Court of Appeals, State of Colorado Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203	
District Court, Park County Honorable Stephen A. Groome	
Plaintiff-Appellant: Indian Mountain Corp. v. **Defendant-Appellee:** Indian Mountain Metropolitan District	▲ **COURT USE ONLY** ▲
Attorney for Plaintiff-Appellant Indian Mountain Corp.: Adam C. Davenport 112 North Rubey Drive, Ste. 101 Golden, Colorado 80403 Cell: 970-217-7387 Office: 720-627-6151 Fax: 720-216-2055 Email: adam.davenport@indianmtnncorp.com Atty. Reg. #: 45342	Case Number: 15CA_____
NOTICE OF APPEAL IN CIVIL CASE PURSUANT TO C.A.R. 3(D)	

I. TRIAL COURT INFORMATION

Court from Which Appeal is Taken: District Court

County: Park

Presiding Judge in Court Below: Honorable Stephen A. Groome

Party Initiating Appeal: Plaintiff, Indian Mountain Corp.

("IMC")

Trial Court Case Number: 14CV30056

II. DESCRIPTION OF NATURE OF CASE AND DISPOSITION IN TRIAL COURT

Nature of Case: During the 1970s and 1980s, IMC and its corporate predecessors Meridian Properties, Inc. ("Meridian") and Park Development Company developed the Indian Mountain subdivision in Park County, Colorado which consists of 2,450 lots. The water supply for individual lots comes from wells drilled by each owner. Pumping of wells in the subdivision causes "out-of-priority" depletions to Tarryall Creek, tributary to the South Platte River. To prevent this injury, Meridian adjudicated a plan for augmentation in Division 1 Water Court Case No. W-7389 on January 2, 1974, *nunc pro tunc* October 1, 1973 ("W-7389 Decree"). IMC subsequently took over development of the Indian Mountain subdivision.

It is undisputed that the augmentation plan water rights have been possessed and operated by IMC, at its own expense since the 1970s. The W-7389 Decree does not require a transfer of the water rights to a mandatory home owners' association, nor does one exist in Indian Mountain. IMC and Indian Mountain Metropolitan District ("IMMD") and its predecessors have negotiated unsuccessfully on and off for many years for the purchase of the water rights. Most recently negotiations broke down after IMMD claimed to own the water rights via a constructive trust. IMC filed the below action to confirm its ownership of the water rights and its ability to sell augmentation service to Indian Mountain lot owners for a reasonable fee.

Judgment or Order Being Appealed: The Trial Court found and ordered that IMC would be unjustly enriched by charging lot owners for use of the water rights that comprise the Indian Mountain augmentation plan and therefore imposed a constructive trust on the same. The Trial Court ordered that IMC must continue to operate the Indian Mountain augmentation plan for the benefit of lot owners or turn over the plan and its water rights to IMMD. IMC also appeals the Trial Court's order denying IMC's Motion for Post-Trial Relief and its award of costs to IMMD.

Basis for Appellate Court's Jurisdiction: A final judgment of the Park County District Court as contemplated by C.R.C.P. 54(b) and C.A.R. 1(a)(1).

Whether the Judgment or Order Resolved all Issues Before the Trial Court: The Trial Court's Findings, Conclusions, and Orders entered March 16, 2015 resolved all issues pending before the trial court.

Whether Judgment Was Final in Accordance with C.R.C.P. 54(b): No further orders were necessary and the judgment was final pursuant to C.R.C.P. 54(b).

Date Judgment or Order was Entered: March 16, 2015.

Date of Mailing Order or Judgment to Counsel: March 16, 2015.

Whether Extension Was Granted to File Motion(s) for Post-Trial Relief: No extensions for filing motions for post-trial relief were sought or granted.

Whether a Motion for Post-Trial Relief Was Filed, and if so, the Relief Sought: A Motion for Post-Trial Relief was filed by IMC. IMC requested that the Court amend its findings and order to find that no constructive trust was warranted in this case because certain documents (referred to during the course of this litigation and at trial as "the HUD documents") could not create a cause of action against IMC due to the applicable statute of limitations. The Trial Court found and ordered that IMC was entitled to reimbursement for its operation and maintenance of the Indian Mountain augmentation plan. IMC also requested that the Court amend its order to clarify that IMC is entitled to reimbursement for its operation and maintenance of the augmentation plan at its own expense since the 1970s. Finally, IMC requested that because the Court confirmed IMC's legal title that the findings and order be amended to reflect that there was no prevailing party for purposes of awarding costs.

Date Motion for Post-Trial Relief was Filed: March 30, 2015.

Date Motion for New Trial or Rehearing Was Denied or Deemed Denied Under C.R.C.P. 59(j): IMC's Motion for Post-Trial Relief was denied on May 6, 2015.

Whether Extension Was Granted to File Notice of Appeal: No extension to file a notice of appeal was sought or granted but for the extension granted to file a notice of appeal pursuant to C.A.R. 4(a).

III. ISSUES PROPOSED TO BE RAISED ON APPEAL

1. Whether the trial court erred in finding that IMC would be unjustly enriched by charging lot owners for use of the Indian Mountain augmentation plan water rights.
2. Whether the trial court erred in finding that the contents of the "HUD documents" warrant imposition of a constructive trust.
3. Whether the trial court's finding that IMC's "return on investment" was derived from lot sales is supported by evidence in the record.
4. Whether the trial court erred in finding that IMMD was providing "water service" as contemplated in C.R.S. §§ 32-1-1004(2)(j) and 32-1-103(25).
5. Whether the trial court erred in finding IMMD the prevailing party for the award of costs pursuant to C.R.C.P. 54(d).

IV. TRANSCRIPT INFORMATION

Whether a Transcript of Evidence is Necessary: A complete transcript will be necessary.

Name of Court Reporter: Christopher Boone, Agren Blando Court Reporting & Video, Inc.

Approximate Number of Pages of Transcript: Undersigned counsel has ordered the transcript of the trial court proceedings which were approximately 20 hours in

length. Mr. Boone estimates that the transcript of the trial court proceedings will be approximately 1,000 pages.

Whether Extension Has Been Requested: No.

V. A PREARGUMENT CONFERENCE IS REQUESTED

VI. ATTORNEY INFORMATION

Attorney for Plaintiff-Appellant:

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Attorney for Defendant-Appellee:

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VII. APPENDICIES TO THIS NOTICE OF APPEAL

1. Findings, Conclusions and Orders, dated March 16, 2015;
2. IMC's Motion for Post-Trial Relief, dated March 30, 2015;
3. Order Denying Plaintiff's Motion for Reconsideration, dated May 6, 2015; and
4. Order Granting Costs to Defendant Indian Mountain Metropolitan District, dated May 26, 2015.

Dated: June 24, 2015

Attorney for Plaintiff-Appellant
Indian Mountain Corp

Adam C. Davenport, #45342
112 North Rubey Drive, Ste. 101
Golden, Colorado 80403
970-217-7387

CERTIFICATE OF SERVICE

I certify that on the 24th day of June, 2015, a true and correct copy of the above NOTICE OF APPEAL, together with complete copies of all attachments was served by e-filing via ICCES and addressed to the following:

Peter J. Ampe
Nathan P. Flynn
Andrew J. Rottman
Hill & Robbins, P.C.
1660 Lincoln Street, Suite 2720
Denver, CO 80264

Clerk of the Park County District Court
Park County Combined Court
300 Fourth St.
Fairplay, CO 80440

Adam C. Davenport
E-filed pursuant to C.A.R. 30
Duly signed original on file at Indian Mountain Corp.

DISTRICT COURT, PARK COUNTY, STATE OF COLORADO P. O. Box 190 Fairplay, Colorado 80440	DATE FILED: March 16, 2015 CASE NUMBER: 2014CV30056
Plaintiff: INDIAN MOUNTAIN CORP. v. **Defendant: INDIAN MOUNTAIN METROPOLITAN DISTRICT**	▲ **COURT USE ONLY** ▲ Case No. 14CV30056
FINDINGS, CONCLUSIONS, AND ORDERS	

This case came before the court for a trial to the court held on March 9, 10, 11, and 12, 2015. At trial Plaintiff Indian Mountain Corp. ("IMC") was represented by Matthew Merrill, Esq. and Adam Davenport, Esq. of White and Jankowski, and Defendant Indian Mountain Metropolitan District ("IMMD") was represented by Peter J. Ampe, Esq. of Hill and Robbins, P.C. The court has considered the testimony and exhibits presented at trial, the stipulated facts set forth in the Trial Management Order, pertinent legal authority, and arguments of counsel. The court hereby enters the following findings, conclusions, and orders.

I. FACTS

A. Stipulated Facts

1. On July 24, 1970, William and Gloria Vigor, Richard and Evalynn Betzing, and Billy and Vera Wyatt conveyed to Park Development Company 10,000 acres of land, portions of which would ultimately become Indian Mountain subdivision. This conveyance included, among other things, "all interest in the Slater Ditch and 27.0 cu. ft. of water per second of time allowed to flow therein under Priority No. 116 . . . Tarryall Ranch Reservoir No. 1, Priority No. A-170 [and] Tarryall Ranch Reservoir No. 2, Priority No. A-288."

2. The Indian Mountain subdivision is located in Park County, Colorado. It consists of approximately 2,450 lots. The lots in the subdivision are zoned for residential use and lot owners may construct dwellings on the lots in compliance with certain requirements specified in the declarations and covenants for the subdivision.

3. Certain lots in the Indian Mountain subdivision are served by residential wells. The residential wells in the Indian Mountain subdivision pump water tributary to the South Platte River system. The groundwater pumped by the wells results in depletions (reductions) in stream flow to Tarryall Creek, which flows into the South

Platte River. The South Platte River is over-appropriated, meaning that at many times, there is more demand by perfected water rights than available supply.

4. The water diversions by residential wells in the Indian Mountain subdivision are "junior" to numerous perfected downstream water rights, meaning that the wells are frequently out of priority and would not lawfully be able to pump water under Colorado's prior appropriation system of water law without a court-approved augmentation plan.

5. The Indian Mountain subdivision was initially developed by Park Development Company, in coordination with its general partner Meridian Properties, Inc.

6. In March 1972, representatives of Meridian Properties, Inc. presented a proposed Service Plan for the proposed Indian Mountain Metropolitan Recreation and Park District ("Recreation District") to the Park County Board of County Commissioners.

7. In the early 1970s, sales of lots in the Indian Mountain subdivision were put on hold while Meridian Properties Inc. obtained a plan for augmentation for wells in the Indian Mountain subdivision from the Division 1 water court in Case No. W-7389. Broadly, the plan for augmentation allows wells in the Indian Mountain subdivision to pump even when the stream depletions they cause would be out of priority.

8. In order to prevent injury to senior water rights caused by a diminished supply of water, the W-7389 plan for augmentation provides a substitute supply of water to Tarryall Creek to offset the depletions from the Indian Mountain subdivision wells.

9. During the mid-1970s, Indian Mountain Corp. became the developer of the Indian Mountain Subdivision.

10. IMC provided documents to potential purchasers stating that access to well permits for a domestic water supply is "assured by the developer."

11. The ownership as between IMC and IMMD of all or portions of the water rights that constitute the substitute supplies in the W-7389 plan for augmentation is in dispute in this case. The substitute supply water rights in the W-7389 plan for augmentation are as follows ("the Subject Water Rights"):

    a. 9 c.f.s. of the Slater Ditch originally decreed in Case No. 341, Park County District Court, October 18, 1889 for Priority No. 116, with an appropriation date of May 20, 1880;

    b. Tarryall Ranch Reservoir No. 1, originally decreed for 33.65 acre feet in Case No. 3286, Park County District Court, March 24, 1953 for Priority A-170, with an appropriation date of December 31, 1923;

c. Tarryall Ranch Reservoir No. 2, originally decreed for 33.65 acre feet in Case No. 3286, Park County District Court, March 24, 1953 for Priority A-228, with an appropriation date of December 31, 1938.

12. Most of the wells in the Indian Mountain subdivision have permits for in house domestic use from the Colorado Division of Water Resources (a/k/a the State Engineer's Office) (there is at least one well permitted for commercial use under a separate augmentation plan). Neither party is aware of the State Engineer denying a permit for a well for in-house domestic use in the Indian Mountain subdivision since the W-7389 decree was entered if the terms of the W-7389 decree were otherwise complied with, including the payment of the required $5.00 fee to the Water Court.

13. Today there is a property owners association for the Indian Mountain subdivision, but membership is not mandatory and not all Indian Mountain lot owners are members.

14. In 1976, Park Development Company conveyed its interest in the platted and unplatted lands in the Indian Mountain subdivision to IMC. Park Development Company also transferred its ownership interest in the Subject Water Rights to IMC. On April 9, 2014, Park Development Co. executed a quit claim deed to IMC confirming the previous conveyance of Park Development Co.'s interest in the Subject Water Rights to IMC, which deed was recorded in Park County.

15. IMC, through its sole owner and shareholder, James Campbell, operated the W-7389 plan for augmentation from 1976 to 2013. IMC operated the Augmentation Plan during this period at its own expense without receiving compensation or payment from IMMD or the Indian Mountain lot owners.

16. Mr. Campbell sold IMC to Bar Star, LLC in August 2013. At that time, Bar Star LLC had two principals, Mr. James Ingalls and Mr. Mark Goosmann.

17. Bar Star LLC, paid a total of $290,000 to purchase IMC and all of its assets.

18. There is not now, nor has there ever been, any agreement between IMC and IMMD or its predecessor, the Indian Mountain Metropolitan Park and Recreation District, for the provision of water or water services for the benefit of IMMD or Indian Mountain lot owners.

19. Effective December 31, 2014, James Ingalls is the sole owner and shareholder of IMC.

20. The wells in the Indian Mountain subdivision have never been curtailed by the Colorado Division of Water Resources through March 31, 2014.

21. IMMD has not paid any money to IMC.

22. Before March 31, 2014, no lot owner paid money to IMC in exchange for replacement water or operation of the augmentation plan.

23. Bar Star Land, LLC owns the following land surrounding the Tarryall Ranch Reservoir: SW1/4SW1/4 Sec. 1; the SE1/4SE1/4 Sec. 2; the NE1/4NE1/4 Sec. 11; the NW1/4NW1/4 Sec. 12, all in Township 9 South, Range 76 West of the 6th P.M. in Park County, Colorado.

24. The Park County Board of County Commissioners signed Resolution No. 2013-01 on January 3, 2013, approving the Amended and Restated Service Plan for IMMD, PCBOCC Resolution No. 2013-01.

25. On February 26, 2013, the District Court of Park County, Colorado entered an Order to Change Name of District, Case No. 1975CW4062, accepting and approving the Amended and Restated Service Plan.

26. IMMD must operate pursuant to the specific terms and conditions in its Amended and Restated Service Plan.

27. IMMD is the owner of an augmentation certificate from Headwater Authority of the South Platte ("HASP"), certificate number 00037 (May 28, 2010).

28. There is not currently a central potable water system providing potable water to individual lots in the Indian Mountain subdivision.

B. Additional Findings of Fact

Indian Mountain Subdivision was intended as a large, upscale recreational development with many amenities including a golf course, ski resort, equestrian trails and stable, and club house. Just after development of Indian Mountain subdivision was commenced, the law concerning the subdividing of real estate changed significantly. Senate Bill 35 was enacted in 1972. This was in response to the awareness that land development in Colorado was out pacing available water supplies. Beginning in 1972, the subdivision of lots less than 35 acres in size required an approved water augmentation plan. This resulted in the developers of Indian Mountain Subdivision having to halt the sale of a lots until an augmentation plan could be processed and approved in Water Court, Division 1, Case # W-7389, (signed January 2, 1974, nunc pro tunc October 1, 1973).

This Augmentation Plan Decree requires that the subject water may only be used for the Indian Mountain Subdivision. Lot owners in Indian Mountain Subdivision, with the payment of an application fee to the Colorado Division of Water Resources, were 'guaranteed' a household well permit to drill a well on his/her lot. The Decree did not mention any requirement that at some point, the developer was required to transfer the Augmentation Plan Decree to a property owners' association with mandatory membership of all lot owners. Soon after this decree, such a requirement became a customary provision in augmentation plan decrees and/or related required documentation and governmental approvals.

From the 1970's to 2013, IMC maintained and operated the Augmentation Plan at its own expense. This involved periodic clean out and repair of the water diversion ditch leading to the storage facility at Tarryall Reservoir and release of water downstream as directed by the district water engineer. During that time, IMC never billed or charged any lot owner, the Indian Mountain Property Owners, or IMMD for the cost of maintenance and operation of the Augmentation Plan.

There are 2,450 platted lots in the Indian Mountain Subdivision. To date, roughly 800 wells have been drilled.

Jim Campbell was a key figure in the development of the subdivision. Initially, he was hired as a supervisor of lot sales in the 1970's and soon thereafter became part of the developer's management. By the late 1970's, Mr. Campbell owned and operated IMC. (Following a falling out and split with the other principals/developers.) From the mid 1970's into the early 1990's, Mr. Campbell maintained ownership and control over the subdivision common areas. He also maintained control of the Recreation District which was to be deeded and exercise control of the common areas. This led to an increase in hostilities between Mr. Campbell and lot owners/other Recreation District board members. After over a decade of pressuring and eventual legal action, Mr. Campbell finally deeded the common areas to the Recreation District. And in 1990 Mr. Campbell was sued and eventually ordered to return to the Recreation District a common area parcel he had deeded to a family member.

By the early 2000's, new board members began attempting to 'patch up' relations with Mr. Campbell. Discussions with Mr. Campbell commenced to explore ways to transfer the Augmentation Plan and its responsibilities to Indian Mountain property owners. Since membership in the property owners association was not mandatory, that organization was not viable option. And since the service plan for the Recreation District (which had taxing capabilities), did not provide for it to perform any water services, it was not an option, at least in its current form.

Discussions between Mr. Campbell and Indian Mountain representatives continued but were described as 'hot and cold.' Mr. Campbell was very difficult to pin down. In 2012 leaders of an 'ad hoc' water committee continued communicating with Mr. Campbell in efforts to determine the best way to turn the Augmentation Plan and its responsibilities over to Indian Mountain property owners. The idea surfaced to convert the Recreation District to a Metropolitan District and amend the service plan to include water services. Mr. Campbell agreed with the concept and even participated in preparation of the wording of the proposed revised service plan. In January 2013, the Park County Board of County Commissioners ('BOCC") approved the conversion to a Metropolitan District along with the amended services plan. In February 2013, the District Court for the 11th Judicial District (Park County) entered its order approving the actions of the BOCC and the name change to IMMD.

Negotiations with Mr. Campbell continued to run 'hot and cold.' After participating in the drafting of the revised service plan for IMMD, Mr. Campbell presented the BOCC with some opposition to the concept immediately before the BOCC hearing was about to commence.

Following BOCC approval of the IMMD's amended service plan, Mr. Campbell conveyed a 'congratulations.' IMMD's attempts to negotiation with Mr. Campbell continued.

Then in August 2013, Mr. Campbell sold all of his ownership interest (via a stock purchase agreement; see IMC Exhibit 82) in IMC to Bar Star Land, LLC, whose manager/owners were Mr. Ingalls and Mr. Goosmann, for $290,000. [Mr. Ingalls bought out Mr. Goosmann in December 2013.] The assets of IMC included land which included and surrounded the Tarryall Reservoir, the W-7389 augmentation plan and its water rights, all IMC's mineral rights, and an outlot in Indian Mountain Subdivision. IMMD was not aware of the sale of IMC's assets and were quite surprised to learn of this development after the fact.

In the fall of 2013, Mr. Ingalls and Mr. Goosmann performed clean-out work on the subject ditch. Mr. Ingalls testified that they spent approximately 150 hours off and on over a 60 day period on the clean-out. He also testified that he had rented a backhoe for this project, which cost $10,000 with the backhoe used for the clean-out approximately 90% of the time. The court also heard testimony from David Wilson regarding his history of performing clean-out and maintenance of the subject ditch over many years and as recently as 2013. The most he ever charged for the work was less than $4,000 per year.

Negotiations for IMMD to acquire the Augmentation Plan from Mr. Ingalls began soon after IMMD learned of the sale of IMC's assets. In November 2013, Mr. Ingalls sent IMMD two invoices, one for 'Water Augmentation and Maintenance 2012' and the other for 'Water Augmentation and Maintenance 2013.' Each invoice sought payment from IMMD in the amount of $143,000. The negotiations soon broke down and this litigation ensued.

II. CLAIMS ADVANCED BY THE PARTIES

IMC's claims are as follows:

1. Declaratory Relief regarding the ownership of the subject water rights (Augmentation Plan).
2. Unjust Enrichment;
3. Declaratory Relief regarding IMMD's alleged non-compliance with its amended service plan; and
4. For Injunctive Relief based on IMMD's alleged non-compliance with its amended service plan.

IMMD's claims are as follows:

1. Declaratory Relief regarding ownership of the subject water rights (Augmentation Plan); claim alleges a claim under a constructive trust theory;
2. Declaratory Relief (Alternative to 1st claim) that, if IMMD has no ownership rights to the augmentation plan, then IMD is operating as Public Utility;
3. Injunctive Relief for IMC to continue operation of the Augmentation Plan, subject to reimbursement for actual expenses by IMMD.

III. ANALYSIS OF THE CLAIMS

A. Ownership and Rights Concerning the Augmentation Plan (including the associated water rights)

This is the central issue of the case. The evidence presented at trial clearly indicates that legal title to the augmentation plan is held by IMC. There was no evidence of an affirmative contractual obligation binding IMC to convey the Augmentation Plan to Indian Mountain property owners. The evidence also is clear that the water and water rights associated with the Augmentation Plan can only be used for the Indian Mountain Subdivision.

IMC contends that, as the owner of the Augmentation Plan, it may charge users and potential users (all lot owners) an annual fee for the augmentation water in addition to maintenance and operating fees. IMC has calculated and contends that it can charge annually $150 per lot with a well plus $15 per lot without a well. This totals $143,000 per year (and includes maintenance and operating costs).

IMMD contends that, starting in 1972 in order for the developer to sell lots, it was required to have an approved Augmentation Plan to ensure that lot purchasers would have a source of potable water via a well permit; that the developer was compensated for the Augmentation Plan, as well as its other costs associated with the subdivision process, from the sale of Indian Mountain lots; that from the 1970's until the fall of 2013, IMC has never attempted to implement such a charge for the water; that none of the developer's promotional materials, including the HUD disclosures required under Federal law, indicated that separate, on-going charges for the right to use augmentation plan water were ever contemplated; and that IMC would be unjustly enriched by collecting $143,000 per year for the water when IMC already received compensation via sale of the lots. IMMD alleges that IMC holds the Augmentation Plan in a constructive trust for the benefit of IMMD/Indian Mountain property owners. [IMMD has always expressed its willingness to pay a reasonable charge for the maintenance and repair of augmentation delivery systems, so the alleged fee for the augmentation water is the only issue.]

This court agrees with IMMD. The court finds and concludes that the facts of this case 'cry out' for the court to impose the equitable remedy of a constructive trust.

"A constructive trust is a flexible equitable remedy that may be imposed to prevent unjust enrichment. It enables the restitution of property that in good conscience does not belong to the" other party. *Bryant v. Community Choice Credit Union*, 160 P.3d 266, 271 (Colo. App. 2007). "Unjust enrichment occurs when (1) at the Plaintiff's expense, (2) the defendant received a benefit, and (3) under circumstances that would make it unjust to the defendant to retain the benefit without paying." *Lawry v. Palm*, 192 P.3d 550, 564 (Colo. App. 2008). "A plaintiff is entitled to recover based on the unjust enrichment of a defendant when the plaintiff has no alternative right under an enforceable contract." *Id.*

First of all, in this case when Mr. Ingalls purchased the stock of IMC, he 'stepped into

Mr. Campbell's shoes.' In other words, since IMC became the developer in the mid 1970's, Mr. Ingalls' acquisition of ownership of IMC did not change anything. IMC was still the developer of Indian Mountain Subdivision from the mid 1970's on and is bound by the significant history of its development, marketing and sale of lots, and use of the Augmentation Plan for the benefit of lot owners.

Second, none of the developer's promotional materials, including the developer's HUD disclosures required under Federal law, hinted at any intent to charge lot owners for the right to use the augmentation water. The HUD disclosure requirements mandated that a developer must provide prospective lot purchasers with written disclosures which included buyers' estimated costs of acquiring certain basics including water. These disclosures detailed the potential costs of acquiring a well permit as well the cost of drilling a well. They made no mention of ongoing fees for the right to use the augmentation water. IMC is estopped from asserting such a right forty (40) years later.

Third, IMC's return on investment occurred by receiving the proceeds from the sale of the lots. IMC's investment included the costs associated with obtaining the Augmentation Plan Decree. IMC's return on investment does NOT include what Mr. Ingalls paid when he purchased the assets of IMC from Mr. Campbell. That amount is irrelevant. To charge ongoing fees for using the water is 'double-dipping,' is unconscionable, and would result in IMC being unjustly enriched.

Fourth, IMC has the Indian Mountain property owners 'over a barrel.' IMC has retained legal title to the Augmentation Plan. This Plan was established for the benefit of Indian Mountain lot owners so they could install wells for potable water. Although there is another avenue for the lot owners to purchase water from another source at considerable expense, this is not what they reasonably believed they bargained for when purchasing their property.

The court finds and concludes that IMC received a benefit (proceeds from lot sales) from the purchasers of the lots, and that IMC would be unjustly enriched by charging ongoing fees forty (40) years later for use of the augmentation water. The court further finds and concludes that IMC holds title to the Augmentation Plan and its associated rights as trustee for the express benefit of the Indian Mountain property owners, the beneficiaries. As long as IMC retains ownership, IMC has a duty to maintain and operate the Augmentation Plan keeping it in compliance at all times. As long as IMC elects to retain ownership, IMC is entitled to be reimbursed for its actual and reasonable expenses for maintenance, repair and operation of the plan. IMC may delegate this task to IMMD or turn over ownership to IMMD, after which IMC's ongoing obligations regarding the Augmentation Plan shall cease.

B. IMC's Claim for Unjust Enrichment.

IMC's second claim is for unjust enrichment. "Unjust enrichment occurs when (1) at the Plaintiff's expense, (2) the defendant received a benefit, and (3) under circumstances that would make it unjust to the defendant to retain the benefit without paying." Lawry v. Palm, 192 P.3d 550, 564 (Colo. App. 2008). In that regard, IMC alleges that IMMD was unjustly enriched in 2012 and 2013 because Indian Mountain property owners were unjustly enriched by utilizing the

Augmentation Plan to use their wells. For the reasons stated above, the court finds and concludes that IMC has failed to establish a prima facie case for unjust enrichment and finds in favor of IMMD and against IMC.

C. IMC's Claim for Declaratory Relief (IMMD's alleged non-compliance with its amended service plan)

At the conclusion of IMC's case, the court granted IMMD's motion to dismiss pursuant to C.R.C.P 41(b)(1). In that regard the court found that the evidence failed to establish that IMMD was not in compliance with its amended service plan, and specifically found that IMMD was in compliance with the amended service plan. The plan contains two components. The first pertains to recreation functions and was never challenged. The second component pertains to water services. IMC alleged that since IMMD had not operated the Augmentation Plan, it was not in compliance with the plan. However, even though the primary purpose for converting the Recreation District to a Metropolitan District and amending the service plan was so that IMMD could take over management and operation of the Augmentation Plan, the amended service plan merely permitted IMMD to perform that function. It was not required. In addition, the court found that the evidence was uncontroverted that IMMD was performing the required portions of water services.

Therefore, regarding IMC's third claim for relief, the court finds in favor of IMMD and against IMC.

D. IMC's Claim for Injunctive Relief (IMMD's alleged non-compliance with its amended service plan)

At the conclusion of IMC's case in chief, the court granted IMMD's motion to dismiss pursuant to C.R.C.P 41(b)(1) since the injunctive relief sought was based on the assumption that IMMD was not in compliance with its amended service plan.

Therefore, regarding IMC's fourth claim for relief, the court finds in favor of IMMD and against IMC.

E. IMMD's Claim for Declaratory Relief (Alternative claim to 1st claim for relief)

Since the court found in favor of IMMG regarding its first claim for relief, the court need not address this alternative claim.

F. IMMD's Third Claim for Injunctive Relief

IMMD's claim pertains to requiring IMC to continue operating the Augmentation Plan. Since the court has dealt with continuing operation of the Augmentation Plan above, the court need not address this claim.

IV. CONCLUSION

The court finds and concludes that IMMD is the prevailing party and is entitled to recover its costs incurred herein. IMMD shall have thirty (30) days from the date of this order to file a bill of costs. After filing, IMC shall have fifteen (15) days to file any objections.

Entered this 16th day of March, 2015

BY THE COURT:

Stephen A. Groome
District Court Judge

DISTRICT COURT, PARK COUNTY, STATE OF COLORADO P.O. Box 190 Fairplay, Colorado 80440	DATE FILED: March 30, 2015 5:19 PM FILING ID: DDA424CD2908A CASE NUMBER: 2014CV30056
Plaintiff: INDIAN MOUNTAIN CORP. **v.** **Defendant: INDIAN MOUNTAIN METROPOLITAN DISTRICT**	▲ **COURT USE ONLY** ▲
Attorneys for Plaintiff Matthew L. Merrill, #37918 Adam C. Davenport, #45342 WHITE & JANKOWSKI, LLP 511 Sixteenth Street, #500 Denver, Colorado 80202 Tele: (303) 595-9441 Fax: (303) 825-5632 Email: matthewm@white-jankowski.com adamd@white-jankowski.com	Case No. 14CV30056
MOTION FOR POST-TRIAL RELIEF	

Plaintiff Indian Mountain Corp. ("IMC"), by and through its undersigned attorneys, and pursuant to C.R.C.P. 59(a), submits this Motion for Post-Trial Relief. In support thereof, IMC states as follows:

CONFERRAL PURSUANT TO C.R.C.P. 121 § 1-15(8)

Undersigned counsel has conferred with counsel for Indian Mountain Metropolitan District ("IMMD") regarding the relief requested herein. IMMD does not consent to this Motion.

MOTION

I. The Court Should Amend Its Findings and Judgment Regarding Constructive Trust.

The Court may amend its findings and judgment in response to a post-trial motion pursuant to C.R.C.P. 59(a)(3) & (4). On page 8 of its Findings, Conclusions, and Orders, the Court relied heavily on the developer's HUD disclosures in imposing a constructive trust. IMC requests that the Court reconsider its findings and judgment relying on the HUD documents.

The HUD disclosures in evidence were developed pursuant to the Interstate Land Sales Act ("ILSA"). *See* 15 U.S.C. § 1701, *et seq*. "In order to qualify for ILSA protection, a plaintiff must show that he purchased a lot from a defendant who qualifies as a developer or developer's agent under ILSA." *Gibbes v. Rose Hill Plantation Development Co.*, 794 F.Supp. 1327, 1333–1334 (D. South Carolina, Charleston Division 1992). IMMD presented no evidence at trial that it purchased a lot or lots from a developer or developer's agent. IMMD is not entitled to relief in this case based on HUD disclosures.

In addition, the statute of limitations for causes of action related to HUD disclosures under ILSA expired long ago. Under ILSA, actions are prohibited more than three years after the date of a sale contract for a lot or the date of discovery of the violation. 15 U.S.C. § 1711(a). The initial sales of lots by the developers in the Indian Mountain subdivision were completed many years ago. Regarding notice, Dr. Haas and Dr. Mattson testified that IMMD and the Indian Mountain Property Owners Association became aware of the "water issue" by 2007 at the latest, and Jim Campbell testified that he had discussions with lot owner representatives prior to that time. Submission of Preserved Testimony of James P. Campbell, Filing ID 55DC8CE6D72BD ("Campbell Deposition"), Deposition Transcript p. 50, lines 13-20; p. 51, lines 4-7. Therefore, any actions related to the HUD disclosures are time barred.

For the reasons above, the Court should not base a constructive trust on HUD documents in this case. As the Court noted at closing arguments, there is no evidence of fraud or deliberate misrepresentation regarding the operation of the augmentation plan. IMMD cannot assert a cause of action based on the HUD documents. The evidence showed that IMC *did* warn buyers about potential augmentation water costs in the notes on all of its plats. IMC Exhibit 315. The evidence also showed that the developers always expected to be compensated for property transferred to IMMD. *See* Exhibit IMMD W at 2 (District's original service plan stating "[i]t is proposed that the District enter into an agreement *to purchase from the developer* [various recreational assets]…") (emphasis added). Based on this law and evidence, IMC respectfully requests that the Court re-evaluate its findings related to the HUD documents and its resulting conclusions and judgment regarding constructive trust.

II. The Court Should Amend and Add To Its Findings and Judgment Regarding Operation and Maintenance Costs.

The Court's findings and conclusions show that IMC is entitled to damages for its operation and maintenance of the augmentation plan. While, IMC acknowledges the Court's conclusion that IMC may not charge for *use* of the water rights,[1] IMC asks the Court to consider additional findings and an amended judgment limited to the *operation and maintenance* services IMC has provided. In its Findings Conclusions, and Orders, the Court stated as follows:

- "From the 1970's to 2013, IMC maintained and operated the Augmentation Plan at its own expense." Findings, Conclusions, and Orders, at 5. Specifically, the Court finds that IMC operated the plan from 1976 through 2013. *Id.* at 3.

[1] IMC does not waive any argument or right of appeal of any issue excluded from this motion pursuant to C.R.C.P. 59(b), and has therefore focused this motion on three narrow issues.

- "IMMD has always expressed its willingness to pay a reasonable charge for the maintenance and repair of the augmentation delivery systems." *Id.* at 7.

- "As long as IMC elects to retain ownership, IMC is entitled to be reimbursed for its actual and reasonable expenses for maintenance, repair and operation of the plan." *Id.* at 8.

These findings and conclusions support an award of damages to IMC for its operation and maintenance of the plan from 1976 through 2013, a total of 38 years of operation. The Court heard evidence regarding operation and maintenance costs at trial, including:

- David Wilson's testimony of charging approximately $4,000 for performing minimal maintenance of the plan, which the Court refers to on page 6 of its Findings, Conclusions, and Order. Mr. Wilson testified that this maintenance did not include long term capital projects or even long-term repairs but instead he merely created "band-aids" to limp the system through each year.

- James Campbell testified regarding his payments of thousands of dollars for maintenance work, and also invested his own time in operation and maintenance. Campbell Deposition, p. 48-54.

- James Ingalls testified regarding his $10,000 rental of a backhoe devoted 90% to operation and maintenance of the plan, plus his time in operating the backhoe.

Based on this evidence, the Court should add a conclusion that IMC is entitled to 38 years of reasonable operation and maintenance costs at $10,000 per year. By law, IMC is entitled to prejudgment interest at the rate of 8%, compounded annually. C.R.S. § 5-12-102(1)(b). *See also Mesa Sand & Gravel Co. v. Landfill Inc.*, 776 P.2d 362 (Colo. 1989) (holding that in cases other than personal injury actions, a party prevailing on a claim may recover prejudgment interest).

In addition to addressing past operation and maintenance charges, the Court should specify that a reasonable amount for IMC to charge for maintenance and operation going forward is $50,000. The Court heard testimony that capital projects related to the water rights have been deferred, including Dave Wilson's testimony regarding the potential need to rebuild the Slater Ditch headgate and a ditch crossing at the Montag Ditch. The District testified that it budgeted $50,000 for water augmentation plan management in 2014. Mr. Pugh and Ms. Clay testified to costs of $37 and $40 per lot for operation and maintenance of smaller plans for augmentation in the neighboring Lost Park and Stage Stop subdivisions. Mr. Pugh and Ms. Clay also testified that those plans have much less physical infrastructure to maintain every year. A similar charge for Indian Mountain subdivision would total approximately $90,000. The Upper Arkansas Water Conservancy District and HASP, both non-profits, charge significantly more per lot for operation and maintenance than Lost Park or Stage Stop. IMC submits that $50,000 per year (the amount budgeted by IMMD), is a reasonable payment for operation and maintenance going forward that will allow IMC to plan and pay for capital projects required to keep the augmentation plan operational.

If the Court does not believe it has sufficient evidence to make these findings and conclusions, it should take additional evidence pursuant to C.R.C.P. 59(a)(1). If it would assist the Court, IMC offers to present evidence regarding the cost of construction of the enlarged Tarryall Ranch Reservoir and additional evidence regarding costs to operate and maintain the water rights.

III. The Court Should Amend its Conclusion that IMMD is the Prevailing Party.

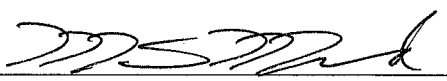
The Court affirmed IMC's title to the Indian Mountain Augmentation Plan and that IMC is entitled to reasonable compensation for its operation and maintenance of that Plan. The Court concluded that ownership was the "central issue of the case." The Court also found however, that IMC held title to the Plan as trustee for the benefit of Indian Mountain lot owners. As a result, the Court in essence found in favor of both parties on each party's "central issue" and neither IMMD nor IMC "prevailed." As a result, IMC requests that the Court amend its conclusion on page 10 to provide that both parties pay their own costs. If the Court reconsiders its finding and concludes that no constructive trust exists in this case, IMC requests that the Court amend its conclusion to find that IMC is the prevailing party in this matter and is entitled to recover its reasonable costs.

CONCLUSION

WHEREFORE, IMC respectfully requests that this Court amend its findings and conclude that no constructive trust is present in this case and that IMC is the prevailing party and therefore entitled to recover its costs. In addition, IMC respectfully requests that the Court amend and add to its findings regarding the reasonable operation and maintenance costs owed by IMMD to IMC, or set a hearing for additional evidence if necessary in support of such findings. Finally, and in the event the Court does not reconsider its ruling regarding IMMD's constructive trust claim, IMC requests that the Court amend its conclusion that IMMD is the prevailing party and instead order that each party is responsible for its own costs incurred in this matter.

Dated this 30th day of March, 2015.

WHITE & JANKOWSKI, LLP

By: *S/ 

*Matthew L. Merrill
Adam C. Davenport

Efiled per C.R.C.P. 121
Duly signed original on file at White & Jankowski, LLP

ATTORNEYS FOR INDIAN MOUNTAIN CORP.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of March, 2015 a true and correct copy **MOTION FOR POST-TRIAL RELIEF** in **Case No. 2014CV30056, Park County** was served by e-filing via ICCES and addressed to the following:

S/
Meredith Taylor,
White & Jankowski, LLP

Efiled per C.R.C.P. 121
Duly signed original on file at White & Jankowski, LLP

Party Name	Party Type	Attorney Name
Indian Mountain Metropolitan District	Defendant	Andrew Rottman Nathan Flynn Peter Ampe

DISTRICT COURT, COUNTY OF PARK, STATE OF COLORADO PO BOX 190, 300 4TH ST. FAIRPLAY, CO 80440 (719)836-2940 **PLAINTIFF:** INDIAN MOUNTAIN CORP. vs. **DEFENDANT:** INDIAN MOUNTAIN METROPOLITAN DISTRICT	Δ COURT USE ONLY Δ Case Number: 14CV30056

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

This matter comes before the court pursuant to the Plaintiff's motion for reconsideration. The court has reviewed the motion, the response, and reply and hereby enters the following order.

The court ruled that Plaintiff is entitled to its "actual and reasonable expenses for maintenance, repair, and operation of the plan." However, Plaintiff failed to meet its burden of proof regarding the 'actual and reasonable expenses' incurred in 2012 and 2013. Furthermore, at trial Plaintiff did not seek payment for such expenses for prior years, and failed to meet its burden of proof regarding any such claimed expenses.

Therefore, Plaintiff's motion for reconsideration is denied.

Entered this 6th day of May 2015.

BY THE COURT:

Stephen A. Groome
District Court Judge

DISTRICT COURT, PARK COUNTY, COLORADO Court Address: P.O. Box 190, 300 Fourth Street, Fairplay, CO, 80440	DATE FILED: May 26, 2015 9:50 AM CASE NUMBER: 2014CV30056
Plaintiff(s) INDIAN MOUNTAIN CORP v. **Defendant(s)** INDIAN MOUNTAIN METROPOLITAN DISTRICT	⚠ **COURT USE ONLY** ⚠
	Case Number: 2014CV30056 Division: B Courtroom:

Order: Order Granting Costs to Defendant Indian Mountain Metropolitan District

The motion/proposed order attached hereto: GRANTED.

Issue Date: 5/26/2015

STEPHEN A GROOME
District Court Judge

DISTRICT COURT, PARK COUNTY, STATE OF COLORADO P. O. Box 190 Fairplay, Colorado 80440	
Plaintiff: **INDIAN MOUNTAIN CORP.** **v.** **Defendant:** **INDIAN MOUNTAIN METROPOLITAN DISTRICT**	▲ COURT USE ONLY ▲
	Case Number: 14CV30056 Ctrm/Div: _____

ORDER GRANTING COSTS TO DEFENDANT INDIAN MOUNTAIN METROPOLITAN DISTRICT

The Court, in its March 16, 2015 Order ("Order") found Defendant Indian Mountain Metropolitan District ("IMMD") to be the prevailing party in this matter and granted costs to IMMD.

The Court, having reviewed IMMD's Bill of Costs (April 15, 2015) and the file and record herein, and finds that the costs requested by IMMD were necessary and reasonable.

Therefore, the Court, in the exercise of its sound discretion, hereby **ORDERS** an award of the reasonable and necessary costs incurred by IMMD in this matter in the amount of $8,160.32 to the Indian Mountain Metropolitan District and against Indian Mountain Corp.

Entered this ___ day of _____, 2015

BY THE COURT:

_____
Stephen A. Groome
District Court Judge