

2005

# High Valley Water Company v. Silver Creek Investors : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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HIGH VALLEY WATER COMPANY,

Appellee  
(plaintiff below),

vs.

SILVER CREEK INVESTORS, LLC.,

Appellant  
(defendant below).

Case No. 20050233

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An appeal from a judgment of the Third District Court, Summit County  
The Honorable Deno G. Himonas

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**BRIEF OF APPELLEE**

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*Oral Argument Requested*

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## TABLE OF CONTENTS

Jurisdiction .....	7
Statement of the Issues on Appeal and Standards of Review .....	7
Determinative Statutes .....	8
Statement of the Case.....	9
Nature of the case.....	9
References to the Trial Transcript and Trial Exhibits.....	9
Course of Proceedings and Disposition Below.....	10
Statement of Facts .....	10
Summary of Arguments .....	15
Argument.....	16
 <b>I. THE TRIAL COURT PROPERLY APPLIED THE STATUTE OF LIMITATIONS TO ANY CLAIM SILVER CREEK MIGHT HAVE HAD AGAINST HIGH VALLEY...</b>	<b>16</b>
<b><i>A. Even under Silver Creek's reading of the Option, the statute of limitations on a claim for breach began to run as early as December 31, 1987, lapsing on or about December 31, 1993.....</i></b>	<b><i>17</i></b>
<b><i>B. The trial court found correctly that the statute of limitations began to run no later than March 28, 1994, when High Valley again repudiated any obligation under the Option .....</i></b>	<b><i>19</i></b>
 <b>II. SILVER CREEK FAILS TO MARSHAL ANY EVIDENCE IN SUPPORT OF, OR EVEN TO CHALLENGE, THE COURT'S FINDING THAT SILVER CREEK KNEW OR SHOULD HAVE KNOWN IT HAD A CLAIM AS OF MARCH, 1994.....</b>	<b>22</b>
 <b>III. SILVER CREEK MISAPPLIES THE LAW CONCERNING EXECUTORY CONTRACTS. ....</b>	<b>24</b>

*High Valley's performance was not contingent of State Engineer approval of High Valley's change application..... 27*

**IV. SILVER CREEK WAS OBLIGATED TO ACT TO ENFORCE ITS RIGHTS UNDER THE OPTION WITHIN A REASONABLE TIME AFTER EXERCISE OF THE OPTION..... 29**

*A. Silver Creek cannot claim reasonably that it permitted High Valley to "use" the water ..... 32*

*B. Silver Creek's argument that the statute did not commence until 1999 is not supported by the unchallenged facts. .... 33*

**V. SILVER CREEK IS ESTOPPED BY ITS OWN INACTION FROM CLAIMING ANY RIGHTS UNDER THE OPTION..... 35**

Conclusion..... 37

Certificate of Service..... 38

**Addendum..... 39**

Findings of Fact and Conclusions of Law..... 40

Judgment ..... 51

## TABLE OF AUTHORITIES

### Cases

<i>Andreini v. Hultgren</i> , 860 P.2d 916 (Utah 1993).....	8
<i>Bailey v. Bayles</i> , 52 P.3d 1158 (Utah 2002) .....	36
<i>Becton Dickson &amp; Co. v. Reese</i> , 668 P.2d 1254 (Utah 1983).....	16
<i>Berenda v. Langford</i> , 914 P.2d 45 (Utah 1996).....	32
<i>Bradford v. Alvey &amp; Sons</i> , 621 P.2d 1240 (Utah 1980) .....	30, 33, 34, 35
<i>Breuer-Harrison, Inc. v. Combe</i> , 799 P.2d 716 (Utah App. 1990).....	18, 26
<i>Butcher v. Gilroy</i> , 744 P.2d 311 (Utah App. 1987) .....	17
<i>Ceco Corp. v. Concrete Specialists, Inc.</i> , 772 P.2d 967 (Utah 1989).....	36
<i>Cobabe v. Stanger</i> , 844 P.2d 298 (Utah 1992) .....	20, 24, 29
<i>DOIT, Inc. v. Touche, Ross &amp; Co.</i> , 926 P.2d 835 (Utah 1996).....	16
<i>Eggett v. Wasatch Energy Corp.</i> , 94 P.3d 193 (Utah 2004) .....	23
<i>Frederickson v. Knight Land Corp.</i> , 667 P.2d 34 (Utah 1983).....	30, 31
<i>Gates Rubber Co. v. USM Corp.</i> , 508 F.2d 603 (7 <sup>th</sup> Cir. 1975).....	16
<i>Gramlich v. Munsey</i> , 838 P.2d 1131 (Utah 1992).....	7
<i>Hill v. Allred</i> , 28 P.3d 1271 (Utah 2001) .....	20
<i>Hurwitz v. David K. Richards Co.</i> , 436 P.2d 794 (Utah 1968).....	29
<i>Kasco Servs Corp v. Benson</i> , 831 P.2d 86 (Utah 1992).....	20

<i>M.H. Walker Realty Co. v. American Surety Co.</i> , 60 Utah 433(1922) .....	17
<i>McKinstry v. McKinstry</i> , 628 P.2d 1286 (Utah 1981).....	8, 10, 12, 14, 24
<i>Myers v. McDonald</i> , 635 P.2d 84 (Utah 1981) .....	17
<i>Order of Railroad Telegraphers v. Railway Express Agency, Inc.</i> , 321 U.S. 342 (1944)	17
<i>Petersen v. Intermountain Capital Corp.</i> , 508 P.2d 536 (Utah 1973) .....	20
<i>Pitcher v. Lauritzen</i> , 423 P.2d 491 (Utah 1967) .....	20
<i>Russell-Packard Dev., Inc. v. Carson</i> , 108 P.3d 741 (Utah 2005) .....	17
<i>Scott v. Majors</i> , 980 P.2d 214 (Utah App. 1999).....	21
<i>Sevy v. Sec. Title Co. of S. Utah</i> , 902 P.2d 629 (Utah 1995) .....	8
<i>SLW/Utah v. Dougherty</i> , 972 P.2d 67 (Utah 1998).....	30
<i>Snow v. Rudd</i> , 998 P.2d 262 (Utah 2000) .....	20
<i>Spears v. Warr</i> , 44 P.3d 742 (Utah 2002) .....	7, 8, 27, 28
<i>State v. Gamblin</i> , 1 P.3d 1108 (Utah 2000) .....	24
<i>State of Colorado v. Western Paving Const.</i> , 833 F.2d 86731 (10 <sup>th</sup> Cir. 1987).....	16
<i>State Tax Comm’n v. Spanish Fork</i> , 100 P.2d 5751 (1940).....	20
<i>State v. Huntington Cleveland Irrig. Co.</i> , 52 P.3d 1257 (Utah 2002).....	20
<i>Tanner v. Provo Reservoir Co.</i> , 98 P.2d 695 (Utah 1940).....	37
<i>Upland Industries v. Pacific Gamble Robinson</i> , 684 P.2d 638 (Utah 1984) .....	19, 21, 22, 23, 24, 26
<i>Utco Assoc. v. Zimmerman</i> , 27 P.3d 177 (Utah 2001).....	36

<i>West Valley City v. Majestic Inv. Co.</i> , 818 P.2d 1311 (Utah App. 1991) .....	23
---	----

### **Statutes**

UTAH CODE ANN. ' 70A-2a-402 .....	20
UTAH CODE ANN. ' 70A-2a-403 .....	20
UTAH CODE ANN. ' 70A-2a-529 .....	20
UTAH CODE ANN. ' 70A-2a-523 .....	20
UTAH CODE ANN. ' 73-3-6 .....	12
UTAH CODE ANN. ' 73-3-8 .....	28
UTAH CODE ANN. ' 78-2a-3(2)(j) .....	7
UTAH CODE ANN. ' 78-12-1 .....	16
UTAH CODE ANN. ' 78-12-22 .....	8
UTAH CODE ANN. ' 78-12-23(2) .....	7, 8, 10
UTAH CODE ANN. ' 78-33-1 .....	9
UTAH R. CIV. P. 52(a) .....	8

### **Other Authorities**

RESTATEMENT (SECOND) OF CONTRACTS ' 250 cmt. B (1981) .....	21
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## JURISDICTION

Final judgment was entered on January 25, 2005. (R. 327). A Notice of Appeal was filed on February 23, 2005. (R. 335). The Utah Supreme Court transferred the appeal on March 10, 2005 (R. 342), establishing jurisdiction in this court pursuant to UTAH CODE ANN. § 78-2a-3(2)(j).

## STATEMENT OF THE ISSUES ON APPEAL AND STANDARDS OF REVIEW

**Issue:** Whether the trial court erred when it found (1) *as a factual matter* that Silver Creek knew or should have known it incurred an injury based on High Valley Water Company's repudiation no later than March 28, 1994, such that, (2) *as a legal matter*, the six-year statute of limitations under section 78-12-23(2), then began to run and lapsed in 2000, thus barring any claim against High Valley.

**Standards of Review:** As the emphasized phrases suggest, there are two issues and two very different standards of review. The applicability a statute of limitations is a legal question reviewed for correctness. *Spears v. Warr*, 44 P.3d 742, 753 ¶ 32 (Utah 2002). *See also Gramlich v. Munsey*, 838 P.2d 1131, 1132 (Utah 1992) ("The trial court's determination that the statute of limitations had expired is a question of law").

The "subsidiary" question, left unaddressed by Silver Creek, is when it "reasonably" should have known that it incurred "a legal injury" such that it could have

filed an action. This is a factual question, reviewed under a clear error standard. *Spears*, 44 P.3d at 753.

This factual question inheres in most any statute of limitations question, and at least when an appellant challenges the application or running of that statute. *See Sevy v. Sec. Title Co. of S. Utah*, 902 P.2d 629, 634 (Utah 1995) (“the issue of when a claimant discovered or should have discovered the facts forming the basis of a cause of action is a question of fact, and the fact finder's conclusion cannot be overturned on appeal unless it is clearly erroneous”). *See also Andreini v. Hultgren*, 860 P.2d 916, 919 (Utah 1993).

In cases tried to the bench, “[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” UTAH R. CIV. P. 52(a). That is so because “the findings of ultimate facts implicitly reflect consideration of the believability of the witnesses’ testimony.” *McKinstry v. McKinstry*, 628 P.2d 1286, 1289 (Utah 1981).

#### **DETERMINATIVE STATUTES**

##### UTAH CODE ANN. § 78-12-23(2)

Within six years — Mesne profits of real property — Instrument in writing.

An action may be brought within six years:

• • •

(2) upon any contract, obligation, or liability founded upon an instrument in writing, except those mentioned in Section 78-12-22.

## STATEMENT OF THE CASE

**Nature of the Case:** This was an action by High Valley for declaratory judgment under UTAH CODE ANN. § 78-33-1, *et seq.*, to have declared that a 1987 Contract—specifically an Option for the purchase of 56 acre feet of water (the “Option”)—is no longer enforceable. (R. 001-006).

The Option provided that upon payment of specified sums and written notice of exercise, High Valley was to segregate and transfer the 56 acre feet and file a change application with the Utah State Engineer seeking to change the place of use of that water and transfer that water to Silver Creek. (R. 319 ¶¶ 14-15).

Nutshelled, High Valley’s claim was that the Option was never properly exercised because only a portion of the purchase price was deposited. Alternatively, High Valley claimed that even if Silver Creek properly exercised, the statute of limitations and other defenses barred any claim for breach against High Valley. (R. 274-84).

**References to the Trial Transcript and Trial Exhibits:** The trial transcript is paginated in the record collectively as page 346. Accordingly, citations to the transcript will be designated as R. 346— followed by the actual transcript page number. Trial exhibits are referred to as “Ex.” followed by their respective numbers. The trial exhibits were received collectively, by stipulation, at R. 346—32.

**Course of Proceedings and Disposition Below:** The action was filed on July 5, 2001. (R. 001). High Valley's summary judgment motion was denied on July 3, 2003. (R. 226-235). The action was tried to the bench, and a decision rendered, on December 8, 2004. (R. 346, *passim*). The trial court ruled that the Option was exercised properly as of December 31, 1987, (R. 320 ¶ 19; R. 321 ¶ 23), and that any claim against High Valley for breach of the Option was time-barred under UTAH CODE ANN. § 78-12-23(2). (R. 323 ¶¶ 37-38; 324 ¶ 4). Findings of Fact and Conclusions of Law and a Judgment were entered on January 25, 2005. (R. 316-325, 327-328). This appeal followed. (R. 335).

#### **STATEMENT OF FACTS**

High Valley Water Company ("High Valley"), is a Utah non-profit, mutual water company that provides water service to its shareholders. (R. 317, ¶ 1). High Valley is entitled to the use of a total of 287 acre feet of water pursuant to two contracts with Weber Basin Water Conservancy District ("Weber Basin"). (R. 317 ¶ 5). The first contract is for 285 acre feet and is dated February 28, 1974, contract no. 29505 ("the 1974 Contract"). The second contract is for 2 acre feet and is dated October 18, 1977, contract no. 7414. *Id.*

Historically, Atkinson Water Company ("AWC"), a private water company, was a High Valley customer and shareholder. (R. 318, ¶ 11). Over time, certain disputes arose between High Valley and AWC concerning delivery to AWC's shareholders. *Id.*

As a result of these disputes, AWC accumulated debt to High Valley for water deliveries. On August 20, 1987, to address these disputes, High Valley, AWC, Atkinson Special Service District and Summit County-Atkinson Water Improvement District entered into an agreement (the “1987 Agreement”). (R. 319, ¶ 12-13; Pltf. Ex. 4).

The 1987 Agreement includes an option allowing AWC to purchase 56 acre-feet from High Valleys 1974 Weber Basin contract, requiring High Valley to segregate that amount from the 1974 Contract. (the “Option”). (R. 319, ¶ 14; Ex. P-4 at 6-7).

The Option provides:

- a. an initial Option price payment or deposit of \$24,371.64,
- b. payments in an amount equal to 10% per year on the initial deposit, from July 31, 1987, to the date of closing of the purchase, and
- c. payment of any unpaid balance owed to High Valley for water service to AWC from August 1, 1987 to the date of closing of the purchase.
- d. Exercise of the Option required that the entire purchase price (initial deposit and subsequent interest and water service payments) be deposited at Silver King Bank (now Bank One).
- e. Upon notice of exercise and deposit of the entire Option price, High Valley was to file an application with the Utah State Engineer for segregation and change in the

point of diversion of 56 acre-feet, together with an assignment of that water to the owner of the Option. (R. 319-20, ¶ 15; Pltf. Ex. 4 at 6-7).

Silver Creek received the Option by assignment on December 1, 1987. (R. 320, ¶ 16). Notice of exercise of the Option was given (by AWC on behalf of Silver Creek) on December 31, 1987. *Id.* Silver Creek deposited \$24,371.64 at Silver King Bank. *Id.* ¶ 18.

Believing that the Option had not been exercised properly because additional money was owed for water service, High Valley did not segregate the 56 acre feet and did not file a change application. (R. 321, ¶ 29-30; Ex. P-33 at 2)(Silver Creek “does not yet have title and will not until it performs certain additional conditions precedent in its option to purchase agreement. These include the payment of additional funds . . .”). Silver Creek did not pay the water service portion of the option price. (R. 346—172-3, 176).

On June 14, 1991, High Valley filed Exchange Application E2846 “Exchange Application”) with the Utah State Engineer. The Exchange Application was advertised as required by UTAH CODE ANN. § 73-3-6. The State Engineer approved the Exchange Application in April of 1992, permitting the exchange of the entire 285 acre feet represented by the 1974 Contract. The purpose of the exchange was to allow High

Valley to interconnect its system with Atkinson Special Service District and Park Ridge Estates. (R. 318 ¶ 8).

The approved Exchange Application was filed with the State Engineer pursuant to and in anticipation of two contracts with Atkinson Special Service District and Park Ridge Estates. The first of these contracts is titled “Agreement to Jointly Construct a Water Well, Reservoir and Water Distribution Pipelines” and is dated July 23, 1991. (Ex. P-24). The second contract is titled “Agreement to Jointly Use, Operate, and Maintain a Water Well, Reservoir, Water Distribution Pipelines and Related Facilities,” also dated July 23, 1991. (Ex. P-25). (R. 318 ¶ 9).

The water exchanged for this project includes the 56 acre feet. (R. 323 ¶ 39). Construction under the agreements was completed, and those operations continue today. (R. 318 ¶ 10). The Weber River Basin is closed to new appropriations of water, and no water rights can be transferred into the basin. (R. 323 ¶ 40).

During 1993 and through the fall of 1994, Silver Creek made a number of written and oral demands that High Valley perform under the Option by segregating the water and filing the change application. High Valley refused each time, believing that it had no obligation to perform under the Option. (R. 322, ¶ 33; 323, ¶ 36. *See also* Exs. P-14, P-36). Silver Creek stated in 1994 that it had the basis for a “suit to establish [its] rights in and to the [water]” (Ex. P-16).

Also during those years, High Valley, believing that it owned the water, took a number of actions consistent with ownership, including as early as 1991 when it filed the exchange application (Ex. P-22), which included the 56 acre feet, and entered into agreements for the construction and operation of the large water system described above and that also included the 56 acre feet. (R. 323, ¶ 39; 318, ¶ 8-9; Exs. P-24, P-25).

High Valley is assessed a yearly charge for water under the two Weber Basin contracts. (Ex. P-38; R. 317 ¶ 7). High Valley has paid each of its yearly assessments since first acquiring those contract rights in 1974 and 1977. (R. 317, ¶¶ 5-7; 323 ¶ 41). The water under the Weber Basin contracts includes the 56 acre feet. (R. 323 ¶ 41, 317 ¶¶ 5-7, 323 ¶ 39).

During the spring and through the fall of 1994, attorneys for High Valley and Silver Creek exchanged a number of letters concerning the Option. The (then) attorneys for High Valley and Silver Creek met on approximately March 21, 1994, to discuss their respective positions concerning the Option. (R. 322, ¶ 33).

This meeting occurred after the exchange of several letters in 1994 concerning performance of the Option. Silver Creek, through its attorney, had made previous demands or requests that High Valley comply with the terms of the Option, and High Valley, believing the Option no longer valid, consistently refused. *Id.* See also R. 346—44-46; 50-51; 55-56.



Silver Creek made it clear at this meeting that it was *then* entitled to, and demanded the transfer of, the 56 acre feet and the filing of the permanent change application. High Valley responded, making it just as clear that it had not transferred the water or filed the permanent change application and that it had no intention of doing so. (R. 322, ¶ 34; *see also* R. 346—55-56, 57, 59). Silver Creek never filed an action against High Valley. (R. 323 ¶¶ 35-38).

#### **SUMMARY OF ARGUMENTS**

A statute of limitations means that time is of the essence as soon as a legal injury becomes actionable. This case is no exception. Silver Creek exercised the Option in 1987. High Valley, believing that exercise defective, did not act. But neither did Silver Creek.

Unchallenged on this appeal is the fact that Silver Creek knew or should have known it had a claim for breach no later than March, 1994. Even if High Valley's prior statements and conduct were insufficient, its unequivocal repudiation in March, 1994 was. Regardless of whether the Option was executory for some period after exercise, as Silver Creek contends, performance was, according to Silver Creek, due at least in 1993, and certainly in 1994, when it "then" believed performance was due and demanded, repeatedly, that High Valley perform.

Having failed to file an action before the generous six year statute of limitations ran—after knowing, in other words, that High Valley had no intention of performing because it believed it had no obligation to perform—Silver Creek let the limitations period lapse, barring any action on the Option.

### **ARGUMENT**

#### **I. THE TRIAL COURT PROPERLY APPLIED THE STATUTE OF LIMITATIONS TO ANY CLAIM SILVER CREEK MIGHT HAVE HAD AGAINST HIGH VALLEY.**

Statutes of limitation generally are and should be unforgiving. “Once a claim accrues, it may not be maintained unless it is commenced within the limitations period prescribed by the applicable statute of limitations.” *DOIT, Inc. v. Touche, Ross & Co.*, 926 P.2d 835, 843 (Utah 1996)(citing UTAH CODE ANN. §78-12-1).<sup>1</sup> A time-based limitation serves important commercial and policy functions applicable in this case:

entirely apart from the merits of particular claims, the interest in certainty and finality in the administration of our affairs, especially in commercial transactions, makes it desirable to terminate contingent liabilities at specific points in time. It is this interest in finality which underlies the description of a limitations act as a “statute of repose.”

*State of Colorado v. Western Paving Const.*, 833 F.2d 867 (10<sup>th</sup> Cir. 1987), *quoting Gates Rubber Co. v. USM Corp.*, 508 F.2d 603, 611 (7th Cir. 1975).<sup>2</sup>

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<sup>1</sup> Section 78-12-1 provides that, “[c]ivil actions may be commenced only within the periods prescribed in this chapter, after the cause of action has accrued, except in specific cases where a different limitation is prescribed by statute.”

<sup>2</sup> Statutes of limitation “are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.” *Becton Dickinson & Co. v.*

This “interest in finality” applies here because twelve years after exercise, Silver Creek emerged and claimed that the Option was still valid. High Valley, believing since at least 1991 that the Option was dead (R. 323 ¶ 39), restated that belief (Ex. P-18) and was forced to file this action to resolve this twelve year old contingency.

***A. Even under Silver Creek’s reading of the Option, the statute of limitations on a claim for breach began to run as early as December 31, 1987, lapsing on or about December 31, 1993.***

Generally, a limitations period begins to run “upon the happening of the last event necessary to complete the cause of action.” *Myers v. McDonald*, 635 P.2d 84, 86 (Utah 1981). Then, a plaintiff must file the claim “before the limitations period expires or the claim will be barred.” *Russell-Packard Dev., Inc. v. Carson*, 108 P.3d 741, 746 (Utah 2005). “Mere ignorance . . . of a cause of action” neither prevents a statute from running nor “excuse[s] a plaintiff’s failure to file a [timely] claim.” *Id.*, citing *Myers*, 635 P.2d at 86.

An action for breach of contract is ripe, and the statute begins to run, “when the breach occurs.” *Butcher v. Gilroy*, 744 P.2d 311, 313 (Utah App. 1987). This has long been the rule. See *M.H. Walker Realty Co. v. American Surety Co.*, 60 Utah 435, 211 P. 998 (1922).

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*Reese*, 668 P.2d 1254, 1257 (Utah 1983), quoting *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944).

According to the Option, or more precisely according to Silver Creek’s successful interpretation of it, High Valley was to file an application to segregate the 56 acre feet and change its point of diversion and assign that water to Silver Creek “[u]pon notice of the exercise of the Option and deposit of the cash sums required by the provisions of [paragraph C] . . . .” (Ex. P-4 at 7, ¶ C. (3). (See R. 320 ¶ 20, 321 ¶ 23).

If, therefore, the Option required High Valley to act immediately—“upon notice” and the initial deposit under paragraph C.(2)(a)—which is how Silver Creek and the trial court read the agreement (R. 320 ¶ 19; R. 346-187, lines 7-8, -15, lines 1-3, -19-20, lines 23-25/1-5)—High Valley breached on or about December 31, 1987, when notice of exercise was given and the funds deposited. (R. 320, ¶ 17-18). Six years later, in December of 1993, Silver Creek had not sued, despite its belief that it “owned” the 56 acre feet. (R. 346—175, 177).

Silver Creek cites *Breuer-Harrison, Inc. v. Combe*, 799 P.2d 716 (Utah App. 1990). *Combe* observed the truism that a contracting party should not be penalized for encouraging performance by a breaching party. *Id.* at 725. (See App. Brf. at 11). High Valley concurs.

But *Combe*’s observation does not describe this case. Because Silver Creek prevailed on its argument that the Option was fully exercised on at the end of 1987 (R.

320 ¶ 19; 321 ¶ 23), High Valley’s obligations matured then and were due “promptly.” (R. 322 ¶ 32).

It was never disputed that Silver Creek “made a *further* unsatisfied demand” in 1993. (R. 321 ¶ 28; *see also* R. 004 ¶ 22 and R. 011 ¶ 22)(emphasis added). That demand came *five years* after exercise. Demands continued throughout 1994. (Exs. P-14 through P-17). Surely, “promptly” came and went before 1994, and several years before 1999, which is when Silver Creek claims the statute began to run. (App. Brf. at 11)(Silver Creek “continued to expect performance . . . until at least 1999”).

If, as Silver Creek argued, performance was due upon exercise, which Silver Creek claimed and the trial court found happened the last day of 1987, then breach occurred in 1988, when High Valley failed to perform. It certainly occurred when High Valley refused demand, either in 1993 or 1994. (R. 321 ¶ 28; R. 322 ¶¶ 33-34; (Ex. P-17). *Upland Industries v. Pacific Gamble Robinson*, 684 P.2d 638, 643 (Utah 1984)(breach of contract occurred when time for performance arrived and party refused to perform).

***B. The trial court found correctly that the statute of limitations began to run no later than March 28, 1994, when High Valley again repudiated any obligation under the Option.***

A claim is generally actionable—it accrues—when “it becomes remediable in the courts, that is when the claim is in such condition that the courts can proceed and give judgment if the claim is established.” *State Tax Comm’n v. Spanish Fork*, 100 P.2d 575,

577 (1940). *See also Hill v. Allred*, 28 P.3d 1271, 1275 ¶ 15 (Utah 2001)(“In most circumstances, a cause of action accrues upon the happening of the last event necessary to complete the cause of action.”)(internal quotation and citation omitted); *State v. Huntington Cleveland Irrig. Co.*, 52 P.3d 1257, 1264 (Utah 2002).

Repudiation is an actionable breach. *Pitcher v. Lauritzen*, 423 P.2d 491 (Utah 1967)(“Repudiation is the refusal to perform a duty or obligation owed to the other party”); *Petersen v. Intermountain Capital Corp.*, 508 P.2d 536 (Utah 1973). “A party’s refusal to perform under the terms of an agreement constitutes a breach of that agreement.” *Cobabe v. Stanger*, 844 P.2d 298, 303 (Utah 1992), *citing inter alia Kasco Servs. Corp. v. Benson*, 831 P.2d 86, 89 (Utah 1992).<sup>3</sup>

“[T]o constitute a repudiation, a party’s language must be sufficiently positive to be reasonably interpreted to mean that the party will not . . . perform. . . .” *Scott v. Majors*, 980 P.2d 214, 218 ¶ 18 (Utah App. 1999), *quoting* RESTATEMENT (SECOND) OF CONTRACTS § 250 cmt. b (1981)(emphasis in *Scott*).

In *Upland Industries*, for example, the parties agreed to a lease that included certain extension provisions and an option to purchase. The parties disputed whether the

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<sup>3</sup> *See also Snow v. Rudd*, 998 P.2d 262, 265-66 (Utah 2000)(statute of limitations on claim by beneficiary against trustee begins to run when beneficiary “knows or through reasonable investigation could have learned of a breach or repudiation”); UTAH CODE ANN. §70A-2a-402(“Anticipatory repudiation”); §70A-2a-529(“Lessor’s damages for lessee’s default”); §70A-2a-523(“Lessor’s remedies”); §70A-2a-403(“Retraction of anticipatory repudiation”).

lessee had extended and exercised the purchase option properly. 684 P.2d at 640. Lessor had notified lessee that a purported extension of the lease was ineffective and that the tenancy had converted to a mere hold-over, thus nullifying the option. *Id.* at 642.

In the ensuing litigation, the lessee counterclaimed seeking to enforce the option. Lessor argued that the counterclaim was time-barred because the statute of limitations began when lessor claimed that the tenancy was a hold-over. Observing that the claim accrues upon breach, *id.* at 643, the court held that breach occurred when lessor “actually refused to convey the property . . . as required under the purchase option . . . .” *Id.*

Matters in this case reached critical mass in March of 1994. After repeated, unsatisfied demands by Silver Creek, the parties convened an all-hands meeting in March, 1994. (R. 322 ¶ 33). There, the two sides staked out unmistakable, unmovable and diametrically opposed positions concerning the Option:

Cary Jones [counsel for Silver Creek] made it real clear that—that his client wanted the water, wanted that right transferred to him.

Bill Geisdorf [then president of High Valley] made it real clear that that was not going to happen.

(R. 346—56).

Moments later, the trial judge got to the heart of the matter:

THE COURT: Here’s what I’m trying to get. . . .by the time this meeting took place . . . was there a position being staked out by High Valley that the [O]ption was not valid, regardless of whether notice had been given?

THE WITNESS: Yes. Definitely.

*Id.* at 57.<sup>4</sup>

This undisputed evidence, and more, resulted in the unchallenged finding that, “High Valley’s position as expressed at the meeting amounted to an absolute repudiation of any obligation to perform.” (R. 322, ¶ 34). Based on the trial court’s finding that the Option had been exercised properly, this repudiation was a breach the moment it occurred. (R. 323-24, ¶¶ 1-3). That breach triggered the limitations period. Silver Creek, then fully aware of its rights, failed to act. *Id.* ¶ 4.<sup>5</sup>

**II. SILVER CREEK FAILS TO MARSHAL ANY EVIDENCE IN SUPPORT OF, OR EVEN TO CHALLENGE, THE COURT’S FINDING THAT SILVER CREEK KNEW OR SHOULD HAVE KNOWN IT HAD A CLAIM AS OF MARCH, 1994.**

The only way to challenge a finding of fact is to first marshal the evidence supporting that finding and then explain why the evidence is insufficient. In other words,

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<sup>4</sup> The witness further described the March, 1994 meeting: “[t]hey were at polar extremes on this issue. Cary Jones [counsel for Silver Creek] would accept nothing less than the 56 acre-feet of water right[,] and Bill Giesdorf [then president of High Valley] . . . was not willing to give him one acre-foot . . .” (R. 346—56-57).

<sup>5</sup> Silver Creek had made several unsatisfied demands that High Valley perform under the Option. (R. 322 ¶¶ 31-33; 323 ¶ 36; 321 ¶ 28; Exs. P-14 through P-17; R. 321 ¶30; 322 ¶ 33; 323 ¶ 36). High Valley’s March, 1994 position on the matter was certainly not new. (Exs. P-12 at 2; P-23 at 3 § VII(a); P-24 and 25). Others involved in the transaction had made the same observation. (Ex. P-33 at 2)(Silver Creek “does not yet have title and will not until it performs certain additional conditions precedent in its option to purchase agreement. These include the payment of additional funds . . .”).



Silver Creek has, first, the unhappy task of cataloguing “every scrap” of evidence against it. *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App. 1991).

“After constructing this magnificent array of supporting evidence, [Silver Creek] must ferret out a fatal flaw in the evidence.” *Id.* That flaw must be serious enough to “convince the appellate court that the court’s finding resting upon the evidence is clearly erroneous.” *Id.* See also *Eggett v. Wasatch Energy Corp.*, 94 P3d 193, 203 (Utah 2004)(after marshaling, the appellant must “demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence, thus making them clearly erroneous.”)

Trial judges deserve this deference “because they are in an advantaged position to evaluate the evidence and determine the facts.” *State v. Gamblin*, 1 P.3d 1108 (Utah 2000). Informing those findings, of course, and expressly recognized by rule 52, is the trial court’s own “consideration of the believability of the witnesses’ testimony.” *McKinstry v. McKinstry*, 628 P.2d 1286, 1289 (Utah 1981).

Nowhere does Silver Creek attempt to marshal and then attack the trial court’s findings. Indeed, Silver Creek does not identify as an appeal issue the “subsidiary” factual finding that it knew, or should have known, that it had a claim in March of 1994. This omission is fatal.

### III. SILVER CREEK MISAPPLIES THE LAW CONCERNING EXECUTORY CONTRACTS.

“[A]nticipatory breach occurs when a party to an *executory* contract manifests a positive and unequivocal intent not to render its promised performance.” *Cobabe*, 844.2d at 303(emphasis added). It is, in other words, a threat not to perform in the future, before performance is actually due. *Upland Indus.*, 684 P.2d at 643(anticipatory breach is committed “before the time has come when there is a present duty of performance, and is the outcome of words or acts evincing an *intention* to refuse performance *in the future*”)(emphasis added)(quotations and citation omitted).

Relying on this concept—where performance is pending but not due—Silver Creek argues that the Option “remains” (apparently to this day) “executory . . . awaiting full performance by the parties.” (App. Brf. at 7). Silver Creek contends that High Valley’s conduct so far is merely “delayed performance.” (App. Br. At 7).

This is appeal by euphemism. The trial court found, and Silver Creek has not adequately challenged it, that High Valley unequivocally repudiated. (R. 322, ¶¶ 33-36). Merely giving a new, more favorable label to conduct already characterized by the trial court is no substitute for a proper challenge to the findings.

Silver Creek prevailed in its argument that the Option was properly and fully exercised in 1987. (R. 321 ¶¶ 19, 23, 30, 31). The Option provides that “upon” exercise, High Valley was to perform. (R. 319-20, ¶ 15; Ex. P-4 at 6). There is nothing executory

about High Valley's obligation. It was under Silver Creek's interpretation due on December 31, 1987. The only interruption was the temporary change, which expired on July 15, 1989. (R. 321 ¶ 26).

At best, therefore, with the approved temporary change in place, High Valley's performance was "executory" during that period, and became due the day the temporary change expired. But here, Silver Creek proves too much. Even if High Valley's performance remained executory after the temporary change lapsed, that performance was due—because the Option had been exercised—the moment Silver Creek demanded it.

The trial court agreed. Silver Creek demanded performance at the March, 1994, meeting: "It was made clear at this meeting that Silver Creek believed it was *then entitled to* the transfer of the 56 acre feet and the filing of the permanent change application." (R. 322 ¶ 34)(emphasis added). High Valley refused, disclaiming any obligation. *Id.*

"An anticipatory breach occurs when a party to an executory contract manifests a positive and unequivocal intent to not render its promised performance when the time fixed for it in the contract arrives." *Breuer-Harrison, Inc. v. Combe*, 799 P.2d 716, 724 (Utah App. 1990).

So even if the Option is deemed “executory,” and High Valley’s breach merely “anticipatory” until performance was due, the time for performing “arrive[d]”—again, because the Option had been fully exercised (R. 320 ¶ 19)—when Silver Creek began issuing demands, the earliest of which was at least in 1993 (R. 321 ¶ 28). Those demands or claims continued through November of 1994. (R. 323 ¶ 36; Exs. P-16, P-17). But the meeting in March of 1994, the facts of which remain unchallenged, was without question the moment of truth for both parties. Silver Creek demanded performance. High Valley, believing the Option unenforceable, refused. (R. 322 ¶¶ 33-35).<sup>6</sup>

*Spears v. Warr* illustrates Silver Creek’s error. There, buyers alleged that an agreement to purchase lots included irrigation rights as part of the price. Sellers claimed that the irrigation rights were to be transferred later, under separate deeds and after additional payment. 44 P.3d at 745-47. Sellers argued among other things that buyers’ claims for breach were time-barred. *Id.* at 753.

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<sup>6</sup> High Valley’s belief that the Option was never properly exercised was not without a sound basis. The Option requires the deposit of a sum certain (\$24,371), interest on that amount, plus payment for water service of \$1,400 per month until closing. (P-4 at 6-7, ¶¶ C.(2)(b)(c) and 3.D.). Silver Creek admitted that it made only the initial deposit, and to this day never paid for the water service. (R. 346—172-3, 176). The trial court ruled nevertheless that the Option was exercised properly and that the other sums (interest and water service payments) were intended to accrue until closing. (R. 320-21 ¶ 22). That interpretation means that High Valley agreed to carry the Atkinson water service for (according to Silver Creek’s reading of the Option) an indeterminate period, until Silver Creek decided it actually wanted the water it “always” believed it “owned.” (R. 346-177). Of course, getting paid for water service was a primary purpose of the 1987 Agreement in the first place. (R. 319 ¶¶ 12-13, 15.a.3.).

The court observed that the statute of limitations begins to run “upon the happening of the last event necessary to complete the cause of action.” *Id.* That event, said the court, was when sellers stated that the water would be delivered only after additional payment. *Id.* at 754. “Thus, the plaintiffs knew or should have known that [sellers] were not going to deliver the irrigation water rights as promised, thereby breaching the agreement.” *Id.*

The essential facts in *Spears* and this case are the same. In both cases, a party believed that performance of a contract was due. In both cases, the party owing that performance stated that it would not perform. In *Spears*, that refusal to perform was a breach, triggering the statute of limitations. *Id.* Applying that same reasoning, the trial court here found that the same refusal also triggered the limitations period. (R. 322 ¶ 33-35).

**High Valley’s performance was not contingent on State Engineer approval of the anticipated change application.**

Silver Creek argues that the Option can “only close [sic] when there is a final [State Engineer] approval of the change application” High Valley was to file. (App. Brf. at 8). This is incorrect. The Option, according to High Valley’s own argument at trial, was fully ripe, and High Valley’s performance was due, as of December 31, 1987. (R. 321 ¶ 23). The trial court agreed. (R. 321 ¶¶ 29-30).

At that point, had High Valley filed the change application and transferred the water, the contract would have been complete *as far as High Valley's obligations were concerned*. The only contingency—outside the control of either party—was whether the State Engineer would approve the application. See UTAH CODE ANN. § 73-3-8(containing requirements for State Engineer approval).

If not, then the parties simply reverted to their pre-contract positions. (Ex. P-4 at 7).<sup>7</sup> But in no event did High Valley owe any further performance. High Valley's obligations ripened in 1987 and, once completed, *ended* its contract duties. This performance was required *before* the State Engineer could act.

Therefore, the outcome of the change application process was not the decisive factor by which to measure High Valley's performance or to determine whether the Option was "executory."<sup>8</sup>

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<sup>7</sup> The Option provides that in the event of State Engineer denial, "then upon issuance of the final order of denial all amounts on deposit . . . shall be disbursed to [Silver Creek] whereupon all rights and obligations pursuant to this paragraph 3C shall terminate and be of no further force or effect." (Ex. P-4 at 7).

<sup>8</sup> Typically, when performance is pending but the time has not yet arrived and there has been an *anticipatory* repudiation, "three options are available to the non-breaching party:

1. Treat the entire contract as broken and sue for damages.
2. Treat the contract as still binding and wait until the time arrive[s] for its performance and at such time bring an action on the contract.
3. Rescind the contract and sue for money paid or for the value of the services or property furnished.

*Cobabe*, 844 P.2d at 303, n.18, *quoting Hurwitz v. David K. Richards Co.*, 436 P.2d 794, 796 (Utah 1968).

This was not a case where the time for performance had not yet arrived and High Valley was merely threatening breach. The Option was exercised (R. 321 ¶¶ 23, 30, 31), meaning that a contract was formed. *SLW/Utah v. Doughty*, 972 P.2d 67, 70 (Utah 1998). Silver Creek was as a result entitled to performance on demand. High Valley breached when demand was refused.<sup>9</sup>

**IV. SILVER CREEK WAS OBLIGATED TO ACT TO ENFORCE ITS RIGHTS UNDER THE OPTION WITHIN A REASONABLE TIME AFTER EXERCISE OF THE OPTION.**

Even if Silver Creek had some unstated discretion to wait before demanding High Valley's performance, that discretion was not indefinite. "[W]hen a provision in a contract requires an act to be performed without specifying the time, the law implies that it is to be done within a reasonable time under the circumstances; and in case of controversy, that is something for the trial court to determine." *Bradford v. Alvey & Sons*, 621 P.2d 1240, 1242 (Utah 1980).

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In this case, however, even under the reading urged by Silver Creek, the time for performing arrived when demand was made, in 1993 (R. 321 ¶ 28), and several times in 1994 (R. 323 ¶ 36), because Silver Creek had properly exercised the Option. (R. 320 ¶ 19).

<sup>9</sup> Time and again High Valley repeated its position. (R. 322 ¶ 33) ("Silver Creek . . . had made previous demands or requests that High Valley file the change application and transfer the 56 acre feet, and High Valley had consistently refused."). *See also* R. 323 ¶ 36 ("Letters exchanged prior to the meeting between attorneys for High Valley and Silver Creek establish that High Valley had taken the position that Silver Creek was not entitled to the 56 acre feet.").

*Frederickson v. Knight Land Corp.*, 667 P.2d 34 (Utah 1983), is instructive. There, plaintiff's contract required that profits from the sale of land be paid to plaintiff, or in the alternative plaintiff had the option to select certain parcels in lieu of payment. Portions of the land were sold at different times. No profits were paid to plaintiff; neither did he ever exercise the option to take land. Receiving neither money nor land, plaintiff sued for breach eight years after the last parcel was sold.

Applying the six year limitations period, the trial court ruled, and our Supreme Court affirmed, that the statute began to run upon the sale of the last parcel, which was the last trigger for the profit payments and which also ended the option to take land in lieu of cash. Plaintiff argued that the statute could not begin until after he made formal demand concerning the option. *Id.* 37-38.

The court disagreed:

Where a demand is necessary to start a limitation period running, a party is not permitted to postpone indefinitely or unreasonably, by failing to make demand, the time when the statute will begin to run, for by his laches he may be deemed to have perfected his right of action so as to start the running of the statute although he never actually made demand. Unless a delay in making a demand is expressly contemplated by the parties, the courts may presume from the lapse of an unreasonable time that a demand was made and refused.

*Id.* at 38 (citation omitted).

Here, of course, a presumption is unnecessary. Silver Creek actually made a demand . . . *several times*. "All that is required [to trigger the statute of limitations] is . . .



sufficient information” to put a plaintiff “on notice” that it may have a claim. *Berenda v. Langford*, 914 P.2d 45, 51 (Utah 1996)(citations omitted).

What put Silver Creek on notice, or should have, were High Valley’s consistent, unambiguous refusals in response to persistent, unambiguous demands. And it is disingenuous for Silver Creek to claim that High Valley merely “delayed” its performance or that it seeks to use that delay “as a basis to excuse its obligation . . . .” (App. Brf. at 9 and n. 2).

By 1993, when Silver Creek demanded performance, High Valley had already acted on its belief that the Option was never properly exercised. It had in 1991 (3½ years after Silver Creek exercised and two years after the temporary change lapsed) dedicated its water to its large distribution project. (R. 323 ¶ 39; 318 ¶¶ 8-9). High Valley did not delay anything. It believed that the Option was dead. Silver Creek’s still unexplained silence between 1988 and 1993 gave High Valley no reason to think otherwise.

If, on the other hand, High Valley had some right to delay its own performance, the result is the same. The trial court found that Silver Creek exercised the Option properly. (R. 320 ¶ 19). The duty to perform then shifted to High Valley. (R. 321 ¶ 23). Ignoring for the moment (1) the unchallenged finding that High Valley was to act “promptly” and (2) the Option’s requirement that High Valley perform “upon” exercise,

High Valley was still required to act “within a reasonable time under the circumstances . . . .” *Bradford*, 621 P.2d at 1242.

Surely five years, from the end of 1987 when the Option was exercised, to the end of 1993, after Silver Creek’s demand, is “reasonable” under these circumstances. That was just the first five years of what Silver Creek seems to believe is a perpetually executory contract. More unsatisfied demands came in 1994. (*See* Exs. P-17 and P-18).

***A. Silver Creek cannot claim reasonably that it permitted High Valley to “use” the water.***

Silver Creek also contends that its inaction is excused and the limitations period delayed practically indefinitely because it “allowed” High Valley to “use” the water as some sort of kind “gesture.” (App. Brf. at 11-12). First, there is absolutely no finding to support this claim. Second, the claim is risible in light of Silver Creek’s “serial demands for performance” during 1993 and 1994. (R. 321 ¶ 30; 322 ¶ 33).

Silver Creek cannot have this issue both ways. Either it demanded the water (regardless of whether it “needed” it) or it did not. The trial court found that it did, repeatedly. Silver Creek even believed in 1994 that it had the basis for a “suit to establish [its] rights in and to the [water]” (Ex. P-16) and still never acted. That fact alone destroys any attempt to overcome the finding that Silver Creek knew it had a claim.

Asked about this “gesture,” Silver Creek’s principal owner could not explain why, if Silver Creek was just being kind for a *dozen* years (1988 through 2000), his attorney demanded the water in 1993 and 1994. (R. 346-174-75, lines 20-25, 1-8).

***B. Silver Creek’s argument that the statute did not commence until 1999 is not supported by the unchallenged facts.***

Finally, Silver Creek argues that the statute of limitations could not have commenced any sooner than 1999, when it made yet another demand. (App. Brf. at 10; *See* Ex. P-29). Silver Creek contends that “[t]he earliest [it] could reasonably be deemed to have demanded performance is May 13, 1999, when counsel for [Silver Creek] sent a letter to High Valley . . . . (App. Brf. at 10).

As remarkable as that claim is in light of the numerous clear and undisputed demands five and six years earlier (R. 321 ¶ 30), Silver Creek proposes this even more remarkable conclusion:

It was not until this point in time that High Valley, in response to [Silver Creek’s] inquiry, made clear that it did not intend to file the required applications with the State Engineer and declined to assign the Water Right to [Silver Creek].”

(App. Brf. at 10).

According to Silver Creek, therefore, the statute could not commence until it got serious about its contract rights. It was serious when it issued written demands by its lawyers. Only after High Valley “made it clear” it would not perform does the statute commence. *Id.* First, Silver Creek seems unaware that this statement is a direct but

insufficient assault on the findings of fact that the 1994 demands and refusals triggered the statute.

Oddly enough, however, the trial court actually agreed with the substance of Silver Creek's argument. Lawyer-issued demands indeed are operative facts in this case. Referring to the March, 1994 meeting, the trial court used strikingly similar language to explain how those facts operate:

*It was made clear at this meeting [among the attorneys] that Silver Creek believed it was then entitled to the transfer of the 56 acre feet and the filing of the permanent change application. High Valley made it clear at this meeting that it had not transferred the water or filed the permanent change application and that it had no intention of doing so. . . . High Valley's position as expressed at the meeting amounted to an absolute repudiation of any obligation to perform.*

(R. 322 ¶ 34)(emphasis added). *See also id.* at ¶ 33.

Silver Creek apparently expects the Court to find some meaningful distinction between the May, 1999 demand by counsel (Ex. P-29) and the 1994 demands, also by counsel. (Exs. P-15, 16 and 17, plus the oral demand at the March, 1994 meeting).

Silver Creek still must overcome High Valley's unequivocal 1994 commentary on the Option when Silver Creek's attorneys issued one such demand:

It is apparent High Valley's position needs clarification. The option to purchase the 56 acre-feet of water was not exercised as contemplated by the agreement and is no longer valid. The purpose of my letter was to resolve any claim to the escrow funds – not to revive the option.

(Ex. P-14).

There is no mistaking the meaning of this statement, and no excuse for failing to act.

**V. SILVER CREEK IS ESTOPPED BY ITS OWN INACTION FROM CLAIMING ANY RIGHTS UNDER THE OPTION.**

This Court may affirm for any reason. *Bailey v. Bayles*, 52 P.3d 1158, 1161 (Utah 2002). The trial court did not rely on estoppel as a basis for invalidating the Option, but this Court may.<sup>10</sup> Ordinarily, equity is not available when there is “an adequate remedy at law.” *Utco Assoc. v. Zimmerman*, 27 P.3d 177, 180 (Utah App. 2001). Accordingly, the legal remedy based on the statute of limitations is the remedy of first resort. If that is unavailable, the court may look to equity.

The unchallenged facts of this case fit squarely within the doctrine of estoppel. Its elements are:

(i)[A] statement, act, or failure to act by one party inconsistent with a claim later asserted; (ii) reasonable action or inaction by the other party taken or not taken on the basis of the first party's statement, admission, act, or failure to act; and (iii) injury to the second party that would result from allowing the first party to contradict or repudiate such statement, act, or failure to act.

*Ceco Corp. v. Concrete Specialists, Inc.*, 772 P.2d 967, 969-70 (Utah 1989) (citations omitted).

Because Silver Creek had not paid the water service portion of the option price (R. 320 ¶¶ 18, 22; (R. 346—172-3, 176), High Valley believed the Option had not been

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<sup>10</sup> High Valley argued estoppel in its motion for summary judgment and at trial. (R. 040; R. 279).

exercised. Hearing nothing from Silver Creek, High Valley proceeded in 1991 with a large water project that included the 56 acre feet. (Exs. P-22, P-24, P-25; R. 318 ¶¶ 8-10; 323 ¶ 39).

Silver Creek knew about High Valley's advertised Exchange Application (P-22) (See R. 346-173) and still did nothing. "Silence, when conscience requires one to speak," is a basis for estoppel. *Tanner v. Provo Reservoir Co.*, 98 P.2d 695 (Utah 1940).

The Weber River Basin is closed to further appropriation and transfers. (R. 323 ¶ 40). The water is all but irreplaceable. (R. 346—73, 75-76). And during the years between 1988 and 2000, when it filed this action to resolve this lingering issue, as might be expected after a dozen years, High Valley has come to rely on that water. (R. 323 ¶ 39).


Silver Creek's failure to marshal even a single fact in support of the trial court's findings ends this appeal. But Silver Creek also misapplies the law. Even if the Option was executory for some period, performance was due, and the limitations period commenced, the moment demand was made. Silver Creek believed it had the basis for a claim—a fact it cannot challenge (See Ex. P-16). Its 1999 demand did not restart a limitations statute that had by that time been running for five years.

**CONCLUSION**

For these reasons, this Court should affirm.

August 19, 2004

*Respectfully submitted,*  
**MABEY & WRIGHT, LLC**

  
\_\_\_\_\_  
David C. Wright  
Attorneys for Appellee High Valley Water  
Company

**CERTIFICATE OF SERVICE**

I certify that on August 19 2005, two copies of the foregoing Brief of Appellee were delivered to the following by:

☐ Hand Delivery

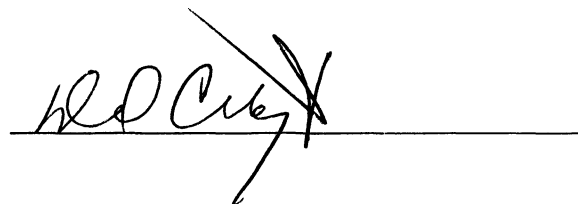
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☒ **U.S. Mail, postage prepaid**

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☐ Certified Mail, Receipt No. \_\_\_\_\_, return receipt requested

Edwin C. Barnes  
Clyde, Snow, et al.  
201 South Main, #1300  
Salt Lake City UT 84111

A handwritten signature in cursive script, appearing to read "Edwin C. Barnes", is written over a horizontal line. The signature is written in dark ink and includes a large, stylized "X" at the end.



# ADDENDUM

No. \_\_\_\_\_  
**FILED**  
JAN 25 2005  
By \_\_\_\_\_ Court  
Deputy Clerk, Summit County

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Attorneys for Plaintiff

STATE OF UTAH  
IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

High Valley Water Company,

Plaintiff,

vs.

Silver Creek Investors,

Defendant.

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

Civil No. 040500463

Judge Deno G. Himonas

This action was tried to the bench on December 8, 2004. Plaintiff was represented by David C. Wright, of Mabey & Wright. Defendant was represented by Edwin C. Barnes, of Clyde, Snow, Sessions & Swenson. Having considered the testimonial, documentary and other evidence and the arguments of counsel, and consistent with the court's oral ruling from the bench on December 8, 2004, the Court hereby makes the following Findings of Fact and Conclusions of Law.

## FINDINGS OF FACT

### Parties, Jurisdiction and Venue:

1. Plaintiff, High Valley Water Company ("High Valley"), is a private, non-profit mutual water company formed pursuant to the laws of the state of Utah for the purpose of providing water service to its shareholders.

2. Defendant, Silver Creek Investors ("Silver Creek"), is a Utah general partnership. Robert Larsen is and always has been the eighty-five percent owner and general partner of Silver Creek.

3. Jurisdiction in this court is proper pursuant to UTAH CODE ANN. § 78-3-4.

4. Venue in this county is proper pursuant to UTAH CODE ANN. § 78-13-4.

### High Valley's Water Rights

5. High Valley is entitled to the use of a total of 287 acre feet of water pursuant to two contracts with Weber Basin Water Conservancy District ("Weber Basin"). The first contract is for 285 acre feet and is dated February 28, 1974, contract no. 29505 ("the 1974 Contract"). The second contract is for 2 acre feet and is dated October 18, 1977, contract no. 7414.

6. High Valley obtained rights under the 1974 Contract for 285 acre feet pursuant to an Assignment from its predecessor, Crossroads Water Company on February 28, 1974.

7. High Valley is assessed a yearly charge for water under both Weber Basin contracts. In 2003, for water service in 2004, High Valley paid a total of \$12,394.55. High Valley has paid each of its yearly assessments since first acquiring those contract rights.

8. On June 14, 1991, High Valley filed Exchange Application E2846 “Exchange Application”) with the Utah State Engineer. The Exchange Application was advertised as required by UTAH CODE ANN. § 73-3-6. On April 13, 1992, the Utah State Engineer approved the Exchange Application, permitting the exchange of the 285 acre feet represented by the 1974 Contract. The purpose of the exchange was to allow High Valley to interconnect its system with Atkinson Special Service District and Park Ridge Estates.

9. The approved Exchange Application was filed with the Utah State Engineer pursuant to and in anticipation of two contracts with Atkinson Special Service District and Park Ridge Estates. The first of these contracts is titled “Agreement to Jointly Construct a Water Well, Reservoir and Water Distribution Pipelines” and is dated July 23, 1991. The second contract is titled “Agreement to Jointly Use, Operate, and Maintain a Water Well, Reservoir, Water Distribution Pipelines and Related Facilities,” also dated July 23, 1991.

10. Construction under the agreements was completed, and those operations continue today.

#### **Creation of the 1987 Option**

11. Historically, Atkinson Water Company (“AWC”), a private water company, was a customer and shareholder of High Valley. Over time, certain disputes arose between High Valley and AWC concerning delivery to AWC’s shareholders.

12. As a result of these disputes, AWC accumulated debt to High Valley for water service.

13. On August 20, 1987, to address these disputes, High Valley, AWC, Atkinson Special Service District and Summit County-Atkinson Water Improvement District entered into an agreement (the "1987 Agreement"). The 1987 Agreement specified the amount owed to High Valley by AWC and provided for payment of that amount.

14. The 1987 Agreement included an option allowing AWC to purchase 56 acre-feet of water from High Valley, and specifically 56 acre feet from the 1974 Contract (the "Option").

15. The Option provides as follows with respect to its proper exercise:

a. written notice of exercise, delivered no later than December 31, 1987,

1. an initial deposit of \$24,371.64,

2. payments in an amount equal to 10% per year on the initial deposit, from July 31, 1987, to the date of closing of the purchase, and

3. payment of any unpaid balance owed to High Valley for water service to AWC as described in paragraph 3D of the 1987 Agreement from August 1, 1987, to the date of closing of the purchase.

b. Exercise of the Option required that the purchase price be deposited at Silver King Bank (now Bank One).

c. High Valley was obligated to file an application with the Utah State Engineer for segregation and change in the point of diversion of 56 acre-feet, together with an assignment of that water to the owner of the Option, upon notice of the exercise of the Option and deposit of the sums required.

**Exercise of the Option**

16. On December 1, 1987, AWC assigned the Option to Silver Creek.

17. AWC gave timely notice of the exercise of the Option on December 31, 1987, on behalf of Silver Creek.

18. Silver Creek deposited \$24,371.64 in Silver King State Bank

19. Silver Creek's conduct in providing timely and proper written notice of exercise of the Option and the timely deposit of the funds just described constituted full performance of its obligations under the Option.

20. After providing written notice of exercise and making the deposit described above, Silver Creek took certain actions consistent with its claim of ownership, including pledging the 56 acre feet as security for a loan.

21. The amount deposited by Silver Creek, with accrued interest, remains at Bank One (formerly Silver King).

22. The remaining balance of the purchase price under the Option was to accrue until the closing date, at which time Silver Creek and High Valley were to calculate the interest due

and owing under part b. of the Option price and to calculate the amount due and owing for water service under part c. of the Option. Any additional amount of accrued interest and water service fees under paragraph 3D of the 1987 Agreement was to be paid at closing.

23. Silver Creek's written notice of exercise and deposit of \$24,371.64 gave rise to High Valley's obligation to file the permanent change application to segregate the 56 acre feet and otherwise begin the process of transferring the 56 acre feet to Silver Creek.

24. Silver Creek, through its attorney Lee Kaposki, filed an Application for Temporary Change of Water, no. 88-35-4 (the "Temporary Application"), on June 30, 1988.

25. The Temporary Application was approved on July 7, 1988.

26. The Temporary Application expired of its own terms on July 15, 1989.

27. Silver Creek knew that the Temporary Application expired on July 15, 1989.

28. In 1993, Silver Creek made a further unsatisfied demand that the 56 acre feet of water be segregated and conveyed to Silver Creek.

29. High Valley did not file the permanent change application as required by the Option, did not take action to segregate the 56 acre feet or otherwise begin the process of transferring the 56 acre feet to Silver Creek.

30. High Valley initially but incorrectly believed that the Option had not been exercised as contemplated by its terms and, notwithstanding serial demands for performance by Silver Creek, declined to segregate and convey the 56 acre feet of water.

31. High Valley's failure to file the permanent change application and perform the other terms of the Option constituted a breach of the Option.

32. Although there is some dispute about when High Valley's breach occurred, it was High Valley's obligation to file its application with the State Engineer upon notice of the exercise of the Option. That did not occur, either upon receipt of the notice or thereafter. The Court does not make a specific finding of when High Valley's breach occurred but notes that High Valley had the obligation to proceed promptly upon exercise of the Option.

33. The (then) attorneys for High Valley, Marc Wangsgard, and Silver Creek, Cary Jones, met approximately one week prior to March 28, 1994, to discuss their respective positions concerning the Option. This meeting occurred after the exchange of several letters in 1994 concerning performance of the Option. Silver Creek, through Mr. Jones, had made previous demands or requests that High Valley file the change application and transfer the 56 acre feet, and High Valley had consistently refused.

34. It was made clear at this meeting that Silver Creek believed it was then entitled to the transfer of the 56 acre feet and the filing of the permanent change application. High Valley made it clear at this meeting that it had not transferred the water or filed the permanent change application and that it had no intention of doing so. To the extent its previous conduct may not have done so, High Valley's position as expressed at the meeting amounted to an absolute repudiation of any obligation to perform.



35. Under any reasonable process contemplated by the Option, High Valley should have filed the change application before the meeting held a week before March 28, 1994.

36. Letters exchanged prior to the meeting between attorneys for High Valley and Silver Creek establish that High Valley had taken the position that Silver Creek was not entitled to the 56 acre feet.

37. The six year statute of limitations on a claim against High Valley for breach of the Option began to run upon breach, but in any event no later than March 28, 1994.

38. Silver Creek failed to file an action for breach or to enforce the Option within six years of High Valley's breach whenever it occurred.

39. Since 1989, High Valley has come to rely on the 56 acre-feet of water in planning for its shareholders, including as early as 1991 when it filed the Exchange Application and then in 1992 entered into the agreements with Park Ridge and Atkinson.

40. The Weber River Basin is closed to new appropriations of water. No water rights can be transferred into the basin.

41. Since before and after the Option was created, High Valley has made all payments under its contract with Weber Basin, payments that total approximately \$11,000 to \$12,000 per year for the last several years. High Valley has been and remains current in those payments.

#### CONCLUSIONS OF LAW

1. A breach of contract occurs when one party, without justification, fails to perform a material term of the contract. Ordinarily, a cause of action accrues upon the happening of the

last event necessary to complete the cause of action. The breach itself is the last event necessary for a breach of contract claim.

2. High Valley breached the Option when it failed to perform its obligations as required upon exercise of the Option or within a reasonable time thereafter.

3. A claim against High Valley for breach of the Option is governed by the six year statute of limitations in UTAH CODE ANN. § 78-12-23(2), requiring that an action be brought within six years of the breach. That six year statute of limitations began to run upon High Valley's breach and clearly no later than High Valley's repudiation of any intention to perform.

4. Silver Creek failed to file an action within six years of knowing that it had or might have a cause of action against High Valley after High Valley absolutely repudiated any obligation under the Option.

5. Accordingly, High Valley is entitled to this court's declaration, and the court hereby declares, that the 1987 Agreement, and specifically the Option, though properly exercised, is no longer enforceable, that Silver Creek no longer has a right to obtain performance under the 1987 Agreement, and the Option specifically, and that High Valley remains the owner of the 56 acre feet. By virtue of the statute of limitations, High Valley is under no obligation, legal or equitable, to transfer the 56 acre feet.

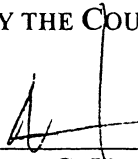
6. Silver Creek is entitled to return of the funds still held at Bank One, and the Court further orders that the deposited funds with accrued interest be returned to Silver Creek. High Valley is obligated to cooperate in returning the funds to Silver Creek.

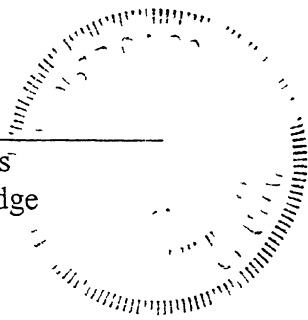
7. ~~8~~ Although the 1987 Agreement contains an attorney fee provision, neither party is entitled to an award of attorney fees under the circumstances of this case.

8. ~~9~~ High Valley is the prevailing party and is therefore entitled to its costs as provided by rule 54(d) of the Utah Rules of Civil Procedure, to be established by a Memorandum of Costs.

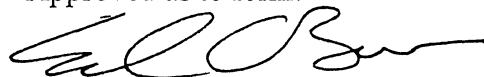
January 25, 2005.

BY THE COURT

  
\_\_\_\_\_  
Deno G. Himonas  
District Court Judge



Approved as to form:

  
\_\_\_\_\_  
Edwin C. Barnes  
Attorney for defendant

**CERTIFICATE OF SERVICE**

I certify that on January 19 2005, a copy of the foregoing Findings of Fact and Conclusions of Law was delivered to the following by:

☒ Hand Delivery

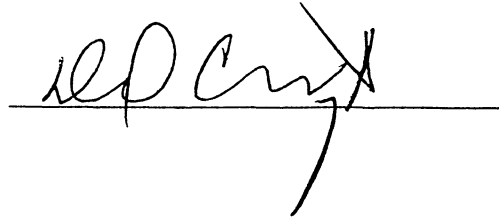
☐ Facsimile

☐ U.S. Mail, postage prepaid

☐ Federal Express

☐ Certified Mail, Receipt No. \_\_\_\_\_, return receipt requested

Edwin C. Barnes  
Clyde, Snow, Sessions  
& Swenson  
201 South Main, #1300  
Salt Lake City UT 84111

A handwritten signature in black ink, appearing to read "Edwin C. Barnes", is written over a horizontal line.

No.                       
**FILED**  
JAN 25 2005 11:36  
By                      Court  
Deputy Clerk, Summit County

David C. Wright - 5566  
**MABEY & WRIGHT, LLC**  
265 East 100 South, #300  
Salt Lake City, Utah 84111  
Telephone: (801) 359-3663  
Fax: (801) 359-2320

Attorneys for Plaintiff

STATE OF UTAH  
IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

---

High Valley Water Company,

Plaintiff,

**vs.**

Silver Creek Investors,

Defendant.

**JUDGMENT**

Civil No. 010500204  
~~040500463~~

Judge Deno G. Himonas

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This action was tried to the bench on December 8, 2004. Plaintiff was represented by David C. Wright, of Mabey & Wright. Defendant was represented by Edwin C. Barnes, of Clyde, Snow, Sessions & Swenson. Having considered the testimonial, documentary and other evidence and the arguments of counsel, and consistent with the court's oral ruling from the bench on December 8, 2004, and its Findings of Fact and Conclusions of Law, it is hereby

**ORDERED, ADJUDGED AND DECREED** that that certain Option for the purchase of 56 acre feet from plaintiff, High Valley Water Company ("High Valley"), which was assigned to

defendant, Silver Creek Investors ("Silver Creek"), which is contained in that certain agreement dated August 20, 1987 (the "1987 Agreement"), by virtue of the statute of limitations, is no longer enforceable, that High Valley is under no legal or equitable obligation to transfer the 56 acre feet to Silver Creek, and that High Valley remains the owner of rights to the 56 acre feet of water, pursuant and subject to the terms and conditions of Weber Basin Water Conservancy District Contract No. 29505 and Exchange No. 1085.

It is further

**ORDERED, ADJUDGED AND DECREED** that the funds currently on deposit at Bank One, in Park City, Utah, in an account under the names of Lee Kapaloski and High Valley, be disbursed to Silver Creek.

It is further


**ORDERED, ADJUDGED AND DECREED** that the parties bear their own attorney fees incurred in this action.

It is further

**ORDERED, ADJUDGED AND DECREED** that High Valley is entitled to its costs of the action pursuant to rule 54(d) of the Utah Rules of Civil Procedure, to be established by a Memorandum of Costs.

January 25, 2005.

BY THE COURT

  
Deno G. Himonas  
District Court Judge

Approved as to form:

A handwritten signature in black ink, appearing to read 'Edwin C. Barnes', written over a horizontal line.

Edwin C. Barnes

Attorney for defendant

**CERTIFICATE OF SERVICE**

I certify that on January \_\_\_\_ 2005, a copy of the foregoing Judgment was delivered to the following by:

☐ Hand Delivery

☐ Facsimile

☒ U.S. Mail, postage prepaid

☐ Federal Express

☐ Certified Mail, Receipt No. \_\_\_\_, return receipt requested

Edwin C. Barnes  
Clyde, Snow, Sessions  
& Swenson  
201 South Main, #1300  
Salt Lake City UT 84111

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**CERTIFICATE OF SERVICE**

I certify that on January 19 2005, a copy of the foregoing Judgment was delivered to the following by:

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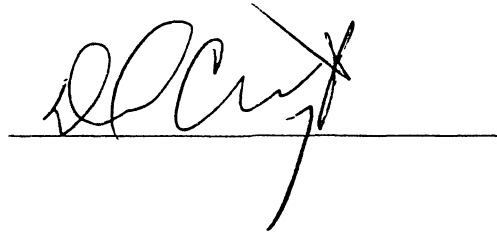
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& Swenson  
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Salt Lake City UT 84111

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