

2008

Glen C. Weiser v. Union Pacific Railroad Company : Brief of Appellee

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Steve W. Call; Ray, Quinney & Nebeker; Elizabeth M. Peck; Attorneys for Plaintiff/Appellant.
J. Clare Williams; Jeffery J. Devashrayee; Reha Deal; Attorneys for Defendant/Appellee.

Recommended Citation

Brief of Appellee, *Weiser v. Union Pacific Railroad Company*, No. 20080124.00 (Utah Supreme Court, 2008).
https://digitalcommons.law.byu.edu/byu_sc2/2771

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH SUPREME COURT

GLEN C. WEISER,

Plaintiff/Appellant,

Appellate Case No. 20080124-SC
(District Court No. 910749302PR)

vs.

Nature of Proceeding: Appeal

UNION PACIFIC RAILROAD
COMPANY,

Defendant/Appellee.

BRIEF OF APPELLEE

On Appeal from a Final Order of the Second Judicial District,
in and for Davis County, State of Utah,
The Honorable Rodney S. Page

Steven W. Call
Ray, Quinney & Nebeker
36 S. State Street, Suite 1400
Salt Lake City, UT 84101
Telephone: (801) 532-1500

Elizabeth M. Peck
Law Office of Elizabeth M. Peck
422 North 300 West
Salt Lake City, UT 84103
Telephone: (801) 521-0844

*Attorneys for Plaintiff/Appellant
Glen C. Weiser*

J. Clare Williams, 3490
Jeffery J. Devashrayee, 6209
Reha Deal, 8487
Union Pacific Railroad Company
280 South 400 West, Suite 250
Salt Lake City, Utah 84101
Telephone: (801) 212-3985
Facsimile: (801) 212-3978

*Attorneys for Defendant/Appellee
Union Pacific Railroad Company*

ORAL ARGUMENT REQUESTED

FILED
UTAH APPELLATE COURT

FEB 11 2009

IN THE UTAH SUPREME COURT

GLEN C. WEISER,

Plaintiff/Appellant,

vs.

UNION PACIFIC RAILROAD
COMPANY,

Defendant/Appellee.

Appellate Case No. 20080124-SC
(District Court No. 910749302PR)

Nature of Proceeding: Appeal

BRIEF OF APPELLEE

On Appeal from a Final Order of the Second Judicial District,
in and for Davis County, State of Utah,
The Honorable Rodney S. Page

Steven W. Call
Ray, Quinney & Nebeker
36 S. State Street, Suite 1400
Salt Lake City, UT 84101
Telephone: (801) 532-1500

Elizabeth M. Peck
Law Office of Elizabeth M. Peck
422 North 300 West
Salt Lake City, UT 84103
Telephone: (801) 521-0844

*Attorneys for Plaintiff/Appellant
Glen C. Weiser*

J. Clare Williams, 3490
Jeffery J. Devashrayee, 6209
Reha Deal, 8487
Union Pacific Railroad Company
280 South 400 West, Suite 250
Salt Lake City, Utah 84101
Telephone: (801) 212-3985
Facsimile: (801) 212-3978

*Attorneys for Defendant/Appellee
Union Pacific Railroad Company*

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT.....	1
DETERMINATIVE STATUTE	1
STATEMENT OF THE CASE	2
NATURE OF THE CASE	2
COURSE OF PROCEEDINGS AND DISPOSITION BELOW.....	2
STATEMENT OF FACTS.....	4
SUMMARY OF THE ARGUMENTS.....	7
ARGUMENT	11
I. THIS COURT SHOULD DECLINE TO CONSIDER THE EFFECT OF THE FILING OF A DECLARATORY STATEMENT UNDER THE PRE-EMPTION ACT BECAUSE WEISER FAILED TO PRESERVE IT	11
II. THE TRIAL COURT PROPERLY CONCLUDED THAT UNION PACIFIC’S INTEREST IN THE PROPERTY IS SUPERIOR TO WEISER’S.....	14
A. <i>Lands to which pre-emption claims had attached were not excluded from Utah Central’s right-of-way grant</i>	14
B. <i>Utah Central had superior title because Weiser had not paid the full purchase price for his pre-emption claim when the right-of-way Act was passed</i>	18
III. THE SECRETARY OF THE INTERIOR DETERMINED THAT UTAH CENTRAL FULFILLED THE REQUIREMENTS OF THE ACT AND UTAH CENTRAL ACQUIRED TITLE ON DECEMBER 15, 1870.....	21
A. <i>Utah Central complied with the requirements of the right-of-way Act</i>	21
B. <i>Rejection of the timely-filed map did not result in a forfeiture</i>	22
IV. THE UNITED STATES SUPREME COURT AND THE UTAH SUPREME COURT HAVE AFFIRMED THE VALIDITY OF THE 1870 RIGHT-OF-WAY GRANT TO UTAH CENTRAL	26
V. STATE LAW CLAIMS ARE IRRELEVANT	29

VI. WEISER DOES NOT HAVE STANDING TO CHALLENGE THE SALE TO UTA, WHICH WAS PROPER IN ANY EVENT.....	30
CONCLUSION	32

TABLE OF AUTHORITIES

CASES

<i>Boise Cascade Corp. v. Union Pac. R. Co.</i> , 630 F.2d 720 (10th Cir. 1980)	24, 29, 30
<i>Buxton v. Traver</i> , 130 U.S. 232 (1889).....	18
<i>Bybee v. Oregon & Central R. Co.</i> , 139 U.S. 663 (1891).....	22, 23, 24, 26
<i>Central Pac. R. Co. v. Dyer</i> , 5 F. Cas. 364 (D. Nev. 1871).....	23
<i>Dipoma v. McPhie</i> , 2001 UT 61, 29 P.3d 1225	19
<i>Elder v. Nephi City</i> , 2007 UT 46, 164 P.3d 1238	7, 8
<i>Emblem v. Lincoln Land Co.</i> , 184 U.S. 660 (1902)	19
<i>French v. Fyan</i> , 93 U.S. 169 (1876)	24, 25
<i>Great N. Ry. Co. v. Steinke</i> , 261 U.S. 119 (1923).....	30
<i>Great N. Ry. Co. v. United States</i> , 315 U.S. 262 (1942).....	7
<i>Ingram v. Salt Lake City</i> , 733 P.2d 126 (Utah 1987).....	13
<i>Kindred v. Union Pac. R. Co.</i> , 168 F. 648 (8th Cir. 1909)	29
<i>King v. McAndrews</i> , 111 F. 860 (8th Cir. 1901).....	24
<i>Leo Sheep Co. v. United States</i> , 440 U.S. 668 (1979)	7, 9, 24
<i>Missouri, Kans. & Tex. Ry. Co. v. Kansas Pac. Ry. Co.</i> , 97 U.S. 491 (1878).....	8, 24, 29
<i>Moon v. Salt Lake County</i> , 76 P. 222 (Utah 1904)	8, 28
<i>New Mexico v. United States Trust Co.</i> , 172 U.S. 171 (1898).....	8
<i>Nielsen v. Northern Pac. R. Co.</i> , 184 F. 601 (9th Cir. 1911).....	15
<i>Noble v. Union River Logging R. Co.</i> , 147 U.S. 165 (1893)	25, 26
<i>Northern Pac. Co. v. Smith</i> , 171 U.S. 260 (1898)	18, 23
<i>Northern Pac. Ry. Co. v. Townsend</i> , 190 U.S. 267 (1903).....	7, 29, 30, 31

<i>Pender v. Board of Education</i> , 296 P.2d 975 (Utah 1956)	18, 19
<i>Railroad Co. v. Baldwin</i> , 103 U.S. 426 (1880).....	16, 20
<i>Reno v. Southern Pac. Co.</i> , 268 F. 751 (9th Cir. 1920)	17, 18
<i>Rio Grande W. Ry. Co. v. Stringham</i> , 110 P. 868 (Utah 1910).....	25
<i>Salt Lake Inv. Co. v. Oregon Short Line R. Co.</i> , 148 P. 439 (Utah 1914)	27
<i>Searle v. Searle</i> , 2001 UT App 367, 38 P.3d 307	13
<i>State v. Harrison</i> , 805 P.2d 769 (Utah Ct. App. 1991).....	20
<i>Stuart v. Union Pac. R. Co.</i> , 227 U.S. 342 (1913).....	15, 17, 20
<i>Sweet v. Sweet</i> , 2006 UT App 216, 138 P.3d 63	13
<i>Tarpey v. Madsen</i> , 178 U.S. 215 (1900).....	16
<i>Tarpey v. Madsen</i> , 53 P. 996 (Utah 1898)	15
<i>U.P.C., Inc. v R.O.A. General, Inc.</i> , 990 P.2d 945 (Utah Ct. App. 1999)	20
<i>Union Pac. Land Resources Corp. v. Moench Inv. Co., Ltd.</i> , 696 F.2d 88 (10th Cir. 1982).....	25
<i>Union Pac. R. Co. v. Harris</i> , 215 U.S. 386 (1910).....	18
<i>United States v. Northern Pac. R. Co.</i> , 177 U.S. 435 (1900).....	3, 23
<i>Van Wyck v. Knevals</i> , 106 U.S. 360 (1882)	8, 24
<i>Whitney v. Taylor</i> , 158 U.S. 85 (1895)	16

STATUTES

12 Stat. 489	16
12 Stat. 492	15, 17
16 Stat. 395	4, 8, 14, 21, 22
23 U.S.C. § 316.....	31
Utah Code Ann. § 78A-3-102(j)	1

IN THE UTAH SUPREME COURT

GLEN C. WEISER,

Plaintiff/Appellant,

Appellate Case No. 20080124-SC
(District Court No. 910749302PR)

vs.

Nature of Proceeding: Appeal

UNION PACIFIC RAILROAD
COMPANY,

Defendant/Appellee.

BRIEF OF APPELLEE

Defendant/Appellee, Union Pacific Railroad Company (“Union Pacific”),
respectfully submits this brief in answer to the opening brief of Plaintiff/Appellant, Glen
C. Weiser (“Weiser”).

JURISDICTIONAL STATEMENT

Jurisdiction is proper in this Court under Utah Code Ann. § 78A-3-102(j), which
gives the Court of Appeals jurisdiction over appeals transferred from the Supreme Court.

DETERMINATIVE STATUTE

16 Stat. 395, December 15, 18705, 8, 12, 19

STATEMENT OF THE CASE

NATURE OF THE CASE

In this case, the parties dispute ownership of a tract of land in Davis County, Utah. A portion of the property falls within the limits of a December 15, 1870, Act of Congress right-of-way grant to Utah Central Railroad Company (“Utah Central”), Union Pacific’s predecessor-in-interest. R. 2944 at 2-3. Weiser’s predecessor-in-interest, George Tomlinson, received a patent to the property on September 25, 1873. R. 4-5. Weiser alleges that he is the sole owner of the property. He brought this action for declaratory relief, ejectment, and damages. R. 4-12.

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Weiser filed a Verified Complaint on January 31, 1991, in which he raised claims for forcible detainer, trespass, unjust enrichment, restitution of premises, declaratory relief, and special damages. R. 1-15. On October 5, 1992, Weiser moved for partial summary judgment, seeking a ruling that he held title to the property and that Union Pacific had no interest. R.136-140, 197-218. In its opposition to Weiser’s motion, Union Pacific argued that it held a fee interest in the property by virtue of the 1870 Act of Congress right-of-way grant to Utah Central that defeated Weiser’s interest in the property. R. 297-98, 299-312. The trial court heard argument and ruled in favor of

Weiser, finding that Utah Central did not receive the benefit of the right-of-way grant because it did not file a profile map with the Secretary of the Interior by the deadline set in the Act. R. 639-48, 823-34.

The trial court certified the partial summary judgment as final pursuant to Rule 54(b) of the Utah Rules of Civil Procedure and Union Pacific appealed. R. 836-37, 840. After oral argument, the Utah Supreme Court dismissed the appeal for lack of jurisdiction, holding that the order appealed from was not properly certifiable, and proceedings in the trial court resumed. R. 911-12.

On October 20, 2000, Union Pacific sought reconsideration of the trial court's ruling that Union Pacific held no interest in the property because Utah Central did not timely submit a profile map. R. 1315-27. Weiser opposed the motion. R. 1450-70. The trial court heard argument and granted Union Pacific's motion on October 1, 2001. R. 1498-1514.

Relying on *United States v. Northern Pacific Railroad Co.*, 177 U.S. 435 (1900), the trial court ruled that the "lapse of a Land Grant statute before the filing of a profile map only authorizes the federal government to seek forfeiture of the railroad Land Grant." R. 1511. The federal government never sought forfeiture of the grant to Utah Central. Therefore, the trial court ruled, "the federal government, regardless of Utah Central Railroad's late filing, accepted the profile map as a timely acceptance of the Land Grant." R. 1511. Ultimately, the trial court ruled that, "[b]ecause the disputed Property is

included within the Land Grant's right of way, the Court concludes that Plaintiff has no valid claim to the Property." R. 1512.

After the trial court's ruling, the parties resolved the remaining issues in the case, which related to the portion of the property that fell outside the railroad right-of-way. The trial court entered final judgment on December 21, 2007, R. 2903-2913, and this appeal followed. R. 2914.

STATEMENT OF FACTS

On May 17, 1869, Utah Central began construction of a railroad line from Ogden to Salt Lake City in the Utah Territory. R. 322. Utah Central completed construction of the railroad line on January 10, 1870. R. 322.

Almost a year after construction was complete, on December 15, 1870, Congress passed an Act "granting to the Utah Central Railroad Company a right of way through the public lands for the construction of a railroad and telegraph." 16 Stat. 395 (attached as Add. A). The Act granted the Utah Central a 400-foot wide right-of-way for its already constructed railroad line:

Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station-buildings, work-shops, depots, machine-shops, switches, side-tracks, turn-tables, and water-stations[.]

Id.

Utah Central was required to file a map showing the location of its railroad line:

[W]ithin three months from the passage of this Act the said Utah Central Railroad Company shall file with the Secretary of the Interior a map to be approved by him, exhibiting the line of the railroad of said company, as the same has been located and constructed[.]

Id.

The Act further required Utah Central to confirm its acceptance of the terms and conditions of the Act:

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

Id. § 4.

Accordingly, Utah Central transmitted its acceptance of the terms of the Act to President Ulysses S. Grant on March 2, 1871. R. 322, 328. President Grant, in turn, transmitted Utah Central's acceptance to the Secretary of the Interior, Columbus Delano, on March 4, 1871, R. 341, who received it on March 9, 1871. R. 322, 327.

On March 6, 1871, four days after sending its acceptance of the terms of the Act to President Grant, Utah Central transmitted to Secretary Delano a profile map showing the already-constructed railroad line. R. 322, 325-26. Secretary Delano received the map on March 7, 1871. R. 322, 325. Although the Act did not require the profile map to be

certified, the Secretary returned the map to Utah Central on March 8, 1871, advising Utah Central that the “map was not certified and could not be accepted.” R. 325.

Twenty-one days later, on March 29, 1871, the Department of the Interior (the “Department”) received a certified profile map from Utah Central. R. 339. The next day, the Department notified Utah Central that it had accepted the certified profile map. R. 339. On June 26, 1871, the Department sent Utah Central a Certificate of Filing of Acceptance of Map. R. 325.

More than two years later, on September 25, 1873, George Tomlinson, Weiser’s predecessor-in-interest, received a patent from the United States purporting to patent a section of Utah Central’s right-of-way. R. 3-4. The property is located in present-day Davis County, near the Salt Lake/Davis County line. R. 314-17.

In 2001, the Utah Legislature passed a bill appropriating funds to the Utah Department of Transportation (“UDOT”) to be used by the Utah Transit Authority (“UTA”) to purchase a commuter rail corridor from Union Pacific. R. 2207-08, 2256-57. The sale contemplated by the Legislature closed on September 20, 2002, and the disputed property was conveyed to UTA as part of the sale. R. 2257.

The railroad line built by Utah Central has been in continuous operation since construction was completed in 1870. It formed a part of the nation’s trans-continental railroad system, and is now in use as a commuter rail corridor. On January 23, 1991, Weiser sued Union Pacific seeking to quiet title to the disputed property. R. 1-15.

SUMMARY OF THE ARGUMENTS

This appeal raises the question whether an 1870 Act of Congress right-of-way grant gave Union Pacific's predecessor, Utah Central, title to the disputed property superior to George Tomlinson's patent. This question arises out of events that occurred in the Utah Territory in 1868 to 1871 and that play a small, local part in "a fascinating chapter in our history." *Leo Sheep Co. v. United States*, 440 U.S. 668, 669 (1979).

Like many right-of-way grants to railroads passed by Congress before 1871, the Act of December 15, 1870, gave Utah Central the land on which the railroad was located. *See Great N. Ry. Co. v. United States*, 315 U.S. 262, 274 (1942). Although, beginning in 1871, Congress was much more likely to grant an easement to a railroad for its right-of-way, earlier grants, including the grant to Utah Central, were "of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted."¹ *Northern Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 271 (1903).

¹ Weiser points out that the 1870 Act says "*the* right of way" and not "*a* right of way," and argues that the difference largely determines the nature of Utah Central's interest. Op. Br. at 37. He relies on the *Great Northern Railway* case to support his argument that the 1870 right-of-way grant gave Utah Central an easement only. That case traces the historical evolution of railroad land grants and supports Union Pacific's argument. *E.g.*, 315 U.S. at 273 ("*After 1871*, outright grants of public lands to private railroad companies seem to have been discontinued." (emphasis added)).

This Court has noted that "a railroad right-of-way is a creature that occupies a unique place among property interests somewhere between traditional easements and fee interests" *Elder v. Nephi City*, 2007 UT ¶ 8 n.3, 164 P.3d 1238. Thus, even if the 1870 Act is construed as granting an easement only, an easement acquired by a railroad

Utah Central received all of the property up to 200 feet on either side of the track, measured from the center line, along the route from Ogden to Salt Lake City. The 1870 right-of-way grant to Utah Central is an example of “our nation’s historical practice of making generous grants of property interests to railroad companies to induce them to tame the western frontier with the steel conduit of civilization.” *Elder v. Nephi City*, 2007 UT 46, ¶ 7, 164 P.3d 1238. “The grant was not a mere gift to the Utah Central Railroad Company, but was designed to promote the interests of the inhabitants of the two cities [Ogden and Salt Lake City], of the public at large, and of the general government, as well as those of the grantee.” *Moon v. Salt Lake County*, 76 P. 222, 225 (Utah 1904).

The Act states “[t]hat the right of way through the public lands be, and the same is hereby, granted[.]” 16 Stat. 395 (attached as Add. A). These words “import a grant *in praesenti* and not one *in futuro*, of the promise of a grant.” *Missouri, Kans. & Tex. Ry.*, 97 U.S. at 496; *accord Van Wyck v. Knevals*, 106 U.S. 360, 365 (1882). In other words, the Act “passed to the company a present interest in the lands to be designated within the limits there specified.” *Missouri, Kans. & Tex. Ry. Co. v. Kansas Pac. Ry. Co.*, 97 U.S. 491, 496 (1878) (construing July 1, 1862, Congressional grant to Leavenworth, Pawnee, & W. R. Co.).

company “requires for its enjoyment a use of the land permanent in its nature and practically exclusive . . . so that ordinarily the fee is of little or no value unless the land is underlaid by a quarry or a mine.” *New Mexico v. United States Trust Co.*, 172 U.S. 171, 183 (1898) (citation omitted).

Accordingly, only claims established before December 15, 1870, “overrode the railroad grant; conflicting claims arising after that time could not be given effect.” *Leo Sheep*, 440 U.S. at 679 (construing 1862 Congressional grant to Union Pacific). The trial court granted partial summary judgment for Union Pacific, ruling that Weiser’s claim to the property could not be given effect because it arose after the date of the Act. This Court should affirm the ruling of the trial court for the following reasons:

First, Weiser failed to preserve the argument that the date of his predecessor-in-interest’s first declaratory statement under the Pre-emption Act establishes his priority date. Accordingly, this Court should decline to address the argument.

Second, the date of Weiser’s predecessor-in-interest’s first declaratory statement does not determine Weiser’s priority in any event. The 1870 Congressional grant to Utah Central was of a right-of-way only. It did not include a grant of “checkerboard” sections of land adjacent to the right-of-way. United States Supreme Court precedent distinguishes between these two types of railroad land grants and holds, consistent with the plain language of the acts, that a right-of-way grant is unqualified. Consequently, a right-of-way grant can be defeated by a pre-emption claimant only if the pre-emption claimant has paid the full purchase price prior to passage of the right-of-way grant. The filing of a declaratory statement alone is insufficient.

Third, title to the disputed property passed to Utah Central on the date the Act, December 15, 1870. The Secretary of the Interior found that Utah Central had complied with the requirements of the Act. Even if Utah Central had not complied, only the United

States could seek forfeiture. The United States did not do so, and Weiser does not have standing to contest Utah Central's compliance. Further, the validity and effectiveness of the right-of-way grant to Utah Central has been affirmed twice by the Utah Supreme Court and once by the United States Supreme Court.

Fourth, because the right-of-way grant to Utah Central was valid and effective as of the date of the Act, and because Weiser's predecessor-in-interest had not acquired a vested interest in the disputed property before the date of the Act, all of Weiser's claims based on state law were properly dismissed by the trial court. State law cannot operate to impair a Congressional right-of-way grant.

Finally, the sale of the disputed property to UTA did not effect a reversion to the United States. Union Pacific sold the property pursuant to a federal statute that permits a railroad to sell lands within its right-of-way to a state department of transportation or its nominee. The sale was proper and Weiser does not have standing to challenge it.

For these reasons, the trial court properly granted partial summary judgment in favor of Union Pacific and its judgment should be affirmed.

ARGUMENT

I. THIS COURT SHOULD DECLINE TO CONSIDER THE EFFECT OF THE FILING OF A DECLARATORY STATEMENT UNDER THE PRE-EMPTION ACT BECAUSE WEISER FAILED TO PRESERVE IT

The declaratory statement issue was not preserved below, and this Court should decline to address it. Weiser proffered evidence in the trial court that his predecessor-in-interest, Tomlinson, filed two declaratory statements, one before the December 15, 1870, right-of-way grant was passed, and one after.² R. 2945 at 25, 2468. However, Weiser never argued to the trial court, either in connection with the proffer or at any other time, that the date of the first declaratory statement should be used to determine priority. As a result, Union Pacific did not have an opportunity to address this argument in the trial court.

In his opening brief, Weiser offers three record citations to demonstrate that the declaratory statement issue was raised below. However, in each instance, the cited portion of the record is a court order rather than a document in which Weiser might have raised the issue or cited relevant case law. Op. Br. at 1 (citing R. 1515-29, Findings of Fact, Conclusions of Law, and Summary Judgment (attached as Add. B); R. 2390-91, Ruling on Motions for Summary Judgment Filed by the Parties (attached as Add. C); and

² For this reason, if this Court rules that the declaratory statement date establishes priority, the case should be remanded so that the trial court can determine which of Tomlinson's two declaratory statement dates should be used.

R. 2909, Revised Findings of Fact, Conclusions of Law and Order and Judgment (attached as Add. D)).

The only mention of the declaratory statement issue in any of the cited orders is the following quote from the Revised Findings of Fact, Conclusions of Law and Order and Judgment: “Weiser contended that Tomlinson’s interest in the property was superior to the Railroad’s because Tomlinson presented his Declaratory Statement of Pre-emption on April 17, 1869 *before* the Conditional Grant was approved by Congress and therefore the Property was not part of the ‘public lands’ at the time Congress approved the Conditional Grant.” R. 2909 (attached as Add. D) (emphasis in original).

However, in the December 8, 2005, bench trial, Weiser proffered evidence concerning Tomlinson’s efforts to comply with pre-emption requirements but did not inform the court or counsel for Union Pacific that he believed that case law supported the conclusion that the date of Tomlinson’s declaratory statement was the operative date for purposes of establishing priority. Instead, his comments were more general, and did not specifically raise the issue. Counsel for Weiser stated: “[W]e’d like an opportunity to file a motion with the Court setting forth the points and authorities that—and the legal research that we have gathered with respect to the preemption issue.” R. 3025. The trial court was not receptive to reconsidering its prior ruling on priority but stated, “I have no objection to your doing that.” R. 3026. Nevertheless, Weiser never filed a motion or any other paper setting forth points and authorities with respect to the declaratory statement issue, until his filings in this appeal.

“““‘[T]o preserve an issue for appellate review, a party must first raise the issue in the trial court,” giving that court an opportunity to rule on the issue.’” *Searle v. Searle*, 2001 UT App 367, ¶ 17, 38 P.3d 307 (citations omitted, alteration in original). ““[T]he issue must be specifically raised’” and “a party must introduce ‘supporting evidence or relevant legal authority.’” *Id.* (citations in original). This Court will address only legal arguments that were raised in the district court. *Sweet v. Sweet*, , 2006 UT App 216, ¶ 5 n.2, 138 P.3d 63; *Ingram v. Salt Lake City*, 733 P.2d 126, 127 (Utah 1987).

Weiser argues on appeal that the trial court erred when it failed to apply controlling law. Op. Br. at 4, 24-25, 31-32. Yet Weiser neglected to bring that law to the attention of the trial court. As a result, the trial court did not rule on the issue. The declaratory statement issue was not preserved for appeal and this Court should decline to address it.

Even if Weiser had preserved the declaratory statement issue for appeal, however, the argument fails because it is based on a misunderstanding of case law construing railroad land grants. In the event that this Court decides to address the issue, an analysis follows.

II. THE TRIAL COURT PROPERLY CONCLUDED THAT UNION PACIFIC'S INTEREST IN THE PROPERTY IS SUPERIOR TO WEISER'S

A. *Lands to which pre-emption claims had attached were not excluded from Utah Central's right-of-way grant*

The 1870 right-of-way grant to Utah Central did not except lands to which pre-emption or homestead rights had “attached.” The grant to Utah Central simply provided:

That the right of way through the public lands be, and the same is hereby, granted to the Utah Central Railroad Company . . . and the right, power, and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station-buildings, work-shops, depots, machine-shops, switches, side-tracks, turn-tables, and water-stations[.]

16 Stat. 395 (attached as Add. A). Like other right-of-way grants to railroads, the grant to Utah Central contained no exceptions or exclusions.

However, in addition to a right-of-way grant, such as the grant to Utah Central, Congress gave some railroads “checkerboard sections” of property adjacent to the railroad line that could be sold to help finance construction. These land grants often contained limiting language, excepting from the grant any lands to which pre-emption or homestead rights had “attached.” For example, on July 1, 1862, Congress made the following grant to the Central Pacific:

“That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy

transportation of the mails, troops, munitions of war, and public stores thereon, *every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad*, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and *to which a pre-emption or homestead claim may not have attached*, at the time the line of said road is definitely fixed.”

Tarpey v. Madsen, 53 P. 996, 997 (Utah 1898) (quoting 12 Stat. 492 (emphasis added)).

The character of the grant to Utah Central is determinative of the issue of priority in this case. The United States Supreme Court long ago held that:

the grant of the right of way differed from the grant of alternate odd-numbered sections in that, while both were expressed in the words of a grant *in praesenti*, the former was without limitation or exception, while the latter was expressly made subject to the limitation or exception that it should not include any lands which, although public at the date of the grant, were sold, reserved, or otherwise disposed of by the United States, or to which a preemption or homestead claim had attached, at the date of definite location.

Stuart v. Union Pac. R. Co., 227 U.S. 342, 353 (1913); *accord Nielsen v. Northern Pac. R. Co.*, 184 F. 601, 602 (9th Cir. 1911).

The United States Supreme Court explained the policy served by the limitations placed on grants of “checkerboard” sections:

The sections granted could be ascertained only when the routes were definitely located. This might take years, the time depending somewhat upon the length of the proposed road and the difficulties of ascertaining the most favorable route. It was not for the interest of the country that in the mean time any portions of the public lands should be withheld from settlement or use because they might, perhaps, when the route was

surveyed, fall within the limits of a grant. Congress, therefore, adopted the policy of keeping the public lands open to occupation and pre-emption, and appropriation to public uses, notwithstanding any grant it might make, until the lands granted were ascertained, and providing that if any sections settled upon or reserved were then found to fall within the limits of the grant, other land in their place should be selected. Thus, settlements on the public lands were encouraged without the aid intended for the construction of the roads being thereby impaired.

Railroad Co. v. Baldwin, 103 U.S. 426, 429 (1880).

However, grants of rights-of-way only needed no qualification because “lands would not be the less valuable for settlement by a road running through them. On the contrary, their value would be greatly enhanced thereby.” *Id.* at 430. Further, a “right of way for the whole distance of the proposed route was a very important part of the aid given” in the right-of-way grants. *Id.* If a railroad company were

compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would be often imposed to the progress of the road. For any loss of lands by settlement or reservation, other lands are given; but for the loss of the right of way by these means, no compensation is provided, nor could any be given by the substitution of another route.

Id.

In his opening brief, Weiser relies on cases construing the language of the qualified grant of “checkerboard” sections to the Central Pacific Railroad under a July 1, 1862, Act of Congress, 12 Stat. 489. Op. Br. at 28-31 (citing *Tarpey v. Madsen*, 178 U.S. 215 (1900); *Whitney v. Taylor*, 158 U.S. 85 (1895)). Those cases interpreted the term

“attached” as used in the qualified land grant to mean something less than “perfected.”³ Specifically, case law held that, where the exception applied, a pre-emption claim “attached” when a declaratory statement was filed. Contrary to Weiser’s argument, Op. Br. at 4-5, this did not perfect a pre-emption claim. It merely began the process. Nevertheless, the interests of would-be pre-emptioners who had filed declaratory statements were preserved by excluding their claims from the “checkerboard” sections granted to the Central Pacific.

By contrast, right-of-way grants, including the right-of-way grant to Utah Central, did not contain the term “attached,” nor did they provide for any exceptions or exclusions. The United States Supreme Court held that, “[h]ad a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists.” *Stuart*, 227 U.S. at 353; accord *Reno v. Southern Pac. Co.*, 268 F. 751, 756 (9th Cir. 1920).

Weiser relies upon cases that interpret the exclusion of lands to which a pre-emption claim had “attached.” These cases are not relevant to the interpretation of the unqualified right-of-way grant to the Utah Central at issue in this case. Instead, the effectiveness of Tomlinson’s pre-emption claim as against Utah Central’s right-of-way

³ This is consistent with the language of the land grant acts, which distinguished between lands that had been “sold, reserved, or otherwise disposed of by the United States,” on the one hand, and lands “to which a pre-emption or homestead claim may not have attached,” on the other. See, e.g., 12 Stat. 492 (emphasis added).

grant is governed by the many cases specifically construing unqualified right-of-way grants.

B. Utah Central had superior title because Weiser had not paid the full purchase price for his pre-emption claim when the right-of-way Act was passed

Tomlinson took subject to the railroad's right-of-way because he had not yet paid the full purchase price for his claim prior to the date of the right-of-way grant. "[U]nder the general laws of the United States, one who, having made an entry, is in actual occupation under the preemption or homestead law, cannot be dispossessed of his priority *at the instance of any individual.*" *Union Pac. R. Co. v. Harris*, 215 U.S. 386, 389 (1910) (emphasis added). However, "the power of Congress over lands which an individual is seeking to acquire under either the pre-emption or the homestead law remains until the payment of the full purchase price required by the former law or the full occupation prescribed by the latter[.]" *Id.*; *Northern Pac. Co. v. Smith*, 171 U.S. 260, 269 (1898) (only vested rights limit power of Congress over public lands and vested rights are obtained only when purchase money has been paid and receipt of proper land officer given to purchaser); *Buxton v. Traver*, 130 U.S. 232, 236 (1889) (same); *see Reno*, 268 F. at 761 ("public lands' . . . are such lands as remained with the government for ultimate disposition, lands to which the government had not already parted with the fee").

In *Pender v. Board of Education*, this Court noted the United States Supreme Court's characterization of the pre-emption statutes as "an offer by the government conditioned upon filing a declaratory statement *and performing certain other acts*."

Unless these conditions are met, there is no acceptance of the offer and no rights arise in favor of the settler.” 296 P.2d 975, 977 (Utah 1956) (emphasis added). ““When these prerequisites were complied with, the settler for the first time acquired a vested right in the premises of which he could not be subsequently deprived.”” *Id.* (quoting *Gonzales v. French*, 164 U.S. 338 (1896)). As the United States Supreme Court held in *Emblem v. Lincoln Land Co.*, “the rights of a claimant are to be measured by the acts of Congress, and if they show ‘that he acquired no vested interest in the land, then, as his rights are created by the statutes, they must be governed by their provisions, whether they be hard or lenient.’” 184 U.S. 660, 664 (1902) (quoting *Frisbie v. Whitney*, 76 U.S. 187 (1869)).

Because the grant to Utah Central was an unqualified right-of-way grant rather than a qualified grant of “checkerboard” sections, priority is determined by the date on which the pre-emption claimant paid the full purchase price of his claim and received a receipt from the land office.⁴ Only if these events occurred before the date of the right-of-way grant could Weiser’s interest be superior to Union Pacific’s. Weiser’s proffered evidence suggests that Tomlinson made cash entry and obtained a purchase receipt on

⁴ To the extent that this rule of law differs materially from the trial court’s reliance on patent date as the reference date for establishing priority, the trial court’s ruling ““is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action, and this is true even though such ground or theory is not urged or argued on appeal by appellee, *was not raised in the lower court, and was not considered or passed on by the lower court.*”” *Dipoma v. McPhie*, 2001 UT 61 ¶ 18, 29 P.3d 1225 (emphasis in original) (quoting *Limb v. Federated Milk Producers Ass’n*, 461 P.2d 290, 293 n.2 (1969)).

February 6, 1872, over one year after Congress passed the right-of-way grant to Utah Central.⁵ Accordingly, Tomlinson took subject to the right-of-way conferred by the Act. *See Stuart*, 277 U.S. at 354 (emphasis added); *Baldwin*, 103 U.S. at 430. The trial court properly so concluded and its judgment should be affirmed.⁶

⁵ Weiser argues that the trial court's refusal to admit the proffered evidence is reversible error. Op. Br. at 2, 4, 28, 31-32. However, "a trial court has broad discretion to determine whether proffered evidence is relevant, and [this Court] will find error in a relevancy ruling only if the trial court has abused its discretion. Additionally, an erroneous evidentiary ruling will lead to reversal only if, absent the error, there is a reasonable likelihood that there would have been a more favorable result for the defendant. A reasonable likelihood of a more favorable outcome exists when the appellate court's confidence in the verdict actually reached is undermined." *State v. Harrison*, 805 P.2d 769, 780-81 (Utah Ct. App. 1991). The Court's confidence in the trial court's judgment in this case should not be undermined because the proffered evidence does not change the result.

⁶ Weiser argues that it was error for the trial court to reverse its prior summary judgment in favor of Weiser in response to Union Pacific's motion for reconsideration. Op. Br. at 3, 7, 45. To the contrary, Rule 54(b) of the Utah Rules of Civil Procedure allows "a [trial] court to change its position with respect to any order or decision before a final judgment has been rendered in the case.'" *U.P.C., Inc. v R.O.A. General, Inc.*, 990 P.2d 945, 958 (Utah Ct. App. 1999) (alteration in original) (quoting *Trembly v. Mrs. Fields Cookies*, 884 P.2d 1306, 1310 n.2 (Utah Ct. App. 1994)).

III. THE SECRETARY OF THE INTERIOR DETERMINED THAT UTAH CENTRAL FULFILLED THE REQUIREMENTS OF THE ACT AND UTAH CENTRAL ACQUIRED TITLE ON DECEMBER 15, 1870

Because the Secretary of the Interior found that Utah Central had complied with the requirements of the 1870 right-of-way grant, title to the disputed property passed to Utah Central as of the date of the Act, December 15, 1870. Accordingly, the trial court correctly entered judgment for Union Pacific, and this Court should affirm.

A. *Utah Central complied with the requirements of the right-of-way Act*

The right-of-way Act required Utah Central to accept its terms and conditions and to file a map showing the location of the already-constructed railroad line. The Act required these steps to be taken within three months of passage of the Act, or by March 15, 1871. To fulfill the requirements, Utah Central accepted the terms and conditions of the Act by letter to President Ulysses S. Grant, which he received by March 4, 1871. R. 322, 328, 341. Likewise, on March 6, 1871, Utah Central transmitted to the Secretary of the Interior a profile map showing the line of the already-constructed railroad. R. 322, 325-26.

The right-of-way Act did not instruct Utah Central to file a *certified* profile map. It simply stated that “within three months from the passage of this act the said Utah Central Railroad Company shall file with the Secretary of the Interior a map to be approved by him, exhibiting the line of the railroad of said company, as the same has been located and constructed[.]” 16 Stat. 395 (attached as Add. A). Nevertheless, the Secretary of the Interior rejected the profile map because it was not certified. R. 325.

Three weeks later, the Secretary received a certified profile map from Utah Central, which he accepted on March 30, 1871. R. 339.

B. Rejection of the timely-filed map did not result in a forfeiture

Although Section 4 of the Act carried the penalty of forfeiture if Utah Central failed to accept its terms and conditions in the manner and by the deadline set, 16 Stat. 395 § 4 (“if such acceptance and service shall not be so made, this grant shall be void”), the Act included no such penalty for failure timely to file a profile map. Moreover, courts have consistently rejected claims that noncompliance with the technical requirements of railroad land and right-of-way grants resulted in automatic forfeiture. For example, in *Bybee v. Oregon & Central Railroad Co.*, the United States Supreme Court considered what consequence, if any, accompanied a railroad’s failure to complete the road within the time limit set by the applicable acts of Congress. 139 U.S. 663, 673 (1891). The act in question stated that, if the railroad failed to complete the line within the time limit provided, ““this act shall be null and void, and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, shall revert to the United States”” *Id.* at 674 (quoting 14 Stat. 239 § 8).

Even Congress’s declaration that the act would be “null and void” was not interpreted by the *Bybee* court as requiring an automatic forfeiture, or even as providing grounds on which an individual could challenge railroad title to the right-of-way. *Id.* at 676. Instead, the Court held that

“no one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee but the grantor or his heirs . . . ; and, if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. . . . And the same doctrine obtains where the grant upon condition proceeds from the government; no individual can assail the title it has conveyed on the ground that the grantee has failed to perform the conditions annexed.”

Id. at 675 (citation omitted); *accord Northern Pac. R. Co.*, 177 U.S. at 441 (“failure to complete the road within the time limited is treated as a condition subsequent, not operating *ipso facto* as a revocation of the grant, but as authorizing the government itself to take advantage of it, and forfeit the grant by judicial proceedings, or by an act of Congress, resuming title to the land” (citation omitted)); *Central Pac. R. Co. v. Dyer*, 5 F. Cas. 364, 368 (D. Nev. 1871) (requirement to designate general route and file map “in no respect affected the grant of the right of way; it only furnished the means by which the secretary could withdraw the lands within a specified distance of such designated route from pre-emption, private entry and sale”)

Accordingly, “lands granted by Congress to aid in the construction of railroads do not revert after a condition broken until a forfeiture has been asserted by the United States, either through judicial proceedings instituted under authority of law for that purpose, or through some legislative action legally equivalent to judgment of office found at common law.” *Northern Pac. Ry. Co.*, 177 U.S. at 441 (quoting *St. Louis, I. M. & S. Ry. Co. v. McGee*, 115 U.S. 469, 473 (1885)); *Smith*, 171 U.S. at 268 (“only the United States could complain of the act of the [railroad] company in changing the location of its

tracks from that previously selected”); *Bybee*, 139 U.S. at 675 (same). Thus, while Weiser argues otherwise, Op. Br. at 34, the United States Supreme Court has held that failure of a condition “ought not to be treated as a forfeiture, unless the language of the act be so clear and unambiguous as to admit of no other reasonable construction.” *Bybee*, 139 U.S. at 677.

These cases are consistent with holdings of the United States Supreme Court that Congressional grants to railroads stand on a different footing than merely private grants, and should receive more liberal interpretations in favor of the governmental purposes for which they were passed. *Leo Sheep*, 440 U.S. at 683; *Missouri, Kans., & Tex.*, 97 U.S. at 497 (“It is always to be borne in mind in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress.”). Those important governmental purposes require that the quasi-judicial decisions of the Secretary of the Interior in granting railroad rights-of-way be protected from collateral attack. *Van Wyck*, 106 U.S. at 368-69 (“A third party cannot take upon himself to enforce conditions attached to the grant when the government does not complain of their breach.” (citation omitted)); *French v. Fyan*, 93 U.S. 169, 171 (1876) (holding that “action of the land-office in issuing a patent for any of the public land, subject to sale by pre-emption or otherwise, is conclusive”); *Boise Cascade Corp. v. Union Pacific R. Co.*, 630 F.2d 720, 723 (10th Cir. 1980) (“The actions of the Secretary may not be reviewed in this collateral proceeding.”); *King v. McAndrews*, 111 F. 860, 864 (8th Cir. 1901) (holding that mistake of law or fact on issue department

had power and duty to decide is impervious to collateral attack); *Union Pac. Land Resources Corp. v. Moench Inv. Co., Ltd.*, 696 F.2d 88, 91 (10th Cir. 1982) (holding that issuance of patent after administrative determination that lands were not mineral in character was final administrative decision conclusive against collateral attack); *Rio Grande W. Ry. Co. v. Stringham*, 110 P. 868, 871 (Utah 1910) (holding that state court was not proper forum and proceeding brought by adverse claimant was not proper proceeding in which to question Secretary of Interior's determination that railroad grant applied even though railroad built road only half as long as anticipated).

This is true even when it is later alleged that the railroad acquired the benefit of an act through "fraudulent representations." *Noble v. Union River Logging R. Co.*, 147 U.S. 165, 172 (1893); *accord French*, 93 U.S. at 171-72. The Supreme Court gave a cogent rationale for this rule:

[I]t would be a departure from sound principle, and contrary to well-considered judgments in this court, and in others of high authority, to permit the validity of [a] patent . . . to be subjected to the test of the verdict of a jury on such oral testimony as might be brought before it. It would be substituting the jury, or the court sitting as a jury, for the tribunal which Congress had provided to determine the question, and would be making a patent of the United States a cheap and unstable reliance as a title for lands which it purported to convey.

French, 93 U.S. at 172.

If the lands over which the right-of-way was granted were public lands, subject to the operation of the statute, "the question whether the plaintiff was entitled to the benefit

of the grant was one which it was competent for the secretary of the interior to decide” *Noble*, 147 U.S. at 176. Therefore, Weiser’s challenge to the 1870 right-of-way grant to Utah Central is misguided. Even if the certified profile map had been required by the Act, imposing forfeiture for a three-week delay in certifying a map would have been inconsistent with the purposes for which Congress passed the 1870 Act. Moreover, it would have worked a “harsh and unjust” result, as it would have left Utah Central with a constructed railroad, but no right-of-way. *Bybee*, 139 U.S. at 677.

Utah Central filed the original profile map in conformance with the Act. The Secretary of the Interior then imposed an additional requirement not found in the Act—that the profile map be certified. Utah Central complied with this extra-statutory requirement and the Secretary accepted the second, certified map. Further, the United States, which was aware that the railroad was already constructed and in operation, never sought a forfeiture. Accordingly, title passed to Utah Central as of the date of the Act and Weiser lacks standing to challenge this disposition of public lands made by the United States almost 140 years ago.

IV. THE UNITED STATES SUPREME COURT AND THE UTAH SUPREME COURT HAVE AFFIRMED THE VALIDITY OF THE 1870 RIGHT-OF-WAY GRANT TO UTAH CENTRAL

The trial court’s partial summary judgment to Union Pacific is supported by Utah Supreme Court and United States Supreme Court cases specifically affirming the validity of the right-of-way grant to Utah Central. Significantly, the Utah Supreme Court

determined in 1914 that the Act was properly accepted by Utah Central. In *Salt Lake Investment Co. v. Oregon Short Line Railroad Co.*, the plaintiff sought compensation from the defendant railroad for the taking of private property for public use. 148 P. 439, 440 (Utah 1914). Like Weiser's trace of title to Tomlinson, the plaintiff in *Salt Lake Investment* traced its title to an 1877 grant of property within the railroad's right-of-way. *Id.* at 442. The railroad counterclaimed, claiming title to the property under *the very same Act at issue in this case.* *Id.* at 440.

The Utah Supreme Court rejected the plaintiff's challenge to the railroad's title and affirmed the validity and effect of the Act. *Id.* at 444-45. Specifically, the court ruled that Utah Central had complied with the requirements of the Act:

On December 15, 1870, . . . Congress granted to the Utah Central Railroad Company, for railroad purposes, "a right of way through the public lands * * * 200 feet in width on each side of said railroad where it may pass through the public domain," from a point at or near Ogden City to Salt Lake City, Utah Territory. The grant required acceptance *and was accepted* in February, 1871, at which time the Utah Central Railroad Company filed with the Secretary of the Interior its articles of incorporation and map showing the route of its road, etc.

Id. at 443 (second omission in original; emphasis added). Because the disputed property was located within the federally granted right-of-way, the Utah Supreme Court concluded that the plaintiff had no claim to the property. *Id.* at 444-45.

The plaintiff appealed to the United States Supreme Court. *Salt Lake Inv. Co. v. Oregon Short Line R. Co.*, 246 U.S. 446 (1918). The High Court also confirmed the

validity of the right-of-way grant, expressly recognizing that it conveyed the right-of-way to Utah Central on December 15, 1870, the date the Act was passed. *Id.* at 447.

Even before the *Salt Lake Investment* cases, the right-of-way grant to Utah Central had been judicially affirmed by the Utah Supreme Court. In *Moon v. Salt Lake County*, the court rejected an argument that the 1870 right-of-way grant ended at the legal boundary of Salt Lake City, excluding “the terminus of the railroad, which was then and is now located near the business portion and center of the city” 76 P. at 224, 224.

The court held that

The language of the act under consideration, the same as in other congressional acts of similar character and purpose, is in terms of a grant in presenti, and imports immediate transfer of interest, and segregation of the land embraced in the grant from the public domain. The grant itself, to the extent of the land included therein, operated as a reservation to any patent, based upon subsequently acquired rights, issued for any portion of the public lands across which the right of way extends, even though no reservation may appear in express terms in such patent.

Id. at 225.

Thus, the United States Supreme Court and the Utah Supreme Court both have ruled that Congress’s right-of-way grant to the Utah Central was a present grant that became effective on the date the Act was passed, December 15, 1870. The trial court so ruled and the judgment should be affirmed.

V. STATE LAW CLAIMS ARE IRRELEVANT

State law claims, statutory or common law, may not be employed to diminish a railroad's title, received by Congressional grant. The United States Supreme Court has repeatedly held as follows:

“The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the states for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee.”

Townsend, 190 U.S. at 270-71 (quoting *Packer v. Bird*, 137 U.S. 661, 669 (1891)). The intent of Congress in granting lands to railroads “should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties. . . . But the rules of the common law must yield in this, as in all other cases, to the legislative will.” *Missouri, Kans. & Tex.*, 97 U.S. at 497; *Kindred v. Union Pac. R. Co.*, 168 F. 648, 653-54 (8th Cir. 1909) (right-of-way cannot be lost by laches or acquiescence, and possession by individuals does not ripen into title, regardless of lapse of time).

In *Boise Cascade*, the Tenth Circuit Court of Appeals disposed of the plaintiff's claims of adverse possession, abandonment, estoppel, and boundary by acquiescence by stating, “[t]hese claims are all irrelevant.” 630 F.2d at 724. The court elaborated: “[I]n granting the right of way Congress conclusively determined the strip covered was

necessary for an important public work” *Id.* ““The whole of the granted right of way must be presumed to be necessary for the purposes of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes.”” *Id.* (quoting *Townsend*, 190 U.S. at 272).

The Tenth Circuit also disposed of statutory challenges to railroad land grant title. In particular, the plaintiff in that case raised claims under Utah’s bona fide purchaser statute, the Occupying Claimants Act, and the Marketable Record Title Act. *Id.* The Tenth Circuit ruled that “[i]t is enough to say that state law cannot operate to ‘impair the efficacy’ of a federal grant or vest title in someone other than the federal grantee.” *Id.*; *see also Great N. Ry. Co. v. Steinke*, 261 U.S. 119, 132-33 (1923) (“neither laches on the part of the company nor any local statute of limitations can invest individuals with any interest in the tract, or with a right to use it for private purposes, without the sanction of the United States”). For these reasons, the trial court properly dismissed all of Weiser’s state law claims, including his claims related to the 1935 quiet title action, and its ruling should be affirmed.

VI. WEISER DOES NOT HAVE STANDING TO CHALLENGE THE SALE TO UTA, WHICH WAS PROPER IN ANY EVENT

Although Utah Central’s right-of-way grant was subject to “reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted,” *Townsend*, 190 U.S. at 271, reversion to the United States was not triggered by

Union Pacific's sale of the disputed property to UTA. First, the property was sold to UTA for the development of a regional commuter rail project. Consequently, the property will continue to be used "for the purpose for which it was granted"—railroad operations. *Id.* For this reason, the reversionary interest was not triggered.

Second, federal law expressly permits the conveyance from Union Pacific to UTA:

For the purposes of this title the consent of the United States is given to any railroad or canal company to convey to the State transportation department of any state, or its nominee, any part of its right-of-way or other property in that State acquired by grant from the United States.

23 U.S.C. § 316. Union Pacific conveyed its right-of-way, which it acquired by grant from the United States, to UTA, the nominee of the State of Utah. The conveyance is expressly permitted by federal statute.

Even if the reversionary interest were triggered by Union Pacific's sale to UTA, title would not vest in Weiser, but in the United States. As demonstrated above, the patent to Weiser's predecessor-in-interest, Tomlinson, from the United States in 1873 did not convey any interest in the disputed property, not even a reversionary interest, because the United States no longer had any interest to convey. The earlier 1870 right-of-way grant to Utah Central had removed the granted right-of-way from the inventory of public lands available for patent. *Cf. Elder*, 2007 UT 46, ¶ 8, 164 P.3d 1238 (holding that disputed property was no longer public land on date of right-of-way grant because Nephi City had received patent to land in question three years earlier).

Therefore, Weiser does not hold an interest in the disputed property that would give him standing to challenge Union Pacific's sale to UTA. The trial court properly rejected Weiser's arguments on this point, and the judgment should be affirmed.

CONCLUSION


The trial court properly ruled that Weiser's claim to the property could not be given effect because it arose after the date of the Act. First, Weiser failed to preserve the declaratory judgment issue for appeal. Second, Weiser's predecessor-in-interest did not pay the full price for his preemption claim until February 6, 1872, more than one year after the right-of-way Act was passed.

Third, the trial court properly determined that the Secretary of the Interior approved Utah Central's certified profile map and that the United States, the only party with standing, never challenged Utah Central's compliance. Consequently, title to the disputed property passed to Utah Central on December 15, 1870, the date of the Act.

Fourth, the trial court properly rejected all of Weiser's state law claims because state law cannot operate to impair a Congressional right-of-way grant. Finally, the trial court properly concluded that Union Pacific's sale of the disputed property to UTA did not effect a forfeiture.

For these reasons, Union Pacific urges this Court to affirm the judgment entered below.

DATED this 11th day of February, 2009.

A handwritten signature in black ink, appearing to read 'Reha Deal', positioned above a horizontal line.

Reha Deal
Attorney for Defendant/Appellee
Union Pacific Railroad Company

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of February, 2009, a copy of the foregoing was served in the manner indicated below upon the following:

Steven W. Call
Ray, Quinney & Nebeker
36 South State, Suite 1400
Salt Lake City, Utah 84111

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight
☐ Facsimile
☐ No Service

Elizabeth M. Peck
422 North 300 West
Salt Lake City, Utah 84103-1217

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight
☐ Facsimile
☐ No Service



ADDENDUM

Addendum A: 16 Stat. 395, December 15, 1870

Addendum B: Findings of Fact, Conclusions of Law, and Summary Judgment

Addendum C: Ruling on Motions for Summary Judgment Filed by the Parties

Addendum D: Revised Findings of Fact, Conclusions of Law and Order and Judgment

ADDENDUM A

PUBLIC ACTS OF THE FORTY-FIRST CONGRESS

OF THE

UNITED STATES,

Passed at the Third Session, which was begun and held at the City of Washington, in the District of Columbia, on Monday, the fifth day of December, A. D. 1870, and was adjourned without day on Saturday the fourth day of March, A. D. 1871.

ULYSSES S. GRANT, President. SCHUYLER COLFAX, Vice-President and President of the Senate. JAMES G. BLAINE, Speaker of the House of Representatives.

CHAP. I. — *An Act to enlarge the Jurisdiction of the probate Courts in Idaho Territory.* Dec. 12, 1870.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the probate courts of the Territory of Idaho, in their respective counties, in addition to their probate jurisdiction, be, and they are hereby, authorized to hear and determine all civil causes wherein the damage or debt claimed does not exceed the sum of five hundred dollars, exclusive of interest, and such criminal cases arising under the laws of the Territory as do not require the intervention of a grand jury: *Provided,* That they shall not have jurisdiction in any matter in controversy, when the title, boundary, or right to the peaceable possession of land may be in dispute, or in chancery or divorce cases: *And provided further,* That in all cases an appeal may be taken from any order, judgment, or decree of said probate courts to the district court.

Probate courts in Idaho to have jurisdiction in certain civil and criminal cases;

but not in land, chancery, or divorce cases.

Appeals.

SEC. 2. *And be it further enacted,* That all acts and parts of acts inconsistent with this act are hereby repealed: *Provided,* That this act shall not affect any suit pending in the district courts of said Territory at the time of its passage.

Repealing clause.

Pending suits.

APPROVED, December 12, 1870.

CHAP. II. — *An Act granting to the Utah Central Railroad Company a Right of Way through the public Lands for the Construction of a Railroad and Telegraph.* Dec. 15, 1870.

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

Right of way through public lands granted to Utah Central Railroad Company for railroad and telegraph;

materials for construction; extent of grant.

- Company to file map of location with Secretary of the Interior within three months.
Rates for transportation.
- Running connections with certain other roads.
- Express conditions of making and accepting grant.
- Congress may enforce conditions.
- Railroad to be a post route and military road.
- Acceptance of grant by the railroad to be in writing and in three months.
- Act may be altered, &c.
- each side of said railroad where it may pass through the public domain, including all necessary ground for station-buildings, work-shops, depots, machine-shops, switches, side-tracks, turn-tables, and water-stations: *Provided*, That within three months from the passage of this act the said Utah Central Railroad Company shall file with the Secretary of the Interior a map to be approved by him, exhibiting the line of the railroad of said company, as the same has been located and constructed: *Provided further*, That said company shall not charge the government higher rates than they do individuals for like transportation and telegraphic service. And it shall be the duty of the Utah Central Railroad Company to permit any other railroad, which has been or shall be authorized to be built by the United States, or by the legislature of the Territory of Utah, to form running connections with its road on fair and equitable terms.
- SEC. 2. *And be it further enacted*, That the United States make the grants herein, and that the said Utah Central Railroad Company accepts the same, upon the express condition that the said company shall not exercise the power given by section ten of chapter sixteen of the laws of the Territory of Utah, approved February nineteenth, eighteen hundred and sixty-nine; and upon the further express condition that if the said company make any breach of the conditions hereof, then in such case, at any time hereafter, the United States, by its Congress, may do any and all acts and things which may be needful and necessary for the enforcement of such conditions.
- SEC. 3. *And be it further enacted*, That said Utah Central Railroad shall be a post route and a military road, subject to the use of the United States for postal, military, naval, and all other government service, and also subject to such regulations as Congress may impose, restricting the charges for such government transportation.
- SEC. 4. *And be it further enacted*, That the acceptance of the terms, conditions, and impositions of this act, by the said Utah Central Railroad Company, shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within three months after the passage of this act, and shall be served on the President of the United States; and if such acceptance and service shall not be so made, this grant shall be void.
- SEC. 5. *And be it further enacted*, That Congress may at any time, having due regard for the rights of said Utah Central Railroad Company, add to, alter, amend, or repeal this act.

APPROVED, December 15, 1870.

Dec. 15, 1870. CHAP. III.—*An Act donating Chattahoochee Arsenal to the State of Florida for educational purposes.*

- Chattahoochee Arsenal given to Florida for educational purposes.
- Secretary of War to make the transfer, and to whom.
- Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the public property, with the grounds, buildings, and appurtenances thereto belonging, situated in Gadsden county, in the State of Florida, and known as the "Chattahoochee Arsenal," and at present occupied by said State as a penitentiary, be, and the same are [is] hereby, granted and donated to the State of Florida for educational purposes.
- SEC. 2. *And be it further enacted*, That the Secretary of War is hereby authorized and directed to transfer said property to the board of internal improvement of the State of Florida, to be held by them in trust, for the use, benefit, and execution of the purpose of this grant, or for such other public purposes as said board may deem proper.
- APPROVED, December 15, 1870.

ADDENDUM B

J. CLARE WILLIAMS, # 3490
JEFFERY J. DEVASHRAYEE, #6209
Attorneys for Defendant
UNION PACIFIC RAILROAD COMPANY
280 South 400 West
Salt Lake City, UT 84101-1151
Telephone: (801) 595-3270

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

IN AND FOR DAVIS COUNTY, STATE OF UTAH

GLEN C. WEISER,

Plaintiff,

vs.

UNION PACIFIC RAILROAD
COMPANY, a corporation,

Defendant.

**FINDINGS OF FACT, CONCLUSIONS
OF LAW AND SUMMARY JUDGMENT**

Civil No. 910749302

Honorable Rodney S. Page

The matter of Defendant's Motion for Reconsideration having come before the Honorable Rodney S. Page on July 31, 2001; Stephen W. Call appearing on behalf of Plaintiff and Jeffery J. Devashrayee appearing on behalf of Defendant; the Court having reviewed Defendant's Motion for Reconsideration, Defendant's Memorandum of Points and Authorities in Support of Motion for Reconsideration and Plaintiff's Opposition to Defendant's Motion for Reconsideration, and having heard the arguments and representations of counsel; and being fully advised in the premises, hereby makes its findings of uncontroverted facts, conclusions of law and order of judgment:

FINDINGS OF UNCONTROVERTED FACTS

1. The Act of Congress of December 15, 1870 (16 Stat. 395) ("1870 Act") provides, among other things, as follows:

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

2. According to the 1870 Act, on December 15, 1870, Congress granted to Defendant's predecessor in interest, Utah Central Railroad, for railways purposes, a right of way through the public lands to the extent of 200 feet in width on each of the track, from a point at or near Ogden to Salt Lake City, Utah territory.

3. Utah Central Railroad began construction of the railroad line at Ogden on May 17, 1869, and completed construction to Salt Lake City on January 10, 1870.

4. Utah Central Railroad's acceptance of the terms of the grant was submitted to the Secretary of the Interior on March 2, 1871.

5. On March 6, 1871, a profile map was filed with the office of the Secretary of the Interior by Utah Central Railroad.

6. The map was rejected by the Secretary of the Interior and returned to Utah Central Railroad on grounds that it was not certified.

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

8. The Secretary of the Interior transmitted to Utah Central Railroad a “Certificate of Filing of Acceptance of Map” on June 26, 1871.

9. The United States Supreme Court in United States v. Northern Pac. R. Co., 177 U.S. 435 (1899), previously held that the alleged lapse of a land grant statute before the filing of a profile map or the construction of a line of railroad was a “condition subsequent” authorizing only the federal government to seek forfeiture of the railroad land grant for that purpose.

10. The federal government has never asserted that the land grant made under the 1870 Act lapsed because Utah Central Railroad did not timely file its profile map.

11. The property to which Plaintiff claims title and which is the subject of this action (the “Property”) is located in Davis County, near the Salt Lake County-Davis County line. All but an extremely small portion (approximately .045 acres) of the property lies within the boundary lines of the 400-foot land grant right of way.

12. Plaintiff claims title to the Property under a patent that his predecessor in interest received from the United States Government on September 25, 1875.

13. The government patent specifically limits the property conveyed pursuant to the patent to those public “lands subject to sale” at the time of the patent.

14. As early as 1904, only thirty-four (34) years after the grant of the property to Utah Central Railroad, the Utah Supreme Court affirmed the validity and effect of the land grant made under the 1870 Act in an action to quiet title to certain property within the Salt lake City limits. Moon v. Salt Lake County, 76 P. 220 (Utah 1904).

15. The Utah Supreme Court affirmed the validity and affect of the same land grant ten years later in Salt Lake Inv. Co. v. Oregon Short Line R. Co., 148 P.2d 439 (Utah 1914), holding that the railroad owned the property in question in accordance with the 1870 Act and that because such property was included or within the federal land grant right of way, the plaintiff had no claim to the property.

16. The plaintiff in Salt Lake Inv. appealed the Utah Supreme Court's decision to the United States Supreme Court, which affirmed both the Utah Supreme Court's decision and the validity and effect of the same land grant, holding that the property in question was not subject to preemption by the plaintiff and that the plaintiff had no right, title or interest in the property. Salt Lake Inv. Co. v. Oregon Short Line R.R. Co., 246 U.S. 446 (1918).

17. Rule 8(c) of the Utah Rules of Civil Procedure reads in part:

(c) *Affirmative defenses.* In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. . . .

18. Rule 12 of the Utah Rules of Civil Procedure provides in part:

(b) *How presented.* Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required

* * * *

(h) *Waiver of defenses.* A party waives all defenses and objections not presented either by motion or by answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits

18. Defendant has not plead the defense of statute of limitations as an affirmative defense pursuant to Rules 8(c) and 12 of the Utah Rules of Civil Procedure.

CONCLUSIONS OF LAW

Based on the foregoing undisputed uncontroverted facts, the Court makes the following conclusions of law:

1. Although Utah Central Railroad failed to file a certified map exhibiting the line of the railroad and approved by the Secretary of the Interior within three months of the passage of the 1870 Act, the alleged lapse of a land grant under the 1870 Act before the filing of a certified profile map only authorizes the federal government to seek forfeiture of the railroad land grant.

2. In holding that only the federal government can seek forfeiture of a railroad land grant if a land grant statute lapses because of late filing of a profile map, the United States Supreme Court in Northern Pac. explained:

Again, it is contended that when a statutory grant contains on the face of the law a provision that each and every grant, right and privilege are upon condition that the road shall be completed within a certain time, and that time expires without performance of the condition, all future proceedings of the company, even if acquiesced in and approved by executive officers of the Government, in disregard of the forfeiture, are unauthorized, *ultra vires* and forbidden.

In other words, if we understand the position, it is claimed that under section 8 of the act of July 2, 1864, non-completion of the railroad within the time limited of itself operates as a forfeiture; the grant immediately reverts to the Government; and the courts must so hold on the simple statement of the fact of non-compliance within the limit. We do not understand this to be a correct statement of law. In *Schulenberg v. Harriman*, 21 Wall, 44, this court was called upon to consider the legal import of such a provision in the act of Congress of June 3, 1856, granting public lands to the State of Wisconsin to aid in the construction of railroads in said State. After providing that the lands should be sold, from time to time, as the construction of the railroad progressed, until the road was completed, it was enacted that "if said road is not completed within ten years no further sales shall be made, and the lands unsold shall revert to the United States."

No part of the road having been built at the expiration of the period limited in the grant, it was claimed that the lands reverted to the United States. It was held by the Circuit Court of the United States for the District of Minnesota that such lands did not *ipso facto* revert to the United States by mere failure to build the road within the period prescribed by Congress, and that no effect a forfeiture some act on the part of the government evincing an intention to take advantage of such failure was essential; and, on error, that ruling was affirmed by this court, and the following statement of the law was made by Mr. Justice Field in giving the opinion of the court:

"In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate, depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If the grant be a public one, it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of

forfeiture, and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of condition, such as an act directing the possession and appropriating of the property, or that it be offered for sale or settlement. At common law the sovereign could not make an entry in person, and, therefore, an office found was necessary to determine the estate; but, as said by this court in a late case, (*United States v. Repentigny*, 5 Wall. 286), ‘the mode of asserting or of resuming the forfeited grant is subject to the legislative authority of the Government. It may be after judicial investigation, or by taking possession directly under the authority of the government without these preliminary proceedings.’

“In the present case no action has been taken either by legislative or judicial proceedings to enforce a forfeiture of the estate granted by the act of Congress. The title remains, therefore, in the State as completely as it existed on the day when the title by location of the route of the railroad acquired precision and became attached to the adjoining alternate sections.”

In July, 1866, Congress granted unto the California and Oregon Railroad Company a right of way over the public lands. In a subsequent suit between the railroad company and one Bybee, a holder of a mining claim, it was claimed that the railroad company had forfeited and lost its right under the grant by its failure to complete its road within the time limited in the act; that such failure operated *ipso facto* as a termination of all right to acquire any further interest in any lands not then patented. But it was held by this court, in the words of Mr. Justice Brown: “That in all cases in which the question has been passed upon by this court, the failure to complete the road within the time limited is treated as a condition subsequent, not operating *ipso facto* as a revocation of the grant, but as authorizing the government itself to take advantage of it, and forfeit the grant by judicial proceedings, or by an act of Congress, resuming title to the land.” *Schulenberg v. Harriman*, 21 Wall. 44; *Van Wyck v. Knevals*, 106 U.S. 360, are then cited, and likewise *St. Louis, & c., Railroad Co. v. McGee*, 115 U.S. 743, where it was said by Chief Justice Waite to have been often decided “that lands granted by Congress to aid in the construction of railroads do not revert after condition broken until a forfeiture has been asserted by the United

States, either through judicial proceedings instituted under authority of law for that purpose, or through some legislative action legally equivalent to judgment of office found at common law.” “Legislation to be sufficient must manifest an intention by Congress to reassert title and to resume possession. As it is to take the place of a suit by the United States to enforce a forfeiture, and judgment therein establishing the right, it should be direct, positive and free from all doubt or ambiguity.”

Northern Pac., 177 U.S. at 439-41.

3. Because the land grant of 1870 was a public grant by the federal government, the federal government alone must assert by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture, and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of condition, such as an act directing the appropriating of the property, or that it be offered for sale or settlement.

4. Because the federal government has never asserted that the land grant of 1870 lapsed because Utah Central Railroad did not timely file its profile map, the federal government, regardless of Utah Central Railroad’s late filing, accepted the profile map and recognized and made effective the land grant in Utah Central Railroad.

5. Because the federal government accepted the filing of the profile map, and because the 1870 land grant of the right of way at issue was an *in praesenti* grant to an already existing line of railroad, the right of way was granted to Utah Central Railroad effective December 15, 1870, the date of the 1870 Act. Therefore, all requirements of the 1870 Act, as conditions subsequent, are irrelevant except as to challenge by the federal government.

6. The land grant of 1870 to Utah Central Railroad remains valid today except as to a challenge by the federal government.

7. Because the Property is included within the land grant's right of way, Plaintiff has no valid claim to the Property.

8. Title to the disputed Property received by Plaintiff's predecessor, by patent from the United States Government on September 25, 1875, is of no effect because it is subsequent to the effective date of the land grant.

9. Plaintiff's claims to the Property are also barred under the doctrine of stare decisis, which is that once a point of law has been decided, that ruling should be followed by a court of the same or lower rank in subsequent cases concerning the same legal issue. Once the court of last resort makes a legal ruling, decisions on the same issue by courts of a lower rank are superseded. State v. Shoulderblade, 905 P.2d 289, 291-92 (Utah 1995).

10. The Utah Supreme Court previously recognized the validity of the land grant of 1870. The circumstances underlying the land grant and the general nature and purpose of the land grant evidence the validity and effect of the land grant:

We have a right to assume that, at the time of the passage of the act, Congress was aware that the railroad had been constructed to the station in the city over public lands within the city limits. This, indeed, appears from the context, for it is provided that within three months from the passage of the act the railroad company shall file with the Secretary of the Interior a map showing the line of railroad, "as the same has been located and constructed": thus showing that the lawmakers had in mind the railroad as it was actually located. . . . The grant was not a mere gift to the Utah Central Railway Company, but was designed to promote the interest of the inhabitants of the two

cities, of the public at large, and of the general government, as well as those of the grantee. . . . That all such legislation by Congress was designed to enhance the interests of the government, as well as to aid such enterprises, is apparent from the terms of the various grants for railroad purposes. At the times when several acts in aid of inter mountain and transcontinental railroads were passed, there were yet immense tracts of public lands unsettled and uncultivated.

Moon, 7 P. at 224-25.

11. This Court must liberally construe the 1870 Act to effectuate Congress' intent regarding the subject land grant:

In constructing acts making grants of such character, offering inducement to individuals or corporations to engage in such expensive quasi public enterprises, the courts will, without hesitation, look in to the condition of the country, the circumstances existing at the time of their passage, and the purposes to be accomplished, and will give such a construction as will carry out the designs of the lawmaking power. The inducements to those engaging in such enterprises are the right of way and the privileges relating to material for the construction of the road. In the interpretation of the language employed in granting such a right of way and such privileges, where the intention of the lawmaker is to subserve the public interest by aiding the enterprise, more liberality will be exercised than in case of a grant of a strictly private character; and this with a view to effectuate the object of Congress. "The acts making the grants," says Mr. Justice Field, "are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent, we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together." *Winona & St. Peter R.R. Co. v. Barney*, 113 U.S. 618, 5 Sup.Ct. 606, 28 L.Ed. 1109. In *United States v. Denver, etc. Railway*, 150 U.S. 1, 14 Sup.Ct. 11, 37 L.Ed. 975, Mr. Justice Jackson, delivering the opinion of the court said: "When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages or to subserve the public interest and welfare by means of

benefits, more or less valuable, offers to individuals or to corporations an inducement under take and accomplish great and expensive enterprises or works of a quasi public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted.” *United States v. Chaplin*, 31 Fed. 890; *Railroad v. Baldwin*, 103 U.S. 426, 26 L.Ed. 5787.

Id. at 225.

12. This Court recognizes the immediate transfer of interest to the Property to Utah Central Railroad under the 1870 Act consistent with the Utah Supreme Court’s determination in

Moon:

The language of the act under consideration, the same as in other congressional acts of similar character and purpose, is in terms of a grant in praesenti, and imports immediate transfer of interest, and segregation of the land embraced in the grant from the public domain. The grant itself, to the extent of the land included therein, operated as a reservation to any patent, based upon subsequently acquainted rights, issued for any portion of the public lands across which the right of way extends, even through no reservation may appear in express terms in such patent. *Northern Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 23 Sup.Ct. 671, 47 L.Ed. 1044; *Railroad Co. v. Baldwin*, 103 U.S. 426, 26 L.Ed. 578.

Id.

13. Consistent with the Utah Supreme Court’s holding in Salt Lake Inv. Co. v. Oregon Short Line R. Co., supra, this Court recognizes Defendant’s compliance with the 1870 Act’s requirements:

On December 15, 1870, . . . Congress granted to the Utah Central Railroad Company, for railroad purposes, “a right of way through the

public lands *** 200 feet in width on each side of said railroad where it may pass through the public domain,” from a point at or near Ogden City to Salt Lake City, Utah Territory. The grant required acceptance and was accepted in February, 1871, at which time the Utah Central Railroad Company filed with the Secretary of the Interior its articles of incorporation and map showing the route of its road, etc.

Salt Lake Inv. Co., 148 P.2d at 443.

14. Like the Property in this case, the property in Salt Lake Inv. was included or within the land grant’s right of way. Therefore, this Court, like the Utah Supreme Court in Salt Lake Inv., recognizes the validity and effect of the Act and concludes that Plaintiff has no claim to the Property.

15. In the appeal in Salt Lake Inv., the United States Supreme Court confirmed the validity of the land grant, explaining that the property was “the subject of conflicting claims - one under a patent to Malcolm MacDuff issued under the Pre-Emption Act, c. 16 Stat. 453, and the other under an act, chapter 2, 16 Stat. 395, granting a right of way ‘through the public lands’ to the Utah Central Railroad Company.” Salt Lake Inv., 246 U.S. at 446-47. Because the right of way was an *in praesenti* grant to an already existing line of railroad, and because Utah Central Railroad had, in fact, made a timely acceptance of the grant, the court explicitly recognized that the right of way had been granted effective December 15, 1870, the date of the Act. *Id.* at 447; Northern Pac., 177 U.S. at 439-41.

16. Like the plaintiff in Salt Lake Inv., Plaintiff’s claim to the Property is an “impossible one” as if he were making no claim to it at all:

[W]e think MacDuff settlement and declaratory statement under the pre-emption act were of no effect. They neither conferred any right

on him nor took any from the government. His claim was not merely irregular or imperfect, but was an impossible one under the law, and so the status of the land was not affected thereby. The land continued to be subject to the disposal of congress and came within the terms of the right of way as much as if he were making no claim to it. Of course, the presence on public land of a mere squatter does not exempt it from the operation of such an act containing, as here, no excepting clause.

Id. at 449.

17. The cases cited and relied on by Plaintiff, to wit: Gately v. Massachusetts, 2 F.3d 1221 (5th Cir. 1993); Lee v. Insurance Co. of North America, 763 P.2d 567 (Haw. 1988); Young v. Northern Terminals, Inc., 290 A.2d 186 (Vt. 1972); and In Re Kina's Estate, 268 N.Y.2d 131 (N.Y. 1966), are not applicable because none of these cases are United States Supreme Court or Utah Supreme Court cases or involves the application or interpretation of an Act of Congress. Further, the legal issues in the instant case are subject to the legal determinations of both the United States Supreme Court and the Utah Supreme Court affirming the validity and effect of the land grant, which determinations are no less authoritative now than they were in the 1900's when they were made and are not subject to interpretation or change by another court regardless of the facts that Plaintiff relies on in support of his claim to the Property.

18. Defendant has waived any statute of limitations defense by failing to assert such an affirmative defense in its Answer.

ORDER OF JUDGMENT

Based on the foregoing uncontroverted facts and conclusions of law, it is hereby

ORDERED, that Defendant's Motion for Reconsideration is hereby granted; and it is further

ORDERED, that the Court's Ruling on Plaintiff's and Defendant's Motion for Summary Judgment filed February 24, 1995, is hereby reversed; and it is further

ORDERED, that the Court's Third Amended Partial Summary Judgment ("Findings of Fact and Conclusions of Law") filed September 6, 1995, is hereby reversed; and it is further

ORDERED, that Defendant's Motion for Summary Judgment is hereby granted.

DATED this _____ day of October, 2001.

BY THE COURT:

Honorable Rodney S. Page
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of October, 2001, a copy of the foregoing was served
in the manner indicated below upon the following:

Steven W. Call, Esq.
Cheri K. Gochberg, Esq.
Ray, Quinney & Nebeker
79 South Main Street
500 Desert Building
Salt Lake City, UT 84111

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight
☐ Facsimile
☐ No Service



ADDENDUM C

FILED

JUL 08 2005

SECOND DISTRICT COURT, STATE OF UTAH
SECOND DISTRICT COURT

COUNTY OF DAVIS, FARMINGTON DEPARTMENT

GLEN C WEISER, an individual
Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY,
a Utah corporation
DefendantRULING ON MOTIONS FOR SUMMARY
JUDGMENT FILED BY THE PARTIES

Case No. 910749302 PR

Judge: Rodney S. Page

This case has been before the Court for a number of years and has been the subject of numerous motions and hearings between the parties, including two interlocutory appeals to the Utah Supreme Court, which were rejected.

Most recently, the matter was before the Court on February 22, 2005 on motions and cross-motions for summary judgment on the various remaining issues. Following the hearing, the Court took the matter under advisement based upon the stipulation of counsel that they would submit to the Court a set of stipulated facts from which the Court could decide the issue of the location of the center line of the right-of-way, a central issue in the case.

At this time, no stipulated facts have been presented to the Court, and therefore the Court will proceed to rule upon those issues before it based upon the memorandums and arguments previously submitted.

On October 1, 2001, this Court entered its findings and judgment on defendant's reconsidered motion for summary judgment. In that ruling the Court found that, by act

2290

Ruling on Motions for Summary Judgment Filed by the



VD18537904

910749302

UNION PACIFIC RAILROAD COMPANY

of congress of December 15, 1870, the Utah Central Railroad, defendants predecessor in Interest, was granted a right-of-way through the public lands to the extent of 200 feet wide on each side of the road from a point near Ogden City to Salt Lake City.

Further, the Court determined that the patent of land in question to George Tomlinson in 1873, plaintiff's predecessor in interest, to the extent that it was included in the right-of-way, granted to the Railroad in 1870, was a nullity. The reason being that the land which was part of the 1870 grant to the Railroad was taken out of the public land subject to preemption and sale, and therefore the Land Department was without authority to convey any rights therein. Northern Pacific vs Townsend 190 U.S. 267; 23 S. CT. 671 (1903).

As a result of this Court's prior ruling, the only issues left for determination are: 1) the location of the right-of-way; 2) the nature of the legal rights conveyed to defendant in the grant; 3) the effect of the District Court's decree quieting title in the land, plaintiff's predecessor in interest in 1935; 4) plaintiff's challenge to the conveyance of the right-of-way to the UTA by the defendant; 5) the question of trespass and damages related thereto in the event defendant is occupying land of the plaintiff not covered by the right-of-way; and 6) the question of sanctions.

As to the question of the exact location of the right-of-way grant, absent the stipulation of facts by the parties, the Court concludes that there are factual disputes which preclude the Court from deciding that issue at this time.

Concerning the nature of the legal rights conveyed to the defendant in the grant, this Court has already determined that the patent issued to plaintiff's predecessor in 1873 was a nullity; however, to clarify the Court's ruling in that regard, this Court would

conclude that the Railroad was granted a limited fee interest subject only to reverter to the Federal government should the Railroad fail to use the land for the purpose specified in the grant. Northern Pacific vs Townsend, *supra*; Great Northern Railway Co. vs United States 315 U.S. 262, 62 S. CT 529 (1942).

It is important to note, as stated in the Townsend Case, the nature of the property interest in land conveyed by grant from congress changed after 1871, and from then on was only considered to be an easement and not a fee interest.

Given the nature of the title held by the Railroad in the right-of-way, the question remains as to what, if any, the effect the State District Court decree quieting title in plaintiff's predecessor in interest has on the right-of-way grant.

This Court would conclude that no action under State law has the ability to limit or circumscribe the rights granted under the 1870 act, with the exception of the exercise of limited state police power.

That would include State court decrees quieting title and various other State legal theories such as adverse possession or The Marketable Record Title Act. Townsend supra; Boise Cascade Corp. vs Union Pacific Railroad Co., 650 F.2d 720, (10th Cir. 1980), cert. denied, 450 U.S. 995 (1981). Even assuming that defendant had been made a party to the quiet title action, a fact that is in dispute, the decree could not have altered or taken away from the nature of the grant to the Railroad in this case.

Given the Court's ruling as to the nature of the legal titled conveyed by the grant, it is clear that any legal rights which may remain in the right-of-way over and above those belonging to the Railroad, belong to the Federal government exclusively.

Given the fact that plaintiff has no legal interest in the right-of-way, he has no legal standing to challenge the transfer of the right-of-way to the Utah Transit Authority. However, even assuming that plaintiff had standing, he has no basis to challenge the transfer here.

Federal law specifically grants to the Railroad the right to transfer to the Department of Transportation of any state, or its nominee, any part of the right-of-way or its property to be used for a similar purpose. 23 United States Code, Section 316. Emphasis added.

Here the Utah Transit Authority is a nominee of the Utah State Department of Transportation and received title to the right-of-way under agreement with the defendant, dated January 16, 2002 to be used for commuter rail.

Even assuming however, that the transfer was not in keeping with Federal law, given the Court's above ruling, only the Federal government, as owner of the reversionary interest, would have standing to challenge it.

For the purpose of the record it should be noted that the Utah Transit Authority has agreed the defendant should continue to pursue this matter on their behalf and that UTA would be bound by any decision rendered herein.

The Court next turns to the question of sanctions, if any, that should be considered by the Court. Each of the parties herein have filed motions for sanctions against the other. The Court has considered these motions and the memorandums and arguments submitted in support thereof and in opposition thereto, and being fully advised in the premises, rules as follows:

This Court initially granted plaintiff's Motion for Summary Judgment on the issue of the validity of the 1870 grant on the rationale that defendant's predecessors in interest failed to comply with the map filing requirements of the 1870 grant.

Subsequent thereto, defendant filed a motion requesting the Court reconsider its ruling based on decisions of the Utah Supreme Court in the Moon Case and the Salt Lake Investments Case, decided in 1904 and 1914 respectively. Each of these cases was directly in point and were cases in which our Supreme Court specifically upheld the validity of the 1870 grant to Utah Central Railroad. Moon vs Salt Lake City, 76 P. 222 JT 1904); Salt Lake Investment vs Oregon Shortline Railroad Company. 148 P. 439 JT 1914), aff'd., 246 U.S. 446 (1918).

Neither defendant, to whose arguments these cases were directly in point, nor plaintiff cited either of these cases in their memorandums or argument to the Court on the question of the validity of the 1870 grant. Obviously both of these cases had been decided long before this issue came before the Court.

Given the relevance of the cases to the issue before the Court, the Court granted defendant's Motion for Reconsideration on condition that defendant pay to the plaintiff sum of \$2,000 to cover reasonable expenses incurred to research, resubmit and argue the Motion for Summary Judgment.

The matter was resubmitted and reargued and the Court modified its prior ruling based upon these cases, and upheld the validity of the 1870 grant.

Subsequent to that time, both parties had submitted motions for sanctions against the other. Plaintiff claiming that defendant violated Rule 11 by failing to adequately research and argue the case before the Court; and defendant against the

plaintiff for failing to find these cases before their action was filed, and filling their action without proper investigation.

After reviewing the circumstances and the memorandum submitted by counsel, the Court concludes that the two cases which were not cited by the defendant in its memorandum or arguments on the original motion were relatively old cases, and as such, were not readily discoverable through the ordinary means of legal research. The Court concludes that defendant's failure to cite or argue these cases originally was not the result of its failure to engage in reasonable inquiry or for the purposes of delaying or hindering the plaintiff, therefore the defendant's actions in that regard do not rise to the level that would justify sanctions under Rule 11 of the Utah Rules of Civil Procedure. The Court does find however, that there was good cause to require defendant to pay the \$2,000 to the plaintiff to cover costs incurred by plaintiff to research and resubmit its memorandum on the reconsidered motion.

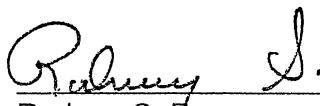
As to the defendant's motion for sanctions against plaintiff for pursuing the various causes of action against defendant without reasonable inquiry, the Court concludes that the causes of action alleged by plaintiff are reasonable under the present status of the law or under nonfrivolous arguments for extension, modification, or reversal of existing law, or the establishment of new law, and therefore defendant's request for sanctions is hereby denied.

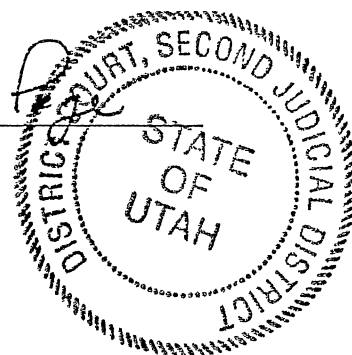
Based upon the foregoing, the Court reserves the question of the location of the right-of-way and any questions as to trespass or damages in the event the right-of-way does not cover all of the property claimed by the plaintiff.

Counsel are instructed to contact the Court's clerk to set a scheduling conference in order to resolve the remaining issues before the Court within fifteen days of the date of this ruling.

Dated this 8th day of July, AD 2005

BY THE COURT:


Rodney S. Page
District Court Judge



CERTIFICATE OF MAILING

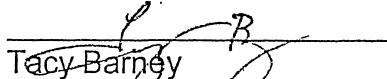
I hereby certify that I mailed a true and correct copy of the foregoing ruling to:

Steve W. Call
36 South Main Street, #1400
Salt Lake City, Utah 84111

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

postage prepaid this 25th day of July, AD 2005.

Alyson Brown
Clerk of Court

By 
Tacy Barney
Deputy Court Clerk

ADDENDUM D

1/2/2008 4:28:58 PM 1495

SECOND DISTRICT COURT

2007 OCT -9 P 8:59

SECOND DISTRICT COURT
2007 DEC 21 P 3:00

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

Elizabeth M. Peck (6304)
136 South Main Street, Suite 404
Salt Lake City, UT 84101
Telephone: (801) 531-6088
Facsimile: (801) 531-6093

Attorneys for Plaintiff Glen C. Weiser

IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR DAVIS COUNTY, STATE OF UTAH

GLEN C. WEISER, an individual,

Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY,
a Utah corporation,

Defendant.

[revised]
**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER AND JUDGMENT**

Civil No. 910749302PR

Hon. Rodney S. Page

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

2903

[revised] Findings of Fact, Conclusions of Law and Or



VD24051554

pages:

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

FINDINGS AND CONCLUSIONS

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

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

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

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

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

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

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

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

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

16 Stat. 395 (December 15, 1870).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ORDER AND JUDGMENT

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

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

1/2/2008 4:26:50 PM 1593

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

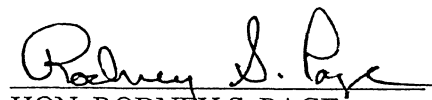
ORDERED that Weiser's claims for relief as alleged in his complaint including his claims to quiet title, restitution, forcible detainer, treble damages, trespass and unjust enrichment are hereby dismissed with prejudice;

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

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

DATED this 21st day of December 2007.

BY THE COURT:


HON. RODNEY S. PAGE
District Court Judge

1/2/2008 1:28:50 PM EST

CERTIFICATE OF MAILING

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

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

949304

1/2/2008 4:20:50 PM1505

CERTIFICATE OF MAILING

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

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



949304