. The reasonable inference is that it issued in harmony with the 1929 Clegg Patent. That is probably why Mr. Clegg never instituted an annulment action. After all, he had protested the original Clark patent application. Blue Ledge is the first to challenge the Clark Patent, yet Blue Ledge "does not know what happened." R. 628 at 23. It may be impossible for Blue Ledge to obtain witness testimony or records explaining what happened between the end of the protest and the issuance of the Clark Patent. Yet, appellant strenuously disagrees with the trial court that there is "no possible benefit in making a factual determination about the incidents of that day [and] [n]othing could be provided that is meaningful, in the court's mind, to the events of that day and why things happened as they did." See Section IV.C., *supra*. Not only should summary judgment have been denied on Blue Ledge's counterclaim, Blue Ledge's failure to be able to locate the salient facts from the past demonstrates the type of prejudice that repose in a statute of limitations seeks to avoid. Accordingly,

43 U.S. C. § 1166 should bar Blue Ledge's attempt to annul and cancel the Clark Patent. In sum, there is no legitimate basis on which Blue Ledge can assail and invalidate the Clark Patent, but there is an applicable statutory bar to Blue Ledge's claim which Gillmor can properly assert. This court should reverse the trial court's contrary conclusions and remand.

**III. THE TRIAL COURT UNJUSTLY REWARDED BLUE LEDGE FOR ITS DELAY IN SEEKING A FINAL JUDGMENT WHILE SUBJECTING GILLMOR TO A PENALTY FOR THE SAME DELAY BY DISMISSING GILLMOR'S ADVERSE POSSESSION CLAIM.**

After the trial court's 2005 denial of summary judgment on the adverse possession claim and grant of partial summary judgment on the quiet title counterclaim, neither party took any action to move the case toward a final judgment. Ultimately, *Gillmor* broached the topic of settlement with Blue Ledge in September 2007 and ***notified Blue Ledge that she would move the case forward if there were no settlement.*** Ex. A to R. 595-602. Blue Ledge's response was to turn Gillmor's stated intent to move the case forward into an opportunity to divert attention from its own failure to move the case toward final judgment. Despite the fact that Blue Ledge had obtained no final judgment on its affirmative claims and had allowed them to languish, Blue Ledge moved for dismissal with prejudice of Gillmor's adverse possession claim, alone. Gillmor therefore both filed her motion to revisit and certified the action as ready for trial. R. 461-462.

In October 2007, Blue Ledge moved to dismiss Gillmor's adverse possession claim for failure to prosecute. On December 5, 2007, when the trial court heard Blue Ledge's motion to dismiss, it asked counsel for Blue Ledge to explain its own inaction and counsel's response was ***"we done [sic] everything we could to prosecute our claim, and we were done."*** R. 628 at 24. On December 7, 2007, the trial court granted Blue Ledge's motion. R 550-552. On December 14, 2007, Blue Ledge submitted a

proposed form of order to which Gillmor objected on December 24, 2007, because the proposed order purported that the Court granted Blue Ledge affirmative relief for which it had not moved, viz., entry of a decree/judgment quieting title in specifically described real property. R. 566-570 & 555-557. On December 31, 2007, the trial court ruled that it would not sign Blue Ledge's proposed order:

"The Court agrees with plaintiff that the proposed order grants more relief than the Court's intended order which simply dismissed plaintiff's claims for failure to prosecute. The Court will not execute the proposed order."

R. 563.

**Only then**, after that message from and statement of the trial court, did Blue Ledge move, on January 7, 2008, for entry of a final judgment and an order with a legal description of the disputed property. R. 573-575. **Blue Ledge thus waited twenty six months, more than two years after the trial court's summary judgment ruling, to seek the affirmative relief it wanted on its counterclaim.** All along, it knew had to do something to complete its case. It did nothing but point a finger at Gillmor's delay when she raised the possibility of settlement. Then, in being heard on its motion to dismiss Gillmor's remaining claim for her failure to prosecute, Blue Ledge told the trial court it had nothing else to do on its counterclaim, when it actually did.

Parties to a lawsuit have equal obligations to move their affirmative claims forward. However, the trial court dismissed Gillmor's claim for delay though she had certified it ready for trial. Blue Ledge had done nothing for an even longer period of time on its counterclaim and was awarded dismissal of Gillmor's claim and a final judgment on its own. "Whether delay is a ground for the dismissal of an action is to be determined on the totality of the circumstances. This includes the conduct of **both** parties and the opportunity **each** has had to move the case forward **if they so desired**;

and also what, if any, difficulty or prejudice may have been caused to the other party by the delay; and most important, whether it appears that any injustice has resulted.”

*Department of Social Servs. v. Romero*, 609 P.2d 1323, 1324 (Utah 1980)(citing cases)(emphasis added); see also, *Crystal Lime & Cement Co. v. Robbins*, 8 Utah 2d 389, 393, 335 P.2d 624 (1959). The Utah Supreme Court in *Crystal Lime* was faced with a case wherein both parties were seeking to quiet title and had done nothing in the case for eight years when the counterclaimant filed a motion to dismiss:

“Respondents' contentions might be very persuasive if they had not filed counterclaims in the action asking that title be quieted in them and also asking that in the event title was not quieted in them that appellant herein be required to reimburse them the amounts they expended for taxes. In asking for such affirmative relief they were in effect cross-complainants in the action. . . ***Since any party to this action could have obtained the relief to which it was entitled at any time it had wanted but both parties chose to dally for a number of years, it was an abuse of discretion for the court to grant respondents' motion to dismiss with prejudice.***”

335 P.2d at 626 (emphasis added). In *Romero*, as in *Crystal Lime*, the state high court did not reward the moving party when they had delayed as well: “we are not impressed with either fairness or propriety in one party sitting silently by for a long period of time, then attempting to blame the other party for the delay.” 609 P.2d at 1325.

Blue Ledge has been every bit as dilatory in pursuing final resolution of its counterclaim as Gillmor in pursuing her remaining claim. Had Gillmor not broached settlement in September 2007, Blue Ledge would undoubtedly still be doing nothing to move its counterclaim to final resolution or to try and terminate Gillmor's adverse possession claim one way or another if that was what was standing in its way. Gillmor has not caused Blue Ledge any delay. Further, Gillmor is the party who certified that claim ready for trial. If at any time, between the 2005 summary judgment ruling and

Gillmor's filing of the trial readiness certificate in October 2007, Blue Ledge had been earnest about needing a court order with a legal description of the disputed property to accompany the quiet title ruling in its favor, it could have and would have sought one. Nothing was ever stopping it from doing so. Additionally, if Blue Ledge was sincere that Utah Rule of Civil Procedure 54(b) presented it with a procedural problem and the adverse possession claim was "the only thing stopping [it] from getting [a] final judgment," then Blue Ledge would have asked for a trial date to force the issue and dispose of the rest of the case. R. 663 at 9. Those are the steps that Blue Ledge would have taken had it wanted to try and obtain a prompt final judgment. Instead, Blue Ledge sat on its hands for over two years and would still be doing so had Gillmor not acted.

In sum, the trial court declined to dismiss Blue Ledge's counterclaim in light of *its* inaction but dismissed with prejudice for failure to prosecute Gillmor's claim that she had certified for trial. Taken together, these decisions of the trial court are inconsistent. One of them does not tolerate delay. One of them does. In that respect, they are fundamentally unfair and constitute an abuse of discretion. Justice requires that this Court set aside the dismissal of Gillmor's adverse possession claim and remand it for trial.

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## CONCLUSION

For the reasons stated above, Appellees respectfully requests that the judgment of the trial court be reversed, in its entirety.

**RESPECTFULLY SUBMITTED** this 20th day of October, 2008.

**PETERS SCOFIELD**  
*A Professional Corporation*



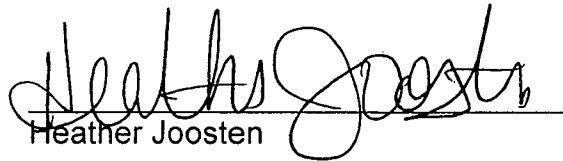
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Attorneys for the Appellees

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing Opening Brief of Appellant was mailed, postage prepaid, this 20<sup>th</sup> day of October, 2008, to the following:

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# EXHIBIT A

THIRD DISTRICT COURT-SUMMIT

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FILED BY KS

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IN THE THIRD DISTRICT COURT IN AND FOR SUMMIT COUNTY

STATE OF UTAH

NADINE GILLMOR,

Plaintiff,

v.

UNITED PARK CITY MINES, a Utah  
corporation, BLUE LEDGE  
CORPORATION, a Utah corporation,  
SUSAN A. MEGUR, STEVE MEGUR,  
JOHN J. CUMMINGS, SUSAN S.  
CUMMINGS, EREMALOS  
DEVELOPMENT, THE ESTATE OF  
CHARLES F. GILLMOR, and ALL  
OTHER PERSONS CLAIMING ANY  
RIGHT, TITLE OR INTEREST ADVERSE  
TO THE INTERESTS OF THE  
PLAINTIFF,

Defendants.

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BLUE LEDGE CORPORATION, a  
Delaware corporation,

Counter-claimant,

FINAL JUDGMENT

Return to Brief

Civil No. 94-060-0087QT

Judge Bruce Lubeck

530645

v.

NADINE GILLMOR, and ALL  
UNKNOWN PERSONS WHO CLAIM  
ANY INTEREST IN THE SUBJECT  
MATTER OF THE ACTION,

Counter-defendants.

On November 8, 2005, the court granted defendant Blue Ledge Corporation's motion for summary judgment on its counterclaim quieting title in Blue Ledge Corporation to the following described real property, and the court having now dismissed all other claims in this action, now enters its final judgment.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

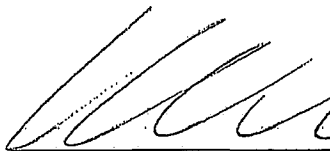
Defendant Blue Ledge Corporation is the sole and exclusive owner of the following real property, Blue Ledge Corporation is entitled to the quiet and peaceful possession of the following real property, and neither plaintiff Nadine Gillmor nor any other person has any estate, right, title, lien or interest in or to the following real property:

The surface estate of those portions of the Woodrow No. 6, Clegg No. 2, and the Clegg No. 3 patented mining claims, situated in the Northwest Quarter of Section 11, Township 2 South, Range 4 East, SLB&M, Summit County, Utah.

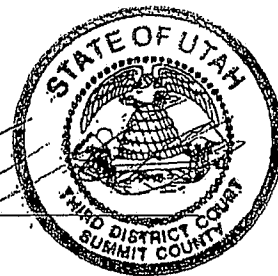
500546

DATED this 21 day of March, 2008.

BY THE COURT:



Honorable Bruce Lubeck  
District Court Judge



ND: 4846-2412-1346, Ver 1

000047

# EXHIBIT B

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

NADINE GILLMOR,

Plaintiff,

vs.

UNITED PARK CITY MINES, et.al.,

Defendants.

**RULING and ORDER**

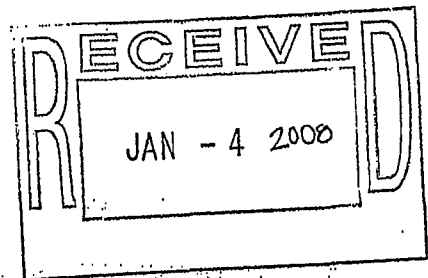
Case No. 940600087

Judge BRUCE C. LUBECK

DATE: December 31, 2007

The above matter came before the court for decision on Blue Ledge's request to submit concerning a proposed order. The court issued a Ruling and Order December 7, 2007. That remains the final order of the court and as indicated therein no further order is required. The court agrees with plaintiff that the proposed order grants more relief than the court's intended order which simply dismissed plaintiff's claims for failure to prosecute. The court will not execute the proposed order.

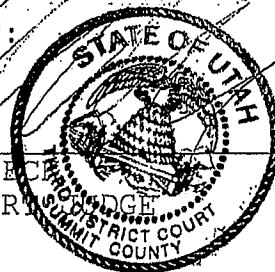
This Ruling and Order is the Order of the court and no other order is required.



DATED this 31 day of Dec, 2007.

BY THE COURT:

BRUCE C. LUBECK  
DISTRICT COURT





CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 940600087 by the method and on the date specified.

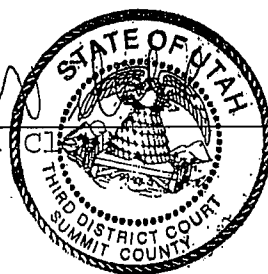
METHOD	NAME
Mail	P. BRUCE BADGER Attorney DEF 215 S STATE ST 12TH FLR POB 510210 SALT LAKE CITY, UT 84151-0210
Mail	ROSEMARY J BELESS Attorney DEF POB 510210 SALT LAKE CITY UT 84151-0210
Mail	GORDON W DUVAL Attorney DEF 947 S 500 E STE 200 AMERICAN FORK UT 84003
Mail	FRANCIS M GIBBONS Attorney DEF 123 2ND AVE #1204 SALT LAKE CITY UT 84103
Mail	RANDY K JOHNSON Attorney DEF 60 E S TEMPLE STE 1800 POB 45120 SALT LAKE CITY UT 84145-0120
Mail	THOMAS W PETERS Attorney PLA 111 E BROADWAY STE 340 SALT LAKE CITY UT 84111-5250
Mail	RONALD F PRICE Attorney PLA 340 BROADWAY CENTRE 111 E BROADWAY SALT LAKE CITY UT 84111
Mail	DAVID W SCOFIELD Attorney PLA 111 E BROADWAY SUITE 340 SALT LAKE CITY UT 84111-2279

Case No: 940600087  
Date: Jan 02, 2008

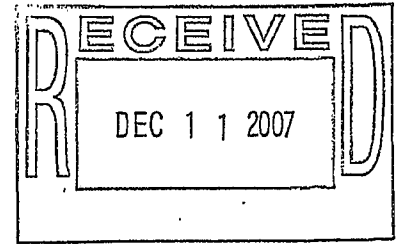
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Dated this 2<sup>nd</sup> day of January, 2008.

B. M.  
Deputy Court Clerk



# EXHIBIT C



IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

<p>PARK CITY COUNTRY CLUB ESTATES, et al.,  Plaintiffs,  v.  UNITED PARK CITY MINES, et al., Defendants.</p>	<p><b>RULING and ORDER</b></p> <p>Case No. 940600087 PR</p> <p>Judge BRUCE C. LUBECK</p> <p>DATE: December 7, 2007</p>
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[Return to Brief](#)

This matter came before the Court on December 5, 2007 for oral arguments on defendant Blue Ledge's motion to dismiss for failure to prosecute.

Blue Ledge filed its motion to dismiss October 9, 2007, plaintiff opposed it October 25, 2007, and Blue Ledge replied in support on November 5, 2007.

At the eleventh hour, on December 3, 2007, the court received plaintiff Gillmor's (Gillmor) request to submit on a motion to reconsider. Gillmor filed her motion to reconsider the court's 2005 grant of summary judgment on October 25, 2007. Blue Ledge filed an opposition November 13, 2007. Gillmor replied and

requested to submit for decision on December 3, 2007. Plaintiff asked that the court consider this motions with the previously scheduled motion to dismiss. On the day prior to oral arguments, defendant submitted a motion for and a proposed surreply.

Although the court would not normally consider such a request to hold oral arguments on such short notice, because the motion is integral to the motion to dismiss and the court wishes to proceed in this case given the inordinate prior delays the court permitted the parties to argue both motions at oral arguments.

Plaintiff Gillmor was present through Ronald F. Price and Blue Ledge was present through Rosemary J. Beless and P. Bruce Badger. Before the hearing the court considered the memoranda and other materials submitted by the parties and after the hearing, the court took the issues under advisement. Since taking the issues under advisement, the court has further and more carefully those materials and considered the law and facts relating to the issues. Now being fully advised, the court renders the following Ruling and Order.

### MOTION TO RECONSIDER

In the thirteen years that have elapsed since Gillmor filed her complaint the following has occurred: the court ordered plaintiff to prosecute her case on four prior occasions; plaintiff filed three amended complaints; Blue Ledge asserted a counterclaim to quiet title in August 1995, which the court granted summary judgment on in November 2005. Plaintiff now requests this court reconsider that grant of summary judgment entered two years ago.

"Trial courts have clear discretion to reconsider and change their position with respect to any orders or decisions as long as no final judgment has been rendered." *Brookside Mobile Home Park v. Peebles*, 2002 UT 48, ¶18 (citations omitted). Nonetheless, although courts generally discourage motions to reconsider "they have become the cheatgrass of the litigation landscape. . . . [T]he extraordinary circumstance may arise when it is appropriate to request a trial court to reconsider a ruling. These occasions are rare." *Shipman v. Evans*, 2004 UT 44, ¶18. Such circumstances may arise when:

- (1) [T]he matter is presented in a 'different light' or under 'different circumstances;'
- (2) there has been a

change in the governing law; (3) a party offers new evidence; (4) 'manifest injustice' will result if the court does not reconsider the prior ruling; (5) a court needs to correct its own errors; or (6) an issue was inadequately briefed when first contemplated by the court.

*Trembly v. Mrs. Fields Cookies*, 884 P.2d 1306, 1311 (UT App. 1994(citation omitted)). At a minimum for a court to properly consider a motion to reconsider a grant of summary judgment a question of fact must exist. *Brookside*, ¶ 18.

In 2005 the court determined there was no dispute of material fact on the issue of Blue Ledge's patent: "the court finds no factual disputes that are material and judgment should be granted as a matter of law to defendant." The court also noted "The statute of limitations applies only to the United States or its successors, and is not applicable here."

Plaintiff brought a "Motion to Revisit the Court's Ruling That Defendant Blue Ledge Corporation is Entitled to Summary Judgment on the Issue of Whether its Claim is Barred by the Applicable Federal Statute of Limitations." Gillmor requests the court reconsider summary judgment because Gillmor believes the court's conclusion on this single issue "is erroneous as a matter of law." Gillmor does not contest any other issue involved in the court's 2005 decision but Gillmor does attempt to introduce facts

that now create a factual dispute.

The court expected plaintiff to draw its attention to some change in law or evidence or circumstances that would have rendered this conclusion of law in doubt. Plaintiff has done no such thing nor does plaintiff dispute this. Rather, the court discovered that plaintiff has only reiterated the arguments she made and lost on two years ago. She specifically states "as set forth in plaintiff's memorandum opposing Blue Ledge's motion for summary judgment" and Gillmor then proceeds to again set forth and elaborate on her same arguments that did not prevail two full years ago.

In 2005 the portion of plaintiff's motion related to the statute of limitations was slightly more than a page long. That page of the 2005 argument included the same citation to the case she elaborates on now. The 2007 motion differs only in length, which derives from an extended discussion of this and other cases, all of which had been decided in 2005 on the application of the statute of limitations. These cases and arguments were clearly available to plaintiff two years ago.

Although plaintiff titles her motion as one to reconsider the application of the statute of limitations she also attempts to reargue that the 1930 patent is not void. She reargues this claim with reference to cases that were available to her, but which she chose not to apply, when she opposed summary judgment



in 2005. The court believes that the cases relied on did not and do not support plaintiff's arguments.

No case cited by plaintiff nor any of her reiterated arguments give the court reason to reconsider its conclusion of law. The court stands by its determination that "[t]he 1929 patent makes any further attempts at conveyance, or any later patents of the same or a different kind, void ab initio." This meant the United States did not have title to convey in 1930, and thus that the statute of limitations is inapplicable to plaintiff's claims. Absent any sound reason to reconsider the court's determination on the effect of the 1929 conveyance, the court sees no justification to reconsider its conclusion of law that the statute of limitations does not apply.

In the surreply Blue Ledge makes clear, with the attachments, that there was and is no factual dispute concerning the issuance of the Clegg patent in 1929. It is beyond factual dispute that Blue Ledge's predecessor received patent title before Gillmor's predecessor and a genuine issue of material fact is not created by the claimed "protest" documents of Gillmor's predecessor.

Plaintiff may, with 20/20 hindsight, wish she had made different arguments two years ago, but a motion to reconsider is not the proper place to argue what a party wishes they had argued, particularly when the cases do not support those

arguments. Simple discontent with a court's adverse conclusion of law does not entitle a party to have the court revisit it. If that were so the court would be deluged with such requests as one party almost always believes the court has misperceived the law. The court rejects plaintiff's motion to reconsider its grant of summary judgment both procedurally and on the merits. Again, this motion was filed over 23 months after the prior November 8, 2005, ruling.

The court notes, given Utah courts' well-established disfavor of motions to reconsider, plaintiff would have been better advised to spend her efforts prosecuting the remaining adverse possession claim in this case, or making a timely 60(b) request or seeking permission for an interlocutory appeal. That she did not, and that she relies on cases and arguments available to her in 2005, is material to the court's ruling on defendant's motion to dismiss as well in denying this motion to reconsider.

#### **MOTION TO DISMISS**

Blue Ledge requests the court dismiss the action brought by plaintiff for failure to prosecute. Plaintiff objects to Blue Ledge's motion, arguing that when parties have asserted counterclaims, they too are responsible to prosecute the case.

Defendant asserts that although plaintiff has filed notices of depositions, no depositions have actually occurred. In fact no

discovery has occurred since 1995. This lack of depositions or other discovery bolsters the court's belief that there is no new reason it should reconsider the prior grant of summary judgment. The fact that plaintiff filed her 54(b) motion does not demonstrate to the court that plaintiff is prosecuting her claims with due diligence. Instead, it looks like another attempt to avoid actually prosecuting her claims. Gillmor filed a certificate of readiness in conjunction with the motion to reconsider and the court fails completely to understand why that claim was not certified as ready for trial immediately after the November 2005 ruling. Blue Ledge had prevailed on its only claim and had no reason to pursue anything as it had no claim to pursue.

"When a 'trial court has provided plaintiffs 'an opportunity to be heard and to do justice,' and that plaintiff abuses its opportunity through inexcusable neglect, the trial court does not abuse its discretion in dismissing the case.'" *Country Meadows Convalescent Ctr. v. Department of Health, Div. of Health Care Fin.*, 851 P.2d 1212, 1216 (Utah Ct. App. 1993).

When the court considers the thirteen years that have elapsed; the ample opportunity plaintiff has had to move this case forward, most especially since November 2005 when nothing was done at all until at least September 2007 when Gillmor asserts settlement negotiations began; her lack of action overall

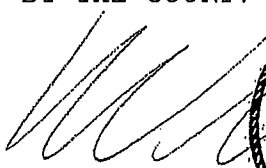
in the case concerning discovery; that most of plaintiff's steps to prosecute her case have generally been in response to a court order or a motion requiring her to do so; that Blue Ledge has had its counterclaims granted and has nothing left to pursue and that the court has determined it will not reconsider that grant of summary judgment; that Blue Ledge has waited thirteen years to develop its land, the court is lead to the conclusion that the only injustice that would result would be in not dismissing this case.

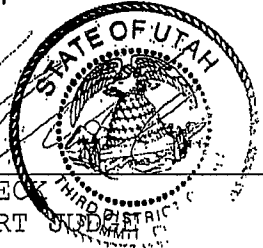
Blue Ledge's motion to dismiss with prejudice is GRANTED.

This Ruling and Order is the Order of the court and no other order is required.

DATED this 7 day of December, 2007.

BY THE COURT:

  
BRUCE C. LUBECK  
DISTRICT COURT



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 940600087 by the method and on the date specified.

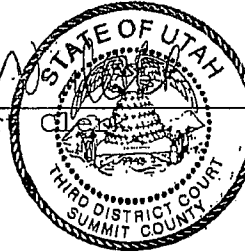
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Mail	DAVID W SCOFIELD Attorney PLA 111 E BROADWAY SUITE 340 SALT LAKE CITY UT 84111-2279

Case No: 940600087  
Date: Dec 10, 2007

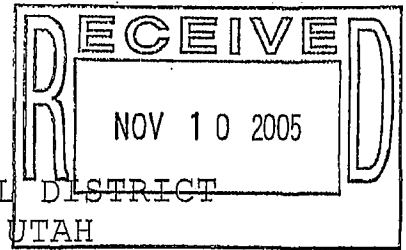
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Dated this 10<sup>th</sup> day of December, 2007.

B. M.  
Deputy Court Clerk



# EXHIBIT D



IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

NADINE GILMOR,

Plaintiff,

vs.

UNITED PARK CITY MINES, BLUE  
LEDGE CORPORATION, SUSAN A.  
MEGUR, STEVE MEGUR, JOHN J.  
CUMMINGS, SUSAN S. CUMMINGS,  
EREMALOS DEVELOPMENT, THE  
ESTATE OF CHARLES F. GILLMOR,  
et.al.,

Defendants.

BLUE LEDGE CORPORATION,

Counterclaimant,

v.

NADINE GILMOR, et.al.,

Counterdefendants

**RULING and ORDER**

Case No. 940300087

Honorable BRUCE C. LUBECK

DATE: November 8, 2005

The above matter came before the court on November 7, 2005, for oral argument on Blue Ledge's motion for summary judgment. Plaintiff was present with David W. Scofield and Thomas W. Peters, United Park City Mines and Blue Ledge were present through Rosemary J. Beless and P. Bruce Badger. Blue Ledge filed this motion on February 25, 2005. Plaintiff filed an opposition response on April 5, 2005. Blue Ledge filed a reply on May 6, 2005. A notice to submit was filed by Plaintiff on May 19, 2005. Oral argument was scheduled and postponed by the parties



and eventually held November 7, 2005. The court took the matter under advisement.

The court has reviewed the pleadings of the parties and heard oral argument, and concludes as follows.

#### ARGUMENTS

Blue Ledge (Defendant) moved for summary judgment quieting title and declaring plaintiff has failed to prove adverse possession.

In March, 1996, a settlement and dismissal was entered dismissing all plaintiff's claims against all but this defendant Blue Ledge and there remains at issue plaintiff's adverse possession claim against Blue Ledge and Blue Ledge's counterclaim seeking to quiet title to the same real property. Plaintiff filed a motion for summary judgment in 1996 on those issues but withdrew it later that year. Defendant claims in 1999 plaintiff deeded her right in the property to another, but in 2004 she received her claim back and now retains her status as a party in interest.

The issue is who owns what defendant calls the Clegg and Woodrow Mining Claims or Patented claims or Clegg Patents. Defendant asserts fee title went from the United States to United Park City Mines (UPCM) in 1929, and in 1930 the United States

issued a homestead (or grazing) patent for property to Johanna Clark, predecessor of plaintiff, which should have excluded the patented claims since the former were patented on May 22, 1929.

In 1994, UPCM, and then this defendant, included the Clegg Patented claims in a proposed subdivision being developed. Plaintiff then filed this action to quiet title in the Patented claims or for declaratory judgment plaintiff owned the Patented Claims by adverse possession. On May 25, 1995, UPMC transferred title to the surface estate of the Patented Claims to Blue Ledge, and only the surface estate of the Patented Claims is at issue.

Defendant claims as undisputed facts that the property at issue is a portion of the surface estate of the Patented Claims situated in the Northwest Quarter of Section 11, Township 2, South, Range 4 East, SLB&M. Fee title, including both surface and mineral estates, was conveyed from the United States to Charles L. Clegg, predecessor of UPCM and Blue Ledge, by patent dated May 22, 1929. On December 20, 1930, the United States issues a homestead patent to Johanna A. Clark, covering 479 acres and including some of the same area as the previous Clegg patents. Those Clark patents included the Patented Claims or Clegg patent. Those Clegg Patents are shown on a Supplemental Plan recorded August 7, 1935. Plaintiff claims ownership through the Clark Patent. Clegg, on July 26, 1929, conveyed fee title to Silver King by Mining Deed, recorded August 1, 1929. On March 16,

1983, Silver King conveyed fee title to UPCM, who on May 25, 1995, transferred title to the surface estate of the Patented Claims to Blue Ledge, but UPCM retained the mineral estate in a Special Warranty Deed recorded June 2, 1995. On August 19, 1982, this court quieted title in UPCM to the Clegg Patent, which was affirmed on appeal. UPCM v. Clegg, 737 P.2d 173 (Utah 1987). UPCM has used the property from 1982. Beginning in 1991, UPCM, now Blue Ledge as successor, have been designing and developing the Hidden Meadows Subdivision, which encompassed the Clegg Patent. Those efforts include road construction and curb and gutter, sewer, phone and power lines, and the Clegg Patents are now prepared for residential development as part of that subdivision.

Blue Ledge argues it holds paramount record title and so title should be quieted in its favor. Blue Ledge must prevail on the strength of its own claim, not the weakness of plaintiff's claim. Where both parties claim title through different chains, each must prove its right to title. To quiet title one must show a claim of title which entitles the party to possession and that the interest claimed by others is adverse or hostile to the alleged claim of title or interest.

Priority of time governs competing interests according to defendant, and the highest evidence of title is that from the United States in a patent. Defendant claims it has shown prima

facie evidence of title and thus the burden is on plaintiff to controvert the evidence of title. The United States could not convey to Clark in 1930 any rights by a grazing or homestead patent, as the United States no longer held and could not cut off existing vested rights held by the owner of the 1929 Patented Claims, the Clegg Patents. Plaintiff clearly has claimed an interest that is hostile to that of Blue Ledge.

Plaintiff is claimed to have failed in her efforts to show adverse possession also. To prove that claim, plaintiff must have paid all taxes on the property and be in actual, open, notorious and exclusive possession of the property for seven continuous years. Plaintiff must strictly comply with those elements and it is argued she cannot prove them.

Plaintiff has not been in actual possession as she claims. There must be actual occupation under such circumstances that the owner, or a person of ordinary prudence, would know, that the land was being held by another. Thus, plaintiff's claim of leasing the property to a third party for grazing is not sufficient. Use of property outside the Clegg Patents is not sufficient either.

Plaintiff has not given notice of adverse possession, and if grazing is claimed as the use, the owner must have actual notice. Plaintiff did not improve the land or give notice in that manner of her claimed occupation, even though that opportunity was

available.

Plaintiff's use was not exclusive as against the title holder, it did not operate as an ouster of the true owner, and it was not continuous for seven years. If the claim is based on grazing, the grazing must be continuous through the grazing season and period for the entire seven years. UPCM used the property as a parachute drop for the U.S. Air Force, weekly mountain bike trails, tours, and for production of a television commercial. From 1991 to 1996 the property was used by UPCM as part of the designed subdivision, thus plaintiff has not ousted the true owner.

Plaintiff must also show, according to defendant, that the use must be for its ordinary use, and this land is not suitable for sheep grazing. This land is not pasture, but hilly sage and oak covered land.

The affidavits attached show that from 1991, one of the developers of the subdivision has not seen livestock grazing on the property and that work on the subdivision has been ongoing since 1995. In 1983 UPCM entered into agreements with the U.S. Air Force to allow the property to be used as a drop zone for parachutists. Touring and bike competitions were held and a television commercial was filed on the property.

In opposition, plaintiff disputes several facts relied on by

defendant, as well as the meaning, or interpretation, of some facts that are not disputed. Plaintiff asserts that the United States conveyance to Clegg was for the mining estate and not the surface estate. Plaintiff disputes that Clegg conveyed fee title to Silver King, and thus disputes the 1973 conveyance to UPCM and the UPCM conveyance to Blue Ledge, again claiming that the surface estate was not conveyed. Plaintiff disputes any significance of the Utah Supreme Court case of UPCM v. Clegg, as plaintiff was not a party and no claims of plaintiff's ownership were adjudicated in that case. Plaintiff also contests and disputes that the land at issue was used by UPCM for various purposes, though plaintiff does not deny agreements existed for such, and asserts the only use of the land was by plaintiff or her lessees.

Plaintiff claims that the federal statute, 43 USC 1166, requires challenges to Homestead Patents be made within 6 years, which patent was granted in the 1930s.

Plaintiff also contends her use of the land has been consistent with her patent, and defendant is not using the land consistent with the mining patent defendant claims. Because plaintiff is using the land consistent with her homestead patent, and defendant is not using the land consistent with a mining patent, plaintiff's title is superior.

Plaintiff also argues that the patent issued by the United

States cannot be attacked by a third party. The grazing or homestead patent is superior title which is clear evidence of title. Plaintiff argues it must be presumed the United States was correct in issuing a Homestead Patent a year after a Mining Patent. Thus, the prior patent does not make it superior to the later patent. The subject matter of the two patents is different.

As to the adverse possession claim of plaintiff, plaintiff claims there are genuine issues of material fact. The Utah statutes on adverse possession require certain factors to be present and plaintiff alleges there are disputes about whether some of those factors are present.

Plaintiff claims title under a written instrument.

Plaintiff claims there was continuous possession from not only 1987, but from 1983, through 1994. Unenclosed property is considered occupied and possessed if used for pasturage or for the ordinary use of the occupant. This land was used by plaintiff in the ordinary usage of grazing in the proper seasons. Plaintiff claims the land is taxed as agricultural and so defendant's assertion that there has never been any grazing is at issue.

The use has also been adverse and this put defendant on notice. Plaintiff contacted UPCM in 1983 to discuss the "overlapping" deeds and that amounted to notice of adverse and open use.

Plaintiff paid taxes since 1983 at least.

Affidavits and documents attached show that grazing occurred yearly and that taxes were paid by plaintiff.

In reply, defendant again argues the United States conveyed fee title to the predecessor of Blue Ledge in 1929. That is said to be a matter of law discernible from the patent. Thereafter, the United States had no title and could not convey anything to plaintiff's predecessor in 1930 as plaintiff claims. The land involves portions of the surface estate of three patented mining claims.

Defendant claims there are only two facts that matter, and those are (1) that the 1929 conveyance precedes the conveyance plaintiff relies on, and (2) defendant used the land while plaintiff claims to have obtained it by adverse possession.

Defendant argues that the dispute about the 1929 patent is a legal, not a factual dispute. Similarly, there is no dispute about the adverse possession claim facts, as plaintiff only argues she did not observe UPCM use of the property, but that she did use it. Plaintiff has not disputed that the property was used by defendants and its predecessors.

As a matter of law, a mining patent conveys surface and mining estates, unless the surface estate is reserved. Recording does not matter with patents from the United States. When the



United States patents land, subsequent attempts by the United States to patent that same land are void, as the United States cannot convey the land again. The second conveyance is void from the beginning and thus plaintiff has no title.

As to adverse possession, defendant was not ousted and there is no dispute but that defendant used the land, and plaintiff did not exclusively use the land. While the court would like to give a presumption of regularity to the 1930 patent, the court sees no possible benefit in making a factual determination about the incidents of that day. Nothing could be provided that is meaningful, in the court's mind, to the events of that day and why things happened as they did. No witnesses could shed any light on motivation or meaning, and the court believes the 1929 patent conveys title and it is unbroken to defendant.

#### DISCUSSION

##### QUIET TITLE.

As to the motion concerning this claim of defendants, the court finds no factual disputes that are material and judgment should be granted as a matter of law to defendant.

The 1929 patent makes any further attempts at conveyance, or any later patents of the same or a different kind, void *ab initio*. The statute of limitations applies only to the United States or its successors, and is not applicable here. A

collateral attack on the homestead patent is allowed by defendant. The court sees nothing but a legal dispute about the effect of these 1929 and 1930 patents.

#### **ADVERSE POSSESSION.**

The court believes there are factual disputes that preclude summary judgment on that claim.

Defendant claims the period of claimed adverse possession is from 1987 to 1994, and plaintiff cannot show ouster as from 1991 defendant has been developing the area. However, plaintiff's affidavit, contrary to her memorandum, asserts adverse possession beginning in 1983, and so the adverse possession claim is "ripe" by 1990. Payment of taxes is not contested for purposes of this motion, but only the "ouster" element.

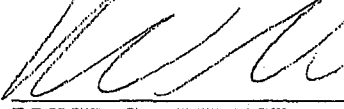
The court sees genuine disputes over how long the property was possessed by plaintiff, what the conditions of the land were, and whether others used the property and what those uses were and when they occurred. While plaintiff's affidavit leaves something to be desired as far as the degree of knowledge about other use, the court does not believe that at this point the court can say plaintiff has failed to create a dispute about whether others used the property, or were "ousted" in a given period of time. Summary judgment is not proper on this claim.

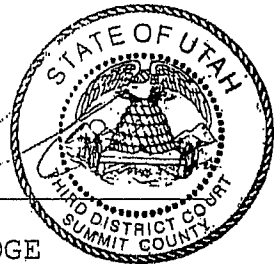
The motion for summary judgment is GRANTED as to defendant's quiet title claim and DENIED as to plaintiff's adverse possession claim.

This Ruling and Order is the Order of the court and no other order is required.

DATED this 8 day of Nov, 2005.

BY THE COURT:

  
BRUCE C. LUBECK  
DISTRICT COURT JUDGE



Case No: 940600087  
Date: Nov 08, 2005

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CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 940600087 by the method and on the date specified.

METHOD NAME

Mail	P. BRUCE BADGER ATTORNEY DEF 215 S STATE ST 12TH FLR POB 510210 SALT LAKE CITY, UT 84151-0210
Mail	ROSEMARY J BELESS ATTORNEY DEF POB 510210 SALT LAKE CITY UT 84151-0210
Mail	THOMAS W PETERS ATTORNEY PLA 111 E BROADWAY STE 340 SALT LAKE CITY UT 84111
Mail	DAVID W SCOFIELD ATTORNEY PLA 111 EAST BROADWAY SUITE 340 SALT LAKE CITY UT 84111-2605

Dated this 8th day of November, 2005.

  
Deputy Court Clerk