

2005

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

Utah Court of Appeals

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JUN 17 2005

IN THE UTAH COURT OF APPEALS

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Appellate Case No. 20050233-CA

BRIEF OF APPELLANT

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1. Findings of Fact and Conclusions of Law
2. Judgment
3. 1987 Agreement
4. Utah Code Ann. § 78-12-23

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j).

STATEMENT OF ISSUES PRESENTED

Whether Silver Creek Investors' ("SCI") written option to purchase 56 acre-feet of water from High Valley Water Company ("High Valley"), which was timely exercised by SCI, is no longer binding upon High Valley due to the running of the statute of limitations.

STANDARD OF REVIEW

The determination of the trial court that the applicable statute of limitations had run is a question of law reviewed for correctness. *Spears v. Warr*, 44 P.3d 742, 753 (Utah 2002); *Quick Safe-T Hitch, Inc. v. RSB Systems L.C.*, 12 P.3d 577, 578 (Utah 2000).

PRESERVATION OF ISSUES IN THE TRIAL COURT

Contract Remains Executory - R. 0286-302, 0346 at pp. 20 and 187

Contract Cannot Have Been Breached Until at Least 1999 - R. 0286-302, 0346 at p. 191

DETERMINATIVE LEGAL PROVISIONS

Utah Code Ann. § 78-12-23 (1996)

STATEMENT OF THE CASE

This case is founded in an August 20, 1987 Agreement (the "Agreement") between

High Valley and the Atkinson Water Company¹ (“Atkinson”) which granted Atkinson the option to purchase 56 acre-feet of Weber Basin Water Conservancy District (“Weber Basin”) contract water right (the “Water Right”) from High Valley (the “Option”). (R. 0002, 0080-89). Appellee, High Valley filed this lawsuit in an effort to avoid its obligation to segregate and transfer the Water Right to SCI. While High Valley acknowledged, and the trial court found, that SCI properly exercised the Option, High Valley failed to fulfill its obligations under the agreement. (R. 0002, 0320). Specifically, this appeal seeks to reverse the judgment entered by the Hon. Deno Himonas that the Option is unenforceable against High Valley due to the running of the statute of limitations. (R. 0327-28).

Atkinson’s rights under the Agreement, including the Option, were assigned to SCI. (R. 0091). SCI, though Atkinson, exercised the Option by giving timely notice and depositing the stated purchase price into escrow. (R.0093, 0320). Upon exercise of the Option, High Valley was obligated to: (1) segregate the Water Right from its underlying Weber Basin contract right; (2) obtain approval from the State Engineer for SCI’s use of the Water Right by filing a change application; and (3) assign the Water Right to SCI. (R. 0085-86). High Valley has yet to fulfill its obligations under the Option.

The Agreement did not set forth a specific time for High Valley’s performance and SCI did not treat High Valley’s delayed performance as a breach of the Agreement since

¹ Atkinson is the predecessor in interest to SCI.

SCI did not have an immediate need for the water. Rather, after it exercised the Option, SCI allowed High Valley to continue using the water while the contract remained executory. While High Valley, as the user of the Water Right, has continued to pay annual assessments to Weber Basin, consistent with its continued use of the water, SCI has exercised other attributes of ownership without objection by High Valley. In particular, SCI filed a temporary change application and pledged the water right to Summit County as partial security for completion of the improvements to the Silver Creek Commerce Center, the development where the Silver Summit Courthouse now sits. (R. 0161, 0171-185). Moreover, the Option price originally paid by SCI remains on deposit and ready for reimbursement to High Valley.

By 1999, SCI's development plans reached the point where it needed to complete the transfer of the Water Right pursuant to the Option. (R.0036 Ex. P-29). When SCI requested instructions for completing the Option, High Valley stated its belief that it was not obligated to transfer the Water Right to SCI. (R.0110-111). High Valley subsequently filed an action seeking a declaration that the Option, timely exercised by SCI, is no longer unenforceable. (R. 0001-06).

On January 25, 2005, the district court entered its judgment that the Option was no longer enforceable against High Valley due to the running of the statute of limitations. (R. 0327-31). The district court found that High Valley effectively repudiated the Option in failing to file a permanent change application with the State Engineer and that such repudiation amounted to a breach. (R. 0322-23). The district court found that such

breach occurred sometime after the exercise of the Option but no later than March 28, 1994. (R. 0322-23). SCI appeals from this judgment.

STATEMENT OF FACTS

1. SCI is a Utah general partnership. (R. 0002).
2. High Valley is a Utah non-profit water company. (R. 0002).
3. High Valley has contracts with Weber Basin which allow High Valley to use a total of 285 acre-feet of Weber Basin water. (R. 0002).
4. Atkinson was a customer and shareholder of High Valley. (R. 0002).
5. Disputes arose between High Valley and Atkinson regarding High Valley's delivery of water to Atkinson's shareholders. (R. 0002).
6. On or about August 20, 1987, High Valley, Atkinson, Atkinson Special Service District, and Summit County-Atkinson Water Improvement District entered into a written agreement intended to resolve these disputes. (R. 0080-89).
7. As partial consideration for the compromise, the Agreement also established the Option which provided for Atkinson to purchase from High Valley 56 acre-feet of its Weber Basin contract water right. (R. 0085-86).
8. To exercise the Option, Atkinson was required to provide High Valley with written notice by midnight on December 31, 1987, and deposit \$24,371.64 at Silver King Bank (now Bank One). (R. 0085-86).
9. Under the terms of the Option, after exercise, High Valley was required to file application with the State Engineer to segregate the Water Right, to change the point

of diversion to accommodate Atkinson's (by assignment SCI's) use, and assign the Water Right to Atkinson (by assignment to SCI). (R.0085-86).

10. In the event the State Engineer rejected the applications, all amounts on deposit were to be dispersed to Atkinson (by assignment to SCI), and the obligations of the parties pursuant to the Option would terminate. (R. 0086).

11. On or about December 1, 1987, Atkinson assigned the Option to SCI. (R. 0091).

12. On December 31, 1987, Atkinson gave timely written notice of the exercise of the Option on behalf of SCI and SCI timely deposit the required funds with Silver King State Bank. (R. 0003, 0093).

13. It is undisputed that the amount deposited, together with accrued interest, remains on deposit with Bank One, the successor to Silver King Bank. (R. 0346 at p. 178)

14. While the Option had an express date by which it had to be exercised, no time was set for the filing of the applications with the State Engineer by High Valley, nor was a date set for the expiration of the Option once exercised. (R. 0085-86).

15. Termination of the Option was provided for in the Agreement only in the event that the State Engineer denied the filing by High Valley. (R. 0085-86).

16. Following the exercise of the Option, SCI, with High Valley's knowledge and implicit approval, exercised the attributes of ownership of the Water Right including pledging the Water Right as security for the Silver Summit development and filing a

temporary change application with the State Engineer. (R. 0161, 0171-185).

17. High Valley did not, and to date has not, filed the required applications with the Utah State Engineer necessary to segregate the Water Right or to change the point of diversion, nor has High Valley assigned the Water Right to SCI. (R. 0001-0006).

18. SCI did not have a use for the Water Right until its real estate development project approached approval. In the meantime, SCI, concerned that the Water Right may be deemed forfeited for non-use, allowed High Valley to continue to use the water without charge other than the cost of the annual lease payments to Weber Basin Water Conservancy District. (R. 0346 at p. 171).

19. SCI, however, continued to rely upon its ownership of the 56 acre-feet of water in planning its Silver Summit development. (R. 0171-185, 0346 at p. 172).

20. In 1999, then approaching its need to make use of the water, SCI wrote to High Valley inquiring about the steps necessary to obtain the segregation, change application, and assignment of the water right. (R. 00346 Ex. P-29).

21. On July 28, 1999, counsel for High Valley responded to SCI's letter asserting that SCI "had not fully met" its obligations under the Agreement and indicating High Valley's belief that it was not required to file application to the Utah State Engineer. (R. 0110-111).

SUMMARY OF THE ARGUMENT

The statute of limitations did not run against SCI because the Option portion of the Agreement remains an executory contract. The parties have remaining obligations of

performance to each other. Specifically, High Valley remains obligated to file the required applications with the State Engineer and to assign the Water Right to SCI. SCI, upon approval of the applications, remains obligated to make the necessary calculations and pay any remaining amount due to High Valley. Closing of the Option portion of the Agreement, and calculation of any additional amounts due, can only occur following the State Engineer's disposition of the change application High Valley is required to file. If the change application is approved, High Valley is required to assign the water right to SCI and SCI is required to make the final Option payment to High Valley. If, and only if, the change application is denied, the Option portion of the Agreement will terminate by its own terms, at which time all funds on deposit are to be returned to SCI.

Alternatively, even assuming that the Option portion of the Agreement were not executory, any breach of the Agreement based upon High Valley's delayed performance and/or repudiation of the Agreement cannot have occurred until at least 1999 when SCI required performance. As such, the six-year statute of limitations could not have run against SCI.

ARGUMENT

I. THE OPTION AGREEMENT REMAINS EXECUTORY AND THEREFORE CANNOT HAVE BEEN BREACHED BY HIGH VALLEY'S DELAYED PERFORMANCE

The Option portion of the Agreement remains an executory contract awaiting full performance by the parties. As such, High Valley's delayed performance does not amount to a breach of the Agreement and the statute of limitations cannot have run. A

statute of limitation begins to run when a cause of action accrues. See *Butcher v. Gilroy*, 744 P.2d 311, 313 (Utah App. 1987). “[A] cause of action on a contract accrues, thus causing the statute of limitations to commence, only upon *breach* of the contract.” *Upland Industry Corporation v. Pacific Gamble Robinson Co.*, 684 P.2d 638, 643 (Utah 1984) (emphasis in original). In this case, because the Option portion of the Agreement remains executory, the time for performance has not passed and no breach can have occurred.

An executory contract is one that has not as yet been fully completed or performed. Blacks Law Dictionary, 395 (6th ed. 1991). By its own terms, the Option portion of the Agreement can only close or terminate following the State Engineer’s disposition of the change application that High Valley is required to file. The Agreement states:

Upon approval of the application, the parties shall cause the said sum on deposit with Silver King Bank to be paid and disbursed to High Valley and Atkinson shall pay to High Valley an amount in addition thereto as necessary to pay the entire amount of the purchase price in accordance with sub-paragraph “3C(2)” above as of the date such payment is made (herein “the Closing Date”) whereupon the transaction shall be deemed closed. ([sic] If there is a surplus in said account as of the Closing Date, the surplus shall be disbursed to Atkinson. In the event the application is denied, then upon issuance of the final order of denial all amounts on deposit with Silver King Bank shall be disbursed to Atkinson where-upon all rights and obligations of the parties pursuant to the paragraph “3C” shall terminate and be of no further force or effect.

(R. 0085-86). Thus, the Option portion of the Agreement can only close when there is a final approval of the change application. Conversely, by its own terms, the Option can

only terminate upon the denial of the change application. Neither of those conditions can arise until High Valley files the required applications which it has not done.² Until the Option either closes as a result of an approval of the change application, or terminates as a result of the denial of the change application, it remains an executory contract.

Because the Option remains executory each party has a present duty of performance. Therefore, the district court should have ordered the parties to complete their remaining mutual obligations as prayed in SCI's Answer. (R. 0012). The district court was simply incorrect in ruling that there was a breach of the Agreement and that the statute of limitations period had run because the contract remains executory.

II. ANY BREACH AS A RESULT OF HIGH VALLEY'S DELAY IN PERFORMANCE OR REPUDIATION DID NOT OCCUR UNTIL AT LEAST 1999

Assuming, *arguendo*, that the Agreement is no longer an executory contract and that High Valley's delayed performance somehow amounted to a breach of the Agreement, such breach cannot have occurred prior to 1999. Therefore, even on this alternative basis, the six-year statute of limitations did not run against SCI.

Any possible breach in this case would have to result from High Valley's delay in performing its obligations or High Valley's repudiation of the Option. However, the Agreement did not contain a time certain for the performance of High Valley's

² Neither should High Valley be allowed to use its own delay in performance as a basis to excuse its obligation to perform. See *Karsarsky v. Merit Systems Protection Board*, 296 F. 3d 1331, 1338-1339 (Fed. Cir. 2002) ("agency should not be excused from performance simply because it failed to perform.").

obligations after SCI exercised the Option. (R. 0085-86). “When no time of performance is specified and one party performs, the non-performing party is not in breach of the contract until either (1) the performing party demands performance within a reasonable amount of time, and the other party still fails to perform within the time specified; or (2) the non-performing party repudiates the contract, and the performing party chooses to treat the repudiation as a breach.” *Kasarsky v. Merit Systems Protection Board*, 296 F. 3d 1331, 1336 (Fed. Cir. 2002) (citing *Roehm v. Horst*, 178 U.S. 1, 13 (1900) (repudiation gives the promisee the right of electing either to wait until the time for the promisor’s performance has arrived or to act upon the renunciation and treat it as a final assertion by the promisor that he is no longer bound by the contract)). Thus, breach cannot have occurred until SCI specifically demanded performance and High Valley specifically refused to file application with the State Engineer or High Valley specifically repudiated the Option and SCI chose to treat the repudiation as a breach.

The earliest that SCI could reasonably be deemed to have demanded performance is May 13, 1999, when counsel for SCI sent a letter to High Valley asking to discuss the steps necessary to obtain the release of the Water Right. (R. 00346 Ex. P-29). It was not until this point in time that High Valley, in response to SCI’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 SCI. (R. 0110-111).

While the district court did not make a specific finding or conclusion regarding when High Valley’s breach occurred, it did find that High Valley failed to perform

shortly after exercise of the Option (even though no time for performance was specified), and then supposedly repudiated the Option during the course of discussions held between the parties in March, 1994. As such, the district court concluded that the statute of limitations must have begun to run no later than March 28, 1994. However, SCI clearly did not chose to treat High Valley's comments as a breach of the Agreement and continued to expect performance from High Valley until at least 1999. Therefore, the alleged repudiation cannot be considered a breach. *Id.*; see also *Upland Industries*, 684 P.2d at 643 ("Defendants therefore had the right to elect either to treat the repudiation as effective and bring suit at once or to continue to treat the repudiation as ineffective and bring suit if and when an actual breach occurred.") and *Kasco Services Corp. v. Benson*, 831, P.2d 86, 89 (Utah 1992) (the performing party "can immediately treat the anticipatory repudiation as a breach, or can continue to treat the contract as operable and urge performance without waiving any right to sue for repudiation."). Further, as this Court has noted, "[a] party that has received a definite repudiation from the breaching party to the contract should not be penalized for its efforts to encourage the breaching party to perform its end of the bargain." *Breuer-Harrison, Inc. v. Combe*, 799 P.2d 716, 725 (Utah App. 1990) (citing *United California Bank v. Prudential Ins. Co.*, 681 P.2d 390,433 (Ariz. Ct. App. 1983)).

Likewise, SCI did not chose to treat High Valley's delayed performance as a breach. SCI asserted its ownership of the water right following its exercise of the Option and considered the Option binding. However, SCI did not need the water for its

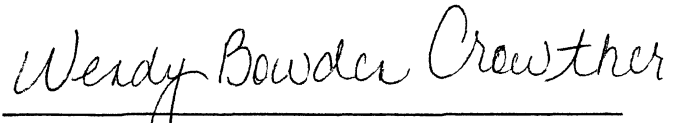
development and did not pursue High Valley's performance until at least 1999. Instead, as a gesture to those served by High Valley, SCI allowed High Valley to continue to the water without charge other than payment of the annual assessments required to maintain the Water Right. Again, SCI did not have an immediate need for the water right and was aware that the right could be subject to forfeiture for non-use if not placed to beneficial use pursuant to Utah Code Ann. § 73-1-4. SCI knowingly allowed High Valley to use the water for its own benefit and to delay in filing the required applications until 1999 when SCI incurred a need for the water. Yet, at no time did SCI consider the Option to have been breached or repudiated. SCI's decision to treat the Option as executory until at least 1999 cannot support a claim that the statute of limitations had run. SCI had no need for performance until after 1999 and the statute of limitations could not have begun to run until after that time.

CONCLUSION

The determination by the district court that the applicable statute of limitations must have begun to run by March 28, 1994 is contrary to applicable law. The Option remained executory and High Valley's delay in performance (made with SCI's consent) did not trigger the running of the statute. Therefore, SCI respectfully asks the Court to reverse the district court judgment, finding that the Option remains valid and binding upon the parties, and that High Valley must complete performance of its obligations under the Option.

Respectfully submitted this 17th day of June, 2005.

CLYDE SNOW SESSIONS & SWENSON

A handwritten signature in cursive script that reads "Wendy Bowden Crowther". The signature is written in dark ink and is positioned above a horizontal line.

Edwin C. Barnes

Steven E. Clyde

Wendy Bowden Crowther

Attorneys for Petitioner/Appellant

Silver Creek Investors

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing BRIEF OF APPELLANT were mailed by first-class mail this 17th day of June, 2005, postage prepaid and correctly addressed to the following:

David C. Wright
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ADDENDUM

Addendum No. 1 - Findings of Fact and Conclusions of Law

No. _____
FILED
JAN 25 2005
By _____ Court
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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. 010500204
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.

1316

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 Kapoloski, 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.

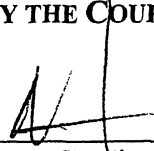
6. Silver Creek is entitled to return of the funds still held at Bank One, and the Court further orders that the deposited funds with accrued interest be returned to Silver Creek. High Valley is obligated to cooperate in returning the funds to Silver Creek.

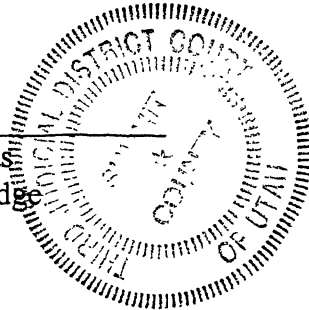
7. Although the 1987 Agreement contains an attorney fee provision, neither party is entitled to an award of attorney fees under the circumstances of this case.

8. 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

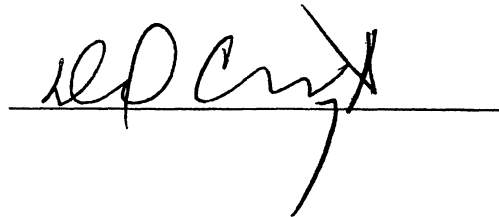
☐ Facsimile

☐ 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.

Addendum No. 2 - Judgement

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

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.

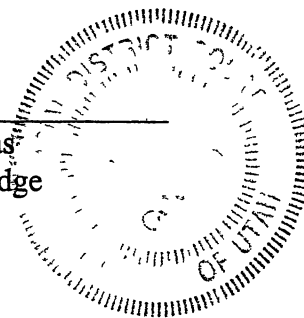
It is further

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

CERTIFICATE OF SERVICE

I certify that on January 19 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



Addendum No. 3 - 1987 Agreement

AGREEMENT

THIS AGREEMENT made this 20th day of August, 1987 between HIGH VALLEY WATER COMPANY, a Utah corporation (herein "High Valley"), ATKINSON WATER COMPANY, a Utah corporation (herein "Atkinson"), ATKINSON SPECIAL SERVICE DISTRICT, a governmental entity (herein the "Special Service District") and SUMMIT COUNTY - ATKINSON WATER IMPROVEMENT DISTRICT, a governmental entity (herein the "Improvement District")

W I T N E S S E T H :

Recitals. High Valley and Atkinson are private water companies which provide water service to their shareholders in service areas located in Snyderville Valley, Summit County, Utah. Atkinson is a shareholder and customer of High Valley. The Special Service District is a governmental entity organized pursuant to Chapter 23, Title 11, Utah Code Annotated, 1953, as amended. The Improvement District is a governmental entity organized pursuant to Chapter 7, Title 17, Utah Code Annotated, 1953, as amended. Atkinson and High Valley and their predecessors in interest have each had various business dealings with the other over a period of years and various differences, controversies, claims and counter-claims have arisen between them. One of the principal obstacles in the settlement of differences between the two private water companies has been Atkinson's lack of sufficient plant and resources to provide water service to it's shareholders independent of water deliveries from High Valley. The Special Improvement District was organized to provide a means for the financing and construction of improvements and additions to the Atkinson system so that said system will have the capability independent of High Valley to provide adequate water service to all of the existing shareholders of Atkinson and to contiguous properties located within the boundaries of the Special Improvement District. (The area within the limits of the Special Improvement District is hereafter sometimes referred to as the "New Service Area"). The Special Improvement District intends to proceed with the construction of additions and improvements to the Atkinson system and the expansion of said system into the New Service Area. (The improved and enlarged system which will operate within the boundaries of the Special Improvement District is hereafter referred to as the "New System"). The Special Improvement District will enter into a Management Agreement with the Special Service District by the terms of which the Special Service District will provide management for the day-to-day operations of the entire water system located within the boundaries of the New Service Area. Atkinson in turn will enter into an agreement with the Special Service District by the terms of which it will lease to the Special Service District certain water and water rights and all of it's existing system. It is further contemplated that the New System shall remain interconnected with the High Valley system and that the interconnection will provide benefits

to both systems. In contemplation of the construction of the additions, improvements and extension of Atkinson's existing system as proposed by the Improvement District; operation of the New System within the New Service Area, and the interconnections between the two systems as provided for by this Agreement, High Valley and Atkinson have agreed upon terms for a complete settlement and a Mutual General Release of all claims and counter-claims now existing between them and all of the parties hereto have agreed upon terms and conditions for interconnection between the two systems. The purpose of this Agreement is to set forth the terms and conditions for the interconnection between the High Valley system and the New System and terms for the settlement between High Valley and Atkinson.

NOW THEREFORE in consideration of the mutual covenants of the parties hereto and other good and valuable considerations the parties agree as follows:

1. Construction of Facilities. Subject to the availability of financing the Special Improvement District will construct additions and improvements to the Atkinson system, including improvements to an existing well and construction and installation of pumps, lines, telemetry and related facilities all in accordance with the plans and specifications prepared by Eckhoff, Watson and Preator Engineering (herein the "Consulting Engineers") copies of which are attached hereto as Exhibit "1". (The work contemplated by Exhibit "1" is hereafter referred to as the "Project"). It is acknowledged that construction of the Project is dependant upon financing. If and when constructed as proposed, the completed system will have the capability to provide sufficient water and water storage to provide water service to Atkinson's former customers and to other customers within the New Service Area without necessity for water deliveries from High Valley. The New System will also provide for all fire flow requirements within the New Service Area and when interconnected with the High Valley system will be capable of providing all supplemental fire flow requirements in High Valley's service area. The interconnection will also provide capability for temporary emergency water deliveries between the two systems. In order to accomplish the foregoing, the parties agree as follows:

A. Atkinson, the Special Improvement District and the Special Service District Agree:

(1) To use their best efforts to promote and further the Project to the end that the same may be financed and constructed within a reasonable time. It is presently anticipated that the Project can be financed, completed and placed in service prior to the end of calendar year 1987.

(2) Atkinson and the Special Improvement District, as owners of the New System and the Special Service District, as Lessee and manager of the New System agree to provide for continued maintenance of the existing interconnection between the two systems at the point designated as Point "A"

on Sheet No. 7 of Exhibit "1" attached hereto and to provide for delivery of water at an additional point of interconnection designated as Point "B" on said Sheet No. 8 of Exhibit "1". The New System shall be capable of delivering to the High Valley system not less than a total of 1,000 gallons per minute for a continuous two hour period (120,000 gallons in aggregate) to satisfy all State and County requirements for fire flow protection in High Valley's system. High Valley shall have sole responsibility for the capability of it's own system on the High Valley side of the interconnections to accomodate deliveries of water from the New System.

(3) The Improvement District and the Special Service District agree to provide to High Valley a good and valid easement for the construction of a pipeline extending from Point "C" on the New System as shown on Sheet No. 8 of Exhibit "1" to Point "B", the new point of interconnection with High Valley's system.

(4) The Special Improvement District as part of the Project shall install at it's expense all required valves and metering equipment in vaults as specified by the Consulting Engineers in order to provide temporary emergency water service from the High Valley system to the New System.

(5) The Special Improvement District shall hold High Valley harmless from all costs and expenses incurred in the course of performance of the foregoing covenants including all construction costs related to the Project, the furnishing of the easement and all design and engineering expense of the Consulting Engineers for services related to the Project in general and to the performance of this Agreement, except certain expenses relating to interconnection between the two systems as provided for by paragraph "2B".

B. High Valley Agrees;

(1) Contemporaneous with construction of the Project by the Improvement District High Valley at it's expense will construct a line extension extending High Valley's system along the right-of-way provided pursuant to paragraph "1A (3)".

(2) Contemporaneous with the construction of the Project and construction of the line extension, High Valley at it's expense will install all required valves and regulating and metering equipment in vaults at the points of interconnection between the two systems, Point "A" and Point "B" (Sheet No. 7&8, Exhibit "1") in order to provide temporary emergency water service and

automatic fire flow capability and metering for the flow of water from the New System to the High Valley system.

(3) The work required by this paragraph "1B" may be bid as an alternate to the main bid for the Project and at the discretion of the parties said work may be performed by the contractor to whom the Project is awarded or under separate contract between High Valley and another contractor. In any event, High Valley shall be solely responsible to pay all costs and expenses associated with the work and all work shall be performed in accordance with the specifications of the consulting engineers.

2. Interconnection Between the New System and the High Valley System.

A. Objectives of Interconnection. The purposes and objectives of the parties for interconnection between the New System and the High Valley system are:

(1) To satisfy state and county requirements for fire flow protection in the High Valley system as provided for in paragraph "1A (2)".

(2) To provide capability for temporary emergency water deliveries from the High Valley system to the New System.

(3) To provide capability for temporary emergency water deliveries (in addition to fire flow protection) from the New System to the High Valley system.

(4) To provide a means for settlement of claims and counter-claims between High Valley and Atkinson and particularly, but not by way of limitation, the full and complete release and discharge of any claim or right which High Valley may have against the assets owned by Atkinson, (including water rights and water system) which are required for use in the New Service area.

B. Construction Expense Relating to Interconnection. The Improvement District shall bear all expenses of whatever character related to the Project except certain expenses relating solely to interconnection between the two systems. High Valley shall bear all expenses including design and engineering expenses of the Consulting Engineers and actual construction costs for the line extension provided for by paragraph "1B (1)" together with expenses of facilities required to provide automatic fire flow capability, temporary emergency water delivery and for metering of such deliveries as provided for in paragraph "1B (2)". The Improvement District shall bear all expenses

including design and engineering expenses of the Consulting Engineers and construction expense relating to the construction of facilities required to provide capability for temporary emergency water delivery as provided for by paragraph "1A (4)".

C. Ownership - Operation and Maintenance Expense. High Valley shall own and maintain the line extension referred to in paragraph "1B (1)" and all equipment and plant required to provide capabilities for automatic fire flow protection and temporary emergency water deliveries to the High Valley system provided for by paragraph "1B (2)". The Improvement District shall own and maintain all equipment and plant required to provide capability for temporary emergency water deliveries to the New System provided for by paragraph "1A (4)". Each party shall bear all costs relating to the operation and maintenance of the facilities owned by it as a part of the expenses relating to operation and maintenance of it's water system. Each party shall be allowed reasonable access to metering equipment installed for the purpose of measuring water deliveries from it's system to the other system and may from time to time perform such tests of such metering equipment as it shall reasonably determine to be necessary in order to assure the accuracy of such equipment. Each party shall have access to the metering equipment herein provided for to allow and provide for preparation and monitoring of billings for the water deliveries contemplated by this Agreement.

D. Water Deliveries - Charges. Water deliveries to the High Valley system shall be on a demand basis by means of automatic equipment which shall deliver water as required to the High Valley system. Water deliveries for temporary emergency service from the High Valley System to the New System shall be accomplished by means of manually operated valves or other appropriate equipment and neither party shall have any obligation to make water deliveries to the other for temporary emergency service (except fire protection) except from surplus capacity on an "as available" basis. Each party shall bill the other for all water deliveries made pursuant to this Agreement at the same rate as paid by other customers of the delivering system and all such billings shall be promptly paid.

3. Settlement of Claims Between High Valley and Atkinson.

A. Statement of Financial Account. Atkinson is the owner of 126 shares of Class I Common Stock of High Valley and as such is entitled to receive water for culinary use. High Valley's system is interconnected with Atkinson's system and High Valley has delivered water for use in Atkinson's system from June 1982 to and including the present date. Atkinson is indebted to High Valley for water service and for Atkinson's share of expenses for Weber Basin Water Conservancy District water reservation fees applicable to the 126 shares of Class I Stock owned by Atkinson. In addition to the aforesaid indebtedness Atkinson is indebted to High Valley for certain additional costs incurred by High Valley in providing water to Atkinson for irrigation use for the period May 1 through October 31, 1985. The agreed amount of the unpaid balance due and owing by Atkinson on account of all of above described obligations as of July 31, 1987 is the sum of \$29,371.64.

B. Settlement of Account - Redemption of Shares. Upon execution of this Agreement Atkinson shall (1) pay to High Valley in cash or certified funds the sum of \$5,000, and (2) deliver to High Valley the certificates evidencing the 126 shares of Class I Common Stock of High Valley standing in the name of Atkinson, duly endorsed for transfer with signatures guaranteed. Upon payment of said funds and delivery of said certificates, the said sum of \$5,000 shall be applied against the account referred in paragraph 3A above thereby reducing the balance of said account from \$29,371.64 to \$24,371.64, whereupon the 126 shares of stock evidenced by the certificates shall be redeemed by High Valley and held by it as Treasury Shares in consideration of the full and complete cancellation of the remaining debt. Upon accomplishment of the foregoing, the full amount of the account referred to in paragraph "3A" shall be settled, satisfied and discharged and Atkinson shall have no further rights as a shareholder of High Valley or in or to any water or water rights of High Valley or to receive further water deliveries from High Valley except as specifically hereinafter provided for in this paragraph "3".

C. Option to Purchase Certain Weber Basin Water Rights. Upon performance of the covenants and provisions of paragraph "1B", Atkinson shall have the right and option to purchase from High Valley 56 acre feet of Weber Basin water under Contract No. 29505 and Exchange No. 1085 upon the terms and conditions hereinafter set forth in this sub-paragraph "3C".

(1) Option Term. The Option shall extend to and including midnight December 31, 1987.

(2) Option Price. The purchase price for the water rights herein referred to shall be the sum of the following:

(a) \$24,371.64 and

(b) An amount equal to 10% per annum on the sum of \$24,371.64, from July 31, 1987 to the Closing Date, and

(c) The full amount of any unpaid balance due and owing High Valley pursuant to paragraph "3E" for water service to Atkinson from August 1, 1987 to and including the Closing Date.

(3) Exercise of Option - Closing. The Option shall be exercised by written notice delivered by Atkinson to High Valley before expiration of the Option. Such notice shall be served upon High Valley by delivery of the same to the office of its President, L. Clifton Read, Jr. at Suite 206, Hill Building, 750 East Hwy. 248, Park City, Utah. As an essential part of the exercise of the Option rights herein provided for Atkinson, contemporaneous with the delivery of the Notice, shall deposit with the Silver King State Bank, Park City, Utah, the entire amount of the purchase price as of the date of the Notice, said amount to be deposited to an interest bearing account which will require the signatures of both Atkinson and High

Valley as a condition to disbursements from said account. Not less frequently than once a month prior to closing and at the time of closing as hereinafter provided for, Atkinson shall make additional deposits to such account as shall be required to cause the entire balance in the account to equal the purchase price as of the date of such deposits. From and after the date of the deposit and until the closing, interest accruals on the account shall be for the benefit of Atkinson. Upon notice of the exercise of the Option and deposit of the cash sums required by the provisions of this paragraph, High Valley shall file an application with the Utah State Engineer for segregation and change in the point of diversion of 56 acre feet of Weber Basin Water under Contract No. 29505 and Exchange No. 1085 together with an appropriate assignment of said 56 acre feet to transfer said water rights to Atkinson for delivery to Atkinson at it's existing well site located approximately 410 feet West and 80 feet North of the South quarter corner of Section 22, T1S, R4E, SLB&M. Each party agrees to cooperate in the filing and prosecution of said application and to take all measures reasonably required of it to accomplish the transfer of said water rights and the change in the point of diversion as contemplated. Upon approval of the application, the parties shall cause the said sum on deposit with Silver King State Bank to be paid and disbursed to High Valley and Atkinson shall pay to High Valley any amount in addition thereto as necessary to pay the entire amount of the purchase price in accordance with sub-paragraph "3C (2)" above as of the date such payment is made (herein "the Closing Date") whereupon the transaction shall be deemed closed. (If there is a surplus in said account as of the Closing Date, the surplus shall be disbursed to Atkinson. In the event the application is denied, then upon issuance of the final order of denial all amounts on deposit with Silver King State Bank shall be disbursed to Atkinson whereupon all rights and obligations of the parties pursuant to this paragraph "3C" shall terminate and be of no further force or effect.

D. Future Water Service Between High Valley and Atkinson. Subject to payment of the charges in this paragraph provided for, High Valley shall lease to Atkinson the 126 shares of Treasury Stock held by it and pursuant to said Lease will continue to deliver water to Atkinson until the New System is placed in service. The agreed lease rate of said shares including all charges for water deliveries to Atkinson at it's point of interconnection with High Valley is the sum of \$1,400 per month commencing August 1, 1987. High Valley shall bill Atkinson for the said sum of \$1,400 per month in monthly billings on or about the first day of each month commencing September 1, 1987 and such billings shall be due and payable on or before the 15th day of the month following delivery of such billing and the unpaid balance of any such statement shall bear interest from and after said due date at the rate of one per cent per month. At High Valley's option, Atkinson agrees to delegate to High Valley the right and obligation to prepare and send monthly billings for water service to each of Atkinson's

customers and to require payment of said billings directly to High Valley. High Valley agrees that all amounts collected by it pursuant to all such billings shall be credited against the monthly statements rendered to Atkinson. High Valley reserves the right to discontinue such billing and collection service at any time upon notice to Atkinson. Atkinson agrees to promptly disconnect any of it's customers who shall fail to pay monthly billings for water services at the time such billings become due or within 45 days thereafter. Atkinson shall furnish disconnect notices to it's delinquent customers not less than 15 days prior to the date of disconnection. The parties expressly acknowledge and agree that in the event Atkinson shall fail to pay the full amount due for monthly water service in accordance with the provisions of this paragraph, at the time any such monthly payment becomes due or within 30 days thereafter the lease of shares provided for by this paragraph and Atkinson's right to continued water service from High Valley shall terminate without notice to Atkinson and that upon such termination High Valley shall have the right to shut off the interconnection between the two systems and discontinue water service to Atkinson. Notwithstanding any other provisions of this paragraph to the contrary, the temporary lease rights and water service provided for by this paragraph shall terminate upon completion or abandonment of the Project.

E. Completion of Project. High Valley and Atkinson agree that at such time as the Project is completed and the New System is placed into service:

(1) High Valley shall discontinue water service to Atkinson.

(2) Atkinson shall be fully released and discharged from any and all obligations to High Valley to provide additional storage capacity for High Valley's system. Atkinson acknowledges that it has heretofore committed to High Valley to construct an additional storage tank to provide not less than 100,000 gallons of additional storage capacity for the High Valley system. This obligation shall be fully satisfied at such time as the New System is completed and placed into service.

(3) The cash and notes receivable in the aggregate principal sum of \$25,000 received by Atkinson as a result of the prosecution of it's claim against Capson, Morris and McComb, which claim arises out of the latter's commitment to provide water storage capacity, shall be the sole and separate property of Atkinson and Atkinson shall have no obligation to High Valley to pay or deliver to High Valley any part of the said cash or the proceeds of said notes or to assign or transfer the said notes to High Valley.

E. Failure of Conditions. In the event the financing for the Project is not obtained or if the Project is abandoned, either High Valley or Atkinson may prosecute any claim it may have against the other except the claims settled and paid pursuant to paragraph "3B". From and after

the date hereof and until failure to obtain financing or abandonment of the Project, High Valley shall have no right to pursue the enforcement of the claims referred to in Paragraphs "3E (2) and (3)". During said period of time the statute of limitations relating to such claims shall be tolled.

G. Mutual Release. Upon performance of the provisions of paragraph "3E", completion of the Project and commencement of operation of the New System, High Valley and Atkinson each agree that the other shall be released and discharged of and from all claims of whatever character which claims have arisen prior to execution of this Agreement or which may hereafter arise as a result of any act or omission to act or transaction which occurred prior to execution of this Agreement, it being the intent of the parties that neither High Valley nor Atkinson shall have any claim against the other except such as may arise under the terms of this Agreement or by reason of acts or omissions to act or transactions which occur after the date of this Agreement.

4. Additional Mutual Covenants. The parties agree that upon completion of the Project and commencement of operation of the New System:

A. The Special Service District and the Special Improvement District shall continuously maintain or cause to be maintained all such facilities owned or leased by them as may be required to deliver to High Valley automatic fire flow and temporary emergency water service as contemplated by this Agreement.

B. High Valley shall continuously maintain or cause to be maintained all such facilities owned by it as may be required to provide temporary emergency water service to the New System as contemplated by this Agreement.

C. Each party shall fully cooperate with the other and shall take such action as reasonably required of it to accomplish the purposes and objectives of this Agreement.

5. Additional Documents - Attorney's Fees. Each party agrees to execute such additional documents as shall be reasonably required to carry out and effectuate the covenants of such party as herein set forth and the intent and purposes of this Agreement. In the event of a default in the performance of this Agreement the party in default shall pay all costs and expenses incurred by the others in the enforcement of this Agreement including reasonable attorney's fees.

6. Approvals. Each party agrees to obtain shareholder approvals, Board of Director approvals and other applicable legal forms of approval as evidence of the authority of the parties to execute and deliver this Agreement or by way of ratification of the execution and delivery of this Agreement by such parties.

IN WITNESS WHEREOF the parties hereto have executed this Agreement
the day and year first above written.

Attest:

Ray Ilwaco
Secretary

HIGH VALLEY WATER COMPANY, a corporation

by Alton Acosta
It's President

Attest:

W. J. L.
Secretary

ATKINSON WATER COMPANY, a corporation

by H. J. P. P.
It's President

Attest:

Claine S. Tatten
Deputy Summit County Clerk

ATKINSON SPECIAL SERVICE DISTRICT
By It's Governing Body, the Summit
County Board of Commissioners

by Thomas E. Shuster
Chairman

Attest:

Claine S. Tatten
Deputy Summit County Clerk

SUMMIT COUNTY - ATKINSON WATER IMPROVEMENT
DISTRICT

By it's Governing Body, the Summit
County Board of Commissioners

by Thomas E. Shuster
Chairman

Addendum No. 4 - Utah Code Ann. § 78-12-23

rendering state. U.C.A.1953, 78-12-22(1) (1999). Potomac Leasing Co. v. Dasco Technology Corp., 2000, 10 P.3d 972, 403 Utah Adv. Rep. 8, 2000 UT 73. Judgment ⇨ 934(1); Limitation Of Actions ⇨ 43

Once a foreign judgment is filed with the State district court pursuant to the Utah Foreign Judgment Act (UFJA), the judgment creditor has eight years to enforce the judgment in the State. U.C.A.1953, 78-12-22(1) (1999). Potomac Leasing Co. v. Dasco Technology Corp., 2000, 10 P.3d 972, 403 Utah Adv. Rep. 8, 2000 UT 73. Judgment ⇨ 934(1)

The eight-year statute of limitations for enforcing foreign judgments applies to the time period between a foreign judgment's entry in the rendering state and the judgment's registration in Utah under the Utah Foreign Judgment Act (UFJA). U.C.A.1953, 78-12-22(1) (1999). Potomac Leasing Co. v. Dasco Technology Corp., 2000, 10 P.3d 972, 403 Utah Adv. Rep. 8, 2000 UT 73. Limitation Of Actions ⇨ 43; Limitation Of Actions ⇨ 118(1)

Principle of comity did not apply to action to enforce foreign judgment under state Foreign Judgment Act after judgment had been filed in state since courts were required to treat foreign judgments same as local judgments once they had been filed. U.C.A.1953, 78-22a-2(2). Pan Energy v. Martin, 1991, 813 P.2d 1142. Courts ⇨ 511

17. — Law governing, foreign judgments

Under Uniform Interstate Family Support Act (UIFSA), action against former husband for child support arrearages, Pennsylvania's statute of limitation applied, where former wife and children resided in Pennsylvania, and Pennsylvania's statute of limitations on such actions, as interpreted by Pennsylvania courts, clearly exceeded Utah's statute of limitations. U.C.A. 1953, 78-12-22(2); 42 Pa.C.S.A. § 5527. State, Dept. of Human Services v. Jacoby, 1999, 975 P.2d 939, 363 Utah Adv. Rep. 23, 1999 UT App 52. Child Support ⇨ 502

For purposes of enforcement, filing of foreign judgment under Utah Foreign Judgments Act

creates new judgment which is governed by Utah statute of limitations, irrespective of subsequent dormancy in state of rendition. U.C.A. 1953, 78-22a-2(2). Pan Energy v. Martin, 1991, 813 P.2d 1142. Judgment ⇨ 928

"Borrowing statute" applies to causes of action that arise in another state and have not yet been reduced to judgment but does not apply to action to enforce foreign judgment. U.C.A. 1953, 78-12-45. Pan Energy v. Martin, 1991, 813 P.2d 1142. Judgment ⇨ 928

Law of forum, including forum's statute of limitations, governs enforcement of foreign judgments; full faith and credit is not denied by application of local procedural law even though forum state's statute of limitations allows enforcement of judgment which is barred by rendering state's statute of limitations. U.S.C.A. Const. Art. 4, § 1. Pan Energy v. Martin, 1991, 813 P.2d 1142. Judgment ⇨ 928

Full faith and credit clause did not require Utah courts to apply foreign statute of limitations or dormancy statute to foreign judgment properly filed under Utah Foreign Judgment Act. U.C.A.1953, 78-22a-1 to 78-22a-4. U.S.C.A. Const. Art. 4, § 1. Pan Energy v. Martin, 1991, 813 P.2d 1142. Judgment ⇨ 928

18. — Child support judgments, foreign judgments

Under Pennsylvania law, as long as an action for arrearages is commenced within six-year statute of limitations, the arrears calculation may go back as far as there is a delinquency in payment. 42 Pa.C.S.A. § 5527. State, Dept. of Human Services v. Jacoby, 1999, 975 P.2d 939, 363 Utah Adv. Rep. 23, 1999 UT App 52. Child Support ⇨ 451

Where former husband appeared in 1975 Ohio proceeding which involved increase in child support payments together with reduction to judgment of accrued arrearages of child support, suit commenced in Utah in 1978 to enforce the 1975 Ohio judgment was timely U.C.A.1953, 78-12-22. Logan v. Schneider, 1980, 609 P.2d 943. Divorce ⇨ 403(9)

§ 78-12-23. Within six years—Mesne profits of real property—Instrument in writing

An action may be brought within six years:

- (1) for the mesne profits of real property;
- (2) upon any contract, obligation, or liability founded upon an instrument in writing, except those mentioned in Section 78-12-22.

Laws 1951, c. 58, § 1; Laws 1984, c. 16, § 2; Laws 1996, c. 79, § 109, eff. April 29, 1996; Laws 1996, c. 210, § 5, eff. April 29, 1996.

Codifications C. 1943, Supp., § 104-12-23.