

1963

# George C. Maw et al v. Weber Basin Water Conservancy District and Ogden Duck Club : Appellants' Reply Brief

Utah Supreme Court

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Neil R. Olmstead; E. J. Skeen; Attorneys for Respondents;

Glen E. Fuller; Attorney for Appellants;

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# IN THE SUPREME COURT OF THE STATE OF UTAH

GEORGE C. MAW, W. EUGENE  
MAW, ORLO S. MAW and FER-  
RELL J. MAW, R. JOHN MAW  
and JUNIOR B. MAW, VIRGIL  
G. MAW and VADEL T. MAW,

*Plaintiffs and Appellants,*

vs.

WEBER BASIN WATER CON-  
SERVANCY DISTRICT and  
OGDEN DUCK CLUB, a Utah  
Corporation,

*Defendants-Respondents.*

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Supreme Court, Utah.

Civil No.  
9950

## APPELLANTS' REPLY BRIEF

Appeal from the Judgment of the  
Second District Court for Weber County  
Hon. John F. Wahlquist, Judge

Glen E. Fuller  
15 East Fourth South Street  
Salt Lake City, Utah  
Attorney for Appellants

E. J. Skeen  
Newhouse Building  
Salt Lake City, Utah  
Neil R. Olmstead  
2324 Adams Avenue  
Ogden, Utah  
Attorney for Respondents

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## APPELLANTS' REPLY BRIEF

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Because of two major areas of argument contained in Respondent's brief which appellants contend are inaccurate, misleading and contrary to the record, appellants submit this reply brief in order that the Court will have the true picture of what happened at the pre-trial proceedings before it.

## ARGUMENT

### I. PLAINTIFFS WERE DENIED THE OPPORTUNITY OF PUTTING ON EVIDENCE ON ALL ISSUES EXCEPT EVIDENCE RELATING TO THE 1936 AGREEMENT.

On Pages 4, 19 and 20 of respondent's brief the contention is raised with references to the transcript, that the Court repeatedly offered to permit plaintiffs to put on evidence in support of their position. On the face of such an argument such a broad generalization might appear logical, but the references in respondents' brief and the quotations containing discussions between the Court and counsel for appellants have been taken out of context. Because of this a word of explanation is in order.

At the pre-trial hearing of February 14, 1963, the Court first addressed its analysis of the situation as to whether or not appellants had a cause of action against the Ogden Duck Club, and it proceeded to analyze that portion of the case first. Obviously, since the liability against the Ogden Duck Club rested in a large measure on an interpretation of the 1936 Agreement between Annie C. Maw and the Ogden Duck Club, it was necessary to fully examine the Agreement. As to the Agreement appellants have stated that they were not in a position, after the lapse of many years, to produce evidence which would alter or explain the meaning of that document other than as the conduct of the vari-

ous litigants would tend to interpret it over a series of years. In fact, Mr. Skeen and other counsel for respondents raised an issue of law as to whether, if attempted, such evidence could be introduced (Tr. 17). To this approach counsel for appellants agreed, relying upon the ambiguity contained within the four corners of the instrument and the course of conduct of the parties over the years to explain that ambiguity.

It is true, as has been referred to by respondent in its references to various portions of the transcript, the appellants declined at each point when the matter was raised to put on evidence which would tend to vary the meaning of the 1936 Agreement other than the type of evidence just referred to. However, *appellants at no point declined to put on evidence of its other theories of the case, and particularly evidence relating to its claims against the Weber Basin Water Conservancy District!*

It was not until the conclusion of the pre-trial proceedings on the day involved that the Court finally turned its attention to the Weber Basin Water Conservancy District, and after a short discussion summarily dismissed the action against it. The bulk of the discussion at the pre-trial hearing was concerned with the Ogden Duck Club. And the references made by respondents to the brief and the Court's offer to permit plaintiffs to put on evidence relating to a different meaning which might be given the 1936 Agreement all related to the claim against the Ogden Duck Club.

**THE COURT:** The court will invite the Plaintiff at this time, if they choose to do so, to present evidence which would give to this document, Exhibit A., some special or unusual meaning. (Tr. 39).

It was not until page 44 of the transcript that the Court got around to discussing the matter of the liability of the Weber Basin Water Conservancy District. This can best be illustrated by references to the very transcript involved.

**MR. FULLER:** No, not necessarily. We proceeded against the Weber Basin on the estoppel theory and the contract theory as well.

**THE COURT:** *We will get to that in a minute.* (Tr. 42).

\* \* \* \*

**THE COURT:** I will let the Defendant club out of the lawsuit. Let me talk about the Weber Basin just a little bit, and make certain I have got this straight now . . . (Tr. 44).

When respondents claim that “the Court offered to impanel the jury and to hear the evidence in support of the appellants’ position, and each time the offer was refused . . . ,” they are simply trying to confuse the matter by lifting a limited portion of the Pre-trial hearing out of context, and attempting to apply it to the entire lawsuit.

## II. THE COURT WAS ADVISED OF PLAINTIFFS’ THEORIES OF RECOVERY AT THE PRE-TRIAL STAGE.

As indicated in a quotation in the preceding point of Argument, the Court was advised at the Pre-trial hearing by appellants' counsel that action was taken against the Weber Basin Water Conservancy District "... on the estoppel theory and contract theory as well." Further, after the Court finished its discussion relating to the liability of the Ogden Duck Club at page 44 of the transcript, the Court was fully advised of appellants' position when discussions relating to the liability of the Weber Basin Water Conservancy District took place:

**THE COURT:** What is your theory?

**MR. FULLER:** Well, our theory is this, the theory is exactly this, before the Maws would sell these lands or Val (Orlo) Maw in particular, you were President of W. John Maw & Sons Company, weren't you?

**MR. VAL (ORLO) MAW:** Yes.

**MR. FULLER:** Entered into a series of negotiations and these hunting rights were spelled out very clearly to the negotiators for the Weber Basin District and Orlo Maw steadfastly refused to sign and sell the land involved without the Duck Club's shooting privileges for himself and other members of the family being settled. His testimony would be that he insisted that he get assurance in the form that he did from Mr. Fjeldsted's letter before he would sign and sell the lands, otherwise, he would have insisted that they condemn all of the property rights the Maws had including the large tract of land, and that upon getting these assurances and in discussions he had with who, you talked with who, Mr. Skeen?

MR. ORLO MAW: Concerning these rights, Mr. Ed. Skeen. Yes.

MR. FULLER: What about Mr. George Smith, their appraiser?

MR. ORLO MAW: Mr. George Smith, their appraiser, we talked at length with him.

MR. FULLER: Anyway, as a result of this, in order to purchase the land without a condemnation suit that was the arrangement that was made. Had there been a condemnation suit, these hunting rights would have been brought into the matter. (Tr. 47).

\* \* \* \*

MR. MAW: They informed me that by preparing this letter to protect all rights which I had no right to sell, that we would avoid a condemnation suit by proceeding with the contract and I refused to sign the contract until the protection, and all of us concerned were given protection and as a result the letter was prepared before I signed the contract. Otherwise, I would have let it go in the condemnation. (Tr. 51).

The foregoing simply refutes the bold assertion made by respondents at page 19 of their brief when they say: "No argument of the Third-Party beneficiary theory was made to the trial court."

As further support to the fact that the Court at Pre-trial was fully aware of the contentions against the Weber Basin Water Conservancy District, we should have a closer look at the record. From the index of the record one can readily see that pre-trial proceedings

occurred on November 5, 1962, on December 19, 1962, and on February 14, 1963. At the Pre-trial hearing on November 5, 1962, the Court requested plaintiffs to submit a statement of its legal theories against the two defendants by December 10, 1962, so that a further Pre-trial hearing could be had in the matter. Accordingly, on the date set for the second pre-trial hearing on December 10, 1962, there was filed in the matter (R. 30) the statement requested by the Court, which set forth very clearly the theories of recovery which plaintiffs would advance as to each defendant. Because of the suggestion that there were new matters before the Court, we take the liberty of printing that portion of the Record at this time in its entirety:

## PLAINTIFFS' STATEMENT OF LEGAL THEORIES AGAINST DEFENDANTS

Civil No. 36819  
Dept. No. 2

In this action, the plaintiffs will proceed against the respective defendants under both contract and tort theories, as follows:

### AS TO OGDEN DUCK CLUB

Contract theory—It will be the position of plaintiffs that the right-of-way agreement (Exhibit "A" of plaintiffs' complaint) has been in continuous force and effect notwithstanding the construction of the Willard Bay Reservoir Project, and that said Ogden Duck Club wrongfully, illegally and unlawfully breached said agreement

by refusing to permit plaintiffs to use the facilities of the Ogden Duck Club as provided in said agreement.

This theory will be supported by the right-of-way agreement attached to the complaint and by the land purchase contract between the Maws and the United States of America wherein it was recognized and agreed in Paragraph 3 a as follows:

“It is understood and agreed that the rights to be conveyed to the United States as described in Article 3 hereof shall be free from lien or encumbrance except: (ii) rights-of-way for roads, (Including the right-of-way granted to the Ogden Duck Club across Tract 95), . . . .”

## AS TO WEBER BASIN WATER CONSERVANCY DISTRICT

Contract theory — Plaintiffs will proceed against this defendant pursuant to what it conceives to be a valid contract wherein it agreed to settle a portion of its claim with the United States of America, which is allied with the Weber Basin Water Conservancy District in the Willard Bay Project, upon the condition and subject to the representations made by the Weber Basin Water Conservancy District through its manager, E. J. Fjeldsted, that plaintiffs would be reimbursed for their “Duck Club shooting privileges” if they, and the people associated with them, would proceed to settle their claims for the actual lands involved with the United States of America.

The basis for the aforesaid contract claim is set forth in Mr. Fjeldsted’s letter to W. John

Maw and Sons, Inc., dated July 5, 1957, set forth in the complaint as Exhibit "B".

Estoppel — Plaintiffs will proceed against Weber Basin Water Conservancy District under tort claiming an estoppel against defendant Weber Basin Conservancy District in that the aforesaid letter, Exhibit "B", wherein Mr. Fjeldsted promised to separately settle with plaintiffs and their representatives and associates from the "Duck Club shooting privileges" if they would settle their other claims with the United States of America. Plaintiffs will contend that this representation was relied upon by them and that they did rely upon the same in settling their other claims, that Mr. Fjeldsted acted for and on behalf of said defendant and in writing said letter (Exhibit "B") he intended that plaintiffs rely and act upon said letter, as they did, and that plaintiffs suffered damages by reason of the refusal of the Weber Basin Water Conservancy District to make good upon its representations.

Trespass—Plaintiffs will further proceed against the Weber Basin Water Conservancy District in tort on the theory that, pursuant to their agreement with the United States of America, they still retain the rights across their lands, even though the route has been changed, to supply the Ogden Duck Club with a route whereby it can cross said lands to its present facilities. Plaintiffs will contend that the fact that the Ogden Duck Club was required to move its buildings some distance by reason of the construction of the Willard Bay Reservoir does not, in any way, relieve either defendants from accounting to plaintiffs for the use of a re-routed road serving the Ogden Duck Club facilities in-

asmuch as the new road still must traverse the same properties which the Maws originally owned albeit the route deviates somewhat from the former route.

As an alternative to any argument which can be, or which might be, advanced by either defendant, to the effect that a new route is being used through the same properties, plaintiffs will proceed against Weber Basin Water Conservancy District on the ground and theory that it deliberately and without legal or justification trespassed upon the original route used by the Ogden Duck Club and destroyed it and caused it to be covered with water, dikes and other facilities so that it cannot ever be used again.

\* \* \* \*

It is submitted that the action of the defendants as generalized in the foregoing legal theories of recovery has, in effect, constituted a complete taking equivalent to a condemnation of the full value of the rights in the properties which plaintiffs enjoyed, and that the reasonable fair cash market value of their rights constitutes the measure of damages in this action.

Respectfully submitted,

/s/ Glen E. Fuller  
Glen E. Fuller  
15 East Fourth South Street  
Salt Lake City, Utah

(R. 30-33)

How could the contentions of plaintiffs be spelled out more clearly than in the foregoing statement?

## CONCLUSION

It is again submitted that these appellants were denied the opportunity of putting on evidence which would develop their theories of recovery in this matter, and that the procedure used by the Court to dismiss the action was contrary to law and justice.

Respectfully submitted,

Glen E. Fuller  
Attorney for Plaintiffs-Appellants  
15 East 4th South  
Salt Lake City, Utah