

2004

Gold Mountain Development, LLC, v. Missouri Flat LTD, Terrell Woodward Sandberg & Cynthia Crane Sandberg; William Ohlinger; Kimberly Gold, Inc; and Does I to X : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

		UTAH COURT OF APPEALS
		BRIEF
GOLD MOUNTAIN DEVELOPMENT LLC,)	
)	UTAH
Plaintiff and Appellee,)	DOCUMENT
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vs.)	50
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MISSOURI FLAT LTD.; TERRELL)	DOCKET NO. 2004 0093
WOODARD SANDBERG & CYNTHIA)	
CRANE SANDBERG; WILLIAM)	(Assigned from the
OHLINGER; KIMBERLY GOLD, INC; and)	Utah Supreme Court)
DOES I to X,)	
)	Docket No. 20040093
)	Civil No. 000600006
Defendants and Appellants.)	Judge David L. Mower

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Development LLC*

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I. STATEMENT OF JURISDICTION

The Utah Supreme Court has original jurisdiction in this matter pursuant to Utah Code Ann. § 78-2-2(3)(j) and Rule 4 of the Utah Rules of Appellate Procedure. The Utah Supreme Court has transferred the case to the Utah Court of Appeals pursuant to Utah Code Ann. § 78-2-2(4) and its Order dated February 9, 2004. [Order, R. 840.]

II. ISSUES PRESENTED AND STANDARDS OF REVIEW.

A. Did the district court correctly construe the 1951 Indenture as conveying an easement for the uses specified in the Indenture rather than fee title to the surface of the subject property?

The district court's construction of the Indenture is a question of law that is reviewed for correctness. *See, e.g., Ault v. Holden*, 2002 UT 33, ¶¶15, 37, 44 P.3d 781 (reviewing grant of summary judgment regarding boundary dispute and construction of deed for correctness); *Hartman v. Potter*, 596 P.2d 653, 656 (Utah 1979) (reviewing construction of deed for correctness).

B. Did Missouri Flat fail to preserve its claims of adverse possession, laches, and estoppel for appellate review where these claims were abandoned at oral argument, not addressed in the district court's Decision, and not raised by Missouri Flat in response to the proposed Order?

The determination that a party failed to preserve an issue for appellate review is a decision made for the first time by the appellate court and therefore not subject to any particular standard of review. Notwithstanding, the appellate court should defer in some measure to the trial court in determining from the record whether an issue was raised before the trial court in a timely fashion or raised to a sufficient level of consciousness. *See, e.g., State v. Pena*, 869 P.2d 932, 935-36 (Utah 1994) (explaining need to defer to trial court and review for clear error in circumstances where the trial court is “in the [better] position to . . . derive a sense of the proceeding as a whole, something an appellate court cannot hope to garner from a cold record”).

C. If the issue of adverse possession was adequately preserved, can Missouri Flat establish title to the surface by adverse possession and demonstrate hostile and adverse possession if the Indenture conveyed an easement for Missouri Flat to use the land?

Because a determination of ownership by adverse possession requires both findings of fact and conclusions of law, this issue presents a mixed question. *See, e.g., State v. Pena*, 869 P.2d 932, 935-38 (Utah 1994) (discussing mixed questions); Utah Code Ann. §§ 78-12-7 to -12.1 (2004) (outlining elements of adverse possession). In general, the district court's legal conclusions are reviewed for correctness, and the findings of fact are reversed only if they are clearly erroneous. *See, e.g., Drazich v. Lasson*, 964 P.2d 324, 326

(Utah Ct. App. 1998) (noting legal issues are reviewed for correctness and factual issues for clear error in case involving interpretation of indenture and claims of adverse possession). However, when confronted with a mixed question of fact and law, appellate courts afford some measure of discretion to the trial court's application of law to the facts. *See Pena*, 869 P.2d at 937-38.

D. If the issues of laches and estoppel were adequately preserved, can Missouri Flat demonstrate laches or estoppel?

The equitable doctrines of laches and estoppel also present mixed questions. *See, e.g., Dept. of Human Services ex rel. Parker v. Irizarry*, 945 P.2d 676, 678 (Utah 1997) (“[W]hether equitable estoppel has been proven is a classic mixed question of fact and law”); *Angelos v. First Interstate Bank of Utah*, 671 P.2d 772, (Utah 1983) (noting “considerable deference” given to trial court on mixed question of laches). When confronted with a mixed question, appellate courts afford some measure of discretion to the trial court's application of law to the facts. *See Pena*, 869 P.2d at 937-38.

III. CONSTITUTIONAL PROVISIONS, STATUTES, OR RULES.

There are no constitutional provisions, statutes, ordinances, rules, or regulations whose interpretation is determinative of the appeal or of central importance to the appeal.

IV. STATEMENT OF CASE.

A. Nature of Case and Course of Proceedings.

Gold Mountain filed this case to quiet title to the subject property (the “Property”) located mostly in Piute County, Utah. The action included a number of parties and title issues. [Complaint, R. 1-65.] Summary judgment was granted or the action was dismissed as to all parties except Missouri Flat. [Notice of Dismissal, R. 308-09, Order Granting Summary Judgment, R. 412-20.] Gold Mountain asserted Missouri Flat’s interest in the Property was limited to an easement for the purposes described in the 1951 Indenture (the “Indenture”) from Gold Mountain’s predecessor in interest to Missouri Flat’s predecessor in interest. [Complaint, R. 1-65.] (*See Addendum, Exhibit 1.*)

Gold Mountain filed a motion for summary judgment on its claims regarding Missouri Flat’s interest in the Property with supporting affidavits and a memorandum. [Motion for Partial Summary Judgment, R. 333-35, Memorandum in Support, R. 322-32, Affidavit of Russell Reiserer, R. 336-39, Supplemental Affidavit of Russell Reiserer, R. 340-42.] Missouri Flat filed a Memorandum in response to the original motion for summary judgment [R. 343-64] and a Rule 56(f) motion to continue discovery. [Motion to Continue Discovery, R. 397-98.] A hearing was held on those motions and the district court granted

the Rule 56(f) Motion but did not rule on the motion for summary judgment. [Order Granting Rule 56(f) Motion, R. 442-44.]

After the additional discovery, Missouri Flat amended its Answer and Counterclaim to allege adverse possession, laches, and estoppel. [First Amended Answer and Counterclaim, R. 447-57.] Supplemental memoranda were filed by both parties on the original motion for summary judgment. [Supplementary Memorandum, R. 472-86 and Reply to Supplementary Memorandum, R. 645-58.] Gold Mountain subsequently filed a separate motion for summary judgment on Missouri Flat's claims of adverse possession, laches and estoppel with supporting memorandum and affidavit. [Motion for Partial Summary Judgment (Adverse Possession, Laches and Estoppel), R. 638-40, Memorandum in Support of Second MSJ, R. 603-37, Affidavit of Russell Reiserer, R. 641-44.] A Memorandum in Opposition to the Second Motion was filed by Missouri Flat [R. 659-77] and a Reply Memorandum was filed by Gold Mountain. [R. 778-89.]

A review hearing was held on the motions for summary judgment in the district court in February 2003. [Notice of Review Hearing, R. 796-97.] A telephonic hearing was held on April 16, 2003. [Reporter's Transcript of Proceedings, R. 843, T. 1-27.] During the telephonic hearing the district court asked for an explanation of the issues to be addressed. [T. 20-24.] The arguments of both parties focused on the Indenture and the parties agreed

that the court should construe the Indenture solely from the language within the four corners of the Indenture, that they were not claiming that the Indenture was ambiguous, and that extrinsic evidence should not be used to determine the intent of the parties. [T. 4-21.] Missouri Flat did not state that any other issues remained to be resolved including adverse possession, laches and estoppel, even though the court asked if anything else needed to be discussed. [T. 20-24.]

The Court issued a Decision on Motions for Summary Judgment. [Decision on Motions for Summary Judgment (the “Decision”), R. 804-08.] (*See* Addendum, Exhibit 2.) In its Decision the district court ruled that Missouri Flat owned a permanent easement on the surface of the Property for grazing and agricultural purposes subject to Gold Mountain’s right to use the surface and sub-surface for mining purposes and that Missouri Flat owned the frame house and the surface which it covers in fee simple. The court ruled that Gold Mountain owned all other rights in the Property. The Decision did not address the issues of adverse possession, laches, or estoppel. [R. 804-08.]

Counsel for Gold Mountain prepared the Findings of Fact, Conclusions of Law and Order and Decree (the “Order”) as directed by the Court in the Decision. Because Missouri Flat had not pursued the issues of adverse possession, laches or estoppel, the Order provided that Missouri Flat had not established those claims. [Order, ¶¶ 3, 11, R. 820-22.]

The Order was submitted to Missouri Flat's attorney for review, who requested some revisions but did not object to the proposed disposition of adverse possession, laches, and estoppel. The Order was entered by the district court. [Order, R. 818-30.] (*See* Addendum, Exhibit 3.)

B. Factual Background.

Before the Indenture, Gold Mountain's predecessor-in-interest owned all right, title, and interests in the Property that historically had been used for gold mining operations. [Order, R. 819-20; Reply Memorandum, R. 779-83.] Since the Indenture, Missouri Flat and its predecessors-in-interest have only used the Property for grazing sheep and/or cattle and uses directly related to those purposes. [Order, R. 819-20; Reply Memorandum, R. 781.] Missouri Flat's predecessors used their interest in the Property, along with other land and interests associated with a large ranching operation, as security for various loans. [Order, R. 819-20; Reply Memorandum, R. 781.] Missouri Flat acquired its interest in the Property by a July 19, 1994 Trustee's Deed resulting from foreclosure by First Security Bank of Utah of a 1987 Trust Deed from prior owners. [Trustee's Deed, R. 672-704.] Missouri Flat also obtained a Quitclaim Deed from First Security Bank dated July 20, 1994. [Quitclaim Deed, R. 705-738.]

Missouri Flat and its predecessors claim to have paid some taxes on the surface of the Property. [Aplt's Br. p. 3.] Since 1976, however, Gold Mountain and its predecessors have paid property taxes that were assessed upon the Property as mineral properties. [Reiserer Aff. ¶ 8, R. 641-44.] Missouri Flat and its predecessors have not taken any action or given any indication to Gold Mountain or its predecessors that they claimed any interest in the Property other than the grazing and agricultural rights granted by the Indenture. [Reiserer Aff., ¶¶ 5-6; R. 641-44.]

Gold Mountain and its predecessors and their agents have conducted mineral exploration and development activities on the Property, have built and maintained several buildings and other improvements on the Property, and have occupied and used the Property for mining, camping, and recreational activities. [Reiserer Aff. ¶¶ 2-4; R. 641-44.]

V. SUMMARY OF ARGUMENTS.

A. The Indenture Conveyed an Easement for the Specified Purposes.

The Indenture grants and conveys the surface of the Property for grazing and agricultural purposes. Utah case law and other authorities hold that such a conveyance for specified uses grants an easement for those uses. Construing the Indenture as granting an easement is necessary to give meaning and purpose to all of the language of the Indenture.

The Utah case law supporting Gold Mountain's interpretation of the Indenture is controlling and case law cited by Missouri Flat does not support its interpretation of the Indenture.

B. The Case Law Appellant Cites from Other States Conflicts with Utah Case Law.

The Court should rely on Utah case law instead of the conflicting case law from other states espoused by Missouri Flat. The contrary case law from other states does not clearly represent the majority rule.

C. The Rules of Construction Relied Upon by Missouri Flat do not Support its Interpretation.

Utah Code Ann. § 57-1-3 and the cases based thereon do not support Missouri Flat's interpretation of the Indenture. Rules of construction based on ambiguity are inappropriate in light of representations made by Missouri Flat to the district court that the Indenture is unambiguous.

D. Missouri Flat Failed to Preserve Claims of Adverse Possession, Laches, and Estoppel for Appellate Review.

Missouri Flat failed to give the court an opportunity to rule on the issues of laches, estoppel, and adverse possession because it did not sufficiently raise those issues to the consciousness of the court and because Missouri Flat did not object to the disposition of those claims in the final order.

E. Missouri Flat Cannot Prevail on its Claim of Adverse Possession.

Assuming the issue was adequately preserved, Missouri Flat cannot prevail on its claim that it has established title to the remaining interests in the surface by adverse possession. No possession has been asserted beyond the use of the surface for grazing and agricultural purposes, as the Indenture granted, and Missouri Flat and its predecessors have done nothing to give notice that they claimed an interest adverse to Gold Mountain and its predecessors.

F. Missouri Flat Cannot Prevail on its Claims of Laches and Estoppel.

Assuming the issues were adequately preserved, Missouri Flat cannot prevail on its claims of laches and estoppel because there has been no lack of diligence in bringing this action, no action or lack thereof that Missouri could have reasonably relied on to its detriment, and the claim of prejudice cannot be supported.

VI. ARGUMENT

A. UNDER UTAH LAW THE INDENTURE CONVEYED AN EASEMENT FOR THE USES SPECIFIED.

This case involves the construction of the Indenture from Annie Laurie Consolidated Gold Mines (“First Party”) to Franklin Taft Paxton, Claine Tad Paxton, Genevieve P. Rawson and Geraldine Paxton (“Second Parties”) dated April 26, 1951 and

recorded July 20, 1951 at Book J of Mining, Page 615 of the Records of Piute County Recorder's Office (the "Indenture"). (Order, ¶ 5, R. 818-30; Addendum, Ex. 1.) Gold Mountain is the successor-in-interest to the rights retained in the Indenture by First Party and Missouri Flat is the successor-in-interest to the interests conveyed to Second Parties by the Indenture. (Addendum, Ex. 3.)

Gold Mountain agrees with the rules of construction to be applied by the Utah courts as set out in the Appellant's Brief. Those rules of construction provide that deeds are construed according to the ordinary rules of contract construction; that the paramount rule of construction is to give effect to the intent of the parties as expressed in the deed as whole and from the language of the deed; and that in interpreting the language of a deed no portion should be rendered meaningless. (Aplt's Br., pp. 5-6.) The Utah Supreme Court has held that "the main object in construing a deed is to ascertain the intention of the parties, especially that of the grantor, *from the language used*" in the deed and the term intention "is a *term of art* and signifies the meaning of the *writing*." *Hartman v. Potter*, 596 P.2d 653, 656 (Utah 1979) (italics in original). The Utah Supreme Court has also stated that if the intent of the parties can be ascertained, "arbitrary rules of law are not to be invoked, and will not control the construction of the instrument." *Haynes v. Hunt*, 85 P.2d 861, 863 (Utah 1939) (quoting *Kirwin v. Farr*, 17 Utah 1, 53 P. 608, 609 (1898)).

While the parties agree upon the rules of construction, they do not agree upon the interpretation of the Indenture. Missouri Flat contends the Indenture conveyed to Second Parties full fee title to the surface of the Property. Gold Mountain asserts that because the Indenture conveyed the surface for grazing and agricultural purposes and granted a separate right to cut and remove certain species of trees from the surface, the Indenture granted an easement to Second Parties for the stated uses under Utah law.

The Indenture states in relevant part, as follows:

That First Party, expressly subject to the exceptions and reservations in favor of First Party its successors and assigns hereinafter mentioned and set forth and, for and in consideration of the sum of One Thousand Dollars (\$1,000.00) and other good and valuable consideration paid by Second Parties, the receipt of which is hereby acknowledged, **hereby grants, bargains, sells and conveys unto Second Parties for grazing and agricultural purposes, the surface of the following described Patented Lode Mining Claims in Gold Mountain Mining District, and the surface only of the Other Property described below, with the right to cut and remove from the surface of said Patented Lode Mining Claims and Other Property any or all of the quaking aspen and chaparral thereon**, all of said mining claims and property being situated in Piute and Sevier Counties, State of Utah, to-wit:

Patented Lode Mining Claims:

[descriptions omitted]

Together with the one story frame house located in Upper Kimberly at the fork of the road leading to Sevier and Marysvale, Utah.

Other Property:

[descriptions omitted]

And for the consideration aforesaid **First Party hereby conveys and quit claims unto Second Parties, for grazing and agricultural purposes, the surface of the following described patented lode mining Claims in Gold Mountain Mining District** situate in Piute County, Utah:

[descriptions omitted]

EXPRESSLY EXCEPTING AND RESERVING HOWEVER, unto the said First Party its successors and assigns, all mines and minerals of whatsoever kind or nature situate, lying or being on, in or under all or any of the patented lode mining claims and other property above described, together with the right and privileges at all times for First Party its successors and assigns and its and their agents and workmen to enter into and upon any of said patented lode mining claims and other property hereinabove described or any part thereof, and to search for, work, mine, develop, remove, extract, store, treat, mill and carry away all said mines and minerals of whatever kind or nature the same may be, and to sink pits and shafts, and to make and drive tunnels, drifts, winzes and other underground workings of every kind, and to occupy and use such parts of the surface hereby conveyed for the construction of such roads and the erection and construction of such buildings, mills, reduction works and other structures, pipe, power and transmission lines, dumps, tailings ponds, and other facilities as may be necessary in connection with any of said mining, milling, or other operations, as fully and entirely as if said First Party its successors and assigns remained the owner in fee simple of said surface, without any liability whatever on the part of First Party its successors and assigns to Second Parties and their respective heirs, executors, administrator and assigns, for any loss, damage or injury that may occur to any property of Second Parties and their respective heirs, executives, administrators and assigns, or to said surface by reason of searching for, working, developing, mining, extracting, storing, treating, milling, removing and carrying away all of said mines and minerals of every kind or nature, and/or utilizing said surface as aforesaid in connection therewith, provided, however, First Party its successors and assigns shall conduct all of said searching, developing, working, mining,

storing, treating, milling, removing and transporting operations and all acts and things connected therewith or incidental thereto in such manner as will cause as little inconvenience to or interruption **of the use of said Surface by Second Parties** and their respective heirs, executors, administrators and assigns as is consistent with the proper conduct and carrying on of any of said mining, milling, or other operations.

Second Parties are hereby given the right to use, for stock watering purposes, such water rights as First Party may have that are available and applicable for such purposes . . . and provided further that said right of Second Parties to so use said water rights shall not in any manner or to any extent interfere with or prevent the use thereof for mining or milling operations by First Party it[s] successors and assigns **on any part of the property of First Part[y]**.

This conveyance is made expressly subject:

[additional exceptions omitted]

TO HAVE AND TO HOLD the above described surface and building hereby conveyed unto Second Parties, their heirs, executors, administrators and assigns forever, subject to the aforesaid exceptions, reservations **and restrictions**.

[remainder of Indenture omitted]

(Addendum, Ex. 1(emphasis added).)

The district court ruled that the Indenture is not ambiguous. [Addendum, Ex. 3, ¶ 4, R. 818-30.] The plain language of the Indenture indicates First Party intended to convey something less than full rights to the surface of the Property because of the limiting phrase “for grazing and agricultural purposes” right after the transfer verb “sells.” [*Id.* at ¶ 5.] The court ruled that the word “for” was intended to show the purposes for which the surface could be used and that it excludes other purposes. [*Id.* at ¶ 6.] The district court also found

that the separate conveyance of the one story house was not so limited. [*Id.* at ¶ 9.] Based on its analysis of the language of the Indenture, the district court ruled that Missouri Flat owns an easement for grazing and agricultural purposes and to cut and removed aspen and chaparral trees on the Property, and that Missouri Flat owns the house and the land on which it is located in fee simple. [*Id.* at ¶ 10.] The court ruled that Gold Mountain owned all other rights to the surface of the subject property. [*Id.* at ¶ 12.]

1. Utah case law holds that a conveyance of property for specified uses creates an easement.

The district court's ruling is in full accord with the Utah Supreme Court's decision in *Haynes v. Hunt*, 85 P.2d 861 (Utah 1939), where the Court construed a deed that conveyed all ground covered by two lakes with associated rights. The deed provided that "Said lakes are to be used for the propagation of fish and the removal of the same by the grantees or assigns." *Id.* at 862. In determining the nature and extent of the interest granted by that deed, the Court stated:

The language in the deed to Hunt, "hereby convey and warrant" normally implies a grant of the fee, but as shown supra the qualifying clause, "to be used for the propagation of fish and the removal of the same" unless properly descriptive of the premises, *is such language as would naturally be used to qualify or limit the grant, to change it from a fee to an easement.* The description of the property for grant of fee is complete without this clause, and unless the clause is used to limit or qualify the grant it can serve no purpose whatsoever. It is an elemental

rule of construction that in construing such instruments every word must be given effect if possible and reasonable, upon the theory that the grantor used no words except those necessary or convenient to express the intent of the parties.

Id. at 864 (emphasis added).

Similarly in this action, the Indenture's reference to the surface and the legal descriptions were sufficient for a complete grant of fee title to the surface. Therefore, the qualifying clause "for grazing and agricultural purposes" would serve no purpose except to limit or qualify the grant and change the estate granted from a fee to an easement.

Missouri Flat dismisses the limiting language in the Indenture as simply describing "the use that was anticipated by the parties at the time of the conveyance of the surface" but offers no basis for that assertion. The location of that limiting language between "grants, bargains sells and conveys to Second Parties" and "the surface of the following described" indicates it was intended to qualify or limit the grant of the surface. Including the same limiting language again in the subsequent paragraph where First Party separately conveyed and quitclaimed to Second Parties "for grazing and agricultural purposes" the surface of separately described property indicates a careful intent to limit both conveyances of the surface, and not simply to indicate the anticipated uses.

Indeed, Missouri Flat's argument would render the language superfluous. If First Party truly intended to convey fee title it would have no reason to describe the anticipated use, because Second Parties could use it for whatever they wanted. The language at issue has meaning only if it limits the estate conveyed. The district court noted that the word "for" is "used as a function word to indicate purpose" and indicates that the phrase was intended to limit the grant to those purposes, not just to indicate anticipated uses. [Addendum, Ex. 2., R. 806.]

If the "for grazing and agricultural purposes" limitation is dismissed so that the Indenture conveys fee title to the surface instead of an easement, other language in the Indenture is also rendered meaningless. The grant "with the right to cut and remove from the surface of said Patented Lode Mining Claims and Other Property any or all of the quaking aspen and chaparral thereon" would be meaningless if the Indentured conveyed fee title to the surface. A fee owner has the right to use all trees and other resources growing on the surface however he wants. This language is difficult to dismiss as merely a statement of other intended uses since the grant is limited to two specific species of trees.

The provision "Together with the one story frame house located in Upper Kimberly at the fork of the road leading to Sevier and Marysvale, Utah" is also unnecessary if the Indenture conveyed fee title to the surface. A fee simple conveyance of land on which

a building is located would normally include the building, so there is no need to separately convey the house unless the Indenture conveyed only an easement. The separate conveyance of the house without limiting language is the reason the district court concluded that the Indenture conveyed fee title to the house and the land on which it was located. Missouri Flat's contentions that the district court was troubled by this portion of the deed and that the finding that the house was granted in fee simple required a "tortured analysis" are not warranted.

2. Reservation of the Right to Use the Surface for Mining Purposes is Consistent With the Grant of an Easement.

Missouri Flat contends the reservation of mineral rights and the right to use the surface for mining operations is totally inconsistent with the grant of an easement, as opposed to conveying fee title to the surface. However, the reservations are fully consistent with a grant of an easement. The reservations were not necessary to retain title to the mineral rights since a conveyance of the surface would not convey the mineral rights but they were necessary to avoid interfering with the dominant estate of the easement owner.

The mineral owner has the right to use the surface for mineral extraction whether an easement was granted or the surface was conveyed in fee. Utah law provides that the owner of a severed mineral estate has a right to use the surface to mine and remove the

minerals, and the right of the mineral owner to use the surface is considered the dominant estate. *Flying Diamond Corp. v. Rust*, 551 P.2d 509, 511 (Utah 1976). Therefore, it was unnecessary to reserve the right to enter the surface for mining operations if the Indenture conveyed fee title to the surface.

Under Utah law, an easement is the dominant estate and the owner of the underlying title or servient estate may only use the property covered by the easement in a manner that will not interfere with the easement holder's use of the easement. *Stevens v. Bird-Jex Company*, 18 P.2d 292, 294 (Utah 1933); and *Weggeland v. Ujifusa*, 384 P.2d 590, 591 (Utah 1963). Since an easement is the dominant estate, the Indenture's expansive reservation of rights to use the surface for mining and other operations and the waiver of damages resulting from those uses was necessary to delineate the rights of the mineral and servient estate owner vis-à-vis the surface easement for grazing and agricultural purposes. The First Party's right to use the surface for mining and related purposes was to not be limited by the grant of grazing and agricultural rights in the surface under the Indenture.

The deed construed in *Haynes v. Hunt* as granting an easement for the stated purposes also included a reservation "Reserving and excepting therefrom all grazing rights and privileges and the use of said waters for watering livestock." 85 P.2d at 862. The Utah

Supreme Court did not consider that reservation of rights to be inconsistent with its finding that the conveyance of land for the stated purposes granted only an easement.

Missouri Flat also contends that the phrase in the reservation “as fully and entirely as if said First Party its successors and assigns remained the owner in fee simple of said surface, without any liability whatsoever on the part of the First Party” is inconsistent with an intent to convey only an easement. The district court interpreted that language to indicate the broadest possible right to use the surface for mining and other operations. [Order ¶ 12, R. 818, 822; Reply to Supplementary Memorandum, R. 645, 655.] The Court’s interpretation is supported by the classical definition of a fee simple estate as “the maximum legal ownership, and the greatest possible aggregate of rights, powers, privileges and immunities which a person may have in land.” MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 29 (West Publishing Co. 1962). This Court has utilized a similar definition in holding that the estate granted by a tax sale is “‘fee simple’ title – i.e., one unencumbered by other claims.” *A.C. Financial, Inc. v. Salt Lake County*, 948 P.2d 771, 776 (Utah 1997). The expansive recitation of uses that can be made of the surface for mining purposes seems clearly intended to ensure that the interest conveyed by the Indenture would not limit First Party’s use of the surface for mining operations.¹

¹ It should be noted that the reservation contains language supporting the district court’s interpretation, including the provision that First Party’s use of the surface for

The district court interpreted the right to use the surface “as if” First Party owned fee title to mean as if First Party owned complete title unencumbered by the easement or other claims. This interpretation best follows the directive that documents are to be interpreted “so as to harmonize all of its provisions and all of its terms, and all of its terms should be given effect if it is possible to do so.” *Buehner Block Company v. UWC Assoc.*, 752 P.2d 892, 895 (Utah 1988). “Each ... provision is to be considered in relation to all of the others with a view toward giving effect to all and ignoring none.” *Plateau Mining Co. v. Utah Div. of State Lands and Forestry*, 802 P.2d 720, 725 (Utah 1990).²

3. *Haynes v. Hunt is Controlling Authority.*

In *Haynes v. Hunt*, the Utah Supreme Court adopted the rule of construction that if conveyance language in a deed includes a qualifying clause describing the use to be made of the property, the statement of use serves to qualify or limit the grant and changes the estate granted from fee title to an easement. 85 P.2d at 864. The Indenture is precisely that

those purposes “will cause as little inconvenience to or interruption of the *use of said surface*” by Second Parties. (Addendum, Exhibit 1 (emphasis added).)

² Even if the district court’s interpretation of the “as if” reference is not considered the best interpretation standing alone, the other provisions that clearly indicate a grant of an easement would justify that interpretation. In *Coltharp v. Coltharp*, 48 Utah 389, 160 P. 121 (1916), the Utah Supreme Court stated: “Moreover, where there are words or phrases found in different parts of a writing which are repugnant the courts must if possible, construe the whole instrument so that all of its parts may be brought in harmony and so that all of its parts may be given some meaning and effect, whether primary or secondary.” *Id.* at 123.

kind of deed. There are no other reported Utah cases construing deeds that convey property for specified purposes, and therefore the rule of construction adopted in *Haynes v. Hunt* is controlling and should be followed as this Court interprets the Indenture.

Missouri Flat argues *Haynes v. Hunt* is not controlling and tries to distinguish the case on the basis that all of the parties conceded that the deed in *Haynes v. Hunt* did not grant fee title. However, there is no indication that the *Haynes* Court limited its analysis on that basis. In fact it is clear the Court found the language used in that deed “normally implies the grant of the fee” but the “qualifying clause ‘to be used for the propagation of fish and the removal of the same’ ... change[d] it from a fee to an easement.” 85 P.2d at 864. Missouri Flat also claims there was no language in the deed in *Haynes v. Hunt* inconsistent with a grant of an easement. However, as noted above, the grantor in that deed reserved the right to use the property for “grazing rights” and for “watering livestock.” *Id.* In this case, Missouri Flat has argued that reserving the right to use the surface for mining and related purposes is inconsistent with a grant of an easement.

4. Missouri Flat Incorrectly Asserts that Several Utah Cases Support its claim that the Indenture Conveyed Fee Title to the Surface.

Missouri Flat contends that in the case of *Wood v. Ashby*, 253 P.2d 351 (Utah 1952), the Utah Supreme Court held the deed in question conveyed fee title despite the fact

that the “deed to Wood *expressly stated* that the object was to secure the land for water gathering purposes.” (Aplt’s Br. at 18 (*emphasis added*).) A careful reading of *Wood*, however, makes it clear the deed did not expressly state that the object was to secure land for water gathering purposes. *Id.* at 353. While it was acknowledged that the grantee’s object in acquiring the land was for water gathering purposes, there is no indication that purpose was expressly stated in the conveyance language of the deed to Wood. *Id.* The full language of the deed is not quoted in the *Wood* opinion, but all references to the deed state it conveyed a strip of land referred to as strip A in fee simple. *Id.* at 352-54.

The issue in *Wood* was the proper construction of the grantor’s reservation of a “right of way for road purposes across” strip A, not the quantum of the interest or estate conveyed. The grantor’s successor contended that although the deed conveyed fee title to strip A, the intent of the parties was for the grantor to retain the same right of way over strip A as he had before the conveyance. In response to that claim, the *Wood* Court stated:

The deed in question granted a fee simple to Wood reserving a “right of way for road purposes across” the land conveyed. It is true that the objective of the grantee was to secure the land for water gathering purposes, but if the intent of the grantor was to use the land exactly as before, it seems more likely that an easement rather than a fee simple would have been granted to Wood.

Id. at 353. Thus, there was no express limitation in the conveyance. Because there was no limiting reference to the purpose of the conveyance, the *Wood* case does not support Missouri Flat's claim.

Missouri Flat also argues the Utah Supreme Court relied on the rule of construction that a deed should be interpreted most strongly against the grantor in reaching its conclusion in *Wood v. Ashby*. (Aplt's Br. at 13). While the Court acknowledged that rule, there is no indication the Court reached its decision by construing the deed against the grantor. The *Wood* Court's statement on the rules of construction was as follows:

It is generally conceded that a deed is to be construed most strongly against the grantor, and most favorably to the grantee. It is also established in this state that a deed should be construed so as to effectuate the intentions and desires of the parties, as manifested by the language made use of in the deed.

253 P.2d at 353 (internal citations omitted). As noted above, the *Wood* Court concluded there was nothing in the deed which limited the estate conveyed.

Missouri Flat also incorrectly represents the holding in *Ruthrauff v. Silver King Western Mining & Milling Co.*, 80 P.2d 338 (Utah 1938), as supporting its interpretation of the Indenture. Missouri Flat contends the Utah Supreme Court reversed the trial court's decision on the grounds that a deed which purported to "remit, release and quitclaim" an undivided interest "conveyed only a limited portion of the property." (Aplt's Br. at 8.)

Rather, in *Ruthrauff* the claim was made that the intent and effect of the deed “was merely to release” an interest in property, and that it did not convey an interest in the property. The Utah Supreme Court held the deed conveyed any interest the grantor had, and that it was not merely a release. *Id.* at 342.

Gold Mountain does not understand the point Missouri Flat tries to make with *Ruthrauff* and other cases in the same paragraph of its brief, unless it means to argue that there is sufficient language in the Indenture to convey fee title to the surface. Gold Mountain acknowledges that without the limiting clause “for grazing and agricultural purposes” the grant, bargain, and sale language in the Indenture is sufficient to convey fee title to the surface of the Property. That is exactly the point made by the Utah Supreme Court in *Haynes v. Hunt*, and it was the reason the Court concluded that language served no purpose except to limit the grant and change it from a fee estate to an easement. *Haynes*, 85 P.2d at 864.

B. THE CASE LAW CITED BY MISSOURI FLAT FROM OTHER STATES SHOULD NOT BE FOLLOWED.

Missouri Flat’s Brief relies to a great extent on cases from other states to assert that a grant of land for stated purposes does not limit the conveyance to an easement. In fact, the only cases it cites where a conveyance of land for a specified purpose did not create an

easement are from states other than Utah.³ Missouri Flat argues no public policy reason for adopting a rule of construction contrary to the rule of *Haynes v. Hunt*. Instead, it quotes the statement from the California case of *City of Manhattan Beach v. Superior Court*, 914 P.2d 160 (Cal. 1996), that “[t]he vast majority of cases hold that the transfer of a fee title is not vitiated solely for the reason that the deeds contains a clause declaring the purpose for which it is intended the granted premises shall be used.” [Aplt’s Br. at 10.] (*But see City of Manhattan Beach*, 914 P.2d at 166 n.8 (describing the authorities as in “hopeless conflict” and that the interaction of the parties to the conveyance is of paramount importance)).

To the contrary, the position taken by the California Supreme Court is not clearly supported by the “vast majority” of the cases from other states. Indeed, as footnote 8 of *City of Manhattan Beach* states, “most out-of-state cases are of marginal relevance to [the] grantor’s intent because each arises from a particular matrix of facts, which generates its own

³ Missouri Flat’s brief cites the Utah cases of *Coleman v. Butkovich*, 556 P.2d 503, 505 (Utah 1976), and *Draziach v. Lasson*, 964 P.2d 324, 326-27 (Utah Ct. App. 1998), to support its contention that a deed which contains a reference to specified land and not a right to use land indicates a grant in fee and not an easement. [Aplt’s Br. at 9.] However, those cases only state that a deed is not effective if it does not contain an adequate legal description. *Coleman*, 556 P.2d at 505 (holding that quitclaim deeds were not invalid because property could be identified with reasonable certainty from description); *Draziach*, 964 P.2d at 326-27 (affirming trial court’s decision that legal description was imprecise and conclusion that appellant did not have an interest in disputed land, and refusing to address issues of adverse possession and boundary by acquiescence that were not relied upon by the trial court in forming its decision).

individual rationale [and] [s]ome also depend upon policy or other considerations not pertinent to our evaluation.” In the Washington case of *Brown v. State*, 924 P.2d 908 (Wash. 1996) (en banc) cited by Missouri Flat, the Washington Supreme Court stated:

Many courts have considered whether a railroad deed conveys fee simple title or an easement. See A.E. Korpela, Annotation, Deed to Railroad Company as Conveying Fee or Easement, 6 ALR 3d 973 (1966). The decisions are in considerable disarray and usually turn on a case-by-case examination of each deed.

924 P.2d at 911. The American Law Reports annotation referenced by the Washington Supreme Court reviews numerous cases interpreting deeds to railroad companies. In Section 6[a] titled “Reference to Purpose of Conveyance,” the Annotation states:

There is an apparent divergence of opinion with respect to the effect of [conveyance] language. In some cases the view is taken that such language is merely descriptive of the use to which the land is to be put and has no effect to limit or restrict the estate conveyed; in others the view is taken that although such language may operate to reduce the fee created from a fee simple to a base, determinable, or conditional fee, it does not operate to restrict the estate transferred to a mere easement; and in others the position is taken that such language indicates an intention to convey an easement only and not a fee.

A.E. Korpela, Deed to Railroad Company as Conveying Fee or Easement, 6 A.L.R. 3d 973, 996 (1966-2004). *See also City of Manhattan Beach*, 914 P.2d at 166 n.8 (noting that [t]he authorities are in hopeless conflict [and] cannot be reconciled.) The Annotation then discusses the factors influencing the different interpretations and states “and particularly if

the reference to purpose was in the granting clause, many courts appear ready to construe the deed as conveying an easement.” *Id.* § 5[a].

When the Utah Supreme Court adopted its rule of construction in *Haynes v. Hunt*, it relied on cases from other states and aligned itself with those that hold a conveyance of property with a statement of purpose serves to limit the estate conveyed to an easement for the stated uses. The rule articulated in *Haynes v. Hunt* is also supported by Powell’s treatise on real property, which states as follows:

A conveyance frequently requires careful scrutiny to determine which kind of interest was intended to be created by the parties. There is a general construction preference for one of two possible meanings which is “against the grantor.” When, however, the problem requires distinguishing an “easement” from an “estate” the generally prevailing attitude is favorable to the finding of an easement wherever it serves the manifested purpose of the parties. *Thus, a conveyance permitting the conveyee to make stated uses of the land, or even to have the exclusive use of the land for a particular purpose, is normally construed to create an easement, and to leave in the conveyor all privileges of use not inconsistent with the easement.*

POWELL ON LAW OF REAL PROPERTY § 34.04, at 34-40.

C. THE RULES OF CONSTRUCTION RELIED UPON BY MISSOURI FLAT DO NOT SUPPORT ITS INTERPRETATION OF THE INDENTURE.

Missouri Flat cites various rules of construction to persuade the Court to favor its interpretation of the Indenture. However, those rules of construction are not applicable to the Indenture in this case.

First, Missouri Flat relies upon Utah Code Ann. § 57-1-3 and annotations to it. Section 57-1-3 states:

A fee simple title is presumed to be intended to pass by a conveyance of real estate, *unless it appears from the conveyance that a lesser estate was intended.*

Id. (emphasis added). This statute does not support an interpretation that the Indenture conveyed a fee interest because the district court's order concluded that the language of the Indenture indicated that "a lesser state was intended." Both parties agree the Indenture limited the interest conveyed to the surface of the Property, and the issue was whether it was intended to convey a lesser estate in the surface. The statute does not impose a presumption in determining what estate is intended where there is language in the conveyance that limits the estate conveyed.

Missouri Flat next relies upon *Jacobson, et al. v. Jacobson, et al.*, 557 P.2d 156 (Utah 1976). The Court in *Jacobson*, however, did not interpret language used in a

conveyance. Instead, the deed in *Jacobson* conveyed unlimited fee title but the grantors sought to use parol evidence to show the document was intended to be an equitable mortgage and not a conveyance of title. *Id.* at 157. The other cases Missouri Flat cites along with *Jacobson* also involve attempts to use parol evidence to show an intent not reflected in the documents, and were not cases construing conveyance language. Those cases held the documents would be presumed to convey the interests stated, and that the party attempting to show a different intent by parol evidence had the burden of overcoming the presumption that the document means what it says, by clear and convincing evidence. That standard has not been applied to favor one construction over another in cases construing the language of a conveyance. Missouri Flat cites no case where the clear and convincing evidence standard was applied in construing the language of a deed.

Missouri Flat also argues the Indenture is ambiguous and therefore the Court should rule in its favor based on the subsequent conduct of Missouri Flat and its predecessors. This argument is wholly inconsistent with Missouri Flat's representations in the telephonic hearing of April 16, 2003. The following dialogue took place during that hearing:

THE COURT: Now, in terms of the status of this case, this is a Motion For Summary Judgment in which both sides are saying, "The deed says what it says and we're not offering any

extraneous evidence about the intention of the parties. Just look at the deed and try and determine what the intent of the parties was within the four corners of the document.” Right, Mr. Russell?

MR. RUSSELL: That’s correct.

Ah, the deed says what it says. It’s a record. It’s an old deed. I don’t know that were gonna get a lot of, ah - - well, I don’t know if extrinsic evidence would be admissible to show what the parties meant. But I don’t know that we could find anybody to tell us what they thought.

(T. 20-21.) Since Missouri Flat represented to the District Court that it was not offering any extrinsic evidence, it may not raise the issue on appeal. *Oliphant v. Estate of Brunetti, et al.*, 2002 UT App 375, ¶ 22, 64 P.3d 587 (party who did not argue parol evidence against motion for summary judgment below was precluded from raising it on appeal).

Finally, Missouri Flat argues the Indenture should be construed most strongly against the grantor because the language of the Indenture either clearly shows the intent to convey fee title or it is ambiguous. That contention simply cannot be supported. An agreement or a contract provision is not ambiguous just because the parties disagree as to its meaning. *Plateau Mining Co.*, 802 P.2d at 725. Also, arbitrary rules of construction such as construing a conveyance most strongly against the grantor should not be applied unless the intention of the grantor cannot be determined from the language of the deed. In *Haynes v. Hunt*, the Utah Supreme Court stated that:

When the intention of the parties to a deed or contract can be ascertained from it, such intention will prevail, unless in contravention of some rule of law; and, when such intention can be ascertained, arbitrary rules of law are not to be invoked, and will not control the construction of the instrument.

85 P.2d at 863 (quoting *Kirwin v. Farr*, 53 P. at 609). In *Russell v. Geyser-Marion Gold Mining Co.*, 423 P.2d 487 (Utah 1967), the Utah Supreme Court stated that “This rule of construction favoring grantees is one of the last rules of construction that should be applied and need not be resorted to so long as a satisfactory result can be reached by other more reliable rules.” *Id.* at 490.

D. MISSOURI FLAT FAILED TO PRESERVE CLAIMS OF LACHES, ESTOPPEL AND ADVERSE POSSESSION FOR APPELLATE REVIEW.

Missouri Flat argues it is entitled to a trial on the merits of its claims of adverse possession, laches, and estoppel, contending that the trial court granted summary judgment on those issues. (Aplt’s Br., pp. 22-23, 27-28.) To the contrary, the trial court did not grant summary judgment on those issues but instead disposed of the claims because Missouri Flat had failed to pursue them.

To properly preserve an issue for appellate review a party must raise it below such that the trial court is given “an opportunity to rule on [the] issue.” *Badger, et al. v. Brooklyn Canal Co., et al.*, 966 P.2d 844, 847 (Utah 1998). The purpose of this rule is to put

the trial judge “on notice of the asserted error” and to allow “the opportunity for correction at that time in the course of the proceeding.” *Id.* (quoting *Broberg v. Hess*, 782 P.2d 198, 201 (Utah Ct. App. 1989)). For a trial court to be “afforded an opportunity to rule on the issue,” the appellant must meet three (3) requirements. First, the issue must be raised in a timely fashion. Second, the issue must be “sufficiently raised . . . to a ‘level of consciousness’ before the trial court . . .” Third, the appellant must introduce supporting evidence or relevant legal authority to support its argument. *Hart v. Salt Lake County Commission, et al.*, 945 P.2d 125, 130 (Utah Ct. App. 1997).

Here, Missouri Flat cannot satisfy those requirements. First, the issues were not raised “timely” in response to the trial court’s question at the hearing. While arguments of adverse possession, laches, and estoppel had been pleaded and addressed in Missouri Flat’s briefing [Amended Answer and Counterclaim, R. 447-457, and Memorandum in Opposition to Second MSJ, R. 659-777], its answer to the trial judge’s question showed it had determined to no longer pursue the issues and that the trial court need not decide them. (T. 20-24.) Second, the same failure also demonstrates the issues were not sufficiently raised to a “level of consciousness” before the trial court. The purpose of these requirements is to give the trial court “the opportunity for a correction at that time in the course of the proceeding.” *Badger*, 966 P.2d at 847 (quoting *Broberg*, 782 P.2d at 201). When the trial

judge asked if there were any other issues to be decided, Missouri Flat's negative response removed those issues from the trial court's "level of consciousness," even assuming it had sufficiently raised them in the first place. Because Missouri Flat failed to timely bring those issues to the trial court's consciousness so they could be addressed before a final order was entered, it cannot now seek a trial on the merits of those claims.

Moreover, when Gold Mountain submitted the proposed Order, Missouri Flat did not object that the Order would resolve the issues of adverse possession, laches, or estoppel. The trial court's Decision did not address any of those claims. (R. 804-08). If Missouri Flat intended to pursue them as it now contends on appeal, its duty was to object to the proposed Order or otherwise raise to a "level of consciousness" the trial court's lack of ruling on the issues. Only by so doing would the trial court have had the "opportunity for a correction at that time in the course of the proceeding." Missouri Flat's failure to do so was a consent to the Order against it on the issues of adverse possession, laches, and estoppel.⁴

⁴ This Court has held that the "mere mention of an issue in the pleadings, when no supporting evidence or relevant legal authority is introduced at trial in support of the claim, is insufficient to raise an issue at trial and thus insufficient to preserve the issue for appeal." *LeBaron & Associates, Inc. v. Rebel Enterprises, Inc., et al.*, 823 P.2d 479, 483 (Utah Ct. App. 1991). In this action, the matter was decided after a hearing on dispositive motions and not at trial. The rule articulated in *LeBaron* required Missouri Flat to raise "supporting evidence or relevant legal authority" at the hearing, and not simply to rely upon the mention of those issues in its briefing, to preserve the issues of laches, estoppel, and adverse possession for appellate review.

Finally, it should be clear that Gold Mountain's proposed Order was not submitted with the intent to take advantage of Missouri Flat on those issues, nor did it have that effect. Missouri Flat's amended pleading before the trial court raised multiple claims as parties commonly do. However, its arguments at the hearing focused entirely on the interpretation of the Indenture, and its representations to the trial court indicated it had determined not to pursue the issues of adverse possession, laches, or estoppel. Because this action was filed to quiet title to the underlying property, the trial court's Decision needed to be implemented by an order which addressed all claims Missouri Flat had asserted, even if some were later abandoned. Moreover, the Order would not be final under Rule 54(b) of the Utah Rules of Civil Procedure unless it disposed of all claims between the parties. *Bradbury, et al. v. Valencia, et al.*, 2000 UT 50, ¶10, 5 P.3d 649 ("To be final, the trial court's order or judgment must dispose of all parties and claims to an action.")

For those reasons, Gold Mountain's proposed Order presented the simple conclusions that "Gold Mountain's claims against Missouri Flat in this matter are not barred by laches [sic] or estoppel" and that "Missouri Flat has not established any rights or title in the Subject Property . . . by adverse possession." (Addendum, Exhibit 3.) The Order was entered without any objection by Missouri Flat. Therefore, the Court should conclude that Missouri Flat abandoned its claims of adverse possession, laches, and estoppel in the trial

court and failed to preserve them for appellate review.

E. MISSOURI FLAT CANNOT PREVAIL ON ITS CLAIM OF TITLE BASED ON ADVERSE POSSESSION.

The critical aspect of Missouri Flat's adverse possession argument is that it claims title beyond the rights granted under the Indenture as interpreted by the district court. Missouri Flat argued below that "[E]ven if the Court were to adopt the interpretation of the Indenture proposed by plaintiff, Missouri Flat and its predecessors have overcome any limitation in the language of the Indenture by adverse possession." [Supplementary Memorandum, R. 477.] Thus, the argument presumes Gold Mountain is the owner of legal title to the surface of the Property, subject to an easement to use the surface for grazing and agricultural purposes and to cut and remove aspen and chaparral trees. As the owner of legal title, Gold Mountain is entitled to the presumptions of possession afforded by Utah Code Ann. §78-12-7 as follows:

In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property shall be presumed to have been possessed thereof within the time required by law; and the occupation of the property by any other person shall be deemed to have been under and in subordination to the legal title, unless it appears that the property has been held and possessed adversely to such legal title for seven years before the commencement of the action.

Id.

Utah courts have held that to overcome the presumption of possession under the statute, the party claiming adverse possession “must be able to show possession such that the legal titleholder is put on notice” that he is claiming adversely to the legal titleholder. Such notice must be based on “conduct clearly inconsistent with the rights of the titleholder.” *Dillman v. Foster*, 656 P.2d 974, 980 (Utah 1982). In the recent case of *Salt Lake County v. Metro West Ready Mix, Inc.*, 2004 UT 23, ¶23, 89 P.3d 155, the Utah Supreme Court held that to overthrow the presumption that the adverse party is not under subordination to the legal owner’s title, the party claiming adversely has the burden to establish the fact by competent evidence. *Id.* (quoting *English v. Openshaw*, 28 Utah 241, 78 P. 476, 477 (1904)). Because of the gravity of adverse possession claims – wresting title from otherwise rightful owners – claimants must strictly comply with all legal requirements. *Metro West*, 2004 UT 23, ¶ 23 (quoting *Martin v. Kearl*, 917 P.2d 91, 93 n.5 (Utah Ct. App. 1996)).

Missouri Flat does not claim it or its predecessors have occupied or possessed the Property for any purpose other than for grazing livestock. The use of the surface for grazing livestock is deemed to be pursuant to the easement granted since the Indenture expressly grants the right to use the surface for grazing and agricultural purposes. Therefore, such use and possession has not been hostile or adverse to Gold Mountain. Missouri Flat and its predecessors have done nothing to invade Gold Mountain’s non-grazing and non-

agricultural interests in the surface in such a manner as would give notice of an adverse claim. Without possession that is clearly adverse to Gold Mountain's fee interest and presumed possession, Missouri Flat cannot succeed in its claim for adverse possession as a matter of law.⁵

Missouri Flat also claims the benefit of Utah Code Ann. § 78-12-8 because it entered upon the surface under a claim of title. As noted above, it cannot use the Indenture to support a claim of title because its claim of adverse possession is based on the presumption that the Indenture granted an easement and First Party retained legal title. A grant of an easement cannot be used to support a claim of title because an easement is not considered a fee title interest. *Chournos, et al. v. D'Angillo, et al.*, 642 P.2d 710, 712 (Utah 1982) (a right of way is an easement not an interest in fee simple).

Missouri Flat also asserts it entered possession under claim of title based on the Trustee's Deed by which it acquired its interest in the surface of the subject property.

⁵Because Missouri Flat has a right to use the surface under the easement, this situation is similar to cotenancy cases where the occupying cotenant that has a right of possession is claiming adversely to the other cotenants. The Utah Courts have stated in those cases that for the occupying cotenant's possession to be considered adverse to the other co-tenants "the words or acts must be openly direct and hostile to the cotenancy relationship." *Massey v. Prothero, et al.*, 664 P.2d 1176, 1180 (Utah 1983). Missouri Flat has not asserted any use except that granted by the easement which clearly is not conduct directly hostile to Gold Mountain's title to the servient estate.

However, since the Trustee's Deed is effective as of July 19, 1994, and this action was filed in March, 2000, Missouri Flat cannot claim to have possessed the surface under the Trustee's Deed for the seven years required by Utah Code Ann. §78-12-8.

It is correct that the parties "disagree on the evidence concerning the payment of taxes" on the surface of the Property. (Aplt's Br., pp. 22-23, 27-28.) However, even if Missouri Flat could show it had paid all taxes on the surface, the Utah Supreme held in *Dillman v. Foster* that the "payment of taxes, standing alone, is insufficient to support" a claim of adverse possession. 656 P.2d at 980. Since Missouri Flat cannot show that it has possessed the surface adversely to Gold Mountain, the conflicting claims of payment of taxes do not have to be addressed for this Court to rule against Missouri Flat's claim of adverse possession.

F. MISSOURI FLAT CANNOT PREVAIL ON ITS CLAIMS OF LACHES OR ESTOPPEL.

The Utah Supreme Court has held that to successfully assert laches two elements must be established: "(1) The lack of diligence on the part of plaintiff; (2) An injury to the defendant owing to such lack of diligence." *Papanikolas Brothers Enterprises v. Sugarhouse Shopping Center Assoc, et al.*, 535 P.2d 1256, 1260 (Utah 1975); *see also Plateau Mining*, 802 P.2d at 731.

Missouri Flat cannot show unreasonable lack of diligence or injury. Since Missouri Flat and its predecessors have done nothing to give Gold Mountain or its predecessors notice that they claimed more than the right to use the Subject Property for grazing purposes, nothing has happened that would require diligence in making further inquiry as to the interests claimed or in bringing an action to confirm the rights of the parties. Missouri Flat's only claim of injury is that there has been a "loss of relevant witnesses." However, as noted above, Missouri Flat informed the district court that the Indenture was to be construed based on the language of the Indenture and it was not offering any extraneous evidence about the intention of the parties. Therefore loss of relevant witnesses is a non-issue.

Estoppel is an equitable defense that is similar to laches but requires more than mere delay. As Missouri Flat notes in its brief the requirements for estoppel are:

(1) an admission, statement, or act inconsistent with the claim afterwards asserted, (2) action by the other party on the faith of such admission, statement, or act, and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act.

Consolidated Coal Co. v. Division of State Lands and Forestry, et al., 886 P.2d 514, 522 (Utah 1994). Missouri Flat notes that the first requirement can be met by failure to act, but that applies only if the party otherwise has a duty to act. *Morgan, et al. v. Board of State*

Lands, et al., 549 P.2d 695, 697 (Utah 1976) (“or by his silence when he ought to speak...”). The *Morgan* case also requires that the person claiming reliance must “act[]with reasonable prudence and diligence” based upon such failure to act. *Id.*

Because Missouri Flat’s only basis for claiming estoppel is silence or inaction on the part of Gold Mountain and its predecessors, it must show there was “silence when [they] ought to speak” that “induced” Missouri Flat and its predecessors to act “with reasonable prudence and diligence” to their detriment. Here there is no relationship between Gold Mountain or its predecessors and Missouri Flat or its predecessors that imposes any duty to speak or act or inquire as to the interest Missouri Flat and its predecessors believed they owned in the Property. Missouri Flat does not allege that either it or its predecessors, or Gold Mountain or its predecessors, have acted in any way inconsistent with the rights granted and reserved by the Indenture as construed by the district court. In addition, there has been no cognizable injury. The claim of injury is deterioration of evidence due to loss of relevant witnesses. However, under the claims made in this case, the testimony of such witnesses would be irrelevant.

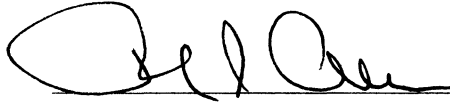
Missouri Flat has cannot support its claims of laches or estoppel, and the district court properly disposed of them in its Order.

VII. CONCLUSION; RELIEF SOUGHT.

The district court's order should be affirmed and this Court should rule that the Indenture granted to Missouri Flat's predecessors (Second Parties) an easement for the uses specified in the Indenture, that it conveyed fee title to the house and the land on which it sits, and that Gold Mountain's predecessor (First Party) retained all other rights and ownership in the Property. That interpretation of the Indenture is in harmony with controlling Utah case law and is necessary to give meaning and effect to all provisions of the Indenture. Case law from other states that is contrary to Utah case law should be disregarded.

The district court's Order regarding adverse possession, laches, and estoppel should be affirmed. Missouri Flat has abandoned those claims in the trial court and has not preserved them for appellate review. Moreover, the facts cannot support those claims on the merits, and the district court properly disposed of them against Missouri Flat.

DATED this 15th day of November, 2004.

A handwritten signature in black ink, appearing to read "Richard G. Allen", written over a horizontal line.

RICHARD G. ALLEN

RICHARDS, BRANDT, MILLER
& NELSON

A handwritten signature in black ink, appearing to read "Matthew C. Barneck", written over a horizontal line.

MATTHEW C. BARNECK

*Attorneys for Gold Mountain
Development LLC*

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of November, 2004, two (2) true and correct copies of the foregoing BRIEF OF APPELLEE, were served by United States mail, first class postage prepaid, on the following:

Carolyn B. McHugh, Esq.
Ronald G. Russell, Esq.
PARR WADDOUPS BROWN GEE & LOVELESS
185 South State Street, Suite 1300
Salt Lake City, UT 84111



Tab 1

acknowledging therein, and duly acknowledged to me that he executed the _____ as Guardian of the Estate of
Max Krotki, an Incompetent.

(NOTARY SEAL)

Carvel Mattsson
NOTARY PUBLIC
Residing at: Richfield, Utah

My commission expires:
May 8, 1953

Recorded at the request of CARVEL MATTSSON this 16th day of July A.D., 1951 at 1:00 P. M.

Irene Elder
PIUTE COUNTY RECORDER

S. B. #62039

THIS INDENTURE made this 26th day of April, A.D. 1951, by and between ANNIE LAURIE CONSOLIDATED GOLD MINES, a Utah corporation, First Party, and FRANKLIN TAFT PAXTON, CLAIINE TAD PAXTON, GENEVIEVE P. RAWSON, and GERALDINE PAXTON, all of Kanosh, Utah, Second Parties,

W I T N E S S E T H :

That First Party, expressly subject to the exceptions and reservations in favor of First Party its successors and assigns hereinafter mentioned and set forth, for and in consideration of the sum of One Thousand Dollars (\$1,000 00) and other good and valuable considerations paid by Second Parties, the receipt whereof is hereby acknowledged, hereby grants, bargains, sells and conveys unto Second Parties, for grazing and agricultural purposes, the surface of the following described Patented Lode Mining Claims in Gold Mountain Mining District, and the surface only of the Other Property described below, with the right to cut and remove from the surface of said Patented Lode Mining Claims and Other Property any or all of the quaking aspen and chaparral thereon, all of said mining claims and property being situated in Piute and Sevier Counties, State of Utah, to-wit:

Patented Lode Mining Claims:

Sevier, Gulch, Adaline and Sevier Mill Site in U. S. Lot #37.

Blue Bird, Red Bird, Blue Bird Fraction, Last Chance, Grass Hopper and Frank Jay in U. S. Lot #3488.

Lillian, Senator Stewart, Annie Laurie, Chief Devora, Royal George, National, H. S. & S. Overland and Minnie Maude in U. S. Lot #3207.

Lincoln and Garfield in U. S. Lot #4419.

Sevier Extension, Pointer, Erie, Erie Fraction, Sevier Extension Group and Sevier Consolidated Mill Site in U. S. Lots Nos. 4694-A, 4694-B and 4694-C.

Fraction A, Gold Mountain H. & J., Pioneer Mine, Utica No. 1, Utica Mine No. 2 and W. F. in U. S. Lots Nos. 4710 and 4769.

Dunmore, Bunker Hill, Free Press and Fourth of July in U. S. Lot #4421.

Senator Cannon in U. S. Lot #4415.

Rolling Hills No. 2, Rolling Hills, Weber, Maid of the Mist No. 2, Maid of the Mist No. 4, Hillside No. 3, Hillside No. 4; Jessie No. 6, Stanley, Maid of the Mist, Hillside, Hillside No. 2, Jessie No. 5, Jessie No. 1, Jessie No. 2, Jessie No. 3; Jessie No. 4 and Maid of the Mist No. 3 in U. S. Lots Nos. 4401 and 4416.

Rolling Hills No. 4, Rolling Hills No. 3, Gold Bird No. 2, Rolling Hills No. 6, Rolling Hills No. 5, Weber No. 2 and Weber No. 3 in U. S. Lots Nos. 4442, 4453 and 4455.

Pride of America No. 3, Pride of America No. 2, Maid of the Mist No. 5, Maid of the Mist No. 6, Hillside No. 5, Hillside No. 7, Hillside No. 6, Hillside No. 8, Jessie No. 7,

Jessie No. 8, Jessie No. 9, Jessie No. 10 and Gold Bird Nos. 3 to 18, both inclusive, in U. S. Lots Nos. 4442, 4453 and 4455.

Bird of all Birds in U. S. Lot #4462.

James G. Elaine, Surprise, Outzen, M. J. & S., Hazel Kirk, Morton, Lookout, Snow Girl and Mogul in U. S. Lots 4291 and 4301.

Blue Ledge, Lookout, No. 1, No. 2, Miller Fraction, Southerly Extension of No. 2, No. 1 Fraction, Extension of the Erie, Ute Fraction, Ute, Blister, and Fish Creek Millsite in U. S. Lots Nos. 4430A and 4430B.

Gold City in U. S. Lot No. 3851.

Holland and Placer Gulch in U. S. Lot No. 3334.

Deer Park and D. J. in U. S. Lot No. 4457.

Dandy Quill in U. S. Lot No. 3850.

Outzen Fraction in U. S. Lot No. 4965.

Tom Boy and Edith in U. S. Lot No. 4939.

Good Enough, Horse Shoe, Horse Shoe Fraction No. 2, Geo. S. Fraction, Crown Point, Palmer G. Breckenridge No. 2, Basin Fraction, Fort Dodge, Mineral Point, Statehood, Good Enough Fraction, Horse Shoe Fraction, Geo. S., Oro Chain, Mascot Fraction, Palmer G. Fraction, Basin, Capt. Dodge, Dodge Fraction, Mineral Point Fraction and Mammoth in U. S. Lot No. 6444.

Overland Fraction in U. S. Lot No. 4586.

Together with the one story frame house located in Upper Kimberly at the fork of the road leading to Sevier and Marysville, Utah.

Other Property:

The North one-half, and the Northwest Quarter of the Southwest Quarter, and Lots 1, 2, 3, 4, and 5 of Section 36, Township 26 South, Range 5 West, Salt Lake Meridian.

And for the consideration aforesaid First Party hereby conveys and quit claims unto Second Parties, for grazing and agricultural purposes, the surface of the following described patented lode mining Claims in Gold Mountain Mining District situate in Piute County, Utah:

Annie Mine, Geneva, Penny Mining Claim and Switzerland, Survey No. 5297.

Columbia Mine, Yukon Mine, U. S. Treasury Mine, Britannia, Klondike Mine, Bank of England, - excluded area in conflict with 5139 LeRoy Mining Claim, Sur. No. 5045
Halifax No. 6 - Surv. No. 5174.

EXPRESSLY EXCEPTING AND RESERVING HOWEVER, unto the said First Party its successors and assigns, all mines and minerals of whatsoever kind or nature situate, lying or being on, in or under all or any of the patented lode mining claims and other property above described, together with the right and privileges at all times for First Party its successors and assigns and its and their agents and workmen to enter into and upon all or any of said patented lode mining claims and other property hereinabove described or any part thereof, and to search for, work, mine, develop, remove, extract, store, treat, mill and carry away all said mines and minerals of whatever kind or nature the same may be, and to sink pits and shafts, and to make and drive tunnels, drifts, winzes and other underground workings of every kind, and to occupy and use such parts of the surface hereby conveyed for the construction of such roads and

and other structures, pipe, power and transmission lines, dumps, tailings ponds, and other facilities, as may be necessary in connection with any of said mining, milling, or other operations, as fully and entirely as if said First Party its successors and assigns remained the owner in fee simple of said surface, without any liability whatever on the part of First Party its successors or assigns to Second Parties and their respective heirs, executors, administrators and assigns, for any loss, damage or injury that may occur to any property of Second Parties and their respective heirs, executors, administrators and assigns, or to said surface by reason of searching for, working, developing, mining, extracting, storing, treating, milling, removing and carrying away all of said mines and minerals of every kind or nature, and/or utilizing said surface as aforesaid in connection therewith, provided, however, First Party its successors and assigns shall conduct all of said searching, developing, working, mining, storing, treating, milling, removing and transporting operations and all acts and things connected therewith or incidental thereto in such manner as will cause as little inconvenience to or interruption of the use of said Surface by Second Parties and their respective heirs, executors, administrators and assigns as is consistent with the proper conduct and carrying on of any of said mining, milling, or other operations.

Second Parties are hereby given the right to use, for stock watering purposes, such water rights as First Party may have that are available and applicable for such purposes, provided, however, Second Parties, their heirs, executors, administrators and assigns, shall not do or permit anything to be done which will in any manner or to any extent impair or destroy any of the water rights of First Party, and First Party its successors and assigns shall not be liable or responsible for any failure or diminution of any of said water rights, and provided further that said right of Second Parties to so use said water rights shall not in any manner or to any extent interfere with or prevent the use thereof for mining or milling operations by First Party its successors and assigns on any part of the property of First Party.

This conveyance is made expressly subject:

(a) To any and all property taxes or other taxes that may be levied or assessed for the year 1951 and thereafter upon any of the surface rights hereby conveyed;

(b) To all existing highways, roads, easements and rights of way and subject to the right of First Party, its successors or assigns, to use and enjoy such highways, roads, easements and rights of way in common with others; and

(c) To the right of First Party, its successors and assigns to enter into and upon the surface hereby conveyed for the purpose of dismantling or removing any and all buildings and other structures (excepting only the one story frame house located in Upper Kimberly at the fork of the road leading to Sevier and Marysville, Utah), machinery, equipment, supplies, pipe, power, transmission and other lines, and any and all other personal property situated upon any part of the surface hereby conveyed.

TO HAVE AND TO HOLD the above described surface and building hereby conveyed unto Second Parties, their heirs, executors, administrators and assigns forever, subject to the aforesaid exceptions, reservations and restrictions.

IN WITNESS WHEREOF, First Party has caused these presents to be executed in its corporate name by its proper officers thereunto duly authorized and its corporate seal to be hereto affixed the day and year first above written.

ATTEST:

\$22.00 in U. S. Revenue
Stamps Attached

ANNIE LAURIE CONSOLIDATED GOLD MINES

Robert E. Mark

(CORPORATE SEAL)

By Charles L. Wheeler
President

STATE OF UTAH)
COUNTY OF SALT LAKE) SS

On the 16th day of May, 1951, personally appeared before me Charles L. Wheeler who being by me duly sworn did say that he is the President of Annie Laurie Consolidated Gold Mines, and that the within

going instrument was signed in half of said corporation by authority of resolution of its directors and said Charles L. Wheeler duly acknowledged to me that said corporation executed and that the seal affixed is the seal of said corporation.

SEAL)

ssion Expires:

11, 1951

at the request of Taft Paxton this 20th day of July A.D., 1951 at 10:00 A. M.

Paul S. Roberts
Notary Public. For the State of
Utah, residing at Murray City, Utah

Irene Elder
PIUTE COUNTY RECORDER

2053

Tab 2

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MAY 30 2003

6th DISTRICT COURT
PIUTE COUNTY

CLERK

DISTRICT COURT, PIUTE COUNTY, UTAH

Piute County Courthouse

Junction, Utah 84740

Telephone: 435-577-2841 Fax: 435-577-2433

GOLD MOUNTAIN DEVELOPMENT LLC,

Plaintiff,

vs.

MISSOURI FLAT LTD., and others,

Defendants.

**DECISION ON MOTIONS FOR
SUMMARY JUDGMENT**

Case No. 000600006

Assigned Judge: DAVID L. MOWER

Cross-motions for summary judgment require me to interpret a document. There is no dispute about the words in the document, neither is it claimed to be ambiguous. The document is entitled "Indenture." It is a title transfer document. I will refer to it as a deed. The grantor was plaintiff's predecessor. The grantee was defendant Missouri Flat's predecessor.

The dispute centers on this question: Who owns the land?

Plaintiff wants this Court to sign

[5.] A judgment and decree quieting fee title ... in Plaintiff, subject to the easements for grazing and agricultural purposes and to cut and remove quaking aspen and chaparral now owned by [defendant] (Language taken directly from paragraph 5 of the Prayer for Relief in the Complaint filed April 4, 2000)

The defendant wants the Court to

... [E]nter ... a decree ... declaring that [defendant] is the owner all of surface rights ...

(From paragraph b. of the Prayer for Relief in the Counterclaim filed May 5, 2000)

In other words, defendant wants to own the entire surface. Plaintiff wants to own the land, but the ownership would be subject to defendant's right to use the surface for certain purposes.

The deed is a long and wordy document. In it, the phrase "First Party" refers to Plaintiff, while "Second Parties" refers to Defendant. I have used my word processor to key in almost every word in it. (I will include this work as an endnote to this decision.)¹ Then I have removed words not essential to my analysis. Here is the result (with emphasis on certain words added by me):

First Party ... hereby grants, bargains, sells and conveys unto Second Parties, for grazing and agricultural purposes, the surface of ..., with the right to cut and remove from the surface ... any or all of the quaking aspen and chaparral thereon

Patented Lode Mining Claims

(A list whose details are not important to my analysis)

Together with the one story frame house located in

Other Property:

(A list as above.)

... RESERVING... unto the ... First Party ... the right and privilege ... to enter ... upon ... and to occupy ... such parts of the surface ... as may be necessary ... as fully and entirely as if ... First Party ... had remained the owner

**...
TO HAVE AND TO HOLD** the above described surface and building ...
unto Second Parties ... forever, subject to the ... exceptions, reservations and restrictions.

I conclude that defendant owns the following:

1. The frame building and that portion of the surface which it covers in fee simple absolute; and
2. a permanent easement to use all the rest of the surface for grazing and agricultural purposes, subject to plaintiff's right to enter for certain purposes.

Here are the reasons why I have reached my conclusion. First, the plain language of the deed indicates that the grantor intended to convey something less than the full rights to the surface. The specific words are, "First Party ... sells ... unto Second Parties, **for grazing and agricultural purposes ...** ." The limiting phrase is that which is shown in bold face. It begins with the word "for," which means "used as a function word to indicate purpose." From Merriam-Webster Online Dictionary, <http://www.m-w.com>. The limiting phrase is positioned within 3 words of the transfer verb "sells."

The use of the word "for" was intended to show the purpose for which the surface could be used. By the same token, it excludes all other such purposes.

Second, the grantor reserved something unto itself. Specifically, the grantor reserved unto itself the right to enter and to occupy. Such a reservation can only be consistent with a grant of less than the full rights to the surface.


Third, the use of the words "to have and to hold ..." do not necessarily mean that the grant

is one of fee simple absolute. It appears to me that that which was granted forever was "the above described surface," the rights to which had already been described and limited.

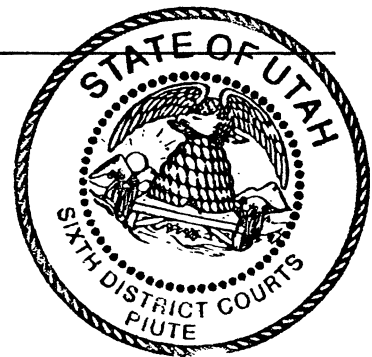
Fourth, it appears that the grant of the building was made in fee simple absolute as to the surface because it was permanently attached to the land and the grantor must have wanted to give the grantee exclusive use and control of it.

Mr. Allen is appointed to draft an appropriate order and to submit it for execution by following the procedures set forth in Rule 4-504, Code of Judicial Administration.

Date May 29, 2003



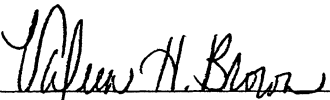
David L. Mower
District Court Judge



CERTIFICATE OF SERVICE

On May 30, 2003 a copy of this DECISION ON MOTIONS FOR SUMMARY JUDGMENT was sent by M=first- class mail, P=Clerk's office pickup box, F=Fax to:

<u>Addressee</u>	<u>Method</u>	<u>Addressee</u>	<u>Method</u>
Richard G. Allen Attorney at Law P.O. Box 254 Lehi, UT 84043	m	Warren H. Peterson Attorney at Law 362 W. Main St. Delta, UT 84624	m
Ronald G. Russell Attorney at Law P.O. Box 11019 Salt Lake City, UT 84147	m		



Tab 3

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NOV 07 2003

6th DISTRICT COURT
PIUTE COUNTY

CLERK

RICHARD G. ALLEN (A0048)
2975 West Executive Parkway
Suite 200
Lehi, Utah 84043
Telephone: (801) 766-1580
Fax: (801) 407-8380
Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
IN AND FOR PIUTE COUNTY
STATE OF UTAH

GOLD MOUNTAIN DEVELOPMENT
LLC, a Utah Limited Liability Company,

Plaintiff,

v.

MISSOURI FLAT LTD., a Utah Limited
Partnership, TERREL WOODARD
SANDBERG and CYNTHIA CRANE
SANDBERG, husband and wife,
individuals, WILLIAM OHLINGER, an
individual, KIMBERLY GOLD, INC, a
New York Corporation, and DOES I TO X,
parties unknown,

Defendants,

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER AND DECREE

Civil No. 000600006

Judge David L. Mower

Cross-motions for Summary Judgment were filed by plaintiff Gold Mountain Development, LLC ("Gold Mountain") and defendant Missouri Flat Ltd ("Missouri Flat") in the above entitled matter and several hearings have been held on those motions. Gold

Mountain was represented by Richard G. Allen. Missouri Flat was represented by Warren Peterson and Richard Waddingham of Waddingham & Peterson and by Ronald Russell of Parr Waddoups Brown Gee & Loveless.

After reviewing the cross-motions and the memoranda, exhibits and affidavits in support of the same and considering the arguments of counsel and being fully advised in the premises and for good cause shown, the Court makes the following findings of fact, conclusions of law and order and decree in this matter.

FINDINGS OF FACT

1. Gold Mountain filed this action to clear up title problems set out in the Complaint and to quiet title in Gold Mountain to certain patented mining claims and other real property described in Exhibit A to the Complaint (the "Subject Property"). The Subject Property is also described in EXHIBIT A hereto.

2. Gold Mountain has obtained judgment against or dismissed all defendants except for Missouri Flat.

3. Gold Mountain seeks a judgment and decree quieting title to the Subject Property in Gold Mountain subject to easements in Missouri Flat for grazing and agricultural purposes and to cut and remove quaking aspen and chaparral.

4. Missouri Flat seeks a decree declaring that Missouri Flat is the owner of all surface rights in the Subject Property subject to certain rights of Gold Mountain to use the surface for mining purposes.

5. The dispute over the rights to the surface of the Subject Property originate in a document referred to as an Indenture dated April 26, 1951 and recorded July 20, 1951 at Book J of Mining, Page 615 of the records of the Piute County Recorder's Office (the "Indenture").

6. Gold Mountain is the successor in interest to the "First Party", the grantor, in the Indenture.

7. Missouri Flat is the successor in interest to the "Second Parties", the grantees, in the Indenture.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over this matter.

2. The cross-motions for summary judgment warrant the Court's granting of summary judgment in this matter.

3. Gold Mountain's claims against Missouri Flat in this matter are not barred by laches or estoppel.

4. The Indenture is not ambiguous and its meaning can be determined by construction of the terms of the Indenture.

5. The plain language of the Indenture indicates that the grantor intended to convey something less than the full rights to the surface. The specific words are, "First Party ... sells ... unto Second Parties, for grazing and agricultural purposes" The limiting phrase being for grazing and agricultural purposes. The limiting phrase begins with the word "for," which means "used as a function word to indicate purpose." *Merriam-Webster Online*

Dictionary, [http: www.m-w.com](http://www.m-w.com). The limiting phrase is positioned within 3 words of the transfer verb “sells.”

6. The use of the word “for” was intended to show the purpose for which the surface could be used. By the same token, it excludes all other such purposes.

7. The grantor reserved something unto itself. Specifically, the grantor reserved unto itself the right to enter and to occupy. Such a reservation can only be consistent with a grant of less than the full rights to the surface.

8. The use of the words “to have and to hold...” do not necessarily mean that the grant is one of fee simple absolute. It appears that that which was granted forever was the “the above described surface,” the rights to which had already been described and limited.

9. It appears that the grant of the building was made in fee simple absolute as to the surface because it was permanently attached to the land and the grantor must have wanted to give the grantees the exclusive use and control of it.

10. Based on the above construction of the Indenture, Missouri Flat owns the following rights and interests in the Subject Property:

- a. The one story frame house located in the Upper Kimberly at the fork of the road leading to Sevier and Marysvale, Utah and that portion of the surface which it covers in fee simple absolute;

- b. A permanent easement to use the rest of the surface for grazing and agricultural purposes, subject to Gold Mountain's right to enter the surface for mining and other purposes as set out in the Indenture; and
- c. A permanent right and easement to cut and remove from the surface all of the quaking aspen and chaparral thereon.

11. Missouri Flat has not established any rights or title in the Subject Property beyond the rights granted by the Indenture by adverse possession.

12. Based on the above construction of the Indenture, Gold Mountain owns in fee simple absolute all other rights and interests, including the surface, in and to the Subject Property subject only to the rights of Missouri Flat in the Subject Property set out in paragraph 10.

ORDER AND DECREE

IT IS THEREFORE ORDERED AND DECREED AS FOLLOWS:

1. The cross-motions for summary judgment by Gold Mountain and Missouri Flat are granted and denied to the extent that the Court finds that the rights and title to the Subject Property are owned and held as herein provided.

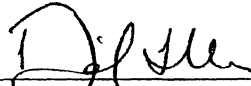
2. Gold Mountain is the owner in fee simple absolute and is entitled to possession of and title to all rights and interests, including the surface, in and to the Subject Property as described in EXHIBIT A attached hereto to and made a part hereof subject only to the rights of Missouri Flat in the Subject Property set out below.

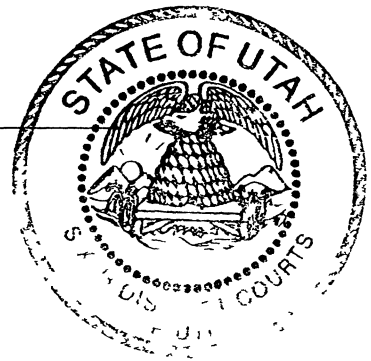
3. Missouri Flat is the owner of and is entitled to possession of and title to the following rights and interests in the Subject Property:

- a. The one story frame house located in the Upper Kimberly at the fork of the road leading to Sevier and Marysvale, Utah and that portion of the surface which it covers in fee simple absolute;
- b. A permanent easement to use the rest of the surface for grazing and agricultural purposes, subject to Gold Mountain's right to enter the surface for mining and other purposes as set out in the Indenture; and
- c. A permanent right and easement to cut and remove from the surface all of the quaking aspen and chaparral thereon.

DATED Aug 6, 2003

BY THE COURT


David L. Mower
District Court Judge



CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Findings of Fact, Conclusions of Law and Order and Decree was mailed, postage prepaid, on this 23rd day of June, 2003 to the following:

Ronald G. Russell
PARR WADDOUPS BROWN GEE & LOVELESS
P.O. Box 11019
Salt Lake City, UT 84147-0019

Warrant G. Peterson
Richard Waddingham
WADDINGHAM & PETERSON
362 West Main Street
Delta, UT 84624

A handwritten signature in black ink, appearing to read "W. Peterson", written over a horizontal line.

2003171.1

EXHIBIT A

Patented Mining Claims
(Piute County)

<u>CLAIM NAME</u>	<u>MINERAL SURVEY NO.</u>
FRACTION A GOLD MOUNTAIN H&J PIONEER MINE UTICA NO. 1 UTICA NO. 2 W. F. LODE	4769 & 4710
BIRD OF ALL BIRDS	4462
BLUE LEDGE LOOKOUT NO. 1 NO. 2 MILLER FRACTION SOUTHERLY EXTENSION OF NO. 2 NO. 1 FRACTION EXTENSION OF THE ERIE UTE UTE FRACTION BLISTER FISH CREEK MILL SITE	4430A & 4430B
DANDY QUILL	3850
SEVIER EXTENSION ERIE ERIE FRACTION POINTER SEVIER EXTENSION GROUP SEVIER CONSOLIDATED MILL SITE	4694-A, 4694-B & 4694-C
MAMMOTH HORSE SHOE HORSE SHOE FRACTION PALMER G. PALMER G. FRACTION	6444

<u>CLAIM NAME</u>	<u>MINERAL SURVEY NO.</u>
HORSE SHOE FRACTION NO. 2	6444 (continued)
ORO CHAIN	
GEORGE S.	
GEORGE S. FRACTION	
GOOD ENOUGH	
GOOD ENOUGH FRACTION	
CAPTAIN DODGE	
BASIN MINING CLAIM	
MINERAL POINT	
CROWN POINT	
MINERAL POINT FRACTION	
BASIN FRACTION	
BRACKENRIDGE NO. 2	
MASCOT FRACTION	
STATEHOOD	
DODGE FRACTION	
FORT DODGE	
RED BIRD	3488
BLUE BIRD	
BLUE BIRD FRACTION	
FRANK JAY	
GRASSHOPPER	
LAST CHANCE	
OUTZEN FRACTION	4965
BUNKERHILL	4421
DUNMORE	
FREE PRESS	
FOURTH OF JULY	
TOM BOY	4939
EDITH	
DEER PARK	4457
D. J.	
SENATOR CANNON	4415
LINCOLN	4419

CLAIM NAMEMINERAL SURVEY NO.

GARFIELD

4419 (continued)

SEVIER

37

GULCH

ADALINE

SEVIER MILLSITE

ROLLING HILLS NO. 2

4401 & 4416

ROLLING HILLS

WEBER

MAID OF THE MIST NO. 2

MAID OF THE MIST NO. 4

HILLSIDE NO. 3

HILLSIDE NO. 4

JESSIE NO. 6

STANLEY

MAID OF THE MIST NO. 3

HILLSIDE NO. 2

HILLSIDE

JESSIE NO. 1

JESSIE NO. 2

JESSIE NO. 3

JESSIE NO. 4

JESSIE NO. 5

MAID OF THE MIST

ROLLING HILLS NO. 3

4453

ROLLING HILLS NO. 4

GOLD BIRD NO. 2

ROLLING HILLS NO. 5

ROLLING HILLS NO. 6

WEBER NO. 2

4442

WEBER NO. 3

PRIDE OF AMERICA NO. 2

PRIDE OF AMERICA NO. 3

MAID OF THE MIST NO. 5

MAID OF THE MIST NO. 6

HILLSIDE NO. 5

HILLSIDE NO. 6

HILLSIDE NO. 7

<u>CLAIM NAME</u>	<u>MINERAL SURVEY NO.</u>
HILLSIDE NO. 8	
JESSIE NO. 7	
JESSIE NO. 8	
JESSIE NO. 9	
JESSIE NO. 10	
GOLD BIRD NO. 3	
GOLD BIRD NO. 4	
GOLD BIRD NO. 5	
GOLD BIRD NO. 6	
GOLD BIRD NO. 7	
GOLD BIRD NO. 8	
GOLD BIRD NO. 9	
GOLD BIRD NO. 10	
GOLD BIRD NO. 11	
GOLD BIRD NO. 12	
GOLD BIRD NO. 13	
GOLD BIRD NO. 14	
GOLD BIRD NO. 15	
GOLD BIRD NO. 16	
GOLD BIRD NO. 17	
GOLD BIRD NO. 18	
HOLLAND	
PLACER GULCH	
GOLD CITY	
JAMES G. BLAINE	
MORTON	
SURPRISE	
LOOKOUT	
OUTZEN	
SNOW GIRL	
M. J. & S.	
MOGUL	
HAZEL KIRK	
ANNIE LAURIE	
SENATOR STEWART	

4442 (continued)

4455

3334

3851

4301

4291

3207

<u>CLAIM NAME</u>	<u>MINERAL SURVEY NO.</u>
LILLIAN CHIEF DEVORA ROYAL GORGE NATIONAL H. S. & S. OVERLAND MINNIE MAUD	3207 (continued)
OVERLAND FRACTION	4586
ANNIE MINE GENEVA FENNY SWITZERLAND	5297
COLUMBIA YUKON U. S. TREASURY BRITANNIA KLONDIKE BANK OF ENGLAND	5170

Other Property
(Piute County)

Township 26 South, Range 5 West, SLB&M

Section 36: Lots 1, 2, 3, 4 and 5, NW $\frac{1}{4}$ SW $\frac{1}{4}$, S $\frac{1}{2}$ N $\frac{1}{2}$

(Sevier County)

Township 26 South, Range 5 West, SLB&M

Section 36: N $\frac{1}{2}$ N $\frac{1}{2}$

Certificate of Service

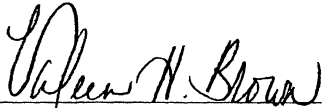
I, Valeen H. Brown Piute County Clerk certify that a true and correct copy of the Findings of Fact, Conclusions of Law and Order and Decree was mailed, postage prepaid, on this 7th day of November, 2003 to the following:

Ronald G. Russell
Parr Waddoups Brown Gee and Loveless
P O Box 11019
Salt Lake City, Utah 84747-0019

Warren H Peterson
362 West Main Street
Delta Utah 84624

Richard G. Allen
2975 West Executive Parkway Suite 200
Lehi, Utah 84043

Signed this 7th day of November 2003.



Valeen H. Brown, Piute County Clerk