

2015

Reed Brasher, an Individual, Appellant, v. Vicki Christensen, an Individual, Appellee.

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



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.

Recommended Citation

Brief of Appellant, *Brasher v Christensen*, No. 20141183 (Utah Court of Appeals, 2015).
https://digitalcommons.law.byu.edu/byu_ca3/3194

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs (2007–) 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 COURT OF APPEALS

REED BRASHER, an individual,

Appellant,

v.

VICKI CHRISTENSEN, an individual,

Appellee.

APPELLANT'S BRIEF

Appellate Case No. 20141183-CA

Trial Case No. 130700011

ATTORNEY FOR APPELLEE

Don M. Torgerson
TORGERSON LAW OFFICES, P.C.
453 East Main, Ste. 100
Price, Utah 84501
Telephone: (435) 637-7011
Facsimile: (435) 636-0138
Email: dt@pricelawyers.com

ATTORNEYS FOR APPELLANT

Justin D. Heideman (USB #8897)
Justin R. Elswick (USB #9153)
HEIDEMAN & ASSOCIATES
2696 North University Ave, Suite 180
Provo, Utah 84604
Tel: (801) 472-7742
Fax: (801) 374-1724
Email: heideman@heidlaw.com
jelswick@heidlaw.com

FILED
UTAH APPELLATE COURTS

MAY 27 2015

IN THE UTAH COURT OF APPEALS

REED BRASHER, an individual,

Appellant,

v.

VICKI CHRISTENSEN, an individual,

Appellee.

APPELLANT'S BRIEF

Appellate Case No. 20141183-CA

Trial Case No. 130700011

ATTORNEY FOR APPELLEE

Don M. Torgerson
TORGERSON LAW OFFICES, P.C.
453 East Main, Ste. 100
Price, Utah 84501
Telephone: (435) 637-7011
Facsimile: (435) 636-0138
Email: dt@pricelawyers.com

ATTORNEYS FOR APPELLANT

Justin D. Heideman (USB #8897)
Justin R. Elswick (USB #9153)
HEIDEMAN & ASSOCIATES
2696 North University Ave, Suite 180
Provo, Utah 84604
Tel: (801) 472-7742
Fax: (801) 374-1724
Email: heideman@heidlaw.com
jelswick@heidlaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
JURISDICTIONAL STATEMENT	1
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	3
STATEMENT OF FACTS.....	7
SUMMARY OF THE ARGUMENT	17
ARGUMENT.....	18
I. The District Court erred in making certain findings of fact that are directly contravened in the record and by trial testimony.	18
II. The District Court erred in finding as a matter of law that the WUA, standing alone, fails to establish an enforceable contract or establish that Christensen accepted Brasher’s offer to lease water to Brasher.	23
III. The District Court erred in finding that there was no meeting of the minds between Christensen and Brasher as to the essential elements necessary to form an oral contract.	27
IV. The District Court erred in finding that Brasher’s claim for promissory estoppel is inapplicable because Christensen’s promise to allow Brasher to draw water in 2013 was conditioned upon Brasher purchasing the Farm.	32
V. The District Court erred in failing to apply the parol evidence rule to certain extrinsic evidence.	36
CONCLUSION	39
CERTIFICATE OF SERVICE.....	41

TABLE OF AUTHORITIES

Cases

<i>Aquagen Int'l, Inc. v. Calrae Trust</i> , 972 P.2d 411 (Utah 1998).....	1, 25
<i>Commercial Union Assocs. v. Clayton</i> , 863 P.2d 29 (Utah Ct. App. 1993).....	2
<i>Daines v. Vincent</i> , 2008 UT 51, 190 P.3d 1269.....	3, 39
<i>Davies v. Olson</i> , 746 P.2d 264 (Utah Ct. App. 1987).....	2
<i>DCH Holdings, LLC v. Nielsen</i> , 2009 UT App 269, 220 P.3d 178.....	3
<i>Hall v. Process Instruments & Control, Inc.</i> , 890 P.2d 1024 Utah 1995).....	26
<i>IFG Leasing Co. v. Gordon</i> , 776 P.2d 607 (Utah 1989).....	1
<i>McKelvey v. Hamilton</i> , 2009 UT App 126, 211 P.3d 390.....	1, 24
<i>Nunley v. Westates Casing Servs., Inc.</i> , 1999 UT 100, 989 P.2d 1077.....	2, 33
<i>Oneida/SLIC v. Oneida Cold Storage & Warehouse</i> , 872 P.2d 1051, (Utah Ct. App. 1994).....	1, 18
<i>Prince, Yeates & Geldzahler v. Young</i> , 2004 UT 26, 94 P.3d 179.....	2
<i>Prows v. State</i> , 822 P.2d 764 (Utah 1991).....	2
<i>Stangl v. Ernst Home Ctr.</i> , 948 P.2d 356 (Utah Ct. App. 1997).....	2
<i>State v. Nielsen</i> , 2014 UT 10, 326 P.3d 645.....	1, 19
<i>Sugarhouse Fin. Co. v. Anderson</i> , 610 P.2d 1369, 1373 (Utah 1980).....	2
<i>Tangren Family Trust v. Tangren</i> , 2008 UT 20, 182 P.3d 326.....	3, 37
<i>Topik v. Thurber</i> , 739 P.2d 1101, 1103 (Utah 1987).....	2
<i>Uhrhahn Constr. & Design, Inc. v. Hopkins</i> , 2008 UT App 41, 179 P.3d 808.....	1, 2, 24
<i>Youngblood v. Auto-Owners Ins. Co.</i> , 2007 UT 28, 158 P.3d 1088.....	2, 33

Statutes

Utah Code Ann. §78A-4-103(2)(j).....1

Other Authorities

Utah R. Civ. P. 24.....1

JURISDICTIONAL STATEMENT

Appellant appeals from the final judgment issued by the Seventh District Court (“District Court”) on December 12, 2014.¹ The Supreme Court of Utah transferred this appeal to the Utah Court of Appeals on January 5, 2015. The Utah Court of Appeals has appellate jurisdiction pursuant to Utah Code Ann. §78A-4-103(2)(j).

STATEMENT OF ISSUES

Issue No. 1: Whether the District Court erred by making certain findings of fact that are directly contravened by the record and trial testimony.

Determinative Law: Utah R. App. P. 24; *State v. Nielsen*, 2014 UT 10, 326 P.3d 645; *IFG Leasing Co. v. Gordon*, 776 P.2d 607 (Utah 1989).

Standard of Review: Clearly erroneous. *State v. Nielsen*, 2014 UT 10, ¶ 36, 326 P.3d 645; *Oneida/SLIC v. Oneida Cold Storage & Warehouse*, 872 P.2d 1051, 1053 (Utah Ct. App. 1994).

Preserved at: [R. 546-551].

Issue No. 2: Whether the District Court erred in finding that the Water Use Authorization (“WUA”), standing alone, fails to establish an enforceable written contract or that Brasher accepted Christensen’s offer to lease water as a matter of law.

Determinative Law: *Uhrhahn Constr. & Design, Inc. v. Hopkins*, 2008 UT App 41, 179 P.3d 808; *McKelvey v. Hamilton*, 2009 UT App 126, 211 P.3d 390; *Aquagen Int’l, Inc. v. Calrae Trust*, 972 P.2d 411 (Utah 1998).

¹ Brasher is the Appellant in this appeal and Plaintiff in the District Court case. Christensen is the Appellee in this appeal and Defendant in the District Court case.

Standard of Review: Clearly erroneous. *Uhrhahn Constr. & Design, Inc. v. Hopkins*, 2008 UT App 41, 179 P.3d 808.

Preserved at: [R. 112-154; 176-195; 529-531; 550-551].

Issue No. 3: Whether the District Court erred in concluding that there was no meeting of the minds between Christensen and Brasher as to the essential elements necessary to form an oral contract.

Determinative Law: *Davies v. Olson*, 746 P.2d 264 (Utah Ct. App. 1987); *Commercial Union Assocs. v. Clayton*, 863 P.2d 29 (Utah Ct. App. 1993); *Prince, Yeates & Geldzahler v. Young*, 2004 UT 26, 94 P.3d 179.

Standard of Review: Clearly erroneous. *Davies v. Olson*, 746 P.2d 264, 265-67 (Utah Ct. App. 1987).

Preserved at: [R. 112-154; 176-195; 531-532; 550-551].

Issue No. 4: Whether the District Court erred in finding that the doctrine of promissory estoppel was inapplicable because the District Court found that Brasher's use of Christensen's water was conditioned upon Brasher's purchase of Christensen's Farm.

Determinative Law: *Stangl v. Ernst Home Ctr.*, 948 P.2d 356 (Utah Ct. App. 1997); *Prows v. State*, 822 P.2d 764 (Utah 1991); *Topik v. Thurber*, 739 P.2d 1101, 1103 (Utah 1987); *Sugarhouse Fin. Co. v. Anderson*, 610 P.2d 1369, 1373 (Utah 1980); *Youngblood v. Auto-Owners Ins. Co.*, 2007 UT 28, 158 P.3d 1088; *Nunley v. Westates Casing Servs., Inc.*, 1999 UT 100, 989 P.2d 1077.

Standard of Review: Correctness. *Stangl v. Ernst Home Ctr.*, 948 P.2d 356 (Utah Ct. App. 1997).

Preserved at: [R. 531-532; 550-551].

Issue No. 5: Whether the District Court erred in failing to apply the parol evidence rule to certain extrinsic evidence.

Determinative Law: *DCH Holdings, LLC v. Nielsen*, 2009 UT App 269, 220 P.3d 178; *Tangren Family Trust v. Tangren*, 2008 UT 20, 182 P.3d 326; *Daines v. Vincent*, 2008 UT 51, 190 P.3d 1269.

Standard of Review: Correctness. *DCH Holdings, LLC v. Nielsen*, 2009 UT App 269, ¶ 7, 220 P.3d 178.

Preserved at: [R. 120; 337-339; 392-393].

STATEMENT OF THE CASE

Nature of the Case

This case was filed by Brasher against Christensen and was heard in the Seventh District Court (“District Court”).

Brasher lacked sufficient water access to sustain his alfalfa crops and cows. In order to cover his water needs, Brasher contacted Christensen to see if he could lease some of her water. Christensen leased 215 shares of class “A” water to Brasher during the year 2012 pursuant to a “Water Use Authorization” (“WUA”) form provided by Huntington-Cleveland Irrigation Company (“HCIC”). Christensen and Brasher executed the exact same form WUA in 2013 for the same number of shares at the same price but for a duration of six years (instead of one year) during a meeting on March 13, 2013. At the meeting, Brasher tendered a check for the 2013 WUA in the same amount as the previous 2012 year. Christensen accepted the payment.

Christensen and Brasher had also previously discussed the possibility of Brasher purchasing Christensen's property along with all of her water shares. An Offer to Purchase Real Estate Form ("Offer to Purchase") for the purchase of Christensen's property was executed by Christensen and Brasher at the March 13, 2013 meeting. Among other things, the Offer to Purchase indicated that Christensen was required to accept or reject the offer by March 2013. Although the Offer to Purchase required Brasher to pay \$5,000.00 in earnest money, Brasher did not tender payment of the earnest money because Christensen indicated that she wanted to speak with her family and her attorney about the Offer to Purchase before making any final decisions.

After leaving the March 13, 2013 meeting, Brasher filed the 2013 WUA with HCIC the same day. Brasher began calling for use of the water in early April, 2013.

During weeks following the March 13, 2013 meeting, Brasher made multiple attempts to contact Christensen to arrange for delivery of the earnest money. Also, because the Offer to Purchase indicated that Brasher was to take possession of Christensen's Farm (but not her house), Brasher wanted to ensure that everything was prepared. Brasher finally reached Christensen on March 24, 2013. During the course of the conversation, Christensen revealed that she had not notified Wayne Gordon (who had been grazing cattle on Christensen's land) that Brasher was to take possession of the Farm the following day. Christensen had privately already decided that she was not going to sell the Farm to Brasher under the terms set forth in the Offer to Purchase—but she did not tell Brasher this during the March 24, 2013 telephone call. Based on Christensen's

failure to notify Wayne Gordon of the impending sale, Brasher assumed that the Offer to Purchase had been rejected.

Near the end of April, 2013, Christensen's real estate agent, Karen Martino-Basso contacted Brasher and indicated that Christensen had decided to raise the price of the Farm \$100,000 and keep 100 shares of water. Sometime near the end of April, 2013 or the beginning of May 2013, HCIC contacted Christensen regarding Brasher's use of her water. Christensen never contacted Brasher to notify him directly that she was canceling the WUA. Instead Christensen submitted a Notice of Termination Water Use Authorization ("Notice of Termination") terminating Brasher's use of the water. The Notice of Termination was dated May 29, 2013—approximately ten weeks from the execution and filing of the WUA and approximately two months after Brasher had commenced using the water. As a result of this termination, Brasher suffered crop loss and was ultimately forced to sell all of his cattle.

Christensen subsequently asserted that her agreement to lease the water under the 2013 WUA was conditioned specifically upon Brasher purchasing her property. Because Brasher did not purchase her property, Christensen believed she was justified in terminating the 2013 WUA.

This case requires the Court to determine: (1) whether the District Court erred in issuing certain findings of fact that are not supported by the record and trial testimony; (2) whether the District Court erred in determining that the 2013 WUA, by itself, is not a contract; (3) whether the District Court erred in concluding that Christensen and Brasher did not enter into an underlying oral agreement concerning the lease of the 215 water

shares in 2013; (4) whether the District Court erred in ruling that the doctrine of promissory estoppel was inapplicable and (5) whether the District Court erred in refusing to preclude the admission of certain evidence based on the parol evidence rule.

Course of Proceedings

Brasher filed the *Complaint* on May 28, 2013. The *Complaint* alleges four causes of action: (1) breach of contract, (2) breach of the covenant of good faith and fair dealing, (3) promissory estoppel, and (4) declaratory relief. [R. 001-005]. Christensen filed an *Answer* on June 24, 2013. [R. 067-071].

On August 20, 2013, Brasher filed a *Motion for Partial Summary Judgment* and accompanying *Memorandum*. [R. 109-154]. After the parties submitted their respective replies, the District Court issued a ruling denying the *Motion for Partial Summary Judgment*. [R. 199-201].

A bench trial was conducted on July 10, 2014.

Disposition at Trial

The District Court judge issued its *Memorandum Decision* on September 17, 2014. [R. 526-533]. A final *Order* incorporating findings of fact and conclusions of law was signed by the District Court on December 12, 2014. [R. 546-551]. The District Court's ruling in favor of Christensen essentially relied upon three legal conclusions:

1. The WUA, by itself, does not establish an enforceable contract; nor does it establish that Christensen accepted Brasher's offer to lease water to Brasher, as a matter of law. The WUA, by its very terms, indicates that it is made "[i]n accordance with a lease and/or agreement." Accordingly, the WUA contemplates

that the parties have reached a separate agreement as to the lease of shares of HCIC stock, and the WUA instructs HCIC to deliver water to one of the parties for a period of time.

2. Brasher has the burden to prove the existence of an oral contract. Whether an oral contract was established turns upon whether there was a meeting of the minds as to each element of the contract. Based on the [purely extrinsic] evidence presented at trial, Christensen believed the water lease was part of the Farm sale. Therefore, there was no meeting of the minds between the parties. Christensen did not intend to lease the water to Brasher unless purchased the Farm—thus no oral contract existed.
3. Brasher's claim for promissory estoppel is inapplicable because Christensen's promise to allow Brasher to draw water in 2013 was conditioned upon Brasher purchasing the Farm. [R. 550-551].

STATEMENT OF FACTS

1. Christensen is the owner of 260 acres of real property ("the Farm"), a house, and certain rights to use irrigation water in Emery County, Utah. [R. 546]
2. The irrigation water is represented by shares of stock in HCIC. [R. 546].
3. At issue in the instant matter are 605.55 shares of HCIC water classified as "A" water, and 175 shares of water classified as "B" water. [R. 546].
4. Brasher owns, or leases, approximately 100 acres of ground in Emery County which he purchased in 2009. [R. 547]. [TT. 117:7-9].

5. On his land, Brasher Farms 60 acres of irrigated pasture, and 30 acres of irrigated alfalfa. [R. 547].
6. Further, Brasher also owns 15 shares of “A” water stock in the HCIC, and 90 shares of “B” water stock in HCIC. This ownership allows Brasher to irrigate approximately 45 acres of his ground. [R. 547].
7. Typically, Brasher must lease enough additional water each year to irrigate the remaining 55 acres Farmed by Brasher each year. [R. 547].
8. Brasher purchased 20 head of cattle in November 2010, to raise on the ground Brasher owned. [R. 547].
9. Brasher uses the irrigated pasture and the alfalfa he grows on his property to feed his cattle. [R. 547].
10. HCIC requires people who lease water from HCIC shareholders to provide HCIC with an executed WUA form. HCIC provides only a single form to its users. [R. 547].

The WUA instructs HCIC to deliver shareholder water to a designated third party. [R. 547].
11. Basher initially leased the 215 shares of “A” water from Christensen in the year 2012. [TT. 14:21-24].
12. Brasher’s lease of the 215 shares of “A” water in 2012 was memorialized solely and exclusively by using HCIC’s WUA form as is the typical custom in the area. [R. 547]. [A copy of the 2012 WUA is attached as Addendum 1].

13. The 2012 WUA between Christensen and Brasher directed HCIC to deliver to Brasher 215 shares of Class “A” water held by Christensen. [R. 547-A].²
14. The 2012 WUA begins with the language “In accordance with a lease and/or other agreement...” [See 2012 WUA, Addendum 1].
15. Christensen testified at trial that the 2012 WUA *was not* contingent upon any real estate offer to purchase Christensen’s Farm or any other associated agreement. [TT. 15:4-20]. According to Christensen, “I just rented [the 215 shares] because I had extra water.” [TT. 15:10-11].
16. The 2012 WUA was accompanied by a check for \$1,290.00, signifying a full, premium, payment for the water lease, which Christensen cashed. [R. 547-A]. [A copy of the Check 1073 dated 4/22/12 for the amount of \$1,290.00 is attached as Addendum 2].
17. Based on the 2012 WUA, HCIC delivered water to Brasher for the water year 2012. [R. 547-A].
18. Brasher used the 215 shares of “A” water from April, 2012 through the end of the water year, October 31, 2012. [R. 547].
19. The language found in the 2012 WUA, and the 2013 WUA are identical. [A copy of the 2013 WUA is attached as Addendum 3].

² In preparing the Record, the District Court failed to Bates-stamp the third page of the final Order. The second page is Bates-stamped as “547” and the fourth page is Bates-stamped as “548.” Accordingly, the intervening third page of the Order is designated as page “547-A” of the Record in this Brief.

20. In February 2013, Brasher initiated contact with Christensen to inquire about leasing Christensen's water for 2013 just as Brasher had done in 2012. [R. 547-A].
21. Christensen initially rejected Brasher's request. [R. 547-A].
22. A short time later, Brasher decided to inquire of Christensen again and called Christensen a second time. [R. 547-A].
23. This time Christensen replied she did not know if her water was going to be available for lease in 2013. [R. 547-A].
24. Brasher following up on this change in Christensen's position, called a third time shortly after the second call to see if the water was going to be available. [R. 547-A].
25. Christensen told Brasher she still wanted to "wait and see." [R. 547-A].
26. However, prior to the March 13, 2013 meeting, Christensen *never* stated that she would *not* lease the water on the basis that she wanted to sell her Farm. [TT. 134:13-15].
27. Following yet another conversation, Brasher reached out on March 10, 2013. [R. 547-A].
28. Importantly, prior to the March 13, 2013 meeting, Christensen never indicated or stated that she would not lease the water because she wanted to sell her Farm. [TT. 134:13-15].
29. During the March 10, 2014 call, Brasher arranged to meet Christensen on March 13, 2013 at Christensen's house. [R. 547-A].

30. During the telephone conversation setting up the March 13, 2013 meeting, Brasher indicated that, in addition to leasing the water, he had some interest in actually purchasing Christensen's Farm. [R. 548].
31. Christensen responded that she would consider selling, but that any real estate purchase offer would not be final until she reviewed it and took it to her attorney. [TT. 215:19-22; 216:6-9].
32. Brasher told Christensen that he had \$5,000.00 earnest money to give Christensen in an effort to advance a purchase of the Farm. [R. 548].
33. The March 13, 2013 meeting at Christensen's home was attended by Brasher, Christensen, and Nedra Swasey ("Swasey") (a friend of Christensen's). [R. 548].
34. Brasher brought a blank WUA form from HCIC and a blank "Offer to Purchase Real Estate Form" ("Offer to Purchase") to the March 13 meeting. [R. 548].
35. Brasher and Christensen negotiated relative to the sale of the Farm and Swasey filled out the Offer to Purchase accordingly. [R. 548].
36. Brasher and Christensen also discussed the need to provide some advance notice to Wayne Gordon (who had been pasturing cows on Christensen's property) that he would have to remove his cows if the Offer to Purchase was accepted. [TT. 112:15 through 113:7].
37. Brasher also explained to Christensen that if Christensen did not lease the 215 irrigation shares, his pasture would burn up and he would not have "anywhere to go" with his cows. [TT. 111:2-7].

38. The Offer to Purchase was signed by the parties at the March 13, 2013 meeting. [A copy of the March 13, 2013 Offer to Purchase Real Estate is attached as Addendum 4]. With respect to the Offer to Purchase, the following facts are relevant:
- a. The amount of \$475,000 is indicated as the total purchase price;
 - b. \$5,000 of the total purchase price was to be deposited as earnest money;
 - c. The Offer to Purchase *does not specify any date* by which earnest money was required to be paid;
 - d. Importantly, the Closing for the sale was to occur on or before December 1, 2013;
 - e. The Offer was to remain open until March 2013. If not accepted by the Owner [Christensen] by this time, the Offer was to be rescinded and any earnest money returned;
 - f. Brasher was to take possession of the "Farm" (but not the house on the Farm) on March 25, 2013. Christensen was to maintain possession of the home until April 2, 2014.
 - g. The sale includes: all mineral and gas and oil rights, approximately 260 acres of land, 605.55 shares of class "A" water and 175 shares of class "B" water, BLM permits, miscellaneous Farm equipment (excluding several enumerated items).
39. Brasher did not pay the earnest money to Christensen at the March 13, 2013 meeting. [R. 548]. Brasher planned on paying Christensen at the meeting, but

Christensen said that she wanted to speak with her family and attorney about the Offer to Purchase before accepting payment of the earnest money. [TT. 91:1-3].

40. Next, Brasher filled out the 2013 WUA himself. The terms “payable 3/15 each year” was not filled in at the March 13th meeting, nor was the term “2018.” [R. 548]. (This finding of fact is challenged in Section I of the Argument).
41. During the March 13, 2013 meeting, Brasher explained that he needed to lease the water for at least five years in order to have the National Conservation Resource Service approve his use of sprinklers on his property. [TT. 83:18 through 84:6].
42. Brasher testified that during the March 13, 2013 meeting, he witnessed Christensen write in the WUA’s ending term of “2018” as presently seen to exist on the 2013 WUA. [TT. 227:4 through 227:11; 227:22 through 228:7].
43. Christensen testified that she *didn’t recall much* of any real discussion about the WUA during the March 13, 2013 meeting. [TT. 217:3-5].
44. Christensen told Brasher at this time that the water would only be leased to him on a year to year basis. [R. 548]. (This finding of fact is challenged in Section I of the Argument).
45. Both parties signed the WUA, and the Offer to Purchase. Christensen then informed Brasher that she needed to discuss both offers with her family and with her attorney before anything was final. [R. 549]. (This finding of fact is challenged in Section I of the Argument).
46. Importantly, Christensen testified at trial that according to her understanding, the 2013 WUA was not in any way an integrated part of the Offer to Purchase and that

- the two documents were not dependent. [TT. 217:10 through 218:23]. Brasher confirmed in his testimony at trial that approval of the 2013 WUA was not contingent upon Christensen approving the Offer to Purchase. [TT. 137:16-25].
47. Christensen allowed Brasher to take the WUA with him when he left. [R. 548].
48. At the meeting, Brasher delivered a check for \$1,290.00 to Christensen, representing the lease payment for the water shares. [R. 548]. [A copy of the Check 1212 dated 3/13/13 for the amount of \$1,290.00 is attached as Addendum 5].
49. The price paid by Brasher for the 2013 lease of the water shares was a premium/high price. [TT. 79:17-18].
50. Brasher filed the WUA with HCIC on March 13th, 2013—the same day that he met with Christensen and Swasey. [R. 549].
51. Christensen never cashed the \$1,290.00 check for the water shares in 2013. [R. 549].
52. Christensen never informed Brasher that she hadn't cashed Brasher's check. However, Brasher was aware that she had not cashed the check because he was watching his account. Brasher was not concerned because the prior year (2012), it took Christensen six weeks before she cashed the check for the water use. [TT. 102:5-13; 136:22-25].
53. Brasher called Christensen at least four times on March 17, both at Christensen's home number and on Christensen's cell phone. Christensen did not answer so he left messages on Christensen's cell phone answering service. [R. 549].

54. Brasher called Christensen again on March 21, 2013 at her home; again, Christensen did not answer or return the call. [R. 549].
55. Brasher called Christensen twice on March 24, 2013. Brasher finally reached Christensen on her home number and spoke with her. During the course of the call, Brasher expressed his concern that, according to the Offer to Purchase, he was to take possession of the Farm on March 25, 2013 (the following day). Specifically, Brasher was worried that Christensen had allowed a neighbor (Wayne Gordon) to pasture his cows on the property, and that Mr. Gordon needed some notice that the Farm was being sold and that he would have to move his cows off the property. [TT. 96:17 through 97:7].
56. Brasher testified that each time he called Christensen during March 2013, his intent was to arrange to drop off the earnest money payment to Christensen. [TT. 113:19 through 114:2]
57. Because Mr. Gordon's cows were eating the grass, Brasher wanted to ensure during the March 24, 2013 call that Christensen had notified Mr. Gordon of the impending purchase and that Mr. Gordon knew he would need to move his cows off the property within ten to fourteen days. [TT. 97:4-16].
58. During the March 24, 2013 phone conversation, however, Brasher learned that Christensen hadn't ever talked to Mr. Gordon about the impending sale of the Farm or made arrangements to have Mr. Gordon remove his cows. [TT. 97:19-21].
59. At that point, Brasher believed that the Offer to Purchase was terminated because the Offer to Purchase indicates that the offer was only open until March, 2013 and

also because he was to take possession of the Farm on March 25, 2013. [See Offer to Purchase, Addendum 4].

60. The Offer to Purchase places the onus on Christensen (as the “Owner”) to accept or reject the offer. [See Offer to Purchase, Addendum 4].
61. At trial Christensen testified that at the time of the March 24, 2013 phone call, she had already determined that she was not going to sell the Farm. However, Christensen also testified that she did not disclose this decision to Brasher, address the payment of earnest money or mention the 2013 WUA. [TT. 223:17 through 224:5].
62. Brasher began drawing water from HCIC under the terms of the 2013 WUA at the beginning of April, 2013. [R. 549].
63. Near the end of April, 2013, Christensen’s real estate agent, Karen Martino-Basso contacted Brasher and indicated that Christensen had decided to raise the price of the Farm \$100,000 and keep 100 shares of water. [TT.108:24 through 109:8].
64. Sometime near the end of April, or the beginning of May 2013, HCIC contacted Christensen regarding Brasher’s use of her water. [R. 549].
65. Christensen never contacted Brasher to notify him directly that she was canceling the WUA. Instead Christensen submitted a Notice of Termination Water Use Authorization (“Notice of Termination) terminating Brasher’s use of the water. The Notice of Termination was dated May 29, 2013—approximately ten weeks from the execution and filing of the WUA and approximately two months after

Brasher had commenced using the water. [A copy of the May 29, 2013 Notice of Termination is attached as Addendum 6].

66. The Notice of Termination provides a space for the Water Share Holder and the “Lessee” of the water to sign. Brasher never signed the Notice of Termination. [TT. 110:1-3].
67. Importantly, Christensen referred to the WUA as a “lease” during trial. [TT. 32:7]. Marilyn Rosquist, the secretary/treasurer of HCIC, confirmed that the HCIC computer system calls the WUA a “lease.” [TT. 63:22-25]. Lee McElprang, one of the members of HCIC’s Board of Directors referred to the WUA as a “lease” and a contract. [TT. 73:15-16] [R. 353]. Allen Staker, chairman of the Board of Directors at HCIC indicated that he believed the WUA was a binding contract between the parties [R. 349-350] Brasher referred to the WUA as a “lease.” [TT. 82:23 through 83:8; 90:22-23; 91:7].
68. After Christensen terminated the 2013 WUA, Brasher attempted to rent some other pasture but none was available. [TT. 127:5-15].
69. After the termination of Brasher’s use of the water, Brasher brought this action, seeking damages for loss of Brasher’s alfalfa crop for the year 2013, and for damages to his cattle operation extending over the purported life of the 5-year water lease. [R. 549].

SUMMARY OF THE ARGUMENT

- I. The District Court erred in making certain findings of fact that are directly contravened in the record and by trial testimony.

- II. The District Court erred in determining that the WUA, standing alone, does not establish an enforceable contract or establish that Christensen accepted Brasher's offer to lease water to Brasher.
- III. The District Court erred in finding that there was no meeting of the minds between Christensen and Brasher as to the essential elements necessary to form an oral contract.
- IV. The District Court erred in finding that Brasher's claim for promissory estoppel is inapplicable because Christensen's promise to allow Brasher to draw water in 2013 was conditioned upon Brasher purchasing the Farm.
- V. The District Court erred in failing to apply the parol evidence rule to certain extrinsic evidence.

ARGUMENT

I. The District Court erred in making certain findings of fact that are directly contravened in the record and by trial testimony.

Utah R. App. P. 24(a)(9) requires that the party challenging a finding of fact "must first marshall all record evidence that supports the challenged finding." Ultimately, in order to successfully challenge a finding of fact, the evidence marshaled must be "so lacking in support as to be against the clear weight of the evidence, thus making [the findings] clearly erroneous." *Oneida/SLIC v. Oneida Cold Storage & Warehouse*, 872 P.2d 1051, 1053 (Utah Ct. App. 1994) (citations omitted). The Utah Supreme Court has recently announced any analysis of the sufficiency of the marshalling requirement should "be focused on the ultimate question of whether the appellant has established a basis for

overcoming the healthy dose of deference owed to factual findings and jury verdicts—and not on whether there is a technical deficiency in marshaling meriting a default.” *State v. Nielsen*, 2014 UT 10, ¶ 41, 326 P.3d 645.

In order to meet marshalling requirements, Brasher has identified all testimony and evidence supporting the findings of fact at issue and indicated the nature of the testimony/evidence, the source of the testimony/evidence, and location of that testimony/evidence. Below each finding of act, Brasher argues why the finding is against the clear weight of evidence. On appeal, Brasher challenges the following three findings of fact that are set forth in the District Court’s final Order in the case [R. 546-551]. Those three challenged findings of fact and the location of all supporting testimony/evidence are as follows:

1. Brasher filled out the 2013 WUA himself. The terms “payable 3/15 each year” was not filled in at the March 13th meeting, nor was the term “2018.” [R. 548].

- (1) The only testimony in support of this finding of fact was given at trial by Christensen’s friend, Nedra Swasey, who was present at the March 13, 2013 meeting. Her testimony is as follows:

Q. Now, the water use authorization has some dates on it in the middle of the page. Do you see those?

A. Yes, I do.

Q. Do you know who wrote the 2013 number?

A. Reed would have had to have written out all of it.

Q. Do you recall him doing that while you were there during the discussion?

A. All of it was not written out.

Q. Which parts do you recall that weren’t written out?

A. I do not remember, “Payable 3-15 of each year.”

Q. Okay. What else?

A. I also do not remember an ending date. There is no way Vikki would lease that water for that length of time, ever, to anybody.

Q. And did you have a discussion about an ending date on that --

- A. Yes. Vikki told him it would be on a year-to-year basis.
Q. And do you know -- was that 2018 filled in before or after your meeting? Do you recall?
A. I do not believe it was filled in when that paper left her home.
Q. Okay.

[TT. 205:18 through 206:19].

(2) There is no specific information in the record concerning this finding of fact.

The District Court's finding of fact that "payable 3/15 each year" was not filled in at the March 13 meeting, nor was the term "2018" is against the clear weight of evidence and clearly erroneous. First, Swasey initially stated that she "could not remember" when initially asked which portions of the 2013 WUA were not completed during the March 13, 2013 meeting. Swasey's testimony was that she "did not remember" an ending date of 2018. Swasey then proceeded to justify this remark by arguing that Christensen would "ever" lease water to anybody for such an extended period of time. With respect to the term "2018," Swasey said that she did "not believe it was filled in when that paper left [Christensen's] home." All of these statements are qualified in that Swasey admits she did not "remember" or that she did not "believe."

Contravening Swasey's testimony is Christensen's own testimony. Christensen acknowledged that the "payable 3/15 each year" was the date of payment indicated on the 2013 WUA [TT. 22:18 through 23:5]. Christensen also admitted during trial that if Brasher had purchased the property, she should would have rented the water to him for a "few years." [TT. 32:12-14].

Brasher testified that during the March 13, 2013 meeting, he left the ending date for the lease blank, but explained to Christensen why he needed the water for a period of

years (rather than just one year). [TT. 100:12-23]. Brasher also testified without qualification that the term “Payable 3-15 of each year” was written in by him and that the term “2018” was written in by Christensen before he left the March 13, 2013 meeting. [T. 227:4-21]. Brasher also noted that the handwriting of the term “2018” is not consistent with his writing and that it looked similar to Christensen’s writing.³ [TT. 227: 22 through 228:4]. Brasher affirmatively stated that he witnessed Christensen write the term “2018” in. [TT. 228:2-7].

Swasey’s qualified testimony is unconvincing given the clear and direct testimony offered by Brasher as to the terms written in the 2013 WUA. It is of significance that Christensen testified that she intended to lease the water for a period of a “few years.” The handwritten term of “2018” is clearly not the same handwriting that appears in the rest of the 2013 WUA that was filled out by Brasher and more closely resembles Christensen’s writing. Nothing in the record shows that this issue was even raised until Swasey was asked about it at trial.

2. Christensen told Brasher during the March 13, 2013 meeting that the water would only be leased to him on a year to year basis. [R. 548].
 - (1) The only testimony in support of this finding of fact was given at trial by Christensen’s friend, Nedra Swasey, who was present at the March 13, 2013 meeting. See the preceding quote of her testimony. [TT. 205:18 through 206:19].
 - (2) There is no specific information in the record concerning this finding of fact.

³ Although handwriting experts were not called to testify in this case, it is readily apparent that the term “2018” as written looks considerably different from the rest of the handwriting in the 2013 WUA that was written by Brasher.

As explained in the argument concerning the preceding finding of fact, the District Court based the finding that Christensen told Brasher that the 2013 WUA was a “year-to-year” lease exclusively on Swasey’s testimony. However, Christensen acknowledged that she was willing to enter into a lease for a “few years.” Furthermore, Brasher gave unequivocal testimony that he saw Christensen fill in the term “2018” in the 2013 WUA while at the March 13 meeting. Swasey’s hazy testimony cannot overcome the statements of Brasher and Christensen. The District Court’s finding of fact was against the clear weight of evidence.

3. Both parties signed the WUA and the Offer to Purchase but Christensen informed Brasher that she needed to discuss both offers with her family and with her attorney before anything was final. [R. 549].

- (1) Christensen testified at trial that Brasher was not supposed to use the water until she “got back with her to see whether [she] was going to sell it [the property] or not.” [TT. 32:10-16].⁴
- (2) Christensen testified at trial that the Offer to Purchase was not a contract until she went to her family and attorney. [TT. 55:14-18].
- (3) Brasher testified at trial that Christensen told him she wanted to speak with her attorney and family before making accepting the Offer to Purchase. [TT. 84:17-25].
- (4) Brasher testified at trial that after discussing the Offer to Purchase during the March 13, 2013 meeting, Christensen indicated that she wanted to speak with her attorney and family before making accepting the Offer to Purchase. [TT. 87:14-24].
- (5) Brasher testified at trial that he understood that he was to pay the earnest money after Christensen spoke to her attorney and family about the Offer to Purchase. [TT. 90:4-11].
- (6) Brasher testified at trial that Christensen would not take the earnest money until speaking with her family and attorney about the sale of the property. [TT. 91:3].

⁴ The discussion Christensen refers to had to do with the sale of the property under the Offer to Purchase—not a discussion about the 2013 WUA.

- (7) Nedra Swasey testified at trial that Christensen kept the Offer to Purchase after the March 13, 2013 meeting so she could take copies of it to review with her attorney and family. [TT. 205:10-14].
- (8) Christensen signed the Offer to Purchase but stated that she needed to discuss the offer with her attorney and family before accepting it. [R. 73]⁵
- (9) Christensen stated that she met with her attorney on March 25, 2013 to discuss the offer on the Farm. She also discussed the offer with her family and ultimately decided not to accept the offer. [R. 83].
- (10) Christensen stated that she signed the Offer of Purchase, but told Brasher she needed to discuss it with her attorney and family before accepting it. [R. 82].⁶
- (11) Christensen stated that she met with her attorney on March 25, 2013 to discuss the offer on the Farm. She also discussed the offer with her family and ultimately decided not to accept the offer. [R. 83].

The District Court's finding of fact that Christensen notified Brasher that she needed to discuss *both* offers (the Offer to Purchase and the 2013 WUA) with her attorney and her family is against the clear weight of evidence and clearly erroneous because all testimony and evidence in the record demonstrates that Christensen only ever discussed taking the Offer to Purchase to her attorney and family. There is no evidence that Christensen told Brasher that she need to take the 2013 WUA to review with her attorney and family. In fact, Brasher took the 2013 WUA and filed it the same day after the March 13, 2013 meeting.

II. The District Court erred in finding as a matter of law that the WUA, standing alone, fails to establish an enforceable contract or establish that Christensen accepted Brasher's offer to lease water to Brasher.

The District Court concluded that "the WUA by itself does not establish an enforceable contract and it does not establish that Christensen accepted Brasher's offer to

⁵ Notably, the record shows that Christensen stated that she needed to discuss the "Offer to Purchase" with her attorney and family before accepting it—not the 2013 WUA.

⁶ Again, Christensen reviewed the Offer to Purchase with her attorney and family—not the 2013 WUA.

least [sic] water to Brasher, as a matter of law.” [R. 550]. This District Court based its legal conclusion on the fact that “[the WUA, by its very terms, conditioned ‘[i]n accordance with a lease and/or agreement.’ Accordingly, the WUA contemplates that the parties have reached a *separate agreement* as to the lease of shares of HCIC stock, and the WUA instructs HCIC to deliver water to one of the parties for a period of time.” [R. 550]. [Emphasis added].

This conclusion is erroneous. Even if the WUA is predicated upon the expectation that the parties have reached some sort of underlying “agreement” (written or oral), the WUA meets the legal elements of a “contract.”

A. The WUA, standing alone, meets the requirements for an enforceable contract.

For either an oral or written contract to be enforceable there must be (1) an offer and acceptance, (2) adequate consideration, and (3) competent parties. See *Uhrhahn Constr. & Design, Inc. v. Hopkins*, 2008 UT App 41, ¶ 12179 P.3d 808.

1. Offer and Acceptance

“An offer is a ‘manifestation of willingness’ to enter into an agreement, inviting another to accept. An acceptance is a manifestation of assent to an offer, such that an objective, reasonable person is justified in understanding that a fully enforceable contract has been made. An acceptance must unconditionally assent to all material terms presented in the offer . . . or it is a rejection. . . . The conduct of both parties may also be considered in determining whether they entered into an agreement. *McKelvey v.*

Hamilton, 2009 UT App 126, 211 P.3d 390 (internal citations and quotation marks omitted).

In the instant case, offer and acceptance are demonstrated by the parties' conduct. More particularly, it is undisputed that Brasher and Christensen met on March 13, 2013, executed the WUA. Brasher paid Christensen the agreed-upon amount for the lease and Christensen accepted the payment. Christensen permitted Brasher to leave with the executed WUA and Brasher filed the WUA the same day. A few weeks later Brasher began calling on the water and used the water for approximately two months before Christensen terminated his use. The previous year (2012), Christensen had leased the same number of shares for the same consideration using the exact same WUA form.

2. Adequate Consideration

The formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange; and consideration. Furthermore, consideration sufficient to support the formation of a contract requires that a performance or a return promise must be bargained for. See *Aquagen Int'l, Inc. v. Calrae Trust*, 972 P.2d 411, 413 (Utah 1998). There is no dispute that the check tendered by Brasher to Christensen for \$1,290.00 was adequate consideration.

3. Competent Parties

There is no dispute that Christensen and Brasher were competent parties at the time the 2013 WUA was executed. [R. 158].

B. Additional evidence supports Brasher's position that the WUA is a contract.

In addition to the fact that the 2013 WUA meets the three elements required to establish a written contract, additional information supports Brasher's position that the WUA is a contract.

First, the 2013 WUA and the check paid by Brasher taken together provide: (1) the names of the parties; (2) a description of the property that is subject of the agreement; (3) the period/term of the agreement; (4) the signatures/dates of the parties (5) the authorization required for HCIC to allow Brasher use of the shares; and (6) the price paid for the shares. Clearly, these elements establish a complete and certain agreement and represent the final expression of the parties as to the leasing of the 215 water shares.

The District Court concluded that because the 2013 WUA contemplated an underlying separate "lease" or "other agreement," the WUA itself could not be a complete contract. This conclusion is neither warranted nor rational. The WUA does not preclude the possibility of a prior oral agreement between parties. Moreover, it is not uncommon for parties to have verbal discussions resulting in an oral understanding that is later memorialized in writing. In the instant case, the parties testified that they met on March 13, 2013 to discuss Brasher's lease of the water and ultimately executed the 2013 WUA after that discussion. The 2013 WUA is the written culmination of the oral agreement the parties had. The fact that the parties engaged in a discussion and came to an understanding concerning the lease of water at the March 13, 2013 meeting does not mean that the WUA lacks the elements and characteristics of a contract.

In addition, Christensen referred to the WUA as a “lease” during trial and in her letter to HCIC terminating Brasher’s use [R. 169]. Marilyn Rosquist, the secretary/treasurer of HCIC, confirmed that the HCIC computer system calls the WUA a “lease.” Lee McElprang, one of the members of HCIC’s Board of Directors referred to the WUA as a “lease” and a “contract. Allen Staker, chairman of the Board of Directors affirmed that the WUA is a binding “contract” between the parties. Brasher referred to the WUA as a “lease.” While the testimony of these individuals is not dispositive of the legal issue, it indicates a strong consensus that the WUA is a legally binding document between the parties who execute and submit the WUA to HCIC.

This Court should reverse the District Court’s legal conclusion that the WUA is not a contract.

III. The District Court erred in finding that there was no meeting of the minds between Christensen and Brasher as to the essential elements necessary to form an oral contract.

The District Court found that Brasher did not prove the existence of an oral contract with Christensen as to the leasing of her 215 Class “A” water shares in 2013 because there was no “meeting of the minds.” Specifically, the District Court found that based on evidence presented at trial “Christensen believed the water lease was *part of* the Farm sale” and that “Christensen did not intend to lease the water to Brasher *unless* he purchased the Farm. . . .” [R. 550]. [Emphasis added].

The District Court erred by entirely misstating Christensen’s own testimony. In fact, Christensen stated unequivocally that the Offer to Purchase and the WUA were *not* dependent on each other; or integrated in any way. Furthermore, the District Court

ignored the clear weight of evidence and every factual *indicia* proving that Christensen did agree to lease the water to Brasher under the terms of the 2013 WUA. The elements of an oral contract were met, and Brasher and Christensen did have a meeting of the minds with respect to the lease of the 215 Class A water shares. Furthermore, if this Court determines that the 2013 WUA is not, standing alone, a contract, it is obvious that the parties entered into an oral contract. Such an oral contract would meet any ostensible criteria set forth in the WUA that it be made “[i]n accordance with a lease and/or agreement.”

A. Christensen testified that the Offer to Purchase and WUA were not integrated or interdependent on each other.

Christensen unambiguously testified at trial that the 2013 WUA was not in any way an integrated part of the Offer to Purchase and that the two documents were not interdependent. Christensen’s own attorney questioned her about her understanding of the relationship between the Offer to Purchase and WUA:

Q. What was your understanding about this Document [the 2013 WUA]?

A. Well, it was just -- he was supposed to just hang on until I got -- seen you and got everything done before I said yes, I’ll -- it’s a go. And before I done that, he started using water.

Q. So was it your understanding that this was part of the other agreement?

A. No.

Q. So you understood them to be separate documents?

A. Yes.

Q. Was it your understanding that one was dependent on the other? That this would only take affect if the other one was signed?

A. No.

Q. Or if the other one went into effect?

A. No. None of it was supposed to be legal.

[TT. 217:8-25].

Brasher similarly confirmed that the 2013 WUA was not contingent upon Christensen approving the Offer to Purchase.

Q. And she told you at that time that she -- that the water lease was contingent on her approving your offer.

A. No, she did not.

[TT. 137:16-25].

The admission by Christensen is directly contrary to the District Court's finding that "Christensen believed the water lease was *part of* the Farm sale" and that "Christensen did not intend to lease the water to Brasher *unless* he purchased the Farm." It is undisputed that the parties did not condition Brasher's rights to lease the water in 2013 on his purchase of the Farm.

Moreover, according to the Offer to Purchase, the sale included 605.55 shares of class "A" water and 175 shares of class "B" water—far in excess the 215 class "A" shares that Brasher leased under the terms of the 2013 WUA. This fact is relevant because if the 2013 WUA was conditioned upon consummation of the sale under the terms of the Offer to Purchase, Brasher would not have needed a separate WUA/lease since he would have had more than enough water merely by purchasing Christensen's property. In other words, the 2013 WUA would have been an unnecessary redundancy had the parties actually believed that the two documents were somehow integrated or interdependent upon each other. There would have been no reason for Christensen to sign the 2013 WUA or accept payment for the lease of 215 shares if she actually believed that the sale of the Farm was requisite—because the sale would have resulted in Brasher receiving an overabundance of water shares. [TT. 45:8 through 46:14].

The idea that the 2013 WUA was conditioned on the sale of the Farm is further belied by the fact that the Offer to Purchase anticipated a closing no later than December 1, 2013. If permission to lease the water was conditioned on the purchase of the Farm by Brasher, the 2013 WUA would necessarily have been held in abeyance until closing had actually occurred up to December 1, 2013 thereby rendering the 2013 WUA useless during the entire 2013 irrigation season . [TT. 50:10 through 51:18].

In addition, the premium payment of \$1,290.00 for the 2013 lease of water was separate from any payment required under the Offer to Purchase. In fact, neither document references the other in any way.

It is critically important to note that the District Court relied *solely* upon the upon the premise that the 2013 WUA was conditioned upon Brasher purchasing the Farm in ruling that the parties did not have a “meeting of the minds” and that, as a result, no oral contract was formed. Because the District Court’s legal conclusion is clearly erroneous, this Court should reverse.

B. The clear weight of evidence and every factual *indicia* prove that the parties entered into an oral agreement whereby Christensen was to lease the water to Brasher and that the oral agreement was represented in the terms of the written 2013 WUA.

There is no dispute that Brasher believed that he entered into an oral contract to least the 215 shares in 2013. In keeping with the terms of the 2012 WUA, Brasher offered to enter into a six (6) year lease for the 215 shares. Thereafter, Christensen’s actions manifest assent in every way to the offer. Plainly, an objective, reasonable person would be justified in understanding that an oral agreement under these circumstances had been

reached. Specifically, Christensen openly manifested her acceptance of the offer by: (1) executing the 2013 WUA during the March 13, 2013 meeting; (2) accepting the check tendered by Brasher for the full lease price; (3) allowing Brasher to leave the meeting with the 2013 WUA in his possession so Brasher could file the WUA with HCIC; and (4) holding onto the check and not returning it to Brasher until it was demanded in discovery during the litigation. These actions patently demonstrate Christensen's accord with the terms of the 2013 WUA. Based on Christensen's conduct, Brasher reasonably relied and commenced using the water for approximately two months before Christensen took any action to terminate the 2013 WUA.

As previously noted, the HCIC 2013 WUA form is identical to the 2012 WUA form. The parties used the exact form document to memorialize their agreement for the 2012 irrigation season. Brasher also paid Christensen the same premium price of \$6.00 per share, in the same fashion (i.e. by check made payable to Christensen). The actions concluding the 2012 agreement are identical with the process the parties followed in 2013 thereby demonstrating the intent of the parties to enter into an agreement concerning the lease of the 215 water shares.

Of particular importance is the fact that the 2013 WUA incorporates specific timing for the payment of the valid consideration. Brasher promised to tender payment for the upcoming irrigation season no later than March 15th of each year. Additionally, the payment term is definite as the check tendered by Brasher established the premium price agreed upon of six dollars (\$6.00) per share – the same amount agreed to in 2012.

In conclusion, the District Court committed reversible error by misstating the actual understanding and intent of the parties. The 2013 WUA was not conditioned upon Brasher's purchase of the Farm. The District Court also ignored the overwhelming and obvious weight of evidence that establishes the parties' oral agreement that culminated in the execution of the 2013 WUA and tender of payment by Brasher of the lease price to Christensen.

IV. The District Court erred in finding that Brasher's claim for promissory estoppel is inapplicable because Christensen's promise to allow Brasher to draw water in 2013 was conditioned upon Brasher purchasing the Farm.

The District Court offered only one reason in its "Conclusions of Law" section for denying Brasher's claim of promissory estoppel: "Christensen's promise to allow Brasher to draw water in 2013 was conditioned upon [B]rasher purchasing the Farm. Accordingly, Brasher's claim for promissory estoppel is inapplicable." [R. 550-551]. The trial court's reasoning is flawed for several reasons.

First, as already addressed in Section III of this brief, both Christensen and Brasher expressly testified that the WUA was *not* conditioned upon Brasher purchasing the Farm. On this basis alone, this Court should reverse the District Court.

Second, and perhaps more importantly, Brasher established by the preponderance of evidence the four elements of promissory estoppel. To prove a cause of action for promissory estoppel, a plaintiff is required to establish that:

- (1) [t]he plaintiff acted with prudence and in reasonable reliance on a promise made by the defendant;
- (2) the defendant knew that the plaintiff had relied on the promise which the defendant should reasonably expect to induce action or forbearance on the part of the plaintiff or a third person;

(3) the defendant was aware of all material facts; and (4) the plaintiff relied on the promise and the reliance resulted in a loss to the plaintiff.

Youngblood v. Auto-Owners Ins. Co., 2007 UT 28, ¶ 16, 158 P.3d 1088 (quoting *Nunley v. Westates Casing Servs., Inc.*, 1999 UT 100, ¶ 35, 989 P.2d 1077).

All four elements are satisfied in this case. As to the first element of “reasonable and prudent reliance,” both the 2012 WUA and 2013 WUA facially manifest Christensen’s agreement that Brasher would have access to least 215 shares of Defendant’s water. Under the terms of the 2012 WUA, Brasher *did* lease and use the water as agreed. The 2013 WUA is identical to the 2012 WUA. The 2013 WUA was executed by the parties at the March 13, 2013 meeting. Furthermore, Brasher tendered and Christensen accepted the check for \$1,290.00 to lease the 215 share (the exact same amount Brasher paid in 2012). In reliance on the foregoing, Brasher did not attempt to secure an alternate water source. In light of the parties’ previous 2012 agreement, Brasher reasonably relied on Christensen’s promise to provide Brasher access to the 215 shares in the 2013 irrigation season. In fact, Brasher immediately filed the 2013 WUA with the HCIC on March 13, 2013 (the same day it was signed) and used the water for approximately two months before Christensen terminated his use.

As to the second element requiring defendant’s knowledge of a plaintiff’s reliance, it is undisputed that Brasher relied upon the 2013 WUA and that Brasher specifically notified Christensen of his serious need to use the water shares to water his crops and support his cattle during the 2013 irrigation season. Of critical importance is the fact that Christensen was admittedly aware in late April/early May 2013 that Brasher was using

the water represented by the 215 shares; and despite this knowledge, Christensen waited until May 29, 2013 to complete the Notice of Termination.

As to the third element necessary to establish promissory estoppel—it is undisputed that Christensen was aware of all material facts relevant to the 2013 WUA and the ramifications of signing the 2013 WUA. Christensen has never argued that she was unaware of even any material fact relevant to, or associated with the 2013 lease of the water shares.

With respect to the fourth element—a plaintiff's reliance and damages—the undisputed testimony at trial was that Christensen, without prior notice to Brasher, terminated his access to the water shares. As a result, Brasher was unable to obtain sufficient water for his crops. Consequently, to avoid losing all his crop, Brasher was forced to focus his remaining water on his alfalfa field and was unable to water his grass field. As a result, Brasher's grass field died, and Brasher was forced to try and secure alternative feed for his cows and was ultimately forced to sell off the cows. [TT. 104:15 through 107:8].

It is also relevant that Christensen decided prior to the March 24, 2013 telephone call (although she never informed Brasher of the decision) that she was not going to sell the Farm to Brasher or accept the earnest money. Even though the Offer to Purchase indicated that Brasher was to take possession of the Farm on March 25, 2013, Christensen had not informed Wayne Gordon (at least at the time of the March 24, 2013 telephone call) that Mr. Gordon would need to remove his cows. Furthermore, at the end of April, 2013, Christensen's real estate agent, Karen Martino-Basso contacted Brasher

and indicated that Christensen had decided to raise the price of the Farm \$100,000 and retain 100 shares of water. The Offer to Purchase required Christensen as the “Owner” to accept or reject the offer by the end of March, 2013.⁷ Christensen did not accept the Offer to Purchase. Furthermore, as stated previously Christensen failed to notify Brasher of that decision. Christensen presumably changed her mind at some point about the pricing and retention of 100 shares after she spoke with her family and/or attorney about the Offer to Purchase. In any case, Christensen decided to reject the Offer to Purchase—not Brasher.

The District Court’s basis for its denial of Brasher’s promissory estoppel claim rested solely conclusion that “Christensen’s promise to allow Brasher to draw water in 2013 was conditioned upon [B]rasher purchasing the Farm.” In reaching this conclusion the Court entirely ignored the direct testimony of Christensen that the lease of the 215 water shares was *not* conditioned upon Brasher’s purchase of the Farm. Brasher’s own testimony corroborates that such a condition was never discussed or agreed to. Accordingly, the District Court’s legal conclusion is not sustainable and should be reversed. This Court also has separate grounds for reversal because Brasher has established every element of his promissory estoppel claim by the necessary preponderance of the evidence.

⁷ The Offer to Purchase doesn’t list a specific date in March—it only indicates the month of March. Since no date is indicated, it is reasonable to presume that March, 25 2013 was the latest day that could have been intended because that was the day upon which Brasher was to take possession of the Farm

V. The District Court erred in failing to apply the parol evidence rule to certain extrinsic evidence.

Prior to trial, Brasher made a motion *in limine* based on the parol evidence rule seeking to preclude Christensen from introducing the Offer to Purchase the Farm, and any evidence attempting to prove that the 2013 WUA was contingent upon Brasher's agreement to purchase the Farm. [R. 332-356]. The District Court denied the motion *in limine* on grounds that the 2013 WUA was not an "integrated contract" and was not a "final expression of one or more terms of an agreement." [R. 444-448]. On appeal, Brasher contends that the District Court committed reversible error in ruling that the parol evidence rule was inapplicable because the 2013 WUA was not an integrated contract or a final expression of the parties' agreement.

"As a principle of contract interpretation, the parol evidence rule has a very narrow application. Simply stated, the rule operates, in the absence of fraud or other invalidating causes, to exclude evidence of contemporaneous conversations, representations, or statements offered for the purpose of varying or adding to the terms of an *integrated* contract." *Hall v. Process Instruments & Control, Inc.*, 890 P.2d 1024, 1026 (Utah 1995) (internal citations omitted).

"Thus, if a contract is integrated, parol evidence is admissible only to clarify ambiguous terms; it is not admissible to vary or contradict the clear and unambiguous terms of the contract. The application of the parol evidence rule is therefore a two-step process: First, the court must determine whether the agreement is integrated. If the court finds the agreement is integrated, then parol evidence may be admitted only if the court

makes a subsequent determination that the language of the agreement is ambiguous.” *Tangren Family Trust v. Tangren*, 2008 UT 20, ¶ 11, 182 P.3d 326 (internal citations and quotation marks omitted).

In the instant case, the 2013 WUA and the check constitute writings sufficient to demonstrate a clearly integrated agreement lacking any ambiguity as to the essential terms.

A. The WUA is an integrated contract.

The Utah Supreme Court has defined an “integrated agreement” as “a writing or writings constituting a final expression of one or more terms of an agreement. To determine whether a writing is an integration, a court must determine whether the parties adopted the writing as the final and complete expression of their bargain. Importantly, we have explained that when parties have reduced to writing what appears to be a complete and certain agreement, it will be conclusively presumed, in the absence of fraud, that the writing contains the whole of the agreement between the parties.” *Tangren Family Trust v. Tangren*, 2008 UT 20, ¶ 12, 182 P.3d 326 (internal citations and quotation marks omitted). The 2013 WUA and the \$1,290 check together constitute a final *written* expression of the terms of the parties’ agreement.

The District Court placed great stock in the opening words of the 2013 WUA which state that the authorization is made [i]n accordance with a lease and/or other agreement.” Specifically, the District Court noted in its conclusions of law that “[t]he WUA contemplates the parties have reached as separate agreement as to the lease of shares of HCIC stock, and the WUA instructs HCIC to deliver water to one of the parties

for a period of time.” [R. 550]. The District Court understood this prefatory language to mean that the WUA itself could not be a contract (Brasher discusses this error in Section II of this Brief). The District Court, however, also ignored the fact that Brasher and Christensen met on March 13, 2013 to discuss the terms of the lease, executed the 2013 WUA and exchanged consideration for the lease (i.e. the \$1,290.00 check). Moreover, Christensen permitted Brasher to take the 2013 WUA with him when he left. These actions establish that the parties did have an “agreement” as inferred by the prefatory language of the 2013 WUA and that the oral agreement and understanding was memorialized in writing by executing the 2013 WUA.

In sum, the 2013 WUA and the check together provide: (1) the names of the parties; (2) a description of the property that is subject of the agreement; (3) the period/term of the agreement; (4) the signatures/dates of the parties (5) the authorization required for HCIC to allow Brasher use of the shares; and (6) the price paid for the shares.

These essential elements establish a “complete and certain agreement” and represent the final expression of the parties as to the leasing of the 215 water shares. There is no ambiguity as to these essential terms. As previously noted, the 2013 WUA and Offer to Purchase do not reference each other in any way. There is no writing that makes the 2013 WUA conditional upon Christensen’s acceptance of the Offer to Purchase or Brasher’s purchase of the property.

There is no dispute that the 2013 WUA specifies that Brasher had authorization to begin calling for water on March 13, 2013 (the “start date”). Because that start date is

expressly established in the 2013 WUA, it can be conclusively presumed, in the absence of fraud, to contain the whole agreement as to that term.

With such an unequivocal terms provide in the 2013 WUA and the check issued by Brasher, the District Court should have concluded these two writings are integrated and that Brasher had authorization to call upon the 215 share in question.

B. Parol evidence cannot be introduced to amend the start date of the WUA because the integrated term is not ambiguous.

“A contractual term or provision is ambiguous if it is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies.” *Daines v. Vincent*, 2008 UT 51, ¶ 25, 190 P.3d 1269 (internal citation and quotation marks omitted).

Brasher’s interpretation of the 2013 WUA’s start date is the only reasonable interpretation. Therefore, the start date term is unambiguous and parol evidence cannot be introduced to alter the term. The District Court should have excluded Christensen from introducing the Offer to Purchase and other evidence attempting to prove that Brasher could not begin calling upon water until Christensen had accepted the Offer to Purchase. See *DCH Holdings, LLC v. Nielsen*, 2009 UT App 269, ¶ 8, 220 P.3d 178 (“The parol evidence rule operates to exclude extrinsic evidence of contemporaneous conversations, representations, or statements offered for the purpose of varying or adding to the terms of an integrated contract.”) (Internal citations and quotations omitted).

CONCLUSION

Based on the foregoing, Brasher respectfully request that the Court:

1. Reverse the three specified findings of fact by the District Court on grounds of clear error.
2. Reverse the District Court's legal conclusion that the 2013 WUA, standing alone, is not a contract.
3. Reverse the District Court's legal conclusion that Christensen and Brasher never had a "meeting of the minds" sufficient to form an oral contract.
4. Reverse the District Court's legal conclusion that promissory estoppel is inapplicable because Christensen required that Brasher purchase her property in order for the 2013 WUA to be valid.
5. Reverse the District Court's legal conclusion that the parol evidence rule is inapplicable to evidence related to the alleged "condition" that Brasher was required to purchase Christensen's property in order to for the 2013 WUA to be effective.

HEIDEMAN & ASSOCIATES



Justin D. Heideman
Attorney for Appellant Reed Brasher

CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2015, I delivered eight copies of the foregoing
APPELLANT'S BRIEF to the Utah Court of Appeals and two copies to the following
party via U.S. Mail, postage prepaid:

Attorney for Appellee Vikki Christensen

TORGERSON LAW OFFICES, P.C.

Attn: Don M. Torgerson

453 East Main, Ste. 100

Price, Utah 84501

Telephone: (435) 637.7011

Facsimile: (435) 636.0138

Email: dt@pricelawyers.com

HEIDEMAN & ASSOCIATES

/s/ Wendy Poulsen

WENDY POULSEN

Legal Assistant

CERTIFICATE OF COMPLIANCE

Pursuant to Utah R. App. P. 24(f)(1)(A), the undersigned certifies that the Appellant's Brief complies with the word limitation of no more than 14,000 words. The total number of words in the Brief is 11,262.

HEIDEMAN & ASSOCIATES



Justin D. Heideman

Attorney for Appellant Reed Brasher

ADDENDA INDEX

Addendum 1:	2012 Water Use Authorization
Addendum 2:	Check 1073 dated 4/22/12 for the amount of \$1,290.00
Addendum 3:	2013 Water Use Authorization
Addendum 4:	March 13, 2013 Offer to Purchase Real Estate
Addendum 5:	Check 1212 dated 3/13/13 for the amount of \$1,290.00
Addendum 6:	May 29, 2013 Notice of Termination

Addendum 1: 2012 Water Use Authorization

P.O. Box 327
HUNTINGTON, UTAH
PHONE (435)687-2505 FAX (435)687-5269

In accordance with a lease and/or other agreement, I J. E. Christensen
(Print Name)

am authorizing Reed Brasher to call for:
(Print Name)

715 shares of Class A water

shares of Class B water

Dease
deactivated
11-6-12

2012 irrigation season ☒ To the end of 2012 irrigation season
(year) (year)

(Please check appropriate box) ☒ Until further notice.

and as per this agreement will be delivered in the _____ Canal

Signed: Vikki Christensen 4, 17 12
(Water Share Owner) (Date)

Signed: Red Barber (Water Share Lessee) 4, 16, 12 (Date)

NOTE: If class B water is leased, the land it is attached to on the subscription agreement must be leased with it. Water leases or exchanges after April 1st are subject to HCIC Board approval and a \$20.00 fee.

Addendum 2: Check 1073 dated 4/22/12 for the amount of \$1,290.00

View Check: #001073 Amount: \$1,290.00 Date: 5/15/2012

[Print Check](#)

Check Front

REED BRASHER 08-09 1823 S BOUNTIFUL BLVD. BOUNTIFUL, UT 84010		51-7935/3240	1073
DATE <u>4/22/12</u>			
PAY TO <u>WIKKI CHRISTENSEN</u>		\$ <u>1290.00</u>	
THE ORDER OF <u>ONE thousand two hundred ninety dollars</u>		NO CHECKS ALLOWED	
MOUNTAIN AMERICA CREDIT UNION P.O. BOX 9021 • WEST JORDAN, UT • 84054 • www.macu.com MEMO <u>215 5th St. LUTHER LANE</u>		<u>Reed Brasher</u>	
⑆324079555⑆501008958490⑆ 1073			

Check Back

DO NOT WRITE IN THESE SPACES	<u>WIKKI CHRISTENSEN</u>	ENDORSE HERE
	<u>Reed Brasher</u>	

Addendum 3: 2013 Water Use Authorization

Reed Brasher 435-609-9356

HUNTINGTON CLEVELAND IRRIGATION COMPANY

P.O. Box 327

HUNTINGTON, UTAH

PHONE (435)687-2905 FAX (435)687-5269

WATER USE AUTHORIZATION

In accordance with a lease and/or other agreement, I Vikki Christensen
(Print Name)

am authorizing Reed Brasher to call for:
(Print Name)

215 shares of Class A water Payable 3/15 of each year
_____ shares of Class B water

from my Huntington Cleveland Irrigation water account starting at the beginning of

2013 irrigation season ☐ To the end of 2018 irrigation season
(year) (year)

(Please check appropriate box) ☐ Until further notice.

This water has previously been delivered in the Huntington Canal

and as per this agreement will be delivered in the Huntington Canal

If the conditions of this agreement change, I will contact the Huntington Cleveland Irrigation Company office and modify, or terminate this agreement.

Signed: Vikki Christensen 3.13.2013
(Water Share Owner) (Date)

Signed: Reed Brasher 3.13.2013
(Water Share Lessee) (Date)

NOTE: If class B water is leased, the land it is attached to on the subscription agreement must be leased with it. Water leases or exchanges after April 1st are subject to HCIC Board approval and a \$20.00 fee.

STORE YOUR DUPLICATE CHECKS IN YOUR CHECK BOX.

☒ Track your expenses...

☐ Clothing

☐ Food

☐ Transportation

☐ Credit Card

☐ Utilities

☐ Mortgage

☐ Entertainment

☐ Insurance

☐ Other: _____

☐ TAX-DEDUCTIBLE ITEM

1212

3/13/13

Vikki Christensen
One thousand two hundred ninety dollars

215 Shells Lease

BALANCE
FORWARD

THIS ITEM

BALANCE

DEPOSIT

OTHER

BALANCE
FORWARD

Addendum 4: March 13, 2013 Offer to Purchase Real Estate

Offer to Purchase Real Estate

This OFFER is made on MARCH 13, 2013, by REED BRASHEK,
Buyer, of LISTED BELOW, City of LAWRENCE,
State of UTAH, who offers to purchase from VIKKI CHRISTENSEN,
Owner, of LISTED BELOW, City of LAWRENCE,
State of UTAH, the following described real estate, located at LISTED BELOW,
City of LAWRENCE, State of UTAH:
PARCEL # 04-0064-0001 AND ADJOINING PARCELS.

The following price is offered for the property:

~~Escrow~~ ERNEST MONEY deposit paid to the Owner with this Offer:

Further deposit to Owner upon signing of Sales Agreement:

Balance due at closing:

Total purchase price:

\$ 475,000⁰⁰
\$ 5,000⁰⁰
\$ 470,000⁰⁰
\$ 475,000⁰⁰

This Offer is conditioned on the following terms:

1. This Offer is conditional upon the Buyer being able to arrange a firm commitment for suitable financing on the following terms within ninety (90) days of acceptance of this Offer by the Owner:

Mortgage amount: _____

Term of Mortgage: _____ monthly payments

Interest rate of Mortgage: _____ percent per annum

2. This Offer is conditional upon the Buyer obtaining a satisfactory termite report and upon a satisfactory inspection of the property by Buyer within ninety (90) days of acceptance of this Offer by the Owner.

3. Property will be sold free and clear of all encumbrances and with good and marketable title.

4. The parties agree to execute a standard Agreement to Sell Real Estate within ninety (90) days of acceptance of this Offer by the Owner.

5. The closing for this sale shall occur on or before DEC 1, 2013, at 5 PM
o'clock, at TITLE CORP, City of CASTLE DALE, State
of UTAH.

6. Other terms:

PLEASE SEE REVERSE SIDE OF DOCUMENT.

7. This Offer shall remain open until MARCH o'clock, on _____.

If not accepted by the Owner by this time, this Offer is rescinded and the deposit money shall be returned.

Red Busher
Buyer's Signature

Vikki Christensen
Owner's Signature

Red Busher
Buyer's Printed Name

VIKKI Christensen
Owner's Printed Name

3/13/13
Date Signed

3-13-13
Date Signed

REED WILL TAKE POSSESSION OF THE "FARM"
NOT THE HOUSE ON 25TH DAY OF MARCH 2013.

VICKIE WILL KEEP POSSESSION OF THE HOME
UNTIL APRIL 2nd 2014.

THIS SALE INCLUDES:
* MINERAL + GAS + OIL RIGHTS INCLUDED IN SALE
APPROX 260 ACRES
605.55 SHARES OF A WATER
175. SHARES OF B WATER

* For 15 years and
profit made from this.
Vikki will receive 10
of said profit.

BLM PERMITS.
MISC FARM EQUIPMENT, DOES NOT INCLUDE "TRAILER
MOTOR HOMES, BOAT, 4-WHEELER. OR ANY OTHER
TITLED ITEMS.

Red Busher
3/13/13

Vikki Christensen
3-13-13

1. lot 11111 of Red Busher
2-13-13

Addendum 5: Check 1212 dated 3/13/13 for the amount of \$1,290.00

CASH ONLY IF ALL CheckLock™ SECURITY FEATURES LISTED ON BACK INDICATE NO TAMPERING OR COPYING

Reed Brasher 08/09
1823 S. Bountiful Blvd
Bountiful, Utah, 84010

1212
31-7955/3240

PAY TO THE
ORDER OF

Vikki Christensen

3/13/13

DATE

\$1290

One thousand two hundred ninety dollars

DOLLARS

MOUNTAIN AMERICA FCU

FOR

215 Shavis Lease

Reed Brasher



⑆324079555⑆501008958490⑆

1212

Plaintiff00003

Addendum 6: May 29, 2013 Notice of Termination

To whom it may concern:

I Vikki Christensen am terminating my lease with Reed Brasher
for 215.00 Shares of Huntington Canal Water as of today
05/20/2013.

Vikki Christensen
Vikki Christensen

