

1988

# George G. Mahas v. Lavar Rindlesbacher : Response to Petition for Rehearing

Utah Supreme Court

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Gary A. Sargent; Attorney for Defendant/Appellant.

Robert L. Froerer; Attorney for Utah Council of Land Surveyors.

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UTAH SUPREME COURT

BRIEF

DOCKET NO. ~~BRUCE W. STRATFORD~~, 49217  
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IN THE SUPREME COURT OF THE STATE OF UTAH

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GEORGE G. MAHAS and ) ANSWER TO PETITION  
LUCILLE H. MAHAS

Plaintiffs/ )  
Respondents ) FOR REHEARING

vs ) Case No. 88-0350

LAVAR RINDLESBACHER )  
Defendant/ )  
Appellant )

-----  
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**FILED**

FEB 13 1991

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Clerk, Supreme Court Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

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GEORGE G. MAHAS and	)	ANSWER TO PETITION
LUCILLE H. MAHAS	)	
Plaintiffs/	)	FOR REHEARING
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LAVAR RINDLESBACHER	)	
Defendant/	)	
Appellant	)	

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COMES NOW Plaintiffs/Respondents, by and through  
their Attorney, Bruce W. Stratford, and hereby answers the  
Petition for Rehearing.

POINT I

NO EVIDENCE EXISTS THAT THE PROPERTY OF RESPONDENTS AND  
APPELLANT IS SEPARATED BY 66 FEET OR THAT THE COURT HAS  
GRANTED OWNERSHIP OF A THIRD PARTY'S LAND TO THE RESPONDENTS

(ARGUMENT ON APPELLANT'S REHEARING POINT I)

No evidence exists to support Appellants claim  
that a 66 foot wide strip of property runs between the  
Appellants and Respondents' properties. Nor is there any  
evidence that the Court has effectively deeded property to  
the Respondents that has never belonged to the Respondents.

Entry Number 3 of Trial Exhibit 1, (the Abstract  
of Title), describes a parcel of land containing 15.82

acres. This 15.82 acres encompasses the land from which Respondent and Appellant both derive their lands. Within the Abstract of Title, Entries Number 4 and 5 set forth right of way conveyances to the Pioneer Electric Power Company. These conveyances are within the 15.82 acres described above.

Counsel for the Appellant and the Utah Council of Land Surveyors - Amicus argue that: (1) The right of way conveyances to the Pioneer Electric Power Company are in the same location as the Warren Canal, (2) Such right of ways are in fact the Warren Canal, and (3) that the Warren Canal therefore was in use and existed prior to the 1902 deed. Which deed first used the reference of a canal. (Exhibit "A" hereto, Trial Court Exhibit 1, Abstract of Title). Such an argument is based upon outright supposition by counsel for the Appellant and Amicus and is not supported by any factual presentation of evidence stemming from the trial.

At the time of trial the testimony indicated that the known existence of the Warren Canal was only traced back to 1908 (Pgs 86, 104, 108, Trial Transcript). No evidence was presented at the trial which established that the Warren Canal existed prior to 1908.

No evidence, other than counsels' supposition, has been presented to support the assertion that the right of ways in the Pioneer Electric Power Company became the Warren Canal, or that the Pioneer Electric Power Company placed a canal in said right of ways, or that any canals existed in these right of ways prior to 1908, nor that the land under

the right of ways became a property boundary line after the right of ways came into existence.

Within the Abstract of Title there are some 50 plus entries affecting the Respondents' land. The caption sheet on the Abstract of Title indicates the situs, shape and boundaries of the Respondents' land pursuant to all of the entries in the Abstract of Title. This caption sheet, (Exhibit "B" hereto, Trial Exhibit 1), clearly shows a canal as a boundary line, yet makes no reference to the Warren Canal. The Canal shown on the caption sheet as the boundary line is placed such that the metes and bounds descriptions of the property match the canal allowing the property description to close. The trial court found that the various metes and bounds descriptions of all the parcels of land presented throughout the trial made sense following the use of a canal as is presented by the Abstract of Title and as such is portrayed on the County Plats. In so finding the trial court declared that the use of the Warren Canal did not make any sense and would lead to an absurd result. (Pg 108 & 109 Trial Transcript).

Speculation in the Brief for Rehearing, that through a mathematical platting of old right of ways, which in turn may become the Warren Canal, and further which then establishes the existence of the Warren Canal prior to the time that the existence of such canal was established at the time of trial court negates the Abstract of Title from its inception in 1882 through 1970, and disregards the County

Plats and other deeds defining the subject and surrounding lands.

The speculative argument presented in the Rehearing Brief further requires the Court to leapfrog away from land descriptions used throughout the Abstract and other deeds and insert the right of ways as boundary lines wherever the reference to a canal is made.

Point I of the Rehearing Brief is merely an attempt to testify and present evidence to the Court while bypassing the need to fully establish the veracity of such assertions, as compared against all other evidence. Additionally, Point I of the Rehearing Brief does not indicate how title to property under the right of ways was removed from a Third Party as is claimed by the Counsel for Appellant-Amicus.

It is further noted that Point I of the Rehearing Brief does not allege manifest error in the application of any principle of law.

#### POINT II

##### EVIDENCE OF THE EXISTENCE OF A SECOND CANAL EXISTS

##### (ARGUMENT ON DEFENDANT/APPELLANT'S REHEARING POINT II)

The evidence presented at the time of trial indicates that the property descriptions refer to a canal. The deeds carry the language referring to a canal. At the trial the bulk of the testimony from the experts dealt with the issue of the reference to a canal and or the Warren

Canal. Throughout the trial testimony was given about the existence of a canal other than the Warren Canal. The testimony of the three expert witnesses, as these witnesses, (including appellants expert witness) referred to the deeds, and plats, dealt with the closing of the property descriptions and how each related to either the Warren Canal or another canal. The trial experts testified that the property lines reconciled only when the references in the deeds to a canal were a canal other than the Warren Canal. (Trial Transcript - Expert Witness Carlsen pg 27, pg 37 - Expert Witness Arave, pg 48-49, - Expert Witness Lawson pg 95, pg 97).

Further the Trial court received evidence of a fence line following the same line as the canal which the experts identified as the only canal which would allow the property descriptions to close (Trial Transcript pg 56).

Argument by Counsel for Appellant-Amicus that no evidence of the existence of a second canal exists is unmeritorious and simply disregards the deeds, testimony and evidence received at the time of trial. The evidence presented at trial as to a canal other than the Warren Canal clearly rises above a preponderance of the evidence and the conclusion by the trial court, that the use of the Warren Canal as a boundary would lead to an "absurd result", is a conclusion fully supported by such evidence.

POINT III  
APPELLANT ONLY RECEIVES WHAT HIS  
PREDECESSOR IN INTEREST CONVEYED

Trial Exhibit 4, (Exhibit "C" hereto) reflects a survey which was commissioned by Pricillia M. Owens in 1968. This survey reflects a canal, other than the Warren Canal. The Appellant's predecessor in interest knew from this survey the boundary lines of the land. The Appellant's predecessor could only convey away what she owned. The deed from the Appellant's predecessor reflects such and uses wording to convey property running to a canal. Which canal Pricillia M. Owens had caused to be plated in the 1968 survey, and which canal the trial court correctly found to be the boundary line.

POINT IV  
PETITION FOR REHEARING IS UNMERITORIOUS

The two points raised in the Petition of Rehearing Brief do not reflect any claims that principles of law have been incorrectly applied or interpreted. Neither do the two points raised bring to light a manifest error in the application of any established fact. The request for Rehearing is improperly made, and has only acted to increase the costs and burden to the Respondent.

SUMMATION

Point I presented by counsel for the APPELLANT and the Utah Council of Land Surveyors - Amicus is purely speculation. Speculation presented as if it were a fact



that somehow two right of way entries in the Abstract of Title turned into boundary lines. The speculation disregards plats, deeds, and trial evidence. The argument asks the Court to assume facts not in evidence and attempts to mislead the Court to a conclusion that somehow a 66 foot wide strip of property has been conveyed from a third, unrepresented party, in the litigation, to the Respondent.

Point II presented by the counsel for Appellant and the Utah Council of Land Surveyors - Amicus, argues that no evidence exists of a second canal. This argument blatantly fails to recognize the deeds, plats, expert testimony, and general evidence received at the time of trial. Point II further begs the question of the level of evidence received and asks the court to disregard the oral testimony and written descriptions referring to a canal, which canal allows for reconciliation of the property and prevents an absurd result of establishing boundary lines based on the Warren Canal.

Point III reflects that the Appellant received the full property which Appellant was entitled to receive from Defendant/Appellant's predecessor in interest.


Point IV sets forth the unmeritorious nature of the petition for Rehearing and further sets out that the arguments in the Rehearing Brief are not based on established fact nor do they represent any new or compelling reason as to why the Court should grant a rehearing, or a remand for a new trial on this matter.

In general the petition for Rehearing attempts to supplant the trial evidence with speculation and suppositions while disregarding the entirety of the evidence presented at the trial.

#### CONCLUSION

The Respondents request that the Court deny the petition for Rehearing, and that the Court further grant, pursuant to the Addendum hereto, Attorneys Fees & Costs in regards to the Answer for the Petition of Rehearing.

Respectfully Submitted

  
\_\_\_\_\_  
Bruce W. Stratford  
Attorney for Plaintiff /  
Respondents

#### CERTIFICATE OF MAILING

I hereby certify that on the 13th day of February, 1991 I mailed, postage prepaid, 4 true and correct copies of the foregoing Answer to Petition for Rehearing to Robert L. Froerer, Attorney for Utah Council of Land Surveyors, Amicus, 707 - 24th Street, Suite A, Ogden, Utah 84401, and to Gary A. Sargent, Attorney for Appellant, 880 McIntrye Bldg, 68 South Main Street, Salt Lake City, Utah, 84111

  
\_\_\_\_\_  
Bruce W. Stratford

## ADDENDUM

### ATTORNEYS FEES & COSTS ON RESPONSE TO REHEARING BRIEF

Plaintiff/Respondents respectfully request an Order from this Court requiring Defendant/Appellant to pay all costs and attorney fees incurred by Plaintiff/Respondents in answering the Petition for Rehearing. Said request is based upon Rule 33, Rules of the Utah Supreme Court, as follows:

"Rule 33, Damages for Delay or frivolous appeal; recover of attorney fees.

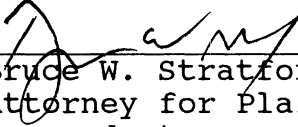
(a) Damages for delay or frivolous appeal. If the Court shall determine that a motion made or appeal taken under these rules ie either frivolous or for delay , it shall award just damages and single or double costs, including reasonable attorney's fees to the prevailing party.

The Petition for Rehearing attempts to assert speculation into evidence, while disregarding the evidence presented at the time of trial. The Petition for Rehearing is not grounded in fact. The Petition for Rehearing is not based on a good faith argument to extend, modify, or reverse existing law. Rather the Petition for Rehearing ignores the established evidence and ignores the correct application of the principles of law to the evidence.

The filing of the Petition for Rehearing clearly falls within the purview of Rule 33 and the Plaintiff/Respondents are entitled to their costs and

attorneys fees. The Affidavit of Costs and Attorneys fees  
being attached hereto.

Respectfully Submitted

  
\_\_\_\_\_  
Bruce W. Stratford  
Attorney for Plaintiff /  
Respondents

BRUCE W. STRATFORD, 4922  
Attorney at Law  
1218 First Security Bank Bldg.  
Ogden, Utah, 84401  
Telephone: 621-6863

IN THE SUPREME COURT OF THE STATE OF UTAH

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GEORGE G. MAHAS and	)	AFFIDAVIT FOR
LUCILLE H. MAHAS	)	
Plaintiffs/ Respondents	)	ATTORNEY FEES
vs	)	Case No. 88-0350
LAVAR RINDLESBACHER	)	
Defendant/ Appellant	)	

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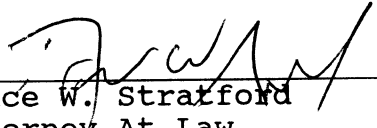
COMES NOW Bruce W. Stratford and hereby submits  
his Affidavit for services rendered in the above entitled  
matter.

February 11, 1990	3.00 Hours	\$300.00
Preparation of Brief		
February 12, 1990	4.00 Hours	\$400.00
Preparation of Brief		
Costs of copying and binding brief (estimated)		
	84.00	
Total:		\$784.00

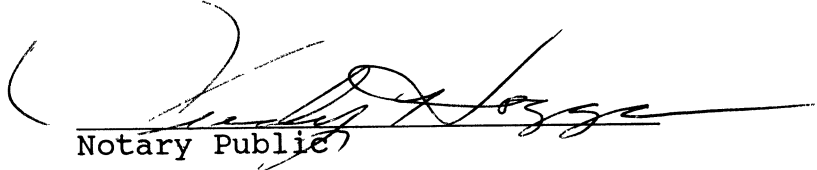
The time spent herein was reasonably necessary in

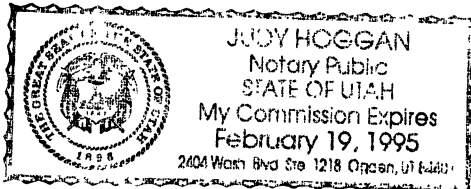
preparing this matter and the charges made are reasonable charges for attorneys in this area.

Date this 3 day of February 1991

  
\_\_\_\_\_  
Bruce W. Stratford  
Attorney At Law

Subscribed and sworn to before me this 13 day of February, 1991.

  
\_\_\_\_\_  
Notary Public



#12. JOSEPH FACINELLI,  
and wife JOHANA,  
and  
CHARLES M. WEBB,  
and wife MARY T.,  
Grantors.  
TO  
NICOLIO PERUCA,  
and  
NICOLIO FAVERO,  
Grantees.

QUIT CLAIM DEED.  
Consideration--\$1.00.  
Dated; March 8, 1902.  
Recorded; March 8, 1902.  
Book "40", page 437.  
Signed; Joseph Facinelli.  
Johana Facinelli.  
Charles M. Webb.  
Mary T. Webb.  
Witness; D.W. Ellis.

quit Claim lands in ----- Weber County, State of Utah-----  
A part of the North East  $\frac{1}{4}$  of Section 10, Township 6 North, Range 2 West, X  
S.L. Meridian, U.S. Survey;  
Being all that portion lying North of the canal of the following described  
property.  
Beginning 20 chs. South and 9 chs. West of the North East corner, said  
quarter section, and running thence West 9 chs., thence N. 27° E. 22.45 chs.,  
thence East 1.06 chs., thence S. 74° E. 3.85 chs., thence S. 7° 45' W. 15.84  
chs., thence N. 58° W. 3 chs., thence S. 15° W. 5 chs., to beginning.

Ack'd. March 8, 1902. --- Joseph Facinelli and wife Johana --- and Charles M.  
Webb and wife Mary T., --- before, D.W. Ellis, County Recorder, Weber County,  
Utah --- with County Recorder's Seal.

# EXHIBIT "B"

## 1 2-23-88 ABSTRACTER OF TITLE

TO ANY REAL ESTATE IN WEBER COUNTY, UTAH  
369 24TH ST., OGDEN CITY, UTAH

Abstract No. 1425.

Sheet No. 1.

### ABSTRACT OF TITLE

TO

A part of the North East Quarter (NE.  $\frac{1}{4}$ ) of Section Ten (10), Township Six (6) North, Range Two (2) West, Salt Lake Meridian, U.S. Survey;  
Being all that part of the following described tract of land, which lies North of the canal:-

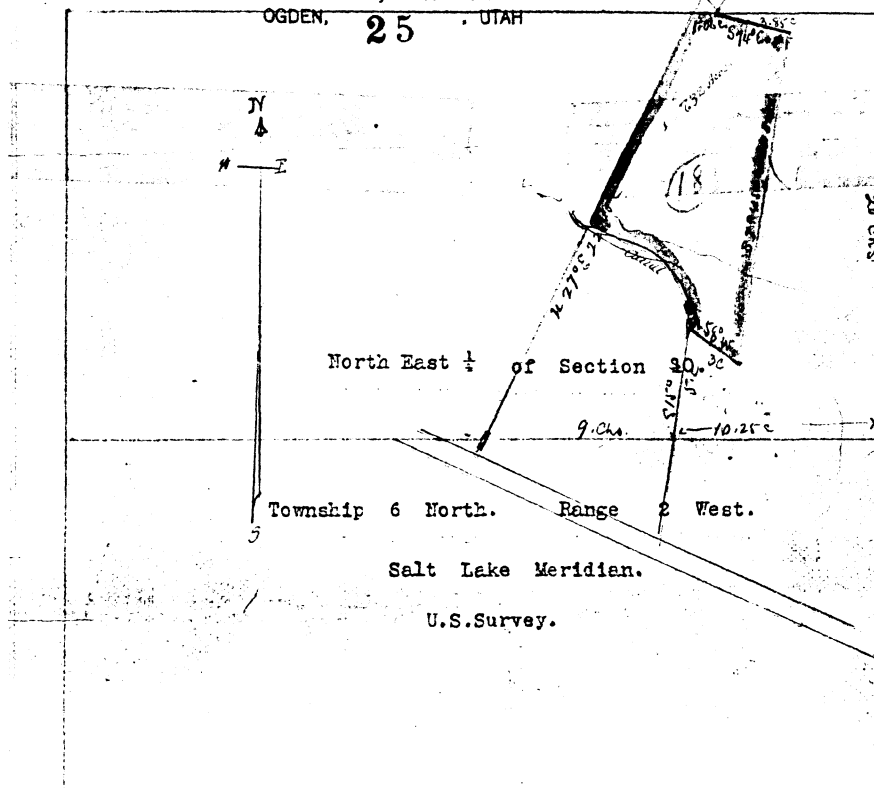
Beginning at a point 20 chains South and 10.25 chains West from the North East corner of the North East quarter of said Section 10, and running thence West 9 chains, thence N. 27° E. 22.45 chains, thence East 1.06 chains, thence S. 74° E. 3.85 chains, thence S. 7° 45' W. 15.84 chains, thence N. 58° W. 3 chains, thence S. 15° W. 5 chains to the place of beginning.

Situate in the County of Weber and State of Utah.

THE HOME ABSTRACT COMPANY

414 Twenty-fourth Street

OGDEN, 25 . UTAH





# EXHIBIT "C"

PACEL NO. 1

## DESCRIPTION

A part of the Northeast Quarter of Section 10 T6N R2W S14W U.S. Survey. Beginning at a point on the Northernly line of Pioneer Road, said point being West along the Section line 528.00 feet S 94° E 198.7 feet S 15° W 1570.93 feet and N 56° 35' W 56.00 feet from the Northeast corner of Section 10 and running thence N 56° 35' W 150.00 feet along the Northernly fence line of Pioneer Road thence N 15° 38' 2" E 742.43 feet to the Deeded South Bank of Canal thence S 39° 04' 44" E 160.00 feet along Deeded Bank of Canal to the West Bank of existing Canal thence S 14° 38' 1" W 695.92 feet along said Bank to the point of beginning.

Contains 2.35 Acres

I, Kent Gene Arace, do hereby certify that I am a Registered Land Surveyor, and that the above plat is a true and correct copy of the original plat of which this is a duplicate, and that I have made a survey of the above described property, I further certify that the above plat correctly shows the true dimensions of the property surveyed.

Date June 6, 1908

GREAT BASIN ENGINEERING & SURVEYING, INC.

PACEL NO. 2

A part of the Northeast Quarter of Section 10 T6N R2W S14W U.S. Survey. Beginning at a point on the Northernly line of Pioneer Road, said point being West along the Section line 528.00 feet S 94° E 198.7 feet S 15° W 1570.93 feet and N 56° 35' W 206.00 feet from the Northeast corner of Section 10 and running thence N 56° 35' W 150.00 feet along the Northernly fence line of Pioneer Road thence N 17° 44' 35" E 778.02 feet to the Deeded South Bank of Canal thence S 39° 04' 44" E 160.00 feet along Deeded Bank of Canal thence S 15° 38' 24" W 742.43 feet along said Bank to the point of beginning.

Contains 2.35 Acres

GREAT BASIN ENGINEERING & SURVEYING	
FOR PROPERTY SURVEY	
PRICILLA OWENS	
DRAWN, L.W.	CHECKED
DATE 22 May 1908	SCALE 1"=100'
NS	

