

1998

Wilkinson Family Farm, LLC, a Utah limited liability company v. Lara L. Babcock, and all other parties known or unknown that may claim an interest in the real property described herein : Brief of Appellee

Utah Court of Appeals

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Bruce A. Maak; Attorney for Appellee.

Recommended Citation

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

CKET NO. 981769-CA

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.)

ADDENDUM TO
BRIEF OF APPELLEE

Appeals No. 981769-CA

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

Oral Argument Priority Classification No. 15

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FILED

Utah Court of Appeals

JUN 11 1999

Julia D'Alesandro
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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

Plaintiff/Appellant,)

vs.)

LARA L. BABCOCK, and all other)
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ADDENDUM

- A.** Transcript of Hearing dated March 3, 1998
- B.** Transcript of Hearing dated June 24, 1998
- C.** Transcript of Hearing dated September 23, 1998
- D.** Findings of Fact and Conclusions of Law

Tab A

ORIGINAL

SECOND DISTRICT
MORGAN COUNTY

98 DEC 11 AM 11:22

SECOND DISTRICT COURT - MORGAN COURT

MORGAN COUNTY, STATE OF UTAH

LLC WILKINSON FAMILY FARM,)	
)	
Plaintiffs,)	
)	Civil No. 960500010
vs.)	
)	Judge Michael J. Glassman
LARA L. BABCOCK,)	
)	
Defendant.)	

REPORTER'S TRANSCRIPT OF VIDEOTAPED PROCEEDINGS

March 3, 1998

JANE G. SAVILLE, C.S.R.
SALT LAKE CITY, UTAH
(801) 532-1262

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Reporter's transcript of videotaped
proceedings in Wilkinson versus Babcock, Case
No. 960500010, on March 3, 1998. Transcribed
by Jane G. Saville, Shorthand Reporter and
Notary Public in and for the State of Utah.

* * * * *

APPEARANCES OF COUNSEL:

For Plaintiff:	ROBERT E. ECHARD Attorney at Law Key Bank Building, Suite 200 2491 Washington Boulevard Ogden, Utah 84401
For Defendant:	MELVIN E. SMITH Attorney at Law 298 24th Street, #200 Ogden, Utah 84401

* * * * *

1 OGDEN, UTAH, MARCH 3, 1998

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6 THE COURT: Thank you. Call the matter of
7 Wilkinson Family Farm, LLC versus Babcock and this is
8 the Morgan case. See if I can refer to the number.
9 960500010. First of all welcome to our court here in
10 Ogden. Appreciate you folks making the trip here. I
11 also apologize for some delay since we tried this case
12 in getting the decision to you. I've been fairly busy
13 and it's just taken some time to get back to you.

14 Start off by making the observation that this
15 is a decision the court is going to make on the record
16 with the parties present, following a several-day trial
17 that was conducted in Morgan. My compliments to you,
18 counsel, in the way the case was presented, and I've
19 had a chance to review the facts and evidence before
20 me, the exhibits, and also the trial briefs that have
21 been submitted, and I'd now go into my findings and
22 issue my decision in this case.

23 First of all, by way of general observation
24 the ground that is in dispute that is clear between the
25 parties is what's turned out to be kind of a

1 triangular-shaped piece of property. And it is the
2 triangle that exists between the actual survey line and
3 the location of the fence line that was established by
4 the Williams family, the predecessors in interest to
5 the Defendant Babcocks.

6 The ground in dispute was homesteaded by the
7 Williams family in the 1800s. The deed from the United
8 States government in this case contained a description
9 that followed the section lines or quarter-section
10 lines, and created parcels of ground that had four
11 square corners. This was also true not only of the
12 defendants' predecessors in interest but also of the
13 Wilkinsons' adjoining piece of ground. Property taxes
14 on the triangular piece that is in question have always
15 been paid by the defendants or their predecessors in
16 interest.

17 I find from the evidence that was presented
18 that two fences had existed on the boundary line -- and
19 when I say the boundary line in this case, the actual
20 survey line, consistent with the survey line -- and
21 that those fences, evidence of those fences existing
22 was presented in the form of some testimony and
23 photographs of the old fence posts and some old wire in
24 the area. Those fences have not existed I find for a
25 number of years, and that the only existing fence

1 between the parcels of property was the fence line that
2 took off on somewhat of a diagonal direction, and is
3 along the line that is the line that is claimed by the
4 plaintiffs Wilkinsons in this case.

5 I find that that fence line that takes off on
6 the diagonal has been the only fence in that area for
7 well over 20 years. There was some testimony from
8 Daryl Meacham in the case about a more recent creation
9 of not only that diagonal fence but the fence along the
10 actual survey line. The court believes that that
11 testimony was helpful, and in some parts it was
12 somewhat inconsistent with other testimony given. But
13 I find on balance from the facts that it's been over 20
14 years since a fence existed on the actual survey line.
15 And I find that from the overall testimony and from the
16 physical descriptions of what was found on the actual
17 survey line.

18 With regard to plaintiffs' use of the ground
19 I find that the plaintiffs' livestock, to the extent at
20 times there was livestock in that area, have been able
21 to roam and graze up to the diagonal fence line; and I
22 find that plaintiffs have also planted somewhat on the
23 disputed triangular piece, but not up to the fence
24 line, and certainly not 100 percent of the property.
25 I'd approximate that more in the nature of about 50

1 percent of the ground, and that varied somewhat from
2 time to time.

3 There was some time spent on the plaintiffs'
4 side of the case concerning minutes from planning
5 commission meetings as the defendant Babcocks were
6 attempting to get a subdivision approved, and reference
7 to the Babcocks not including this ground for purposes
8 of getting their subdivision approved. The court finds
9 that that's somewhat of a red herring in the case
10 because the reason the Babcocks did that is to be able
11 to say to the planning commission, "We want the
12 subdivision approved. We have a dispute over the
13 triangular piece, and just for the sake of approval of
14 the subdivision we're proposing, leave it out."

15 Then they were able to get the subdivision
16 approved that they were proposing, but it was still
17 clear that the triangular piece was in dispute. So I
18 don't find in any way that the Babcocks had given up
19 their claim or their dispute that they should be the
20 owners of that triangular piece.

21 There was also some testimony about
22 potentially statements made to give an indication that
23 that was given up, but I find that the Exhibit No. 1
24 that was introduced that was the agreement, it clearly
25 covers that there is an area that was in dispute -- and

1 I believe it's paragraph 2 on page 2. And it says:

2 "Boundary line dispute exists relative to
3 the existing fence line located along the
4 south boundary of the Fox Hollow Subdivision.
5 Parties do not intend to resolve that dispute
6 by this agreement, and reserve their claims
7 relative to that dispute."

8 This was signed by both parties and it clearly covers
9 that issue.

10 I'll continue on with some facts in a moment,
11 but right at this point I'd like to observe that, as
12 has been agreed by the parties, in order for there to
13 be a boundary line by acquiescence there would have to
14 be "occupation up to a visible line marked by
15 monuments, fences, or buildings; mutual acquiescence in
16 the line as a boundary for a long period of time by
17 adjoining landowners." Now, certainly the court rules
18 that the occupation up to the visible line, which would
19 be the diagonal fence line, that that element is met.

20 That No. 3, "for a long period of time," was
21 met as I found already I believe that was for well over
22 20 years, and the parties were adjoining landowners.

23 The tougher question, and it's one the
24 attorneys have dealt with and I think know well in
25 yours briefs, is this question of mutual acquiescence

1 in the line as a boundary. I think attorneys and
2 judges for ages have struggled with what acquiescence
3 means. It's been argued by Mr. Echard's side of the
4 case that acquiescence can mean indolence. And they've
5 cited a case that points out factually that we had a
6 landowner there that didn't even realize that they were
7 being occupied on the lands that belonged to them by
8 way of survey, and the courts have held that not even
9 knowing about it could be indolence on your part, and
10 that that could qualify for the element of mutual
11 acquiescence in the line as a boundary.

12 Now, in that case that was cited by Mr.
13 Echard there had been a building built in that area,
14 grazing of animals, and I don't recall but it seems to
15 me there may have been some crop growth that had gone
16 on in that area.

17 Based on the strength of that case and on the
18 overall evidence in this case of the occupation in the
19 area, the court believes that the presumption has been
20 met on the side of the plaintiffs' side of this case to
21 suggest that there may have been a boundary line by
22 acquiescence. But I can only get there if I view the
23 phrase acquiescence as incorporating indolence and just
24 not taking any action to kick someone off of the
25 disputed property.

1 The defense in this case has argued that,
2 well, even if the court finds that, that the court
3 should go further and take a look at whether the
4 presumption could be rebutted by the purpose of the
5 fence when it was installed, and by the true boundary
6 being whether it was unknown or uncertain. Now, in
7 this case as I said in the beginning, the original deed
8 that came in from the United States government -- and
9 this would have been not only the deed that went to the
10 Williams family, the defendants' predecessors in
11 interest, but also the Wilkinson family, called out
12 deed lines that shouldn't be real difficult to follow.
13 They create right angles, they follow section or
14 quarter-section lines. And the court doesn't find in
15 this case there was confusion or needed to be confusion
16 about where the actual boundary line was.

17 This is a case, and I think the record
18 already will reflect, that the court, and I suppose the
19 judge along with the parties, had a chance to walk over
20 the ground, and it was very valuable. I found that the
21 topography was steeper terrain than what your models
22 depicted to me, or what I had gleaned from the
23 photographs that were presented. The topography of the
24 land in this case from my perspective created somewhat
25 of a natural barrier between these adjoining property

1 owners in terms of their use of the land.

2 The area that's near where the boundary line
3 went through is quite steep, there's a cliffy area and
4 some deep swales that made fencing in this area
5 difficult. The court feels that it was rather
6 graphically demonstrated. Even though I'd have to say
7 I've worked on some fences over the year I've never had
8 to fence ground quite that hilly. And it was quite
9 graphically demonstrated to the court when a deep swale
10 is attempted to be crossed with a cattle fence that in
11 order to go down into the low portion that you are
12 fighting against the natural tension you are attempting
13 to put on the fence through the rest of the run of the
14 fence, and over time it would have a tendency to pull
15 the fence up out of the low swale and allow an area for
16 cattle to get down underneath it and escape.

17 The court finds, having walked around, having
18 looked at it, and having examined where the fence was
19 run, and taking into account all of the testimony in
20 the case that the angled fence was put in and it's
21 purpose for being put in was to keep livestock in the
22 Williams' parcel or the defendants' parcel, the
23 defendants' predecessor in interest. And that was its
24 sole purpose and it was not put in in order to
25 establish the boundary line.

1 The court, based on that finding, is ruling
2 in favor of the defendants in this case, and I find
3 that the actual boundary line should be that of the
4 survey line and should follow the line where the newer
5 fence was put in after the defendants had torn out this
6 older fence that followed the angled line. In so
7 finding I also find that this was a legitimate dispute
8 between these parties, that they certainly had the
9 right to come to court and peacefully work out in a
10 court of law. The court believes that each party
11 should bear their own attorney's fees and costs in this
12 action. Not costs, excuse me, but attorney's fees, and
13 that the costs should be awarded to the prevailing
14 party.

15 Now, have I left you on your side with any
16 questions, on the defense side?

17 MR. SMITH: No, your honor.

18 THE COURT: Mr. Echard?

19 MR. ECHARD: No, your honor.

20 THE COURT: All right. I'll ask you then on
21 the defense side to prepare findings and an order for
22 the court to sign and submit those to Mr. Echard, if
23 you would, for his approval.

24 Again, I thank you folks, and unless there
25 are any questions the court will be in recess at this

1 time.

2 MR. SMITH: Thank you, your honor.

3 (Whereupon, the proceedings were
4 concluded for the day.)
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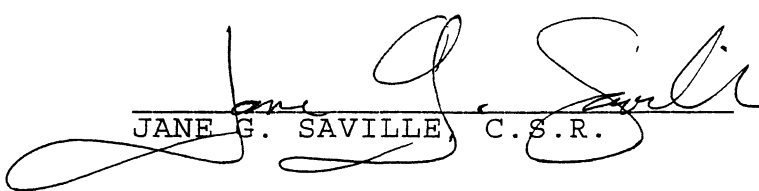
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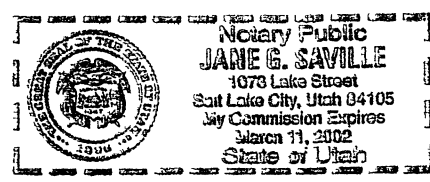
C E R T I F I C A T E

STATE OF UTAH)
 : SS.
COUNTY OF SALT LAKE)

I, JANE G. SAVILLE, do hereby certify that I
am a Certified Shorthand Reporter in the State of Utah;
that as such reporter I transcribed the videotaped
proceedings in the foregoing matter, and the foregoing
pages constitute a full, true, and accurate report of
the same.

DATED at Salt Lake City, Utah this 6th
day of December, 1998.


JANE G. SAVILLE, C.S.R.



Tab B

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

WILKINSON FAMILY FARM, LLC,	:	Trial Court Case No. 96050010
	:	
Plaintiff,	:	Utah Supreme Court No. 981769-SC
	:	
v	:	
	:	
LARA BABCOCK and	:	
MIKE BABCOCK,	:	
	:	
Defendants.	:	

HEARING HELD JUNE 24, 1998

BEFORE

THE HONORABLE MICHAEL J. GLASMANN

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
652 Jefferson Cove
Sandy, Utah 84070
801-567-1157

APPEARANCES

For the Plaintiff: ROBERT A. ECHARD
Attorney at Law
2491 Washington Blvd., Suite 200
Ogden, Utah 84401

For the Defendant: BRUCE A. MAAK
PARR, WADDOUPS, BROWN, GEE & LOVELESS
185 South State, Suite 1300
Salt Lake City, Utah 84111

* * *

June 24, 1998

P R O C E E D I N G S

THE COURT: Are you ready to proceed with your arguments?

MR. ECHARD: Yes, your Honor.

THE COURT: Okay, go ahead.

MR. ECHARD: Your Honor, if I could hand the Court a copy of the transcript of the Court's ruling, that I thought I had previously given to you but I thought perhaps having one in your hand would be helpful and I've highlighted in yellow the language which I think is relevant to what we'll be discussing today from your decision. This was taken from the video and transcribed by my secretary under my request.

What we are here today for, your Honor, is to ask the Court to reverse its decision in this based upon an issue of law. We're not asking the Court to change the findings of fact. We believe the findings of fact made by the Court, in fact, when properly applied to the law compels a decision in my client's favor.

In order to do that perhaps I could just generally outline the issue as I see it and then I'll go on and discuss in more detail in a minute. Both parties in their original briefs and the Court in its decision have concluded what the issues were on, just a minute, let me

1 find it here. On Page 3 on that transcript that I've given
2 on the second to the last page, the court recited where it
3 says "I will continue on with some facts in a moment",
4 there at the bottom of that you concluded and did accept
5 the issues that had to be decided as indicated by the
6 counsel. And that was, in order to show boundary line by
7 acquiescence we have the occupation to a visible line. You
8 found specifically that there was an occupation to a
9 visible line in the next paragraph. You said that was the
10 diagram of the fence. That that element was met.

11 Next was for a long period of time you found
12 specifically that it was for a long period of time in
13 excess of 20 years.

14 Number 3, by adjoining property owners, I don't
15 know if you specifically said that but it was rather
16 obvious that they were adjoining property owners. That was
17 never an issue.

18 And then the third one was mutual acquiescence
19 that the line is a boundary and that is the issue. The
20 Court I believe found that we carry that burden. And I
21 direct the Court's attention to the next page, the
22 paragraph in the center that says "based on the strength in
23 that case and the overall evidence in this case of the
24 occupation and (inaudible), the Court believes that the
25 presumption has been met on the plaintiff's side of this

1 case to suggest that there may have been a boundary line of
2 acquiescence but I can only get there if I view that the
3 phrase acquiescence is incorporating indolence and just not
4 taking any action to kick anybody off the disputed
5 property. So, it seems to me that if you're saying that
6 it's based upon indolence that there was establishment of
7 acquiescence in a boundary line.

8 You then go back on the very last paragraph of
9 that page and on the top of the next paragraph where I've
10 highlighted it. That said "they are great right angles",
11 talking about the original section line, "that that section
12 of quarter lines", and the Court doesn't find in this case
13 that there was confusion or needed to be confusion about
14 where the actual boundary line was. That is the whole crux
15 of the legal argument in this case in my opinion. But I
16 understand the Court is saying that there wasn't a
17 confusion between the parties but it didn't need to be
18 confused. And to that degree the Court is correct and to
19 find the Staker obligation as response to this.

20 The Court then does go on and saw, however, that
21 because this was not the original line that, and I'm
22 looking now at the bottom of that same paragraph, excuse
23 me, page, next to the last paragraph where I've
24 highlighted, that the angle fence was put in and its
25 purpose for being put in was to keep livestock from the

1 Williams' parcel or the defendant's parcel, the defendant's
2 predecessor-in-interest, and that was its sole purpose and
3 was not put in in order to establish the boundary line. Of
4 course, based on that finding is ruling for the defendants.

5 So, it sounds like what the court, as I
6 understand, really is saying is that all of these things
7 have been met. They were indolence in as established by the
8 cases but that because -- let me get the wording here
9 correct again -- that it was not for the purpose of
10 establishing the boundary line.

11 So what the court it's saying that is a fence of
12 convenience and that, therefore, even though they occupied
13 to that fence of convenience, that was not sufficient.
14 That just doesn't happen to be the law in the State of
15 Utah. And I'm sure the Court has had a chance to read our
16 memorandum. We tried to cite extensively in those
17 memorandums the law as it is in Utah. I want to quote--

18 THE COURT: I might indicate to you and I think
19 it is fair to both sides that I've looked at these as they
20 came in but because of this calendaring problem, I rely on
21 the calendar that comes to me as to what's coming this
22 morning. And I haven't read it right before you were
23 coming. So you should be aware of that.

24 MR. ECHARD: Well, I assume before the Court will
25 rule, it will go back and read it in some detail. And if

1 that's the case, I will try to hit the highlights and not
2 try to cover everything in the memorandum so as not to use
3 the Court's time. But just focusing on the issue, Halliday
4 versus Cluff was the case that early had been ruled by
5 Judge Oaks, Dallen Oaks that was on the bench that said
6 there had to be uncertainty, they had to be objective
7 uncertainty in the boundary line initially or they could
8 not be a determination of boundary line by acquiescence.

9 That was specifically overturned in Staker. And
10 referring to the Staker case, referring to the Halliday
11 case said the following, and let me read it because I think
12 some of the language is important, and this is quoted on
13 page 5 of our responsive memorandum. Halliday and his
14 progeny, and I think progeny is very important because what
15 the Court is doing is overruling Halliday and all of his
16 progeny and all counsel ever quotes to you in his
17 memorandum is Halliday and his progeny and that was
18 specifically overruled by Staker and they make it very
19 clear.

20 If the Court is trying to find that, I'll wait
21 until you find that.

22 THE COURT: (Inaudible)

23 MR. ECHARD: Okay. Would require that property
24 lines as shown in the record title not be displaced by
25 another boundary line--and I'm skipping a few things here--

1 if he or his predecessor in title had reason to know the
2 true boundary line during the period of acquiescence. In
3 other words, there must have been a practical form of
4 dispute. The party claiming boundary by acquiescence has
5 the burden of proving the objective uncertainty as part of
6 its prime case. That is saying that that's what Halliday
7 said and they reversed that. That seems to me to be
8 precisely what the case is saying, the Court is saying in
9 this case, is that Halliday and his progeny said that they
10 had to be uncertainty that if they knew where the boundary
11 line was then they cannot have an acquiescence. That is
12 not the law in the State of Utah anymore. If, in fact, the
13 parties have acquiesced and even though they knew that it
14 was not the original boundary, Utah law now says that
15 indolence can establish that element and then that is the
16 new boundary line.

17 And then Staker, it goes through and some of his
18 footnotes and it specifically makes the distinction of
19 boundary by acquiescence as opposed to boundary by
20 agreement. Now when there is boundary by agreement, you
21 have to have an objective uncertainty. This is not a case
22 of boundary by agreement, it is a boundary by acquiescence.
23 And so what the Court has done in Staker is carved out a
24 new area where it no longer makes any difference that the
25 fence line was a line of convenience or if there was a

1 dispute. If those four elements have been met -- and
2 you'll note that the four elements do not include
3 uncertainty. If the occupation to the visible line --
4 which the Court found existed -- for a long period of time--
5 - which you found existed -- by adjoining property owners--
6 which you found existed -- and mutual acquiescence that
7 it's a boundary line and that's where the case came in that
8 we cited, specifically where the Court, and that's Carter
9 versus Hamouth in 1996, where it indicated that indolence
10 was sufficient to establish that.

11 Now, counsel has pointed out in his responsive
12 memorandum and I don't think even counsel or I, either one,
13 knew at the time we were trying that case that Carter was
14 reversed by the Supreme Court. We talked about that in the
15 beginning of our memorandum. But the only basis on which
16 that was reversed was the fact that the Court recalls in
17 Carter, and the Court made a comment about it in its
18 findings, that there was a section of land that was bounded
19 some cliffs and the other person didn't even have access to
20 this other line, land and they ruled that the person
21 bringing the case could have all of it including that area
22 that was bounded by cliffs for indolence. The Supreme
23 Court said that that area which the defendant or the owner
24 of the property did not have access to because of the
25 natural barriers, that wasn't sufficient boundary line to

1 establish the deal. But it went on in its comment and I've
2 cited on page two of our responsive memorandum what the
3 court said because I think it is important the court still
4 recognize the indolence. It said -- this is the Supreme
5 Court overruling -- during the years of ownership, the
6 Straitters had no access to the disputed area. It was
7 entirely in landlock. The trial court found that they
8 could not access it from the remainder of their property
9 which was on the plateau above the disputed area. They did
10 not own any adjoining tract in which access could be
11 gained. Because of the inability to take possession of the
12 disputed area, the indolence of the Straitters cannot be
13 construed to be acquiescence.

14 The point is that the Supreme Court did not
15 overrule the cistrict court - the Appellate Court's
16 determination that indolence was a basis. They merely said
17 that factually as to that inaccessible piece of property
18 that that did not constitute indolence. And the Court will
19 remember that the Prida case recited a number of other
20 cases in which indolence had been specifically an issue on
21 the basis upon which this should be a determination.

22 Let me see if I can find, yeah, in the Carter
23 case they relied upon Lane versus Walker a 1973 case. We
24 cite that on page four of our memorandum, responsive
25 memorandum. In which the Supreme Court had stated that

1 acquiescence can consist of indolence or consent by
2 (inaudible) so the Carter court was only repeating what the
3 Supreme Court had previously said to that time. And
4 obviously the Supreme Court is saying again when they
5 reversed Carter that they recognize that indolence can be a
6 basis. So, what I'm saying is the fact that it was
7 reversed did not change anything that's significant to this
8 case. It was a factual determination.

9 So what we have is a clear law that says that if
10 parties have a fenced line that is used up to the fence
11 line regardless of whether it is a fence of convenience,
12 regardless of whether or not they knew about the original
13 line makes absolutely no difference. Under current law, as
14 long as you establish those four elements, my client
15 prevails. And as I see the Court's ruling, you found that
16 there was evidence of indolence in this particular case as
17 to that particular line and would have ruled in my client's
18 favor but for the Court's conclusion that because the line
19 was known or should have been known then that therefore
20 should not be the line in question. And that's where we
21 think the Court should have an opportunity to correct the
22 application of the law to the facts because I don't think
23 the facts are disputed.

24 Now, I did make an objection also to the findings
25 prepared by counsel. I'd like to address that separately.

1 Let me get though arguing this, unless the Court wants be
2 to do it right at the moment.

3 THE COURT: You can address it separate.

4 MR. ECHARD: Thank you.

5 MR. MAAK: May it please the Court and counsel.
6 The plaintiffs in this case are basically making two
7 arguments to your Honor. The first is that the Court found
8 each and every element, each of the four elements combined
9 by acquiescence and, therefore, having so found the Court
10 made a mistake not having ruled in their favor. The
11 problem with that argument is that's not what your Honor
12 did. Your Honor found three elements and found against
13 them on the fourth element. We'll go into that detail a
14 little later.

15 The second is the plaintiffs argue that the
16 doctrine, that if a fence is installed as a cattle
17 containment barrier and not as a boundary the doctrine
18 doesn't apply and they suggest that somehow that doctrine
19 established by at least six Utah Supreme Court cases has
20 evaporated. They haven't cited any case for that
21 proposition and none exists and they're wrong on that
22 point.

23 Let me first talk about the elements of doctrine
24 abounded by acquiescence. Your Honor, we agree did find
25 three elements. You found occupation up to a visible line.

1 A second element for a long time. A third by adjoining
2 land owners.

3 The fourth element I would like to quote because
4 it answers everything. Mutual acquiescence in the line as
5 a boundary line. Those words kind of get slurred when it's
6 quoted to you or ignored. But that's the essence of the
7 doctrine. You have two people recognizing a barrier as a
8 boundary, not as a cattle barrier.

9 I'd like to kind of take the Court through the
10 history of this case so that what the Court said and what
11 the Court did is placed in context. The plaintiff filed a
12 trial brief in this case which basically relied on only one
13 case, Carter versus Hamereth and argued basically that case
14 to the Court and no others. And Carter versus Hamereth, at
15 the time it was quoted to you, at the time it was cited to
16 you, at the time it was argued to you, had been reversed on
17 that point. When the argument was briefed, when the motion
18 to alter or amend a judgment was filed, that case wasn't
19 mentioned. It wasn't mentioned that it existed or that it
20 had been reversed or anything. It was just ignored.

21 And in our response we pointed out that the case
22 was no longer good law. And what that case said was that
23 on the facts of Carter versus Hamereth the Court of Appeals
24 said that indolence, without more, would suffice to
25 establish boundary by acquiescence.

1 I'd like to clarify what the facts are. The
2 words landlocked have been used, lack of access have been
3 used. I'd like the Court to clearly know that we are not
4 talking about a parcel that is "landlocked" in the usual
5 legal sense, that is surrounded by the property owned by
6 another. That wasn't the case there. This was 160 acre
7 tract of land. Thirty-two acres of which were at the base
8 of a cliff. There was a geographical impediment to using
9 the property at the bottom from the remainder of the
10 owner's land. And in that case for, undisputedly for a 60
11 year period, somebody other than the owner used the land at
12 the base of the cliff because the owner couldn't get to it
13 and the Court held, based on those facts, the indolence
14 that the lack of the assertion of a right, the lack of a
15 complaint about another person using your property was
16 sufficient to establish a boundary by acquiescence.

17 With that background the Court indicated its
18 concern about what the case said. Your Honor said that
19 based upon the evidence the plaintiffs have made a showing
20 of indolence but that, based upon all of the evidence,
21 boundary by acquiescence had not been established and your
22 Honor identified these points. You said both parties knew
23 the exact knew the exact location of the boundary. Your
24 Honor even said that a fence, an old fence was installed
25 right on the real boundary. Your Honor said that you

1 visited the site and you observed the fact that the slant
2 cattle containment fence alleged to be the boundary
3 obviously departed from the square boundary lines that the
4 party's deeds recited cited which were described in quarter
5 sections and half sections. You found that the only
6 purpose, the only purpose of this fence line was to contain
7 livestock. And I might add as a footnote that nobody can
8 question that finding, your Honor, because each and every
9 witness who testified for the Wilkinsons said in their
10 depositions which were published at trial, that the only
11 purpose of this fence was to contain livestock and that it
12 had no other purpose. Every one of them said that.

13 In fact, Harry Wilkinson said in his deposition
14 that he agreed with Babcock's predecessor, Elwood Williams,
15 that the fence would be maintained as a cattle containment
16 fence. So there is no question about what the evidence
17 was. Everybody knew and understood and expected that this
18 was a cattle containment fence.

19 Your Honor found that the cattle containment
20 fence was installed where it was because of the topography
21 of the property. Your Honor found that it was not feasible
22 to install a cattle containment fence on the true boundary
23 because of the cliffs that your Honor walked and saw. You
24 said it was not feasible to install or maintain a fence on
25 the true boundary. That's very much like Carter

1 versus Hamereth. You have the edge of a plateau in Carter
2 versus Hamereth which prevented access to and use of the
3 adjacent property. In this case we have a geographical
4 feature that precluded the installation of a cattle
5 containment fence on the true boundary. Very, very
6 similar.

7 THE COURT: Let me just clarify something there.
8 To me the case is somewhat different than the facts in
9 Carter in that instead of a constant cliff, my findings are
10 that there are areas along that boundary line that made a
11 fence on the true boundary line very difficult, if not
12 impossible, to install and keep installed and that would
13 especially be true given the technology for the
14 installation of fences that existed back when the old
15 fences were being put in. And so, I think the record
16 should reflect though there are areas past that steep area
17 on the property where the fence could have been maintained
18 on the boundary line but everything else you were saying is
19 consistent with what my findings are.

20 MR. MAAK: Okay.

21 THE COURT: Okay.

22 MR. MAAK: And I think it is important to point
23 out that in Carter versus Hamereth you were not presented
24 with a case where it was a cattle contained fence. The
25 court made no findings and made no mention that the fence

1 was installed to contain cattle. Totally not there. Not a
2 word like that in the decision.

3 So I'd like to read what the Court, the Supreme
4 Court, said when they reversed the Court of Appeals
5 decision that was cited to you. Because of this inability
6 to take physical possession of the disputed area, the
7 indolence of the Shraders cannot be construed to be
8 acquiescence. Let's see, the something must be attributed
9 to the physical inability to possess the disputed area, not
10 to their acquiescence in the edge of the plateau with its
11 cliff and ledges as the boundary.

12 So the reason for the acquiescence was based upon
13 a physical feature. Now in that respect, the two cases are
14 very, very similar. People have to acquiesce in the fence
15 as a boundary. In this case they couldn't acquiesce it as
16 a boundary because they couldn't get to it physically.

17 Similarly in this case, a cattle containment
18 fence could not feasibly be installed in the area of the
19 gully and cliffs on our property along the true boundary.

20 Now, counsel is arguing to your Honor that it's
21 crystal clear that whether or not the fence is a cattle
22 containment fence is irrelevant, that it's not the law of
23 this state anymore. And that's just not so. There is no
24 case that says that. There is no language that says that.
25 Counsel is telling you that's what the cases saying. What

1 counsel needs to do is quote you the language that says
2 that because it is not there.

3 First, there is no arguing with the Court's
4 ruling that the fence was installed as a cattle containment
5 fence. Your Honor did say that, and there is not doubt
6 about that and there can't be any question as a matter of
7 fact about that because as I indicated, all of the
8 Wilkinsons testified that that was the purpose of the
9 fence. And Harry Wilkinson and Elwood Williams agreed to
10 maintain it as a fence to separate their cattle.

11 Let's talk about how this Court has construed,
12 how our Supreme Court has construed the law of boundary by
13 acquiescence because I think there has been some confusion
14 injected into that history. Halliday versus Cluff was
15 decided in 1984. Before that decision the Supreme Court in
16 a multitude of cases held that the doctrine of boundary by
17 acquiescence has four elements. And the four elements are
18 almost always quoted verbatim without any change
19 whatsoever. And every time before 1984 that the Supreme
20 Court described what boundary by acquiescence had to have
21 in order to be proved, the four element is mutual
22 acquiescence in that line as a boundary. The words are
23 always there.

24 And along came Halliday versus Cluff. In Halliday
25 versus Cluff the court added a fifth factor. It did not

1 monkey with the first four. It didn't touch them. It
2 said, in addition to those four factors there must be
3 objective uncertainty as to the location of the boundary.
4 That has nothing to do, according to that case, with what
5 the owner's think. The Court said you have to show a deed
6 conflict, something in the public record as a matter of
7 title that shows a dispute or uncertainty as the location
8 of the boundary or you have to show that as a matter of
9 observing there is uncertainty as to the location of the
10 boundary. It's important now that that does not have
11 anything to do with whether the parties acquiesce in a line
12 as a boundary or not.

13 Now in this case, there is no objective on
14 certainty but there doesn't have to be and we're not saying
15 there has to, ever has to be. And we have never argued to
16 your Honor that there has to be objective uncertainty
17 because there isn't any. And that requirement is gone.
18 Halliday versus Cluff was overruled by Staker versus
19 Ainsworth in 1990 and what Staker did was it overruled
20 Halliday versus Cluff's fifth element. It deleted
21 objective uncertainty as a requirement. It returned us to
22 the state of the law as it existed before Halliday verus
23 Cluff. It didn't change the law as it existed before
24 Halliday versus Cluff. This is the language on which the
25 plaintiffs in this case rely for their incorrect assertion

1 that Staker overruled all of the livestock fence cases.

2 This is the letter. The court said, "We overrule
3 Halliday versus Cluff and it's progeny," progeny means
4 after not before," and it's progeny as to the objective
5 uncertainty requirement in boundary by acquiescence.
6 That's not hard language to understand. It does not say we
7 have eliminated all of our cases that one must acquiesce
8 any line as a boundary. It doesn't say that all of our
9 cases about fences being installed to contain livestock
10 cannot be boundary by acquiescence because the parties have
11 been acquiesced in a line as a swap containment and not as
12 a boundary. It doesn't say that.

13 Now, when counsel gets up again I want him to
14 read to you where it says any place that the doctrine of a
15 fence installed to contain livestock can't be bounded by
16 acquiescence has somehow evaporated. It would make no
17 sense to do that. First, Staker itself doesn't say that.
18 Second, the Staker formulation of the four elements of the
19 boundary by acquiescence is verbatim, verbatim the pre
20 Halliday formulation. The words are the same.

21 The Court of Appeals in Jacobs versus Handrum
22 which was decided after Staker is also instructive. It was
23 a 1994 case. The court have stated "prior to 1984, the
24 elements of boundary by acquiescence in Utah were the same
25 as they are today. The requirement for boundary by

1 acquiescence after Staker in 1990 are the same as they were
2 prior to Halliday in 1984. Now what I'm giving you, your
3 Honor, are words out of a case that saying what I'm telling
4 you. That is not what counsel has done. He says that
5 something is there that isn't there.

6 How much sense does it make that two landowners
7 want to install a fence to contain livestock? And that's
8 their intention and they both admit it as these parties
9 have. For a Court to say, no, guys, wrong. You just lost
10 your property. That's the pitch that is being made to you.
11 It doesn't make any sense. It's not fair. The law is not
12 designed to frustrate the reasonable intentions of people
13 and these people, by everybody's admission, intended that
14 there be a division for purposes of separating livestock.
15 Not for purposes of making a gift of five acres.

16 Our Supreme Court has, in at least six cases,
17 stated very clearly that a fence installed for the purpose
18 of containing livestock cannot be the basis of boundary by
19 acquiescence. And, again, I want to read words because I
20 don't want there to be confusion. Grace and Roper "the
21 fence along the west side of the disputed strip was built
22 for stock control and not as a boundary. Therefore, it was
23 not acquiesced in as a boundary by both parties."

24 Leon versus Dansie, a fence installed to contain
25 cattle "eliminates any question of boundary by

1 acquiescence". It's logical. Staker didn't say anything
2 about cattle fences. And it is true, your Honor, I want to
3 be candid, there has been no case since Staker that has
4 addressed a cattle containment fence. That hasn't happen
5 yet. I submit to the Court that that shouldn't be the
6 issue. In order for a person to say the law has changed,
7 you have to point to the language and say where the law has
8 changed. That hasn't been done and can't be done here.
9 But our Supreme Court, if you believe in prophecy answered
10 the question for us.

11 Actually, two months before the Staker case was
12 decided our Supreme Court decided the case of Grace and
13 Roper v Finlinson. In that case, just two months before
14 Staker, the appellant invited the Court to overrule
15 Halliday versus Cluff. They raised the issue to the Court
16 and said please overrule Halliday versus Cluff. This is
17 what our Supreme Court said two months before it decided
18 Staker. "Even if we were to so limit Halliday, Finlinson
19 would not prevail here because he cannot satisfy all of the
20 elements of Fuelco". Those are usual four requirements.
21 The trial court found that the fence along the west side of
22 the disputed strip was built for stock control and not as a
23 boundary. Therefore, it was not acquiesced in as a
24 boundary by both parties. This is the Staker court talking
25 two months before they decided the case that counsel is

1 telling you changed everything.

2 And the Grace and Roper court is saying even if
3 we do what they, in fact, did two months later, it doesn't
4 matter because this is a stock control fence. It's not a
5 boundary fence.

6 I don't know how you wiggle out of that, your
7 Honor. Those words, no matter how clever a lawyer is
8 you've got to be able to say where the words are. And I'm
9 giving you the words. That's what they say.

10 So in contrast to counsel's argument that Staker
11 eliminated cattle fences we have first, the language of
12 every formulation of this doctrine with respect to the
13 forth element is the same.

14 THE COURT: I think I'm with you as far as that
15 argument. I understand it at this point. Let me turn to
16 Mr. Echard -

17 MR. MAAK: Very well.

18 MR. ECHARD: Let me address two or three things,
19 your Honor. First of all, I'd like to point out that if
20 you look at counsel's memorandum of cases he just cited you
21 concerning the cattle, every one of them, the dates are
22 there, he didn't cite the dates to you but if I can turn to
23 that page I will cite the dates. Every one of them was
24 prior to 1990. There's not a single case he has cited to
25 you concerning cattle boundary that predates 1990 and that

1 was the objection we made during the trial and our argument
2 we've made all along is he is using old cases.

3 THE COURT: You've made the argument though that
4 Halliday which then gets reversed by Staker, and that
5 Staker in effect undoes the old cases.

6 MR. ECHARD: As to the uncertainty, yes we did.
7 I didn't talk about Staker in dealing with the cattle fence
8 line.

9 THE COURT: But don't you agree with the argument
10 that was just made that in effect Staker just undid that
11 fifth element from Halliday and that we're back --

12 MR. ECHARD: No.

13 THE COURT: -- with the same statement of law
14 that we had before?

15 MR. ECHARD: Let me cite you some language from
16 Staker. On page 421 of Staker, they are specifically
17 reviewing the Halliday case and what was reversed. In
18 quoting the Halliday case they said, "by the same token, a
19 claimant cannot assert boundary by acquiescence if he or
20 his predecessor in title had reason to know the true
21 location of the boundary during the period of acquiescence.
22 Staker specifically overruled that, specifically by quoting
23 the language overruled that. And indicated specifically,
24 Justice Howe, they quoted Justice Howe in his objection to
25 Halliday when they did Staker because he became the

1 majority instead of the minority. When he said, Justice
2 Howe concluded in his descending opinion to Halliday, "it
3 is not unjust in certain cases to require disputed owners
4 to live with what they and their predecessors have
5 acquiesced in for a long period of time". And then they go
6 on and state again that the fact that it was unknown at the
7 time or that they had reason to know the true boundary
8 didn't have any effect anymore. (Inaudible)

9 Now, if I understand what he is saying and what I
10 understand the Court said is that even though there
11 indolence and we met our burden on that, that the fact the
12 parties knew the true boundaries, defeated our case.

13 THE COURT: To the extent I created some
14 confusion with the use of that word, when I revisit this, I
15 may need to clarify that.

16 MR. ECHARD: Okay.

17 THE COURT: What the Court ruling really was
18 trying to get at there is that I suppose had these parties
19 been in conflict from the get-go and it was clear that
20 there was confusion about the boundary line and I don't
21 want to try to get back into Halliday because I'm not
22 attempting to do that. But then it's certainly indolence
23 for one party just to sit back and allow usage of the
24 property to be made. But as Mr. Maak has argued -- and I
25 always apologize when I read your name I want to say Mock

1 and it's Maak that you do by.

2 MR. MAAK: It is, your Honor.

3 THE COURT: That as Mr. Maak has argued, he is
4 right on in his argument about what my findings were in
5 this case and that is that I have never found -- and I
6 remember this case very clearly. As you both know, we
7 walked out there in the snow and walked that boundary line
8 and it was well tried by both of you. I remember the facts
9 very well. What is so obvious when you are out there is
10 that you have a square line that follows the other
11 boundaries that are in the area and it is, they have
12 demarcated from that line to travel a route that made the
13 installation of a stock fence that would stay in place
14 possibly.

15 And as I talked about a few moments ago on this
16 record, there are areas where that could have been done on
17 the old boundary line but you had to go through that big
18 swell in the valley area and it is obvious, and I believe
19 there were some pictures shown to this effect that when you
20 go down through the swell that the tension, if you can't
21 maintain tension on the fence that it eventually pops that
22 fence up out of that swell and the cows can walk underneath
23 the fence. That problem, and I'm finding from the
24 testimony and view of the land, caused the fence to be put
25 in in a different location not in anyway to establish a

1 boundary but simply put in to control stock.

2 MR. ECHARD: May I make a comment on that?

3 THE COURT: Yes.

4 MR. ECHARD: Factual. I didn't make a motion
5 based upon factual findings of Court but now it gets to
6 that point. The Court has to remember there was testimony
7 that tons and tons of material was taken out of that area
8 and washed down in the lower area to fill in an unlevel
9 area. What you saw was not the condition of that area at
10 the time the fence line could have been put in. What you
11 saw was an altered area that was done specifically by
12 washing water through it and took tons down below, plus the
13 fact the parties testified that there was a fence in place,
14 you found that were posts in that area. They testified
15 that they put the fence back in that area, there is a fence
16 existing in that area now so it's not a question of whether
17 they could, it's a question of maybe whether it was
18 convenient and I understand that's what the Court's saying.
19 But to conclude from what you saw up there that day, that
20 that was the condition at the time the fence was changed is
21 not supported by new evidence.

22 THE COURT: Well, there was testimony to support
23 that that uneven ground existed and that is why they moved
24 the fence where they did.

25 MR. ECHARD: Right.

1 THE COURT: And it is not my recollection that
2 the testimony was that the washing that occurred took the
3 ground from the hilly, precisely the area where the fence
4 could not be put in but there was some washing that took
5 place --

6 MR. ECHARD: It enlarged it, I think, is what
7 really happened.

8 THE COURT: -- but, back to my findings and this
9 is what I want to make clear, and I'm not saying that I'm
10 not willing to look at your case law again. I'll revisit
11 it. I wish that I had revisited it intensely before taking
12 the bench today and I apologize to you counsel. As you
13 know it wasn't on the calendar. Again, it's that Morgan
14 snafu we keep running into.

15 But, the finding of the Court, and there is no
16 question in my mind that the boundary line was clear to the
17 parties back then. There is testimony that it was clear
18 back then. There's remnants of an old fence along the
19 boundary. But this fence demarcated from that course for
20 the convenience of putting a stock fence is where they felt
21 the stock fence could last and be maintained so that the
22 stock would be controlled.

23 And so what I'm saying is the argument that Mr.
24 Maak is making is accurate that that was the Court's
25 finding and, therefore, what he is saying is that it's not

1 a question of now acquiescing in a new line that was a
2 disputed boundary line. That fence was never put in to be
3 the boundary line and so that, so when I use the word
4 indolence, and I should clarify this.

5 I suppose I was thinking out loud somewhat from
6 the perspective of a land owner that now in hind sight, if
7 I'm over there on the side of the folks that were being
8 represented by Mr. Maak, they might look at it and say well
9 in hindsight we should have gone out there and put up
10 another fence in and seen to it that nobody ever crossed
11 over onto that other property. And they didn't do that.
12 But, again, I've never found that the fence line that was
13 put in on the angle was intended to be a boundary line.

14 MR. ECHARD: Okay. But that's my whole point.
15 The law does not require that. It specifically allows my
16 client to prevail without having to establish that. That
17 is the whole point of the law that I've cited over and over
18 in these memorandums.

19 THE COURT: And if I could repeat, and I want to
20 make sure you know that I understand what you're arguing.
21 You are argument really says, if I can't state again the
22 negative point. That even if the parties knew very
23 clearly, because, again, for the record we were taking
24 about section lines that were those old exact section lines
25 that were very square. But even though the parties knew

1 that, what you are saying is that even if they put the
2 stock fence in for the containment of stock and it never
3 was intended to be the boundary.

4 MR. ECHARD: A line of convenience.

5 THE COURT: A line, whatever. But now that the
6 time passes --

7 MR. ECHARD: Right.

8 THE COURT: And that we have now usage made by
9 Wilkinsons and there was evidence of some crop cultivation,
10 not right up to the boundary line --

11 MR. ECHARD: Almost.

12 THE COURT: But not all the way along the
13 boundary line.

14 MR. ECHARD: Right.

15 THE COURT: But, in the kind of upper northern
16 area of Stan's property and that there couldn't be a
17 dispute that the stock, if any, that the Wilkinson's had
18 might have gone right down to the fence line that's the
19 stock line so they are in effect coming onto the Babcock
20 property and coming down to that fence line. Your argument
21 is that if the Babcocks or their predecessors in interest
22 allow that to take place for the reckless a period of time,
23 it then becomes the boundary.

24 MR. ECHARD: That's correct.

25 THE COURT: Okay.

1 MR. ECHARD: And I think that law is clear on it.

2 THE COURT: And you do and Mr. Maak thinks it's
3 not clear and I am willing to review your case law again
4 that you've argued. Now, can I do this with you?

5 MR. ECHARD: Can I make one comment. I think I
6 need to find out if the Court is concerned about it being
7 used for cattle. He keeps challenging that and that is not
8 the law in the State of Utah. If it is used for imposing
9 of cattle, it's sufficient. If the Court isn't concerned
10 about that, I won't spend time on it. But he has
11 challenged me to site some statements in the case that
12 address that issue. He keeps saying that even if you
13 accept my argument that the use of the land, the disputed
14 land, for cattle is not sufficient. That's what I've
15 pointed out in all of his cases are pre-1990. The Carter
16 case specifically was used for the enclosement of cattle
17 and the Supreme Court decision in Carter specifically talks
18 about the fact that it was used for cattle. And they did
19 not find that a basis for reversing it.

20 MR. MAAK: That is not my argument, your Honor.
21 And I'll state this, your Honor.

22 THE COURT: Yeah, I didn't understand that to be
23 there.

24 MR. ECHARD: Now, what is the big issue on cattle
25 ranch. I don't want to - he keeps saying it's only for the

1 purpose of cattle. If he's acknowledging that assuming all
2 the other elements are met, so we eliminate discussion,
3 that if the property was used for 20 years to enclose
4 cattle that is sufficient then I don't need to go into it.
5 But I've heard him say, last time in the argument and now
6 that that is not sufficient and he challenged me to site
7 some language in Carter that specifically referred to the
8 use of land for the encompassing of cattle.

9 THE COURT: Do you want to respond to that, Mr.
10 Maak?

11 MR. MAAK: My point, your Honor, is that the
12 Supreme Court has said six times and has never been changed
13 that a fence installed for the purpose of containing cattle
14 rather than as a boundary line cannot provide the basis --

15 MR. ECHARD: All right, I'll address that.

16 MR. MAAK: --only be acquiescence. The fact that
17 there are cattle occupying the place is not what I am
18 talking about.

19 MR. ECHARD: Okay.

20 MR. MAAK: It is that the fence has a purpose
21 different than that of a boundary. It is a purpose to
22 divide or contain stock where the land is returned.

23 THE COURT: That's how I understood it.

24 MR. ECHARD: And Carter specifically was a fence
25 that was put in to contain cattle. And Carter said that

1 indolence to that fence was sufficient. The Supreme Court,
2 in addressing Carter, again mentions that it was used for
3 the containment of cattle and for farming. And it made the
4 comment that the true owner of the property had observed
5 the land and observed that the fence and all was containing
6 cattle. That is clearly an issue in Carter. I ask you to
7 read the Carter case and the Supreme Court decision. I
8 have a copy of the Supreme Court decision on Carter which I
9 can give the Court. I think you have the other one. I
10 don't have that one available.

11 THE COURT: I have copies of that already.

12 MR. ECHARD: Now, the other thing that counsel
13 made a big deal of is that somehow the Supreme Court
14 overruled Carter and that that applies to this case. By
15 the Carter overruling of the Supreme Court, that was very
16 clear, that was totally in acceptable land. It was
17 landlocked. That is not the sort of thing that is involved
18 in this case. That was not landlocked. The fence was
19 installed, it was reinstalled. It may have been that it
20 was not convenient to maintain the fence in that area but
21 it clearly is not what the Supreme Court was saying. It
22 was saying that it was impossible for the other person to
23 have access to it. And you'll have to read those cases,
24 too.

25 So I think that when we come down to the fact the

1 Court, and by the way, I do need to cite to the Court this
2 thing about indolence. They cite in here also, if I recall
3 correctly, I can't put my hands on it but I stated the
4 other Supreme Court case earlier that cited that indolence
5 was sufficient. You don't have to rely upon Carter for
6 that purpose. The Supreme Court recognizes in, prior to
7 Carter, the case I cited to you in my memorandum and also
8 recognized in overruling Carter, that indolence had been
9 previously established by the Supreme Court.

10 Here it is. This is the Carter case from the
11 Supreme Court and it says, In quieting title in plaintiff
12 the trial court and the Court of Appeals is affirming the
13 trial court's relied upon Lane versus Walker, 29 Utah2d
14 1973, where we, the Supreme Court, stated that acquiescence
15 can consist of indolence and consent by silence. So, they
16 didn't touch indolence at all.

17 So, the only question we really have here as I
18 see it, I think clearly we showed indolence. We showed the
19 knowledge of the predecessors and the other parties that
20 the fence was being used to--the fence by Wilkinson and
21 even there had been a comment that Wilkinson was trying to
22 steal their land and so forth. They knew the use. We have
23 evidence of aerial maps showing that this land had been in
24 the land bank and had been used almost up to the fence on
25 the one edge for farming. All the disputed area was

1 clearly, not all, the disputed area was used for farming.
2 They knew about that. They knew that he was not sticking
3 with the boundary line. They knew that he was not sticking
4 with the old fence line but he was farming and grazing the
5 disputed area (inaudible). They did nothing. That's the
6 indolence.

7 It seems to me what the Court has really done,
8 your Honor, is by this line of cases, they've really taken
9 adverse possession and said if you're there for 20 years,
10 they let you adverse possess it without paying taxes. And
11 you heard the cases and that's clear in that area that
12 they've carved out. And that's what's happened in this
13 case. They are saying we don't care what the line was
14 before. We don't care whether or not they knew it was a
15 line. We don't have to have a dispute. All we have to
16 show is a line acquiesced in for a period of 20 years that
17 is occupied and then that settles the problem. And they
18 cite cases, law reviews and everything that said, gee, what
19 Judge Oak's did in this thing created a huge problem. We
20 don't want to fight with this. We just want to say if a
21 line has been there for 20 years, it's been used, it
22 belongs to this person so we can get on with life. That's
23 clearly what the court says. And I think that's clearly
24 what we have in this case. Thank you.

25 Now, as to the other issue, do you want --

1 MR. MAAK: Your Honor, can I respond?

2 MR. ECHARD: How come he gets to respond? I
3 don't think he gets to respond after I respond.

4 MR. MAAK: Well, I'm asking for permission.

5 THE COURT: You may.

6 MR. MAAK: Your Honor, the problem is the cases
7 don't say what counsel just told you they do. He hasn't
8 read, I invited him to do so. He says those, that Carter
9 was --

10 MR. ECHARD: That's nothing new, your Honor, this
11 is just reiterating the --

12 MR. MAAK: No, no. He says that Carter versus
13 Hanrath was all about a livestock control fence. The truth
14 is there were livestock. So what? The point is the court
15 did not find this fence was installed to contain livestock.
16 It is a boundary by acquiescence. I invite counsel one
17 more time to stand up and show the Court the language --

18 THE COURT: Let me interrupt, this takes on a
19 little more flavor kind of like a debate where he
20 challenges the other side to respond.

21 I'm going to go back to the cases. I understand
22 the issue very well and I think you both would agree that
23 we verbalized here what that issue is. I don't think there
24 is a dispute about the Court's findings. I'm not moving
25 away in anyway from that finding that I made before. I'm

1 willing to take another look at the case law and I'll look
2 at it all from top to bottom. And it's an interesting
3 case. I think it's a case, I kind of get the feeling which
4 ever way it went that it's going to go up on appeal. And
5 it's, I think each case that comes up on these boundary
6 line cases have some unique facts to them. It's one
7 they'll have to look at.

8 MR. MAAK: My last point, your Honor.

9 THE COURT: Okay.

10 MR. MAAK: The statement that somehow boundary by
11 acquiescence has become adverse possession without paying
12 taxes. That's just bull-claw.

13 THE COURT: No, you don't even need to make that
14 point because I understand already from your argument that
15 that is your position that that is not where the law has
16 gone. That's Mr. Echard's and that's really where the
17 split comes between the two of you.

18 MR. MAAK: What he says is what the court is
19 saying that any fence that people occupy up to creates
20 boundary by acquiescence and he edits out the language
21 "mutually acquiesced in as a boundary".

22 THE COURT: I'll be taking a close look at that.
23 I understand the issue.

24 Now, your dispute as to how the other findings
25 have read, can I suggest that I take a look at this, that

1 we schedule a phone conference in the very near future to
2 make this decision and can we deal with the other language
3 in the phone conference?

4 MR. ECHARD: May I just suggest that the best way
5 to do it is to take the precise language of the Court which
6 is very precise and make up the findings? I mean we don't
7 need to augment what you've said. I think you've covered
8 it and whatever you do and subsequently if you do anything,
9 just take that and make the language.

10 The problem I have is counsel has, in my opinion,
11 doctored a little bit to try to create things. For
12 example, he talks about agreements and a lot of things you
13 don't need to talk.

14 THE COURT: And I will say this. There are
15 times when I am making a ruling from the bench that I may
16 not cover every detail but they may be findings that are
17 consistent with what my findings are. And what I'd like to
18 do, because for me to rule on that and then grant your
19 motion to set this aside doesn't make much sense. What I'd
20 like to do is then revisit this with the two of you over
21 the phone and tell you what language I want to go with.

22 MR. ECHARD: Okay.

23 MR. MAAK: Okay, thank you, your Honor.

24 THE COURT: Thank you both.

25 MR. ECHARD: And may I ask one other thing? My

1 understanding is the status is that the Court sign the
2 documents with a holding of not been filed so the appeal
3 time doesn't (inaudible).

4 THE COURT: That's correct.

5 MR. ECHARD: Thank you.

6 THE COURT: It will not start to run until this
7 has been decided.

8 MR. ECHARD: Thank you.

9 THE COURT: Okay. Thank you.

10 (Whereupon the proceedings were adjourned.)

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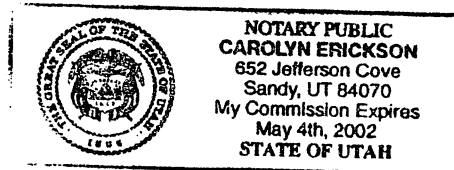
CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned hearing held before Judge Michael Glasmann was transcribed by me from a video tape and is a full, true, and correct transcription of the hearing as set forth in the preceding pages to the best of my ability.

Signed this 16th day of January, 1999 in Sandy, Utah.


Carolyn Erickson
Certified Shorthand Reporter
Certified Court Transcriber

My Commission expires May 4, 2002



Tab C

IN THE SECOND JUDICIAL DISTRICT COURT

~~WELLS~~ MORGAN

FOR ~~WELLS~~ COUNTY, STATE OF UTAH

WILKINSON FAMILY FARM, LLC,	:	Trial Court Case No. 96050010
	:	
Plaintiff,	:	Utah Supreme Court No. 981769-SC
	:	
v	:	
	:	
LARA BABCOCK and	:	
MIKE BABCOCK,	:	
	:	
Defendants.	:	

HEARING HELD SEPTEMBER 23, 1998

BEFORE

THE HONORABLE MICHAEL J. GLASMANN

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
652 Jefferson Cove
Sandy, Utah 84070
801-567-1157

APPEARANCES

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PARR, WADDOUPS, BROWN, GEE & LOVELESS
185 South State, Suite 1300
Salt Lake City, Utah 84111

* * *

1 SEPTEMBER 23, 1998

2 P R O C E E D I N G S

3 THE COURT: All right, are you there? Okay, I'm
4 putting it on the speaker phone. Are you able to hear me?

5 MR. ECHARD: Yes, your Honor.

6 MR. MACK: Just fine, your Honor.

7 THE COURT: Okay. We are on the record now and it's
8 my in-chamber's record and this is in the case of Wilkinson
9 Family Farm, LLC, versus Lara and Mike Babcock. And what
10 is before the Court this morning is a decision or decisions
11 to be made in some areas. The first one that I'd like to
12 deal with is that the plaintiffs in this case have brought
13 a motion for the Court to reconsider its ruling in the
14 case. Is that how you saw that pleading?

15 MR. ECHARD: I don't have it in front of me. I'm
16 sorry, Judge. We did ask, and I don't know if it's Rule 59
17 and 60 being combined, I'm sorry, I don't have the papers
18 in front of me.

19 MR. MACK: It was filed a motion to alter or
20 amend a judgment.

21 MR. ECHARD: Okay.

22 THE COURT: That's right. Now, we're going to
23 deal with that one first. I've reviewed the motion to
24 alter or amend judgment and the memo in support thereof.
25 I've reviewed all of the material that has been submitted

1 by both sides in this matter and the Court is denying that
2 motion. The Court is willing to stand on its original
3 ruling and I find that the interpretation of the case law
4 as submitted by your office, Mr. Echard, is different than
5 my understanding of the law and I believe that there is a
6 requirement that, the fence that was put in, be intended as
7 a boundary fence and it was, and it's my finding, and I've
8 made specific findings concerning this, is that it was not
9 ever intended to be a boundary fence but rather a stock
10 containment fence and that there was not an attempt to even
11 put it close to what the actual boundary of the property
12 was.

13 Now, having made that ruling, there was also an
14 objection to the findings of fact and conclusions of law
15 that had been submitted by Mr. Mack and I'd like you, I
16 don't know if each of you have those available, I'm going
17 to suggest some changes and ask that they be resubmitted at
18 this point.

19 MR. ECHARD: Can you hang on, (inaudible).

20 THE COURT: Sure. Do you have yours, Mr. Mack?

21 MR. MACK: I do.

22 THE COURT: Okay.

23 MR. MACK: Whatever you do, don't change my
24 picture.

25 THE COURT: Your picture? Oh, the picture won't

1 change. I'd kid with you more, I just don't know if Mr.
2 Echard is back.

3 MR. MACK: Oh.

4 THE COURT: I probably should wait until he gets
5 back.

6 MR. MACK: I just asked while I'm unopposed.

7 THE COURT: Okay. I assume you have your
8 findings there, Mr. Mack.

9 MR. MACK: I do, Judge.

10 THE COURT: Okay.

11 MR. ECHARD: I'm sorry, I can't find anyone
12 available to try to find it for me, Judge, I'll just have
13 to --

14 THE COURT: Okay. I'll read the whole paragraph
15 to you and let you know about the change. I'm dealing with
16 the findings of fact and conclusions of law, and you have
17 raised some objections to the way in which Mr. Mack had
18 worded those findings --

19 MR. ECHARD: Right.

20 THE COURT: --and conclusions and some of your
21 objection I agree with and I want to tell you how I want it
22 changed. When you go paragraph 7, not paragraph 7 but page
23 7, paragraph 16, I want that entire 16th paragraph out and
24 it read "Wilkinson and his predecessors knew that the
25 location of the boundary between the Wilkinson property and

1 the Babcock property was the true boundary. Babcocks and
2 the predecessors knew that the boundary between the
3 Wilkinson property and the Babcock property was the true
4 boundary. Both Wilkinson and it's predecessors and the
5 Babcocks and their predecessors knew that the slant fence
6 was not located on the true boundary".

7 The reason I want that paragraph out is I believe
8 in the rest of the paragraphs we cover adequately what my
9 ruling was. That one goes further and has me finding what
10 the Wilkinson's knew and there's certainly evidence there
11 to support the idea that someone could have or should have
12 known but I'm making a finding as though Wilkinson's
13 testified or that I knew from their testimony that they
14 definitely knew what the boundary was and just to say that
15 goes stronger and it goes further than what I was
16 comfortable with. Do both of you understand?

17 MR. ECHARD: Yes, your Honor.

18 MR. MACK: I do.

19 THE COURT: Okay. Now, paragraph 17, I want it
20 to read the boundary between the Wilkinson property and the
21 Babcock property was neither unknown nor uncertain. The
22 way it reads now is "the Babcock property is neither
23 unknown nor uncertain and never has been unknown or
24 uncertain" and, again, it's just stating that stronger than
25 what I want stated.

1 MR. ECHARD: Okay.

2 THE COURT: I like it written, was neither
3 unknown or uncertain. Now, I assume that you'll be the one
4 making these changes, MR.. Mack, so are you getting these
5 down?

6 MR. MACK: I am.

7 THE COURT: Is that one clear?

8 MR. MACK: Yes.

9 THE COURT: Okay. Next is paragraph 19 on page
10 8. It reads "Babcock's predecessors and Wilkinson and its
11 predecessors agree that the slant fence would be installed
12 and maintained as a livestock containment fence". I want
13 that paragraph out. I don't find from the evidence that
14 they all came together and had a specific agreement about
15 this slanted fence. I do find that that's definitely what
16 Babcock's predecessors intended. But I don't have evidence
17 of them coming to an agreement together to form an
18 agreement to that affect. Now, one might argue that
19 impliedly everybody understood that back then but that
20 states that differently than what my findings would be.

21 MR. ECHARD: I'm not arguing with you, your
22 Honor, but Harry Wilkinson did expressly state that he and
23 Babcock's predecessor's agreed that it be maintained as a
24 livestock containment fence.

25 MR. MACK: Oh, well --

1 THE COURT: And --

2 MR. MACK: I'm not sure I agree with that but
3 anyway.

4 THE COURT: And I'm not saying that, and I need
5 to clarify something. I'm not saying that that didn't
6 happen and I'm not making a finding against that. That's
7 what's a little tricky about me changing these. I go off
8 the record to supposedly undermine the other findings that
9 I've made. I am aware that that -- and I think that was
10 deposition testimony, wasn't it?

11 MR. ECHARD: It was.

12 THE COURT: I was aware of that from the
13 deposition testimony and I will don't have a problem again
14 with it being a stock containment fence. In fact,
15 arguably, any fence that's even when it's on boundary lines
16 are stock containment fences. Do you follow what I'm
17 saying?

18 MR. ECHARD: Yes.

19 THE COURT: But, I do find that the slanted fence
20 was definitely put in for that purpose and it did not
21 follow the boundary line, I've already said this, because
22 of the difficulty in following the boundary line with the
23 undulations of the earth and what those steepness of the
24 earth problems created to maintain the fence.

25 Next is paragraph 20 and that paragraph I want to

1 come out also. It reads "Babcock's predecessors allowed
2 Wilkinson's predecessors to use portions of the disputed
3 property. The consent and permission, however, did not
4 constitute any agreement on the part of Babcock's
5 predecessors that Wilkinson's predecessors owned or had any
6 legal right with respect to the disputed property". That
7 one, now that I reread that I'm not sure I have too much of
8 a problem with it. Let me just look at it one more time.

9 I think the problem I have with it is the notion
10 that they allowed them to use the property. I mean, they
11 did but it doesn't appear to me that that there was a
12 formal decision made and that's what that kind of implies
13 is that there was a decision made to allow the use. I
14 don't know that I really evidence of that. Kind of what it
15 appeared to me is that we've got wide open spaces,
16 certainly with large tracts of land and that they fenced it
17 to fence off the stock so they wouldn't get out and they
18 followed the course that was easier to put the fence in but
19 I just, I don't think after that with the hilly and
20 different topography because they weren't attempting to
21 farm it themselves, speaking of the Babcock's predecessors,
22 I just don't think they were paying a lot of attention to
23 what was going on with the property. And one might argue
24 that they, therefore, allowed Wilkinson to use it but that
25 kind of implies an agreement I think in the way that

1 paragraph is written. Do you understand where I'm coming
2 from, Mr. Mack?

3 MR. MACK: I do, your Honor.

4 THE COURT: Okay. Any questions on your part,
5 Mr. Echard?

6 MR. ECHARD: No, your Honor.

7 THE COURT: Okay. Twenty will come out. Those
8 were the only changes that I wanted to make in the
9 findings.

10 MR. ECHARD: May I ask a question on that, Judge?

11 THE COURT: Yes.

12 MR. ECHARD: My recollection is I asked that your
13 ruling make in your, well, at least I don't have a
14 transcript of it, that specifically found that the
15 plaintiff admitted early and to the indolence and so forth
16 be specifically placed in your findings. And it was not in
17 there.

18 MR. MACK: I don't think that's appropriate, your
19 Honor. You made a discussion about if this and if that and
20 maybe this and maybe that and then you made specific
21 findings that there was. There was no objection and that's
22 in here. But there was no finding that the plaintiff, and
23 what Mr. Echard is asking you to do is to find that he has
24 met his burden in establishing his case which is what he is
25 basing his objection and motion to reconsider.

1 MR. ECHARD: Except that that's what precisely
2 what you said. I only asking that what you said be
3 precisely put in your findings.

4 MR. MACK: And, your Honor, that is, you said
5 exactly the opposite at our last hearing.

6 THE COURT: And I am not going to put that in
7 these findings and I don't want it put in. And I might
8 explain, Mr. Echard, that why I wasn't to make the finding
9 that I thought all these elements had been met and
10 therefore --

11 MR. ECHARD: No, I'm not asking you to put that
12 in, --

13 THE COURT: No, and I understand that, and my use
14 of the word "indolence", I as trying to use a word that had
15 been used by the appellate court in describing someone not
16 setting up and objecting to someone using the property.

17 MR. ECHARD: Okay, but one of the elements and
18 you found specifically --

19 THE COURT: And whatever specific findings I
20 found about their not interrupting or stopping the
21 Wilkinsons or their predecessors from using the property in
22 whatever way it was used, that I've already found.

23 MR. ECHARD: But it's not in any papers, he
24 specifically excluded it.

25 THE COURT: Well, do you want to respond to that,

1 Mr. Mack?

2 MR. MACK: Well, let's not speculate, let's look
3 and see.

4 MR. ECHARD: My recollection and I gave the Court
5 a copy of the transcript and the language is there and I
6 apologize for not having found that but I didn't realize we
7 were going to do this.

8 MR. MACK: Paragraph 20, Babcock's predecessors
9 allowed Wilkinson's predecessors to use portions of the
10 disputed property --

11 MR. ECHARD: That's not what happened. The
12 Court--

13 THE COURT: Just a minute, let Mr. Mack finish
14 and then I'll let you respond.

15 MR. MACK: It also says that Wilkinsons farmed a
16 portion of the disputed property and that their cattle
17 grazed up to the disputed property. Now, what other facts
18 are there?

19 MR. ECHARD: Let me respond. The Court says the
20 specific finding that it found that the plaintiff had met
21 its burden in showing that the other side had been indolent
22 in its, and I don't recall the exact wording, all I want is
23 the exact wording. That is one of elements the Court then
24 indicated that because this was a fence of convenience as
25 opposed to, as has been mentioned before, intended to be a

1 boundary, they knew was a boundary, that they found against
2 us. But he found in one issue that we showed the indolence
3 but he found that that was not sufficient in this case and
4 that's all I want this to show is that Mr. Mack has
5 purposely not put that in and knowing the significance of
6 that particular finding by the Court. And if the Court
7 felt that it was significant enough that it made a precise
8 finding on that and we have a right to have that put in.

9 MR. MACK: Well, (inaudible), your Honor.

10 THE COURT: Well, hold on just a moment, and by
11 the way, I didn't, I don't find that either one of you is
12 trying to be tricky with the other one and I realize that
13 in these boundary line cases that you may feel that there
14 is very, you may feel as attorneys, that there is some very
15 close calls in terms of what language is used and how it is
16 viewed.

17 What I'm concerned about is I don't want
18 particular phrases to trap overall the finding that I've
19 been attempting to make in this case. And let me just say
20 this, the language in paragraph 20 that I took out, I do
21 think we need to say that Babcock's predecessors did not--
22 and I'm trying to phrase this as we go, it seems to me they
23 did not interrupt or --

24 MR. ECHARD: Just what you said, that they agreed
25 to let them, I don't know if you're using the exact

1 definition of the statute when you referred to it and
2 that's precisely what you're saying now. I don't know what
3 your reluctance is in putting in what the Court said at the
4 time that it issued its order. That's what findings are
5 supposed to do.

6 MR. MACK: And, your Honor, I think you should
7 tell us what you want.

8 MR. ECHARD: By the way, I (Inaudible), counsel,
9 and that's what I'm doing.

10 THE COURT: Yes, you do, and I've heard the
11 arguments on both sides. What I want the facts to show is
12 that the, again, we've already stated that the slant fence
13 was the boundary line, not the boundary line but not
14 intended as the boundary line but rather as a stock
15 containment fence and that the area between the slanted
16 fence and the actual boundary line between the properties,
17 that the use that was made by Wilkinson was not disallowed
18 by Babcocks or their predecessors and that they did not
19 interrupt that use by Wilkinsons.

20 MR. ECHARD: Okay.

21 THE COURT: And so the reason I am being somewhat
22 skiddish about the word, use of the word indolent is that
23 when I used that when I was making my findings originally
24 from the bench, I wasn't try to make more of a finding than
25 what I've just said. And it has caused me some concern

1 after the fact that it may be viewed by a court that I'm
2 attempting to make a finding that is consistent with that
3 ruling that you've argued about, Mr. Echard, to say that,
4 therefore, the property boundary should be moved over to
5 the slanted fence. And I'm not attempting to do that. And
6 I am, and frankly indolence is not a word that I ever use
7 in my day-to-day discussions with people so I was using the
8 word out of that other case which I thought was the
9 appellate court's way of describing that someone uses
10 property and no one comes over and interrupts their usage.
11 And what I'm really trying to say now is I'm making that
12 finding that whatever stock grazing might have gone on by
13 Wilkinson's stock over that fence line, nobody stopped or
14 interrupted that because, in fact, there was no fence
15 allowing the actual boundary line to stop or interrupt it.

16 MR. ECHARD: But I think also, your Honor, that I
17 think you intended at that time, I don't know what you
18 intended, but anyway, the evidence is also not only did
19 they have cows, they also raised crops for a number of
20 years which went up next to the fence. There's no mention
21 of that on the disputed piece of property.

22 THE COURT: And that's my point there is that I
23 made a specific finding about the crop usage, it didn't go
24 right up to the fence.

25 MR. ECHARD: Right.

1 THE COURT: But it, there was some crop usage on
2 a portion of the land. And I've already made a finding
3 concerning that. And that's what I'm saying is that I
4 don't want the use of the word indolence to go outside of
5 what my specific findings were.

6 MR. ECHARD: Well, I think the definition of
7 indolence as you made specific reference to the case made
8 clear what you intended but you did make the comment that
9 you found the plaintiff or the burden as to that issue and
10 then you made reference to the case. So I thought it was
11 pretty clear.

12 MR. MACK: Your Honor, may I make a suggestion?

13 THE COURT: Yes.

14 MR. MACK: Can we put back in the first sentence
15 of paragraph 20 and state that Babcock's predecessors
16 allowed Wilkinson's predecessors without objection or
17 interruption to use portions of the disputed property.

18 MR. ECHARD: I strenuously object to that. I
19 think he is clearly trying to manipulate your findings on
20 that because the law is clear that if a person uses
21 property with permission that you don't read this. He
22 didn't give anyone permission, he used it openly and
23 notoriously and there was nothing done by the other party.
24 That's different than saying that they gave permission
25 because the Court has received no testimony at all from

1 anybody that talked about permission being given. So, I
2 think, again, that it is clearly inappropriate in the
3 findings.

4 MR. MACK: Well, there was testimony that they
5 agreed to maintain the fence and the cattle contained the
6 fence and there was testimony that Wilkinsons farmed a
7 portion and had cattle graze up to it.

8 MR. ECHARD: Yeah, but I think that wording is
9 better handled the way the Judge worded it just now rather
10 than saying they gave permission. That assumes an asserted
11 position that is clearly not supported by the evidence.
12 But I think when the Court says that they used it for a
13 period of time and the Court found that there was no effort
14 to stop them from using it and so forth, that it more
15 appropriately fits the evidence as the Court indicated.

16 MR. MACK: Your Honor, would you tell us what
17 you'd like?

18 THE COURT: Yeah. I'm trying to. We're trying
19 to draft between the three of us over the phone here. It's
20 a little bit difficult. Again, the word "allowed" in that
21 sentence again is more than what I'm finding went on. I
22 don't, in other words, if I had had someone take the stand
23 in the case and said, oh yeah, we always knew where the
24 boundary line was and this was our stock fence and, yeah,
25 we knew those guys were over there doing some cropping and

1 that their cattle wandered over there and we allowed it and
2 we talked to them about it and they knew we were allowing
3 them to do that. I don't, I didn't receive that kind of
4 evidence in the case.

5 But what I am saying there specifically is that,
6 and I didn't write down my sentence but it's words to the
7 effect that, and I realize that you may not be comfortable
8 with the phrase "did not interrupt" but if it can be stated
9 more succinctly than what I'm stating it, that would be
10 fine. I think I said something to the effect that
11 Babcock's predecessors did not interrupt Wilkinson, maybe
12 the use of a portion of the disputed property by
13 Wilkinson's predecessors. Something to that affect because
14 that's, in fact, what happened. I mean there were some
15 cattle that were able to access that area and there was
16 some crop usage that went on and nobody interrupted.

17 MR. MACK: That's fine by me.

18 MR. ECHARD: That's fine, your Honor.

19 THE COURT: Okay.

20 MR. MACK: Can I read it, your Honor, so there is
21 no argument?

22 THE COURT: Yeah, let's hear what you've --

23 MR. MACK: I've written down, Babcock's
24 predecessors did not interrupt the use of a portion of the
25 disputed property by Wilkinson's predecessors.

1 MR. ECHARD: But except that that's not correct
2 because the only disputed property is right up to the fence
3 and he, in fact, used all of it for cows (inaudible).

4 MR. MACK: Well, I just wrote down what the Judge
5 said.

6 THE COURT: I wanted to say just that. Because
7 when you say that, Mr. Echard, there was a little bit of,
8 and frankly, I've been out in that type of country and
9 driven cows around and I'm aware that they'll go about
10 anywhere when you're trying to make them go somewhere else.
11 So I'm not saying that a cow couldn't get right down to
12 that fence. But there were some areas with the tall,
13 really well developed sage brush that, again, I don't know
14 that anything, I don't even know that the cows went right
15 down to that fence.

16 MR. ECHARD: Well, at that point we had, of
17 course, that's 20 years or more, closer to 30 or 40 years.
18 You can't assume because the sage brush is sitting there
19 now that they didn't go down there later or earlier.

20 THE COURT: But again, all I'm able to find is
21 that a portion of the ground was used not, and I don't
22 think it's fair to say that all of it was used. And,
23 again, I've made the finding that to the extent there were
24 cows that might have been wandering in that direction, the
25 only thing that would have stopped them would have been a

1 fence. And that was (inaudible) obviously in appellate
2 court.

3 MR. ECHARD: Okay. If you can make sure that's
4 clearly in the findings then.

5 THE COURT: Well, I think that to the extent it's
6 stock containment and the way it exists right now I don't
7 feel that Mr. Mack needs to put that specific of a finding
8 in these findings. I want him to use the wording that he
9 just barely read back to me and that will be adequate from
10 my perspective.

11 I mean you certainly have the argument that you
12 made factually on appeal that if it's a stock containment
13 fence, it contains stock from a (inaudible). I mean for
14 someone to argue and I don't think Mr. Mack can argue in
15 good faith that the cows on Wilkinson's side never came
16 down to the fence. I mean, -

17 MR. ECHARD: Well, that's the only purpose for
18 putting a portion in there, and I can guarantee you that
19 he'll be citing precisely your findings, saying that the
20 record or transcript is not applicable because you put your
21 finding in a precise language.

22 MR. MACK: Well, Mr. Echard, I'm putting in
23 precise language because that's what the Judge is telling
24 me and all three of us sitting here know to a certainty
25 there was plenty of area in the area of that slant fence

1 where cattle could not physically get in.

2 MR. ECHARD: And I don't agree.

3 MR. MACK: Okay.

4 THE COURT: And that's something that I'll make a
5 record of here. I cannot say that I know there were areas
6 where a cow could not get to. But I'm also not making a
7 finding that there, that the cows could get to every area
8 of that fence. Frankly, in the time that I walked over and
9 looked at the property and examined it, I didn't have that
10 specific question in my mind as to whether there were any
11 areas of the fence that the cows couldn't get to.

12 But, in general I think that the appellate court,
13 and, again, I don't think that a specific finding needs to
14 be made because I think it was just portions of the ground
15 that were used by Wilkinson and yet I've already, I think,
16 made a finding that it was the stock containment fence and
17 I think that goes both directions.

18 MR. ECHARD: Okay.

19 THE COURT: So, that argument is there
20 (inaudible). All right, if you'll use that language you
21 put in, Mr. Mack, and then that's, those are the only
22 changes I wanted to make in the findings.

23 I don't recall that there were any changes that
24 needed to be made in the judgment but I do think that
25 probably we need to have that resubmitted because I've

1 already signed the judgment and dated it March 30th.

2 MR. MACK: Yes, I assumed that any corresponding
3 changes in the conclusions, and I don't recall that they
4 were tracked into the conclusions but any corresponding
5 changes in the conclusions that would, as you've said,
6 would also be made. (Inaudible)

7 MR. ECHARD: I don't want to go through this
8 again, your Honor. With all due respect, there are changes
9 to be made --

10 MR. MACK: No, that's what the Judge and I were
11 talking to subject to the findings and I'm just saying he
12 didn't say anything about the conclusions. But if the
13 conclusions track any of the language in the findings, I'm
14 assuming that that carries over and we don't need to get
15 into the exact wording of the conclusions. They will just
16 match the findings. Is that a fair assumption, your Honor?

17 THE COURT: Well, I'm looking at the conclusions
18 right now.

19 MR. MACK: And they may not repeat all the
20 findings, I don't any problem. Some people do, some people
21 don't and I don't recall it happened in this case.

22 THE COURT: Let me take just a moment. I want to
23 read those and see if I think there's a problem because I
24 didn't think anything needed to be changed there. Looking
25 at your paragraph 3, Mr. Mack, on the conclusions, page 10.

1 "Babcocks and their predecessors on the one hand, and
2 Wilkinsons and its predecessors on the other hand knew that
3 the boundary line between their respective properties was
4 the true boundary and knew of its location on the ground".
5 I think I'd like to add the phrase at the end of knew
6 there, or should have known.

7 MR. MACK: Knew or should have known that the
8 boundaries line between the respective properties. Is that
9 what you want?

10 THE COURT: Right.

11 MR. ECHARD: Could we just put should have known
12 other than knew because that again implies that somehow
13 there's some evidence that they knew and I don't think that
14 is supported.

15 MR. MACK: Well, I don't agree with that, your
16 Honor. All you have to do is look down the fence line and
17 it's crystal clear where the boundary is.

18 THE COURT: Well, not only that but I think with
19 the evidence that was presented about the old fence post
20 that were along the boundary line I want it to read knew or
21 should have known.

22 MR. ECHARD: Well, there is no fence line, your
23 Honor, where the slant fence they are not on the original--

24 MR. MACK: That is not correct.

25 THE COURT: No, they were on the original fence

1 line, the old ones. Well, in fairness, there were two old
2 fences. There was the old slant fence and there was some
3 evidence that that fence that was torn out when Babcock put
4 in the fancy new fence, that there was evidence of an older
5 fence that ran down the true boundary line and that's why I
6 want that to read knew or should have known.

7 MR. ECHARD: Okay.

8 THE COURT: Okay. The next sentence, the
9 location on the ground of the true boundary was never
10 uncertain or unknown to either Wilkinson and his
11 predecessors or Babcocks and their predecessors.

12 MR. ECHARD: Isn't that a repeat? By doing the
13 first one don't you eliminate the necessity for the next
14 one?

15 THE COURT: I'll allow that to stand. I'm just--

16 MR. ECHARD: When you said, that (inaudible),
17 okay.

18 THE COURT: Let me look at paragraph 4 for a
19 minute first. In paragraph 4 it says in the last sentence
20 there, both Wilkinson and its predecessors and Babcocks and
21 their predecessors knew that the slant fence was not
22 located on the boundary between the Babcock and the
23 Wilkinson property. No, I'm going to let that one stand.
24 I think that is accurate.

25 The next one, Wilkinson's occupation of the

1 disputed property was with the permission and consent of
2 Babcock's predecessors.

3 MR. MACK: That's the line you changed in the
4 findings.

5 THE COURT: Wilkinson's occupation of the
6 disputed property was with the permission and consent of
7 Babcock's predecessors.

8 MR. ECHARD: See, that implies that they somehow
9 need verbal consent to it which you have found they have
10 not but it had been merely a matter that they did not
11 object to interfere with. I would suggest to track the
12 language that you made in the findings.

13 THE COURT: Do you have a suggestion? I'm a
14 little uncomfortable with the language, Mr. Mack. Do you
15 have a suggestion there for a change?

16 MR. MACK: Well, in the conclusions of law, the
17 factual credit before it is a finding that there was not an
18 interruption or a complaint about it and that it had
19 occurred for a period of time because it was visible on the
20 land. I believe that that is a legitimate legal conclusion
21 to be drawn when the only evidence is somebody does
22 something, it is not objected to, and when people know that
23 they are using their property. I don't know how else to
24 say it.

25 THE COURT: Let me throw this language out.

1 Wilkinson's occupation of the disputed property was not
2 disputed by Babcock's predecessors.

3 MR. MACK: That'd be great.

4 MR. ECHARD: I think that's factually what the
5 evidence was.

6 THE COURT: I said disputed. I don't know what I
7 said. Was not objected --

8 MR. MACK: Objected not disputed.

9 THE COURT: Was not objected to. I didn't mean
10 disputed. I don't know why I said it. Wilkinson's
11 occupation of the disputed property was not objected to by
12 Babcock's predecessors.

13 MR. ECHARD: That's fine with me, your Honor.

14 THE COURT: Any objection to that, Mr. Mack?

15 MR. MACK: No, your Honor.

16 THE COURT: Okay. The rest of it I'm comfortable
17 with on the conclusions.

18 The judgment, let me just see if it tracks. No,
19 the judgment appears to be fine. Now, maybe the thing for
20 us to do because I have not changed the judgment, what are
21 your thoughts, Mr. Mack? I'll start with you in terms of
22 the judgments. Do you want to resubmit the judgment or do
23 you want to leave it standing with the date I put on it and
24 then you'll submit amended findings of fact, conclusions of
25 law? And then you'll also be submitting an order on my

1 denial of the motion to whatever that pleading was called.

2 MR. ECHARD: (Inaudible).

3 THE COURT: Alter or amend judgment. But you
4 could put a phrase in there, somewhere it has to state that
5 from this Court's perspective the appeal period begins to
6 run from the day of my signing of the order denying the
7 motion to alter or amend judgment.

8 MR. MACK: I think that's fine, your Honor. Why
9 don't I submit a revised findings and conclusions and a new
10 judgment for you to enter concurrently along with an order
11 that recites the judgment as previously entered and it's
12 not going to be filed and the time for appeal runs from the
13 judgment that is in fact (inaudible).

14 MR. ECHARD: That would be fine with me if you
15 just had a new one and you signed it again, Judge. Because
16 it was signed inadvertantly by you not realizing that there
17 was an objection filed. It was filed because of the
18 county, there was a mixup I think, to indicate that that
19 judgment date stands would be inappropriate because you
20 filed this, you know, we're not in a position from a legal
21 standpoint given the objections to sign it at that time and
22 we were told it would not be.

23 THE COURT: Okay. That sounds like you're both
24 in agreement. The way Mr. Mack started doing it, sounds
25 like you would be in agreement with that.

1 MR. ECHARD: Right. So the date of the judgment
2 and the date of your denial of our motion will be the same.

3 MR. MACK: One last item, your Honor.

4 THE COURT: Okay.

5 MR. MACK: There is an objection to the billed
6 costs.

7 THE COURT: Oh, that's right. I do have that in
8 my notes. As was stated in the memo, what this has to do
9 with is the Court awarding the deposition fee as a cost
10 item in the case and I think it was pointed out in your
11 memorandum, Mr. Echard, that that was a descretionary call
12 of the Court.

13 MR. ECHARD: It is.

14 THE COURT: And the Court believes that that is
15 appropriate for that cost to be included. I'll just
16 verbarlize generally, I've included those costs in past
17 judgments that I've awarded and it certainly appears to me
18 that it was reasonable and necessary for those depositions
19 to have been taken in conjunction with this case.

20 MR. ECHARD: Okay. And I assume that Mack will
21 prepare all three of those rulings subject to me for
22 approval as to form.

23 MR. MACK: I'll just send it to the Judge. If
24 you want to object you can but --

25 MR. ECHARD: Well, I know, but I'd like to have

1 it sent for my approval as to form so I can review it
2 before it goes to the Judge.

3 THE COURT: Why don't you do both, if you would,
4 Mr. Maak? Put it into an approval as to form line on it
5 for Mr. Echard and then also put the certificate of mailing
6 and I'll rely, would be in the record here, we'll all rely
7 on the timing of the certificate of mailing.

8 MR. ECHARD: Can I make a comment on that? It's
9 not intended to (inaudible) Mr. Mack, but that's in
10 violation of every rule the Court has adopted.

11 MR. MACK: You're wrong.

12 MR. ECHARD: The rule, may I finish?

13 MR. MACK: Yes.

14 MR. ECHARD: And I've already had Judge
15 (inaudible) rule on this issue and make a note as the
16 presiding judge for this district that it shall not be done
17 that way. I've also had the district court judge's Bob
18 Bailey commented it shall not be done that way. The party
19 is entitled to either one or the other.

20 THE COURT: Well, --

21 MR. ECHARD: Altercation of an eight day
22 admission to the Court by (inaudible) precisely under the
23 administrative rules or relying saying that we approved as
24 to form, but --

25 THE COURT: But, Mr. ---

1 MR. ECHARD: -- is inappropriate.

2 THE COURT: But, MR.. Echard, let me interrupt
3 you. The reason it's inappropriate is that we don't want
4 to create confusion out there on the part of the receiving
5 attorney --

6 MR. ECHARD: Right.

7 THE COURT: -- when he or she see's an approval
8 as to form line and they maybe are real busy and they set
9 in on their desk thinking they've got the opportunity to
10 approve or if they don't that it will sit.

11 MR. ECHARD: Right, that's correct.

12 THE COURT: We just eliminated that because I
13 just told you how we were going to treat this. Now, the
14 only reason I suggested that is I wanted Mr. Mack to send
15 that over and give you the chance just to sign off and
16 approve it and it would go through more quickly. When you
17 say you're entitled to either/or, if you're not comfortable
18 with that then Mr. Mack can just do the certificate of
19 mailing and just go that route.

20 MR. ECHARD: Well, if he does, he has to give the
21 notification to me that I have five days in which to
22 object.

23 THE COURT: Sure, sure. And I assume --

24 MR. ECHARD: But all we have in this case, again,
25 is I don't end up in a situation like we were in last time.

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MR. MACK: Now, Bob, I think that, let me talk about that.

MR. ECHARD: Okay, but --

MR. MACK: Bob, you know what? You did not say approved as to form on those findings that were submitted to you.

MR. ECHARD: Well, I --

(Over talking)

MR. MACK: Your objections were not timely and you submitted a letter to this Judge suggesting that I was trying to take advantage and I personally --

MR. ECHARD: Counsel, that's not what we are going to do now and I'm not interested in arguing the facts.

THE COURT: No, wait. Let me say this. The reason Mr. Mack's hair is standing up on the back of his neck is he, and I'm not saying you're saying this, Mr. Echard, but he's concerned for the record and probably for whatever is being said to me as the Judge, that we're not left with the impression that he was trying to slip it through before you got a chance to object.

MR. ECHARD: And that's --

THE COURT: Let me state, and I don't think you're saying that. I made it very clear for the record that Mr. Mack approached this correctly in terms of

1 preparing the findings, conclusions, and the judgment and
2 submitting them to you. They didn't come to me
3 inappropriately. What sometimes happens here is that an
4 objection will be filed and it will be filed but somehow I
5 don't get notice of it as the Judge and then I'm looking at
6 the pleadings, the requisite time period has passed. I
7 sign them and I don't know that an objection has been
8 filed. And I haven't even gone back to check to see if the
9 objection that you filed, Mr. Echard, was timely filed.
10 Yet, frankly, I assumed that it was but even if it was a
11 few days late, it's fair that we deal with any substantive
12 objection that you had. So, that that's, I don't see
13 anything wrong with what either one of you have done, okay?

14 MR. ECHARD: And I'm talking about as of this
15 date. On this date I either have to know that I have time
16 enough to review them and sign them as to approval as to
17 form or I'm limited to my eight days to object. I need to
18 know one or the other because I'm hopeful that we'll get
19 the language that we discussed. But let's just assume that
20 there is another issue. I've got to know which way and
21 which operation I'm under. The problem I have, and this
22 happens more and more often by attorneys in our district,
23 and I'm not referring to Mr. Mack at all, is that we are
24 not given that opportunity. And in this particular case,
25 if it is being submitted on an eight day notice then it has

1 to state under the rules that it will be submitted to the
2 Court in X many days if objection is not filed. This
3 notice on the certificate of mailing does not accomplish
4 that purpose. So I don't really care which way we do it
5 but I'd like to know what my parameters are. If he sends
6 it to me approval as to form and he certifies to your
7 Honor, and two days later you decide, Well, I'll sign it, I
8 think it's what I said, then I've been denied the
9 opportunity to do one or the other.

10 THE COURT: Well, we are not going to do that.
11 As I understand it, Mr. Mack, you're going to do a mailing.

12 MR. MACK: I am.

13 THE COURT: And in that you are going to put down
14 statutorilly what the requirement is. Now, this question
15 does come up, I guess. Are you then going to do that with
16 the mailing and then hold the pleadings until that time
17 period is past or are you just going to do the mailing and
18 send the pleadings into me counting on me to keep track of
19 whether the time period has past?

20 MR. MACK: What I will do, your Honor, is what I
21 did last time. That is, I will submit it to Mr. Echard
22 with a certificate of service and when eight days has
23 expired, I will send it to you with a letter that says here
24 are the findings and conclusions. They were served eight
25 days ago and I have received no objection.

1 MR. ECHARD: See, and again, I'm not talking
2 about the last time but the problem we have and it's
3 broader than just this case, is that when all it shows is a
4 certificate of mailing to me, that does not put me on
5 notice that you are going to do it in eight days. You're
6 telling me now on the phone but the certificate that is
7 required is a certificate that says, you know, I'm
8 submitting it you, you have five days plus three days
9 mailing to file an objection. If you do not, it will be
10 submitted to the court. And when you just have a
11 certificate of mailing it does not have additional language
12 and it has approval as to form, that is not properly
13 notifying the other attorney that you are exercising that
14 option.

15 (Over talking).

16 MR. MACK: I guess what I'd like you to do is
17 have you tell me what this rule is because I am not aware
18 of any rule like that.

19 MR. ECHARD: Well, I will gladly try to --

20 MR. MACK: Because it's Rule 4504 that governs
21 that, there is nothing what you're talking about in here
22 like that. It's not here.

23 MR. ECHARD: That is the rule though.

24 MR. MACK: Tell me what you would like me to do
25 and I'll do --

1 MR. ECHARD: I'll fax you a copy of the notice
2 that traditionally you put on these things.

3 MR. MACK: If that's the way you do it that's
4 fine.

5 MR. ECHARD: Your Honor, I don't want to go
6 through on this again, I would like to submit them and not
7 have any objection about the way it's been done.

8 THE COURT: No, I understand that, so here's what
9 I would like to see you do. You know it's interesting,
10 I'll just make this comment that the language we've
11 included in that Notice that tells someone that they have
12 five days in addition to the three days that are allowed
13 for mailing for a total of eight days -

14 MR. ECHARD: Right.

15 THE COURT: I haven't checked the statute to see
16 if that's statutory or if that maybe is a --

17 MR. ECHARD: It's not quoted verbatim but it
18 requires that kind of notification.

19 THE COURT: Well, and so, again, you may both
20 have a point. I think if you would, in this case, Mr.
21 Mack, if you would include language to that effect that
22 tells Mr. Echart what the timing is and I hope you're not
23 confused by what I'm saying here, it's just three days from
24 the date you are showing that someone is certifying that it
25 went out of your office, plus five days for a total of

1 eight days, the eight days that we are talking about. And
2 if you'll just state that in the notice.

3 MR. MACK: I would be absolutely happy to do
4 that.

5 MR. ECHARD: And I'll fax you just one of the
6 forms for you --

7 MR. MACK: Do you know what I'd like you to fax
8 me? Fax me the rule.

9 MR. ECHARD: Well, I'll fax you the form that
10 used, too, so you'll have both of them.

11 MR. MACK: I would like to see why I have to do
12 that, why in 25 years I have not learned of this
13 requirement.

14 MR. ECHARD: Well, the rule hasn't been in effect
15 that many years.

16 MR. MACK: It's CAA and it's 4-504 and just show
17 me where it says that.

18 THE COURT: Mr. Mack?

19 MR. MACK: Yes, your Honor.

20 THE COURT: I'm not sure that, I don't have the
21 rule in front of me, and the rule may not spell that out
22 and that could be somewhat of a, a prac - in the area we
23 see it come up a lot in this in the domestic area where
24 we'll have folks that may not have the rules available to
25 them and so just the fact you do a certificate of mailing,

1 I think we've kind of modified in the direction of having
2 our notice spell out what it is that the rule sets in
3 motion when you send the certificate of mailing and that is
4 to spell out for someone that they have the eight days. I
5 kind of suspect that's how it's evolved.

6 So, again, I'm just asking you from the
7 perspective that you both have expressed we don't want any
8 confusion on this one.

9 So, Mr. Echard, if you'll fax that to him today
10 that form of that notice that we have used some of in this
11 District.

12 Mr. Mack, you might be right, it may not even be
13 something that's required. Certainly, with this lengthy
14 discussion that we've had on the record, I don't think
15 there can be any doubt about the timing we're talking
16 about.

17 MR. ECHARD: That's correct.

18 THE COURT: All right, now, anything else that we
19 need to do at this poing?

20 MR. ECHARD: No, your Honor.

21 THE COURT: Mr. Mack?

22 MR. MACK: No, your Honor. Have, have a lovely
23 day.

24 THE COURT: You guys, too. I hope I'm not at
25 fault for making this more difficult than it should have

1 been but we're about through with it so --

2 MR. ECHARD: Okay. Appreciate that, your Honor.

3 THE COURT: Okay. Thank you both.

4 MR. ECHARD: Thank you, bye.

5 (Whereupon the telephone conference was concluded.)

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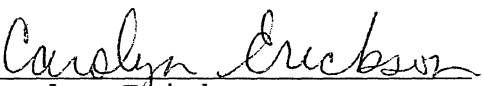
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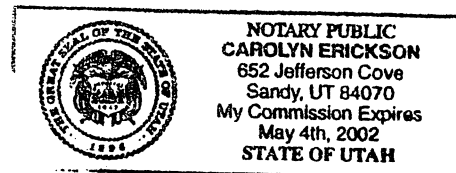
CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned hearing held before Judge Michael Glasmann was transcribed by me from a video tape and is a full, true, and correct transcription of the hearing as set forth in the preceding pages to the best of my ability.

Signed this 16th day of January, 1999 in Sandy, Utah.


Carolyn Erickson
Certified Shorthand Reporter
Certified Court Transcriber

My Commission expires May 4, 2002



Tab D

✓
SECOND DISTRICT
MORGAN COUNTY

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IN THE SECOND JUDICIAL DISTRICT COURT OF MORGAN COUNTY
STATE OF UTAH

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

Plaintiff,)

vs.)

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

Defendants.)

**FINDINGS OF FACT
AND
CONCLUSIONS OF LAW**

Civil No. 960000010

(Hon. Michael J. Glasmann)

The trial of this action came on regularly before the Court, the Honorable Michael J. Glasmann presiding, on December 11 and 12, 1997, plaintiff appearing through its counsel, Robert A. Echard, and defendants appearing through their counsel, Bruce A. Maak, and the Court having heard the evidence offered by the parties and the arguments of counsel and

having considered the matters on file herein, and the Court having announced its decision, now therefore, the Court hereby makes and enters the following

FINDINGS OF FACT

1. Plaintiff Wilkinson Family Farm, LLC ("Wilkinson") is a limited liability company organized under the laws of the State of Utah.

2. Defendants Lara L. Babcock and Michael Babcock ("Babcocks") are each citizens of the State of Utah residing in Morgan County, Utah.

3. Wilkinson and Babcocks own adjoining tracts of land located in Morgan County, Utah. The legal description of the land owned by Babcocks is as follows:

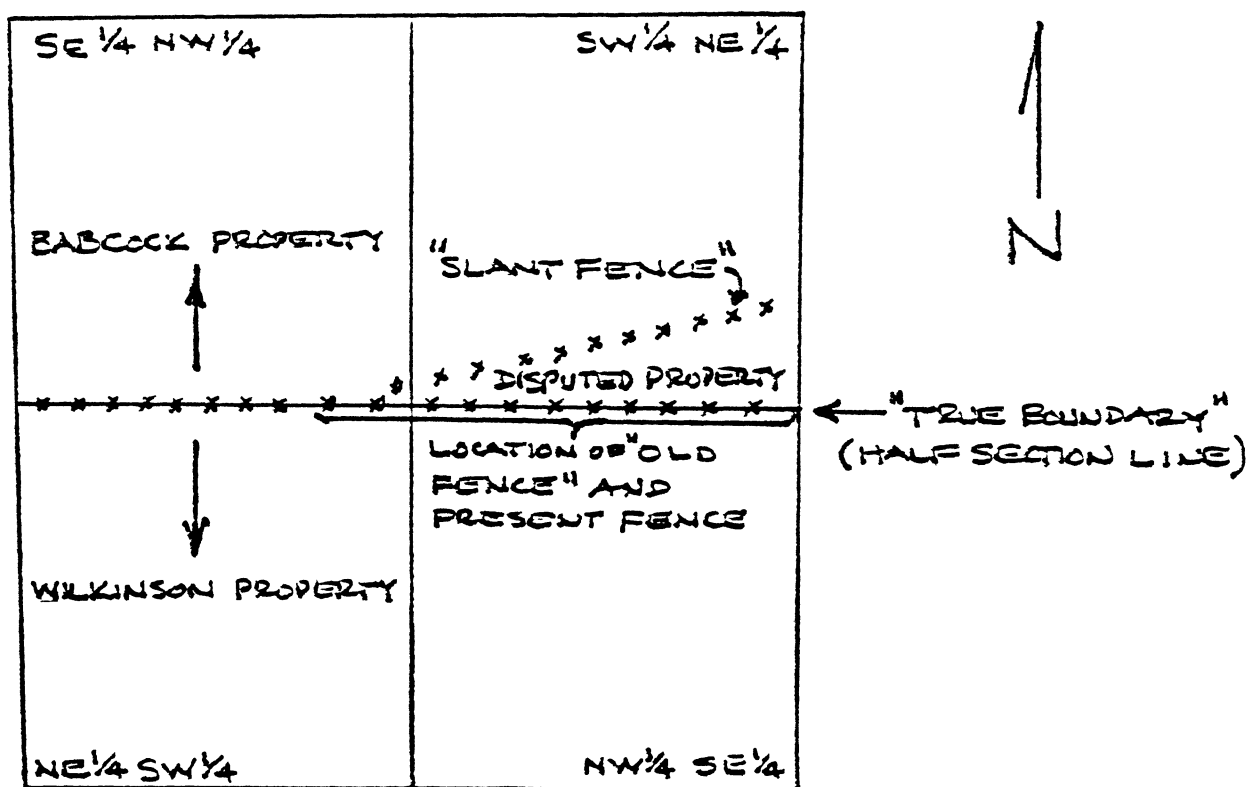
A tract of land situate in the Southeast quarter of the Northwest quarter (SE $\frac{1}{4}$ NW $\frac{1}{4}$) and the Southwest quarter of the Northeast quarter (SW $\frac{1}{4}$ NE $\frac{1}{4}$) of Section 30, Township 5 North, Range 2 East, Salt Lake Base and Meridian, U.S. Survey, Morgan County, Utah, being more particularly described as follows: The South 525.00 feet of said Southeast quarter of the Northwest quarter and the South 525.00 feet of said Southwest quarter of the Northeast quarter of Section 30.

The tract of land described immediately above is hereinafter referred to as the "Babcock Property." A part of the Babcock Property has been conveyed to others since Babcocks acquired it, but the portions so conveyed are not at issue in this action. The legal description of the adjoining land owned by Wilkinson is as follows:

Beginning at Southeast corner of Section 30, Township 5 North, Range 2 East, Salt Lake Base and Meridian: North 160 rods; thence West 320 rods; thence South 72 rods; thence Southeasterly to the South line of Section 30; thence East 236.75 rods to point of beginning. Being a portion of the South half of Section 30.

The tract of land described immediately above is hereinafter referred to as the "Wilkinson Property."

4. The northerly boundary of the Wilkinson Property is coincident with the southerly boundary of 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 various fences.



SECTION 30, T5N R2E

5. In this action, Wilkinson claims ownership of the triangular portion of the property lying within the legal description of the Babcock Property which lies south of a fence slanting north from the True Boundary, which is identified as the "Slant Fence" in the

diagram above and will be hereinafter referred to as the "Slant Fence." As used in these Findings and Conclusions, "True Boundary" shall mean and refer to the boundary between the Babcock Property and the Wilkinson Property that is established by their respective legal descriptions. The location of the "True Boundary" is so identified in the diagram above.

6. The chain of title to the Babcock Property began with a conveyance from the United States of America to James Williams during 1897. Title to the Babcock Property passed from James Williams to Elwood Williams and Mabel Williams, his wife. Elwood Williams and/or Mabel Williams owned the Babcock Property until 1958, when the Babcock Property was conveyed to Douglas R. Williams and James E. Williams, who are the sons of Elwood and Mabel Williams. James Williams and Douglas Williams conveyed the Babcock Property to Babcocks in 1992.

7. Each of the deeds after patent covering the Babcock Property, which are mentioned in paragraph 6 above, describe the southerly boundary of the Babcock Property as the True Boundary, which is the half section line running east and west of Section 30, Township 5 North, Range 2 E, Salt Lake Base and Meridian.

8. The Wilkinson family first acquired an interest in the Wilkinson Property when John Wilkinson and Alice Wilkinson received a conveyance of the Wilkinson Property in 1935. John Wilkinson and Alice Wilkinson conveyed the Wilkinson Property to Harry Wilkinson and Dorothy Wilkinson, his wife, in 1955. Harry Wilkinson and Dorothy Wilkinson conveyed the Wilkinson Property to Harry Wilkinson and Dorothy Wilkinson, as tenants in common, in 1976. Harry Wilkinson and Dorothy Wilkinson conveyed the

Wilkinson Property to Wilkinson Family Partnership in 1984 and 1985. Wilkinson Family Partnership conveyed the Wilkinson Property to Wilkinson Family Farm, LLC in 1995.

9. Each of the deeds covering the Wilkinson Property that effect the conveyances described in the preceding paragraph describe the northerly boundary of the Wilkinson Property as the True Boundary, which is the half section line running east and west of Section 30, Township 5 North, Range 2 East, Salt Lake Base and Meridian.

10. In all of the deeds effecting conveyances of the Babcock Property and the Wilkinson Property, the boundary between those properties is described as a straight line (i.e., a line with no jogs or slants departing from a straight line), that straight line being a half section line.

11. Wilkinson initiated this action against Babcocks seeking a determination that Wilkinson owned the approximately triangular tract of land lying south of the Slant Fence. A surveyor's description of the disputed property is as follows:

A parcel of land situate in the Northeast quarter and the Northwest quarter of Section 30, Township 5 North, Range 2 East, Salt Lake Base and Meridian, Morgan County, Utah, being more particularly described as follows: Commencing at the West quarter corner of Section 30; thence South 88°42'14" East 2463.67 feet to the true point of beginning; thence North 00°00'00" East 10.64 feet; thence North 87°41'19" East 450.84 feet; thence North 79°58'48" East 126.84 feet; thence North 76°23'47" East 1087.06 feet; thence South 04°38'44" West 343.99 feet; thence North 88°42'14" West 1604.50 feet to the point of beginning.

The Notice of Lis Pendens recorded on behalf of Wilkinson in this action describes the disputed property as follows:

A tract of land situate in the Southwest $\frac{1}{4}$ of the Northeast $\frac{1}{4}$ and the Southeast $\frac{1}{4}$ of the Northwest $\frac{1}{4}$ of Section 30, Township 5 North, Range 2 East,

Salt Lake Base and Meridian, lying South of Fox Hollow Subdivision and East of the Dennis and Lenore Hancock property deeded in Book M79 at Page 551 of Official Records, more particularly described as follows:

Commencing at the Northeast corner of said Section 30, thence North 89°09'43" West 1320 feet, thence South 2350 feet more or less to the South fence line of Fox Hollow Subdivision, the true point of beginning, thence following said South line, South 76°23'74" West 1087.06 feet, thence South 79°58'48" West 126.84 feet, thence South 87°42'19" West 450.84 feet, thence South 00°00'00" East 10.64 feet, thence North 88°42'14" East 1550 feet more or less to the Southeast corner of the Southwest ¼ of the Northeast ¼ of said Section 30, thence North 290 feet more or less to the South line of Fox Hollow Subdivision and the point of beginning.

That approximately triangular tract of land (whichever description is accurate) is hereinafter referred to as the "Disputed Property."

12. At least three different fences have existed in the vicinity of the Disputed Property. A very old fence existed on or very close to the True Boundary in excess of 20 years ago in the location marked in the diagram in paragraph 4 as the "Old Fence." Babcocks installed a fence very close to the Old Fence on the True Boundary during 1996. In addition, more than 20 years ago a fence was installed by Babcocks' predecessors, which fence is identified as the "Slant Fence" on the diagram above. The Slant Fence is the only fence that has existed in the area of the Disputed Property for in excess of 20 years.

13. The terrain in the vicinity of the Babcock Property and the Wilkinson Property is generally rolling hills, but in the area of the True Boundary south of the Slant Fence, there exists unusually steep, cliffy topography. This steep, cliffy topography has made installation of a fence along the True Boundary extremely difficult in this area. Any fence installed on the True Boundary in this area would have been extremely difficult to install and almost

impossible to maintain. The tension in any fence installed in this area would tend to pull up posts and wires in the lower areas of the fence, which in turn would allow livestock to escape.

14. The topography in the area of the Slant Fence, however, was like the surrounding topography and allowed easy, convenient fencing and was suitable for a livestock containment fence.

15. During the trial, the Court inspected the property at issue in this action. The Court was able easily to see that the Slant Fence departed from the straight line of the True Boundary by sighting east down the fence along the half section line lying to the west of the Disputed Property. That the Slant Fence was not located on the straight line of the True Boundary is obvious.

16. The boundary between the Wilkinson Property and the Babcock Property was neither unknown nor uncertain.

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.

18. Babcocks' predecessors did not interrupt the use of a portion of the Disputed Property by Wilkinson's predecessors.

19. The livestock of Wilkinson and its predecessors have, from time to time, grazed on the Disputed Property up to the Slant Fence. In addition, from time to time, Wilkinson and its predecessors have cultivated something less than one-half of the Disputed Property, but such cultivation was not up to the Slant Fence.

20. In seeking governmental approval for their subdivision, Babcocks did not include the Disputed Property in their proposed subdivision. Babcocks intentionally excluded the Disputed Property from their subdivision application in order to avoid objections to subdivision approval and to enhance the likelihood of subdivision approval and not because they did not claim ownership of the Disputed Property.

21. Babcocks and Wilkinson have on various occasions discussed exchanging various parcels of land owned by each for the mutual benefit of both, including exchanges involving Babcocks' transfer to Wilkinson of the Disputed Property. However, Babcocks and Wilkinson never arrived at any agreement under which Babcocks agreed to give up any

claim to the Disputed Property or to transfer ownership of the Disputed Property to Wilkinson.

22. Babcocks and their predecessors have paid all real property taxes on the Disputed Property. Wilkinson and its predecessors have never paid any real property taxes on the Disputed Property.

23. Wilkinson and its predecessors occupied up to the Slant Fence for in excess of 20 years.

24. Wilkinson and its predecessors, on the one hand, and Babcocks and their predecessors, on the other hand, are adjoining landowners.

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.

26. Wilkinson caused to be recorded a certain Notice of Lis Pendens relating to this action, which was recorded in the office of the Morgan County Recorder on December 4, 1996 as Entry No. 71679 in Book M0124 at Pages 385-387.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Court hereby makes and enters the following Conclusions of Law:

1. Wilkinson and Babcocks are adjoining landowners within the meaning of the doctrine of boundary by acquiescence or agreement.

2. Wilkinson and its predecessors occupied up to the Slant Fence for longer than 20 years within the meaning of the doctrine of boundary by acquiescence or agreement.

3. Babcocks and their predecessors, on the one hand, and Wilkinson and its predecessors, on the other hand, knew or should have known that the boundary line between their respective properties was the True Boundary and knew of its location on the ground. The location on the ground of the True Boundary was never uncertain or unknown to either Wilkinson and its predecessors or Babcocks and their predecessors.

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.

5. Wilkinson's occupation of the Disputed Property was not objected to by Babcocks' predecessors.

6. Neither Babcocks nor their predecessors ever agreed with Wilkinson or its predecessors to give up any claim to the Disputed Property or to convey the Disputed Property to Wilkinson or its predecessors.

7. The doctrine of boundary by acquiescence or agreement does not apply in this action.

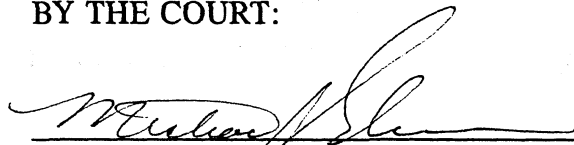
8. Babcocks own the Disputed Property free and clear of any claim of Wilkinson and its predecessors.

9. Wilkinson's Complaint should be dismissed with prejudice and upon its merits and Babcocks should be awarded their costs.

10. The Notice of Lis Pendens recorded by Wilkinson with respect to this action should be released and discharged.

MADE AND ENTERED this 30 day of October, 1998.

BY THE COURT:



Honorable Michael J. Glasmann
District Judge

NOTICE TO COUNSEL

TO: WILKINSON FAMILY FARM AND ITS COUNSEL:

You will please take notice that the undersigned attorney for defendants Babcocks will submit the foregoing to the Court for signature upon the expiration of five (5) days from the date this notice is mailed to you, allowing three (3) days for mailing, unless written objection is filed prior to that time, pursuant to Rule 4-504 of the Utah Code of Judicial Administration 1988. Kindly govern yourself accordingly.

DATED this _____ day of September, 1998.

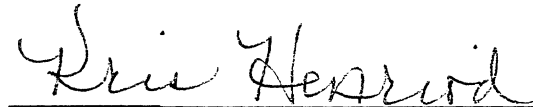
Bruce A. Maak
Attorney for Defendants Babcocks

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Findings of Fact and Conclusions of Law
was served this 23rd Sept. day of ~~October~~, 1998 by mailing on said date copies thereof by
United States mail, first class postage prepaid, addressed to:

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Kris Henriod, Secretary