

2005

Glynn F. Wayment, Edward C. England v. William Howard, Lee R. Howard : Reply Brief

Utah Supreme Court

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



Part of the [Law Commons](#)

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

John H. Mabey Jr.; David C. Wright; Mabey & Wright; Attorneys for Appellees.

J. Craig Smith; D. Scott Crook; Scott M. Ellsworth; Smith Hartvigsen; Attorneys for Appellants.

Recommended Citation

Reply Brief, *Glynn F. Wayment, Edward C. England v. William Howard, Lee R. Howard*, No. 20050547.00 (Utah Supreme Court, 2005).
https://digitalcommons.law.byu.edu/byu_sc2/2583

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

IN THE UTAH SUPREME COURT

GLYNN F. WAYMENT and EDWARD C.
ENGLAND,

Plaintiffs/Appellees,

v.

WILLIAM HOWARD,
Defendant,

and LEE R. HOWARD,
Defendant/Appellant.

LEE R. HOWARD,
Counterclaimant/Appellant,

v.

GLYNN F. WAYMENT and EDWARD C.
ENGLAND,
Counterdefendants.

Appellants' Reply

Appellate No.: 20050547

Civil No.: 010903790 WA
Judge W. Brent West

*Appeal from Decisions of the Second Judicial District Court
Judge Brent West*

John H. Mabey, Jr.
David C. Wright
Mabey & Wright, LLC
265 East 100 South, #300
Salt Lake City, Utah 84111

Attorneys for Appellees

J. Craig Smith (4143)
D. Scott Crook (7495)
Scott M. Ellsworth (7514)
Smith Hartvigsen, PLLC
215 South State Street, Suite 650
Salt Lake City, Utah 84111
Telephone (801) 413-1600
Facsimile (801) 413-1620

Attorneys for Appellants:
Defendant/Counterclaimant, Lee R. Howard

FILED
UTAH APPELLATE COURTS

MAY 10 2006

IN THE UTAH SUPREME COURT

GLYNN F. WAYMENT and EDWARD C.
ENGLAND,

Plaintiffs/Appellees,

v.

WILLIAM HOWARD,

Defendant,

and LEE R. HOWARD,

Defendant/Appellant.

LEE R. HOWARD,

Counterclaimant/Appellant,

v.

GLYNN F. WAYMENT and EDWARD C.
ENGLAND,

Counterdefendants.

Appellants' Reply

Appellate No.: 20050547

Civil No.: 010903790 WA
Judge W. Brent West

*Appeal from Decisions of the Second Judicial District Court
Judge Brent West*

John H. Mabey, Jr.
David C. Wright
Mabey & Wright, LLC
265 East 100 South, #300
Salt Lake City, Utah 84111

Attorneys for Appellees

J. Craig Smith (4143)
D. Scott Crook (7495)
Scott M. Ellsworth (7514)
Smith Hartvigsen, PLLC
215 South State Street, Suite 650
Salt Lake City, Utah 84111
Telephone (801) 413-1600
Facsimile (801) 413-1620

Attorneys for Appellants:
Defendant/Counterclaimant, Lee R. Howard

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
ARGUMENT.....	1
INTRODUCTION.....	1
POINT 1 THE EVIDENCE DOES NOT SUPPORT THE TRIAL COURT’S DETERMINATION THAT THE HOWARD DIKE INTERFERES WITH THE PLAINTIFFS’ WATER RIGHT.....	5
A. INTERFERENCE AS A MIXED QUESTION OF LAW AND FACT.....	5
B. THERE IS NO EVIDENCE OF INTERFERENCE TO MARSHALL.....	7
1. <i>Plaintiffs’ “Devastating Evidence.”</i>	7
2. <i>The Absence of Evidence and the Inadequacy of the Findings Excuses the Howards from the Marshalling Requirement.</i>	12
C. GENERAL IRRIGATION DUTIES ON THE UTAH DIVISION OF WATER RIGHTS WEBSITE DO NOT TRUMP PARTICULAR DUTIES IMPOSED BY A CERTIFICATE OF APPROPRIATION.	13
POINT 2 THE TRIAL COURT ERRED IN DENYING THE HOWARDS’ SUMMARY JUDGMENT MOTIONS.....	17
A. PLAINTIFFS FAILED PROPERLY TO DISPUTE HOWARD’S STATEMENTS OF UNDISPUTED FACT.	17
B. THE TRIAL COURT DISREGARDED THE EXPRESS MANDATE OF URCP 56(d).	19
C. THE PLAINTIFFS’ INTERFERENCE CLAIM WAS BARRED BY <i>RES JUDICATA</i> , THE RELEVANT ISSUES IN BOTH THE EARLIER APPLICATION PROCEEDING AND THE TRIAL BELOW BEING IDENTICAL.....	20
POINT 3 THE TRIAL COURT INCORRECTLY DISPOSED OF THE HOWARD’S COUNTERCLAIMS.....	21
B. THE HOWARDS’ NEGLIGENCE AND NUISANCE COUNTERCLAIMS.	23
CONCLUSION	24
CERTIFICATE OF SERVICE	26

TABLE OF AUTHORITIES

Cases

<i>Adams v. Portage Irrigation, Reservoir & Power Co.</i> , 95 Utah 1, 72 P.2d 648 (Utah 1937)	1
<i>Anderson v. Doms</i> , 1999 UT App 207, ¶10, 984 P.2d 392	12
<i>Archer v. Bd. of State Lands and Forestry</i> , 907 P.2d 1142 (Utah 1995)	22
<i>Basic Controlex Corp., Inc. v. Klockner Moeller Corp.</i> , 202 F.3d 450 (1 st Cir. 2000)	16
<i>College Irr. Co. v. Logan River & Blacksmith Fork Irr. Co.</i> , 780 P.2d 1241 (Utah 1989)..	1, 9, 12
<i>Gary Porter Const. v. Fox Const., Inc.</i> , 2004 UT App 354, 101 P.3d 371	17, 18
<i>Morales v. Trans World Airlines, Inc.</i> , 504 U.S. 374 (1992)	16
<i>Mouty v. The Sandy City Recorder</i> , 2005 UT 41, ¶17, 122 P.3d 521	22
<i>Provo River Water Users Ass'n v. Lambert</i> , 642 P.2d 1219 (Utah 1982)	16
<i>Saleh v. Farmers Ins. Exchange</i> , 2006 UT 20, ---P.3d---, 2006 WL 744261	22
<i>Salt Lake City et al. v. Salt Lake City Water & Electrical Power Co.</i> , 25 Utah 456, 71 P. 1069...	9
<i>Salt Lake City v. Gardner</i> , 39 Utah 30, 114 P. 17	6
<i>Salt Lake City v. Silver Fork Pipeline Corp.</i> , 2000 UT 3, 5 P.3d 120	6
<i>Salt Lake County v. Metro West Ready Mix, Inc.</i> , 2004 UT 23, 89 P.3d 155,	17
<i>Schott Optical Glass, Inc. v. United States</i> , 82 Cust. Ct. 11, 468 F. Supp. 1318 (1979)	11
<i>Searle v. Milburn Irr. Co.</i> , 2006 UT 16, 547 Utah Adv. Rep. 11	6
<i>United States Fuel Co. v. Huntington-Cleveland Irrigation Co.</i> , 2003 UT 49, 79 P.3d 945	24

Statutes

UCA § 63-46a-4	14
UCA § 73-3-3	4
UCA § 73-2-1	13, 14
UCA § 73-3-8	7, 15

Rules

URCP Rule 7	17
URCP Rule 56	19

Treatises

10B Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, <i>Federal Practice and Procedure</i> (“FPP”), Civ. 3d § 2737 (1998)	19
--	----

ARGUMENT

INTRODUCTION

Weary of being the lone voice in this dispute defending long-settled Utah water law, the Howards note yet again that a cause of action for interference with approved appropriation of water cannot exist absent a showing that the claimant's water has been diminished in either merit or measure:

as long as [a water right owner] receives at his point of diversion the quantity and quality to which his appropriation entitles him, he as an appropriator, *has no control over or concern with what anyone else may do on or with the stream*, or what uses, if any, they may make thereof.

Adams v. Portage Irrigation, Reservoir & Power Co., 95 Utah 1, 72 P.2d 648, 653 (Utah 1937) (emphasis added); *see also College Irr. Co. v. Logan River & Blacksmith Fork Irr. Co.*, 780 P.2d 1241, 1244 (Utah 1989) (“[S]o long as a water user has sufficient water at its point of diversion to satisfy its right, it has no complaint about upstream uses of water. . . .” (citations omitted)).

Far from showing any decrease in either quantity or quality of the water available to them, however, the evidence before the trial court overwhelmingly demonstrated that, for years, the Plaintiffs have taken and continue to take from the Slough considerably more than the 75 acre-feet to which they are entitled (R. 308 & 345; 1625:59–60; FF ¶11 (Add. Tab J)). They have taken water at a rate of flow far greater than the ½ cfs which they are allowed and outside their approved period of use: May 1st through September 30th (R. 308, 324, 332–33, 345; R. 1625 at 199–200). Since 1998, Plaintiffs have taken from the Slough over *2000%* of their entitlement (*id.*), all of which they put to use

irrigating far more acreage than they have any right to irrigate (R. 308, 346, & 1625 at 60–68, 195–98; FF ¶¶12 & 41 (Add. Tab J)). And the crowning irony: since the Howards built the dike in 1998, Plaintiffs have had more water than at any time in the preceding 40 years (R. 347 & 1625 at 68–71).

Plaintiffs have not, in short, suffered any interference with their water right, do not have standing to bring their non-existent interference claims against the Howards, and—despite the length and expense of this dispute—do not have the proof to support any claims against the Howards. The Howards were thus understandably confused and alarmed by the trial court’s ruling holding them liable for this imaginary interference: when someone has not been injured, he should not be able to hale his neighbor into court demanding reparations.

Despite the illicit bloating of their water right, however, Plaintiffs continue waving red herrings about, arguing that the Howards are somehow to blame for imaginary losses they admit not having suffered. Plaintiffs have taken their allotment of water, and more, twenty times over. They do not—they cannot possibly—have any claim for interference. Diminution of their water right is the last thing in the world Plaintiffs can complain of.

Even if we were to assume, *arguendo*, that the Howards’ dike does “impound” some amount of water flowing through the Slough (which it does not), the amount impounded would be a teaspoon to a bucket, considering the enormous amount of water Plaintiffs unlawfully store, divert and use. It is this unlawful diversion which eviscerates Plaintiffs’ claim and demands reversal of the trial court’s ruling.

Consider a hypothetical situation: I am a hunter with a license to bag one goose a

day. Geese typically fly from a pond on your fallow property to my cultivated grain fields to feed. However, rather than one goose, in reality and in violation of the law I bag ten geese a day. Do I have a claim against you when you plant grain on your property so only twenty geese migrate onto my property each day? Should I be able to force you to leave your land fallow by arguing that my poaching does not excuse or justify your “interference” with my illegal method of operation? No one is “interfering” with my hunting rights; I’m still getting my goose and a great many more besides. No one is going to order you to abet my poaching just because I’ve deluded myself into believing I deserve the nine geese I’m poaching and blame you for interfering with me satisfying my “need.” And no one is going to buy in to my bizarre argument that the whole situation is somehow your fault because my poaching “does not excuse or justify your interference.”

(Br.Opp. 27.)

Plaintiffs have never sought proper authorization for any of the many differences between their right in their Certificate of Appropriation and their actual water use in practice. No approval permits their taking over 2000% of the water to which they are entitled. No approved Exchange or Change Application memorializes approval for them to divert water under their Warren Irrigation shares into the Marriott Slough, nor does any further approval allow them to store that water in the Slough, or to divert it out of the Slough, or to use it on their irrigated acreage (which, by the way, comprises well over 250% of the area their certificate permits). Nothing allows their blatantly illegal diversion into the Slough of the water flowing in the County drainage ditch east of 59th West, nor

its storage in the Slough, nor its redirection for use in Plaintiffs' unlawful irrigation.¹ Plaintiffs did not even have authorization to dredge the Slough in 1997 (R. 341–42) so as to illegally store and redirect unlawfully appropriated water to illicitly irrigate unauthorized acreage.

Plaintiffs' enormities, however, although reprehensible and indeed criminal, *see* UCA §§ 73-3-3(9), 73-2-27(1)(d) & (2), are merely by the way for our present purposes. The focus of the present dispute is the Plaintiffs' utterly groundless assertion, whence the trial court's equally groundless ruling, that the Howards have somehow interfered with the Plaintiffs' water right by constructing a dike—with the approval of the U.S. Army Corps of Engineers and the acquiescence of the Utah State Engineer—which has had no effect whatever on the flows in the Slough.² To the contrary, Plaintiffs' ability to get water from the slough has actually improved since the installation of the Howard dike:

Q [By J. Craig Smith] So is the ability to water out of the slough better now than it was—let's say in 2002 than it was in 1995?

A [By Glynn Wayment] Yes, I think. Yes, it is, but it's not better than it was back in 1970 and 1975 in there.

(R. 315, 660; *see also* R. 1625 at 70.) What evidence there is, in sum, shows that Plaintiffs have always received, and continue to take, many times more water than their water right allows. Accordingly, evidence supporting Plaintiffs' interference claim

¹ Nor, incidentally, have Plaintiffs ever sought or received permission from the Howards (or from anyone else), to flood the Howards' land and turn it into a bog. This, however, is the unhappy result of their improper diversion of the water in the County drainage ditch. (*See* R. 1571 at 28–29 & 480–94; 1573 at 411–14, 418, 459–60, & 462–65.)

² The pipes installed through the dike (36 and 15 inches) more than suffice to permit the same historic flows as had existed prior to the dike's construction (R. 324 & 351; Trial: R. 1573 at 401–09; Tr.Exh. 33). The pipes prevent (although the dike does not cause) any backup of water (*see id.* & R. 354–58; Trial: R. 1573 at 406–09), and there has been no additional ponding on either side of the dike since it was built (*id.*).

simply does not, cannot, exist: The water which Plaintiffs may legally claim—0.5 cfs, up to 75 acre-feet—is submerged beneath 19 times that much water, which would all have to be siphoned off before anyone could so much as dip their hand into the original water right, let alone interfere with it.

Plaintiffs have adduced no evidence demonstrating any decrease in either flow or pumping capacity. Plaintiffs have not, in fact, demonstrated any injury at all, and the trial court should not have let the action survive beyond summary judgment, to say nothing of trial.

POINT 1 THE EVIDENCE DOES NOT SUPPORT THE TRIAL COURT'S DETERMINATION THAT THE HOWARD DIKE INTERFERES WITH THE PLAINTIFFS' WATER RIGHT.

A. INTERFERENCE AS A MIXED QUESTION OF LAW AND FACT.

Plaintiffs argue that the issue of “interference is a straightforward question of fact: either Howard’s dike interfered with [Plaintiffs’] water right ... or it did not” (*Br.Opp.* 22).³ Plaintiffs’ argument, however, ill comports with their incessant insistence that “interference” is not a factual issue at all. To the contrary, Plaintiffs have maintained throughout the five years of this dispute, that a determination of interference involves not merely questions of diminution of water quantity or quality (evidence of which Plaintiffs have yet to produce), but the plainly legal issues of water quantity seizable without

³ Plaintiffs’ vehemence on this point may be ascribed to their belief that this Court will rubber-stamp the trial court’s *Decision* because the Howards have “fail[ed] to marshal all of the evidence supporting th[e interference] finding.” (*Br.Opp.* 25). Plaintiffs would have been better served by pointing out to the Howards some of the evidence Plaintiffs expect them to marshal—that is, evidence actually supporting the trial court’s *Decision* (The Howards have found none in the record, *see* the discussion in Section 1.B, below).

authorization in addition to one's original grant and the protectability of one's means of appropriation (i.e., accessibility⁴) irrespective of unlicensed overappropriation. Given the fact that it is this "additional," legally questionable, water with which Plaintiffs claim the Howards have interfered, Plaintiffs can hardly assert now that their interference claim is nothing but "a straightforward question of fact." It is Plaintiffs, not the Howards, who have pushed this issue beyond what might reasonably pass as a solely factual question.

Attempting to sidestep the mixed-question standard of review set forth by this Court in *Searle v. Milburn Irr. Co.*, 2006 UT 16, 547 Utah Adv. Rep. 11, Plaintiffs go on at length about *Searle's* Change Application focus. Even were the Court to rule interference solely a question of fact, however (and the Howards have never contended that a factual determination of cause and effect has no place in such an analysis),⁵ to allow Plaintiffs such a protective legal cocoon as the clear-error standard would be to abet Plaintiffs' disregard of the law. Plaintiffs have unlawfully seized, diverted, rediverted, and applied water without ever once filing the appropriate change or exchange applications.⁶ They cannot now call the *Searle* standard inapplicable simply because they

⁴ In connection with accessibility's nature as a legal and not a merely factual consideration, *see, e.g., Salt Lake City v. Gardner*, 39 Utah 30, 114 P. 17, 152–53 (discussing at length the factual *and* legal considerations involved in such a determination).

⁵ *See, for example, Salt Lake City v. Silver Fork Pipeline Corp.*, 2000 UT 3, ¶¶24–26, 5 P.3d 1206, which discusses a trial court's "finding" that interception of source water in a mine "substantially interferes" with the rights of other appropriators. This, however, is simply the factual portion of a logically mixed question.

⁶ Plaintiffs appear to believe—ostensibly, at least—that ignoring such requirements is harmless, and they cite to *Salt Lake City v. Silver Fork Pipeline Corp.*, 2000 UT 3, ¶37, 5 P.3d 1206, in support. (*Br.Opp.* 27.) This is both disingenuous and erroneous. *Silver Fork* dealt with issues of forfeiture. The Court there noted that failure to follow the mandated procedures of changing point of diversion, although creating no right to such a

are stealing the water rather than seeking the lawful right to use it. And this, of course, would entail the UCA §73-3-8(1) analysis Plaintiffs admit must be addressed as a mixed question of law and fact. (*Br.Opp.* 23.)

B. THERE IS NO EVIDENCE OF INTERFERENCE TO MARSHALL.

In any case, however, the entire absence from the record of any evidence of interference renders the question of marshalling moot. Despite Plaintiffs' assertion that the Howards have failed to satisfy the marshalling requirement by "omit[ting] devastating evidence" (*Br.Opp.* 26), the reality is that the "devastating evidence" to which Plaintiffs point is nothing of the sort. As a matter of fact, what little "evidence" there is plainly demonstrates the insufficiency of Plaintiffs' claims.

1. Plaintiffs' "Devastating Evidence."

"[L]'audace," recommended Danton, "*encore de l'audace, toujours de l'audace*,"⁷ and Plaintiffs have taken his advice to heart, presumptuously adducing as "devastating evidence" of interference a meager three paragraphs of testimony and an exhibit which do not show any interference. Unfortunately, Plaintiffs' evidence falls far short of Plaintiffs' hopes and fizzles as badly as Danton's revolution.

a. Lee Howard's "Intent." Plaintiffs cite to the testimony of Steven Clyde, Plaintiffs' erstwhile attorney, and that of John Mann, Regional Engineer for Weber County, to the effect that "Howard admitted that his real purpose for installing

point of diversion and entailing criminal liability, was not tantamount to forfeiture of the holder's usufructory interest in the water. This observation by the *Silver Fork* Court, however, hardly excuses Plaintiffs' defiance of statutorily mandated procedure in the present instance.

⁷ Loosely "audacity, audacity, always audacity."

the dike was to impound water”:

Clyde: He [Mr. Howard’s attorney] indicated his client was in fact impounding water because they were having difficulty due to relatively low flows getting water into a pond area that they had and wanted to back up water sufficiently enough that they could pump into their pond. Secondly, they were having difficulty keeping livestock confined and wanted the dike across the slough to support a fence so they could control cattle.

(R.1627 (originally 1573), 521:1–12 & 522:3–11 (Steven Clyde).)

Q [by David Wright] Did either of the Howards ever describe to you or explain to you why they were putting the dike in the slough?

A [by John Mann] In the course of conversations they’d indicated that they didn’t want to have their side of the slough de-watered completely and that they wanted to make sure, you know, that the plaintiffs didn’t overuse the water right that they had established.

Q So you said they wanted to make sure that their side was not de-watered, is that what you said, over here?

A That’s what I said. I’m not sure that’s completely accurate but anyway, they wanted to make sure there was not water removed from their property in excess of the water right that would have been—that the plaintiffs would have been entitled to, let me put it that way.

(R.1626 (originally 1572), 236: 7–20.)

Leaving aside Mr. Howard’s continuing insistence that he never said that the intent behind the installation of the dike was to impound water (since it wasn’t) so as to deprive Plaintiffs of their ill-gotten supply (which it doesn’t), these transcript excerpts do not prove anything. Ordinarily, of course, intent is a necessary, but not a sufficient condition of a given act. Intent is a necessary element to a murder conviction, but it is hardly sufficient to prove that a murder took place, especially in the absence of anyone being killed. In the same way, evidence of Mr. Howard’s intent in installing the dike—however questionable—does not *ipso facto* prove that the dike impounds water or interferes in any way with the flow of water in the Marriott Slough.

On the contrary, Plaintiffs have never adduced *any* evidence of interference: The flows in the Slough have not decreased; they have, according to Plaintiff Glynn Wayment, actually improved since the installation of the dike (R. 315, 660; *see also* R. 1625 at 70). Plaintiffs can show no deficit whatsoever in quantity or quality of the water they receive and do not, consequently, have any right at all to seek reparations from the Howards. “Indeed, it would be contrary to the universal sense of mankind to permit redress where there has been no wrong.” *Salt Lake City et al. v. Salt Lake City Water & Electrical Power Co.*, 25 Utah 456, 71 P. 1069, 1072. “Neither at common law,” the *Salt Lake Water & Electrical* Court observed, “nor under the law of appropriation, does [an] appropriator own the water in the stream,” *id.*, quite the reverse: “[S]o long as a water user has sufficient water at its point of diversion to satisfy its right, it has no complaint about upstream uses of water. . . .” *College Irr. Co.*, 780 P.2d at 1244. Plaintiffs, of course, have *20 times* the water sufficient to satisfy their right, and can therefore have no complaint about the Howards’ dike.

b. Whether the Howard Dike Impounds Water. Equally debile and irrelevant is the “evidence of impoundment” which, Plaintiffs argue, the Howards should have marshaled.

The Howards are uncertain as to the relevance of such “evidence” in light of the fact that evidence of impoundment of water behind the dike (of which there is none since the dike doesn’t hold back any of Plaintiffs’ water) is entirely irrelevant unless Plaintiffs fail to receive water sufficient to satisfy their water right, *i.e.*, unless it is first established that there has *been* any interference. Plaintiffs cannot, in sum, assume established the

very point at issue and then denounce activities perfectly innocent absent the point's establishment.

Ignoring such logical puzzles, however, Plaintiffs point to the testimony of Regional Engineer John Mann as “critical,” “devastating evidence” that the Howard dike impounds water:

Well, I walked back over the dike and [*sic*] just to refresh my memory as to what was there as best I could. It was raining yesterday morning so I probably wasn't as observant as I might have been if it had been a little different circumstance but nonetheless, water on the Howard side, not so much water perhaps on the other side.

(R. 1626 at 233: 4–16.) Even assuming the alleged impoundment relevant without first establishing some sort of diminution in Plaintiffs' water supply, this is hardly the “devastating evidence” Plaintiffs paint it to be. Here is Mr. Mann, looking at the Slough in a rainstorm, “so [he's] probably [not] as observant as [he] might have been,” measuring the water on either side of the dike, by eye, and concluding that there is “water on the Howard side” but “no so much water *perhaps* on the other side.” (*Id.*, emphasis added.) Moreover, Mr. Mann's observation took place during the trial, in November of 2003—a period during which Plaintiffs have no call on or right to use any water. So Mann's casual observation establishes nothing: It was made at a time when Plaintiffs had no right to divert or use the water in the Slough.⁸ The trumpeting of Mann's testimony is a damning indictment of Plaintiffs' “evidence” of interference. This was the best they could do? No citations to observations, let alone measurements taken during irrigation

⁸ Incidentally, it was only a few days later that the trial judge went to look at the dike during trial. This onsite visit, which Plaintiffs tout so highly, thus shares the same deficiencies as Mann's visit to the dike did. Both have little if any probative value.

season when Plaintiffs have some right take water?

Plaintiffs also cite to two conclusory opinions offered by Plaintiffs during trial: that of Glynn Wayment:

Q [by David Wright] Okay. Since the Howard dike has been installed, would you describe to the Court how, if at all, how it has changed the slough or your ability to pump or irrigate?

A [by Glynn Wayment] Yes. With the dam in there, it's cut our cycle in half and we're not able to draw clear up here to the separation tin and that's half our water. So you'd say the cycle is cut in half.

(R. 1625 at 46:5–11); and that of Edward England: “The dike definitely holds back water” (R. 151:15). As has been noted before, though, “[a] statement of a witness, which is based solely upon his own opinion, and which is merely a conclusion of an ultimate fact in issue, has no probative value.” *Schott Optical Glass, Inc. v. United States*, 82 Cust. Ct. 11, 22–23, 468 F. Supp. 1318, 1325 (1979) (citations omitted).

Plaintiffs finally cite to the photographs they include at Tab D of the Addendum to their *Brief in Opposition*, comprising Trial Exhibits Nos. 105, 106, and 107. These photographs, according to Plaintiffs, demonstrate that the dike impounds water. Actually, however, each of these various photos demonstrates that the water in the Slough is clearly moving through the pipes from the north side of the dike (facing the Howards' property) to the south side (toward Plaintiffs' properties). The bottom photo of Exhibit No. 107, which Plaintiffs particularly stress, is misleading: it depicts the dike from the north (the Howard property), but the tulies obscure the bottom of the pipe through which the water flows southward. This cannot, however, be seen, and the picture does not, as a result, show anything.

2. ***The Absence of Evidence and the Inadequacy of the Findings Excuses the Howards from the Marshalling Requirement.***

Although the marshalling requirement is theoretically absolute, the Court of Appeals, aware that evidence cannot be marshaled if it does not exist in the record, has twice excused appellants from the requirement where challenged findings are “unsupported in the record,” “are so inadequate that they cannot be meaningfully challenged,” or “do not support the conclusion[s]” based thereon. *Anderson v. Doms*, 1999 UT App 207, ¶10, 984 P.2d 392 (quoting *Woodward v. Fazzio*, 823 P.2d 474, 477 (Utah Ct. App. 1991)).

Such is the case with the relevant “findings” in the present dispute. The trial court’s findings on interference are utterly self-contradictory, remarkably vague, and completely unsupported in the record. In its *Findings of Fact*, the trial court declares that Plaintiffs adduced evidence at trial demonstrating that “[t]he [Howard] dike interferes with plaintiffs’ water right” (R. 1457; *FF&CL* ¶29). The trial court supports this inference with the singularly uninformative finding that “[t]he dike has decreased or slowed the flow of water to plaintiffs’ pump and otherwise change[] the way the slough functions by changing its flow” (*id.*). Taken together, these two “findings” tautologically state only that the trial court found that the dike interfered because it believed that the dike interfered.

Bearing in mind the *College Irrigation* requirement that interference can only exist when an appropriator lacks “sufficient water at its point of diversion to satisfy its right,” 780 P.2d at 1244, this finding simply cannot be reconciled with the previous one:

Neither plaintiffs nor defendants have taken any flow measurements in the slough. Plaintiffs have diverted more than 75 acre-feet of water from the Marriott Slough during the period May 1 to September 30. Plaintiffs irrigate more acreage than the 25 specified in the Certificate.

(R. 1457; *FF&CL* ¶28.) **How**, the Howards ask yet again, can Plaintiffs claim to have suffered any interference when they appropriate many times their allotted water and have absolutely no idea how much is in the Slough at any given time anyway? Plaintiffs cannot produce a single measurement demonstrating any diminution in their unlawful take, and more than ever since the dike was installed.

There is no evidence of interference in the record. Anywhere. And this entire absence of supporting evidence, coupled with the trial court's contradictory and inadequate findings, excuses the Howards from the meaningless task of reviewing irrelevancies in the name of marshalling, but without any real substance.

C. GENERAL IRRIGATION DUTIES ON THE UTAH DIVISION OF WATER RIGHTS WEBSITE DO NOT TRUMP PARTICULAR DUTIES IMPOSED BY A CERTIFICATE OF APPROPRIATION.

Plaintiffs vehemently argue that their irrigation duty is four acre-feet, regardless of their Certificate's specific three-acre-foot limitation (*Br.Opp.* 28–30). Plaintiffs' argument is essentially that, in order to “secure the equitable apportionment and distribution of ... water,” UCA §73-2-1(3)(b), the State Engineer “might even use something as dubious as a website” (*Br.Opp.* 29–30). This position, however, contradicts the law.

First, Utah law provides that

[t]he state engineer *may* make rules, in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, consistent with the purposes and provisions of this title, governing:

- (a) water distribution systems ... ;
- (b) water measurement ... ;
-
- (d) the determination of water rights; and
- (e) the form and content of applications and related documents, maps, and reports.

UCA §73-2-1(5) (emphasis added). This grant of permissive authority to regulate these several areas gives the State Engineer the authority to set irrigation duty limits **by rule**, should he or she so choose. UCA §63-46a-4, however, delineates a series of mandatory steps in the rule-adoption process, including filing with the Division of Administrative Rules, §63-46a-4(4)(a); publication in the Utah State Bulletin, §63-46a-4(4)(c); notice to interested parties, §63-46a-4(8); and a period for public comment, §63-46a-4(9). The duty limitations Plaintiffs cite, allegedly from the Division of Water Rights website, have not undergone any such proceeding, and do not, consequently have any force of law. They are, at best, policy suggestions (at worst, misleading irrelevancies). They certainly cannot be used by Plaintiffs to shield their illegal misappropriation and abuse of Utah's water, nor as a sword to justify their flagrant disregard of the three-acre-foot limitation on their Certificate of Appropriation.

Second, Plaintiffs rely on the hedging, equivocal testimony of Regional Engineer John Mann (beginning: R. 1626 at 231), throughout which he sought to justify the four-acre-foot duty. Of course, Plaintiffs pointedly ignore Mr. Mann's admission on cross examination that it is the duty on the Certificate that governs, not the duty suggested on the website:

Q [by D. Scott Crook] ... you testified that [the duty has] changed now [from 3 acre-feet] to 4-acre feet but does a general irrigation duty bury the irrigation duty that's identified on a water certificate?

A [by John Mann] The certificate itself speaks for itself and I don't think that the duty that's established by the state engineer has authority to modify the certificate itself or the limits of the water right

Q ... the state engineer's policy ... is to enforce limitation [*sic*] found in the certificate; is that correct?

A I think that that would be the responsibility of the state engineer, yes

....

... [I]f the certificate specifies a number of acre-feet then yes, the water user—that's what the water right would be.

(R. 1626 at 264:13–265:13.)

Third, a jump in irrigation duties from three acre-feet to four, to every irrigator diverting from the Weber River, would obviously create an enormous drain on the available water, especially given that the “Weber River is considered to be fully appropriated” (R. 1626 at 253:15–16). The lack of sufficient water would create automatic interference throughout the drainage, simply by virtue of the extra acre-foot draw. The State Engineer, however, may not permit appropriation where unappropriated water is not available. *See, e.g.*, UCA § 73-3-8(1).⁹

Fourth, Plaintiffs' notion that the Water Rights Website trumps the established Certificate falls foul of established norms of interpretation. It is well- and long-established law—in both statutory and contractual contexts—that “if there is inconsistency, uncertainty or overlapping in the provisions of a document, language which deals more specifically with a subject matter takes precedence over general language.” *Provo River Water Users Ass'n v. Lambert*, 642 P.2d 1219, 1227 (Utah

⁹ UCA §73-3-8(1) provides in relevant part as follows: “It shall be the duty of the state engineer to approve an application if: (a) there is unappropriated water in the proposed source; (b) the proposed use will not impair existing rights or interfere with the more beneficial use of the water; If an application does not meet the requirements of this section, it shall be rejected.”

1982), *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (“[I]t is a commonplace of statutory construction that the specific governs the general” (citation omitted)); *Basic Controlex Corp., Inc. v. Klockner Moeller Corp.*, 202 F.3d 450, 453 (1st Cir. 2000) (“faced with a conflict between provisions in a specific statute ... and the terms of a general law, ... the provisions of the specific statute prevail” (citation omitted)). While the Water Rights Website’s suggested duty values and Plaintiffs’ Certificate are not a single document, if the Website somehow has any legal stature the same sort of analysis ought to apply between a valid policy document and a particular instance of that policy’s application. Thus the four of the webpage is overruled by the three of the Certificate of Appropriation.¹⁰

Finally, from a policy perspective, adopting Plaintiffs’ notion that the Division of Water Rights website somehow establishes controlling regulatory law would ultimately destroy the internet as a viable source of government information. That one might detrimentally rely upon information listed on a webpage—irrespective of whether it had the force of law (*i.e.*, that it had been properly adopted as a rule or local ordinance)—must, in the long run, dissuade government entities from providing any internet access at all to any substantive provisions: the risk would be simply too great to justify any benefit.

For all of these reasons, this Court should reject Plaintiffs’ attempt to apotheosize

¹⁰ Plaintiffs’ backwards view that general trumps specific leads only to chaos and calamity in a world where exceptions could never apply. An internet map of Utah highways, for example, listing speed limits on each, would have to be deemed to govern over posted speed limit signs along the road itself. And such speed limit signs would mean motorists could ignore temporary speed signs at construction sites.

a website over established law. Plaintiffs are entitled only to a duty of three acre-feet, as specified in their Certificate.

POINT 2 THE TRIAL COURT ERRED IN DENYING THE HOWARDS' SUMMARY JUDGMENT MOTIONS.

A. PLAINTIFFS FAILED PROPERLY TO DISPUTE HOWARD'S STATEMENTS OF UNDISPUTED FACT.

Plaintiffs assert that their piecemeal, fractional restatement and paraphrasing of the Howards' *Summary Judgment* undisputed facts nevertheless somehow satisfied the “verbatim restatement” requirement of URCP Rule 7(c)(3)(B). (*Br.Opp.* 31.) The rule, however, is quite explicit: *verbatim* means “verbatim,” not “almost verbatim,” to say nothing of “paraphrased” or “implied by reference.”

It is true the Court found in *Salt Lake County v. Metro West Ready Mix, Inc.*, 2004 UT 23 ¶23 n.4, 89 P.3d 155, that although the County had failed “to comply with the technical requirements of rule [7(c)(3)(B)],” the failure “was harmless in th[at] case” because the “disputed facts were clearly provided in the body of the memorandum with applicable record references....” *id.*¹¹ But it is also true, as the Court of Appeals pointed out in *Gary Porter Const. v. Fox Const., Inc.*, 2004 UT App 354, 101 P.3d 371, that *Metro West* may very have created the proverbial exception that swallows the rule, reducing the “verbatim restatement” mandate to “a mere suggestion,” 2004 UT App 354, ¶15 n.2, and creating a troublesome procedural dilemma:

[T]he rule announced by the [*Metro West* C]ourt leaves it unclear what remedies are available to trial courts for a party's failure to follow the procedure outlined in [URCP 7(c)(3)(B)].... [I]f failure to comply with the

¹¹ The Howards are dismayed that they have had to do Plaintiffs' research for them in order to address this issue.

rule is “harmless” as long as a disputed fact can be gleaned from the opposition papers, then [it becomes] unclear whether granting summary judgment, because facts are admitted as undisputed that otherwise would not have been, is *ever* within the trial court’s discretion for failure to comply with the rule.

Id. (emphasis added, citations omitted).¹²

In any event, *Metro West’s* rescission of the rule’s “technical requirements” from its informing policy is legally alarming. What *is* a rule, after all, but a set of technical requirements embodying the policy that informs it? Or how can a policy be enforced but through the enforcement of its instantiating rules? Ignore the “technicalities” of a recipe, and you abandon the hoped-for dish. Change the rhythm of a waltz, and it’s no longer a waltz. Change a rule, and you renounce the policy behind it: “How can we know the dancer from the dance?”¹³ Disregarding the requirements of rule 7(c)(3)(B) negates entirely the underlying policy of clear and expeditious determination of the existence of factual issues, forcing trial judges instead to winnow through prose for information which should have been clearly listed, restated verbatim, and specifically disputed.

It’s up to the Court, of course, but the Howards, along with the Court of Appeals, respectfully submit that if Plaintiffs’ improper responses to the Howards’ undisputed

¹² The Court of Appeals concluded with a rare request for clarification:

[B]ecause the rule announced in [*Metro West*] was in a footnote with no reference to apparently conflicting prior case law, we ask the Utah Supreme Court to clarify the scope of remedies under rule 7(c)(3)(B) ..., 2004 UT App 354, ¶15 n.2, essentially requesting that the rule be enforced as written or repealed.

¹³ W.B. Yeats, “*Among School Children*.” In the context of the present dispute, the critical interrelationship between policy and rule, to which Yeats’s poem so admirably applies (and which Plaintiffs wish the Court to ignore), recalls the admonitory adage “anyone who draws a distinction between the spirit and the letter of the law is trying to disobey one or the other.”

facts nevertheless somehow satisfy rule 7(c)(3)(B), then there is in reality no rule 7(c)(3)(B) to satisfy.

Howards' undisputed facts should have been deemed admitted.

B. THE TRIAL COURT DISREGARDED THE EXPRESS MANDATE OF URCP RULE 56(d).

Consonant with their tack on all the errors at issue—dismissing each as but a trivial infraction unworthy of notice—the Plaintiffs characterize as “sufficient[]” the trial court’s refusal to specify controverted material facts, as required by URCP Rule 56(d) (*Br. Opp.* 33–34), arguing that any analysis beyond what the trial court actually did would not have been “practicable” (*id.*). Here again, Plaintiffs urge a disquieting disregard of the rules.

A glance at the record suffices to show that the trial court did not make even the slightest attempt to comply with Rule 56(d) but instead flatly denied that it had any such duty: “In a motion for summary judgment, it is not the Court’s role to sort through and sift out all the facts that are ‘thrown at it’ to determine which facts are disputed and which are not” (R. 272). This, however, is *precisely* the court’s role: “technically speaking, the obligation imposed on the district judge by Rule 56(d) to specify the uncontroverted material facts is compulsory.” 10B Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* (“FPP”), Civ. 3d § 2737 (1998).¹⁴

¹⁴ A court may, it seems, decline to enter a rule 56(d) if it “determines that ... identifying the facts that no longer may be disputed would not materially expedite the adjudication.” FPP § 2737. In the present matter, of course, the trial court made no such determination; on the contrary, the trial court’s declaration that “sort[ing] through ... the facts ‘thrown at

This was not, as Plaintiffs paint it, a question of “practicability,” but of patent nonfeasance. Although presumably aware of the requirements of rule 56(d), the trial court simply made the nebulous statement that “there [were] numerous minor and major disputed issues of material fact” (*id.*), but then pointedly refused “to list or itemize all the disputed facts” (*id.*), despite the mandate of the rule.

**C. THE PLAINTIFFS’ INTERFERENCE CLAIM WAS BARRED BY
RES JUDICATA, THE RELEVANT ISSUES IN BOTH THE
EARLIER APPLICATION PROCEEDING AND THE TRIAL
BELOW BEING IDENTICAL.**

Despite the State Engineer’s denial of their earlier application to appropriate additional water from the Marriott Slough, Plaintiffs argue that *res judicata* did not bar their interference claim on the grounds that “[t]he disposition of that application for additional water does not even resemble, let alone implicate, the issues in this case.” (*Br. Opp.* 35). Actually, however, the “additional water” Plaintiffs asserted before the State Engineer was water “foreign to the slough” (R. 148; Add. Tab E) to be “used *with* Water Right Number 35-8073” (R. 1451 ¶ 1; quoted in *Br. Opp.* 35), is the same water Plaintiffs now claim and illegally use as a *part of* Water Right 35-8073 with which Lee Howard has somehow interfered. Plaintiffs’ attempt to sidestep *res judicata* as to the water they were denied the use of by labeling it “additional” water for “supplemental irrigation” which “has no bearing on” their interference claim (*Br. Opp.* 35)—despite the fact that it is one of the foundation stones of their case—is akin to trying to hide King Kong in New York City with a hat and sunglasses.

it” is “not the Court’s role” demonstrates the court’s belief that no such effort was even necessary.

The issue in both the administrative proceeding and the present dispute are precisely the same in this regard: whether Plaintiffs are entitled to divert additional waters into the Slough and then to redirect them from the Slough for irrigation. What Plaintiffs *call* the water in question is utterly irrelevant. *Res Judicata* barred Plaintiffs' assertion that the water they add to the Slough after diverting it from the Warren Canal and retains a separate identity, and the trial court erred, both in permitting the allegation and in accepting it as grounds for denying Lee Howard's motion for summary judgment.¹⁵

**POINT 3 THE TRIAL COURT INCORRECTLY DISPOSED OF
THE HOWARD'S COUNTERCLAIMS.**

A. THE HOWARDS' TRESPASS COUNTERCLAIM.

Intoning yet again their mantra that the trial court's mistake was "surely [a] harmless" error (*id.* at 37 n.7) to be waived off as trivial or, at worst, frowningly condoned, Plaintiffs disingenuously attempt to imbue the trial court's erroneous dismissal of Mr. Howard's trespass counterclaim with an intention that simply isn't there (*Br.Opp.* 35–38).

The Trial Court's August 23, 2004, *Supplemental Decision* (issued at the request of Howard's in his effort to allow the trial court to correct obvious errors without the necessity of Appeal) declares unambiguously, though incorrectly, that "the Defendants' trespass claim was formally withdrawn at trial" (R. 1275). As the Howards pointed out in

¹⁵ Plaintiffs end their argument on this point by asserting that "[b]ecause the matters were not related, Howard made no such claim at trial" (*Br.Opp.* 35). This, however, is untrue. The Howards directly addressed at trial the Plaintiffs' application before and its denial by the State Engineer on cross-examination. Doing so would have been pointless had the Howards not been directly addressing their *res judicata* arguments.

their opening Brief (pp. 45–46), and as Plaintiffs grudgingly acknowledge, this is simply not true: it was the Plaintiffs’ trespass claim which was *dismissed*, not withdrawn. Irrespective of whether Lee Howard’s trespass claim was litigated or not, the trial court’s *Decision* was mistaken. Plaintiffs concede that the trial court’s declaration was “obviously mistaken” (*Br.Opp.* 37), and that they “knew the claim was not withdrawn” (*id.*).

Despite this, however, Plaintiffs demand that this Court grant effect to the trial court’s error, dismissing a counterclaim which was never dismissed, based, not upon the plain text of the Decision, but upon (a) a fanciful analysis of what they believe the trial court *meant* to do and (b) the *Findings and Conclusions* they themselves drafted (to which the Howards properly objected (R. 1278–93)). This, however, is not only impossible (especially given the trial court’s unambiguous statement), it also runs contrary to every principle of linguistic construction under Utah law.¹⁶

Unfortunately for Plaintiffs, the plain language of the Decision mistakenly declares only that “the Defendants’ trespass claim was formally withdrawn at trial” (R. 1275); it makes no further representations, nor does it explain the statement in any way.

¹⁶ *Mouty v. The Sandy City Recorder*, 2005 UT 41, ¶17, 122 P.3d 521 (statutes are interpreted to give effect to legislative intent as evidenced by the plain language, assuming each term was used advisedly, and only turning to “other modes of construction” if the language is ambiguous); *Archer v. Bd. of State Lands and Forestry*, 907 P.2d 1142, 1145 (Utah 1995) (“administrative rules should generally be construed according to their plain language read[ing] each term literally unless such a reading is unreasonably inoperable” (citations omitted)); *Saleh v. Farmers Ins. Exchange*, 2006 UT 20, ¶21, ---P.3d---, 2006 WL 744261 (“If the language within the four corners of [a] contract is unambiguous, the parties’ intentions are determined from the plain meaning of the contractual language” (citation omitted)). It seems only reasonable that judicial decisions should be subject to the same scrutiny afforded legislative and administrative enactments, as well as that applied to contracts.

Plaintiffs suggest that the trial court’s actual intent is to be gleaned from its earlier, April 2004, ruling: “The trial court believed it had resolved the counterclaims ‘inferentially’ in its original trial decision” (*Br.Opp.* 37). But the trial court didn’t say this either. The actual statement was “[t]he issues contained in the Defendants’ Counterclaim were *addressed* inferentially, but not directly” (R. 1275). There is a significant difference between Plaintiffs’ “resolved ... ‘inferentially,’” and the trial court’s “addressed inferentially.” The former language—Plaintiffs’—implies that one can read the April Decision and infer from the statements made therein that the trial court meant to dismiss Lee Howard’s counterclaims. The latter language—the trial court’s—actually makes no such assertion. Nor could the trial court make such a representation in good faith, since there *is* nothing in the earlier *Decision* from which one can infer any intent to dismiss the trespass counterclaim.¹⁷

There is simply nothing to which the Plaintiffs can rationally point to demonstrate that the trial court did anything in the August Decision other than continue to ignore Lee Howard’s trespass counterclaim as a result of its erroneous belief that the claim had been “formally withdrawn.”

B. THE HOWARDS’ NEGLIGENCE AND NUISANCE COUNTERCLAIMS.

The Plaintiffs point to the trial court’s FF ¶¶ 33, 34, and 35, wherein the trial court

¹⁷ It is ironic that Plaintiffs here attempt to undermine the certainty of plain and unambiguous judicial language, when their arguments concerning the Department of Water Rights website is a transparent attempt to gloss over the inherent uncertainties in a virtual document with no legal standing at all from which the State Engineer’s office has expressly insulated itself by way of a disclaimer plainly warning against anyone assuming the certainty of anything on the website.

cites Plaintiffs' dredging and subsequent inundation of the Howards' land as a definitive and proper handling of the Howards' counterclaims for negligence and nuisance. (*Br.Opp.* 38.) Actually, however, FFs ¶¶ 34 and 35 are legal conclusions, not findings at all, inasmuch as they render legal determinations as to negligence and nuisance (or rather their absence). This Court may address legal questions, of course, without regard to the findings of the trial court. *See United States Fuel Co. v. Huntington-Cleveland Irrigation Co.*, 2003 UT 49, ¶9, 79 P.3d 945.

CONCLUSION

Mr. Lee Howard respectfully submits, in light of the foregoing, together with the arguments set forth in his Opening Brief, that the Plaintiffs failed utterly to prove their claims before the trial court. Plaintiffs have suffered no damage to their water right; to the contrary, Plaintiffs continue illegally to divert and appropriate many times the amount of water to which they are entitled. Plaintiffs cannot claim interference when they have suffered neither diminution in their supply nor pejoration of the quality of their water. The trial court therefore erred in granting Plaintiffs relief from harm they have never in reality suffered.

Lee Howard therefore respectfully requests that this Court, **first**, reverse the trial court's Order denying the Howards' motions for summary judgment and order the trial court to enter judgment in favor of Lee Howard on Plaintiffs' interference claims; **second**, in the alternative, vacate the trial court's Final Judgment as to Plaintiffs' interference claims; **third**, order the trial court to enter judgment in favor of Lee Howard as to his trespass, nuisance, and negligence counterclaims, and enjoin Plaintiffs' acting

outside the bounds of their certificate of appropriation; and **fourth**, remand this matter to the trial court for a determination of punitive damages and attorney's fees.

Dated this 10th day of May, 2006.

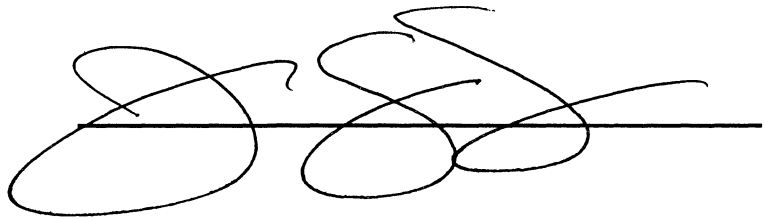


J. Craig Smith
D. Scott Crook
Scott M. Ellsworth
SMITH HARTVIGSEN, PLLC
Attorneys for Appellant Lee Howard

CERTIFICATE OF SERVICE

On this 10th day of May, 2006, two true and correct copies of the foregoing **APPELLANT'S REPLY BRIEF** was sent through the United States mail, first-class, postage prepaid, addressed as follows:

John H. Mabey, Jr.
David C. Wright
MABEY & WRIGHT
265 East 100 South, #300
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to be "JH Mabey Jr", is written over a solid horizontal line. The signature is stylized with large loops and a long horizontal stroke at the end.