

2008

# Gillmor v. Blue Ledge Corporation : Brief of Appellee

Utah Court of Appeals

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## Recommended Citation

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**IN THE UTAH COURT OF APPEALS**

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NADINE F. GILLMOR,	)	
	)	
Plaintiff/Counterclaim	)	
Defendant/Appellant,	)	
	)	
v.	)	Appellate Case No. 20080045-CA
	)	
BLUE LEDGE CORPORATION,	)	District Court Case No. 940600087QT
	)	
Defendant/Counterclaimant/	)	
Appellee.	)	

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**BRIEF OF APPELLEE**

**APPEAL FROM FINAL JUDGMENT QUIETING TITLE IN  
BLUE LEDGE CORPORATION**

**THIRD DISTRICT COURT, SUMMIT COUNTY, UTAH  
HON. BRUCE LUBECK**

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Addendum B	Blue Ledge 1929 Patent (Certified copy)
Addendum C	Gillmor 1930 Patent (Certified copy)
Addendum D	Supplemental Plat (Certified copy)

## **STATEMENT OF JURISDICTION**

The Utah Court of Appeals has jurisdiction of this appeal pursuant to [Utah Code Ann. § 78A-4-103\(2\)\(j\)](#).

## **ISSUES PRESENTED FOR REVIEW**

Appellee Blue Ledge Corporation (hereinafter "Blue Ledge") disagrees with the statement of the issues in the opening brief of Appellant Nadine F. Gillmor (hereinafter "Gillmor"). The issues, properly framed, with the applicable standards of review, are as follows:

### **Issue I: Summary Judgment Quieting Title in Blue Ledge to Disputed Property**

Because Blue Ledge's predecessor in title received fee title to the disputed real property by a May 22, 1929 patent from the United States and because Gillmor claims title to the same real property through a subsequent December 20, 1930 patent from the United States, was Blue Ledge entitled to summary judgment to quiet title in Blue Ledge to the disputed real property?

### **Issue I: Standard of Review: Correctness**

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Because a summary judgment presents questions of law, the Court of Appeals reviews the

district court's ruling for correctness. [\*Johansen v. Johansen\*, 2002 UT App. 75, 45 P.3d 520.](#)

**Issue II: Dismissal of Gillmor's Adverse Possession Claim for Failure to Prosecute**

Because Gillmor had failed to prosecute her adverse possession claim for over thirteen years and offered no excuse to the district court for her delay, was Blue Ledge entitled to the dismissal of Gillmor's adverse possession claim, pursuant to [Rule 41\(b\)](#) of the Utah Rules of Civil Procedure, for Gillmor's failure to prosecute?

**Issue II: Standard Of Review: Abuse of Discretion**

Dismissal for failure to prosecute is a decision within the broad discretion of the trial court. [Country Meadows Convalescent Center v. Utah Dept. of Health](#), [851 P.2d 1212 \(Utah 1993\)](#). An appellate court will not interfere with that decision unless it clearly appears that the trial court has abused its discretion. [Id. at 1214](#). Therefore, the Court of Appeals reviews the district court's ruling for abuse of discretion. [Id.](#)

**Preservation of Issues for Review**

The issues were preserved for appeal in the district court in: (1) Blue Ledge's papers filed and oral argument for summary judgment quieting title to Blue Ledge in the disputed real property and (2) Blue Ledge's papers filed and oral argument to dismiss Gillmor's adverse possession claim for failure to prosecute,



pursuant to [Utah R. Civ. P. 41\(b\)](#), and for entry of final judgment. ([R. 328-355](#); [391-412](#); [440-460](#); [490-500](#); [573-583](#)).

### **STATUTES, RULES AND REGULATIONS**

The following Utah Rules of Civil Procedure are determinative in this appeal:

- (1) [Rule 41\(b\)](#) of the Utah Rules of Civil Procedure: Involuntary Dismissal; Effect Thereof;
- (2) [Rule 56\(a\)-\(e\)](#) of the Utah Rules of Civil Procedure: Summary Judgment; and
- (3) [Rule 54\(b\)](#) of the Utah Rules of Civil Procedure: Judgment Upon Multiple Claims and/or Involving Multiple Parties.

These rules are set forth verbatim in [Addendum A](#) hereto.

### **STATEMENT OF THE CASE**

#### **NATURE OF THE CASE**

The issue in this quiet title action is whether Gillmor or Blue Ledge owns the disputed real property, which is defined as those portions of the surface estate of the Woodrow No. 6, Clegg No. 2, and Clegg No. 3 patented mining claims (such portions are hereinafter designated as the "Clegg and Woodrow Mining Claims" or the "Patented Claims") which are situated in the Northwest Quarter of

Section 11, Township 2 South, Range 4 East, SLB&M. The property at issue covers approximately 31 acres.

### **Blue Ledge's Record Title**

In the May 22, 1929 patent, the United States conveyed fee title to the Clegg Nos. 1-3 and the Woodrow Nos. 1-6 mining claims to Blue Ledge's predecessor in interest. The Patented Claims represent about 31 acres of the approximate 171 acres included in this patent. Each mining claim included in the patent is described by a metes and bounds description pursuant to Mineral Survey No. 6792.

On December 20, 1930, the United States issued the homestead patent to the predecessor in interest of Gillmor for over 479 acres of land, including the Northwest Quarter of Section 11, T2S, R4E, which included the Patented Claims already conveyed by the United States to Blue Ledge's predecessor in interest by the patent dated May 22, 1929. The lands included in the homestead patent are described by aliquot parts (fractions of sections, such as the "Northwest Quarter of Section 11"), rather than by metes and bounds as in the May 22, 1929 patent. The mistake in patenting the Patented Claims twice may have arisen because of these differences in descriptions of the same property and the United States Public Survey's delayed preparation of a Supplemental Plat depicting the Patented Claims.

In 1994, Blue Ledge had included the Patented Claims in the proposed subdivision plat for the Hidden Meadows Subdivision in Park City, Utah, and was

preparing the infrastructure, including roads, curb and gutter, sewer lines, power lines, telephone lines, and natural gas lines, on portions of the Patented Claims for subdivision development. At that time, Gillmor filed the instant action to quiet title in Gillmor to the Patented Claims, or in the alternative, for a declaratory judgment that she owned the Patented Claims by adverse possession. Although the Patented Claims had been surveyed and improved for Blue Ledge's residential development purposes, Gillmor's action halted plat approval for this subdivision. Blue Ledge counterclaimed, seeking to quiet title to the Patented Claims in Blue Ledge.

The issues in this case are exceedingly simple. Regarding record title, Blue Ledge unquestionably holds paramount record title to the Patented Claims. As a matter of law, once land has been conveyed from the United States to a patentee, the United States cannot convey the same land a second time. After May 22, 1929, the United States no longer had title to the Patented Claims and could not convey title to Gillmor's predecessor in interest on December 20, 1930. Consequently, the district court on November 8, 2005, granted Blue Ledge's motion for summary judgment to quiet title in Blue Ledge to the Patented Claims.

### **Dismissal of Gillmor's Adverse Possession Claim**

As to Gillmor's alternative adverse possession claim, Gillmor failed, for thirteen years, to diligently prosecute her adverse possession claim. In 1996, Gillmor withdrew her motion for summary judgment on her adverse possession claim, when faced with Blue Ledge's opposition memorandum. Since that time, four judges, at four order to show cause hearings, required her to diligently prosecute her claim, but she has failed to do so and has failed to offer any excuse for her failure to prosecute. Consequently, when Blue Ledge filed its motion to dismiss Gillmor's adverse possession claim for failure to prosecute, pursuant to [Rule 41\(b\)](#) of the Utah Rules of Civil Procedure, the district court, on December 7, 2007, dismissed with prejudice Gillmor's adverse possession claim.

### **Final Judgment With Property Description**

Finally, when Blue Ledge cited basic hornbook law stating that a final judgment in a quiet title action must include a real property description in order to identify the parcel of real property and that such property description was a basic necessity—not "further relief," the district court entered the Final Judgment in this case, with a real property description, quieting title in Blue Ledge to the Patented Claims on March 21, 2008.

## **THE COURSE OF PROCEEDINGS AND DISPOSITION BY THE DISTRICT COURT**

The following proceedings in the case are particularly relevant to the district court's dismissal of Gillmor's adverse possession claim for her failure to prosecute her claim for over thirteen years:

1. On or about June 23, 1994, Gillmor filed her complaint in this case, alleging record title, or in the alternative, title by adverse possession to the Patented Claims and alleging various other claims to property rights against Blue Ledge and other defendants. ([District Court Docket \(R. Vol. 3\)](#); Gillmor Complaint ([R. 1-9](#)).)
2. On or about August 29, 1995, Blue Ledge filed its counterclaim quieting title in Blue Ledge to the Patented Claims. ([District Court Docket \(R. Vol. 3\)](#); Blue Ledge Counterclaim ([R. 135-152](#)).)
3. On or about June 19, 1996, Gillmor filed a motion for summary judgment on her adverse possession claim to the Patented Claims. ([District Court Docket \(R. Vol. 3\)](#); Plaintiff's Motion for Summary Judgment ([R. 240-255](#)).)
4. On or about July 17, 1996, Blue Ledge filed its memorandum in opposition to Gillmor's motion for summary judgment on the adverse possession issue. ([District Court Docket \(R. Vol. 3\)](#); Defendant Blue Ledge Corporation's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment ([R. 256-277](#)).)

5. On or about September 20, 1996, Gillmor withdrew her motion for summary judgment on her claim of adverse possession to the Patented Claims, stating that "additional discovery will be required before trial or renewal of Motion for Summary Judgment." ([District Court Docket \(R. Vol. 3\)](#)); Notice of Withdrawal of Motion for Summary Judgment ([R. 281-283](#)).)

6. Since Gillmor withdrew her motion for summary judgment on September 20, 1996, Gillmor has prepared no discovery, including interrogatories or requests for production of documents, and has taken no depositions, in this case. ([District Court Docket \(R. Vol. 3\)](#).)

7. On December 9, 1997, the district court held an order to show cause hearing as to why this case should not be dismissed for failure to prosecute. At the December 9, 1997 hearing, Judge Brian stated that the case would be dismissed if it was not prosecuted by April 1, 1998. ([District Court Docket Entry \(R. Vol. 3\)](#).)

8. After the December 9, 1997 hearing, Gillmor's attorneys noticed depositions, but subsequently cancelled and did not take the depositions. ([District Court Docket \(R. Vol. 3\)](#).)

9. On or about November 17, 1999, the district court held a second order to show cause hearing as to why this case should not be dismissed for failure to prosecute. At the November 17, 1999 hearing, Judge Brian stated that the case

would be dismissed if it was not prosecuted by December 21, 1999. ([District Court Docket Entry \(R. Vol. 3\).](#))

10. After the November 17, 1999 hearing, Gillmor's attorneys again filed notices of depositions but subsequently "continued" the depositions "without date." ([District Court Docket \(R. Vol. 3\).](#))

11. On or about August 19, 2002, the district court held a third order to show cause hearing as to why the case should not be dismissed for failure to prosecute. At the August 19, 2002 hearing, Judge Hilder ruled that the buyers of the Gillmor claim to the Patented Claims had thirty days to file a notice of substitution of counsel and a memorandum opposing dismissal. ([District Court Docket Entry \(R. Vol. 3\).](#))

12. On November 19, 2003, the district court held a fourth order to show cause hearing as to why this case should not be dismissed for failure to prosecute. At the November 19, 2003 hearing, Judge Lubeck ruled that an attorney report be filed within thirty days or the case "will be definitely dismissed." ([District Court Docket Entry \(R. Vol. 3\).](#))

13. Pursuant to the district court's order, a Stipulated Scheduling Order was filed in this case on December 19, 2003, with a fact discovery cutoff date of November 30, 2004, and a deadline for dispositive motions of February 27, 2005. ([District Court Docket \(R. Vol. 3\)](#); Stipulated Scheduling Order ([R. 323-325](#))).

14. Gillmor's attorneys did not take any discovery, including interrogatories, requests for production of documents, or depositions, prior to the November 30, 2004 deadline, and Gillmor's attorneys did not file any dispositive motions prior to the February 27, 2005 deadline. ([District Court Docket \(R. Vol. 3\).](#))

15. On February 25, 2005, Blue Ledge filed its motion for summary judgment to quiet title in Blue Ledge and to establish that Gillmor had failed to prove her adverse possession claim. ([District Court Docket \(R. Vol. 3\)](#); Blue Ledge Corporation's Motion for Summary Judgment to Quiet Title in Blue Ledge Corporation ([R. 328-354](#)).)

16. After responsive motion papers had been filed and oral argument was held on November 7, 2005, the district court issued its written Ruling and Order on November 8, 2005, granting Blue Ledge's quiet title claim to the Patented Claims as a matter of law but denying summary judgment as to Gillmor's adverse possession claim because of factual disputes. ([District Court Docket \(R. Vol. 3\)](#); Ruling and Order ([R. 425-439](#)).)

17. Gillmor's attorneys made no efforts to prove Gillmor's adverse possession claim after the district court's Ruling and Order dated November 8, 2005. ([District Court Docket \(R. Vol. 3\).](#))



18. On October 9, 2007, in an attempt to move this case toward conclusion, Blue Ledge filed its motion to dismiss Gillmor's adverse possession claim for her failure to prosecute. ([District Court Docket \(R. Vol. 3\)](#); ([R. 447-460](#)).)

19. In a Ruling and Order dated December 7, 2007, the district court granted Blue Ledge's motion to dismiss with prejudice Gillmor's adverse possession claim for Gillmor's failure to prosecute ([District Court Docket \(R. Vol. 3\)](#); ([R. 544-554](#)).)

20. On March 21, 2008, the district court entered a Final Judgment quieting title in Blue Ledge to the Patented Claims and included a property description of the Patented Claims. ([District Court Docket \(R. Vol. 3\)](#); ([R. 645-647](#)).)

### **STATEMENT OF RELEVANT FACTS**

Blue Ledge disputes Gillmor's characterization of Land Office documents (Paragraphs 4-8) and Gillmor's adverse possession allegations (Paragraphs 13-16) in Gillmor's Statement of Facts in her Opening Brief. The United States Land Office documents attached to the Affidavit of Rosemary J. Beless ([R. 536-540 and Ex. A-C](#)) and attached by Gillmor (without foundation) to Gillmor's Reply Memorandum ([R. 522-525 and Ex. A](#)), speak for themselves. Gillmor's adverse possession allegations, denied by Blue Ledge, are not at issue in this appeal.

The district court held there were genuine issues of material fact regarding Gillmor's adverse possession claim. (Ruling and Order dated November 8, 2005; [R. 425-439](#).) The district court subsequently dismissed Gillmor's adverse possession claim for her failure to prosecute this claim for over thirteen years. (Ruling and Order dated December 7, 2007; [R. 544-554](#).) Consequently, all of these disputed facts in Gillmor's Statement of Facts are irrelevant to the issues on appeal in this case.

The following facts are relevant to Blue Ledge's ownership of record title to the Patented Claims and the district court's granting Blue Ledge's motion for summary judgment to quiet title in Blue Ledge to the Patented Claims:

1. The real property at issue in this case is those portions of the surface estate of Woodrow No. 6, Clegg No. 2, and Clegg No. 3 patented mining claims (such portions of the surface estate are hereinafter designated the "Clegg and Woodrow Mining Claims" or the "Patented Claims") which are situated in the Northwest Quarter of Section 11, Township 2 South, Range 4 East, SLB&M. (Counterclaim ¶¶ 10, 11 and 12 ([R. 135-152](#)); Gillmor Answer ¶¶ 5 and 6 ([R. 153-162](#)).)

2. Fee title to the Patented Claims, including both the surface and mineral estates, was conveyed from the United States of America to Charles L. Clegg, predecessor in interest of Blue Ledge, by patent dated May 22, 1929

(hereinafter the "Blue Ledge 1929 Patent"). (A certified copy of the Blue Ledge 1929 Patent is attached hereto as [Addendum B; \(R. 332-352, Ex. C\)](#); Counterclaim ¶ 8 ([R. 135-152](#)); Gillmor Answer ¶ 5 ([R. 153-162](#)).)

3. The United States of America issued a homestead patent, dated December 20, 1930, to Johanna A. Clark, predecessor to Gillmor, covering over 479 acres of land and including the Northwest Quarter of Section 11, Township 2 South, Range 4 East, SLB&M, Summit County, Utah (the "Gillmor 1930 Patent"). (A certified copy of the Gillmor 1930 Patent is attached hereto as [Addendum C; \(R. 332-352, Ex. D\)](#); Aff. of Nadine Gillmor ("Gillmor Aff.") ¶ 6, June 18, 1996; Aff. of Alan Spriggs ¶ 2(a), June 18, 1996 ([R. 243-255, Attachments 3 and 1](#)).)

4. The Gillmor 1930 Patent included the Patented Claims. (Gillmor Aff., ¶¶ 6 and 7 ([R. 243-255, Attachment 3](#)).)

5. The Patented Claims, as situated in the Northwest Quarter of Section 11, Township 2 South, Range 4 East, SLB&M, are depicted on that Supplemental Plat of Section 11, Township 2 South, Range 4 East, SLB&M, prepared by the United States Public Survey Office, Salt Lake City, Utah, October 31, 1931, accepted by the United States Department of Interior, General Land Office, Washington, D.C., November 11, 1931, and recorded with the Summit County Recorder, Utah, on August 7, 1935, at Entry No. 55024. (A

certified copy of the Supplemental Plat is attached hereto as [Addendum D \(R. 332-352, Ex. E\).](#))

6. Gillmor claims ownership of the Patented Claims by virtue of a chain of title dating from the Gillmor 1930 Patent. (Gillmor Aff. ¶¶ 6 and 7 ([R. 243-255, Attachment 3](#)).)

7. On July 26, 1929, Charles D. Clegg, patentee of the United States, and his wife Martha A. Clegg, grantors, conveyed fee title to the Patented Claims to the Silver King Extension Mining Company, grantee, by Mining Deed recorded August 1, 1929. (Certified copy of the Mining Deed at [R. 332-352, Ex. F.](#))

8. On March 16, 1973, the Silver King Extension Mining Company, grantor, conveyed fee title to the Patented Claims to United Park City Mines Company, grantee, by Mining Deed on June 28, 1973. (Certified copy of the Mining Deed at [R. 332-352, Ex. G.](#))

9. On May 25, 1995, United Park City Mines Company transferred title to the surface estate of the Patented Claims to Blue Ledge, and United Park City Mines Company retained the mineral estate, in that Special Warranty Deed recorded on June 2, 1995. (Certified copy of the Special Warranty Deed at [R. 332-352, Ex. H.](#))

10. On August 19, 1982, the Third District Court for Summit County, Utah, issued its Judgment, Order and Decree in *United Park City Mines Company*

*v. Estate of Clegg, et al.*, Civil No. 5933, quieting title in United Park City Mines Company to the Patented Claims (mineral and surface estates), and said Judgment, Order and Decree was recorded on August 24, 1982. (Certified copy of the Judgment, Order and Decree at [R. 332-352, Ex. I.](#))

11. In 1987, the Utah Supreme Court confirmed United Park City Mines Company's title to the Patented Claims (surface and mineral estate) in [\*United Park City Mines Company v. Estate of Clegg, et al.\*, 737 P.2d 173 \(Utah 1987\)](#).

12. In [\*United Park City Mines Company v. Estate of Clegg, et al.\*, 737 P.2d 173 \(Utah 1987\)](#), Gillmor's husband, Frank Gillmor, was a witness and evidence was presented that the Gillmor family members were previously lessees of the surface estate of the Patented Claims, but no claim to title to the Patented Claims was made by any of the Gillmors in that case. [737 P.2d at 175](#).

13. On November 8, 2005, the district court granted Blue Ledge's motion for summary judgment to quiet title in Blue Ledge to the Patented Claims. ([R. 425-439.](#))

14. On December 7, 2007, the district court granted Blue Ledge's motion to dismiss with prejudice Gillmor's adverse possession claim to the Patented Claims for Gillmor's failure to prosecute her adverse possession claim for over thirteen years. ([R. 544-554.](#))

15. On March 21, 2008, the district court entered the Final Judgment quieting title in Blue Ledge to the Patented Claims and including a real property description of the Patented Claims. ([R. 645-647.](#))

### **SUMMARY OF ARGUMENTS**

Gillmor is trying to complicate and confuse a very simple matter: the United States conveyed fee title to the Patented Claims to the predecessor-in-interest of Blue Ledge on May 22, 1929. That this May 22, 1929 Patent conveyed fee title (surface and mineral estates) to the land is a simple matter of law which can be ascertained from the patent itself. After May 22, 1929, the United States no longer had title to the Patented Claims and could not convey title to Gillmor's predecessor-in-interest on December 20, 1930. All of Gillmor's "red-herring" arguments, including surface use limitations for unpatented mining claims, unsupported tales of what "might have happened" at the Land Office, and a six-year statute of limitations for the United States, are simply inapplicable.

Gillmor's adverse possession claim was dismissed for her failure to prosecute her claim for over thirteen years and her failure to provide any reasonable excuse or good cause for her failure to prosecute. Moreover, while Gillmor's adverse possession claim was pending in the district court for over thirteen years, Blue Ledge was precluded from developing the Patented Claims on

which it had spent time and money constructing the infrastructure for a residential subdivision.

Finally, Blue Ledge moved for entry of a final judgment in this case as soon as Gillmor's adverse possession claim had been dismissed. Furthermore, a real property description in a final judgment to quiet title in real property is a basic necessity—not a matter for which a party must request "further" or "affirmative relief."

### **ARGUMENT**

#### **I. BLUE LEDGE HAS SATISFIED ITS BURDEN OF PROOF TO QUIET TITLE TO THE PATENTED CLAIMS IN BLUE LEDGE.**

In order to succeed in an action to quiet title, a party must "prevail on the strength of his own claim to title and not on the defendant's weakness of title."

[\*Kelly v. Hard Money Funding, Inc.\*, 87 P.3d 734, 740 \(Utah Ct. App. 2004\).](#)

Where both parties claim ownership through different chains of title, each party must assume the burden of establishing its title by competent evidence. [\*Dunlap v. Stichting Mayflower Mountain Fonds\*, 76 P.3d 711, 713 \(Utah Ct. App. 2003\).](#) If, as in the instant case, a party can make a prima facie showing of title, the burden is on the opposing party to controvert the evidence of title. [\*Babock v. Dangerfield\*, 94 P.2d 862, 863 \(Utah 1939\).](#)

In Blue Ledge's motion for summary judgment to quiet title in Blue Ledge to the Patented Claims, Blue Ledge included a certified copy of the Blue Ledge 1929

Patent, granting Blue Ledge's predecessor-in-interest, fee simple title to the Patented Claims, including the surface and mineral estates. The chain of title to the Patented Claims was then traced, by attached certified copies of deeds, to United Park City Mines Company, and then by a deed to the surface estate to Blue Ledge. ([R. 332-352, Ex. C, F, G & H](#)). Thus, Blue Ledge clearly demonstrated an unbroken chain of title dating from the Blue Ledge 1929 Patent.

Because the Blue Ledge 1929 Patent was issued prior to the Gillmor 1930 Patent, Blue Ledge has satisfied its burden to show its record title to the Patented Claims. In issuing the Gillmor 1930 Patent, dated December 20, 1930, the United States could not convey away rights which it no longer held in the Patented Claims, and the Gillmor 1930 Patent could not cut off previously existing vested rights held by the owner of the Blue Ledge 1929 Patent. See [Montgomery v. Gerlinger](#), 304 P.2d 93, 95-96 (Cal. Ct. App. 1956); [People v. Dorr](#), 157 P.2d 859, 861 (Cal. Ct. App. 1945); [Ames v. Empire Star Mines Co., Ltd.](#), 110 P.2d 13, 17 (Cal. 1941); [Brown v. Luddy](#), 9 P.2d 326, 331 (Cal. Ct. App. 1932) ("A patent of the government cannot, any more than a deed of an individual, transfer what the grantor does not possess.").

By demonstrating its paramount record title to the Patented Claims, Blue Ledge satisfied its burden of proof to quiet title in Blue Ledge to the Patented Claims. Title is a matter of the plain language in the Blue Ledge 1929 Patent. It is



a question of law; there are no issues of fact. Moreover, Blue Ledge need not speculate as to why the United States made a clerical error in issuing the Gillmor 1930 Patent after it had issued the Blue Ledge 1929 Patent for the Patented Claims. Such speculation is irrelevant and pointless. Blue Ledge need only provide certified copies of its 1929 Patent and an unbroken chain of deeds to Blue Ledge in order to satisfy its burden of proof to quiet title in Blue Ledge to the Patented Claims.

**II. FEE TITLE TO THE PATENTED CLAIMS WAS CONVEYED FROM THE UNITED STATES TO BLUE LEDGE'S PREDECESSOR ON MAY 22, 1929.**

While Gillmor disputes that the surface estate of the Patented Claims was conveyed to Blue Ledge's predecessor by the May 22, 1929 Patent, Gillmor provides no legal basis in the Blue Ledge 1929 Patent for this dispute.<sup>1</sup> That the Blue Ledge 1929 Patent conveyed fee title (surface and mineral estates) to the Patented Claims is a simple matter of law which can be ascertained from the patent itself.

It is basic hornbook law that a mining claim patent includes the surface estate, as well as the mineral estate, unless the patent contains a reservation

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<sup>1</sup> Instead, Gillmor argues, by reverse logic, that because the Gillmor 1930 Patent was a Stock-Raising Homestead Act patent (which, by statute, must reserve all minerals to the United States), then the Blue Ledge 1929 Patent must not have included the surface estate to the Patented Claims. Gillmor Opening Brief at 14-15. However, the Blue Ledge 1929 Patent obviously was issued before the Gillmor 1930 Patent and the Blue Ledge 1929 Patent includes the surface estate.

excluding the surface estate. [\*St. Louis Mining & Milling Company of Montana v. Montana Mining Co.\*, 194 U.S. 235, 237 \(1904\)](#); [\*Deffebach v. Hawke\*, 115 U.S. 392, 406 \(1885\)](#); [\*Empire State-Idaho Mining & Developing Co. v. Bunker Hill & Sullivan Mining & Concentrating Co.\*, 114 F. 420, 421 \(9<sup>th</sup> Cir. 1902\)](#); [\*Superior Co. v. Musselshell County\*, 41 P.2d 14 \(Mont. 1935\)](#); [\*Hinz v. Musselshell Co.\*, 267 P. 1113, 1116 \(Mont. 1928\)](#).

A review of the Blue Ledge 1929 Patent reveals that the only reservations and exceptions in the patent are for: (1) any vested or accrued water rights; (2) a right-of-way for ditches and canals constructed by the authority of the United States; (3) easements, drainage and other means to complete development as provided by the Utah Legislature; and (4) certain rights for transmission line purposes for Utah Power & Light Company. There is no reservation or exception made for the surface estate.

Furthermore, the Utah Supreme Court confirmed the fee title (both surface and mineral estates) in Blue Ledge's predecessor to all of the Clegg Nos. 1-3 and Woodrow Nos. 1-6 patented claims, including the Patented Claims, under this same Blue Ledge 1929 Patent, in [\*United Park City Mines Company v. Estate of Clegg\*, 737 P.2d 173 \(Utah 1987\)](#). Indeed, the decision in that case, in which Gillmor's husband was a witness, is admitted by Gillmor. (Gillmor's Response to Blue Ledge's Statement of Facts ¶¶ 13 and 14; [R. 362](#).)

Finally, even the legal memoranda (Affidavit of H. James Clegg and attached legal memoranda) attached to Gillmor's April 1, 2005 Opposition Memorandum (R. [358-383, Attachment 4](#)), state that the surface estate is included in the Blue Ledge 1929 Patent to the Patented Claims. Indeed, Gillmor has presented no language in the Blue Ledge 1929 Patent or any applicable case law to dispute the legal conclusion that the surface estate to the Patented Claims is included in the Blue Ledge 1929 Patent.

Since the Blue Ledge 1929 Patent conveyed fee simple title (including the surface and mineral estates) to Blue Ledge's predecessor-in-interest, and there is no dispute in the chain of title from this predecessor to Blue Ledge, Blue Ledge holds record title to the Patented Claims. It simply does not matter how many subsequent patents the United States issued to the Patented Claims after the Blue Ledge 1929 Patent because the United States had divested itself of title to the Patented Claims and had no title to convey in subsequent patents.

**III. THE UNITED STATES DID NOT HAVE TITLE TO THE PATENTED CLAIMS AT THE TIME OF THE GILLMOR 1930 PATENT.**

Because the United States conveyed fee title in the Patented Claims to Blue Ledge in the Blue Ledge 1929 Patent, the United States had no interest in the Patented Claims to convey to Gillmor's predecessor in the Gillmor 1930 Patent.

Consequently, no title to the Patented Claims passed under the Gillmor 1930 Patent.

The United States Supreme Court has repeatedly held that when land has previously been patented by the United States, then a subsequent patent by the United States is void. [\*St. Louis Smelting Co. v. Kemp\*, 104 U.S. 636, 640-645 \(1881\); \*Proctor v. Painter\*, 15 F.2d 974 \(9th Cir. 1926\)](#) (citing a lengthy list of United States Supreme Court cases on this point).

Like any other conveyance, once land has been transferred by the United States, it is beyond the authority of the Land Department to transfer it again. [\*St. Louis Smelting\*, 104 U.S. at 641.](#) When the land is already patented, the Land Department has no authority to act, and no authority exists to patent the same land a second time. [\*Id.\* at 646-647.](#) After the first patent is issued, “the United States has no interest left to grant.” [\*Francoeur v. Newhouse\*, 40 F. 618, 623 \(C.C. Cal. 1889\); \*Northern Pac. R. Co. v. Cannon\*, 54 F. 252, 258 \(C.C. Dist. Mont. 1893\); \*Jorgensen v. McAllister\*, 202 P. 1059 \(Idaho 1921\); \*West v. Minneapolis Mining & Smelting Co.\*, 217 P. 342, 343 \(Mont. 1923\)](#) (“where land is not owned by the United States, . . . the land officials are without jurisdiction to dispose of it, and if, in defiance of law, a patent issues to it, the same is ineffectual to pass title and is void from the beginning, and in such case may be assailed in an action of law, and like a void judgment, may be attacked collaterally”). Upon issuance of a patent,

the land becomes private property, subject to the same rules of private ownership prescribed by the laws of the state. [West v. Minneapolis, 217 P. at 344](#) (citing Lindley on Mines § 22).<sup>2</sup>

Because the United States did not hold title to the Patented Claims at the time of the Gillmor 1930 Patent, title to the Patented Claims did not pass to the patentee under the Gillmor 1930 Patent.<sup>3</sup>

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<sup>2</sup> Although Gillmor argues for the "strong presumption" of the validity of a patent from the United States (Opening Brief at 10-11), Gillmor does not cite a case for the presumption of validity of a subsequent patent when the United States has already transferred title in a previous patent, nor could she, because such proposition is contrary to law.

<sup>3</sup> Blue Ledge is not "seeking . . . annulment "of the Gillmor 1930 Patent, as argued by Gillmor in her Opening Brief. (Opening Brief at 21.) The Gillmor 1930 Patent is not voidable, but void *ab initio* (void from its issuance), since the United States had no interest left in the Patented Claims to transfer in the Gillmor 1930 Patent.

**IV. 43 U.S.C. § 1166 IS INAPPLICABLE BECAUSE THE UNITED STATES DID NOT HAVE TITLE TO THE PATENTED CLAIMS AT THE TIME OF THE GILLMOR 1930 PATENT.**

It is clear from all of the cases regarding the application of [43 U.S.C. § 1166](#) (the "1891 Statute of Limitations"), including the cases cited by Gillmor,<sup>4</sup> that this statute only applies when the United States has title to the property to be conveyed to the patentee at the time of the patent. The purpose of the 1891 Statute of Limitations is to secure and provide marketable title to the patentee six years after issuance of the patent and protect the patent from rescission by the government for various procedural irregularities, withdrawals, or reclassifications. [United States v. Eaton Shale Co.](#), 433 F. Supp. 1256, 1268 (D. Colo. 1977). However, the 1891

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<sup>4</sup> In the cases cited by Gillmor, the United States had title at the time of patent and conveyed title under the patent to the patentee. Therefore, the 1891 Statute of Limitations protected the patentee from rescission of the patent for various procedural irregularities, such as the government's reclassification or withdrawal of lands from public entry or sale. See [Wollan v. United States Dept. of the Interior](#), 997 F. Supp. 1397 (D. Colo. 1998) (the federal government did convey the land by patent and Wollan argued the patent should not have been issued because of his claims); [State of Alaska v. The First National Bank of Anchorage](#), 689 P.2d 483 (Alaska 1984) (the federal government did convey title to the land by the patent and Alaska argued the patent should not have issued because of prior withdrawals); [United States v. Chandler-Dunbar Water Power Co.](#), 209 U.S. 447 (1908) (the United States conveyed title to two islands by the patent and the United States wanted to rescind the patent by claiming the patent should not have been issued because the land was reserved for public purposes); [State of Louisiana v. Garfield](#), 211 U.S. 70 (1908) (unresolved issues as to whether a patent was issued for swamp lands and whether the statute barred such rescission).

Furthermore, Blue Ledge does not "stand in the shoes" of the United States, nor is Blue Ledge a successor to the United States as the original grantor of the land. In contrast, Wollan "stood in the shoes" of the United States and was a successor-in-interest of the United States because he wanted the patent invalidated so that the land would be returned to the United States. [Wollan](#), 997 F.Supp. at 1398.

Statute of Limitations cannot create title to a patentee when the United States had no title to convey at the time of the patent. [\*United States v. Winona & St. P.R. Co.\*, 165 U.S. 463 \(1897\); \*Northern P.R. Co. v. United States\*, 227 U.S. 355 \(1913\).](#)

In [\*United States v. Chandler-Dunbar\*, 209 U.S. at 450](#), a case cited by Gillmor, Mr. Justice Holmes begins his discussion of the applicability of the 1891 Statute of Limitations by stating that the land must belong to the United States at the time of patent in order for the statute to apply: “This land, whether reserved or not, was public land of the United States, and in kind open to sale and conveyance through the Land Department.” Justice Holmes also cites the earlier case of [\*United States v. Winona & St. T.R. Co.\*, 165 U.S. at 476](#), where Mr. Justice Brewer sets forth the limitation on the application of the 1891 Statute of Limitations:

[T]he act of 1891 . . . provided that suits to vacate and annul patents . . . should only be brought within six years after the date of issue. Under the benign influence of this statute, it would not matter what the mistake or error of the lands department was, what the frauds and misrepresentations of the patentee were, the patent would become conclusive as a transfer of the title, *providing only that the land was public land of the United States, and open to sale and conveyance through the land department.*

[\*165 U.S. at 476\*](#) (emphasis added).

Likewise, in 1913 the United States Supreme Court held the 1891 Statute of Limitations was not available in a suit brought by the United States to annul patents issued in the mistaken belief that the land was owned by the United States

at the time of the patent, when it was not. [\*Northern P.R. Co. v. United States\*, 227 U.S. at 374.](#) When the land was owned by the Yakima Indians, not by the United States, at the time of patent, the 1891 Statute of Limitations did not protect title under the patent from rescission. [\*Id.\*](#)

In addressing the issue of whether the 1891 Statute of Limitations can secure title in a patent when the United States had no title at the time of patent, the Louisiana Supreme Court stated:

The prerequisite to the effectiveness of the statute of limitations in the federal act is a patent issued on lands which the United States has power to dispose of under Acts of Congress or the Constitution. A judicial act purporting to alienate that which was inalienable was, because of the very fact of the inalienability, incapable of being validated because it was more than merely invalid. It was in effect an act transferring nothing and creating nothing. . . . Thus, lands which were inalienable . . . could not be acquired by a mere statute of limitations for there was no title to transfer in the beginning.

[\*Gulf Oil Corporation v. State Mineral Board\*, 317 So.2d 576, 588 \(La. 1975\).](#)

In the instant case, the United States conveyed the Patented Claims to Blue Ledge's predecessor in the Blue Ledge 1929 Patent, so there was no title to the Patented Claims for the United States to transfer to Gillmor's predecessor in the Gillmor 1930 Patent. Since the 1891 Statute of Limitations cannot create title



when there was none to be transferred, the 1891 Statute of Limitations is not applicable.<sup>5</sup>

The district court put Gillmor's 1891 Statute of Limitations argument to rest in its decision quieting title to the Patented Claims in Blue Ledge:

The 1929 patent makes any further attempt at conveyance, or any later patents of the same or different kinds, 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.

Ruling and Order at 10-11 ([R. 425-439](#)).

V. **THE ADMINISTRATIVE RECORD AND THE BASIC TENETS OF MINING LAW SUPPORT BLUE LEDGE'S TITLE TO THE PATENTED CLAIMS.**

Gillmor has selected portions of Land Office documents and quotations regarding unpatented mining claims in an attempt to confuse and complicate the simple issues in this case.

In a desperate effort before the district court, Gillmor attached, without any foundation, a copy of the Second Amended Protest in Contest No. 4781 filed by C.D. Clegg (predecessor of Blue Ledge) against the homestead entry of Johanna A.

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<sup>5</sup> Gillmor does not explain how the 1891 Statute of Limitations could apply in the instant case. The court could not simply "validate" the Gillmor 1930 Patent, since the United States does not have title to the Patented Claims to transfer to Gillmor. The United States would have to take title to the Patented Claims away from Blue Ledge before it could transfer title to Gillmor. The United States has no reason to do this.

Clark (predecessor to Gillmor) and stated that "the Government issued the patent to Clark after considering and rejecting Clegg's protest." Gillmor's Reply Memorandum at 3 ([R. 523](#)). This statement, and paraphrases of this statement throughout Gillmor's Reply Memorandum, are absolutely false.

As shown in the documents obtained from the National Archives and attached to the Affidavit of Rosemary J. Beless ([R. 536-541, Ex. A-C](#)), the decision of the Department of Interior, dated January 21, 1927, and the decision of the Commissioner of the General Land Office, dated January 17, 1928, state that the Johanna A. Clark homestead entry should be cancelled as to the land conflicting with the Clegg Nos. 2 and 3 and the Woodrow No. 6 claims (the "Patented Claims") in conformance with the C.D. Clegg Amended Protest. Gillmor simply failed to include the decisions on this Contest in her Reply Memorandum. These decisions support Blue Ledge's title to the Patented Claims, not Gillmor's creative tale.

Now, in her Opening Brief, Gillmor makes up her own fairytale without any reference to the administrative record. Although the Land Office cancelled the Clark homestead entry as to land conflicting with the Patented Claims, Gillmor states that the Land Office "plainly determined to grant Ms. Clark all of the surface rights" and then the "United States saw fit to grant those mineral rights to Mr. Clegg." Opening Brief at 15. Gillmor, it seems, conveniently forgets that the

Blue Ledge 1929 Patent for fee title to the Patented Claims was issued before the Gillmor 1930 Patent. Moreover, Blue Ledge could not have previously "refuted" Gillmor's fairytale because (1) Gillmor just created it in her Opening Brief; (2) Gillmor has not one shred of evidence to support her fairytale; and (3) Gillmor's fairytale disregards the language in the Blue Ledge 1929 Patent and all of the patent law in the Mining Law of 1872.

Gillmor spins another tale in her Opening Brief by stating that perhaps Gillmor's predecessor's date of entry upon the land was prior to the date of Blue Ledge's predecessor. Opening Brief at 18. However, from that Second Amended Protest in Contest No. 4781 which Gillmor attached to her Reply Memorandum ([R. 522-526, Ex. A](#)) before the district court, Gillmor knows that Blue Ledge's predecessor located its claims in 1914 and 1916 and Gillmor's predecessor filed her homestead entry in 1917.

Gillmor then goes on to quote contemporary cases dealing with unpatented mining claims (Gillmor Opening Brief at 19, n. 4, citing [U.S. v. Good, 257 F.Supp.2d 1306 \(U.S. Dist. Ct. Col. 2003\)](#) and [U.S. v. Etcheverry, 230 F.2d 193 \(9<sup>th</sup> Cir. 1956\)](#)). Indeed, certain unpatented mining claims do have surface uses limited to mining and related purposes, but we are not dealing with any unpatented mining claims in this case. The Patented Claims were patented in 1929. Therefore, Gillmor's argument regarding the use of the surface estate of unpatented

mining claims is totally irrelevant. As stated in Section II above, a mining claim patent automatically includes the surface estate, as well as the mineral estate, unless the patent contains a reservation excluding the surface estate. There is no such reservation in the Blue Ledge 1929 Patent.

**VI. GILLMOR HAS FAILED TO DILIGENTLY PROSECUTE HER ADVERSE POSSESSION CLAIM.**

In her Opening Brief, Gillmor makes much of Blue Ledge's supposed motivation for filing its Rule 41(b) motion to dismiss Gillmor's adverse possession claim. Actually, Blue Ledge's motivation was simple: Blue Ledge had spent considerable time and money preparing the Patented Claims for development, but Blue Ledge had been prevented from platting and selling the Patented Claims because Gillmor's adverse possession claim had been pending against the Patented Claims for thirteen years.

Blue Ledge prosecuted its counterclaim, quieting Blue Ledge's record title to the Patented Claims, to a successful conclusion in Blue Ledge's motion for summary judgment which the district court granted on November 8, 2005. However, Blue Ledge had no duty to prosecute Gillmor's adverse possession claim. Notably, even in her Opening Brief, Gillmor offers no facts in regard to a compelling reason why she did not prosecute her adverse possession claim for thirteen years.

Indeed, Gillmor has never offered any excuse, much less a compelling reason or good cause, for her failure to diligently prosecute her adverse possession claim for thirteen years.<sup>6</sup> Gillmor's only argument is that Blue Ledge should not have filed its Rule 41(b) motion because Gillmor made a settlement proposal (which Blue Ledge rejected September 27, 2007) to which Gillmor attached a copy of her draft motion for reconsideration of the district court's November 8, 2005 decision quieting title in Blue Ledge to the Patented Claims. Gillmor's draft motion was evidently attached to her settlement proposal in order to convince Blue Ledge to pay Gillmor to dismiss her adverse possession claim, even though Gillmor's draft motion to reconsider did not attempt to prosecute Gillmor's adverse possession claim. Indeed, Gillmor's attachment of only a draft motion to reconsider, without any motion regarding Gillmor's adverse possession claim, implied that she was not prosecuting her adverse possession claim.

**A. Gillmor Has Offered No Excuse for Her Failure to Prosecute Her Adverse Possession Claim for Thirteen Years.**

The burden is upon the party attacking a [Rule 41\(b\)](#) dismissal, to offer a reasonable excuse for that party's lack of diligence. [Country Meadows Convalescent Center v. Utah Dept. of Health](#), 851 P.2d 1212, 1215 (Ut. Ct. App. 1993). In [Country Meadows](#), plaintiff's claim was dismissed when the plaintiff

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<sup>6</sup> In a review of Utah Rule 41(b) cases, Blue Ledge has not found another example of a lawsuit that languished as long as thirteen years. Cases were dismissed for failure to prosecute after two years, four years, seven years, or, at most, eight years.

"failed to offer any persuasive or legitimate reason for failing to take steps to advance its petition for over five years." [\*Id.\* at 1216](#). Gillmor has offered no excuse for her failure to prosecute her adverse possession claim for thirteen years.

The Utah courts have repeatedly held that a trial court has discretion to dismiss a case under [Rule 41\(b\)](#) when a party neglects to prosecute "without justifiable excuse." [Country Meadows, 851 P.2d at 1215](#), quoting [Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor, Inc., 544 P.2d 876, 879 \(Utah 1975\)](#). "Such non-action is inexcusable, not only from the standpoint of the parties, but because it constitutes abuse of the judicial process." [Maxfield v. Rushton, 779 P.2d 237, 240-41 \(Ut. Ct. App. 1989\), cert. denied, 789 P.2d 33 \(Utah 1989\)](#).

In [Meadow Fresh Farms](#), the court explained that allowing protracted litigation, without good cause or a reasonable excuse for plaintiff's lack of diligence, causes serious problems in securing witnesses and addressing allegations after a long passage of time. [Meadow Fresh Farms, Inc. v. Utah State Univ., 813 P.2d 1216, 1220 \(Ut. Ct. App. 1991\)](#). The court noted that "the underlying events relating to this action occurred nearly a decade ago, in 1981. . . . After ten years, it is reasonable to assume the facts are stale. Many of the potential witnesses have moved out of state and/or their recollection of the circumstances and events may have dimmed." [\*Id.\* The Meadow Fresh](#) case was dismissed, for failure to

prosecute, in 1990. [\*Id.\* at 1217.](#) The instant case, with underlying events also occurring in the early 1980's, was still pending in 2007. Gillmor's adverse possession claim, which is extremely fact-sensitive and relates to a period of time in the early 1980's, had languished for thirteen years while facts had become extremely stale and witnesses' recollections dim regarding events that occurred around twenty-seven years ago. With no justification from Gillmor, such delay in prosecution is a serious abuse of the judicial process—to the detriment of Blue Ledge.

**B. Gillmor's Adverse Possession Claim Is Appropriate for Dismissal.**

In addition to considering the length of time a case has been pending, the Utah Supreme Court has used five factors to assist the courts in assessing the sufficiency of a proffered excuse for a plaintiff's failure to prosecute with due diligence. These five factors include:

- (1) The conduct of both parties;
- (2) The opportunity each party has had to move the case forward;
- (3) What each party has done to move the case forward;
- (4) The amount of difficulty or prejudice that may have been caused to the other side; and
- (5) "Most important," whether injustice may result from the dismissal.

[\*Country Meadows\*, 851 P.2d at 1215; \*Meadow Fresh Farms, Inc. v. Utah State Univ.\*, 813 P.2d 1216, 1219 \(Utah Ct. App. 1991\) quoting \*Westinghouse Electric Supply Co. v. Paul W. Larsen Contractor, Inc.\*, 544 P.2d 876, 879 \(Utah 1975\).](#)

The facts in this case clearly demonstrate that the five factors have been met for the dismissal of this case for Gillmor's failure to prosecute pursuant to [Rule 41\(b\)](#).

First, as to the conduct of the parties, Gillmor has engaged in no discovery since all of her claims, except her claim to title to the Patented Claims, were settled in 1996.<sup>7</sup> Gillmor filed a motion for summary judgment on her adverse possession claim on or about June 19, 1996. However, after Blue Ledge filed its opposition memorandum on July 17, 1996, Gillmor withdrew her motion for summary judgment on her adverse possession claim on September 20, 1996, stating that "additional discovery will be required before trial or renewal of Motion for Summary Judgment." After Gillmor withdrew her motion for summary judgment on her adverse possession claim on September 20, 1996, Gillmor has taken no discovery, including interrogatories, requests for production, or depositions, in this case.

Even after Gillmor was ordered at four different order to show cause hearings to prosecute her claim or face dismissal, she has failed to prosecute her remaining adverse possession claim. Gillmor's counsel has repeatedly filed notices of depositions, pursuant to an order of the judge at two of the four order to show cause hearings, and then cancelled the depositions at a later date.

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<sup>7</sup> Prior to that settlement, Gillmor prepared one set of preliminary interrogatories, on all of her claims, which was filed September 18, 1995.



Second, Gillmor has had every conceivable opportunity to move this case forward. At four different order to show cause hearings, the judge agreed to give her one more opportunity to prosecute her claim. Yet, each time she has failed to prosecute with due diligence. After the order to show cause hearings on December 9, 1997, and November 17, 1999, Gillmor's attorneys filed notices of depositions, but no depositions were ever taken. After the November 19, 2003, order to show cause hearing, a Stipulated Scheduling Order was filed on December 19, 2003, but Gillmor failed to take any discovery before the discovery cutoff date of November 30, 2004, and failed to file any dispositive motions before the dispositive deadline of February 27, 2005. In the district court's Ruling and Order entered November 8, 2005, granting Blue Ledge's motion for summary judgment to quiet title in Blue Ledge, the court determined that Gillmor had created factual disputes as to her claim of adverse possession which would preclude summary judgment on that claim. The court, however, stated "plaintiff's affidavit leaves something to be desired as far as the degree of knowledge about other use." Nevertheless, Gillmor did not prosecute her claim after that November 8, 2005 Ruling and Order.

Third, Gillmor has done nothing to move her claim forward since she withdrew her motion for summary judgment on her adverse possession claim in

1996. In contrast, although Blue Ledge has no duty to prosecute Gillmor's claim with diligence, Blue Ledge filed its own motion for summary judgment to quiet title to the Patented Claims in Blue Ledge, pursuant to the Stipulated Scheduling Order, on February 25, 2005. Blue Ledge also moved for summary judgment declaring that Gillmor had failed to prove her adverse possession claim. In the district court's Ruling and Order dated November 8, 2005, the court granted Blue Ledge's motion for summary judgment to quiet title to the Patented Claims in Blue Ledge. While the court stated there were disputes of fact as to Gillmor's adverse possession claim which precluded summary judgment, Gillmor did not pursue her claim after the Ruling and Order.

Fourth, the pendency of Gillmor's adverse possession claim for thirteen years has caused a great amount of difficulty and prejudice to Blue Ledge. Gillmor filed her adverse possession against Blue Ledge on June 23, 1994, just as Blue Ledge was preparing the Patented Claims for subdivision approval and development. Although Gillmor has been aware that she has prevented Blue Ledge from developing the Patented Claims for thirteen years, Gillmor did nothing to prosecute her claim. Indeed, at one point in the lawsuit, Gillmor transferred her claim of adverse possession to another party. In contrast, Blue Ledge has expended a great deal of money preparing the Patented Claims for development

and has been prevented from developing the Patented Claims because of the continued pendency of Gillmor's action.

Fifth, no injustice would result from this dismissal because Blue Ledge holds record title to the Patented Claims and Gillmor has failed to present any compelling facts as to her adverse possession claim in thirteen years. Blue Ledge had spent money in development of the Patented Claims but had not been able to reap any economic benefit from development or marketing of the Patented Claims because of the pendency of this action for thirteen years. Dismissal of this case would prevent further injustice from occurring.

**C. It Is Gillmor's Duty To Diligently Prosecute Her Adverse Possession Claim.**

Contrary to Gillmor's argument, the parties do not have an equal obligation to prosecute Gillmor's adverse possession claim. Adverse possession is Gillmor's claim. Blue Ledge's counterclaim to quiet title to Blue Ledge in the Patented Claims had been successfully resolved, following Blue Ledge's motion for summary judgment, in the district court's November 8, 2005 decision.

The Utah courts have repeatedly held that "the duty to prosecute is a duty of due diligence imposed on the plaintiff, not on a defendant." [\*Country Meadows\*, 851 P.2d at 1216](#). Blue Ledge completed the prosecution of its counterclaim in 2005, and Blue Ledge had no duty to prosecute Gillmor's claim for adverse possession. Consequently, the cases that Gillmor cites for the proposition that

Blue Ledge should have taken the initiative to prosecute Gillmor's adverse possession claim are inapposite.<sup>8</sup>

**D. Gillmor's Certificate for Readiness for Trial, Filed After Blue Ledge's Motion To Dismiss, Does Not Preclude Dismissal.**

Throughout the long history of this case, Gillmor's method of operation has always been the same. She waits until she is threatened with dismissal of her claim, and then she files a document to prevent immediate dismissal and prolong the already-protracted litigation. For example, after the order to show cause hearings on December 9, 1997, and November 17, 1999, Gillmor's attorneys filed notices of depositions, but no depositions were ever taken. After the November 19, 2003 order to show cause hearing, a Stipulated Scheduling Order was filed on December 19, 2003, but Gillmor failed to take any discovery or file any dispositive motions prior to the deadlines in the order.

Finally, only after the [Rule 41\(b\)](#) motion was filed to dismiss Gillmor's adverse possession claim for her failure to prosecute for thirteen years, did Gillmor

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<sup>8</sup> Neither [Crystal Lime](#) nor [Firebrand](#) is applicable in the instant case. In [Crystal Lime & Cement Co. v. Robbins](#), 335 P.2d 624 (Utah 1959), the court had already reached a judgment on the merits of the case, but neither side prepared findings of fact, conclusions of law and a decree for a period of four years, when either side could have done so. Since a judgment had been reached in this case on both plaintiff's and defendant's claims, this case is inapplicable to the instant case. [See 335 P.2d at 625](#). In [Firebrand](#), neither party had an active interest in the case but a change of counsel evidently caused a four-year delay in plaintiff's obtaining a default judgment against the defendants. [Johnson v. Firebrand, Inc.](#), 571 P.2d 1368, 1369 (Utah 1977). In contrast to the lack of any activity in *Firebrand*, Blue Ledge has pursued its claim to a resolution.

file her Certificate for Readiness for Trial on October 24, 2007. The fact that after thirteen years Gillmor has filed her Certificate for Readiness for Trial, about two weeks after receiving Blue Ledge's motion to dismiss her claim for failure to prosecute, did not preclude the district court's granting Blue Ledge's Rule 41(b) motion. See [\*Maxfield v. Fishler\*, 538 P.2d 1323, 1324 \(Utah 1975\)](#) (plaintiff's claim dismissed on the first day of trial for failure to prosecute); [\*Maxfield v. Rushton\*, 779 P.2d 237, 239 \(Utah Ct. App. 1989\)](#) (plaintiff's action dismissed at pretrial hearing for failure to timely prosecute); [\*Charlie Brown Construction Co., Inc. v. Leisure Sports Inc.\*, 740 P.2d 1368, 1370 \(Utah Ct. App. 1987\)](#) (the court ordered the matter dismissed at the pretrial conference for failure to prosecute); [\*Country Meadows\*, 851 P.2d at 1216](#) (plaintiff's claim dismissed when plaintiff made no attempt to reactivate the case until after the dismissal motion).

It would be a travesty of justice to allow Gillmor to resurrect this moribund case where facts are stale and witnesses' memories are dimmed, by merely filing a Certificate for Readiness for Trial. [\*See Meadow Fresh Farms\*, 813 P.2d at 1220](#) (plaintiff's claim was dismissed for failure to prosecute where "[d]efendants in this case are prejudiced by the passage of time").

**E. A Final Judgment Could Not Have Been Entered Until After the Adverse Possession Claim Was Dismissed on December 7, 2007.**

Gillmor argues that Blue Ledge was dilatory in not moving for entry of final judgment quieting title to the Patented Claims, with a real property description, at

the time of the November 8, 2005 Ruling and Order confirming Blue Ledge's record title to the Patented Claims. However, the issue of Gillmor's alleged adverse possession of Blue Ledge's Patented Claims was still outstanding on November 8, 2005.

It is basic hornbook law that a final judgment may not be entered until all of the issues in the case have been decided. This is particularly true with two related issues, such as record title and potential loss of record title through adverse possession. [Rule 54\(b\)](#) of the Utah Rules of Civil Procedure expressly states that a final judgment cannot be entered until all of the claims of the parties have been determined:

(b) *Judgment upon multiple claims and/or involving multiple parties.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon express direction for the entry of judgment. In the absence of such determination in any direction, any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all of the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

[Rule 54\(b\)](#) (emphasis added).

Therefore, pursuant to [Rule 54\(b\)](#), Blue Ledge could not have moved for entry of final judgment until Gillmor's adverse possession claim was dismissed.

Indeed, in Blue Ledge's motion to dismiss Gillmor's adverse possession claim, filed October 9, 2007, Blue Ledge also moves for entry of final judgment pursuant to [Rule 54\(b\)](#), stating:

With dismissal of Gillmor's adverse possession claim, this Court should enter final judgment in this case by operation of law and pursuant to Rule 54(b) because all claims in this case will have been finally adjudicated and there is no reason to delay entry of final judgment.

Memorandum in Support of Defendant Blue Ledge Corporation's Motion to Dismiss Plaintiff's Adverse Possession Claim for Failure to Prosecute Pursuant to Rule 41(b) and for Entry of Final Judgment at 12 ([R. 458](#)).

It was not until after the district court dismissed Gillmor's adverse possession claim, on December 7, 2007, that the entry of a final judgment in this case, incorporating the November 8, 2005 record title decision and the December 7, 2007 adverse possession decision, with a property description of the Patented Claims, could have been entered.

**F. In a Quiet Title Action, a Final Judgment Incorporating a Property Description Is Not "Further Relief" or "Affirmative Relief."**

A description of the "Patented Claims" in a final judgment, incorporating the district court's decisions of November 8, 2005, and December 7, 2007, is not "further relief" or "affirmative relief," as Gillmor argues, it is simply a requirement

at the conclusion of a quiet title case. After Blue Ledge had prevailed on its claim to record title to the Patented Claims and the district court had dismissed Gillmor's adverse possession claim to the Patented Claims, it was appropriate that a final judgment be entered with a property description of the Patented Claims which could be recorded.

A property description is not "affirmative relief" in a final judgment or decree to quiet title, it is a basic necessity. Again, this is a matter of hornbook law. As to a final judgment or decree to quiet title, *Corpus Juris Secundum* provides:

The judgment or decree must determine all issues; definitely fix and settle the rights of the parties; follow the findings and decision; and comply with any relevant statutory provisions. The decree should describe the property with reasonable certainty and such definiteness as to enable the parties to know the precise limits or the location of the boundary lines.

[74 C.J.S. Quieting Title, Judgment or Decree and its Enforcement, § 90](#)

[\(2007\)](#) (emphasis added); citing [Ollison v. Village of Climax Springs, 916](#)

[S.W.2d 198, 201 \(Mo. 1996\)](#) ("It is universally held that judgments should

describe with reasonable certainty the land adjudicated therein."); [Lisher v.](#)

[Krasselt, 492 P.2d 52 \(Idaho 1972\)](#) (judgment defining rights to land must

contain a sufficient property description); *see also*, [Ash v. State, 572 P.2d](#)

[1374 \(Utah 1977\)](#) (judgment provides description of property for public



notice to purchasers); [\*Arnold Industries, Inc. v. Love\*, 63 P.3d 721, 730 \(Utah 2002\)](#) (a quiet title decree adjudicating rights to real property includes a legal description of the real property).

Without a property description in a final judgment, there is no means to provide a public record and public notice of the description of the property for which title was quieted.

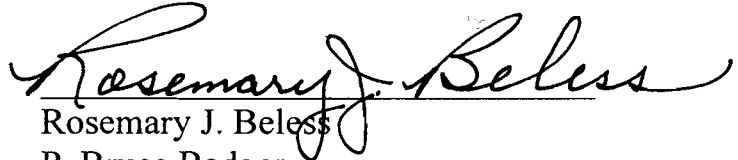
Consequently, Blue Ledge's motion for entry of final judgment could not have been filed any earlier and, indeed, could not have been granted until Gillmor's adverse possession claim was dismissed. Likewise, incorporating the description of the Patented Claims in the final judgment is a basic necessity in this, or any, quiet title case; it is never "further relief" or "affirmative relief."

### **CONCLUSION**

For the reasons set forth herein, the following orders of the district court should be affirmed: (1) the district court's Ruling and Order, dated November 8, 2005, granting Blue Ledge's motion for summary judgment for record title in the Patented Claims in Blue Ledge; (2) the district court's Ruling and Order, dated December 7, 2007, granting Blue Ledge's motion to dismiss Gillmor's adverse possession claim for her failure to prosecute; and (3) the district court's Final

Judgment, dated March 21, 2008, quieting title in Blue Ledge to the Patented Claims, with a real property description of the Patented Claims.

DATED this 24<sup>th</sup> day of December, 2008.

A handwritten signature in cursive script, reading "Rosemary J. Beless". The signature is written in black ink and is positioned above the printed name.

Rosemary J. Beless

P. Bruce Badger

FABIAN & CLENDENIN,

A Professional Corporation

Attorneys for Defendant/

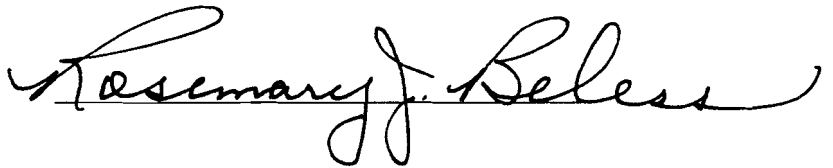
Counterclaimant/Appellee

Blue Ledge Corporation

**CERTIFICATE OF SERVICE**

I hereby certify that on the 24<sup>th</sup> day of December, 2008, I caused to be deposited in the United States Mail, postage prepaid, two (2) true and correct copies of **BRIEF OF APPELLEE** to the following counsel of record:

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A handwritten signature in cursive script, reading "Rosemary J. Beless", written over a horizontal line.