

2004

Gold Mountain Development LLC v. Missouri Flat LTD : Reply Brief

Utah Court of Appeals

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BRIEF

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DOCKET NO. 2004 0093**

IN THE COURT OF APPEALS OF THE STATE OF UTAH

GOLD MOUNTAIN DEVELOPMENT
LLC,

Plaintiff & Appellee,

vs.

MISSOURI FLAT LTD.; Et Al.,

Defendants & Appellants.

REPLY BRIEF OF APPELLANT
MISSOURI FLAT LTD.

(Assigned from the Utah Supreme Court)

Docket No. 20040093

Civil No. 000600006

APPEAL FROM SUMMARY JUDGMENT ENTERED IN CASE NO. 000600006
IN THE SIXTH JUDICIAL DISTRICT COURT, PIUTE COUNTY, STATE OF UTAH
HONORABLE DAVID L. MOWER, DISTRICT JUDGE

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

GOLD MOUNTAIN DEVELOPMENT LLC,	REPLY BRIEF OF APPELLANT MISSOURI FLAT LTD.
Plaintiff & Appellee,	(Assigned from the Utah Supreme Court)
vs.	Docket No. 20040093
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APPELLANT'S REPLY BRIEF

I. ARGUMENT

A. Missouri Flat Neither Waived Its Arguments of Contract Construction Nor Conceded that the Indenture Expressly Conveyed Only an Easement.

The one thing that Missouri Flat and Gold Mountain seem to agree on is that the Indenture should be construed according to ordinary rules of contract construction. [See, Appellee's Brief, at p. 11.] The first rule to be applied in interpreting the deed is that the court should "give effect to the intent of the parties as expressed in the deed as a whole." *Hanock v. Planned Development Corp.*, 791 P.2d 183, 185 (Utah 1990). [See also, Appellee's Brief, at 11.] Missouri Flat and Gold Mountain each vigorously assert that, if all of the language is considered and made meaningful, it is apparent that its interpretation is correct as a matter of law. Of course, it cannot be apparent from the face of the Indenture both that the surface was conveyed in fee and that only an easement was granted. Although each party urged a resolution of the matter based upon the wholesale adoption of its interpretation of the Indenture, there were actually three issues before the trial court and now before this Court. First, does the language used in the Indenture support, as a matter of law, Missouri Flat's position that the surface was granted to its predecessor in fee? Second, is Gold Mountain correct that the Indenture unambiguously

created only an easement for grazing and agricultural purposes? Third, if when read in its entirety the Indenture is not clear as to the intent of the parties, what interest should be deemed to have been conveyed? Although Missouri Flat and Gold Mountain each argued that the language of the deed, when considered in total, supported its client's position as to the interest conveyed, neither conceded that the other's position was apparent from that same language. Indeed, the very portions of the Indenture that support Missouri Flat's argument that the surface was conveyed in fee, refute Gold Mountain's position that the creation of an easement is apparent. Moreover, in considering the matter de novo, this Court should not disregard either the conflicting language in the Indenture or the rules of deed construction.

Likewise, there is nothing in the transcript of the post-hearing, telephonic conference with the trial court, that supports a finding that either party conceded the other's position was obvious from the face of the document. The trial court had before it numerous briefs and affidavits filed by Gold Mountain and Missouri Flat that argued for diametrically opposed interpretations of the Indenture. [*See*, R. 322-332; 333-335; 336-339; 340-342; 343-364; 365-366; 367-376; 379-378; 379-396; 399-405; 406-409; 442-444; 472-486; 487-602; 603-637; 638-640; 641-644; 645-658; 659-777; 778-789.] After the extensive briefing was completed, the trial court held oral argument on the pending

motions for summary judgment against Missouri Flat. [See, R. 798]. The transcript of the actual argument on the summary judgment motions was not made a part of the record.

[See, R. 831-833] After the hearing, the trial court scheduled a telephonic conference to address the court's questions and his notes, which were attached to the Notice of Hearing.

[See, R. 799-802] Thus, by the time of the telephonic hearing the matter had been extensively briefed and argued to the trial court. Consequently, the trial court also knew that Missouri Flat vehemently disagreed with Gold Mountain's interpretation of the Indenture. There is nothing in any of the memoranda filed with the trial court to suggest that Missouri Flat ever conceded that, if the trial court did not find that the deed conveyed the surface in fee, it must find that it unambiguously conveyed only an easement.

Likewise, Gold Mountain never conceded that if its position did not prevail, the court must find a conveyance of fee simple from the face of the document. In arguing for their respective positions, each party highlighted the portions of the Indenture that it believed weighed in favor of an interpretation favorable to its position, thereby calling the court's attention to those that conflicted with a finding for the opposition. The trial court was always free to find that portions of the Indenture conflicted and that the intent of the grantor was not clear from the face of the document. Nothing that happened during the subsequent telephone conference changed that.

The purpose of the telephone call was to allow the trial court to “get back together with both of you and ask my questions and see if you could give me some more help.” [R. 843, at p. 5.] The court then raised a number of specific questions that counsel for the parties were asked to address. During the telephonic conference, counsel for Missouri Flat continued to argue that language of the Indenture supported a finding that the deed conveyed the surface in fee simple. [R. 843, at 16-20.] After both parties reiterated their positions that the Indenture if read properly supported their client’s position, the trial court stated the language quoted by Gold Mountain that neither party was offering “any extraneous evidence about the intention of the parties.” [R. 843, at 20.] The trial court also stated that the parties were asking him to “look at the deed and try and determine what the intents of the parties was within the four corners of the document.” [R. 843, at 20.] Counsel for Missouri Flat responded that he did not “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.” [R. 843, at pp. 20-21.] That statement simply acknowledges that, as was argued in the briefs on laches and estoppel already before the court, no one was still alive who could provide testimony about what was intended. [See, 659-777, at p. 10.] There is nothing about counsel’s response that prevented the trial court from concluding that neither Missouri Flat’s nor Gold Mountain’s position was

clear from the document. Likewise, counsel for Missouri Flat never conceded that if it did not prevail, the Indenture must unambiguously grant only an easement. The trial court was asked to review the entire document and “try [to] determine” the intent of the grantor. If that intent was not apparent, the court should have applied additional rules of construction to resolve the issue.

Missouri Flat continues to assert that a careful review of the language of the Indenture supports a finding that it conveyed the surface in fee to Missouri Flat’s predecessor. If, however, this Court does not agree, the language highlighted by Missouri Flat renders the deed at least ambiguous. If the meaning of the grantor is unclear, a finding of a conveyance in fee is favored and any ambiguity should be resolved in favor of the grantee.

B. The Indenture Supports A Finding that The Surface was Conveyed in Fee.

1. The “As If” Language Shows Expressly that Fee to the Surface Was Conveyed.

The Indenture states that the grantor reserves the right to continue to use “the surface hereby conveyed” in connection with the grantor’s mining activities “as fully and entirely as if said First Party [Gold Mountain’s Predecessor] . . . remained the owner in fee simple of said surface.” [Indenture, at p. 2-3 (emphasis added), attached as Exhibit 1

to Appellant's Brief.] This language alone is enough to find error in the trial court's ruling that the Indenture clearly and unambiguously granted only an easement. Gold Mountain argues that the Indenture gave Missouri Flat's predecessor an easement but retained to the grantor the fee of the surface. If that were the case, Gold Mountain's predecessor would "in fact" remain the owner in fee of the surface. Yet, it is obvious from the "as if" language quoted above that this was not the case. The words "as if" suggest a hypothetical situation that is different than what actually exists. This language simply cannot be reconciled with a finding that the grantor retained the surface in fee.

Gold Mountain asks this Court to ignore the obvious import of this language and instead adopt the trial court's position that the "as if" language was simply an attempt to allow the grantor the "broadest possible right to use the surface." [*See*, Appellee's Brief, at p. 20.] That analysis, however, ignores the way in which the grantor sought to preserve that right. The Indenture did not state that the grantor could continue to use the surface because he remained the owner in fee of the surface. Rather, it expressly states that he should be given rights to the surface in connection with his mining activities "as if" he remained the owner in fee of the surface. It is apparent from the words used that the grantor understood that, after this conveyance to Missouri Flat's predecessor, he would no longer "actually" be the owner in fee of said surface.

Missouri Flat does not disagree that the grantor wanted to retain very broad rights to use the surface in connection with its mining activities. Likewise, Missouri Flat does not dispute the cases and authorities cited by Gold Mountain which state that ownership in fee simple provides the “greatest possible aggregate of rights.” [See, Appellee Brief, at p. 20.] The intent of the grantor to retain broad rights to use the surface for mining does not change the acknowledgment in the document itself that the grantor understood that he no longer owned the surface in fee. The document states that the grantor may continue to use the surface in connection with its mining activities “as fully and entirely as if” it “remained the owner in fee simple of said surface.” The use of the words “as if” would make no sense if the grantor continued to own the surface in fee. It is only in the context of a severance of the surface in fee from the mineral estate in fee that the hypothetical statement gives meaning to the document. Although the grantor had conveyed the surface in fee, he retained the broadest possible rights to use that surface in connection with the activities enumerated in the same paragraph. Those activities include intrusions on the surface to facilitate the mining activities anticipated in connection with the use of the mineral estate which the grantor did retain in fee. Contrary to Gold Mountain’s suggestions, there is no way to harmonize the “as if” language with its position that the grantor retained the surface in fee.

This language alone is sufficient to establish that the Indenture conveyed the surface in fee to Missouri Flat's predecessor. At the very least, however, it makes the grant ambiguous. There is no way to neutralize the "as if" language to support the trial court's decision that the Indenture unambiguously conveyed only an easement. Thus, the trial court must be reversed.

2. The Decision of *Haynes v. Hunt* is Not Inconsistent With A Finding that the Indenture Conveyed the Surface in Fee.

Gold Mountain relies primarily on the 1939 decision of the Utah Supreme Court in *Haynes v. Hunt*. 85 P.2d 861 (Utah 1939). That case, like every other decision interpreting a deed in Utah, starts from the premise that the intent of the grantor should be determined by considering the "whole deed and every part thereof." 85 P.2d at 863. If the deed under consideration had provisions like those in this case, it is likely that the result would have been different. For example, there was no statement in the deed to Hunt that the grantor could continue to use the lakes and lake front property as if the grantor retained fee simple in that property. Likewise, unlike the Indenture here, there was not a house included in the grant to Hunt. In that case, based upon the actual language of the deed and the written contract which explained the "fishing privilege" in more detail, the Court concluded that an easement had been conveyed. There is nothing

about the *Haynes* decision that suggests this Court should ignore all other provisions of the Indenture and focus only on the provision which describes the intended use of the property by the grantee. The *Haynes* Court recognized that the paramount rule of deed construction was to consider the entire document. 85 P.2d at 863.

Moreover, in the 65 years that have passed since *Haynes* was decided, many courts have recognized that language addressing the use of the property may be merely descriptive of the intended purpose and not intended to limit the grant. *See*, Appellant's Brief, at pp. 12-13. Although decisions from other jurisdictions are not binding on this Court, they are helpful. If the reference to grazing and agricultural purposes is read as a description of the intended use by the grantee under the Indenture, the remaining provisions can all be harmonized. The grant of the surface in fee would make the "as if" provision consistent with the fact that the grantor had not retained title to the surface in fee. Indeed, the detailed description of the type of activities in which the grantor could continue to engage on the surface, including the limitations of the grantor's liability for damage to the surface, would be essential because of the change in ownership of the surface.

Furthermore, Missouri Flat agrees with Gold Mountain that the decisions concerning whether a statement of the intended use is a limitation of the grant or merely

descriptive is dependant on a case by case analysis. [See, Appellee's Brief, at p. 27.] The *Haynes* case does not stand for the proposition, as Gold Mountain seems to suggest, that every deed describing the grantee's anticipated use automatically creates an easement regardless of what other provisions are contained in that document.

In this case, a finding that the surface was served from the mineral estate and conveyed to the grantor in fee simple, subject to the grantor's use in connection with its mining activities, is supported by the language of the Indenture taken as a whole. Gold Mountain concedes that but for the descriptive language, the words of grant and the use of specific legal descriptions support a conveyance in fee. [See, Appellee's Brief at pp. 16 & 25.] Likewise, even the trial court found that an easement in a house for grazing purposes made no sense and thus "the grantor must have wanted to give the grantees the exclusive use and control of it." [R. 818-30, at p. 4, ¶ 9.] Therefore, the trial court interpreted the exact same grant language as conveying one of the described properties listed in fee simple, but only an easement over the rest. [R. 804-08, at p. 3.] There is simply no way to support a finding of an unambiguous intent of the grantor to make such distinctions about the property described in the Indenture.

C. If a Grant in Fee Simple is Not Apparent, the Indenture is Ambiguous and Must be Interpreted Against the Grantor and in Favor of a Conveyance in Fee Simple.

The Utah legislature has codified a preference for conveyances in fee simple:

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.

UTAH CODE ANN. § 57-1-3. Gold Mountain argues that because all parties agree that only a part of the real property owned, the surface, was conveyed this statute is inapplicable. [See, Appellee's Brief, at p. 29.] The statute is not concerned with the boundaries of the legal description of the real property conveyed, but rather with the "title" granted. An easement is a lesser estate than title in fee simple. If the trial court was in error when it concluded that the grantor's intent to convey only an easement was obvious from the Indenture, the intent is ambiguous. Under that scenario, Utah law presumes that the grantor intended to convey title in fee simple absolute.

In addition, the Utah courts recognize that where the intent of the parties is unclear, the deed should be interpreted "most strongly against the grantor, and most favorably to the grantee." *Wood v. Ashby*, 253 P.2d 351, 585 (Utah 1952).¹ Gold

¹Although Gold Mountain questions whether the *Wood* Court actually applied this rule, the Court certainly cited it favorably. [See, Appellee's Brief, at 24. Moreover, although the exact language of the deed under consideration was not quoted in the decision, the parties and the court were in agreement that the conveyance to Wood was

Mountain argues against the application of this rule on the ground that the deed is not rendered ambiguous simply because the parties disagree on its meaning. [See, Appellee's Brief, at p. 31.] Missouri Flat does not suggest otherwise. In this case, however, the provisions highlighted by Missouri Flat either support a conveyance of the surface in fee or, at the very least, make the intent of the grantor unclear. The trial court's ruling, which found an intent to grant one of the described properties in fee and convey only an easement over the rest, shows that it too found portions of the document in conflict. Under these circumstances, application of the rule interpreting the Indenture against the grantor is applicable. *Haynes* does not hold otherwise: "When the intention of the parties to a deed or contract can be ascertained from it" arbitrary rules of law will not be invoked. 85 P.2d at 863. If the intent cannot be ascertained from the document alone, other rules must be applied to determine the effect of the deed.

If the Court does not find the "as if" language and other provisions indicative of an intent to convey the surface in fee, it should find the document unclear in ascertaining that intent. If the grantor's intent is not evident from the face of the document, a presumption in favor of a conveyance in fee should be applied and the Indenture should be interpreted against the grantor. Thus, the trial court's decision should be reversed and judgment

for water gathering purposes but that the conveyance was in fee. 253 P.2d at 585.

entered finding that the surface was conveyed in fee simple to Missouri Flat's predecessor.

D. Missouri Flat Did Not Waive its Claims of Laches, Estoppel, and Adverse Possession.

Gold Mountain cannot have it both ways. Either it drafted the order implementing the trial court's decision in good faith to reflect accurately what was decided or it tried to lull counsel for Missouri Flat and the trial court into adopting an order that did not correctly reflect the ruling. Despite Gold Mountain's arguments before this Court, Missouri Flat believes it was the former. Both counsel agreed on an order that reflected the trial court's intent to decide all of the issues pending in the summary judgment motions before it. Those memoranda included Missouri Flat's arguments on laches, estoppel, and adverse possession. [R. 603-637; 638-640; 641-644; 659-777; 778-789.] The decision on the motions for summary judgment found that Missouri Flat had fee simple title to the house and the real property on which it stood, but only an easement in the other described parcels. [R. 804-808, at p. 3] To reach that conclusion, the trial court necessarily had to reject Missouri Flat's claims of estoppel, laches, and adverse possession. Consequently, when counsel for Gold Mountain prepared the order he included conclusions of law finding against Missouri Flat on those issues. [R. 818-830, at

pp. 3 & 5.] The trial court reviewed the order and entered it. The trial court would not have done so if it had not intended to resolve the laches, estoppel, and adverse possession issues that were pending in the summary judgment motions decided by the order.

Gold Mountain now argues that it included these issues in the order because it assumed Missouri Flat had abandoned those claims. [*See*, Appellee's Brief, at p. 35.] Apparently, this belief arose from the post-hearing telephone conference. After the parties had addressed the questions raised by the trial court in the first twenty-three pages of the transcript, the following exchange occurred:

THE COURT: Okay. And Mr. Russell, what else did you want to talk about today?
Mr. RUSSELL: I think that about covers it, probably.

[R. 843, at p. 24.] At that point the court and counsel said goodbye and ended the telephone conference. There is nothing about counsel for Missouri Flat's response that communicated an intent to waive the claims for estoppel, laches, and adverse possession that had been briefed and were pending before the court. Furthermore, if that is what Gold Mountain truly believed, it could easily have prepared the order indicating that Missouri Flat had abandoned these claims. It did not do so. Instead, the order contains "Conclusions of Law" which state:

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

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

[R. 818-830, at pp. 3 & 5.] Likewise, if the trial court believed that counsel for Missouri Flat had waived these claims, it could have struck the conclusions or modified the order. The court did neither; it entered the order as written thereby ruling on the claims for laches, estoppel and adverse possession.

Gold Mountain's position that Missouri Flat waived these claims is not supported by the record or the case law. None of the decisions cited by Gold Mountain finds that an issue properly briefed in a memoranda filed with the trial court is waived if not repeated at the hearing on that motion. [See, Appellee's Brief, at pp. 32-33.] In *Badger v. Brooklyn Canal Co.*, 966 P.2d 844 (Utah 1998), the issue was whether the shareholders of an irrigation company had properly exhausted their administrative remedies by raising the relevant issue before the State Engineer. 966 P.2d at 847. Because the plaintiffs did not raise the particular issue "either during the hearing or through their written protests," the Utah Supreme Court found it had not been properly preserved. *Id* (emphasis added).

The facts in *Broberg v. Hess*, 782 P.2d 198 (Utah Ct. App. 1989) are equally inapplicable. The issue before the Court of Appeals was whether the plaintiff had properly preserved a request for written questions to be answered by prospective jurors.

The *Broberg* Court found that “[t]he record on appeal does not show how, in what context, or even whether the written questions were brought to the trial court’s attention at the time of voir dire of the potential jurors.” 782 P.2d at 201. Consequently, because no objection was made before the jury was empaneled or even during trial, the issue was not preserved.

In *Hart v. Salt Lake County Commission*, 945 P.2d 125 (Utah Ct. App. 1997), the issue was whether an objection to a jury instruction on the grounds that there was insufficient evidence to support the claim was sufficient to put the trial court on notice that the defendant contended it owed no duty to the plaintiff. 945 P.2d at 130-31. Other than this vague objection to the jury instruction, the “record [did] not reflect any other attempt by the County to preserve this issue for appeal.” 945 P.2d at 131.

In none of these cases, did the court hold that when a party presents an argument in a brief submitted in opposition to or in support of a motion for summary judgment, that party must also raise the argument at the hearing on the motion or it is waived. Such a rule would be contrary to the purpose of oral argument, which is to supplement the brief and address questions of the court. The claims of laches, estoppel, and adverse possession were expressly included in the memoranda filed with the trial court. [R. 659-777.] Indeed, Gold Mountain admits that Missouri Flat argued these issues below. [See,

Appellee's Brief, at p. 36 (quoting Missouri Flat's Supplementary Memorandum on Adverse Possession).] It would make for very tedious motion practice, if every issue raised in the briefs was waived if not specifically reargued orally. Indeed, trial courts rarely have the patience or the time to listen to counsel reiterate everything in his or her brief. Gold Mountain can point to no authority for this position and it is contrary to the order actually entered by the trial court.

Furthermore, Gold Mountain's argument that Missouri Flat waived these claims by inference at the end of the post-briefing, post-hearing, telephone conference scheduled by the trial court to address its specific questions is absurd. Under Gold Mountain's theory not only are arguments and claims asserted in a summary judgment memorandum forfeited if not reargued orally, they can also be waived by politely responding in the negative when in a post-argument telephone conversation the trial judge asks if there is anything else to discuss.

E. Summary Judgment was Improper on the Claim of Adverse Possession.

To prevail on a claim for adverse possession, Missouri Flat must establish that: 1) it occupied the property continuously for seven years; 2) paid the taxes levied and assessed; 3) and put the property to the ordinary use of the occupant. *Salt Lake County v. Metro Ready Mix, Inc.*, 2004 Utah 23, at ¶ 22, 89 P.3d 155, 160 (Utah). The third

requirement is often referred to as a showing that possession was adverse. The Utah Legislature has determined that whenever the adverse possession claimant “or those under whom he claims” entered the property under claim of title based upon a written instrument, the property “is deemed to have been held adversely.” UTAH CODE ANN. § 78-12-8. Gold Mountain argues that Missouri Flat cannot meet the seven year requirement because the Trustee’s Deed to Missouri Flat is dated July 19, 1994. [See, Appellee’s Brief, at p. 39.] That argument ignores the right of Missouri Flat to tack possession.

Missouri Flat’s predecessor “under whom it claims,” also took the surface of the property under color of title. The Warranty Deed dated December 15, 1987 “grants and conveys” to Missouri Flat’s predecessor, “the following described tracts of land in Sevier County, State of Utah.” [R. 761-765, at p. 1.] The Warranty Deed contains no limitation on or description of the use of the property and no suggestion that only an easement is being conveyed. Thus, Missouri Flat’s predecessor took under color of title. Missouri Flat is entitled to tack the time the surface was occupied by its predecessor with the time it occupied the surface. *See, e.g., Royal Street Land Co. v. Reed*, 739 P.2d 1104, 1106 (Utah 1987) (tacking of successive periods allowed to meet seven-year adverse possession requirement); *Martin v. Kearl*, 917 P.2d 91, 92 n.2 (Utah Ct. App. 1996)

(“Under the doctrine of tacking, the seven-year period of possession may be completed by one possessor or by a series of possessors in privity with each other.”) (citations omitted). The prior Warranty Deed was executed in 1987 and the Trustee’s Deed under which Missouri Flat took title was dated 1994. Tacking these periods together more than meets the seven-year period of possession required to establish adverse possession.

Because possession under color of title is deemed adverse, Missouri Flat need only prove the payment of taxes to satisfy the requirements of adverse possession. Missouri Flat paid all of the taxes assessed for surface use unrelated to mining and has therefore also met that burden. *See, Royal Street Land Co. v. Reed*, 739 P.2d 1104, 1107 (Utah 1987). If this Court disagrees that the issue on taxes can be resolved as a matter of law in favor of Missouri Flat, however, both parties agree this material issue of fact is contested. [See, Appellee’s Brief, at p. 9.] Consequently, it was error for the trial court to grant summary judgment against Missouri Flat on its adverse possession claim.

F. The Trial Court Improperly Granted Summary Judgment on Missouri Flat’s Claims of Estoppel and Laches.

Gold Mountain waited fifty years to pursue its quiet title action. The witnesses that could have testified about the original Indenture are no longer available, the property has increased in value, and subsequent deeds have contained no restrictions on the use of

the surface. Missouri Flat has been disadvantaged by these events. It cannot obtain relevant testimony to defend against Gold Mountain's belated claims and it has purchased the property and paid the taxes with the understandable belief that it holds title to the surface in fee. Similar facts have supported implementation of the doctrine of laches and estoppel by the Utah courts. *See, e.g., Jacobson v. Jacobson*, 557 P.2d 156, 158-59 (Utah 1976) (death of relevant witness during the eight years party delayed in bringing claim supported a finding of laches); *Ruthrauff v. Silver King Western Mining & Milling Co.*, 80 P.2d 338, 347 (Utah 1938) (death of relevant witnesses and faded memory of others during a delay of eighteen years supported a finding of laches). Although Gold Mountain dismisses the relevance of these events, there has been a real impact on Missouri Flat. If the original grantor and grantee were still available, their testimony could be extremely helpful in harmonizing the language of the Indenture with the subsequent behavior of the parties.

Once again, Gold Mountain suggests that counsel for Missouri Flat waived all of its arguments and theories during the telephone conference scheduled to address the trial court's post-hearing questions on the summary judgment motions. Gold Mountain argues that Missouri Flat must have intended to abandon its laches, estoppel, and adverse possession claims because it did not raise them during the telephone conference. [*See,*

Appellee's Brief, at 32-34.] At the time of the telephone conference, the trial court had before it two separately briefed motions for summary judgment. The first was on the issue of the interpretation of the Indenture. [R. 322-332; 333-335; 336-339, 340-342; 343-364; 365-366; 367-376.] The second motion for summary judgment was directed specifically to the claims of laches, estoppel, and adverse possession that had been added by Missouri Flat's Amended Complaint. [R. 424-428; 445-446; 603-637; 638-640; 641-644; 645-658; 659-777; 778-789.] Missouri Flat expressly argued in its memoranda that issues of fact precluded summary judgment on its adverse possession claim. [R. 659-777, at pp. 6-9.] It also provided legal analysis and argument opposing summary judgment in favor of Gold Mountain on the claims for laches and estoppel. [R. 659-777, at pp. 9-11.] For example, Missouri Flat stated:

Plaintiff [Gold Mountain] and its predecessors have waited since 1951 to institute an action seeking a determination that Missouri Flat and its predecessors have owned nothing more than an easement in the surface estate in spite of the plain language of the Indenture and subsequent conveyances which establish that fee title to the surface estate was conveyed. During that period of time, Missouri Flat and its predecessors have possessed the property, paid all taxes, executed trust deeds, and otherwise acted in accordance with ownership of fee title to the surface estate. [See Statement of Disputed Material Facts ¶ 13.] Now, 50 years later, plaintiff asserts for the first time that Missouri Flat and its predecessors have only owned an easement in the surface. Missouri Flat is substantially prejudiced by such delay in that all of the parties to the Indenture who could provide information and testify regarding the intent of the language, are now deceased or cannot be found.

[R. 659-777, at p. 9.] These issues and claims and the relevance of subsequent conduct were squarely before the trial court. Missouri Flat never waived these claims, and the trial court actually entered an order which included findings and conclusions on laches, estoppel, and adverse possession. Despite Gold Mountain's repeated arguments to the contrary, these issues are properly before this Court.

II. CONCLUSION

The 1951 Indenture is a confusing and old document. If it is read as an attempt to sever the surface estate in fee from the mineral estate in fee, it is consistent with many other deeds which contain mineral reservations to the grantor. That interpretation also gives meaning to the grantor's express reservation of the right to continue to use the surface in connection with mining activities "as if" he retained ownership in fee of the surface. Under this analysis, the references to the use of the surface for grazing and agricultural purposes can be harmonized as a description but not a limitation on the use that was anticipated at the time. Such a reading of the deed not only makes sense of the express limitations on the grantor's liability for injury to the surface, it also explains the conveyance of the house. When taken as a whole, the Indenture can be read as a conveyance in fee of the surface. That interpretation also is consistent with the behavior of the parties, including the use of the surface as security for loans, and the exclusion of

any reference to the intended use of the surface in subsequent deeds. Thus, the trial court's decision should be reversed and an order entered finding that Missouri Flat owns the surface in fee.

If this Court cannot ascertain from the Indenture that a conveyance in fee was intended, the document is ambiguous. The grantor's own acknowledgment that he did not actually own the surface in fee in the "as if" clause, together with other portions of the Indenture make a finding of a conveyance of no more than an easement highly questionable. Thus, the Court should resolve the uncertainties against the grantor and in favor of transfer of the surface in fee simple absolute.

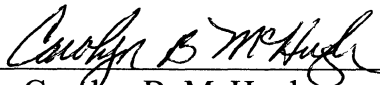
Even if the deed could be found to unequivocally grant only an easement, Missouri Flat and its predecessors have obtained title in fee to the surface by adverse possession. The deed to Missouri Flat and that to its predecessor contain no limitations on the use of the surface. Thus, these parties took possession under color of title. By Utah law, that possession is deemed to be adverse. Together they have occupied the surface adversely for over seven years. Moreover, the taxes on the surface not associated with mining activities have been paid by Missouri Flat and its predecessors. Thus, the trial court was in error when it granted summary judgment in favor of Gold Mountain on Missouri Flat's adverse possession claim.

Finally, Gold Mountain has waited much too long to bring this action. During the last fifty years the surface has been conveyed to good faith purchasers like Missouri Flat with no indication that only an easement was being granted. Furthermore, the critical witnesses who could explain the conflicting provisions of the Indenture have passed away. Gold Mountain's claim to the fee estate in the surface is, therefore, barred by laches and estoppel.

For all of these reasons, Missouri Flat respectfully requests that the decision of the trial court be reversed and judgment be entered in favor of Missouri Flat.

DATED this 14~~th~~ day of December, 2004.

PARR WADDOUPS BROWN GEE & LOVELESS

By: 
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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of December, 2004, a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANT MISSOURI FLAT LTD.** was served by United States mail, first class postage prepaid, on the following:

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