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Steven W. Call; Ray, Quinney and Nebeker; Elizabeth M. Peck; Law Office of Elizabeth M. Peck; attorneys for appellant.

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THE UTAH COURT OF APPEALS

GLEN C. WEISER, an individual,

Plaintiff/Appellant,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation,

Defendant/Appellee.

20080124

Case No. ~~220080124-CA~~
(District Court No. 910749302PR)

Nature of Proceeding: APPEAL

ADDENDUM TO BRIEF OF APPELLANT

On Appeal from Judgment of Dismissal made by the Second District Court for Davis County, Hon. Rodney S. Paige Presiding

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GLEN C. WEISER, an individual,

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Tab A

SECOND DISTRICT COURT
2007 DEC 21 P 3:00

SECOND DISTRICT COURT
2007 OCT -9 P 8:59

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IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR DAVIS COUNTY, STATE OF UTAH

GLEN C. WEISER, an individual, Plaintiff, v. UNION PACIFIC RAILROAD COMPANY, a Utah corporation, Defendant.	[revised] **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER AND JUDGMENT** Civil No. 910749302PR Hon. Rodney S. Page

The Court having considered the various proceedings previously conducted by the Court and the Court's prior rulings in the case and having further considered that all issues before the

[revised] Findings of Fact, Conclusions of Law and Or
VD24051554 pages:
910749302 UNION PACIFIC RAILROAD COM

Court have been heretofore resolved or adjudicated, the Court hereby makes its findings of fact, conclusions of law and order and judgment as follows:

FINDINGS AND CONCLUSIONS

1. This long enduring case arises from an action that was filed by Glen C. Weiser (hereinafter the "Plaintiff" or "Weiser") against defendant Union Pacific Railroad Company (hereinafter "Union Pacific" or "Railroad") regarding a parcel of land located in Davis County, Utah near the Salt Lake County line (hereinafter the "Property").

2. A brief history of the case is given by the Supreme Court in *Weiser v. Union Pacific R. Co.*, 932 P.2d 596 (Utah 1997), which provides, in part, as follows. "In 1873, Weiser's most remote predecessor in interest purportedly received title to the disputed land through a federal land grant patent issued by President Ulysses S. Grant. In 1935, the district court for Davis County quieted title to the disputed property in Roelof Steenblik, one of Weiser's predecessors in interest. All known entities with a possible claim to the property were made parties to that action. The Railroad was not made a party because there was no public record of its interest. The Railroad did receive constructive notice by publication, however." Id. at 597.

3. " In 1982, Union Pacific began construction of a semi-truck loading facility on the disputed property. In 1987, Weiser discovered the Railroad's use of the property and through counsel requested the Railroad to surrender and vacate the property. The Railroad refused, and Weiser had Associated Title Company prepare a title report, which showed that Weiser owned the property in fee simple. He again made a formal demand that the Railroad surrender and

vacate the property. Union Pacific again refused. Plaintiff brought this action to gain possession of and to quiet title to the property." Id. at 597.

4. Union Pacific defended the action "contending that the United States had granted its predecessor in interest, Utah Central Railroad, a 400-foot-wide "right-of-way through public lands for the construction of a railroad and telegraph" in March of 1870. One of the conditions of the grant was that within three months after the passage of the 1870 Act, the Railroad file with the Secretary of Interior a map approved by him "exhibiting the line of said company, as the same has been located and constructed." The parties dispute whether this condition was fulfilled. Weiser contends that because the Railroad did not timely file a certified map that was accepted by the Secretary of Interior, the Railroad's grant of right-of-way fails. [footnote omitted]. After extensive research and historical analysis, the trial court granted a partial summary judgment that the grant to the Railroad failed for lack of condition." Id. at 597.

5. Through extensive summary judgment proceedings, the Court determined that the following facts relating to the parties' controversy were undisputed.

(a) The Act of Congress of December 15, 1870 (16 Stat. 395) (hereinafter "1870 Act"), which is relevant in this matter, provides among other things as follows:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the right of way through the public lands be, and the same is hereby, granted to the Utah Central Railroad Company, a corporation created under the laws of the Legislative Assembly of the Territory of Utah, its successors and assigns, for the construction of a railroad and telegraph from a point at or near Ogden City, in the territory of Utah, to Salt Lake City, in said territory; ... Said way is granted to said railroad to the extent of 200 feet in width on each side of said railroad where it may pass through the public domain ... Provided, that within three months from the passage of this act the said Utah Central Railroad Company shall file with the Secretary of the

Interior a map approved by him, exhibiting the line of the railroad of such company as the same has been located and constructed: ...

16 Stat. 395 (December 15, 1870).

(b) The conditional 200 foot right of way grant pursuant to the 1870 Act would overlap substantially all of plaintiff's property (hereinafter "Property") which is the subject of this action.

(c) On March 7, 1871, a profile map was filed with the office of the Secretary of the Interior by the Utah Central Railroad. Defendant Union Pacific Railroad is a successor in interest to the Utah Central Railroad.

(d) On the following day, the map was rejected by the Secretary of the Interior and returned to the Utah Central Railroad on grounds that it was not certified.

(e) On March 30, 1871, the Utah Central Railroad resubmitted the profile map (presumably a certified map) which was duly accepted by the Secretary of the Interior on that date.

(f) The Utah Central Railroad failed to file a certified map with the Secretary of the Interior within the time limitation set by Congress in the 1870 Act.

(g) In exchange for consideration, plaintiff's predecessors in interest received title to the Property by patent from the United States Government on September 25, 187[3] [sic].

(j) Plaintiff's chain of title in the Property appears on the record of the Davis County Recorder in which county the Property is situated.

(k) A right-of-way grant to the Utah Central Railroad, which is at issue in this case, does not appear on any of the plat maps recorded in the Davis County Recorder's Office.

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(l) Plaintiff and his predecessors in interest have paid the property taxes on the Property for at least the past 25 years.

(m) Defendant made its first improvements and enclosures on the Property when it commenced the construction of the TOFC facility in 1982.

(n) There is a disputed question of fact whether defendant Union Pacific Railroad and/or its predecessor's have paid property taxes on the property.

6. The Court granted Weiser's motion for partial summary judgment pertaining to the land grant issue in 1995. The Railroad filed a motion for reconsideration. The motion was denied. Thereafter, an appeal was pursued by the Railroad which was later dismissed by the Supreme Court. On October 19, 2000, the Railroad filed a motion for reconsideration. Weiser objected to the motion as untimely and improper. The Court determined that it would consider the motion.

7. Upon considering the Railroad's motion, the Court determined that despite its prior granting of partial summary judgment in favor of Weiser, the doctrine of *stare decisis* required the Court to alter its prior ruling in the case.[1] The Court concluded that it was compelled under the doctrine of stare *decisis* to change its decision despite the fact that the undisputed facts reflected that the Utah Central Railroad had failed to comply with the Conditional Grant. In making its decision the Court acknowledged that Weiser was not a party to any of the decisions cited by the Court and was not afforded an opportunity to present evidence or raise issues in those cases.

8. The Court rejected Weiser's arguments that the Court should have analyzed the issues in the case under the doctrines of *res judicata* and *collateral estoppel* and that neither doctrine was binding upon Weiser in this case. Based upon the Court's legal reasoning, the Court reversed its prior summary judgment made in favor of Weiser and granted the Railroad's motion for partial summary judgment in its October 1, 2001 ruling.

9. Based upon the Courts' amended ruling that the Conditional Grant was valid, the Court addressed the character of the Grant. The Grant provides, in relevant part, as follows:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That *the* right of way through the public lands be, and the same is hereby, granted to the Utah Central Railroad Company, a corporation created under the laws of the legislative assembly of the Territory of Utah, its successors and assigns, for the construction of a railroad and telegraph from a point at or near Ogden City, in the Territory of Utah, to Salt Lake City, in said Territory; and the right, power, and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, . . .

10. The Court then concluded that the foregoing conveyance conveyed a fee or limited fee interest in the Property to the Railroad and Weiser has no remaining interest in the Property. The Court rejected Weiser's argument that the Conditional Grant conveyed only a right-of-way to the Utah Central Railroad. Consequently, the Court concluded that the subject Property was owned by the Railroad.[2]

---

[1] The Court also concluded that Weiser lacked standing to challenge the Grant.

[2] There was only a small part of the Property that was outside of the 400 foot right-of-way and the parties have settled any claim thereto.

11. However, the Court concluded that the Property was in fact part of the "public lands" at the time of the Conditional Grant was approved by Congress. In making the foregoing determination the Court rejected Weiser's argument that the Property was not taken out of the public lands because Weiser's original predecessor (Tomlinson) had acquired a homestead or pre-emption interest in the property. Weiser contended that Tomlinson's interest in the property was superior to the Railroad's because Tomlinson presented his Declaratory Statement of Pre-emption on April 17, 1869 *before* the Conditional Grant was approved by Congress and therefore the Property was not part of the "public lands" at the time Congress approved the Conditional Grant. Weiser contended that his position was supported by case authority. The Court rejected Weiser's arguments and concluded that the period of time for perfecting an interest in Property through the doctrine of pre-emption is determined by the date that the final proof of pre-emption was completed on July 6, 1872 and not on April 17, 1869 when Tomlinson's Declaratory Statement of Pre-emption was made. Because the Court concluded that the date of proof is the controlling date for the purpose of determining when whether the Property was part of the public lands, the Court determined that the evidence proffered by Weiser at an evidentiary hearing that Tomlinson Declaration Statement was made on the public record on April 17, 1869 (before the Conditional Grant was approved by Congress) was irrelevant.

12. The Court also concluded that the Decree Quieting Title made in favor of Weiser's predecessor by the Fourth District Court is not dispositive or binding upon this Court's determination that the Property belongs to the Railroad because no action under state law has the ability to limit or circumscribe land rights granted to the Railroad. In making this determination

the Court rejected Weiser's argument that the Decree Quieting Title to the Property made by the honorable Judge Pratt in 1935 is binding and enforceable under the doctrines of res judicata and collateral estoppel because the Railroad had no interest of record in the County Recorder and because the Railroad received constructive notice of the quiet title action by means of publication.

13. The Court has also concluded that the conveyance of its interest in the Property to another did not cause the Property to revert to Weiser. The Court also rejected the argument raised by Weiser that defendant Union Pacific intended to remise or release its interest in the Property when it quitclaimed its interest in the Property to another and rejects the assertion that the conveyance of its interest by quitclaim deed was conclusive evidence. Weiser contended that if the conveyance of the Property was a limited fee conveyance, the limited fee was made subject to reverter to the United States and thereafter passed to Weiser through his chain of title stemming back to the original land patent given to Tomlinson.

14. The Court has determined that the Railroad did not obtain any interest in the Property by way of adverse possession because it did not satisfy the requirements needed to establish a claim of adverse possession and that its ownership interest in the Property is based solely upon the Conditional Grant.

ORDER AND JUDGMENT

Based upon the foregoing findings and conclusions made by the Court and the prior proceedings in the case, the Court makes and enters its order and judgment as follows:

ORDERED that defendant Union Pacific Railroad received a limited fee interest in the Property pursuant to the Conditional Grant;

ORDERED that defendant Union Pacific Railroad's limited fee did not revert back to the United States and then transfer forward to Weiser when Union Pacific Railroad purported to convey its purported interest to another;

ORDERED that Weiser's claims for relief as alleged in his complaint including his claims to quiet title, restitution, forcible detainer, treble damages, trespass and unjust enrichment are hereby dismissed with prejudice;

ORDERED that defendant Union Pacific Railroad's alleged defense of adverse possession is also dismissed for cause; and

ORDERED that this Judgment is final as to the matters ruled upon and shall be entered by the Clerk of the Court without further delay, the Court having determined that all claims between the parties in this case have now been adjudicated.

DATED this 21st day of December 2007.

BY THE COURT:

Rodney S. Page

HON. RODNEY S. PAGE
District Court Judge

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing was sent via first class mail by depositing the same with the United States Postal Service, postage prepaid to:

Jeff Devashrayee
280 South 400 West, Suite 250
Salt Lake City, Utah 84101
Facsimile No. 212-3978

_____

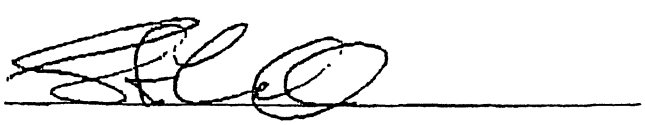
949304

1/2/2008 9:26:39 [illegible]

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing [revised] proposed findings of fact, conclusions of law and judgment and order was mailed via first class mail on October 9, 2007 by depositing the same with the United States Postal Service, postage prepaid to:

Jeff Devashrayee
280 South 400 West, Suite 250
Salt Lake City, Utah 84101
Facsimile No. 212-3978



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Tab B

1 IN THE DISTRICT COURT OF DAVIS COUNTY

2 STATE OF UTAH

3 *****

4 GLEN C WEISER,)
)
5 Plaintiff,)
)
6 vs.) VIDEO TRANSCRIPT
)
7 UNION PACIFIC RAILROAD COMPANY,) Case No. 910749302
)
8 Defendant.)

9 *****

10

11 BENCH TRIAL

12 DECEMBER 8, 2005

13 HONORABLE RODNEY S. PAGE

14

15

16 *****

17 APPEARANCES:

18 FOR THE PLAINTIFF: STEVEN W. CALL

19 FOR THE DEFENDANT: JEFFERY J. DEVASHRAYEE

20

*****

21

22

23 Transcribed by Dean Olsen, CSR
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24 North Ogden, Utah 84414
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25

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9 *****

10

11 FARMINGTON, UTAH DECEMBER 8, 2005

12 **THE COURT:** Good morning, ladies and gentlemen.

13 **MS. PECK:** Morning.

14 **THE COURT:** This is the time set for a hearing in the

15 matter of Glen C. Weiser versus Union Pacific Railroad. This

16 is case number 910749302. Mr. Weiser is not present,

17 apparently is ill and has not been able to be here today, but

18 it's the decision of his counsel and Mr. Wiser to go ahead in

19 this matter. Is that correct, Mr. Call?

20 **MR. CALL:** (Unintelligible)

21 **THE COURT:** Mr. call is here representing Mr. Weiser

22 along with co-counsel. The defendant is represented by

23 Mr. Jeffery Devashrayee --

24 **MR. DEVASHRAYEE:** Yes.

25 **THE COURT:** -- who is representing the Railroad. Is the

1 plaintiff ready to proceed, Mr. Call?
2 **MR. CALL:** We are, your Honor.
3 **THE COURT:** Is the defendant ready, Mr. Devashrayee?
4 **MR. DEVASHRAYEE:** Yes, your Honor.
5 **THE COURT:** Do either of you wish to make opening
6 statements? Mr. Call?
7 **MR. CALL:** I believe we'd just proceed with the
8 testimony at this time and then reserve that statement for
9 after.
10 **THE COURT:** Is that agreeable with you, Mr. Devashrayee?
11 **MR. DEVASHRAYEE:** Yes, your Honor.
12 **THE COURT:** All right. You may proceed. Call your
13 first witness.
14 **MR. CALL:** Your Honor, the plaintiff, would call Max
15 Elliott to the stand.
16 **THE COURT:** Mr. Elliott, will you step up and be sworn
17 please.
18 If you'll have a seat on the witness stand please.
19 **MAX ELLIOTT,**
20 called as a witness, being first duly sworn,
21 was examined and testified as follows:
22 **DIRECT EXAMINATION**
23 **BY MR. CALL:**
24 **Q.** Good morning, Mr. Elliott.
25 **A.** Good morning.

1 **Q.** How are you this morning?
2 **A.** I'm good.
3 **Q.** Good. We appreciate you coming today. Can you state
4 your full name for the record please.
5 **A.** Max Brent Elliott.
6 **Q.** And what is your currently address, Mr. Elliott?
7 **A.** 917 South 250 East, Farmington, Utah.
8 **Q.** And just very briefly, what is your educational
9 background?
10 **A.** I attended college at Weber College and Brigham Young
11 University. Took correspondence courses in surveying.
12 **Q.** And what licenses do you hold?
13 **A.** I hold a license as a licensed land surveyor in the
14 State Of Utah, licensed -- license number 141269.
15 **Q.** And where are you currently employed?
16 **A.** I'm currently employed by Davis County.
17 **Q.** And how long have you been employed by Davis County?
18 **A.** I've been with Davis County 45 years approximately.
19 **Q.** In what capacity?
20 **A.** To begin with, I just worked with the surveying crew.
21 Then when I was licensed in '64, I was over the crew. And
22 then eventually I became the Deputy County Surveyor and now I
23 am presently the County Surveyor.
24 **Q.** Okay. Are you acquainted with the method of surveying
25 and the responsibilities of surveyors in connection with the

1 standards established in the State of Utah?
2 **A.** Yes.
3 **Q.** Okay. Are you acquainted with the method of recording
4 documents in the Davis County --
5 **A.** I am.
6 **Q.** -- (Unintelligible)?
7 **A.** We work -- in our capacity as the County Surveyor, we
8 work a lot, as do all surveyors, with the records of the
9 various courthouses. Specifically in my case, it would be
10 the courthouse of Davis County, the Recorder's Office.
11 **Q.** And in connection with this case, have you had an
12 opportunity to review the records of the county with respect
13 to the property that's in dispute which is located in Section
14 14?
15 **A.** I have.
16 **Q.** Okay. And what materials have you reviewed in
17 connection with Section 14?
18 **A.** I reviewed from the patent at the time that the property
19 was deeded to George Tomlinson, the transactions since then
20 where he'd deeded it like to Malcolm McDuff, McDuff deeded
21 back to him. Then McDuff deeded to Hancocks. All -- all
22 these deeds I'm very familiar with.
23 There was a question raised in my mind as to the
24 relationship of the patent, and understanding a little bit
25 about preemption --

1 **Q.** Okay. Let me -- let me --
2 **A.** Okay.
3 **Q.** I'll address that.
4 **A.** Okay.
5 **Q.** Okay. Based on the records that you have reviewed and
6 your experience as a surveyor, do you have an understanding
7 as to the history of Section 14 located in Davis County?
8 **A.** I do.
9 **Q.** Okay. Does that information indicate, in your opinion,
10 where the centerline of the railroad track was located with
11 respect to the Utah Central Railroad?
12 **A.** From the deeds you can come up with the centerline of
13 the Union Pacific Railroad, or the Utah Central Railroad
14 then.
15 **Q.** Okay. And in connection with your work, have you
16 prepared a plat or a map of various deeds as they appear on
17 the records of the county?
18 **A.** I prepared this one from the records of Davis County,
19 this plat that's here.
20 **Q.** Okay. And when you say this one, are you referring to
21 what's been marked as Plaintiff's Exhibit No. 1?
22 **A.** Yes, I am.
23 **Q.** And is that your surveyor's certificate that appears on
24 that plat?
25 **A.** That is --

1 **Q.** (Unintelligible)
2 **A.** That is correct, that is --
3 **Q.** Okay.
4 **A.** -- my certificate.
5 **MR. CALL:** Your Honor, we'd move for admission of
6 Exhibit 1.
7 **THE COURT:** Mr. Devashrayee.
8 **MR. DEVASHRAYEE:** Your Honor, the only comment I have is
9 that it's not accurate with respect to the Court's ruling
10 earlier a couple of times with regard to ownership of that,
11 of the right of way. Otherwise, I don't have any objection
12 to it.
13 **THE COURT:** Noting that the Court has previously
14 determined the ownership of the easement, the only issue
15 before the Court is the question of where the centerline of
16 the original road lied. The Court will receive it only as to
17 that issue. Relative to the other issues, the Court will not
18 receive it. And so it's limited for that purpose, and I will
19 receive it for that purpose only.
20 **MR. CALL:** Okay.
21 **Q. (BY MR. CALL)** Mr. Elliott, in looking at Exhibit 1, if
22 you would for a minute, could you explain to the Court, if
23 you would, the contents of that exhibit.
24 **A.** We show the dash -- I show the dashed line where the 200
25 feet would be each side of the centerline of the Utah Central

1 Railroad. I also show the deeds and they -- how they were
2 conveyed, like to Denver and Rio Grande Railroad, to Mellons
3 and others, warranty deeds, other deeds that were deeded to
4 those folks way back in the beginning.
5 **Q.** Okay. And in looking at these color codes that you have
6 on this exhibit, do those -- those legends that you have
7 there correlate with the deeds with respect to each of those
8 properties?
9 **A.** Yes, that's -- that is the purpose and intent for the
10 keys over here on the right-hand side.
11 **Q.** Okay. And with respect to those deeds, is there
12 information that would indicate in the deeds that you have
13 reviewed where the centerline is with respect to the Utah
14 Central Railroad?
15 **A.** Yes, they do.
16 **Q.** Okay. Would you explain to the Court which deeds you're
17 referring to.
18 **A.** Yes. The second one down where it's the Hancock, the
19 Denver and Rio Grande Western Railroad Company, April the
20 28th, 1884, recorded in Book H, page 570, Davis County
21 Recorder's Office, ties it to the north quarter corner and
22 leaves no doubt as to what it's doing. Especially when you
23 look to the deed which is immediately south of that, which is
24 a deed from George Tomlinson to Denver and Rio Grande
25 Railroad, March 22nd, 1883. In -- in talking about his

1 parcel, they describe it as being bounded on the north by
2 Thomas Hancock, bounded on the south by Thomas Hancock, and
3 bounded on the east side by the Utah Central Railroad.
4 **Q.** Okay.
5 **A.** Then the description across there, which is the Mellon
6 description, which is clear over -- right on the top clear to
7 the right-hand side, says, Thomas Hancock and Sarah Ann
8 Hancock to Joesph W. Mellon, April the 2nd, 1920, recorded in
9 Book 1-C, page 519, Davis County Recorder's Office, that is
10 also tied to the north quarter corner as it comes up there
11 and describes it. And there's -- you can determine the
12 centerline of the railroad, the Central Railroad, from those
13 two descriptions --
14 **Q.** Okay.
15 **A.** -- at that point.
16 **Q.** And the deeds that you're referring to, are they set
17 forth in Exhibits 33, 34 and 35 of Plaintiff's Exhibit? Will
18 you take a minute and look at those?
19 **THE COURT:** What exhibit numbers are they, Mister --
20 **MR. CALL:** 33, 34, and 35.
21 **THE WITNESS:** The two that I'm specifically talking
22 about is 33 is correct.
23 **Q. (BY MR. CALL)** Okay.
24 **A.** 34 is further south down the railroad. It's -- I
25 mentioned it, but it's not the one that I'm specifically

1 using at this time. The other one is the deed to Mellon.
2 And let's see --
3 **Q.** Well, let's just go through them one at a time then --
4 **A.** Okay.
5 **Q.** -- so with respect to Exhibit No. 34 --
6 **A.** Okay.
7 **Q.** -- that was the -- one of deeds that you relied upon in
8 making that determination?
9 **A.** No. 33 was.
10 **Q.** No. 33.
11 **A.** Yes.
12 **Q.** Okay. And is that -- is that deed that's been set out
13 in Exhibit 33 a true and correct copy of the deed that was
14 recorded with the County Recorder?
15 **A.** Yeah. We have the actual deed here as Book H of Deeds,
16 page 570, which is from the County Recorder's records.
17 **MR. CALL:** Okay. Your Honor, we'd move for the
18 admission of Exhibit 33.
19 **THE COURT:** Any objection with the same limitation, Mr.
20 Devashrayee?
21 **MR. DEVASHRAYEE:** No objection with the same limitation,
22 your Honor.
23 **THE COURT:** All right. 33 will be received.
24 **Q. (BY MR. CALL)** Okay. What was the other deed that you
25 looked at, Mr. Elliott?

1 **A.** The other one is the deed to Mellon, which is on the
2 east side. Let me look here and see which one it is.
3 It's number 36. That deed is mentioned I think
4 previously as in Book 1-C of Deeds, page 519.
5 **MR. CALL:** Okay. Your Honor, we'd move for the
6 admission of the warranty deed that has been presented as
7 Plaintiff's Exhibit 36.
8 **THE COURT:** Mr. Devashrayee, with the same
9 qualification?
10 **MR. DEVASHRAYEE:** Yes, your Honor. And I -- I probably
11 won't have any objections with regard to these deeds as long
12 as we have that qualification, which I think embodies my
13 concern about relevance (Unintelligible). Is that fair?
14 **THE COURT:** That's --
15 **MR. DEVASHRAYEE:** And I'm not gonna have any problem --
16 **THE COURT:** The reason the Court is receiving them is
17 centerline issue only.
18 **MR. DEVASHRAYEE:** Okay. Thank you.
19 **MR. CALL:** Well, your Honor, may I address that briefly?
20 **THE COURT:** Sure.
21 **MR. CALL:** It was my understanding that these
22 proceedings were not only to determine the centerline, but
23 also the boundaries of the Weiser property with respect to
24 the right of way and how much of the property of the Weiser
25 property lies outside of the 400-foot right of way --

1 **THE COURT:** That may be the issue also, but the key is
2 where that centerline is.
3 **MR. CALL:** Right. And --
4 **THE COURT:** There's no question it goes 200 feet on each
5 side of that centerline, and so the question of where the
6 Weiser property would lie is also relevant, but --
7 **MR. CALL:** Right.
8 **THE COURT:** -- not the chain of title.
9 **MR. CALL:** But in addition to that, your Honor, these
10 are public records, they're self-authenticating, and so we --
11 when the Court says that there's a limitation, I mean I
12 understand that there's some relevancy limitation, but these
13 are authentic --
14 **THE COURT:** Doesn't matter. I'm not considering them
15 for that issue. The Court's already ruled on that as far as
16 those things are concerned, and you need to realize that I'm
17 receiving them for only that purpose. That's the only reason
18 they'll be received by the Court and allowed in evidence.
19 **MR. CALL:** Okay.
20 **THE COURT:** Okay?
21 **MR. CALL:** Thank you, your Honor.
22 **Q. (BY MR. CALL)** Okay. With -- what other materials did
23 you consider, Mr. Elliott, in deciding where the centerline
24 of that Utah Central Railroad track was located?
25 **A.** The other Denver and Rio Grande descriptions that were

1 deeded further south also --
2 **Q.** Okay. Which deed was that that you considered?
3 **A.** That was the No. 34, I believe. Let me look.
4 **Q.** And what was that transfer, Mr. Elliott?
5 **A.** That was Thomas Hancock to Denver and Rio Grande Western
6 Railroad Company. It begins at station 144 plus 17, a point
7 275 feet east of the quarter post between Sections 11 and 14,
8 Township 1 North, Range 1 West. And 725 feet south, 3
9 degrees 15 minutes west along the centerline of said railway.
10 They're speaking of the Denver and Rio Grande, but it
11 lies immediately against the Utah Central Railroad.
12 **MR. CALL:** Okay. With that, your Honor, we'd also move
13 for Exhibit 34.
14 **THE COURT:** 34 is received.
15 **MR. DEVASHRAYEE:** No objection, your Honor.
16 **THE COURT:** What's your objection on that?
17 **MR. DEVASHRAYEE:** No objection.
18 **THE COURT:** All right.
19 **MR. DEVASHRAYEE:** Subject to the qualification.
20 **THE COURT:** Yes.
21 **Q. (BY MR. CALL)** Mr. Elliott, in addition to the deeds that
22 we've discussed, what other information have you deter --
23 have you looked at in determining where the centerline of the
24 Utah Central Railroad is located with respect to the records
25 of the county?

1 **A.** I have looked at the Louis L. Pomantier deed that he
2 gave to Utah Central Railroad and -- but it does not tie it
3 down, it just gives the width of it, saying it's 50 feet on
4 each side of the survey line or along the road.
5 **Q.** And which exhibit is that, Mr. Elliott?
6 **A.** That's Deed No. 4, Lewis Pomantier to Utah Central
7 Railroad, June 17th, 1870.
8 **Q.** And is that reflected on your map?
9 **A.** It is.
10 **Q.** And how is it reflected?
11 **A.** It's the yellow area about halfway through the Tomlinson
12 property (unintelligible) south.
13 **Q.** And does that deed, it is reference the -- does it
14 reference the centerline of the railroad track?
15 **A.** That's what it -- it was from -- what it called for --
16 well, let's read it. That probably is better than me trying
17 to explain it.
18 Book B of Deeds, page 170, Louis L. Pomantier to Utah
19 Central Railroad Company, know all men by these presents that
20 I, Louis D. (sic) Pomantier of Salt Lake City of the County
21 of Salt Lake and Territory of Utah, in consideration of the
22 sum of one dollar in hand paid by the Utah Central Railroad
23 Company of Utah Territory, have bargained and sold and do
24 hereby grant, bargain, sell, and convey under the said
25 railroad company, their successors in office and assigns

1 forever a certain tract of land, situated, lying, and being
2 in the County of Davis, in territory aforesaid, bounded and
3 described as follows, to wit: All that portion of land
4 situated in the south half of the northeast quarter of
5 Section 14, Township 1 North, Range 1 West, U.S. Survey, Salt
6 Lake Meridian. Within lines running parallel with the line
7 of survey of said railroad as now located on each side of the
8 line of said road at a distance of 50 feet therefrom. A
9 certified map of said road is now located, being recorded in
10 the Recorder's Office of said county.
11 Do you want me to go or stop --
12 **Q.** No, that -- that's fine.
13 **A.** That pretty well covers what we're talking about, the
14 centerline.
15 **Q.** We'd move, your Honor -- well, let me first ask,
16 Mr. Elliott, is Exhibit 4 a true and correct copy of the deed
17 that was recorded with the County Recorder?
18 **A.** It is.
19 **MR. CALL:** We'd move for admission of Exhibit 4.
20 **THE COURT:** Any objection?
21 **MR. DEVASHRAYEE:** No objection subject to qualification.
22 **THE COURT:** 4 is received with that limitation.
23 **Q. (BY MR. CALL)** Based on the various records that you
24 reviewed, Mr. Elliott, do you have an opinion as to where the
25 centerline track was of the Utah Central Railroad?

1 **A.** Absolutely. From the deed from Hancock to the Utah
2 Cen -- or to Denver and Rio Grande Railroad and Thomas
3 Hancock to the Mellons, yeah, that defines it well.
4 **Q.** In addition to these deeds, have you also reviewed other
5 maps and materials that are located within the County
6 Recorder's Office?
7 **A.** I have over the years, yes.
8 **Q.** And what is your opinion as to the location of that
9 centerline, Mr. Elliott?
10 **A.** Well, I think these two deeds reflect basically where
11 that 100 foot is between the two deeds, and the centerline
12 would be 50 feet from either one of them.
13 **Q.** Okay. And so is that centerline reflected where the
14 track is located on your Exhibit No. 1?
15 **A.** As per the records, yes.
16 **Q.** Okay.
17 **A.** I have not -- I have not conducted an actual field
18 survey. This is strictly from the records.
19 **Q.** Right. Have you reviewed field surveys that have been
20 done of the property, however?
21 **A.** Only those -- I've looked at them briefly -- that have
22 been done.
23 **Q.** Now, I believe you mentioned, Mr. Elliott, that -- and
24 let me ask you, with respect to the records of the county, is
25 it your understanding -- you're familiar with the dispute in

1 this case; is that correct?
2 **A.** That is correct.
3 **Q.** And you're familiar with the right of way issue that's
4 been in dispute in this case?
5 **A.** I am.
6 **Q.** Okay. And as the County Surveyor, are you familiar with
7 the records that exist with respect to those properties that
8 are adjacent to the railroad?
9 **A.** You mean the patents where Utah Central Railroad went
10 through the properties --
11 **Q.** Yes.
12 **A.** -- in Davis County? Yes, very much so.
13 **Q.** Okay. And are you familiar with which properties were
14 public lands at the time that the railroad received its
15 conveyance from the United States in December of 1870?
16 **MR. DEVASHRAYEE:** Objection, your Honor, irrelevant.
17 **THE COURT:** Sustained.
18 **MR. CALL:** Well, your Honor, can I address that issue?
19 **THE COURT:** You can.
20 **MR. CALL:** Your Honor, based on this Court's prior
21 ruling, this court, it's our understanding, determined that
22 the right of way grant that was given to the Union Pacific
23 Railroad was in fact a valid grant, and we're assuming that
24 to be true. That grant, however, was made subject to the
25 condition that it was only over the public lands. Mr.

1 Elliott, who is here, will testify if permitted that in fact,
2 the Weiser property was not public land at the time that the
3 right of way was given. We are not here seeking to challenge
4 this Court's decision on the validity of that grant. That we
5 understand and we respect the Court's decision that that has
6 been -- that has been decided. The issue which hasn't been
7 decided, however, is whether or not these are in fact public
8 lands. And in order for Mr. Weiser to be able to fairly
9 present to this Court the proper boundaries of that right of
10 way as set forth on the public records, is for Mr. Elliott to
11 be able to testify as to whether or not this property was
12 public land at the time that grant was given. This case,
13 your Honor, has gone on for many, many years, and this is the
14 first evidentiary hearing that has ever been held in this
15 matter. We don't think that the Court has ever received any
16 evidence or affidavit with respect to whether this property
17 is public land or wasn't public land at the time the
18 conveyance was made. Mr. Elliott is very familiar with the
19 events that occurred at the time of the recording of the
20 right of way or at the time that that grant was given, and we
21 think it's extremely relevant in order to determine the
22 boundaries of that right of way, which is the purpose of this
23 hearing, that he be permitted to testify whether -- whether
24 part of this property was public land at the time that that
25 railroad right of way was -- the profile map with respect to

1 that right of way was recorded.

2 **THE COURT:** Mr. Devashrayee.

3 **MR. DEVASHRAYEE:** Whether this is public land or private

4 land has absolutely nothing to do with what we're here for

5 today. And the fact is, the Court has already ruled -- let

6 me read from the Court's ruling which the Court is already

7 familiar with. The court determined that the patent for the

8 (unintelligible) George Tomlinson was included in the right

9 of way granted the railroad and was a nullity. The reason

10 being that the land which is part of the 1870 grant to the

11 railroad was taken out of the public land subject to

12 preemption and sale and, therefore, the Land Department was

13 without authority to convey any rights therein.

14 That is -- that's the Court's ruling and that is a

15 correct ruling, it's consistent with the law, and it has --

16 whether this land's public or private land has absolutely

17 nothing to do with finding the centerline in the 400-foot

18 grant of right of way, which has been confirmed as being

19 valid and effective.

20 **THE COURT:** (Unintelligible)

21 **MR. CALL:** May I respond, your Honor?

22 **THE COURT:** No. Based upon the evidence presented to

23 the Court at the time its ruling was made, the Court has

24 ruled on this issue and I will sustain the objection, period.

25 **MR. CALL:** Okay. With that, your Honor, may we -- may

1 we at least for purposes of the record --
2 **THE COURT:** You can proffer --
3 **MR. CALL:** -- make a proffer with Mr. Elliott now?
4 **THE COURT:** You may.
5 **MR. CALL:** Because we don't want to have to come back,
6 your Honor. We just think that Mr. Elliott has gone through
7 this in great detail, and if we could go through and put this
8 evidence on the record, then it would be there for further
9 review.
10 **THE COURT:** I'll allow you to proffer it in that
11 respect. Mr. Devashrayee.
12 **MR. DEVASHRAYEE:** Your Honor, do I just sit and listen
13 to the proffer then? I -- you have my objections.
14 **THE COURT:** You can listen to the proffer noting that it
15 comes in only for the purposes of the record. The Court has
16 sustained your objection and I will not consider it in my
17 ruling.
18 **MR. DEVASHRAYEE:** Thank you, your Honor.
19 **Q. (BY MR. CALL)** Okay. Mr. Elliott, in connection with
20 your testimony -- with your review of the records, we were
21 discussing the public record that -- the records of the
22 county and what constituted public land in 1870. Are you
23 with me?
24 **A.** Yes.
25 **Q.** Okay. You previously testified I believe that you were

1 familiar with the various records and deeds as they existed
2 in Section 14.
3 **A.** Yes.
4 **Q.** And you've reviewed them with respect to the status of
5 those deeds in 1870; is that correct?
6 **A.** That is correct.
7 **Q.** And do the records of the county reflect that the Weiser
8 property or even the Tomlinson property, as referred to on
9 your Exhibit 1, does it reflect that that was public land in
10 1870?
11 **A.** No, it doesn't reflect either.
12 **Q.** Is it -- from the records of the county that you have
13 reviewed, does it indicate that there was some claim or
14 preemption made on the Tomlinson land prior to 1870?
15 **A.** Do I have latitude to speak?
16 **Q.** Yes. Yes, and let me just -- in talking about the
17 Tomlinson property, it's my understanding that it's defined
18 by the outer brackets --
19 **A.** The Tom -- the Tomlinson property includes this plus the
20 northeast quarter of the northwest quarter of Section 14 and
21 lot 2 that sits down below here.
22 **Q.** Okay.
23 **A.** A total of 150.50 acres. We're looking at 80 acres of
24 the 150.50 acres.
25 **Q.** Okay. And in 1870, however, the Weiser property was

1 part of that Tomlinson property; is that correct?
2 **A.** That is correct.
3 **Q.** Okay. And would you for the benefit of the Court in
4 connection with this proffer indicate what records reflect as
5 to your opinion that this was not public land in 1870?
6 And let me just maybe help you through this and ask
7 you --
8 **A.** Okay.
9 **Q.** -- could you explain to the Court --
10 **THE COURT:** Well, let me just indicate, I'm not gonna
11 let you lead him through a bunch of things, Counsel --
12 **MR. CALL:** Okay.
13 **THE COURT:** -- if he wants to -- if he can respond to
14 your questions, that's fine, but --
15 **THE WITNESS:** Let me say this: I'm familiar with Utah
16 Central Railroad all the way through Davis County.
17 **Q. (BY MR. CALL)** Okay.
18 **A.** As they go through Davis County --
19 **Q.** Yeah.
20 **A.** -- in most instances, they acquired, Utah Central
21 Railroad, from the settlers a hundred-foot right of way, 50
22 feet each side of the road or survey line they described it.
23 **Q.** Okay.
24 **A.** The majority of the property that they went through had
25 not received their patent by December the 15th, 1870.

1 **Q.** Okay. And why is that?
2 **A.** Because there's a process that you have to go through to
3 get your patent. The patent isn't the beginning, it's the
4 conclusion of the law of 1841, that you have to make a
5 declaratory statement, then either be on the ground or go on
6 the ground. You had to be a citizen of the United States or
7 be -- or make application to become a citizen of the United
8 States. You had to also not have more than one preemption.
9 You had to be the head of a home or of age or you could be a
10 woman and still have been eligible to do those things under
11 that law. Also, you had to then prove to the United States
12 of America that you had been on the land, that you met all
13 these commitments, and then pay them. If it was 160 acres,
14 you had to pay $1.25 an acre. If it was less than 160 acres,
15 you had to pay $2.50 an acre for that land.
16 **Q.** And in this case, did Mr. Tomlinson, who is the -- do
17 the records reflect that Mr. Tomlinson was the first claimant
18 to this property?
19 **A.** Yes, he's the -- he's the one that got the patent.
20 **Q.** Do the records of the county reflect that Mr. Tomlinson
21 made a declaratory statement with respect to this property?
22 **A.** No, they do not.
23 **Q.** Okay.
24 **A.** But the National Archives, U.S. Land Office, kept all
25 that kind of information. They've done a beautiful job.

1 **Q.** And have you reviewed those records?
2 **A.** I have.
3 **Q.** And do those records reflect that Mr. Tomlinson made a
4 declaratory statement that was recorded on April 17th, 1869?
5 **A.** They do.
6 **Q.** Do the records further reflect that there were other
7 competing declaratory statements made on that property?
8 **A.** In the same year, there was a Mr. Pomantier, Louis L.
9 Pomantier, the same one that gave the deed to Utah Central
10 Railroad, he made a declaratory statement. And also a Mr.
11 Sabine, a Mr. McDuff, and also a Mr. Varley.
12 **Q.** Okay. And so when you refer to the one that gave the
13 Central Railroad a deed, Mr. Pomantier --
14 Just if I might approach, your Honor.
15 Mr. Pomantier who deeded this property to Utah Central
16 Railroad, referring to the yellow property here?
17 **A.** Yes.
18 **Q.** He gave a deed to the Utah Central Railroad for that
19 property?
20 **A.** He did, found in Book B, page 170 of the Davis County
21 Recorder's Office.
22 **Q.** Okay. And he had made a preemptive claim in 1869 as
23 well?
24 **A.** Yes. He made his declaratory statement, No. 631 or 681,
25 it's hard to read, for the lot 3 in the southwest quarter of

1 the northeast quarter of 14, 1 North, 1 West, Louis L.
2 Pomantier, May the 22nd, '69.
3 **Q.** Okay. And would you -- could I refer you to Plaintiff's
4 Exhibit 8.
5 **A.** Now, which one's this?
6 **Q.** Exhibit 8.
7 **A.** 8? Okay. Yes.
8 **Q.** Could you explain to the Court what that record reflects
9 or what the relevancy of that is with respect to these
10 statements of preemption?
11 **A.** This is No. 742, cash entry, Salt Lake City, Utah
12 Territory, Section 14, 1 North, 1 West, patent September the
13 25th, 1873, declaratory statement. And at that point -- and
14 this comes from the National Archives.
15 **Q.** Okay.
16 **A.** That point, they go through and they say that -- they
17 mention George Tomlinson, April 17th, '69, made his
18 declaratory statement, his first declaratory statement.
19 Declaratory statement. And then after that, they said, it
20 conflicts with -- and they give No. 631 or 681, which is
21 Louis L. Pomantier, and it looks like a J -- you can't make
22 out the rest of his name -- Sabine, and he made his April
23 23rd, '69. And then there's a couple others. But it
24 mentions all these that have made statements in '69 that
25 they're gonna go onto that ground and prove it, become

1 their's.
2 **Q.** And why were these statements made in 1869?
3 **A.** As I've looked through some of the records, it appears
4 to me that in 1869 is when they finally opened the office in
5 the Utah Territory in Salt Lake City. I remember reading
6 that date.
7 **Q.** Is there information or is there -- are there -- is
8 there information in the public records that you've referred
9 to that indicates when Mr. Tomlinson entered on the property
10 that you've designated as -- on your map?
11 **A.** Yes. Number -- let's see --
12 **Q.** Well, go ahead.
13 **A.** No. 6 of the exhibits.
14 **Q.** Yes.
15 **A.** A neighbor -- here's what it says: I, Thomas Hancock, a
16 citizen of the United States and of lawful age, do solemnly
17 swear that I am well acquainted with George Tomlinson, who is
18 a naturalized citizen of the United States, and the head of a
19 family consisting of a wife and one child, and is an
20 inhabitant of the northeast -- of the northwest quarter and
21 lot 2 and west half of northeast quarter Section 14 of
22 Township 1 North, Range 1 West. And that no other person
23 resided upon the said land entitled to the right of
24 preemption. That the said George Tomlinson entered upon and
25 made a settlement in person on the said land since the 1st

1 day of June, since -- not on, but since the 1st day of June,
2 1840.
3 The reason they say that is prior to 1840, there were
4 squatters on the ground and they weren't protected by this
5 particular preemption law.
6 **Q.** Okay. Let me -- let me ask you another question --
7 **A.** Okay.
8 **Q.** -- Mr. Elliott. In order to comply with the preemption
9 statute, was Mr. Tomlinson required to file a declaration? I
10 believe you mentioned he was required to file a declaration
11 of citizenship.
12 **A.** Yeah. Yes, he was.
13 **Q.** And do the records reflect that Mr. Tomlinson filed a
14 declaration of citizenship?
15 **A.** No. 2 --
16 **Q.** Exhibit No. 2 --
17 **A.** Yeah, No. 2, declaration of intention to become a
18 citizen of the United --
19 **Q.** Will you slow down, just -- give me just a minute here.
20 **A.** Okay.
21 **Q.** Would you identify Exhibit No. 2 for the Court please.
22 **A.** Exhibit No. 2 here is the declaration of intention to
23 become a citizen of the United States, by George Tomlinson.
24 **Q.** Okay. And was that duly recorded? With the Land
25 Office?

1 **A.** It was with the Land Office. It was with their records
2 that are kept in the National Archives.
3 **Q.** And does your office now have copies of those records?
4 **A.** We do of these and some others.
5 **Q.** Okay.
6 **A.** But we got them from the National Archives.
7 **Q.** Would you explain to the Court please the purpose of
8 that declaration of U.S. citizenship?
9 **A.** Well, you could not preempt land --
10 **THE COURT:** I really don't think I need to know that.
11 **MR. CALL:** Okay. We would move, your Honor, just for
12 purposes of our proffer, we'd move for the admission of the
13 exhibits that Mr. Elliott has referred to.
14 **THE COURT:** Court will deny their admission. That would
15 be Exhibits 2, 6, and 8.
16 **MR. CALL:** Okay.
17 **THE COURT:** But will retain them as a part of the record
18 as reflective of what the proffer would have been.
19 **MR. CALL:** Thank you, your Honor.
20 **Q. (BY MR. CALL)** Mr. Elliott, after Mr. Tomlinson performed
21 these -- this declaration or after this was recorded --
22 **THE COURT:** Is this still part of your proffer?
23 **MR. CALL:** This is all part of our proffer, your honor.
24 **THE COURT:** Okay.
25 **Q. (BY MR. CALL)** I believe you indicated that the third

1 step -- and I prepared -- let me just indicate for the Court
2 that I prepared this exhibit to reflect steps that you
3 articulated them as they occurred with respect to this
4 property.
5 **A.** Uh-huh, that's correct?
6 **Q.** And let me just give you a copy of this, if I might.
7 May I approach the witness, your Honor?
8 **THE COURT:** You may.
9 **Q.** **(BY MR. CALL)** Excuse me. Okay. On step No. 3 there,
10 you indicated I believe that there has to be a proof of
11 preemption that's made at some point in time; is that
12 correct?
13 **A.** That is correct.
14 **Q.** And would you explain for the Court whether
15 Mr. Tomlinson made that proof and how that may have been
16 made.
17 **A.** Mr. Tomlinson had Mr. Hancock prepare a document that
18 was accepted and was with those documents we received from
19 the National Archives, which is No. 6. Can I read that?
20 **Q.** Yes.
21 **A.** I, Thomas Hancock, a citizen of the United States, of
22 lawful age, do solemnly swear that I am well acquainted with
23 George Tomlinson, who is a naturalized citizen of the United
24 States, and the head of a family consisting of a wife and one
25 child. And is inhabitant of the northeast of the northwest

1 quarter of lot -- and lot 2 and the west half of the
2 northeast quarter num -- of Section 14 of Township 1 North of
3 Range 1 West. And that no other person reside upon the said
4 land entitled to the right of preemption. That the said
5 George Tomlinson entered upon and made a settlement in person
6 on the said land since the 1st day of June, 1840, to wit: On
7 the 17th day April, 1871, and has erected thereon a log
8 house, 14 by 16 feet, with roof, floors, doors, and windows,
9 and is a comfortable home to live in. And has lived in the
10 said house and made it his exclusive home from the 17th day
11 of April, 1871, to the present time. That he did not remove
12 from his own land within the Territory of Utah to make the
13 settlement above referred to. And that he has since said
14 settlement plowed, fenced, and cultivated about 50 acres of
15 said land, and has thereon 115 rods of fencing. Signed by
16 Thomas Hancock. Received by J.D. Overton, Receiver. And
17 he -- he says he -- that -- do hereby certify that the above
18 affidavit was taken and subscribed before me this 6th day of
19 February, A.D. 1872.
20 **Q.** Okay. And then referring to Exhibit 13, Mr. Elliott, is
21 that the other document you -- I believe you referred to with
22 respect to the proof made by Mr. Tomlinson?
23 **A.** Yes, that is correct.
24 **Q.** Could you -- could you either read or explain to the
25 court the purpose of that --

1 **A.** I'll read it because it -- it's pretty clear in the way
2 it's written by them.
3 **Q.** Okay.
4 **A.** This is Certificate No. 742 -- which is also the number
5 that finally the patent was given under. Proof of right of
6 preemption of George Tomlinson, Section 14, Township 1 North,
7 Range 1 West, Preemption Act, 14th of September, 1841.
8 Allowed this 6th day of february, 1872, George -- I think
9 it's George -- G-e-o R. Maxwell, and Overton, I can't --
10 he's -- I can't read his first name. George Tomlinson,
11 claiming the right of preemption under the provisions of the
12 Act of Congress, entitled an act to appropriate the proceeds
13 of the public lands and to grant preemption rights, approved
14 September the 4th, 1841 to the northeast of the northwest,
15 the west half of the northeast quarter, lot 2 of Section No.
16 14 of Township No. 1 North of Range 1-E.
17 And they correct that. There was an error in that one.
18 Should have been 1-W, but -- and they -- and everything else
19 has the W, but this does have E.
20 **Q.** Thank you.
21 **A.** Subject to sale at the Land Office at Salt Lake City, do
22 solemnly swear that I have never had the benefit of any right
23 of preemption under this act. That I am not the owner of 320
24 acres of any land in any state or territory of the United
25 States. Nor have I settled upon and improved said land to

1 sell the same on speculation, but in good faith to
2 appropriate it to my exclusive use or benefit, and that I
3 have not directly or indirectly made any agreement or
4 contract in any way or manner with any person or persons
5 whatsoever by which the title which I may acquire from the
6 government of the United States should inure in whole or in
7 part to the benefit of any person except myself.
8 It's signed with his mark, George Tomlinson. I,
9 George -- G-O R. Maxwell, register of the Land Office, Salt
10 Lake City, Utah, do hereby certify that the above affidavit
11 was taken and subscribed before me this 6th day of February,
12 A.D. 1872. Again he signs his name G-E-O R, period, Maxwell,
13 Register.
14 **Q.** Okay. Is it your understanding that both of these -- if
15 I've understood your testimony correctly, it's -- these
16 documents were provided to the Land Office in order for
17 Mr. Tomlinson to prove up his preemption?
18 **A.** Yeah, and I've been impressed at how well they kept the
19 records back there.
20 **Q.** Okay. And on your outline here, Mr. Elliott, you've
21 indicated that as step No. 4, that there must be a statement
22 of no other preemption claim.
23 **A.** That is correct.
24 **Q.** Do the records of the county reflect that Mr. Tomlinson
25 had made a preemption claim on any other property in the

1 county?
2 **A.** I'm not -- I wouldn't know on all the county, but he
3 himself with just what I read has stated that he has not made
4 any other preemptions.
5 **Q.** And you're not familiar with any evidence in the
6 record --
7 **A.** No, no.
8 **Q.** -- that would contradict that, are you?
9 **A.** No, I'm not.
10 **Q.** Okay. What was the next step as you understood it that
11 Mr. Tomlinson needed to undertake in order to obtain his
12 patent?
13 **A.** He had to pay the money.
14 **Q.** And is that what you refer to as the settlement on
15 preemption claim?
16 **A.** Yes, that would be correct.
17 **Q.** Is that step No. 5?
18 **A.** That is correct.
19 **Q.** Would you please indicate to the Court what the records
20 reflect with respect to any payment or settlement that was
21 made by Mr. Tomlinson with the United States Land Office?
22 **A.** I will. No. 12 is again No. 742, the number which he
23 received his patent --
24 **Q.** Okay. Let me just -- for the record, you're referring
25 to Exhibit 12?

1 **A.** I am.
2 **Q.** Okay. And could you identify that document?
3 **A.** This is the Receiver's Office --
4 **Q.** Could I get you to pull that microphone down just a
5 little bit there? You put your hand up so that -- there.
6 Thank you.
7 (Transcriber's note: When the witness placed
8 his mouth close to the microphone, it caused
9 the sound to be distorted and made it often
10 difficult to understand.)
11 **A.** This is the Receiver's Office at Salt Lake City, Utah,
12 February the 6th, 1872. Received from George Tomlinson of
13 Salt Lake County, Utah, the sum of $376.25 due in full for
14 the west half of the northeast quarter and the northeast
15 quarter of the northwest -- let's see, and the -- the west
16 half of the northeast quarter and the northeast quarter of
17 the northwest quarter and lot 2 of Section No. 14 in Section
18 No. 1 North of Range 1 West, containing 150 acres and 50
19 hundredths, at two -- and it -- it's hard to read, but when
20 you -- they dated the balance of $376.25. And if you divide
21 that by 150.50 acres, that's $2.50 an acre.
22 **Q.** Okay. And is that the quantity of acreage that the
23 county records reflect that Mr. Tomlinson had made a
24 preemptive claim for?
25 **A.** That is what he received his patent for is 150.5 acres

1 as described here with this description. No. 7 also refers
2 to the same thing, only this is to the Register.
3 **Q.** Okay. Let me just make -- okay. So Exhibit No. 7 is a
4 record. Could you identify that document for the court
5 please.
6 **A.** Yes, it's No. 742, and it's Exhibit No. 7, where he
7 goes -- and the Register is -- pretty well says the same
8 thing that the Receiver did. That -- this one's not as easy
9 as to read, somebody has smeared through it, but you can
10 pretty tell it out. I'll read it, too. Land Office of Salt
11 Lake City, Utah, February the 6th, 1872. It is hereby
12 certified that in pursuance of law, George Tomlinson, Salt
13 Lake County, Territory of Utah, on this date purchased of the
14 Register of this office the lot or west half of northeast --
15 and you can't read what's there -- the northeast of the
16 northwest quarter and lot 2 of Section 14 in Township 1 North
17 of Range 1 West, containing 150 and five -- 50 hundredths of
18 an acre at the rate of $2.50 per acre, amounting to $376.25,
19 for which the said George Tomlinson has made payment in full
20 as required by law.
21 Now, therefore, be it known that on presentation of this
22 certificate to the Commissioner of the General Land Office,
23 the said George Tomlinson shall be entitled to receive a
24 patent for the lots above described. G-e-o R. Maxwell,
25 Register.

1 **Q.** Okay. So it's my understanding from what you've read,
2 Mr. Elliott, and the exhibits that you've provided that
3 public records clearly indicate that Mr. Tomlinson paid for
4 the 150.5 acres.
5 **A.** That is correct.
6 **Q.** And that was -- those payments were made pursuant to the
7 preemption that he had previously made.
8 **A.** That is correct. That was -- this is the conclusion of
9 the process.
10 **Q.** Okay. Now, after the payment was made, as step No. 6,
11 you indicate that there was a call for patent from the United
12 States; is that correct?
13 **A.** That is correct.
14 **Q.** Could I refer you to Exhibit No. 9.
15 And let me -- before I get to that, let me just
16 indicate, recognizing the Court's ruling but for purposes of
17 the proffer, we'd ask that these exhibits be received.
18 **THE COURT:** The Court will deny their reception;
19 however, they will remain a part of the record to be included
20 as part of the proffer that was made.
21 **MR. CALL:** Thank you, your Honor.
22 **Q. (BY MR. CALL)** Okay. Exhibit No. 9, Mr. Tomlinson.
23 **A.** Relationship to Mr. Tomlinson --
24 **Q.** Could you identify that document.
25 **A.** Yes. This is a -- I would like to read it. It's pretty

1 well self-ex --
2 Q. If you could identify it and then just tell us what it
3 is and then read --
4 A. It is No. 9, and it is where he's -- I think it's where
5 he's -- he wants to receive his patent.
6 Q. Okay.
7 A. Salt Lake City, January -- I can't read that. To the
8 Commissioner, General Land Office. Dear Sir, I would be glad
9 to receive the patents for my land as soon as practical --
10 practicable. If you can forward it without delay, you will
11 ender -- forever something, yours respectfully, George
12 Tomlinson, as follows, No. 742, Township No. 1 North of Range
13 1 West, Utah Survey. And I don't know if he's saying paid up
14 or what, February the 6th, 1872.
15 Q. Okay. And the payments that you referred to under
16 Exhibit -- or under your step No. 5, what dates were those
17 payments made on?
18 A. They were also -- let me look, but I'm -- think they
19 were February the 6th, also in 1872.
20 Yes, they are. February the 6th, 1872, also.
21 Q. Okay. And so that's the date that's reflected there in
22 the call for the patent.
23 A. Uh-huh. Yes, it is, the bottom there.
24 Q. So the records reflect, if I've understood your
25 testimony correctly, Mr. Elliott, that full payment was made

1 by Mr. Tomlinson pursuant to his preemptive claim on February
2 the 6th, 1872?
3 **A.** That is correct. According to the records from the
4 National Archives.
5 **Q.** Okay. And after that payment was made, what was the
6 next step that occurred with respect to these events?
7 **A.** Evidently, he didn't get his patent immediately because
8 we have -- No. 19 is next in order as I look at this. It is
9 the Salt Lake Land Office talking to the Commissioner General
10 in Washington, D.C. Can I read this?
11 Q. Yes.
12 A. United States Land Office, Salt Lake City, June the
13 24th, 1873. Commissioner of the General Land Office,
14 Washington, D.C. Sir, referring to your letter G of April
15 22nd, 1873, and to cash entry No. 742 of George Tomlinson, I
16 have to state that James Sabine and Louis L. Pomantier have
17 been notified of the decision of the Honorable Secretary of
18 the Interior in the matter of the application to enter the
19 west half of the northeast quarter and lots 1 and 2 of
20 Section 14, Township 1 North, Range 1 West. And no further
21 steps have been taken by said parties in the case. L.L.
22 Pomantier has a large ranch in Rich County, at least 175
23 miles distance from this place, and (Unintelligible) has
24 resided there for a number of years past. Sabine lives in
25 Salt Lake, and we know of no person or persons living on or

1 laying claim to any portion of this other than George
2 Tomlinson. Respectfully, something Overton, Receiver, and
3 G-e-o R. Maxwell, Register.
4 Q. Okay. Now, Mr. Pomantier and Mr. Sabine, are they not
5 the two other gentlemen that you mentioned who had made
6 preemptive claims in 1869?
7 A. They are two of them, yes.
8 Q. And is this to the same Tomlinson property, the one
9 that's --
10 A. Yes.
11 Q. -- identified on your map?
12 A. Yes, it's the same property that they're referring to
13 here. And in addition, they mention lot 2 when they're
14 talking about this --
15 Q. Okay.
16 A. -- which is below it.
17 Q. Then on page 3 of Exhibit 19 there, is there a letter
18 that is -- that is sent -- it appears you've got a letter
19 from the United States Land Office to the Commissioner.
20 A. Number -- number which one?
21 Q. Page 3 of Exhibit 19.
22 A. This is the -- there is a letter. It's -- it's way
23 after the fact. I would like to read it, though.
24 Q. Okay.
25 A. Number -- on the left-hand side it says, cash 742,

1 referring to his patent number. Territory of Utah, County of
2 Salt Lake, patent delivered by Register and Receiver, R.R.,
3 but -- it's what it says, but that's who it'd be I'm sure is
4 referring to. George Tomlinson, being first duly sworn, says
5 that he is the identical George Tomlinson who made cash entry
6 No. 742 for the west half of the northeast quarter and the
7 northeast quarter of the northwest quarter and lot 2 of
8 Section 14, Town plat 1 North, Range 1 West, upon the 6th day
9 of February, 1872. That sometime in 1865, I sent my
10 certificate of receipt, entry No. 742, by J.B. Overton, I
11 believe, Receiver, together with an erroneous patent to the
12 Commissioner of the General Land Office for correction, and
13 received no receipt or -- or memorandum from him thereof
14 subscribed.
15 And then he witnesses it and he swore to it on the 29th
16 day of November, Territory of Utah, County of Salt Lake.
17 It's -- there's a new Register there by the name I think
18 of -- I'm guessing Master that's there. And then he has
19 below that, Charles Burns and Malcolm McDuff, each for
20 himself and not for one another, say that they are well
21 acquainted with George Tomlinson, who to their own knowledge
22 is the identical person who made the above-mentioned entry.
23 And that said Malcolm McDuff (Unintelligible) for himself
24 says that he was present and saw George Tomlinson deliver his
25 Receiver's receipt to the Receiver of the Land Office as by

1 him, and his (Unintelligible) set forth. Malcolm H. McDuff,
2 subscribed, Charles Burns, and was sworn to before me this
3 29th of -- I'm not sure of the month and I'm not sure of the
4 year, but I think it's 1880, something McMaster, Register.
5 Q. Okay. And who is the land Receiver and Register?
6 You've mentioned those individuals.
7 A. They are the employees of the United States of America
8 who were taking care of making sure everything is done
9 correctly with the preemption law.
10 Q. Okay.
11 A. And settlers on the land.
12 Q. Now, if I could refer you to Exhibit 19, was there a
13 letter sent by the Receiver and the Register both to the
14 Commissioner of the General Land Office in Washington, D.C.?
15 A. That is the one I did read, No. 19 --
16 Q. Okay.
17 A. -- and yes, it was signed by both of them, both
18 respectfully, something Overton, Receiver, and G-e-o R.
19 Maxwell, Register.
20 **MR. CALL:** Okay. Your Honor, subject to the prior -- to
21 the proffer that's being made, we would ask the Court to
22 receive the exhibits that have been referred to by the
23 witness, including Exhibit 19, and what was the other exhibit
24 there that you read from --
25 **THE COURT:** Let me indicate to you the exhibits that

1 I've received as part of the proffer. I've received 2, 6, 7,
2 8, 9, 12, 13, 19, and 20. And although they are not received
3 for the purpose of the matter that is here before the Court,
4 they will be received and retained in the record for the
5 purpose of the proffer.
6 **MR. CALL:** Thank you. Was that Exhibit 20 that you were
7 referring to?
8 **THE COURT:** That was the Tomlinson patent.
9 **Q. (BY MR. CALL)** Is that what you were reading from was --
10 **A.** No. The last one I was reading from --
11 **THE COURT:** Believe it was 19.
12 **THE WITNESS:** 19.
13 **Q. (BY MR. CALL)** Exhibit 19.
14 **A.** And the one that -- and No. 9 and 19, I've read from
15 both those. I have not read from the patent yet. That's No.
16 20.
17 **Q.** No, I -- we're coming to that.
18 **A.** Okay.
19 **Q.** I just wanted to make sure that we had that other
20 exhibit that you read from in here. Was that No. 9 that you
21 were reading from?
22 **A.** Just now or before, sir?
23 **Q.** Just -- just now, the last one that you finished.
24 **A.** The last one -- well, we moved from No. 9 and that
25 letter of 1880, we moved back and talked about briefly No. 19

1 again.
2 **Q.** Okay. I was referring to the one that indicated that
3 he'd been -- excuse me, that he'd been on the ground since
4 1865.
5 **A.** Well, that -- that was number -- it's right after No. 9,
6 so I would assume that that's -- let's take a look.
7 **THE COURT:** Believe it's 19.
8 **THE WITNESS:** 19 is the one from those. And that's --
9 those are more important, but the letter I read from 1865
10 where he states that -- I find it -- that may be in my files,
11 but not in here.
12 **Q.** **(BY MR. CALL)** Do you have a copy of that document?
13 **A.** I do.
14 **Q.** Can I look at that?
15 **A.** Yes. That's the one that mentions the 1865.
16 **Q.** Can I take this out and have it marked as an exhibit?
17 **A.** Sure.
18 **THE COURT:** You know, it appears to be redundant --
19 **MR. CALL:** Okay.
20 **THE COURT:** -- because he's read that before from other
21 sources.
22 **MR. CALL:** Okay.
23 **THE COURT:** So let's don't spend time doing that.
24 **Q.** **(BY MR. CALL)** Okay, Mr. Elliott, based on those events
25 and the determination made by the Land Office, was there a

1 patent that was issued to Mr. Elliott -- or to Mr. Tomlinson?
2 **A.** Yes, there was.
3 **Q.** And before we get to that, let me just ask, you've gone
4 through, you've read a lot of legal descriptions when you
5 have recited these documents upon which you have based your
6 opinion or your analysis. Do those legal descriptions
7 include the property which is referred to on your map as the
8 Weiser property?
9 **A.** Yes. The Weiser property falls within the west half of
10 the northeast quarter of Section 14, Township 1 North, Range
11 1 West, Salt Lake Basin Meridian, and it definitely is within
12 the property that they're talking about here with Tomlinson.
13 **MR. DEVASHRAYEE:** Is this still part of the proffer?
14 **MR. CALL:** This is part of the proffer --
15 **THE COURT:** Still part of the proffer.
16 **MR. CALL:** (Unintelligible)
17 **THE COURT:** As far as I -- let us know when that ends,
18 will you?
19 **MR. CALL:** I will, your honor.
20 **THE COURT:** Hope that ends sometime soon.
21 **Q.** **(BY MR. CALL)** Okay. Would you then identify the patent
22 that was received by Mr. Tomlinson?
23 **A.** Yes, No. 20 is the patent that was received by
24 Mr. George Tomlinson, September the 25th, 1873.
25 **Q.** And is that patent duly recorded on the records of the

1 county?
2 **A.** It is. It's recorded in Book C, page 458 of the Davis
3 County Recorder's Office.
4 **MR. CALL:** We move, your Honor, for admission of that
5 exhibit based on the same proffer.
6 **THE COURT:** 20 is received under the same limitation and
7 solely for the purpose of the proffer.
8 **Q. (BY MR. CALL)** Since, Mr. Elliott -- and this is part of
9 the proffer as well. I'll let the Court know when we're
10 finished. But since the patent was received, has the county
11 considered this property to be privately owned since that
12 time?
13 **A.** Yes, we've considered it as private property. We've
14 taxed it as the property throughout the years. We still show
15 on the present record that these individuals own those
16 properties that -- that have come down from the Tomlinson
17 patent, the properties.
18 **Q.** Is there anything in the county records that indicated
19 that -- that this property was transferred to the Utah
20 Central Railroad?
21 **A.** Nothing in the records. There are maps that were
22 prepared by Oregon Shortline Railroad where they claimed it,
23 because they couldn't find a deed, I assume. That's an
24 assumption on my part, but they did on their map say that it
25 was -- they got it through the December 15th, 1870, date.

1 **Q.** And on your map, do you -- do the records of the county
2 reflect that the Denver Rio Grande actually purchased right
3 of ways from Tomlinson or his successors in interest?
4 **A.** They did. They purchased both from Thomas Hancock and
5 George Tomlinson their strip of grounds that lie immediately
6 west of the hundred-foot strip of the Utah Central Railroad.
7 **Q.** Okay. And are those right of ways, were those
8 properties that that railroad purchased, are they within the
9 400-foot right of way that has been asserted by the Railroad
10 or that has been determined to exist by the Court?
11 **A.** Yes, they are. They fall within that 400-foot corridor.
12 **Q.** And have you attached copies of those deeds?
13 **A.** Yes. They're --
14 **Q.** Which deeds are those?
15 **A.** Exhibit No. 5.
16 **Q.** Can you explain that document please.
17 **A.** I think it's --
18 **Q.** You don't have to read it, but if you could just explain
19 what it is.
20 **A.** It is a deed -- excuse me, No. 5 is not the correct one.
21 That's on the other side of the Great Salt Lake and Hot
22 Springs Railway Company.
23 **Q.** Okay.
24 **A.** That also falls within the 400-foot corridor somewhat,
25 but the Denver and Rio Grande ones are No. 32, No. 33, and

1 No. 34.
2 **Q.** Okay. Let me have you turn to Exhibit 32, if you would
3 please.
4 **A.** Okay.
5 **Q.** Would you just -- just very -- without reading it, would
6 you just explain what that -- what that conveyance was as
7 reflected on the county records.
8 **A.** According to county records, Book H, page 32 of the
9 County Recorder's Office, George and Matilda Tomlinson --
10 well, they got George and M. Tomlinson, to the Denver and Rio
11 Grande Railroad Company.
12 **Q.** Okay.
13 **A.** And the date was 16th day of May, 1883.
14 **Q.** Okay. And they're conveying to whom?
15 **A.** They are conveying the property to Denver and Rio Grande
16 Western Railroad.
17 **Q.** And when you say the property, you're not referring to
18 all the Tomlinson property, you're referring to this
19 property --
20 **A.** No, just -- just for that area where the railroad went
21 through Tomlinson's property.
22 **Q.** On the west side of their property.
23 **A.** On the west side of the Utah Central Railroad.
24 **Q.** And Exhibit -- what was the other exhibit you referenced
25 where property was sold to the Denver and Rio Grande within

1 the 400-foot right of way?
2 **A.** One of them was 33.
3 **Q.** Okay. I think -- believe you mentioned 34.
4 **A.** And also, yeah, 34. And those were -- those were both
5 deeded by Mr. Tom Hancock to the Denver and Rio Grande
6 Western Railroad Company. Properties that also fall within
7 the 400-foot corridor.
8 **Q.** Okay. And did Mr. Hancock obtain his interest from Mr.
9 Tomlinson?
10 **A.** He -- he obtained his interest from Mr. Malcolm McDuff,
11 who obtained his interest from George w. Tomlinson.
12 **Q.** And so these -- if I understand your testimony
13 correctly, the records reflect that the Denver Rio Grande
14 Railroad purchased these properties from either Mr. Tomlinson
15 or his successor in interest --
16 **A.** That is --
17 **Q.** -- as reflected on your map.
18 **A.** That is correct according to the records of the Davis
19 County Recorder's office.
20 **MR. CALL:** Okay. We'd move for the admission of those
21 exhibits on the same condition, your Honor.
22 **THE COURT:** 33 and 34 have already been received as part
23 of the other testimony relative to the deeds. It was
24 limited. I will receive 32 only for the purpose of the
25 proffer.

1 **Q. (BY MR. CALL)** Okay. Now, Mr. Elliott, I believe you've
2 indicated, and I would just like some further clarification
3 as to properties that exist within this 400-foot corridor
4 from the Salt Lake County line to the Weber County line.
5 **A.** Yes.
6 **Q.** I believe you indicated that there -- that you have
7 taken the time and have looked at deeds within that corridor
8 and patent dates to see if this -- the events that occurred
9 with respect to Mr. Tomlinson's property is similar or
10 dissimilar to those other properties; is that correct?
11 **A.** That is correct. They --
12 **Q.** What have you -- what have you determined?
13 **A.** There's many different ways that they've taken property.
14 Some were the homestead, some were through the college funds,
15 some even purchased through the same process from the Union
16 Pacific Railroad because they owned lands in this area also.
17 But it's -- but a lot of them are preemptioned, like
18 Tomlinsons. And the thing that I noticed most is that,
19 again, I stress that the majority of the patents, most of the
20 patents, not all of them, but most of them received their
21 actual patent from the United States government after
22 December the 15th, 1870.
23 **Q.** And do those records, at least the ones that you've
24 looked at, do the county records reflect that those
25 properties are still privately owned on the records of the

1 county?
2 **A.** Yes, they are.
3 **Q.** Okay. And is it your opinion as the County Surveyor
4 that those properties were not public domain or public ground
5 in December of 1870?
6 **A.** The one they made themself through -- most of them took
7 from the settler a right of way through there a hundred foot
8 wide.
9 **Q.** By purchase?
10 **A.** By purchase. But again, the patent dates fall -- fall
11 after December 15th, 1870, and unless you go back and request
12 from the National Archives the information in relationship to
13 that patent, then everything falls into place. They make
14 their declaration, they prove up on it, they are possessing
15 it, they have neighbors that testify to that, that they're on
16 it and they're having it. And finally, they get the patent,
17 but the patent doesn't come immediately. It takes a process
18 of time.
19 **Q.** I understand. If -- if a determination were made or is
20 made that the patent is the controlling date, could you
21 explain to the Court approximately what percentage of ground
22 between Salt Lake County and Weber County would be perhaps
23 affected by that determination?
24 **A.** I think I'd be safe if I said at least 70 percent would
25 be affected by that act.

1 **Q.** And just for clarification, that is, you're saying that
2 the patents on approximately 70 percent of the properties
3 between Salt Lake County and Weber County were received after
4 the December 15th, 1870 act?
5 **A.** That is correct.
6 **Q.** But that they're treated as private property for
7 purposes of the county because of the preemptive or homestead
8 or other claims that existed before the patent was issued.
9 **A.** The county doesn't have the records of the archives
10 unless they send for them.
11 **Q.** Yeah.
12 **A.** In our office, we've sent for some of those of different
13 parcels. I've -- as I mentioned before, I'm impressed with
14 the records kept by the National Archives. But the patent,
15 again, is not the beginning of ownership in this case. It's
16 like a contract. It's the conclusion. And if I make a
17 contract with you and I follow through all the steps, then I
18 am entitled to have that automobile or piece of property at
19 the end of that time. And that's what the patent does with
20 all these individuals through Davis County.
21 **Q.** And the same is true with Mr. Tomlinson in this case.
22 **A.** Yeah, he's no different.
23 **Q.** Okay.
24 **A.** Except the only difference I can see with Mr. Tomlinson
25 is that with all the confusion they did not, or we've never

1 found as of yet, a deed to Utah Central Railroad. But that
2 is not enough reason to say it's not private land.
3 **Q.** Right. And I believe -- did you testify before -- and I
4 apologize if I've asked this, but did you indicate that the
5 records also indicated that the Utah Central Railroad
6 negotiated and actually purchased a portion of the land
7 within -- that's adjacent from Mr. Tomlinson?
8 **A.** No -- well, yeah, it's his land, but they got it from
9 another man that declared -- made his declaration -- a
10 declaratory statement, Pomantier --
11 **Q.** Okay.
12 **A.** -- and then lost it through -- through the Land Office.
13 They wouldn't give him land. But yes, they took a deed from
14 him for one-half of it through Tomlinson's property, Utah
15 Central Railroad did.
16 **Q.** So the county records reflect that the Utah Central
17 Railroad purchased or purport -- or purchased a deed --
18 **A.** From Louis L. Pomantier, yes.
19 **Q.** Okay. As to property that falls within the scope of Mr.
20 Tomlinson's land.
21 **A.** Yes, absolutely.
22 **Q.** And that was one of the -- I believe -- was that one of
23 the exhibits that you presented?
24 **A.** It was.
25 **Q.** Can you identify that very quickly so we might have that

1 admitted.
2 **A.** I think it's already been admitted, but I'm not sure.
3 **THE COURT:** Which one is it?
4 **THE WITNESS:** It's -- it's where he gets the deed from
5 the Railroad. It's No. 4.
6 **THE COURT:** That has been --
7 **THE WITNESS:** Right.
8 **THE COURT:** -- referred to, but it -- and has been
9 received.
10 **THE WITNESS:** Yeah.
11 **Q. (BY MR. CALL)** Okay. We -- that's No. 4?
12 **A.** That's No. 4 of the exhibit.
13 **Q.** Okay.
14 **THE COURT:** I show that's the Louis deed; is that
15 correct?
16 **THE WITNESS:** That's a Louis Pomantier to Utah Central
17 Railroad, that is correct, Judge.
18 **Q. (BY MR. CALL)** And this, this is the deed we've just
19 referenced, is it reflected on your chart somewhere in some
20 color?
21 **A.** Yes, it's the one in yellow. It covers one-half of
22 Tomlinson's property, north south.
23 **Q.** And so it does actually -- the piece that the Utah
24 Central was purchasing actually is adjacent to the Weiser
25 boundary.

1 **A.** That is correct. Again, you need to understand the
2 des -- excuse me. The descriptions as given back then were
3 not tied -- as it went through the Utah Central Railroad,
4 once in a while I found where they tied it to a section
5 corner or a quarter corner. Most the time, like here, they
6 just said 50 foot each side of the survey line or center of
7 the road through the south half of the northeast quarter of
8 Section 14, Township 1 North, Range 1 West. And so they --
9 and so we (Unintelligible) where it's at by the other deeds.
10 **Q.** Okay. And is that generally acceptable in your
11 practice --
12 **A.** Well, yes --
13 **Q.** -- in these kind of ancient matters?
14 **A.** -- because that's really where it's at. And they got 50
15 feet each side of it as they went through the -- according to
16 Pomantier's deed, but Pomantier's deed became non-useful with
17 the action of the U.S. Land Surveyor's Office.
18 **Q.** And that's because Mr. Tomlinson's claim was determined
19 to be --
20 **A.** Superior.
21 **Q.** -- superior to that of Mr. Pomantier.
22 **A.** Yeah, he proved -- did everything he had to do to obtain
23 that patent.
24 **MR. CALL:** Okay. We would on the same conditions move
25 for the admission of Exhibit 4, your Honor.

1 **THE COURT:** It's already been received.
2 **MR. CALL:** Okay. May I have just one minute?
3 **THE COURT:** Uh-huh.
4 **Q. (BY MR. CALL)** Okay. Now, Mr. Elliott, it's my
5 understanding that you've also made some calculations with
6 respect --
7 **THE COURT:** Is this still part of the proffer?
8 **MR. CALL:** This is not.
9 **THE COURT:** Okay. I want to give Mr. Devashrayee an
10 opportunity to ask any questions as a part of the proffer.
11 **MR. CALL:** Okay.
12 **MR. DEVASHRAYEE:** (Mr. Devashrayee stands away from the
13 microphone and is difficult to hear.) You know, I really --
14 I guess I wanna make a comment first just for the record,
15 that it be noted that there was a lot of leading going on
16 (Unintelligible) legal conclusions made. I object to those
17 being made during the proffer, just for the record. As far
18 as the actual proffer's concerned and what Mr. Elliott was
19 making -- or was testifying to, it really becomes a legal
20 issue, which I probably (Unintelligible) ask him to assume --
21 make some assumptions on my cross-examination. So I think
22 that's what I'm gonna do, and I'm gonna leave it at that.
23 **EXAMINATION**
24 **BY THE COURT:**
25 **Q.** Okay. I'm going to ask a few questions because I think

1 the record needs to be clarified. First of all, Mr. Elliott,
2 if you'll look at the timeline which you've been referred to
3 relative to the preemption and patent process. You testified
4 that the act of Congress which created the easement occurred
5 on December 15th, 1870; is that right?
6 **A.** That's for Utah Central Railroad.
7 **Q.** Yes.
8 **A.** Yes.
9 **Q.** Other than the declaration statement and the declaration
10 of intent to be a U.S. citizen, were there any of those steps
11 that had been carried out by Mr. Tomlinson prior to December,
12 1870? That's a yes or no question.
13 **A.** I would say -- I don't know how to answer yes because --
14 or no --
15 **Q.** It's a yes or no question, Mr. Elliott, and I'll --
16 **A.** Okay.
17 **Q.** -- just review them with you. Step 1 was the
18 declaration statement.
19 **A.** Okay.
20 **Q.** He had made that apparently in 1869, based upon your
21 testimony.
22 **A.** That's correct.
23 **Q.** No. 2 was the declaration of intent to be a citizen,
24 which was made in 1869. Step 3 was the proof of preemption.
25 That was done, according to your testimony, on July 6th,

1872. Statement of no other preemption of claim was done February 6th, 1872.

A. Is that one -- let me look. That's number 6?

Q. Uh-huh.

A. Hold on just a minute.

Q. No, that's not No. 6. That's the statement of preemption. Your testimony is clearly that the only two steps that he had taken of all of those steps was the declaration statement and the intent to file to be a U.S. citizen. Would that be correct?

A. Yes.

Q. Okay.

A. May I --

Q. No. It's a yes or no question.

A. Okay.

Q. Was there -- the patent in this matter was not issued until when?

A. It was -- it was -- we'd have to look for sure, but I think it's September the 25th of '73, but let's check that. I don't want --

Q. I think that's what it would indicate, so it was long after 1870; is that correct?

A. This is correct.

Q. Anything from the records that you have reviewed that indicated that any improvements, either the home that was

1 apparently placed there in -- later or the cultivation
2 occurred on any of the easement that was included within the
3 400-foot right of way? Do you have any information from the
4 record that you can recall?
5 **A.** Can I read -- refer to that again? I think we need to
6 refer to No. 6.
7 **Q.** You can do that if you'd like to.
8 **A.** Okay. This is George Tomlinson's having his neighbor or
9 someone, a citizen, anyway, Thomas Hancock testify --
10 **Q.** I realize that, but is there anything from that record
11 that indicates to you where on the what, hundred and some odd
12 acres it was located?
13 **A.** The 150.5 acres?
14 **Q.** Uh-huh.
15 **A.** The home, you mean?
16 **Q.** Yeah.
17 **A.** Prior to the --
18 **Q.** Or the improvements?
19 **A.** You mean prior to this?
20 **Q.** Yes. Is there anything from the record at all that
21 indicates where on the hundred and -- what is it? 128 -- 150
22 acres?
23 **A.** 150.5 acres --
24 **Q.** The improvements were located. That's a yes or no
25 question.

1 **A.** When you say -- now again, rephrase it then. I --
2 **Q.** Were there -- is there anything from the record that
3 you've seen that indicates where the home or the cultivation
4 occurred on that 150 acres?
5 **A.** The cultivation, your Honor, was 50 acres, which was --
6 **Q.** I realize that, but do you know where it was from the
7 records?
8 **A.** I can pretty well tell where the home was at, but it's
9 after the fact with the next deed.
10 **Q.** Your answer is no then; is that right?
11 **A.** Not -- not at December 15th, 1870.
12 **Q.** Okay. Let's -- I have a couple of other questions I
13 wanna ask --
14 **A.** Okay.
15 **Q.** -- because I think the record needs to be clarified.
16 It's true that at the time the declaration was filed in 1869,
17 based upon your testimony, that there were two other
18 competing declarations on the property; is that true?
19 **A.** That is correct.
20 **Q.** The other question I would ask, do you have any
21 knowledge of whether or not D. and R.G. Railroad was ever
22 granted any kind of an easement along its right of way?
23 **A.** Only by these individuals at that time. I'm looking at
24 the old records now.
25 **Q.** I understand, but there was never any act of Congress

1 that gave the D. and R.G. any kind of right of way, was
2 there?
3 **A.** No. That's why they purchased it.
4 **Q.** They had to purchase it, didn't they --
5 **A.** That's right.
6 **Q.** -- all of it?
7 **A.** Yes.
8 **Q.** Okay. The fourth question is, that I have in that
9 regard, the County Recorder's Office lists property based
10 upon fee title ownership; is that correct?
11 **A.** Most of the time that's absolutely correct, yes.
12 **Q.** And records any easement thereon as a burden on that fee
13 title; is that correct?
14 **A.** That is correct.
15 **Q.** Based upon that in Davis County then and in any county,
16 at least where Utah Central Railroad goes, the private
17 property owner would be listed under the easement of the
18 Railroad; is that correct?
19 **A.** They aren't. Do you follow what -- they're not listed
20 under any easement of the Railroad in our records.
21 **Q.** So do you exclude all of the easement property of the
22 Railroad from the private property owner in Davis County?
23 **A.** Yes. It does not show that they have 200 feet each
24 side --
25 **Q.** No, no, no, what I'm saying, but the private property

1 owner goes right up to the Railroad, doesn't he?
2 **A.** Up to the hundred foot, yes.
3 **Q.** It doesn't show the easement.
4 **A.** That is correct.
5 **THE COURT:** Okay. I have no further questions.
6 **REDIRECT EXAMINATION**
7 **BY MR. CALL:**
8 **Q.** Mr. Elliott -- and maybe we need to mark that exhibit.
9 I thought you had a document that you referred to that
10 indicated that Mr. Tomlinson had been on that property since
11 1865; isn't that correct?
12 **A.** Well, that is true, yeah.
13 **Q.** We'd like to mark that. Do you have that --
14 **THE COURT:** But that's not the issue, Mister --
15 **MR. CALL:** I'd still like to mark that exhibit. It
16 shows that -- doesn't that show that --
17 **THE COURT:** I think he already has that in the
18 evidence --
19 **THE WITNESS:** Well, I think you took it --
20 **THE COURT:** -- and he's read from various documents --
21 **THE WITNESS:** I think you took it from me and had it
22 entered.
23 **MR. CALL:** I haven't had that entered. You read it and
24 I'd like to -- we can mark it during a break, but I'd like to
25 just have --

1 **THE COURT:** You're welcome to have that in there. I
2 have no objection to that. We'll --
3 **MR. CALL:** Okay.
4 **THE COURT:** -- make it as part of the proffer. I think
5 there is testimony to the effect that he was on the property
6 since 1840.
7 **Q. (BY MR. CALL)** Right. And -- and Mister -- Mr. Elliott,
8 could I just address for just a minute the issue about the
9 Land Office? I believe you testified that that Land Office
10 in the Territory of Utah had not opened until 1869; is that
11 correct?
12 **A.** Having read recently in the past, it -- it indicated the
13 Utah office was opened in 1869.
14 **Q.** Okay. And is it your understanding that prior to that
15 time, there was nowhere prior to the time that these
16 preemptions and so forth were filed in 1869, to your
17 understanding of the matter, there was noplace where
18 Mr. Tomlinson could have filed anything prior to that time
19 with respect to his claim to the property?
20 **A.** I would think not.
21 **Q.** Okay. And is it your opinion and testimony today, Mr.
22 Elliott, that the records indicate that Mr. Tomlinson was
23 physically on that property prior to 1870?
24 **A.** Again, we can only go by the testimony of Mr. Thomas
25 Hancock, and he indicates that he's been there for a long

1 time. He talks about the number of improvements. I mean, I
2 think it's 200 rods of fencing. That's 1897 and a half feet
3 of fencing. He talks about 50 acres as being cultivated, and
4 they didn't have a John Deere tractor. You used an oxen or a
5 horse or a mule. And you -- to put 50 acres under
6 cultivation and plow doesn't happen in a couple of days.
7 **Q.** Okay. And with respect to the fact that these -- these
8 documents, some of them that you've looked to, refer to 1840,
9 what's your understanding with respect to that? Is that the
10 form that was used or could you give some insight or help to
11 the Court as to why it's referring to 1840 in some of those
12 records?
13 **A.** I think the reason -- this is my opinion. I've looked
14 at Edmund Webb's and also George Tomlinson's, and they're
15 both the same -- they're almost mirrors of each other as they
16 go through this process, and they both say since, which means
17 after the date of 1840.
18 **Q.** Okay. Is that -- is that -- is it your understanding
19 that there -- that the reason that's there is that has
20 something to do with the 1840 preemption act or something of
21 that nature? Or what's your understanding as to why that's
22 cited?
23 **A.** Again -- again, reading books in relationship to
24 preemption, they made the law specific so it didn't cover
25 some squatters that were already on the ground in 1830 and

1 1840. And I think that that was probably their intent when
2 they put that date in there.
3 **Q.** So it's not your testimony that he was on the ground --
4 it's not your reading of the documents or your opinion that
5 he's asserting that he was on the ground in 1840.
6 **A.** No. It's since.
7 **Q.** Since 1840.
8 **A.** Yeah.
9 **Q.** And from the records that you've reviewed, it indicates
10 that he was on the ground at least as early as 1865.
11 **A.** That is correct.
12 **Q.** Now -- and then I believe you also and the Court
13 referenced the declaration of his intent to be a citizen of
14 the United States; is that correct?
15 **A.** That's correct.
16 **Q.** Is -- to your knowledge, is there any reason for that,
17 such a declaration to be recorded with the Land Office other
18 than to perfect a preemption claim?
19 **A.** That's part of the process.
20 **Q.** Of the preemption process?
21 **A.** He had to do that to get his land.
22 **Q.** Now, Mr. Elliott, it's my understanding that you have
23 also performed some calculations to address how much of the
24 Weiser property --
25 **THE COURT:** Now, wait a minute. Is that the end of the

1 proffer?
2 **MR. CALL:** Oh, it is, your Honor.
3 **THE COURT:** Okay. Anything further, Mr. Devashrayee, as
4 far as the proffer?
5 **MR. DEVASHRAYEE:** No, your Honor.
6 **THE COURT:** Okay. That testimony then that -- up to
7 this point is considered to be part of the proffer, is not to
8 be considered by this Court in resolution of the issue that
9 is before the Court at this time, but will be a part of the
10 record for any purpose subsequent to this.
11 **MR. CALL:** Thank you.
12 **THE COURT:** So now we'll go back to the testimony
13 relative to other matters, and you may proceed.
14 **MR. CALL:** Thank you, your Honor. And I just wanna
15 indicate to the court, if I might, that we very much
16 appreciate that because of the time that's been spent here
17 and these -- these new matters, as the Court knows, that
18 these records are old and -- and it's not easy to go through
19 all of this, and we appreciate the Court's indulgence in
20 allowing all of this important evidence to be placed on the
21 record for further proceedings, though not for today's issue.
22 **Q. (BY MR. CALL)** Mr. Elliott, it's my understanding that
23 you have also performed a calculation as to the amount of
24 property that would -- amount of the Weiser property as
25 reflected on your map that lies outside of the 400-foot

1 corridor.
2 **A.** Yes. Can I read this?
3 **Q.** Certainly.
4 **A.** I, Max B. Elliott, professional land surveyor, No.
5 141269 dash 2201, in the State of Utah, hereby certify that I
6 have on this day, Wednesday, December the 7th, 2005,
7 calculated the area that is outside the 200 feet from the
8 centerline of Utah Central Railroad on the Weiser property.
9 (Unintelligible) warranty deed found in Book 1-C, page 519,
10 Thomas Hancock and his wife, Sarah Ann Hancock, to Joseph W.
11 Mellon. The area equals 2376.66 square feet or 0.0546 acres.
12 **Q.** Okay. Which deeds do you refer -- were you referring to
13 when you made that opinion?
14 **A.** I was referring to the deed of Mr. Hancock that he and
15 his wife deeded to Joseph W. Mellon.
16 **Q.** Could I -- I just need to get a number on that so that I
17 can move to have that admitted.
18 **A.** It was found in Book 1-C, page 519 of the --
19 **THE COURT:** Have we talked about that deed before now --
20 **THE WITNESS:** Yes.
21 **THE COURT:** -- Mr. Elliott? What exhibit was it? I'm
22 trying to find it here. Was it the No. 5, the Hancock deed?
23 **THE WITNESS:** No. I think -- I think we have not
24 mentioned it, your Honor.
25 **THE COURT:** Okay.

1 **THE WITNESS:** It's No. 36. Maybe it has been entered.
2 I'm not sure.
3 **THE COURT:** It has been entered.
4 **THE WITNESS:** Okay.
5 **MR. CALL:** That's thirty -- I guess we'd move for the
6 admission of 36 outside the proffer.
7 **THE COURT:** It wasn't iss -- it wasn't offered in
8 conjunction with the proffer.
9 **MR. CALL:** Oh, okay. Thank you, your Honor.
10 **Q. (BY MR. CALL)** Did you consider -- in reaching that
11 opinion, did you consider the other deeds that you had --
12 which deeds in addition to that deed did you consider --
13 **A.** Again -- again, in coming to that conclusion, I looked
14 at the Denver and Rio Grande Railroad deed and description
15 that is on the west side of the hundred-foot corridor of the
16 Utah Central Railroad as per the deeds of Davis County.
17 **Q.** Okay. Which number is -- which deed is that?
18 I'm sorry, Mr. Elliott, we need to get these admitted
19 and we need to know what -- which of these documents you have
20 relied upon in making your opinion.
21 **A.** I think it's No. 33. I'll look fast and --
22 **THE COURT:** It is, and that has already been received.
23 **MR. CALL:** Okay. Outside the proffer?
24 **THE COURT:** Outside the proffer.
25 **Q. (BY MR. CALL)** Okay. Any of these other deeds that you

1 considered in making that determination?
2 **A.** No. Those two pretty well defined what was shown on the
3 rest of the records going through Davis County of the
4 hundred-foot corridor, and also the Mellon description
5 describes their west line as being the east line of the
6 O.S.L. Railroad Line.
7 **Q.** And which exhibit is the Mellow description?
8 **A.** That's the one we just --
9 **Q.** Is that 36?
10 **A.** I think it is. Let me look.
11 **THE COURT:** It is 36.
12 **THE WITNESS:** Okay.
13 **Q.** **(BY MR. CALL)** Okay. From Hancock to Joseph Mellon?
14 **A.** Yes.
15 **Q.** Okay. Did you -- did you look at any other -- I guess
16 you may have looked at other materials in formulating your
17 opinion? They don't necessarily have to be in the record,
18 but let me just --
19 **A.** No, I worked strictly -- I worked strictly from the
20 records of those two descriptions. And the Mellon
21 description, although it's old --
22 **Q.** Yes.
23 **A.** -- is well written. You don't usually find one that old
24 that has that good of closure.
25 **Q.** Okay. So again, in concluding, Mr. Elliott, it's your

1 opinion that there is 2376.66 square feet or .054 --
2 **A.** Sixth acre.
3 **Q.** -- sixth acres of property that lies outside of the
4 400-foot corridor that's been addressed in this case.
5 **A.** That is correct.
6 **MR. CALL:** Thank you, your honor. That's -- that's all
7 we have for right now from Mister --
8 **THE COURT:** You may cross-examine.
9 **MR. CALL:** -- Elliott.
10 **MR. DEVASHRAYEE:** Thank you, your honor. Move this up a
11 little closer.
12 **THE COURT:** It's pretty hard to move. You need to leave
13 it right there or you won't be in the video.
14 **MR. DEVASHRAYEE:** Okay. I'm good. I'm fine.
15 **CROSS-EXAMINATION**
16 **BY MR. DEVASHRAYEE:**
17 **Q.** Morning, Mr. Elliott.
18 **A.** Good morning, Jeff.
19 **Q.** Nice to see you again. Just a few questions really.
20 You haven't done a boundary survey.
21 **A.** I have not.
22 **Q.** And Exhibit 1, the plat that you've prepared, that's not
23 a survey.
24 **A.** That is not. It's compiled from the records of the
25 county.

1 **Q.** And you haven't been to the property. You haven't
2 actually walked the property.
3 **A.** I have not.
4 **Q.** Okay. Let's go ahead and take a look at that Exhibit 1
5 for a second.
6 May I approach, your Honor?
7 **THE COURT:** You may. You may wanna turn it a little bit
8 so Max can see it a little better.
9 **Q.** **(BY MR. DEVASHRAYEE)** All right. (Unintelligible) Mr.
10 Elliott. First of all, on this plat, you marked the 200 feet
11 width right of way on each side of centerline, correct?
12 **A.** That is correct.
13 **Q.** Okay. And that's referencing the 400-foot land grant --
14 **A.** Of December 15th, 1870, yes.
15 **Q.** I want to make -- I want you to make an assumption for
16 me, okay? I want you to assume, first of all, that the land
17 grant to Utah Central was a valid, effective land grant.
18 Okay? Is that fair? Can you make that assumption?
19 **A.** I can make that assumption.
20 **Q.** (Unintelligible) assumption. I want you to also make
21 (Unintelligible) --
22 **A.** Understanding that's just an assumption on your part.
23 **Q.** I want you to assume that it's supported by governing
24 law, okay?
25 **MR. CALL:** Your honor, I'm gonna have to object to the

1 form of these questions. He's not asking the witness factual
2 issues. He's asking him to make legal conclusions based on
3 assumptions.
4 **THE COURT:** Overrule the objection. Go ahead.
5 **Q. (BY MR. DEVASHRAYEE)** I want you to assume that it's
6 supported by governing law, okay? And that the patent date
7 is the critical date. Okay? For purposes of
8 (Unintelligible) that kind of thing. Is that okay? Is that
9 fair? Just make the assumption for me, okay?
10 **A.** I'm having a hard time making the assumption because it
11 doesn't correlate with what I know.
12 **THE COURT:** You don't have to worry about what you
13 know --
14 **THE WITNESS:** Okay. All right.
15 **THE COURT:** (Unintelligible)
16 **THE WITNESS:** All right. Making that assumption.
17 **Q. (BY MR. DEVASHRAYEE)** Just make the assumption that it's
18 supported, that that 400-foot land grant right of way is
19 support by a pronouncement of the United States Supreme
20 Court. I want you to make that assumption as well, okay?
21 Okay. If we make that assumption, then the only property
22 that we have that's depicted on your plat 1 -- on your plat,
23 Exhibit 1, is that small triangle --
24 **A.** That --
25 **Q.** -- that's outside of the right of way, correct? That

1 Mr. Weiser owns as you (unintelligible), correct?
2 **A.** That would be correct.
3 **Q.** Okay. Now, you know John Stall, correct?
4 **A.** I do know John.
5 **Q.** Okay. You've met him before.
6 **A.** Oh, yeah. I've known John for years.
7 **Q.** Okay. Now, Mr. Stall is -- he's done a boundary survey.
8 And he's been out to the property, all right? And Mr. Stall
9 calculates this square footage outside the 400-foot land
10 grant right of way as 1635 square feet, or .0375 acres.
11 Would you have any reason to disagree with Mr. Stall's
12 conclusions based on the fact that he's been out there and
13 he's done a survey?
14 **MR. CALL:** Your Honor, I just have to object to the form
15 of the question. This is cross-examination.
16 **THE COURT:** Overruled.
17 **THE WITNESS:** I haven't -- I have not looked at John's
18 survey. I have not looked at John's calculations. And until
19 I did that, I couldn't answer that.
20 **Q. (BY MR. DEVASHRAYEE)** Okay. Let me ask you this: It is
21 a small area, though.
22 **A.** Yes.
23 **Q.** (Unintelligible)
24 **A.** Yeah, (Unintelligible) not come with much.
25 **Q.** Could I see your -- I've never seen that before

1 (Unintelligible). Thank you. And the area you come up with,
2 2376.66 square feet or .05 (unintelligible) acres, that's
3 from your review of the deeds.
4 **A.** That is from the deeds, yes, absolutely.
5 **Q.** Okay. Now, we met a couple days ago --
6 **A.** We did.
7 **Q.** -- do you remember that?
8 **A.** I do.
9 **Q.** And I asked you when we met if you would take any
10 exception to where the centerline is depicted in the railroad
11 location maps. Do you remember when I asked you that?
12 **A.** And I -- and I don't have any problem with that.
13 **Q.** The railroad location maps that are on -- on file with
14 the Davis County Recorder.
15 **A.** That's correct.
16 **Q.** You take no issue (Unintelligible).
17 **A.** I have -- I have no issue.
18 **Q.** Okay.
19 **MR. CALL:** Your Honor, I guess I object again. This
20 goes well beyond the direct. He's asking --
21 **THE COURT:** Well, let me indicate that he can call him
22 back as his own witness --
23 **MR. CALL:** Right.
24 **THE COURT:** -- and in the interest of time, I'm gonna
25 allow him to go beyond that, and you're --

1 **MR. CALL:** Okay.
2 **THE COURT:** -- welcome to cross-examine or anything you
3 want to.
4 **MR. CALL:** Very well.
5 **THE COURT:** But I don't wanna have Mr. Elliott down here
6 for two days on things we --
7 **MR. CALL:** Okay.
8 **THE COURT:** -- can take care all at once.
9 **MR. CALL:** Okay.
10 **MR. DEVASHRAYEE:** Well, it is west of centerline,
11 that's -- that's --
12 **THE COURT:** And it is relevant. Go ahead.
13 **MR. DEVASHRAYEE:** Mister -- Mr. Elliott has testified to
14 the centerline.
15 **Q. (BY MR. DEVASHRAYEE)** Okay. If Mr. Stall has relied on
16 those railroad location maps to determine the centerline and
17 as a result determining the property that's lying outside of
18 the 400-foot land grant right of way, could you -- if he's
19 done that (Unintelligible) --
20 **A.** Let me --
21 **Q.** -- take any exception to the -- to his calculation of
22 the square footage of 635 square feet outside of the 400 land
23 grant right of way?
24 **A.** How much?
25 **Q.** Six -- 1635 square feet.

1 **A.** See, we're only talking -- and you don't realize how
2 small this is. We're not talking a lot of difference between
3 1600 and 2300 square feet.
4 **Q.** (Unintelligible)
5 **A.** It's not much property.
6 **THE COURT:** Mr. Elliott, you need to understand, it
7 isn't much, but that's why we're here.
8 **THE WITNESS:** Okay.
9 **THE COURT:** Okay.
10 **THE WITNESS:** But -- but there again, I would think that
11 probably if he has -- if he come up with a survey out there
12 on the ground that was two feet different than mine, my
13 calculations from the deed, it would easily create with the
14 distance that I calculate down along that sliver on the
15 west -- on the westerly side of what's outside of the 400
16 feet -- you follow me?
17 **Q. (BY MR. DEVASHRAYEE)** Right.
18 **A.** If he was off two or three feet in reality out there on
19 the ground from the de -- from the record, it would add up
20 probably to six, seven, eight hundred feet alone, square
21 feet.
22 **Q.** Okay. Just let me confirm.
23 **A.** Okay.
24 **Q.** First of all, I want you to assume -- you say you'd take
25 no exception with the centerlines depicted on the railroad

1 location maps, correct?
2 **A.** Yeah, because they're just a map.
3 **Q.** Okay. (Unintelligible) Okay. And let's say that
4 Mister -- let's say that Mister --
5 **A.** And let me -- let me say --
6 **Q.** No, hold on, Mr. Elliott. Let's just assume that Mr.
7 Stall relied on those railroad location maps to determine the
8 centerline, okay? And that he's been out to the property,
9 okay? And let's also -- I'm gonna tell you that Mr. Stall
10 really takes no exception to your eastern boundary of that --
11 that small triangle representing, as we're calling it, the
12 outside property or the property that Mr. Weiser's claiming,
13 okay? If that's true, if he agrees -- if he essentially
14 agrees with you on that boundary and he's taking the
15 centerline from the railroad location maps and his own
16 walking of the property, would you have any reason to dispute
17 his calculation of 635 square feet?
18 **A.** I wouldn't answer that until I looked at his survey and
19 his notes and calculated it myself. I've seen too many times
20 that surveyors have not been correct.
21 **Q.** Okay. And we're agreeing, though, it's a very small
22 piece of property.
23 **A.** Yeah, absolutely.
24 **MR. DEVASHRAYEE:** I'm done. Thank you, your Honor.
25 **THE COURT:** Redirect.

1 **MR. CALL:** We don't have redirect on that particular
2 issue.
3 **THE COURT:** You may step down, Mr. Elliott. Thank you.
4 **THE WITNESS:** Am I free to go?
5 **THE COURT:** You are free to go.
6 **THE WITNESS:** Thank you.
7 **MR. CALL:** We reserve the right recall Mr. Elliott on
8 rebuttal if necessary.
9 **THE COURT:** You understand that, Mr. Elliott? They'll
10 contact you if they need you back, but you don't need to stay
11 here.
12 **THE WITNESS:** All right.
13 **THE COURT:** Thanks for coming.
14 **MR. DEVASHRAYEE:** (Unintelligible)
15 **THE WITNESS:** Thank you, Jeff. Thanks, Steve.
16 **THE COURT:** Anything else you need? Got all your stuff?
17 Don't take any of our exhibits.
18 **THE WITNESS:** If I get it all, I'll be lucky.
19 **THE COURT:** Okay.
20 **THE WITNESS:** Thank you.
21 **THE COURT:** Call your next witness please.
22 **MR. CALL:** Can I have just one --
23 **THE COURT:** Sure.
24 **MR. CALL:** May we just take a minute break, your Honor?
25 **THE COURT:** Sure, we'll take a ten-minute break. We'll

1 be back at 11:10.

2 (The Court took a brief recess.)

3 **THE COURT:** We're back in session. Parties and counsel

4 are present. You may call your next witness, Mr. Call.

5 **MR. CALL:** Your honor, if I just may indicate to the

6 Court that the during the break, we have met, Mr. Devashrayee

7 and Ms. Peck and I, and we have settled this issue with

8 respect to the property. And we have stipulated that the

9 property that lies outside of the 400-foot corridor is 2000

10 square feet. And that I'll just indicate is just a

11 compromise between the 2377 feet testified to by Mr. Elliott

12 and the 1635 square feet that would have been testified to by

13 Mr. Stall.

14 And we've agreed that for purposes of that calculation,

15 that the centerline is the centerline that was indicated by

16 Mr. Stall in his document, but that centerline stipulation is

17 for that purpose and not for purposes of altering or changing

18 any of the testimony with respect to the deeds and the

19 records that were -- that was -- that was testified to by

20 Mister --

21 **THE COURT:** The proffered --

22 **MR. CALL:** The proffer --

23 **THE COURT:** -- information.

24 **MR. CALL:** -- yes.

25 **MR. DEVASHRAYEE:** Your Honor, can I just for the record,

1 I wanna specify the centerline that Mr. Stall specified.
2 **THE COURT:** Yes.
3 **MR. DEVASHRAYEE:** It is -- the centerline is located
4 366.62 feet east of the quarter corner common to Sections 11
5 and 14.
6 **THE COURT:** Section 11 and 14?
7 **MR. DEVASHRAYEE:** Sections 11 and 14. Right, John? Or
8 in other words, it's coincident with track No. 1 as shown on
9 the maps. And we just figured, your Honor, we're talking
10 about such a small piece of property, that it's not gonna
11 matter much in terms of the rest of the issues that -- we
12 figured that'd make you happy.
13 **THE COURT:** It does make me happy, and shows that you
14 are, as I believed all along, reasonable counsel when it gets
15 right down to it.
16 **MR. DEVASHRAYEE:** Your Honor, could I say one other --
17 Steve will agree here --
18 **THE COURT:** Yes.
19 **MR. DEVASHRAYEE:** -- just -- just because we stipulate
20 to this, it doesn't mean -- you know, we still have issues
21 of, you know, he still has his claims of trespass, forcible
22 detainer. We of course disagree with that. There's still
23 issues of why we're out on that property to begin with. That
24 has already been briefed. And then there's the issue of
25 valuation. It's after that, assuming that Mr. Weiser

1 prevails on those claims, so we got a couple more steps to
2 take, but this is a big one and now we can move on.
3 **THE COURT:** It does appear to be a significant one and
4 that we can move on to these other issues that I'm not sure
5 are any less complicated, but at least we have a beginning
6 point on those matters. Are we able to go on -- forward on
7 any of those at this time?
8 **MR. CALL:** I don't believe so. What we would like to
9 do, your Honor, is that -- is maybe agree on a briefing
10 schedule on some of the issues. I think before we address
11 damages and the trespass issues, we'd like an opportunity to
12 file a motion with the Court setting forth the points and
13 authorities that -- and the legal research that we have
14 gathered with respect to the effect of the preemption issue.
15 **THE COURT:** Okay. I am not gonna consider that,
16 Counsel. I've already ruled on that particular issue. I've
17 given you the opportunity to take the record. That should
18 have been before the Court a long time ago if you wanted to
19 raise those issues. I'm not gonna preclude you from keeping
20 them a part of the record so that as you wanna go up on
21 appeal, it's there, but I am not gonna reconsider that issue.
22 **MR. CALL:** But we would like at least the opportunity to
23 file a motion and have it denied so that the Court of Appeals
24 doesn't -- doesn't say, well, you should have filed your
25 motion under Rule 52 --

1 **THE COURT:** I have denied your motion right now, so you
2 don't need to go to the briefing expense. I've -- I'll rule
3 from the bench that I've already considered that matter.
4 I've ruled on it, and I'll deny your motion to reconsider
5 because I think that's what it is.
6 **MR. CALL:** I guess the concern that we would have, your
7 Honor, and if he could just as a procedural matter, if we
8 could just identify those issues, we could set it out in just
9 a very brief document so that it's in the record, so that
10 there isn't the assertion that we're trying to raise new
11 issues on appeal. Because it didn't come into evidence here,
12 we like -- if we could just file that document. But with
13 that said, we'll just do that to preserve the record and then
14 the Court can promptly deny it and -- and it's denied
15 already, but we'll just lodge that --
16 **THE COURT:** I have no objection to your doing that.
17 **MR. CALL:** -- filing that and then --
18 **MR. DEVASHRAYEE:** So I have to respond to it now?
19 **THE COURT:** If you want to respond, you can, but you
20 don't have to because I've already denied it.
21 **MR. DEVASHRAYEE:** Okay. Thank you.
22 **THE COURT:** All right. Now, the other thing is that --
23 that leaves the issue as to damages relative to this property
24 that we're talking about.
25 **MR. DEVASHRAYEE:** Well, no, your Honor. Still -- we

1 still have to -- they to get worthy (Unintelligible).
2 **THE COURT:** I'm saying that, but what I'm saying is, to
3 me, you've got an issue that is subject to being settled
4 between the parties. All right? You know what you're
5 talking about now. And so my encouragement is that you get
6 together and see if you can resolve that issue. If in fact
7 you can resolve that issue, we can enter a judgment, and we
8 could reserve the issue relative to this preemption issue if
9 you want to appeal that. But it could resolve this other
10 matter -- you know, even looking at some of these things
11 we're talking about, the question becomes whether or not you
12 can really justify going ahead and expending more time on the
13 question of damage. Really, it's not a significant matter
14 unless somehow that preemption issue is found to be valid.
15 **MR. DEVASHRAYEE:** Yes.
16 **THE COURT:** That's what I -- that's where I really think
17 we are in this matter. And so I would just ask you to look
18 at it from that perspective, see if you want to -- you can
19 come to a resolution of that damage issue, and even if --
20 like I say, if you want to reserve for the purposes of appeal
21 the preemption issue, you can do that. But you may wanna
22 look at it from that perspective. But I would like to set a
23 cutoff time like -- this has been languishing for a long
24 time, my fault, you fault, all of us. We need to get this
25 resolved. And so what I will do, I'd like to give you some

1 time to see if you can resolve it. Will 30 days be enough
2 time to let you look at it? We're into the holidays and I
3 know it's a difficult time, but I'll give you what time you
4 need, but I just want to move it along and get it resolved.
5 **MR. DEVASHRAYEE:** Could I have more time? I
6 (Unintelligible) lot of time to dedicate to this issue for
7 the next 30 -- could we have 60 days?
8 **THE COURT:** It's up to you two --
9 **MR. CALL:** We'd go even --
10 **THE COURT:** We've been going for 12 years. Haven't we?
11 **MR. CALL:** What's a few more. Yeah, we'd go -- why
12 don't we go through the end of February.
13 **THE COURT:** Could you get my -- Val, could you go get my
14 2006 calendar?
15 **MR. CALL:** We would, your Honor -- in order to determine
16 the issue of value, we had previously talked about and had
17 requested copies of the records showing how much the property
18 had been sold for. And the Court reserved on that. Wanted
19 to determine if there was any property that lied outside of
20 the right of way. In light of the fact that the parties have
21 stipulated that there is indeed property that's outside of
22 the right of way, we would like to receive copies of those
23 documents so we can see what this -- we believe it was an
24 arm's length transaction between the Railroad and the State
25 of Utah. We'd like to see those documents --

1 **THE COURT:** Well --
2 **MR. CALL:** -- so we can see the values.
3 **THE COURT:** -- the only concern I have about that is
4 we're talking about such a small portion. I'm not sure I'm
5 willing to let you look at that. Mr. Devashrayee, what's the
6 position of the defendant in this matter?
7 **MR. DEVASHRAYEE:** I'm didn't -- I'm sorry, I didn't hear
8 the first part of it. What were you wanting?
9 **THE COURT:** They wanna know how much you paid for the
10 property.
11 **MR. DEVASHRAYEE:** I don't want (unintelligible) that's
12 irrelevant. I'm not gonna give you those documents.
13 **THE COURT:** It is -- you know, the issue is -- issue is
14 not right now. The issue is when this matter was filed in
15 1991.
16 **MR. CALL:** Well, I would agree --
17 **THE COURT:** We're talking about value.
18 **MR. CALL:** I would agree with the issue of the value at
19 that time except that Mr. Weiser's still the owner of the
20 property that lies outside, and if there's been a purported
21 sale of that property today, that's still his property. That
22 evidence would be relevant to damages.
23 **THE COURT:** At this point I will not allow it to be
24 discovered. All right? Go from there, and if I think
25 there's some reason to look at it, I'll be glad to do that.

1 But at this point, I'll deny that request.
2 Let's set a schedule. And you are right, if it's a
3 continuing trespass, damage would be relevant, but at this
4 point, I'm gonna deny that request.
5 I'll give you -- if you want 60 days, what if I give you
6 until the 10th of February to see what you can work out on
7 the matter. Is that enough time?
8 **MR. CALL:** I believe we indicated if we could have
9 through the end of February.
10 **THE COURT:** Do you want that -- you know, I'll let you
11 set the schedule --
12 **MR. CALL:** The end of February's fine.
13 **THE COURT:** -- as long as we've got a schedule, all
14 right? So we'll go -- I'll give you until the end of
15 February, which is the 28th, as a period of settlement. We
16 have the issues remaining that have been indicated. My
17 question would be, do you wish further evidentiary hearing on
18 those issues or do you consider them primarily to be ones
19 of -- of subject to briefing and maybe you could reach
20 stipulated facts? It's up to you, I'll do it either way.
21 **MR. DEVASHRAYEE:** Your Honor, I have already briefed
22 these issues in my brief (unintelligible) out. It's called
23 brief of property regarding property --
24 **THE COURT:** I think we've briefed all the issues in this
25 case several times.

1 **MR. DEVASHRAYEE:** And if Steve wants to brief them
2 again, I guess we can, but I'm content for you just to rule
3 from the brief.
4 **MR. CALL:** Yeah, I think that we have briefed the
5 issues. Our claims are: We claim for quiet title, an
6 issue -- and order for restitution as to that part of our
7 property that allows that -- lies outside, we've got a
8 forcible detainer claim, we have a treble damages claim, an
9 intentional trespass claim, a claim for unjust enrichment,
10 and a claim for punitive damages on that little parcel. So I
11 guess what we would anticipate would be giving -- having an
12 evidentiary hearing. We've already briefed out the liability
13 issues, and there's no dispute as to possession or the amount
14 of property that's outside, so we'd be talking just the
15 numbers with respect to those claims.
16 **MR. DEVASHRAYEE:** Guess we could have an evidentiary
17 hearing on -- on those issues. I mean I would present
18 evidence and am prepared to even at this hearing, although I
19 know that wasn't -- I didn't know how far the Court was gonna
20 go, but I was gonna show -- I have exhibits that were gonna
21 indicate no chain of our title to that property.
22 **THE COURT:** This is from UDOT that you're claiming?
23 **MR. DEVASHRAYEE:** Right, exactly. Now, that's in the
24 form of an affidavit, so the evidence is in. So I'm not
25 sure -- maybe just an ordinarily hearing without having to be

1 evidentiary, that may be good enough.

2 **THE COURT:** Well, I'll tell you what I'm gonna do. I'm

3 gonna continue it. I'll give you until the end of February

4 to see what you can do about resolving it. At that time, I

5 will get you two on a conference call and we'll set up a

6 schedule for how we're gonna handle the balance --

7 **MR. DEVASHRAYEE:** Okay.

8 **MR. CALL:** (Unintelligible)

9 **THE COURT:** -- of the case. And between now and then

10 it'll give you a chance to sift through and see what you

11 really think's viable and maybe not so viable, and we can

12 boil it down to the issues that are really relevant before

13 us.

14 Let me indicate, when's the best time -- it's best for

15 me to make conference calls on Tuesday morning because I --

16 that's my civil law and motion calendar. What I would

17 propose, that I call you two on February 28th in the morning

18 sometime and that we check the status on the matter. If

19 you're able to resolve things before then and we need a

20 conference call or you wanna submit pleadings, you're welcome

21 to do that, but just so we stay on track. We'll have a

22 conference call on the 28th of February. What's the best

23 time of the day for you?

24 **MR. CALL:** Ten o'clock.

25 **THE COURT:** How about you, Mr. Devashrayee?

1 **MR. DEVASHRAYEE:** That's fine.
2 **THE COURT:** We'll call at ten o'clock on that date.
3 **MR. DEVASHRAYEE:** That's a Tuesday?
4 **THE COURT:** That's 28th of February, that's a Tuesday.
5 **MR. DEVASHRAYEE:** Okay.
6 **THE COURT:** I would like, Mr. Call, for you to submit an
7 order in conjunction with today's hearing relative to the
8 stipulation and the agreement.
9 **MR. CALL:** Okay.
10 **THE COURT:** Also, you can include in that the motion
11 that you've made for the Court to reconsider the -- the
12 preemption issue, and that I have denied that request. Send
13 a copy of that to Mr. Devashrayee at least five days before
14 it's submitted to me for signature.
15 And just let me say to counsel, I have appreciated all
16 the work you've done on this trying to educate the Court. It
17 seems to be a simple factual issue, but there are a lot of
18 facts that are of relative ancient origin that are important
19 in this matter. And so I think that's one of the reasons I
20 think counsel have tried to resolve the matter to see if
21 something could be resolved that would be amenable to each of
22 the parties. We're still trying to do that, but if we fail
23 in that, we'll get it resolved for you sometime in the
24 spring, so -- all right? Hope Mr. Weiser's doing well --
25 **MR. CALL:** Thank you.

1 **THE COURT:** -- is able to be back with us, so -- see you
2 back. Make sure we got all your exhibits. The ones I show I
3 have received, just for the purpose of the record, first of
4 all, as to those matters not included in the proffer, I have
5 received Exhibit 1, which was the Elliott survey. I've
6 received Exhibit 4. I have received Exhibit 33, 34, and 36.
7 I have rejected Exhibit 5, Exhibit 6, Exhibit 7, Exhibit 8,
8 Exhibit 9, Exhibit 12 and 13, Exhibit 19 and 20, and Exhibit
9 32. But I will retain those in the file as being proffered
10 as exhibits as part of the proffered testimony which has been
11 made a part of the record.
12 **MR. CALL:** We also have that we had proffered Exhibit 2
13 and Exhibit 4 --
14 **THE COURT:** 2 was rejected again.
15 **MR. CALL:** -- as rejected exhibits and --
16 **THE COURT:** Yes.
17 **MR. CALL:** -- I believe you mentioned 2 and 4, but they
18 were also rejected.
19 **THE COURT:** I do show 2 and 4. I show 2. 4 was the
20 Louis deed which was received --
21 **MR. CALL:** Okay.
22 **THE COURT:** -- in conjunction with the first testimony.
23 **MR. CALL:** Okay.
24 **MR. DEVASHRAYEE:** All with the limited admissibility
25 (Unintelligible).

1 **THE COURT:** Yes, to the question of the centerline
2 issue.
3 **MR. CALL:** And then the only other document is the one
4 that we'd like to mark with Tacy that he's left with us.
5 **THE COURT:** What exhibit is that? That needs to be
6 marked --
7 **MR. CALL:** I guess we'll mark it as Exhibit 42.
8 **THE COURT:** Be Exhibit 42, and what is that, the
9 narration on the --
10 **MR. CALL:** The delivery, and I do have a certification
11 from Washington, D.C. -- the National Archives Records
12 Administration on that document.
13 **THE COURT:** What is it? I remember he read from it, but
14 I can't -- how do you want to entitle it? Is that the one
15 that talks about 1865?
16 **MS. PECK:** It is, your Honor.
17 **THE COURT:** That will be Tomlinson.
18 **MR. CALL:** George Tomlinson. It's an affidavit -- it's
19 an affidavit --
20 **MS. PECK:** 1865 occupation.
21 **MR. CALL:** Yeah, it's an affidavit of Tomlinson.
22 **THE COURT:** I'll make that part of the record as part of
23 the proffer, but again reject it as otherwise being
24 irrelevant.
25 **MR. DEVASHRAYEE:** Steve, do you have that document?

1 **MR. CALL:** We -- this is the only copy that I have. I
2 could give you --
3 **MR. DEVASHRAYEE:** Would you make me a copy and send it
4 to me?
5 **MR. CALL:** Sure.
6 **THE COURT:** Any other issues? All right. Will you take
7 your exhibits with you because we don't have a place to store
8 them, but --
9 **MR. CALL:** We will take them.
10 **THE COURT:** All right. Thank you, gentlemen. I
11 appreciate your being able to resolve this matter today,
12 so --
13 **MR. CALL:** Thank you.
14 **MR. DEVASHRAYEE:** Thank you, your Honor.
15 **MS. PECK:** Thank you, your Honor.
16 **THE COURT:** We'll talk to you in February.
17 **MR. CALL:** Okay.
18 **THE COURT:** Let me just indicate, can we just excise --
19 I mean copy those two pages and mark that as Exhibit --
20 **MR. CALL:** 42.
21 **THE COURT:** 42? Is that okay?
22 **MR. CALL:** That's --
23 **THE COURT:** And then we'll make a copy for you, Mr.
24 Devashrayee, while we're doing that rather than --
25 **MR. DEVASHRAYEE:** Yes.

1 **THE COURT:** -- the whole exhibit. Is that agreeable?
2 **MR. DEVASHRAYEE:** Yes.
3 **THE COURT:** All right.
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1 CERTIFICATE

2 STATE OF UTAH)
) SS
3 COUNTY OF WEBER)

4 THIS IS TO CERTIFY THAT THE FOREGOING 92 PAGES OF
5 TRANSCRIPT CONSTITUTE A TRUE AND ACCURATE RECORD OF THE
6 PROCEEDINGS TO THE BEST OF MY KNOWLEDGE AND ABILITY AS A
7 CERTIFIED SHORTHAND REPORTER IN AND FOR THE STATE OF UTAH.
8 DATED AT OGDEN, UTAH THIS 8th DAY OF March, 2008.
9
10 Dean Olsen
11 DEAN OLSEN, CSR
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Tab C

[GENERAL NATURE—No. 2.]

AN ACT granting to the Utah Central Railroad Company a right of way through the public lands for the construction of a railroad and telegraph.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way through the public lands be, and the same is hereby, granted to the Utah Central Railroad Company, a corporation created under the laws of the legislative assembly of the Territory of Utah, its successors and assigns, for the construction of a railroad and telegraph from a point at or near Ogden City, in the Territory of Utah, to Salt Lake City, in said Territory; and the right, power, and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station-buildings, work-shops, depots, machine-shops, switches, side-tracks, turn-tables, and water-stations: *Provided*, That within three months from the passage of this act the said Utah Central Railroad Company shall file with the Secretary of the Interior a map to be approved by him, exhibiting the line of the railroad of said company, as the same has been located and constructed: *Provided further*, That said company shall not charge the Government higher rates than they do individuals for like transportation and telegraphic service. And it shall be the duty of the Utah Central Railroad Company to permit any other railroad, which has been or shall be authorized to be built by the United States, or by the legislature of the Territory of Utah, to form running connections with its road on fair and equitable terms.

SEC. 2. *And be it further enacted*, That the United States make the grants herein, and that the said Utah Central Railroad Company accepts the same, upon the express condition that the said company shall not exercise the power given by section ten of chapter sixteen of the laws of the Territory of Utah, approved February nineteenth, eighteen hundred and sixty-nine; and upon the further express condition that if the said company make any breach of the conditions hereof, then in such case, at any time hereafter, the United States, by its Congress, may do any and all acts and things which may be needful and necessary for the enforcement of such conditions.

SEC. 3. *And be it further enacted*, That said Utah Central Railroad shall be a post route and a military road, subject to the use of the United States for postal, military, naval, and all other Government service, and also subject to such regulations as Congress may impose, restricting the charges for such Government transportation.

SEC. 4. *And be it further enacted*, That the acceptance of the terms, conditions, and impositions of this act, by the said Utah Central Railroad Company, shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within three months after the passage of this act, and shall be served on the President of the United States; and if such acceptance and service shall not be so made, this grant shall be void.

SEC. 5. *And be it further enacted*, That Congress may at any time, having due regard for the rights of said Utah Central Railroad Company, add to, alter, amend, or repeal this act.

Approved, December 15, 1870.

Department of State, Washington, May 9, 1871.
A true copy.
W. Hays
Chief Clerk.

Tab D

DECLARATION OF INTENTION,

To Become a Citizen of the United States

I, George Tomlinson do declare, on oath, that it is bona fide my intention to become a Citizen of the United States of America, and to renounce and abjure forever, all allegiance and fidelity, to all and any Foreign Prince, Potentate, State and Sovereignty whatever, and particularly to Victoria, Queen of Great Britain and Ireland of whom I was a subject.

Sworn and subscribed to before)
me, at my office, at Salt Lake City, this)
3rd day of May, A.D. 1869.)

Patrick Synch Clerk of the U.S. 3rd District Court, in and for the Territory of Utah, do certify that the above is a true copy of the Original Declaration of Intention of George Tomlinson to become a Citizen of the United States of America, remaining on record in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the Seal of said Court, at my office in Salt Lake City in said District this 3rd day of May, A.D. 1869

Patrick Synch, Clerk

848554

DECLARATION OF INTENTION,

To Become a Citizen of the United States.

I, George Sheuchinow do declare, on oath, that it is bona fide my intention to become a Citizen of the United States of America, and to renounce and abjure forever, all allegiance and fidelity, to all and any Foreign Prince, Potentate, State and Sovereignty whatever, and particularly to Victoria, Queen of Great Britain & Ireland of whom I was a subject.

SWORN and subscribed to before me, at my office, at Salt Lake City, this 3rd day of May, A. D. 1869

Patrick Lynch Clerk of the U. S. 3rd District Court, in and for the Territory of Utah.

I, Patrick Lynch, Clerk of the U S. 3rd District Court, in and for the Territory of Utah, do certify that the above is a true copy of the Original Declaration of Intention of George Sheuchinow to become a Citizen of the United States of America, remaining on record in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and affixed the Seal of said Court, at my office, in Salt Lake City in said District this 3rd day of May A. D. 1869

Patrick Lynch
Clerk.

News Print.

Tab E

I, Thomas Hancock, a citizen of the U.S. and of lawful age do solemnly swear that I am well acquainted with George Tomlinson who is a naturalized citizen of the U.S. and the head of a family consisting of a wife and 1 child and is an inhabitant of the NE of NW ¼ of Lots 2 and West ½ of NE quarter of Section No. fourteen (14) of Township No. one (1) North, of Range No. one (1) west and that no other person resided upon the said land, entitled to the right of pre-emption; that the said George Tomlinson entered upon and made a settlement in person on the said land since the first day of June, 1840, to wit: on the 17th day of April, 1871; and has erected thereon a log house 14 x 16 feet with roof, floor, door and windows and is a comfortable house to live in and has lived in the said house, and made it his exclusive home, from the 17th day of April, 1871, till the present time; that he did not remove from his own land, within the State of Utah, to make the settlement above referred to; and that he has, since said settlement, plowed, fenced, and cultivated about 50 acres of said land and has thereon 115 rods fencing.

Thomas Hancock

I, _____, Receiver do hereby certify that the above affidavit was taken and subscribed before me, this 6th day of February, A.D. 1872.

_____, Receiver

~~Be it~~, I Thomas Hancock a citizen of the U.S. made off lawful age do solemnly swear that I am well acquainted with George Tomlinson who is a naturalized citizen of the U.S. and the head of a family consisting of a wife & child and is an inhabitant of the N E of N. W 1/4 & Lots 2 and West 1/2 of South East quarter of Section No. Fourteen (14) of Township No. One (1) North, of Range No. One (1) West and that no other person resided upon the said land, entitled to the right of pre-emption; that the said George Tomlinson entered upon and made a settlement in person on the said land since the first day of June, 1840, to wit: on the 17th day of April, 1871; and has erected thereon a log house 14x16 feet with roof, floor door and window and is a comfortable house to live in

and has lived in the said house, and made it his exclusive home, from the 17th day of April, 1871, till the present time; that he did not remove from his own land, within the State of Utah, to make the settlement above referred to; and that he has, since said settlement, plowed, fenced, and cultivated about 50 acres of said land and now thereon 115 rods fencing

Thomas Hancock

I. G. B. Overton Receiver do hereby certify that the above affidavit was taken and subscribed before me, this 6th day of February, A. D. 187 2

G. B. Overton Receiver

WE certify that whose name subscribed to the foregoing affidavit, person of respectability.

, Register.

, Receiver.

Tab F

No. 742 Land Office at Salt Lake City, Utah February 6th, 1872

It is hereby certified, That, in pursuance of Law, George Tomlinson, Salt Lake County, Territory of Utah on this day purchased of the Register of this Office, the Lot or West ½ of North East ____ North East of Northwest ¼ and lot 2 of Section No. fourteen in Township No. (1) one North of Range No. _____ containing one hundred fifty and 50/100 acres, at the rate of two dollars and fifty cents per acre, amounting to three hundred and seventy-six dollars and twenty-five cents for which the said George Tomlinson has made payment in full as required by law.

Now, therefore, be it known, That, on presentation of this certificate to the COMMISSIONER OF THE GENERAL LAND OFFICE, the said George Tomlinson shall be entitled to receive a Patent for the Lot above described.

_____, Register

848554

No. 742 **LAND OFFICE** at Salt Lake City Ut Nov 6th 1872.

It is hereby certified, That, in pursuance of Law, George Goulinow

Salt Lake County, State of Ter Utah on this day purchased of the Register of this Office, the Lot or West ½ of North East ¼ North East of North West ¼ in Township No. and lot (2) of Section No. Fourteen containing (1) one north of Range No. Fifteen west acres, at the rate of One hundred & fifty — and 50/100 dollars and fifty cents per acre, amounting to One hundred & Two. dollars and Twenty five cents, for which the said George Goulinow ha made payment in full as required by law.

Now, therefore, be it known, That, on presentation of this certificate to the COMMISSIONER OF THE GENERAL LAND OFFICE, the said George Goulinow shall be entitled to receive a Patent for the Lot above described.

Geo P Maxwell
Register.

Tab G

Ill-742.

Cash Entry

Salt Lake City, U.T.

Sec 11 - T2N - R1W.
Pat. Sept. 25th 1873
Rec. Vol. 2, Page 335

Declatory Statement

No. 2541.

Surveyed

Not offered - In Rail Road Limits

[illegible] April 17/69 & Aug 18/71 -
[illegible] all his filed for
[illegible] with [illegible] No 681. - Lot 3 & SW¼ NE¼ 14:
[illegible] Louis G. Almanten, May 2 2/69 [illegible]
[illegible] W½ NE¼ & Lots 2, 3, 3. Sec 14: 1N: 1W: [illegible]
[illegible] April 23/69 & July 2 2/69.
[illegible] W½ NE¼ 14: 1N: 1W: - Wm Varley, [illegible]
[illegible] 2 2, 1873.
[illegible] R 913. 706. - Melcombe [illegible]
[illegible] 20/69. - SE¼ SW¼ 11: & NE¼ NW¼ & Lots 1, 2, [illegible]
[illegible] 14: 1N: 1W.

Approved
July 9th 1873
A. W. G.

1 — 5

Tab H

S L City 1873
Jan 29th

to the Commissioner Genl
Land office

Dear Sir

I would be
glad to receive the patents
for my land as soon
~~as soon~~ as practicable:
if you can forward it
without delay you
will confer a favour on

Yours Respy
George Tomlinson

as follows: No 742
Township No one North of
Range No one West
Utah Survey
faced up Feb 6th, 1872

Tab I

J R

ter K. No. 34572

George Tomlinson
S. L. City Utah
Jan 29 1873

Calls for his patent

Ref'd to Div C
May 5/73

13/357

Referred to Div. G. May 29
Ans. June 7th 1873

Referred to Div.

Received (G. L. O.) Feb 11, 1873.

Tab J

C. B. P. #6 75
Salt Lake City, Utah
Cash 74
Geo. Tomlinson
W½ N.E.¼ N.E.¼ N.W.¼
& Lot 2
14 " 17 N " 17 W

To R.R. June 17th 1872.
Approved. 60 days for appeal
by L.L. Palmentier et. al.
Apl 22. 73 D.H.L. R.R.
For report
To Geo. Tomlinson June 7
1873 giving status of case
D.H.L.
Approved:
July 9th 1873
D.H.L.

Tab K

No. 742 Receiver's Office at Salt Lake City Feb __ 1872

Received from George Tomlinson of Salt Lake County, Utah the sum of Three Hundred and Seventy-Six dollars and Twenty-Five cents; being in full for the West ½ of NE ¼ and North East ¼ of North West ¼ and Lot Two (2) quarter of Section No. Fourteen in Township No. One (1) North of Range No. One (1) West containing one hundred and fifty acres and fifty hundredths, at $2.__ per acre.

$376.25 _____, Receiver

No. 242 Receiver's Office at Salt Lake City Feb. 18 1872

RECEIVED from George Tomlinson

of Salt Lake County Utah the sum of Three Hundred and Seventy Six dollars and Twenty five cents; being in full for the West ½ of West ½ East ½ of West ½ East ½ of West ½ Lot Two (2) quarter of Section No. Fourteen in Township No. One (1) North of Range No. One (1) West containing One Hundred and Fifty acres and Fifty hundredths, at

$2.50 per acre.

$376.25

W B Wilson Receiver.

Tab L

PROOF OF RIGHT OF PRE-EMPTION OF GEORGE TOMLINSON

I, George Tomlinson, claiming the right of pre-emption under the provisions of the act of Congress entitled "An act to appropriate the proceeds of the public lands, and to grant pre-emption rights," approved September 4, 1841, to the NE NW ¼ Lot 2 of Section number 14 of Township number 1 North, or Range number 1 East, subject to sale at the Land Office at Salt Lake City, do solemnly swear that I have never had the benefit of any right of pre-emption under this act; that I am not the owner of three hundred and twenty acres of any land in any State or Territory of the United States, nor have I settled upon and improved said land to sell the same on speculation, but in good faith to appropriate it to my exclusive use or benefit; and that I have not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which I may acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except myself.

George X Tomlinson

I, Geo. R. Maxwell, Register, of the Land Office Salt Lake City, Utah, do hereby certify that the above affidavit was taken and subscribed before me, this 6th day of July, A.D. 1872.

Geo. R. Maxwell, Register

No. _____

PROOF OF RIGHT OF PRE-EMPTION. of George Tomlinson

Sec. 14 T. 1 N., R. 1 W.

Pre-emption Act, 4th September, 1841

Allowed this 6th day of February, 1872.

Geo. R. Maxwell, Register.

Wm. Wilson, Receiver.

I, George Tomlinson, claiming the right of pre-emption the provisions of the act of Congress entitled "An act to appropriate the proceeds of the public and to grant pre-emption rights," approved September 4, 1841, to the NE. 1/4 NW. 1/4 NE. 1/4 Lot 2 r of Section number 14 of Township number 1 North, of e number 1 E., subject to sale at the Land Office at Salt Lake City, do solemnly swear that I have never had enefit of any right of pre-emption under this act; that I am not the owner of three hundred and y acres of any land in any State or Territory of the United States, nor have I settled upon and ved said land to sell the same on speculation, but in good faith to appropriate it to my exclusive benefit; and that I have not, directly or indirectly, made any agreement or contract, in any way nner, with any person or persons whatsoever, by which the title which I may acquire from the rnment of the United States should inure, in whole or in part, to the benefit of any person except f.

his
George X Tomlinson
mark

, Geo. R. Maxwell Register, of the Land Office Salt Lake City, Utah, do hereby certify that the above affidavit was and subscribed before me, this 6th day of Feby, A. D. 1872.

Geo. R. Maxwell
Register

Tab M

STEVEN W. CALL (A5260)
RAY, QUINNEY & NEBEKER
36 South State Street, Ste. 1400
Salt Lake City, Utah 84111
Tel. (801) 350-1500
Fax (801) 532-7543

ELIZABETH M. PECK (A6304)
LAW OFFICE OF ELIZABETH M. PECK
422 North 300 West
Salt Lake City, Utah 84103
Tel. (801) 521-0844

IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR DAVIS COUNTY, STATE OF UTAH

GLEN C. WEISER, an individual, Plaintiff, v. UNION PACIFIC RAILROAD COMPANY, a Utah corporation, Defendant.	**NOTICE OF APPEAL** Civil No. 910749302 Hon. Rodney S. Page

Plaintiff Glen C. Weiser (the "Plaintiff"), by and through counsel, hereby gives NOTICE OF APPEAL of the Second Judicial District Court's various Rulings, Orders and Judgments made final by that certain Findings of Fact, Conclusions of Law and Order and Judgment entered herein on December 21, 2007.

In addition, Plaintiff gives notice of appeal, *inter alia*, with regard to the following rulings, orders and/or judgments:

1) The Findings of Fact, Conclusions of Law and Order and Judgment entered on December 21, 2007.

2) This Court's reconsideration of its grant of partial summary judgment to Plaintiff upon UPRR's Motion, and this Court's October 1, 2001 reversal of its grant of partial summary judgment to Plaintiff and award of partial summary judgment to UPRR on the grounds of *stare decisis* and lack of Plaintiff's standing to challenge the Conditional Grant;

3) This Court's rejection of Plaintiff's arguments that the Court should have analyzed the issues in the case under the doctrines of *res judicata* and *collateral estoppel* and its determination that neither legal doctrine was binding in this case;

4) This Court's October 1, 2001 ruling that the Conditional Grant was valid, and that pursuant to the Conditional Grant, a fee or limited fee interest in the subject property was conveyed to UPRR and that Plaintiff had no remaining interest in the property; in so ruling, the Court concluded that UPRR owned the subject property and rejected Plaintiff's argument that the Conditional Grant conveyed only a right-of-way to UPRR's predecessor in interest.

5) This Court's October 1, 2001 ruling which concluded that the subject property was part of the "public lands" at the time the Conditional Grant was approved by Congress, and each of this Court's subsequent rulings which rejected Plaintiff's arguments and evidence that the property was taken out of the public lands by virtue of Plaintiff's original predecessor's homestead or pre-emption interest in the property.

6) This Court's conclusion and ruling that the Utah Fourth District Court's 1935 Decree Quieting Title in favor of Plaintiff's predecessor was not dispositive or binding upon this Court's determination that the subject property belongs to UPRR.

7) This Court's conclusion and ruling that UPRR's conveyance of the subject property to another third party did not cause the property to revert to Plaintiff, nor was UPRR's conveyance of the property to another conclusive evidence of its intent to remise or release its interest in the property. The Court ruled and ordered that UPRR's limited fee interest did not revert back to the United States and then transfer forward to Plaintiff, and in so ruling, the Court rejected Plaintiff's contention that if the conveyance of the property was a limited fee conveyance, then it was subject to a reverter to the United States and forward passage to Plaintiff through his chain of title.

8) This Court's December 21, 2007 Order dismissing Plaintiff's claims with prejudice for relief for quiet title, restitution, forcible detainer, treble damages, trespass and unjust enrichment.

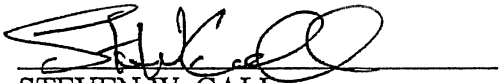
9) The Court's ruling that the evidence and exhibits presented at trial by the plaintiff on December 8, 2005 that the subject property was not part of the public lands were irrelevant and the Court's ultimate conclusion and ruling at that hearing that the plaintiff's property was part of the public lands at all relevant times.

10) The Court's ruling which precluded discovery as to the purchase of the subject property which was sold by the defendant.

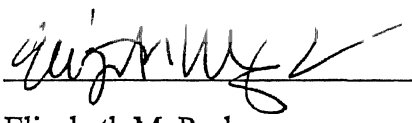
11) The Court's rulings on the applicability of the pre-emption doctrine.

DATED this 18th day of January, 2008.

RAY QUINNEY & NEBEKER



STEVEN W. CALL



Elizabeth M. Peck

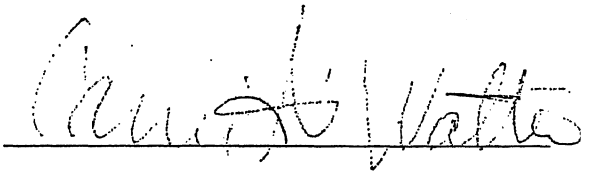
Co-Counsel for Plaintiff Glen Weiser

964707

CERTIFICATE OF SERVICE

I hereby certify day of 18th day of January, 2008, a true and correct copy of **NOTICE OF APPEAL** was served by first-class mail, postage prepaid, to:

Jeffery J. Devashrayee
280 South 400 West
Salt Lake City, Utah 84101



964707

Tab N

UNITED STATES OF AMERICA

STATE OF UTAH, }
} ss.
County of Davis }

I, Glen Day, County Clerk in and for the County of Davis, State of Utah, and ex officio Clerk of the District Court, Second Judicial District, do hereby certify the foregoing to be a full, true and correct copy of the ORDER CONFIRMING SALE OF REAL ESTATE AND PROCEEDS AND AUTHORIZING AND DIRECTING GUARDIAN TO EXECUTE CONVEYANCE In the Matter of the Guardianship of Emeline Burton, also known as Emeline Hill Burton and Emeline M. Burton, Incompetent that I have compared the same with the original now remaining on file in this office and that it is a correct transcript therefrom and of the whole thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and official Seal this 26th day of April A. D. 1935.

Glen Day
County Clerk

(Seal)

By Zada Waite, Deputy

Recorded April 26th 1935, at 4:30 P. M. Abstracted 4/16 7.

Ruby Nuttall County Recorder.

No. 8OR44

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT, IN AND FOR DAVIS COUNTY, STATE OF UTAH.

ROLLOF STEENBLIK,

Plaintiff

vs.

J. W. MELLEN and LAURA WILLIAMS, JOSEPH BURNS, JAMES E. BURNS, CHARLES BURNS, Jr., SARAH H. STACEY, MARTHA HARKER, ELLEN WATKIN, MARY ELLEN TOMLINSON, HANNAH BLACKBURN, WILLIAM OLIVER, HANNAH JANE PACK, BETSEY A. WANN, ROSE HOWARD, SARAH ELLEN MUIR, JAMES E. BURNS, JR., LAURA BURNS WILLIAMS, OLIVE GARSIDE, ZELLA GARSIDE, JENNIE GARSIDE, GOLDEN GARSIDE, SUSAN GARSIDE, THELMA GARSIDE, OLIVER GARSIDE, JAMES BRYSON, Jr., WAY BRYSON, CLARENCE BRYSON, EDWARD OLIVER BRYSON, MARY BRYSON, WALTER BRYSON, LEONARD BRYSON, all the heirs of Charles Burns, and Susannah Oliver Burns, Susan Oliver Garside, and Mary Emma Bryson, deceased, and the heirs at l[illegible] devisees if any of such of said named persons as are deceased; Also all other persons unknown, claiming any right, title, estate, lien or interest in the real property described in the Complaint, adverse to Plaintiff's ownership, or any cloud upon Plaintiff's title thereto; and S. Beck & S. Rosenfield, dba United Electric Company,

Defendants.

DECREE QUIETING TITLE

The above entitled action having come regularly on for hearing on the 20th day of April, 1935, before the Court sitting without a jury, the plaintiff appearing in person, and by his attorneys Foote and Dawson, and the defendants having been served with summons by publication, and personally, and having failed to appear within the time prescribed by law, and their default having been duly entered herein, and the default of the defendant J. W. Mellen, having been entered by stipulation, and evidence having been

duly introduced on behalf of the plaintiff, and the Court, having duly considered the same and being well advised in the premises, finds the issues in favor of the plaintiff and against the defendants.

And it appearing that said Defendants are without any right, estate or interest whatever in and to said land or parcel of property as described in said complaint.

NOW, THEREFORE, on motion of Foote and Dawson, Attorneys for the Plaintiff herein,

IT IS ORDERED, ADJUDGED AND DECREED that the defendants and neither of them have any right, estate or interest whatever in and to the property herein described; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the title of plaintiff in and to said hereinafter described property is good and valid and the title of plaintiff thereto is adjudged to be quieted against all claims and demands of the defendants or either of them, and the said defendants and each of them are hereby enjoined and debarred from asserting any claim whatsoever in and to said land, and premises or any part thereof, adverse to the plaintiff.

That said premises, situated, lying and being in the County of Davis, State of Utah, are described as follows:

Beginning at a point 415.2 feet East and 24.7 feet South 5 degrees 04 minutes West from the Quarter corner between Sections 11 and 14 in Township 1 North, Range 1 West, Salt Lake Meridian and Base, thence East 187.4 feet to the Westerly line of the S.L.& O. Ry., right of way; thence South 6 degrees 36 minutes West, 1588.6 feet along said right of way; thence West 81.6 feet; thence North 5 degrees 04 minutes East 1581.4 feet along the East side of the O.S.L. Ry., right of way, to place of beginning.

ALSO, beginning at a point 684.5 feet East and 24.8 feet South 6 degrees 36 minutes West from the above described Quarter corner; thence East 78.2 feet to the Northwest corner of one acre piece; thence South 4 degrees 50 minutes West, 216 feet; thence East 204.0 feet to center of rock wall along West side of County Road; thence South 5 degrees 06 minutes West, 1169.5 feet along said rock wall on West side of County Road; thence West 217.7 feet to East line of Salt Lake and Ogden Ry., right of way; thence North to place of beginning, containing, 12.34 acres, more or less.

ALSO, a right of way being on the North of the herein described tracts of land. The said right of way is 1½ rods wide.

Eugene E. Pratt

Judge of the Second Judicial District Court.

Done in open Court this 20th day of April, 1935.

UNITED STATES OF AMERICA

STATE OF UTAH, }
County of Davis } ss.

I, Olen Day, County Clerk in and for the County of Davis, State of Utah, and Ex-Officio Clerk of the District Court, Second Judicial District, do hereby certify the foregoing to be a full, true and correct copy of the DECREE QUIETING TITLE in the case of Heber Steenblik, Plaintiff vs. J. W. Mellen, et al, Defendants, that I have compared the same with the original now remaining on file in this office and that it is a correct transcript therefrom and of the whole thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal this 22nd day of April A.D. 1935.

Olen Day, County Clerk.

By Leda Smith, Deputy.

Filed May 7, 1935, at 3:35

Tab O

932 P.2d 596, 310 Utah Adv. Rep. 14

Supreme Court of Utah.
Glen C. WEISER, Plaintiff and Appellee,
v.
UNION PACIFIC RAILROAD COMPANY, a corporation, Defendant and Appellant.
No. 950471.
Feb. 14, 1997.

Individual who claimed ownership of property on which railroad had built facility brought action to quiet title. The Second District Court, Farmington Department, Rodney S. Page, J., entered partial summary judgment in favor of individual, and certified judgment as final for purposes of appeal. Railroad appealed, and the Supreme Court, Howe, J., held that matter involved only single claim, even though multiple issues were involved, and thus could not be certified as final.

Appeal dismissed.

West Headnotes

[1] KeyCite Citing References for this Headnote

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k37 Waiver of Objections
106k37(2) k. Time of Making Objection. Most Cited Cases

Lack of subject matter jurisdiction can be raised at anytime by either party or by court.

[2] KeyCite Citing References for this Headnote

30 Appeal and Error
30III Decisions Reviewable
30III(D) Finality of Determination
30k75 Final Judgments or Decrees
30k80 Determination of Controversy
30k80(6) k. Determination of Part of Controversy. Most Cited Cases

30 Appeal and Error KeyCite Citing References for this Headnote
30VII Transfer of Cause
30VII(B) Petition or Prayer, Allowance, and Certificate or Affidavit
30k366 k. Certificate as to Grounds. Most Cited Cases

Quiet title action in which grant of partial summary judgment was made involved only single claim for relief, and thus, could not be certified for as final for purpose of appeal; while several issues were presented by different legal theories asserted, only one claim existed, that of ownership of disputed property. Rules Civ.Proc., Rule 54(b).

***596** Steven W. Call, Salt Lake City, for plaintiff and appellee.

Morris O. Haggerty, J. Clare Williams, Salt Lake City, for defendant and appellant.

***597** HOWE, Justice:

Union Pacific Railroad Company appeals from a partial grant of summary judgment in this quiet title action holding invalid Union Pacific's claim, under the Conditional Land Grant Act of 1870, to a 400-foot-wide right-of-way centered on its tracks in Davis County, Utah, which overlaps property claimed by plaintiff Glen C. Weiser.

In 1873, Weiser's most remote predecessor in interest purportedly received title to the disputed land through a federal land grant patent issued by President Ulysses S. Grant. In 1935, the district court for Davis County quieted title to the disputed property in Roelof Steenblik, one of Weiser's predecessors in interest. All known entities with a possible claim to the property were made parties to that action. The Railroad was not made a party because there was no public record of its interest. The Railroad did receive constructive notice by publication, however. In 1982, Union Pacific began construction of a semi-truck loading facility on the disputed property. In 1987, Weiser discovered the Railroad's use of the property and through counsel requested the Railroad to surrender and vacate the property. The Railroad refused, and Weiser had Associated Title Company prepare a title report, which showed that Weiser owned the property in fee simple. He again made a formal demand that the Railroad surrender and vacate the property. Union Pacific again refused. Plaintiff brought this action to gain possession of and to quiet title to the property. Union Pacific counterclaimed, contending that the United States had granted its predecessor in interest, Utah Central Railroad, a 400-foot-wide "right-of-way through public lands for the construction of a railroad and telegraph" in March of 1870. One of the conditions of the grant was that within three months after the passage of the 1870 Act, the Railroad file with the Secretary of Interior a map approved by him "exhibiting the line of said company, as the same has been located and constructed." The parties dispute whether this condition was fulfilled. Weiser contends that because the Railroad did not timely file a certified map that was accepted by the Secretary of Interior, the Railroad's grant of right-of-way fails.

[1] After extensive research and historical analysis, the trial court granted a partial summary judgment that the grant to the Railroad failed for lack of condition. The court certified its partial summary judgment as final under Utah Rule of Civil Procedure 54(b) and explicitly "reserved for further proceedings the parties' other claims in the case, including their claims of title based upon other theories of law and/or equity." Weiser opposed the motion for certification and now argues that this court lacks jurisdiction because "[t]he Partial Summary Judgment entered by the Trial Court is not an order which can be certified final under Rule 54(b)." He offers no support for his contention. However, "a lack of [subject matter] jurisdiction can be raised at any time by either party or by the court." *Olson v. Salt Lake City Sch. Dist.,* 724 P.2d 960, 964 (Utah 1986); *see also Petersen v. Utah Bd. of Pardons,* 907 P.2d 1148, 1151 (Utah 1995).

[2] In *Kennecott Corp. v. Utah State Tax Commission,* 814 P.2d 1099, 1101 (Utah 1991), we reviewed the requirements for certification of a partial judgment as final. There, we reiterated our holding in *Pate v. Marathon Steel Co.,* 692 P.2d 765, 767 (Utah 1984):

First, there must be multiple claims for relief or multiple parties to the action. Second, the judgment appealed from must have been entered on an order that would have been appealable but for the fact that other claims or parties remain in the action. Third, the trial court, in its discretion, must make a determination that "there is no just reason for delay" of the appeal.

In the case before us, the trial court appears to have confused "claim" and "issue." Certification requires different claims, not merely different issues. Here we have one claim-ownership of the disputed land-supported by different legal theories.

The trial court stated that the issue of the validity of the land grant was a core dispositive issue, because a decision in Union Pacific's favor would moot the other claims and render further proceedings unnecessary. ***598** Therefore, there was "no just reason to delay directing entry of final judgment." While it may be true that if we were to find that Union Pacific prevails under the grant, Weiser's other arguments would be irrelevant, the trial court failed to consider the opposite case.[FN1] If Union Pacific were to lose on appeal on the land-grant issue, it could pursue its claim under one of the reserved theories of law and/or equity, resulting in a piecemeal appeal. We held in *Bennion v.*

Pennzoil Co., 826 P.2d 137, 138 (Utah 1992), that "a claim is not separate if a decision on claims remaining below would moot the issues on appeal." Here, a ruling that Union Pacific owns the disputed land under, for example, adverse possession would moot the appeal now before us. Thus, to hear this case in its present form would be to risk a waste of judicial resources.

FN1. This is rather surprising, considering that the trial court itself concluded that Union Pacific did *not* prevail.

Apparently relying on our statement in *Kennecott,* 814 P.2d at 1103 (quoting *Indiana Harbor Belt R.R. v. American Cyanamid Co.,* 860 F.2d 1441, 1445 (7th Cir.1988)), that the determination of the separateness of a claim " 'focuses on the degree of factual overlap between the issue certified for appeal and the issues remaining in the district court,' " the trial court stated that the judgment was appropriate for certification because the underlying action involved "multiple claims for relief which do not arise out of the same set of operative facts." It is true that the facts supporting ownership under the land grant and under different theories of law and equity do not overlap. These separate facts, however, all relate to the single land ownership claim. In sum, here there are neither multiple parties nor multiple claims. Therefore, the partial summary judgment is not certifiable under rule 54(b), and we dismiss this appeal for lack of jurisdiction.

ZIMMERMAN, C.J., STEWART, Associate C.J., and DURHAM and RUSSON, JJ., concur in Justice HOWE's opinion.

Utah,1997.
Weiser v. Union Pacific R. Co.
932 P.2d 596, 310 Utah Adv. Rep. 14

END OF DOCUMENT

(C) 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

Tab Z

Certified copy of the
[illegible] and answer thereto,
[illegible] City Book Vol. 4-
[illegible] R Road Co, furnished
[illegible] Dec 1873

Department of the Interior.

Received Mch 7, 1871

Dated Mch 6th, 1871

From Hon W H Hooper

Present

Subject.

Submits for approval map of Utah Central RR, with a copy of the Act of Dec 15. 1870 granting the Co. the right of way thro. the public lands.

Action.

Above within map was not certified & could not be accepted

Mch 8. 71

Advised of acceptance of map Mch 30. 71

Registered 1-306

Filed

10330

Law Offices

Emott, Hammond & Pomeroy.

Rooms 21, 22 & 23.

No. 20 Nassau St.

New York, Sept. 30th 1872

Hon Columbus Delano
Secretary of the Interior
Washington. D.C.

Sir.

Some time since the President and Directors of the "Utah Central Railway Co" & "Utah Central Railroad Co" presented us with a Copy of its Mortgage accompanied by other papers showing a compliance with the law relating to its powers & organization, with the request that we should give our legal Opinion as to the validity of the same. Among these papers was

a Certificate of your Department that the law relating to the organization of said Railroad has been complied in the filing of its Map &c.

Unfortunately this Certificate has been lost or mislaid and we are obliged to ask for a duplicate or an original Certificate covering same premises. Will you favor us with the same.

Your Obedient Servants
Emott, Hammond & Pomeroy.

House of Representatives,

Washington, D. C., Feby 3, 1877.

Hon. Zachariah Chandler
Secretary of the Interior.

Dear Sir:-

Congress granted the Utah Central Railroad Company the right of way for its road and telegraph line over the public lands between Ogden and Salt Lake City, the formal acceptance of which was delivered to the Department I think in February 1871. The road has no record on its files of this acceptance having been tendered. Will you kindly furnish me a letter acknowledging the receipt of the Company's acceptance?

And oblige

Yours, Respectfully,

G. L. Cannon