

1982

# Mack Halladay and Merle Halladay v. Madge Cluff et al : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MACK HALLADAY and MERLE  
HALLADAY,

Plaintiffs-  
Appellants,

vs.

MADGE CLUFF, PERRY K. BIGELOW  
and NORMA G. BIGELOW,

Defendants-  
Respondents

Case No. 17754

18032

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BRIEF OF APPELLANTS

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APPEAL FROM THE JUDGMENT OF THE FOURTH JUDICIAL  
DISTRICT COURT IN AND FOR UTAH COUNTY, STATE  
OF UTAH, HONORABLE GEORGE E. BALLIF, PRESIDING

---

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Provo, Utah 84601

FILED

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Clerk, Supreme Court, Utah

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Case No. 17754

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BRIEF OF APPELLANTS

---

NATURE OF THE CASE

Plaintiffs brought this action to quiet title to certain property located adjacent to property of defendants.

DISPOSITION IN THE LOWER COURT

The lower court quieted title in plaintiffs of the parcel W-X-Y-Z on Appendix Exhibit A attached hereto, and quieted title in defendant Bigelow of the area between Parcel 1 and Parcel 2 colored in brown on Appendix Exhibit A, and quieted title in defendants Cluff and Bigelow of Parcel P-M-N-O on Appendix Exhibit A.

RELIEF SOUGHT ON APPEAL

Plaintiffs respectfully request the court to reverse the decree of the lower court quieting title to Parcel P-M-N-O

on Appendix Exhibit A in defendants and quiet title to said parcel in plaintiffs.

#### STATEMENT OF FACTS

In 1927, the property in the area P-M-N-O on Appendix Exhibit A was acquired by John E. Clift. (Record at 345). John E. Clift did not pay taxes on P-M-N-O in 1946, 1947, 1948, 1949, and 1950. (Record at 337). In 1951, Parcel P-M-N-O was sold at a tax sale and was purchased by George Collard. A tax deed was issued to and recorded by Mr. Collard. Mr. Collard owned no other property in the vicinity of Parcel P-M-N-O. (Exhibit 29).

On or about July 16, 1958 George E. Collard and Rosella J. Collard, his wife, conveyed Parcel P-M-N-O to Albert Halladay and plaintiff Mack Halladay. (Exhibit 29). On or about November 7, 1958 Albert C. Halladay and Maude Halladay his wife quit claimed their interest in Parcel P-M-N-O to plaintiffs Mack Halladay and Merle Halladay, his wife. (Exhibit 29). Plaintiffs had acquired Parcel 7 on Appendix Exhibit A in 1950 and later acquired Parcel 6 in 1961. (Exhibits 6 and 7).

On the line M-N there exists a fence which was erected more than 50 years ago. There is no fence along the line O-P. (Record at 54). The property taxes on the parcel P-M-N-O have been paid by plaintiffs since 1958. (Record at 199).

Defendants Cluff and Bigelow have on occasion occupied

Parcel P-M-N-O for the purposes of gardening and farming and business purposes. When plaintiffs purchased Parcel P-M-N-O in 1958, plaintiff Mack Halladay told defendant Perry Bigelow that he (Mr. Halladay) had purchased the P-M-N-O property. (Record at 277). During the period from 1970 to 1980, Mr. Halladay informed Mr. Bigelow on several occasions that he (Mr. Halladay) owned the property and that Mr. Bigelow should not make use of the property. (Record at 278). Defendant Perry Bigelow did use part of Parcel P-M-N-O with the permission of plaintiff Mack Halladay for the purpose of raising a garden. (Record at 176). In 1978, plaintiff Mack Halladay prevented defendant Perry Bigelow from building a potato cellar on the P-M-N-O property. Plaintiff informed defendant Bigelow at that time that he (Mr. Halladay) owned the ground and that defendant Bigelow would have to move the potato cellar back onto his own property. (Record at 178).

Prior to 1978, defendant Madge Cluff Kelson had never had any discussion or dispute with plaintiff Mack Halladay concerning the P-M-N-O property.

#### ARGUMENT

##### POINT I

THE DOCTRINE OF BOUNDARY BY ACQUIESCENCE IS INAPPLICABLE TO THIS CASE INASMUCH AS PLAINTIFFS ACQUIRED PARCEL P-M-N-O AS A SEPARATE TRACT OF LAND AND INASMUCH AS P-M-N-O WAS OWNED BY THIRD PARTIES UNTIL 1958. THE ONLY THEORY AVAILABLE TO DEFENDANT UNTIL 1958 WOULD BE ADVERSE POSSESSION.

The court concluded that a boundary line had been estab-



land affected was owned by a third party during the pertinent time and thus was not susceptible to being affected by an agreement between these parties or their predecessors in interest.

The lower court found that the M-N fenceline has marked the boundary of occupancy of the defendants Cluff and Bigelow and their predecessors' interests since before 1948. (Record at 54). However, the only period of occupancy by defendants that is material to this case is from the year 1958 when plaintiffs purchased Parcel P-M-N-O. The reason occupancy is not material is because P-M-N-O was owned from 1927 to 1958 by third parties who did not own property north of the fenceline. For defendants to have acquired any ownership interest in Parcel P-M-N-O prior to 1958, defendants would have had to have met the statutory requirements of adverse possession, Title 78-12-12 Utah Code Annotated 1953 as amended. There was no evidence presented that defendants have paid any taxes on Parcel P-M-N-O or that plaintiffs' predecessors in title acquiesced in the M-N fence as a boundary. Prior to 1958, Parcel P-M-N-O was owned by the Clifts and the Collards. Defendants could not have acquired title by acquiescence to Parcel P-M-N-O prior to a long period of years after 1958 when plaintiffs acquired that property. It is undisputed that defendants have not met the requirements of title by adverse possession to the Parcel P-M-N-O.

Prior to plaintiffs' acquisition of Parcel P-M-N-O in

1958, plaintiffs owned Parcel 7 as shown on Appendix Exhibit A. Plaintiffs acquired Parcel 6 in 1961. Therefore, defendant Cluff could not have acquired any title by the doctrine of boundary of acquiescence to Parcel P-M-N-O prior to 1961 inasmuch as plaintiffs otherwise would have been acquiescing away the entire parcel, rather than merely acquiescing in a certain fenceline as a boundary between adjoining parcels.

Furthermore, the doctrine of boundary by acquiescence simply is not applicable to the facts of this case. This is not a case wherein Party B purchases Black Acre and Party W purchases White Acre and the two parties acquiesce in a certain existing fenceline as a boundary between White Acre and Black Acre. In this case, plaintiffs own White Acre and defendants own Black Acre. Subsequently plaintiffs purchased Green Acre (Parcel P-M-N-O) which lies between White Acre and Black Acre. A fence lies between Green Acre and White Acre. At the time plaintiffs purchased Green Acre, the fenceline M-N had been in existence for fifty years. Defendants are now attempting to acquire Green Acre in its entirety by claims of boundary by acquiescence. Although plaintiffs may have allowed defendants to occupy portions of Parcel P-M-N-O, plaintiffs did not purchase an entire parcel of ground simply to give it away to adjoining landowners. Purchasing real estate is not acquiescence that a third party may have it. Plaintiffs' purchase of Parcel P-M-N-O is antithetical to their acquiescence in the M-N fence as a boundary between

plaintiffs' property and defendants' property.

## POINT II

THE EVIDENCE PRESENTED IN THE LOWER COURT IS  
INSUFFICIENT TO CREATE A PRESUMPTION OF  
BOUNDARY BY ACQUIESCENCE.

Should the court find that the doctrine of boundary by acquiescence is applicable to the facts of this case, that doctrine would not be applicable as between plaintiffs and defendants Bigelow until 1958, and as between plaintiffs and defendant Cluff until 1961, inasmuch as until those dates plaintiffs did not own property which would lend itself to acquiescence in the M-N fenceline as a boundary line. Plaintiffs did not acquire Parcel P-M-N-O until 1958, and plaintiffs did not acquire Parcel 6 until 1961. In Fuoco v. Williams, 15 Utah 2d 156, 389 P. 2d 143 (1964) the court stated:

This court over a period of years has formulated four elements which must be shown by the person claiming title by acquiescence in order to raise the presumption that a binding agreement exists settling a dispute or uncertain boundary. These elements are: (1) occupation up to a visible line marked definitely by monuments, fences or buildings and (2) acquiescence in the line as a boundary (3) for a long period of years (4) by adjoining landowners. If these four elements exist then it is incumbent upon him who assails title by acquiescence to show by competent evidence that a boundary was not thus established. But if the party claiming title by acquiescence fails to carry his burden and raise the presumption, then there is no case at all.

389 P. 2d 145.

In the present case, it is undisputed that defendants have occupied up to the visible M-N fence line on various occasions. However, it is disputed that there was acquiescence

in the M-N fence as a boundary line for a long period of years by adjoining landowners because P-M-N-O was owned by third parties from 1921 until 1958. In Fuoco v. Williams, supra, the court reversed the decision of the lower court and remanded the case to the lower court because although "it was conceded that defendants had occupied the land up to the ditch for a long period of years and that the dispute was between adjoining landowners," there was no evidence that the defendants had acquiesced in the ditch as a boundary. Upon remand the lower court found that there had been mutual acquiescence, but the Supreme Court reversed that decision on appeal.

In order to establish a boundary by acquiescence, it is not necessary that the acquiescence should be manifested by a conventional agreement, but recognition in acquiescence must be mutual, and both parties must have knowledge of the existence of the line as a boundary line.

\* \* \*

The Williams, who claiming title by acquiescence, have failed to prove all of the four elements necessary to raise the presumption that a binding agreement exists settling an uncertain boundary. Therefore, title to the disputed tract must be quieted in the Fuocos.

Fuoco v. Williams, 18 Utah 2d 282 421 P. 2d 944, (1966).

See also Goodman v. Wilkinson, 629 P. 2d 447 (Utah 1981); Hales v. Frakes, 600 P. 2d 566 (Utah 1979).

In Hales v. Frakes, supra, the court held that "the district court could properly determine in that case that the plaintiff's occupation to the fence without interference was not sufficient to establish defendant's acquiescence in the fence as a boundary." 600 P. 2d 559.

In the present case, there was no evidence that plaintiffs ever acquiesced in the M-N fence as a boundary line. The M-N fenceline represented the North boundary to a parcel of real estate plaintiffs purchased in 1958. (Record 173). Mack Halladay testified that in 1976 Provo City asked permission from him to put a heavier power line across Parcel P-M-N-O, and that Mr. Halladay helped in trimming the trees. He also testified that defendant Perry Bigelow used part of the P-M-N-O property for a garden with the permission of plaintiff Mack Halladay. Plaintiff Halladay permitted defendant Bigelow to use his irrigation water in the garden. In 1978, plaintiff Halladay prevented defendant Bigelow from building a potato cellar on the P-M-N-O parcel. He told defendant Bigelow that he (plaintiff Halladay) owned the ground at that time and that defendant Bigelow would have to move back onto his own property. (Record at 175-178).

Defendant Bigelow testified that plaintiff Halladay had told him around 1957 that he (plaintiff Halladay) had purchased the P-M-N-O property (the property was not actually purchased until 1958, however). He also testified that when he (defendant Bigelow) ever started to do something on the property that plaintiff Halladay would tell him that he should not do it and that he (plaintiff Halladay) owned it. Defendant Bigelow testified that plaintiff Halladay had so informed him off and on over the past ten years. (Record at 277-278). Defendant



Madge Cluff Kelson testified that between 1948 and 1978 she never had any discussion or dispute with plaintiff Halladay concerning the P-M-N-O property. (Record at 223).

There is no testimony that any question about a boundary line arose prior to 1978. Mr. Halladay has always claimed the P-M-N-O property even though he allowed defendants to use it.

Whether or not plaintiff acquiesced in the M-N fence as a boundary between plaintiffs' and defendants' property is a question of law which can be reviewed on appeal by this court. In Molden & Sons Inc., v. Osaka Landscaping and Nursery, Inc., 584 P. 2d 968 (Wash. App. 1978), the court discussed the distinction between questions of law and questions of fact as follows:

The trial court stated as a finding of fact, that the plaintiff had cured the breach. The fact that a court designates its determination as a "finding" does not make it so if it is in reality a conclusion of law. Under Washington practice a conclusion of law mislabeled as a finding, will be treated as a conclusion.

In Leschi v. Highway Comm'n., 84 Wash. 2d 271, at 283, 525 P. 2d 774, 783 (1974), a finding of fact was defined as an

assertion that a phenomenon has happened or will be happening independent of or anterior to any assertion as to its legal effect.

In applying that definition to the facts at hand, it is clear that whether the plaintiff had provided new cinders would be a finding of fact. However, whether the replacement of cinders constituted a "cure" is a determination of the legal effect of that action and is thus a conclusion of law. Therefore, the pertinent standard of review is whether the conclusion of law, that a cure resulted, is supported by the evidence. (Omitting citations).

Similarly in Cities Service Gas Company v. State Corporation Commission, 201 Kan. 223, 440 P. 2d 660 (1968) the court stated:

An ultimate finding is a conclusion of law or at least a determination of law and fact. It is to be distinguished from the basic findings of primary evidentiary or circumstantial facts. It is subject to judicial review and, on such review, the court may substitute its judgment for that of the commission. (Helvering v. Tex-Penn. Co., 300 U.S. 481, 491, 57 S. Ct. 569, 81 L. Ed. 755.)

440 P. 2d 661.

In the present case, acquiescence is the legal effect of plaintiffs' acts with regard to the P-M-N-O property. The only fact that indicates a possible acquiescence on the part of plaintiffs is that defendants occupied up to the M-N fence line on various occasions. However, there is substantial evidence to rebut any indication of an acquiescence by plaintiffs. As the court held in Hales v. Frakes, supra, the mere occupation of property to a fence line without interference does not necessarily result in acquiescence by the record title holder. Neither does the failure to claim to the true boundary line result in acquiescence. Hales v. Frakes, supra; Glen v. Whitney, 116 Utah 267, 209 P. 2d 257 (1949); Ringwood v. Bradford, 2 Utah 2d 119, 269 P. 2d 1053 (1954).

As previously mentioned, plaintiffs have on many occasions claimed ownership of the P-M-N-O parcel during the period of plaintiffs' alleged acquiescence in the M-N fence as a boundary line. The evidence not being sufficient to establish acquiescence on the part of plaintiffs, no presumption of boundary by acquiescence arises in this

Assuming, arguendo, that there were some evidence indicating an acquiescence on the part of the plaintiffs, the record indicates that any such period of acquiescence would be less than twenty years. Only in the "rarest of cases" may a boundary be established by acquiescence of less than twenty years. Hobson v. Panguitch Lake Corp., 530 P. 2d, 792 (Utah 1975); King v. Fronk, 14 Utah 2d 135, 378 P. 2d 893 (1963).

As to defendant Cluff, any period of acquiescence would not have begun until 1961, the year in which plaintiffs acquired Parcel 6. Prior to 1961, plaintiffs did not own any property north of the M-N fence which would facilitate plaintiffs acquiescing in the M-N fence as a boundary between plaintiffs and defendant Cluff's property. It is inconceivable that plaintiffs would acquiesce in the M-N fence as a boundary between plaintiffs' and defendant Cluff's property prior to 1961 since it would mean that plaintiffs would be giving away all of their land north of defendant Cluff's property. Therefore, any possible acquiescence on the part of plaintiffs with regard to the Cluff property would have been from 1961 to 1978, a period of only seventeen years.

As to defendants Bigelow, defendant Perry Bigelow testified that plaintiff Mack Halladay has told him off and on over the last ten years, that he (plaintiff Halladay) owned Parcel P-M-N-O. According to defendant Bigelow's testimony, plaintiff has claimed ownership of Parcel P-M-N-O since 1958 and more particularly since 1970. Therefore, any possible



acquiescence by plaintiffs could only have occurred from 1958 to 1970, a period of only twelve years.

The fourth element necessary to create a presumption of boundary by acquiescence is that there be mutual acquiescence by adjoining landowners. Prior to 1958, there could be no acquiescence because the landowners north of the M-N fence did not own the P-M-N-O property. As to defendant Cluff, the property north of the M-N fence was not owned by the owner of the P-M-N-O property until 1961. Therefore, as to defendants Bigelow there could be no acquiescence by adjoining landowners until 1958, and as to defendant Cluff there could be no acquiescence by adjoining landowners until 1961.

Defendant having failed to establish three of the four elements necessary to create a presumption of boundary by acquiescence, the doctrine of boundary by acquiescence has no application to the facts of this case and title to the P-M-N-O property should be quieted in plaintiffs.

### POINT III

ANY PRESUMPTION OF BOUNDARY BY ACQUIESCENCE WAS REBUTTED BY PLAINTIFFS' AND DEFENDANTS' EVIDENCE THAT THERE WAS NO AGREEMENT OR DISPUTE AS TO THE BOUNDARY BETWEEN THEIR RESPECTIVE PROPERTIES.

Should the court determine that the evidence is sufficient to create a presumption of boundary line by acquiescence in the M-N fence, this presumption is rebutted by evidence that there was no agreement between plaintiffs and defendants as to the boundary between their properties. In Wright v. Clissold, 521 P. 2d 1224 (Utah 1974) the court stated:

Once these elements are established the court is required to presume the existence of a binding agreement unless the party who assails it proves by competent evidence that there actually was no agreement between the adjoining landowners or there could not have been a proper agreement. Facts which prove the latter include the following: (1) no parties available, e. g., sole ownership of the property with the existing line which was later transferred in tracts to two or more other persons; (2) the line was set for a purpose other than setting a boundary; (3) the absence of a dispute or uncertainty in fixing the boundary, and (4) possible mistake or inadvertance in locating the boundary on facts that would warrant relief in equity.

521 P.2d 1226.

In the present case there was never a dispute among the parties as to the boundary between their respective properties until 1978. This action was initiated in 1979 after defendants Bigelow had begun erecting a building which partially extended onto the P-M-N-O property. Defendant Perry Bigelow testified that plaintiff Mack Halladay has informed him over the years that plaintiff Halladay owns the property and that defendant Bigelow should not use it. Plaintiff Halladay has given permission to Mr. Bigelow to use both the land and his irrigation water on other occasions, however. With respect to defendants Cluff, the evidence merely indicates that there has been no discussion regarding the boundary between plaintiffs' and defendant Cluff's property.

In the absence of any dispute or uncertainty, and in light of plaintiffs' comments to defendants Bigelow, the evidence shows that there was no agreement among the parties as to the M-N fence being a boundary line between their

respective properties. Therefore any presumption that the M-N fence is a boundary line between plaintiffs' and defendants' property was rebutted by the evidence presented both by plaintiffs and by defendants.

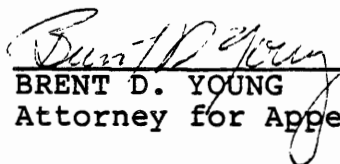
#### CONCLUSION

The doctrine of boundary line by acquiescence is not applicable to the facts of this case because the property in dispute, parcel P-M-N-O, is part of a separate, identified tract of land created by deeds of conveyance in 1927 which was owned by third parties until 1958. The property in dispute is Green Acre located between Black Acre to the South and White Acre to the North. It is not part of a larger parcel of land severed by a fence erected because of an uncertainty as to the boundary between plaintiffs' (White Acre) and defendants' (Black Acre) property. The fenceline is the boundary between Green Acre and White Acre.

The evidence is insufficient to create a presumption of boundary by acquiescence because the facts do not indicate acquiescence in the M-N fence as a boundary line for a long period of years by adjoining land owners. In any event, any presumption of boundary by acquiescence has been rebutted by evidence that there was no agreement that the M-N fence would serve as a boundary between plaintiffs' and defendants' property and there was no uncertainty as to the boundary between the parties' respective properties. Therefore, plaintiffs respectfully request the court to reverse the

holding of the lower court with respect to the P-M-N-O property  
and quiet title to that property in the plaintiffs.

Dated this 4 day of January, 1982.

  
BRENT D. YOUNG  
Attorney for Appellants

MAILING CERTIFICATE

Mailed two copies of the foregoing Appellants' Brief, postage prepaid, to S. Rex Lewis, Esq., Attorney for Defendants Bigelow, and to M. Dayle Jeffs, Esq., Attorney for Defendant Cluff, addressed as follows:

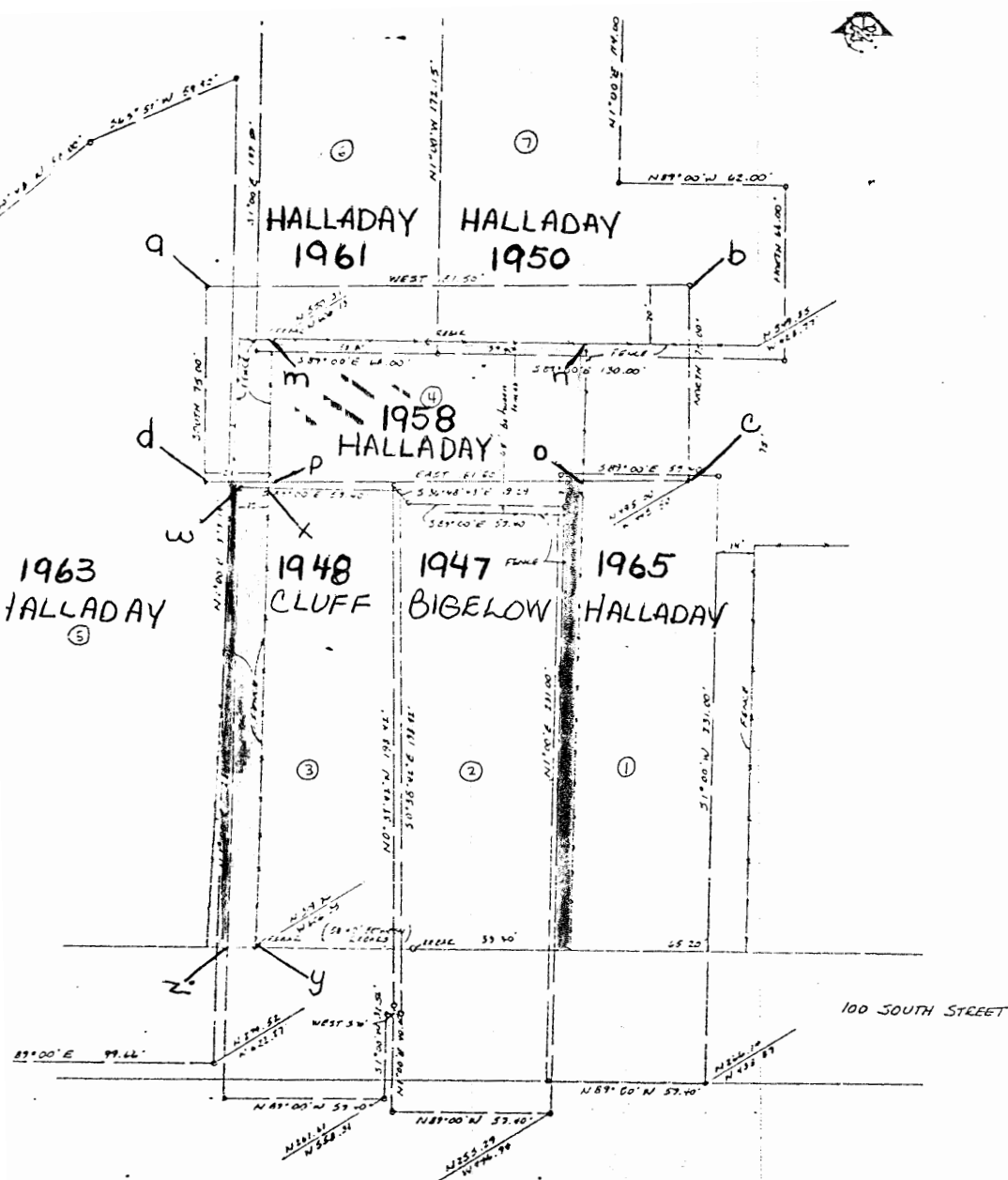
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January 4, 1982.

  
BRENT D. YOUNG

## A P P E N D I X



1. Mack A. Halladay - Commencing 3.63 chains West and 3.95 chains North and 3.90 chains North 89° West from the Southeast Corner of Section 2, Township 7 South, Range 2 East, Salt Lake Base and Meridian; thence North 89° West 0.90 chains; thence North 1° East 3.50 chains; thence South 89° East 0.90 chains; thence South 1° West 3.50 chains to the point of beginning.
2. Perry K. Bigelow - Commencing 3.63 chains West and 3.80 chains North and 3.90 chains North 89° West from the Southeast Corner of Section 2, Township 7 South, Range 2 East, Salt Lake Base and Meridian; thence North 89° West 39.4 feet; thence North 1° East 40 feet; thence North 0° 35' 42" West 151.42 feet; thence South 36° 45' 43" East 9.24 feet; thence South 89° East 59.4 feet; thence South 1° West 131.00 feet to the point of beginning.
3. Madge Cluff - Commencing 241.36 feet West and 256.08 feet North and 316.80 feet North 89° West from the Southeast Corner of Section 2, Township 7 South, Range 2 East, Salt Lake Base and Meridian; thence North 89° West 59.4 feet; thence North 1° East 231.00 feet; thence South 89° East 59.40 feet; thence South 0° 35' 42" East 198.42 feet; thence West 5.70 feet; thence South 1° West 32.56 feet to the point of beginning.
4. Merle Halladay - Commencing 6.75 chains West and 7.50 chains North of the Southeast Corner of Section 2, Township 7 South, Range 2 East, Salt Lake Base and Meridian; thence North 75.00 feet; thence West 2.75 chains; thence South 75.00 feet; thence East 2.75 chains to the point of beginning.
5. Mack Halladay - Commencing 9.51 chains West and 4.16 chains North 1°00' East of the Southeast Corner of Section 2, Township 7 South, Range 2 East, Salt Lake Base and Meridian; thence North 1°00' East 373.14 feet; thence South 65°31' West 59.90 feet; thence South 50°45' West 50.00 feet; thence South 1°00' West 309.64 feet; thence South 89°00' East 1.51 chains to the point of beginning.
6. Mack Halladay - Commencing 3.63 chains West and 10.45 chains North 1°00' East and 3.54 chains North 89°00' West and North 1°00' East 3 rods and North 89°00' West 80.50 feet and 25.55 feet South 1°00' West of the Southeast Corner of Section 2, Township 7 South, Range 2 East, Salt Lake Base and Meridian; thence South 65°31' West 74.50 feet; thence South 1°00' East 139.50 feet; thence South 89°00' East 68.00 feet; thence North 1°00' West 172.15 feet to the point of beginning.
7. Mack Halladay - Commencing 3.63 chains West and 10.45 chains North 1°00' East and 3.54 chains North 89°00' West and North 1°00' East 3 rods and North 89°00' West 80.50 feet and 25.55 feet South 1°00' West of the Southeast Corner of Section 2, Township 7 South, Range 2 East, Salt Lake Base and Meridian; thence South 1°00' East 172.15 feet; thence South 89°00' East 139.00 feet; thence North - rods; thence North 89°00' West 62.00 feet; thence North 1°00' East 114.00 feet; thence South 83°23' West 65.50 feet to the point of beginning.

FENCE LOCATION			
BRENT YOUNG			
MACK HALLADAY PROPERTY		PROVO	
1050 WEST 50 SOUTH			
CLYDE R. NAYLOR			
REGISTERED CIVIL ENGINEERS AND LAND SURVEYORS			
OREN		UTAH	
6-18-80	1"=30'	LOC	9905