

1998

# Wilkinson Family Farm v. Lara L. Babcock : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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WILKINSON FAMILY FARM, LLC, a )  
Utah limited liability company, )

Plaintiff/Appellant, )

vs. )

LARA L. BABCOCK, and all other )  
parties known or unknown that may claim )  
an interest in the real property described )  
herein, )

Defendant/Appellee. )

981769-CA

**BRIEF OF APPELLEE**

Appeals No. 981769-CA

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Appeal from the Second Judicial District Court  
of Weber County, State of Utah  
The Honorable Michael J. Glasmann, District Court Judge

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Oral Argument Priority Classification No. 15

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JUN 11 1999

Julia D'Alessandro  
Clerk of the Court

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## **STATEMENT OF JURISDICTION**

The Utah Supreme Court has appellate jurisdiction over this case under Utah Code Ann. §78-2-2(3)(j). The Supreme Court is authorized to transfer this appeal to the Court of Appeals under Utah Code Ann. §78-2-2(4). The Court of Appeals has appellate jurisdiction over this case pursuant to Utah Code Ann. §78-2a-3(2)(k).

## **STATEMENT OF ISSUES**

Because appellee is dissatisfied with appellant's Statement of Issues, it advances its own issues presented for review:

1. Did the district court rule, as Wilkinson suggests, that Wilkinson carried its burden of establishing mutual acquiescence in the fence as a boundary? This issue presents a question of law and is therefore reviewable for correctness. *Carlie v. Morgan*, 922 P.2d 1 (Utah 1996). This issue was preserved in the parties' post-trial memoranda. [R. 136 through 197].

2. Did the district court rule, as contended by Wilkinson, that objective uncertainty is a required element to boundary by acquiescence? This issue presents a question of law and is therefore reviewable for correctness. *Carlie v. Morgan*, 922 P.2d 1 (Utah 1996). This issue was preserved in the parties' post-trial memoranda. [R. 136 through 197].

3. Did the district court find "indolence" at all and, assuming it did, does such "indolence" create a conclusive presumption of acquiescence? This issue presents a question of law and is therefore reviewable for correctness. *Carlie v. Morgan*, 922

P.2d 1 (Utah 1996). This issue was preserved in the parties' post-trial memoranda.

[R. 136 through 197].

4. Does Wilkinson's acceptance of the trial court's finding of fact that the parties did not mutually acquiesce in the fence as a boundary negate its other challenges on appeal? This issue presents a question of law and is therefore reviewable for correctness. *Carlie v. Morgan*, 922 P.2d 1 (Utah 1996). This issue was preserved in the parties' post-trial memoranda. [R. 136 through 197].

5. Can a fence installed solely for the purposes of containing cattle, and not as a boundary, constitute a boundary by acquiescence? This issue presents a question of law and is therefore reviewable for correctness. *Carlie v. Morgan*, 922 P.2d 1 (Utah 1996). This issue was preserved in the parties' post-trial memoranda. [R. 136 through 197].

### **DETERMINATIVE PROVISIONS**

No such provisions apply to this appeal.

### **STATEMENT OF THE CASE**

Because appellee is dissatisfied with appellant's Statement of the Case, it advances its own statement:

#### **Nature of the Case**

This is a boundary by acquiescence case. Plaintiff/appellant Wilkinson Family Farm, L.L.C. (hereinafter referred to as "Wilkinson") initiated this action against Lara L. Babcock (hereinafter "Babcock") seeking to establish ownership of approximately

five acres of land based upon the existence of a fence line claimed by Wilkinson to constitute a boundary by acquiescence.

### **Course of Proceedings and Disposition Below**

Following a two day bench trial, the trial court found that no boundary by acquiescence existed and dismissed Wilkinson's Complaint with prejudice. The district court's Findings of Fact, Conclusions of Law, and Judgment were entered on October 30, 1998. [R. 205-222]. Wilkinson timely initiated an appeal by filing a Notice of Appeal on November 19, 1998. [R. 332].

### **Statement of Facts**

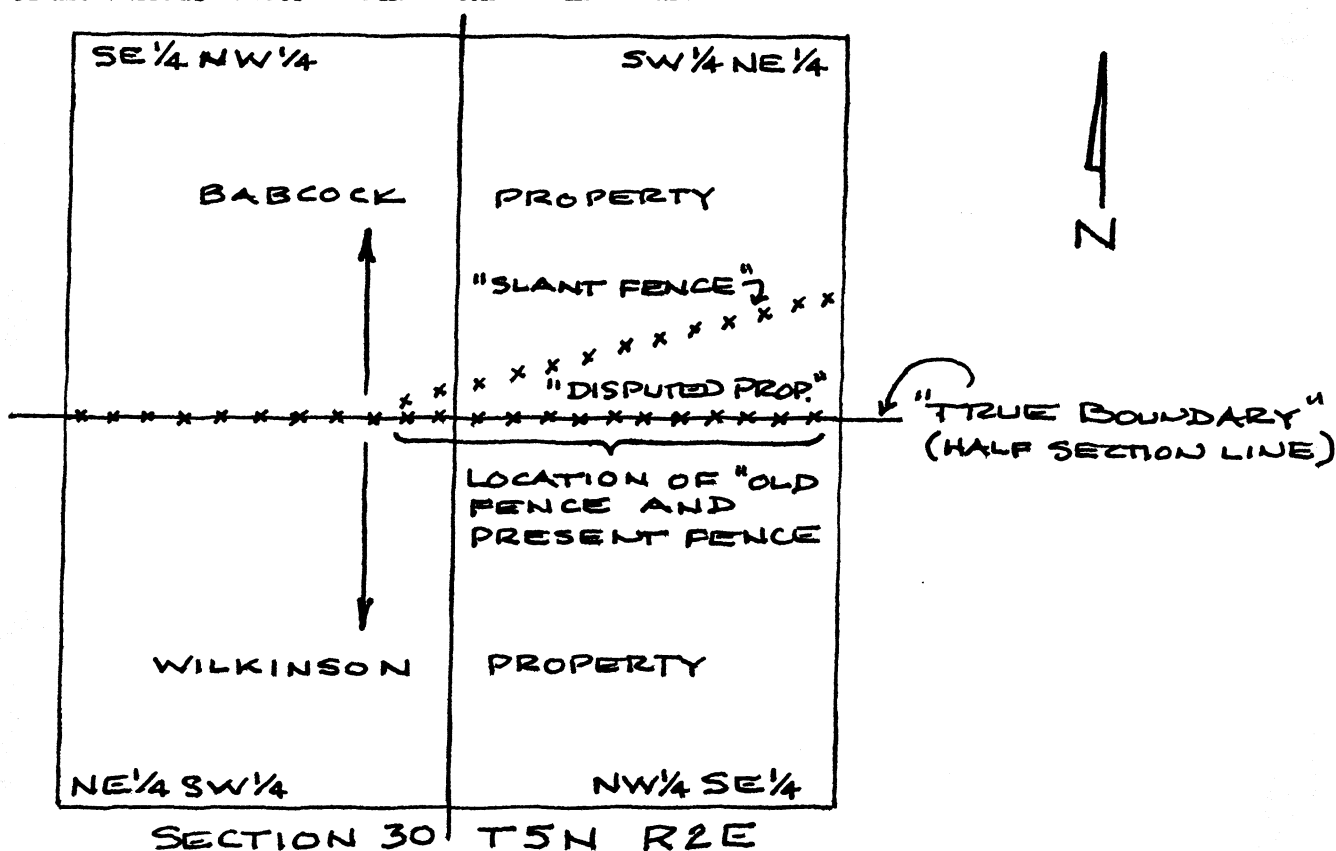
The Statement of Facts contained at pages 5 to 6 of Wilkinson's Brief is inaccurate and incomplete. Although Wilkinson on this appeal does not challenge the trial court's Findings of Fact, and Wilkinson surely does not marshal any evidence in support of them, it advances under its Statement of Facts only those facts tending to support its position, and numerous of those statements are inaccurate.<sup>1</sup> In the following

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<sup>1</sup> In paragraph 3, Wilkinson claims it used the disputed property to grow crops and graze animals. The court found, however, that Wilkinson used only a portion of the disputed property and that its cultivation was not even up to the alleged fence of acquiescence. [Findings of Fact, ¶ 19]. Wilkinson's claim in paragraph 4 about placing a part of the disputed property into a federal program is irrelevant because it does not relate to what happened on the land, and there was no evidence that the owners of the Babcock land were even aware of this. Interestingly, this federal program paid Wilkinson for not farming the land in question. [T. 153]. In paragraph 6, Wilkinson asserts that the court found "that the disputed area was used for some crop usage." As already noted, the court found that Wilkinson only used a fraction of the area and did not even cultivate up to the disputed fence, which is the only relevant issue. In paragraph 7, Wilkinson indicates that the trial court found that the fence line originally was not intended as a boundary line. In fact, the evidence established that the parties agreed to maintain the disputed fence as a livestock containment fence throughout its existence and that the purpose of the fence was always and exclusively to contain stock and not to establish a boundary. [Conclusions of Law, ¶ 4].

statement, Babcock does not attempt to marshal all of the evidence supporting the trial court's findings. The following facts were either specifically found by the court or are supportive of those findings.

Babcock and Wilkinson own properties that are contiguous. The northerly boundary of the Wilkinson property (the "Wilkinson Property") coincides with the southerly boundary of the Babcock property (the "Babcock Property"). For illustrative purposes, following is a diagram showing the location of the Babcock Property and the Wilkinson Property in the vicinity of their common boundary, along with the locations of the various fences that have existed in the area:



[Findings of Fact, ¶ 4]. The true boundary between the Wilkinson Property and Babcock Property (the "True Boundary") is a straight line. [Findings of Fact, ¶¶ 7 and

9]. Wilkinson sought to establish ownership of the triangular portion of the Babcock Property (the "Disputed Property") lying south of a fence slanting north from the True Boundary, which is identified as "Slant Fence" in the diagram above. [Findings of Fact, ¶ 5].

The Babcock Property was owned from patent to 1992 by members of the Williams family. Williams conveyed the Babcock Property to Babcock in 1992. The Wilkinson Property has been in the Wilkinson family since 1935. [Findings of Fact, ¶¶ 6 and 8]. Each of the deeds in the chain of title to the Babcock Property and the Wilkinson Property describe the boundary between their properties as a straight line, which is the half section line of Section 30, Township 5 North, Range 5 East. [Findings of Fact, ¶¶ 7 and 9]. Although the Wilkinsons have effected at least four conveyances of the Wilkinson Property (in 1955, 1976, 1984, and 1985), the Wilkinson family and Wilkinson have always described their property as having a straight line as its southern boundary (i.e., without any jog along the Slant Fence such as would exist if the boundary were as Wilkinson contends here). [Findings of Fact, ¶ 10].

At least three different fences have existed in the area of the disputed boundary. A very old fence existed on the True Boundary in excess of twenty years ago. Babcocks installed another fence very close to the location of the old fence on the True Boundary in 1996. In addition, more than twenty years ago, a fence was installed by the Williams family in the vicinity of the "Slant Fence" identified on the diagram. [Findings of Fact, ¶ 12].

It was evident to Babcocks, their predecessors the Williamses, and Wilkinson and its predecessors, that the Slant Fence is not located on the True Boundary between the parties' properties. It is easy to see that the Slant Fence departs from the straight line of the True Boundary by sighting down the fence along the half section line. That the Slant Fence is not located on the straight line of the True Boundary is obvious. The true location of the boundary between the Wilkinson Property and the Babcock Property was never unknown or uncertain to the parties. [Findings of Fact, ¶ 16]. The fact that some of the parties' predecessors long ago installed a fence along the True Boundary reinforces this fact. The trial court found that Wilkinson and its predecessors and Babcock and its predecessors knew that the Slant Fence was not located on the actual boundary between their properties. [Conclusions of Law, ¶ 4].

The Slant Fence was installed where it was, rather than on the True Boundary, exclusively because of the topography in the area. In the vicinity of the True Boundary, the topography is very steep and hilly, making installation of a fence difficult and making installation of a fence that will effectively contain livestock almost impossible. [Findings of Fact, ¶ 13]. The Slant Fence was, therefore, installed in its location because the topography in this area allowed easy, convenient fencing suitable for livestock containment. [Findings of Fact, ¶14]. A fence on the True Boundary would not effectively contain livestock. [Findings of Fact, ¶ 17]. The trial court found that Babcock's predecessors and Wilkinson's predecessors agreed that the Slant Fence would be used and maintained as a livestock containment fence. [Conclusions of Law,

¶ 4]. Each of the Wilkinsons testifying at trial was impeached with his deposition testimony stating unequivocally that the Slant Fence was installed solely to contain livestock and for no other purpose. [Harry J. Wilkinson Depo. p. 22, T. 244; Max Wilkinson Depo. p. 18, T. 147-48; Harry Wayne Wilkinson Depo. p. 20, T. 78]. In fact, Harry Wilkinson testified that he had a conversation with Josh Williams in the 1940s about the Slant Fence in which the parties agreed that the Slant Fence would be maintained as a method of separating the parties' livestock. [Harry J. Wilkinson Depo. p. 20-21, T. 244]. Harry Wilkinson also testified that the reason that the Slant Fence jogged off of the straight line was to make it simpler to put in and take care of. [Harry J. Wilkinson Depo. p. 41, T. 244]. The photographs introduced at trial demonstrate that a large canyon exists in the area of the Disputed Property and that one of the sloped sides of that canyon is in the vicinity of the True Boundary. [E.g., Exhibits 17 (the True Boundary goes through the canyon shown in the upper middle of this photograph) 19, and 20, T. 398-400].

The trial court found as follows with respect to the reason why the Slant Fence was installed where it was:

17. The Slant Fence was installed by the then-owner of the Babcock Property in excess of 20 years ago. The Slant Fence was not installed to establish a boundary or was not installed in a location considered to be the boundary between the Wilkinson Property and the Babcock Property; rather, the Slant Fence was installed for the exclusive purpose of containing livestock on the Babcock Property and preventing livestock from escaping from the Babcock Property onto the Wilkinson Property. The only reason why the fence in the vicinity of the Disputed Property was not always installed along the True Boundary was because of the topography in the area -- installation of a livestock

containment fence along the True Boundary would be extremely difficult, maintenance of the fence would be extremely difficult, and a fence located on the True Boundary would not effectively contain livestock. The Slant Fence was installed where it was so that it would effectively and conveniently function as a livestock containment fence and avoid the extreme topography in the vicinity of the True Boundary.

4. The purpose of the Slant Fence was always and exclusively to contain livestock and not to establish a boundary. The Slant Fence was located where it was because a livestock containment fence could not effectively be installed and maintained on the True Boundary. Babcocks' predecessors and Wilkinson's predecessors agreed that the Slant Fence would be used and maintained as a livestock containment fence. Both Wilkinson and its predecessors and Babcocks and their predecessors knew that the Slant Fence was not located on the boundary between the Babcock Property and the Wilkinson Property.

[Findings of Fact, ¶ 17; and Conclusions of Law, ¶ 4].

Although the district court did find that Wilkinson and its predecessors occupied the Disputed Property for in excess of twenty years, the court also found that they grazed cattle only from time to time on the Disputed Property and cultivated less than half of the Disputed Property, with such cultivation not going up to the Slant Fence.

[Findings of Fact, ¶ 19]. The trial court found that Wilkinson's occupation of the Disputed Property was not objected to by Babcock's predecessors, but neither Babcocks nor their predecessors ever gave up their claim of ownership of the Disputed Property.

[Conclusion of Law, ¶¶ 5, 6]. There was no evidence that Wilkinson ever asserted ownership over the Disputed Property to Babcock or their predecessors. Indeed, all of the evidence was to the contrary. Wilkinson sometimes asked Williams for permission to use the Disputed Property. [Harry J. Wilkinson testimony at T. 247-48; Harry J.

Wilkinson Depo. pp. 32 and 40]. When Wilkinson conveyed their property intra-family in 1955, 1976, 1984, and 1985, they did not include the Disputed Property in the conveyances. [Findings of Fact, ¶ 10]. Wilkinson and its predecessors never paid real property taxes on the Disputed Property and Babcock and their predecessors paid all of the real property taxes on the Disputed Property.<sup>2</sup> [Findings of Fact, ¶ 22]. Indeed, since Babcocks became the owners of the Babcock Property, Babcock and Wilkinson have discussed exchanging various parcels of land owned by each for the mutual benefit of both, including exchanges involving Babcock's transfer to Wilkinson of the Disputed Property.<sup>3</sup> [Findings of Fact, ¶ 21].

Based upon the foregoing, and the other evidence at trial, the court made a specific Finding of Fact that "Wilkinson and its predecessors and Babcock and their predecessors did not mutually acquiesce in the Slant Fence as a boundary between the Wilkinson Property and the Babcock Property." [Findings of Fact, ¶ 25].

Wilkinson does not challenge that determinative finding in this appeal.

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<sup>2</sup> The claimant's failure to pay taxes on the disputed land and the record owner's payment of the taxes is one factor indicating that the parties did not acquiesce in a fence as a boundary. E.g., Madsen v. Clegg, 639 P.2d 726, 729-30 (Utah 1981) ["plaintiff's . . . payment of taxes on the disputed property . . . show[s] that he did not acquiesce in defendant's claim of ownership."]; Ringwood v. Bradford, 269 P.2d 1053, 1056 (Utah 1954).

<sup>3</sup> A claimant's offer to purchase disputed property from the record owner suffices, without more, to preclude any boundary by acquiescence. Van Dyke v. Chappel, 818 P.2d 1023, 1027 (Utah 1991). A claimant's offer to purchase disputed land constitutes a recognition of the true boundary and a rejection of the fence as a boundary. Leon v. Dansie, 639 P.2d 730, 731 (Utah 1981).

## **SUMMARY OF ARGUMENTS**

### **POINT I**

#### **WILKINSON HAS MISCHARACTERIZED THE COURT'S ANALYTICAL PROCESS**

Wilkinson argues that the trial court found it had carried its burden of establishing mutual acquiescence or at least a presumption of mutual acquiescence and that the trial court improperly found this presumption rebutted by a finding of the purpose of the fence or lack of uncertainty as to the location of the True Boundary. A review of the transcripts of all of the hearings during which the trial court addressed this issue demonstrates that the trial court did no such thing.

### **POINT II**

#### **WILKINSON'S FAILURE TO CHALLENGE THE COURT'S FACTUAL FINDING THAT THE PARTIES DID NOT MUTUALLY ACQUIESCENCE IN THE FENCE AS A BOUNDARY IS DETERMINATIVE**

Each of Wilkinson's points on appeal seek to reverse the trial court's finding of no mutual acquiescence. Wilkinson's concession that it does not challenge the court's finding of fact that there was no mutual acquiescence and its failure to marshal the evidence in support of the court's finding requires that this finding stand. This finding by the court negates each of Wilkinson's challenges on appeal.

### **POINT III**

#### **A FENCE INSTALLED SOLELY FOR THE PURPOSE OF CONTAINING CATTLE, AND NOT AS A BOUNDARY, CANNOT BE A BOUNDARY BY ACQUIESCENCE**

A fence installed as a cattle containment fence, and not as a boundary fence, cannot give rise to the doctrine of boundary by acquiescence because the parties by definition cannot mutually acquiesce in the line as a boundary. At least seven Supreme Court cases so hold, and those holdings have never been reversed or undermined.

### **POINT IV**

#### **INDOLENCE DOES NOT CREATE A CONCLUSIVE PRESUMPTION OF ACQUIESCENCE**

No Utah case so holds. The trial court did not find, and refused to find, "indolence." Indolence is not an issue in a cattle containment fence case. In any event, indolence is only one factor among many bearing upon whether the parties mutually acquiesce in a boundary.

### **POINT V**

#### **BOUNDARY UNCERTAINTY IS A RELEVANT CONSIDERATION**

The court did not re-adopt any requirement of objective uncertainty. The parties' knowledge of the actual location of the boundary is a relevant fact that, among others, bears upon whether the parties acquiesced in a different line as a boundary.

## **ARGUMENT**

### **POINT I**

#### **WILKINSON HAS MISCHARACTERIZED THE COURT'S ANALYTICAL PROCESS**

In *Staker v. Ainsworth*, 785 P.2d 417, 420 (Utah 1990) the Utah Supreme Court identified the four elements of the doctrine of boundary by acquiescence:

(1) Occupation up to a visible line marked by monuments, fences, or buildings, (2) mutual acquiescence in the line as a boundary, (3) for a long period of time, (4) by adjoining landowners.

Here, the court found all of these elements to be present other than the second element -- "mutual acquiescence in the line as a boundary."

Wilkinson's Brief contains a few carefully selected, incomplete selections from the court's statements at the three hearings that followed the trial during which its findings were announced, formulated, and finalized. Wilkinson argues, based upon those incomplete references, that the trial court reasoned and found as follows: First, Wilkinson argues that the trial court found that Wilkinson had carried its burden of establishing the mutual acquiescence element or, at least, the presumption of that mutual acquiescence element. [Wilkinson Brief, pp. 8-9 and 14]. Second, Wilkinson argues that the trial court improperly found that this finding of acquiescence, or at least a presumption of this finding, was improperly rebutted or overcome by the initial purpose of the fence or lack of uncertainty as to the location of the True Boundary. [Wilkinson Brief, pp. 13-14 and 18].

A reading of all of the trial court's pronouncements on this issue reveals that the trial court did not state or reason as Wilkinson suggests. The Appendix to this Brief contains all of the court's three rulings to which reference is made here.<sup>4</sup> The first hearing of March 3, 1998 will be referred to as the "March Hearing," the second hearing of June 24, 1998 will be referred to as the "June Hearing," and the third hearing of September 23, 1998 will be referred to as the "September Hearing."

At the first hearing, the March Hearing, the court observed that the parties' deed lines established a straight line as their boundary [March Hearing Transcript, p. 4], that various fences had existed in the area of the parties' boundary, some on the True Boundary, and some off the True Boundary [March Hearing Transcript, pp. 4-5], that the parties respectively paid taxes on their respective deeded properties [March Hearing Transcript, p. 4], that there was no confusion between the parties as to the location of the actual boundary [March Hearing Transcript, p. 9], that a cattle containment fence could not effectively have been installed along the True Boundary, [March Hearing Transcript, pp. 9-10], and that the Slant Fence was installed solely as a cattle containment fence. [March Hearing Transcript, p. 10].

Wilkinson argues from the March Hearing Transcript that the court held that Wilkinson had established a presumption of boundary by acquiescence. A reasonable reading of what the court said, however, indicates that the court indicated that such a

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<sup>4</sup> Wilkinson's Appendix contains a transcript of only the first ruling.

presumption had been met only if one views acquiescence as meaning indolence only, which the trial court refused to do. Here is the quotation:

Based on the strength of that case and on the overall evidence in this case of the occupation in the area, the court believes that the presumption has been met on the Plaintiff's side of this case to suggest that there may have been a boundary line by acquiescence, but I can only get there if I view that the phrase acquiescence as incorporating indolence and just not taking any action to kick someone off the disputed property.

[March Hearing Transcript, p. 8]. The trial court then went on to conclude that although Babcock's predecessors did not try to kick Wilkinson off the Disputed Property, this fact did not constitute mutual acquiescence in a line as a boundary between the parties based upon the facts in this case. [March Hearing Transcript, pp. 9-11].

At the second hearing, the June Hearing, at which Wilkinson moved the court to set aside its Judgment based upon the very same arguments now being advanced to this Court, the district court reiterated that it did not intend to convey the analytical process that Wilkinson once again argues to this Court. Wilkinson's counsel advanced that argument at pages 3 through 11 of the June Hearing Transcript. [June Hearing Transcript, pp. 3-11]. In response, Babcock's counsel argued essentially what is now being reargued to this Court -- that the trial court in its original announcement of its ruling at the March Hearing found a lack of mutual acquiescence in the fence as a boundary based upon the court's multiple factual findings bearing upon this issue, which are generally set forth above. [June Hearing Transcript, pp. 12-16]. In re-

sponse, the District Judge stated that those statements by Babcock's counsel were consistent with what the trial judge intended. [June Transcript, p. 16, lns. 15-20].

Later, at pages 24 to 25, Wilkinson's counsel again reargued that the District Judge had held that, although Wilkinson had met its burden to establish acquiescence, the fact that the parties knew the true boundaries defeated Wilkinson's case. [June Transcript, p. 25]. Once again, the Trial Judge corrected Wilkinson's counsel. The District Judge stated:

To the extent I created some confusion with the use of that word [indolence], when I revisit this, I may need to clarify that

\* \* \*

What the court ruling really was trying to get at there is that I suppose had these parties been in conflict from the get-go and it was clear that there was confusion about the boundary line and I don't want to get back into Halladay because I'm not attempting to do that. But then it's certainly indolence for one party just to sit back and allow usage of the property to be made

\* \* \*

That as Mr. Maak has argued, he is right on in his argument about what my findings were in this case and that is that I have never found -- and I remember this case very clearly.

At pages 28-29, the court further explained its intent in using the word "indolence" -- the court explained that the boundary line was clear to the parties when the Slant Fence was installed and the parties intentionally installed it where it could be maintained as a cattle containment fence. The court stated that the parties never intended that the fence be established as a boundary line and that the fence was only installed to contain cattle. [June Transcript, pp. 25-29].

The argument between Wilkinson's counsel and the court as to what the court stated and meant continued at the third hearing in September, 1998 that addressed Wilkinson's objections to the Findings of Fact and Conclusions of Law. Wilkinson's counsel requested that the court specifically make a finding of Babcock and her predecessors' "indolence" as to the boundary. [September Transcript, p. 10]. The court stated, "I am not going to put that in these findings and I don't want it put in." [September Transcript, p. 11, lns. 6-7]. The District Judge went on to state that "I don't want particular phrases to trap over all the findings that I have been attempting to make in this case." [September Transcript, p. 13]. The court then stated that it wanted the findings to show that the Slant Fence was installed not as a boundary line but rather as a stock containment fence and that Babcock's predecessors did not interrupt the limited use that Wilkinson made of the property. [September Transcript, pp. 14-15].

The court stated:

And what I'm really trying to say now is I'm making that finding that whatever stock grazing might have gone on by Wilkinson's stock over that fence line, nobody stopped or interrupted that because, in fact, there was no fence allowing the actual boundary line to stop or interrupt it.

[September Transcript, p. 15, lns. 11-15]. At pages 15 to 16, the court stated again that it had made no findings that Wilkinson had cultivated crops up to the fence. At page 18 the court stated that although "there were some [of Wilkinson's] cattle that were able to access that area," this use was not interrupted by Babcock or its predeces-

sors. [September Transcript, p. 18]. The court stated that it could not find that the cows could get to every area of the fence. [September Transcript, p. 21].

Wilkinson's argument to this Court that the lower court found that it had met its burden of establishing a presumption of acquiescence, that the court found a presumption of acquiescence, or that the court re-incorporated the requirement of objective uncertainty [created by *Halladay v. Cluff*, 685 P.2d 500 (Utah 1984) and reversed in *Staker v. Ainsworth*, 785 P.2d 417 (Utah 1990)] is a misstatement of the court's ruling. The Findings of Fact and Conclusions of Law were executed by the court after extensive briefing and argument with which the court was intimately involved. Those Findings of Fact and Conclusions of Law contain no hint of the logic or reasoning that Wilkinson now argues that the trial court employed. The court's own statements at all of the three hearings during which this subject was discussed also make clear that the Court did not reason or hold as Wilkinson suggests. Rather, those hearings collectively demonstrate that the trial court found, based upon all of the evidence and the other findings of the court, that as a matter of fact the parties and their predecessors did not mutually acquiesce in the Slant Fence as a boundary.

## POINT II

### **WILKINSON'S FAILURE TO CHALLENGE THE COURT'S FACTUAL FINDING THAT THE PARTIES DID NOT MUTUALLY ACQUIESCENCE IN THE FENCE AS A BOUNDARY IS DETERMINATIVE**

The trial court is required, in a trial without jury, to enter Findings of Fact, which "shall not be set aside unless clearly erroneous." Rule 52(a), Utah Rules of Civil Procedure; *Woodhaven Apartments v. Washington*, 942 P.2d 918 (Utah 1997). The findings contained in the Findings of Fact should be limited to the ultimate facts, and not evidentiary facts. *Pearson v. Pearson*, 561 P.2d 1080 (Utah 1977). Whether the parties mutually acquiesced in a fence as a boundary, in a boundary by acquiescence case, is unquestionably an ultimate fact that constitutes a court's finding of fact. The Supreme Court has treated trial courts' findings concerning mutual acquiescence as findings of fact that are not to be set aside unless clearly erroneous. E.g., *Grayson Roper, Ltd. v. Finlinson*, 782 P.2d 467 (Utah 1989); *Hales v. Frakes*, 600 P.2d 556 (Utah 1979); *Leon v. Dansie*, 639 P.2d 730 (Utah 1981).

The following is a verbatim quotation of paragraph 25 of the trial court's Findings of Fact in this case:

25. Wilkinson and its predecessors and Babcocks and their predecessors did not mutually acquiesce in the Slant Fence as a boundary between the Wilkinson Property and the Babcock Property.

Wilkinson concedes that "Wilkinson has not asked this Court to reverse the trial court's findings of fact." [Wilkinson Brief, p. 20]. Even if Wilkinson were to choose to attack

the court's Findings of Fact, it could not properly be allowed to do so because it has made no effort to marshal the evidence in support of the court's findings. When a party fails to marshal the evidence in support of the court's findings, the appellate court will not consider any challenge to those findings. E.g., *Saunders v. Sharp*, 806 P.2d 198 (Utah 1991). Thus, because Wilkinson concedes it does not challenge the court's findings of fact, and because it has not marshaled the evidence in support of those findings in any event, this Court may not properly entertain any challenge to the trial court's finding that Babcock and its predecessors and Wilkinson and its predecessors did not mutually acquiesce in the fence as a boundary.

The Utah Supreme Court addressed this specific circumstance in *Grayson Roper, Ltd. v. Finlinson*, 782 P.2d 467, 572 (Utah 1989):

The trial court found that the fence along the west side of the disputed strip was build for stock control and not as a boundary; therefore, it was not acquiesced in as a boundary by both parties. Finlinson has not attempted to carry his burden of overturning that finding on appeal. See *Bartell*, 776 P.2d at 886. We therefore decline to overturn the trial court's finding on that point. (emphasis added).

Here, just like in *Grayson*, Wilkinson has not attempted to carry its burden of overturning the trial court's finding of no mutual acquiescence. *Grayson* requires for that reason that the trial court's judgment be affirmed.

Each of Wilkinson's arguments on appeal fails if the court's finding of no mutual acquiescence stands. Wilkinson's Point I argues that the court should not have found mutual acquiescence because the trial court improperly considered the purpose of the

fence. Point II argues that indolence (which the trial court specifically refused to find) creates a conclusive presumption of acquiescence. Point III argues that the trial court improperly found that the presumption of acquiescence was rebutted by lack of uncertainty as the true location of the boundary (the trial court did not so rule). Thus, each ground for appeal seeks to reverse the trial court's finding that the parties did not mutually acquiesce in the Slant Fence as a boundary line. Because Wilkinson concedes that it does not challenge that finding and does not marshal the evidence in support of it, each of its three arguments why that finding is incorrect should be rejected.

Point IV of Wilkinson's Brief under the peculiar heading of "Evidence Marshaled in Favor of Babcock" contains Wilkinson's statement that it does not challenge the Findings of Fact and a concession that it would have had to marshal the evidence in support of those findings had it chosen to challenge them, but contains no effort to marshal the evidence based upon this statement: "Wilkinson believes that Babcock will acknowledge that the trial court found that the presumption of acquiescence was rebutted by the trial court's finding that when the fence was originally installed the original boundary was known and that the fence was not intended as a boundary line, but as a containment fence." [Wilkinson Brief, p. 20]. Babcock concedes no such thing, and argued against this very position at both the June and September Hearings. Rather, Babcock reiterates what the trial court stated at both the June and September Hearings -- based upon the evidence before it, the court found, as a matter of fact, that there was no mutual acquiescence in the Slant Fence as a boundary. As Point I above

establishes, the trial court did not adopt, and in fact rejected, the analytical formulation urged by Wilkinson. This is either one more effort to twist the court's factual findings into a legal framework not adopted by the trial court or an improper effort to excuse Wilkinson's failure to marshal the evidence and to give it some toehold for a future argument that it should be allowed to marshal the evidence in its Reply Brief. Babcock will most strenuously object to any effort by Wilkinson belatedly to marshal the evidence in its Reply Brief.

### **POINT III**

#### **A FENCE INSTALLED SOLELY FOR THE PURPOSE OF CONTAINING CATTLE, AND NOT AS A BOUNDARY, CANNOT BE A BOUNDARY BY ACQUIESCENCE**

If adjoining landowners know and recognize the actual boundary between their properties, and, with that knowledge, install a fence in a different location to contain cattle because of topography in the area, Wilkinson would have the court believe that the cattle containment fence becomes a boundary fence contrary to the parties' admitted mutual intentions. That obviously makes no sense and is not the law.

It has always been the law in the State of Utah that when a fence is installed as a cattle containment fence and not as a boundary fence, such a fence cannot give rise to the doctrine of boundary by acquiescence. The reason for this correct principle is crystal clear -- boundary by acquiescence requires "mutual acquiescence in the line as a boundary." *Staker v. Ainsworth*, 785 P.2d 417, 420 (Utah 1990). If the fence is

installed with the parties' mutual intent to contain cattle and not as a boundary, it follows that a cattle containment fence cannot give rise to boundary by acquiescence. The third element to boundary by acquiescence has never varied from the verbatim formulation requiring "mutual acquiescence in the line as a boundary." To establish the doctrine therefore, "both parties must have knowledge of the existence of a line as a boundary line." *Fuocco v. Williams*, 421 P.2d 944, 947 (Utah 1966). Mutual acquiescence in a fence as a barrier for any purpose other than a boundary does not constitute acquiescence in the fence as a boundary. *Florence v. Hiline Equipment Co.*, 581 P.2d 998 (Utah 1978).

The Utah Supreme Court has held on at least seven separate occasions that a fence installed to control cattle cannot create a boundary by acquiescence. *Grayson Roper Limited Partnership v. Finlinson*, 782 P.2d 467, 472 (Utah 1989) ["[T]he fence along the west side of the disputed strip was built for stock control and not as a boundary; therefore, it was not acquiesced in as a boundary by both parties"]; *Leon v. Dansie*, 639 P.2d 730, 731 (Utah 1981) [fence installed to contain cattle "eliminates any question of boundary by acquiescence. . . ."]; *Hales v. Frakes*, 600 P.2d 556 (Utah 1979); *Wright v. Clissold*, 521 P.2d 1224, 1227 (Utah 1974); *Anderson v. Osguthorpe*, 504 P.2d 1000, 1002 (Utah 1972); *Ringwood v. Bradford*, 269 P.2d 1053 (Utah 1954); *Hummel v. Young*, 265 P.2d 410 (Utah 1953).

Wilkinson addresses none of these cases under Point I of its Brief, which contains its argument on this subject. Instead, Wilkinson attempts to place the cattle

containment fence exception into an analytical framework never adopted by any court. Wilkinson's argument goes like this: First, *Halladay v. Cluff*, 685 P.2d 500 (Utah 1984) created a fifth element of the boundary of acquiescence doctrine -- objective uncertainty as to the location of the actual boundary. Second, the requirement of objective uncertainty was eliminated in *Staker v. Ainsworth*, 785 P.2d 417 (Utah 1990). So far, Wilkinson is correct. Third, Wilkinson argues that because in our case the trial court found that the parties knew the location of the True Boundary but because of topography installed a cattle containment fence in a different location, somehow the court improperly re-introduced the requirement of objective uncertainty. The record in this case contains no suggestion that the trial court ever regarded objective uncertainty as a requirement to Wilkinson's case here. Rather, the trial court found that the Slant Fence was installed, because of topography, not as a boundary fence, but rather as a cattle containment fence and that both parties recognized the fence as such. Accordingly, there was no "mutual acquiescence in the line as a boundary."

Plaintiff suggests, without any support in the *Staker* case itself, that *Staker* somehow totally changed the law of boundary by acquiescence in the State of Utah with respect to livestock containment fences. First, *Staker* does not even address this issue. Second, the Utah appellate courts have on multiple occasions stated that the doctrine of boundary by acquiescence after *Staker* is the same as it was prior to *Halladay* (that is, the doctrine has four elements, exclusive of the fifth "objective uncertainty" requirement engrafted by *Halladay* in 1984). The *Staker* case, itself, contains a verbatim

formulation of the four elements of the doctrine as it existed before *Halladay*. Compare the verbatim formulations of the four elements of the doctrine in *Staker v. Ainsworth*, 785 P.2d 417, 420 (Utah 1990) and *Goodman v. Wilkinson*, 629 P.2d 447, 448 (Utah 1981). Second, the Court of Appeals in *Jacobs v. Hafen*, 875 P.2d 559, 562 (Utah App. 1994) stated as follows:

Prior to 1984, the elements of boundary by acquiescence in Utah were the same as they are today. \* \* \* [T]he requirements for boundary by acquiescence after *Staker* in 1990 are the same as they were prior to *Halladay* in 1984.

Third, the Utah Supreme Court has held that the cattle fence exception applies even with the deletion of the "objective uncertainty" element of the doctrine. In *Grayson Roper Limited Partnership v. Finlinson*, 782 P.2d 467, 472 (Utah 1989), which was decided just two months before *Staker*, the Utah Supreme Court addressed a livestock fence scenario in which the appellant invited the Court to disregard the *Halladay* court's requirement of objective uncertainty. The *Grayson* Court stated:

Even if we were to so limit *Halladay*, Finlinson would not prevail here because he cannot satisfy all the elements of *Fuocco* [the four traditional requirements to boundary by acquiescence]. The trial court found that the fence along the west side of the disputed strip was built for stock control and not as a boundary; therefore, it was not acquiesced in as a boundary by both parties. (emphasis added).

*Id.* at 472. *Grayson* establishes that the cattle fence exception to the doctrine applies now, as it always has. Thus, the Utah appellate courts' multiple holdings establish that a fence built for stock control and not to establish a boundary cannot give rise to the

doctrine boundary by acquiescence. This concept has never been questioned or undermined. It is the law of this state now.

That a fence installed not as a boundary but solely to contain cattle cannot constitute a boundary by acquiescence comports also with sound policy, logic, and good sense. If both adjoining owners know the true boundary and agree to install and maintain a fence to contain stock in a location other than the true boundary because of topographical considerations, and the parties never regard the cattle containment fence as a boundary but one periodically occupies its side of the cattle containment fence, does it make any sense to conclude that the cattle containment fence becomes a boundary as a matter of law? Such a principle is contrary to human intuition and frustrates the mutual intent and legitimate expectations of the parties. Such a principle would require parties to build unnecessary boundary fences in addition to cattle containment fences to avoid losing their land notwithstanding that both parties never regarded the containment fence as a boundary. Such a principle also runs counter to the obviously sound principle that "[a] person should be presumed to claim title to all the land called for by his deed unless it clearly appears otherwise." *Brown v. Milliner*, 232 P.2d 202, 208 (Utah 1951). It also conflicts with the requirements that the doctrine be "restrictively applied" and that the party claiming under the doctrine has the burden of establishing all of the elements to the doctrine, one of which is acquiescence in the line as a boundary. *Englert v. Zane*, 848 P.2d 165 (Utah App. 1993).

Abandoning the cattle containment exception would be contrary to at least seven Supreme Court cases squarely on point, would violate the classical formulation of the doctrine requiring mutual acquiescence in the line as a boundary, would improperly shift the presumption from deed lines to fence lines never intended as boundary lines, would be bad policy, and would make no sense.

#### POINT IV

#### INDOLENCE DOES NOT CREATE A CONCLUSIVE PRESUMPTION OF ACQUIESCENCE

Point II of Wilkinson's Brief argues that indolence creates a conclusive presumption of acquiescence. The first problem with this argument is that the court's Findings of Fact and Conclusions of Law do not find any indolence. In fact, the court specifically stated that it did not want to make any finding of indolence. [September Hearing Transcript, p. 11, lns. 6-7]. Because the court did not find, and refused to find, indolence on the part of Babcock and its predecessors, this argument must be rejected.

Even if indolence existed, however, Utah law does not create any conclusive presumption of a boundary by acquiescence arising from indolence. Wilkinson advances two cases in support of its argument. The quotation advanced at page 15 of the Wilkinson Brief from *Olsen v. Park Daughters Investment, Inc.*, 511 P.2d 145 (Utah 1973) stands only for the proposition that once all of the elements of boundary by acquiescence are established, the boundary so established is conclusively established. The court's exact language is as follows:

. . . . Wherefore, there has developed the doctrine of acquiescence. Its essence is that where there arises a dispute as to the boundary between parties and it appears that there is a recognizable physical boundary of any character which has been acquiesced in as a boundary for a long time, the conflict should be conclusively presumed to have been reconciled in some manner. It is our opinion that the policy of encouraging peace and good order and or discouraging trouble and controversy demands that that be accepted as the correct doctrine. . . . *Id.* at 147.

*Olsen* addressed the interaction of the Marketable Record Title Act and boundary by acquiescence; it did not even address the evidentiary framework of the latter. The *Olsen* case most assuredly does not state that indolence creates a presumption, much less a conclusive presumption, of acquiescence.

The next case on which Wilkinson relies is *Carter v. Hanrath*, 885 P.2d 801 (Utah App. 1994), rev'd, 925 P.2d 960 (Utah 1996). *Carter* concerned a party's occupation up to a fence line or cliff for over 60 years with neither party objecting to that state of affairs. Because of steep cliffs, however, the title owner of the disputed property was practically unable to access the disputed land. The Court of Appeals decision held that indolence for an extended period of time was sufficient under the facts of that case to establish acquiescence in the fence line as a boundary.<sup>5</sup> The Supreme Court, reversing, held that "because of this inability to take physical possession of the disputed area, the indolence of the Schraders cannot be construed to be acquiescence. Their nonuse must be attributed to their physical inability to possess the

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<sup>5</sup> Unlike this action, *Carter* did not concern a case where the parties knew the location of the true boundary and intended and agreed that the fence was a cattle containment fence and not a boundary fence.

disputed area, not to their acquiescence in the edge of the plateau with its cliffs and ledges as the boundary." *Id.* at 962. Similarly here, as the court found, Babcocks' predecessor could not feasibly or conveniently install a cattle containment fence along the True Boundary, as a consequence of which it was knowingly installed in a location other than the True Boundary to serve its intended purpose. Babcocks' predecessor, like the *Carter* case, was practically prevented, by cliffy topography, from including the disputed area with the remainder of his land to graze livestock.

The concept of "indolence" never arises in the context of a cattle containment fence, which was knowingly installed by the parties at a location other than the true boundary by virtue of topographical considerations. The Supreme Court's pronouncements with respect to fences installed to contain cattle and not to establish boundaries hold that such fences cannot constitute boundaries by acquiescence. Thus, in the case of a fence installed solely to contain cattle, one does not even arrive at the issue whether there is any presumption or conclusive presumption of acquiescence based upon indolence. The doctrine simply does not apply. Even if it did apply, the Supreme Court, addressing cattle containment fences, has found no mutual acquiescence exists even when the adverse claimant actually uses and occupies the disputed property without objection. *Grayson Roper, Ltd. v. Finlinson*, 782 P.2d 467, 470 (Utah 1989) [(that court found claimant and owner both used the disputed property for over 50 years)]; *Hales v. Frakes*, 600 P.2d 556 (Utah 1979) (the owner never interfered with the claimant's use of the disputed property but "the [claimant's] occupation to the fence

was not sufficient to establish [the owner's] acquiescence in the fence as a boundary"]; *Anderson v. Osguthorpe*, 504 P.2d 1000 (Utah 1972) [claimant's cattle grazed in disputed area, but no acquiescence shown because fence intended as a livestock containment fence]; *Ringwood v. Bradford*, 269 P.2d 1053 (Utah 1954) [claimant's use of one-half of disputed property did not establish acquiescence when fence intended as a livestock containment fence].

Finally, the trial court's finding that Wilkinson occupied and/or used a portion of the Disputed Property bears upon the first element of the doctrine (occupation up to a visible line). It does not establish the distinct second element of acquiescence. A deed owner's allowing the claimant to share or use the disputed land is not sufficient, alone, to establish acquiescence. *Brown v. Milliner*, 232 P.2d 202, 208 (Utah 1951) ["the fact that a landowner allows others to share with him the use of his land does not necessarily signify a disclaimer of ownership"]; *Hales v. Frakes*, 600 P.2d 556 (Utah 1979); *Madsen v. Clegg*, 639 P.2d 726, 730 (Utah 1981); *Wright v. Clissold*, 521 P.2d 1224 (Utah 1974).

Because the court did not find indolence, because governing appellate authorities do not hold indolence to create a presumption, much less a conclusive presumption, of acquiescence, because an owner allowing another to use his property does not alone establish acquiescence, and because the fence in this case was determined to be solely a livestock containment fence, this Point of Wilkinson's Brief must be rejected.

## POINT V

### BOUNDARY UNCERTAINTY IS A RELEVANT CONSIDERATION

Wilkinson argues that the district court improperly ruled that a presumption of acquiescence was rebutted by the lack of uncertainty as to the true location of the boundary. As demonstrated in Point I above, the district court did not rule. The district court's ruling, which was explored in three separate hearings and ultimately embodied in its Findings of Fact and Conclusions of Law, merely found that the parties knew the location of the True Boundary and mutually agreed to maintain a fence as a cattle containment fence in a location other than the True Boundary. The court did not go through any analysis of rebutting presumptions or re-adopting the requirement of objective uncertainty of *Halladay v. Cluff*. It just didn't happen.

Plaintiff argues that the district court's statement that both parties knew the location of the actual boundary was an erroneous reincorporation of the now overruled requirement of *Halladay v. Cluff*, 685 P.2d 500 (Utah 1984) that there be "objective uncertainty" as to the boundary location for boundary by acquiescence to apply. Again, plaintiff has misstated the district court's ruling. The district court did not state or imply that "objective uncertainty" was a requirement to establishing boundary by acquiescence in this case. Rather, the district court found, as a plainly relevant fact, that both parties knew the true location of the boundary. In determining whether

adjoining landowners acquiesce in a fence line as a boundary, it is surely relevant that each knew that the boundary was located elsewhere.

*Halladay v. Cluff* in 1984 added a requirement of objective uncertainty as a requirement to the doctrine of boundary by acquiescence. In 1990, the Supreme Court in *Staker v. Ainsworth* removed that requirement. *Staker* did not, however, overrule or remove the law that existed long before *Halladay* that the parties' knowledge of the location of the True Boundary is a factor bearing upon whether parties mutually acquiesce in some other boundary established by a monument. Long before *Halladay v. Cluff*, the Supreme Court stated "it is true that if there is no uncertainty as to the location of the True Boundary line the parties may not, knowing where the True Boundary line is, establish a boundary line by acquiescence at another place." *Nunley v. Walker*, 369 P.2d 117, 122 (Utah 1962). Similarly, "in the absence of any initial uncertainty concerning the ownership of the property in question, the doctrine of boundary by acquiescence has no application." *Madsen v. Clegg*, 639 P.2d 726 (Utah 1981). Moreover, the Utah appellate courts have observed that when the legal title boundary is configured differently than the fence claimed to be the boundary, the parties are on notice that the fence is likely not the True Boundary, and that is a factor that must be considered in determining whether the parties have mutually acquiesced in the fence as a boundary. E.g., *Roderick v. Durfey*, 746 P.2d 1186 (Utah App. 1987); *Madsen v. Clegg*, 639 P.2d 726 (Utah 1981).

To summarize, the district court never stated that "objective uncertainty" was a requirement to the application of the doctrine of boundary by acquiescence. The district court's finding that both parties knew the location of the True Boundary is a relevant finding that along with other evidence supports the Court's conclusion that there was no "mutual acquiescence in the line as a boundary" in this case.

### **CONCLUSION**

The trial court's findings of fact state that the parties did not mutually acquiesce in the Slant Fence as a boundary. Wilkinson's entire appeal rests upon a reversal of that finding of fact, which Wilkinson admits that it does not challenge and with respect to which Wilkinson has not marshaled the evidence. Wilkinson's arguments rely upon an analytical formulation of the trial court's ruling that the trial court, itself, rejected. The trial court's unchallenged finding, that the parties, knowing the True Boundary, installed a fence line to contain cattle in a different location because of topographical considerations precludes the application of the doctrine of boundary by acquiescence here. The trial court found, based upon the evidence, that there was no mutual acquiescence in the Slant Fence as a boundary. The trial court found no presumptions, conclusive or otherwise, and did not re-adopt any requirement of objective uncertainty. The trial court did not find, and refused to find, "indolence." Even if it had found indolence, that finding is merely one piece of evidence to be considered with others in determining whether the parties mutually acquiesced in a line as a boundary -- it creates no presumptions, conclusive or otherwise.

Appellee Babcock respectfully requests that this Court affirm the district court's judgment in all respects and award Babcock her costs on appeal.

RESPECTFULLY SUBMITTED this 11 day of June, 1999.

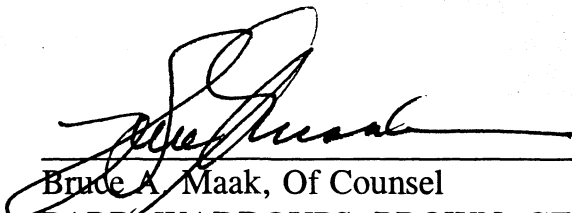
A handwritten signature in black ink, appearing to read "Bruce A. Maak", is written over a horizontal line.

Bruce A. Maak, Of Counsel  
PARR, WADDOUPS, BROWN, GEE  
& LOVELESS  
Attorneys for Defendant/Appellee

## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the foregoing **BRIEF OF APPELLEE** and **ADD-  
ENDUM TO BRIEF OF APPELLEE** was served this 11 day of June, 1999 by  
mailing on said date two copies thereof by United States mail, first class postage  
prepaid, addressed to:

Robert A. Echard, Esq.  
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Ogden, Utah 84401



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